

In the matter of: **The *Human Rights Act*, R.S.N.S., 1989, c. 214, as amended 1991, c.12**

BETWEEN: **JAN SLAUNWHITE**

-Complainant-

and

BAY LANDING DINING ROOM AND LOUNGE

-Respondent-

and/or

TOMMY DUGGAN

-Respondent-

and

THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

DECISION

BEFORE: Bonita M. Small
 Board of Inquiry

DATE OF DECISION: January 31st, 2005

COUNSEL: Michael Wood Q.C. and Sarah Dyck, articled clerk
 for the Nova Scotia Human Rights Commission

 Kent Noseworthy
 for the Bay Landing Dining Room and Lounge

Background

This is the matter of a complaint under the *Human Rights Act* R.S.N.S., 1989, c.214 as amended by 1991 c.12.

On May 2, 2001 Ms. Jan Slaunwhite laid a complaint under the *Act* alleging that she was discriminated against in the matter of employment by the Bay Landing Dining Room and Lounge and Tommy Duggan contrary to section 5(1)(d)(m) and 5(2) of the said *Act* and that such discrimination took the form of sexual harassment.

I was appointed a Board of Inquiry on May 31st, 2004 based on the nomination of Chief Judge Patrick Curran, under Section 32(A)(1) of the Nova Scotia Human Rights Act. There were two pre-hearing conferences held in this matter. The first one was held by telephone conference on July 16th, 2004. The second pre-hearing conference was held on September 7, 2004 also by telephone conference. At that time a date for the hearing into this matter was set. Evidence was heard on November 23rd, 24th, 25th, 2004 and part of the morning of December 1, 2004. Closing arguments were heard for the remainder of December 1, 2004. Mr. Michael Wood, assisted by Ms. Sarah Dyck represented the Human Rights Commission. The complainant, Jan Slaunwhite was provided with the opportunity to obtain counsel however she advised that she was content with the submissions of Mr. Wood and Ms. Dyck on her behalf. One of the respondents, Bay Landing Dining Room and Lounge was represented by Mr. Kent Noseworthy. The other respondent, Mr. Tommy Duggan was also provided with the opportunity to obtain counsel however he declined. Ms. Slaunwhite gave evidence and was present for all of the witnesses. Mr. Noseworthy was also present for all of the evidence. His client, Bay Landing Dining Room and Lounge was represented by the owner/operator, Mr. Jamie Miles who also gave evidence and was present on Day 1, Day 3 and Day 4 of the hearing. Mr. Tommy Duggan gave evidence and was present on Day 1 and Day 3 only. Mr. Wood was present for all of the hearing. Ms. Dyck was present on Day 1, 2 and 4. Ms. Slaunwhite chose not do a closing argument. Mr. Duggan as well chose not to do a closing argument. Both Mr. Wood and Mr. Noseworthy presented oral closing arguments.

Summary of the Evidence

The Bay Landing Dining Room and/or Lounge is an establishment located in Prospect Bay. The property on which the establishment sits has been in the family of the owner Jamie Miles since the 1950's. It was a private club/marina until 1995 when Jamie Miles decided to open it to the public. He obtained a full-time liquor licence in 1995 and opened it up as a lounge on July 29th, 1995. A restaurant was opened shortly thereafter. Mr. Miles was then and continues to be the owner/operator of the entire establishment. Around 1996 Mr. Miles had a serious accident that hospitalized him for some months. His girlfriend at the time who is presently his common-law spouse, Ms. Judy Clancey stepped in to help him out while he was recuperating. Mr. Miles went back to work in July, 1996 and at that time it was decided that Ms. Clancey would maintain an active role in the running of the establishment. Ms. Clancey became the kitchen and dining room manager while Mr. Miles looked after the lounge part of the establishment. Ms. Clancey looked after the payroll for the whole establishment and on the dining room side looked after the scheduling, hiring and ordering. Mr. Miles looked after the banking for the whole establishment, as well as the scheduling, hiring and inventory for the lounge area.

It should be noted that counsel for the parties had agreed between themselves that certain witnesses would go on at certain times depending on the availability of the witnesses. The result of that was that the hearing didn't follow the usual pattern starting with witnesses for the Commission and then witnesses for the Respondent.

The first witness in this hearing was the complainant, Jan Slaunwhite, called by the Commission. Ms. Slaunwhite's evidence is that she graduated from high school in 1993 and did a business course in 1997-1999. She was a food waitress at another establishment in the Prospect Bay area and then went to work for the Bay Landing Dining Room and Lounge (the first respondent) in 1998. She claims that she started there in 1998 as a part-time food waitress and then started filling in for the bartenders. She claims that it was around 2000 that she made a complete transition to the lounge as a part-time bartender. In the fall of 2000 she recalls that Tommy Duggan (the Second Respondent) was employed in the lounge as well as Nancy Fleming, Vince Lapierre. Her shifts at that time were generally as follows: she would work all day by herself on Sundays, Wednesday nights and every second Friday night. She says that she worked there on average about 18-30 hours every two weeks and she visited there as a customer

about 2-3 days a week. She knew Tommy Duggan from the community. She claims that prior to November 2000 he was a good friend of hers; he liked to joke; she says she took it in stride. She says that during her time at the Bay Landing there was lots of sexual innuendo; it was a joking/teasing atmosphere. She claims it was a very relaxed environment and that she was a participant to a degree. She testified that Tommy Duggan would make reference to his penis which he called "Mr. Wiggly". She states that a lot of sexual jokes had Mr. Wiggly as the main subject and in her view this was general knowledge. Ms. Slaunwhite says that she never complained to Tommy Duggan about this type of behaviour.

The incident which forms much of the basis for these proceedings happened on November 5, 2000. It was a Sunday which meant that Ms. Slaunwhite was required to open the bar, work by herself all day and then close up the bar at night. The hours on Sunday were from noon until 11:00 p.m. Ms. Slaunwhite recalls that Mr. Duggan was there as a customer that day. He and his girlfriend Heather Timmons and friend had come down earlier in the afternoon for a few drinks; she recalls that they left and then Mr. Duggan returned by himself probably around 5:00 or 6:00 p.m. She stated that Mr. Duggan stayed until closing playing the machines and drinking. She then started the closing process. She was doing the accounting and Mr. Duggan was helping her to re-stock and clean up. She claims that they were conversing on and off. Then, she says that she was counting the money and Mr. Duggan was behind her and he had his pants down. She says that he said: "Mr. Wiggly should be rolling around in those fives with you." She says she said, "What the f. are you doing?" He then pulled his pants up. She says this happened behind the bar area; she claimed he was moving towards her with his pants down until "he realized it wasn't a good thing to be doing". She thinks his hand was on her shoulder and saw that his penis was visible. She says she continued with what she had to do; i.e. the closing process and then while on her way to Jamie's office with the cash and a large container carrying loonies Mr. Duggan came up behind her, was pulling at her shirt from behind and trying to push it up her back as if it was going to come off. She says she went into the office, he was still behind her, the safe was pretty close to the door and says "I was scared. I didn't know...this wasn't funny anymore." She knows there was conversation; she doesn't know what she said. She was bent over on the other side of the bar ready to leave and he told her he was sorry. She said he said to her that nobody had to know and grabbed her arms while he was telling her this. She

says she said “Yes, don’t worry about it” and said, “I’m leaving.” They both left. She is not clear on the time she got home on the night in question. She thinks it could have been anywhere between 12:00 a.m. and 2:00 a.m.; she can’t be more precise than that. She went home and cried. She didn’t know what to think. She was up all night lying in bed. The next day she went to Bay Landing early in the morning even though she wasn’t scheduled to work. She recalls seeing Judy Clancey and Nancy Fleming and asking them where Jamie was. She said she had to talk to him. She recalls seeing Jamie Miles coming out of his office with a dolly and told him that “Tommy came after her with his pants down.” She said she told Jamie to do what he had to do and that she didn’t want to see Tommy again. She thinks Judy and Nancy were within earshot and thinks they must have heard because they laughed and Jamie was smiling too. She recalls one of the women making a comment about Mr. Wiggly coming after her. Ms. Slaunwhite says that she did not use the term Mr. Wiggly; she just said he came after her with his pants down. Then she says she felt like an idiot and then they laughed it off. She doesn’t remember Mr. Miles saying a lot; she doesn’t remember him asking anything. She says she left a short time after that; about a half hour later. She doesn’t believe the incident was ever discussed on any other occasion between her and Mr. Miles. She continued to work at the Bay Landing. She claims that she did work with Mr. Duggan again at least once that year and thinks it was New Year’s Eve when there were 3,4, or maybe 5 bartenders working that night. She says she didn’t have any further problems with Mr. Duggan. She says it “stirred inside her for a couple of months.” She became more angry and felt all alone. She says there were other people in the bar that knew. She says Tommy did apologize to her when they were both customers. She says she said to him “Don’t worry about it.” They didn’t discuss it again. Ms. Slaunwhite continued to work there and patronize the establishment until the month of January, 2001. She says that she finally told her boyfriend Troy about the incident with Tommy Duggan and that as a result Troy went to Bay Landing and assaulted Tommy Duggan. She worked that Sunday following the assault involving Troy and Tommy and finished her shift. But when she went to work that following Wednesday, she felt like the public were all talking about her and looking at her. She says she worked some of her shift and then she went to talk to Judy Clancey to tell her she felt bad. Ms. Slaunwhite says Ms. Clancey’s response was “she should feel bad”. Ms. Slaunwhite says she left shortly after that and never went back to work there again.

Ms. Slaunwhite says that for her own mental health she couldn't go back. At first she was really angry; then really scared; she felt violated; blamed herself for a long time; she had been known to a lot of people in the community; after this incident she says she was not treated the same. She became depressed; used to have anxiety attacks; she didn't want to leave her house; she felt betrayed by everybody.

She says that in December 2000 she was in contact with some ladies at the Avalon Centre, a sexual support group; she says she went to the doctor and was given medication for the anxiety as well as the depression; she was given paxil but stopped taking it; she became addicted to gravol.

On questioning by Mr. Noseworthy the Board learned that Ms. Slaunwhite is now 30 years old which would make her around 26 years old at the time of these alleged incidents. She says she didn't have an interview for the job at the Bay Landing. She claims she's not sure when she went from the food side of the establishment to the bar side.

She admits that after the incident she didn't reduce her hours; it was her primary source of income. She admitted that she participated in the sexual banter as long as it was harmless. She agrees that she didn't complain to management about the sexual banter. She admits that she was at times a kidder and a joker; she says she has a sense of humour too. She didn't agree that she pulled up her skirt to show her behind at a Halloween Party. She says she did not show Tommy Duggan her g-string nor did she ever place a \$5.00 bill in her cleavage and ask Tommy to remove it. She does remember an incident when Tommy Duggan grabbed her breast; "more of a motion to grab them", in her memory.

