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TD 8/84

Decision rendered August 1, 1984

IN THE MATTER OF THE  
CANADIAN HUMAN RIGHTS ACT  
(S.C. 1976-77. C. 33, as amended)

AND IN THE MATTER of a Hearing  
before a Human Rights Tribunal  
Appointed under Section 39 of  
the Canadian Human Rights Act

BETWEEN:  
KRISTINA POTAPCZYK,  
Complainant,  
- and -

ALISTAIR MACBAIN,  
Respondent.

DECISION OF TRIBUNAL

BEFORE: Sidney N. Lederman (Chairman)  
Wendy Robson  
Peter Cumming

APPEARANCES: Russell G. Juriansz, Counsel for  
the Canadian Human Rights Commission

Mary F. Cornish, Counsel for the  
Complainant Kristina Potapczyk

No one appearing for the Respondent,  
Alistair MacBain

HEARD IN TORONTO, CANADA, ON APRIL 9, 10, 11, 12 and 13 AND  
ON MAY 17 and 18, 1984.

>INTRODUCTION.

The Complainant, Kristina Potapczyk, age 29, of Niagara Falls, Ontario,  
was employed by the Respondent, Alistair MacBain, Member of Parliament for  
Niagara Falls-Niagara-on-the Lake, commencing March 1, 1982 as a Special

Assistant in Ottawa, and her employment was terminated April 15, 1983. While in a technical sense her employer was the federal government, Mr. MacBain was the employer in fact as he hired and fired her and determined all the terms and conditions of her employment. Ms. Potapczyk alleges that her employer, Mr. MacBain, discriminated against her because of her sex, in contravention

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of paragraphs 7(a), 7(b) and 10(a) of the Canadian Human Rights Act, 1976-77, c. 33, as amended, which provide:

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, on a prohibited ground of  
discrimination.

10. It is a discriminatory practice for an employee organization  
or organization of employers

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(a) to establish or pursue a policy or practice  
that deprives or tends to deprive an individual or class of  
individuals of any employment opportunities on a prohibited  
ground of discrimination.

Prohibited grounds of discrimination in section 3 include "sex" and the case law has held that sexual harassment is an aspect of discrimination because of "sex". More will be said in respect of this when the legal issues are discussed.

Ms. Potapczyk alleges that Mr. MacBain sexually harassed her during her employment, changed her employment duties adversely, and ultimately terminated her employment as part of this harassment. Specifically, her Complaint (Exhibit #C-13) alleges that:

"...during the course of my employment as he interfered with my job performance and did humiliate, insult and intimidate me on several occasions by leering at me, making unwelcome remarks and innuendos about my person, by offering unwelcome invitations, and by placing himself unnecessarily close to me or ordering that I stand close to him during conversation. These practices that he pursued affected my capabilities and my self-esteem. Mr. MacBain demanded that I resign and/or quit my job and I left under duress, protest and distress on April 15, 1983."

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At the relevant time, there were three staff members employed in the Ottawa office of Mr. MacBain. Ms. Linda Paniccia, now 26, as Administrative Assistant, performed the typing, filing, and receptionist functions in the office. Ms. Nanda Casucci, the Senior Special Assistant, was responsible for more important correspondence, grants and subsidies application considerations, for all the public affairs dealing with the Member,

speechwriting and preparation of general constituency communications, and Ms. Potapczyk was Junior Special Assistant. Ms. Casucci had joined Mr. MacBain's staff June 1, 1981, and Ms. Paniccia November 9, 1981. All three appear to be bright, young people.

Mr. MacBain, through his counsel, Mr. Pierre Genest, made two appearances before us seeking, on each occasion, an adjournment to challenge

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the impartiality of the Tribunal in the Federal Court. When these requests were denied, Mr. Genest withdrew from the hearing on the instructions of his client.

Mr. MacBain declined to appear at the hearing on the merits of the Complaint and present any evidence. Moreover, he declined to have his counsel present to cross-examine witnesses. We have no doubt after hearing all of the evidence, in saying that the four principal witnesses

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- 4 in

this case were sincere, truthful witnesses. Some of the evidence was somewhat bizarre, but we must relate it in some detail to describe the nature of the employment environment in Mr. MacBain's Ottawa office.

#### THE EVIDENCE.

Ms. Potapczyk is a 1979 graduate with a Bachelor of Fine Arts degree from the University of Windsor. She was employed with the Shaw Festival at Niagara-on-the Lake upon her graduation, first in the box office, and later in publicity as an assistant, ultimately becoming the Press Officer in 1981.

Ms. Potapczyk, of Polish ancestry, first met Mr. MacBain at a beauty contest in June, 1980, when she was in charge of the contest and he was one of the judges. Mr. MacBain, a lawyer, who is about 58 years of age, had been elected as a Member of Parliament after running as a candidate of the Liberal Party of Canada, in the February, 1980, general election.

Ms. Potapczyk testified that in June, 1981, Mr. MacBain called her at the Shaw Festival, asking for Festival brochures that he wished to circulate to Members of Parliament to promote the Shaw Festival. He also asked her

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- 5 for

her resume at this time saying he wanted to consider her for a job, but she did not provide him with it because she was not interested. Later, she received an invitation (Exhibit #C-1) from the Postmaster General, apparently at the initiative of Mr. MacBain (Transcript, Vol. 3, p. 242), to a stamp unveiling ceremony and luncheon, at which she was invited to join Mr. and Mrs. MacBain.

Ms. Potapczyk testified that in mid-October Mr. MacBain telephoned her to express his regrets at hearing of her father's recent death, and to ask her to consider a job with his office in Ottawa as Special Assistant. Ms. Potapczyk was interested in this possibility and went to Ottawa on November 10, 1981, to meet with Mr. MacBain. At this meeting, Mr. MacBain expressed

concern about the Shaw Festival being able to replace Ms. Potapczyk. When she asked about the job description she testified that he first replied it was "Anything you want it to be" (Transcript, Vol. 3, P. 246), but then described her prospective job duties as including public relations on behalf of his office, liaison with the Polish community within Niagara Falls , liaison generally with cultural groups, such as the Shaw Festival and the Niagara Falls Music Theatre Society, and a researcher in respect of women's issues.

