T.D. 13/93
Decision rendered on July 27, 1993

CANADIAN HUMAN RIGHTS ACT
(R.S.C., 1985, c. H-6 as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

BOBBI STADNYK
Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION
Commission

- and -

CANADA EMPLOYMENT AND IMMMIGRATION COMMISSION
Respondent

DECISION OF THE TRIBUNAL

TRIBUNAL: Raymond William Kirzinger
Chairman

APPEARANCES: Odette Lalumiere, Counsel for the Commission
Myra Yuzak, Counsel for the Respondent
Bobbi Stadnyk, on her own behalf

DATES AND LOCATION
OF HEARING: September 30, October 1 and 2, 1992
January 11, 12, 13, 14 and 15, 1993
Regina, Saskatchewan

DECISION

This case involves a complaint under sections 7 and 14 of the Canadian Human Rights Act. Many of the issues in this case were factual and, as a result, a considerable amount of evidence was heard by the Tribunal.

The complaint centers around a job interview that the Complainant had with Canada Employment and Immigration Centre ("CEIC") in 1989. However, a brief history of the Complainant's background and experiences with the Federal Government prior to that time is important for context and an understanding of the issues arising from the 1989 job interview.

In September of 1981, the Complainant commenced employment at the Regina Airport as a firefighter with Transport Canada. She was one of the first female firefighters in Canada. According to Ms. Stadnyk's evidence, she was subjected to very severe sexual harassment at the Airport. The Complainant was dismissed and eventually filed a complaint with the Canadian Human Rights Commission ("CHRC"). Her complaint was settled, which resulted in her reinstatement at the Regina Airport. According to Ms. Stadnyk, the harassment continued and in fact became worse when she returned. As a result, the Public Service Commission ("PSC") was involved in trying to relocate Ms. Stadnyk. She also filed another complaint with the HRC - relating to the continued harassment upon her return to the Airport.

The PSC made extensive efforts to relocate Ms. Stadnyk to various Government Departments - but to no avail. Eventually, the second complaint was settled and, in part, provided that Ms. Stadnyk was to be

designated as a "surplus employee"- entitling her to priority status with placements in other departments. However, this designation did not take place until after the interview in question.

Throughout the course of her experience with sexual harassment, the Complainant became a type of "crusader" on the issue. She was actively involved in pursuing the media to make known her plight with the Federal Government. As well, she appeared on a national television show "W5", dealing with her sexual harassment experiences in the Federal Government. The Complainant was contacted at times by the media for updates on her story, though it appears that she quite often initiated communications with the media. In fact, a press package she had prepared was presented in evidence at the hearing which made it pretty clear that the Complainant was quite aggressive in her pursuit of the media.

The CEIC office in Regina advertised for a Regional Information Officer - 2 ("IS-2") position during the fall of 1988. As part of anticipatory staffing, CEIC was looking for two successful candidates and, in fact, prior to the interview in question, two such candidates had been selected by CEIC.

The duties of an IS-2 officer included planning and producing information and promotional materials; advising CEIC employees of public information policies and programs; and, communicating with other governmental departments (at all levels of government), the media and the public at large.

PSC's Regional Director for Saskatchewan/Manitoba, John Charrette, was personally involved in efforts to re-position Ms. Stadnyk. He was with CEIC in Regina at one time and used his personal connections to arrange a job interview for the Complainant in January of 1989. By that time, CEIC was in the process of requesting Clearance Certificates from PSC so that the two successful candidates could be offered positions. Although PSC had no authority to do so (ie. Ms. Stadnyk did not yet have surplus status), it did not issue the Clearance Certificates because it wanted the Complainant considered for the position. There appears to have been some confusion in the PSC at the time as to whether or not the Complainant had priority status. It is clear however that the Complainant did not have priority status until some months after the interview.

At the time in question, Susan Hogarth was the Saskatchewan Regional Manager of Public Affairs for CEIC. A meeting was arranged at a Regina PSC office on January 18, 1989, in part, to discuss possible placement of Miss Stadnyk to the IS-2 position. John Charrette, Susan Hogarth and some other individuals were present at the meeting. Ms. Hogarth expressed concerns about interviewing the Complainant. She was concerned that she may be set up for failure (ie. based upon her personal suitability) and that she may be in a conflict of interest. Miss Hogarth was pressured to meet with the Complainant, and agreed to do so, with the PSC being responsible for the time and place of the meeting.

One day prior to this meeting (ie. January 17, 1989), an article had appeared in the Regina Leader Post dealing with the Complainant's plight with sexual harassment and the Federal Government. This article, as with

other Regina Leader Post articles, was written by a reporter named Ann Kyle, who also covered the Regina Leader Post's labour issues (which would involve CEIC). Susan Hogarth saw the article and clipped it for reference and use during the interview. The article was also discussed at Ms. Hogarth's meeting with John Charrette.

The interview took place at the PSC Office in Regina on January 25, 1989. The interview was conducted by Ms. Hogarth. No one else besides the Complainant and her were present. The Complainant finds the manner in which the interview was conducted, some of the questions asked and the outcome of it, offensive. For the most part, the evidence of the Complainant and Miss Hogarth are largely consistent with respect to the contents of the alleged offensive portions of the interview. However, the context indicated by each differs dramatically. For that reason, it is necessary to set out the evidence of Ms. Stadnyk and Miss Hogarth separately on this point. The interview is the subject matter of the complaint in issue and, for that reason, I will provide more details of the evidence given with respect to it.

