IN THE MATTER OF A Complaint of Karen Davison against Nova Scotia Construction Safety Association and/or Bruce Collins and/or Michael Kelly

Nova Scotia Board of Inquiry
Under the Human Rights Act
Jennifer Bankier (Chair)

Heard: August 6, 7, 8 and 9, 2002; November 29, 2002; December 2, 3, and 4, 2002; February 25 and 28, 2003; March 25, 2003; May 5, 6, and 7, 2003; August 27, 2003.

Decision: July 15, 2005.

Counsel:

Mr. Michael Wood, Ms. Meaghan Beaton and Ms. Jennifer Ross for the Nova Scotia Human Rights Commission

Mr. David Farrar and Ms. Lisa Gallivan for the Respondents.

DECISION

IN THE MATTER OF the *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended S.N.S. 1991, c. 12

I. INTRODUCTION

The complaint in this case alleges violations of sections 5(1)(d)(m) (Employment: Sex) and/or 5(2) (Sexual Harassment) and/or 11 (Retaliation).

This is an exceptionally complex Human Rights Case, and it is not a typical case of sexual harassment or gender harassment, where often only the Complainant and an individual Respondent are available as witnesses.

In this case, there were 20 witnesses, including the Complainant, Karen Davison, and the two individual Respondents, Bruce Collins and Michael Kelly.

The testimony of these witnesses and oral submissions by the parties required 15 hearing days (August 6, 7, 8, and 9, 2002; November 29, 2002; December 2, 3, and 4, 2002; February 25 and 28, 2003; March 25, 2003; May 5, 6, and 7, 2003; and August 27, 2003.

There are eleven volumes of transcript, numbering 2038 pages in total. Thirty-one exhibits, numbering 317 pages in total were put in evidence. There are numerous legal and factual issues. As a result, it is not surprising that this decision is also long.

II. PARTIES

Introduction

There are five parties in this case: the Nova Scotia Human Rights Commission, the Complainant, Ms. Karen Davison, the individual Respondents, Mr. Bruce Collins and Mr. Michael Kelly, and the institutional Respondent, the Nova Scotia Construction Safety Association (hereafter NSCSA).

The Nova Scotia Human Rights Commission was represented in these proceedings by Mr. Michael Wood, assisted by Ms. Meaghan Beaton and Jennifer Ross, at various times.

The Complainant, Ms. Karen Davison, was unrepresented by a lawyer. At times, Ms. Davison relied on the questions and representations of Mr. Wood or asked questions through Mr. Wood. At other times Ms. Davison asked her own questions of witnesses called by the other parties, introduced her own Exhibits, and called one witness of her own.

The Respondents, Bruce Collins, Michael Kelly, and the Nova Scotia Construction Safety Association were represented by Mr. David Farrar and Ms. Lisa Gallivan.

Ms. Janet Curry represented the Nova Scotia Workers' Compensation Board with respect to the similar fact evidence issue discussed below.

I will begin this decision by providing brief background information with respect to the parties.

Nova Scotia Human Rights Commission

I assume that the Nova Scotia Human Rights Commission requires no introduction.

Nova Scotia Construction Safety Association (Institutional Respondent)

In the middle of 1991, the Nova Scotia construction industry set up a committee to look at safety in the construction industry. The work of this committee led to the creation of the Nova Scotia Construction Safety Association (NSCSA). The NSCSA was incorporated in May, 1993. The Respondent, Bruce Collins was hired as the general manager of the NSCSA in December, 1993, and was the organization's first employee. The NSCSA began its operations in January, 1994. As noted on its website (http://www.nscsa.org/), "The NSCSA offers safety training and audits to promote a positive culture shift in the construction industry." In the NSCSA context, an audit measures the quality and results of an

organization's safety program. The NSCSA offers a Certificate of Recognition which is awarded to companies that have a successful safety program. Many companies and organizations in Nova Scotia require that tender applicants have a Certificate of Recognition as a prerequisite for participation in the tender process.

NSCSA's Board of Directors is made up of 12 directors. The Construction Association of Nova Scotia (CANS) and the Nova Scotia Homebuilders Association appoint two directors each. The Atlantic Province Ready Mix Concrete Association, the Nova Scotia Roadbuilders Association, Nova Scotia Power, and the Government of Nova Scotia each appoint one director. There are two labour representatives on the NSCSA Board, one appointed by the Mainland Building and Construction Trades Council, and the other appointed by the Cape Breton Building and Trades Council.

The NSCSA's four person Executive Committee consists of the Board's Chair, Vice-Chair, Treasurer/Secretary and the NSCSA General Manager Ex-Officio (i.e. the Respondent Bruce Collins). During the critical period in 1997, the Board members serving on the Executive Committee were Jack Osmond (Chair), Roddie MacLennan and Don Thornton.

The NSCSA initially occupied relatively small premises on Cornwallis Street in Halifax. As its workload expanded, and the number of staff increased, the NSCSA then acquired larger premises in Burnside, Dartmouth and completed the move to these premises by October, 1996. By June of 1997, the NSCSA employed 17 people.

Bruce Collins (Individual Respondent)

After graduating from high school Mr. Collins spent a year at each of Dalhousie and Acadia Universities. He then worked with horses for a few years. Mr. Collins then became a reporter, working for the Charlottetown Guardian, ATV News in Prince Edward Island, and the Fredericton Gleaner, before becoming news editor and city editor for the St. John's Daily. Mr. Collins then worked for several years for Canadian National Railways' public relations department. Mr. Collins then returned to the newspaper business, to run three weekly newspapers in Cape Breton. Mr. Collins then went to work for the Nova Scotia Government caucus office, first as a research officer and then as director of research. Mr. Collins then worked for a year as Director of Communications with the Nova Scotia Department of Labour. Mr. Collins then moved to the Nova Scotia Workers' Compensation Board (WCB), where he worked until December, 1993. At the time of his departure, Mr. Collins was the Executive Corporate Secretary and Director of Public Affairs at the WCB. Mr. Collins has served as General Manager Scotia Construction Safety Association since December 27, 1993. At the time of his testimony in December, 2002, he was also serving as President and Chief Executive Officer of a full-profit subsidiary owned by the

NSCSA and established in 2001, called Safety Audit Management Systems, which provides occupational health and safety services outside the construction industry and outside Nova Scotia. I conclude that despite the difference in titles, Mr. Collins' functions in the two organizations are the same, i.e. Mr. Collins is, in fact, though not in name, the CEO of the Nova Scotia Construction Safety Association.

Karen Davison (Complainant)

Ms. Davison graduated from Queen Elizabeth High School in June, 1986. From August, 1985 until April, 1994, she worked as a waiter at Smitty's Family Restaurant on Tower Road in Halifax. During the 1992-93 academic year, she attended Margille Career College and graduated from the legal secretarial program in May, 1993. Starting in June, 1993, she worked as an administrative secretary in the regional offices of Emco Supply, a heating and plumbing supply company. On November 30, 1994, she applied for an administrative assistant/secretarial position with the Nova Scotia Construction Safety Association after witness Larry Scaravelli, a friend, phoned and suggested that she do so. On December 15, 1994, Mr. Collins wrote to Ms. Davison offering her the position of Administrative Assistant. Ms. Davison started work at the NSCSA on January 3, 1995. At that time the NSCSA had only four other full time employees: Bruce Collins, Mike Kelly, Larry Scaravelli and Jim Williams. In 1996, Ms. Davison assumed the position of Training Information Advisor, where she was in charge of setting up and coordinating the details of demand training courses (i.e. safety training courses specifically requested by corporations or other institutions for the members of their organization, which reflect the organization's specific training needs as opposed to the NSCSA's regular scheduled training courses, which would be directed to a more general audience). During the time periods most relevant to this case, Ms. Davison reported to the Respondent Michael Kelly. Ms. Davison participated in the walkout referred to below.

Michael Kelly (Individual Respondent)

At the time of his testimony, Mr. Kelly was Director of Safety Services/Quality Manager for the Nova Scotia Construction Safety Association. Mr. Kelly left high school at Grade 11 during the 1970s, but subsequently completed his GED in 1978. Mr. Kelly received training over the years from a number of different organizations. In his younger years this training related to a variety of trades. Mr. Kelly started his own company called GM Kelly Contracting and Landscaping Services Limited, which he ran as owner and general manager from 1980 until 1993. This company did excavation, earth works, and acted as an underground services contractor to the residential and light commercial market, with a specialization in water and sewer installation and underground petroleum installation and removals. Beginning in the mid 1990's, after he suffered a workplace injury, Mr. Kelly's training and the resulting certificates

focused on safety matters. Mr. Kelly first worked for the NSCSA as a contract trainer beginning in the spring of 1994. Later he worked for the NSCSA as a salaried trainer, reporting to Jim Williams. In the latter part of 1995, Mr. Kelly joined the NSCSA management team as Training Manager, reporting to Bruce Collins. In June of 1996, he received a Certificate in Adult Training from Acadia University. Mr. Kelly became Director of Safety Services at the NSCSA in December of 1996. In December, 1999, he assumed the additional responsibility of Quality Manager. Mr. Kelly received a Diploma in Management from St. Mary's University in June, 2001. Mr. Kelly did not participate in the walkout.

III. WITNESSES

At this point, I will also briefly introduce the other witnesses. This is desirable because most witnesses testified with respect to more than one issue, and it would be inconvenient to provide background information for this many people the first time, or each time, that I refer to their testimony.

Brian Arsenault

Mr. Arsenault has a B.A. in Sociology and English from St. Thomas University, a Master of Social Work from Dalhousie, and a Certificate in Advanced Mediation from Harvard Law School and a Certificate in Total Quality Management from Sir George Washington University. Mr. Arsenault worked for seven years as the Director of Training and Consulting for the Advanced Management Centre at Henson College at Dalhousie University. Mr. Arsenault now has his own consulting company, Brian Arsenault and Associates, which he started in 1994.. Mr. Arsenault works as a management consultant in the field of human resources. After the walkout referred to below, the Nova Scotia Construction Safety Association contracted out the human resource responsibility for the organization on a contract basis to Mr. Arsenault, starting on June 19, 1997. Mr. Arsenault resigned this position in October, 1997, because of serious disagreements with the approach of another consultant, Mario Patenaude, who was subsequently retained by the NSCSA in September, 1997.

Greg Barr

Mr. Barr came to the NSCSA as a Dalhousie co-op student in the summer of 1995, to build an in-house computer database system for the NSCSA for billing, entering receipts and customer statements. He worked part-time for the NSCSA during the 1995-96 academic year, and became a full-time employee when he graduated from university in 1996. Larry Scaravelli was Mr. Barr's supervisor. Mr. Barr assumed most of Larry Scaravelli's responsibilities when Mr. Scaravelli's employment at the NSCSA was terminated in 1997. At the time of his testimony in August, 2002, Mr. Barr was Director of Finance and Information Systems, and Human Resource Manager for the Nova Scotia Construction Safety

Association, reporting to Bruce Collins. Mr. Barr has held both these titles since 1999. Mr. Barr did not participate in the walkout.

Judy Bunston

Ms. Bunston worked for the Canadian Imperial Bank of Commerce for seven and a half years. She then worked for Powco Steel Company as an office worker for three years. Ms. Bunston next acted as office manager for Anspek Roofing for three years. She developed cancer, did not work for two years, and moved from Ontario to Nova Scotia. Ms. Bunston began work at the NSCSA on January 10, 1995, as a shipper. Ms. Bunston filled in for Stephanie Kewachuk during Ms. Kewachuk's maternity leave, handling course registrations. Ms. Bunston became Audit team leader in November, 1997, and then became Audit Services Manager in June 1998, reporting to Mike Kelly. She became Acting Director of Audit in June, 1999, and Director of Audit in May 2000, reporting to Bruce Collins. At the time of her testimony in August, 2002, Ms. Bunston was Director of Member Satisfaction at the NSCSA, a job that involves visiting with the customers, helping them with their programs, and troubleshooting. Ms. Bunston also reports to Bruce Collins in this position. Ms. Bunston did not participate in the walkout.

Bruce English

At the time of his testimony in February, 2003, Mr. English was Director of Human Resources at the Nova Scotia Workers' Compensation Board (WCB). Mr. English came to the WCB in 1997, i.e. three years after Mr. Collins left the WCB. He was called as a witness solely for the purpose of introducing certain documents from Mr. Collins' WCB personnel file into evidence. The Respondents raised a similar fact objection with respect to Mr. Moffatt's testimony. This issue is discussed at a later stage of this decision.

Craig Falkenham

Mr. Falkenham started work at the NSCSA in January, 1995. He was initially hired on a six month term contract to help the NSCSA understand a new database system that it had acquired. After Mr. Falkenham completed this task, the NSCSA asked him to stay on in a permanent staff position because he understood the system better than anyone else. Mr. Falkenham initially reported to Larry Scaravelli, and then, after Mr. Scaravelli's departure, to Greg Barr. At the NSCSA's Burnside location, Mr. Falkenham occupied a cubicle on one side of Ms. Davison's cubicle in the central administration area of office. Mr. Falkenham left the NSCSA in March, 2001. He testified that he left of his own volition because he had gone as far as he could in the Association, so he left and enrolled in CDI College, graduating in March 2002. At the time of his testimony in August, 2002, Mr. Falkenham was unemployed and volunteering at Human Resources

Development Canada for the work experience. Mr. Falkenham testified that Greg Barr, who is still employed by the NSCSA was prepared to act as a reference for Mr. Falkenham in his quest for employment. Mr. Falkenham participated in the walkout.

Krista Hyland

Ms. Hyland began work at the NSCSA in October, 1996. She began as a receptionist, then moved to the Audit Department in February, 1997, and worked her way up to the position of Senior Audit Advisor, which she held when she left the NSCSA in November, 2000. While she worked in the audit department, Ms. Hyland initially reported to Mike Kelly, and then later to Judy Bunston. Ms Hyland worked briefly at Portobello Marine Services, and then established her own safety training and consulting company, Hyland Safety Services in April, 2001. Ms. Hyland participated in the walkout.

Stephanie Kewachuk

Ms. Kewachuk began work at the NSCSA in October, 1995 as a safety advisor clerk. Later she became Audit Information Officer. Mike Kelly was Ms. Kewachuk's supervisor. Ms. Kewachuk went on maternity leave in July, 1997. The maternity leave was scheduled to last until February, 1998, but Ms. Kewachuk's employment at the NSCSA ended in January, 1998 when she resigned. After a gap in her employment of about a year, Ms. Kewachuk became a safety officer with Pro Insul, a company working as a subcontractor for the Sable offshore project in 1999. Ms. Kewachuk next worked as a safety officer at the Mount Saint Vincent motherhouse for two years. Ms. Kewachuk worked for the Halifax Shipyard as a safety advisor. from September, 2001 until May, 2002. At the time of her testimony in August, 2002 Ms. Kewachuk was managing the health, safety and environmental programme for Ocean Rig with respect to the Erik Raude semi-submersible drill rig at Woodside. Ms. Kewachuk participated in the walkout.

James LeBlanc

At the time of his testimony in May, 2003, Mr. LeBlanc was Director of the Occupational Health and Safety Division of the Nova Scotia Department of Environment and Labour, and had served in that capacity since 1994.

Debra MacDonald

Ms. MacDonald began work at the NSCSA in December, 1996 as receptionist and secretary to the General Manager, reporting to Bruce Collins. She left the NSCSA in January, 1999. She took a year off and then went to work for the Red Cross. At the time of her testimony in December, 2002, Ms. MacDonald worked for the

Red Cross in the Home Partners department, which coordinates clients and home support workers. Ms. MacDonald did not participate in the walkout.

Angela MacKinnon

Ms. MacKinnon began work at the NSCSA in October, 1995, and handled accounts receivable. Ms. MacKinnon initially reported to Larry Scaravelli, and later to Greg Barr. Ms. MacKinnon occupied the cubicle on the other side of the Complainant Karen Davison's cubicle from witness Craig Falkenham at the NSCSA's Burnside premises. Ms. MacKinnon left the NSCSA in February, 1999. After her departure she worked for two and a half years in the financial department of Mount St. Vincent University (MSVU), in the position of distance coordinator, where she was responsible for accounts receivable for off campus students. At the time of her testimony in August, 2002, Ms. MacKinnon was a student in the co-op programme at MSVU, working toward a Bachelor's degree in Information Technology and occupying a co-op position in information system support at the Department of National Defence in Dartmouth. Ms. MacKinnon's father, Frank MacKinnon, represented the Cape Breton Island Building Trades Council on the NSCSA Board of Directors at the time of some of the events relevant to this case. Ms. MacKinnon participated in the walkout.

Myrna McQuaid

Ms. McQuaid first worked for the NSCSA on a temporary basis in 1996 providing assistance with the wait list for training, before the move to Burnside. Bruce Collins, who was a friend of Ms. McQuaid, suggested that she apply for this position. After the move, Ms. McQuaid was rehired in a permanent position and worked in the Shipping Department at the NSCSA, getting materials ready for the trainers, and looking after sales. She reported at first to Mike Kelly, and then to Diane Lutley. Ms. McQuaid resigned from the NSCSA in September, 1999. She worked briefly with another company that did safety training, and then established her own company, Safety Solutions 2000, which provides safety training. Ms. McQuaid did not participate in the walkout.

Robert Moffatt

Mr. Moffatt was an employee of the Nova Scotia Workers' Compensation Board (WCB) from 1989 until 1995, initially as a community relations representative, and later as a communications officer. Mr. Bruce Collins was Mr. Moffatt's direct supervisor from 1989 until Mr. Collins' departure from the WCB at the end of 1993, except from a period immediately before Mr. Collins' departure when Mr. Moffatt reported to Jim Houston, the Director of Policy. The Respondents raised a similar fact objection with respect to Mr. Moffatt's testimony. This issue is discussed at a later stage of this decision.

Suzanne Myette

Ms. Myette has never worked for the Nova Scotia Construction Safety Association. In 1996 she was the roommate of witness Angela MacKinnon. Through Ms. MacKinnon, Ms. Myette got to know a number of NSCSA employees. In June, 1996, Ms. Myette was invited to attend a barbecue at Respondent Michael Kelly's house, which is where a number of the alleged incidents involving Bruce Collins were alleged to have taken place. Ms. Myette's roommate relationship with Ms. MacKinnon ended two years before Ms. Myette's testimony in these proceedings in August, 2002.

Jack Osmond

Mr. Osmond is a contractor. Mr. Osmond served on the committee that the construction industry established in the middle of 1991 to look at safety in the construction industry, which led to the formation of the Nova Scotia Construction Safety Association. Mr. Osmond was a member of the Board of the Nova Construction Safety Association from 1994 to 2001 as the representative of the Construction Association of Nova Scotia (CANS). Mr. Osmond was the founding Chair of the Board of the Nova Scotia Construction Safety Association. Mr. Osmond was Chair of the Board at the time of most the alleged events that are the basis for this Human Rights Complaint (until the end of 1997).

Paul Pettipas

Mr. Pettipas has a Bachelor of Commerce from St. Mary's University, and a law degree from Dalhousie Law School. He became a builder-developer. He initially became a member of the Board of Directors of the Nova Scotia Construction Safety Association as a volunteer for the Nova Scotia Home Builders Association in October, 1997. At the time of his testimony, Mr. Pettipas was the Chief Executive Officer of the Nova Scotia Home Builders Association. He became Chair of the Board of the Nova Scotia Construction Safety Association in 1998, and served in this capacity for three years. At the time of his testimony, Mr. Pettipas was the past Chair of the NSCSA Board. Mr. Pettipas is the uncle of Karen Davison, but the relationship does not appear to be a close one.

Larry Scaravelli

Mr. Scaravelli has a B.A. from Dalhousie, and owned a bailiff services company called Doc-U-Serve before coming to the NSCSA. Mr. Scaravelli joined the NSCSA in January, 1994 as Office Manager. Mr. Scaravelli was the second person hired by the NSCSA, after Mr. Collins. Mr. Scaravelli's employment was terminated by the NSCSA in October, 1997. At the time of this termination, Mr. Scaravelli was Director of Finance and Administration, reporting to Bruce Collins. At the time of his testimony in August, 2002, Mr. Scaravelli was

President of Momentum IT Group in Halifax, a web-based development company which he co-founded. Mr. Scaravelli participated in the walkout.

Karen Swindells (King)

Ms. Swindells initially worked for the NSCSA as a part-time instructor, then became a full-time employee in 1995, and remained with the NSCSA until the spring of 1998, when she left to work for the Nova Scotia Department of Transportation. Ms. Swindells began her full-time employment as an instructor, reporting to Jim Williams. She next became Training Coordinator, and then worked on Quality Development, reporting to Mike Kelly with respect to both of these positions. Initially, in her capacity as Training Coordinator, Ms. Swindells was responsible for both regularly scheduled courses and on-demand training, but subsequently the Complainant, Karen Davison, took over responsibility for the demand training courses. Ms. Swindells participated in the walkout. (The full name of this witness at the time of her testimony was Karen Swindells King, and she testified with her baby in her arms. At the time of the events that are the subject of this Human Rights complaint, she was known by her maiden name of Karen Swindells, and I will refer to her in this decision by that name.)

IV. PROVISIONS OF THE HUMAN RIGHTS ACT RELEVANT TO ALLEGED VIOLATIONS IN THIS CASE

The provisions of the *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended 1991, c. 12, that are relevant to this case are as follows:

> **Meaning of discrimination**
>
> 4. For the purpose of this *Act*, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.
>
> **Prohibition of discrimination**
>
> 5(1) No person shall in respect of ...
>
> (d) employment;
>
> discriminate against an individual or class of individuals on account of
>
> (m) sex ...
>
> (2) No person shall sexually harass an individual.
>
> **Interpretation**

3 In this *Act*, ...

(n) "sex" includes pregnancy, possibility of pregnancy and pregnancy-related illness;

(o) "sexual harassment" means

(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 is 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 of reprisal against an individual for rejecting a sexual solicitation or advance.

Prohibition of retaliation

11 No person shall evict, discharge, suspend, expel or otherwise retaliate against any person on account of a complaint or an expressed intention to complain or on account of evidence or assistance given in any way in respect of the initiation, inquiry or prosecution of a complaint or other proceeding under this *Act*.

V. JURISDICTION OF BOARDS OF INQUIRY

The Jurisdiction of a Board of Inquiry is found at section 34(7) of the *Human Rights Act*:

(7) A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision.

VI. EVIDENCE

Before proceeding to the substance of this complaint, I will first address a number of evidential issues.

a) Evidence Admissible Before Boards of Inquiry

As an administrative tribunal, a Board of Inquiry is not subject to the traditional rules of evidence that apply in civil trials before the courts. Section 7 of the *Boards of Inquiry Regulations*, NS Reg 221/91 governs the evidence which is admissible before a Board of Inquiry:

7. 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 other 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

b) Legal and Evidential Burdens

The standard that a Board of Inquiry applies in assessing evidence is the civil balance of probabilities standard (*Etobicoke v. Ontario Human Rights Commission* (1982), 40 N.R. 159 at 165).

The ultimate legal onus or burden of proof in human rights proceedings varies with respect to different issues. As Sopinka et al note: ((Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (2nd ed.) at p. 57 (footnotes omitted)):

> The legal burden of proof normally arises after the evidence has been completed and the question is whether the trier of fact has been persuaded with respect to the issue or case to the civil ... standard of proof.
>
> The incidence of the legal burden of proof means the party has the obligation to prove or disprove the existence or non-existence of a fact or issue to the civil ... standard; otherwise that party loses on that issue

In civil proceedings, including human rights cases, the legal burden of proof is essentially a tie-breaking rule that applies if the Board of Inquiry cannot make up its mind one way or the other. In the words of the Privy Council in *Robins v. National Trust Co.*, [1927] A.C. 515 (P.C.) at 520:

> But onus as a determining factor ... can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

(See also Sopinka et al., *supra*, at pp. 58-59).

Parties may also be subject to varying evidential burdens. Sopinka et al, *supra*, make the following comments with respect to evidential burdens, at pp. 55-57 and 59 (most footnotes omitted):

> The term "evidential burden" means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue. [In footnote 23, the authors quote J.B. Thayer, *A Preliminary Treatise of Evidence at Common Law*, reprint of 1898 ed. (New York: August M. Kelley, 1959) at 355: "... the duty of going forward in argument or in producing evidence; whether at the beginning of a case or at any moment throughout the trial or the discussion."] ...
>
> A party who bears an evidential burden is subject to an adverse ruling for failing to meet the threshold test for the particular evidential burden. ...
>
> The significance of the evidential burden arises when there is a question as to which party has the right or the obligation to begin adducing evidence. It also arises when there is a

> question as to whether sufficient evidence has been adduced to raise an issue for determination by the trier of fact. Like the legal burden of proof, an evidential burden relates to a particular fact or issue, and where multiple facts or issues are disputed, the evidential burden in relation to different facts or issues may be distributed between the parties.

When the party bearing the evidential burden has introduced sufficient evidence to satisfy the trier of fact on this issue, then, in some circumstances, the opposing party may become subject to a different evidential burden with respect to some aspect of the issue.

A useful explanation of the legal and evidentiary burdens with respect to sexual harassment claims under the *Nova Scotia Human Rights Act* can be found in the decision of Evelyne Meltzer, the Board of Inquiry in *Miller v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433 (NSBOI) at paras. 118-121:

> David J. Bright, N.S. Board of Inquiry in *McLellan* [*v. Mentor Investments Ltd.* (1991), 15 C.H.R.R. D/134 (NSBOI)] ...quoted from *Zarankin v. Johnstone* (1984), 5 C.H.R.R. D/2280, para. 19221; aff'd (1985), 5 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 which 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.
>
> Although *McLellan*, *supra*, was decided before the definition of sexual harassment was added to the N.S. *Human Rights Act* in subsection 3(o), the burden of proof requirements applied to paragraphs (i) and (ii) of this subsection applicable in the present case should remain the same.
>
> Accordingly in Nova Scotia, 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 which is expressly prohibited in subsection 5(2), rather in subsection 5(1), where other forms of discrimination are prohibited.

In *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 at p. 558, the Supreme Court of Canada explained the nature of a prima facie case as follows:

> A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

c) Credibility

In this case, on a number of occasions the various witnesses gave conflicting testimony with respect to facts. It is therefore important to bear in mind the principles that govern findings of credibility. A useful summary of the principles governing assessment of witness credibility can be found in the decision of the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at paragraphs 8-11:

> ... [T]he validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the judge may have remarked favourably or unfavourably on the evidence or the demeanor of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; see *In re Brethour v. Law Society of B.C.* (1951), 1 W.W.R. (NS) 34, at 38-39.
>
> If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, see *Raymond v. Bosanquet Tp.* (1919), 59 S.C.R. 452, at 460. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> 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. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of other, but is based on all the elements by which it can be tested in the particular case.

The following comments from *Hadzic v. Pizza Hut Canada* (1999), 37 C.H.R.R. D/252 (B.C.H.R.T.) at para. 36 are also helpful:

> Others factors that must be weighed include the witnesses' motives, their powers of observation, their relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses' evidence.

d) Circumstantial Evidence

There is often little direct evidence with respect to events at issue in human rights cases, and the parties may have to rely on circumstantial evidence. Even in situations where there is no direct evidence, a Board of Inquiry can still make findings of fact based on circumstantial evidence. A convenient summary of the law with respect to circumstantial evidence in human rights cases can be found in *Fortune v. Annapolis District School Bard* (1992), 20 C.H.R.R. D/100 (N.S. Bd. Inq.) at paras 25 and 32-33:

> ... Mrs. Fortune was not given consideration by the School Board for the position awarded to Mr. Robinson. There is no direct reference to the reason for this being the gender of Mrs. Fortune. However, if circumstantial evidence reasonably leads to the conclusion that gender was the most probable reason, the case has been made out. As is stated in Beatrice Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987), at p. 142:
>
> > The appropriate test in matters involving circumstantial evidence ... may therefore be formulated in this manner: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses. ...
>
> ... While the Act does not make disrespectful conduct illegal per se, such a course of conduct is relevant in assessing whether an inference of discrimination on the basis of sex is appropriate. In other words, if an applicant who obviously possesses a characteristic that is a prohibited ground under the Act is not treated with the respect and dignity one expects all applicants to be accorded, an inference may be drawn that the characteristic in question is the reason for the poor treatment. If other circumstances support the inference then the case becomes clearer.
>
> ¶ 33 Vizkelety, *Proving Discrimination in Canada* is helpful on this point. She says at p. 142-43:
>
> > Where there is an undertaking to proceed by way of circumstantial evidence, to prove a fact in issue piece by piece, bit by bit, the probative value of each item, when taken singly, will not always be apparent. ... But in many instances it may well be impossible to prove the discrimination otherwise. At the very least, a decision on relevance should take into account the fact that the evidence being tendered is <u>but part of an aggregate</u> from which the fact finder will ultimately be asked to infer the existence of a fact in issue. [Emphasis in hearing decision]

The following comments from *Basi v. Canadian National Railway Co. (No. 1)* (1988), 9 C.H.R.R. D/5029 (Can. Trib) at paras. 38482, 38485 and 38486 are also helpful:

> Since direct evidence is rarely available to a complainant ... it is left to the Board to determine whether or not the complainant has been able to prove that the [employer's] explanation is pretextual by inference from what is, in most cases, circumstantial evidence.
>
> > ... In a case where direct evidence of discrimination is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is at issue. This is not always an easy task to carry out. The conduct alleged to be discriminatory must be carefully analyzed and scrutinized in the context of the situation in which it arises. [*Kennedy v. Mohawk College* (1973) (Ont. Bd. Inq.) (Borons) [unreported].] ...
>
> It follows ... that in establishing the circumstantial evidence, a complainant should face no more onerous a test than he would in proving his case generally in the ordinary course. ...
>
> I am persuaded by the logic employed by B. Vizkelety in her recent book *Proving Discrimination in Canada* (Toronto: Carswell, 1987), where she states at 142:
>
> > ... There is indeed, virtually unanimity that the usual standard of proof in discrimination cases is the civil standard of preponderance. The appropriate test in matters involving circumstantial evidence ... should be consistent with this standard ... .

These comments with respect to the use of circumstantial evidence are particularly relevant in this case with respect to the retaliation issue.

e) Relevance of Evidence With Respect to Other Controversies at the NSCSA

The testimony in this case and the resulting transcript in this case are as long as they are because the parties in this case, other than the Human Rights Commission were influenced in their choice of evidence by a variety of controversies during 1997 that extend beyond the scope of the present human rights complaint.

During 1997, the people associated with the NSCSA became polarized into two groups that I will refer to as the "critics" and the "loyalists". (I do not mean either of these terms to be pejorative, since I consider both criticism and loyalty to be healthy for both societies and organizations.) Mr. Bruce Collins, and his leadership of the NSCSA, was the primary focus of both the criticism and the loyalty for which I have named these two groups.

This split in the NSCSA eventually led to a spontaneous walkout of the employee "critics" (constituting at that time the majority of the employees of the NSCSA). The NSCSA was not unionized at that time, and this walkout did not reflect the normal labour relations split between management and labour. The walkout included at least one manager, and the "critics" included at least one member of the NSCSA's Board of Directors. The staff who walked out retained lawyer Ron Pink to negotiate with the members of the NSCSA's Executive Committee to arrange terms upon which the employees would end the walkout, but the

associated controversies contained to complicate the environment at the NSCSA at least for the rest of 1997. This split within the NSCSA has also generated a significant amount of legal action apart from this human rights complaint, including a) the certification of a union; b) the decertification of the same union; c) a wrongful dismissal suit against the NSCSA by a former manager; d) a labour standards application by the Complainant against the NSCSA, which was apparently based on summary termination without notice, that had been successful at the first stage of the labour standards process, although the Respondents were planning to appeal this result at the time of their testimony before me; and e) a complaint by the Complainant to the Nova Scotia Barristers Society against Mr. Farrar, because he had attempted to obtain access on behalf of the Respondents to the Complainant's medical records, which was dismissed by the Nova Scotia Barristers Society. There were hints that there might also be other outstanding legal proceedings that were less clearly identified. Occasionally I had to stop all parties but the Commission from engaging in what appeared to be fishing expeditions relevant only to other litigation and not conceivably relevant to this case.

Ultimately, in his final submission, Mr. Wood presented me with a useful argument with respect to the relevance of this broader evidence, which I reproduce below:

> Although the Board of Inquiry heard lengthy evidence regarding Davison's complaints of sexual harassment, gender discrimination, and retaliation, the Board of Inquiry also heard testimony into a number of matters which the Commission submits are irrelevant to the question of Davison's human rights complaint. These matters include allegations of financial mismanagement at the NSCSA, whether or not Collins and Kelly were qualified for their positions at the NSCSA, and the events surrounding Kelly's application to the Canadian Registered Safety Professional Association. The Board of Inquiry heard a great deal of evidence concerning the July 1997 employee walkout [*sic*: the employee walkout was actually in early June, 1997] at the NSCSA, the Commission submits that this evidence is only relevant to the extent to which it may have involved issues of sexual harassment or retaliation. The Commission does not take a position on these issues as it submits that they are irrelevant to the matters that must be looked at by the Board of Inquiry.

I agree with Mr. Wood's submission on this point, and I have endeavoured to avoid venturing into this larger pool of evidence except where it is absolutely essential. I have no desire to further inflame the existing divisions within the NSCSA by commenting on controversial matters that lie outside my mandate.

I note that the Complainant and the Respondents all seemed to perceive membership in the opposing faction as relevant to credibility on an across-the-board basis. I expressly refuse to make any general finding of credibility based on any given individual's status as a "critic" or a "loyalist" within the larger disputes at the NSCSA(For the witnesses listed above, participation or non-participation in the walkout is a useful test for "critic" and "loyalist" status respectively.) Based on my observation of the witnesses and their testimony, I see no reason that either category of witness is more dependable than the other as witnesses simply on the basis of their status as loyalists or critics. In general,

my perception of the witnesses was that most, if not all, were sincere in their differing beliefs with respect to the more general controversies at the N.S.C.S.A. It is possible to be mistaken without being malicious. I expressly state that I have formed no opinion whatsoever with respect to the larger issues within the NSCSA.

These larger issues within the NSCSA are relevant to interpreting testimony to a limited degree, in the sense that because of the intensity of a) the polarization within the NSCSA, and b) the negative consequences that that split has had for people on both sides of the argument, persons on both sides of the NSCSA split between "critics" and "loyalists" tend to have a very negative opinion of each others' behaviour and motives. As illustration of situations where this negative polarization was clearly influencing the interpretation by parties of each others' behaviour, I note that Ms. Davison, a "critic", seriously asserted to me that Mr. Collins had faked a heart attack to delay the Respondents' response to the formal Human Rights Complaint, while Mr. Kelly, a "loyalist", asserted in his testimony before me that there was a risk of Ms. Davison "going postal" and physically hurting her coworkers. I reject both of these assertions as products of the polarization within the NSCSA that have no connection to reality, and I have been careful to monitor the testimony of all witnesses associated with the NSCSA with a view to taking into account the impact of the polarization on their perceptions of reality.

I note that many issues with respect to this human rights complaint are to be resolved, not on a subjective standard, but on an objective standard based on the reasonable person. In this context, I conclude that the reasonable person is not a party to the polarization within the NSCSA, and is neither a "critic" nor a "loyalist", but rather an outside observer of these disputes.

f) <u>Similar Fact Evidence</u>

The Respondents objected when the Commission proposed to call witnesses Bruce English and Robert Moffatt to testify with respect to certain alleged aspects of Mr. Collins' prior work history at the Nova Scotia Workers' Compensation Board (WCB), on the basis that this would be similar fact evidence. The parties made written and oral submissions to me on this issue. It was agreed that in order to expedite the hearing of the case, I would provide a short statement of my conclusions with respect to the admission or non-admission of this evidence by an email message to the parties, and that I would provide more detailed reasons in support of my ruling in my final decision on this case. This segment of my decision provides these detailed reasons.

The leading authority with respect to similar fact evidence in the context of human rights tribunals in Nova Scotia, is the decision of the Nova Scotia Court of Appeal in *Mehta v. MacKay* (1990), 15 C.H.R.R. D/232 (N.S.C.S.A.) where the relevant principles are set out as follows at para. 15:

> The following principles relevant to the present case may be extracted from the jurisprudence.
>
> 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 a 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 a clear linkage or nexus to an issue other than disposition or propensity such as intention, pattern or system, credibility, corporate knowledge or negation of denial, and its probative value to that issue outweighs its prejudice to the defendant. [emphasis added]

After considering the oral and written submission of the parties, I ruled that I would hear the testimony of Mr. England and Mr. Moffatt, on the basis that, at a minimum, it was relevant to a determination of credibility with respect to Mr. Collins. I will discuss the reasons for my conclusion that this evidence is relevant to the credibility issue in greater detail in this section below.

After I received the evidence, it became apparent that it was also relevant to another issue in the sexual harassment analysis. The section 3(o)(i) of the Nova Scotia *Human Rights Act* defines sexual harassment as "vexatious sexual conduct or a course of comment that is known or ought reasonably to be known as unwelcome" [emphasis added]. In other words, section 3(o)(i) identifies two ways by which "unwelcomeness" can be demonstrated.

The first is by evidence that the respondent actually had subjective knowledge that the sexualized conduct or comments was unwelcome. This subjective branch of the unwelcomeness test is obviously a variation on the "intention", "knowledge", and "negation of denial" grounds recognized as a basis for the exercise of discretion to receive similar fact evidence in *Mehta*, *supra.*

The second branch of the test for unwelcomeness specified in section 3(o)(i) of the Nova Scotia *Human Rights Act*, allows the unwelcomeness requirement to be satisfied by a determination by the tribunal that even though the particular respondent had no subjective knowledge that the sexualized behaviour in question was unwelcome, a reasonable person with knowledge of the facts that have been put in evidence would have known the conduct was unwelcome (a standard which is specified in the legislation by the words "ought reasonably to be known as unwelcome"). I conclude that evidence that is relevant to the determination of what a reasonable person would consider unwelcome on the facts of a particular case "has a clear linkage or nexus to an issue other than

disposition or propensity", to quote the language of the Nova Scotia court in *Mehta* quoted above.

I conclude that some of the evidence and/or exhibits entered in evidence during the testimony of Mr. Moffatt and Mr. English is relevant to determining whether or Mr. Collins had actual knowledge that some or all of his sexualized behaviours were likely to be unwelcome to employees under his supervision. I also conclude that some of this evidence forms part of the factual basis for whether a reasonable person in Mr. Collins' position would have perceived the sexualized behaviours at issue were unwelcome. Further discussion of this issue will deferred until I reach the actual analysis of the unwelcomeness issue at a later stage of this decision.

I will now return to a discussion of how the evidence of Mr. English and Mr. Moffatt, and associated Exhibits, are relevant to the issue of the credibility of Mr. Collins in this case.

Before counsel for the Respondents raised the similar fact issue in connection with the proposed testimony of Mr. English and Mr. Moffatt, Mr. Collins had already given testimony with respect to his experiences at the Workers Compensation Board, without objection from counsel for the Respondents. The most important portions of this testimony were as follows [emphasis added]:

Q. I want to take you back to your time at the Workers' Compensation Board. ... And what I want to ask you about is <u>are you aware of any allegations made by staff at the Board with respect to sexual -- alleged sexual harassment by you there?</u> ...

A. <u>Not sexual harassment, harassment</u>.

Q. Harassment, all right. And what were those allegations about? Let me ask you this first of all. Were you aware of them at the time you were at the Board or did you find out about them subsequently?

A. I was aware of them at the time I was at the Board. It was in the last year I was there.

Q. And who was the person that was making those allegations?

A. Robert Moffatt.

Q. And what was Mr. Moffatt in relation to you? Was he someone that reported to you --

A. He was public affairs rep. He's one of a number of people that reported to me at that particular point in time.

Q. And how would you describe your relationship with Mr. Moffatt while you were working there?

A. Oh, fine. I didn't -- I had no particular relationship with Robert. I mean, he was someone who worked in Public Relations. I didn't really have a relationship with him one way or the other.

