Introduction

In the matter involving a complaint by Ms. Sylvia Wigg against GUY HARRISON and/or ART PRO LITHO

Introduction

This matter arises out of a formal complaint by Sylvia Wigg filed with the Nova Scotia Human Rights Commission, ("Commission") on, or about, September 21, 1998 alleging that Guy Harrison and/or Art Pro Litho Limited engaged in conduct that constitutes a discriminatory practice under section 5 (2) of the Nova Scotia Human Rights Act, R.S.N.S., 1989, c.214 (as amended 1991), "the Act". A single person Board of Inquiry ("the Board") appointed pursuant Section 32A of the Act, by the Chief Justice of the Provincial Court of Nova Scotia.

The parties to these proceedings are: the Complainant, Sylvia Wigg, who was not independently represented, the Respondent(s), Guy Harrison and/or Art Pro Litho, represented by Darrell Dexter, and the Commission represented by Karen A. Fitzner. Assisted by Articled Clerk, Timothy O'Leary.

A formal notice of this hearing was properly given and advertisement(s) were placed in local newspapers. A formal daylong public hearing into the complaint was held in Halifax, Nova Scotia, on February 22, 1999.

Background

Guy Harrison and/or Art Pro Litho Limited from September 1993 to February 21, 1997 employed the Complainant. On July 10, 1997 Sylvia Wigg (Complainant) filed a complaint with the Nova Scotia Human Rights Commission against Mr. Harrison and/or Art Pro Litho Limited. In her complaint Mrs. Wigg alleging that she was sexual harassed contrary to Section 5(2) of the *Human Rights Act*, R.S.N.S., 1989, c.214, (as amended) The Complainant states in here written complaint:

I, Sylvia Wigg complain against Guy Harrison and/or Art Pro Litho Limited that on or about January, 1995 to present and continuing Harrison did sexual harass me.

The Complainant alleges a series of incidents, which led her to leaving her Art Pro Litho because of the sexual harassment from the Respondent.

The Respondent, Guy Harrison, is President and owner of Art Pro Litho Limited acknowledges that he did inquire of Mrs. Wigg as to whether or not she would be interested in having a sex with him, or words to that effect, but having such inquiry rebuffed, he says he made no further inquiries to wit, he did not sexual harass the Complainant. Mr. Harrison is the President and owner of Art Pro Litho Limited and, his own testimony indicated that he was effectively the manager-owner with day-to-day operational responsibilities. Art Pro Litho Limited is a printing and binding business located in Dartmouth, Nova Scotia. The Respondent is the owner and the manager - operator of Art Pro Litho.

The Respondent has operated this business for approximately thirteen (13) years. The Respondent's wife is also an employee of the operation involved, it appears from the evidence, in bookkeeping and other management functions. It appears from the evidence that at Art Pro "normally there are about two (2) employees, three (3) at the most" (transcript p.140) and one (1) or two (2) part-timers. The Respondent, Guy Harrison is currently fifty-seven (57) years old.

A Human Rights Officer employed by the Commission subsequently investigated the Complainant's allegations; the parties engaged in a settlement process without success. On or about October 5, 1998 the Nova Scotia Human Rights Commission on the nomination of the Chief Judge of Provincial Court and under Section 32(A)(1) of the *Human Rights Act* appointed myself, J. Royden Trainor, to sit as chair of a Board of Inquiry.

The Complaint is a married 60 year old mother and grandmother, who first joined Art Pro Litho Limited as an employee on or about September 23, 1993, and was continuously employed there until about February 21, 1997. The Complainant is currently employed as a babysitter, caring for her grandchildren and makes about a hundred dollars a week for providing these services.

The Complainant began work at Art Pro as a part-time employee, but had moved to full-time work. The Complaint's evidence was that she was eager for the opportunity to earn much needed money and that her family's financial situation was a very difficult one. Mrs. Wigg was a competent employee received a raise while at her employment with Art Pro.

The Commission called five (5) witnesses. In addition to Sylvia Wigg, the Commission called Ms. Sherry Flint, Mr. Douglas Wigg, and Ms. Linda Ann Brewer, a former employee of Art Pro Litho. The Complainant, Sylvia Wigg was not independently represented at the hearing and, although called as a witness, did not herself take advantage of the opportunity to examine witnesses or make submissions at the conclusion of the evidence of her own accord.She relied on the Commission's case.

The Respondent(s) called three witnesses, including Guy Harrison the Respondent in his own right and at all material times the President and owner of the Respondent company, Art Pro Litho Ltd.

The Respondent's Solicitor called evidence from Ms. Darlene Hendrickson, a former employee of Art Pro Litho Limited and Mr. David John MacDonald, a current employee of Art Pro Litho.

The Respondents denies the Complainant's allegation that he sexually harassed her and disputes several specific facts and events accreted by the Complainant.

Preliminary/Procedural Decisions

A number of evidentiary and related issues arose during these proceedings. In the interest of time the Board gave oral decisions at the hearing and are re-expressed here in written form.

Evidence of Ms Flint

The Commission sought to call Sherrie Flint as a witness. The Respondent objected to the hearing of evidence from Miss Flint arguing, in part, any evidence Miss Flint would give would be hearsay and she should not benefit from any hearsay exceptions that would allow this evidence to be heard.

Among, other things, the Respondent's Solicitor objected as follows (p. 59, transcript):

"I mean, if she is simply going to corroborate what Ms. Wigg says, I mean, it's her daughter. We would expect her to corroborate what it is that she has to say. I am not sure that it's useful on terms of the evidentiary part of this hearing".

The Commission referenced regulations made under subsection 42(2) of the *Act*, in particular NS Reg. 221/91 and number 7 of those Regulations, which state:

"In relation to a hearing before a Board of Inquiry, a Board of Inquiry may receive and accept such evidence and other information, whether on oath or affidavit or otherwise, as the Board of Inquiry sees fit, whether or not such evidence or information is or would be admissible in a court of law; notwithstanding however, a Board of Inquiry may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence."

The Commission further argued that credibility was a key issue in this case and evidence that may corroborate the complainant's evidence should be heard by the Board; the Board must then assess the evidence and come to a judgment as to what weight, if any, such evidence should be given.

Decision:

NS Reg. 221/91 made under Section 42 (2) of the *Act* guides the Board's approach on hearing evidence. The Board is not bound by the strict rules of evidence that would ordinarily apply in a court proceeding. Regulation 221/91 has been a codification of the established practice of Boards for some time and reflects public policy objectives of facilitating the Human Rights Inquiry Process. The Board agrees that credibility is a critical issue in this proceeding and that this evidence may be helpful in that regard.

The Board will hear the evidence of Ms Flint and the Board will come to an assessment as to what weight is properly given to such evidence. The Board accepts that there is some evidence Ms. Flint can give relating to job search activities, and which, we are told by Commission Solicitor, Miss Flint has direct knowledge and where credibility is a critical aspect of this matter this additional evidence may be of assistance to the Board. This decision is entirely consistant with simular rulings made in simular circumstances by Boards if Inquiry in Nova Scotia and else where.

Similar Fact Evidence, Evidence of Linda Brewer:

The Commission called Miss Linda Brewer to provide testimony before the Board. The Respondent objected to admission of this evidence, the Respondent's Solicitor argued (transcript pp. 95-96):

"It is repugnant to the process because what it does, it throws the whole process into imbalance...but that, in and of itself, is not the reason why she shouldn't be heard, the whole reason why you have rules against surprise witnesses and why they're excluded commonly from proceedings is because, in the first instance, they intend to make some kind of an allegation about the Respondent, that is, information that the Respondent needs to know well in advance of any kind of trial. It's a fundamental tenant of law that every person who is accused or his or her allegation made against them is entitled to know the case. He has to meet well before he ever gets to the hearing room. It's as simple as that".

Well, there are a number of reasons why she shouldn't be heard. The whole question of just surprise, on itself, is repugnant to the process because what it does is it throws the whole process into imbalance. In my case, I wasn't able to speak to my client until this morning about this witness, and certainly not able to have any opportunity to respond.

But that, in and of itself, is not the reason why she shouldn't be heard. I mean, the whole reason why you have rules against surprise witnesses and why they are excluded commonly from proceedings is because, in the first instance, if they intend to make some kind of an allegation about a respondent, that is information that the respondent needs to know well in advance of any kind of a trial. It's kind of a fundamental -- it's a fundamental tenet of law that every person

who is accused or there's an allegation made against is entitled to know the case he has to meet well before he ever gets to the hearing room. It's as simple as that.

You can't give a full answer and defence if you don't know what it is that the evidence is going to be that's called against you. And this is not a complex evidential point. This is a matter that, as far as I know, goes right back to Runnymeade and the Magna Carta. You show up in a court or in a hearing and you are entitled beforehand to know the nature of the complaint and the allegation. So on that basis alone there is enough reason to keep this out, (a) for surprise, (b) for the consequences of surprise, which is not being able to know the case that you have to meet.

And, third, the -- one assumes that if this is an attack on Mr. Harrison's credibility, as I understand it from my friend, on a similar fact basis, then there is a whole -- I mean, the general tenet of law is that you don't admit similar fact evidence.

The Commission argued a Board of Inquiry process, is a particular public process which, as part of its mandate provides public notice of its proceedings and, as a result of the advertisement pursuant to this hearing an individual having came forward with evidence directly related to the matters before this hearing. The Commission argued that it was appropriate and important for the Board to hear evidence that goes to important issues in this proceeding.

Further, the Commission indicated that it undertook best efforts to notify the Respondent upon becoming aware of the evidence of Miss Linda Ann Brewer. It was unfortunate that this witness did not come forward earlier, but she did come forward immediately upon reading the public notice of this hearing. The Commission also argued, the evidence of Ms Brewer did not fundamentally change the nature of the case against the Respondent. The Commission further noted there was no risk of collusion on part of the witnesses: (Transcript p. 96-99):

My friend is correct that he was advised of this witness at about 3:30 yesterday afternoon, which was about 30 minutes after I was advised about this witness. This witness came forward of her own volition as a consequence of the newspaper notice that was put in Saturday's paper and she is a former employee of the respondent. She has information that I believe is relevant to this matter and relevant to this Board.