Ms. Stadnyk's evidence in chief was that the interview took place in a large boardroom with a table in the center. The Complainant and Ms. Hogarth were seated at the table and, without even introducing herself, Ms. Hogarth leaned forward with her hands on her hips and said, "How do you feel about body-rubbing at the photocopier?". The Tribunal questioned Ms. Stadnyk at that time and asked if in fact that was the first thing that Ms. Hogarth said - to which the Complainant replied, "Yes". Ms. Stadnyk said that she was confused and surprised and did not provide a verbal response.

As a result, Ms. Hogarth leaned forward again and in a louder voice said, "Well, how do you feel about body rubbing at the photocopier?".

Ms. Stadnyk indicated that Ms. Hogarth then went on to say that the Complainant's attitude towards sexual harassment was well known and that the Federal Government was an Old Boys' Club. She then pulled out the Regina Leader Post article, threw it on the table and said, "Your attitude is well known and this is not acceptable, and people in the federal service do not go public with this type of information.".

It was Ms. Stadnyk's evidence that Ms. Hogarth then said she had experienced a situation in the Federal Government and asked how the Complainant would react to the situation. The situation was that of a female employee who had spent two weeks preparing a presentation for a group of managers. During the presentation a man at the back of the room was leering at her throughout the presentation and at the end commented on her great legs.

The Complainant testified that her response was, "Are you trying to tell me that you have a sexual harassment problem in your office?". Ms. Hogarth replied that "No, we don't have any problem" but added that, "We do

have a man who is particularly bad for this kind of behavior but we know how to deal with it.".

Ms. Stadnyk indicated that the discussion then focused on the conflict of interest she would have because of her media contact and the fact that this was a public relations job. Ms. Stadnyk indicated that it was a private versus

public matter and that she could separate the two and thought she could adequately deal with any such conflict.

Ms. Stadnyk had made some notes shortly after the incident and during the Hearing asked that they be admitted into evidence. The notes were apparently about matters that upset Ms. Stadnyk which were outlined in her testimony as above. The Tribunal did not allow the admittance of such notes into evidence. It should be noted that had such notes been introduced, they would have been found irrelevant since (as it turned out) there was no conflict on whether or not the matters that upset Ms. Stadnyk actually occurred.

Ms. Stadnyk indicated that the interview took approximately fifteen minutes, that the main gist of the interview was an attack on her views on sexual harassment and that she was very upset and ran out of the interview room when it was completed.

In cross-examination, the Complainant admitted that there may have been more to the interview than indicated in her examination in chief. She said that she primarily recalled the matters that had upset her. She admitted that there may have been a "hello" at the outset of the interview. She basically indicated that issues she did not take offense to, she did not recall.

Susan Hogarth, on the other hand, gave a very detailed account of the interview through approximately one day of examination in chief and two days under cross-examination by the Complainant and the HRC. Ms. Hogarth's evidence was that the interview began with a greeting, that there was a discussion regarding the position available, that she explained the role

of an Information Officer and then the relationship of an Information Officer with the media. From there, the conversation proceeded to a

discussion of conflict of interest - how Information Officer's private interests could not conflict with the Department's interests. Ms. Hogarth referred to the most recent newspaper article about the Complainant in the Regina Leader Post and informed her that the same reporter, Ann Kyle, covered the employment issues with CEIC. Ms. Stadnyk indicated that she understood the problem, but Ms. Hogarth's impression was that she did not agree that it was a conflict of interest. There was then a discussion about the Complainant's continued dealings with the media and Ms. Hogarth indicated that John Charrette had expressed concerns about the Complainant introducing herself to potential employers through the media - he had indicated to Ms. Hogaarth that as a result of the January 17, 1989 article "all kinds of job leads went down the tubes". Ms. Stadnyk indicated that that was "their problem" and not hers. Then there was further discussion about how Ms. Stadnyk came to speak with Ann Kyle and, at that stage, Ms. Stadnyk did not indicate that she would not actively pursue her case in the media.

Ms. Hogarth indicated to the Complainant that she had a well known position on sexual harassment and that, office politics being what they are, coworkers might want to exploit that area as a weakness or vulnerability. Ms. Hogarth indicated that her department was no better or worse than any other and that she could not guarantee that "things would be free of harassment".

At this point, Ms. Hogarth posited two questions in the area of harassment. Ms. Hogarth indicated that she had experience or knowledge of

the two situations. She asked Ms. Stadnyk how she would handle each of the two situations. Ms. Hogarth paraphrased the first question as follows:

> "You were at the photocopier and an office boy, and I'm very specific in the sense that I used the word 'office boy', comes by and rubs up against you, the 'Xerox body rub'. What would you do?"

The Complainant's response was apparently to minimize the incident - to suggest that it was an accident, that the space was not large enough. Ms. Hogarth indicated that such was not the case - this was in fact a case of sexual harassment; it was offensive. The Complainant indicated that she knew the difference between an accident and harassment but she never did provide an answer.

The second situation posited was paraphrased by Ms. Hogarth in the following manner:

> "You have made a presentation that you have worked very hard and long on. It was to members of the management group. One of them, instead of commenting on the presentation, remarks that you have nice legs. What would you do?".

The Complainant's response to the second situation was that she could take a joke. She then went on to say that she would talk directly to the individual.

At this stage of the interview, Ms. Hogarth thoughts were that the media contact was a significant concern, though not yet fatal to the Complainant's chances of employment, and the responses to the sexual harassment hypotheticals were considered to be "training factors" (ie. the

answers were more tolerant than the interviewer would have thought appropriate, but the Complainant could be trained on different ways of handling the situation).