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At this initial interview in Ottawa November 10, 1981, Mr. MacBain introduced Ms. Potapczyk to his staff, Linda Paniccia and Nanda Casucci, but at the same time he was doing this, Ms. Potapczyk testified that he was "grilling Nanda as to work she was doing ... and in a very stern and direct tone ... was criticizing her" (Transcript, Vol. 3, pp. 247, 248).

Mr. MacBain then took her to a Public Accounts Committee meeting which he had to attend, and then to lunch where they discussed the salary and benefits relating to her employment. Ms. Potapczyk then sat in the public gallery for the commons Question Period, and later Mr. MacBain took her to dinner in the Parliamentary restaurant, together with a friend and his wife visiting from Newfoundland. Mr. MacBain told Ms. Potapczyk not to rush into a decision about the job.

About two and one-half weeks later, Mr. MacBain called and asked her if he could come to her mother's house to discuss the job further. At that time he warned her that the job was insecure in that it was dependent on his being re-elected, and he expressed concern about her recently widowed mother's feelings if Ms. Potapczyk moved to Ottawa. Mr. MacBain also emphasized that his staff had to be loyal to him; his staff had to be prepared to work sixteen hours a

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- 7 day;  
and that Ms. Potapczyk would have to drop her connections with the theatre.

After later telephone conversations with Mr. MacBain, Ms. Potapczyk accepted the Special Assistant position at the end of December, 1981, and was to commence employment March 1, 1982, at an annual salary of \$19,300.00. She stressed in her testimony that she took the job only after his firm assurances that he would guide and teach her in the position, as she had considerable concern about her lack of political experience (Transcript, Vol 3, pp. 256, 257, 259).

In the interim, Mr. MacBain saw her on a number of occasions: at the Little Theatre building opening; he asked her to attend at the constituency Liberal Association annual meeting with the President of the Polish Legion; he asked her to come to a meeting at the YMCA where Mr. MacBain was speaking; Mr. MacBain attended, with his wife, at the closing night of a play that Ms. Potapczyk was directing.

Mr. MacBain had told Ms. Linda Paniccia and Ms. Nanda Casucci on several occasions prior to Ms. Potapczyk's employment that his new "Polish assistant" was very attractive and would "solve all the problems in the office" (Transcript, Vol. 4, pp. 469, 470). It is obvious

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a note (Exhibit #C-10) from another Member of Parliament that he had commented elsewhere upon her attractiveness. More generally, it is clear he liked to show off his three attractive young female employees (Transcript, Vol 4, pp. 464, 465).

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Ms. Casucci testified that Mr. MacBain was disinterested in considering any applicants other than Ms. Potapczyk for the Special Assistant position, and did not submit her to the same hiring process that Ms. Casucci had experienced (Transcript, Vol. 5, pp. 669-672).

Ms. Potapczyk commenced employment with Mr. MacBain March 1, 1982, in his Ottawa office. At that time, Ms. Potapczyk as Junior Special Assistant, Ms. Nanda Casucci as Senior Special Assistant, and Ms. Linda Paniccia as Administrative Assistant, were the three staff employees in the office. Ms. Potapczyk received an Employee Manual (Exhibit #C-2) on her first day at work, which included job descriptions. However, these written job descriptions were never of much significance, and there was considerable departure in the actual work performed.

At first, Ms. Potapczyk had specific tasks, such as to clip newspaper items to do with the women's movement and to compile master lists of certain constituents as target

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- 9 groups

for mailings. Moreover, she familiarized herself with the library of Parliament, and with the Public Accounts Committee of which Mr. MacBain was a member. However, Ms. Potapczyk felt that she was not an integral part of the office, and spoke to Ms. Casucci about having weekly meetings and asked to be part of the running of the office. Ms. Paniccia testified that Ms. Potapczyk was upset by the work that she was receiving, which was tedious, and not what Ms. Potapczyk had expected (Transcript, Vol. 4, pp. 479, 480). However, Mr. MacBain seemed largely to ignore Ms. Potapczyk at this time (Transcript, Vol 4, p. 481). Moreover, the work load was very unequal, as Ms. Potapczyk would leave the office by 6:00 p.m. whereas the other two employees would work until 8:30 or 9:00 p.m.

Ms. Linda Paniccia testified that Ms. Potapczyk asked the others for work, but so far as Ms. Paniccia was concerned, she did not want to give up her assignments because she did not want Mr. MacBain to think that she could not do the job (Transcript, Vol 4, pp. 472, 476).

An early task given to Ms. Potapczyk was the preparation of the intended summer "householder" called "Ottawa Report" (Transcript, Vol. 3, pp. 283, 284), a small booklet distributed by Members of Parliament to his or her

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- 10 constituents.

Each member is apparently allowed to put out such a pamphlet four times a year.

When Ms. Potapczyk had evidenced interest in working on the "householder" a couple of days after she was on the job, Mr. MacBain instructed Ms. Nanda Casucci to introduce Ms. Potapczyk to the task of doing the next householder (Transcript, Vol. 5, p. 614). The next morning, Mr. MacBain advised Ms. Casucci that Ms. Potapczyk would be solely responsible to him "so that he could monitor her progress on a personal basis" (Transcript, Vo. 5, p. 614).

Ms. Potapczyk met Mr. MacBain for dinner at the Parliamentary restaurant on July 21, 1982, to discuss the forthcoming summer householder. She

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testified that at this dinner he said, "We've got a problem", that he said he found it hard to believe that she got along with people, and that she had "a bad attitude" (Transcript, Vol. 3, pp. 314-315, 318) and that the other two women in the office were unhappy with Ms. Potapczyk and felt that she did not like working in the office. However, Ms. Paniccia testified later that she did not at any time discuss Ms. Potapczyk's job performance with Mr. MacBain; nor had she been critical at any time of the way Ms. Potapczyk worked; nor had Mr. MacBain ever complained to Ms. Paniccia about Ms. Potapczyk's performance until February, 1983 (Transcript, Vol. 4, pp. 478-480).