To address the concerns of my friend, first of all, he says there should be no surprise. And ideally there isn't, but as you know, in Human Rights proceedings there's no discovery procedure, there's no avenue for that. One of the reasons of putting public notice in is that if anyone has information that's relevant, it should be heard. The public is given notice of this. We're not bound by rules of the court. If we were presenting this witness to show a propensity on the part of the respondent to behave a certain way, then under normal rules of court that is the concern with similar fact evidence.

In this case, this is relevant, we say, to the hearing because we have two parties to this case, which -- with no witnesses to it and so credibility is at issue. What evidence this witness can give establishes a pattern that can be seen in the evidence and it also corroborates or tends to support, if accepted, the evidence of the complainant in this matter.

Commission Solicitor went on at (Transcript p.97):

... The Nova Scotia Court of Appeal decision in Metha (Infra.) you may be familiar with -- and it's a 1990 decision. In that case it was the decision of a Board that was overturned on several counts and one of them was on a similar fact issue...

But in that case, the Court was talking about when it is appropriate. And what they were concerned about in that case, and why the Board decision was overturned, was that it wasn't made clear on the part of the Board, why the evidence had been admitted and a concern that it had been admitted and used to show a propensity, which is unacceptable.

Decision

Similar fact evidence has regularly been accepted by Human Rights Tribunals and the admissibility of such evidence has been upheld by the courts, I am not breaking new ground here. It has been specifically admitted with respect to allegations of sexual harassment. In the case before this Board there is no suggestion that the parties alleging similar facts have discussed their situation before giving evidence.

The Nova Scotia Court of Appeal decision in Metha v. MacKay, C.H.R.R. (1992) D/232 at page D235 and paragraph 16, Mr. Justice Freeman sets out the discretion of a Board of Inquiry to admit similar fact evidence:

"Such discretion may be properly exercised after Judge has made a determination that the evidence has a clear linkage or nexus to an issue other than the disposition or propensity such as intention, pattern, or system, credibility, corporate knowledge, etc." (Emphasis mine)

In, a criminal law matter, *R. v. Robertson* (1987), 39 D.L.R. (4th) 321, Williamson, J. stated:

The rule is an exclusionary rule and an exception to the general and fundamental principle that all relevant evidence is admissible. A general statement of the exclusionary rule is that evidence of the accuser's discernible conduct on past occasion is tendered to show his bad disposition is (my emphasis) inadmissible unless it is so prohibitive of an issue or issues in the case as to outweigh the prejudice caused.'"

At. .p. D/234 p. Metha (*Infra.*) Freeman, J.A. favorably references Mr. Justice Pigeon in Guay v. R. (1978), 42 C.C.C. (2d) 536, (SCC):

"On the admissibility of similar fact evidence, I think it should be said that it is essentially in the discretion of the trial judge. In exercising this discretion, he must have regard to the general principles established by the cases. There is no closed list of the sort of cases where such evidence is admissible. (Emphasis Mine)

A Board of Inquiry approach to hearing evidence is more flexible than is the case in a civil trial or a criminal law proceeding. Nonetheless, not all or any evidence can or should be heard and the purpose and use of that evidence must still conform to rules of application established in law. While inquiries are more open to hearing such evidence, they can not abuse this capacity and the purpose for which it is used must conform to established rules. The evidence can not be used to prejudice a respondent or create an impression in the mind of the Board that a respondent is more likely to have committed the offence for which they are accused of because they had done something similar before.

In Graesser v. Porto, (1983), 4 C.H.R.R. D/1569 (Ont. Board of Inquiry) the Board set out the argument well when it said at D/1572:

...If similar fact evidence were excluded, the Trier of Fact would be faced with having to decide an issue based solely on the evidence of the parties for him. In situations where there is some doubt as to what actually happened, the Trier of Fact might have difficulty in deciding the matter. Nonetheless, sources of evidence come into play within this context, and, where such is

the case, the Trier of Fact should be receptive to similar fact evidence. The evidence is not admitted to establish the guilt or innocence of the accused, but rather, to enable the decision-maker to make a more informed decision. Similar fact evidence can be used to corroborate testimony previously given. It should not be used if the evidence unduly influences the Trier of Fact. **(my emphasis).**

Freeman, J. at D/ 235 and paragraph 16, in Metha, *Infra.* sets out four principles which are drawn from the jurisprudence and pertain to the admission of similar fact evidence and the approach accepted by this Board:

1. The general rule is that all relevant evidence is admissible.

2. The rule excluding evidence of similar facts is an exception to the general rule.

3. Judges have the discretion to admit similar fact evidence having 'regard to the general principles established by the cases.'

4. Such discretion may be properly exercised after a Judge has made a determination that the evidence has (my emphasis) a clear linkage or nexus to an issue other than the disposition or propensity such as intention, pattern, or system, credibility, corporate knowledge or negation of denial, and its prohibitive value to that issue outweighs its prejudice to the defendant."

The Board relies on the noted four principles when considering the admission of similar fact evidence. The Board is also mindful that NS Reg. 221/91may also be helpful:

"In relation to a hearing before a Board of Inquiry, a Board of Inquiry may receive and accept such evidence and other information, whether on oath or affidavit or otherwise, as the Board of Inquiry sees fit, whether or not such evidence or information is or would be admissible in a court of law; notwithstanding however, a Board of Inquiry may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence."

It is incumbent upon the Commission to demonstrate the nexus or linkage to an issue other than the disposition or propensity such as intention, pattern or system and show that this nexus is linked to things like intention, pattern or system, credibility, corporate knowledge or negation of denial, and its prohibitive value to the issue and that such outweighs its prejudice to the Respondent. The Board reinforced this point in questions to the Commission. (Proceeding transcript p.109)

... the caution given us by learned jurists have always been that the admission of similar fact evidence must be– we must be very clear that there is a linkage or nexus between the evidence and an issue before the Inquiry or that's being pursued or looked at. I wonder if you could re-articulate that nexus for me, given the cautions I have read in the law about the admission of similar fact evidence."

Solicitor for the Commission replied to the Board's (transcript p. 109)

...To what we would say, without telling exactly what the evidence would be, but we say the links are that credibility is an issue for you– it's always an issue, but in a case particularly where you don't have any outside witness other than the parties that witnesses the events alleged, it is a very fundamental issue for you in this matter. We say this evidence would perhaps support or corroborate the credibility of the complainant into this matter.

And also, the second link, that we see, based on what we anticipate the evidence would be, is that there is a pattern that I think you will see flowing from what the evidence of Mrs. Wigg and what it would be of Mrs. Brewer. And I think to perhaps reiterate, it's the Commission's view that you have to hear this evidence and if you disagree after you hear it with those things or feel it's of no weight or whatever, that's for you to decide. But to make that decision at the hearing it would be problematic.

The Respondent's Solicitor responded (Transcript pp.110-111):

Well, I mean, my reply, I think, is the same as my initial objection, which is that the evidence to be given can have no probative value with respect to the facts of this case. It can't prove anything about this case. And so it's offered, and my friend is careful to say it's offered in order to bolster the credibility of the complainant. But by extension it's to attack the credibility of the respondent. And the -- it's not enough to say that it's simply -- that is a good enough reason to let it in. I mean, the reality is -- the whole reason why you keep similar fact evidence out is because it's an attack on character. That's why it's kept out in the first place. Because you can't infer from past conduct to guilt on a matter that's before the Court. I mean, that taints the whole process. And that's the position that I took before the break and that's the same one I take now.

The Board is much impressed with the decision of David Bright, in: Human Rights Commission v. MacLellan v. Mentor Investments Ltd. (1992) 15 C.H.H.R, D/134 at D/137 provides strong guidance to this Board:

In order to ascertain whether or not similar facts have a material bearing on the issue, the courts have looked at criminal law where such utilization is, generally speaking, more frequent occurrence than in civil cases. Mr. Justice Channel stated in Hales v. Kerr, [1908] 2 K.B. 601 at pp.604-05 that an example of how to determine whether there is the material bearing on the issues is as follows:

[W] Here the allegation is of a practice to admit or to do a particular act, the material issue is the existence or nonexistence of an alleged practice, evidence that the act or admission has happened on several other occasions is always admissible to show that its happening on a particular occasion is not a mere accident or a mere isolated offence. In civil proceedings, the rules are not dissimilar. It is not legitimate to charge a man with an act of negligence on a day in October and ask the jury to infer that he was negligent on that date because he was negligent on every other day in September. The Defendant may have mended his ways for the day named in October.

Moreover, he does not come to trial prepared to meet all the allegations of previous negligence. There are many reasons why such evidence is not admissible in such an issue. But where the issue is the Defendant pursues a course of conduct which is dangerous to his neighbors, it is legitimate to show that his conduct has been a source of danger on other occasions, and it is a legitimate inference that, having caused injury on those occasions, it has caused injury in the Plaintiff's case also.

Mr. Bright went on at p.137 of his decision in Mentor (*Infra.*)

One of the areas of law that gives me the greatest difficulty is the use of similar fact evidence. I have been included, generally speaking, to admit almost all evidence offered to the parties and only utilize reasonably strict rules of evidence when the parties are dealing directly with the gist of the complaint. The danger in this, of course, is that the evidence may be allowed in which later proves not to be relevant but which may poison or cloud the mind of the adjudicator. As a consequence, therefore, I have consistently attempted to utilize similar fact evidence only when it is relevant, when it is related directly to the issue of this case.

And, at paragraph 19, Bright states:

If similar fact evidence were excluded the trier of fact would be faced with having to decide an issue based solely on the evidence of the parties before him. In situations where there is some doubt as to what actually happened, the trier of fact might have difficulty deciding the matter. Nonetheless, sources of evidence come into play within this context, and where such is the case, the trier of fact should be receipted to similar fact evidence. The evidence is not admitted to establish the guilt or the innocence of the accused (emphasis mine), but rather to enable the decision-maker to make a more informed decision. Similar fact evidence can be used to corroborate testimony and it should not be used if the evidence unduly influences the trier of fact.