Q. Did he ever come to you and complain directly to you about your conduct?

A. No.

Q. How did you find out he was making some sort of --

A. I found out --

Q. -- allegations --

A. -- six months after they completed their investigation, or they undertook their investigation. I found out I was asked to go to Dave Stuewe's office one day to meet some lawyer whose name I don't remember, who was a forensic something or other. David told me that there had been allegations made against a senior member of management with respect to harassment; that those allegations were serious and they had been investigated.

I thought he had me in there in my capacity as the director of public affairs to advise me of this because it may be becoming some kind of a public issue. And I said, Who? And he said, You. I just about fell out of the chair. So he talked pretty loosely about what those allegations were.

I remember one of them specifically was I had taken an eight-and-a-half by 11 piece of paper, letter paper, it was rolled up in my hand. Robert was standing by the photocopier and I hit him in the shoulder with it and that hurt him. That was one of them. What the others were I don't specifically recall at the moment, but the end result -- I mean, there was so much wrong with that whole process of -- the investigation went on for six months. There's a harassment policy at Workers' Comp that requires you, requires the Board when an issue of harassment is made, to notify the person that is being accused of harassment so that it stops.

And depending upon what the nature of that harassment is, then discipline and investigation and/or discipline measures may take place. None of that took place in my case. The investigation took place. And subsequent to it, I discovered that everybody I'd ever talked to in my life had been asked questions about that and then sworn to secrecy.

Did it result in any discipline measures with respect to me? No, it didn't. It wasn't the reason why I left the Workers' Compensation Board. It certainly contributed to it. ... I was at the end of my rope there mentally. There was just so much work I was just too tired. So -- ...

Q. And was that meeting the end of the process? ... When you had this meeting and you were informed about these allegations and the investigation, had the matter been concluded as far as the Board was concerned at that -- ... stage?

A. -- no idea. Nothing was ever said to me beyond that. I had a few discussions with David Stuewe about it and they had more had to do with process than anything. David wanted Robert to report to somebody else, I -- didn't matter to me who he reported to. For a while they had him reporting to the policy guy. They had me reviewing his work. ...

So -- and the Robert Moffatt thing was a bit embarrassing for me but I didn't -- it wasn't the sole reason. It was one of the many reasons why I left Workers' Comp. ...

The most important aspect of Mr. Collins' testimony above is the assertion that the investigation of his behaviour at the WCB was only with respect to what is

often called personal harassment, i.e. harassment that has nothing to do with any of the grounds of discrimination specified in the Nova Scotia *Human Rights Act* (e.g. sexual harassment, race, sex, disability, sexual orientation). A human rights Board of Inquiry under the *Act* has no jurisdiction over harassment that does not relate to one of the grounds specified in the *Act*. Mr. Collins specifically testifies above that the investigation in question had nothing to do with sexual harassment, the type of discrimination at issue in the present case.

In deciding to admit the similar fact evidence with respect to the credibility issue, my concern was not whether Mr. Collins had in fact engaged in acts of sexual harassment at the WCB. My concern was with whether Mr. Collins' testimony that the investigation into his conduct as a manager there had nothing to do with sexual harassment was correct. If the evidence from the WCB confirmed Mr. Collins' testimony on this point, this would strengthen his credibility with respect to contexts where there was conflicting witness testimony, and credibility was important in making findings of fact. If, in fact, the evidence from the WCB indicated that the investigation in question did relate to sexual harassment, contrary to Mr. Collins' testimony above, then this was would reduce the credibility of Mr. Collins in this case in situations of conflicting evidence between Mr. Collins and other witnesses.

When Mr. English and Mr. Moffatt testified, it became apparent that sexual harassment was, in fact, one of the issues in the allegations against Mr. Collins at the WCB. This was apparent both from the testimony of Robert Moffatt, and from a letter from David Stuewe, the Chief Executive Officer of the WCB, to Mr. Collins dated December 17, 1993, which was entered in evidence as Exhibit 18. I will defer detailed consideration of this letter until I reach the "unwelcomeness" issue discussed above at a later stage of this judgment. For the time being, it is sufficient to quote part of one sentence in Mr. Stuewe's letter, namely "...your use of sexual comments as part of this treatment [of Robert Moffatt] has raised the question of sexual harassment."

Mr. Collins was absent for personal reasons during the testimony of Mr. English and Mr. Moffatt. At a later stage of the hearings, counsel for the Respondents recalled Mr. Collins as a witness. On cross-examination, the following exchange took place between Mr. Collins and counsel for the Commission [emphasis added]:

> Q. You talked about a meeting in early 1993 with Mr. Stuewe where the issue of the relationship between you and Mr. Moffatt was raised.
>
> A. Yes.
>
> Q. And I think you indicated that you had been advised by Mr. Stuewe at that time that there were certain problems --
>
> A. Yes.

Q. -- in relation to that relationship. What were those problems as he described them to you at that time?

A. One was supposed to have been a physical assault against Robert.

Q. Is this the rolled-up paper? Is that the -- what --

A. Yeah, that's the one.

Q. -- you're talking about? Hitting him with the rolled-up paper? Okay. What else was described as being a problem?

A. General management style and the relationship with Robert. Robert thought that I was making some kind of sexual propositions to him.

Q. Uh-huh.

A. I think that, in essence, were the three that I recall.

Q. Now before when you testified, my recollection was that you had no -- you did not testify about any sexual component to the complaints of Mr. Moffatt. Do you now way that you remember there was a sexual component to his complaints

A. No. I said those are allegations that he made. ...

Q. But my question was, and the transcript, of course, will speak for itself --

A. Well it can speak for itself.

Q. -- that do you recall in your earlier questioning you denied that any of Mr. Moffatt's complaints had a sexual component to it?

A. No, I don't recall that.

Q. But you are saying today that you did understand at the time that there were sexual components to his complaints?

A. Well I understood that he suggested that there was some kind of proposition. He felt that I was maybe making propositions to him.

Q. Okay.

A. But I specifically recall, both the lawyer and David Stuewe, in that meeting say they found no evidence of that. So you know, the meeting was the end of it, in my view. The problem was what they were going to do with Robert Moffatt.

Based in the excerpts above, there is a clear inconsistency in Mr. Collins' testimony before the testimony of Mr. English and Mr. Moffatt and the receipt in evidence of Exhibit 18, and his testimony after the receipt of this evidence, with respect to whether Mr. Collins was aware that the investigation with respect to him at the WCB related, in part, to sexual harassment. In his earlier testimony, Mr. Collins clearly stated that the investigation was only with respect to personal harassment (irrelevant to the issues in this case), but after this evidence was received, Mr. Collins stated that he was aware during his time at the WCB that

the investigation included an element of sexual harassment. Mr. Collins also stated that he did not remember making any inconsistent statement in his earlier testimony.

I do not believe Mr. Collins would ever forget that the investigation at the WCB included a sexual harassment component. This inconsistency in Mr. Collins' testimony before and after receipt of the similar fact evidence goes directly to his credibility. On the basis of this inconsistency, I conclude that Mr. Collins is capable, upon occasion, of giving misleading and self-serving testimony when this will work to his advantage in these proceedings.

VII. DELAY AND ABUSE OF PROCESS

The Respondents made a preliminary request that I should dismiss this Human Rights Complaint without addressing the merits, on the basis of delay on the part of the Commission amounting to an abuse of process in administrative law. Mr. Farrar rightly took the position that it would not be possible to determine the merits of the Respondents' request for dismissal of the Complaint on the basis of delay until I had heard all the evidence in the case.

The parties agree that the leading case with respect to delay as abuse of process is the decision of the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

In *Blencoe*, the Supreme Court of Canada first rejected the proposition asserted by the Respondent in *Blencoe* that section 7 of the *Charter of Rights and Freedoms* provided a basis for respondents to human rights complaints to obtain a stay, on the following basis at the paragraphs specified below [emphasis added]:

> ¶ 83 It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings. ...
>
> ¶ 96 I do not doubt that parties in human rights sex discrimination proceedings experience some level of stress and disruption of their lives as a consequence of allegations of complainants. Even accepting that the stress and anxiety experienced by the respondent in this case was linked to delays in the proceedings, I cannot conclude that the scope of his security of the person protected by s. 7 of the Charter covers such emotional effects nor that they can be equated with the kind of stigma contemplated in *Mills* (1986), *supra*, of an overlong and vexatious pending criminal trial or in G. *(J.)*, supra, where the state sought to remove a child from his or her parents. If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted. This will also be the case when dealing with the regulation of a business, profession, or other activity. A civil suit involving fraud, defamation or the tort of sexual battery will also be "stigmatizing". The Commission's investigations are not public, the respondent is

asked to provide his version of events, and communication goes back and forth. While the respondent may be vilified by the press, there is no "stigmatizing" state pronouncement as to his "fitness" that would carry with it serious consequences such as those in G. (J.). There is thus no constitutional right or freedom against such stigma protected by the s. 7 rights to "liberty" or "security of the person".

The Supreme Court in *Blencoe* then turned to the question of whether the *Blencoe* Respondent was entitled to a remedy pursuant to administrative law principles. The Court's most relevant comments are as follows, at the specified paragraphs [emphasis added]:

¶ 117 In the context of a breach of s. 11(b) of the *Charter*, a stay has been found to constitute the only possible remedy ... . The respondent asked for the same remedy in his administrative law proceedings ... . There is, however, no support for the notion that a stay is the only remedy available in administrative law proceedings. A stay accords very little importance to the interest of implementing the *Human Rights Code* and giving effect to the complainants' rights to have their cases heard. Other remedies are available for abuse of process. Where a respondent asks for a stay, he or she will have to bear a heavy burden.... [emphasis added]

¶ 120 In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (Power, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

(d) Was the Delay Unacceptable?

¶ 121 To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, *supra*, at p. 9-68). There is no abuse of process by delay per se. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was "inordinate".

¶ 122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

¶ 126 The arguments advanced by the parties before us rely heavily on criminal judgments where delay was considered in the context of s. 11(b) or s. 7 of the *Charter*. It must be kept in ... that the human rights process of receiving complaints, investigating

them, determining whether they are substantial enough to investigate and report and then to refer the matter to the Tribunal for hearing is a very different process from the criminal process. The British Columbia human rights process is designed to protect respondents by ensuring that cases are not adjudicated unless there is some basis for the claims to go forward and unless the issue cannot be disposed of prior to adjudication. ... The Commission therefore performs a gatekeeping or screening function, preventing those cases that are trivial or insubstantial from proceeding. There is also the goal of settlement through mediation which is lacking in the criminal context. The human rights process thus takes a great deal more time prior to referring a complaint to the Tribunal for hearing.

¶ 127 The principles of natural justice also require that both sides be given an opportunity to participate in reviewing documents at various stages in the process and to review the investigation report. The parties therefore have a chance to make submissions before a referral is made to the Tribunal. These steps in the process take time. Indeed, the Commission was under a statutory obligation to proceed as it did. The process itself was not challenged in this case. True, the Commission took longer than is desirable to process these Complaints. I am not condoning that. Nevertheless, ... While the case may not have been an extremely complicated one, these stages are necessary for the protection of the respondents in the context of the human rights complaints system. ...

¶ 129 In *Kodellas*, *supra*, the Saskatchewan Court of Appeal held that the determination of whether the delay is unreasonable is, in part, a comparative one whereby one can compare the length of delay in the case at bar with the length of time normally taken for processing in the same jurisdiction and in other jurisdictions in Canada. While this factor has limited weight, I would note that in this regard, on average, it takes the Canadian Human Rights Commission 27 months to resolve a complaint (J. Simpson, "Human Rights Commission Mill Grinds Slowly", *The Globe & Mail* (October 1, 1998), p. A18, as quoted in R. E. Hawkins, "Reputational Review III: Delay, Disrepute and Human Rights Commissions" (2000), 25 Queen's L.J. 599, at p. 600). In Ontario, the average length of complaints, according to the *Annual Report* 1997-1998 of the Ontario Human Rights Commission (1998), at p. 24, is 19.9 months. The respondent's counsel at the oral hearing quoted a report of the British Columbia Ministry where the average time to get to a hearing in British Columbia is three years.

¶ 130 The delay in the case at bar should be compared to that in analogous cases. In *Nisbett*, the sexual harassment complaint had been outstanding for approximately three years. In *Canadian Airlines*, there was a 50-month delay between the filing of the complaint and the appointment of an investigator. In *Stefani*, there was a delay of two years and three months between the complaint and the inspection and an additional six- or seven-month delay which followed. In *Brown*, a three-year period had elapsed prior to serving the petitioner with notice of the inquiry. In *Misra*, there was a five-year delay during which time Misra was suspended from the practice of medicine. Finally, in *Ratzlaff*, it had been seven years before the physician received a hearing notice.

¶ 131 A review of the facts in this case demonstrates that, unlike the aforementioned cases where there was complete inactivity for extremely lengthy periods, the communication between the parties in the case at bar was ongoing. While Lowry J. acknowledged the five-month delay of inactivity, on balance, he found no unacceptable delay and considered the time that elapsed to be nothing more "than the time required to process complaints of this kind given the limitations imposed by the resources available" (para. 47). ...

¶ 132 ... Taking into account the ongoing communication between the parties, the delay in this case does not strike me as one that would offend the community's sense of decency and fairness. [emphasis added]

> ¶ 135 Nevertheless, I am very concerned with the lack of efficiency of the Commission and its lack of commitment to deal more expeditiously with complaints. Lack of resources cannot explain every delay in giving information, appointing inquiry officers, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases. In *R. v. Morin*, [1992] 1 S.C.R. 771, at p. 795, the Court stated that in the context of s. 11(b) of the Charter, the government "has a constitutional obligation to commit sufficient resources to prevent unreasonable delay". The demands of natural justice are apposite. ...

I have been unable to locate any Nova Scotia Board of Inquiry decision addressing the abuse of power/delay issue which was decided after the Supreme Court of Canada's decision in *Blencoe* that the applies the Supreme Court's *Blencoe* test. However, the 1999 decision of the Board of Inquiry in *Redden v. Saberi* [1999] N.S.H.R.B.I.D. No. 3 (N.S. B.O.I.) seems essentially consistent with the analytical framework adopted by the Supreme Court majority in *Blencoe*, and provides a useful description of the processes and problems in the operation of the Nova Scotia Human Rights Commission at the paragraphs quoted below [emphasis added]:

> **DELAY**
>
> ¶ 36 At the opening of the hearing on September 27, Mr. Mason moved that the inquiry be stayed on the basis that his client's ability to mount a full and effective defence had been prejudiced by the delay of three years which had elapsed between the filing of the complaint and the hearing. He argued further that Mr. Saberi's s. 7 rights under the *Charter* were infringed in these proceedings. ... Mr. Mason argued that the substantial stigma attached to being the subject of a human rights complaint amounted to an interference with Mr. Saberi's security of the person, and that the delay in processing the complaint did not comply with the requirements of fundamental justice. I declined to stay the proceedings but stated that I would retain jurisdiction over the issue of delay and deal with it in these reasons. ...
>
> Did the delay or other aspects of the Commission's process result in a denial of natural justice?
>
> ¶ 38 There is a modest jurisprudence on the issue of delay in human rights proceedings in Nova Scotia, though it has been addressed many times in other provinces. Since the matter was fully argued, it will perhaps be useful to state the applicable legal principles here, as I see them. First of all, it is clear that a board of inquiry has jurisdiction to decide whether the proceedings of the Human Rights Commission have been in accordance with the requirements of natural justice up to the date of the hearing. S. 34(7) of the *Human Rights Act* states in general terms that a board of inquiry "has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act." In *Volvo Canada Ltd. v. Mary Ritchie and the Nova Scotia Human Rights Commission* (1989), 10 C.H.R.R. D/6341, Glube C.J.T.D. as she then was, stated that "the Board of Inquiry has the power to deal with allegations of unfairness, denial of natural justice, or inability to respond due to delay" (at p. D/6343). She rejected an application to quash the appointment of a board of inquiry on the basis of alleged delay, stating that it was for the board to hear argument on the issue in the first instance, and that "the Board of Inquiry may choose to deal with the purported delay by the

complainant in filing her complaint by declining to give her a remedy" (at p. D/6343). Justice Glube did not state positively that the board had the power to stay proceedings in a preliminary way, but it seems implicit in her reasoning that such a power exists. ...

¶ 39 Having established that the board has jurisdiction to inquire into the issue of alleged breaches of natural justice by the Human Rights Commission, including those arising from delay, the next question that arises is whether proceedings should be stayed at the outset, or whether the issue should be dealt with as part of the decision. As a general rule I would suggest that a board should be very wary of staying proceedings before hearing a complaint on the merits. There may be unusual cases where the delay is so extreme and the prejudice to the respondent so palpable that the complaint may safely be stayed at the outset. But it must always be kept in mind that the human rights process is the only avenue open to a complainant, and that the Commission rather than the complainant has carriage of the complaint. In those cases where delay arises because the complainant has only come forward after an inordinate period of time, there is perhaps more justification for making a preliminary ruling adverse to the complainant. In most cases, however, it will be the Commission's action (or inaction) which is impugned, rather than that of the complainant. In such cases it would be highly inequitable to prevent the complainant from having his or her "day in court" unless the respondent can demonstrate very serious prejudice directly attributable to the Commission's delay. ... [emphasis added]

¶ 42 A similar test is used in civil litigation in Nova Scotia to decide whether an action should be dismissed for want of prosecution. Aside from cases of "extremely lengthy delay" where prejudice may be presumed, the Court of Appeal has stated that a defendant in a civil action must demonstrate serious prejudice as well as "inordinate and inexcusable delay" to succeed in having a plaintiff's claim dismissed for want of prosecution: *Martell v. Robert McAlpine Ltd*. (1978), 25 N.S.R. (2d) 540; *Moir v. Landry* (1991), 104 N.S.R. (2d) 281; *Hurley v. Co-operators General Insurance Co.* (1998), 169 N.S.R. (2d) 22. While there are certainly some differences between the civil litigation context and the investigative processes triggered by a human rights complaint, on the fundamental question of when a claim should be dismissed peremptorily on the basis of delay it seems to me that the legal tests in the two contexts should be similar, if not necessarily identical.

¶ 43 The chronology of this case is as follows, according to the testimony of William Grant and the documentary record produced before me. He began by describing the Commission's normal investigative procedure and then discussed the processing of Ms. Redden's complaint. Ms. Redden telephoned the Commission on June 6, 1996 and spoke to a staff member who said that he could provide information but could not take any action until Ms. Redden had filed a written complaint. She did so by letter addressed to Herb Desmond, a Human Rights Officer at the Commission, dated August 19, 1996, but Mr. Grant took over the file at that point. It typically takes some discussion between the complainant and Commission staff before a formal complaint can be filed, which is then sent to the respondent. In this case Ms. Redden's formal complaint was dated February 12, 1997 (in fact it is dated "1996" in Ms. Redden's handwriting, but it was agreed that this was in error). Mr. Saberi was sent a copy of the complaint with a covering letter dated February 18, 1997 asking a number of questions, describing the complaint process, and asking him to reply within a month. When Mr. Saberi did not reply Mr. Grant contacted him and arranged a meeting on April 14. Mr. Grant sent Mr. Saberi a copy of the summary of that interview by letter dated April 25, asking him to sign one copy or indicate where he thought corrections were required. Mr. Saberi did neither. After waiting for some period of time Mr. Grant sent the draft statement to Ms. Redden for rebuttal, and then sent a copy of her rebuttal to Mr. Saberi by letter dated June 30, 1997. At this point the complaint went before an assessment team at the Human Rights Commission who decided on July 25 that the complaint should be further investigated.

When informing Mr. Saberi of this decision by letter of August 5, Mr. Grant noted that he had "a backlog of complaints" and that it would be some time before he could proceed.

¶ 44 Over the next eleven months Mr. Grant interviewed six witnesses in addition to Mr. Saberi and Ms. Redden, prepared written summaries of the interviews, and arranged for the summaries to be reviewed, corrected if necessary, and approved by those witnesses. Mr. Grant interviewed Mr. Saberi again on June 29, 1998 and sent him a summary of the investigation on July 30 which included the summaries of all interviews conducted to date. After numerous fruitless attempts over the next seven weeks to contact Mr. Saberi by letter, telephone and fax in order to ascertain if he had any comments or responses to the summary, Mr. Grant passed on the file to Commission counsel on September 25, 1998. On January 29, 1999 the Commission decided to refer the complaint to a board of inquiry.

¶ 45 There is no evidence before me as to when the chief judge of the Provincial Court was approached for a nomination, but apparently on April 29 Mr. Patrick Duncan was appointed as a board of inquiry. It took some time to find hearing dates suitable to all parties, and the inquiry under Mr. Duncan did not commence until August 10, 1999. Unfortunately, after Ms. Redden had been testifying for an hour or so, she mentioned the name of one of the respondent's witnesses whose presence Mr. Duncan realized would give rise to a perception of conflict of interest on his part. Mr. Duncan was obliged to withdraw from the inquiry and the chief judge was sought out for another nomination. I was named as a board of inquiry on August 25 and the hearing was rescheduled for September 27 and 28, when it proceeded without incident. Final arguments were heard orally on October 29 after an exchange of written submissions. I should add for the sake of completeness that the hearing before me began de novo; Ms. Redden's testimony from the earlier inquiry was not used.

¶ 46 Summarizing this course of events, it appears that there were three periods when the Commission's process moved more slowly than would have been desirable: a six-month period between the receipt of Ms. Redden's letter in August 1996 and the drafting of the formal complaint in February 1997; the period of eleven months between the assessment team's decision to require further investigation in July 1997 and the closure of that investigation in June 1998; and the period of four months between the referral of the file to Commission counsel and the decision of the Commission to appoint a board of inquiry. Assuming that the Commission promptly requested the chief judge of the Provincial Court to nominate a board of inquiry, I cannot attribute any of the delay between January 29, 1999 and the commencement of the first inquiry in August to the Commission. Finding dates convenient for all parties and their counsel is not an easy task and some delay is inevitable on this score. Essentially, then, we are dealing with a period of some 32 months to move the complaint from Ms. Redden's letter to the appointment of a board of inquiry.

¶ 47 On the face of it, this is a long time to process a relatively straightforward complaint. Mr. Saberi's failure to respond to any of Mr. Grant's letters contributed in a minor way to the delays, but I note that Mr. Grant was conscientious about moving the file forward when Mr. Saberi did not meet the deadlines for commenting on or signing the various documents sent to him. In particular, the fact that it took six months to generate a formal complaint and a year to interview a half-dozen witnesses is troubling. I hasten to add that I do not in any way fault Mr. Grant for this state of affairs. He is an experienced and competent human rights officer, but he freely admitted that at these two points he had a "backlog" of complaints to process. He testified that his caseload over this period was in the high 30s or low 40s. He was not asked about the complexity of the cases assigned to him, but I expect they would fall in a range from relatively straightforward complaints with few witnesses aside from the parties, to more complex

cases with many parties to interview. Given this caseload it does not appear to me that he could have moved matters forward much more quickly than he did. I acknowledge too that potential witnesses may be reluctant to speak to officers of the Commission and may be difficult to track down, all of which takes up time. Insofar as I can attribute any responsibility for the relatively slow movement of this complaint, the problem appears to lie either in the overall level of resources which the Commission has at its disposal, or the effective management of those resources, or possibly both. I repeat that I do not find any fault with the actions of the individual officer, Mr. Grant, in this case. While I do not find the delay in this case to be cause for alarm, I hope that the Commission will review its procedures in an effort to be more expeditious in investigating complaints.

¶ 48 Making a finding that a complaint has been processed slowly presupposes that there was an ideal speed at which it should have progressed. In this case, and purely for the purpose of argument, it seems to me that ideally it should have taken about two months to generate a formal complaint, perhaps five months to interview the remaining witnesses, and two months for the Commission to appoint a board of inquiry once Commission counsel was seized of the matter. Following that hypothetical time-line, about a year would have been shaved off the period of 29 months. However, the respondent is not entitled to insist on perfection. Neither boards of inquiry nor, I venture to say, courts, should be quick to condemn human rights commissions for slow process by judging them according to some standard of perfection. The ideal is not the norm in any context. While I have found the delay in this case to be somewhat troubling from the perspective of both complainant and respondent, I do not find it to be unreasonable.

¶ 49 In any case, delay in and of itself cannot be equated with a breach of the rules of natural justice, except perhaps in extreme situations. The delay must give rise to some prejudice to the respondent before he can complain of it. It is useful to compare a recent Ontario case on delay with the matter under review. In *Ford Motor Co, . supra*, Board of Inquiry Constance Backhouse found that an eight-year delay between the time of filing the complaint and the appointment of a board of inquiry was directly attributable to the Ontario Human Rights Commission.

¶ 50 Applying the *Nisbett* test, she declined to hear two complaints against the respondent because of demonstrated prejudice (one witness had died and key documents had been destroyed), but allowed the others to proceed. The Ontario Court (General Division) (1999), 34 C.H.R.R. D/405 upheld her decision in spite of labelling the Commission's delay "shameful and scandalous" (at p. D/407). It is clear that in the complaint under review the delays do not even approach those in *Ford*, where the long delay was found not to constitute prejudice in itself. Applying the *Nisbett* test to the facts in this case, I cannot find any evidence of prejudice to the respondent. There is no evidence that witnesses have died, or cannot now be located, or that key documents have gone missing because of the delay. Counsel for the respondent was unable to point to a single witness who was now unavailable because of the delay between complaint and inquiry. Two witnesses, one for the Commission and one for the respondent, both testified by telephone because they now reside in Western Canada. The evidence suggests they moved away from Nova Scotia some time ago, however, so that even if the Commission had proceeded more quickly, those witnesses might not have been present to testify. Counsel for the respondent rightly pointed out that the delay was likely to have affected Mr. Saberi's ability to recall specific dates and times for key events. I accept that, but I have also found that Mr. Saberi was a very busy man with many people working for him in various capacities, which would also have affected his recall even if the inquiry had taken place sooner. It will be apparent that I do not find the delay to be so extreme that prejudice should be presumed, as it was in a civil litigation context in *Martell, supra*, after a failure to prosecute for ten years.

> ¶ 51 Two other aspects of the Commission's investigative process were alleged to have resulted in a breach of its duty of fairness to the respondent. It was alleged that Mr. Grant's investigation was flawed because he failed to interview key witnesses whose testimony would have shown that Mr. Saberi was responsible for the hiring of many women with children either personally or through companies he controlled, and thus that he was unlikely to discriminate on the basis of pregnancy. It was also alleged that "Mr. Grant's reluctance to question Mr. Nieforth on his racist views that Iranian men treat women differently shows potential bias." On the first point, Mr. Saberi never suggested a single witness that the Commission should interview during the entire investigative process. It was open to his counsel to bring any witnesses he wished to the inquiry to demonstrate the "family-friendly" nature of Mr. Saberi's employment practices. As it was, only one new witness, Ms. Skinner-Adjemian, was called on this point. The central point of Mr. Grant's investigation was to determine if there was a *prima facie case* that this particular complainant had been discriminated against on the basis of pregnancy or family status. Mr. Saberi's general employment practices with regard to the hiring of women with small children would have been of only modest relevance at the investigative stage, and also would have taken up more precious time. I do not find any fault with Mr. Grant's decision not to engage in a full-scale inquisition of Mr. Saberi's hiring practices.

I will now analyse the sequence of events in this case, including the issue of who is responsible for any delays. In stating that a party is responsible for a delay, I do not necessarily intend to suggest that the delay in question is blameworthy.

In this case, the Complaint initially approached the Commission just over a year after one of the most important sets of sexual harassment allegations to be considered in the case, namely the barbeque incidents. I also note that with respect to allegations of verbal sexual harassment, a complainant cannot rely on a single sexualized comment, but must demonstrate a sexualized course of comment. It may only be possible to establish such a course of comment over a period of time. I conclude that the complaint was not responsible for any inordinate delay in the timing of her initial approach to the Nova Scotia Human Rights Commission.

Any issue of unreasonable or inordinate delay must therefore relate to the conduct between the Commission of the Respondents. (It was not that the Complainant contributed to any significant delays after her initial approach to the Commission. I have prepared a timeline of the exchanges of correspondence and major events associated with this Complaint, which appears as Appendix A to this decision.

It is not reasonable to expect the Human Rights Commission and the Complainant to draft and sign a formal complaint form until the events that form the basis of the complaint have come to a close. The last of the events relevant to the complaint with respect to the retaliation issue under Section 11 of the *Act* occurred in mid-March, 1998. The formal complaint was drafted, signed and circulated to the parties on April 9, 1998. I conclude that there was no unreasonable delay in the preparation of the formal complaint.

The Respondents did not file their reply to the formal complaint until August 13, 1998. If there is any delay in this 4 month time period, it is that of the Respondents and not the Commission or the Complaint.

The Commission received the Complainant's rebuttal to the Respondent's Reply on Nov. 12, 1998, a 3 month period. The delay here is attributable to the Complainant, and is less than the 4 month period that the Respondents took in preparing the reply.

On Dec. 17, 1998, approximately one month after receiving the necessary documentation from both parties, the NSHRC Assessment team produced a report recommending that the Complaint go to the investigation stage. This is not an unreasonable delay on the part of the Commission.

Presumably because of the Christmas holidays, or internal reporting procedures within the Commission, the Respondents were not notified of the Assessment team's recommendation until Jan. 6, 1999. On Jan. 15, 1999, David Farrar, the lawyer for the Respondents requested that the investigation process should be coordinated through his office. There is then a 2 month delay until activity becomes visible again on March 3, 1999. At that point, Meredith Fillmore, the Human Rights Officer responsible for Ms. Davison's complaint, writes to Mr. Farrar, and indicates that the complaint investigation won't begin until the end of March. Ms. Fillmore, also requests certain documents from Mr. Farrar.

There is active memo preparation and exchange of communications between Ms. Fillmore and Karen Davison, until April 16, 1999, after which there is no recorded activity with respect to Ms. Davison's human rights complaint until July 16, 1999. This is an unexplained three months delay attributable to the Commission.

By July 16, 2005, the original Human Rights Officer responsible for the file, Meredith Fillmore, has been replaced by a new Human Rights Officer, Marie Patrol. On July 16, Ms. Patrol writes to David Farrar, the lawyer for the respondents, indicating that she has been assigned to the file and the complaint will now proceed to investigation. Ms. Paturel states that she is working on an investigation plan, and notes that Mr. Farrar has not provided the documents that Ms. Fillmore requested on March 3. Eleven days later, Mr. Farrar writes to Ms. Paturel, apologizing for the delay, and saying he hopes to provide the documents requested on March 3 in a week or two. In a letter dated August 20, 1999, Mr. Farrar provides the documents requested on March 3, 1999, thus terminating a 5 month delay attributable to the Respondents, which overlaps with the three month delay attributable to the Commission.

There is then a 4 month unexplained delay attributable to the Commission, before Ms. Paturel completes her investigation plan. On December 19, 1999, Ms. Paturel writes to Mr. Farrar, stating she has completed the investigation plan,

and requesting a significant number of documents and contact information for a number of potential witnesses to be interviewed by the Respondents by January 4, 2000. Not surprisingly, given that this is the holiday season, Mr. Farrar does not provide the documents and contact information by January 4, 2000. However, this delay persists after the holidays, and Ms. Paturel does not succeed in obtaining the documents and contact information from the Respondents until February 25, 2000. This is a two month delay attributable to the Respondents.

From March 1, 2000 until June 15, 2000 Ms. Paturel is very active in interviewing large numbers of potential witnesses, and otherwise collecting information with respect to the investigation. There is no delay on the part of the Commission in this period.

On July 4, 2000, Ms. Paturel writes to Mr. Farrar requesting arrangements to interview a number of current or former members of the NSCSA Board of Directors. On August 8, 2000, Ms. Paturel writes to Mr. Farrar, complaining that she has not received any response to her letter of July 4, 2000 and again requesting arrangements to interview these witnesses. On Aug. 9, 2001, Mr. Farrar answers Ms. Paturel. This is a one month delay attributable to the respondents.

On September 1, 2000, Ms. Paturel writes to Mr. Farrar apologizing for the delay in answering his letter of August 9, 2000. This is a one month delay attributable to the Commission.

Then on September 19, 2000, there is a letter from Ms. Paturel to Mr. Farrar complaining that Mr. Farrar has not answered her letter of September 1. On September 20, Ms. Farrar answers Ms. Paturel suggesting dates for these interviews of November 2, 2000. If these interviews had taken place at this time, there would have been a 4 month delay in the interviewing of these witnesses, with 3 months of this period attributable to the Respondents, and one month to the Commission.

These proposed interviews on November 2, 2000 do not take place, however, presumably, because, after a last memo to the HRC files from Ms. Paturel dated October 28, 2000, she disappears from the records of this case. There is a 2 month delay attributable to the Commission as a result, until Mr. Bill Grant assumes responsibility for handling the file on Jan 6. 2001. In January, under Mr. Grant's supervision, 4 draft interview reports for witnesses previously interviewed are prepared. In February, 2000, 12 draft interview reports are prepared, and Mr. Grant contacts more witnesses. In March and April 2001, Mr. Grant interviews one of Board Members that Ms. Paturel wished to interview, and more draft interview reports are prepared.

On April 19, 2001, Mr. Grant writes to Mr. Farrar, complaining that the earliest possible date proposed by the Respondents for an interview with one of the BOD

members is June 18, 2001 (a two month delay attributable to the Respondents if this interview had been deferred until then). As a result of Mr. Grant's complaint, this interview is rescheduled to May 28, 2001 (a one month delay). On May 16, 2001, Mr. Grant sends a follow-up letter to Mr. Farrar's firm, inquiring about the status of documents he requested from the Respondents in a letter dated March 22, 2001. These letters are provided to Mr. Grant on May 30, 2001, a two month delay attributable to the Respondents.

On June 6, 2001, Mr. Grant writes to a lawyer in Mr. Farrar's firm, requesting additional documents. These documents are provided by the respondents on June 21, 2001.

Mr. Grant's last correspondence to any of the parties is on June 27, 2001. There is then a two week delay, while Mr. Grant prepares the first Investigation Report which is dated July 12, 2001. I find that there is no unreasonable delay on the part of the Commission with respect to the preparation of the Investigation Report, after the investigation process is completed in the last week of June, 2001. This report is circulated to the parties on July 12, 2001.

The response of the Respondents to the Investigation Report #1 is received by the Commission on August 31, 2001. This is a one and a half month delay attributable to the Respondents. One week later, Mr. Grant drafts Investigation Report #2. Mr. Grant appears to be very efficient, and this is an exceedingly prompt revision of this Report in light of the Respondents' Response. On September 6, 2001, Mr. Grant also drafts a letter to the Human Rights Commission itself, presumably referring his report for consideration by the Commission.

Although this is not entirely clear from the record before me, it appears that the Commission itself decided to refer Ms. Davison's complaint to a Board of Inquiry on or before October 9, 2001. (The Commission, which is composed primarily of part-time members appointed from the community by the Nova Scotia government, usually meets once a month.) There is therefore about a one month delay, before the Chair of the Commission sends correspondence to the parties, presumably notifying them of the Commission's decision. On November 2, 2001, the NSHRC Chair writes to Judge Jean-Louis Batiot, who is responsible for nominating Board of Inquiry Chairs under the *Act*, requesting the nomination of a person to serve as the Board of Inquiry in this case.

On December 20th (a 2 month delay attributable to Judge, and not the Commission) Judge Batiot writes a letter to the Commission nominating me for the Board of Inquiry Chair position in this case. There is then a delay about six weeks before I am notified of the appointment, presumably because Judge Batiot's nomination had to be approved at one of the monthly Commission meetings.

To summarize, there was no unreasonable delay on the part of the Commission before the Formal Complaint was drafted and signed in early April, 1998, given that the last of event that served as a foundation for the retaliation portion of the Complaint took place in March, 1998. Thus the timeline to be evaluated here, begins in April , 1998. The Commission completed the decision-making process with respect to whether to refer the Complaint to a Board of Inquiry by October 9, 2001. Thus, it took a three and a half year period to complete the Commission stage of the human rights process in this case, which is, to a considerable degree, as noted above, designed to protect respondents through the exercise of a "gate-keeping" function on the part of the Commission.

In this case, it is clear from my analysis above, that both the Commission and Respondent were responsible for delays in processing the Complaint. The Complainant, Karen Davison, contributed only 3 months worth of delay to the three and a half year time period in processing the Complaint. Under these circumstances, it would be entirely unfair to the Complainant, and likely to bring the process of justice into disrepute, if I were to dismiss the case without a ruling under these circumstances.

This is also a very complex case, as demonstrated by a comparison to the *Redden* case above. For example, in *Redden* there were three hearing days. In this case, there were fifteen hearing days (i.e. five times the number of hearing days in *Redden*). In *Redden*, the responsible Human Rights Officer interviewed a half-a-dozen witnesses. In this case, 17 witnesses other than the parties testified, and the documentation provided to me suggests that a number of potential witnesses were interviewed by Commission staff who did not testify before me.

The complexity of the present case is also demonstrated by the volume of documentation collected or generated by the staff of the Human Rights Commission during the assessment and investigation of this case. Exhibit 26 is a list of documents in the Commission files which was provided by the Commission to the Respondent. These documents are numbered sequentially, and the page numbers for each document appear in Exhibit 26. This allows me to determine that the total number of pages of documentation in the Commission files with respect to this case is 1045 pages. Some of these documents are duplicates, but even with the duplicates eliminated the total page count is still about 1000 pages. It is not surprising that it took the Commission several years to gather, prepare, and analyse this volume of documentary evidence (which has not deteriorated over time).

The Respondent expressed particular concerns that the memories of witnesses had deteriorated. In the light of my finding above that it was reasonable for the Commission to prepare the formal complaint within a month of the last allegedly retaliatory action at issue in this case, the discussion of deterioration in witness memories is to be evaluated with respect to delays in a process that began in April, 1998. To the extent that the memories in question relate to events in 1995,

1996, and the first half of 1997, there would likely have been deterioration in memories even if the case had been processed very rapidly, e.g. if the Commission had referred the case to a Board of Inquiry one year after the formal complaint in April, 1999.

With respect to the impact of delay on the evidence before me, I note that there was a significant volume of documentary evidence in this case, which has not deteriorated with time. I was able to decide one of the sexual harassment allegations in favour of the Complainant primarily on documentary evidence, i.e. a photograph. Much of the evidence with respect to the retaliation issue was in written form, and readily accessible. If I were to dismiss this Complaint, simply because some witnesses may have suffered some memory deterioration, this would deny recovery to the Complainant in situations where written evidence that is not subject to deterioration clearly supports it.

With respect to witness memory deterioration in the context of oral testimony, my conclusion after listening to the witnesses, is that most witnesses retained memories or startling or unusual events (a category into which many of the alleged incidents of sexual harassment in this case fall). Loss of memory primarily related to surrounding or contextual issues. This is only relevant to the quality of evidence if the surrounding details were important to the issue to be decided. With respect to most witnesses testifying with respect to the allegations before me, the peripheral details were not essential to decide the case accurately. To the extent that evidence clearly is unreliable with respect to a particular allegation, the obvious solution is to dismiss the particular allegation rather than dismissing the whole case.

The Respondents spent considerable energy during the testimony before me in establishing that certain witnesses had not been asked by the Commission to review and sign the summary of their interviews with Commission staffers, and only saw these documents when they were subpoenaed a few weeks before they testified before me. I agree with Mr. Farrar that this is unfortunate and I would encourage the Commission in future to circulate witness summaries to the witnesses for review and signature in a timely manner. This is not, however, an example of delay in the making of the Commission's decision to send the case to a Board of Inquiry, and it is not an appropriate basis for me to dismiss the case without ruling on the merits or giving remedies that will benefit those who are innocent of any delays caused by the Commission and the Respondents themselves, i.e. the Complainant and any persons presently employed at the NSCSA who would benefit from the non-monetary orders I make below.

