

NOVA SCOTIA HUMAN RIGHTS COMMISSION

BETWEEN:

LINDSAY JANE WILLOW

- COMPLAINANT

- and -

**HALIFAX REGIONAL SCHOOL BOARD, DR. GORDON
YOUNG and JOHN ORLANDO**

- RESPONDENTS

OPINION

Board of Inquiry:

J. Walter Thompson, Q.C.

Heard:

December 12, 14, 16, 19, 2005
January 4, 11, 13, 14, 29, 30, 31, 2006
March 8, 10, 2006

Counsel:

Darlene Jamieson, for the Complainant

Tara Erskine / Nicole McNeil, for the Respondents

Anne E. Smith / Jennifer Ross, for the Nova Scotia
Human Rights Commission

Introduction

[1] This proceeding arises out of an incident which took place in a Halifax high school early in September, 2000. Two teachers encountered a third teacher, the complainant Lindsay Willow, and a seventeen year old student in a change room of the high school. One of them, the respondent John Orlando, reported the encounter to the second respondent, school principal Gordon Young, who in turn called in the police. The police investigated, but found no evidence of wrongdoing. There were no charges. No one apologized to Ms. Willow or made amends.

[2] Ms. Willow launched a complaint under the Nova Scotia, *Human Rights Act*. She alleges that John Orlando, Gordon Young and the Halifax Regional School Board discriminated against her on the basis of her sexual orientation contrary to section 5 of the Act. To succeed, Ms. Willow has to persuade me on a balance of probabilities that discrimination was among the factors that contributed to the respondents' course of conduct. If so persuaded, then I have a broad power under the *Act* to award remedies.

[3] I begin with a narrative of what happened. I accept as fact most, but not all, of what is briefly related. I will then review the evidence of the parties with an emphasis on the evidence of the two respondents, John Orlando and Gordon Young. Once the incident occurred, the action passed to them.

The Incident

[4] The scene is the corridor near the entry to the gymnasium of a metropolitan high school on Friday, September 8, 2000, the first day of school for grade twelve students, at about 2:00 o'clock in the afternoon. A French teacher, Sandra Starratt, is busy sending students in and out of the gym for opening proceedings or class photos. She has a table set up directly across from the doors to the boys' change room.

[5] The high school, Halifax West, is operating split-shifts in the facilities of another high school, J.L. Illsley. The Halifax West building has just been

condemned. J.L. Illsley operates in the morning. Halifax West operates in the afternoon.

[6] In 2000, Dr. Gordon Young is the principal of Halifax West. His two vice-principals are Joy Earle and Donald Clarke. The two physical education teachers at the school are Lindsay Willow and Rick Kitley. Ms. Earle is the head of the physical education department for administrative purposes but carries no teaching duties in it. John Orlando is a math teacher, but he also serves as Athletic Director, a volunteer position concerned primarily with inter-scholastic sports.

[7] “The West” is in the final process of moving. Space is short because two schools are operating in one building. The shower area of the boys’ change room across the corridor from the gym at Illsley has been given to the West for the storage of athletic equipment. A steel door has been installed to separate the change room from what has become the storage room. One enters the storage room from the corridor through the change room door and the change room itself. Attached to the change room is a small washroom consisting of a toilet and a sink.

[8] The storage area has to be organized. Equipment has to be moved from the old facility and placed in the storage area. Lindsay Willow is one of two physical education teachers at the West. She is responsible, in whole or in part, for doing this task. Ms. Willow has to go in and out of this storage room as a part of her work.

[9] At about 2:00 o’clock on the Friday afternoon, Ms. Willow recruits a student to help her move some large, heavy archery targets and some climbing or tug of war rope. They pass Ms. Starratt as they enter the change room off the corridor. They go through the change room into the newly created storage room. They move the equipment. On their way out, they enter the washroom and wash their hands. While they are in the washroom, Mr. Orlando and Mr. Kitley come into the change room, walk past the washroom, have a look in the storage room and come back out into the corridor. They see Ms. Willow in the change room as she comes in and goes out. Ms. Willow and the student leave the washroom, and as they opening the change room door to the corridor, they meet Mr. Orlando and Mr. Kitley who are

coming back in to have another look at the storage room. Ms. Willow speaks to Ms. Starratt in the corridor and then she and the student go about their business.

[10] Late in the afternoon of Tuesday, September 12, Mr. Orlando speaks to a vice-principal, Don Clarke. Mr. Clarke in his notes says that Mr. Orlando reported that he and Mr. Kitley saw Ms. Willow standing in the washroom door. Mr. Orlando told Mr. Clarke that Ms. Willow looked very nervous and uncomfortable as if she were trying to hide somebody. Mr. Orlando said that when he and Mr. Kitley reentered, they saw Ms. Willow trying to “sneak” a female student out of the washroom and the changing room. Mr. Clarke says later that evening Mr. Orlando called him to tell him that Mr. Kitley had to use a key to unlock the door.

[11] Mr. Clarke checks Mr. Orlando’s story with Ms. Starratt and Mr. Kitley and then the same evening reports it to the principal, Dr. Young. Dr. Young says that Mr. Clarke told him that Mr. Orlando had reported a suspicious incident; Ms. Willow and the student had been in a small washroom.

[12] Dr. Young speaks to Mr. Orlando. He says in his evidence that Mr. Orlando told him the story, and that he simply listened to what Mr. Orlando said. Dr. Young also says that Mr. Orlando described overhearing a conversation after the incident.

[13] Dr. Young’s notes add that Mr. Orlando said it (the incident) seemed very suspicious to him. Mr. Orlando said he was concerned about the student who, he said, was infatuated with Ms. Willow. Dr. Young’s notes recount that Mr. Orlando said that:

He(Mr. Orlando) believed there was something going on possibly of a sexual nature. He had witnessed a conversation between LW and a female student in which the student had complained that the material LW had given her was all about lesbian’s point of view. LW indicated that it was just a woman’s perspective.

[14] Dr. Young also speaks to Mr. Kitley. He says Mr. Kitley recounted the

incident. but also according to the notes, told him he “thought” the door had been locked. Mr. Kitley also related an incident during one of Ms. Willow’s gym class which he interpreted to be some form of sexual play during one of Ms. Willow’s gym classes. “One was on the floor on her back. Another girl was bouncing on her pelvis while the third girl stood astride of the upper body slapping the breasts of the girl on the floor”.

[15] Mr. Kitley has died, but we do have his written statement to the police on January 11, 2001. For reasons that I will explain later, I do not accept the description of the look on Ms. Willow’s and the student’s faces or the manner in which they left the change room, but otherwise I find the part quoted below to be a concise statement of what happened. Mr. Kitley says that he and Mr. Orlando wanted to inspect the storage area. He says they saw Ms. Starratt in the hall. Mr. Kitley then says:

I automatically stuck my key in and it opened with a touch. I got a sensation that the door was open. We went in. We saw Lindsay standing in the bathroom area and she turned and looked at us. The door was partially closed. I had no suspicions at that time, as I didn’t see Starratt anything other than Lindsay in the doorway. Both of us (me and John), went in the back door. We were in there about 15 seconds. We could tell there was not much of a chance for us to store something, as it was very full. So we went out. Lindsay was still basically in the same spot, door partially shut and her facing inwards. We walked out into the hallway, standing there was Sandra, teacher on duty. We (John and myself) decided to go back into check about a piece of equipment to see if it could fit in. I don’t remember what piece now. When I went to open the door I felt pressure on the door, the door opened. What I saw was (the student) trying to get by me very quickly. She had a look of terror on her face, but it was first a look of shock. I kept going in. (The student) and Lindsay started going out. Lindsay was directly behind (the student), almost pushing her out of the door. Lindsay had a look of shock first, and then a look of anger. John came in behind me. Lindsay yelled back at us, make sure you lock the door.

[16] Dr. Young also speaks to Ms. Starrett. She confirms that she had seen Ms. Willow and the student enter and leave. He says he and Ms. Starrett shared some concerns it was unusual for a student and Ms. Willow to have been in the change room.