I have quoted extensively from Mr. Bright as his review of the law and application of it, also in a matter of sexual harassment before a Board of Inquiry, is as good an analysis as you can get and reflects the state of the law on this matter. I agree with the Mr. Bright's analysis and application of the law on this issue and adopt the same approach in the present matter. The Board does take seriously the cautions expressed through the case law and arguments by Counsel for the Respondent about the limited use of similar fact evidence.

The application of the case law to the matter before this Board leads the Board to the conclusion that it should hear the evidence of Mr. Brewer particularly as it may bare directly in aiding the Board on issues of credibility and to a lesser extent pattern or scheme.

The Board shall hear the evidence of Ms Brewer, if the Respondent continues to take the position that the failure of an appropriate amount of notice of this witness has hampered or prejudiced his ability to provide a full answer and response to this new evidence, the Board will entertain to a motion from the Respondent seeking an opportunity to adduce, at a later date, new evidence to respond to, test or challenge the evidence. I will leave that decision to the Respondent once he has heard the evidence and has had the full opportunity for cross-examination.

In absence of hearing the evidence, it is difficult to determine whether or not the evidence is of such a nature that previous notice would have been critical to the Respondent in providing an opportunity to test this evidence. The Board will assess the evidence and it the appropriate weight, if any at all.

Non-Suit

At the close of the Commission's direct case, the counsel for the Respondent sought to have the matter before the Board "dismissed summarily", argument that the Commission had not met its test to show a *prima facie* case, and the conduct complained of by the Complainant does not meet the definition of sexual harassment as is set out under the Nova Scotia Act. (Transcript p. 123):

I would like a move to have the matter dismissed summarily. It's clear from the evidence that has been offered, they've not offered anything to prove -- the definition of sexual harassment, they have proved -- at the best that they can do, if we take all of Ms. Wigg's evidence as being absolute fact, the best that they have done is offered that there was a solicitation done within the workplace. Other than that, it's how people looked at somebody, the fact that somebody -- not even touch. She said pressed against her back as the person was obviously going by.

I mean, there's nothing in this that amounts to a vexatious sexual conduct or course of comment that is known or ought to reasonably be known as unwelcome. That just hasn't been disclosed at all in the evidence that has been put forward by the Commission at this point. There's no complaint here. Nothing that fills the definition of sexual harassment. I don't think there's a need

for us to go on and to call further evidence because they haven't discharged even the first burden on them, which is to show a prima facie case. And that would be my submission at this time.

The Commission did not agree (transcript p. 124):

Couldn't disagree with my friend more. We're dealing with an allegation of sexual harassment under the Act. There is a prohibition under the Act that no one shall sexually harass an individual. The definition is found at Section 3, sub (o), if the Board wants to take a minute to refer to that.

The burden is on the complainant and the Commission to show a prima facie case of sexual harassment. In this case the evidence has shown that Mrs. Wigg was an employee of Mr. Harrison's. He approached her and propositioned her at a time when there was -- there's no evidence that there was any indication she would be interested in that sort of a relationship. She was his -- he was her boss and there was no -- there's no evidence at all that was anything that was invited or -- and, quite clearly, the evidence is that Mrs. Wigg made it quite clear to the respondent she was not interested.

After that, the evidence is -- to which there is no evidence to the contrary at this stage, that there was evidence of possible leering and staring at Mrs. Wigg in an inappropriate way. And the incidents culminate with an incident of physical touching, which was known or should have been known to be unwelcome given the prior responses that she was not interested.

A course of comments were made, as well, in referring back to the original proposition and suggesting that perhaps Mrs. Wigg would be thinking about this offer when she quite clearly made it known to the respondent that she had no interest in him in this way.

I think it meets the -- we've established -- your decision to make, but it is our submission that certainly a prima facie case has been made out here that there has been a sexual solicitation or advance made to an individual by another individual where that person was in a position to confer a benefit or to deny a benefit, as Mr. Harrison, we say, was in this case, to the individual to whom solicitation or advances were made, where the individual who makes the solicitation or advance knows or ought to reasonably know it is unwelcome. I think the evidence before you at this stage is that clearly was the case."

In a recent (N.S.) Board of Inquiry Decision, Chair, Bruce H. Wildsmith, Q.C. in Human Rights Commission vs. I.M.P. Group Limited ,[October 3, 1994] carried out an extensive review of the law relating to non-suit. In that case, also a sexual harassment matter, the Respondents argued non-suit. The Board indicated that it would hear the motion without requiring the Respondents to elect first as to whether first they would be calling evidence and without precluding the Respondents from giving evidence if their motion failed. Wildsmith described what is meant by a *prima facie* case, by referencing the learned author Sarah Blake in Administrative Law in Canada (Toronto: Butterworths 1992), at paragraph 17 at page 9 of his decision, Wildsmith quotes Blake:

Blake says that a much lower standard than the balance of probabilities is applied and that if there is "some evidence (however weak)" to support the complainants, then it must be taken into account. Credibility of the witnesses and weight of evidence is not considered at this stage.

Blake thus suggests that on a motion for non-suit, the evidence should be accepted at face value as though credible and true, and if capable of suggesting a *prima facie* case, the motion for non-suit should be rejected.

(D.J. Naum) in Tomen v. Ontario Teachers Federation (No. 3) (1990, 11C.H.R.R. D/223 (Ontario Bd. Of Inq) at paragraph 19 provides further direction:

I am bound to view the evidence through a narrow prism. I am not, as such, evaluating conflicting evidence. The question before me in terms of the evidence is whether, taking the testimony in light of the most favourable to the commission, I can determine that it has carried the burden of proof in establishing a *prima facie* case.

And, in Abary v. North York Brampton Hospital (No.2) (1989), 9 C.H.R.R.D/4975 (Ont. Bd. Of Inq.), Chair Ratushny stated at para. 38202:

It must be kept in mind that the evidential threshold is very low, i.e. "any" evidence capable of supporting the adverse finding. Moreover, the credibility of evidence is not be weighed at this stage in the absence of the extreme situation of testimony which is so far fetched it is not to be capable of belief by any reasonable person. The commission has met this case.

Decision:

The Board relies much on the reasoning of Board Chair Wildsmith in the Human Rights Commission vs. I.M.P. Group Limited (Infra.) a case very much on point and wherein the Board dismissed the non-suit motion in a sexual harassment suit, after finding "some evidence" to allow this matter to proceed as do I in the present case.

The evidence is not weighed and assessed at this point and the rejection of the motion does not mean that the Complainant will succeed if no further evidence is brought forward. It simply means that this conclusion could be made, not that it ought to be or will be made. That is to say, dismissing the non-suit motion does not place the Board in the position of concluding that it would find in favour of the Complainants if the evidence were left unanswered. The fact of the matter is that the threshold that the Commission must meet at this juncture is far lower than the one it must meet in order for the Board find for them. The purpose of a motion for non-suit is to dispose of cases with no merit; Board Chair Wildesmith makes this point at page 21 of his decision:

To say there is such evidence on which a reasonable person could act, is not to say the person would act or ought to act. I do not conclude, one way or the other, as to whether the evidence presented thus far justifies, in the final analysis, making findings against the Respondents. That decision must be made later when all the evidence the parties wish to adduce has been presented and the cases have been brought to final conclusion.

Reviewing the evidence and applying the law with my best judgement and on these facts, the Board must rule the motion fails, the Commission has met its test, and we shall proceed.

The Facts

The Complainant gave evidence that after working for the Respondent for approximately two years without incident, a change beginning with a particular incident took place in 1995. Consistent with the written complaint, the Complainant's evidence was that in the Respondent propositioned and/or requested sex from her. It is the Complainant's evidence that she had clearly rejected that offer and that there was nothing in her conduct that would or could have allowed the Respondent to conclude that such an inquiry for sex was in any way wanted or would be entertained. Indeed she received assurances from the Respondent that he accepted her response to his proposition and that would be the end of the matter.

The Complainant discussed this incident with members of her family and particularly her husband and daughter, but was convinced that having been given an assurance by Mr. Harrison the incident would not be repeated or pursued. Mrs Wigg states that she was reassured by Mr. Harrison's promise and despite her " shock" (transcript p. 15) reporting the incident to her husband and other family members, she decided to she would continue to work at Art Pro stating she " can handle it" (transcript p. 16), and because of the families financial need.

The Complainant gave further evidence that although she had received assurances from the Respondent "that he would not raise the subject [again]" about a week later the Respondent made an additional inquiry of the Complainant as to whether or not she had thought about his earlier question [about sex]. Compliantant is certain this second question was in reference to the earlier proposition of sex from the Respondent. This second inquiry again, solicited an angry and strong response from the Complaint including the slamming of her hand down and a threat to leave if the matter was ever raised again. The Complainant testified the Respondent gave additional assurances subject would not be mentioned again, but he did not offer an apology. The Complaint also testified that she again reported this incident to family members and made special efforts to avoid beingalone with the Respondent.

It is the evidence of the Complainant that the incidences she describes made the workplace extremely stressful and uncomfortable for her and at times so much so that she felt physically ill and under great emotional stress (transcript p 18). While there was no medical evidence submitted at the hearing, the Complainant indicated that she did seek assistance from a medical doctor to deal with her ongoing stress upset. The Complaint also immediately began job search activities, which was in part, supported, by a letter admitted as **Exhibit 2** and the testimony of Ms. Flint. The Complainant's efforts to find other appropriate employment were unsuccessful.

In mid-February, 1997 " the same thing was happening" (transcript p. 22) that is, conduct of a sexual nature began again on or about February 17, 1997 up to another incident on or about February 20, 1997, when the she left Art Pro. The Complainant gave evidence (transcript pp.21-25) of these incidents and her leaving Art Pro:

Q. When you say "the same thing was happening," what do you mean?

A. Well, he was --

Q. What did you see?

A. Like he was pulling up his pants or doing up his fly or something to that effect anyway. And that was on the Wednesday.

On Thursday, I was working doing the -- oh, I was getting the cards ready. These are business cards. Ready for the Nova Scotia Power. And with those you get a computer printout and you have to read the printout to make sure that these cards, whichever person they were going to, was going to be sent the right way. It either went by mail or delivery.