On the night in question, Ms. Slaunwhite says she doesn't remember who the cook was; she thinks it may have been Michael Smith. She says Tommy Duggan was not scheduled to work that day. He didn't do anything related to the bar until closing that evening. She doesn't recall who locked the door that night. She doesn't recall whether the lights were on or off. She then goes through the close-out routine. She thinks Tommy Duggan emptied the ashtrays. She doesn't think she checked the washrooms. She admits that there is a telephone in Jamie's office and a deadbolt on the office door. She says Tommy Duggan exposed himself when she was counting the loonies. She can't recall what her tips were. She doesn't recall Tommy carrying anything to the office. She says she was the only one in the office; she was trying to keep him out. She says

she didn't close the door and put the deadbolt on because of her strength versus his strength. When asked why she didn't call somebody she said she didn't know "when your mind is in this state, you don't what to think." She agreed she didn't pick up the phone to call 911 nor did she call her boyfriend at the time, Troy. She agreed that she knew Jamie Miles' phone number but she didn't call him. She claims that it was not a consistent assault; it "came in spurts". She says her intention was to "make a beeline and leave". She says she stayed in the bar until he left.

She says she didn't tell Troy initially because it wasn't something that was easy to say.

She doesn't recall seeing Derek Nash the next day; says it's possible he was there. She says she doesn't know what Judy Clancey was doing that day. She says that she remembers saying, "I don't know what he was thinking." She says there was no questioning; it became a full conversation about what happened; she says there was no course of action discussed. Ms. Slaunwhite says she didn't tell Jamie the details. She does remember telling them that Heather wasn't there and the phone kept ringing. She says it became a topic of discussion between everybody. She recalls Nancy Fleming asking what it looked like. Ms. Slaunwhite says that she knows that Jamie did speak to Tommy at the bar; she says Jamie told her that Tommy came to him and told him what happened. Ms. Slaunwhite does admit that the assault was out of character for Tommy. She says she shared the incident with Susan Slaunwhite, Judy Clancey and Nancy Fleming. Ms. Slaunwhite agreed that she felt comfortable about speaking to management. She says she wasn't a complainer. After the assault in January, 2001 she went into a depression. She says that she knows that Heather Timmons called the establishment twice that night but nobody answered the phone.

Ms. Slaunwhite doesn't remember saying that the matter was no big deal and that she didn't want Jamie to do anything. When shown her initial statement to the Human Rights Commission Ms. Slaunwhite agreed that Tommy Duggan did pinch and grab her between the legs, although there was a lot she couldn't recall. She also claimed that paragraph 7 of her statement was accurate although she did not mention it in her direct examination by Mr. Wood. For the record, paragraph 7 states that "Duggan pulled his pants but they were not zipped. I had to finish closing up so, with my hands full of money, I headed towards the office. I reached the office door and I felt Duggan pull up the back of my shirt. I sat the money down, Duggan threw me up against the wall trying to pull up the front of my shirt. He commented that we could have

sex on the pool tables and that we wouldn't make a mess they're covered." Ms. Slaunwhite claims that "there's a lot she doesn't remember - there's a lot her mind doesn't allow her to remember." Paragraph 8 of her statement to the Human Rights Commission was also brought to Ms. Slaunwhite's attention. Paragraph 8 states: "Somehow I got into the office. I tried to block the door and lock it but Duggan managed to push his way in and in the process he banged the safe door against the inside of my left knee leaving a bruise. Duggan pushed me against the safe and tried to pull my pants down all the while telling me that I wanted to have sex with him. I tried to knee Duggan and he pushed off of me and left the office." When asked about this, Ms. Slaunwhite said it did happen. She said "It's been 4 years". She says she has difficulty recalling events at times.

When asked why Tommy Duggan cleaned the ashtrays and helped with the VLTs even though he wasn't being paid, Ms. Slaunwhite's response was that everybody at the Bay Landing stayed after hours. It was "not uncommon for staff who weren't working at the time to help working staff clean up".

The next witness was Ms. Judy Clancey the common-law spouse of Jamie Myles for 13 years. Ms. Clancey was called as a witness for the Bay Landing. On questioning from Mr. Noseworthy, Ms. Clancey says that she initially knew Jan Slaunwhite as a customer and then had her do some accounting for her. She started out coming in and ensuring accuracy of the bar sheets, which then evolved into helping out in the dining room. Based on her recollection and with assistance from the exhibit she prepared herself outlining the hours that Jan had worked, she believed that it was around July, 2000 when Ms. Slaunwhite made the transition from dining room waitress to bartender. Ms. Clancey says she didn't have anything to do with Jan (Ms. Slaunwhite) after the transition except for the payroll. She says Jamie would have been Jan's supervisor and she believes that Nancy Fleming would have trained Jan. When presented with Exhibit 21 the Rules of Conduct for Bay Landing dated November 25, 1995 Ms. Clancey says she doesn't know who prepared that document. She does however recognize Exhibit 20 which she played a part in drafting. She knows staff were made aware of this memo which outlined company policies and procedures however she doesn't know how. She knows that the complainant did not sign either of the memos. Ms. Clancey described the complainant as self-confident and in control. She made the odd complaint that people weren't pulling their weight

but nothing out of the ordinary. Ms. Clancey said her management style was different from Jamie's. Ms. Clancey would have staff meetings and write memos at least once a month. She says Jamie's style was one on one; he was not a memo writer.

In relation to the incident involving Ms. Slaunwhite and Mr. Duggan Ms. Clancey recalls that on November 6, 2000 she knows that it was payroll day. She recalls that she was seated at the bar; there was her, Jamie and Nancy Fleming. She was doing her paperwork and could hear Jan and Nancy laughing and talking. She couldn't make out what they were saying; she thinks it was close to opening time. She recalls Jamie coming out of his office and she heard "Tommy, pants down". She says it was just laughing, carrying on about something over the weekend. She just figured it was weekend talk. They were about 15 feet away. At one point she saw that Jamie and Jan were together. She said it appeared "like two girls - ho, ho, ho." She says she definitely heard both girls laughing. She says Jan didn't speak to her at all after that about the incident. When directed to Exhibit 1 Ms. Clancey claims that she did not giggle as suggested by Ms. Slaunwhite. She says she was aware that Jan asked not to work with Tommy Duggan; she thinks Jamie would have made her aware of that.

Ms. Clancey recalls that the complainant came to her on January 14th or 17th, whichever was the Wednesday and said she wanted to leave work because she was embarrassed. Ms. Clancey said Ms. Slaunwhite felt it was all her (Ms. Slaunwhite's) fault and that Ms. Clancey's response was that Ms. Slaunwhite should call Jamie. Ms. Clancey says she didn't take any phone calls from Jan at Bay Landing or at her home after that. She said that New Year's Eve is the only time that Ms. Slaunwhite and Mr. Duggan ever worked together again after the incident.

On questioning by Mr. Wood, Ms. Clancey agreed that there was not a sexual harassment policy in place at the Bay Landing establishment. She doesn't recall ever talking about the issue of sexual harassment at the establishment.

Ms. Nancy Fleming was the next witness in this matter. She was a witness for the Commission. Ms. Fleming was and is a long-time employee of the Bay Landing. She has been working there full-time as a bartender for about 10 years.. She says she has known the complainant for approximately 8 years. She recalls speaking to the complainant that Monday morning which we now know as November 6th, 2000. She said she spoke to Jan that morning but she can't tell what was said word for word. She says that Jan told her that Tommy Duggan was

there. Jan told Ms. Fleming that she was counting her money and he exposed himself to her; he said something like “Mr. Wiggly would like to help count those five’s.” Ms. Fleming says she knew what that meant. She says Jamie was there and Derek Nash was sitting at the bar about 4 feet away. She says her and Jan were behind the bar and Jamie was doing a pop order. She says that Judy Clancey was not there as far as she knew; it was just Nancy that Jan was speaking to until Jamie got into the conversation. Ms. Fleming recalls that Jamie asked if Jan wanted him to speak to Tommy and she recalls that Jan said no. Ms. Fleming recalls that she asked Ms. Slaunwhite if it was true that Tommy was well-endowed and Jan’s response was “I don’t know. I didn’t look.” Ms. Fleming doesn’t recall if Jamie was there or not when that was said. In her recollection Jan was not laughing but she wasn’t upset. She recalls that it was serious. When asked if anyone laughed when she asked if he was well-endowed she recalls that there was probably some but it wasn’t hysterical laughter; just a lighter tone.

Ms. Fleming described Ms. Slaunwhite as pleasant, outgoing and extroverted. She “didn’t complain of anything when she worked there.” Ms. Fleming also described Mr. Miles as a “good boss, very approachable.”

The next witness in this matter was 26 year old Adina Gallant, a witness called by the Bay Landing. She has been working on and off at the Bay Landing since 1999. She is presently employed there as a bartender. She recalls being at work one day and hearing Jan speak to Nancy. She doesn’t remember exactly what was said but does recall it being said that Tommy Duggan had exposed himself to Jan in some manner. Ms. Gallant does not recall the date of this conversation, she doesn’t recall where Ms. Slaunwhite and Ms. Fleming were while the conversation was going on, nor does she recall if anyone else was there. She recalls that it was a normal conversation level and doesn’t recall seeing Mr. Miles or Ms. Clancey. She doesn’t recall if they were laughing; she does recall hearing “Mr. Wiggly” referred to as Ms. Duggan. She says she’s sure the conversation took place but she’s not clear about the details.

The next witness in this matter was Derek Nash, a witness for the Bay Landing. He recalls that he went to the Bay Landing on November 6th, 2000 in the early afternoon to have a beer or 2. He recalls walking up to the side bar where the visa machine was. He recalls Ms. Slaunwhite and Ms. Fleming standing at the side counter and Ms. Fleming saying to Ms. Slaunwhite: “Tell Derek.” He recalls Ms. Slaunwhite saying “Well, let’s just say Mr. Wiggly

was out.” That led Ms. Nash to believe that Tommy had exposed himself. Ms. Nash’s recollection is that that was pretty much the end of the conversation. He recalls taking the beverages and walking away. His recollection was that Ms. Slaunwhite seemed ok - “pretty much normal.” On questioning by Mr. Wood, he recalls that at the time there were a few people, perhaps 3 at the end of the bar. He can’t remember seeing Jamie Miles, but he does recall seeing Judy Clancey doing paperwork about 20 feet away.

He also recalls having a conversation with Jamie Miles where Mr. Miles admitted that he was talking about the exposure incident and basically acknowledging that he (Mr. Miles) “had a problem to deal with.”