At this point, I should indicate that the Complainant made a practice of recording her telephone conversations. At the time of the hearing she indicated that she had approximately sixty tapes in her possession. She made and recorded some follow-up telephone conversations with Ms. Hogarth. One of such tapes (regarding a telephone conversation between the Complainant and Ms. Hogarth the day following the interview) was referred to in the Complainant's examination in chief by the HRC. At that time, the HRC indicated that it did not intend to introduce the tape into evidence - however, the Respondent indicated that it certainly would be doing so when presenting its case. The tape mysteriously disappeared at that time and was apparently discovered once again when the Complainant was cross-examining Ms. Hogarth (though the Complainant did not introduce the tape into evidence). At the end of the Respondent's re-direct of Ms. Hogarth, the tape was introduced by consent of all parties. In that tape, Ms. Stadnyk referred to the discussion between herself and Ms. Hogarth about the sexual harassment questions asked, how it bothered the Complainant and that Ms. Hogarth had indicated there was an individual in their office "who was bad for that sort of thing".

This is the only area where the Tribunal had difficulty with the evidence given by Ms. Hogarth, because no mention was previously made in her evidence about such an individual. By way of explanation, Ms. Hogarth

indicated that she simply did not recall this matter when giving her evidence

previously. It should be noted that this evidence simply did not arise in her previous testimony and that it was introduced through her re-direct evidence. She only recalled that matter when she heard the tape played. Ms. Hogarth testified that she had discussed this situation with Ms. Stadnyk immediately prior to positing the two sexual harassment questions and in the context of how her department was no better than any other. She had told Ms. Stadnyk that there was a gentleman in her office who stood too close to people when talking to them. This made Ms. Hogarth uncomfortable, but she noticed that the gentleman used the same distance when speaking to other people in the office, both male and female. Accordingly, she determined that it was a matter of each person's own comfort level and that it appeared to be more her problem than that of the gentleman in question. She had then proceeded with the two hypotheticals.

I should also make one comment with respect to the taped telephone conversation between the Complainant and Ms. Hogarth. In her evidence, the Complainant portrayed Ms. Hogarth as a loud, aggressive and somewhat ruthless person. I found it interesting that when listening to the telephone call in question Ms. Hogarth sounded relatively soft-spoken, reserved and unaggressive.

When the two questions were dealt with, Ms. Stadnyk then volunteered that she intended to collaborate on a book with author, Maggie Siggins, about her experience with sexual harassment in the public service. Ms. Hogarth was startled by the comment. Ms Stadnyk had not mentioned that at the outset of the interview. She asked Ms. Stadnyk what she wanted - whether it was "the job, justice or revenge". At this point it was Ms.

Hogarth's impression that the Complainant did not want the job. As well, Ms. Hogarth determined the Complainant was not suitable for the IS-2 position. She however reiterated many times giving her evidence that up to that point, any concerns she had with the Complainant were more a matter of training issues than suitability.

The interview concluded with Ms. Hogarth informing the Complainant that she could expect to hear from the PSC in the near future. The interview ended on a cordial note.

Ms. Hogarth's evidence was that the interview lasted approximately forty five to fifty minutes, though neither of the parties made notes or any other written records during the interview. According to Ms. Hogarth's evidence, the hypotheticals in question were dealt with approximately seventy per cent of the way through the interview.

Following the interview, Ms. Hogarth met with John Charrette who had asked her how the interview had gone. Ms. Hogarth indicated that the Complainant was talking about writing a book with Maggie Siggins. Mr. Charrette's response was that, "We can't use her then.".

It is necessary for this Tribunal to make a determination as to which of the two versions of the interview it must find as fact. In the Tribunal's view, there is some degree of consistency in both versions (on the specific points Ms. Stadnyk outlined in her evidence). For example, this is not a situation where the Complainant said that two questions on sexual harassment were

asked of her and the other party denied that such questions were asked. Simply, the variation is primarily in the context.

It is apparent from the Complainant's evidence that at the time of the interview, she had been off work for a while, that she was emotionally distraught and in her own words "like a caged animal". She was apparently suffering from a variety of ailments related primarily to her emotional condition. Eventually it was recommended to her (by a Doctor) that she leave the Federal Government or she could not expect to live for a long time (due to her emotional condition with resultant physical effects). This condition seems to have had a significant impact on the Complainant's reaction to and recollection of the interview.

I find the Complainant's evidence on the interview simply unreliable. Her recounting of the interview in her examination in chief was often unbelievable. Her admission in cross-examination that there may have been more to the interview and that she only recalled the matters that upset her was very telling. Ms. Hogarth on the other hand, was on the witness stand for approximately three full day's of hearing time. Her answers were detailed and consistent and she appeared to the Tribunal to be truthful, straightforward and reliable in her manner of giving evidence.

In fact, the Complainant was allowed to use a taped conversation of Ms. Hogarth's previous verbal statement given to the HRC investigator for the purpose of proving prior inconsistent statements. The Complainant's

position was that such statements displayed that Ms. Hogarth was saying one thing at the hearing and something completely different previously. The

Complainant alleged a number of inconsistencies in the statements and this Tribunal ruled that there were indeed three inconsistent statements. However, it should be noted that the inconsistencies were very minor in nature and could be characterized largely as a different way of explaining the situations or pertaining more to minor, near inconsequential details. Because of the nature of the variations, this is not seen by the Tribunal to reflect in any significant manner upon the reliability or credibility of Ms. Hogarth as a witness. Indeed, the majority of the alleged inconsistencies, and certainly the significant inconsistencies, were determined to be unfounded.

It should also be noted that Ms. Stadnyk did not present herseff as a particularly good witness. Her evidence seemed somewhat postured in examination in chief. As opposed to telling her version of all of the facts, her evidence often seemed to be confined to only telling her version of the facts she believed would advance her case.