So I was standing there and I was reading this and looking at it, and all of a sudden I felt something up against my back.

Q. Uh-huh.

A. And I turned around real quick and Mr. Harrison was right up against me. And I said, What the hell are you doing? Like, Get away from me. And he started to move back. I said, Just don't touch me. Then he moved back and he started to move away. And I said, You really must want

me out of here really bad. And he says, No, I don't. And I said, Well, why don't you just bloody well leave me alone? And I was shaking so bad I couldn't -- I didn't know if I could keep on working. And he just went on down to the far end. And so I didn't -- I just kept on working, or trying to.

Q. Was there anyone else there at the time?

A. At that time, no. Well, I kept talking to myself and I thought, Okay, well, I'm going to phone my kids or phone somebody and let them know what's happening here. I remember phoning Doug on his cell phone and he wasn't there, I couldn't get him. And I tried to call Sherri and I couldn't get her either.

So I thought, Okay. What can I do? So I thought, Okay, well, I just keep on working because everybody will be coming in very soon. So I was standing there working on that and then I finished that, and then I turned around to the folding machine which was behind me --

Q. Uh-huh.

A. -- and I thought, Well, there's some work for me there so I'll do some of the folding, and then for sure somebody'll be in. And with that --

Q. What time of day was this, do you remember?

A. It would be about 9. 8:30 or 9 in the morning.

Q. So it was before --

A. I got there at 8:30 so it would be around 9.

Q. Uh-huh.

A. And with that, Mr. Harrison came back again and he said, Why didn't you stop me sooner? He said, I would only go as far as you want me to go. And I said, What the hell are you talking about? What the hell are you talking about? And with that -- he's got some papers in his hand and he took them and he threw them.

With that, I hear the front door open upstairs and Mrs. Harrison came in and I'm sure Tim came down the stairs about the same time. And Mr. Harrison said -- I assume -- as I heard them come in, I thought -- I felt safe so I flipped on the machine. And Mr. Harrison said something, but I didn't hear what he said because I had turned the machine on so I didn't hear.

Q. Did you --

A. But I felt safe then because everybody was coming in.

Q. Did you speak to anyone at the shop about this that day?

A. As soon as I got home I told Doug.

Q. Did you talk to anyone else at the shop that day? Did you speak to the other employees or --

A. I went upstairs to -- when I was leaving and I took my time sheet up and gave it to Lucille. Mr. Harrison followed me up the stairs and I gave her my time sheet and then I -- when I was leaving, either Mr. Harrison or Mrs. Harrison -- one of them said, Are you coming in tomorrow? And I said, You never know. And I left. And then I told -- went home and told Doug and I told Sherri all about it, too.

Q. Did you go back to work after that and --

A. No, I did not.

Board must turn its mind to the credibility of the various witnesses and the evidence presented.

Clearly, the issue before me is the credibility of the various witnesses. A helpful description as to credibility is found in Faryna v. Chorny [1952] 2 D.L.R. 354 (B.CC.A.). Mr. Justice O'Halloran stated at p.357:

The credibility of interested witnesses; particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

There is no machine that an adjudicator can use to discovery if a witness is being truthful or less than candid. Therefore, any adjudicator, including myself, is left with our own personal background, and reaction to evidence given. It is a less than perfect system, but one that usually is successful as a direct consequence of the adversarial process.

The evidence of Ms. Brewer while not essential for the Board to draw its conclusion on the credibility of the evidence of the Complainant, does describe a remarkably similar course of conduct or scheme of activity, strikingly similar to the Complaints evidence. One can not miss the striking similarity and consistency of the evidence of Ms Brewer and that of the Complainant including; the Respondent's unwanted proposition of a sexual nature, which was rejected, the Respondent referenced the non-sexual his relationship with this wife and more to the point, Ms. Brewer's evidence that dispute her clear rejection of the Respondent's proposition he revisited the issue including other unwanted workplace incidents after the initial rejection and periods where nothing would happen (transcript p.118). Ms Brewer's evidence matches the pattern described by the Complaint, exactly, Ms Brewer's evidence also points to a difficult and uncomfortable workplace environment and special steps she took to avoid being alone with the Respondent.

The Board should not conclude that because a Respondent may have previously done similar things now complained of, he is likely to be guilty of the complaint now before the Board. However, the evidence of Ms. Brewer does support the credibility of the Complainant's version of events and raises questions about the evidence of the Respondent. I hasten to add that the evidence of Ms Brewer is from an independent witness with no relationship to the Complainant and nothing to gain from these proceedings. The Respondent's general approach in his evidence that in the matter before this Board is largely the result of an over-reaction or a misunderstanding seems is particularly suspect after hearing Ms. Brewer's evidence.

The Respondent did not deny or challenge the evidence of Ms Brewer. The Board left open the possibility for the Respondent to make a motion to hear other evidence, at a later date, to rebut

the evidence of Mrs Brewer. The Respondent chose not to do so. Ms Brewer's evidence is not insignificant as to credibility, pattern, course of conduct and/or scheme.

With or without the Evidence of Ms Brewer, the Board was impressed with the consistency, sincerity of the Complaint's evidence and the degree to which her evidence fits together with the collaborative evidence of others such as her job search activities . Her evidence held together was consistent, and collaborated. While the Board appreciates the limits of third party evidence, it was sworn evidence, consistent and believable. Taken in its entirety the unchallenged evidence of emotional upset, job search activities the EI claim are consistent. Simply put, the Mrs. Wigg was believable. Her evidence fits together, was consistent, supported by additional evidence of others and including the Complaint's job search efforts, prior to her departure from Art Pro but after the first incidents of and the proposition by the Respondent for a sexual relationship.

Under direct examination by his Solicitor, the Respondent acknowledges that a conversation on the subject of sex took place between himself and the Complainant, early 1995 on the subject of sex. The direct examination by his Council on this point is covered in the (transcript pages 144-145:

Q. Okay. That's Exhibit 12 and that's just the complaint in its entirety. And in the second paragraph Ms. Wigg describes a conversation that you had with her in early 1995, and I wonder if you could just provide for us the background to that and bring us up to the conversation.

A. The second one?

Q. Yes.

A. Yes. Well, Wigg -- or Mrs. Wigg and the way she was acting by times, I was inquisitive and I did not -- not asking her for sex as this -- I did make that -- I did ask her if that's what was on her mind.

Q. Okay.

A. Given the way she was acting.

Q. Well, what do you mean by that, Mr. Harrison? What do you mean the way thatshe was acting

A. Okay. Well, one example would be her and I were standing by the cutting machine and we were discussing a printing job. And I thought we were doing all right. We were discussing this job. And when I turned around to ask her if she understood what was needed here, she could hardly speak and her face was very red and she did nod yes, she could understand it. And I remember at the time I was quite perturbed. I folded my arms and just said, you know, What in the heck's going on here? And that's a basic example, but that actual example happened right there.

Q. What did you interpret that to mean, Mr. Harrison?

A. Well, I wasn't sure. Of course I wasn't sure, I'm not experienced there, but whatever was going on there, we should have been paying attention to the job that we were doing. She was about to trim the job or finish it somehow. That's what we should have been doing. What she was doing, I don't know.

Q. Okay. But you obviously -- I mean, what you're saying is that this was the kind of activity that led to this conversation about interest in sex.

A. Yes.

Q. So --

A. Yeah.

Q. -- what interpretation did you give her activities that made you make this connection?

A. Well, I considered that type of activity to be suggestive and of a sexual nature and I simply asked her, you know, What's on your mind? Or, Are you interested in sex? What are you doing? That's the way that was.

The Respondent testified the Complainant was a competent employee. The Respondent, characterises the September 1995 Conversation(s) with the Complaint far differenially than the Complainant. The Respondent denies that the other incidents described in the in the written complaint against the Respondent and in her testimony took place. The Respondent denies he sexually harassed the Complainaint and also suggests some very odd behaviour on part of the Complaint including the Complainaint taking down her pants on a number of occasions in front of the Respondent.

The Board accepts the version of events as described by the Complainant as to the nature and context of the 1995 conversation about sex. The exchange was not a mere inquiry was not about what was on the Complaint's mind, it was a request for sex from an employer to an employee. The Board is troubled by the Respondent's suggestion that the reason he inquired, as he put it, as to whether or not sex was on the mind of the Complaint, was large part due to "the way she was acting" (page 144 transcript). The Respondent fails to provide any examples or believable evidence to support this suggestion.

The Board does recognise that the Complaint was under great stress for a number of reasons, including the work place environment and personal and family financial problems. I think Mrs and Mr Wigg were forthright on this point. There is no doubt that the Complaint was economically venerable and in a subordinate position to the Respondent. Respondent's evidence, is not helpful to his cause, (transcript page 144) the Respondent states:

A. Yes. Well, Wigg -- or Mrs. Wigg and the way she was acting by times, I was inquisitive and I did not -- not asking her for sex as this -- I did make that -- I did ask her if that's what was on her mind.

Q. Okay.

A. Given the way she was acting.

Q. Well, what do you mean by that, Mr. Harrison? What do you mean the way that she was acting?

A. Okay. Well, one example would be her and I was standing by the cutting machine and we were discussing a printing job. And I thought we were doing all right. We were discussing this job. And when I turned around to ask her if she understood what was needed here, she could hardly speak and her face was very red and she did nod yes, she could understand it. And I remember at the time I was quite perturbed. I folded my arms and just said, you know, What in the heck's going on here? And that's a basic example, but that actual example happened right there.

Q. What did you interpret that to mean, Mr. Harrison?

A. Well, I wasn't sure. Of course I wasn't sure, I'm not experienced there, but whatever was going on there, we should have been paying attention to the job that we were doing. She was about to trim the job or finish it somehow. That's what we should have been doing. What she was doing, I don't know.

Q. Okay. But you obviously -- I mean, what you're saying is that this was the kind of activity that led to this conversation about interest in sex.