Ms. Timmons was the next witness in this matter. Ms. Timmons was at the time of the incident and continues to be, the common-law spouse of Mr. Tommy Duggan. It should be noted that Ms. Timmons was present during the testimony of Jan Slaunwhite. As a result of Ms. Slaunwhite’s testimony, Ms. Timmons on her own behalf wanted to give evidence. Despite an objection from Ms. Slaunwhite, I ruled that I would hear Ms. Timmons’ evidence and weigh it accordingly.

Ms. Timmons recalls that her, Tommy Duggan and Steve Lipton had been at the Bay Landing on November 5th, 2000 which she recalls as a Sunday. She recalls that they had brunch together and then left to go home around suppertime. She says that Mr. Duggan went home with her and then left around 7:30 p.m. to go back to the Bay Landing to play the VLTs. She recalls calling around 10:00 p.m. and asking Ms. Slaunwhite if Tommy was there. She recalls speaking to Tommy asking him to come home because he had to work the next morning. He told her he would be home in a little while. She then called again around 12:00 a.m. She says Ms. Slaunwhite answered the phone and put Tommy on the line. He said he would be home shortly. She doesn’t recall anything unusual about his voice. She says he arrived home around 12:15 a.m.; he drove home; she knew he had been drinking; in her opinion he “had had a few.” He appeared visibly intoxicated but she doesn’t recall that he was slurring his words.

She says that Ms. Slaunwhite and Mr. Duggan were very friendly. She recalls that they played the VLTs together a lot. Ms. Timmons also admitted that she had called the Bay Landing many times on other Sundays for the same reason that she called on November 5th, 2000.

The next witness in this matter was George Jackson, who is the father-in-law of Ms. Jan

Slaunwhite and the step-father of Troy Ralph, Ms. Slaunwhite's present husband and then boyfriend. He was called by the Commission.

He recalls hearing about the incident between Ms. Slaunwhite and Mr. Duggan when his wife came home one night and said that "Jan had been assaulted by Tommy." He does recall that prior to the assault on Mr. Duggan by Troy Ralph that he (Mr. Jackson) approached Mr. Miles and told him that he (Mr. Miles) should have done more to protect Mr. Slaunwhite. He recalls that Mr. Miles just shrugged and moved on.

The next witness in this matter was Tommy Duggan, the second respondent. Mr. Duggan had been a part-time bartender at the Bay Landing for about 2 years. He worked every Saturday night and every second Friday night- approximately 10-20 hours a week. He and Ms. Slaunwhite alternated working Friday nights. Based on the compilation by Ms. Clancey - Exhibit 22 he agreed that he started work there on October 9, 1999 and ended around the first week of February, 2001. He recalls that on November 5, 2000 he, Steve Lipton and Heather went to the Bay Landing for brunch and stayed there until about 5:30 p.m. He recalls that he may have had about 6 or 7 beers up until that point and claims he was not drunk. He says he stayed at home for about 2 or 3 hours then drove back to the Bay Landing "to play the machines again." He recalls Ms. Slaunwhite working and says that he "had another 6 or 7 beers - could be more, could be less." He says he was "feeling good" at the end of the night. He recalls speaking to Heather on the phone and does remember somewhat helping to clean up. He recalls "doing the machines for her" which involved taking the coins out, doing the print-outs, calculating what was won, etc. He says there were about 7- 9 machines at that time. He also recalls doing the ashtrays.

In relation to the incident involving Ms. Slaunwhite Mr. Duggan recalls that he did expose himself to her. He recalls that she was counting the money, they were both behind the bar and he "whipped it out." He recalls helping Ms. Slaunwhite carry some loonies to the office and grabbing her arm telling her not to say anything. He doesn't recall lifting up her shirt; in fact he doesn't remember "anything from then on." He recalls driving home, recalls that Heather was still up but doesn't remember talking to Heather when he got home. He does recall a second phone call from Heather while at the Bay Landing. He thinks that that phone call was after he exposed himself. On questioning from Mr. Noseworthy, Mr. Duggan recalls that he had had about 15 beer at closing time and Jan hadn't cut him off. He recalls that he "just remembers

grabbing her by the arm and telling her not to say anything.” He doesn’t recall the pinching; he doesn’t think he pulled up the back of her shirt; in fact he says he couldn’t have pulled up the back of her shirt because he claims he was carrying the loonies to the office. He doesn’t think he apologized that evening and wasn’t sure what Ms. Slaunwhite was doing when he exposed himself. He doesn’t recall whether or not he used the term “Mr. Wiggly” that night - he could have.

He does recall being disciplined by Jamie about a week later; he recalls going to see Jamie one day while he was at the Bay Landing. Mr. Duggan says a conversation took place in Mr. Miles’s office where he told Mr. Miles that he had “f’ed up.” Mr. Duggan does not remember what Mr. Miles said, nor does he remember what Mr. Duggan said to him. He does recall apologizing to Ms. Slaunwhite about 4 days later when he was on his way to play darts. He recalls that Ms. Slaunwhite was there as a customer playing the machines. He approached her and apologized. Her response was “alright.” She didn’t appear to him to be angry or upset. He does recall that Jamie Miles told him to go and apologize to Ms. Slaunwhite.

When asked about the relationship with Ms. Slaunwhite after the November 5th incident, Mr. Duggan he says the relationship seemed the same. He recalls only working with her at functions and on New Year’s Eve.

He does recall one Halloween Ms. Slaunwhite lifted her skirt up and she was wearing a g-string. He says that once she exposed her bra, bragging that it cost \$40.00. He also recalls an incident when Ms. Slaunwhite was patronizing the Bay Landing and he was working there. Ms. Slaunwhite ordered a drink and there was a \$5.00 bill between her breasts. He recalls grabbing it from her. He claims that the photograph of Ms. Slaunwhite - Exhibit 14- was given to him by Susan Slaunwhite, another Bay Landing employee and friend of Jan Slaunwhite’s. He does recall that Ms. Slaunwhite bought him a beer after the November 5th incident. He thinks she had won on the machines and it was typical for winners to buy everyone in the bar a drink.

Mr. Duggan recalls the incident with Troy Ralph. He was working that night and heard that Troy was coming to see him. He arrived at the bar and told Mr. Duggan to come outside; at that point Mr. Ralph assaulted Mr. Duggan. As a result of this assault, Mr. Duggan no longer has central vision in his eye.

As for the incident involving Ms. Slaunwhite, Mr. Duggan agrees that he was charged

with and pleaded guilty to sexually assaulting Ms. Slaunwhite on November 5, 2000. He received a year's probation and a \$500.00 fine which was to be donated to the Avalon Sexual Assault Centre.

Mr. Duggan was arrested at the Bay Landing one night while he was working for the sexual assault on Ms. Slaunwhite. Shortly after that he was terminated by Mr. Miles.

Jamie Miles, the owner/operator of the Bay Landing Dining Room and Lounge was the final witness heard in this matter. In relation to the hiring of Jan Slaunwhite he claims he didn't hire her initially. He assumes that Ms. Clancey hired her, then Ms. Slaunwhite moved over to the bar side. Mr. Miles described Ms. Slaunwhite as a happy employee. She never brought any issues to his attention. He says he was there every day and described himself as approachable. His way of handling matters is to "take people aside and have conversations with them". He describes the close-out and in doing so suggests that carrying the loonies is a 2-hand operation.

On November 6, 2000 he recalls that Judy and he were both there. He recalls that Nancy Fleming was working that day. Back then the bar opened at 11:00 a.m.; it was usual for bartenders to be there 40 minutes ahead of closing. Ms. Miles recalls seeing Jan that morning; he assumes she was there as a customer. He says that Jan never did ask to meet with him. He recalls being behind the bar checking the cannisters, etc. At that point he recalls overhearing Jan Slaunwhite and Nancy Fleming laughing and having a little chat. At that time he didn't know what they were talking about. He says Jan was on the customer side; Nancy was on the work side counting money or getting ready. He says he was within 8 feet of the women and overheard Nancy and Jan speaking about and laughing about "Mr. Wiggly". He wasn't sure who said it. Mr. Miles testified that that got his attention, and then Jan told him that Tommy exposed himself the previous night. Ms. Miles recalls that he was shocked that they found it so funny. He recalls asking Ms. Slaunwhite what she wanted him to do about it. He recalls her saying that she wasn't comfortable to work with him alone - she never gave him the impression that she wanted Mr. Miles to reprimand Mr. Duggan. Mr. Miles' evidence was that Ms. Slaunwhite gave him the impression that she didn't want Troy to find out about it. He recalls asked Ms. Slaunwhite if Mr. Duggan apologized and her response was yes. Mr. Miles says that he continued with his work duties and he recalls that Jan went over to commence gambling. He says that Ms. Slaunwhite did not come to his office to speak to him privately. He says he would expect her to take him aside.

When asked whether or not there were any customers present, Ms. Miles says that yes, Derek Nash was present although he claims he didn't see Derek. He says that he "found out after he was present". When asked about Judy Clancey he says he doesn't know; he says "she wasn't there with them; he doesn't recall seeing Judy". He says that he was bent over by the bar, Nancy was laughing and he thinks Jan was laughing. He recalls Ms. Slaunwhite saying "It happened here last night." He asked her what she wanted him to do. He recalls her smiling; he says, "it was a big joke at the time." Mr. Miles knew about Mr. Wiggly; he knew it meant Tommy's genitals. Mr. Miles' evidence was that Ms. Slaunwhite's body language was not "traumatized". He recalls Nancy having a laugh over it - "it wasn't a long conversation; no more than 3 or 4 minutes." He recalls being on the premises for another couple of hours. He doesn't know how long Ms. Slaunwhite stayed; he knows she gambled. On questioning from Mr. Wood, Mr. Miles recalls Ms. Slaunwhite saying that she did not want Troy to find out.

Mr. Miles doesn't think he saw Tommy Duggan the following day. He recalls that Mr. Duggan came to him. Mr. Miles testified that "Tommy was curious as to what she had to say." Mr. Miles recalls meeting with Mr. Duggan in Mr. Miles' office with the door partially closed. Mr. Miles' evidence was that "it was an embarrassing topic for him (Mr. Miles)." He says that Mr. Duggan didn't elaborate on what happened. He told Mr. Miles that he had apologized that night. He didn't describe what happened. Mr. Miles testified that he told Mr. Duggan that "he should apologize for his own safety and for Jan's sake." Mr. Miles says that Mr. Duggan told him he apologized to Ms. Slaunwhite the second time, and his evidence is that "everything seemed to go as normal after that." He says that from overhearing Nancy he knew that people were talking about the flashing incident.

When asked about Ms. Slaunwhite and Mr. Duggan working together after the incident he says the only other time Mr. Duggan and Ms. Slaunwhite worked together was New Year's Eve. He recalls having a full staff on that night. He says it was not a problem for him to live up to the expectation that they not work together since it wasn't common practice that they work together in any event.

When asked about a conversation with George Jackson he says he does recall a conversation where Mr. Jackson gave the impression that he (Jamie) should have done more.