Finally, the Respondents complained of the manner in which the Commission conducted its interviews, and/or with respect to timely Respondent access to documents and the identity of witnesses.

I agree with the Board of Inquiry in *Redden* that it is usually not a good idea for a Board of Inquiry to second-guess the decisions of Commission investigators conducting an investigation. I see no reason to depart from this principle in this case.

In fact, most of the relevant documents in this case were obtained from the Respondents rather than the Complainant. Moreover, the Respondent itself had access to most of the relevant witnesses, since most of them were present or former employees and Board Members, and many of them were still employed by the NSCSA during the first couple of years of the Commission process. Indeed, the Commission obtained contact information for most of these witnesses from the Respondents.

For all these reasons, I decline to dismiss this human rights complaint without making an order or providing remedies to successful parties.

VIII. NATURE OF DISCRIMINATION

Before undertaking a detailed analysis of the specific allegations of discrimination against the Respondents in this case, some preliminary discussion of the general legal characteristics of discrimination is desirable. As noted in S.R. Ball, *Canadian Employment Law* (2005), V. 2 at p. 33-3 [footnotes omitted]:

> Discrimination is a more difficult concept than might first appear. At its heart lies the notion of a distinction that imposes differential burdens, obligations or disadvantages upon a person because of actual or presumed membership in a group. All discrimination is defined by reference to the effect on the complainant, not by reference to the motive or intent of the respondent. Consistent with the remedial emphasis, a finding of unlawful discrimination does not depend on any malicious, deliberate, intention or even careless conduct by the respondent. A finding of discrimination on the basis of sex or race, for example, is a finding about a discriminatory impact. It does not require or imply a judgment about deliberate sexist, racist or other reprehensible conduct. Unfortunately, some employers incorrectly interpret a complaint of unlawful discrimination as if it were an allegation of moral wrongdoing and respond accordingly. Employers should be encouraged to adopt the remedial perspective dictated by the legislation.

IX. ALLEGATION OF GENDER DISCRIMINATION/HARASSMENT WITH RESPECT TO RESPONDENT MICHAEL KELLY

a) Preliminary Comments

On occasion, in conversations outside the scope of the human rights process, it appears that the complainant, who is not a lawyer, referred to the issue she was raising with respect to Mr. Kelly as one of sexual harassment. In fact, from a lawyer's perspective, under the definition of sexual harassment in section 3(o) of the Nova Scotia *Human Rights Act*, the allegation with respect to Mr. Kelly is not an issue of sexual harassment, because it does not have any of the elements of

sexuality that are a prerequisite to sexual harassment claims under section 3(o) of the *Act*. Ms. Davison's claim with respect to Mr. Kelly can be more accurately described as an allegation of sex (gender) discrimination in employment under sections 5(1)(d) and (m) of the *Human Rights Act*.

There are no other allegations of sex discrimination against Mr. Kelly before me, and none of the evidence before me suggested that Mr. Kelly has ever engaged in sexual harassment. To avoid confusion with sexual harassment, I will hereafter refer to the allegation against Mr. Kelly as one of gender discrimination or gender harassment.

b) Facts

In a letter to the Nova Scotia Human Rights Commission (Exhibit 2) dated August 14, 1997, the Complainant, Karen Davison, described the allegation against Mr. Kelly as follows:

> In the spring of 1997, I approached Mr. Mike Kelly and requested a short meeting with him to discuss an issue. Mr. Kelly wanted to know what I wanted to speak with him about. I told Mr. Kelly that I would prefer to wait until he had a few minutes to speak privately - but that it was not an urgent matter. Mr. Kelly then said, ".. as long as you aren't going to tell me you're pregnant and leaving..". I remember that I laughed off his statement (he caught me off guard - I didn't know **what** to say) but I definitely did not appreciate having my personal sex life referred to and brought into the conversation in this manner. I also did not like the inference that I felt Mr. Kelly was making which was that my getting pregnant would be looked upon in a negative manner with regard to my job at the association. The subject I wished to discuss with Mr. Kelly was with regard to requesting a raise. I did end up speaking with Mr. Kelly about this request and did subsequently receive a raise in pay. [emphasis in the original]

In her testimony in chief at the hearing, Ms. Davison stated that this conversation took place while she and Mr. Kelly were walking in an area where the training course materials were put together.

Mr. Kelly's description of the relevant circumstances was as follows:

> I was sitting at my desk and directly across from my desk I have two chairs that I keep in my office. And Stephanie Kewachuck was in one chair. And Stephanie was giving me an overview of her maternity leave. And toward the tail end of our meeting, Karen stuck her head in the door and she walked into the meeting and she said ... when you're finished with Stephanie, I have to talk to you about something important. And I said, Not a problem, just please don't tell me you're going out on maternity leave, too. That was the comment.

When asked why he made this comment, Mr. Kelly testified:

> Well, I had just finished discussing Stephanie's maternity leave and I'd just discovered I was going to lose that resource for eight months. There we were an office of one-ofs. When someone went out of that process or out of that picture, we didn't have anybody

that could step in and absorb that function. We had to bring a replacement in. And I was being facetious. It wasn't a lament. It was a joke.

During cross-examination, Mr. Farrar asked Ms. Davison whether she was aware that around the time to which she was referring when she testified about the alleged comments of Mr. Kelly, she recalled that Stephanie Kewachuk was into Mr. Kelly's office and advised him that she was pregnant and going on maternity leave. Ms. Davison said she was aware of this, but that this was some time before the conversation to which she referred in her testimony above. When Mr. Farrar asked Ms. Davison why she considered Mr. Kelly's behaviour to be sexually harassing, the relevant exchange was as follows:

A. Because I had seen what had happened to Stephanie [Kewachuk] after she had told him that she was going to be leaving to have a baby, and they cancelled her training courses and they started treating her differently, you know, and I didn't -- the impression that I got from Mr. Kelly when he made that comment to me was, by the way he said it, as long as you're not going to tell me you're pregnant, was that if I told him that I was, for some -- whatever reasons, that I could expect to be treated the same way, that it would be frowned upon.

Q. So whatever the comment made by Mr. Kelly may have been, you read into that that if you were to say that, that you would be treated differently at the NSCSA?

A. I inferred from his tone and the way that he said it, yes, that I -- you know, and I saw what happened to Stephanie after she told them she was pregnant, so -- I couldn't understand why he would say that in the first place because it was the first thing that he said, as soon as I asked to speak to him privately, and I couldn't understand why on earth that would pop out of his mouth, why he would think to say something like that, like from me saying I wanted to speak to him privately.

When Ms. Kewachuk took the stand, she was not asked any questions by any party about the conversation between Ms. Davison and Mr. Kelly, which Mr. Kelly testified took place in her presence. Ms. Kewachuk did give the following testimony during examination in chief:

Q. ... Why did you leave the Safety Association? Did you leave of your own volition or were you let go?

A. I resigned.

Q. And why did you resign?

A. Because I felt that I was discriminated against due to my pregnancy. I felt that there was no opportunities or would not be any opportunities there for me despite the hard work and effort that I felt that I put into my job. And just -- I think mostly because of the stress. Being a new mother it just -- I couldn't foresee staying there. ...

[In response to another question;}

A. ... I have gone through my own case with the Human Rights Commission over my issues. ...

Q. This was this pregnancy issue you referred to?

A. Yes. ...

Q. And the other complaint you described has been resolved or completed in some fashion?

A. It was concluded.

[In response to a later question;]

A. ... I know that there were days that I told Karen, you know, what a terrible time I was having with Mike during my pregnancy and how upset I was. ...

I was provided with no other evidence from any party with respect to Ms. Kewachuk's human rights Complaint, or what the resolution of this Complaint was.

As noted in the *Faryna* case quoted above, "the real test of the truth of the story of a witness ... 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." Considering the preponderance of the probabilities in the context described above, I conclude that the most likely explanation of Mr. Kelly's remarks (whatever their exact wording), is the one given by Mr. Kelly, namely, that these remarks were made at or shortly after the time when he found out that Ms. Kewachuk was going on maternity leave, as a joke at a time when Mr. Kelly was feeling somewhat stressed as a result of his discovery that it would be necessary to find means of covering Ms. Kewachuk's workload while she was on maternity leave. If this is the timing and the explanation of these remarks, then it is not necessary to determine whether they were actually made in the presence of Ms. Kewachuk, or at a different time shortly afterward while Mr. Kelly was walking down a hallway with Karen Davison.

c) <u>Legal Analysis</u>

The allegations of sex discrimination in this case are somewhat unusual and counsel for the Human Rights Commission were able to locate only one case where the issues bore any resemblance to the issues in this case. In the Newfoundland case of *Butt v. Smith* (1992), 20 C.H.R.R. D/39 (Nfld. Bd. Inq.), the Board of Inquiry made the following findings of fact at paras. 39-42:

> I find that Frank Smith undoubtedly made comments to other management people to the effect that pregnancy costs the company money, disrupts work schedules and requires replacement employees.
>
> I also find it probable that Mr. Smith made such comments in circumstances in which other employees, including Ms. Butt, would have heard them. I do not find that Mr. Smith directed such comments to either of the complainants in this case. I find that the company, probably inadvertently, created a perception that management was not sympathetic to pregnant employees.

> Mr. Smith vigorously denied making the comment regarding zapping female employees with a radar gun so that they wouldn't get pregnant. However, I find that such comment was made sometime prior to Secretaries Day in 1989. ...
>
> Finally, I find that the Lundrigan incident [where, in response to a comment by Mr. Lundrigan about marriage of the complainant, Mr. Smith replied "I'm not concerned about her being married; it's when she starts having babies that its going to be a problem"] occurred. I do not believe that Mr. Smith intended anything adverse or threatening to Ms. Butt by the comment. Indeed, it is likely that the comment was intended to reflect the high regard that Mr. Smith had for Ms. Butt's competence and capability such that her departure on maternity leave would have been a problem for him and the company.

There is an issue about the applicability of the legal conclusions of the Board in the *Butt* decision in the present case, because the Newfoundland legislation under which the case was decided differs significantly from the Nova Scotia legislation. In Nova Scotia, as noted above, the definition of sexual harassment in section 3(o)(i) of the *Human Rights Act*, which governs the express sexual harassment provision in section 5(2), is restricted to behaviour that has a element of sexuality. Any other kinds of discrimination that relate to gender must be dealt with under the general sex discrimination provision found in section 5(1)(d)(m) of the *Act*. It should be noted that Section 3(n) of the *Human Rights Act* explicitly states that, for the purposes of the *Act*, the word sex "includes pregnancy, possibility of pregnancy and pregnancy related illness".

The Newfoundland human rights statute has more general harassment provisions that apply to a wide variety of grounds of discrimination. The relevant Newfoundland sections read as follows (S.N. 1983, c. 62):

> 12. A person in an establishment shall not harass another person in the establishment because of the race, religion, religious creed, sex, marital status, physical disability, political opinion, colour or ethnic, national or social origin of that person.
>
> 2(g) "harass" means to engage in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

Because of this difference in legislative provisions, the Board of Inquiry in *Butt* referred to the case before it, which is one of sex discrimination in the broad sense (which I am referring to as gender discrimination or gender harassment in this decision) as one of "sexual harassment", even though no element of sexuality of the kind required by the Nova Scotia legislation was present. The Board's analysis focused on the requirements of section 2(g) that the alleged harassment must involve vexatious comment that ought reasonably to be known to be unwelcome.

As I noted earlier, the Nova Scotia legislation's definition of sexual harassment (which requires that a course of comment be vexatious and reasonably known to be unwelcome) applies only to behaviour that has an element of sexuality. If a remedy is available with respect to a non sexualized, gender-related comment such as the one attributed to Mr. Kelly, or the ones attributed to the respondents

in the *Butt* case, it must come with the general prohibition on sex discrimination in employment under the Nova Scotia *Human Rights Act*.

As noted by S.R. Ball, *Canadian Employment Law* (2005), V. 2 at p. 33-6, a number of Canadian jurisdictions do not have any express prohibition of sexual harassment in their legislation, and even fewer jurisdictions have explicit general prohibitions of harassment on other grounds in their statutes. Ball notes, however, that, even in the absence of an express harassment provision, "it has been held that harassment with respect to a prohibited ground of discrimination will be treated as discrimination on the basis of that prohibited ground." (*Ibid* at p. 33-6, citing the decision of the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252)). With respect to non-sexualized gender discrimination in particular, Ball makes the following comments at p. 33-68 [footnotes omitted]:

> Although sexual harassment complaints typically involve offensive conduct of a *sexual* nature, this is probably not necessary. The essential elements of an abuse of power on the basis of a prohibited ground should suffice to extend the legislative protection to so-called gender harassment; that is, for example, harassment of women in the absence of overt sexual content. [*italic* emphasis in Ball; underlining emphasis added in *Davison*]

The premise that the general sex discrimination provisions of the Nova Scotia *Human Rights Act* would cover acts of harassment based on sex even in the absence of an explicit provision, is confirmed by the judgment of the Board of Inquiry in *Cameron v. Giorgio and Lim Restaurant*, [1993] N.S.H.R.B.I.D. No. 1, where Board Chair Phil Girard stated, at para 4:

> ... I should state that the complaint was laid under the old *Act* (S.N.S. 1969, c. 11 as amended) [which did not explicitly prohibit sexual harassment]. The Act was amended by S.N.S. 1991, c. 12, but the new *Act* does not appear to be materially different on any relevant points from the old Act. The *Human Rights Act* now specifically prohibits sexual harassment (Section 5(2)), but counsel did not dispute that the alleged acts, if proven, would support a finding of sexual harassment as included in the sex discrimination provisions of section 12()(d) [*sic*] of the old Act.

Aggarwal and Gupta agree with this analysis, and, moreover, explicitly note that comments or other behaviours related to pregnancy can constitute harassment (A. P. Aggarwal & M.M. Gupta, *Sexual Harassment in the Workplace* (3rd ed.) at pp. 185-186):

> Surveillance of a pregnant female's use of restroom facilities constitutes a form of sexual harassment [presumably gender harassment in Nova Scotia, given our explicit definition of sexual harassment]. Repressive surveillance is humiliating for a pregnant employee, who, as a natural consequence of the pregnancy, needs to use the restroom more frequently. ....
>
> In *Gendron v. Treasury Board (National Defence)* [(1994), P.S.S.S.R.B. File 166-2-221152 to 166-2-22164 (Galipeau)] the Public Service Staff Relations Board ... ordered the Department to "take a hard look at itself and take measures to ensure that

> other employees are not subject to harassment or reprisals of any kind because of pregnancy" [*Ibid*, at 145].

I will therefore evaluate the allegation of gender discrimination against Mr. Kelly as one of gender harassment, and rely upon the accumulated body of case law with respect to the meaning of harassment. Thus, the *Butt* decision from Newfoundland is potentially relevant in my analysis of the allegation of gender harassment against Mr. Kelly, although it is not conclusive, given that it is based on statutory provisions that do not appear in the Nova Scotia legislation.

Turning to the present case, I note that the Complaint Form alleges only a single act of gender discrimination on the part of Mr. Kelly, namely, the comment described above. If this complaint fell under the statutory definition of sexual harassment in section 3(o)(i) of the Nova Scotia *Human Rights Act*, it appears that the fact that only a single comment by Mr. Kelly is alleged would be fatal to the complainant's claim. Section 3(o)(i) refers to sexual harassment as " vexatious sexual conduct or a course of comment". The Board of Inquiry in *Miller v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433 (NSBOI), at para. 125, analyses this provision as follows:

> The Nova Scotia Human Rights Act ... does not require a course of vexatious conduct, but does expressly state that a course of comment is required to constitute sexual harassment. In Nova Scotia one incident may be sufficient to constitute sexual harassment for unwelcome vexatious conduct as in *Cameron v. Giorgio & Lim Restaurant, supra*. 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.

However, the allegation against Mr. Kelly, as I have noted above, does not fall within the Nova Scotia statute's definition of sexual harassment, and must therefore be dealt with as an issue of gender harassment under the general sex discrimination provision of the *Act*, where section 3(o)(i) does not apply, and where the precedents governing harassment in jurisdictions where there is no statutory definition of harassment are relevant. Aggarwal et al., *supra*, make the following comments with respect to this at pp. 140-141, 143-44 (footnotes omitted):

> It is a commonly held view that sexual encounters must occur frequently before they are considered to be sexual harassment. This, however, should depend upon the type of harassment involved. More serious forms of sexual harassment, such as those involving physical assault, need not occur more than once in order to be considered as sexual harassment. Other types of subtle behaviour involving comments or propositions may occur repeatedly before the behaviour may be identified as being sexual harassment.
>
> In the *Cherie Bell* case, Mr. Shime expressed the view that: "persistent and frequent conduct is not a condition for an adverse finding under the *Code* because a single incident of an employee being denied equality of employment because of sex is also prohibited". ....
>
> ... unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. A "hostile

> environment" sexual harassment claim generally requires a showing of a pattern of offensive conduct. But a single, unusually severe incident of sexual misconduct may be sufficient to constitute sexual harassment. ...
>
> Professor Swan in *Canada Post Corp. v. C.U.P.W. (Gibson*) [(1987), 27 L.A.C.(3d) 27 at 44], while dealing with the issue of whether or not one isolated or single incident of sexual teasing was unwelcome, stated:
>
> > Moreover, the *comments about the tampons and underwear were directly related to the female employee's gender*, and could not have been made to a male employee. They were also, in my view, calculated to insult her gender, and to imply that she was unsanitary. *These are not comments that, in my view, one would ordinarily have to make more than once in order to establish that they were likely to be unwelcome.* [Emphasis added by Aggarwal et al.]

Thus, it appears that a single comment relating to gender can constitute gender harassment where the comment is extreme, but that in less extreme circumstances more than one gender-related comment or some additional conduct relating to gender will be required as a prerequisite for finding gender harassment in the case of a gender-related comment that is not extreme.

In the *Butt* case discussed above, there was more than one comment relating to pregnant women at issue in the case. Under that circumstance, it was clearly necessary for the Newfoundland tribunal in *Butt* to proceed to address the issues of vexatiousness and unwelcomeness that formed the foundation of its decision.

In this case, Mr. Kelly made only one comment to Ms. Davison relating to pregnancy, maternity, or maternity leave. This comment, as I held above, was made as a joke and in close proximity in time to Mr. Kelly's discovery of the fact that Ms. Kewachuk would be going on maternity leave and that he would have to find a way to deal with the human resource issues arising from her absence. Ms. Davison was aware of Ms. Kewachuk's impending maternity leave at the time when Mr. Kelly made this comment to her. Even if I accept Ms. Davison's position that Mr. Kelly said ", ".. as long as you aren't going to tell me you're pregnant and leaving.. " (Ex. 2) this remark in this context is not the kind of single, extreme comment that can be held to constitute gender harassment in the absence of a pattern of comments or one or more related actions.

Ms. Davison in her testimony attempted to link Mr. Kelly's comment to a pattern of alleged subsequent discrimination against Ms. Kewachuk with respect to Ms. Kewachuk's pregnancy and maternity leave, in order to establish a basis for a finding of a pattern of gender discrimination that had a negative impact upon Ms. Davison as an observer concerned about her own possible situation if she ever became pregnant while employed at the N.S.C.A.. If it were possible to establish that such pregnancy/maternity discrimination against Ms. Kewachuk took place, through sufficiently detailed testimony from Ms. Kewachuk, and/or by evidence of the results of Ms. Kewachuk's Human Rights Complaint against the Respondents, such an argument might succeed.

On the basis of the evidence before me, I must find that a pattern of pregnancy discrimination against Ms. Kewachuk or other pregnant female employees of the Nova Scotia Construction Safety Association is not established on the evidence above and cannot serve as a foundation for a successful gender harassment claim by Ms. Davison against Mr. Kelly. Ms. Kewachuk's testimony on this issue, which is reproduced above, is insufficiently detailed to permit me to evaluate the merits of her claim. With respect to Ms. Kewachuk's Human Rights Complaint, I was informed only that the complaint had been resolved in some manner. No party provided me with any information about the nature of the resolution.

Under these circumstances, I conclude that the allegation of gender discrimination/harassment against Mr. Kelly cannot succeed on the basis of a preliminary finding that the remark attributed to Mr. Kelly is an isolated comment that is not severe enough, standing on its own, to support a claim of gender harassment. It is not necessary, therefore to address the issues of vexatiousness and unwelcome conduct that are discussed in the *Butt* case, and further consideration of *Butt* is therefore unnecessary.

I hold that the allegations of gender harassment against Mr. Kelly under the present Human Rights Complaint must be dismissed.

X. SEXUAL HARASSMENT ALLEGATIONS WITH RESPECT TO RESPONDENT BRUCE COLLINS

a) Preliminary Comments

As noted in *Hadzic v. Pizza Hut Canada* (1999), 37 C.H.R.R. D/252 (B.C.H.R.T.) at para. 31, in the context of allegations of employment discrimination:

> The burden of proof is on a complainant to establish that a respondent discriminated against him or her with respect to the terms or conditions of his employment because of the grounds alleged in the complaint. The evidentiary burden is on the complainant to establish a *prima facie* case. If a *prima facie* case is established, the evidentiary burden then shifts to the respondent to respond with some evidence that the alleged acts did not occur or that they did not constitute discrimination.

In analysing the sexual harassment allegations against Mr. Collins, I will first make findings of fact with respect to the question of whether the events that are the basis for the allegations of sexual harassment did or did not take place. I will then do the factual and legal analysis necessary to determine whether those events that did take place constitute sexual harassment under the Nova Scotia *Human Rights Act*.

b) Facts: Did the Alleged Events Take place?

I have carefully reviewed the ten volumes of transcript evidence, the written submissions of the parties, including extensive summaries of evidence of various witnesses with respect to particular events and discussions of credibility of the testimony of particular witnesses, as well as the written record of the parties oral submissions on these factual issues contained in Volume 11 of the transcript. In the light of all this material, I make the following findings of fact with respect to the various alleged events:

1) Internet Picture of a Naked Woman

The witnesses who were in a position to give direct evidence (as opposed to testimony based on hearsay) with respect to this factual allegation were Karen Davison, Larry Scaravelli, and Bruce Collins.

Ms. Davison testified that the events in question took place in 1995, while the NSCSA still occupied its relatively small premises at Cornwallis street. The most important portions of her testimony were as follows:

A. ... I remember an incident where I walked into [Mr. Collins'] office to give him a letter to sign that he had asked me to type, and there was a picture of a nude woman on his computer screen, and then he photocopied the picture and handed it out to staff, in front of me. ...

Q. Now you described this photo of the nude woman on his computer screen. Tell me a little bit more about that incident. What time of day was it, first of all?

A. It was during business hours. I think it was after four, four or four-thirty, if memory serves. And he -- Mr. Collins had asked me to type a letter, so I did, and I needed to bring it to him for his signature, and he was in his office, which, as I said, also doubled as the conference room, and his door was opened to his office. And he was in there talking to his friend, whose name I also think is Bruce, but I can't remember his last name. Anyhow, the two of them were in there talking about something, the door was open, I finished the letter, I brought it in for his signature, and I knocked on the door as I went in. And his computer faced out towards the door, and so when I walked in and his computer was right there, and that's when I saw what was on his computer, which was a picture of a naked woman.

Q. And what, if anything, was said about that at the time?

A. He did not say anything to me about it at the time. But he knew that I had seen it and he didn't try to cover it up. And he knew that I was coming in his office because I knocked and he had asked me to bring in the letter when it was ready to sign, so --

Q. And what happened with that photo of the nude woman, if anything?

A. He then printed a copy, photocopied it, and handed it out to male members of the staff.

Q. And where were you while this process was going on?

A. I was at my desk.

Q. And when did this happen in relation to when you went into his office?

A. I would say about ten minutes later, approximately ...

Q. Did he say anything about it when he handed it to them?

A. I don't recall if he said anything or if he just handed them copies. I remember he was laughing about it, though.

Q. Were there any other -- I'll call it computer incidents, that happened while you were employed there?

A. I don't understand what you mean by "computer incidents."

Q. Well, any other similar other sorts of things with computer photos or the like?

A. Not that I recall.

Under cross-examination by Mr. Farrar, Ms. Davison gave the following testimony:

Q. And ... you consider to be sexual harassment ... this picture on the internet.

A. The picture on the internet and the fact that he photocopied it and passed it out to the male staff. ....

A. His computer faced out, and he was on the other side. They had an oval boardroom table, and his computer and desk were set up in this corner, and the door to the office was here. So the door was open, he was on the other side of the boardroom table, speaking with [the friend] ... I knocked, I brought in a letter, and I walked towards Bruce to give it to him ... And that's when I looked, and his computer was there because it faces the door, and that's when I saw the picture. ... as I walked towards Bruce, he was up on the other side of where his office was set up, so I had to get pretty close to his computer to give him the memo.

Q. And I take it that you took a pretty close look at this picture?

A. I glanced at it long enough to see that it was a naked woman, which kind of shocks me. It's not what you expect to see on your boss's screen when you walk in with a memo, especially when you knock and he knows you're coming in. I thought he would have tried to cover it up. ...

Q. Well, I take it that if it was a regular occurring event, it wouldn't have been so shocking to you. Is that a fair statement?

A. It would be shocking if it happened every day, yes. It would still be shocking. I mean, I don't expect to see naked pictures of anybody on computers at work.

Q. And you never saw it since then, did you?

A. There was -- that was the one time I saw it.

The testimony of Mr. Collins with respect to this issue was as follows:

Q. So this is the allegation of a naked woman appearing on your computer or being displayed on your computer screen. ... you printing and distributing it ... what do you say about that?

A. I'm going to tell you that that particular day was the first day that we got the internet in the office. ... I had heard up to that point a lot about the internet and what you could see on it and what you couldn't see on it. And I tried to search around. I wasn't having a whole lot of success with it. I asked Larry Scaravelli, Where do I look to see all this kind of stuff that I've heard about?

Q. See what sort of stuff, were you asking?

A. Well, pornography, pictures, those kinds of things. ... I'd been hearing about it for about a year or so. And my curiosity was certainly there. Larry came in and showed me how to search on alternative binaries. I started doing some searching. I found all kinds of things, none of them which were particularly, I didn't think, pornographic. I don't recall the specific picture, itself. I remember looking at the candidates that were vying for Sports Illustrated cover and all kinds of other things. But you know, Bruce Kierstead came in, it was late in the day. I left it and went over to deal with whatever issue he had to deal with, and that's what I recall of it.

Q. And so Ms. Davison came in? You recall her --

A. She may -- ...have come in. I don't particularly recall her coming in. But I'm not going to suggest to you that she didn't. She may very well have come in.

Q. And if she had come into your office, was your computer screen configured so that it was visible from someone entering your office?

A. Well, it may have been. I don't know. Like, at one point my computer was on the front of my desk. Another time it was on the side of my desk. Another time it was on the back credenza side of the thing. It was a great big huge U-shaped thing and I was turning it around all the time. But you know, I don't -- I'm not going to deny that that took place. It very well may have. I have no specific memory of it at all.

Q. Did you print a copy of a photograph --

A. Well, I may have. I don't recall doing that. I've heard testimony to the effect that I have, that I printed it off on a colour printer. We didn't have a colour printer until we moved to the other address, so if I printed it off it would have been in black and white. I just -- it's not something that I have a particular recollection of. But I know, I know on the day that we got on the internet, I was in my office having a look to see what could be found there. And I wasn't particularly skilled in searching on the internet, I can tell you. So --

Q. So you think you may have printed off a copy --

A. Well, I don't know that I did or I didn't. I don't recall doing that. That's 1995.

Q. Yes.

A. That's seven years ago. I have no idea.

Q. So is it fair to say that you may have or you may not have?

A. Well, I said I may have. ...

Q. And might you have distributed it to people in the office?

A. Well, I don't know that I did or I didn't. You know, I could tell you I might have, but I might not have, too. So -- ... I don't know.

Q. So that activity would not have been out of character?

A. Well, I don't know if that's an -- to respond that activity being out of character, am I capable of doing that? Sure, I was capable of doing it. ... Would it be my normal character to do that? No, not really. I mean, it was like getting a new toy. I give my son something at Christmas. I got access to the internet, I thought it was a big, neat thing and I discovered it wasn't any particular big, neat thing and I didn't know how to use it. And quite frankly, I never had the time. So I may have looked for a day or two at stuff, but that would be about it

Q. Uh-huh. And did anybody complain to you about that activity?

A. No. First time I heard about it was in 1997.

Mr. Scaravelli testified that the NSCSA first got its Internet connection at the Cornwallis premises, Mr. Collins was browsing pornography, and showed Mr. Scaravelli an image on his computer of a naked woman on the ground on her elbows with sunglasses on with her legs spread apart. Mr. Scaravelli stated that no other employees were present when Mr. Collins showed Mr. Scaravelli this photograph. Mr. Scaravelli also testified that Mr. Collins gave a printed version of this computer image to a male employee, although Mr. Scaravelli's memory of the identity of that employee had faded.

Karen Swindells testified that Ms. Davison had complained to her about pornographic nude pictures on Mr. Collins' computer monitor at the Cornwallis premises shortly after the move to Burnside.

After carefully considering this testimony, I conclude that Ms. Davison did, in fact, observe a photograph of a nude woman on Mr. Collins' computer screen in Mr. Collins' office shortly after the NSCSA first acquired its Internet connection. I also conclude, on a balance of probabilities, that Mr. Collins did print out a copy of this photograph and distribute it to at least one male employee. I accept Ms. Davison's testimony that Mr. Collins attitude while distributing the photograph was one of amusement, and Mr. Collins' testimony that in exploring the internet that he was like a child with a new toy.

2) Barbecue

i) <u>Preliminary Issues</u>

There are two preliminary issues that I must address before analysing issues associated with activities at the barbeque described below.

a) Was the barbeque a staff barbeque?

A number of alleged events relevant to the allegations of sexual harassment are associated with a barbecue held by Mr. Michael Kelly on July 13, 1996. The first preliminary issue I must address here is whether any incidents of sexual harassment that happened at the barbeque can be legally considered to be sexual harassment *in employment*, i.e. whether activities among employees on a social occasion can constitute employment discrimination.

The decision of the Ontario Court of Appeal in *Simpson v. Consumers' Association of Canada* (2001) 57 O.R. (3d) 351 (Ont. C.A.) (leave to appeal refused by the Supreme Court of Canada, [2002] S.C.C.A. No. 83) provides useful guidance on this issue. In *Simpson*, a supervisor sued for wrongful dismissal when his employment was terminated because of a number of incidents of sexual harassment of female employees. The trial court allowed the action for wrongful dismissal because although the judge found that the alleged incidents took place, they occurred away from the workplace. This decision was overturned by the Ontario Court of Appeal, on the following basis (at paras. 5, 57-58 and 61) [emphasis added]:

> The basis for the appeal is that the respondent's behaviour created a workplace which was infected by sexual harassment, and that, as the chief executive of the employer, his conduct required the employer to terminate his employment. The trial judge effectively acknowledged the situation but dismissed all of the incidents as either occurring outside the workplace or as consensual conduct. The appellant submits that the trial judge erred in characterizing the location of the incidents as outside the workplace, as many occurred at work-related conferences and ... .
>
> **(1) Definition of the "workplace"**
>
> The trial judge did not clarify any definition of the workplace for the purpose of his conclusion. In fact, three of the incidents -- Sandy Reiter, Julie Glascott, and the hot tub -- took place at CAC meetings or retreats held at hotels. These were clearly business meetings, but included a social component. That the incidents occurred after the official business of the meetings, and, for example, in a hospitality suite, does not mean that they are outside the workplace and therefore outside the employment context. *In Smith v. Kamloops & District Elizabeth Fry Society* (1996), 136 D.L.R. (4th) 644 at p. 654, 25 B.C.L.R. (3d) 24, the British Columbia Court of Appeal held that "[a]n employee's conduct outside the workplace which is likely to be prejudicial to the business of the employer can constitute grounds for summary dismissal." In *Tellier v. Bank of Montreal* (1987), 17 C.C.E.L. 1 (Ont. Dist. Ct.), one of the key events constituting sexual harassment occurred at a cocktail party held by a company that was doing business with the bank.
>
> These CAC meetings, including the social aspects, were perceived by the staff as job related. The people invited were either employees or volunteers of the association, attending a function paid for by the association. ... Although these incidents did not take place within the physical confines of the office, they occurred in the context of the work environment. ...
>
> It would be artificial and contrary to the purpose of controlling sexual harassment in the workplace to say that after-work interaction between a supervisor and other employees cannot constitute the workplace for the purpose of the application of the law regarding

> employment-related sexual harassment. The determination of whether, in any particular case, activity that occurs after hours or outside the confines of the business establishment can be the subject of complaint will be a question of fact. ...

A convenient and accurate summary of the evidence that is relevant to the determination of whether the barbeque in question can be considered a staff barbeque, where the "social aspects were perceived by the staff as job related" can be found in the final submission of the Commission at p. 4 [emphasis added]:

> ... One of these incidents [of alleged sexual harassment] took place in July, 1996, at a barbeque hosted by Mike Kelly at his home in Windsor Junction. ....
>
> The Commission ... submits that this barbeque could be considered a NSCSA staff event. Evidence was put forward that not only did staff feel that was there a requirement to attend this staff function, but that the NSCSA supplied the food for the evening. In her testimony, Davison referred to the event as a "staff barbeque", stating that Collins implied to staff that they should attend. Davison felt that it would be frowned upon if she did not participate in the barbeque, a sentiment which was shared by other NSCSA staff. Davison recalled that Mr. Scaravelli was upset at being unable to attend the barbeque as he felt that Collins wanted staff to attend. Other witnesses remarked upon the number of staff present and the sentiment that staff were required to attend. Although Ms. MacKinnon testified that she felt could have chosen [sic] not to go to the barbeque, she remarked that the only staff member not present was Mr. Scaravelli. Ms. Kewachuk testified that there was really not an option, as employees were told and expected to attend, a feeling shared by Ms. McQuaid.
>
> When asked if there was an expectation that staff attend the barbeque, Collins testified that he "could care less whether staff went or not". Although he encouraged the management group to attend as staff would be present, he stated that the last thing on his mind was who attended, noting that the reasons for having a barbeque was a celebration for the progress that the NSCSA had made as an organization. In his testimony, Kelly didn't know whether it was fair to describe the barbeque as a staff barbeque, as he had invited several neighbors. He did note, however, that the barbeque was mostly dominated by, if not exclusively consisting of staff.

Based on my own review of the transcript, this submission is an accurate summary of the evidence given by various witnesses with respect to the status of the barbeque. I conclude that the barbeque was sufficiently work-related that incidents of sexual harassment happening there can be treated as sexual harassment in the context of employment.

b) Condition of Mr. Collins at the barbeque

As factual background to all these factual allegations, I note that both Mr. Collins, and a number of other witnesses, testified that Mr. Collins was extremely drunk on this occasion, and that this degree of drunkenness was out of character for Mr. Collins. As background to what follows, I note that, based on the testimony before me, Mr. Collins' family life is stressful because his son has a terminal illness, and Mr. Collins' wife is a bi-polar manic-depressive. Mr. Collins' testimony with respect to the extent of his drunkenness at the party, the reasons for it, and the impact on his ability to remember events, was as follows:

Q. ... What's your version of what happened [the night of the barbecue]

A. Well, to be very honest with you, I'm so mixed up about this barbecue I don't know how much is what I know and how much is what I remember and how much is what people have told me about it. But I will tell you to the best of my ability what I recall from that particular night. ...

Q. And what do you recall about the events?

A. Well, I recall -- where do I begin? First of all I made arrangements prior to going to the barbecue with Shane and Myrna McQuaid. They were good friends of us and I had my son -- my wife was in the hospital. It was summertime. We were doing the renovations at MacDonald Avenue. I was trying to run the business over at Cornwallis. We couldn't afford to pay an architect to manage the renovations so I was working at Cornwallis and at MacDonald. I was running back and forth to Truro to the hospital every day. I was carrying my son around with me because we had no summer sitter at that time. I think he was five or six years old. It was a very stressful time.

Anyway, I arranged with Myrna and Shane to take Sam for the evening, that evening, and to pick him up at the barbecue. Myrna indicated that she wouldn't drink and that she would drive home. And Sam had spent the night with them on more than one occasion. They used to live across the street from us at one point and he was very comfortable with them.

So I went to the liquor store on the way there and I bought a bunch of booze. And I went to that party with the idea that I was going to have a great time.

Q. What were your drinking habits up to that point in time? ... How often did you drink and ... how much? ... On other occasions. Not at the barbecue. ...

A. ... Pre [age] 25 I drank a lot. ... Post [age] 25 I drank very little. And it became less and less over the years. When I started to work with the government, because of the nature of my work, it got so confusing to me about what was confidential and privileged information and I just decided that discretion was the better part of valour here and I know I can keep secrets if I'm not drinking. But get drinking, I'm liable to tell people stories I shouldn't be telling them. So I just kind of stopped drinking.

Now that doesn't mean I don't drink. I like to have wine when I'm out for supper. I enjoy it. But I wouldn't drink 12 beer in 12 months. And I rarely drink hard liquor except for tequila once in a blue moon. I don't drink.

Q. What alcohol did you take to the barbecue?

A. I took two quarts of wine, a quart of tequila, a pint of Peach Schnapps and I forget what else. Some beer, I think.

Q. Was this for sharing with a bunch of people or --

A. No, I had no plan on ...sharing it with anybody. No plans whatsoever. Anybody was welcome to drink it. I certainly wasn't going to deny them. But I had the full intent of drinking every bit of it myself. ... I did. I drank it. I drank all that plus Mike Kelly was feeding me some shooters for a while, some concoction I don't know. But I drank those, too.

Q. Okay. Go ahead. What do you remember about the events that night?

A. Well, if you had asked me the day after, I would say I remember the events as being an okay time, people were laughing and carrying on, enjoying themselves. I had a pretty good time. I went downtown afterwards for a while. I got someone to drive me over to the office about 3 o'clock in the morning and I slept on my couch until probably 9:30 or so. And I went out and picked Sam up and went home. So that's what I remember.

Now turn the clock ahead a year or so afterwards and ask me what I remember of [the chicken breast incident discussed below ... various comments omitted which are reproduced below] ...

Now, I could tell you that I recall more and I could tell you that I recall less. But I really don't recall very much more than that. And I'm not even certain any more whether I recall it or I recall it because that's what people told me happened or a version of that. I just don't remember. I don't remember very much about that whole night. ...

In her testimony, Myrna McQuaid, who was in a position to know Mr. Collins' behaviour with respect to alcohol because she was a friend and socialized with Mr. Collins on many occasions, also testified that Mr. Collins' drinking on the night of the barbecue was unusual for Mr. Collins, and that Mr. Collins, speaking colloquially, was "feeling pretty good" at the barbecue. Ms. Angela MacKinnon also testified that she was aware of the background circumstances with Mr. Collins' family, and that Mr. Collins' intoxication on the night of the barbecue was exceptional.

I accept the testimony of Mr. Collins, Myrna McQuaid, and Angela MacKinnon with respect to Mr. Collins' state of intoxication on the night of the barbecue, the reasons for it, and the impact on Mr. Collins' memory of events at the barbecue.

ii) Crotch Grabbing/Photo

The testimony of Karen Davison with respect to this issue was as follows:

A. I ... remember Mr. Collins was at the barbecue and he was sort of in charge of taking care of the pork and the chicken that they were barbecuing for the staff. And I was taking pictures of all people there and I asked Mr. Collins to turn around so I could take his picture. And when he did, he said, "take a picture of this," and grabbed his crotch. ...

Q. Did you, in fact, take a picture?

A. Yes, I did.

Q. Look at tab number 6 of Exhibit 1, please.

A. Yes. That's the picture I took.

Q. And what was Mr. Collins saying when you took this picture?

A. Here, take a picture of this.

Q. And what was he doing?

A. Grabbing his crotch, which I found very distasteful.

The following exchange with respect to the crotch-grabbing issue took place between Mr. Farrar and Ms. Davison on cross-examination:

Q. Now this barbecue. Tell me, to the best of your recollection, what it is that Mr. Collins said to you at that time

A. To the best of my recollection, he was -- as I said, I asked him to turn around while he was at the barbecue, so I could take a picture of him. And when he turned around, he said, Take a picture of this, and grabbed his crotch. ...