[17] Dr. Young exchanges voice mails with Cst. Mark Young, a school-police liaison officer. Cst. Young testified that while Dr. Young may not have used the words “sexual assault” in his message, a sexual assault was what he understood Dr. Young was calling about. He, in his return message, advises Dr. Young that an investigation should be done.

[18] Dr. Young also calls Dr. Susan Church, who was then Assistant Superintendent of Schools. Dr. Church says Dr. Young told her that two reliable witnesses witnessed behaviour indicating an inappropriate relationship between a teacher and a student. She says that certainly Dr. Young implied that the relationship was sexual. She says that, on the basis of this information, she agreed the police should be called.

[19] Dr. Young calls the police asking if they could send a police officer, preferably a female, to the school.

The Police Investigation

[20] Cst. Emmons Devine, a Halifax Regional Policeman now retired, testified that on Wednesday, September 13, 2000 he was dispatched to the West in response to an allegation of sexual assault. He testified that on arrival he spoke to Dr. Young who said that a couple of teachers had witnessed Ms. Willow and a student in a small washroom together. Cst. Devine left the school and came back later in the day with another officer, Cst. Carol Campbell-Waugh. Cst. Campbell-Waugh interviewed the student alone and then, with Dr. Young and Cst. Devine, interviewed Ms. Willow.

[21] Constable Cambell-Waugh says that the student told her that she and Ms. Willow were in the change room to move equipment and entered the washroom

afterwards to wash their hands. The police notes say Cst. Campbell-Waugh told Dr. Young what the student had said. Cst. Campbell-Waugh also says Ms. Willow confirmed in her interview that Ms. Willow and the student had been washing their hands. The police notes say Ms. Willow said “they were only there for very short time and they were washing their hands and this is why they were in this particular area”.

[22] I quote from the end of the police report made at the end of the day:

This case for now is concluded with regards to the suspicious circumstances, all the people have been spoken to and the two female parties allegedly involved in the alleged activity were spoken to by the police and it is of the opinion of Cst. Campbell and Cst. Devine that quite probably nothing had occurred on September 9, 2000 at approximately 1400 hours. The third witness in regards to this situation, Sandra Starritt (sic), she would be another teacher at JL Ilsley High that saw the two ladies, the teacher and the student, go into the locker room on the date in question. It would appear that the two had only been in the locker room a short period of time before the two gentlemen entered the locker room and subsequently Ms. Willow and (the student) left the locker room area.

Suspicious Circumstances

[23] I wish to make three things clear at the outset.

1. Lindsay Willow enlisted the student, as she had done before, to help her move equipment. They went into to the new storage area, moved some heavy archery targets and some heavy rope. On the way out, they went into the small toilet off the change room and washed their hands.

Ms. Willow and the student testified that they were washing their hands in the washroom. I accept their evidence. The proposition that the pair were so seized by sexual passion in the middle of a school day that they

resorted, in full view of another teacher, to a change room off a busy corridor, a location accessible through unlocked doors is, in my opinion, preposterous.

2. John Orlando and Gordon Young alleged Lindsay Willow had sexually assaulted the student.

Dr. Young records in his notes that Mr. Orlando told him that he “believed there was something going on possibly of a sexual nature.” Mr. Orlando told a teacher from another school, Paula Simms, that the incident was sexual. Mr. Orlando told the police in his written statement, “You definitely have a victim here, and it was definitely wrong.”

Dr. Young’s notes record that he did not want to speak to Ms. Willow or the student for fear he “would have alerted a possible sexual offender.” Cst. Mark Young understood Dr. Young’s to be seeking advice about what he should do in response to a complaint of a teacher being in an inappropriate sexual relationship with a student. Dr. Susan Church says Dr. Young told her that two reliable witnesses said they had witnessed behaviour that indicated an inappropriate relationship between a teacher and a student. She inferred that he meant the relationship was sexual. Cst. Devine says he was dispatched to investigate a report of a sexual assault.

3. An allegation of a sexual assault on a student is most serious.

Some may say that allegations of sexual assault on a student are something which teachers in this day and age have to put up with as a part of professional life. Others may say that being accused of sexually assaulting a student is not something one should be upset about. My view is that the allegation of any criminal offence is very serious, and an allegation that an adult would violate a position of trust and sexually exploit a young person placed in their care is a most serious allegation.

[24] It is immoral and unethical for a teacher, or anyone else, to take sexual advantage of a young person in one's charge. It is also criminal. The *Code* provides:

s. 153.(1) Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who

(a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person, or

(b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.

(2) In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years.

[25] The Crown in a prosecution, or a plaintiff in a civil suit, must establish that the alleged victim did not consent to the assault. The effect of the age provision above is to negate the requirement to prove consent. Thus, it is an offence for a person in a position of trust to sexually touch someone who is less than eighteen regardless of whether that someone has consented or not.

[26] Mr. Orlando and Dr. Young say that the circumstances of Ms. Willow and the student being in the washroom together were suspicious. The fact is that they were washing their hands and so whether the circumstances were "suspicious" or not becomes moot. In any event, I find the "suspicious circumstances" to be

bogus. I will review them.

[27] The student is the daughter of another teacher. The student was often around the school having arrived early with her mother or waiting to return home with her mother. The student was willing to help with chores. She was a good athlete and so familiar with the physical education teachers and activities. It was natural for Ms. Willow to ask her to help.

[28] There was nothing unusual or exceptional about Ms. Willow and the student being in the change room. The area may have been a “boys” change room, it was not being used as such on the days in question and, of course, it was the route to the storage room. Ms. Willow enlisted the student to help her on three separate occasions during those first days of school. One occasion involved the carriage of golf clubs. Ms. Willow says they went together into the storage room with the golf clubs. The student cannot remember whether she actually went in or not, but she says she did help Ms. Willow with them. On the second occasion, Ms. Willow and the student, as previously related, bumped into Mr. Orlando and Mr. Kitley coming out of the change room. A third occasion involved the student watching, at Ms. Willow’s request, a stereo in a hallway outside the change room while Ms. Willow did some other things. Then Ms. Willow and Joy Earle, a vice-principal, moved the stereo into the storage room.

[29] Ms. Willow and the student believe that the second occasion, the cause of all this woe, happened on Monday, September 11th. I am satisfied that it probably happened on Friday, September 8th. Sandra Starrett was in the corridor on that Friday. She saw them go into the change room. There is no suggestion by Ms. Starratt that they were carrying golf clubs.

[30] The day, Monday or Friday, does not matter in any event. This case is about the report of Ms. Willow and the student being in the washroom, not the fact of it. I find the confusion of Ms. Willow and the student about the date, if anything, to be reassuring. Their entering the change room together, in my view, was so mundane, so ordinary, so without significance, that the sequence blurs into the rush of life. Ironically, the incident might be said to be “suspicious” if one placed it as having taken place on Monday afternoon because then the incident

would be said to have occurred after normal hours while the student was waiting for her mother to take her home and in the absence of Ms. Starratt and the traffic in the corridor outside the gym.

[31] The door to the washroom was, to adopt Mr. Kitley's description from his statement to the police, "partially closed". That is to say, the door was mostly open. The door opened inwards. Ms. Willow was on one side of it standing in the door way and visible. The student was on the other side of the door, separated from by it from Ms. Willow, and could not be seen. There was not, and there could not have been any, physical contact between them as long as the door to that tiny washroom was open.

[32] The only evidence that I can see that could implicate Ms. Willow and the student as having been in the washroom for an illicit purpose consists of "looks" or the manner of leaving. Ms. Willow and the student both testify that they could think of no reason to be embarrassed and were not. As I relate later, I have difficulty with Mr. Kitley and Mr. Orlando's description of the pair's demeanor, and how that description translated over time in the various reports. I reject their evidence.