Mr. Miles says that he would have handled the situation differently if he had known that

it was an assault. He says that if it had involved more than an exposure he most definitely would have done something in writing. He says he acted according to the information that he was provided with. He acted the way he did because he didn't want Ms. Slaunwhite's boyfriend to find out. In answer to questioning by Mr. Wood, Mr. Miles says that he would have gotten both sides of the story; he would probably have contacted the police himself. He says that he doesn't think he would have been justified in laying people off given what he knew. He felt that enough had been done; he felt that Ms. Slaunwhite was happy and that he lived up to his part of the agreement.

Mr. Miles was not in the bar when the incident with Troy Ralph happened on January 14, 2001. He says that he does remember going there at closing time and seeing Mr. Duggan who was still working at the time and appeared to be in shock. Mr. Miles told him he should go to the hospital but he says Mr. Duggan said he didn't want to go. After the assault between Mr. Duggan and Mr. Ralph Mr. Miles says that Mr. Duggan continued to work some shifts but it wasn't working out. Mr. Miles knew that Mr. Duggan didn't want to be there but he wanted to be careful. He took advice that both Mr. Duggan and Ms. Slaunwhite should leave and on that advice he fired Mr. Tommy.

He does recall that Ms. Slaunwhite came to work on January 14th, the day after the assault between Mr. Duggan and Mr. Ralph. He recalls her being quite upset and says that was the most upset he had seen Jan. He says he could tell she was uncomfortable - "she knew that the community knew." He says that Ms. Slaunwhite showed up for work the following Wednesday, but left early. She never reported for work again. The next contact that he had regarding Ms. Slaunwhite was with Constable Forhan, who pressed charges against Mr. Duggan. Mr. Miles states that Ms. Slaunwhite was not dismissed. He was expecting a call from her. He finally called Ms. Slaunwhite after 2 months and she told him she wasn't coming back. He asked her for a doctor's note which she provided. Based upon that, he provided a Record of Employment which listed her last day of work as January 14th, 2001

He does remember that Troy Ralph came to see him to apologize and Mr. Miles barred Mr. Ralph from the bar for a month.

Mr. Duggan was arrested at the bar one night while he was working, shortly after the incident involving Mr. Ralph and Mr. Duggan.

Mr. Miles says that it wasn't until the human rights' complaint was filed by Ms. Slaunwhite that he learned that the incident involving Ms. Slaunwhite and Mr. Duggan was more than an exposure incident.

When shown Mr. Slaunwhite's statement to the Human Rights Commission (Exhibit 1) Mr. Miles claims that it is "totally untrue from his recollection." He says that the only thing that is true is that she did come in the next morning, and the only reason he was brought into it was that he overheard the conversation. He doesn't recall her saying "Do whatever is necessary."

When asked by Mr. Wood how, if at all, Tommy Duggan was disciplined for the incident involving Ms. Slaunwhite, Mr. Miles' response was that he spoke to him a day or two later, told him he thought it was inappropriate and mentioned the excessive drinking.

When asked about whether or not staff were sometimes there to help clean up he admitted that he knew that it happened. He says that he didn't have a problem with that at the time; he left it up to the bartenders.

The Burden of Proof

The burden of proof is set out in section 39(3) of the Nova Scotia *Human Rights Act* R.S.N.S. 1989, c. 214, as amended 1991, c.12 which states as follows:

Sufficiency of evidence for prosecution

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

A reasonable preponderance of evidence has been equated with the civil standard which is one described as being on a balance of probabilities. As pointed out by Chair Bright in *McLellan v. Mentor Investments Ltd.* (1991), 15 C.H.R.R. D/134 (N.S.Bd. Inq.) at paragraph 16:

"The civil burden or "preponderance of evidence" or proof of fact on a balance of probabilities has been described as follows:

[T]hat degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If this evidence is such that the tribunal can say "we think it is more probable than not," the burden is discharged, but, if the probabilities

are equal, it is not” *Miller v. Minister of Pensions* [1947] 2 All E.R 372 (C.A.) at 374 per Lord Denning.

In short, therefore the onus of proving the allegations is upon those who made the allegations, in this case the Human Rights Commission and the complainant, Ms. Jan Slaunwhite. The allegation is one where the violation is under two sections of the *Act*, section 5(2) which is the prohibition against sexual harassment and section 5(1)(d)(m) which states that “no person shall in respect of employment discriminate against an individual or class of individuals on account of sex.”

Credibility

As is clear from the summary of the evidence this is a matter in which there are issues of credibility. Both counsel pointed to a case which has been often quoted and helpful when assessing credibility and determining the facts. The case is one from the British Columbia Court of Appeal; it is the case of *Faryna v. Chorny* [1952] 2 D.L.R. 354. Mr. Justice O’Halloran stated at p. 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour 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 in that place and in those conditions.

ANALYSIS

In determining whether or not the evidence presented constitutes a violation(s) under the Nova Scotia *Human Rights Act*, it is necessary to look at the relevant sections of the *Act*. Prior to the amendments in 1991, the *Act* did not speak specifically of sexual harassment and indeed did not define sexual harassment. (*McLellan v. Mentor Investments Ltd.* (1991), 15 C.H.R.R. D/134 (N.S.Bd. Inq)) The amendments do define sexual harassment and explicitly state in subsection 5(2): “No person shall sexually harass an individual.” “The amendments were obviously

intended to expressly state what had been previously implied.” (*Miller v. Sam’s Pizza House* (1995), 23 C.H.R.R. D/433 (N.S. Bd. Inq). Sexual harassment is defined as :

(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. 1991, c. 12, s. 1.

Up until the November 5th, 2000 incident the evidence has established that Ms. Slaunwhite and Mr. Duggan were friends, although aside from a housewarming party that Mr. Duggan attended at the complainant’s house, they did not socialize outside the Bay Landing. Ms. Slaunwhite described the atmosphere at the Bay Landing as “a very relaxed environment”. She says they were all a “tight group” but it was strictly a working relationship. She says there was lots of sexual innuendo and a lot of sexual connotations particularly with reference to Tommy Duggan’s penis, also referred to as “Mr. Wiggly”, which she said was the subject of a lot of the jokes. She says she was a participant to a degree as long as it was harmless. There was evidence that Ms. Slaunwhite showed her g-string to Mr. Duggan which she denied and as well she denied placing a \$5.00 bill in her cleavage and asking Mr. Duggan to remove it. She does remember an incident where Mr. Duggan grabbed her breast but then said that it was more of a motion to grab. I also acknowledge Exhibit #4, the picture which has been put into evidence of Ms. Slaunwhite on a vacation where her breasts are covered by her hands and written on top of them are the initials T.D. Ms. Slaunwhite’s response to Mr. Noseworthy on the circumstances regarding that photograph are that Mr. Duggan asked for “titty pictures” before she went on her vacation. She admits that she didn’t complain about any behaviour prior to November 6, 2000. Ms. Clancey and Mr. Miles both testified about the written rules of conduct (Exhibits 20 and 21) that were part of the establishment policy and procedures. Ms. Clancey testified that nobody ever brought

to her attention any inappropriate conduct to each other. Ms. Clancey does remember thinking that when she overheard Ms. Slaunwhite and Ms. Fleming speaking about the November 5th incident that she thought it was just “weekend talk.” Ms. Fleming described Ms. Slaunwhite as pleasant, outgoing and extroverted. Ms. Heather Timmons, the common-law spouse of Tommy Duggan recalls a Halloween party at the Bay Landing where Ms. Slaunwhite was dressed up as Cleopatra and Mr. Duggan was working at the time was asked by Ms. Slaunwhite who was a patron to “take a five from her breast”. She says that Mr. Duggan and Ms. Slaunwhite were very friendly; they “played the VLTs together. Tommy Duggan agreed that Ms. Slaunwhite carried on “just like everyone else.” He recalls a Halloween Party where Ms. Slaunwhite lifted up her skirt and she was wearing a G-string. He says she once exposed her bra and bragged about it costing \$40.00. Ms. Slaunwhite was not asked about that.

In determining whether or not such evidence establishes any violations, the case of *Miller v. Sam’s Pizza House* (1995), 23 C.H.R.R. D/433 is helpful. At paragraph 122:

“The definition of harassment under paragraph 3(o)(i) of the Nova Scotia legislation establishes that a respondent must have engaged in “vexatious sexual conduct or a course of conduct.” Sexual harassment is a broad concept encompassing a wide range of comments and conduct that do not necessarily have to be specifically directed at the complainant. Sexual harassment has been described as including verbal abuse or threats; sexually oriented joke, remarks, innuendoes, or taunting; derogatory or patronizing name calling; comment or a sexual nature about weight, body shape, size or figure; rough and vulgar humour or language; display of pornographic material; practical jokes which cause awkwardness or embarrassment; leering, ogling or other gestures with suggestive overtones; lewd gestures; unwelcome invitations or requests; unnecessary and inappropriate physical contact such as patting, pinching, stroking or suggestively brushing up against someone else’s body; as well as sexual touching or physical assault.

In making that conclusion, the Board of Inquiry at paragraph 140 states the following:

“With respect to the work environment, human rights legislation in Canada does not prohibit normal social interchanges, interpersonal relations, flirtation or even intimate sexual conduct between consenting adults.”

And further in *Bell v. Ladas* (1980), 1 C.H.R.R. D/155 (Ont. Bd. Inq) at paragraph 1390:

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

And further at paragraph 141 in *Miller, supra*

“The intention is not to legislate a pristine or sterile work environment, but to curb harassing conduct, provide all employees equal opportunities and protect an employee’s right to work in an environment free from unwanted sexual pressures.”

I accept Mr. Noseworthy’s submission that this is a bar/lounge situation where the dialogue and interaction is logically different than what one would find in, for example, an elementary school situation. Although it is clear that at least on the part of Ms. Slaunwhite and Mr. Duggan prior to November 5, 2000, there was friendly banter between them and sexual innuendo, both Mr. Miles and Ms. Clancey testified that they were not aware of any improper sexual conduct. This is consistent with Ms. Slaunwhite’s evidence where she admits that she she didn’t complain about such conduct prior to November 5th, 2000. The only individuals who were able to comment in any detail on such matters were Ms. Slaunwhite and Mr. Duggan although I do note that both Ms. Fleming and Mr. Nash appeared to be familiar with the term, “Mr. Wiggly”, and I do acknowledge Ms. Fleming’s comment on November 6th, 2000 when upon Ms. Slaunwhite telling her about the incident the night before, Ms. Fleming asked, “So, is it true that he is well-endowed?” I also acknowledge Ms. Timmons’ testimony regarding Ms. Slaunwhite’s behaviour on Halloween. Most importantly there hasn't been any evidence which has suggested that anyone was particularly offended by these comments or activities, including Ms. Slaunwhite and Mr. Duggan. As a result while I do some friendly bantering and perhaps a moderate amount of sexual innuendo I am not convinced that the evidence presents an environment rife with such activity thereby amounting to a poisonous work environment. On the whole the evidence prior to the November 5th incident fails to convince me that the conduct envisaged by the Act has been established. Bearing in mind all of the factors to be considered I do not find liability against either of the respondents in that regard.