Q. That's your recollection, as you sit here today?

A. As I said, it's all written out in my Human Rights complaint. It's been a long time. I have not wanted to remember any of these things, so that's what I remember, yes.

Q. So what you're saying is that you can't remember exactly what it was that Mr. Collins said to you at that particular point in time?

A. I remember it was inappropriate. It was disgusting, and I didn't appreciate it. It made me feel icky.

Q. And in fact that this -- this man who you detested, who you felt was a pig, you were taking a picture of him at this barbecue?

A. I was taking pictures of everybody at this barbecue.

Q. But you were taking them of Mr. Collins as well, someone who you said that you felt was a pig and that you detested? Were you not?

A. I never said that I detested him. I said that I thought he was a pig. But he was still my boss, and he was still at the barbecue, and I was taking pictures of everybody at the barbecue.

Mr. Collins testimony with respect to this issue was as follows:

Q. Now there was also the incident about Karen Davison taking your photograph and you were grabbing your crotch.

A. Yeah, well I could have been --

Q. I'm sure you've seen the ... photograph --

A. -- the photograph, yeah.

Q. Do you remember anything about what was going on there?

A. Not a thing. I don't remember the picture being taken. I don't remember very much about it. I don't -- I hardly remember Karen being there at all, quite frankly. I know that she was there earlier in the evening. I don't recall seeing her later in the evening. ... And I don't remember very much about it. I just don't. I've had people tell me about it, but in honesty, I just don't recall very much about it. ...

Q. We talked about the barbecue and we talked about the photograph of you apparently grabbing your crotch. And I think your evidence was that you don't remember anything about that.

A. Well, no, I don't recall anything directly. I mean, I've been asked that question before and I don't know what, in response -- I don't remember the picture being taken, quite frankly. I saw the picture. I've seen it in black and white and colour and everything else. I still don't recall it. I've had other people tell me what was happening at the time and, you know, for what it's worth I don't have a recollection of it at all.

Given the presence of the photograph of Mr. Collins grabbing his crotch which was entered as Exhibit 1, Tab 6, there can be no question that Mr. Collins did, in fact, grab his crotch in front of Ms. Davison and that she did take a photograph of it. It is also clear from the photograph that Mr. Collins was making some comment at the time. I accept the testimony of Ms. Davison that, whatever the comment was, Ms. Davison found it inappropriate, disgusting, and made Ms. Davison feel "icky" (to use her word). I also conclude that it is more likely than not that Mr. Collins' comment bears a significant resemblance to the one that Ms. Davison originally attributed to him, namely, "take a picture of this".

iii) Chicken Breast Comments

A convenient introduction to this alleged event can be found in Exhibit 2, Ms. Davison's initial letter to the Nova Scotia Human Rights Commission, dated August 14, 1997:

> On the night of July 13, 1996, the Nova Scotia Construction Safety Association held a staff barbecue at the home of Mr. Mike Kelly. It was at this staff function that Mr. Bruce Collins made reference to the size of my breasts. This occurred while he was serving chicken from the barbecue to various staff members. Mr. Collins made reference to other female's [sic] breast size as well. He did this by referring to the amount of chicken he felt certain female staff members needed in order to augment their chest size. He told one female staff member (Angela MacKinnon) that she shouldn't have any chicken because her chest was already big enough. According to Mr. Collins, I needed two pieces of chicken. I took this to mean that he felt I needed one piece of chicken to augment each of my breasts. I was shocked by his comments - and very embarrassed as well.

Ms. Davison's oral testimony was essentially consistent with the description above. During her examination in chief on this issue, Ms. Davison testified that she was sitting at a table when these comments were made. From the testimony of other witnesses, it appears that the table in question was one in Mr. Kelly's kitchen. (Exhibit 12 is a photograph of this table in Mr. Kelly's kitchen.) The interchange between Ms. Davison and Mr. Farrar on cross-examination with respect to this incident was as follows:

Q. And, in fact, of all the incidents that you've talked about, the only thing that you attribute as being directed to you is the incident at the barbecue.

A. Directly at me?

Q. Directly at you. There's no other --

A. Well, I consider being -- having someone tell risqué jokes in my presence when they know that I can hear them as being directed at me. Whether they're actually speaking to me or not, if I can hear them, same thing.

Q. Well, did you ever express to anybody that that made you uncomfortable?

A. As I stated, no. I did not feel that I could.

Q. No. But insofar as any comment was directly made to you, the only one comment that you can point to in the three years that you were at the Construction Safety Association is this alleged comment that Mr. Collins made about the chicken breasts?

A. I guess I would have to say yes.

Mr. Collins' testimony with respect to the chicken breast incident was as follows:

Q. Okay. Go ahead. What do you remember about the events that night?

A. ... the issue of the chicken breast -- I don't remember the chicken breast issue. Vaguely. I remember it vaguely. I specifically don't recall it. I remember serving -- there was pork chops and chicken breasts and I remember going up to Angela, or the table that Angela was sitting at and asking anybody if they wanted anything, and chicken breasts or breasts or pork chops. And Angela kind of shaking her chest and saying, No thanks, I have enough. And everybody laughed. I laughed. I remember that part of it. I turned to who I thought was Karen Swindells, that's how I remember it -- although people have told me otherwise since that time and said, Perhaps you need more. Perhaps you should have some, or something to that effect. That's what I recall about that. ... Now, I could tell you that I recall more and I could tell you that I recall less. But I really don't recall very much more than that. And I'm not even certain any more whether I recall it or I recall it because that's what people told me happened or a version of that. ...

Witness Suzanne Myette was never employed by the NSCSA. At the time of the barbecue she was rooming with Angela MacKinnon, and was invited to the barbecue as a friend of Angela's. Ms. Myette's testimony with respect to the chicken breast issue was as follows:

Q. Anything else that you observed that evening?

A. When we did sit down to eat, I know for sure that myself and Angela and Karen Davison were at the kitchen table or dining room area and we were having some chicken. And Bruce made a comment that Angela shouldn't have any chicken because she's a very well-endowed girl, and that Karen should -- better have some more to eat -- in relation to our breast sizes.

Q. Did he make any comment about you?

A. That I could have one.

Q. What did you say, if anything, in response to that?

A. I don't think that I responded to that comment.

Q. Did any of the other women respond?

A. No, not that I remember.

Witness Craig Falkenham's testimony with respect to this issue was as follows:

Q. ... did you attend a staff barbecue at Mr. Kelly's house one evening?

A. Yes.

Q. Tell me what you recall about the events of that evening.

A. It was at Mike Kelly's house, I remember. We were all there, and there was a barbecue going on. It was -- Bruce was cooking up food and I remember we were all in the backyard just having fun, it was a good time.

I remember, the incident that you're probably referring to, is the food incident, I guess, when Bruce was cooking up food on the barbecue, he was cooking chicken breasts, and, I believe, steaks. And he was going around the table, and he had the -- he was bringing chicken breasts out and steak out.

And a bunch of us were sitting around the table, and he was -- he had the chef's apron on, he was speaking in an Italian accent, and he was saying, Who wants a chicken breast? Who wants a chicken breast? And we were just kind of laughing because he was speaking in a bad Italian accent.

And he said to Angela, Angela MacKinnon, who, well there's no gentle way to say this, she's big breasted, and he says, You, you don't need any chicken breasts, you've got plenty already. And he went on to Karen Davison and Angela's friend Suzanne, who did not work at the association, she was just there as a guest. And he said, You, you two need plenty of chicken breasts, here you take a double helping or something to that effect.

And we were all just laughing, but I realized, at that point, we were just looking around and just laughing like, oh my God, I can't believe he said that.

Witness Greg Barr, who was still employed as a manager at the Nova Scotia Construction Safety Association, testified as follows with respect to the chicken breast incident:

A. Mostly what I recall of that is -- well, it's been quite a while so it's hard to picture exactly what happened but I have a general sense of -- of, like, Bruce was doing the barbecuing and he was going around asking people if they wanted anything to eat, chicken, and I forget what else was being cooked that night. I seem to recall him -- like, I -- Angela was sitting across from me and a friend of hers was there and I remember him coming in and just asking if anybody wanted any -- anymore chicken or anymore chicken breasts. I seem to remember Angela, like, saying -- like, she would say, like, no, I'm -- you know, I'm fine, I got -- I'm fine, I don't need any kind of shape. Insinuating that -- that she had enough breasts.

Q. So what -- what did she say? I wasn't clear.

A. I can't remember her exact words but I seem to remember her come -- Bruce coming in and asking if people needed more breasts or more chicken breasts and her kind of shaking and saying I -- no, I'm fine, I -- I have enough breasts, or I'm okay, or something like that. I can't remember her exact words but I have a sense of that happening and everybody laughing and, like, it was a very social night that I can remember. Everybody

laughing and having a good time and stuff. And I remember -- no, that would be the only thing I can think of that --

Q. Did he make similar comments to any -- or was there a similar exchange with anyone other than Angela?

A. In terms of people shaking -- like, asking if they wanted anymore breasts?

Q. Well, any -- any interaction where the number of chicken breasts was somehow equated to the size of their chest?

A. I do -- like, I don't remember anything other than that specific kind of event but I do remember that Karen was sitting, I think, away from the table, off kind of like behind me. And I know that Bruce went over and said something to her. I -- I don't -- like it was everybody was laughing after what Angela did. It was funny and I don't recall what would have been said.

Q. Were you sitting at the same table as Angela?

A. Yeah, I was right across from her.

Witness Angela MacKinnon testified with respect to the chicken breast incident, as follows:

[At the barbecue Mr. Collins] made reference to chicken breasts with regards to all of the women that were in the room at the time. I believe somebody came in from outside and asked what everybody wanted from the barbecue, and I think the choices were chicken and steak, but I can't remember what it was besides chicken breasts. But, he made reference to how many chicken breasts each woman should have and he was talking like a fake Italian accent, and he said that I wouldn't need any chicken breasts, Karen Davison would need a lot of chicken breasts and my friend, Suzanne Myatt [error in transcript], was also there, and he said that she might need one or two.

Q. And he did he give any indication as to how he decided who should get what number of chicken breasts?

A. He looked from each of and he looked at our chest area, that's all I really remember and it was another, his type of joke, he thought it was funny.

Q. Did you laugh?

A. No.

Q. Were you offended by that?

A. Yes.

Q. Did you say anything at that time?

A. No, I did not.

Q. Why not?

A. I don't know -- I guess it was that I was intimidated. I didn't feel that I was -- I didn't know who was offended by it, I didn't know if it was maybe just a personal thing for me

and I didn't want to make a scene about it, and, you know, he is in a position of authority, he was my boss, I didn't feel comfortable saying anything.

In cross-examination the following exchange between Mr. Farrar and Ms. MacKinnon took place:

A. [Mr. Collins] looked at each one of us, as I said, and told us -- or told whoever, us, whoever was in the room, how many chicken breasts we needed.

Q. Did you make any comment to Mr. Collins to the effect that, I don't need any?

A. No, I didn't.

Q. You never said anything along the lines, I've got enough already, I don't need any more?

A. No, I did not. He made that comment, I didn't.

Q. I see. And, what to the best of your recollection, did he actually say to you?

A. He actually said, "you don't need any, you don't need any chicken breasts".

Q. I see. And then you took that, from what he said, as being sexually suggestive to you.

A. In combination with what he said to the other people, yes, I did.

Q. And he said to the other people, to the best of your recollection, you can use a couple, and you can use one or two, correct?

A. No, no. He said that -- something to the effect that Karen Davison, when he spoke to her, it was that she needed a lot -- ... and the other person, who was my friend, Suzanne, she could use one or two.

Q. At any time in that exchange did Mr. Collins make explicit reference to anyone's breasts?

A. Not explicit reference, no.

I accept the testimony of Ms. MacKinnon that she did not make a suggestive comment to Mr. Collins drawing an analogy between her own breasts and the chicken breasts.

Ms. McQuaid testified that she had only brief exposure to events associated with the chicken breast allegation. She happened to come into the kitchen where Mr. Collins was standing holding barbecue tongs, and heard him say:

... something about these are not as big as your breasts, Angela. And that's all I was witnessed to and I went back outside.

Q ... what was he referring to when he talked about Ms. MacKinnon's breasts ... was he making reference to something in particular?

A The chicken breasts.

Ms. Stephanie Kewachuk also testified that Mr. Collins' comments at the barbecue about female guests needing a chicken breast relative to the size of their breasts, but her memory of the context had faded seriously with time, since she testified that the event took place in a gazebo, while the other witnesses testified that it took place in Mr. Kelly's kitchen. I place no reliance on Ms. Kewachuk's testimony with respect to this issue.

After carefully considering all the evidence before me, I conclude that Mr. Collins did make comments that he obviously believed to be humorous based on an analogy between the chicken breasts he was serving and the size of the breasts of the women he was serving them to.

iv) Being "Grabby" with Respect to a Woman at Barbecue

Ms. Davison testified that she had heard that Mr. Collins had been "grabby" with women at the barbecue, but that she did not see this herself. The primary witness with respect to this issue was Suzanne Myette, Angela MacKinnon's roommate. Ms. Myette's testimony with respect to this issue was as follows:

A. There was dancing. Mr. Collins had been asking me to dance or at me to dance, and I was uncomfortable with that situation. He was, like, pressing up against me.

Q. Did you, in fact, dance with him?

A. Maybe for a second before I wriggled away.

Q. And when you say he was pressing against you, what -- did he have his arms around you, was he just standing there, or --

A. Yes. His arms were around me and he had his body up against me.

Q. Was that something that occurred on more than one occasion or simply one occasion?

A. One -- that evening?

Q. Yes.

A. Well, he was -- he was trying to get me to dance a few times, and a couple of the male employees were kind of just keeping me off to the side or dancing with me just to keep me out of view because they knew I was uncomfortable when he had done that with me.

Q. Okay. Who were those male employees? Do you remember?

A. Ian MacLean.

Q. Yes.

A. And Craig Falkenham.

Mr. Collins' testimony about this issue was as follows:

A. I remember dancing at the barbecue. I remember dancing, specifically, with Suzanne Myette. The type of dancing that would be would be jiving in particular. I don't remember ever touching Suzanne inappropriately. In fact, some period of time after that barbecue I ran into her one day at the Halifax Shopping Centre in the lunch area, the food court. She was waving like crazy at me and I didn't know who it was. And she came over and she said, Hi, hi, hi, how are you. And I said, Great. And she just looked at me and said, You don't remember who I am. And she said, I'm Suzanne, Angela's friend. And I remember putting my hand up on my head and said, Oh, the barbecue. She started laughing and I said, I can't remember a damn thing about that barbecue. And she said, Oh, it was great fun, we were dancing. And we were talking and I talked to her for about five minutes there and I never laid eyes on Suzanne again until she testified here.

You know, I can't honestly tell you whether I did or did not do those things. It would be out of character for me if I did those things; that's not something I would do. It's not something that I recall ever having done before and I certainly don't recall ever having done anything since. So I remember dancing with her and other people at that party. I don't particularly recall anything untoward about the process. I just don't recall it.

Mr. Farrar did not cross-examine Ms. Myette with respect to this issue. Mr. MacLean was not called as a witness. Mr. Falkenham did not refer to the allegation that Mr. Collins had been "grabby" while dancing with Ms. Myette in his cross-examination of Ms. Myette. Instead he focused on the issue of whether Mr. Collins and Ms. Myette had met and had a friendly conversation in a shopping centre. Ms. Myette's testimony on this issue was as follows:

Q. And have you seen Mr. Collins since that night?

A. No.

Q. Did you run into him in the Halifax Shopping Centre at one point of time after this event occurred?

A. Not that I remember.

Q. I'm instructed that Mr. Collins met you in the Halifax Shopping Centre and that you waved for him to come over and reintroduced yourself because he didn't remember you from the barbecue. Do you have any recollection of that at this point in time?

A. No, I do not.

Q. And you -- so you have no recollection of any discussion that you had with him at that time about the barbecue?

A. Definitely not.

Q. So, then, from your recollection, you have not discussed the barbecue with Mr. Collins since that night?

A. No, I have not.

Ms. Myette is one of the more detached witnesses to testify before me. She was never employed by the NSCSA, and her roommate relationship with Ms. MacKinnon terminated in 2000, two years before she gave her testimony before

me in August, 2002. I accept Ms. Myette's testimony with respect to this issue, and conclude that Mr. Collins was indeed "grabby" in his dealings with Ms. Myette in the context of dancing at the barbecue.

v) "Take it Like a Man": Male Employee

Ms. Myette also testified with respect to the last allegation made with respect to Mr. Collins' behaviour at the barbecue. Ms. Myette's testimony on this issue was as follows:

A. He did press one of the male employees up against the wall of the house, and said to him, I'm going to show you how to take it like a man.

Q. When you say he pressed him up against the house, what -- can you describe a little bit more what that looked like, or what you saw?

A. Well, he pressed him -- his body up against the employee's body, against the wall of the house.

Q. Which way was the employee facing?

A. He was facing the wall.

Q. So Mr. Collins was behind him?

A. Right.

Q. Okay. And -- all right. And do you know who that employee was?

A. Craig Falkenham.

Q. What, if anything, did Mr. Falkenham say or do?

A. I don't recall him saying anything, just maybe chuckled. He's not a real expressive type to say anything. Just chuckled it off, mainly. The people that were around just sort of laughed it off.

Q. All right. And how did you feel about that incident? What did you take from it?

A. That it was a bit unusual and inappropriate.

Q. What was inappropriate about it, in your mind?

A. Well, when he said that to him, that he would show him how to take it like a man, I was thinking, in my mind, that he was referring to a homosexual sexuality act. That was the inappropriate part.

Mr. Farrar did not ask Ms. Myette any questions about her testimony on this issue during cross-examination.

When Mr. Falkenham testified to his recollections of events at the barbecue, he did not spontaneously recall this incident, and neither Mr. Wood or Mr. Farrar asked him any questions about it.

Angela MacKinnon did testify with respect to this allegation. Ms. MacKinnon's testimony was as follows:

A. I actually saw him -- we were outside, out on the back deck, I believe, and he -- oh actually, yes there was two more incidents: one where I saw him push Craig Falkenham up against a wall and make another comment, similar to what he had said to Greg Barr [with respect to an allegation below, that he was going to show him what a real man was]. And he actually pushed him up against a wall, and had his arm up. Craig was against the wall and he had his arm up on the other side of him.

Mr. Farrar did cross-examine Ms. MacKinnon on this matter, and her testimony was as follows:

Q. ... before I leave the barbecue -- you mentioned that Mr. Collins made a -- pushed Mr. Falkenham up against a wall --

A. Yes.

Q. -- and made a comment to him at that time.

A. Yes.

Q. Mr. Falkenham just gave evidence in this proceeding.

A. Yes.

Q. He made no mention of that event having occurred at the -- at the barbecue.

A. Uh-huh.

Q. Did you ever discuss that event with him afterwards?

A. No, I didn't.

Q. Did you ever discuss any of the events that occurred at the barbecue with anyone afterwards?

A. Yeah, I'm sure I probably discussed it with Suzanne. We lived together at the time, so I'm sure we discussed it, I'm positive. I don't remember the conversation, but I'm sure we discussed it. And, as far as anyone else, I can't think of anyone else that I discussed it with.

Q. What was the nature of your discussion with Suzanne?

A. We just were talking about the night and things that had happened and things that we had seen happen during the night, that's all.

Neither lawyer asked Mr. Collins any questions with respect to this allegation. Karen Davison also did not testify with respect to this incident.

This factual allegation is the most difficult one for me to resolve. On the one hand, I consider Ms. Myette to be one of the more credible witnesses before me.

On the other hand, the fact that the alleged target of Mr. Collins' behaviour, Mr. Craig Falkenham, did not appear to recall this incident when he gave his testimony about the barbecue is troubling. On the other hand, Mr. Falkenam was unemployed at the time of his testimony, and dependent on the NSCSA for a reference in seeking a new job.

Although the issue is a close one, on balance I have concluded that I accept Ms. Myette's testimony with respect to this issue, and that Mr. Collins did indeed push Mr. Falkenham up against a wall, and refer to him taking it like a man. I note that Mr. Falkenham himself appears to have behaved as if the episode was a humorous one, according to Ms. Myette's testimony.

3) Birthday Party and Simulated Anal Sex

Ms. Davison's testimony with respect to this issue was as follows:

A. It was common practice at the Association to celebrate staff birthdays. Usually, what they would do is someone would go and buy a birthday card and the staff would sign it, and then at some point during that day, the staff would get together and sing Happy Birthday to that person and everyone would have cake. And it didn't take long. This was usually, like, you know, 15 or 20 minutes. And during one particular birthday celebration, the staff were together and Mr. Collins went up behind Mr. Scaravelli, put his arms around him, and simulated what I can only describe as anal sex.

Q. Can you describe physically what you were observing that you concluded was anal sex?

A. He came up behind -- from behind and he put his arms around Mr. Scaravelli, and then he pressed his body in thrusting motions against Mr. Scaravelli's buttocks.

Q. What, if anything, did Mr. -- was Mr. Collins saying?

A. He didn't say anything while he was doing this.

Q. What, if anything, did Mr. Scaravelli say?

A. Absolutely nothing that I recall at the time. He had this rather shocked look on his face. ...

Q. ... What comments -- maybe a better way of putting it is what complaints, if any, did you make to anyone about the birthday incident?

A. Once again, I didn't make any complaints to anybody. I didn't think I could make a complaint against my boss. And at this point, it was almost like typical behaviour from him. That's the way I looked at it, that it was becoming increasing as time went on, and I just -- you know, as a single woman supporting herself, I really didn't feel that I could go to my boss and say, you know, I really don't appreciate that behaviour or I really think that's inappropriate.

During cross-examination by Mr. Farrar, Ms. Davison gave the following testimony:

Q. And again, this is not something that you brought to the attention of anyone in authority.

A. Everyone in authority at the Association was there, as far as I know. I think Mike was there and Bruce was there. Larry was there and the staff were there, so I don't know -- well, they saw it too.

Q. And did anyone else comment with respect to it, to you?

A. I'm not sure if anyone else commented to me about it or not. I don't recall.

Q. And again, this is an incident that you consider to be significant enough that you put it in your complaint to the Human Rights Commission, even though it wasn't directed at you?

A. Exactly. The fact that I had to witness it. I didn't think it was appropriate for that to take place, for him to do that to Larry. I thought it was disgusting.

Q. And you didn't ask Mr. Kelly, or talk to Mr. Kelly and say, Mr. Kelly, I found that disgusting?

A. No, I did not.

Mr. Scaravelli's testimony with respect to this issue was as follows:

A. Well, I remember we had a birthday party in the photocopy room. All staff that were present in the office at the time gathered to sing happy birthday -- I can't, sorry, remember, we did that infrequently with certain staff during their birthday. I can remember Mr. Collins grabbing my hips while I was standing near the cake and mocking anal intercourse with me.

Q. Mocking anal, excuse me, mocking anal intercourse?

A. Just gyrating the gestures.

Q. Did he say anything when he did that?

A. I can't remember specifics.

Q. Did you say anything?

A. No.

Q. What reaction did you have to that?

A. A bit of shock; disbelief; extreme embarrassment.

Q. Were there any other staff members present when that occurred?

A. I believe there were several, yes.

Ms. MacKinnon also testified that this incident took place, and also gave the following testimony:

Q. What was [Mr. Collins'] demeanour at that time?

A. Once again, it was a joke, it was carrying on.

Q. And, what was the reaction of the other people?

A. I think a few people laughed.

Q. Did you laugh?

A. No.

Ms. Kewachuk testified that this incident took place, but could not recall which male employee it happened to.

The witnesses agreed that, other than holding Mr. Scaravelli's hips, Mr. Collins did not make physical contact with Mr. Scaravelli during the alleged simulation of anal sex.

Mr. Collins denied that this incident took place. His testimony was as follows:

A. I don't remember it at all. It's not something that I think I would do. It would offend me, myself, if I did that. I can imagine running up behind Larry and saying, I'm first, I'm first. Because there was this thing about -- I mean, look at me, I like deserts. I like to get the corner of the first piece, the corner of the cake. It was a joke around there. I certainly would not go up behind any male or female person and pretend to have sex with them from behind. It's not something I would do. And if these people -- I've heard them all say it. If they think I did that, then they're wrong. I couldn't have. I just wouldn't do that.

Mr. Kelly testified that he attended all the birthday celebrations and "I've never seen anything that might be remotely construed as being simulated anal sex." Ms. Bunston could not recall any such incident.

I accept the testimony of Ms. Davison, Mr. Scaravelli, Ms. MacKinnon, and Ms. Kewachuk that this incident happened. I conclude on the basis of the evidence before me that it happened at some time in 1996.

4) Closet / Real Man

Karen Davison did not testify with respect to this allegation. Angela MacKinnon's testimony with respect to this alleged incident was as follows:

A. As far as within the office, I heard a couple comments made to, well one particular comment, made to a male staff member, it was to Greg Barr. ...

Q. Tell me about the -- let's get a little bit of information -- this Greg Barr comment, who was the person that made the comment first --

A. Bruce Collins.

Q. Mr. Collins. What did he say?

A. He said that he was going to take him into a closet and show him -- I mean I'm paraphrasing here -- but take him into a closet and show him what a real man was.

Q. What was the circumstances that gave rise to that comment?

A. I don't really remember. I remember where we were, we were up by the reception area, there was a closet over to the right hand side. I don't remember what led up to it, or anything like that.

Q. And, was this in Burnside?

A. Yes, it was. ...

[Q.] All right. And who else was around when this comment was made?

A. I'm sure that the receptionist was there, but I can't remember who was in the position at that time. There was quite a few people that were in that position, but I can't remember who it was.

Q. And, what was Mr. Collins' demeanour like when he was saying this?

A. It was a joke. It was inappropriate, but it was a joke.

Q. Did other people laugh?

A. No, not that I remember
.

Q. What was Mr. Barr's reaction, to the best of your knowledge?

A. He may have chuckled, I can't really remember. I don't think he took any visible offence to it or anything.

Q. Did you express any concern to anybody at that time or later about that incident?

A. No, I did not. ...

At a later stage of her testimony, Ms. MacKinnon made the following additional comments:

Q. What about the other incidents in the office, the ones involving Mr. Barr and Mr. Scaravelli, were you offended by them?

A. Yes.

Q. Did you express any concern to Mr. Collins about those incidents?

A. No, I did not.

Q. Why not?

A. Once again, I was intimidated, I suppose, he was in a position of authority, I didn't feel like I could say anything. As far as I was concerned, it was something -- the things that he was doing he should have known that they were inappropriate and I didn't feel it was my position to say, to tell him how to behave.

Mr. Collins did not testify with respect to this allegation.

Counsel for the Commission did not ask Greg Barr any questions about this allegation during examination in chief. During Ms. Gallivan's cross-examination of Mr. Barr, Mr. Barr testified as follows with respect to this allegation:

Q. Do you ever recall an incident with Mr. Collins where he made some -- a comment in the nature of, Come into the closet and I'll show you how to take it like a man?

A. No.

Q. Do you ever recall that happening at any time?

A. No.

Q. Do you recall any comments similar to that being made to you by Mr. Collins?

A. No.

I note that Mr. Barr is still an employee of the NSCSA, reporting to Mr. Collins, and that it is possible that this might influence his testimony. Nevertheless, given that Ms. MacKinnon is the only witness to testify that the events of this allegation happened, and that Mr. Barr, the alleged target, testified that he had no recollection of this incident or of any similar behaviour directed toward him by Mr. Collins, I find that I am not able to draw any definite conclusion whether this alleged incident happened or not. Accordingly, the onus of proof with respect to this issue requires that I conclude that it has not been proven on a balance of probabilities that this alleged incident took place.

5) Patting Male Employee's Buttocks

This allegation relates to a male employee, Ian MacLean. Ms. Davison's testimony with respect to this allegation was as follows:

Q. Okay. You described something involving Mr. MacLean, Ian MacLean? ...

A. Well, I noticed Mr. Collins, on several occasions as Mr. MacLean would walk by, he would just pat or you know, grab his -- Mr. MacLean's buttocks.

Q. And how many times did you see that happen?

A. I would say three or four. ...

On cross-examination about this issue, Ms. Davison testified as follows:

Q. Have you had discussions with Mr. MacLean to request that he come here to give evidence?

A. No.

Q. He would be the best one to speak about what Mr. Collins --

A. Yes.

Q. -- did to him.

A. I agree. I agree.

Q. And whether or not he took offence to anything that Mr. Collins may have done.

A. I observed it. I don't know how it made Mr. MacLean feel. I know how it made me feel, which was I wanted to barf.

Mr. Scaravelli testified that he witnessed one situation where Mr. MacLean was stressed about a workplace issue, and Mr. Collins first put his arm around Mr. MacLean's shoulder and made a joking comment, and then grabbed him by the buttocks and told him to cheer up or lighten up. Angela MacKinnon testified that she witnessed the alleged incident referred to by Mr. Scaravelli.

Mr. Collins testified as follows:

Q. Now we also see in here allegations that you grabbed or touched Mr. MacLean's buttocks. ... Do you recall an incident where you hugged Mr. MacLean in the office?

A. Well, I don't know what someone means by "hugged." Would I have put my arm around his shoulder? Yeah, I would have. I could do that with Ian, no problem.

Q. But you would distinguish that ... from putting two arms --

A. Two arms around and hugging him or something? I don't think I would have done that.

Q. Yeah. What about grabbing or touching his ... buttocks?

A. I listened to -- could I have done it? Sure. I could have done that to Ian. I wouldn't have grabbed him. I may have patted his butt the same way you would at a baseball game or something. I listened to what Larry Scaravelli had to say in his testimony. And when he spoke I did recall that event. Up to that point I didn't know what they were talking about. I did recall that particular event. ...

Q. And what do you remember about it?

A. [After a long discussion of his interactions with Ian MacLean, including why Mr. MacLean was stressed on the occasion referred to by Mr. Scaravelli, Mr. Collins continued:] So to go right back to your original question, I'm sorry for the sidetrack, but could I have patted his butt? Yes. Would I have grabbed his butt in a harassing or sexual or threatening manner? Absolutely not. This was one gentleman I quite admired and still do.

Ian MacLean himself was not called as a witness by any party. In the absence of direct testimony from Mr. MacLean, I accept Mr. Collins' testimony that the "butt-patting" in the incident reported by Mr. Scaravelli was non-sensual, and the sort of thing that might happen among players at a baseball game. Also, in the absence of testimony from Mr. MacLean, I find that the multiple examples of Mr. Collins grabbing Mr. MacLean's buttocks that were alleged by the Complainant have not been proven on a balance of probabilities.

6) "Getting Laid"

Ms. Davison's testimony with respect to this allegation was as follows:

A. I'm not sure if it was '96 or '97, but one time when everyone was leaving the Association for the weekend, Mr. Collins told Judy Bunston as she was leaving that he hoped she got laid over the weekend.

Q. Did you hear that comment?

A. Yes, I did.

Q. What reaction, if any, did Ms. Bunston have to it?

A. She didn't seem to mind.

Q. What did you see that caused you to conclude that?

A. She laughed.

Q. And how would you describe Mr. Collins' demeanour when he made the comment?

A. He was -- his demeanour? I guess you could say he was laughing too. They may have thought it was funny. I certainly didn't.

Q. And where were they in relation to you when they made the comment?

A. About five to ten feet away.

Ms. Bunston's testimony with respect to this issue was as follows:

Q. Now the other incident that has seemed to have got a lot of -- of attention at this hearing and a lot of press is the statement or something along the lines of Mr. Collins said to you I hope you get laid. Do you have any recollection of that and what were the circumstances giving rise to it, if you have a recollection?

A. If Bruce said that to me then it was probably a response to something that I said. I was very -- if he said, What are you doing this weekend I would probably say, I hope I get laid. That would not have been uncommon and if I was leaving, hope you get laid this weekend in response to -- because I would have said that, yes.

Mr. Collins' testimony on this issue was as follows:

Q. ... This is the allegation about some comment to Judy Bunston.

A. Oh, yes, I remember that very well.

Q. Okay, tell me about it.

A. I believe it was in the latter part of the week. I'm almost certain it was on a Friday. I'm almost certain that it was some time between six and 7 o'clock in the evening. It might have been 5:30 in the evening. Judy's -- how can I describe Judy? Judy is a very outgoing and effervescent kind of a person. And she's always got a good story and a good joke.

Anyway, I was talking to her somewhere in the office and I asked her what she was going to be up to this weekend. She said she was going out, she was going to party and party -- and all she hoped was she got laid that weekend. I laughed. I was surprised by the comment, but I didn't -- I certainly wasn't offended by it. I remember her leaving. I was in my office. She would be out by the door some 25 feet away. She said, Goodnight, everybody. And I said, Goodnight and I hope you get laid this weekend. I remember saying it, very distinctly. So, yes --

Q. And what was --

A. -- I did say it.

Q. What was Judy's reaction to that?

A. I think she just laughed when she was going out the door. I don't recall anybody else being there. I mean, in this it suggests that Karen was there. She may have been there. I don't recall her being there. I certainly don't -- I wouldn't have believed that there would have been anybody in there for the purposes of business because I wouldn't have done that or said that. But I remember that comment very well. ...

Q. Which premises was that in?

A. That was on Cornwallis Street. That would have been late '94 or early '95.

Based on the testimony of Ms. Davison, and Mr. Collins, I conclude that this event did happen. I accept the testimony of Ms. Bunston and Mr. Collins that Mr. Collins' remark was in response to a comment by Ms. Bunston about getting laid. There is a conflict in the evidence of Ms. Davison and Mr. Collins about when the event happened. I accept the testimony of Mr. Collins that this event took place at the Cornwallis Street premises of the NSCSA. The NSCSA remained at the Cornwallis street premises until summer of 1996. It seems most likely that this event happened in the first half of 1996.

7) Chair Taping Incident

With respect to this matter, Ms. Davison testified as follows:

Q. Now let's recap here what we've talked about. We've talked about 1995, 1996, and we've talked about the incident with Mr. Kelly in the spring of 1997. There's one additional incident that you made reference to with respect to Judy Bunston and being taped to the chair. When did that occur?

A. Well, it was when we were in Burnside. I remember that. It was in the back room by the back door of the building. I don't remember the specific date when it occurred.

Q. Do you remember the year?

A. I think it was before the walkout, so 1997 sometime. But I just remember walking through the department, and Bruce was using a tape gun to tape her to the chair, and she was on the phone talking to a client.

Q. And I take it you took that to be something of a sexually harassing action on his part?

A. I didn't appreciate to see it, and I kept thinking I hope he doesn't try that with me. But, you know, I don't know how Ms. Bunston viewed it, but I certainly didn't think it was appropriate for a supervisor or, in this case, the general manager to go around with a tape gun and -- even if he was joking, I still thought it was inappropriate for him to be taping someone in their chair.

Q. What I asked you, whether it's inappropriate or not, did you feel that was of a sexual nature to tape Ms. Bunston to the chair like that ?

A. I thought it was degrading to Judy as a woman, yes.

Q. Did you think that she felt that way?

A. I have no idea how Ms. Bunston felt.

Mr. Scaravelli's testimony on this issue was as follows:

A. ... well there was the incident where I saw Judy Bunston taped to her chair.

Q. Tell me what you remember about that.

A. I remember she was in the far side of the cubicles at 35 MacDonald Avenue, Mr. Collins grabbed some packaging tape and wrapped it around her, not once or twice but 25 times.

And actually initially the first couple wrap arounds it did appear to be quite funny, but as it continued I saw it started to become uncomfortable to Ms. Bunston and it became uncomfortable to me. I thought enough was enough.

Q. Did Mr. Collins say anything while he was doing that?

A. I couldn't recall, the memory of the actual action is more vivid. I'd never wrote down specific statements, so it would be tough for me to recall exact words.

Q. And what was your sense as to whether Ms. Bunston, or Ms. Bunston's reaction? Do you have any recollection of what her behaviour was?

A. It was nervous laughter.

Q. Pardon me?

A. She had nervous laughter -- very nervous.

Mr. Farrar's cross-examination on this matter included the following dialogue with Mr. Scaravelli:

Q. Do you know what led up to that incident?

A. No.

Q. Did you observe Mr. Collins' son being there at that particular point in time?

A. No.

Q. You didn't?

A. I don't remember him being there.

Q. You don't recall him being there.

A. No.

Angela MacKinnon recalled the chair-taping incident in passing, but stated that her recollections of it were vague.

Ms. Bunston's testimony with respect to this issue was as follows:

Q. ... there was reference to an incident where you were tied up in the shipping and receiving room. Could you explain to us your version of that event?

A. The -- Bruce had been in with his son, Sam, and they were in the back area. I was on the phone, if I recall correctly. And my comment would have been, I'm tied up right now. So he took the -- the gum [sic: transcription error?] -- the tape gum and -- did he tape me to the chair or did he -- he did tape me up. I don't remember if my hands were behind my back or if he just taped me around the chair. But, yeah, that happened.

Q. And was -- did you take any offence to that?

A. Well, no, because it was -- his -- his son was with him. It was -- we were carrying on.

Q. Now there are a number of people who suggested they witnessed that event, Ms. Davison being one of them, Mr. Scaravelli being another, and Ms. MacKinnon being another that suggested they were in or around that area when that occurred and that they witnessed it. What can you say to that? ...

A. ... Shipping and receiving was in the back of the building. They -- I don't recall. Myrna and I would have been there as a normal part of our working. ... Myrna McQuaid. ... I don't recall whether they were there or not.

Q. Ms. Davison that she felt that the activities of Mr. Collins at that particular point in time were demeaning to women. Did you feel anything demeaning about what Mr. Collins had done at that time?

A. I have two sons of my own who are grown and we were humouring a child. If that's demeaning then --

Ms. McQuaid's testimony on this matter was as follows:

Q. ... there was another incident involving Judy Bunston getting taped to her chair or something like that. Do you recall anything about that?

A. Uh-huh.

Q. And what do you remember about it?

A. She was just sitting in her chair and Bruce come in and he took some tape and he taped her to the chair.

Q. And what was she doing while this was going on?

A. She was talking on the phone.

Q. And was this at the time where you and she worked in the same area?

A. Yes.

Q. Okay. And what was your interpretation of what was going on?

A. They were just having fun.

Q. Did it bother you in any way?

A. No

Q. Did Ms. Bunston complain at all about that incident?

A. No.

Q. Do you know if anyone else saw it?

A. I have no idea; I was on the phone.

On cross-examination, Ms. McQuaid testified as follows:

Q. Now and I take it that Mr. Collins was in the office -- in the shipping and receiving area as well. Was anybody else in there?

A. I don't recall. I believe there was just the three of us there.

Q. Do you recall if Sam was in there? Mr. Collins' son?

A. No.

Q. Okay. And I take it that Judy was laughing and joking at the time that this occurred?

A. Yes.

Mr. Collin's testimony with respect to this incident was as follows:

Q. There's also ... the reference to the taping of her [Judy Bunston] into her chair. ... Tell me about that. I presume you remember that, as well.

A. Oh, yeah, I remember that very well, actually. ...

Q. Which premises was that in?

A. That was in -- on Burnside. ... And I believe it would have been in 1996, though I'm not certain. It's either in '96 or '97. But I was off that day. I had taken Sam to the IWK for his regular appointments there. It takes about six hours over there. My wife was in an institution out west. I had a parcel I wanted to send to her. I stopped back in the office in the shipping and receiving area to get the tape gun to tape it up.