[33] I accept the evidence of Ms. Willow and the student saying that they were not embarrassed, much less "visibly rocked" as Mr. Orlando later said to the police. I am satisfied there was nothing peculiar about Ms. Willow's demeanor nor that of the student in the change area, on leaving it or later. Ms. Willow and the student deny any facial expression or demeanor that would suggest embarrassment or shock at having been seen in the change room. I accept their denial. They moved equipment, washed their hands and left. Why would they be embarrassed or shocked to be seen?

[34] Ms. Starratt said she saw nothing unusual in the demeanor or facial expression of Ms. Willow or the student when they came out of the change room. I accept the evidence of Ms. Starratt. She says that Ms. Willow came up and spoke to her about something after leaving the change area. She had a good look at Ms. Willow. She says she saw nothing. Ms. Willow's approach to Ms. Starratt also speaks to Ms. Willow's lack of self-consciousness of there having been

anything unusual about having been in the change room area with the student.

[35] Some perceived Ms. Willow as being too close to her students, particularly those who had been enrolled in the Leadership course. The course requires, as I understand it, a relatively high degree of personal engagement, by both teacher and students. Both vice-principals, Joy Earle and Don Clarke, say they had cautioned Ms. Willow about the risks associated with a close relationship being misperceived. Both vice-principals also spoke of the risks associated with a student and a teacher being alone together. They both hastened to add that young teachers especially have to be cautious about their involvement with students and it is not unusual for senior teachers such as themselves to have to advise young teachers such as Ms. Willow.

[36] Mr. Clarke and Ms. Earle spoke of the risk arising out of being seen to be alone with a student. The risk, as I understand it, is that the student will make a false accusation of misconduct and the teacher will only have his or her word to rebut it, or that some parent or other member of the public will complain about a “suspicious circumstance”. The risk, as I understand it, is of perception by others. Here, however, it is the teachers who have adopted the perception that they themselves fear from those others and have made a suspicious circumstance of it.

[37] Perhaps Ms. Willow was too friendly with students, but surely most people hope teachers will be more than conveyors of data. I also acknowledge this is a suspicious age. One must indeed, as a teacher, be aware that people at large do not grant deference, will be quick to complain, and the authorities will bend over backwards to accommodate the complainer. I understand that people may be quick to blame a teacher for a perception of suspicious conduct. That is a regrettable fact of life. It is a sorry thing indeed, however, when the profession itself is so quick to turn on itself on the basis of a “perception”. I am dismayed by their lack of faith and trust in one another. A teacher, it appears, need not fear the perception of a neurotic parent or a vengeful student so much as his or her own colleagues. No doubt the teachers at Halifax West will triumph over the rigidities of conduct presupposed by this affair, but the “message” to them - that one must always watch one’s back for fear of one’s colleague’s perceptions of

conduct as well as the perceptions of other malignant parties- is a very unfortunate one.

[38] Lindsay Willow and the student are both highly respected members of the community. Mr. Orlando, and Dr. Young quickly enough, supposed that Ms. Willow and the student were engaged in sexual behaviour. Their reputations counted for nothing. I am at a loss to understand why.

[39] Mr. Orlando told Mr. Clarke that “Ms. Willow had relationships with students that were too familiar and inappropriate...” Mr. Orlando told Dr. Young that the student was “infatuated” with Ms. Willow and that “he believed there was something going on possibly of a sexual nature” between them. For Mr. Orlando, at least, the issue was not one of how being in a washroom together might be perceived. He thought that there was a sexual element in the relationship. This can only have been based, in my view, on the perception that Ms. Willow was gay and had seduced the student. This perception plays to the stereotype of the gay as likely to seek out and exploit young people.

[40] Ironically, Mr. Orlando was at pains to stress the close relationship between Mr. Kitley and the student. Mr. Orlando is reported in one of the notes to have said that they were as close “as father and daughter.” He gave as a “suspicious” circumstance the student’s failure to greet him with the warmth he would have expected as they passed one another coming out of the change room. Here is a double standard. The difference is, of course, that he knew Mr. Kitley to be a married hetero-sexual and so presumptively above suspicion.

[41] Mr. Kitley described to Dr. Young some activity between female students that he says he saw taking place in a gym class taught by Ms. Willow. Dr. Young’s notes describing the activity are quoted above. The suggestion is, I suppose, that Ms. Willow tolerates sex play among students during her classes and therefore is more likely to be a person who sexually assaults students. I find any connection with an alleged assault by Ms. Willow on a student is so remote as to be meaningless, if not absurd. I wonder how the students would feel about Mr. Kitley’s interpretation of what they were doing.

[42] There was a conversation between Ms. Willow and two students which Mr. Orlando overheard and which both Mr. Orlando and Mr. Kitley said influenced Mr. Orlando's decision to report the locker room incident to Mr. Clarke. The conversation took place on the Monday or the Tuesday following the Friday incident. The content of the conversation is uncertain. One student, who did not give evidence at the hearing, is reported by Mr. Orlando to have said to Ms. Willow that materials, either printed or on the internet, to which Ms. Willow had referred the students, reflected homosexual or alternate lifestyle themes. I find the substance of the overheard conversation, even if I accept it as related by Mr. Orlando, to be insubstantial and no indication that Ms. Willow is a person who was likely to take sexual advantage of a student. I find his use of the overheard conversation as evidence of Ms. Willow's improper sexual proclivities to be evidence that he was motivated by an element of prejudice.

[43] The circumstances were not suspicious. They were innocent. The construction of them as indicative of a sexual assault demonstrates, in my view, an element of discrimination against Ms. Willow because of her perceived sexual orientation. I am satisfied that Ms. Willow's sexual orientation was a real "suspicious circumstance" in Mr. Orlando's mind.

Joy Earle

[44] Before I canvass the evidence of the respondents, I do wish to make an aside about the vice-principal, Joy Earle.

[45] She testified herself and was referred to, always favourably, by others. I only wish she had been in charge. Ms. Earle said that she would have checked with Ms. Willow and the student before calling the police. I accept that evidence. I am confident that if she knew the two were simply washing their hands, she would not have called the police. Ms. Earle, I am confident, would have given Lindsay Willow a hug and told her to forget about it. Ms. Earle would have, I am confident, told Rick Kitley and John Orlando not to be so foolish and to watch themselves. She said she thought Mr. Orlando malicious. She would not have been shy about telling them what she thought.

[46] She brings, I conclude, common sense, directness and good humour to her work. Nothing was likely to resolve the bad relations between Ms. Willow and Mr. Kitley and Mr. Orlando, but I think all of this trouble, which eventually consumed about 13 days of hearings would have been avoided if the matter had been left to her.

The Evidence of the Respondents

John Orlando

[47] Mr. Orlando reported that Ms. Willow and the student were engaged in some kind of sexual activity in the washroom. I find he said so in effect to Mr. Clarke and Dr. Young. I find Mr. Orlando said so to Ms. Paula Simms. I find he said so in effect to Cst. Campbell-Waugh.

[48] I cannot fathom his thinking. Mr. Orlando expresses his good faith and his concern for the welfare of the students, and perhaps he has convinced himself that he was so motivated, but I find the very idea that Ms. Willow and the student, both in terms of the very high regard with which they were held, and the circumstances of that afternoon, were engaged in a sexual encounter, to be so improbable that I am driven reluctantly to the conclusion that prejudice was at least a factor in his decision and their bringing it forward to the school administration.

[49] I discount Mr. Rick Kitley's role in this affair. Mr. Orlando was the instigator. I accept the general description of Mr. Kitley as "not having a mean bone in his body". I accept that he did not bear Ms. Willow ill-will and tried to get along with her. I am also satisfied that the substance of Mr. Kitley's statements to Mr. Roland King and to the police were influenced by his wish to support Mr. Orlando. I do not accept his statements on the issue of demeanor.

[50] I repeat that Mr. Orlando was the instigator. He would have it that his report to Mr. Clarke was just background not to be taken further, but he later

took the initiative to call Dr. Young before Dr. Young could call him. He also took the initiative to call Mr. Clarke to mistakenly report that the change room door had been locked.