The November 5th, 2000 incident requires a thorough examination because it is that incident which triggered Ms. Slaunwhite's complaint. In order to determine whether or not the evidence establishes a violation it is necessary to examine some inconsistencies concerning that incident which have raised issues of credibility. Ms. Slaunwhite's sworn testimony on questioning from Mr. Wood is that while she was closing up for the night, Mr. Duggan, who had consumed a substantial amount of beer during the day and into the closing hour surprised her by making a suggestive comment about the money she was counting while concurrently exposing his penis to her. She further claims while she was on her way to the office he tried to lift up the back of her shirt and later while back at the bar he said to her that nobody had to know and grabbed her by the arms while telling her this. That is the gist of the evidence as told to this Board of Inquiry on questioning from Mr. Wood. In contrast, the incident that Ms. Slaunwhite described to the Commission in a written statement dated May 2, 2001 described an incident that was more serious and which she then confirmed when it was put to her by Mr. Noseworthy . When asked by Mr. Noseworthy about the discrepancies Ms. Slaunwhite's response was "there's a lot I don't recall", "there's a lot my mind doesn't allow me to remember", and "I have difficulty recalling the events at times". In assessing the evidence of Ms. Slaunwhite I was urged to view her subsequent behaviour as a factor in assessing credibility. For example I was asked to view the following pieces of evidence as proof that the incident described by Ms. Slaunwhite was not that serious and therefore not as described in her written statement; for example, not telling her boyfriend about it until several months later, not seeking medical attention shortly afterwards, not taking any medication shortly after the incident or there being scanty, if any, evidence as to observations about Ms. Slaunwhite's demeanour subsequent to November 5th, 2000. I do not place a significant amount of weight on what I will call the "subsequent behaviour evidence". There has been no expert evidence provided as to how an individual reacts to such events and I find that Ms. Slaunwhite's subsequent demeanour is not too helpful in determining the extent of the incident between Ms. Slaunwhite and Mr. Duggan. While I admit to having concerns over the factual discrepancies in her evidence versus the statement that she gave to the Commission what I do know is that I had an excellent chance to observe Ms. Slaunwhite's demeanour while she was testifying at this inquiry. She gave the impression of someone attempting to describe unpleasant events that left a

strong impression on her, even years after the incident, and I found her sworn testimony regarding the events of that night very compelling. The only other person who can shed light on the incident that night is Tommy Duggan. Mr. Duggan gave sworn evidence regarding this incident for the first time. He recalls exposing his penis to Ms. Slaunwhite and grabbing her arm at the same time telling her not to say anything. He doesn't recall lifting up her shirt, pinching her, pulling up the back of her shirt or "roughing her up" in the office; he does however admit to exposing himself and for the most part, he doesn't vehemently deny Ms. Slaunwhite allegations. On the whole I found Mr. Duggan's evidence to be somewhat self-serving; for example he doesn't recall a lot of the details of that night but he is certain that he spoke to his girlfriend, Heather Timmons twice that evening, the second of which would have happened around the time of the assault; quite frankly I am at a loss as to how he can recall the two phone calls from his girlfriend but is unable to recall other details of the evening. On that point I also note the evidence of Heather Timmons, Mr. Duggan's present partner and partner during the period in question. Ms. Timmons says that she recalls making two phone calls that night to the Bay Landing and that both times she spoke to Mr. Duggan. Ms. Slaunwhite said that she recalls the phone ringing but that neither she nor Mr. Duggan answered the phone. Although Ms. Timmons' evidence would appear to corroborate Mr. Duggan's evidence I do not place too much weight on Ms. Timmons' assertion that she had spoken twice that particular night to Mr. Duggan. While I don't disbelieve Ms. Timmons' evidence that she spoke to Mr. Duggan her evidence is also that she had called other Sunday nights as well with the same request. As a result I am not convinced that her testimony corroborates Mr. Duggan. I do note that Mr. Duggan pleaded guilty on August 20, 2002 to a charge of sexual assault arising from the above-mentioned incident which I find corroborates Ms. Slaunwhite's testimony. On the whole, while I am not prepared to find on the balance of probabilities that Ms. Slaunwhite was subjected to the behaviour that she described in her written statement I am prepared to accept the evidence that she described on direct examination during this Board of Inquiry.

In determining whether or not Ms. Slaunwhite was a victim of sexual harassment in relation to the November 5th incident it is necessary to determine whether or not Mr. Duggan engaged in vexatious sexual conduct or a course of comment that is known or ought reasonably

to be known as unwelcome.

The authority on the issue as to whether or not one incident of vexatious sexual conduct is sufficient to ground a complaint is clear and not disputed. As stated by Chair Meltzer in *Miller v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433 (N.S.Bd.Inq.)

“In Nova Scotia one incident may be sufficient to constitute sexual harassment for unwelcome conduct as in *Cameron v. Giorgio & Lim Restaurant.*” (1994), 21 C.H.R.R. D/501 (N.S.Bd.Inq) See also *Bell and Korczak v. Ladas and the Flaming Steer Steak House* (1980) 1 C.H.R.R. D/155 (Ont. Bd. Inq) and *Karlenzig v. Chris' Holdings Ltd.* (1991), 15 C.H.R.R. D/5 (Sask. Bd. Inq)

The question then becomes whether or not the conduct described on November 5th, 2000 was “vexatious sexual conduct.” What is meant by the term “vexatious” in paragraph 3(o)(i) of the *Act*? The Board in *Miller, supra* at paragraph 127:

“The proper test is whether or not the comment or conduct was vexatious to the complainant .”

And further, the Board quotes *Cuff vs. Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972 (Ont. Bd. Inq.)

“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.”

Notwithstanding that this Board has heard Ms. Slaunwhite's personality described as self-confident and extroverted I am unable to conclude that her personality characteristics would likely mean that she would not be offended by Mr. Duggan's acts. I find that the acts as described by Ms. Slaunwhite fit within the definition of vexatious sexual conduct as contemplated by the *Act*. The suggestive comment made by Mr. Duggan about “Mr. Wiggly

rolling in the fives” is lewd, exposing his penis is offensive, trying to lift up the back of her shirt and then telling her that nobody had to know and grabbing her by the arms while telling her this is clearly inappropriate physical contact. The next question is whether or not that “vexatious sexual conduct” was known or ought reasonably to be known as unwelcome. Again, quoting *Miller supra*, at paragraph 130,

“The last part of the definition in paragraph 3(o)(i) is that this vexatious sexual conduct or a course of comment is known or reasonably to be known as unwelcome. 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.”

In finding that Tommy Duggan knew or ought reasonably to have known that his behaviour that night was unwelcome, I use the words of the Board of Inquiry in *Miller supra*; “the fact that Ms. Slaunwhite tolerated certain behaviour or even participated to a certain degree does not make sexually explicit activities innocuous or obviate the standards established by the law.” The case law clearly establishes that it is a subjective test regarding the particular complainant. The burden rests with the respondent to ascertain that any sexual conduct is welcome and continues to be welcome. Although I’m cognizant of the friendly, “sexual bantering” relationship between the complainant and Mr. Duggan prior to this incident I am not able to support a finding that Ms. Slaunwhite welcomed this particular activity by Mr. Duggan. Her response to him when he exposed himself “What the f. are you doing?” would clearly indicate that he had stepped well beyond the limits. Furthermore, Mr. Duggan’s apology shortly after the incident and his admission to Mr. Miles that he had f’ed up would demonstrate that he knew he had gone well beyond all decent standards of behaviour. As well, although I don’t have the benefit of knowing the facts that surrounded Mr. Duggan’s guilty plea to sexual assault against Mr. Slaunwhite, I find that I am entitled to rely on that conviction in determining whether or not sexual harassment took place. (*Fernandes v. MultiSun Movies Ltd.* (1998), 35 C.H.R.R. D/43 (B.C.H.R.T.); *Eldridge v. 2887126 Canada Inc. (c.o.b. Imperial Buffet)*, [2000] O.H.R.

B.I.D. No.4.

On the issue of liability I conclude that Ms. Slaunwhite and the Commission have proven on the balance of probabilities that she was sexually harassed by the respondent, and that Mr. Duggan has not provided a sufficient justification or defence to his actions on November 5th, 2000. Thus, there is sufficient evidence to support a violation contrary to section 5(2) of the Nova Scotia *Human Rights Act*.

Employer Liability

Having found that Tommy Duggan is personally liable for the incident on November 5th, 2000 the focus now shifts to what, if any, responsibility the Bay Landing has as a result of the November 5th incident involving Ms. Slaunwhite and Mr. Duggan. The relevant section for that inquiry is section 5(1)(d)(m) which, as stated previously, is the following:

5(1) No person shall in respect of...

(d) employment

discriminate against an individual or class of individuals on account of...

(m) sex.

Prior to the amendments in human rights legislation expressly prohibiting sexual harassment, the courts and tribunals typically viewed find sexual harassment as discrimination on the basis of sex. (*Janzen v. Platy Enterprises Ltd* (1989), 10 C.H.R.R. D/6205 (S.C.C.) The question in this case is whether or not any person (which can include employer) has in respect of employment discriminated against the complainant on account of sex. The law appears to be well-settled that employers can be liable for the discriminatory acts of its employees, particularly in the context of sexual harassment. It has been suggested by counsel for the Commission that the principles and reasoning in *Robichaud v. the Queen* (1987) 40 D.L.R. (4th) 577 apply to this case; counsel for the employer submits the *Robichaud* principle is not as all applicable to the facts in this case. In order to make that determination it is necessary to review the evolution of

jurisprudence in that regard.

Initially sexual harassment cases were concerned with harassment by the employer himself or herself. *Robichaud, supra.* was a case which involved offending behaviour by a supervisor toward an employee where the federal government was the employer. The issue was whether or not the employer could be found liable for the sexually harassing behaviour of its employee when the employer was not aware of the behaviour. The court was dealing with the interpretation of the *Canadian Human Rights Act* and in doing so, discussed the purpose of human rights legislation in general:

“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.” (As per Mr. Justice LaForest, J paragraphs 9 and 10)

and further at paragraphs 11 and 12

“The interpretative principles I have set forth seem to me to largely dispositive of this case. To begin with, they dispose of the argument that one should have reference to theories of employer liability developed in the context of criminal or quasi-criminal conduct. These are completely beside the point as being fault-oriented, for, as we saw, 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.” (*Robichaud, supra*)

The legislative scheme that the court was dealing with involved the interpretation of section 7 of the *Canadian Human Rights Act*, which stated as follows:

It is a discriminatory practice, directly or indirectly,

1. to refuse to employ or continue to employ any individual, or

2. **in the course of employment** to differentiate adversely in relation to an employee.