I was taping it up at the counter. Judy was sitting, I believe, behind me and to my left. Myrna McQuaid was sitting at her desk by the window. Judy was on the phone talking to her sister. I know her sister quite well, as well. Her sister was talking to me through

Judy. We were talking back and forth kind of through Judy and carrying on. And Judy said, I really have to go, I'm tied up. And Sam said, Daddy, she's not tied up, she's sitting in her chair. And I walked over to Judy and I said, Well, she's tied up now. And I walked around the chair a few times with the tape gun. Judy was laughing, I was laughing, Sam was laughing. It wasn't anything, in my view, harassing. It happened on the spur of the moment. There was nothing connected to sex or anything else with it. It was just -- I have a little boy who is, among his other problems, is high-functioning autistic. He's very literal, very outspoken and talkative and she said, She's tied up, he said, No, she isn't. And I said, Well, she is now. And that was it.

I helped to take the tape off and that was the end of it. We were just entertaining a little guy. That's the sum and total of that. There was nobody else there.

Q. So it was just yourself, Ms. Bunston, your son and Ms. McQuaid?

A. That's it. ...

Q. How long did it last, this event?

A. Oh, I don't know, a minute or two, or less than a minute. It wasn't a very long thing. I was just stopping there to tape up a parcel and get myself home.

Q. And how many times did you go around with the tape, do you recall?

A. Oh, I have no idea. I went around more than a couple. Sam was laughing, I was laughing, Judy was laughing. I mean it wasn't hysterical laughing or anything, it was just funny to us.

It is clear from the testimony above that the chair-taping incident happened. I accept the testimony of Ms. Bunston and Mr. Collins with respect to the context (including the presence of Mr. Collins' son) and the reasons that this happened. I conclude that the chair-taping incident was a verbal and visual pun, for the benefit of Mr. Collins' son, based on Ms. Bunston's reference to being "tied up" in the sense that she was busy. This is the most likely explanation of this event. I conclude that Ms. Davison, Ms. MacKinnon, and Mr. Scaravelli were merely chance passers-by, who did not have an opportunity to appreciate the full context of this event.

8) Sexual Jokes

Ms. Davison's most general allegation with respect to Mr. Collins was that he told sexualized jokes in her presence and the presence of other employees from the first year of her employment in 1995. Ms. Davison's testimony on this issue was as follows:

Q. What was it that you didn't like about the work that first year?

A. It wasn't the work that I didn't like, it was the behaviour of Mr. Collins.

[Q.] Can you describe for us what you mean by that?

A. ... what I would describe as crude jokes. ...

Q. So you've described what you said were crude jokes. Can you tell us more by what you mean by that?

A. Just what I would describe as off-colour jokes that were inappropriate for the office.

Q. What was the subject matter of the jokes, do you remember?

A. They were sexual jokes.

Q. Are you able to remember any examples?

A. I'm not good at remembering jokes in general, so no. I just remember that they made me uncomfortable.

Q. Where was he when he told these jokes?

A. In the main office area.

Q. And where was he in relation to your work space?

A. Very close in proximity. It was a very small office. So he was around my desk at the time. ...

Q. And these jokes that you heard Mr. Collins telling, who was he telling them to?

A. Well, everyone that was around. Like I said, it was a very small office, so if he was standing in the hallway, well, I guess you wouldn't say it was a hallway, in the main office area -- I mean it was like everyone's -- the rest of the cubes where the other people sat were right there and they weren't very far from my desk either, so in the main office area.

Q. And how frequently would this occur?

A. Every once in awhile, frequently enough to make me feel uncomfortable because it wasn't a one-time thing.

Q. Are you able to give us any indication, beyond what you've said, about how often it took place? "Once in awhile" doesn't give me a very clear picture.

A. I don't know. Maybe -- how many times he told jokes and how many times --

Q. Yeah. How often was it? Was it once a year?

A. No. ... It might be once a week or once every other week.

Q. And what about other people in the office. What participation, if any, did they have in this joke telling?

A. I don't remember the others specifically telling any sexual jokes of the same nature.

Q. Okay. What, if anything, did you say to anyone about these jokes?

A. I didn't say anything. I didn't think I could say anything.

Q. Why not?

A. Because he was my boss, and what am I going to say? He's my boss. He signs my paycheque. I needed the job. So I just said nothing. I just said nothing. I didn't think I could say anything to him. ...

Q. ... how would you describe the 1996 year, your second year of work at the Association?

A. At the beginning, I would say it was similar to the first year, the first half of it, anyway, and then things deteriorated. The thing is, with Mr. Collins' behaviour is, you know -- it seemed to snowball and it seemed to get more pronounced as time went on. So in 1996, once we moved to Burnside, it seemed that his behaviour got worse.

Q. What do you mean by that?

A. Well, it just seemed as though, you know, the sexual jokes and saying things to staff members, that seemed to become more frequent as time went on. ... He seemed more at ease with telling sexual jokes around the office in front of people.

Q. What participation did you, yourself, have in telling those types of jokes?

A. None.

Q. Did you participate in telling any jokes in the office?

A. No. ...

Q. How would you describe yourself, Ms. Davison, when you deal with issues such as, you know, risqué jokes and comments and things? How would you describe yourself?

A. I would describe myself as a very conservative person. I don't tell risqué jokes. I don't appreciate hearing risqué jokes. That's how I would describe myself.

During cross-examination, Ms. Davison made the following comments with respect to this issue:

A. The incidents in my complaint were the risqué jokes, and that was throughout the whole time I was there.

Q. Yeah, but you can't recall just one of those jokes as we sit here today.

A. Not specifically, no. I don't like those kind of jokes. They're not the kind of thing I would try to remember. ...

Q. So that -- and you don't know -- you can't say anything about the risqué jokes at this point in time, as to what they were, so that the --

A. They were of a sexual nature, I remember that. And they offended me.

Q. And you're saying that with -- looking back in time.

A. How else would I do it?

Q. Well, you never made any complaint of it at the time to anyone.

A. As I said before, as a single woman, I did not feel that I could bring this issue up with Bruce. I needed the job.

Q. Ms. Davison, you're not suggesting to me that you're the type of person that when you saw an issue at work that you wouldn't raise it?

A. At that time, I was that kind of person, yes. I was very timid.

Q. I see. And that changed over time, did it?

A. Well, it's changed over the years. I used to be a very shy person, growing up. I'm not as shy as I used to be, but I think -- you know, people evolve over time anyways, but the events at the NSCSA certainly, you know, changed the way that I view the world, and it -- I guess I was really naive compared to -- then as compared to now because I thought, you know, as long as I went to work and did my job to the best of my ability, that everything would be fine. And I guess that's, you know, something that I learned isn't true.

Q. So that -- getting back to break this down, the first time that you ever make anyone aware of the complaints during your first year of employment, the photograph on the computer and the risqué jokes, is after the walkout in June of 1997.

A. It had been discussed before the walkout.

Q. Discussed with whom?

A. Amongst the staff, I do believe.

Q. And who did you discuss it with in particular?

A. I can't think specifically, but I know that part of the reason for the walkout was because -- you know, it wasn't just me that thought that some of Bruce's behaviour was inappropriate.

Q. Who else made complaints about Bruce's behaviour at any time prior to the walkout?

A. Specifically? I mean -- it was a long time ago. It's hard to remember specifics, but I mean I know that one of the reasons why everyone walked out was because of Bruce's behaviour. And, you know, people that were on the walkout, when we were off the job, we discussed it. ...

Q. So the passage of time has impaired your memory with respect to the events that occurred back in 1995 and 1996.

A. As to specific dates and conversations, somewhat. I would say somewhat

Q. Or even to the substance? You can't recall the substance of the jokes that were made other than to tell us in very general terms they were sexual in nature. That's all you can tell us about that.

A. And I'm not very good at remembering jokes. Someone could tell me a joke last week, and I probably wouldn't remember it this week. It's not something I would try to remember. ...

A. [In response to a later question in the context of the barbecue] Well, I consider being -- having someone tell risqué jokes in my presence when they know that I can hear them as

being directed at me. Whether they're actually speaking to me or not, if I can hear them, same thing. ...

Q. ... you can't remember any jokes that may have been told.

A. Specific. I remember him telling jokes. I just can't remember the specifics of the jokes. ...

Q. Sure. So when you say that you remember, you don't really remember. You don't remember any specifics.

A. I remember these incidents.

Q. Yes.

A. As I've outlined them. It has been five years.

Q. Sure, and that's why it would be important to make notes of anything that was of significance at that particular point in time, so that we could --

A. I didn't know when these incidents occurred that I would need to be writing everything down because at some point in the following two years I was going to be filing a complaint with the Human Rights Commission. I don't think anybody goes to work every day and thinks, I have to make a note of what this person said or what that person says because I might need to remember that some day.

Q. Well, Ms. Davison, in June of 1997, you were making a note of just about everything that was happening --

A. Because that was after the walkout and then the whole atmosphere at the NSCSA had changed greatly by then.

Angela MacKinnon testified that Mr. Collins often told jokes that were inappropriate, although she said she couldn't remember any specifics. She characterized some of the alleged events discussed above, such as the alleged comment by Mr. Collins with respect to Mr. Barr and the closet, the simulated anal sex with respect to Mr. Scaravelli, and the chicken breast incident, as examples of Mr. Collins' sexual joking. Ms. MacKinnon made the following comments under cross-examination by Mr. Farrar:

Q. Now, with respect to your indication that you never were involved in any joking back and forth at work, is -- did I interpret your evidence correctly?

A. No, I wouldn't say I wasn't involved in joking; I wasn't involved in joking of a sexual nature or anything type of sexist jokes, or --

Q. What do you consider to be jokes of a sexual nature? Can you give me an example of a joke --

A. Well, any of the incidents like I described. I was never involved with anything like that, no.

Q. Okay, well when you talk about jokes of a sexual nature, that's what your talking about when you talk about -- you're talking about Mr. Collins with the simulating the intercourse and --

A. He was usually carrying on, yeah, it was -- I knew that it was something he thought was funny, yes.

Greg Barr's testimony with respect to sexual joking in the workplace was as follows:

Q. Did you ever hear jokes of a sexual nature in the workplace?

A. Yeah, I would say I would -- did -- yeah.

Q. Did you participate in telling those jokes?

A. I don't remember telling any but I could have. I don't recall though.

Q. Did you ever hear Ms. Davison telling any?

A. I don't think so.

Q. Did you ever hear -- recall Mr. Collins telling any?

A. Yeah, I would say. There was several individuals in the office that liked to joke and share jokes.

Q. And in addition to Mr. Collins, who else do you recall participating in -- in telling jokes of a sexual nature?

A. Probably Judy Bunston, Larry Scaravelli, Ian MacLean would joke around, Craig Falkenham. I don't know if I could say that they were of a sexual nature but he definitely likes to tell jokes and have a few laughs. So I would say that might -- what I can remember, actually.

Q. Okay. Were you personally offended by any of the jokes?'

A. No.

Q. Did any of the staff tell you that they were offended by any of these jokes?

A. Not that I recall, no.

Judy Bunston's testimony on this topic was as follows:

A. ... as far as harassment went, there was no one who told more dirty jokes in that office than I did and it seemed acceptable. I don't ever recall Karen telling a joke but I don't recall her not saying anything or -- or saying anything about being offended because I was a joke teller. It was a very relaxed atmosphere that we worked in. It was -- we were really, really busy and we had a lot of fun. It was -- it was fun to work there even though the wages weren't great. Everybody got along fairly well.

Q. So you indicated that you're a person that enjoys the odd dirty joke and likes to tell them?

A. Oh, yeah.

Q. Was that -- did that occur in your prior workplaces? I'm --

A. Oh, yes.

Q. -- thinking of the roofing --

A. Oh, yes.

Q. -- company and --

A. Yes.

Q. -- steel company. And lots of people there that would participate as well?

A. That's right.

Q. Who were the other people at the Construction Safety Association that you felt enjoyed participating in that sort of humour?

A. Well, I would say everybody did. I don't recall Karen ever telling jokes but Craig used to have his little Dilbert things and --

Q. His little Dilbert things?

A. Dilbert jokes and --

Q. I'm -- I'm talking sort of sexual -- what you describe as dirty jokes. And that's -- that's a little different than a Dilbert joke, isn't it?

A. Yeah.

Q. I'm talking about the -- the category of jokes that you've described as dirty jokes. Who were the people in the office that --

A. I would say the worst offender was me --

Q. Who was the second worst?

A. Okay. Who else told dirty jokes? Probably Bruce. I don't recall Mike or Karen ... ever telling dirty jokes. I would say the ones that told them were probably -- the top of the list would be myself and Bruce

[Q.] Did anybody ever complain, to your knowledge, about that joking?

A. No.

Myrna McQuaid gave the following testimony with respect to this issue:

Q. Let me ask you this question, prior to the walkout did you ever see Bruce do or say anything that you considered to be inappropriate in the workplace?

A. Yeah. Sometimes his jokes were a little off colour and I really didn't pay much attention. Like, whenever things got where I was uncomfortable, I walked away.

Q. And how often would that have happened?

A. Not a whole lot because I didn't -- I wasn't around. Like, I worked out there -- once Judy moved out I was there by myself.

Q. Yeah. And what sort of things would have made you feel uncomfortable?

A. Sometimes the jokes were pretty bad. I would just walk away or not comment or --

Q. And who was telling these jokes?

A. Whoever happened to be in the smoke room or outside. You know, it was different people.

Q. Is that where most -- you heard most of the jokes in the smoking room or outside?

A. Yeah.

Q. Did Mr. Collins smoke in the smoking room?

A. Yes.

Q. Who else would have been in there?

A. Well there was a lot of us that smoked at that time. So it would have been --

Q. Was Ms. Davison one of them?

A. Yes.

Q. Did she ever tell jokes to your recollection?

A. No.

Q. Pardon me?

A. No.

Q. And you say some of the jokes would be ones that made you feel uncomfortable. What was the content of the joke that made you feel uncomfortable?

A. Probably just some of the words or -- I really can't remember now. Some words I didn't like to hear and when I heard them I would walk away.

Q. Did those words have a sexual connotation? Is that what --

A. Yes.

Mr. Kelly testified that he had heard Mr. Collins tell sexually orientated jokes in the office, but that the only place Mr. Kelly overheard Mr. Collins tell that type of joke was at the management table or with a small group of management personnel during lunch. Mr. Kelly stated that he never heard Mr. Collins tell such a joke to a general audience or to the staff or in an area where there would be a mixed audience. Later in his testimony, Mr. Kelly elaborated as follows:

Q. But you did hear [Mr. Collins] tell sexually orientated jokes?

A. Yes. But Bruce probably wasn't the worst at that. There were staff members that did a lot more than Bruce did. Much more graphic.

Q. Was anyone ever spoken to about those jokes?

A. On a couple of occasions there was some suggestion that -- and not from Bruce, but it was suggested that, you know, you have to be careful with some of those issues, some of those things.

There's a lady in our office who tells a lot of jokes, Judy Bunston. And some of her jokes are a little on the risqué side or a little rough side.

Mr. Collins gave the following testimony on this issue:

Q. Would you agree that when someone is in a supervisory position they should not engage in activities that are considered offensive to their subordinates?

A. Yeah, I would agree with that.

Q. Would you agree that it would be inappropriate for a supervisor to tell sexually suggestive jokes around employees in the office?

A. Well, not necessarily.

Q. Okay. In what circumstances would it be appropriate, in your view?

A. Well, it's not whether it's inappropriate or appropriate. Your first question to me had to deal specifically with, Would I do anything that offended anybody? And I said, No, I don't think that was appropriate, and the same thing with the telling of jokes. I would quite willingly tell a joke to somebody who had told me jokes in the past, who I felt comfortable with. If I thought for a moment that someone would be offended by it, it would be inappropriate to do that.

Q. Have any employees, that you've been responsible for supervising, complained to you about jokes that you've told in a workplace?

A. No.

Q. And I take it, from other evidence, that you do enjoy telling jokes?

A. Yeah. I don't mind telling jokes. ... I like a good joke. I mean, I like a good laugh. I've got a sense of humour.

Q. But you would agree with me that there are some jokes that are fine for telling in a workplace setting and some that are not?

A. Yeah. I would agree with you that there are some jokes that are fine for telling in a workplace, some that are not.

Q. And some that are not, yeah. Where would your personal line be between the ones that are fine and the ones that are not?

A. Well, I'd have no idea. You'd have to give me an example of what you meant. I am not offended by a whole lot of things. So -- and also it would be dependent certainly on the

environment. If you were in my office with the door shut and you told me a joke and I may find it funny, I may not. If you stood up in front the workplace and told the same joke, I might think that would be inappropriate. It depends on who was there and what the conditions were and what the environment was like and those kinds of things.

Q. So you make an assessment of who the people are that are going to hear it?

A. Well, I don't think I readily make an assessment. I think you develop a rapport with people and sometimes you know inherently what's right and what's not right; or what's right and what's wrong. And I certainly wouldn't sit down with my 11-year-old and tell him some jokes that I might feel very comfortable talking to Mike Kelly with or someone at this table, or somebody else. It just depends.

Q. When did you first find out that there were employees at the Construction Safety Association that found some of the jokes you told offensive?

A. I found out at the airport on May 29th, 1997.

Q. And who met you at the airport?

A. The -- some representatives of the board of directors -- in recollection, I believe it was Roddy McLellan, Don Thornton, and Jack Osmond. There may have been one more present, but I can't recall.

Q. And what did they tell you at that time?

A. They told me we had problems at the workplace.

Q. Did they tell you what the problems were?

A. They told me that there was series of charges that had been made against me. They were -- some of them were management-related. The majority were financial, and there were some harassment issues. I asked them specifically what those issues were. They told me they preferred not to talk to me about those. That they were engaging in an investigator and he would ask me questions. ...

Q. So after [a meeting in October, 1997] when the Board approved you, did you from that point forward conduct yourself any differently than you had prior to the walk-out?

A. Absolutely.

Q. And in what ways? ...

A. ... I certainly don't tell jokes to anybody, I'll tell you that, ever. In the workplace, with the exception of the management group, most of whom have been with me for -- some as long as eight years and I think the most least one is five years. I feel very comfortable with them ... .

Q. ... the question I have for you is did you ever tell off-colour, risqué jokes in the presence of Karen Davison?

A. I may have.

Q. Okay. And did you have any indication that she was upset or offended by them?

A. No.

Q. Did anybody prior to the walk-out tell you they were upset or offended by any of the jokes you told in the workplace?

A. No. Not that I -- no.

Q. Did anyone ever tell you they were embarrassed by some of your humour?

A. No.

Q. If they had, what would you have done?

A. I would have apologized to them.

Q. Would you have stopped saying those things?

A. Certainly in their presence, yes.

Q. And do I understand from your earlier evidence that you no longer tell those jokes except in a very small circle?

A. Well, that's true.

On cross-examination, Mr. Collins made the following comments:

> Certainly to choose one person in that organization, being me, regardless of my position as general manager, about talking about jokes that would make [Karen Davison] feel uncomfortable, I mean, to me was like, you know, putting your hand in the bucket and pulling out me. Everybody was telling jokes for the most part. Not every single person in the building. But joke-telling was not something that was unique to me.
>
> We moved Craig [Falkenham] from the cubicles to a private office to cut down the conversations going back and forth over the cubicles between he and Angela. Karen Davison sat in the middle of them. The conversations that went back and forth between them were not jokes about Dilbert. They were laced with sexual innuendo. ...
>
> ... I sit back and I look at the essence of these complaints. The essence of them. And I'm thinking that me and others telling jokes, if they were inappropriate and if they were offending, they could have been stopped in two minutes by mentioning that to somebody. That's what I believe. I don't think it's a big deal.

During his second time on the witness stand, under direct examination by Mr. Farrar, Mr. Collins stated:

> ... did I knowingly or unwittingly harass anybody? The answer to that question is absolutely, categorically no. It never happened. Do I like to tell jokes? Sure. I like to hear them, too. And I heard plenty of them. Did I ever tell a joke that for which its intent was to hurt or embarrass anybody? No, it's not my nature.

After careful consideration of the evidence before me, it seems clear that Mr. Collins did tell sexual jokes in the workplace on numerous occasions, and in the presence of Karen Davison and other employees, despite the fact that the various

witnesses could not recall the exact nature of most of these groups. In making this finding, I am influenced by the fact that on the basis of the testimony before me, Mr. Collins seems to have perceived many of the incidents of sexualized behaviour or comments which I have already held to exist (distribution of a print-out of the Internet picture of a naked woman, the crotch/photo incident, the chicken breast incident, the birthday incident and the comment to Ms. Bunston about getting laid) to be jokes. I conclude that these are the most startling and extreme examples of Mr. Collins' joking, which stood out in the witnesses' memories precisely for this reason. A conclusion that Mr. Collins also engaged in less memorable and unusual joking, where the details would not be recalled by the witnesses in the ordinary course of things, is consistent with the testimony of all the witnesses reproduced above, including that of Mr. Collins.

I will analyze and decide whether this pattern of sexual joking, and the other incidents discussed above, do or not constitute sexual harassment under the Nova Scotia *Human Rights Act* in the next segment of this decision.

c) Did the Events Constitute Sexual Harassment?

1) The Nature of "Sexual Annoyance" Sexual Harassment

The definition of sexual harassment in the Nova Scotia *Human Rights Act* in section 3(o) has three branches. The one that is relevant for our purposes is section 3(o)(i) which provides as follows:

> 3 In this *Act*, ...
>
> (o) "sexual harassment" means
>
> (i) vexatious sexual conduct or a course of comment that is known or ought reasonably to be known as unwelcome ...

A Nova Scotia Board of Inquiry in *Wigg v. Harrison, [1999] N.S.H.R.B.I.D. No. 2 (N.S.B.O.I.)* made the following statements with respect to the nature of sexual harassment under section 3(o), at paras 74-83 and 85-86:

> 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* ... defined sexual harassment in the workplace at p.1284 [D/6277, para. 44451] as:
>
> > ... unwelcome conduct of a 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*, ... quote with approval at D/6224 the definition of sexual harassment from *Sexual Harassment in the Workplac*e (Toronto: Butterworths, 1987) by Arjun P. Aggarwal at 1:

> Sexual harassment is 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*, ... 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 by the *Wigg* tribunal].

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*, ...

> 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* ...

> 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 personne) 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 added by the *Wigg* tribunal)

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

> 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 by the *Wigg* tribunal.]

Dixon, C.J. [*sic*], went on to say in *Janzen* ... 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 [*sic*] finds guidance in the works of the learned author Arjun P. Aggarwal revised text *Sexual Harassment in the Workplace* (Butterworths) 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. ...
>
> 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 sexually harassed in the last twelve-month period of their employment.

...

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."

¶ 86 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.

The authors of the latest edition of the leading text on sexual harassment law (A. P. Aggarwal & M.M. Gupta, *Sexual Harassment in the Workplace* (3rd edition at p. 14)) identify two broad categories of sexual harassment, which they call sexual coercion and sexual annoyance. Section 3(o)(i) of the Nova Scotia *Human Rights Act* applies to the "sexual annoyance" category, which Aggarwal and Gupta define as follows, at p. 14:

> 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.

Aggarwal and Gupta note that sexual harassment can take the form of verbal behaviour, gestures and other non-verbal behaviour, visual sexual harassment, physical behaviour, psychological sexual harassment and electronic (e-mail) harassment. They provide extensive lists of unacceptable behaviours in each category that may constitute sexual harassment. Excerpts from these lists that are relevant for our purposes are found below (Aggarwal *et al.*, *supra*, at pp. 14-17) [emphasis added]:

1. VERBAL BEHAVIOUR

Listed below are examples of unacceptable verbal behaviours that may constitute sexual harassment. <u>The behaviours listed below do not necessarily have to be specifically directed at the victim to constitute sexual harassment</u>:

- continuous idle chatter of a sexual nature and graphic sexual descriptions;
- offensive and persistent risqué jokes or jesting, and kidding about sex or gender-specific traits; ...
- comments of a sexual nature about weight, body shape, size or figure; ...
- innuendoes or taunting;
- unwelcome remarks;
- rough and vulgar humour or language;
- jokes that cause awkwardness or embarrassment;
- gender-based insults or sexist remarks;
- comments about a person's looks, dress, appearance, or sexual habits
- inquiries or comments about an individual's sex life and/or relationship with sex partner;
- remarks about a woman's breasts, buttocks, vagina, and her overall figure ... .

2. GESTURES AND OTHER NON-VERBAL BEHAVIOUR

Gestures are movements of the body, head, arms, hands and fingers, face, and eyes that are expressive of an idea, opinion or emotion. Non-verbal behaviours are actions intended for an effect or as a demonstration. Gestures and non-verbal behaviours generally do not involve physical contact. Some gestures are intended only to get the attention of the victim, while others are intended to provoke a reaction from the receiver. Listed below are examples of unacceptable gestures and non-verbal behaviours that may constitute sexual harassment:

- sexual looks such as leering and ogling with suggestive overtones; ...

- holding or eating food provocatively;
- lewd gestures, such as hand or sign language to denote sexual activity ... .

3. VISUAL SEXUAL HARASSMENT

This includes:

- display of pornographic or other offensive, derogatory and/or sexually explicit pictures, photographs, cartoons, drawings, symbols, and other material
- display of girlie magazines;
- showing of pornographic or sexually explicit movies or slides;
- sexual exposure, such as dropping down pants in view of female employees.

4. PHYSICAL BEHAVIOUR

Unwanted physical contact can range from offensive conduct to criminal behaviour. One employee may feel that the physical contact is sexual harassment, while another may dismiss it as an annoyance.

The examples of behaviours listed below involve *actual physical contact* with the victim [emphasis in the original]. Some of these behaviours are explicitly sexual in nature, some may be accidental:

- touching that is inappropriate in the workplace such as patting, pinching, stroking or brushing up against the body;
- hugging;
- cornering or mauling
- invading another's "personal space";
- attempted or actual kissing or fondling;
- physical assaults; ... .

5. PSYCHOLOGICAL SEXUAL HARASSMENT

[None of the examples under this heading are relevant to this case]

6. ELECTRONIC (E-MAIL) HARASSMENT

[Not directly relevant for our purposes on the face of the text, since the authors assume for purposes of this heading that there is no direct visual, verbal, or physical contact between the harasser and the victim, and that contact is only by email. However, one of the examples given has some relevancy]:

- display of pornographic or other offensive, derogatory, and/or sexually explicit pictures; ...

In the context of employment, the common element among all these diverse examples of sexual harassment is that they all involve the sexualization of the workplace. The purpose of the sexual annoyance branch of sexual harassment law is to protect employees against having to endure the sexualization of the workplace as a term or condition of employment.

Although the examples given above are usually framed in terms of heterosexual sexual harassment of women by men, Aggarwal and Gupta, *supra*, also note at pp. 103-104 that [footnotes omitted]:

> Thus, it is obvious from a review of the few Canadian same-sex cases that there is little controversy in the Canadian legal profession over whether same-sex sexual harassment is sexual harassment. The issue of the harasser's gender and or sexual orientation was not raised nor discussed in these cases. So long as the conduct of the harasser was sexual in nature and offensive and unwanted, such conduct amounted to sexual harassment irrespective of the harasser's gender or sexual orientation. Same-sex sexual harassment is simply afforded the same treatment as opposite sexual harassment.

Given the language of section 3(o)(i) of the Nova Scotia statute, it appears that the sexual harassment issue in this case must be analyzed with respect to four separate requirements, namely: a) the conduct or comments in question must be sexual in nature; b) there must be "sexual conduct or a course of comment"; c) that is vexatious; and d) that is known or ought reasonably to be known as unwelcome. I will discuss the legal requirements with respect to each of these issues separately below.

2) Sexuality

For behaviours to constitute sexual conduct, or a sexual course of comment, there must be some element of sexuality associated with them before they can be held to constitute sexual harassment, although relief may be found with respect to non-sexual forms of gender discrimination under the general sex discrimination provisions of the *Act*, as I have noted during my analysis of the allegation against Mr. Kelly.

All the incidents that I have found took place, as a question of fact, *supra*, contain obvious elements of sexuality , with one exception, namely the chair-taping incident. I conclude that, on the facts as I have found them above, this incident involves no element of sexuality. The only way that an element of sexuality could be injected into this incident would be if it were equated to sexualized bondage. No party in these proceedings suggested such an analogy, and they were quite right not to do so. I refuse to draw any such inference of sexuality.

Ms. Davison apparently considered this situation to be an incident of gender harassment which she considered degrading to women. However, I held in my findings above that Ms. Davison was not fully aware of the context of this incident, namely that it was a verbal and visual pun to entertain Mr. Collin's son, based on Ms. Bunston's statement on the telephone that she was tied up at the time. I conclude that this incident does not constitute gender discrimination either. As a result, Mr. Collins is not liable in any way under the *Human Rights Act* with respect to this incident.

3) Sexual Conduct or a Sexual Course of Comment

As indicated earlier during the discussion of the gender harassment complaint against Mr. Kelly, the Board of Inquiry in *Miller v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433 (NSBOI), ruled at para. 125 that under the definition of sexual

harassment in section 3(o)(i) of the Nova Scotia *Human Rights Act*, only one act of sexual conduct is required to satisfy this requirement of the act, but with respect to sexual comments, "there must be some degree of repetition of unwelcome sex-based comment or comments of a sexual nature in order to constitute sexual harassment." The "course of comment" requirement applies to what Aggarwal and Gupta have characterized as "verbal behaviour" in the excerpt from their text reproduced *supra*, so that more the one such incident of sexualized comment would be required to hold a respondent liability for sexual harassment.

The incidents where I have found, as a matter of fact, that the sexualized conduct or comments actually took place, all satisfy the *Act*'s requirement with respect to the number of incidents, when analyzed within the framework of categories from the Aggarwal and Gupta text, quoted *supra*.

Only one example of the behaviour in question is required with respect to the following Aggarwal and Gupta categories: Gestures and Non-Verbal behaviours, Visual Sexual Harassment, and Electronic Display of Sexually Explicit Pictures. One or more of these categories would apply to all of the following incidents in this case: the internet picture of a naked woman incident; the crotch grabbing incident at the barbecue; Mr. Collins being "grabby" with respect to Suzanne Myette; the incident where Mr. Collins pushed a male employee up against a wall at the barbecue and referred to him taking it like a man; and the incident where Mr. Collins grabbed Mr. Scaravelli's hips and simulated anal sex. The crotch-grabbing incident and the "up against the wall" incident also involved verbal comments that are relevant to the question of whether there was a sexual course of comment.

With respect to verbal sexual comments, section 3(o)(i) of the Act requires some degree of repetition for a finding of sexual harassment to be possible. I hold that, taken together, Mr. Collins' verbal comments accompanying his gesture with respect to his crotch, Mr. Collins' verbal analogies between chicken breasts and women's breasts at the barbecue, the "take it like a man aspect" of the "up against the wall episode at the barbecue, the reference to Ms. Bunston "getting laid", and Mr. Collin's ongoing pattern of sexual joking constitute a repetitive pattern of sexual comment that satisfies the requirements of this aspect of section 3(o)(i) of the *Act*.

4) Vexatiousness

Even where there is sexual conduct, or a course of sexual comments, section 3(o)(i) requires that this behaviour be "vexatious". the Board of Inquiry in *Miller v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433 (NSBOI), at paras. 127-129, explains the nature of the vexatiousness requirements as follows [emphasis added]:

The Meaning of Vexatious: The Subjective Test

What is meant by the word "vexatious" in paragraph 3(o)(i) of the Act? The Board in *Broadfield* [*v. De Havilland/Boeing of Canada Ltd.* (1993), 19 C.H.R.R. D/347 (Ont. Bd. Inq.)], quotes *Cuff v. Gypsy Restaurant*, *supra*, in para. 31527 to define the word 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:

> "Vexatious" is defined by the Concise Oxford dictionary as "annoying" or "distressing" ... 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 (D/366).

Chief Justice Dickson underlines in *Janzen* [*v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252], that all women in the workplace need not be discriminated against for a finding of discrimination:

> The fallacy ... is the belief that sex discrimination only exists where gender is the sole ingredient in the discriminatory action and where, therefore, all members of the affected group are mistreated identically. While the concept of discrimination is rooted in the notion of treating an individual as a part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group (p. 1288).

Further, as conduct only constitutes sexual harassment when it is unwelcome, conduct acceptable to one woman may be unwelcome by another. Where certain female employees are exposed to conduct of a sexual nature and do not find it offensive due to a consensual relationship or where they hold a different threshold of acceptability, this does not render the conduct any less discriminatory to those who are embarrassed, intimidated, demeaned, frightened or humiliated by the actions and comments of the perpetrator.

Thus, the fact that Ms. Bunston, for example, not only consented to exchanges of sexual jokes with Mr. Collins, but enjoyed sexual jokes so much that she engaged in them herself, does not prevent other women or men at the NSCSA who subjectively found Mr. Collins' sexualized conduct or comments subjectively annoying, distressing, embarrassing, intimidating, demeaning, frightening, or humiliating from succeeding with a sexual harassment claim.

It is clear from the witness testimony I reproduced above that at least one woman or man testified, with respect to all the incidents identified as factual above, that she or he subjectively found Mr. Collins' conduct or comments vexatious in the sense defined above.

Ms. Davison testified that she found the incident involving the internet photograph of a naked woman "shocking".

With respect to the crotch grabbing/photo incident, Ms. Davison testified that she found it "very distasteful" and that it made her feel "icky".

With respect to the chicken breast incident, Ms. Davison was "shocked" and "very embarrassed" by Mr. Collins' comments. Craig Falkenham testified that the employees at the table where the incident took place "were just looking around and just laughing like, oh my God, I can't believe he said that. Angela MacKinnon testified that she was "offended" by the comments.

With respect to Mr. Collins' grabbing Ms. Myette during the dancing, the fact that Ms. Myette "wriggled away" indicates that she found this vexatious, as does the fact that she testified that a couple of male employees were trying to protect her "because they knew I was uncomfortable when he had done that with me."

From the testimony with respect to the up against the wall/take it like a man incident, it is possible that Mr. Falkenham did not find this incident vexatious, since he chuckled at the time, and did not recall the incident during his testimony, but Ms. Myette who observed it did find it vexatious since she testified that she found it "a bit unusual and inappropriate" as a reference to "a homosexuality sexual act".

With respect to the birthday/simulated anal sex incident with respect to Larry Scaravelli, Ms. Davison stated that she found the incident "disgusting". Mr. Scaravelli stated that his reaction was "A bit of shock, disbelief, extreme embarrassment".

With respect to Mr. Collins' comment that he hoped Ms. Bunston "got laid" on the weekend, Ms. Davison testified that "They may have thought it was funny. I certainly didn't."

With respect to Mr. Collins' generalized pattern of sexual joking, Ms. Davison described these "risqué" jokes as inappropriate, and said they made her uncomfortable. Ms. MacKinnon also characterized the jokes as inappropriate. Mr. Barr testified that he was not personally offended by these jokes. Ms. Bunston was also not offended. Ms. McQuaid testified that some of the sexual words in Mr. Collins' sexual jokes made her uncomfortable.

I accept the testimony of all the witnesses referred to above who testified that Mr. Collins behaviour with respect to one or more of the incidents made them subjectively uncomfortable, and conclude that all the witnesses in question found such conduct or comments subjectively vexatious, as required by section 3(o)(i) of the *Act*. At least one witness found each of the incidents described above vexatious, which means that section 3(o)(i)'s vexatiousness requirement is met for all these incidents. The vexatiousness requirement does not require that the behaviour in question be directed at the individual who found the conduct or comments vexatious. The fact that some witnesses did not find the behaviours in question subjectively vexatious does not affect the outcome, since, as noted above, the vexatiousness requirement does not require that all observers

experience subjective vexation. It is enough that one or more observers does experience such vexation, and that was the case for all the incidents here.

I reject the implication of certain comments and testimony of the Respondents that the witnesses were lying when they testified that they found these behaviours subjectively vexatious, and that this testimony was a product of the conflict between the critics and loyalists within the NSCSA, rather than a reflection of a genuine subjective response to the events in question. This allegation was based on the fact that none of these witnesses complained before the date of the walkout in June, 1997. I find as a matter of fact that these witnesses did not complain about genuine subjective experiences of vexatiousness because they were subjectively afraid for their jobs at the NSCSA if they objected to the sexualized behaviours of Mr. Collins, who was effectively the CEO of the NSCSA, as well as the most powerful individual within the organization.

The relevance of a failure to complain will also be discussed in the next section of this analysis, which addresses section 3(o)(i)'s requirement that sexual conduct or a sexual course of comment is "known or ought reasonably to be known as unwelcome".

5) Unwelcomeness

Mr. Collins repeatedly stated during his testimony that he did not intend to offend anyone by his conduct. Even if I were to accept Mr. Collins' testimony on this point, this would not assist Mr. Collins, because unwelcomeness is determined using the objective standard of whether a reasonable person would consider the comments or conduct in question to be unwelcome.

Section 3(o)(i) of the Nova Scotia *Human Rights Act* states that sexual harassment exists where vexatious sexual conduct or a sexual course of comment "is known *or ought reasonably to be known* as unwelcome" [emphasis added]. The words "ought reasonably to be known as unwelcome" indicate that the standard is that of the reasonable person.

The Board of Inquiry in *Wigg v. Harrison, [1999] N.S.H.R.B.I.D. No. 2 (N.S.B.O.I.)* discussed the nature of the unwelcomeness requirement imposed by the words "ought reasonably to be known" in section 3(o)(i) of the Nova Scotia *Human Rights Act* at paras. 93-95, 98-99, and 103-105 of its decision:

> ... 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.
>
> ¶ 94 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* [*v. Canada (Treasury Board),* [1987] 2 S.C.R. 84 at 92 [8 C.H.R.R. D/4326] 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 in *Wigg*.]

¶ 95 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). *Mickey* 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 [*v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433 (NSBOI]]. ...

Unwelcomeness

> ¶ 97 What is meant by "unwelcome" in paras. 3(o)(i) and 3(o)(ii) of the Nova Scotia *Human Rights Act*. ...

¶ 98 At p. D/447 in *Miller* [*v. Sam's Pizza House*] ..., "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 responses signal unwanted or unwelcome behaviour." ...

¶ 99 At p. D/447 in *Miller* [*v. Sam's Pizza House*]:

> 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. ...

¶ 103 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 in *Wigg*] 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.

> ¶ 104 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 [emphasis added in *Davison*]. 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.
>
> ¶ 105 Proof of intention to discriminate is also not necessary according to the Supreme Court of Canada in *Robichaud* ... to establish a case of sexual harassment under this paragraph. The issue of intent arose in *Lampman v. PhotoflairLtd.* (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...

In the Aggarwal and Gupta text (A. P. Aggarwal & M.M. Gupta, *Sexual Harassment in the Workplace* (3d edition), the authors make the following comment about the reasonable person standard in "sexual annoyance" sexual harassment cases at pp. 131-132) [footnotes omitted]:

> Of course, ... in determining whether harassment is sufficiently severe or pervasive to create a "hostile or poisonous" environment, the harassers' conduct should be evaluated from the objective standard of "reasonable person". However, the objective standard should not be applied in a vacuum. The adjudicators should give consideration to the context in which the alleged harassment took place. The trier of fact must "adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstance."
>
> At the same time, the "reasonable person" standard should consider the victim's perspective and not stereotypical notions of acceptable behaviour. For example, the workplace where sexual slurs, displays of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant.

The incidents alleged to be sexual harassment in this case (which took place from 1995 through the first half of 1997) took place six to 8 years after the Supreme Court of Canada ruled definitively in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, that sexual harassment constituted sex discrimination. (There were, of course, a variety of tribunal and lower court decisions discussing sexual harassment before the issue finally reached the Supreme Court of Canada.) Sexual harassment has also received considerable attention in both the

general media and in professional or business publications during this time. As a result, awareness that many people of both genders find sexualized behaviour unwelcome and unprofessional has increased substantially, both among the general population, and within the business community.