[51] As I have said, I accept that the demeanor or “the look” of Ms. Willow and the student were normal. I accept the evidence of Ms. Starratt, but I am also persuaded that this demeanor business evolved with the telling.

[52] Dr. Young described Mr. Orlando’s reports to him twice in his testimony, once as it came through Mr. Don Clarke and once as it came from Mr. Orlando himself, without saying anything about the demeanor of Ms. Willow and the student. Only, later in his testimony, Dr. Young mentioned being told the pair looked “very distraught”, but he also said that Mr. Orlando had said nothing about “red faces”. Dr. Young’s notes of the incident say nothing about how Ms. Willow or the student “looked”. I am satisfied that Mr. Orlando did not say to Dr. Young that Ms. Willow or the student had a look of “shock”, “terror”, “anger”, or that they looked “rocked” or “disturbed”.

[53] In the beginning, demeanor or “look” was not a prominent factor. The evidence became shaded towards the demeanor of Ms. Willow and the student in the formal statements Mr. Orlando later made to the police, to Mr. Roland King of the School Board and to Mr. Michael Lambert of the Human Rights commission.

[54] I was surprised then by what Mr. Orlando said about “the look” in his testimony. He said he does not remember Ms. Willow’s face as she came out of the change room at all. He could not say that she was “visibly rocked” or even embarrassed. He said in testimony that he could not remember saying she looked very nervous and uncomfortable to Mr. Clarke and when pressed, even denied he had said so. He had, however, told the police that she was visibly rocked. He told Mr. Clarke, according to Mr. Clarke’s notes, that Ms. Willow appeared “very nervous and uncomfortable.”

[55] Mr. Orlando, in his testimony, came up with the notion that it had been the “look” of embarrassment on the student’s face when the discussion came up

about material with lesbian themes which he found suspicious. He says it was not the comment about material with lesbian themes per se which was the issue, but rather the student's reaction. He compared the "look" to the "look" he had seen on her face coming out of the change room. This was, however, new evidence at the actual hearing and was not mentioned in any of his previous statements or in the reports of the statements he made to Dr. Young or Mr. Clarke. I find that odd. It occurs to me that Mr. Orlando decided that the suggestion of comments about materials with lesbian themes being a factor in his deciding to report the incident would not stand up to scrutiny, as indeed it does not, and so added an aggravating factor in his actual testimony. In any event, I reject the evidence that the student was embarrassed by the comment, whatever it was.

[56] Mr. Kitley said that he and Mr. Orlando encountered Ms. Willow and the student immediately upon opening the change room door. Mr. Kitley said in his police statement "...I felt pressure on the door, the door opened..." Dr. Young's notes say Mr. Kitley ".....when he came through the door he was almost bolded (sic) over by LW and (the student) on the way out." Ms. Willow said that she did not see Mr. Orlando and Mr. Kitley until she and the student were opening the door to leave. The student said that as they were leaving the change room, the door opened.

[57] Mr. Orlando, however, tells a different story. He is reported by Mr. Clarke, as recorded by Dr. Young's notes, as having said "Soon after that JO and RK saw (the student) come out of the washroom area and quickly move across the change room area out into the hallway." Mr. Clarke's own notes say that Mr. Orlando told him that he "observed Ms. Willow trying to 'sneak' a female student, out of the washroom and out of the changing area". In his testimony Mr. Clarke said that perhaps Mr. Orlando had not said he had actually seen them in the washroom together, but that was the assumption he made from what Mr. Orlando had told him. Dr. Young, in his testimony, says he was told about Ms. Willow and the student "coming across". Mr. Orlando himself in his actual testimony said he had encountered Ms. Willow and the student near the end of the privacy wall, that is to say very close to the door.

[58] I am satisfied that Mr. Orlando misled Mr. Clarke and Dr. Young about

where he had seen Ms. Willow and the student. I am also satisfied he misled them about the manner of their exit. Mr. Clarke quotes Mr. Orlando as having said that Ms. Willow was trying to “sneak” the student out of the washroom. I find it absurd to think that Ms. Willow, having walked into the change room in full view of Ms. Starratt would then try to “sneak” her back out into the busy corridor.

[59] Mr. Orlando denies having used the word “sneak”. Mr. Clarke says he would not have put the word in quotation marks if Mr. Orlando had not actually said it.

[60] I note that it was Mr. Clarke that Mr. Orlando spoke to, not Ms. Earle. Ms. Earle was the department head and in the hierarchy she was the one, I would think, Mr. Orlando should speak to. Mr. Orlando believed that Ms. Earle supported Ms. Willow. I think he avoided Ms. Earle and on purpose brought the incident to Mr. Clarke.

[61] The door leading from the corridor to the change room was not locked and indeed upon investigation it was established that it could not be locked from the inside at all. Typically, nobody bothered to pass on that fact to Ms. Willow.

[62] Mr. Orlando did not find out if the door to the change room was locked or not before making his reports to Mr. Clarke and Dr. Young. Mr. Orlando chose to say to Dr. Young, Mr. Clarke and Mr. Michael Lambert of the Human Rights Commission that the change room door was locked.

[63] At best, Mr. Orlando misled them about a fact of which he should have been sure. A locked door may suggest some private activity and would be a “suspicious circumstance”. Mr. Orlando had a duty to be sure before he reported it as such to Dr. Young. Dr. Young’s notes say that he “asked if the change room had been locked JO said he saw RK put his key in the lock turn it and push the door open.” Mr. Orlando did not really answer the question and misled Dr. Young. He could easily have checked the facts for himself and told Dr. Young the door was not locked. There is no suggestion in all the evidence that Mr. Orlando or Mr. Kitley locked the door when they left, which further suggests to me that the door was open when they went in and they left it open when they went out.

[64] Then in his actual testimony, Mr. Orlando said he did not know if the door was locked after all.

[65] I accept the evidence of Paula Simms about her conversation with Mr. Orlando. Paula Simms testified that she was, in September 2000, a teacher at Lockview High School and its Athletic Director. She says that she happened to be at the Illsley facility for a game with Illsley or the West. She says Mr. Orlando approached her for advice, and so believes it was before the police had been called. She says that Orlando told her he had walked in on Ms. Willow and a student engaged in sexual activity. She says Orlando used the phrase “having sex” and said that the student was a female. He used the term “lesbian”. She says it was not a positive kind of conversation, she had a game to coach and so she cut it off. She said she knew that Mr. Orlando and Ms. Willow would “butt heads a lot”.

[66] The precise timing of that conversation is not important. I find it most unlikely that Ms. Simms would invent the whole incident. I am disturbed that Mr. Orlando denies it entirely and says, more or less, that she made it up.

[67] Mr. Orlando denies that he said, suggested or implied that Ms. Willow and the student were engaged in something improper in the washroom. He would have it that his report to Mr. Clarke was something just for the record and he never really meant that anyone should act on it. I find this to be disingenuous. Dr. Young understood from speaking to him directly, and from speaking to Mr. Clarke, that Ms. Willow and the student may have been engaged in sexual activity and there is nothing in Mr. Orlando’s subsequent statement to the police to suggest that he was being equivocal about it. I find he later said to Cst. Campbell-Waugh, that he thought what went on was definitely wrong and there definitely was a victim.

[68] Cst. Campbell-Waugh took a statement from Mr. Orlando in February, 2001. Cst. Campbell-Waugh wrote the statement down and Mr. Orlando signed it. The space between the statement and the end of the page above Mr. Orlando’s signature is filled with a squiggle. The statement records that Mr. Orlando said “.....you definitely have a victim here, and it was definitely wrong”. Mr. Orlando,

in his testimony, denied having said that as a part of his statement, or that he said it at all. He said the words were some misconstruction of a conversation he had with Cst. Campbell-Waugh after he had signed the statement. He said that the words "...you definitely have a victim here, and it was definitely wrong" were added by the constable afterwards and were never a part of the statement as he signed it. I find this testimony to be extraordinary. I accept that he said the quoted words to the constable, that she wrote them down as a part of his statement and then he signed his name in confirmation.