I find the following quote from the British Columbia Court of Appeal, referred to in the case of Lindahl v. Auld-Philips Ltd. (1986), 7 C.H.H.R. D/3396 (B.C.H.PC.), at page D/3398, relevant.

". . . from the judgment of O'Halloran, J.A., delivered in the British Columbia Court of Appeal in Faryna v. Chomy (1952), 2 D.L.R. 354 (pp- 356-8):

> ... In short, the real test of the truth of the story of a witness in such a case must be its harmony with preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

As well, in another British Columbia case, Forsyth v. Matsqui (1988), 10 C.H.R.R. D/5854 (B.C.H.R.C.) at D/5857, in dealing with circumstantial evidence, the Board of Inquiry stated:

"... an inference of discrimination may be drawn where the evidence offered in support of it renders such inference more probable than the other possible inferences or hypothesis."

In short, each of these cases suggest that the Tribunal consider which version of the facts is more probable.

As a whole this Tribunal finds that Ms. Hogarth was a credible and reliable witness and that the Complainant, Ms. Stadnyk, was not a particularly credible and reliable witness. In part, the Complainant's portrayal of the interview as a brief and ruthless personal attack by a conniving, aggressive and reprehensible interviewer is simply not reasonable or credible, and certainly the least probable of the two versions of the interview. Consequently, this Tribunal accepts Ms. Hogarth's version of the interview as fact.

Following the interview, three telephone conversations took place between Ms. Hogarth and the Complainant. The day after the interview, the Complainant contacted Ms. Hogarth and (as previously indicated) taped this conversation. The telephone call was clearly placed by Ms. Stadnyk to confirm the nature of the questions asked during the interview. As Ms. Stadnyk indicated in her evidence, she believed she had been lied to before by the Federal Government and was going to make sure that it did not happen again. It appears to this Tribunal that Ms. Stadnyk, at that time and at the

outset of the hearing believed that Ms. Hogarth would deny that she asked the alleged offensive questions.

Some time later, Ms. Stadnyk once again contacted Ms. Hogarth asking when testing might begin and then confirmed her concern with the discussion of sexual harassment at the interview. The PSC was to notify Ms. Stadnyk that she was not successful for the position. With this in mind, Ms. Hogarth was essentially non-committal and not particularly responsive in either of the two telephone conversations placed by Ms. Stadnyk.

Following the second conversation, Ms. Hogarth recognized that the Complainant was disturbed about the discussion during the interview, since she dwelt on it during the two telephone conversations. As a result, she initiated a short call to the Complainant indicating that the interview was not intended to offend her and to apologize if in fact she perceived it as offensive.

The evidence indicated that after the interview, Ms. Stadnyk was eventually notified by the PSC that she was not going to be considered for the IS-2 position.

MS. Hogarth commented on the interview to the PSC by Memo dated February 10, 1989. She confirmed that exploration about Ms. Stadnyk's use of the media consumed the "majority of time". Her reasons for determining that the Complainant was not suitable for the IS-2 position were also outlined - (1) Ms. Stadnyk had a situational approach to decision-making; (2) she appeared unable to adopt someone else's position as a starting point of

problem resolution; and, (3) the conflict of interest situation (specifically collaborating on a book).

On July 29, 1989 Ms. Stadnyk filed a complaint with the HRC on the basis of sex which was particularized as follows:

> "Canada Employment and Immigration Commission ("CEIC") discriminated against me by subjecting me to differential treatment and harassment in the course of a job interview and by refusing to hire me because of my sex (female) contrary to sections 7 and 14 of the Canadian Human Rights Act. On January 25, 1989, Regional Manager, Public Affairs Susan Hogarth interviewed me for a position as an Information Officer (IS 2) with CEIC. During the interview she asked me, on three occasions, to state my views on body rubbing at the office photocopier and told me that there was a male employee in the CEIC office who frequently engaged in such behavior. She told me that she did not consider this employee's behavior to constitute a problem and expressed concern about the effect my presence in the office might have, given my known opposition to sexual harassment."

On September 30, 1990, the Complainant resigned from the Federal Civil Service due primarily to her medical condition and emotional state.

In terms of conducting the hearing, the Complainant reserved the right to cross-examine witnesses at the outset of the hearing and as the hearing progressed (and as she became more familiar with the process), she acted more and more as an independent party in the proceedings. Eventually, this led to her request, once the Respondent's case had commenced, to call certain expert witnesses. Since the Complainant was not a trained lawyer and there was a break in the hearing, this Tribunal allowed Ms. Stadnyk to call an

expert in the field of sociology and women's issues to give evidence at the outset of the re-convened hearing.

Alison Hayford, a sociology professor, with a PH.D. in political/social geography, was qualified as a social scientist with an expertise in women's studies. Professor Hayford indicated that the definition of sexual harassment has been constantly evolving and that it involves a power relationship where women have been traditionally silenced. As well, she indicated that men and women see harassment differently. She outlined how the power relationship would come into play in a job interview. It should be noted that in crossexamination, Professor Hayford did indicate that questions on sexual harassment could be relevant in certain circumstances (if it was relevant to the job), but in most cases such questions would be irrelevant and inappropriate.

In addition to Ms. Hayford, each party called an expert in the area of journalism, dealing with the conflict of interest issue.

The Respondent's witness, Professor Nick Russell, was qualified by consent of all parties as an expert in journalism ethics. He is writing a PH.D thesis in this area, has sent a book on this topic for publication and appeared to the Tribunal as a well-spoken and knowledgeable expert. His opinion was that journalists must be objective, fair and balanced, with a high degree of integrity, no hidden agendas and apparent neutrality. These characteristics are important for credibility purposes. In the case of Information Officers, journalists working with them must be able to trust them.