Confirmation of this growing social awareness about sexual harassment can be found in an empirical study discussed by Aggarwal and Gupta (3d ed.), *supra*, at p. 18, which found, *inter alia*, that that sexual teasing, jokes and remarks by a supervisor were considered to be sexual harassment a) by 52% of female respondents in 1980, 72% of female respondents in 1987, and 83% of female respondents in 1994, and b) by 53% of male respondents in 1980, 58% of male respondents in 1987, and 73% of male respondents in 1994. At page 2 of their text, Aggarwal and Gupta also reproduce data from the same study that demonstrate that in response to unwelcome sexual attention, only 13% of women and 8% of men reported the behaviour to a supervisor or other official, and only 13% of women and 5% of men threatened to tell or told others of the behaviour in question.

I conclude that any reasonable person would be aware by 1995 that a significant number of individuals in our society find sexualization of the workplace unprofessional, unacceptable and unwelcome. A reasonable person would also be aware by 1995 that inequalities of power in the workplace, and the strong negative reactions that many managers display toward allegations that their behaviour constitutes sexual harassment, may cause some employees to remain silent and not express the fact that they find sexualized behaviour unwelcome when the sexualized behaviour in question is that of a manager, such as Mr. Collins, who has significant power with respect to their employment.

If anything the general awareness of such issues by a reasonable person who is a senior manager, such as Mr. Collins, would be greater than that of a reasonable person in the general population. A reasonable senior manager such as Mr. Collins would appreciate that s/he may have to address sexual harassment as a human resource issue, and that, as part of his or her job, s/he would educate himself or herself about the nature of sexual harassment. A reasonable senior manager would also appreciate the power that s/he wields over the employment of more junior managers and ordinary employees, and that such inequalities of power would make employees and junior managers reluctant to challenge the senior manager, directly or indirectly, with respect to unwelcome sexualized behaviour on the part of the senior manager, out of fear that they will suffer negative job consequences as a result.

The general reasonableness analysis above would be sufficient, in and of itself, to dispose of the unwelcomeness issue with respect to the sexual harassment allegations in this case. I find that a reasonable senior manager in Mr. Collins' position would: a) appreciate that a significant number of employees in Canada find any sexualized behaviour in the workplace to be unwelcome and

unprofessional; b) that it was highly likely some employees at the NSCSA would fall into this category; c) that such employees would find sexualized behaviours on the part of Mr. Collins to be offensive and unwelcome, even when Mr. Collins himself considered them to be humorous; and d) that employees who did find such sexualized behaviours unwelcome would be unlikely to complain about them because of the power that Mr. Collins had over their jobs.

More specifically, I find that a reasonable person with Mr. Collins' senior management responsibilities, would have appreciated by 1995 that the particular sexualized behaviours by Mr. Collins that are still at issue in this case, namely, i) the display and distribution of the Internet picture of a naked woman, ii) the crotch grabbing episode at the barbecue, iii) the chicken breast incident at the barbecue, iv) grabby behaviour with respect to Ms. Myette in the context of dancing at the barbecue; v) the up against a wall/take it like a man episode at the barbecue, vi) the simulated anal sex at the birthday party, vii) the "getting laid" comment, and viii) the ongoing pattern of sexual joking, would be unwelcome to an employee or employees who observed them.

More specifically, I note that the objective standard is relevant, in the context of the barbeque, where it is arguable, and I so find, that the excessive amount of alcohol that Mr. Collins had consumed, for understandable reasons, had severely impaired Mr. Collins' actual, subjective awareness of events, including the possibility that his behaviour was unwelcome to the employees on the receiving end of it. Even under these conditions, Mr. Collins' behaviour can be held to constitute sexual harassment, because a reasonable senior manager would not consume so much alcohol at a social occasion involving staff that his/or her awareness of the possibility that his or her sexually-related behaviour was unwelcome would be impaired.

There is, however, evidence that suggests that Mr. Collins may have <u>actually</u> been aware that some or all of his sexually oriented behaviour might well be unwelcome to employees at the NSCSA. This can be found in Exhibit 18, the letter from Mr. Stuewe, the CEO of the Nova Scotia Workers' Compensation Board (WCB) to Mr. Collins, dated December 17, 1993, that was mentioned in my discussion of the similar fact evidence issue above. The relevant portions of Mr. Stuewe's letter are as follows:

> Dear Bruce:
>
> You are aware an investigation has been conducted into complaints received from Robert Moffatt concerning your conduct towards him over an extended period of time. The investigation is now complete and I am writing to advise you of the conclusions I have reached and the decisions I have made. ... [other criticisms deleted]
>
> Your general demeanour includes a light-hearted sexual component. This is known and understood by your peers though not always appreciated, as some comments can be offensive to certain groups and individuals. However, a sexual comment can easily be mistaken in a power relationship such as exists between supervisors and subordinates.

When sexual innuendos are added to a professional relationship, especially one that is not otherwise working well, the mix can be particularly destructive. It is clear now that you will have to eliminate this component from your behaviour in the workplace and with your colleagues and subordinates.

Your behaviour has had a serious impact on Robert. Further, your use of sexual comments as part of this treatment has raised the question of sexual harassment. Given your general demeanour and the recognition that there was for some time in your department regular "personal chatter" and "off colour" remarks, I am of the view that the comments attributed to you by Robert were certainly inappropriate, but not intended as a proposition. Your comments may have been intended to shock or intimidate Robert, which is absolutely and totally inappropriate behaviour between a supervisor and a subordinate.

It has been recognized by those you work with, and even by Robert, that you have recently been trying to change your ways, and improve your management approach. You are to be applauded for your efforts, but you must understand that the elimination of abusive and intimidating behavior from your way of dealing with people must be complete and immediate, as must be the elimination of all sexual comments.

Specifically, the following will occur effective immediately: ...

3. Sexual comments in the workplace (or made to other employees outside the workplace), even ones made in a joking manner, must be understood by you to be inappropriate and unacceptable, and must cease immediately.

I will be watching very closely to see whether you are accomplishing these objectives. I want to make it very clear that these objectives must be achieved quickly and the new way of managing and behaving sustained in order for there to be any prospect for you as a member of management here. Indeed, any recurrence of abusive or intimidating behaviour, or any inappropriate sexual comments, will lead to your immediate dismissal.

Please feel free to discuss this with me at your convenience.

If Mr. Collins actually received Mr. Stuewe's letter, and read the contents reproduced above, it is clear that he would actually be aware that the kind of sexualized behaviours that he engaged in at the NSCSA were likely to be unwelcome to at least some employees.

Mr. Collins was absent for personal reasons at the time when Exhibit 18 was received in evidence. At a later stage of the hearings, counsel for the Respondents recalled Mr. Collins as a witness, and Mr. Collins gave the following testimony:

Q. Okay. Now if you look at exhibit number 18. ... This is a document addressed to you and signed by David Stuewe from the Workers' Compensation Board. ... When did you first see this letter?

A. I saw it at 10 to 2 yesterday afternoon when you handed it to me to review it.

Q. Had you ever seen it prior to that time?

A. No, I did not.

Q. Where were you on December 17th, 1993? Were you still working at the Workers' Compensation --

A. No, I had left my employment with the Workers' Compensation Board on December 15th, 1993.

Q. I note that this letter is not addressed to your address. Were you into the Workers' Compensation Board after December the 15th, 1993?

A. I was in the office to sign a severance agreement, confidentiality agreement and to pick up a cheque sometime, I believe, in the week between Christmas and New Years. I'm not sure the exact date, but it was in that vicinity somewhere. ...

Q. Okay. Now if you'd turn to Exhibit 19 [a letter from Mr. Stuewe to Mr. Collins dated January 7, 1994, and containing terms of a severance arrangement between Mr. Collins and the WCB], do you recognize that document?

A. Yeah, I do.

Q. And I note that this is addressed to PO Box 323 Shubenacadie, Nova Scotia.

A. Yes.

Q. Is that your post office box?

A. Yes.

Q. Did you receive this at your address or did you receive it by hand as indicated on the letter?

A. I received it by hand at the Workers' Compensation Board office. I didn't receive it on January 7th, either. I received it -- it was dated on January 7th, so I would not be taxed in that fiscal year '93 and that money would be part of my taxable income in the fiscal year 1994. That was part of the negotiated agreement. I'd already accepted other employment prior to the 15th of December. I accepted another job sometime the first week of December.

Q. And what was that job?

A. The job that I currently hold.

Q. Now with respect to the Exhibit number 18 -- ... Prior to reading this letter, what information had been provided to you by Mr. Stuewe or anyone else with respect to allegations or suggestions of sexual harassment by Mr. Moffatt?

A. In the early part of 1993, and I'm going -- you know, it's 11 years ago so I would think it would be sometime February, March or April, I was called into a meeting at David Stuewe's office and introduced to a lawyer whose name I don't recall. ... I was told that he was a forensic specialist and he had been carrying out an investigation at the Board in response to complaints.

Now quite frankly, I thought I was being called in there and they were telling me this information in my capacity as either executive corporate secretary or director of public affairs. And when I asked for more details, David told me it had to do with me. That was quite a shock to me at that particular point in time.

And when he explained that is was with respect to Robert Moffatt, he told me that there had been an ongoing investigation for some period of months, I think three or four months, that that investigation had been completed. But there were going to be problems with respect to Robert's and mine's relationship in the future.

They asked me to respond to a bunch of things, which I did. And between that period and the period that I left, I must have asked David on, I don't know, 30 occasions what he was going to do about the process. ...

In the second or third week of December, David approached me one Friday afternoon and he wanted to have a chat. He wanted me to give up my responsibilities as director of public affairs and do the duties of executive corporate secretary only. ... I didn't want to be seen by anybody as anything being taken away. So I decided to leave and take a constructive dismissal action with the Board, which is what I did.

So I did not formally accept [the NSCSA] job until I completed the negotiations on severance, which were very amicable. There was a lawyer appointed by the Board to negotiate with me. We spent, I think, two phone calls. We reached an amiable agreement. My relationship with the Board after I left continued to be good. The Board hired me in January and February of 1994. David Stuewe did.

Q. For what purpose?

A. To write a summary of legislative and policy review. I believe they paid me somewhere in excess of 3, 4 or $5,000, in that vicinity, for carrying out that work. So when I left there was no great animosity between anybody. And I can tell you right now if someone had given me this letter, there is no way on earth I would have done anything for them. I wouldn't have written a policy review. They could take their money and shove it. I wouldn't have done it. ...

In other words, during examination in chief by Mr. Farrar, Mr. Collins denied ever receiving or reading Exhibit 18, based on the proposition that he had left his job on December 15, and this letter was dated December 17, and addressed to Mr. Collins at the WCB instead of at his home address. I note that Exhibit 19, the severance agreement, states that Mr. Collins' employment with the WCB terminated December 31, 1993, but there is no need to resolve this issue in the light of other testimony given by Mr. Collins. I note that in the examination in chief by Mr. Farrar reproduced above, Mr. Collins clearly states that he received the severance letter and the severance cheque by hand at the WCB office, instead of through the mail to his home address, which was the address on this letter.

During cross-examination, the following dialogue between Mr. Collins and counsel for the Commission Mr. Collins is more specific on this point.

Q. And then in December of 1993, do you know when you actually met with Mr. Stuewe and signed this document? I can get it out if you wish, it's Exhibit 19. It's the severance arrangement that ... you signed. ...

A. No, it wasn't signed in January. It was dated in January, as was the cheque.

Q. When was it signed, do you know?

A. It was signed, say, on the 27th of December, maybe.

Q. And was Mr. Stuewe with you when you signed it?

A. Yeah. He and I and Dr. [Elgie].

Q. And at that time, was there any discussion of the issues that you see referred to in Exhibit 18 which is the December 17th ... letter?

A. No, there wasn't. ...

Q. Uh-huh.

A. ... And I accepted -- in order to accept the money, I could not have accepted the [NSCSA] employment. I got the cheque at 10:30 in the morning and I accepted the job at noon. And I negotiated with that with the people. And I gave them a verbal acceptance and I said I wasn't accepting or responding to the letter until after I completed some negotiations I had to complete with the Workers' Compensation Board.

Q. So the acceptance of the Construction Safety Association position was in late December, was it? ...

A. Formally, yes. ... I went to work -- my first day of work there was on December 27th, on that day. Because I went from that meeting, I deposited that cheque and I went to work.

Even if I were to accept Mr. Collins' testimony that his departure from the WCB had nothing to do with the issues described in Exhibit 18 and that he actually left the WCB on December 15, instead of at some later date, I cannot accept and do not believe Mr. Collins' testimony that the management of the WCB never provided him with a copy of Exhibit 18. This seems inherently improbable and unlikely. I conclude that the WCB must have provided Mr. Collins with a copy of this letter, by mailing it to his home address (despite the workplace address on the face of the letter), or by providing a copy of the letter during the severance negotiations, or by handing Mr. Collins a copy when, according to Mr. Collins' own testimony, he came to the WCB on December 27, 1993, to sign the severance agreement and to receive the severance cheque. I conclude that Mr. Collins statements that he did not receive a copy of Exhibit 18 from the WCB are self-serving and misleading testimony similar to the other self-serving and misleading testimony that I discussed in my more general discussion of the WCB evidence above.

I have concluded that Mr. Collins did receive a copy of Exhibit 18. As noted in my earlier analysis with respect to the unwelcomeness issue, if Mr. Collins actually read Exhibit 18 after he received it from the WCB, Mr. Collins would be actually and subjectively aware that his sexualized behaviour at the NSCSA might well be unwelcome to some employees.

It is possible, however, that Mr. Collins' statement in his testimony above that he did not <u>read</u> Exhibit 18 until the day before his second set of testimony in this hearing is accurate. It is apparent from a number of places in Mr. Collins' testimony, including his testimony with respect to Exhibit 18 reproduced above,

that Mr. Collins tends to put off reading at least some documents that he expects to be painful, unless some other person (Mr. Farrar, in this case, on the day before Mr. Collins testimony with respect to this document) compels him to do so. I have some sympathy for this reaction on the part of Mr. Collins, but even were I to make a finding that Mr. Collins received but did not read Exhibit 18 in 1993, this would not assist Mr. Collins with respect to the unwelcomeness issue.

Even if Mr. Collins himself did not actually read Exhibit 18 when he received it, and so did not benefit subjectively from the insights this letter provides with respect to the riskiness of potentially unwelcome sexualized behaviours, section 3(o)(i) of the Nova Scotia *Human Rights Act* makes it clear that a respondent will be liable where a reasonable person would be aware that sexualized behaviours in question are unwelcome.

I conclude that a reasonable person in Mr. Collins' position, who received Exhibit 18 from a more senior manager in an environment where he knew an investigation of his conduct with respect to alleged sexualized behaviours had taken place, would read such a letter to discover if it contained useful advice about how to avoid such investigations and controversies with respect to similar sexualized behaviour in the future.

If the reasonable person in Mr. Collins' position had read Exhibit 18, then he or she would be aware that the kind of sexualized behaviour that s/he was alleged to have engaged in at the WCB should be avoided in future (whether or not the reasonable person had actually engaged in such behaviours in the past), in order to avoid liability for such behaviours if they proved unwelcome to other employees in future.

On the basis of all the legal analysis and findings of fact in this section of the decision, I conclude that the requirement of the "unwelcomeness" component of the definition of sexual harassment in section 3 (o)(i) of the Nova Scotia *Human Rights Act* has been met in this case with respect to all of i) the display and distribution of the Internet picture of a naked woman, ii) the crotch grabbing episode at the barbecue, iii) the chicken breast incident at the barbecue, iv) grabby behaviour with respect to Ms. Myette in the context of dancing at the barbecue; v) the up against a wall/take it like a man episode at the barbecue, vi) the simulated anal sex at the birthday party, vii) the "getting laid" comment, and viii) the ongoing pattern of sexual joking.

d) <u>Conclusion</u>

I conclude that all components (sexualized conduct or a sexualized course of comment, vexatiousness in terms of the subjective perception of these events by employees, and satisfaction, at a minimum, of the requirement for unwelcomeness from the perspective of a reasonable person) have been met with respect to the following sexualized behaviours on the part of Mr. Collins: of i) the

display and distribution of the Internet picture of a naked woman, ii) the crotch grabbing episode at the barbecue, iii) the chicken breast incident at the barbecue, iv) grabby behaviour with respect to Ms. Myette in the context of dancing at the barbecue; v) the up against a wall/take it like a man episode at the barbecue, vi) the simulated anal sex at the birthday party, vii) the "getting laid" comment, and viii) the ongoing pattern of sexual joking. Accordingly, Respondent Bruce Collins is liable for sexual harassment under section 3(o)(i) of the Nova Scotia *Human Rights Act*.

XI. RETALIATION

a) The Law of Retaliation

The Nova Scotia *Human Rights Act*'s prohibition on retaliation is found in section 11, which reads as follows [emphasis added]:

> 11 No person shall evict, discharge, suspend, expel or otherwise retaliate against any person on account of a complaint or an expressed intention to complain or on account of evidence or assistance given in any way in respect of the initiation, inquiry or prosecution of a complaint or other proceeding under this Act.

The first important thing to be noted about the s. 11 retaliation provision is that it prohibits retaliation not only when a complainant has actually filed a complaint with the Human Rights Commission, but also where a person has expressed an intention to complain, even if no actual complaint has yet been filed with the Commission. This makes it unnecessary to determine the precise moment at which Ms. Davison actually filed her complaint (i.e. did she make a complaint when she initially approached the Nova Scotia Human Rights Commission in August, 1997, or did this happen only when Ms. Davison signed the formal complaint form in April, 1998).

A convenient summary of the law relating to the retaliation provisions of human rights statutes can be found in Aggarwal and Gupta, *supra*, , at pp. 177-179 and 181 of their text [most footnotes omitted] [emphasis added]:

> ... A complainant may prove a violation of such a retaliation provision ... either by demonstrating that the respondent intended to engage in the conduct described in that section or that the respondent can reasonably be perceived as having intended to engage in such conduct. ...
>
> Moreover, retaliation amounts to unlawful discrimination. Retaliation against employees who make a complaint, participate in an investigation, or give evidence, is unlawful. Employers should make sure that their treatment of an employee who has made a harassment complaint or participated in an investigation, or gave evidence, cannot be interpreted as retaliation. For example, discipline, shift change, transfer, wage reduction, lack of a promotion, "cold treatment", or other adverse employment action following a complaint or giving of evidence may be considered forms of retaliation, unless they can be justified.

> At the same time, employers should advise supervisors and the alleged perpetrator not to retaliate against the complaining employee or the witnesses, if any. It may be advisable to follow up the complaint, regardless of the outcome of the investigation, to make sure that no other incidents of harassment or retaliation have occurred.
>
> In *Van Berkel v. MPI Security Ltd*. [(B.C. 1996), 28 C.H.R.R. D/504 (Attafuah)] the British Columbia Human Rights council found that the employer retaliated against Ms. Navratil, a witness for the Complainant, ... by contacting her current employer ... "by making an adverse report about her to her manager at Zellers in Coquitlam Centre mall." ...
>
> In *Bailey v. Anmore (Village)* [(B.C. 1992), 19 C.H.R.R. D/369 (Patch), the Complainant was fired soon after her employer learned that she intended to file a sexual harassment complaint. Though the tribunal ultimately dismissed the precipitating sexual harassment complaint, it nevertheless found that the Complainant's employment was terminated in retaliation of her intent to file the complaint, and this constituted a separate breach [of the retaliation provisions of the B.C. human rights statute]. ... The tribunal ... pointed out that:
>
> > It is not necessary that a decision be based solely on a prohibited ground to constitute a violation of the *Human Rights Act*. It is merely necessary that the prohibited basis be one of the reasons for the decision. *I am satisfied that the threat of a sexual harassment complaint was a significant factor in deciding to terminate the* complainant on July 3, 1990. The actions of the respondent constituted discrimination against the complainant because of her allegations of sexual harassment contrary to [the retaliation provision of the *Act.* [emphasis in italics added by Aggarwal; underlining emphasis added in *Davison*] ...
>
> Human rights statutes are intended to protect not only those who are successful in their complaint but all those who chose to exercise their rights. The right is to complain, not just to complain successfully. Retaliation or reprisal is itself a form of discrimination. Even if the allegations of sexual harassment were not proven, an employer who has embarked on a campaign of retaliation or reprisal may nonetheless become subject to the wide remedial powers of the human rights legislation. ...

A useful elaboration on the rule that a discriminatory consideration (including retaliation with respect to a human rights complaint) does not have to be the only reason for an employer decision in order for an complainant to obtain relief, may be found in *Almeida v. Chubb Fire Security Division* (1984), 5 C.H.R.R. d/2104 at para. 17840-17841 [emphasis added]:

> ... it is sufficient for a complainant to establish that the prohibited ground of discrimination constituted only one among a number of factors leading to the decisions which are the subject matter of the complaint ....
>
> although the prohibited ground of decision making must have some causal role or influence in the decision made, it need not be the exclusive cause of or influence on the decision. Indeed, ... it is not necessary to establish that the prohibited ground was the main reason for the decision in question.

W.S. Tarnopolsky and W.F. Pentney in *Discrimination and the Law* (Carswell: 2004) clearly state the rationale behind these interpretations of the retaliation provisions of human rights statutes at pp. 9-84 to 9-85 [emphasis added]:

In *Sharma v. Yellow Cab Co.* (1983), 4 C.H.R.R. D/1432, a British Columbia Board of Inquiry ruled that the retaliation provision would be breached even if the original complaint which triggered the adverse consequences was not well founded in law or fact. Any other conclusion would have ignored the obvious intent of the legislation which is to encourage persons to file complaints of discrimination by assuring them that no adverse consequences will follow from their actions, regardless of the outcome of the complaint.

The Board of Inquiry in *Entrop v. Imperial Oil Ltd. (No. 7)* (1995), 23 C.H.R.R. D/213 (Ont. Bd. of Inq.), made the following helpful comments about retaliation claims at paras. 37-41 [emphasis added]:

> ... In order to prove a [retaliation] violation ... the Commission must adduce evidence of an actual or threatened prejudicial act. In addition, the Commission must also establish that there is a linkage between the actual or threatened prejudicial act and the enforcement of a person's rights under the *Code*.
>
> The linkage can be demonstrated in several different ways.
>
> Where there is evidence that a the respondent intended the act or threat to serve as retaliation for a human rights complaint, this will provide the requisite linkage. However, as is well established in human rights jurisprudence, the inability to prove intention is not fatal to the claim. There are many situations in which a respondent is not consciously aware of the discriminatory impact of certain behaviour. The detrimental respondent is not consciously aware of the discriminatory impact of certain behaviour. The detrimental effect of such actions can still create substantial damage. As the Supreme Court of Canada noted in *Action travail des femmes v. Canadian National Railway Co.* (1987), 8 C.H.R.R. D/4210 [at D/4225, para. 33241],
>
> > the imputation of a requirement of "intent", even if unrelated to moral fault, failed to respond adequately to the many instances where the effect of policies and practices is discriminatory even if that effect is unintended.
>
> ... Human rights legislation is not punitive but compensatory in nature. The central focus is upon the impact of the behaviour in question. Consequently, the Board of Inquiry is required to examine the impact of the action upon the perceptions of the complainant. If the complainant reasonably perceived the act to serve as retaliation for the human rights complaint, this would also constitute sufficient linkage, quite apart from any proven intention on the part of the respondent. ...
>
> Obviously, the matter of the "reasonableness" of he complainant's perception must also be addressed. Respondents must not be held accountable for unreasonable anxiety or undue overreaction on the part of the complainant. But great care must be taken in assessing the proper standard of "reasonableness" to apply to allegations under [the retaliation provision] of the *Code*. There is a wealth of legal literature which documents the difficulty of constructing an objective definition of "reasonableness." The hypothetical reasonable man, which was ubiquitous in the legal texts a mere few decades ago, has given way to the "reasonable person", the "reasonable woman," the "reasonable sexual harassment victim," and so on. [The retaliation provision] offers another critical juncture for reevaluating what tribunals and courts should define as reasonable in the context of reprisals taken against those seeking to enforce their rights under the *Human Rights Code*.
>
> The proper standard under [the retaliation section] is the "reasonable human rights complainant". In assessing the reasonableness of the complainant's fears and perceptions, boards of inquiry must be sensitive to the particular difficulties that confront complainants, many of whom experience great fear and anxiety surrounding the lodging

> and pursuit of a human rights complaint. This is exacerbated where the complainant continues in an ongoing relationship with the respondent, especially where that relationship is complicated by a differential in power, such as is undeniably manifest in the employer-employee setting. In such a context, otherwise innocuous events, conversations and correspondence may take on an overly intimidating aura, with an impact out of all proportion to any original intent or understanding on the part of the respondent. The damage, however, may be enormous. Such actions may frighten complainants into dropping their allegations, submitting to otherwise unacceptable terms of settlement, or refusing to tender critical evidence. The overriding purpose of the *Code*, to ensure equality and eradicate discrimination, is completely frustrated when this occurs. Boards of inquiry must be vigilant to ensure that cases of reprisals are dealt with speedily, efficiently, thoroughly and seriously.
>
> The evidence indicates that since he filed his human rights complaint, there have been a series of acts, both actual and threatened, which affected Mr. Entrop detrimentally in his employment with Imperial Oil. There is sufficient evidence of the requisite linkage between the acts and the human rights complaint. Some of the incidents ... support the finding that the respondent intended to retaliate against Mr. Entrop. There is also evidence of conduct lacking unequivocal proof of intention. With respect to the latter incidents, I find that the necessary linkage can be rooted in the reasonable perceptions of the complainant. There is more than sufficient evidence that the acts [in question] have caused Mr. Entrop to perceive that he is being retaliated against for filing a human rights complaint. The acts and threatened acts have created an atmosphere which caused the complainant to fear for his job security. ... Furthermore, the evidence indicates that a reasonable human rights complainant, placed in the position of Mr. Entrop, would have been justified in perceiving the various acts described ... to be manifestly linked to the outstanding human rights complaint and to constitute retaliation for that complaint.

The complainant's motive in bringing a human rights complaint is not grounds for rejecting an otherwise valid claim for relief under the statute. On this point, see the following comments from the decision of a recent Ontario Board of Inquiry in *Rubio v. A-Voz Portuguese Canadian Newspaper Ltd.*, [1997] O.H.R.B.I.D. No. 10 at para. 20:

> The entire theory of the defence appeared to be that the Complainant's motive for making her complaint was to discredit the Personal Respondent in Toronto's Portuguese community, and that in this she acted in concert with several others. I ruled orally that the Complainant's motive for filing her complaint is an irrelevant factor: it does not provide a defence to actions that would otherwise constitute a contravention of the *Code*. I did, however, permit the Respondents' agent to cross-examine the Complainant with respect to her knowledge of the alleged co-conspirators, on the grounds that her motive for making the complaint might be relevant to her credibility generally. ...

Although I, too, allowed the Respondents to cross-examine the Complainant and other witnesses who are "critics" with respect to the alleged conspiracy in this case, as noted above, after carefully considering this evidence I decline to draw any general inference of lack of credibility with respect to either "critics" or "loyalists" in the context of the controversies at the NSCSA.

b) Date when Respondents Became Aware that the Complainant intended to file or had filed a Human Rights Complaint

Given that section 11 applies only to retaliation "on account of a complaint or of an expressed intention to complain", it is clear that the respondents must be aware that Ms. Davison intended to file a human rights complaint before their conduct can constitute retaliation. (The Respondents made arguments that essentially asserted that they needed to know the details of Ms. Davison's complaint before they could be liable for retaliation. Such knowledge is not required for a liability under section 11. The language of section 11 expressly indicates that it is sufficient that the Respondents know that the Complainant intended to file a human rights complaint, even if the Complainant has not actually done so at that time.)

Mr. Kelly expressly testified that he had heard through the grapevine as early as July, 1997, that Ms. Davison intended to file a human rights complaint. The issue of Mr. Collins' awareness is less clear. However, it is certain that Mr. Collins and the Board of Directors of the NSCSA knew of Ms. Davison's intent to file or actual filing of a human rights complaint no later than a meeting of the Board of Directors of the NSCSA on October 8, 1997, when Ms. Davison circulated a memo to the members of the Board stating that she had filed a human rights complaint against Bruce Collins and Michael Kelly. (This was the same Board meeting at which the report prepared by Mario Patenaude (Exhibit 11), which is discussed below, was circulated to the NSCSA Board.) I will treat October 8, 1997 as the latest possible date by which Mr. Collins, Mr. Kelly, and the NSCSA Board of Directors were all aware of the fact that complainant intended to file, or had actually filed a complaint with the Nova Scotia Human Rights Commission.

c) Documents relevant to the Retaliation Issue

This is an unusual retaliation case, because there are a number of written documents that expressly refer to the human rights complaint and/or the sexual harassment allegations that are its foundation, that are relevant to the retaliation issue.

The first of these documents is Exhibit 11, prepared by a consultant, Mario G. Patenaude, of Integral Human Resources Management Consulting Ltd., and entitled "Organizational Accident Report: Nova Scotia Construction Safety Association", which was prepared and circulated to the meeting of the NSCSA Board of Directors on October 8, 1997 (the same day that the Complainant circulated to the Board her memorandum advising the Board of her Human Rights Complaint). Mr. Patenaude's Report is the first written expression of what I will call the conspiracy theory, which is relied upon by the Respondents to discredit both Ms. Davison's sexual harassment allegations and Ms. Davison's allegations of retaliation. This conspiracy theory assumes that the human rights complaint is a reflection of a conspiracy of "critics" illegitimately targeting Mr.

Collins as general manager with a view to removing him. The most relevant comments from this report are excerpted below:

> The purpose of this report is to describe the sequence of events and contributing factors which led to the walk-out of a large segment of the Nova Scotia Construction Safety Association's (NSCSA) employee population, identify the root causes of such contributing factors, and make recommendations regarding the course of action to be taken in order to correct current organizational issues, and prevent such a situation from occurring again in the future. ...
>
> Our firm ... was retained by the NSCSA following a meeting between the organization's General Manager (GM) Bruce Collins, and ... Paul Kent. the two individuals were senior managers and colleagues a the Nova Scotia Workers compensation Board in the early 90's. Mr. Kent is a client of our firm, and is a former colleague of its President, Mario G. Patenaude. ...
>
> [Mr. Patenaude's firm interviewed three members of the Board of Directors and ten staff members. The Complainant in this human rights complaint, Karen Davison, was not one of the ten employees interviewed by Mr. Patenaude.]
>
> **IV. ACCIDENT PROFILE ...**
>
> Another segment [of the staff] was led to believe that the General Manager's employment would be terminated as a result of the sexual harassment allegations made against him, which would solve all organizational problems which these members perceived he was the cause of. It is important to note that the issue of sexual harassment was not an issue which was brought up repeatedly during the interview process, and that financial mismanagement appears to be used now by those opposing the General Manager.
>
> **V. ROOT-CAUSE ANALYSIS ...**
>
> **Summary**
>
> A young, inexperienced and fearful member of the NSCSA's management team [subsequent analysis in this document makes it clear that the person referred to is Larry Scaravelli], was encouraged to lead a group of dissatisfied employees into believing that allegations of sexual harassment by the General Manager, communicated to the Executive Committee in his absence, would result in rapid termination of his employment, and simultaneous resolution of all human resources issues, including their short and long-term job security. ...
>
> **Root Causes ...**
>
> Behaviours and language which may be deemed appropriate to a mature generation, on a construction site, or at a private party were construed by many employees as sexual harassment. [emphasis added]
>
> Related to the General Manager ...
>
> **A group of employees believed that the Board of Directors would react impulsively to allegations of sexual harassment made against the GM and would terminate his employment with NSCSA. They speculated that the fear of public disclosure of such allegations would entice the GM to resign. ...**
>
> In an effort to be a truly participative manager, and "one of the gang" the GM did not recognize that some of his behaviors and actions, particularly in non-business settings,

> may have been perceived as inappropriate by a relatively young, inexperienced and respecting population
>
> **VII. RECOMMENDATIONS** ...
>
> Provide a 2-3 hour sexual-harassment seminar to all NSCSA staff. ...
>
> The General Manager will have to be extremely vigilant of the impact of his personal conduct, either professionally or socially, on his credibility with, and respect by, members of his staff.

I note the following preliminary points with respect to Mr. Patenaude's report: a) Mr. Patenaude is commendably frank about the nature of the networking connections that brought Mr. Patenaude into contact with Mr. Collins, and the role of Mr. Collins in recruiting Mr. Patenaude to provide a report to the NSCSA Board of Directors; b) Mr. Patenaude nowhere in this document lays claim to any expertise in human rights/sexual harassment law, and this lack of expertise is readily apparent when the paragraph I have emphasized in the excerpt above is compared to the analysis of the sexual harassment issue earlier in this decision; and c) the credibility of Mr. Patenaude's allegations that the motives for the sexual harassment allegations, and, by logical extension, the human rights complaint with respect to those allegations, were illegitimate, and part of a conspiracy against Mr. Collins actually motivated by other, illegitimate, motives are fundamentally undermined by the fact that he interviewed both of the potential Respondents (Bruce Collins and Michael Kelly), but did not interview the complainant, Karen Davison.

On October 17, 1997, Jack Osmond, the Chair of the NSCSA Board of Directors sent a letter to Karen Davison which contained the following comments with respect to Ms. Davison's memorandum to the Board of Directors of October 17, 1997 [emphasis added]:

> Further to your memo to the Board of directors of October 8th, 1997, please be advised of the following:
>
> 1. The Board Members chose not to receive the memo and referred the matter to the Executive Committee for appropriate dispensation.
>
> 2. The Executive Committee met on October 16th, 1997, to consider this issue. It was the decision of the Executive Committee that since this matter is currently being considered by the Nova Scotia Human Rights Commission we shall not communicate further with you regarding this particular issue. ...
>
> On another issue, it was noted by one of our members that you chose to forward this correspondence to us using what appears to be a template letterhead for the NSCSA. This issue is a personal one related specifically to you - such type of letterhead should not be used in the future for personal correspondence.

It is interesting that the Chair of the NSCSA Board of Directors, the only body standing above and with the power to discipline the organization's CEO, Bruce

Collins, should refuse to investigate an allegation of sexual harassment by that CEO (behaviour which might warrant discipline or remedial action) and base that decision on the existence of a human rights complaint. Also, it is interesting that the Board Chair characterizes the sexual harassment issue as one that is personal to the complainant, and not one that is potentially relevant to all employees and the entire organization.

In the November 18, 1997 (expiry date) issue of *Frank* magazine, which would have appeared on the newsstands on November 4, 1997, there is an article at p. 4 headed "Bruce Collins Denies All" (Exhibit 1, Tab 4, first page) which among other comments, contains the following reference to Ms. Davison's human rights complaint [emphasis added]:

> ... One staffer, **Karen Davidson [sic], has filed a complaint about Bruce's behavior to the Human Rights Commission**. Bruce says he hasn't officially been made aware of it.
>
> Allegations he patted men's bums, compared women's breasts to chicken breasts, at an office barbecue, and downloaded porn off the internet at his office, are absurd and untrue, he insists. ...

This *Frank* article makes no reference to Mr. Kelly, but refers only to Mr. Collins. The Respondents suggest that Ms. Davison was the source of information for this *Frank* article, but provided no evidence to support this allegation, other than the contents of the article itself. I note that on the basis of the testimony of the witnesses before me and the factual inferences I have drawn from that testimony above, Ms. Davison was not the only witness to these events or the only person to perceive them as involving sexual harassment. Also, although Ms. Davison denies having discussed the sexual harassment complaint with other employees during office hours other than to the limited extent mentioned in the letter from Dawna Ring reproduced below, there would be nothing wrong in Ms. Davison discussing the human rights complaint with colleagues outside office hours, and it seems likely that this happened. Thus, it is perfectly possible that other employees or former employees supplied this information to *Frank*, rather than the Complainant. The fact that Ms. Davison's name is misspelled in the *Frank* article tends to suggest that the information came from someone else.

The next document I will refer to here is a letter from Michael Kelly to Karen Davison dated November 25, 1997 (Ex. 1, Tab. 1, p. 72), Mr. Kelly makes the following comments [emphasis added]:

> ... a number of issues have come to my attention that cause me concern:
>
> 1) you have reportedly approached a staff member and expressed a desire to inform them of <u>your alleged complaint with the Human Rights Commission</u> and provide them with the details. <u>This is a personal issue between you and the Commission.</u> The management of the NSCSA has not been informed of any specifics relating to a claim of harassment. Until such time that this issue is revealed and resolved, spreading rumours and innuendo is unacceptable. ...

In a letter dated December 2, 1997, from Dawna Ring (a lawyer who had been retained by Ms. Davison at that time) to Mr. Kelly, (which is the first of several documents introduced in evidence as a combined Exhibit 13), Ms. Ring replies to Mr. Kelly's letter of November 25, 1997, and makes the following comments:

> I have been retained by Ms. Davison to act on her behalf in relation to her initial and ongoing harassment at her workplace. Your first complaint and comment against Ms. Davison is wrong both factually and legally. I will deal with the latter first.
>
> The Association has an immediate and ongoing responsibility to address all harassment issues of its employees as soon as they are apprised that such a harassment allegation exists. The minute anyone within the administration knew that Ms. Davison was concerned about a harassment issue, the Association had the legal obligation to do the following:
>
> 1. Approach her to find out the particulars of the harassment she was experiencing;
>
> 2. Conduct an internal investigation, which is best done by an outside independent expert in the field;
>
> 3. Determine if harassment occurred; and
>
> 4. Take all steps necessary to alleviate the harassment.
>
> The Association has an obligation to do these things immediately. It also has the legal obligation to create a safe work environment for all of its employees. Employees are to be protected not only within the property of the Association but also at all functions for the Association, including barbecues, meetings with managers after hours, etc.
>
> The Association has been terribly misguided by failing to accept the letter of Ms. Davison and conducting all of the above steps. ...
>
> The Nova Scotia Human Rights Commission is unfortunately faced with far too many harassment and discrimination complaints. They do not have sufficient staff to be able to address these complaints the minute a complainant first files their concerns with the Human Rights Commission. It sometimes takes nine months to a year before the Commission can commence its process. At no time are Ms. Davison's concerns of harassment *the spreading of rumors and innuendo*. That is a terrible characterization of her concerns of harassment at the workplace which the Association has failed in their legal duty to address. [emphasis in the original]
>
> Ms. Davison further informs me that she did not approach anyone. Two separate individuals came to her, stated that she had heard rumors she had filed a complaint with the Nova Scotia Human Rights Commission, and asked her to confirm if it was true. She answered their question and moved on. ...
>
> Although your memos to Ms. Davison have an apparent conciliatory tone, your actions clearly counteract that image. The issues which you have raised are miniscule employer/employee issues which should be addressed by a quick discussion with a staff person. ... [Various criticisms of Ms. Davison are addressed.] It is completely inappropriate when she has informed you that she has provided this information to a lawyer, that you suspend her without pay for not dealing with this memo.
>
> I was in Ottawa for the release of the Krever Report and was storm stayed until late Friday evening and had a hearing on Saturday. Ms. Davison informed you of those

> reasons. The actions of previously suspending Ms. Davison with pay and recently suspending her without pay are outrageous. These severe forms of discipline are maintained for the employee who has done the most serious form of misconduct including rape, harassment, and theft while an internal investigation is ongoing.
>
> Ms. Davison has the right to be protected from retaliation as a result of filing a complaint with the Human Rights Commission ... .
>
> This is to put yourself and the Association on notice, it is claimed the actions taken by the Association against Ms. Davison, including this proliferation of memos and suspensions with and without pay, amount to retaliation against Ms. Davison's legitimate employee rights in filing the complaint with the Human Rights commission ... these actions and severe form of discipline constitute ongoing forms of harassment. This letter has [also] been directed to the Chair and Board members of the Association, and we trust the harassment and retaliation will cease.

In a letter contained in Exhibit 13, dated December 3, 1997 to Dawna Ring, Mr. David Farrar, the lawyer for the Respondents, made the following comments [emphasis added]:

> The NSCSA does not accept your suggestion that the actions taken by the NSCSA against Ms. Davison are in response to Ms. Davison filing a complaint with the Human Rights Commission ... These allegations have no basis in fact and are without merit.
>
> It is the position of the NSCSA that Ms. Davison is the one who is using the threat of a complaint to the Human Rights Commission as leverage in attempting to avoid the repercussions of inadequate performance. ...
>
> ... The NSCSA and the individuals referred to in your correspondence consider Ms. Davison to be responsible for any damages the individuals or the NSCSA may suffer as a result of the defamatory comments contained in your letter.