[69] The quoted words are evidence of Mr. Orlando's continuing animus against Ms. Willow. The statement was made to the police on February 4, 2001. The one mitigating factor is that neither Gordon Young or anyone else had told him that she and the student had simply been washing their hands after moving some equipment. Perhaps he really did not know. Like others, he was left in the dark to think the worst. Ironically, this may explain why he would have said the words to Cst. Campbell-Waugh.

[70] Mr. Orlando's evidence is so self-contradictory, so often contradicted by others who I find were both independent and credible and his evidence is in some aspects so extraordinary that I am driven to accept Mr. Dan Smith's testimony of what was said at Mr. Pat Hayes' retirement party in June, 2001. I do so with hesitation. It is not that I found Mr. Smith lacking in credibility, but Mr. Orlando's evidence on the issue has collateral support, and the evidence is so harmful to Mr. Orlando and the respondent's case that I would have chosen not to accept it if the evidence of the conversations were viewed in isolation. My general impression of Mr. Orlando's credibility is such, however, that I feel I must reject his denials.

[71] Mr. Pat Hayes retired in June, 2001. A barbecue party was held for him at the home of another teacher. Mr. Dan Smith and Mr. Orlando, both teachers at the West, attended the party. Mr. Smith testified that he overheard Mr. Orlando making comments about Ms. Willow to others present.

[72] Mr. Smith testified that Mr. Orlando had referred to Ms. Willow as a "canoe

licker” a term which I understand is a derogatory name for a lesbian. He said Mr. Orlando accompanied the words with a sexually suggestive gesture. He said Mr. Orlando described Ms. Willow as a molester who ought to have been fired.

[73] I accept Mr. Smith’s evidence. The comments are hard evidence of discrimination.

[74] In summary, I am satisfied that Mr. Orlando, at the least, perceived Ms. Willow to be gay. Whether a person is, or is not, actually gay, is not important. It is discriminatory to call someone a “faggot” or, as in this case, a “canoe-licker”, whether the person is actually gay or not. (*North Vancouver School District No. 44 v. Jubran*, 2005 BCCA 201) I am satisfied that his perception of Ms. Willow’s sexual orientation was a significant factor in his determination to report her to Mr. Clarke and Dr. Young. This is sufficient to impose liability upon him. (*Leadley v. Oakland Developments Ltd. and Laraine Robichaud*, 51 C.H.R.R. D\273 (N.S. Bd.Inq.) at par. 62.) He presumed that Ms. Willow and the student were engaged in sexual activity because he perceived Ms. Willow to be gay.

Gordon Young

[75] Dr. Young made two errors. His first error was to call the police. His second error was to perpetuate the suspicion of Ms. Willow. He called the police without having spoken to the student, or to Ms. Willow, and without having properly investigated the report. As a result, Ms. Willow was falsely accused of having sexually assaulted a student. Ms. Willow and the student had washed their hands after moving equipment. Dr. Young either knew they had been washing their hands or he ought to have known they were washing their hands. He knew or ought to have known that they were innocent. Rather than apologizing and making amends for the false accusation, Dr. Young maintained the suspicion of Ms. Willow.

[76] Dr. Young should have clearly asked Ms. Willow and the student why they were in the change area locker room before he called the police. At the least, he

should have spoken to the student. While an interview with Ms. Willow may have raised legal issues if there had been a criminal offence, I do not accept that he could imperil an investigation by politely asking the student if she had been in the locker area with Ms. Willow and if so why. The student was highly regarded. It seems to me to be unwarranted and entirely cynical to suggest that the student would fabricate a story. He was reckless not to have obtained the explanation that the two were simply washing their hands after moving dirty gym equipment.

[77] Dr. Young ignored Mr. Clarke's suggestion to interview Ms. Willow or the student. He did not consult Ms. Earle who, I believe from her testimony, would have given him the same advice.

[78] Dr. Young took the bald proposition that Ms. Willow and the student were in a small washroom together and called upon the police to investigate what I find to be an allegation of a sexual assault. He disregarded the context of the washroom location near a physical education storage room, the context of the proper business of Ms. Willow as a physical education teacher to be coming and going to the storage room, the context of the time in the middle of the school day, the context of the activity in the adjacent corridor, the context of the presence of Mrs. Starratt in that busy corridor, and the context of the unlocked door entering the storage area. He disregarded the fact that Mrs. Starratt saw Ms. Willow and the student enter and come out in a perfectly normal way. He disregarded the well known disaffection between his main informant, Mr. Orlando, and Ms. Willow. He disregarded the good reputations of the student and Ms. Willow.

[79] Dr. Young thought Ms. Willow and the student were probably engaged in sexual activity. Almost any other explanation is more reasonable. The least inquiry of the student or Ms. Willow would have found one that is most reasonable. He reacted to a story which a little trust, a little faith, and then a little investigation would quickly have resolved.

[80] Dr. Young had a duty of care to Ms. Willow and indeed to the student whose conduct was no less implicated. The Supreme Court of Canada has recently addressed a case of a false report of sexual abuse. A jury at trial had found

Memorial University to have been negligent in making a false report about a student whose name was Wanda Young. The Supreme Court said:

Those whose professional responsibilities include the exercise of such power over the careers and future lives of fee-paying students are required to take the necessary care to get their facts straight before taking a potential career-ending action in relation to a student. While legislative and judicial policy mandates the quick reporting of information of suspected child abuse, it does not do so to the exclusion of consideration of the legitimate interests of the person named in the report, or the interests of informants. This is not at all to say that the respondents were obliged to conduct their own investigation of the suspected abuse. Informants are *not* required to have reasonable cause to believe abuse has in fact occurred before making a report. They are, however, obliged to have *reasonable cause to make a report to CPS*, i.e. to possess information that CPS reasonably ought to be asked to look into, even if it turns out to be misinformation. It is the absence of reasonable cause *even to make a report* that lies at the heart of the appellant's allegation of negligence. (*Young v. Bella*, 2006 SCC 3, at paragraph 34)

[81] Dr. Young, in my view, did not have “reasonable cause to even make a report”, and he breached his duty to both Ms. Willow and the student. Dr. Young, in my view, was negligent. I do not, however, find in it any discriminatory intent or effect. In other words, I am not satisfied that any discrimination was a factor in his decision to call the police to investigate Ms. Willow. I do not say the same for his error of perpetuating the allegation afterwards.

[82] Ms. Willow and the student told Dr. Young Ms. Willow was gay in saying to him that Mr. Orlando had been motivated by homophobia. The incident “outed” Ms. Willow. Dr. Young then knew she was gay. In any event, he certainly knew that those who reported her sexual assault on a female, perceived her to be gay.

[83] Dr. Young chose to entrust the investigation to the police. Having done so

he should have listened to their report, accepted it and immediately exonerated Ms. Willow and the student. Instead, he decided the police report meant only that they found insufficient evidence to actually prosecute Ms. Willow and continued to suspect her.

[84] Police investigate crimes. Police seek evidence of crimes and analyze that evidence to see if it provides reasonable grounds to believe that someone has committed a criminal offence. Police report in those terms. In this case, they found no evidence of wrongdoing and said so. Dr. Young either did not accept their report or he fundamentally misconstrued it.

[85] Dr. Young says that the police suggested to him, in effect, that something was going on in the washroom, but that since both parties denied it, there was nothing they could do. That was not, however, the police evidence in testimony nor is it the evidence that arises out of their notes. Cst. Devine in particular said nothing to indicate he thought Ms. Willow was up to no good in the washroom. His demeanor on the stand, to me at least, suggested that he thought the allegation empty, if not frivolous. Cst. Campbell-Waugh was more cautious, but she too said nothing to indicate misbehaviour by Ms. Willow and the student.