As well, Professor Russell indicated that an Information Officer with a high public profile was not acceptable, though through a process called

"laundering" (where the individual withdrew from the public eye and eventually had his or her profile reduced), such an individual could be suitable for an Information Officer job.

With respect to an individual criticizing his or her own organization, such as in the case at hand, Professor Russell indicated that this is simply unacceptable. It is an actual conflict and not acceptable even if the criticism is justified and valid. An Information Officer position is simply not one in which an individual can criticize his or her own organization.

His opinion was that ethics are very prominent in journalism. He referred to the Professional Standards of the Canadian Public Relations Society Inc. ("CPRS") and the Code of Professional Standards of the Public Relations Society of America ("PRSA") and confirmed that such codes accurately depict the ethical standards to be adhered to by journalists and public relations persons (including Information Officers). As well, he reviewed the Federal Government's conflict of interest guidelines and confirmed that such guidelines accurately represent the ethical standards to be followed by an Information Officer employed in the Federal Civil Service.

In cross-examination by the HRC, Professor Russell did indicate that, from an ethical perspective, it would be appropriate for an Information Officer to speak out about sexual harassment in a case where the Information Officer has a new experience with sexual harassment in the workplace. However, it would not be ethical to speak out about past sexual harassment situations, due to conflict of interest.

The Complainant called, in rebuttal, Professor Gerald Sperling who was qualified, by consent, as an expert in journalism and Professor of journalism and Political Science.

Professor Sperling's opinion was that there were many other views on ethics and that objectivity was in effect nonsense. His opinion was that Professor Russell's views on ethics were old-fashioned, outdated and not part of journalism in the real world. He did not appear to be familiar with the ethical guidelines of the CPRS and the PRSA.

In cross-examination on a hypothetical situation with facts close to those in the case at hand, Professor Sperling appeared to be very evasive and unwilling to provide an opinion on the ethics of the situation. His position was rather to ask a variety of questions for clarification purposes each time he was asked a question. He did, however, admit at one point that if the Government thought its policy was correct, it would be difficult for a person like the Complainant to represent the Government's position on sexual harassment on the one hand and criticize it on her own behalf on the other (even if the criticism occurred on the individual's own time).

This Tribunal has no difficulty in accepting the opinions of Professor Russell over those given by Professor Sperling. Professor Russell's expertise was precise and specifically directed to the issues he was commenting upon that is, ethics in the area of journalism. He has a

relatively high degree of expertise and specialization in the area and presented himself as a knowledgeable and forthright expert witness.

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Professor Sperling, on the other hand, appeared to have no particular expertise or training in the area of ethics, other than practical experience as a journalist. He did not appear to be very knowledgeable on the matter of ethics other than to suggest that by and large ethics was not a significant consideration in the real world of journalism.

I therefore accept Professor Russell's opinion that (for Information Officers and journalists) ethics are an important consideration and that the avoidance of conflicts of interest and attainment of objectivity, etc. is an important and valid consideration. Even if Professor Sperling's opinion that ethics are not high on the priority list for most practicing journalists was accurate, a prospective employer should be able to expect a candidate for employment to meet established and reasonable ethical guidelines. The fact that many practising journalists may ignore ethical guidelines, (which this Tribunal does not necessarily accept) does not render ethical considerations irrelevant.

I will now consider the legislation and related law as they apply to the facts of this case.

This complaint is made pursuant to sections 7 and 14 of the Canadian Human Rights Act which provide as follows:

"7. It is a discriminatory practice, directly or indirectly:

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

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in part on a prohibited ground of discrimination.

14. (1) It is a discriminatory practice, ...

(c) in matters related to employment, to harass an individual on a prohibited ground of discrimination.

(2) Without limiting the generality of Subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination."

It is the view of this Tribunal that the grounds upon which Ms. Stadnyk's complaint may succeed are any one or more of the following:

(1) if the Respondent's failure or refusal to continue the testing process for the Information Officer position constituted a breach under subsection 7(a);

(2) if the Respondent's questioning of the Complainant and discussions regarding sexual harassment during the interview and the treatment in general received by the Complainant with respect to the possible employment, constituted adverse differential treatment of the Complainant pursuant to subsection 7(b); and,

(3) if the manner in which the interview was conducted amounted to sexual harassment and a breach of subsection 14(1).

At the outset of the Respondent's summation, it chose to concede or agree with some potential issues. The Tribunal believes that such agreements or concessions are in accordance with the preponderance of legal authority and determines such issues in accordance with the Respondent's agreement or concession as the case may be . The matters agreed to are as follows:

(1) The Canadian Human Rights Act is to be given a broad and liberal interpretation;

(2) The definition of "employer" and "employment" under the Act can include a prospective employer and prospective employment and, consequently, the conduct of a prospective employer during a job interview is subject to the provisions of the Act;

(3) Employers can be liable under the Act for the acts of their employees - in this case, CEIC assumes full

responsibility for any discriminatory practice by Susan Hogarth; and,

(4) Sexual harassment under the Act can occur amongst members of the same sex.

As well, the Respondent did not rely on a defense of bona fide occupational requirement (under section 15 of the Act), so that section is not in issue.

The Complainant and HRC allege that one of the reasons the Complainant was denied an employment opportunity by CEIC was because she was a previous victim of sexual harassment and/or that she was female, either of which would be prohibited grounds of discrimination under the Act.