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- 11 Ms.

Casucci also testified later that it was not until February, 1983, that Mr. MacBain began to criticize Ms. Potapczyk. Ms. Casucci said that Mr. MacBain never criticized Ms. Potapczyk until after Ms. Casucci returned to the Ottawa office from a sojourn on January 31, 1983 (Transcript, Vol. 5, pp. 660, 661). At the dinner on July 21, 1982, Ms. Potapczyk began to cry and exclaimed that she didn't have many friends in Ottawa, whereupon Mr. MacBain said, she testified, "Don't you think I get lonely too" (Transcript, Vol. 3, p. 316). Ms. Potapczyk replied that she would try to be more aware of herself and her actions. Mr. MacBain walked her to the bus stop after dinner and left. According to Ms. Potapczyk, prior to the July 21 dinner, Mr. MacBain had only taken her to the Parliamentary restaurant on one earlier occasion, and this had been shortly after she had commenced working for him, at which time they had discussed her work in the office.

On August 5, 1982, Mr. MacBain and Ms. Potapczyk had lunch in the Parliamentary restaurant to discuss the householder, when, she testified, he told her that she was "still rude", needed "discipline" and that he was still receiving complaints about her from the other two women (Transcript, Vol. 2, p. 322). She testified that he told Ms. Potapczyk he thought that she had a personality problem. Ms. Potapczyk insisted on knowing specifically who was

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- 12 complaining,

and wanted to call her supposed critics immediately, but Mr.

MacBain would not let her. However, Ms. Potapczyk subsequently asked the Niagara Falls constituency office worker, Marg Germano, if she had complained

about her as Mr. MacBain had alleged, but Ms. Germano denied making any complaints. However, when Ms. Potapczyk asked Ms. Casucci, the latter told her that one telephone caller to the office had complained about the manner in which Ms. Potapczyk had answered a telephone call.

Ms. Potapczyk testified that Mr. MacBain also told her on August 5 that Nanda Casucci was not receiving Holy Communion because she felt guilty in the way Ms. Potapczyk dealt with Mr. MacBain. However, Ms. Casucci later testified that she had told Mr. MacBain that she was not receiving Communion because of her bad feelings about the affair she perceived to be taking place between Mr. MacBain and Ms. Potapczyk, which impression had been created by Mr. MacBain in May, 1982 (Transcript, Vol. 5, pp. 673, 674). Ms. Potapczyk testified that Mr. MacBain also told her at the August 5, 1982, lunch meeting that he had thought of firing her within the first three months of her being employed.

The summer householder (Exhibit #C-4) that Ms. Potapczyk worked on was well received, and indeed, Mr. MacBain complimented her upon it when it came

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out in the

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- 13 last

week of August. There were to be problems, however, in respect of the second one, the intended fall householder.

In the fall of 1982, Mr. MacBain spoke to Ms. Casucci about the fall householder which Ms. Potapczyk was then preparing. Ms. Casucci advised him orally on two occasions that the theme (a seven day menu of processed foods available from the Niagara area) of the proposed householder was not politically appropriate, at the time, and then wrote a three page memo (Exhibit #HRC-5) because he was not heeding her advice. The proposed householder was subsequently withdrawn, but this was not due to any fault on the part of its preparation by Ms. Potapczyk as the theme was the idea of Mr. MacBain himself. Ms. Casucci testified that in fact the draft householder "had been done quite well" (Transcript, Vol. 3, p. 312, Vol. 5, p. 627). Mr. MacBain, however, told Ms. Potapczyk in October that she "had missed the boat" and that the householder "wasn't what he wanted" (Transcript, Vol. 3, p. 333), but he never suggested this to Ms. Casucci (Transcript, Vol. 5, p. 660).

On December 8, 1982, Ms. Potapczyk joined Mr. MacBain for dinner in the Parliamentary restaurant in advance of their going together to a "Polish Congress Christmas Party" in the South Block to meet refugees from Poland at which several Members of Parliament were present.

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- 14 Afterwards,

as Mr. MacBain was walking Ms. Potapczyk to the bus stop, and as they passed the nearby Press Club, she said that he asked her in for a drink, but she declined, and told him that he did not have to wait with her at the bus stop. Ms. Potapczyk said that while at the bus stop he rubbed her shoulders with his hands to warm her up, to which she silently objected. She felt that he had had too much to drink that evening. She also felt that during the dinner he had stared at her breasts.

The other two staff members, Linda Paniccia and Nanda Casucci, both testified.

Linda Paniccia has two university degrees, a Bachelor of Arts in Secretarial Administrative Studies, and a Bachelor of Education, both from the University of Western Ontario. Mr. MacBain had been the family lawyer. Ms. Paniccia complained that Mr. MacBain would want her too close to him when showing her work and would come up to her from behind with his head over her shoulder, and his body against the arm rest of the chair (Transcript, Vol. 4, pp. 437, 441). Ms. Casucci in her testimony confirmed that Mr. MacBain would get too close physically to Ms. Paniccia. Ms. Paniccia also said that Mr. MacBain tried about half a dozen times to kiss her good night and a couple of times in the office (Transcript, Vol. 4, pp. 442, 443). She, Nanda

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- 15 Casucci

and Mr. MacBain all lived in the same apartment building, and he

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would often walk the two staff members home, with the good night kisses coming in the elevator. Ms. Casucci lived on the first floor, Ms. Paniccia on the fifth floor, and Mr. MacBain on the nineteenth floor. Mr. MacBain never made a sexual proposition to Ms. Paniccia at any time. He never invited her to his apartment or suggested that she invite him to her apartment (Transcript, Vol. 4, p. 497). Nor had he ever propositioned Ms. Casucci. The kisses would be given with the other girl being present. Ms. Paniccia and Ms. Casucci did not like this, and eventually Ms. Casucci complained to Mr. MacBain and it stopped (Transcript, Vol. 5, pp. 645, 648). These good night kisses when he went home with them were simply that, and Mr. MacBain never sexually propositioned either Ms. Paniccia or Ms. Casucci. Ms. Paniccia was afraid of Mr. MacBain and did not complain to Mr. MacBain about the closeness, but felt that he should have known from her body movements that she found it objectionable (Transcript, Vol. 4, pp. 443, 459, 460, 461).