[86] Cst. Cambell-Waugh did say she thought the presence of the student and Ms. Willow in the change area was “weird”. I am satisfied, however, that she thought it was weird because she did not know that Ms. Willow, a female physical education teacher, had routine business to do in the area. No one explained to Cst. Campbell-Waugh, nor did she know, that an equipment room had recently been created out of the shower room of the boys’ change room, that Ms. Willow was responsible for equipment placed in there and routinely needed to have access to it. Cst. Campbell-Waugh said repeatedly in her evidence that she understood the washroom area to be a closed off area, an unused area, an area that was usually or supposed to have been locked. None of that is correct. The area was not closed off, it was not locked and it was most certainly being used by Ms. Willow. Cst. Cambell-Waugh, I am satisfied, was not properly briefed by Dr. Young.

[87] Cst. Campbell-Waugh interviewed the student alone and then reported to Dr. Young. Cst. Campbell-Waugh, with Dr. Young and Cst. Devine present, then interviewed Ms. Willow. Dr. Young says that Cst. Campbell-Waugh told him the student initially denied having been in the washroom at all. Dr. Young says that Ms. Willow also denied having been in the washroom. He says he was faced with a contradiction in the facts and had to live with it.

[88] Cst. Campbell-Waugh, however, did not say in her oral evidence that either the student or Ms. Willow had denied being in the washroom. Cst. Devine did not say that Ms. Willow had denied being in the washroom. The police notes do not mention a denial. Mr. Roland King makes no mention of a denial in the notes of his interview with Dr. Young. Counsel for Dr. Young and the Board made no inquiry of any denial in the cross-examination of Cst. Devine, Cst. Campbell-Waugh, Ms. Willow, or the student. I presume Dr. Young had not instructed counsel about a denial of having been in the washroom. The denial first appeared in Dr. Young's late discovered notes and then he testified about the denial in his evidence. I am skeptical about his evidence of the denial, but in the end I am satisfied that he misconstrued what he had been told. Of course, he did not help himself by confronting and haranguing Ms. Willow rather than listening to her.

[89] I am satisfied that neither Ms. Willow nor the student denied to the police that they had been in the washroom, but the point is, for the purposes of this decision, that Dr. Young carried forward the idea that they had denied being in the washroom. He continued to live with the contradiction.

[90] Dr. Young, it would appear, also remained ignorant of the fact that Ms. Willow and the student had simply been washing their hands. To my surprise, he said in his own testimony that he had been unaware Ms. Willow and the student were washing their hands until some months after the incident when he was interviewed by Mr. Roland King of the School Board. His own notes had said that the student told him they had been "in there to wash her hands because she and LW had been handling rope which had chemicals on it". The police notes say that both Ms. Willow and the student told them they had been in the washroom washing their hands. Dr. Young was present for the police interview with Ms.

Willow. I will accept Dr. Young's sworn testimony, but it leads me to conclude he did not take in what had happened and, in the aftermath, did not bother to find out.

[91] If Dr. Young did not know or had any doubts, he should have approached the student in the days after the incident, either himself or perhaps through someone like Ms. Earle. The police investigation was virtually closed. Even if Dr. Young thought there was some possibility of something arising out of further police work, that still does not excuse him from getting to the bottom of what happened.

[92] Dr. Young lived in ignorance of what Ms. Willow and the student were doing in the washroom and of what they said when first confronted about it. Dr. Young was asked near the conclusion of his evidence what he would say today about what had happened in the washroom that day. He said "I have no idea" twice and then, finally, "I am prepared now to accept that they were just washing their hands."

[93] This was for me the defining moment. Five and a half years later the school, in the person of the principal, could not bring itself to acknowledge that Ms. Willow and the student were utterly innocent of any wrong doing. Dr. Young managed to maintain in his own mind the suspicion that Ms. Willow was someone who was likely to take sexual advantage of students. Not only did he maintain the suspicion in his own mind, he did his best to ensure no one else knew the facts and so perpetuated the suspicion within the school.

[94] In my opinion, once he learned that Ms. Willow and the student had been in the washroom washing their hands after moving equipment, he ought to have apologized profusely and in writing for having overreacted and called in the police. Furthermore, he ought to have promised to make such amends as would ensure that Ms. Willow suffered no adverse consequences of the grotesque allegation that had been made against her, and then he should have been sure that the amends were made. I am astounded that he, as he told Ms. Willow's mother, Barbara

Stanley, thought he had no responsibility to clear Ms. Willow's name.

[95] In the event, he compounded the problem by trying to put a lid on it, and by doing nothing to make Ms. Willow's position in the school more comfortable. I am satisfied that a significant component of the community of Halifax West High School knew that Ms. Willow had been summoned to the principal's office to meet with police officers in connection with a sexual impropriety involving a student. Ms. Earle said students and even janitors knew. Mr. Terry MacInnis, an industrial arts teacher, testified he knew about it. Dr. Faught, another teacher, knew and, according to hearsay evidence, the student's mother overheard him joking about it. The topic is a hot one. Ms. Willow did not have in hand the categorical retraction and apology that would have substantially removed the stain upon her.

[96] Dr. Young, however, either did not find out himself that Ms. Willow and the student were simply washing their hands or did not let it be said that they were. Mr. MacInnis said he had never been told they were just washing their hands. Ms. Starrett said she did not know they had simply been washing their hands until shortly before the hearing. Mrs. Drake, Mr. Kitley's widow, said he had never told her in the time before he died that they had simply been washing their hands. Mr. Orlando said, much to my dismay, that even he had not been told.

[97] I find that Dr. Young himself did not accept that Ms. Willow and the student were innocent and that the allegation made against them was without foundation. I conclude his conduct towards Ms. Willow after September 13, 2000 was based on a continuing suspicion that Ms. Willow had been engaged in some sexual activity with the student. As of March 8, 2006, he still "had no idea" what they were doing in the washroom.

[98] The evidence through the Commission's witnesses suggested that Ms. Willow was truculent and had contributed to making her own life in the school difficult. Life is full of slings and arrows one has to bear with them, even when they are as outrageous as this one. The evidence seemed to be from Ms. Earle and Mr. Clarke that the school as a whole had disregarded the incident, the respect

for Ms. Willow had not been diminished and her life at the school could have continued normally if she had let it. It appeared that Ms. Willow should have put the matter behind her and gotten on with her life.

[99] I became increasingly persuaded as the respondent's evidence unfolded, however, that my first impressions were not correct in that Mr. Young, Mr. Orlando, Mr. Kitley and other members of the school community never knew or never internalized the fact that Ms. Willow and the student had simply been washing their hands after handling dirty athletic equipment and remained suspicious of her. The cloud continued to hang over her and no one dispelled it.

[100] Dr. Young, I am satisfied, remained suspicious of her. I am satisfied that his suspicion of her translated not only into the perpetuation of the cloud, but also into many of the more concrete limitations and interferences of which she complains. It is easy enough for an administrator to hide behind the policies and procedures in a bureaucracy. I do not go so far as to say that she would have had promotions into administration. I find that too speculative, but I do agree with her submission that her position in the school was compromised as long as Dr. Young was the principal. She was given redundancy notices, a favourite course disappeared, she lost preparation time, supervision of her classes increased, Dr. Young decided to come on one of her outdoor trips, he confronted her about lateness and how she dealt with a cut hand, she was denied without her knowledge of the opportunity to have the "perk" of participating in a curriculum project with the Board and so on. Ms. Willow was also effectively forced to be in close contact with her false accusers. In particular, she had to continue to share a small office with Mr. Kitley.

[101] Ms. Willow continued to feel distressed in the school environment. I am satisfied there was good, objective reason for this.