It is quite clear that discrimination need only be one of the grounds for the denial or rejection, rather than the sole or main reason. As stated succinctly by MacGuigan, J.A., in Holden and Canadian Human Rights

Commission v. Canadian National Railway (1991), 4 C.H.R.R. D/12, (F.C.A.), at D/15:

"As the case law establishes, it is sufficient that the discrimination be a basis for the employer's decision: Sheehan v. Upper Lakes Shipping Ltd. [1978] 1 F.C. 836 at 844 (F.C.A.) reversed on other grounds by S.C.C. at [1979] S.C.R. 902."

In my view the Respondent's case on this issue is overwhelming. The evidence indicated that the Complainant had been, and had intended to continue, criticizing the Federal Government. The IS-2 position, in turn, required the successful applicant to be a spokesperson on behalf of the Federal Government and, indeed, this could even potentially occur with respect to sexual harassment matters. An example was given during the hearing of the Federal Government's intention (at the time. of this hearing) to deny unemployment benefits to individuals who quit their jobs without just cause. This had created some criticism from the general public about potential problems for people who quit their jobs because of sexual harassment. If Ms. Stadnyk had been an Information Officer for CEIC at the time, it

would have been her responsibility to explain and defend the Government's position on this issue.

There are no doubt numerous positions in the Federal Public Service where speaking out against the Federal Government on the issue of sexual harassment would not be as critical as in the case of an Information Officer. However, it is difficult to imagine even on a common-sense basis how an outspoken critic of the Government in the public eye could also be an effective, credible and reliable Information Officer.

This basic premise is supported by a number of matters raised by the Respondent.

The Treasury Board conflict of interest guidelines for the Federal Public Service were entered as an exhibit. It is clear that the guidelines would apply to the position for the IS-2 position sought by the Complainant. The Complainant had signed a certification that she read and understood the conflict of interest guidelines when she initially was appointed to the firefighting position at the Regina Airport. Section 7 of Appendix A to the guidelines provides that "before or upon appointment, employees must sign a document certifying that they have read and understood this Code and that, as a condition of employment, they will observe the Code."

In her evidence, Ms. Stadnyk indicated that she was not really aware of the conflict of interest guidelines and really did not understand them. Even if she did not in fact understand the guidelines or she was not aware of them, section 7 above makes it clear that public servants must understand the Code and observe it as a condition of employment. If the Complainant was not aware of the Code or did not understand it, it would appear to be a failing on her part which would not excuse conflicts of interest she might find herself in with the IS-2 position (for example, in writing the critical book).

I will now outline some of the applicable parts of the Code, as follows:

> "4. The objects of the Code are to enhance public confidence in the integrity of employees and the Public Service:

... (d) by minimizing the possibility of conflicts arising between the private interests and public service duties of employees and

providing for the resolution of such conflicts in the public interest should they arise.

5. ... each employee is responsible for taking such action as is necessary to prevent real, potential or apparent conflicts of interest. ....

6. Every employee shall conform to the following principles:

(a) employees shall perform their official duties and arrange their private affairs in such a manner that public confidence and trust in the integrity, objectivity and partiality of the Government are conserved and enhanced;

(b) employees have an obligation to act in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law;

(c) employees shall not have private interests, other than those permitted pursuant to this Code, that would be affected particularly or significantly by Government actions in which they participate;

(d) on appointment to office, and thereafter, employees shall arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising, but if such a conflict does arise between the private interests of an employee and the official duties and responsibilities of that employee, the conflict shall be resolved in favour of the public interest; ...

(g) employees shall not knowingly take advantage of, or benefit from, information that is obtained in the course of their official duties and responsibilities and that it is not generally available to the public. ...

26. Involvement in outside employment and other activities by employees is not prohibited unless the employment or other

activity is such that it is likely to result in a conflict of interest..... The designated official may require that such activity be curtailed, modified, or ceased, where it has been determined that a real or potential conflict of interest exists."

As well, section 16 of the Code provides that employees comply with the Code by, in a case such as this, avoidance.

If the employee fails to comply, section 33 provides that such employee ". . . . is subject to appropriate disciplinary action up to and including discharge".

The conflict of interest guidelines and similar provisions affecting Public Servants have been challenged in various cases on the basis of an individual's guarantee of freedom of expression. The parties did not make direct arguments on the Canadian Charter of Rights and Freedoms (the "Charter") and, specifically, the section 2 right to freedom of expression. However, the Charter was mentioned periodically during the hearing, freedom of expression was referred to by the parties, and certain cases relied on in argument dealt with the Charter and/or freedom of expression (for example, Osborn v. The Queen (1991), 82 D.L.R. 4th 321 (S.C.C.), dealing with the Charter, was referred to by the parties, as was Fraser v. Public Service Staff Relations Board (1985), 9 C.C.E.L. 233 (S.C.C), which is a case involving freedom of expression). Although the parties did not press Charter or freedom of expression arguments, it appears to be necessary to mention the issue in the context of the conflict of interest guidelines and the Complainant's wish to publicly criticize the Government (since the issue was raised indirectly in argument before this Tribunal).

I do not intend to deal with the Charter/freedom of expression issue in great detail (again primarily because of the nature of argument made by the parties). Had the Charter or freedom of expression issue been pressed, I would have had no difficulty in determining that in the case of an information Officer and the circumstances in question, the Code (and any

Information officer and the circumstances in question, the Code constitutes a reasonable limitation on Ms. Stadnyk's right to freedom of expression.

In addition to the Code, the Respondent also filed as exhibits the Code of Professional Standards of the CPRS. and the Code of Professional Standards of the PRSA. The Respondent's journalism ethics expert confirmed that such Codes are recognized and accepted in the area of journalism and as they relate to public relations people.