All three female staff employees testified that Mr. MacBain stood and sat excessively close to them in the office while they were working. Ms. Potapczyk testified that Mr. MacBain would stand beside her chair when giving assignments and would bend over her, or sit on the arm of her

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- 16 chair,

such that he was too close, and if they were both standing, he would be so near that their bodies were touching at the arms (Transcript, Vol. 3, pp. 288, 290, 291, 300, 301). She testified that when she was called into his inner office, he would often tell her to "come here" so that they would be standing very close together. She felt that this was "expected" of her (Transcript, Vol. 3, pp. 301, 302). Mr. MacBain similarly positioned himself close to the other two employees (Transcript, Vol. 3, p. 303). However, Ms. Potapczyk did not at any time tell Mr. MacBain that she felt uncomfortable because of his physical proximity, even though she did not think that he even realized her discomfort (Transcript, Vol. 3, pp. 305, 306). Ms. Casucci confirmed that Mr. MacBain would often go around behind Linda Paniccia's chair, put his arm around the back of it and lean over and in too close. Ms. Casucci said that Ms. Paniccia became so flustered by Mr. MacBain's excessive closeness that she would not comprehend his instructions although she would



indicate to him that she had so that he would move away. After Mr. MacBain left she would then ask Ms. Casucci to repeat the instructions that he had given. Ms. Paniccia observed that Ms. Potapczyk did not like Mr. MacBain's excessive closeness (Transcript, Vol. 4, p. 487).

Ms. Casucci had her desk in Mr. MacBain's inner office, across from his desk. She testified that Mr. MacBain

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- 17 would

often call her "to please come around" behind his desk to explain something, and would often come to her desk, sit on the arm of the chair with his leg touching her leg, in such a way that she "felt he was invading my space". She felt that she told him through "my body language" that the persistent closeness was unwelcome.

Ms. Casucci said that Mr. MacBain's arm would be around the back of Ms. Potapczyk's chair, with his arm touching her shoulder and arm, and that Ms. Potapczyk would tense up and be nervous.

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Ms. Paniccia testified that the excessive closeness was not really discussed between Ms. Paniccia and Ms. Casucci, although they would joke about his saying "Come over here" (Transcript, Vol. 4, pp. 496, 497); however, Ms. Casucci testified that it was discussed (Transcript, Vol. 5, p. 652).

Ms. Nanda Casucci grew up in Niagara Falls. She has impressive credentials and was well qualified for a Senior Assistant's position to a Member of Parliament. She was an Ontario Scholar, won various awards and graduated summa cum laude from Niagara University. She is quite obviously a remarkable and talented young person, and worked very hard, capably and loyally for Mr. MacBain.

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- 18 -

Unhappy about the unequal distribution of work loads in the office, Ms. Casucci requested a meeting with Mr. MacBain. They had dinner in the Parliamentary restaurant at the end of May, 1982, at which time she raised the problem of disparity of workloads, and the fact also that Linda Paniccia was underpaid (at \$15,600.00) in relation to Ms. Potapczyk (at \$19,300.00). Ms. Casucci testified that she asked Mr. MacBain why Ms. Potapczyk had been hired and he replied that "A man gets lonely up here", and when Ms. Casucci asked him what he meant, she said he chuckled and said "What do you think I mean?" Ms. Casucci replied that she was disgusted and insulted that Mr. MacBain would do this, but he replied only that if he was forced to get rid of Ms. Potapczyk "the next one I bring in will be worse". Curiously, there never was an affair between Mr. MacBain and Ms. Potapczyk. This false impression, created by Mr. MacBain, was to plague the working relationship in the office to the end of Ms. Potapczyk's employment. Mr. MacBain then advised Ms. Casucci that the staff would not be receiving a pay increase because the money "from the staff fund" was needed for a word processor (Transcript, Vol. 5, p. 623). Ms. Casucci testified that within a couple of days Mr. MacBain advised her that she was not going to work on the householder any more, not even to train Ms. Potapczyk. She knew that he

understood her to enjoy working on the householder, and felt that he was punishing her for questioning office procedures (Transcript, Vol. 5, p. 623).

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In July of 1982, the problems in the office had not been resolved, and Ms. Casucci threatened to resign, but Mr. MacBain pleaded with her to stay, saying that he would agree to implement their original intent of her administering the office on his behalf, with Ms. Potapczyk responsible to Ms. Casucci.

However, a few days later, Mr. MacBain changed his mind and said that this approach was not a good idea. Ms. Casucci went on holidays at that point, and worked in the constituency office in Niagara Falls for some time, not returning to Ottawa until November 3.

Ms. Linda Paniccia thought Mr. MacBain and Ms. Potapczyk possibly were having an affair, because of his boasting about her and because of the unequal work loads, even though Ms. Potapczyk seemed upset that she was not working (Transcript, Vol. 4, pp. 481-483). Ms. Paniccia knew also about May, 1982, that Mr. MacBain had responded to Ms. Nanda Casucci's inquiry of him as to why Ms. Potapczyk had been employed and that Mr. MacBain had said "a man

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gets lonely up here", leaving the false impression that there was some sort of relationship between Mr. MacBain and Ms. Potapczyk.

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Ms. Paniccia and Ms. Casucci were often very upset by the comments Mr. MacBain made to them. Ms. Paniccia testified that Mr. MacBain often said to her that she had a weight problem (Transcript, Vol. 4, p. 486). Linda Paniccia felt that he did not respect her, would talk down to her and yell at her to come into his office for dictation (Transcript, Vol. 4, pp. 492-493). This was done openly because when Mr. Louis Grigoroff, a later witness, was in the office he said he saw Mr. MacBain suddenly and constantly change priorities and say to Ms. Paniccia "I want this on my desk by 11:00 o'clock or you're dead" and later "or I'll kill you" (Transcript, Vol. 4, p. 530).