[102] I have said that Dr. Young made two errors; one in calling in the police and the second in failing to apologize and make amends. I have also said that not only did Dr. Young fail to make amends, but also that his attitude and approach to Ms. Willow both personally and professionally were marked by his continuing

suspicion that she was a person capable of engaging in a sexual relationship with a student. I am prepared to accept that Ms. Willow's sexual orientation or perceived sexual orientation was not a factor in his first error; calling the police. I am not prepared to accept, however, that her sexual orientation, or her perceived sexual orientation was not a factor in his second error. In my opinion, her sexual orientation or her perceived sexual orientation was a factor in his failure to make amends and his failure to ensure that Ms. Willow, in light of the false accusation that had been made against her, was fully comfortable in the school community and environment. She was perceived to be of a certain sexual orientation among people in the school community and she was perceived to have been in a situation suggestive of a sexual relationship with a student. Dr. Young was either aware of that, or ought to have been aware of that, and it was his positive duty under the *Human Rights Act* to counter the perception she had been engaged in the sexual relationship with the student.

[103] I do not find the suggestion that Ms. Willow was engaged in a sexual relationship with a student to be "gender neutral". The stereotype is that gays are more likely to seek out young people. Mr. Orlando's perception of Mr. Kitley as a father figure, to me, makes the contrast. Ms. Willow on the other hand was, as a female, someone who had too close a relationship with a student of the same sex.

[104] Ms. Willow continued to be perceived as a person who may have been carrying on a sexual relationship with a student of the same sex. This perception was not only wrong, but as it was born of prejudice, it had to be corrected in order for Ms. Willow to thrive in the school community. Dr. Young had a positive duty towards her to create a positive work environment for her. He did not fulfill it. Instead, he compounded the difficulties of her life within the school.

[105] I refer to the Supreme Court of Canada decision in *Ross v. New Brunswick School District No. 15* (1996), 25 C.H.R.R.D/175 per LaForest paragraph 50:

The (.....) Board found an obligation within the school community to work towards the creation of an environment in which students of all

backgrounds will be welcomed and equal. It stated:

In such situations it is not sufficient for a school board to take a passive role. A school board has a duty to maintain a positive school environment for all persons served by it and must be ever vigilant of anything that might interfere with this duty.

I am in complete agreement with this statement, ...

[106] I also refer to the British Columbia Court of Appeal in *North Vancouver School Dist. No. 44 v. Jubran* (2005), CHRR Doc. 05-166, 2005 BCCA 201, paragraphs 92-93:

...The Tribunal relied on *Ross* for the Supreme Court of Canada's articulation of the importance of a discrimination-free school environment and the duty of the School Board to provide it. That environment is mandated by the special position educational institutions occupy in fostering the values of our society and the Code, which requires those who provide services to the public to do so in a non-discriminatory way, so as to foster the full participation of individuals in the life of British Columbia, in a climate of understanding, mutual respect and equality of dignity and rights (see s. 3 of the *Code*).

The Tribunal's conclusion concerning the responsibility of the School Board to foster a discrimination-free environment may be compared to that of the Supreme Court of Canada in *Robichaud*. That case concerned a complaint of sexual harassment against an employee of the Federal Government. The Supreme Court found the Government liable for the acts of its employee, not on the basis of vicarious liability, but on the ground that the employer was responsible to remedy the undesirable effects of discrimination and provide "the most important remedy - a healthy work environment" (at 94).

[107] In my view, these considerations apply to teachers as well as students and to superiors within an administration as well as school boards.

The Board

[108] Ms. Willow was anxious, not to say desperate, to have someone say to her; “We are very sorry. We made a malignant allegation against you. The allegation was false. We accept without qualification that you and the student are innocent of any wrongdoing. Be assured that we maintain the utmost respect for you. We will work with you to ensure you do not suffer any professional impediments or further personal humiliation.”

[109] Ms. Willow was not going to get any sympathy or understanding from Dr. Young. It was not his business, he thought, to protect his teachers from calumnies or help those who were subject to them. Ms. Willow appealed to the Halifax Board. The Board chose to analyze her complaint within the context of the collective agreement, found no violation, obtusely blamed the police for coming to the school, and washed its hands of the complaint. The Board was not going to protect its teachers from calumnies or help them either. I understand from Dr. Young that a Dr. Reid, who I understand held a senior position with the Board, had said Dr. Young had “blown it” by calling in the police. If so, there is certainly no reflection of that in the Board’s response to Dr. Young. Perhaps it was easier to let Ms. Willow twist in the wind than take on a principal and to use its resources to embark on a long hearing rather than admit any error.

[110] I again refer to *Ross* and *Jubran*. I find the Board failed in its duty to provide a positive environment for someone perceived to be gay and was not vigilant to protect her.

The Student

[111] The student, in her testimony, described being confronted and interrogated

by Cst. Cambell-Waugh. She said at first she was confused about what the constable was talking about, and then frustrated and upset as the constable persisted in prodding whether there had been a physical, a sexual, interaction, and then not accepting her denials. She says she did not understand why Ms. Willow had been accused. She wept as she said in testimony that Ms. Willow was the last person who would do anything like that.

[112] She says the police officer, without asking specifically whether she was gay, asked her about boyfriends. Implicitly she was being questioned about her own sex life. She says she became angry.

[113] The student said she was upset afterwards that Ms. Willow would think that she had been responsible for the report. Her journal and her notes to Ms. Willow record her own distress and her worry about Ms. Willow. Ms. Willow, of course, had to distance herself from the student, and the student regretted the loss of a relationship with a teacher she highly admired and respected. The student said that the incident and the fallout from it were always in her head. It was tough not to think about it. She said that Ms. Earle was very helpful and supportive, but the school itself offered nothing.

[114] The student was, in 2000, seventeen years old. She is now twenty-two, and in spite of everything, is pursuing a Bachelor of Education degree. In 2000, she was technically a minor, but she was and is now, by all accounts, a fine, mature and accomplished young woman. I take it as granted that she was both aware and responsible.

[115] Dr. Young, however, dismissed her. He did not talk to her first, nor last. I conclude from his reluctance to accept the fact that she and Ms. Willow had been washing her hands that he would not have accepted her word anyway. The presumption, and one that smacks of discrimination, is that she was too young to know any better.

[116] The student was not a child. She was not naive. She was not a dupe. She was mature and aware. She was implicated in the wrongdoing. It cannot be

thought that she would have been innocent of knowledge of the wrongfulness of any sexual liaison with a teacher. One cannot, in my view, say the one is innocent and the other is guilty. If Ms. Willow and the student were engaged in a sexual encounter, then they are both, in a moral sense, guilty. The insult of the allegation is no less to her than to Ms. Willow and to say otherwise is to compound the insult by making an infant of her.

[117] The school, as she said, did nothing for the student. No one, it appears, ever even apologized to her for alleging that she had been engaged in a sexual encounter in the washroom. Both Dr. Young and Mr. Orlando, in particular, justified the report of Ms. Willow and the student as arising out of the concern for her. Dr. Young, however, subjected her to an ordeal and thereafter showed indifference.

Award

[118] The *Human Rights Act* provides:

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. 1991, c. 12, s. 1.

5 (1) No person shall in respect of

(d) employment;

discriminate against an individual or class of individuals on account of

(n) sexual orientation;

(v) that individuals association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).

[119] Section 34(8) of the Act grants a board broad remedial powers. It says:

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.

[120] The *Human Rights Act* is an ameliorative, not a punitive, statute. It is intended to use a “velvet glove” to educate and persuade. If education and persuasion do not resolve a complaint, then there is the “iron hand” of a hearing such as this one within the velvet glove. The purpose of the hearing remains the same, to continue the basic ameliorative principles of the Act through a judicial determination.

[121] The process and the law favour the complainant. The Commission employs people skilled in the arts of investigation, education, persuasion and mediation. If a resolution is not effected through the good offices of the Commission then the matter may proceed to a hearing with competent and experienced counsel representing the complainant and the broader interests of the Commission. The Commission’s own services and those of its counsel are provided the complainant free of charge.