In a letter to Mr. Farrar in reply to the above letter dated December 5, 1997 (also contained in Exhibit 13), Ms. Ring made the following comments:

> Never threaten my client again with defamation when she is exercising her legal rights as an employee. Her complaints relate to the general manager and her supervisor, both hired by the Association and under the control of the Board of Directors. She has the right to inform her employer and the Nova Scotia Human Rights Commission without the threat of defamation. These concerns may never be the subject of defamation as they are qualified, privileged communications. I consider this illegal and unmeritorious threat by her employer to frighten her away from exercising her employee's rights through the threat of a legal action that does not exist, to be a further form of harassment.
>
> Ms. Davison was highly valued as an employee prior to the employees exercising their concerns about the harassment at work resulting in a series of events which occurred in the summer, including ... her contacting the Human Rights commission with her complaint. ... However, since the walkout ... Ms. Davison's work environment has become intolerable and the level of harassment she is repeatedly subjected to has increased substantially.
>
> Ms. Davison is not using any threat of a complaint to the Human Rights Commission as a leverage to avoid the repercussions of inadequate performance. There is no threat, it has happened. Ms. Davison contacted the Human Rights Commission with her full

complaint on August 14, 1997, as is evidenced by the letter from Ms. Francine Comeau, Coordinator of Investigations and Compliance, on August 28, 1997, attached. We intend to keep the Human Rights Commission apprised of all harassment that exists at her workplace as it is relevant to her ongoing complaint before the Commission. ...

Exhibit 13 also contains a reply from Mr. Farrar, dated January 8, 1998, to Ms. Ring's letter of December 5, 1997. This letter terminates Ms. Davison's employment at the NSCSA effective January 9, 1998 (i.e. with only one day's notice), and contains the following comments [emphasis added]:

> ... The NSCSA was and is prepared to address any complaint of sexual harassment made by any employee. It has not now, nor has it ever, subjected Ms. Davison to any type of retaliation as a result of the complaint. Indeed, until late October 1997, other than Ms. Davison's assertions that she had made the complaint, no notice was given to the NSCSA of the complaint.
>
> The fact that Ms. Davison continuously referenced her complaint in the workplace is evidence of her intention to use it as leverage. ...
>
> Ms. Davison's use of the Human Rights complaint as leverage is further evidenced by the fact that she at one time indicated to Mike Kelly, her supervisor, that she was making a sexual harassment claim against him. She subsequently advised Mr. Kelly that she was "dropping" the complaint against him and simply proceeding against Mr. Collins. The allegation of a complaint against Mr. Kelly has resulted in a tremendous amount of stress to him and to his family. The NSCSA was approached by Frank Magazine who advised that it had information about sexual harassment complaints made by employees against Mr. Kelly and Mr. Collins. They indicated they would be publishing a report in the paper regarding these complaints. The only possible source of the information to Frank Magazine would have been either the Human Rights commission or Ms. Davison herself, as they were the only parties knowledgeable at that time about the complaint. ...
>
> Finally, reference is made in your correspondence to discrimination that Ms. Davison suffered in not receiving the training team leader position. Ms. Davison is not qualified for that position and that is the reason why she did not receive it. This is yet another example of Ms. Davison's attempts to use the treat of a sexual harassment complaint to obtain an advantage in her employment situation.
>
> It is quite clear that the relationship between Ms. Davison and the NSCSA cannot continue.
>
> Please accept this letter as notice that effective January 9th, 1998, Ms. Davison's employment is terminated for cause, particulars of which are set out in this correspondence and my previous correspondence, and include:
>
> 1. harassment in the workplace with respect to the use of complaints to the Human Rights Commission as leverage in an attempt to gain an advantage in her employment situation; ...
>
> 3. disclosure of information to third parties, including Frank Magazine, in an effort to cause injury to her employer and her superiors; ...
>
> 6. insubordination at work.

Also included in Exhibit 13 is a letter from Ms. Ring, dated January 9, 1998, in response to Mr. Farrar's letter of January 8, 1998, which contains the following comments:

> The first page and a half of your letter seems to suggest that somehow Ms. Davison was at fault for not notifying people at her workplace about her complaint. She had filed it with the Human Rights Commission. The Commission is backlogged and did not provide it to you. Any information that she did provide about this complaint, she is condemned for at the other end stating that somehow it is used as form of leverage. It wasn't. ...;
>
> Ms. Davison has been harassed, continues to be harassed and retaliated against. She is not being dismissed for just cause. She is being dismissed on the basis of continuing harassment. It will form a part of her Human Rights complaint.
>
> Ms. Davison does not have the financial resources to be able to enable me to continue to assist her in this matter. As the Nova Scotia Human Rights Commission is able to compensate her for all of the injuries she has suffered as part of the sexual harassment, this wrongful dismissal shall be included as part of her claim.

In the Respondents' prehearing brief submitted to me as the Board of Inquiry on June 28, 2002, Mr. Farrar, on behalf of the respondents, made the following submissions: [emphasis added]

> The Respondents deny that they have ever subjected Ms. Davison to any type of retaliation as a result of the complaint that she advanced. This allegation has no factual basis and is completely without merit. In fact, until October, 1997, the NSCSA had no formal notice of the complaint and <u>had only heard of a potential complaint</u> through Ms. Davison's continued reference to a complaint in the workplace. [emphasis added]
>
> The basis of the claim of retaliation is based upon Ms. Davison's
>
> 1) failure to obtain the position of Training Team Leader;
>
> 2) repeated petty and unwarranted discipline; and
>
> 3) the termination of her employment. ...
>
> On January 8, 1998, Ms. Davison was terminated for cause including:
>
> 1. <u>harassment in the workplace including the use of complaints to the Human Rights Commission as leverage in an attempt to gain an advantage in her employment situation;</u> ...
>
> 3. disclosure of information to third parties including Frank Magazine in an effort to cause injury to her employer and her superiors; ...
>
> <u>Rather than retaliation, there appears, in this case to be evidence of an intention by Ms. Davison to use the human rights process as leverage against her employer. Ms. Davison's intention to use the complaint process as leverage against her employer is evidenced in her conduct in indicating to her supervisor, Michael Kelly, that she intended to advance a claim of sexual harassment against him personally. Not only did Ms. Davison threaten Mr. Kelly with a complaint of sexual harassment, she apparently advised Frank Magazine of the potential for this complaint. Frank</u>

> Magazine then published an article outlining the allegation. As a result, Mr. Kelly was forced to advise his wife and two teenage daughters of the allegations. This unsubstantiated allegation against Mr. Kelly caused a tremendous amount of stress to both Mr. Kelly personally, and to his family. Ms. Davison subsequently advised Mr. Kelly that she was "dropping" the complaint against him and intended only to proceed with a complaint against Mr. Collins. [emphasis added]
>
> Ms. Davison has clearly attempted, throughout the course of this proceeding, to utilize the complaint process to address her performance inadequacies and other difficulties in the workplace. ...

In the Respondents' final brief, submitted to me on August 1, 2003, Mr., Farrar quotes from his January, 1998 letter contained in Exhibit 13, including the reference to "harassment in the workplace including the use of complaints to the Human Rights Commission as leverage in an attempt to gain an advantage in her employment situation" and "disclosure of information to third parties including Frank Magazine in an effort to cause injury to her employer and her superiors ... ." Mr. Farrar then makes the following comments [emphasis added]:

> Jack Osmond [the Chair of the NSCSA Board of Directors in December, 1997, at the time of the decision to terminate Ms. Davison's employment] testified that the decision to terminate Ms. Davison's employment was a decision of the Board of Directors ... . Mr. Osmond ... stated that at the time that the decision to terminate Ms. Davison's employment was reached the Board considered the impact that the decision would have on her complaint and concluded that the termination was necessary regardless of the complaint. Mr. Osmond stated that at that time, the Board felt the complaint was a non issue and "basically behind us" ...
>
> It is respectfully submitted that the evidence is clear that Ms. Davison's termination was not related to the complaint filed with the Human rights Commission.

d) Retaliation Allegations in this case

Four different allegations of retaliation have been raised in this case, namely, 1) a false and obviously malicious letter to Ms. Davison's new employer after the termination of her employment at the NSCSA; 2) the termination of Ms. Davison's employment at the NSCSA; 3) repeated acts of harassment and/or discipline directed at Ms. Davison during her employment from October to December, 1997, which, in her letter quoted above, Ms. Ring characterized as petty and unwarranted; and 4) issues with respect to the Training Team Leader position.

1) False Letter

Contrary to Mr. Farrar's statement in the final paragraph quoted above, the documents quoted above make it entirely clear that the decision to terminate Ms. Davison's employment was, in fact, related to her human rights complaint, and the evidence of this fact can be found in the above submissions on behalf of the Respondents.

The first issue of retaliation that I will discuss is a false and malicious letter that was sent to Ms. Davison's new employer, Black and MacDonald, after the termination of Ms. Davison's employment at the NSCSA. This letter is found in Exhibit 1, Tab 5, and the relevant portions read as follows [emphasis added]:

> February 22/98
>
> Dear Mr. [Larry] MacDonald
> c/o Black and MacDonald ...
>
> I am a Safety Officer with the Occupational Health and Safety Division of the NS Department of Labour. I have had the opportunity to inspect your sites in the past and found your company to be co operative and very keen on health and safety issues. I have put pen to paper to inform you of a situation of which you are probably not aware.
>
> [criticisms of two male "critic" former employees of the NSCSA now working for Black and MacDonald omitted]
>
> [A male "critic" working for Black and MacDonald] has hired Karen Davison as his secretary. Karen is also a former worker of the NSCSA. Karen has reportedly filed sexual harassment charges against Mike Kelly. Mike Kelly is the Director of Safety Services. The story we hear, is that her and Mike had a sexual relationship. He ended it and she got mad. Same old story.

I note that no witness or lawyer in this case ever made any that Ms. Davison actually had an affair with Mr. Kelly. I expressly find that the statement above is a lie, and made to injure Ms. Davison and to threaten her new employment relationship after the termination of her employment at the NSCSA. In other words, this an example of the kind of retaliation based on contact with a new employer exemplified in the case of *Van Berkel v. MPI Security Ltd.* (B.C. 1996), 28 C.H.R.R. D/504 (Attafuah), which is discussed in the excerpt from Aggarwal and Gupta reproduced *supra* in the discussion of retaliation law above.

When read as a whole, it is clear that the false letter of February 28, 1998 originated with someone with insider knowledge of the controversies within the NSCSA. It is also clearly refers to Ms. Davison's human rights complaint, and implies that the complaint is unfounded and malicious based on the false assertion that Ms. Davison engaged in an affair with Mr. Kelly.

This February 22, 1998 letter contains an additional lie. The author states that s/he is a Safety Officer with the Nova Scotia Occupational Safety Division. Also found at Exhibit 1, Tab 5, is a letter from Jim LeBlanc, Executive Director, Occupational Safety Division of the Nova Scotia Department of Labour, dated March 13, 1998, which it makes it clear that this attribution is also a lie, and that the originator of this letter was not an employee of the Occupational Safety Division:

> Adrian Morrison,
> Black and McDonald Limited, Atlantic Region ...
>
> Dear Mr. Morrison:
>
> Further to our meeting of March 6, 1998, and our subsequent receipt of the letter addressed to Larry McDonald dated February 22, 1998, we have completed a thorough investigation of the matter.
>
> From the illegible signature on the letter, we could not identify who the letter came from. We have reviewed the signatures of our officers and can find no comparable signature.
>
> The content of the letter is not in an area for which any officer of the Division would have the authority or need to comment in the course of their work.
>
> I have therefore concluded that the letter did not originate from any officer of the Division, and have no information to provide that would substantiate any of the allegations made.

I consider the false letter of February 22, 1998 to be an absolutely outrageous example of malicious retaliation against Ms. Davison, based on her Human Rights Complaint. If it had been possible to identify the author of this letter, I would have awarded not only compensatory but a substantial award of punitive damages against that person with respect to this malicious and outrageous act of retaliation.

Unfortunately, there was no evidence before me that would allow the identification of the author of this letter, beyond the fact that s/he has insider knowledge about the NSCSA. I expressly conclude that Mr. Kelly is not the author of this letter since it tells a lie about him, as part of the process of retaliating against Ms. Davison. The letter does not tell any lies about Mr. Collins, but I would like to think that Mr. Collins would not tell malicious lies about Mr. Kelly, since the evidence before me demonstrates that Mr. Kelly has been extremely loyal to Mr. Kelly.

Thus it is clear that the false letter constitutes an act of retaliation against Ms. Davison that is connected to her Human Rights Complaint, and that the author has insider knowledge of the NSCSA in some way, but it is not possible to conclude that this act of retaliation was perpetrated by any of the Respondents in this case. Accordingly, I cannot, unfortunately, award a remedy to Ms. Davison against any Respondent in these proceedings with respect to this act of retaliation.

2) Termination of Employment

In light of the correspondence reproduced above, it is absolutely clear that the Respondents are liable under section 11 of the *Human Rights Act* with respect to the termination of the Complainant's employment. In the letter that gave the

Complainant notice of this termination, dated January 8, 1998, Mr. Farrar, on behalf of his clients, expressly states:

> Please accept this letter as notice that effective January 9th, 1998, Ms. Davison's employment with the NSCSA is terminated for cause, particulars of which are set out in this correspondence and my previous correspondence, and include:
>
> 1. harassment in the workplace with respect to the use of complaints to the Human Rights Commission as leverage in an attempt to gain an advantage in her employment situation. ...
>
> 3. disclosure of information to third parties, including Frank Magazine, in an effort to cause injury to her employer and her superiors .... .

These paragraphs are clear statements that the Respondents actually intended to terminate Ms. Davison's employment "on account of" Ms. Davison's expressed intention to file a human rights complaint, or the complaint itself.

It appears from the correspondence above that the Respondents believed that Ms. Davison's proposed human rights complaint was unfounded. This is a very common belief on the part of respondents, and such assumptions by respondents are often wrong, as in this case, where I have held that a significant number of the allegations of sexual harassment are in fact well-founded. Even if the Respondents were right in the assumption that Ms. Davison's complaint was entirely unfounded, this would still not assist them, since, as demonstrated by the legal authorities cited above, the law is clear that complainants are entitled to be protected from retaliation by their employers "on account" of intent to file a human rights complaint, or an actual complaint, even if that complaint is unfounded.

The respondents also appear to believe that Ms. Davison had an improper motive for her human rights complaint, based either on a conspiracy theory of the kind articulated in Mr. Patenaude's report, or as a means of benefiting herself within her employment.

First, I note that the reasonable complainant would be unlikely to see a human rights complaint as a means of benefiting themselves within a workplace, since such complaints, in practice, are far more likely to attract retaliation than beneficial outcomes. Moreover, I do not believe that Ms. Davison had any such actual , subjective expectations.

Second, I note that it is not a requirement for a legitimate human rights complaint that the Complainant have what the Respondents consider to be proper motives for filing a human rights complaint, or that a Complainant have only one narrow motive for filing a human rights complaint. This is clear from the following comments from the decision in Ontario Board of Inquiry *Rubio v. A-Voz Portuguese Canadian Newspaper Ltd.*, [1997] O.H.R.B.I.D. No. 10 at para. 20, which is quoted at the end of the analysis of the law of retaliation above.

Moreover, in this case, I, in fact allowed extensive evidence from many witnesses, including the Respondents, with respect to the supposed employee conspiracy that allegedly gave rise to the complainant's human rights complaint. After careful consideration of this enormous volume of evidence, I have that this testimony does not, in fact, undermine the Complainant's credibility with respect to the sexual harassment issues in this case. I conclude that the Complainant was sincere in bringing the present human rights complaint, in the sense that she and other employees sincerely found Mr. Collins' sexualized behaviours "vexatious" (to use the legal term) as I have explicitly found in my analysis above.

Further, I conclude based on the evidence that the only ways that the Complainant could be considered to have "made use" of her Complaint in the context of her employment are to achieve the legitimate goal of achieving a workplace that is free of sexualized behaviours, and to protect herself from behaviours which she (and Ms Ring) sincerely believed to be retaliation against the Complainant with respect to her intent to make a complaint to the Human Rights Commission, or the actual filing of such a complaint. These are both legitimate objectives under the *Act*, and references by the Complainant to her intended complaint for these purposes are not legitimate grounds for dismissal by the Respondents.

I also conclude that a reasonable human rights complainant (to use the standard defined in the legal authorities above) would have also have concluded that there was retaliation on the facts of this case.

I consider the assertion that it was proper to terminate Ms. Davison's employment, on the basis that the Respondents believe she had supplied information about her human rights compliant to *Frank* magazine to be another example of retaliation against Ms. Davison "on account" of her human rights complaint, or her intention to file a human rights complaint.

This is true, even if I leave aside the facts discussed above that the Respondents have not in fact proved, to my satisfaction, that Ms. Davison supplied the information behind the article in *Frank*, and that the *Frank* article about Ms. Davison's complaint that was provided in the exhibits in fact contained no reference to Mr. Kelly, contrary to the assertions of the Respondents.

The Respondents seem to assume that there is something wrong with a human rights complainant notifying the media that s/he has filed or intends to file a human rights complaint. This is not correct. The fact that an employee intends to file or has filed a human rights complaint is not confidential information <u>of the employer</u> that triggers a duty of confidentiality on the part of employees. A human rights complaint by an employee with respect to discrimination in her workplace is in no way the property of the employer. Human rights complaints

are a matter of public interest, as is the elimination of discrimination in the workplace.

Employees are free to announce to the entire world that they have filed or intend to file a human rights complaint, whether this takes through a press conference where all the media are invited (including *Frank*), or through Internet correspondence, or by providing information only to a particular media source, such as *Frank*.

In addition to the reasons discussed above, the Respondents listed many other reasons that they asserted were good cause for terminating the Complainant's employment. Many pages of Exhibits were entered for this purpose, and extensive oral testimony by many witnesses was given with a view to establishing the legitimacy of those reasons (on the part of the Respondents) or rebutting them (on the part of the Complainant and the Commission).

I have given careful consideration to this evidence and these issues, but I do not have to address these issues here. The reason for the conclusion is that it is sufficient to support a finding of retaliation, at this point with respect to the decision to terminate Ms. Davison, if the fact that she intended to file or actually filed a Complaint is one of the reasons for the termination. If this is established, and I have held above that Ms. Davison's intent to file a Complaint or the actual filing of it is at least one of the reasons for her termination, then the other reasons are legally irrelevant to the issue of whether retaliation under section 11 has been established with respect to the termination of Ms. Davison.

I find that the termination of Ms. Davison does constitute improper retaliation on account of Ms. Davison's intention or actual filing of a complaint under section 11 of the *Nova Scotia Human Rights Act.*

3) Retaliation through harassment and/or discipline during employment

In the preceding section of this analysis I concluded, on the basis of the evidence and documentation before me, that the Respondents actually intended to terminate the Complainant's employment on account of her human rights complaint or intention to file a human rights complaint.

In this section, I will initially approach the question of retaliation through harassment and/or discipline during employment through the alternative grounds for a finding of retaliation defined in the authorities above, namely, that it is sufficient if a reasonable human rights complainant in the position of the actual complainant would conclude that the behaviour of the Respondents is retaliatory.

In this case, I conclude that a reasonable human rights complainant in the position of Ms. Davison would consider that the escalating criticism of her work and the imposition of the kinds of discipline described in Ms. Ring's letter reproduced above constitute retaliation on account of Ms. Davison's intent to file or actual filing of her human rights complaint on the basis that a reasonable person would believe that the intention or actual filing of Ms. Davison's complaint is at least one of the reasons that these harassing and/or disciplinary actions were taken.

The reasons why the reasonable human rights complainant would draw these conclusions are as follows. I have held that the Respondents, including the Board of Directors of the Institutional Respondent NSCSA found out about Ms. Davison's proposed or actual human rights complaint no later than a Board Meeting on October 8, 1997. This was the same meeting at which Mr. Patenaude presented his report, which was prepared without any interview with Ms. Davison, and which alleged that the motives for the staff sexual harassment complaints that formed the basis of the human rights complaints were improper. Witness Paul Pettipas, became a member of the NSCSA Board and attended the October 8, 1997 Board meeting as his first meeting as a Board member. I accept the testimony of Mr. Pettipas that the termination of Ms. Davison's employment was at least discussed at this meeting, even though the Board's final decision to fire Ms. Davison did not take place until the December 8, 1997 NSCSA Board meeting.

On October 17, 1997, Ms. Davison received the Board's response to her memo discussing her human rights complaint, quoted above, which stated that the Board would be taking no action with respect to the issues of sexual harassment raised by Ms. Davison, but would rather be leaving them to the Human Rights Commission to deal with. This letter also suggests that the human rights complaint is merely a personal issue specifically related to Ms. Davison, and not a matter of general workplace concern. This proposition that the human rights complaint is merely personal to Ms. Davison is reiterated again as one of the bases for Mr. Kelly's criticism in the portion of his letter of November 25, 1993, reproduced above.

It is clear from a review of Ms. Davison's personnel file that the number of critical documents included in this file escalated significantly after October 8, 1997, the day when Ms. Davison directly notified the Respondents of her intent to file a human rights complaint, and the day when Mr. Patenaude's criticism of employee sexual harassment allegations as improperly motivated was received by the Board. Eventually, Ms. Davison was subjected to discipline short of termination, including letters of warning, suspension with pay and suspension without pay. To a reasonable human rights complainant, this would appear to be an effort on the part of the Respondents to build a paper trail of progressive discipline which would eventually justify the termination of Ms. Davison's employment for apparent (but not actual) cause.

I have already concluded, in my analysis of the termination as retaliation issue above, that the Respondents actually intended to terminate Ms. Davison's employment, at least in part "on account of" Ms. Davison's intended or actual human rights complaint. I believe that a reasonable human rights complainant would also conclude that the harassment and/or discipline of Ms. Davison during the period from October 8, 1997 until December, 1997, was on account of Ms. Davison's actual or proposed human rights complaint.

The reasonable human rights complainant would base this conclusion on

a) the fact that there was an escalation of serious criticism of Ms. Davison's work shortly after the Respondents all learned of her proposed human rights complaint;

b) the Board's refusal to take any internal action with respect to the issues of sexual harassment raised by Ms. Davison, and Ms. Osborne's characterization of the human rights issue as merely personal to the claimant;

c) the fact that Mr. Kelly explicitly referred to the human rights complaint as one of the grounds for his letter of November 25, 1997, which ultimately served as the foundation for the suspension of Ms. Davison without pay for an alleged failure to comply with Mr. Kelly's demand to provide a written response to the November 25, 1997 letter (which was in fact attributable to the absence of Ms. Ring, which Ms. Davison had informed Mr. Kelly of in a memo dated November 29, 1997; see the excerpts from Ms. Ring's letter of December 2, 1997, reproduced above); and

d) the fact that, as Ms. Ring notes, the measures of discipline imposed are quite severe relative to Ms. Davison's alleged misbehaviours, such as the allegation that Ms. Davison approached a staff member and expressed a desire to discuss the human rights complaint.

Although the evidence is circumstantial, I also conclude that on the basis of the cumulative impact of all the evidence introduced before me, the Respondents actually engaged in the course of conduct described above with an intent to build a paper trail that would justify summary termination of Ms. Davison's employment for cause on account of the proposed or actual human rights complaint. I note that the implication that the sexual harassment allegations were illegitimate and improperly motivated, which the Respondents explicitly used to justify the termination of Ms. Davison's employment, first surfaced in Mr. Patenaude's report to the October 8, 1997 Board of Meeting, and it seems likely that these comments in Mr. Patenaude's report influenced the interactions of the Respondents with Ms. Davison between October 8, 1997 and the summary termination of her employment on January 8, 1997.

The respondents argued that they had other, legitimate reasons to criticize and discipline Ms. Davison. These assertions on the part of the Respondents were strongly contested by Ms. Davison, Ms. Ring, other witnesses, and the Commission in the hearing before me. It is not necessary to address these assertions here, because, again, it is sufficient that for a finding that retaliation was on account of an actual or proposed complaint if complaint was one of the reasons for the criticism and disciplining of the complainant during the period after the Respondents became aware of the proposed complaint, even if the Respondents' behaviour was influenced, in part, by other legitimate concerns. The reasonable human rights complainant would conclude, and I also do conclude that the proposed complaint was one of the reasons for the behaviour of the Respondents discussed in this section, and these behaviours do therefore constitute retaliation against Ms. Davison under section 11 of the Nova Scotia *Human Rights Act*.

Finally, the Respondents in testimony before me essentially characterized Ms. Davison's distribution of her October memo about her human rights complaint to the NSCSA Board of Directors as an act of insubordination that could be a ground for discipline .

I note, first, that discipline directed at Ms. Davison because she attempted to provide information about her human rights complaint to the controlling body of her employer would obviously be "on account of" Ms. Davison's human rights complaint, and therefore constitute retaliatory action under section 11 of the Nova Scotia *Human Rights Act*.

Moreover, the only person or entity with the NSCSA in authority over Mr. Collins was the Board of Directors, which had clear authority to investigate Mr. Collins' conduct, discipline him if necessary, or order Mr. Collins to undertake remedial actions. All other employees, including the other managers, such as Mr. Kelly or Mr. Scaravelli, were subordinate to Mr. Collins, had no authority over Mr. Collins, and might reasonably fear retaliation themselves if they tried to suggest to Mr. Collins that his sexualized behaviour constituted sexual harassment.

Thus, the Board of Directors was the only potentially effective body that a reasonable human rights complainant could approach to seek a remedy with respect to sexualized behaviours (past, present or future) on the part of Mr. Collins. Although the NSCSA was working to develop a sexual harassment policy at the time the Complainant approached the Board of governors, no such policy was actually adopted by the NSCSA until January, 1998, when the Ms. Davison's employment had been terminated. In the absence of a sexual harassment policy that included a provision for an independent investigation by independent persons who are not subject to Mr. Collins' authority, the only reasonable internal complaint mechanism available to a reasonable complainant in the position of Ms. Davison was to approach the Board of Directors.

With respect to the statement in Mr. Osmond's letter that the Executive Committee, and, by implication, the full Board of Directors, would not communicate with Ms. Davison because the complaint was before the Nova Scotia Human Rights Commission, I would note that a Complainant does not give up his or her right to pursue alternative remedies within his or her place of employment merely because s/he has also chosen to file a human rights complaint. Employees in unionized workplaces are still entitled to pursue grievances under their collective agreements at the same time that they file a human rights complaint. As an employee in an ununionized work force, Ms. Davison still was entitled to request the Board of Directors as the only entity within the NSCSA with authority over the NSCSA CEO, Bruce Collins, to provide a remedy for past sexual harassment in the workplace.

4) Training Team Leader Job

The final allegation of retaliation against the Respondents relates to the Training Team Leader job. On or about October 14, 1997, the Respondents posted internally and advertised externally what the Respondents claimed was a position called "Training Team Leader". Ms. Davison and Myrna McQuaid applied for this position as internal candidates. The Respondents hired an external candidate, Diane Lutley, to fill this position, after an interview process conducted by Michael Kelly and Greg Barr. After the decision was made to hire Ms. Lutley, Mr. Kelly required Ms. Davison to provide a job description with respect to her current work in organizing and monitoring demand courses. After Ms. Davison provided this memo, Mr. Kelly then required Ms. Davison to train Ms. Lutley with respect to the most important components of the work that Ms. Davison had done until Ms. Lutley was hired.

Much of the evidence and argument before me was directed to the question of whether the Training Job Leader job was in fact Ms. Davison's old job under a new title, or whether it was a new job that Ms. Davison was unqualified to fill because she did not have previous managerial experience.

With respect to the latter assertion, I note that all managers must at some point become managers for the first time, at a time when they have no managerial experience, and many people without prior managerial experience often prove to be good managers. Witness Greg Barr is a good example of this at the NSCSA. Thus, the fact that Ms. Davison allegedly did not have managerial experience (whatever that may be) does not necessarily mean that she would not become a competent manager in future.

I also note that a clever person can always define a particular job description to exclude particular people (for example, by requiring past managerial experience).

It is not necessary to determine whether the Training Team Leader position exactly corresponded with Ms. Davison's past job, or whether the job description was drafted explicitly to exclude Ms. Davison, or whether the job interview process was fair, in order to determine whether the Training Team Leader process had a retaliatory impact on Ms. Davison, however.

I have already ruled in the preceding sections that Ms. Davison's human rights complaint, or her intention to file a human rights complaint actually was at least one of the motivations to summarily terminate Ms. Davison's employment. I also held above that a reasonable human rights complainant would conclude that the escalating written complaints and disciplinary measures recorded in Ms. Davison's personnel file were designed to build a pretextual paper trail of progressive discipline designed to justify the termination of Ms. Davison which was actually motivated, at least in part, by Ms. Davison's proposed or actual human rights complaint.

Even with an apparently convincing paper trail of progressive discipline, the Respondents would still have experienced serious practical problems if they summarily terminated Ms. Davison's employment without notice. It is completely clear from the evidence before me, and especially from the description of her past work that Ms. Davison provided at the request of Mr. Kelly as a basis for the training of Ms. Lutley in these tasks, that Ms. Davison's work in organizing demand training courses for the NSCSA played a critical role in the NSCSA's activities. If the NSCSA were simply to fire Ms. Davison on short notice without first having her train a replacement who could immediately take over the tasks previously carried out by Ms. Davison, this would have a very negative and immediate impact on the NSCSA's operations, either by impairing the performance of these tasks until a replacement could be hired, or by overloading the other NSCSA staff members who would have to assume all of Ms. Davison's work on short notice without warning.

In light of this practical fact, I conclude that a reasonable human rights complainant would conclude that at least one of the reasons the NSCSA hired Ms. Lutley, an entirely new employee, was to take over the most important elements of Ms. Davison's workload, so the NSCSA could summarily fire Ms. Davison after she had trained Ms. Lutley, without any of these practical negative consequences, with at least one of the reasons for this firing being Ms. Davison's human rights complaint as demonstrated by the analyses in the previous section. Although the evidence is circumstantial, I also conclude that the Respondents were actually motivated by a retaliatory desire to achieve this result.

5) Role of the various respondents in retaliation

Thus far, I have performed the retaliation analysis as if the Respondents were a single entity. In fact there are two individual Respondents, Michael Kelly and Bruce Collins, and one institutional Respondent, the Nova Scotia Construction

Safety Association. In this segment of the retaliation analysis, I will consider the role of the different Respondents with respect to the various kinds of retaliation that I have found to exist in the analysis above.

From the time that Mr. Farrar becomes involved in the process, he is clearly representing all three Respondents. Any retaliation conclusions associated with to statements by Mr. Farrar should therefore be attributed to all three respondents.

With respect to retaliation against the Complainant through critical/disciplinary actions, and the Training Team Leader position, the most consistently visible actor is Mr. Kelly, who is also the author of the November 27, 1997 letter which contains an express retaliatory statement associated with Ms. Davison's human rights complaint. I therefore conclude that Mr. Kelly is liable for retaliation against the Ms. Davison in these contexts.

Mr. Collins' role in these contexts is less visible, but Mr. Kelly testified that Mr. Collins closely monitored what was going on. I accept Mr. Kelly's testimony on this point, because I believe, on the one hand, Mr. Kelly in such a legally sensitive context would wish to notify and consult Mr. Collins about Mr. Kelly's actions in self-preservation, while Mr. Collins, on the other hand, would want to actively and closely monitor the development of any disciplinary/replacement process with respect to Ms. Davison.

With respect to the period between the delivery of Ms. Davison's memo about the human rights complaint to the Board of Directors of the institutional Respondent NSCSA and the termination of Ms. Davison's employment, I conclude that, at a minimum, the Respondent NSCSA should be directly liable for the retaliatory consequences resulting from Board Chair Jack Osmond's memo to Ms. Davison of October 17, 1997.

With respect to the retaliatory termination of Ms. Davison's employment on January 9, 1998, on the basis of the documentary evidence and testimony before me, I conclude that the NSCSA Board of Directors made the retaliatory decision to terminate Ms. Davison's employment in early December, 1997, on the basis of a retaliatory recommendation from Respondent Bruce Collins, based on the paper trail of apparent progressive discipline constructed by Respondent Mike Kelly, in consultation with Respondent Bruce Collins. Thus, I conclude that all three Respondents are directly liable to the Complainant, Karen Davison, for retaliation with respect to the retaliatory termination of her employment under section 11 of the Nova Scotia *Human Rights Act*.

XII. LIABILITY OF INSTITUTIONAL RESPONDENT NOVA SCOTIA CONSTRUCTION SAFETY ASSOCIATION

I have discussed the issue of the institutional Respondent's direct liability for actions of the members of the Board of Directors and Executive Committee that are its governing bodies in the previous section of this decision.

In this section, I will discuss whether the Respondent NSCSA is also liable for violations of the sexual harassment provisions of the *Act*, by its General Manager, Bruce Collins, and whether the NSCSA can be held liable for retaliatory acts by its Respondent managers, Bruce Collins and Michael Kelly.

The leading authority in this area is that of the Supreme Court of Canada in *Robichaud v. The Queen* (1987) 8 C.H.R.R. D/4326, where the Court stated at paras 17-19 [emphasis added]:

> ¶ 17 ... I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions. I agree with the following remarks ... :
>
> > A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive, workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.
>
> ¶ 18 In the light of these conclusions, it is unnecessary for me to examine the allegations that the [Respondent employer] would, in any event, be directly liable for management's failure to adequately investigate Robichaud's complaints, thereby perpetuating the poisoned work environment. At all events, this, too, involves the acts of employees.
>
> ¶ 19 I should perhaps add that while the conduct of an employer is theoretically irrelevant to the imposition of liability in a case like this, it may nonetheless have important practical implications for the employer. Its conduct may preclude or render redundant many of the contemplated remedies. For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability.

The Board of Inquiry in *Miller v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433 (NSBOI) states at para 153 that the *Robichaud* approach applies in the following

way to employer liability with respect to human rights complaints in Nova Scotia:

> The law is clear that employers are liable for the actions of their employees in situations of discrimination, including sexual harassment, on the grounds that the employer has control of the work environment and is therefore in the best position to redress or respond to the consequences of harassment (*Robichaud*, *supra*). Employers are generally liable where the harassing conduct is that of a supervisor or where they knew or ought to have known that the employee's harassing behavior in the work environment was unacceptable and unwelcome, and they did not act to stop the behavior or redress the victim. ... [emphasis added]

Since both Mr. Collins and Mr. Kelly are clearly supervisors, the employer, the Respondent Nova Scotia Construction Safety Association, is clearly liable under *Robichaud* for the acts of sexual harassment in violation of section 3(o)(i) of the Nova Scotia *Human Rights Act*, and the retaliatory behaviours of Mr. Collins and Mr. Kelly under section 11 of the *Act*.

The Respondent NSCSA attempted to rely on the last, "remedial" paragraph of the *Robichaud* decision reproduced above, on the basis that certain actions of the NSCSA should be treated as a "scheme to remedy and prevent recurrence", which the Supreme Court suggests "may preclude or render redundant many of the contemplated remedies". I note that all of the steps referred to are prospective in nature, and directed at possible future occurrences of sexual harassment.

Such measures may, indeed be relevant to the remedial orders that I make in this case order with respect to non-monetary remedies designed to protect the present employees of the NSCSA from sexual harassment, if such measures are likely to be effective in achieving the objectives of preventing and/or redressing future instances of sexual harassment.

These measures are not relevant to any compensation that I might otherwise award to the Complainant, however, because the NSCSA has not done absolutely nothing to remedy the harm that the Complainant has suffered through the negative impact of her own experiences of past sexual harassment and retaliation at the NSCSA. Instead, as demonstrated in my analysis above, the NSCSA Board has itself engaged in direct acts of retaliation against the Complainant, and is directly liable in its own right for these retaliatory acts under section 11 of the Nova Scotia *Human Rights Act*.

I will return to these issues in my discussion of remedies in the next section of this decision.

XIII. REMEDIES

a) Board of Inquiry Remedial Powers

The remedial powers of a Board of Inquiry are found in section 34(8) of the Nova Scotia *Human Rights Act*, and are as follows:

> (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.

b) Nonmonetary Remedies

As noted in my comments in the previous section, counsel for the Respondents relied upon the suggestion of the Supreme Court of Canada in *Robichaud* that non-monetary remedies against a Respondent may not be necessary where the Respondent has already adopted a scheme that will prevent recurrence of the violations in question, and/or provide effective remedies if they occur. I would agree with the Respondents on this point if the evidence before a Board of Inquiry demonstrates that the particular measures adopted by the Respondents are likely to be effective in preventing recurrence of the problems in question, as opposed to mere empty window-dressing designed to protect against negative consequences in litigation, without actually being effective in addressing the underlying problems in practice.

One of the measures relied upon by the Respondents in making this argument was the fact that the NSCSA adopted a sexual harassment policy in January 1998, at about the same time that the Complainant's employment was terminated. Although there was a variety of testimony and documents submitted in evidence that referred to the development and adoption of this sexual harassment policy, I was and remain troubled by the fact that no copy of the NSCSA sexual harassment policy itself was ever provided to me as evidence.

I am also troubled by the contents of one of the documents with respect to the development of the sexual harassment policy that was submitted in evidence as Exhibit 28. Exhibit 28 is a memorandum dated December 17, 1997, from Lynn MacInnis, the person responsible for human resource issues at the NSCSA at that time, to Bruce Collins, which is entitled "harassment policy update". The statement within this document that most concerns me is as follows [emphasis added]:

> Staff were uncomfortable with the original draft because of the involvement of outside parties in the investigation process and a general lack of procedures (i.e. what to do and when) and numerous minor issues.

Mr. Collins stated during his testimony with respect to this document that he was one of the staff members who objected to "the involvement of outside parties in the investigation process".

On the basis of Exhibit 18, I am seriously concerned that the sexual harassment policy may not make provision for external independent investigation of allegations of sexual harassment against senior managers, such as Mr. Collins.

Because of the power differential between Mr. Collins and all other employees, it is unlikely that any internal investigation mechanism could fairly and effectively evaluate allegations of sexual harassment against Mr. Collins (or other senior managers). In some workplaces, this problem might be addressed by assigning responsibility for evaluating sexual harassment allegations against CEOs to the Board of Directors, but on the basis of events in this case described above, I have serious doubts that such an approach to processing sexual harassment complaints against Mr. Collins or other senior managers who work closely with the NSCSA Board and/or Executive would be effective. My misgivings in this area are reinforced by the following analysis in a new book authored by A.P. Aggarwal and M.M. Gupta, entitled *Sexual Harassment Investigations: How to Limit Your Liability and More* (Harassment Publications, 2004) at pp. 59-60:

> E. Sexual Harassment by Top Management Personnel
>
> Allegations of sexual harassment against the top brass of a corporation may create a dilemma for management. It also raises a number of questions including the effectiveness of *in house* mechanisms to combat sexual harassment. The company must ask itself: [emphasis in the original]
>
> - Do we have an effective policy to meet the situation when the president or a senior executive is alleged to have committed sexual harassment?
> - Who would order and who would conduct an investigation?
> - Would the investigation be objective and fair without fear or favour?
> - Can either or both parties receive a fair hearing if the case is covered by the media? Would publicity discourage witnesses from coming forward?
> - Who would implement the recommendations and who would impose sanctions?
>
> The policy should contain special provisions and procedures, or ideally the company should have a separate policy, to deal with situations involving senior management The policy should designate an individual outside the organization (at arms length) to receive and investigate such complaints. See Appendix B - sample Policy Provisions for Complaints Against Senior Management.

It is impossible for me to determine whether the NSCSA's present sexual harassment policy is likely to be effective in addressing sexual harassment complaints against senior management without seeing a copy of the policy in question. I therefore direct the Respondent NSCSA to provide me with a copy of the sexual harassment policy in force at the NSCSA on July 15, 2005, by a date on or before Monday, August 22, 2005.