Ms. Casucci testified, crying, that Mr. MacBain told her often that she "should encourage men more", that she "was frigid", that she should "wear less conservative clothing", that she should "act a bit more sexy," "act less intelligently with men" and that she should gain five pounds and "increase (her) bust size". Ms. Casucci found these comments "devastating when someone attacks the very essence and the most basic part of a person" and would be reduced to tears in his presence (Transcript, Vol. 5, pp. 684, 692).

Mr. MacBain succeeded, intentionally or otherwise, in often getting his three young female staff members into an agitated emotional state.

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- 21 -

It was obvious from all the evidence that there was a breakdown in communication between Mr. MacBain and his staff and a lack of effective direction from Mr. MacBain (Transcript, Vol. 3, p. 313).

In November, Mr. Louis Grigoroff, a self-employed businessman in Niagara Falls, a political strategist and publicist, and a friend of Mr. MacBain's of 25 years standing came to Ottawa at the request of Mr. MacBain, to evaluate the organization of his office and make suggestions for improvements. This was necessary as Mr. MacBain wished to reorganize his office to accommodate the new duties that he was assuming by reason of his recent appointment as Parliamentary Secretary to the Minister of Justice. Mr. Grigoroff observed the office over the period November 16 to November 19. While he was in Ottawa, Ms. Potapczyk complained to him about the disorganization and confusion of the office. She specifically pointed out that the distribution of work load was uneven amongst the staff with Ms. Potapczyk getting too little work.

Mr. Grigoroff is a very well organized and capable individual, who did a thorough analysis of Mr. MacBain's Ottawa office. He made suggestions for a subject-matter index, with appropriate cross-referencing and cross-indexing, a word processor, a redistribution of the unequal work load,

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- 22 a

spinning-off of some matters to the constituency office in Niagara Falls, and a recommendation that Ms. Casucci be made Office Manager and Ms.

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Potapczyk be assigned more specific tasks. He had found the office chaotic and disorganized, with Mr. MacBain changing priorities every hour or so. He testified that Mr. MacBain had no concept of work-loads, or how long it would reasonably take a staff member to complete an assignment. Mr. Grigoroff found the office morale to be very low. He said it was obvious that Ms. Potapczyk "wanted to work but was not being given any work of any substance" (Transcript, Vol. 4, pp. 525-530).

Mr. Grigoroff said that Mr. MacBain made flattering comments about Ms. Potapczyk to him such as "Didn't she look good", and "wasn't she well dressed" (Transcript, Vol. 4, p. 532). Mr. MacBain had also made crude comments on other occasions to Mr. Grigoroff about the physical endowments of Linda Paniccia and Nanda Casucci. Mr. MacBain had also referred to Ms. Potapczyk as a "role model for a tits and ass man" (Transcript, Vol. 5, pp. 553-554).

Without the three female employees having complained to him beforehand, Mr. Grigoroff said he observed the excessive physical closeness in the office by Mr. MacBain with the female employees (Transcript, Vol. 4, pp. 528-536). He would stand and sit too close, and put his arm around the

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- 23 employee's

shoulder, and was "hovering around all three". Mr. Grigoroff noted that Ms. Potapczyk seemed to cringe, stiffening her shoulders and bringing her elbows in to her side, when Mr. MacBain would come too near.

When Mr. Grigoroff later asked Ms. Casucci and Ms. Paniccia why they did not object to the closeness, they responded by saying that they wanted to avoid any confrontation, and that Mr. MacBain was the boss (Transcript, Vol. 4, pp. 538, 539).

Mr. Grigoroff, who made many astute observations of the Ottawa office, felt that Mr. MacBain did not want the three female employees to fraternize with each other. Mr. Grigoroff had the impression that Mr. MacBain insisted that he assign the work directly to Ms. Potapczyk, rather than allow Nanda Casucci to do so to Ms. Potapczyk, because he wanted his staff to be dependent upon him. During the course of Mr. Grigoroff's evidence, the following exchange took place:

"THE CHAIRMAN: How much of a morale problem, at least in terms of your observation, turned on this activity - that is, of his standing close - and how much of it turned on the general disorganization, or Mr. MacBain not having any idea as to the length of time that assignments take, or the uneven workload, or the problem of changing priorities in his tasks?

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- 24 -

THE WITNESS: I saw much of it as a method of creating dependency upon the employer. They weren't to fraternize; they weren't to talk with each other; they weren't to discuss with each other. If Miss Casucci and Miss Paniccia were not living in the same apartment together it would have been even worse. Ms. Potapczyk perceived them as enemies. They perceived her as some kind of enemy and they had ill thoughts to go along with that perception. Demoralizing?

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It was more than demoralizing. It was a group of people thrown in a very small office. You had one person who I'm sure is a fine person yet was given no work of any substance; you had two that were overworked; and you had the favouritism being, let's say, spread around.

My perception, objectively speaking, I would imagine that when you have one female person seated at a desk watching another one being coozied up to, jealousy - at least envy - must creep into it. When on the following day the situation is reversed, I don't think that does too much for the other person's psyche. On an ongoing basis, in essence, I thought he was trying to keep everybody off balance and create a dependency on him. And I thought in the case of Miss Casucci he was succeeding quite well. She was totally loyal, perhaps still is.

THE CHAIRMAN: In terms of your observing this morale problem, how important a part was the sexual by-play, if I may call it that?

THE WITNESS: Well, I think the sexual by-play was demonstrative. I think it was intended to convey messages, whether it was to Louis Grigoroff sitting on a chair or a loveseat or whether it was pawing off one employee's feelings against another. In essence, I started to suspect something earlier, back in October when we were working on the election campaign, and Al - Mr. MacBain was constantly pressing Miss Casucci to

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produce a report on why she should go back to Ottawa. Now I may be stupid or something but I couldn't quite understand, and never will, how an employee can be required to justify the return to Ottawa when they are engaged to work in Ottawa, when you are engaged to work specifically in 540 North at the House of Commons and in no other place, when they are relocated in Ottawa - asked to relocate there so they can commence their employment - continue it and when they in fact become a resident of Ottawa, now why in heaven's name after a vacation would any employee be told on a daily basis, "You had better get that report ready or I may not take you back to Ottawa with me"?