By moving away from a fault-oriented scheme and placing responsibility on the employer even in the absence of knowledge of the behaviour on the employer's part, the court found that the offending behaviour should nonetheless be found to be "in the course of employment". The principle of no-fault based employer liability in human rights legislation has been applied in courts and tribunals across the country. (See *Janzen, supra, Fernandes v. MultiSun Movies Ltd.* (1998) 35 C.H.R.R.D/43 (B.C.H.R.T., *Eldridge v. 2887126 Canada Inc. (c.o.b. Imperial Buffet)* [2000] O.H.R. B.I.D. No. 4, *Thessaloniki Holdings Ltd. v Saskatchewan (Human Rights Commission)* (1991), 15 C.H.R.R. D/33, *Guzman v. T* (1997) 27 C.H.R.R. D/349 (B.C.C.H.R.).

The wording in the Nova Scotia *Human Rights Act* uses the phrase "in respect of employment" as opposed to "in the course of employment." In *Janzen, supra*, Chief Justice Dickson, in finding that the difference between the wording, "in respect of employment"; "in the course of employment", was not significant, applied Mr. Justice LaForest's "purposive" interpretation in *Robichaud, supra*:

"The term "course of employment" should not be interpreted as only referring to activities which fall narrowly within the employee's job description. To employ such a narrow definition would be wrongly to import tortious notions of vicarious liability into the field of discrimination law. It would appear more sensible and more consonant with the purpose of the *Act* to interpret the phrase "in the course of employment" as meaning work or job-related." (at p.92)[p.D/4331 C.H.R.R.]

Other jurisdictions have followed Mr. Justice LaForest's "purposive interpretation". (See *Karlenzig v. Chris' Holding Ltd.* (1991), 15 C.H.R.R. D/5 (Sask. Bd. Inq); *Hadzic v. Pizza Hut Canada* (1999), 37 C.H.R.R. D/252; *Nixon v. Greensides* (1992), 20 C.H.R.R. D/469(Sask. Bd of Inq) affirmed on appeal at [1993] S.J. No. 302 (Sask. Q.B.)

I conclude that the phrase "in respect of employment" in the Nova Scotia legislation should also be interpreted in the broad, remedial fashion suggested by Mr. Justice LaForest in *Robichaud, supra* . In doing so, I am aware of the underpinnings of this principle which is one of "placing responsibility" for an organization on those who control it and are in a position to take

effective remedial action to remove undesirable conditions. (*Robichaud, supra*, at 33944)

The analysis now turns to whether or not the *Robichaud* principle applies in this case. The issue is whether or not the November 5th incident was sufficiently “in respect of employment” to attract employer liability. Tommy Duggan, the offender of the sexually harassing behaviour, was a co-worker of the complainant, although on the day of the incident he was not scheduled to work at all. He went to the Bay Landing for brunch as a customer and stayed until around supertime drinking beer and playing the VLT’s. He went home and went back to the establishment after supper to play the VLT’s. It’s not clear what time he went to the establishment the second time; it appears to have been sometime after he had supper at his house with his girlfriend, Heather Timmons. He stayed at the Bay Landing until closing as a customer. The restaurant had closed down a few hours earlier. He was there for last call which was around 11:00 p.m. but instead of leaving the establishment he stayed on leaving just he and Ms. Slaunwhite alone together in the establishment. It was the condoned practice at the time that staff who patronized the Bay Landing at the time of closing would sometimes stay behind and help whomever was working at the time with the closing-out process, which could take up to an hour sometimes. The closing-out process involved locking the doors, turning off the lights, emptying the ashtrays, checking the washrooms, at that time weighing the liquor bottles to see how much had been consumed, counting and re-stocking all of the inventory which included beer, pop, snack foods, etc. , recording all of that on a bar sheet, counting the money, emptying the VLTs, counting the loonies from the VLTs, ensuring there was a float for the next staff person, taking the money including the loonies to Mr. Miles’ office, putting it in the office safe and locking the exit doors and the gate which surrounds the establishment. Mr. Duggan helped to clean the ashtrays and empty the VLTs although that is not completely clear. Ms. Slauwhite recalls that he also helped to re-stock the bar although Mr. Duggan does not remember that; he’s pretty sure he would remember if he was putting the stock back in the fridge.

Counsel for the Commission submits that when you look at the broad and purposive interpretation required of human rights legislation that it is open to conclude that such an interpretation would include employees who are engaged in activities in the workplace with at

least the tacit consent of the employer; Mr. Wood suggests that the Mr. Duggan's emptying of ashtrays and the VLT machines as well as his status as an employee which in effect, allowed him to stay behind after closing were sufficiently "in respect of employment" to invoke liability on the part of the employer. On the other hand, counsel for Mr. Miles (the Bay Landing) submits that to find liability in this factual situation is to stretch the meaning of the phrase "in respect of employment" well beyond its intended purpose. He says that Mr. Duggan's staying behind after closing was not work-related at all. Rather he was there as a companion of Ms. Slaunwhite and his emptying of the ashtrays and VLTs was to assist but was not in any way "in respect of employment" as contemplated by the *Act*.

Other decisions are helpful in making this assessment. In *Janzen, supra*, the complainants were 2 waitresses who were sexually harassed by the cook; although the cook wasn't in an official supervisory role, the court in that case found that the cook did have an authority that had been granted to him by the employer; in other words, the cook was found to have a supervisory relationship granted to him by the employer. It should be noted that the cook was working at the time of complaints and the offending behaviour took place in the workplace.

Karlenzig v. Chris' Holding Ltd. (1991), 15 C.H.R.R. D/5 (Sask. Bd. Inq.) extended the liability to co-workers in the workplace in a non-supervisory capacity. It was a case involving a waitress who described an incident where she was grabbed by the cook while she was standing on a pail reaching for tomatoes. The Board accepted the submission of the Commission that the case of *Robichaud v. Canada (Treasury Board), supra* was not intended merely to be confined to situations of a "supervisory" nature. *Karlenzig, supra* was affirmed on appeal to the Saskatchewan Queen's Bench. In deciding the issue of liability of the employer vis a vis a co-worker relationship the court indicated the following:

"Clearly, social policies underlying the *Saskatchewan Code* will be frustrated if s. 16(1) is interpreted to exclude sexual discrimination by fellow workers who have no supervisory role. Sexual Harassment in the workplace will continue unless the employer is held accountable. Only the employer is in a position to effectively curtail this anti-social behaviour." (at para. 7)

The cases have further extended liability to include situations where the complainant and the respondent are not in the traditional workplace setting when the harassment occurred.

Simpson v. Consumers' Association of Canada (2001), 53 O.R. (3d) 351 (Ont. C.A.) was a matter which, although not a human rights case, involved behaviour by the supervisor that was found to be of a sexually harassing nature. In that case the court found that even though some of the impugned conduct occurred on business trips thus taking it outside the workplace and the normal employment context, nonetheless it was still found to be employment-related. As stated by Mr. Justice Feldman at paragraph 6,

“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.”

Another variation on the *Robichard* principle where liability was imposed can be found in *Jalbert v. Moore* [1996] B.C.C.H.R.D. No. 37. In that case the complainant worked at a wholesale supply warehouse and the offender was a customer at the complainant's place of business. The complainant filed a complaint against the customer and the customer's employer. The legislation in that case contained the phrase with “respect to employment.” The adjudicator quotes Chief Justice Dickson in *Canadian National Railway Co. V. Canada (Canadian Human Rights Commission)* [1987] 1 S.C.R. 1114 at 1134, who stated that “when interpreting human rights legislation such laws should be given not only their plain meaning but also “full recognition and effect” and, in accordance with the Interpretation Act [R.S.C. 1985 C. 1-21], “a fairly large and liberal interpretation as will best ensure that their objects are attained.” He went on to caution that “we should not search for ways and means to minimize those rights and enfeeble their proper impact.” In finding liability in *Jalbert, supra*, the Chair was of the view that the “employer, the party with the most control over workplace conditions, has a large responsibility for ensuring that there is no discrimination in its hiring, promotion, training and workplace conditions.” (at para. 39)

Nixon v. Greensides (1992), 20 C.H.R.R. D/469 (Sask. Bd. Inq) is also a case which involved a customer harassing the complainant waitress.

The analysis now shifts to a determination as to whether or not the facts in this matter support a finding that the *Robichaud* principle applies and that the November 5th incident was “in respect of employment.” The evidence is clear that the harassing incident happened in the workplace, after the establishment was closed to the public. Ms. Slaunwhite was the only bartender scheduled to work that day and close the bar - that was her routine on Sundays, a routine which was known by Mr. Duggan. Mr. Duggan stayed behind after the customers had left, with no objection from Ms. Slaunwhite. Mr. Miles knew and condoned the practice of staff staying behind after hours to assist. The circumstances behind Mr. Duggan’s presence in the workplace after hours that night is relevant. Counsel for the employer suggests that after the bar closed to the public Mr. Duggan became Ms. Slaunwhite’s personal company and that the employer should not be responsible for whatever happens between Ms. Slaunwhite and her choice of company. In other words Ms. Slaunwhite chose to have Mr. Duggan there as her companion. In my view the evidence does not support that submission. While the evidence suggests that Ms. Slaunwhite and Mr. Duggan were friends it was a friendship that did not extend beyond the workplace except for a housewarming party hosted by Ms. Slaunwhite. As Ms. Slaunwhite says, “They were a tight group but it was strictly a working relationship.” I acknowledge that the relationship between Ms. Slaunwhite and Mr. Duggan was very friendly and even flirtatious but the evidence does not disclose that it went beyond the workplace environment. In my opinion Ms. Slaunwhite and Mr. Duggan were nothing more than part-time co-workers of equal status who enjoyed sexual bantering back and forth. In short, I am not persuaded that the evidence supports a finding that Mr. Duggan and Ms. Slaunwhite enjoyed the “personal” relationship suggested by Mr. Noseworthy. This view is further supported by Mr. Duggan’s actions when the bar initially closed. The evidence shows that Mr. Duggan’s assistance by cleaning the ashtrays and emptying the VLTs, as minimal as it was, was part of the “practice” that had developed amongst the staff. Mr. Duggan was just following the practice of doing what everybody else did at that time, although clearly he took advantage by going beyond the limits of decent behaviour. It is my view

that since the employer tacitly approved that “practice” it should follow that the employer should therefore be responsible for whatever happens in respect of it. This is not a conclusion arrived at lightly. As both Mr. Noseworthy and Mr. Wood pointed out there is little jurisprudence interpreting the phrase “in respect of employment” and none that I am aware of with this particular fact situation either in Nova Scotia or elsewhere. In reaching my conclusion I am cognizant of the facts, as well as the words of Chief Justice Dickson when he stated that the “employer is the party with the most control over workplace conditions.” (*Canadian National Railway Co.*, supra.) I am also mindful of the remedial purpose of human rights legislation. As a result of the foregoing analysis, I find on the balance of probabilities that the *Robichaud* principle does apply here and that the incident described on November 5th, 2000 is sufficiently “in respect of employment” as contemplated by the Nova Scotia *Human Rights Act*. Therefore the employer is liable for the actions of Tommy Duggan that night contrary to section 5(1)(d)(m) of the said *Act*.