The CPRS Code provides in part:

> "(a) a member shall act primarily in the public interest in the practice of public relations and shall neither act nor induce others to act in a way which may affect unfavourably the practice of public relations, the community or the society; ...
>
> (c) a member shall protect the confidence of present, former and/or prospective clients or employers;
>
> (d) a member shall not represent conflicting or competing interests without the express consent of those concerned, given after full disclosure the facts."

The PRSA Code provides:

> "1. a member shall conduct his or her professional life in accordance with the public interest. ...
>
> 10. a member shall not represent conflicting or competing interests without the express consent of those concerned, given after full disclosure the facts.
>
> 11. a member shall not place himself or herself in a position where the member's personal interest is or may be in conflict with an obligation to an employer or client, or others, without full disclosure of such interests to all involved. ...

13. a member shall scrupulously safeguard the confidences and privacy rights of present, former and prospective clients or employers."

Professor Russell considered a hypothetical situation with facts such as those in the present case and was of the opinion that there was a conflict of interest. If a prospective employee has spoken out against her prospective employer in the past and has indicated that she intends to continue doing so, tl-Lis is simply not acceptable and is an actual conflict of interest (this is so even if the cause which she speaks out about is justified and valid). It is simply unacceptable for an Information Officer to adopt this public role of criticizing his or her employer.

Therefore, I find that the Respondent certainly had a preponderance of good reasons not to proceed with the interviewing process, etc. because of the conflict of interest. Ms. Hogarth's evidence was that she was concerned about possible conflict of interest situations during the course of the interview, but only to the extent that they were to be "training issues". However, once the Complainant indicated that she intended to write a book about her experiences with the Federal Government, she simply could not go on any further. In addition to the conflict of interest, the letter Ms. Hogarth sent to Mr. Charrette indicated that Ms. Stadnyk lacked suitability in other areas - ie. she was a situational thinker and could not easily adopt another person's perspective (which to Ms. Hogarth, were important qualities for an Information Officer). These valid reasons, of course, does not rule out the possibility that one of the other reasons the Complainant's application did not proceed. further was due to a prohibited ground of discrimination.

The assessment of this issue is similar to the assessment of the other issues (or grounds upon which the complaint can succeed). That is, whether, on an objective basis, the Respondent's conduct towards and treatment of the Complainant (including the denial of an employment opportunity) were based in any manner upon a prohibited ground of discrimination.

It is quite clear that the Complainant is not required to prove that the Respondent intended to discriminate against her in order for the complaint to succeed. The Canadian Human Rights Act and similar Human Rights legislation goes beyond situations of

intentional discrimination. This principle is set out in such cases as Action Travail des Femmes v. Canadian National Railway, [1987] 1 S.C.R. 1114; Ontario Human Rights Commission and O'Malley vs. Simpsons-Sears Ltd., [19.85] 2 S.C.R. 536; Bhinder v. Canadian National Railway Co., [1985] 2 S.C.R. 561, affirming [1983] 2 F.C. 531. In the Action Travail des Femmes case, Chief justice Dickson (as he then was) says at page 1138:

> "As discussed above, the Supreme Court in the Simpsons-Sears and Bhinder decisions has already recognized that Canadian Human Rights legislation is directed not only at intentional discrimination, but at unintentional discrimination as well."

In this case, for example, I have no difficulty finding that CEIC and Ms. Hogarth did not have any vindictive or discriminatory purposes in mind in dealing with the Complainant. However, this of itself does not mean that, viewed on an objective basis, the Respondent has not discriminated against Ms. Stadnyk. By the same token, I believe that Ms. Stadnyk was genuinely offended and sincerely believes that she was attacked and discriminated against because of her stance on, and experience with, sexual harassment.

The Courts have been equally clear in stating that the subjective perception of discrimination on the part of the Complainant is not sufficient of itself to substantiate a claim. Some reasonable and objective standard must be applied to the language, words, or conduct complained of. In the Ontario Human Rights case of Bell and Korczak v. Ladas and The Flaming Steer Steakhouse (1980), 1 C.H.R.R. D/155 (O.H.R.C.), the Board indicated at page D/156, while discussing the issue of sexual conversation:

> "... thus, differences of opinion by an employee where sexual matters are discussed may not involve a violation of The Code; it is only when the language or words may be reasonably construed to form a condition of employment that the Code provides a remedy.".

The Respondent presented to the Tribunal a number of cases where a Respondent had exercised bad judgment, poor taste, insensitivity, etc. and where the Complainant had a sincere

genuine belief that such actions and comments were based or directed at them on a prohibited ground of discrimination. However, the adjudicating bodies have ruled that such conduct did not amount to violation of applicable Human Rights Codes. See Dhami v. Canada Employment and Immigration Commission (1989), 11 C.H.R.R. D/253 (Can); Fu v. Ontario Solicitor General (1985), 6 C.H.R.R. D/2797 (Ont); Makkar v. Scarborough (City) (1987), 8 C.H.R.R. D/4280 (Ont); Syed v. Canada (Minister of National Revenue) (1990), 12 C.H.R.R. D/l(Can); Aragona v. Elegant Lamp Co. Ltd. (1982), 3 C.H.R.R. D/1109 (Ont); Nimako v. Canadian National Hotels (1987) 8 C.H.R.R. D/3985 (Ont); and Watt v. Niagara (Regional Municipality) (1984), 5 C.H.R.R, D/2453 (Ont).

The HRC submitted to the Tribunal a United States Court of Appeal decision which goes beyond merely the reasonable person/objective standard. In Ellison v. Brady (1991), 924 F.2b 872 (9th CLR), the Court indicated its concern that by simply using the reasonable person standard, the result could be stereotyped notions of acceptable behavior (which in fact are discriminatory) being unchallenged. Accordingly, the Court adopted the notion of the "reasonable victim's perspective".