Again I felt that this was his way of mentally subjugating an employee by creating dependency."

(Transcript, Vol. 4, pp. 542-544)

Mr. Grigoroff asked Mr. MacBain if he "was bedding" Ms. Potapczyk and got the non-committal response of "Remember you said that; I didn't" (Transcript, Vol. 5, pp. 555, 556).

Mr. Grigoroff could tell that Ms. Potapczyk wanted to work, but was getting very little, and he "just couldn't fathom what her precise role was in that office" (Transcript, Vol. 5, pp. 573, 574).

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Mr. Grigoroff advised Linda Paniccia and Nanda Casucci to be more forceful with Mr. MacBain. Mr. Grigoroff found them to be timid because they were concerned that they might be fired and might return to Niagara Falls in perceived disgrace from the standpoint of friends and family. He astutely observed that both girls were on a pedestal within their families because of the apparently prestigious jobs that they held (Transcript, Vol. 5, pp. 588-592). Mr. Grigoroff spoke twice in successive days to Mr. MacBain about the problem of his getting too close physically to his employees, and said that it could create problems for him (Transcript, Vol. 4, pp. 535-536).

Mr. Grigoroff told Ms. Paniccia that he had advised Mr. MacBain that he was standing and sitting physically too close to the female employees in the office and making them uncomfortable (Transcript, Vol. 4, pp. 454-455).

Ms. Casucci confirmed that Mr. Grigoroff had expressed concern to the employees about Mr. MacBain's closeness to them while working, and had asked them how they felt about it, and whether they had spoken to Mr. MacBain about it. Ms. Casucci felt she had told him through her "body language" (Transcript, Vol. 5, pp. 644, 645).

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It was obvious from the evidence that Mr. MacBain placed himself too close to his female workers generally and openly (Transcript, Vol. 4, p. 456). Mr. Grigoroff said to Mr. MacBain that he did not have to "put on a show" for him (Transcript, Vol. 4, p. 536). Mr. Grigoroff also told Mr. MacBain that he had talked to Linda Paniccia and Nanda Casucci about this,

and they did not like it, and he could tell from observation that Ms. Potapczyk did not either. Mr. MacBain laughed in response and said only that he had not noticed this alleged behaviour on his part.

Notwithstanding Mr. Grigoroff's advice, Mr. MacBain's behaviour never did change and he continued to persist in standing and sitting excessively close to his female staff members.

Ms. Paniccia testified that in the week following Mr. Grigoroff's visit Mr. MacBain seemed upset with his staff, and told Ms. Casucci to tell Ms. Potapczyk and Mr. Paniccia that the three of them were not going to the staff Christmas party (Transcript, Vol. 4, pp. 491, 492).

Mr. Grigoroff completed his report in early December, 1982, which concluded, amongst other things, that there was an uneven distribution of work in the office, with Nanda Casucci and Linda Paniccia being overworked, and

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- 28 Ms.

Potapczyk underworked, and that the office was disorganized and lacked direction. As well, Mr. Grigoroff concluded that there was general unhappiness amongst the staff, and that Mr. MacBain generally placed himself physically too close to the women while working with them.

A vice-president of the riding Liberal association executive, Myra Leffler, then requested that Ms. Potapczyk meet with her and another executive member, Joan Hunter, to discuss the problems raised in the report. They did meet on December 12, 1982. The concerns expressed at this meeting

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by Ms. Potapczyk, as she testified, were that she felt that she had been abused by Mr. MacBain at the dinner and luncheon meetings, in terms of the complaints that he made about her, and that she was not being used actively or constructively in the office and generally not being given a chance.

Ms. Casucci testified that she and Mr. MacBain had a meeting with the Liberal executive for the constituency on January 10, 1983, when Mrs. Leffler and Mrs. Hunter told Mr. MacBain that they had had a meeting with Ms. Potapczyk and that she wanted to work, but was underworked, and that the other employees were overworked. When one of the executive members asked Mr. MacBain whether there was "something going on between you and Kris," Mr. MacBain

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- 29 replied,

"No, at least if I was getting that" (Transcript, Vol. 5, p. 654).

On January 18, 1983, Ms. Potapczyk said that Mr. MacBain asked her for dinner in the Parliamentary restaurant. Ms. Potapczyk declined, saying that she was trying to diet. Ms. Potapczyk testified that Mr. MacBain then suggested that they have dinner one night at her apartment for the purpose of talking about her job. She testified that Mr. MacBain said that it would be better than having dinner at the Parliamentary restaurant because they "fight too much" there (Transcript, Vol. 3, p. 365). This suggestion took Ms. Potapczyk off guard and she mentioned that she had an allergy appointment for

the next Monday, January 24. She testified that Mr. MacBain then suggested that she simply take the whole day off and make dinner that evening and he would come over. Ms. Potapczyk considered this to be a sexual advance, and she was scared and frightened. Ms. Paniccia confirmed in her testimony that Ms. Potapczyk had this perception of Mr. MacBain's invitation, Ms. Potapczyk having spoken to Ms. Paniccia about it following her discussion with Mr. MacBain (Transcript, Vol. 4, p. 463).

Ms. Casucci said that Ms. Potapczyk had telephoned her on January 21st about the dinner invitation, crying and

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- 30 upset, saying that Mr. MacBain had said "We can't talk about (your job) in the Parliamentary restaurant because you get too emotionally upset". She confirmed that Ms. Potapczyk felt very upset and threatened by the January 18 dinner invitation (Transcript, Vol. 5, pp. 652, 653).

Ms. Casucci previously had the impression that Mr. MacBain and Ms. Potapczyk were having an affair. She had arrived at that conclusion because Ms. Potapczyk had little to do, because Ms. Casucci had been forbidden to give her work, and because of what Mr. MacBain had suggested when he spoke with her in May, 1982. Indeed Ms. Casucci thought that this was the situation all along until Ms. Potapczyk told her on January 21, 1983, that she was frightened and offended by Mr. MacBain's suggestion of dinner at her apartment to discuss her job (Transcript, Vol. 5, pp. 650, 681).