The Response

Robichaud, supra goes on to say that while the conduct of an employer is theoretically irrelevant in the context of statutorily based liability, it may nonetheless have important practical implications in the sense that it may preclude or render redundant some of the remedies provided under the *Act*. 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 as an employer who does little or nothing. (At D/4333, par. 33944-D/4334, para. 33946.)

As the court points out in *Thessaloniki Holdings Ltd. v. Saskatchewan (Human Rights Commission)* (1991), 15 C.H.R.R. D/333 (Sask. Q.B.):

“There is no need for employers to despair over the prospects of responsibility for discrimination by co-workers. If instances of sexual harassment occur unknown to the employer, as was the situation here, all that is expected is a proper response by the employer. That did not occur. Instead, the employer trivialized the serious incident. In effect, the employer was requiring the complainant to work in a discriminatory setting. Had the employer taken

taken firm action to eliminate the discrimination it is probable proceedings would not have been commenced.” (at para. 15)

That brings this analysis into the next issue which involves the response by Mr. Miles once he found out about the harassment. Did Mr. Miles respond appropriately to the situation and, if so, or if not, how does that impact on the employer’s exposure to damages? As stated earlier I am satisfied that Mr. Miles did not become aware of the fact that Tommy Duggan had been at the Bay Landing until the following day when Ms. Slaunwhite did indeed bring the incident of November 5th, 2000 to the attention of the employer. Therefore the response of the employer must be examined and in that regard what the employer knew and what he did as a result of that knowledge is relevant. Again, issues of credibility are essential in making those factual determinations.

While it is clear that Jamie Miles was told about the incident between Tommy Duggan and the complainant the day following the incident, who was there and what he was told is not so clear.

There are five witnesses that gave evidence on how the events unfolded on November 6th, 2000. They are the complainant, Nancy Fleming, Judy Clancey, Adina Gallant, Derek Nash and Jamie Miles. Ms. Slaunwhite says Ms. Clancey, Mr. Miles and Ms. Fleming were there. She says it’s possible Derek Nash was there; she can’t remember. Ms. Clancey doesn’t recall Derek Nash being there; she recalls that there was her, Ms. Fleming, Ms. Slaunwhite and Mr. Miles. Ms. Fleming recalls that Mr. Nash was sitting there at the bar. She thinks Mr. Miles was there; Ms. Clancey was not there as far as she knew; she says it was just she (Ms. Fleming) that Ms. Slaunwhite was speaking to and that Mr. Miles “got into the conversation.” Mr. Nash doesn’t remember seeing Mr. Miles; he recalls speaking with Ms. Fleming and Ms. Slaunwhite and then walking away; he also recalls that there were a few people at the end of the bar, maybe 3 of them. He thinks he saw Ms. Clancey doing paperwork about 20 feet away. Mr. Miles initially said in his evidence that he and Ms. Clancey were both there but in discussing the conversation with Ms. Slaunwhite and Ms. Fleming he doesn’t recall Ms. Clancey being present. He says that Mr. Nash was present, however he admits that he “found out after he was present.” Another area of

inconsistency in how the events unfolded that day is the issue of whether or not there was laughing about the incident the night previously. I agree with counsel that that issue is relevant because it is related to how seriously the employer viewed this incident. Ms. Clancey recalls that both girls were laughing, Ms. Fleming recalls that Ms. Slaunwhite was not laughing but she wasn't upset -she was matter of fact. Mr. Nash recalls that Mr. Slaunwhite "was pretty much normal, but not laughing." Mr. Miles recalls that Ms. Fleming was laughing; he thinks that Ms. Slaunwhite was laughing. As to what Mr. Miles was told, Ms. Slaunwhite says that she told Mr. Miles that Mr. Duggan came after her with his pants down. Ms. Slaunwhite doesn't know if she told Mr. Miles that Mr. Duggan chased her around the bar and put his hands on her. Ms. Fleming recalls Ms. Slaunwhite telling her that Mr. Duggan said "Mr. Wiggly would like to help you count those five's." Mr. Miles recalls overhearing Ms. Fleming and Mr. Slaunwhite speaking about Mr. Wiggly and then Ms. Slaunwhite telling him that Mr. Duggan had exposed himself the previous night. Another area of inconsistency involves the response that Ms. Slaunwhite expected of Mr. Miles. Mr. Miles says he got the impression that Ms. Slaunwhite didn't want Troy (Ms. Slaunwhite' boyfriend at the time) to find out about it, although he's not sure if Ms. Slaunwhite actually said that or he assumed it and recalls her saying that she wasn't comfortable to work with Mr. Duggan alone; she never gave him the impression that she wanted Mr. Miles to reprimand Mr. Duggan. Ms. Slaunwhite says she told Mr. Miles to do what he had to do - she didn't want to see him again (Tommy). Ms. Slaunwhite says that she was putting the onus on Mr. Miles - she just "didn't know about what measures were available." Ms. Slaunwhite says she doesn't remember saying that the matter was no big deal and that she didn't want Mr. Miles to do anything. Ms. Clancey was aware that Ms. Slaunwhite didn't want to work together with Mr. Duggan but she's not sure how she knows that; she thinks she got that from Mr. Miles. Ms. Fleming recalls that Mr. Miles asked her if he wanted him to talk to Mr. Duggan.

Clearly, there are inconsistencies in the evidence. I don't find that any of these witnesses were deliberately not telling the truth but it should be recognized that they are recalling events which happened four years ago. Some gave previous written statements but those statements were provided months after November 6th. All of that as well as all of the inconsistencies must be

weighed in determining credibility.

One of the pieces of evidence that caused me to ponder greatly was that of Derek Nash. Mr. Nash gave his evidence in a very forthright manner and in my view appeared to have very good recollection of the events. His evidence was quite different from the rest in terms of the time of day it happened (he says it was early afternoon) , who was there (he doesn't recall Mr. Miles being there) and whether or not there was laughing (he claims Ms. Slaunwhite wasn't laughing). The other witnesses including Adina Gallant seem to all put the "conversation" at sometime before opening which at that time was 11:00 a.m. which is in my view very different from the early afternoon as suggested by Mr. Nash; furthermore he recalls taking the beverages and walking away which is also inconsistent with Ms. Fleming who says that Mr. Nash was sitting at the bar. As well, Mr. Nash recalls three other people sitting at the bar which is consistent with his evidence that the establishment was open at the time.

What that does is cause me to question the credibility of the evidence of Ms. Fleming and Mr. Miles. In fact Ms. Fleming is really the only one who recalls Derek Nash being present because even Mr. Miles admits to being told afterward that Mr. Nash was present. I don't necessarily disbelieve Ms. Fleming but I think the only way to reconcile these inconsistencies is to conclude that there were perhaps 2 conversations, one in the early morning before opening and one later on, not necessarily even that day. It is clear from the evidence that there was a lot of chit chat about the incident between Mr. Duggan and Ms. Slaunwhite so I would suggest it's not beyond the realm of possibility that there were two or more conversations about this. I also have to question the evidence of Mr. Miles who says that Mr. Nash was there although he only knows that because he was told that later. The other difficulty with Mr. Miles' evidence is his assertion that he recalls Ms. Slaunwhite saying she didn't want to work with Mr. Duggan again. Ms. Slaunwhite's evidence is that she said she didn't want to see Mr. Duggan again. There was a lot of evidence in this matter directed at the hours that Mr. Duggan and Ms. Slaunwhite worked. The evidence establishes that Ms. Slaunwhite worked all day Sundays, Wednesday evenings and alternated Friday nights with Mr. Duggan. Mr. Duggan for the most part worked every Friday and very second Saturday. What is odd about such evidence is Mr. Miles' suggestion that he had done

what Ms. Slaunwhite asked him to do, when in fact that appears never to have been an issue. Ms. Slaunwhite and Mr. Miles were never scheduled to work together anyway. Ms. Slaunwhite's evidence that she didn't want to see Mr. Duggan again is more credible than Mr. Miles' evidence in that regard. All in all where there are inconsistencies I prefer Ms. Slaunwhite's account over the others. I find that Ms. Slaunwhite seemed to give the account that is credible. She says it happened in the morning before opening, she says it's possible Derek Nash was there although she doesn't recall it which would lend credence to the theory that maybe she saw him later on. Given the teasing, friendly relationship known to exist between Mr. Duggan and Ms. Slaunwhite, as well as the general knowledge which people seemed to have about "Mr. Wiggly" it is my view that it is quite conceivable that when Ms. Slaunwhite reported about the incident, it wasn't taken as seriously as it should have been and she may very well have gotten the reaction that she stated in her evidence. As to what the employer was told about this matter given Ms. Slaunwhite's evidence that she doesn't know if she told him he chased her around the bar and that she doesn't know if she told Mr. Miles that he put his hands on her, I am unable to conclude that the employer knew at that time about the full extent of the incident. I find however that he did at that time know about the exposure and the lewd language by Mr. Duggan.

As stated, the evidence establishes that Mr. Miles responded to the incident described by Ms. Slaunwhite by ensuring that Ms. Slaunwhite and Mr. Duggan never work the same shift together again, except for New Year's Eve which involved all of the staff working. As well, Mr. Miles indicated that he spoke to Mr. Duggan in his office and directed him to apologize to Ms. Slaunwhite.

A determination of whether or not the response is appropriate it is largely dependant on the facts in each situation. It is clear that the employer has the obligation to take steps to deal with harassment by other employees once the harassment is known to the employer. (*Nixon v. Greensides* (1992), 20 C.H.R.R. D/469 (Sask. Bd. Inq). Again, as stated previously Mr. Miles' efforts to ensure that Ms. Slaunwhite and Mr. Duggan never work a shift together is somewhat peculiar given that for the most part it was not their routine to do so. The evidence is clear that the offending behaviour happened while Mr. Duggan was a customer so by ensuring they not work

together again I fail to see how that responds to Mr. Duggan's behaviour when he is patronizing the establishment. As for the "meeting" between Mr. Miles and Mr. Duggan, Mr. Miles' evidence was that he spoke to Mr. Duggan when he "popped by" one evening. This would indicate that he was passively waiting for Mr. Duggan to come to the bar rather than Mr. Miles contacting Mr. Duggan himself and setting up a meeting. As well, the meeting itself doesn't appear to have been very meaningful. Mr. Miles considered this to be an "embarrassing topic" and it appears that all that was said concerning the details of the incident was that Mr. Duggan "f-ed up." As well, Mr. Miles' direction to Mr. Duggan to apologize to Ms. Slaunwhite was redundant given that Mr. Duggan had already apologized the night of the incident.