[122] Human Rights legislation is quasi-constitutional and must be given a broad interpretation mindful of the purposes for which it was established. The complainant need only prove that there was an element of discrimination in the action complained of, or to put it another way, that discrimination was a factor in the action complained of. The motives or intentions of the respondents to the complaint are not relevant; it is the effect of the discriminatory practice which is

significant. The law provides the complainant with a reverse onus; once the complainant has established a prima facie case of discrimination then it falls to the respondent to establish that it cannot reasonably accommodate the complainant. One may infer a discriminatory intent from abusive behaviour. Employers, who are responsible for maintaining a work place free of discrimination, are liable for the discriminatory practices or actions of its employees. The Supreme Court of Canada said in *Robichaud v. Canada* 1987 CarswellNat 1105, paragraphs 9 & 10:

It is worth repeating that by its very words, the Act (s. 2) seeks "to give effect" to the principle of equal opportunity for individuals by eradicating invidious discrimination. It is not primarily aimed at punishing those who discriminate. McIntyre J. puts the same thought in these words in *O'Malley* at p. 547:

The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.

Since the Act is essentially concerned with the removal of discrimination, as opposed to punishing anti-social behaviour, it follows that the motives or intention of those who discriminate are not central to its concerns. Rather, the Act is directed to redressing socially undesirable conditions quite apart from the reasons for their existence. *O'Malley* makes it clear that "an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation" (at p. 547). This legislation creates what are "essentially civil remedies" (p. 549). McIntyre J. there explains that to require intention would make the Act unworkable.

Indeed, if the Act is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can

remedy undesirable effects; only an employer can provide the most important remedy--a healthy work environment. The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the Act's carefully crafted remedies effective.

Hence, 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.

[123] The Supreme Court directs that human rights legislation is not to be interpreted in a "niggardly" fashion, but the legal and procedural advantage given a complainant is balanced in measure by a "niggardly" approach to damages. The Human Rights Act is remedial, not punitive. Tribunals are often invited to inflate the damage awards above the range which has been established, but the invitation has regularly been refused. In *Johnson v. Halifax Regional Police Service* (2003), 48 C.H.R.R. D/307, Professor Phillip Girard considered arguments on damages that are much the same as those presented to me. He accepted the seriousness of the insult of the discrimination that Mr. Johnson suffered and that it carried on for some time after the incident itself. He awarded \$10,000.00, which is pretty much the maximum of the range. I refer again to *Jubran* where \$4,000.00 was awarded to a high school student who had suffered years of bullying because he was perceived to be gay.

[124] The decisions seem to implicitly acknowledge that money, beyond a certain amount, cannot answer for the hurt suffered by someone who is the victim of discrimination. I have used the word invidious to express the difficulty of finding that, for example, Ms. Willow's agony was worse than Mr. Johnson's.

Complainants will obviously do their best to make their own case “the worst”, that their victimization is greater than others, but I see a policy underlying the human rights process and the awards that follow from it. I am content to more or less adopt the limits that other tribunals have imposed on themselves.

[125] Just the same, it does seem to me that Ms. Willow’s situation, having to face day after day her accusers and those who were suspicious of her, was worse than Mr. Johnson’s. I do not think that I will do too much damage to the rules that govern me if I apportion damages on a yearly basis during Dr. Young’s tenure. In the meantime, Mr. Kitley has died and Mr. Orlando has left the province.

[126] I assess damages of \$5,000.00 for the false report to the police and the agony Ms. Willow suffered immediately, and \$5,000.00 for the school year 2000-01. I assess \$5,000.00 for each of the school years that followed while Dr. Young remained principal, ie. 2001-02, 2002-03, and 2003-04 for a total of \$25,000.00.

[127] I allow simple interest at the rate of 2.5% on the amount accumulating from year to year. Thus, I allow interest in the amount of \$250.00 for 2001, \$375.00 for 2002, \$500.00 for 2003, \$625.00 for 2004, and \$625.00 for 2005. The total is \$2,375.00.

[128] I will not parse the damages among the parties. Mr. Orlando was primarily responsible for generating the report and discrimination was a factor in his actions. Dr. Young was responsible for perpetuating its effects. The School Board washed its hands of Ms. Willow’s well founded plea. In any event, the Board is liable “vicariously”, as that word is understood in the human rights context.

[129] Ms. Willow also says that the psychological trauma disabled her from pursuing her usual summer employment and diverted her from fulfilling other hopes and dreams. I have considered those losses in the above award.

[130] Ms. Willow submits that the incident and its aftermath had the effect of denying her professional advancement and so cost her money. I am asked to

direct the Board to appoint Ms. Willow to be a vice-principal. I am not persuaded that I ought to do so. Ms. Willow is highly regarded and I wish her the best, but I do not think it for me to impose someone on the teachers and students in a school. I am also afraid that such an appointment would be tainted and may rebound against her. I think it better if she acquires a position on her own considerable merits through the ordinary process. And, at a certain point, one does have to have faith that the Board will be fair.

[131] Nor can I say that Ms. Willow would have attained a higher salary in the years since 2000. She was then 26. She is now still in her early thirties. I am not persuaded that her track would have been that fast.

[132] I do not find systemic discrimination. I find negligence and mal administration. I make no order for the formulation of policies or sensitivity training.

[133] I am not persuaded that aggravated or exemplary damages are warranted. This is a Human Rights case. It seems to me that higher orders of damages should be reserved, in the context of the *Human Rights Act*, for blatant acts of discrimination.

[134] I have been asked to require an apology from the respondents, Gordon Young and John Orlando. Its been five and a half years. An apology ought to have been forthcoming long ago. I doubt that any ordered apology would be sincere. I will not require it now.

[135] The Board, however, owes Ms. Willow a full, written statement exonerating her from any suggestion of wrongdoing and apologizing for the great distress they have caused her. The Board shall provide Ms. Willow with a full written retraction of the accusation acknowledging that:

- she and the student were simply washing their hands after moving athletic equipment,

- the allegation that she was engaged in a sexual assault on a student was utterly without foundation
- it was a grievous mistake to have called the police without proper inquiry
- she continued to be subject to and treated with suspicion for years after the incident.

[136] The Board shall also apologize on each count.

[137] As I have said, in my opinion, the student has been discriminated against as well. A presumption has been made about her sexual orientation and a conclusion drawn about the likelihood of her participation in a sexual encounter with a female teacher on the basis of that presumed sexual orientation. She too has had her name dragged into the mud and had her life disrupted. I understand that I may provide her with a remedy as well. She has been treated as a hapless child. I refer to the broad remedial power granted by section 34(8) of the Act and the award granted Mr. Earl Fraser by Professor Girard in *Johnson*. I order that the student be paid \$2,500.00.

[138] Ms. Willow's parents rallied round admirably, coming to Halifax immediately after the incident and doing their utmost to support her and effect an immediate resolution. I award \$1,000.00 as a contribution to their expenses.

[139] I am invited to exercise some moral suasion and recommend that the Board also reimburse Ms. Willow for her legal fees. The fees of the lawyers engaged, for all parties, will dwarf my award. I am, however, loathe to propose a precedent whereby complainants may be encouraged to seek their own counsel in such proceedings, and I am also loathe to further burden the public purse. Ms. Jamieson represented Ms. Willow well, and I certainly do not slight her. Just the same, the Commission counsel are also competent and experienced and may be expected to carry the complainant's case. The complainants also have the benefits of the services of commission staff. Complainants have the right to retain their own counsel, and these counsel are welcome to participate in the proceeding, but

in my view this is a process in which parties, if they wish, should retain counsel at their own expense.

[140] This has been an extraordinarily expensive proceeding. This whole affair has cost, I am sure, the equivalent of several teacher-years. I regret the money spent on lawyers and process.

[141] In summary, I direct:

1. the Respondents to pay to Lindsay Willow the sum of \$27,375.00;
2. the Respondents to pay to the student the sum of \$2,500.00;
3. the Respondents pay to Barbara Stanley the sum of \$1,000.00;
4. the Board to provide Ms. Willow with a letter of exoneration and apology in the terms outlined above.

J. Walter Thompson, Q.C.

May 9, 2006