However, Mr. MacBain had never before made an overt sexual proposition, if such this was, in the ten months of their relationship. Ms. Potapczyk testified that when Mr. MacBain suggested dinner at her apartment it "was in a tone that he hadn't used before." Mr. MacBain said that they would talk

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about this invitation further, but January 24th came and went without any further initiative by Mr. MacBain in respect of the suggested dinner together. Ms. Paniccia

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- 31 and Ms. Casucci both testified that Mr. MacBain had never suggested having dinner with either of them at their apartments (Transcript, Vol. 4, p. 464).

However, on January 25th, Mr. MacBain met Ms. Potapczyk in the House of Commons lobby to assign some work, and at that time he asked about the intended dinner engagement. Ms. Potapczyk responded by saying that she was engaged every evening that week, and asked if they could meet during the day to talk about her job.

Any social invitation in the evening by a male employer to a female employee, whether simply for the purpose of discussing business or not, is fraught with danger and evidences bad judgment at the least, when the employee is having problems (for whatever reason) in respect of her job functions. This is particularly so, when the employer, like Mr. MacBain, suddenly and drastically changes her duties, as he did in the next few days following her declining his dinner invitation on January 25th. The position

of the employee's authority implies a possible coerced socializing, an intimidation that compliance with the employer's invitation is, in effect, a condition of employment. Clearly, if the adverse changes in job function are a consequence of the refusal to meet socially, there is sexual harassment.

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Ms. Potapczyk testified that Mr. MacBain instructed her to receive dictation on January 26 and 27, and transcribe tapes from a dictaphone, even though she had no stenographic skills (other than being able to type somewhat) and had not been expected to do this as Special Assistant. As well, Linda Paniccia was present in the office and she normally performed all the secretarial and typist duties. In effect, Ms. Potapczyk was reduced to a secretary/typist role. Ms. Potapczyk said that in giving dictation Mr. MacBain would go too fast, even though she asked him to slow down. Further, he insisted that the letters be typed for his signature before the end of the day. Ms. Potapczyk testified that she heard that Mr. MacBain had said in reference to her "It was about time she learned how to do something" (Transcript, Vol. 3, p. 379). Ms. Paniccia confirmed the sudden change in Ms. Potapczyk's duties (Transcript, Vol. 4, pp. 465-467). Ms. Casucci also confirmed that Ms. Potapczyk's duties had been changed by Mr. MacBain at the end of January, 1983 (Transcript, Vol. 5, p. 663).

Ms. Potapczyk says that subsequent to January 18, Mr. MacBain spoke to her relatively infrequently, was more remote, and often ignored her. She said that he would come into the office and say hello to the other two women, but not to her. She said that she felt his negative attitude toward

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- 33 her

was because she had declined his dinner invitation (Transcript, Vol. 4, pp. 390, 391).

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Mr. MacBain had indicated to Ms. Casucci, unknown to Ms. Potapczyk, on February 17, 1983, that he was going to terminate Ms. Potapczyk's employment (Transcript, Vol. 5, p. 655, 657).

On March 15, 1982, Mr. MacBain approached Ms. Potapczyk in the office and asked her for dinner in the Parliamentary restaurant, but she declined, saying she had an appointment at 8:30 p.m., adding that she would be present in the office to see him until 8:00 p.m. Mr. MacBain responded that the matters he wanted to discuss with her could wait. However, the next day, March 17th, Mr. MacBain asked Ms. Potapczyk to come into his inner office and Ms. Potapczyk testified that Mr. MacBain said "he did not think things were working out between the two of us", that she did not pull her weight and that the other women felt this as well. She said that he also told her he might prefer to have a lawyer as a Special Assistant, given his position as Parliamentary Secretary to the Minister of Justice, which he had assumed in the fall of 1982. He also said that she was "a horrible worker" and that he wanted to have employees who liked him. Mr. MacBain told Ms. Potapczyk that he was not firing her but

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- 34 to



stay in the office and take her time in finding another job that suited her (Transcript, Vol. 4, pp. 394, 395).

On April 12th, Mr. MacBain asked Ms. Potapczyk how she was doing in finding another job, and she replied that she had made applications, but had not had any interviews.

On April 14th, Ms. Potapczyk was told that Mr. MacBain wanted to meet her downstairs outside the House of Commons. She was then told by him that he wanted her to resign as of the end of the month. When Ms. Potapczyk said that she was not resigning, she testified that Mr. MacBain replied that she was indeed "quitting" and "leaving". He said that he was not going to replace her, but for the sake of appearances if necessary would say that he needed a lawyer in the position. When asked about the quality of reference she might receive, Ms. Potapczyk testified that Mr. MacBain said, "I'll have to do the best I can" (Transcript, Vol. 4, pp. 402, 403). Mr. MacBain instructed Ms. Potapczyk to type a letter terminating her employment which she did (Exhibit #C-7), but which read simply "I hereby dismiss Kristina Potapczyk as of April 30, 1983". Mr. MacBain thought it to be too negative, and instructed her to type a new letter, which she did (Exhibit #C-8). It said merely that she would be "leaving (his) employ" and asked the Personnel Office to supply her with two weeks pay in lieu of

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- 35 notice.

Ms. Potapczyk was very upset, and returned to the office whereupon she informed the staff, and called a lawyer to represent her. The next day, April 15, 1983, Ms. Potapczyk wrote a letter to Mr. MacBain (Exhibit #C-9) which said, amongst other things, that she could "only conclude" that his decision to terminate her employment was:

"prompted by my lack of positive response to the suggestive comments made by you over the past year and climaxing with the "Let's have steak and wine in your apartment Kris, and talk about

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your job" - proposition made by you to me on January 18, 1983 and rejected by me as was the further "dinner suggestion" on March 15, 1983".