A. Yes.

Q. So -

A. Yeah.

Q. -- what interpretation did you give her activities that made you make this connection?

A. Well, I considered that type of activity to be suggestive and of a sexual nature and I simply asked her, you know, What's on your mind? Or, Are you interested in sex? What are you doing? That's the way that was. (Emphasis Mine)

Under cross-examination the Respondent said of the sexually provocative and suggestive conduct of the Complaint (Proceedings transcript 159-161):

Q. Yeah. Mr. Harrison, you admitted that sometime in 1995 you spoke to Mrs. Wigg about whether -- something about sexual content. Whether she wanted to have sex with you or you raised the issue of sex with Mrs. Wigg, isn't that correct?

A. Yes.

Q. And you were asked about -- to give a background to that and you indicated, I believe, that you asked that question because she was red in the face and couldn't speak, is --

A. That was one example.

Q. And is --

A. Yes.

Q. That's why -- I wanted to clarify that. Were you saying that was the lead-up to the proposition?

A. Not that particular event, no.

Q. So then perhaps we didn't get your answer as to what led up to you're asking Mrs. Wigg about sex in '95. You didn't answer that question, did you?

A. I thought I had.

Q. But your answer was she was red in the face and couldn't speak, but now you're telling us that wasn't at that time.

A. Well, that was an example. It wasn't that particular time, I'm sure. That was an example of the workplace activity.

Q. You also indicated -- you said it was -- that you asked this question because of the way she was acting. And then you gave the example she was red in the face and she couldn't speak. Can you tell us a little more? What are you saying about the way she was acting that led you to ask this question?

A. Well, if I'm describe -- or employee and myself are discussing a job, there's no reason at the end of the discussion for the employee to be standing there behind me that way.

Q. That way.

A. At all.

Q. I see.

A. They would be standing beside me, they would be, you know, involved in the discussion.

Q. Isn't it possible, Mr. Harrison, that someone might be red in the face or have difficulty speaking if they're feeling afraid? Isn't that also -- could that be an explanation for why someone is red in the face or having trouble speaking?

A. I suppose it could be, yes.

Q. And if I was sitting here, as I may well be, red in the face, I'm not sure, would you assume that I want to have sex with you?

A. No, not at all.

The Board does not accept that after discussing a printing job a Complainant turning "around red-faced and hardly able to speak" in anyway be construed as some form of invitation that she was interested in sex . The Respondents characterisation of "I was inquisitive and did not — not asking her for sex as this — I did make that — I did ask her if that was on her mind", (transcript p. 145) is, at best, a gloss on the 1995 incident and if I must choose a version of those events more credible and more likely to be the way things happened I choose that of the Complainant.

The Respondent also further indicates, repeating his statements to the Human Rights investigator, certain incidents involving Mrs. Wigg in the last month or so of her employment at Art Pro Limited. The Respondent describes three (3) or four (4) occasions where Mrs. Wigg had removed her clothes or at least her pants and undergarments in the workplace and in the presence of the Respondent (transcript p. 154-155). The Board finds this evidence, bizarre, out of character for Ms. Wigg and unbelievable. The incident itself is specifically denied by the Mrs Wigg.

An employee disrobing in the workplace is a serious breach of workplace conduct, essentially stripping naked in a relatively open work area was never acted upon nor was she disciplined in any way. The Respondent's evidence does not strike me as credible, it does not hold together and does not, in the view of the Board's, did not happen.

Under direct examination by his solicitor, the Respondent specifically denies that other than the initial inquiry he made of the Respondant in early in 1995 ever took place. The Respondent also suggests that " he is not experienced there"(transcript p.145) yet it was the unchallenged

evidence of Mrs. Brewer is that he certainly had some experience asking employees about their sex lives and making a inquiry about having sex with him.

Where there is a dispute in the versions of events I am strongly inclined to accept the testimony of the Complainant who testimony was clear, consistent and taken as a whole with all the evidence available to this board, the Complaint's versions of events is far more likely to reflect the actual events then that of the Respondent.

The Law

Sexual Harassment:

The *Nova Scotia Human Rights Act*, amended in 1991, defines sexual harassment and explicitly states in subsection 5(2): "No persons shall sexually harass an individual."

Sexual harassment is defined in subsection 3(o) of the *Act* to mean:

3(o)

i. vexatious sexual conduct or a course of comment that is known or ought reasonably to be known as unwelcome;
ii. a sexual solicitation or advance made to an individual by another individual where the other individual is in a position to confer a benefit on, or deny a benefit to, the individual to whom the solicitation or advance was made, where the individual who makes the solicitation or advance knows or ought reasonably to know that it is unwelcome, or
iii. a reprisal or threat or reprisal against an individual for rejecting a solicitation or advance.

The Supreme Court of Canada in *Janzen* v. *Platy Enterprises Ltd.* [1989] 1 S.C.R. 1252 [10 C.H.R.R. D/6205] determined that sexual harassment is a form of sexual discrimination in that a woman subjected to discriminatory treatment in the workplace due to her gender is denied equal opportunity employment. The Court in *Janzen* (*Infra.*) defined sexual harassment in the workplace at p.1284 [D/6277, para.44451] as:

... unwelcome conduct of sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.

The Supreme Court of Canada in *Janzen*, *Infra.* quote with approval at D/6224 the definition of sexual harassment from *Sexual Harassment in the Workplace* (Toronto: Butterworths, 1987) by Arjun P. Aggarwal at 1:

Sexual harassment in a complex issue involving men and women, their perceptions and behaviour, and the social norms of the society...

Sexual harassment is any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity. Harassment behaviour may manifest itself blatantly in forms such as leering, grabbing, and even sexual assault. More subtle forms of sexual harassment may include innuendoes, and propositions for dates or sexual favours.

At [D/6232] Dickson, in C.J. *Janzen*, *Infra.* notes a long line of Canadian, American and English cases that recognise sexual harassment to be a form of sexual discrimination prohibited by human rights legislation. The often quoted decision of O.B. Shime in the Ontario case *Bell* v. *Ladas* (1980), 1 C.H.R.R. D/155 [paras. 1387-88]:

... But what about sexual harassment? Clearly a person who is disadvantaged because of her sex, is being discriminated against in her employment... The evil to be remedied is the utilisation of economic power or authority so as to restrict a woman's guaranteed and equal access in the workplace, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman ... [emphasis added].

Human rights legislation thus seeks to proclaim a common standard and protect individuals' dignity and human rights by prohibiting amongst others, sexual discrimination in the workplace. Unwelcome conduct of a sexual nature detrimentally affects the work environment and negatively impacts those harassed. As Adjudicator Shime stated at D/156 [para. 1389]: in *Bell*, *Infra.*

There is no reason why the law, which reaches into the workplace so as to protect the work environment from physical and chemical pollution or extreme of temperature, ought not to protect employees as well from negative, psychological and mental effects...[of] adverse and gender-directed conduct...

At p. [D/6227, para. 44451]: in *Janzen* (*Infra.)*

When sexual harassment occurs in the workplace it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employee forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

The English summary in *Quebec (comm. des droits de la personnne)* v. *Habachi* (1992), 18 C.H.R.R. D/485-D.486 is a helpful precis of the law:

The Tribunal defines sexual harassment as sexually abusive conduct which either has direct consequences on the victim's conditions and opportunities or which results in a climate of intimidation, humiliation or hostility. Although sexual harassment can take subtler or more flagrant forms, it always consists of unwanted sexual demands or behaviour... The Tribunal notes that it is not necessary that tangible economic damage be shown before a finding of sexual harassment can be made. Sexual conduct which renders the environment hostile or intimidating constitutes sexual harassment. (emphasis mine)

Chief Justice Dickson discusses this at [D/6226]. In *Janzen*, *Infra.*

The main point in allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment include a denial of concrete employment rewards for refusing to participate in sexual activity. [Emphasis added.]

Dixon,C.J., went on to say in Janzen (*Infra*) that in his view, sexual harassment in the workplace could be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment. I find this instructive.

Board finds guidance in the works of the learned author Arjun P. Aggarwal's revised text Sexual Harassment in the Workplace (Buttersworths) 2nd Edition (1992). At p.1 of his text the learned author states:

Sexual harassment is any sexual oriented practice that endangers an individuals continued employment, negatively affects his/her work performance, or undermines his or her sense of

personal dignity. Her absent behaviour may manifest itself blatantly in forms such as leering, grabbing, or even sexual assault. More subtle forms of sexual harassment may include sexual innuendoes, proposition for dates or sexual favours.

...

Women are especially vulnerable to sexual harassment because, for the most part they are employed in low status, low paying jobs. Most work in the clerical and service areas of the employment sector, and are usually supervised by male bosses. Because of the fear of losing their jobs, many women have silently endured sexual harassment in the workplace, considering it to be "normal" occupational hazard. Until recent years the practice of sexual harassment was virtually unchallenged.

And, at p.3 of his text:

About 5% of women, who experience sexual harassment quit, 10% resign giving sexual harassment as the reason for their departure and 50% try and ignore it. Among this 50%, there is a 10% productivity drop in the workplace of the victim. Analysis of the survey shows that at least 15% of female employees have been sexual harassed in the last twelve-month period of their employment.

After reviewing the history and the development of the policy and law around sexual harassment Aggarwal goes on at p. 10 of his text to state:

Sexual harassment appears to indicate that such behaviour can be divided into two categories: sexual coercion and sexual annoyance. Sexual coercion is sexual harassment that results from some direct consequence to the worker's employment status or some gain or loss of tangible job benefits. Sexual harassment of this coercive kind can involve an "employment nexus". The classic case of sexual harassment falls into the nexus category: A supervisor using his power over salary promotions and employment itself, attempts to coerce a subordinate to grant sexual favours. If the worker succeeds to the supervisor's request, tangible job benefits follow. If the worker refuses job benefits are denied.

Sexual annoyance, the second type of sexual harassment, is sexually related conduct that is hostile, intimidating, or offensive to the employee, but nonetheless has no direct link to any tangible job benefit or harm. Rather, this annoying conduct creates a bothersome work environment and effectively makes the worker's willingness to endure that environment a term or condition of employment.

The second category contains two subject groups. Sometimes employees subject to persistent requests for sexual favours persistently refuses. Although that refusal does not cause any loss of job benefits, the very persistence of the demand creates an offensive work environment, which the employee should not be compelled to endure. The second subgroup embraces all other conduct of a sexual nature that demeans or humiliates that person addressed and in that way also creates an offensive work environment. This includes sexual taunts, lewd or provocative comments and gestures and sexual offensive physical contact.