At Page 878 of the judgment, the Court of Appeal stated:

> "Next, we believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. . . . if we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reenforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.
>
> We therefore prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that men consider unobjectionable may offend many women. ... ("a male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has 'a great figure' or 'nice

legs'. The female subordinate, however, may find such comments offensive')."

The Court then goes on to say on Page 879:

"In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hypersensitive employee, we hold that a female employee states a prima fade case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person's standard tends to be malebiased and tends to systematically ignore the experiences of women."

I am not aware that the Ellison case has been considered or adopted by any Canadian Court, or for that matter, that the reasonable victim standard has been adopted. However, in this particular case, I believe it is appropriate to consider the application of such an approach since we are dealing with a Complainant who appears to have been extremely sensitive about any sexual harassment comments. It is, however, interesting to note that in the case in question, the matters complained about during the interview took place between two females. The comments in the Ellison case seem to be most particularly directed towards male and female interactions - where the male may not intend to be harassing and may not see the behavior constituting such, but where the female perceives the situation differently. In the case at hand, we have two females involved in the interview, both of whom genuinely seem to perceive the situation differently.

Bearing in mind the objects of the Canadian Human Rights Act as set out in section 2 and the Court's clear direction that the Act is to be interpreted in a broad and liberal fashion, I am prepared to adopt the reasonable victim (in this case a woman) perspective for the purposes of this case. In doing so, I am assuming a heightened degree of sensitivity and concern about sexual harassment by the reasonable person (in this case a reasonable woman).

Even viewing the nature and conduct of the interview from the standard of a reasonable woman who is a previous victim of sexual

harassment, I do not find the conduct of the interview, nor the denial of the opportunity, offensive. I unequivocably believe that Ms. Stadnyk fits the definition of the "rare hypersensitive employee" referred to in the Ellison case. The Complainant had well-publicized critical views regarding the Federal Government. She was now applying for a job as a spokesperson for one of its departments. Since the focus of Ms. Stadnyk's criticism was sexual harassment, I believe a reasonable female would expect to be asked questions about use of the media and sexual harassment in such circumstances. If her public criticism of the Government had been in the area of environmental standards (for example) , a reasonable female candidate for a public relations position would expect questions about the candidate's use of the media and public discussions about the environment.

In my view, the questioning and discussions about sexual harassment were necessary and incidental components to the Respondent's valid concern about the Complainant's use of the media to criticize the Government, because the topic of criticism was sexual harassment.

Accordingly, this Tribunal finds that CEIC did not deny the Complainant an opportunity (for training or a job) on a prohibited ground of discrimination. As well, I find that the Respondent did not differentiate adversely in its treatment of Ms. Stadnyk because she was a previous victim of sexual harassment or on any other prohibited ground of discrimination. The Respondent's concern with sexual harassment, as well as its denial of the employment opportunity, were valid and reasonable concerns in the circumstances and were not based in any respect upon a prohibited ground of discrimination.

As to the manner in which the interview was conducted by Ms. Hogarth, it is important to consider the definition of sexual harassment as defined by Chief justice

Dickson (as he then was) in Janzen and Govereau v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252 at page 1284:

> "Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse jobrelated consequences for the victims of harassment. It is, as Adjudicator Shime observed in Bell v. Ladas, supra, and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practise, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being."

Ms. Hogarth's approach with the two hypothetical questions was somewhat subtle and indirect, but one would not expect a prospective employer to always ask direct questions. For example, the indirect approach may often result in more reliable answers from the interviewee (ie. it is not as easy to give the answers the candidate expects the interviewer to be looking for). It appears from the evidence that Ms. Stadnyk was going through a very difficult time in her life when the interview took place. She had not been working for quite some time and appears to have been emotionally distraught. Her recounting of the interview and evidence appears to be exemplary of her condition at the time. That is, she remembered only the specific things that offended her and they were portrayed in evidence (and

probably interpreted by her at the time) as outrageous attacks on her dignity and person. As a result, her evidence regarding the interview was largely unbelievable and unreliable. The Respondent, in conducting its interview and denying further opportunity to the Complainant, was operating on a valid concern, one which I believe would not offend a reasonable female.

I must say that I do not necessarily condone in all respects the manner in which the Respondent conducted its interview or the

way in which the PSC arranged the interview (one wonders why the PSC would attempt to place Ms. Stadnyk in a position which had "conflict of interest" written all over it), or the failure of the PSC to promptly notify Ms. Stadnyk after the decision had been made not to proceed with the interviewing process (this seems to have caused difficulty to both Ms. Stadnyk and Ms. Hogarth).

I certainly believe that the manner in which the interview was conducted is the nearest the complaint comes to succeeding. The suggestion by Ms. Hogarth that there is someone in her office who bothers her with his behavior, and the immediate follow-up with the two examples of which Ms. Hogarth indicates she has knowledge, certainly would raise questions in the eyes of a reasonable female interviewee who had previously experienced such harassment. However, I believe that such reasonable female considering the entire context and circumstances/ would find that although Ms. Hogarth might have used, for instance, other examples or phrased them differently, the offensiveness is not such as would constitute discrimination on a prohibited ground under the Canadian Human Rights Act . As indicated in the Janzen decision, supra, the practise must "constitute a profound affront to the dignity" of (in this case) the prospective employee forced to endure it -

such was not the case in this situation. I believe that a reasonable female who was a victim of previous sexual harassment would not find the conduct of the interview a profound affront to her dignity, given the circumstances of this case.

Consequently, I find that the complaint is not substantiated on any of the possible grounds and is therefore dismissed.

DATED this 20th day of May 1993.

Raymond William Kirzinger