I will review this policy and then determine whether it is necessary to make some order to ensure that the NSCSA's sexual harassment policy is effective even in processing sexual harassment complaints against the General Manager or other senior managers.

I retain jurisdiction to make a determination on the basis of my examination of the NSCSA's present sexual harassment policy, received as a result of this order, with respect to whether an order directing amendment or replacement of the NSCSA's sexual harassment policy is necessary in order to provide an effective remedy in this case.

It is also common for a Board of Inquiry to order sensitivity training as a non-monetary remedy in discrimination cases. In this case, the employees of the Respondents have received some sensitivity training, but there has been significant turnover of the staff at the NSCSA, and the members of the NSCSA Board of Directors. I mention the latter, because I believe that it is important also to provide sensitivity training to the present NSCSA Board Members, as well as the staff. In this case, I also conclude that the training should not only include sensitivity training, but also explicit training with respect to the impact of power differentials in the context of discrimination, and the illegality and harmful effects of retaliation in the context of intended or actual human rights complaints.

Accordingly, I order that:

a) The Respondents (corporate and individual), their present employees, and any new employees shall take sensitivity training, training with respect to the effect of power differentials in the context of discrimination, and training with respect to the illegality and harmful effects of retaliation in the context of actual or proposed human rights complaints, during working hours with no loss of pay, for as many hours as the Nova Scotia Human Rights Commission considers necessary.

b) The present Board of Directors of the Respondent Nova Scotia Construction Safety Association shall take sensitivity training, training with respect to the effect of power differentials in the context of discrimination, and training with respect to the illegality and harmful effects of retaliation in the context of actual or proposed human rights complaints, at a time convenient for the Board Members in question, for as many hours as the Nova Scotia Human Rights Commission considers necessary. New Members of the NSCSA Board of Directors shall receive such training upon their appointment to the Board.

I also make the following nonmonetary order, which is common in Nova Scotia human rights cases:

The Respondents (corporate and individual) shall each allow the Nova Scotia Human Rights Commission to monitor the employment practices of the Respondents in any operation or business they maintain in Nova Scotia for a period of three years following this decision.

c) Monetary Remedies

1) Monetary Remedies: Principles

Monetary remedies in human rights cases fall into two categories: compensatory damages and punitive/exemplary damages. Compensatory damages may include economic damages designed to compensate the Complainant for economic losses resulting from the discrimination in question and general damages designed to compensate the Complainant for non-economic losses.

The comments of the Board of Inquiry in *Miller v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433 (NSBOI) at paras. 202-207 and 213-215 provide a useful overview of the law of compensatory damages in human rights cases at the present time:

> ¶ 202 The power of this Board to award remedies is vested in subsection 34(8) of the Human Rights Act which states:
>
> > 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.
>
> ¶ 203 The N.S. Board of Inquiry (Chair David J. Bright) in *McLellan*, *supra*, 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 N.S. Board of Inquiry (Chair Philip Girard) in *Cameron v. Giorgio & Lim Restaurant*, *supra*, 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, according to Bright, however, "... must reflect the nature of the sexual harassment itself' (D/156).
>
> **General Damages**
>
> ¶ 204 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 (Ont. Bd. Inq.), at D/3855 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 "licence 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.
>
> ¶ 205 More recently, the Ontario Board of Inquiry in *Yale v. Metropoulos* (1994) 20 C.H.R.R. D/45 (Ont. Bd. Inq.), at D/49 approved these general principles. Professor

Cumming in *Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170 (Ont. Bd. Inq.) noted that damage awards in human rights cases have become "progressively more substantial in recent years" in order to provide true compensation and to reflect the loss of the human rights of equality of opportunity in employment. He states:

> Although damage awards in human rights cases historically were small in size, they have become progressively more substantial in recent years. It is now a principle of human rights damage assessments that damage awards ought not to be minimal, but ought to provide true compensation other than in exceptional circumstances, for two reasons. First, it is necessary to do this to meet the objective of restitution ... Second, it is necessary to give true compensation to a complainant to meet the broader policy objectives of the *Code*. It is important that damage awards not trivialize or diminish respect for the public policy declared in the *Human Rights Code* (D/2196).

¶ 206 The tribunal in *Morrison v. O'Leary Associates* (1992), 15 C.H.R.R. D/237 (N.S. Bd. Inq.), at D/249 affirmed this statement. Similarly, the Ontario Board of Inquiry in *Underwood v. Board of Commissioners of Police of Smith Falls* (1986), 7 C.H.R.R. D/3176 (Ont. Bd. Inq.) stated at D/3184 that "... the initial reticence of boards of inquiry to make more than the most minimal awards is giving way to the view that damages ought to be more substantial." According to the Ontario Board of inquiry in *Shaw v. Levac Supply Ltd.* (1991), 14 C.H.R.R. D/36 (Ont. Bd. Inq.), the damage awards in sexual harassment cases, in particular, have been increasing over the years. He explains the reason for this increase in quantum in the following statement:

> Tribunals have taken into account the effect of inflation, lest it convert into mere licence fees sums that might once have been appropriate, and they reflect as well changing perceptions as to the gravity of the injury implicit in such assaults upon human dignity (D/62).

Furthermore, the recent award of $10,000 in exemplary damages by the Nova Scotia Board of Inquiry in *Hillcrest Manor, supra*, illustrates this trend of higher awards.

¶ 207 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 (Ont. Bd. Inq.) at D/873, 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. ...

¶ 213 In *Torres*, *supra*, at D/872, Professor Cumming stated "[a]lthough the nature of harassment in individual cases will be the ultimate determinant of the quantum of damages, consideration should be given to awards made in previous cases".

Accordingly, I have reviewed the damage awards of recent sexual harassment decisions in both Nova Scotia and in other jurisdictions.

¶ 214 Mr. Duplak in his summation indicated that damage awards in civil actions for sexual assault range between $10,000 and $100,000 depending on the frequency and the extent of the sexual assault. For example, in *H.R. v. F.M.* (1993), 129 N.B.R. (2d) 303 (Q.B.) the plaintiff was awarded $8,000 in general damages. In that case, the defendant touched the plaintiffs breasts when she was sitting beside him in a truck in the presence of her child, made lewd and suggestive sexual remarks, and made harassing phone calls to her. Although there is a $100,000 cap on non-pecuniary damages from the trilogy of cases in the Supreme Court of Canada (*Andrew's v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thorton v. Board of School Trustees of School District No. 57* (Prince George), [1978] 2 S.C.R. 267; and *Arnold v. Teno*, [1978] 2 S.C.R. 287), in more recent cases higher damage awards have been granted. For example, in B. (K.L.) v. B. (K.E.) (1991), 7 C.C.L.T. (2d) 105 (Man. Q.B.) an award of $170,000 was allowed in a case of persistent incest.

¶ 215 Damage awards in human right tribunals, according to the B.C. Council of Human Rights in *Burton v. Chalifour Bros. Construction Ltd.* (1994), 21 C.H.R.R. D/501 (B.C.H.R.C.) are in general smaller than those awarded by the courts in civil actions of sexual assault. In that case the complainant who worked in the construction industry was awarded $4,500 in general damages when co-workers placed a poster of a nude woman on the wall, and made rude and abusive remarks to the complainant. ...

With respect to punitive or exemplary damages (the terms mean the same thing), the Board of Inquiry in *Miller v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433 (NSBOI) made the following comments at paras 217-223 [emphasis added]:

Exemplary Damages

¶ 218 In *Michelle Dillman v. IMP Group Limited* (N.S. Bd. Inq. decision dated 31 October 1994), Chair Michael Wood noted that punitive damages are rarely awarded. He stated at page D/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 et al.* (1985), 67 N.S.R. (2d) 112 (S.C., T.D.) stated at p. 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. However, Professor Cumming stated in *Torres*, *supra*, at D/870 regarding punitive damages, it was not "a proper interpretation of the *Code* to say that they never can be awarded."

¶ 219 Professor Cumming found an implicit power to award punitive damages in the Ontario legislation. The provision on which Professor Cumming relied is very similar to subsection 34(8) of the N.S. *Human Rights Act* where the Board can order "any act or thing that constitutes full compliance" with the *Act*. Cumming noted that the [broad] wording of this remedy section permits boards to make awards other than compensation if their purpose is to prevent future human right violations. He argues that punitive damages should be permitted if they are consistent with the purposes of educat[ing] the wrongdoers and ultimately, ... ensur[ing] future compliance" with human rights legislation (D/870). He explains where such awards are appropriate in the following passage at D/870:

> In certain cases, it may be highly instructive for a respondent to face the paying of a penalty. If the Board is of the opinion that no other order could be so effective as to encourage future compliance with the Code as a punitive order, then I believe that an order of punitive damages might be proper. Such an award would be consistent with the educative purposes of the Code. It must be pointed out though, that such an

> award should have as its sole purpose the prevention of future breaches of the Code. That is, the penalty should be made only to effect deterrence, not to denounce the act or wrongdoer, nor to exact retribution. Any aim other than "full compliance" with the Code, i.e. deterrence from future breaches, would certainly be, in my opinion, beyond the powers of a Board of Inquiry.
>
> Even if this interpretation is correct, punitive damages would be very rarely made. For most respondents, the mere participation in inquiry proceedings or the awarding of compensatory damages alone will have a deterrent effect. Only where a Board is of the opinion that a greater deterrent is needed would punitive damages be necessary. One can speculate that this might be true in some sexual harassment cases.
>
> ¶ 220 There is precedent for and increasing use of exemplary damages to effect full compliance. In *Janzen*, *supra*, the complainants were awarded $3,000 and $3,500 in exemplary damages because of the nature of the physical and mental sexual harassment, and because of the substantial psychological impact of the harassment they both endured.
>
> ¶ 221 In Nova Scotia, the board in *Hillcrest Manor, supra*, awarded the Complainant $10,000 in exemplary damages for the emotional pain and suffering she suffered for three and a half months while working as a kitchen worker. The Respondent used demeaning language and gender-based insults regularly and on a few occasions played sexual jokes on other kitchen workers. As a result of this poisoned work environment, the Complainant in the *Hillcrest Manor* decision suffered significant emotional stress and, nervous anxiety which required on-going treatment.
>
> ¶ 222 The evidence adduced by the Commission and Ms. Barrett-White in *Miller*, admitted in part by the Respondents, constitutes a flagrant case of sexual harassment that is more severe than in the *Hillcrest Manor* case. The emotional pain and suffering as well as the "devastating" psychological impact of the sexual harassment on Ms. Barrett-White due to the Respondents' reprehensible behavior clearly warrants an award in exemplary damages. Further, as Mr. Duplak stated in his summation, at no time during the hearing did the Respondents indicate any remorse or apologize for their conduct.
>
> ¶ 223 This sexual behavior (verbal and physical) escalated over the course of the Complainant's employ, despite her explicit protests and efforts to avoid the situation. Mr. Samir Nasralla abused his position of power as the employer; his sexual conduct and comments rendered the work environment hostile and intolerable. He condoned the sexual harassing behavior of his employee and brother Mr. Lee Nasralla. He ignored the Complainant's repeated verbal and non-verbal indicators that his behavior was unwelcome. He ignored the suggestions of male employees and other males who frequented the restaurant to alter his behavior as the Complainant and other waitresses did not like it. He verbally abused the Complainant when she quit and threatened her with the "Lebanese mob" should she go to the police. For these reasons I order an additional $10,000.00 be paid in exemplary damages to Ms. Barrett-White. This is based in part, on the evidence of Ms. Barrett-White's psychologist who determined that six months of therapy, costing approximately $3000., would be required to resolve the post-traumatic reactions.

I am puzzled by the conclusion of the Board in *Miller v. Sam's Pizza House* at paras 221-223 that punitive damages should be awarded because the Complainant suffered "significant emotional stress and nervous anxiety which required on-going treatment", a "devastating" psychological impact, and that the award of $10,000 punitive damages reflects, in part, the fact that the complainant has a need for therapy costing approximately $3000.00. It is good that counsel

provided evidence of these harms, and that the Board made an award on the basis of this evidence, but I would suggest that such an award belongs more appropriately under item "vii) The psychological impact of the harassment upon the victim" in the list of factors relevant to the assessment of general compensatory damages reproduced from the *Torres* case above.

I would note that, as a teacher of the course on Tort Law and Damage Compensation at Dalhousie Law School, I am shocked when reading human rights decisions at how rarely evidence of the sort submitted to the tribunal in *Miller v. Sam's Pizza House* is put in evidence in human rights cases. In most such cases, including this one, the evidence introduced by counsel for the Commission on behalf of the complainant (who usually does not have a lawyer of his or her own) is limited to brief testimony by the Complainant about the impact of the discrimination on him or her, with no introduction, for example, of medical testimony with respect to the physical and mental health consequences that discrimination may have on a complainant. This is unfortunate, because there is a growing body of evidence that the health impact of discrimination on its targets can be quite severe. See, for example, see S.A. Lenhart, *Clinical Aspects of Sexual Harassment and Gender Discrimination: Psychological Consequences and Treatment Interventions* (Brunner-Routledge, 2004), where the author states at p. 135 of her text:

> A large number of physical symptoms have been reported in relation to discriminatory experiences, including gastrointestinal disorders, jaw tightening, teeth grinding, dizziness, nausea, diarrhea, tics, muscle spasms, fatigue, dyspepsia, neck pain, back pain, pulse changes, headaches, weight loss, weight gain, increased perspiration, cold feet and hands, loss of appetite, binge eating, decreased libido, delayed recovery from illness, sleep disruption, increased respiratory or urinary tract infections, recurrences of chronic illnesses, ulcers, irritable bowel syndrome, migraines, eczema, and urticaria. ... Psychological reactions that have been reported include persistent sadness, negative outlook, irritability, lability, anergia and hypergia, mood swings, impulsivity, emotional flooding, anxiety, fears of loss of control, excessive guilt and shame, escape fantasies, compulsive thoughts, rage episodes, obsessional fears, crying spells, persistent anger and fear, decreased self-esteem, self-doubt, diminished self-confidence, decreased concentration, anhedonia, and feelings of humiliation, helplessness, vulnerability, and alienation. The psychiatric disorders that have been reported include 1) anxiety disorders, especially generalized anxiety disorder, post-traumatic stress disorder, acute stress disorder, and dissociation disorders; (2) somatization disorders; (3) sleep disorders; (4) sexual function disorders; (5) psychoactive substance abuse disorders; (6) depressive disorders; and (8) DSM-IV ... V code diagnoses associated with marital, occupational, interpersonal and bereavement issues.

I would encourage Commission counsel or other lawyers representing Complainants in future human rights cases with respect to damage claims, to explore with Complainants the presence or absence of the broad range of symptoms described above, to bring out evidence of such symptoms during the testimony of the Complainant if they in fact exist, and to consider providing expert testimony to assist Boards of Inquiry in making accurate and adequate awards of general damages. I suspect that the absence of such testimony is one

of the reasons that awards of general damages in human rights cases have historically been so low.

2) Monetary Remedies in this Case

In this case the Complainant, Karen Davison, gave the following summary of the impact of the Respondents' human rights violations upon her:

> A. [Witness crying] It's been five years of my life that I pretty much consider down the tubes because of this. And I know it's not the place of this Inquiry to take that into consideration, but as if the stress of going through this in the first place wasn't bad enough, everything in the five years since has been just as bad. If I knew then what I know now, I would never have taken that job there, never. I just want my life back, and I have felt for the last five years that I haven't had my own life. I know what they did to me. They know what they did to me, even though I'm convinced they're going to lie through their teeth. But I know that I'm right.
>
> Q. Can you describe for us the impact that these events have had on you, as a person?
>
> A. [Witness crying] I'm not the same person I was five years ago, that's for sure. I am very suspicious of people and their motives now. I don't trust people as much as I used to. I feel as though my self-esteem and my self-confidence has been sapped. They have taken away my sense of wellbeing and the Karen that existed before all of this is gone. The person that I am now is a different Karen. This is probably the worst thing that's ever happened to me in my life.

In assessing an award of general damages in this case, I will make separate awards of general damages with respect to the sexual harassment violations and the retaliation violations of the *Human Rights Act*.

On the basis of Ms. Davison's testimony as a whole, I conclude that she perceived the behaviours that I have held to constitute sexual harassment as vexatious sexual annoyances, to borrow language from the *Act* and the provisions of the Aggarwal and Gupta text quoted earlier. I would award Ms. Davison $3,000 in general damages against Mr. Collins and the Nova Scotia Construction Safety Association, jointly and severally, with respect to the sexual harassment violations committed by Mr. Collins.

By contrast, I conclude that the strong emotional responses of the Complainant described in the excerpt from her testimony quoted above, reflect severe stress resulting from the Respondents' breaches of the retaliation section of the *Act*. A more substantial award of general damages is therefore required for the retaliation breaches.

I award Ms. Davison $7,000 in general damages for the retaliation breaches against Mr. Collins, Mr. Kelly and the Nova Scotia Construction Safety Association, jointly and severally, with respect to the retaliatory behaviours of Mr. Collins and Mr. Kelly.

I also make a separate award of general damages of $3,000 against the institutional Respondent, the Nova Scotia Construction Safety Association with respect to the actions of its Board of Directors that were directly retaliatory against the Complainant. This $3,000 award is in addition to the liability of the NSCSA with the behaviour of its managerial employees under the *Robichaud* rule discussed above.

Turning to the issue of compensation for economic loss, although the Complainant was briefly suspended without pay, and it appears that the Complainant was unemployed for about a month after the termination of her employment at the NSCSA, I was provided with no evidence to demonstrate the amount of the Complainant's loss (if any) during these periods. In the absence of such evidence, I can make no award for loss of income or other economic losses on the part of the Complainant.

With respect to punitive damages, counsel for the Commission and the Respondents both submitted that no award of exemplary or punitive damages was appropriate on these facts. The Complainant, representing herself, requested an award of punitive/exemplary damages.

I agree with counsel for the Commission and the Respondents, that no award of exemplary damages is appropriate here with respect to the sexual harassment violations of the *Act*.

I have concluded, however, that an award of punitive damages is appropriate with respect to the institutional Respondent Nova Scotia Construction Safety Association, to ensure that the patterns of retaliatory behaviour in this case do not recur in future if other staff members raise allegations of discrimination (whether sexual or on other grounds under the Nova Scotia *Human Rights Act*.

It is clear that the risk of retaliation against potential or actual human rights complainants, is one of the most significant barriers to the achievement of non-discriminatory workplaces, both within the NSCSA itself and in other workplaces across Canada. Most employees are well aware that there is a serious risk of retaliation if they raise issues of discrimination in the workplace, and as a result many of them remain silent in the face of ongoing discrimination because of fear of losing their jobs through retaliation. It is clear that employees within the NSCSA already were subject to such fears even before the workforce at the NSCSA actually witnessed the NSCSA's retaliation against Ms. Davison on account of her human rights complaint. Although there has been a significant amount of turnover in the NSCSA workforce, I am sure that current NSCSA employees are aware through the grapevine that Ms. Davison lost her job, in part because of retaliation on account of her human rights complaint, and that the NSCSA Board of Directors, without an independent investigation of the merits of Ms. Davison's claim, simply supported individual respondents Collins and Kelly

both with respect to the retaliation in the workplace and in the context of the litigation of Ms. Davison's human rights complaint.

I am concerned that the awards of compensatory damages I have made in this case ($13,000 in total) are not sufficient to deter the Board of Directors from repeating this retaliatory conduct in future, if, for example, some employee were to make another discrimination complaint against Mr. Collins, who is a member of the NSCSA's four person Executive Committee, and an individual with whom Board members work closely and rely upon heavily. In order to ensure that the $13,000 compensatory award is not simply a license fee that the NSCSA Board is willing to pay, while still continuing to uncritically support Mr. Collins in the case of future discrimination conflicts, I make an additional award of $7,000 exemplary damages against the institutional Respondent Nova Scotia Construction Safety Association.

XIV. ORDER

For the foregoing reasons, this Board of Inquiry orders as follows:

1. The Respondents Nova Scotia Construction Safety Association and Bruce Collins are jointly and severally liable to pay within ninety days of the date of this decision to the Complainant, Ms. Karen Davison, the following:

As general damages, the sum of $3,000.00.

2. The Respondents Nova Scotia Construction Safety Association, Michael Kelly and Bruce Collins are jointly and severally liable to pay within ninety days of the date of this decision to the Complainant, Ms. Karen Davison, the following:

As general damages, the sum of $7,000.00.

3. The Respondent Nova Scotia Construction Safety Association is liable to pay within ninety days of the date of this decision to the Complainant, Ms. Karen Davison, the following:

a) As general damages, the sum of $3,000;

b) As exemplary damages, the sum of $7,000.

4. The Respondents (corporate and individual) shall each allow the Nova Scotia Human Rights Commission to monitor the employment practices of the Respondents in any operation or business they maintain in Nova Scotia for a period of three years following this decision.

5. The Respondents (corporate and individual), their present employees, and any new employees shall take sensitivity training, training with respect to the effect of power differentials in the context of discrimination, and training with respect to the illegality and harmful effects of retaliation in the context of actual or proposed human rights complaints, during working hours with no loss of pay, for as many hours as the Nova Scotia Human Rights Commission considers necessary.

6. The present Board of Directors of the Respondent Nova Scotia Construction Safety Association shall take sensitivity training, training with respect to the effect of power differentials in the context of discrimination, and training with respect to the illegality and harmful effects of retaliation in the context of actual or proposed human rights complaints, at a time convenient for the Board Members in question, for as many hours as the Nova Scotia Human Rights Commission considers necessary. New Members of the NSCSA Board of Directors shall receive such training upon their appointment to the Board.

7. The Respondent Nova Scotia Construction Safety Association shall deliver to the Chair of the Board of Inquiry a copy of the sexual harassment policy in force at the NSCSA on July 15, 2005, on or before Monday, August 22, 2005. The Board retains jurisdiction to review the Sexual Harassment Policy so provided, and make any orders necessary to ensure that the NSCSA's sexual harassment policy is amended, if necessary ,to make it effective in processing sexual harassment complaints against senior managers at the NSCSA.

The Board of Inquiry shall retain jurisdiction for the purpose of resolving any difficulties the parties might experience in implementing this Order.

Dated: July 15, 2005

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Jennifer Bankier, Chair Human Rights Board of Inquiry

APPENDIX A

TIMELINE, DAVISON HUMAN RIGHTS COMPLAINT

KD=Karen Davison Complainant DF=David Farrar, lawyer for the Respondents

MF=Meredith Fillmore, first Human Rights Officer Responsible for this case
MP=Marie Paturel, second Human Rights Officer Responsible fort this case
BG= Bill Grant, third Human Rights Officer Responsible for this case

1995-May 1997	EVENTS RELEVANT TO SEXUAL HARASSMENT PORTION OF HUMAN RIGHTS COMPLAINT
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August 7, 1997:	Phone call by Karen Davison (Complainant) to the NSHRC
August 14, 1997:	INITIAL LETTER FROM COMPLAINANT TO NSHRC, DESCRIBING SEXUAL HARASSMENT ALLEGATIONS
August 27, 1997	Letter from Davison to HRC
August 28, 1997	Letter from HRC to Davison
September 3, 1997	Letter to HRC file from M. Fillmore, HR officer responsible for handling KD's complaint
October 1, 1997	HRC notes phone call from Bruce Collins
October 3, 1997	HRC memo to file by M. Fillmore
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October 8, 1997:	EVENTS RELEVANT TO RETALIATION PORTION OF KD'S HUMAN RIGHTS COMPLAINT BEGIN
October 8 & 9 1997	Memo to HRC file from MF
Oct. 16 & 17, 1997	Memo to HRC file from MF
October 23, 1997	Memo to HRC file from MF
October 28, 1997	Letter from F. Comeau, HRC, to J. Osborne, Chair, NSCSA Board of Directors
Nov. 10, 1997	Letter from D. Farrar, Respondent's lawyer to F. Comeau, HRC, & Memo to HRC file from MF
Nov. 12, 1997	Memo to HRC file from MF
Nov. 17 & 18, 1997	Memo to HRC file from MF
Nov. 19 & 20, 1997	Memos to file from KD to MF (HRC)
Nov. 20 & 21, 1997	Memos to HRC file from MF
Nov. 24, 1997	Memo to HRC file from MF & memo from MF to F. Comeau (HRC)
Nov. 27, 1997	Memo from KD to MF (HRC)
Nov. 27-28/97	Memo to HRC file from MF
Dec. 2, 1997	Memo from KD to MF HRC

Dec. ?	Memo to HR file re KD
Dec. 8, 1997	F. Comeau, HRC, means with Bruce Collins et al
Dec. 8, 1997	Memo from KD to F. Comeau
Dec. 15, 1997	Letter from D. Ring on behalf of KD to F. Comeau, HRC
Feb.10-11, 1998	Memo to HRC file from MF
Feb. 17, 1998	Memo to HRC file from MF
March 5, 1998	Memo to HRC file from MF
March 13, 1998	EVENTS RELEVANT TO RETALIATION PORTION OF KD'S HUMAN RIGHTS COMPLAINT END
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March 17, 1998	Letter from KD to MF
March 26, 1998	Memo to HRC file from MF
March 31, 1998	Letter from KD to MF & memo to HRC file by MF
April 1, 1998	Memo to HRC file from MF
April 8-9/98	Memo to HRC file from MF
April 9, 1998	Interview record, KD
April 9, 1998	LETTER FROM MF TO RESPONDENTS WITH FORMAL COMPLAINT ATTACHED
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April 23, 1998	Letter from David Farrar to MF (HRC)
May 6, 1998	Handwritten notes of MF re interview, A. Barrett
May 15, 1998	Original deadline for Respondents' response to formal complaint: not met
May 19, 1998	Letter, D. Farrar to MF HRC requesting extension for deadline to reply to Formal Complaint
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May 20, 1998	Memo to HRC file from MF
May 22, 1998	Memo to HRC file from MF
May 25, 1998	Memos to HRC file from MF
May 26, 1998	Memos to HRC file from MF
May 27, 1998	Letter from MF (HRC) to D. Farrar informing of conciliation meeting on June 25, 1998
May 27, 1998	Letter from MF to KD
June 10, 1998	Memo to HRC file from MF
June 22, 1998	Fax from KD to MF (HRC)
June 22, 1998	Memo to HRC file from MF
June 25, 1998	Conciliation meeting
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July 6, 1998	Memo to HRC file from MF
July 7, 1998	Memo to HRC file from MF
July 9, 1998	Memo to file from MF
July 14, 1998	Memo to HRC file from MF
July 16, 1998	Memo to HRC file from MF

July 17, 1998 Memo to HRC file from MF
July 20, 1998 Memo to HRC file from MF
July 22, 1998 Memo to HRC file from MF
July 29, 1998 Memo to HRC file from MF
July 30, 1998 Memo to HRC file from MF
August 4, 1998 Memo to HRC file from MF
August 5, 1998 Letter from D. Farrar to MF (HRC)
August 5, 1998 Memo to HRC file from MF
August 10, 1998 Memo to HRC file from MF
August 11, 1998 Memo to HRC file from MF
August 12, 1998 Memo to HRC file from MF
August 13, 1998 RESPONDENTS' REPLY TO FORMAL COMPLAINT

Aug. 13, 1998 Letter from MF (HRC) to KD & Memo to file
Aug. 14, 1998 Letter from MF (HRC) to D. Farrar & Memo to file
Aug. 21, 1998 Memo to HRC file from MF
Aug. 24, 1998 Memo to HRC file from MF
Sept. 16, 1998 Memo to HRC file from MF
Sept. 17, 1998 Memo to HRC file from MF
Sept. 23, 1998 Memo to HRC file from MF
Sept. 24, 1998 Memo to HRC file from MF
Sept. 25, 1998 Memo to HRC file from MF
Sept. 28, 1998 Memo to HRC file from MF
Sept. 29, 1998 Memos to HRC file from MF
Sept. 30, 1998 Memo to HRC file from MF
Oct. 5, 1998 Memo to HRC file from MF
Oct. 6, 1998 Memo to HRC file from MF
Oct. 20, 1998 Memo to HRC file from MF
Oct. 21, 1998 Memo to HRC file from MF
Oct. 26, 1998 Memo to HRC file from MF
Oct. 28, 1998 Memo to HRC file from MF
Oct. 30, 1998 Memo to HRC file from MF
Nov. 2, 1998 Memo to HRC file from MF
Nov. 10, 1998 Memo to HRC file from MF
Nov. 12, 1998 HRC RECEIVES REBUTTAL TO RESPONDENTS REPLY FROM KD

Nov. 12, 1998 Memo to HRC file from MF
Nov. 13, 1998 Letter from KD to MF providing document
Nov. 16, 1998 Letter from MF to KD
Nov. 16, 1998 Letter from MF to D. Farrar
Nov. 26, 1998 Memo to HRC file from MF
Dec. 9, 1998 Memo to HRC file from MF
Dec. 11, 1998 Memo to HRC file from MF
Dec. 17, 1998 NSHRC ASSESSMENT TEAM REPORT RE COMPLAINT

Jan. 4, 1999	Memo to HRC file from MF
Jan. 6, 1999	LETTER FROM MF to D. FARRAR SAYING ASSESSMENT TEAM DECIDED COMPLAINT SHOULD BE INVESTIGATED
Jan. 15, 1999	Letter from D. Farrar to MF requesting that investigation be coordinated through his office
Jan. 18, 1999	Two emails from KD to MF'

March 3, 1999	Letter from MF to DF saying complaint investigation won't begin until end of March and requesting documents
March 3, 1999	Email from MF to KD
March 3, 1999	Letter from MF to KD
March 5, 1999	Memo to HRC file from MF
March 16, 1999	Email from KD to MF
April 7, 1999	2 memos to HRC file by MF
April 13, 1999	Memo to HRC file from MF
April 16, 1999	Email from KD to MF (HRC)

July 16, 1999	Letter from Marie Paturel (HRC) to D. Farrar saying she has been assigned to the file & complaint will now proceed to investigation: MP is preparing an investigation plan and will be in touch & noting there has been no response by the respondents to a request from MF on March 3/99 for certain documents
July 27, 1999	Letter from DF to Paturel, apologizing for delay in providing requested info, hopes to provide in next week or so

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August 20, 1999	Letter from Farrar to MP (HRC) enclosing docs/response promised in letter of July 27, 1999

October 28, 1999	Email to KD to Paturel.
November 11, 1999	Memo to HRC file from MP

December 15, 1999	Letter from MP to DF says she has completed investigation plan and is beginning investigation ... requests a large variety of info from Respondents (documents, witness contact info) by Jan. 4, 2000
Dec. 20, 1999	2 memos to HRC file from MP
Jan. 4, 2000	Letter from MP (HRC) to KD
Jan. 6, 2000	Phone call from MP to DF re non-receipt of requested documents on Jan. 4, 2000

Jan. 7, 2000	Memo to HRC file from MP
Jan. 6, 2000	DF promises docs to MP by Jan. 21
Jan. 21, 2000	HRC does not receive promised documents from respondents
Jan. 24, 2000	MP leaves voice message for DF
Jan. 25, 2000	MP leaves 2 voice messages for DF
Jan. 27, 2000	MP reaches DF: DF says he will contact client, find out where info is and contact MF; MF does not hear from DF; also memo to file, MP
Jan. 28, 2000	Email to Paturel from KD
Feb. 1, 2000	Memo to HRC file from MP
Feb. 9, 2000	MP leaves message for DF
Feb. 10, 2000	Letter from Paturel to KD
Feb. 11, 2000	MP leaves 2 messages for DF
Feb. 14, 2000	MP phones and reaches DF; DF says will be getting info by Feb. 18
Feb. 17, 2000	Memo to HRC file from MP
Feb. 18, 2000	MF does not receive documents from DF: leaves message on voice mail
Feb. 21, 2000	Voicemail and fax from MP to DF
Feb. 21, 2000	Letter from DF to MP saying that all docs. & contact info should be sent by NSCSA to DF's office by Feb. 23/00
Feb. 21, 2000	Letter from MP (HRC) to KD
Feb. 21, 2000	Memo to file, MP
Feb. 24, 2000	MP (HRC) leaves voice mail for DF and sends letter to DF saying still have not received requested contact info re witnesses etc. or explanation of delay (also MP memo to HR file)
Feb. 25, 2000	Letter from KD to Paturel (HRC)
Feb. 25, 2000	Letter from DF providing requested info & saying he received it from NSCSA that day
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March 1, 2000	Letter from MP to DF re setting up interviews
March 1, 2000	Letter from MP to KD
March 3, 2000	Letter from DF to MP
March 5, 2000	HRC interviews a witness by phone
March 6, 2000	HRC interviews a witness by phone
March 7, 2000	HRC witness interview
March 7, 2000	MP requests info from respondents
March 8, 2000	Info from respondents provided
March 8, 2000	Memo to HRC file from MP
March 9, 2000	Letter from DF to Paturel
March 9, 2000	Memo to HRC file from MP
March 13, 2000	Letter from MP (HRC) to DF re arranging

	interviews with NSCSA employees
March 13, 2000	Letter from DF to Paturel
March 14, 2000	Letter from Paturel to DF
March 14, 2000	Witness interview by phone
March 15, 2000	Letter from DF to Paturel
March 16, 2000	3 NSCSA employees interviewed at NSCSA office
March 17, 2000	Letter from Paturel to KD
March 20, 2000	Letter from Paturel to DF
March 20, 2000	Letter from KD to Paturel
March 21, 2000	Witness interview by phone
March 24, 2000	Letter from MP (HRC) to KD's doctor
March 28, 2000	Memo to HRC file from MP
March 29, 2000	Witness interview by phone
April 7, 2000	Letter from KD to Paturel
April 11, 2000	DF to MP re arranging interviews with Collins and Kelly: says possible April 18 (rescheduled to June 7)
April 13, 2000	Letter, MP to DF
April 15, 2000	Letter MP to DF
April 18, 2000	Memo to HRC file from MP
April 24, 2000	Letter from KD's doctor to MP
April 25, 2000	Letter from Paturel to Farrar saying may want to interview additional witnesses and wanting contact info
April 25, 2000	Letter from MP to possible witness
April 26, 2000	Letter from MP to KD
April 26, 2000	Letter from MP to possible witness
April 27, 2000	Email, from KD to Paturel
April 29, 2000	Memo to HRC file from MP
May 10, 2000	Letter from DF to Paturel
May 16, 2000	Letter from MP to DF
May 23, 2000	Letter from Francine Comeau (HRC) to KD
May 29, 2000	Letter from DF to MP
May 29, 2000	Memo to HRC file from MP
June 2, 2000	Memo from Paturel to F. Comeau (HRC)
June 2, 2000	Letter from Paturel to DF
June 2, 2000	Memo to HRC file from MP
June 5, 2000	Witness Interview
June 7, 2000	Witness Interview, Bruce Collins
June 7, 2000	Witness Interview, Michael Kelly
June 8, 2000	Letter, DF to Paturel
June 13, 2000	Witness Interview
June 15, 2000	Witness Interview
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July 4, 2000	Letter from Marie Paturel to DF re arrangements to interview present

	or former NSCSA Bd. of Directors Members
July 13, 2000	Letter from MP to possible witness
July 13, 2000	Memo to HRC file from MP
July 14, 2000	Memo to HRC file from MP
August 8, 2000	Letter from MP to DF, saying no response to her letter to DF of July 4, 2000, and again requests meetings with BOD members
Aug. 9, 2000	Letter from DF to MP
Aug. 10, 2000	Memo to HRC file from MP
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Sept. 1, 2000	Letter from MP to DF, apologizing for delay in answering DF's letter of Aug. 9, and discussing dates for interviews with BOD members
Sept. 19, 2000	Letter from MP to DF complaining no reply to her letter of Sept. 1 re suggested interview dates for BOD Members
Sept. 20, 2000	Letter from DF to MP suggesting Nov. 2, 2000 date for interviews with BOD members
Sept. 21, 2000	Letter from MP to DF
Sept. 25, 2000	Email from MP to a witness enclosing interview report
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Oct. 28, 2000	Memo to HRC file from MP
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Jan. 6, 2001	Draft HRC Interview Report for a witness prepared
Jan. 8, 2001	Draft HRC Interview Report for 2 witnesses prepared
Jan 21, 2001	Draft HRC Interview Report for a witness prepared
Feb. 8, 2001	Draft HRC Interview Report for a witness prepared
Feb. 12, 2001	Draft HRC Interview Report for 6 witnesses prepared
Feb. 15, 2001	Draft HRC Interview Report for 5 witnesses prepared
Feb. 20, 2001	Email from new HRC officer responsible for case, Bill Grant to (2?) witnesses
March 6, 2001	Email from BG (HRC) to a witness
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March 22, 2001	Letter from BG to DF asking for docs
March 23, 2001	Interview with former NSCSA BOD member; draft interview report prepared
March 27, 2001	Letter from BG to DF
April 5, 2001	Draft Interview Report for Bruce Collins
April 5, 2001	Letter from BG to DF
April 6, 2001	Letter from DF to BG
April 6, 2001	Letter from BG to DF
April 6, 2001	Revised draft interview report for former BOD witness

April 19, 2001	Letter from BG to DF, complaining that earliest date offered for interview with former BOD chair is June 18, 2001, delay not acceptable
May 7, 2001	Letter from BG to a witness
May 15, 2001	Letter from BG to a witness
May 16, 2001	Letter from BG to DF, following up request for docs. requested in March 22/01 letter
May 22, 2001	Letter from BG to DF
May 28, 2001	Interview with former BOD Chair
May 30, 2001	Letter from lawyer in DF's firm to BG, including docs. requested in March 22/01 letter
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June 1, 2001	Letter/email from BG to a witness
June 6, 2001	Letter from BG to lawyer in DF's firm requesting additional docs.
June 7, 2001	Reply from that lawyer to BG
June 14, 2001	Memo from BG to HRC file
June 15, 2001	Draft Interview Report for a Witness
June 18, 2001	Letter from BG to that witness
June 21, 2001	Response from lawyer in DF's firm with docs. requested by BG in June 6, 2001 letter
June 26, 2001	Letter from BG to a witness
June 26, 2001	Revised interview report for that witness
June 27, 2001	Letter from BG to lawyer in DF's firm
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July 12, 2001	INVESTIGATION REPORT #1, BILL GRANT
July 12, 2001	Letters from BG to KD and lawyer for the respondents
July 16, 2001	Letter from BG to lawyer for Respondents
July 16, 2001	Letter from lawyer for respondents to BG
July 16, 2001	Memo to file by BG
Aug. 14, 2001	Memo to file by BG
Aug. 23, 2001	Letter from BG to lawyer for respondents
Aug. 30, 2001	Letter from KD to BG
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Aug. 31, 2001	RESPONSE OF RESPONDENTS TO INVESTIGATION REPORT
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Sept 6. 2001	INVESTIGATION REPORT #2, BILL GRANT
Sept. 6, 2001	Memo by Bill Grant to Nova Scotia Human Rights Commission
Sept. 6, 2001	Letter by BG to KD
Sept. 6, 2001	Letter, BG to DF
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? 2001	DECISION, NSHRC TO REFER COMPLAINT TO BOI

Oct. 9, 2001	Letter, Chair, NSHRC to KD
Oct. 9, 2001	LETTER, CHAIR NSHRC TO DF
Oct. 22, 2001	Email, BG to both KD and DF
Nov. 2, 2001	Letter, Chair, NSHRC to KD
Nov. 2, 2001	Letter, Chair, NSHRC to KD
Nov. 2, 2001	LETTER, CHAIR, NSHRC TO JUDGE RESPONSIBLE FOR NOMINATING BOARD OF INQUIRY CHAIRS
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Dec. 20, 2001	LETTER FROM JUDGE NOMINATING J. BANKIER AS BOI
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Feb. 4, 2001	LETTER, FROM CHAIR, NSHRC, NOTIFYING J. BANKIER OF APPOINTMENT AS BOI