...

In its milder form it [sexual harassment] may be confined to verbal innuendoes and inappropriate . In a smaller form it may be confined to verbal innuendoes, and inappropriate affectionate gestures.

The author identifies at p.11-12 of his text that as a general rule the following behaviour constitutes sexual harassment and includes inquires or comments about an individual's sex life and/or other relationships with sex partner. And, similarly sexual looks such or leering or ogling and unwanted propositions for sex.

It is important in this case for all parties to clearly understand what constitutes sexual harassment and to recognise that sexual harassment is considered to be a form of sex discrimination in Canada and expressly prohibited in Nova Scotia under the *Human Rights Act*. As David J. Bright stated in *McLellan* v. *Mentor Investments Ltd*. (199), 15 C.H.R.R. d/134 at d/136, para. 15: "Human rights decisions are, however, not written solely for lawyers, but for the benefit of all because of the remedial nature of the legislation."

As stated by La Forest J. discussing the federal *Human Rights Act* in *Robichaud* v. *Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at 92 [8 C.H.R.R. D/4326 at D/4331, para.339450], "It is remedial. Its aim is to identify and eliminate discrimination." As such there is a public character to human rights legislation. Professor Tarnopolsky (as he then was) stated in *Amber* v. *Leder* (unreported, Ont.Bd.Inq.), 1970 at p.9, quoted in Aggarwal, *Sexual Harassment in the Workplace* (Toronto: Butterworths, 1992, 2d ed.) at 244:

Human rights legislation in Canada was ... deemed necessary for forwarding the equity, dignity and rights of all human beings ... It follows clearly, therefore, that complaints of discrimination are not matters merely between two parties -- the complainant and the respondent -- but a matter concerning the public. An act of discrimination does not give rise merely to a new private claim for compensation -- it amounts to a public wrong.

Conduct or a Course of Comment

The definition of harassment under para.3 (o)(i) of the Nova Scotia legislation establishes that a respondent must have engaged "in vexatious sexual conduct or a course of comment". Sexual harassment is a broad concept encompassing a wide range of comments and conduct that do not necessarily have to be specifically directed at the complainant.

In Miller vs. Sams' Pizza House (*Infra.*) Sexual harassment has been described as including verbal abuse or threats; sexually oriented jokes, remarks, innuendoes, or taunting, leering, ogling or other gestures with suggestive overtones; unnecessary and inappropriate physical contact such as patting, pinching, stroking or suggestively brushing up against someone else's body; as well as sexual touching or physical assault.

At p. D/446 Millar vs. Sam's Pizza House (*Infra.*) The Board states:

Thus, sexual solicitation, sexually oriented comments, actual physical contact of a sexual nature or more subtle conduct such as gender-based insults and taunting may constitute sexual harassment (*Broadfield* v. *De Havilland/Boeing of Canada Ltd.* (1993), 19 C.H.R.R. D/347 (Ont.Bd.Inq.).

Board Chair Philip Gerard stated in *Cameron* v. *Giorgio & Lim Restaurant* (1993), 21 C.H.R.R. D/79 at [D/84] para.34, "The law is clear that comments not involving sexual proposition or explicit sexual language may nonetheless constitute sexual harassment

The Board dealt with the meaning of the phrase "course of" in *Broadfield*, *Infra.*, where a passage from the earlier decision of *Cuff* v. *Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972 at D/3980-D/3981 (Ont.Bd.Inq.) is quoted at para.132:

"Course" suggests that harassment will require more than one event. There must be come degree of repetition of the "vexatious comment or conduct" in order to constitutes harassment.

I agree with the reasoning in Miller v. Sam's Pizza House (*Infra*), the Nova Scotia *Human Rights Act*, does not require a course of vexatious conduct, the importance of the use of the word "or" in section 3(o)(i) is critical. The law does expressly state that a course of comment is required to constitute sexual harassment. One incident may be sufficient to constitute sexual harassment or unwelcome vexatious conduct as in *Cameron* v. *Giorgio & Lim Restaurant*, *Infra.,* however, it would appear that there must be some degree of repetition of unwelcome sex-based comment or comments of a sexual nature in order to constitute sexual harassment.

Vexatious:

In Miller v. Sam's Pizza House, (Infra.) P. D/446 the Board asks, as do I, What is meant by the word "vexatious" in para. 3(o)(i) of the *Act*? The Board in *Broadfield*, *Infra.*, quotes *Cuff* v. *Gypsy Restaurant*, *Infra.*, in para.31527 to define the work vexatious and discusses the subjective element of sexual harassment. The proper test is whether or not the comment or conduct was vexatious to the complainant (D/366 [para.132]):

The Concise Oxford Dictionary as "annoying" or "distressing"... defines "Vexatious" The fact that the comment or conduct must be vexatious imports a subjective element into the definition of harassment; was the comment or conduct vexatious to this complainant? In considering this condition, account should be taken of the personality and character of the complainant; a shy reserved person, or in some cases a younger, less experienced, or more vulnerable person, is less likely to manifest her annoyance, irritation or agitation with the respondent's behaviour than a self-confident, extroverted individual.

Known or ought Reasonably to be known: The Objective Test

Section. 3(o)(i) of the Act addressed " vexatious sexual conduct or a course of comment is known or ought reasonably to be known as unwelcome " [emphasis added]. The Boards of Inquiry have used an objective test to determine whether or not the alleged sexual conduct or course of comment constitutes sexual harassment. That is to say, would a "reasonable person", rather than the actual respondent, have known or ought to have known that the behaviour/comment was offensive or unwelcome by the particular complainant.

Another element of the constructive knowledge or "reasonable person" test would appear to be that proof of intention to discriminate is not necessary to establish a case of discrimination (*Fleming* v. *Simpac Systems Corp.* (1992), 18 C.H.R.R. D/234). As La Forest J. in *Robichaud*, *Infra.*, at 91 [D/4330, para. 33938] states:

... the central purpose of a human rights Act is remedial -- to eradicate anti-social conditions without regard to the motives or intention of those who cause them. [Emphasis added.]

For Nova Scotia authorities on this point see *Association of Black Social Workers* v. *Arts Plus* (N.S.Bd.Inq. decision dated August 26, 1994, Chair M.A. Hickey) and *Rasheed* v. *Bramhill* (decision dated December 2, 1980 [2 C.H.R.R. D/249 (N.S.Bd.Inq.)], Chair W.H. Charles). Hickey relied on *Rasheed* for the proposition that the intention to discriminate is not a pre-requisite for a finding of discrimination and affirmed in Miller *Infra*.

In the matter before this Board there is no doubt that the Respondent had actual knowledge from the Complainant that his comments and conduct were unwelcome and unwanted.

Unwelcomeness

What is meant by "unwelcome" in paras. 3(o)(i) and 3(o)(ii) of the Nova Scotia *Human Rights Act.* Aggarwal, *Infra.,* describes this element at p.63 as follows:

The primary identifying factor in sexual harassment incidents is that sexual encounters are unsolicited by the complainant and unwelcome to the complainant. As sexual attraction often plays a role in the day-to-day social exchange between employees, "the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected sexual advances may well be difficult to discern. But this distinction is essential because sexual conduct becomes unlawful only when it is "unwelcome".

At p. D/447 in Miller *(Infra.),* "signals of unwelcome conduct vary from individual to individual and may vary in strength depending on the incident, the comment or the behaviour. A sexual advance may incite a strong refusal and outrage or may be met with stony silence and evasion. Both response signal unwanted or unwelcome behaviour." At p.69 Aggarwal, *Infra.,* explains:

To establish that the sexual conduct or advances in question were unwanted or unwelcome, the complainant is not required to prove that she had "verbally protested" or expressly said "no" to the perpetrator or conveyed to him in another way that his behaviour was unwelcome. It is sufficient for the complainant to establish that she by her conduct or body movement or body language conveyed to the perpetrator her disapproval of his advances. Where the complainant attempted to evade the harasser as much as she could, it was found that the conduct was unwelcome although no verbal protest was made.

At p. D/447 in Miller *(Infra.)*:

Though a protest is strong evidence, it is not necessary element in a claim of sexual harassment. Fear of repercussions may prevent a person in a position of weakness from protesting. A victim of harassment need not confront the harasser directly so long as her conduct demonstrates explicitly or implicitly that the sexual conduct is unwelcome. For example, in *Anderson* v. *Guyed* (`1990) 11 C.H.R.R. D/415 (B.C.H.R.C.), the complainant was subjected to suggestive remarks from her employer. She ignored the remarks and did not complain about them because she was afraid of losing her job. The Chairperson did not find her failure to rebuff the advances to be unusual in the circumstances.

With respect to the work environment, human rights legislation in Canada does not prohibit normal social exchanges, interpersonal relations, flirtation or even intimate sexual conduct between consenting adults as stated in at D/156 in *Bell*, *Infra.:*

The prohibition of such conduct is not without its dangers... It is not abnormal, nor should it be prohibited, activity for a supervisor to become socially involved with an employee. An invitation to dinner is not an invitation to a complaint.

The intention is not to legislate a pristine or sterile work environment, but to curb harassing conduct, provide all employees equal opportunities and protect an employee's rights to work in an environment free from unwanted sexual pressure (see Aggarwal, *Infra.,* p.8).

Accordingly, incidents of unwelcome sexual solicitations or advances by an individual in a position to confer or deny a benefit has been defined as constituting sexual harassment under para. 3(o)(i) of the Nova Scotia *Act.*

The Alberta Board of Inquiry in *Contenti* v. *Gold Seats Inc.* (1992), 20 C.H.R.R. D/74 at D/79 and D/80 [para. 51] stated:

[I]n identifying discriminatory conduct, the actual knowledge and intentions of the perpetrator are not as important as the impact of the behaviour on the work environment generally and on the particular victim, whose personal and economic vulnerability are often well-known to those standing in the position of an employer. (emphasis added) It is often stated as an objective, or "reasonableness" standard, that the harasser "knew or ought to have known" that his conduct was unwelcome to the complainant.