As the case law suggests a proper response by the employer could mean the difference between finding one's self in proceedings versus not being involved in such proceedings at all.

Mr. Miles stated that if he had he known what really happened he would have responded differently. The cases are clear; a meaningful investigation is crucial. Ms. Slaunwhite's evidence is that she never discussed the incident with Mr. Miles again after that brief informal interchange on November 6th, 2000 with other people present. An appropriate course of action would have been to have a formal meeting with Ms. Slaunwhite to determine what happened, even if all he knew prior to setting up such a meeting was that Mr. Duggan had exposed himself. The same approach should have been used with Mr. Duggan. Instead of waiting until he "popped by", Mr. Miles should have initiated contact with Mr. Duggan and set up a meeting with him to discuss the proper facts. By not ensuring quick and proper information the danger is exactly what happened in this hearing; memories fade and details are forgotten. The other reason for a meaningful investigation, and I think in this case it may be the most important one, has to do with the message that a meaningful investigation sends. There has been evidence in this hearing that the Bay Landing Dining Room and Lounge was not just an eating and drinking establishment; in fact some witnesses described it as a "community centre."; according to Ms. Fleming, "everyone knew about this incident and everyone was talking about it". By failing to conduct a meaningful investigation what is the employer saying not only to Ms. Slaunwhite and his employees but the community at large? One gets the sense that the matter was treated as though it was considered a

harmless joke and that it would be best if the whole thing was forgotten. As stated by the Board in *Hinds v. Canada (Employment & Immigration Commission)* (1988), 10 C.H.R.R. D/5683 (Can. Trib.)

“A meaningful investigation would, at the least, have been a statement of disapproval of the incident and perhaps have served as a deterrent to others from engaging in such acts.”(para. 41617)

Another course of action Mr. Miles may have taken has to do with involves Mr. Miles' assertion that he had lived up to the expectation that Ms. Slaunwhite and Mr. Duggan not work together again. In my view Mr. Miles' response would have been much more effective if he had in some manner taken away Mr. Duggan's customer privileges by barring him from the establishment for a period of time and suspending him from working there for a period of time. It would certainly send a proper message to the complainant that this was being taken seriously and to the general public that such behaviour would not be tolerated.

The other course of action Mr. Miles may have taken involves the condoned practice of staff staying behind after hours. Mr. Miles' knowledge that the incident took place after hours should have been a wake-up call to Mr. Miles that such after- hours interaction is not wise to condone. Perhaps some new policy to the staff reflecting disapproval of such a practice may have assisted in remedying the situation. Even something as simple as having a staff meeting to discuss sexual harassment issues or some effort to implement a sexual harassment policy would have gone a long way in reducing Mr. Miles' exposure to damages in this case.

Remedy

Bearing in mind that human rights legislation is not meant to punish but to awaken the employer to the fact that even subtle tolerance of sexual discrimination in the workplace is unacceptable, I turn now to the remedy.

The powers available to award damages in this matter are found in section 34(8) of the Nova Scotia *Human Rights Act*, which states as follows:

“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 thereof;”

The goal of damages, according to the N.S. Board of Inquiry in *Cameron v. Giorgio & Lim Restaurant* (1993), 21 C.H.R.R. D/85 should be to put the complainant “in the same position she would have been in had the act of sexual harassment not occurred.”

In terms of general damages, counsel for the Commission submits that the typical range for this type of case is between \$1000.00 and \$10,000.00 and points out the case of *Kirk Johnson v. Halifax Regional Municipality*, unreported decision of Chair Girard, Board of Inquiry, December, 2003 where Professor Girard indicated that \$10,000.00 is the upper limit and awarded that amount. Counsel for the Bay Landing suggests that the evidence is slim as to the emotional impact on Ms. Slaunwhite. He notes that there is no corroborative evidence as to her personal testimony. He notes that Ms. Slaunwhite did not miss any time from work and that her work hours didn't go down. He suggests that if general damages are to be awarded, then against the employer the damages would be at the lower end of the scale, if any.

In determining general damages, the factors to be considered were identified in *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 at D/873, para. 7758. These factors are the following:

1. the nature of the harassment (physical or verbal)
2. the degree of aggressiveness and physical contact;
3. the time period of the harassment;
4. the frequency of the harassment;
5. the age of the victim;
6. the vulnerability of the victim; and,
7. the psychological impact of the harassment on the victim.

Ms. Slaunwhite says the incident stirred inside her for a couple of months. She became more angry than really scared; she felt violated; she blamed herself for a long time; she claims that she had been known to a lot of people in the community but afterwards she was not treated the same. She became depressed; used to have anxiety attacks; she didn't want to leave the house; she felt betrayed by everybody.

I find that the nature of the sexual harassment was verbal and physical. The complainant was relatively young at the time. The harassment happened in circumstances in which the complainant was highly vulnerable both physically (she was the only employee working in the establishment and economically (it was her primary source of income at the time). I also find that even though the harassment was not of a frequent or ongoing nature but involved one particular incident, it had significant psychological impact on the complainant. In considering the appropriate award I have also considered the Bay Landing's response to the discrimination which can only be described as inadequate. Mr. Miles could have done much more than what he did do. This is surprising given the very positive comments the employees had with respect to Mr. Miles. As a result I find joint and several liability in relation to both of the respondents in the amount of \$3500.00.

In relation to special damages, counsel for the Commission suggested that lost wages are appropriate here, which includes tips. Counsel for the Bay Landing suggests that the issue of lost wages doesn't come up at all. He submits that the nexus required to establish a real and causal connection between the sexual harassment and the termination of employment is remote. (*Miller v. Sam's Pizza, supra*) He submits that Ms. Slaunwhite's leaving was as a result of the incident between Mr. Ralph and Mr. Duggan, a very public event that made her feel uncomfortable in the establishment but was not related to the November incident. I don't agree with that analysis of the evidence that was presented. Notwithstanding that the evidence did not disclose any more incidents of harassment it is my view that the "stirring inside for a couple of months" described by Ms. Slaunwhite was directly related to Mr. Miles' inadequate attempts to remedy the matter. In my view it demonstrates that his efforts to resolve the matter had a very limited effect on reducing the harm to Ms. Slaunwhite, a harm that affected her dignity and reputation; in fact, the

January 14th incident was the culmination of the employer's inadequate response to the November 5th incident. In short, I find that the evidence does establish a nexus between the sexual harassment and Ms. Slaunwhite's departure from the workplace. Although I cannot conclude with any certainty from the evidence that the complainant would have remained at the Bay Landing I do find that Ms. Slaunwhite is entitled to the wages she lost when she left the Bay Landing on January 17, 2001 to when she started at her new job on May 14th, 2001. As stated by Chair E. Meltzer in *Miller v. Sam's Pizza House, supra*,

“Victims of sexual harassment are entitled to the wages they lost only for the period of time between when they left the respondents' employment and when they were next employed.”(at p. 43)

Counsel for the commission and for the employer agree with the hourly rate and the average tips received as suggested by Ms. Slaunwhite in her evidence however there is a dispute with respect to Ms. Slaunwhite's entitlement to any tips. Mr. Noseworthy submits that loss income (in this case tips) should not be allowed unless it is reported for income tax purposes to Revenue Canada. Mr. Wood's submission is that Ms. Slaunwhite wasn't asked the question as to whether or not she reported the tips and in any event there is not a positive duty to present it as proof. Chair David J. Bright in *McLellan v. Mentor Investments Ltd.* (1991), 25 C.H.R.R. D/134 did not award tips because the complainant indicated that she hadn't declared tips on her income tax; in *Miller v. Sam's Pizza House, supra* Chair E. Meltzer appeared to adopt Chair Bright's view that tips can only be recovered in a damages award if they are declared for income tax purposes. In both of these cases it appears that the question as to whether or not they declared tips on their income tax was put to the complainants. In my view such income tax reporting evidence is helpful in determining reliability as to amounts but is not completely necessary as suggested by Mr. Noseworthy. The employer in this matter has not disputed the amount in tips suggested by Ms. Slaunwhite, but rather the evidence to substantiate that amount. The only evidence we have in that regard is that of Ms. Slaunwhite. I have no reason to question those amounts particularly since the employer hasn't therefore I will award her the amounts suggested by Mr. Wood, which are an average of \$100.00 on Sundays, and \$120.00 on Wednesdays and Fridays. My calculation

in tips amounts to \$4480.00 over a 16 week period. As for salary loss, I accept Mr. Wood's mathematical exercise and find that Ms. Slaunwhite would have averaged 37.7 hours per 2-week period which totals \$1720.00. Therefore the total amount of lost wages are \$6760.00. As for the prescription medication which Ms. Slaunwhite suggested is somewhere in the vicinity of \$50.00 - \$100.00 I note that Ms. Slaunwhite was questioned as to whether or not she had receipts. I am in agreement with Mr. Noseworthy that although not an exorbitant amount absent any receipts I am not inclined to award such an amount. As for interest I note that these proceedings arose as early as May, 2001. It is now February, 2005. I have not been informed by counsel or by the evidence as to the cause for such a delay. As a result I am not prepared to order any interest on the monetary award for lost income or general damages.

I do not find nor has it been suggested that this is a case for exemplary damages.

As for non-monetary damages, Mr. Wood submits that this would apply only to the Bay Landing as the employer and I agree. Mr. Wood further submits that the Bay Landing would benefit from a policy regarding sexual harassment that is approved by the Human Rights Commission developed within a reasonable period of time. He further submits that some staff training be provided to the employees and approved by the Human Rights Commission. Mr. Noseworthy submits that the employer is taking these matters seriously and has dealt with two incidents that appeared to be inappropriate in a reasonable manner. The evidence has established that the Bay Landing did not have a sexual harassment policy; it did have codes of conduct in place which appeared to address some matters but as the evidence established these codes of conduct were loosely enforced and didn't appear to have much, if any, impact on the staff. I do agree with Mr. Noseworthy that the evidence shows that the employer did take these matters seriously after Ms. Slaunwhite left the establishment however it is my view that these issues are challenging and require some form of training. As pointed out by Mr. Wood, for the most part the behaviour is really only a lack of understanding on how these matters affect people as opposed to the impression that the employer was acting out of malice. I agree with Mr. Wood that the employer in this case was far from malicious however I do think that Mr. Miles and his staff would definitely benefit from some sensitivity training in relation to these issues. I therefore order