... while the legislation does not aim to prohibit consensual conduct of a sexual nature in the workplace, the proper test in an unequal employment relationship is said to be whether the subordinate "solicited" the behaviour or was a "willing participant" not whether he or she went along "voluntarily" with any sexual demands or failed to object verbally or resist otherwise.

The burden lies with those in a position of authority or in a position to confer or deny a benefit to ensure that any behaviour of a sexual nature is welcome and continues to be welcome by the individual to whom the solicitation or advance is made. The same subjective and objective elements discussed above with respect to para. 3(o)(i) of the Nova Scotia *Human Rights Act* apply to unwelcome sexual solicitations and advances under para. 3(o)(ii). That is, the particular personality and character of the complainant is considered in determining whether the complainant found any solicitation or advance of a sexual nature unwelcome; and it is incumbent upon the employer/supervisor to ensure the solicitation or advance is welcome. The "reasonable person" test is used to determine if the respondent knew or ought to have known the solicitation or advance was inappropriate.

Proof of intention to discriminate is also not necessary according to the Supreme Court of Canada in *Robichaud, Infra.,* to establish a case of sexual harassment under this paragraph. The issue of intent arose in *Lampman* v. *Photoflair Ltd.* (1992), 18 C.H.R.R. D/196 (Ont.Bd.Inq.) in the context of a defence that the work environment was a very easygoing one and that the respondent employer was an "arm around your shoulder kind of guy". The Ontario Board of Inquiry ruled at p. D/208 [para(s). 64-66]:

... neither an informal working environment nor a gregarious nature on the part... of the "person in a position to confer, grant or deny a benefit or advancement" to the complaining employee offers a defence to an allegation of sexual harassment. The Code's protection of a female employee's right to be free of sexual advances or solicitations from their superiors is available whether or not the workplace environment is an informal or friendly one and whether or not the superior in question views the relationship as a non-hierarchical one...

Reprisal or Threat of Reprisal

While the Nova Scotia legislation in para. 3(o)(iii) also defines sexual harassment in cases where the respondent makes a reprisal or threat of reprisal against an individual for rejecting a solicitation or advance, this *quid pro quo* element of sexual harassment is not essential for a finding for discrimination. The use of the word "or" separating the three clauses in subsection 3(o) clearly shows that this is the law in Nova Scotia.

In the main Chief Justice Dixon decision in Janzen, (*Infra.*) holds that sexual harassment in the workplace could be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment.

As in Mentor, (*Infra.*) people could suffer sexual harassment but continue to work in that atmosphere and location. There is, however, no question that the application and the definition

of sexual harassment will continue to be a difficult and troublesome one which, very often needs to be made on a case-by-case basis and the facts before each Board of Inquiry.

Constructive Dismissal

I find in this case there was a real and casual connection between the sexual harassment and the termination of their employment. On this point, also Adjudicator Henteleff in the original *Janzen* hearing (1985), 6 C.H.R.R. D/2735 at D/2768 (Man.Bd.Adj.) And *Cox* v. *Jagbritte Inc.* (1981), 3 C.H.R.R. D/609 at D/616, paras. 5593-94.

Boards have accepted the description by Aggarwal, 1st ed., *Infra.,* of constructive dismissal outlined below:

In the case where the female employees were forced to quit their job because they could no longer tolerate the harasser's sexual advances, the employer normally took the defence that he did not discriminate by terminating their services, rather the complainants quit the employment themselves. Thus there was no adverse differentiation on the ground of sex, and thus, no violation of the law.

However, the boards of inquiry and tribunals are unanimously of the view that where the complainants choose to leave their employment rather than endure unwelcome advances, the complainants may be deemed to have been dismissed contrary to the prohibition against discriminatory dismissal of a human rights statute. Thus, where complainants are forced to quit their jobs because of sexual harassment, a complaint may be brought to a Human Rights Commission. Aggarwal's 2d ed., *Infra.*, at 107.

Not every conversation with respect to sex is discrimination:

Not every conversation about sex is disallowed in the workplace, or, said another way, that any conversation with respect to the sex in the workplace constitutes sexual harassment. At p. D156 in Bell, (*Infra.)* Adjudicator Shime, Q.C. where he stated:

The prohibition of such conduct is not without its dangers. One must be cautious that the laws not inhibit normal social contact between management and employees or normal discussion between management and employees. It is not abnormal, nor should it be prohibited, activity for a supervisor to become socially involved with an employee. *An invitation to dinner is not an invitation to a complaint. The danger or the evil that is to be avoided is coerced or compelled social contact where the employee's refusal to participate may result in a loss of employment benefits*. Such coercion or compulsion may be overt or settled, but if any feature of employment becomes reasonable dependent on reciprocating a social relationship preferred by a member of management, then the overture becomes a condition of employment and may be considered to be discriminatory. Again, the Code ought not to be seen or perceived as inhibiting free speech. If sex cannot be discussed between supervisor and employee, neither can other values such as race, colour or creed which are contained in the Code, be discussed.

Burden of Proof

Subsection 39(3) of the *Human Rights Act* states:

39(3) In any prosecution under this *Act*, it is sufficient for conviction if a reasonable preponderance of evidence supports a charge that the accused has done anything prohibited by the Act or has refused or neglected to comply with an order made under this Act. (Emphasis a mine)

David J. Bright, N.S. Board of Inquiry at D/136 in *McLellan*, *Infra.*, quotes from *Zarankin* v. *Johnstone* (1984), 5 C.H.R.R. D/2274 at D/2280, para. 19221; aff'd (1985), 6 C.H.R.R. D/2651 (B.C.S.C.) a description of the requirements previous adjudicators have found necessary to prove sexual harassment (D/137 [para.17]:

The complainant must prove, on a balance of probabilities, that there was a contravention ... of the *Human Rights Code*. This involves two parts: 1) proof that the alleged conduct by the respondent occurred; 2) proof that it constituted sexual harassment in the circumstances (for example, that it took place without the complainant's willing consent). If the complainant leads evidence that could satisfy these requirements, then the respondent has an evidentiary burden to respond with some evidence that the acts did not occur or that they did not constitute sexual harassment.

Once the complainant has established a *prima facie* case of sexual harassment, the burden shifts to the respondent to prove that it never took place or that it was welcomed. Unlike other forms of discrimination, there is no defence or justification available in cases of sexual harassment. That is, none of the exceptions outlined in s.6 of the *Act* apply to sexual harassment that is expressly prohibited in subjection 5(2), rather than in subsection 5(1), where other forms of discrimination are prohibited.

Issues:

In the concluding arguments to the Board, counsel for the Respondent accurately expressed the challenge of this case. (Transcript p.169)

... there cases are very difficult, and of course the nature of these complaints are such that they happened in private, and when trying to assess them, it's a matter of assessing and weighing the evidence of the two parties.

And again at (transcript p.170):

Now the question is, does this amount to sexual harassment? Does this bare question in either form, that is suggested by Mr. Harrison or suggested by Ms. Wigg, does that amount to harassment?"

Decision

In the case before this Board, the Board accepts that the Complainant was very clear that sexual advances were unwanted. From the very first incident in 1995, the Respondent was on notice that his sexual advances were absolutely unwanted. The Board accepts the evidence that there were additional propositions and innuendos made to the Complainant of a sexual nature, both in 1995 and again in 1997.

While it is not necessary in the law for women to expressly object to their employer that they find certain conduct distasteful, in this particular case that point was made abundantly clear to the Respondent from September, 1995 forward had actual and specific knowledge that his conduct was unwelcome. There is no need to inquire further as to whether or not he had a constructive knowledge or to apply the reasonable person test as to whether or not a reasonable person would have known that such conduct was unwelcome.

It is the Board's finding that we are not speaking of a single incident, but a number of incidents.The 1995 incident involved a proposition by the employer to the female Complainant to have sex with him, by definition this was vexatious conduct. The immediate response on the part

of the Complainant was a strong, clear and angry rebuke. This is a very serious matter with a dramatic impact on the Complaint who immediately began to look for employment opportunities elsewhere but stayed at Art Pro largely for reason of economic necessity and the assurances given by the Respondent that it would not happen again.

Perhaps, had the matter ended there the Respondent's argument that there was simply an exploration of a possible sexual relationship and not sexual harassment would be much stronger, but it did not end, he persisted and did engage in a course of conduct that constitutes sexual harassment; he did create an environment that was intolerable for the Complainant. An employer who is going to proposition a subordinate employee, is in very dangerous territory.

The Complainant felt, after the additional incidents in February 1997 that the workplace was intolerable, perhaps even dangerous for her to continue and she ceased employment. Whether or not the employer implied a direct threat is irrelevant. Over a period of a number of years there was a reoccurring theme and suggestion that the Respondent wanted to have a sexual relationship with the Complainant, who in this case is a vulnerable sixty (60) year old woman who needed a job and income.

There was some suggestion on the part of the Respondent that the Board should look to the fact that other things were going on in the Complainant's life, which would create stress and that this was not related to the alleged incident or sexual harassment. The Board does to use a principal of tort law, you have to take the victim as you find them. Complainant was vulnerable and disadvantaged in her relationship with the Respondent and, indeed, the Board's conclusion that the Respondent was aware of additional pressures in the Complainant's life, and a reasonable person, a fair person, and a good employer would have been doubly cautious in this situation.

The adverse consequences of sexual harassment are not limited to the victim's job or work environment; they may also extend to the victim's health and well being. The Board accepts that victims of sexual harassment often suffer psychological and physical consequences in addition to economic consequences. Stress, fear and anxiety, are frequently experienced by sexual harassment victims both on and off the job, and they may eventually feel listless, powerless and emotionally depressed. Victims may also experience decreased ambition, a dread of going to work loss of self-confidence and self-esteem. Physically, victims may experience symptoms such as insomnia, headaches, neck and backaches, stomach problems, hypertension, and in some case are reduced to the point of psychological and physical breakdown. (Aggarwal, (*Infra.*) p.115.

And after hearing all of the evidence and observing the demeanor of the witnesses and reflecting on the scheme and profile of events that took place between September, 1995 and February, 1997, the Board finds the evidence of the Complainant, consistent credible and believable.

I find that the Respondents, Art Pro Litho and/or Guy Harrison did sexual harass the Complainant, Ms. Sylvia Wigg, in contravention of the Nova Scotia *Human Rights Act*. In drawing this conclusion the Board has reviewed carefully the relevant case law and the relevant sections of the Nova Scotia *Human Rights Act*. It has also drawn certain conclusions of fact that the Respondent, Harrison did proposition the Complainant, Mrs. Wigg for sex in September, 1995 and, that despite the strong rebuke from Mrs. Wigg he did revisit the issue a number of days later, again to a strong rebuke there were other incidents as well.

In 1997 a series of other incidents took place including gestures and the pressing up against Mrs. Wigg, which were an expression of and a continuation of sexual harassment which had been initiated in 1995.

The Respondent took no remedial action, such would not have been so much an admission of wrong doing as a good faith gesture and an effort to cleanse the environment. A request from an employer to an employee for sexual relations is a very serious matter with significant consequences both to the employer and the employee, particularly where that employer is prepared to revisit the topic despite a strong and clear rejection by the employee. This is not appropriate conduct and while a mere proposition may in and itself not constitute sexual harassment, revisiting the issue after a strong rejection clearly is. It is reasonable to expect that such incidents would create stress, discomfort and adverse consequences for the person propositioned and may, as in this case force them to quit their employment.

Employers are in a special relationship with their employees and they are in a position to confer benefits or detriments to an employee whether or not that is actually implied or directly stated to an employee a proposition for sex does not diminish the higher standard which is applied to an employer in these situations. At page 80 of his text, Aggerwall (*Infra.*.) states:

The employer-employee relationship embodies clear-cut power implications ... It is not, therefore, necessary that there be job related reprisals attached to a sexual invitation in order for these power implications to be felt by the employee."

I agree with the learned author on this point. I agree with Chief Justice Dixon at p. D/6227 in Janzen, (*Infra.*) :

When sexual harassment occurs in the workplace it is an abuse of both economic and sexual power. The sexual harassment is a demeaning practice; one that constitutes a profound front to the dignity of employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as a employee and as a human being.

We are not speaking of a single incident, but a number of incidents at least two (2) of which took place in 1995 and others, which took place subsequent in 1997. I believe that there were other smaller incidents that took place between 1995 and 1997 which were a continuation of the sexual harassment which began in 1995.

Under subsection 39(3) of the Nova Scotia *Human Rights Act,* the Commission must adduce a reasonable preponderance of evidence to prove its case. The complainants must establish a *prima facie* case demonstrating that the alleged conduct occurred, and that it constituted sexual harassment. The Commission has done so.

I find that the preponderance of evidence adduced by the Commission, as required under subjection 39(13) of the *Act*, and that the key legal elements necessary to prove an allegation of sexual have been met. There is credible evidence that the respondents in fact knew their comments and conduct were unwelcome but he persisted. The Respondent put Mrs. Wigg in a extremely unfortunate situation, vulnerable and desperately needing employment she was trapped in a job with a boss that slowly is chipping away at her dignity and self respect by his unacceptable conduct, to wit his sexual harassment.

The Board finds that the Respondantant's conduct does constitute a violation of the Sexual Harassment provisions of the under the Nova Scotia Human Rights Act. The Commission has met every aspect of its legal burden which I have examined with care and reference to leading case law with particular attention to Nova Scotia Human Right's Board of Inquiry.

Award

AWARD

The power of this Board to award remedies is vested in subsection 34(8) of the *Human Rights Act,* which states:

34(8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor.

The NS Board of Inquiry in *McLellan, Infra.,* noted that damages in cases of sexual harassment are awarded like any other civil damages. Thus, the onus is on the complainants to prove the need for damages. The respondents also can lead evidence demonstrating a lack of mitigation, or that damages should only be minimal. The goal of damages, according to the NS Board of Inquiry in *Cameron* v. *Giorgio & Lim Restaurant*, *Infra.*, should be to put the complainant "... in the same position she would have been in had the act of sexual harassment not occurred" (D/85). The damages must reflect the nature of the sexual harassment itself" (D.156).

General Damages

The general principles in awarding general damages in human rights decisions were described by the Board of Inquiry in *Willis* v. *David Anthony Phillips Properties* (1987), 8 C.H.R.R. D/3847 at D/3855 [para. 30460] (Ont.Bd.Inq.) as follows:

Awards of general damages under the *Human Rights Code*, 1981 should be high enough to provide real redress for the harm suffered, insofar as money can provide such redress, and high enough to encourage respect for the legislative decision that certain kinds of discrimination are unacceptable in our society... No award should be so low as to amount to a mere "license fee" for continued discrimination. At the same time, fairness requires that an award bear a reasonable relationship to awards made by earlier boards of inquiry.

As concerns the monetary award, I have taken into consideration the criteria established by Professor Cumming in *Torres* v. *Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 at D/873 [para. 7758] (Ont.Bd.Inq.), when awarding general damages in cases of sexual harassment:

(i) The nature of the harassment, that is, was it simply verbal or was it physical as well?

(ii) The degree of aggressiveness and physical contact in the harassment;

(iii) The ongoing nature, that is, the time period of the harassment;

(iv) The frequency of the harassment;

(v) The age of the victim;

(vi) The vulnerability of the victim; and

(vii) The psychological impact of the harassment upon the victim.

Exemplary Damages

In *Dillman* v. *IMP Group Limited* (N.S.Bd.Inq. decision dated October 31, 1994), Chair Michael Wood noted that punitive damages are rarely awarded. He stated at p.21 that they were "generally only available where a party has conducted themselves maliciously or in such a fashion as to intentionally cause damage." Justice Rogers in *Mehta* v. *MacKinnon* (1985), 67 N.S.R. (2d) 112 [6 C.H.R.R. D/2634] (S.C.) Stated at 124 that the provisions in the *Human Rights Act* conferring power on a Board of Inquiry are generally compensatory, rather than penal or criminal in nature.

The Respondent's Solicitor suggests in his submission that a general damages award of 750.00 is appropriate and the Complainant 's solicitor suggests an award in the range of $6000.00. Having careful regard for the law particularly the test set out in *Torres* v. *Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 at D/873 [para. 7758] (Ont.Bd.Inq. and the facts of this particular case I have drawn a different conclusion then both council.

I am satisfied the Complainant made reasonable efforts to obtain other suitable employment and mitigate her wage loss. I acknowledge the Respondent's submission that any wage loss award should be net of EI received. There is merit in this position given the nature and purpose of EI entitlement and program. Nonetheless Mrs. Wigg was forced to access EI and use up some of her entitlement and capacity to access EI at a later date through no fault of her own. Public policy provides an important social safety net in EI, however, the safety net is not there to mitigate the losses of a perpetrator of sexual harassment, we must strike a balance. I am not in agreement with the Solicitor for the Respondent's submission that the appropriate award for wage loss would be $361.00, and I am not convinced by the Complainant's Solicitor's submission that the wage loss claim should be in the range of $8,500.00.

Other Remedies

It is also appropriate to make certain orders under the *Human Rights Act* in an attempt to achieve compliance with the *Act.* Counsel for the Commission has requested certain remedies to ensure the public interest is protected and future human rights violations are prevented. Such orders have been made in other cases and I think they are most appropriate in the present situation.

Award

I have carefully reviewed the submission of the parties and reviewed the case law with care particularly as it reflects on the specific facts of this matter and its impact on Mrs. Wigg. The Board has reached the following conclusion as to the appropriate remedy:

1. The Respondent Art Pro and Guy Harrison provide to the Complaint a letter of apology to the Respondent.

2. The Respondent pay to the Complainant, Sylvia Wigg, the sum of $3800.00 in general and exemplary damages.

3. The Respondent pay to the Complainant the sum of $1200.00 in lost-earnings.

4.Pre-Judgement Interest @ 5% x 2 years.

5. The Respondents Guy Harrison shall be required to take sensitivity. Through sensitivity training, the respondents will develop a better understanding of what constitutes sexual harassment and why it is prohibited in Nova Scotia under the *Human Rights Act*.

6. The Respondents file a sexual harassment policy in conformance with the *Act* with the Halifax Office of the Nova Scotia Human Rights Commission within six mouths of the date of this decision.

I stress again that the purpose of human rights legislation is not to punish the offenders. Rather it is meant to stop harm, educate all and attempt to have matters proceed in harmony.

I would be remiss if I failed to express my gratitude to counsel for their courtesy and professionalism.

DATED at Halifax, Nova Scotia this 16, day of August, 1999.

It is so ordered by this Board.

Royden Trainor

Chair — Board

BOARD OF INQUIRY 1999

IN THE MATTER OF: The Human Rights Act, R.S.N.S., 1989, as amended by 1991, c.12

- and -

IN THE MATTER OF: A complaint under the Human Rights Act by Ms. Sylvia Wigg

COMPLAINANT

- and -

GUY HARRISON and/or ART PRO LITHO

RESPONDENT(S)

BEFORE BOARD OF INQUIRY CHAIR: J. Royden Trainor

SOLICITOR FOR THE HUMAN RIGHTS Karen A. Fitzner

COMMISSION: Timothy O'Leary, Articled Clerk

SOLICITOR FOR THE RESPONDENT: Darrell Dexter

DATE OF DECISION: August 13, 1999

ORDER

UPON HEARING into the above matter at a public hearing held on February 22, 1999;

UPON REVIEWING all the evidence and written submissions filed on behalf of the Nova Scotia Human Rights Commission and on be half of the Respondent in this matter;

IT IS HEREBY ORDERED pursuant authority in NS Reg.98/98:

1. The Respondent, Guy Harrison, pay to the Complainant, Sylvia Wigg the sum of $3800.00 in general and exemplary damages.

2.The Respondent pay to the Complainant, Sylvia Wigg the sum of $1200.00 in lost-earnings.

3.Pre-Judgement Interest @ 5% x 2 years.

Dated August 16, 1999, at Halifax, Nova Scotia.

Royden Trainor

Chair of the Human Rights Board of Inquiry