Ms. Potapczyk testified that she had first contacted the Canadian Human Rights Commission the week of March 21, 1983, with an appointment then set for March 30, but the Complaint (Exhibit #C-13) was not signed until April 27, 1983.

She had also learned from Linda Paniccia, after telling her about the dinner invitation of January 18th, that Ms. Casucci had had a conversation with Mr. MacBain in May, 1982 in which he had suggested that he had hired Ms. Potapczyk because he was "lonely" in Ottawa. (Transcript, Vol. 4, p. 411). Mr. MacBain had also said at the time of the Polish Christmas party to the other staff employees not

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"bother waiting up for us. Kris and I will be late coming in to the

office tomorrow morning" (Transcript, Vol. 4, p. 412), but this seemed intended as a comment in jest, at least as understood by Ms. Panaccia and Ms. Casucci (Transcript, Vol. 4, pp. 488, 489).

Ms. Potapczyk alleges in this hearing that Mr. MacBain had sexual designs in respect of her and that was the reason for her being hired as Special Assistant. She claims that this is why she was not assigned tasks normally done by a Special Assistant, and why she was not trained. She felt that she was placed in a vulnerable position so as to enable her employer to be able to proposition her successfully, as she thought he attempted to do January 18, 1983; and that when she rebuffed this proposition her job duties were reduced to a secretarial role, and ultimately her employment was terminated. Moreover, she complains that the work environment was hostile with unwelcome touching and physical contact which in itself constituted sexual harassment.

Ms. Panaccia had given Mr. MacBain a letter of resignation (Exhibit #C-14) on April 8, 1983, and left April 29, 1983 (Transcript, Vol. 4, pp. 503, 504). Her letter, in advance of Ms. Potapczyk's termination and Complaint, accords with Ms. Panaccia's testimony as to the

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of the employment environment in Mr. MacBain's office.

"When you engaged me in October of 1981 to come to Ottawa as a member of your House of Commons staff, I did not envision the depth of new knowledge and experience that was to follow. The resulting exposure to the activities on "the hill" has been very rewarding, and it has been an unforgettable period in my life. I am grateful and appreciative for the opportunity that you extended to me at that time.

However, as we are both fully aware, the promising opportunities of my first post university employment were soon to deteriorate into a most unpleasant experience. Although I joined your Ottawa staff with the background of two university degrees, I

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was promptly reduced to the status of a clerk typist the employment level at which you have restricted me for the past year and a half. In fact, when a higher level and better paying position became available in our office, I was not given an opportunity for advancement, instead I saw the job offer go to an outside person with lesser qualifications than I have, thereby destroying my ambitions and eliminating my motivations for the future. Moreover, for over one year, I have been witness to a totally unequal distribution of workload as a result of the hiring.

I'm sure that you have at all times understood my resentment towards certain of your personal methods in operating our office. Although my co-workers and I have shown you loyalty and respect, your attitude and conduct have been most distressing to me. In particular, I disapprove of your constant harassment of me in the performance of my duties, and specifically, the swearing and cursing

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regarding work completion, despite the fact that with the overabundance of work thrown at me at any given time, I have excelled at a far higher standard than is the norm in general office practice. As you are aware, I do not appreciate your innuendos and inferences regarding my physical attributes or those of my co-workers. Also, I continue to resent your adverse comments respecting certain aspects of my physical appearance; ie., your perception of my weight requirements. I consider this to be yet another form of the continuous office harassment directed at me by you. We have also been subjected to your attempts to deny employee benefits and privileges given to us by the House of Commons, regarding paid vacations, inflationary pay increases, and social functions, etc.

In general, the overall treatment of employees has, in my opinion, been one of a lack of intra-office leadership, direction, and the setting of a good example by you for staff to follow. I have had to continually contend with the matter of imprecise, vague directions from you as to work and individual tasks, inaccurate or misleading identification of assignments and individuals, and unclear written notes and verbal instructions. Just recently, another such occurrence happened as a result of many of the foregoing factors; something that could have been avoided with a little bit more thought on your part, prior to issuing what turned out to be misdirected and erroneous instructions. And, I resent the fact that you apparently place full responsibility for this occurrence on my shoulders. I would like to take this opportunity to state categorically that I was merely following your instructions to the letter, as witnessed by another staff member who fully supports my position."

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Ms. Paniccia impressed us as a very competent, hard working, and loyal staff member to Mr. MacBain and it is very unfair and unfortunate that she, and Nanda Casucci, who later resigned as well, were treated in the manner

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that they were.

Ms. Potapczyk had signed her Complaint (Exhibit #C-13) on April 27, 1983, at which time she was discussing a wrongful dismissal from employment claim with her solicitor. She found new employment that commenced May 2, 1983, and she settled the wrongful dismissal claim with Mr. MacBain, receiving ten weeks' salary (over and above the two weeks' salary that she had received at the time of termination) on or about June 1, 1983 (Transcript, Vol. 4, pp. 420, 421). Although Ms. Potapczyk's then solicitor (not Ms. Cornish) knew of the human rights Complaint, it seems that Mr. MacBain was not advised of it by Ms. Potapczyk or her solicitor at the time of settlement of the wrongful dismissal claim. Nor was Mr. MacBain told by Ms. Potapczyk's lawyer about the fact that Ms. Potapczyk had found other employment which commenced May 2, when he settled the wrongful dismissal claim about June 1, 1983 (Transcript, Vol. 4, pp. 421, 422, 424).

The issue as to whether there is a breach of the Canadian Human Rights Act is independent of the issues of wrongful dismissal, but it has been a matter of concern to us

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Mr. MacBain was not told before he entered into a settlement of the wrongful dismissal claim about both the Complaint having been made, and also of the fact that Ms. Potapczyk had found new employment as of May 2, 1983.

THE LAW.

It has been held that sexual harassment is a prohibited form of discrimination under s. 7 of the Canadian Human Rights Act. In the first of the federal harassment cases, Robichaud et al v. Brennan et al, both the Tribunal decision at (1982) 3 CHRR D/977 and the Review Tribunal decision at (1983) 4 CHRR D/1272 found harassment to be prohibited. This was followed by another Tribunal in Kotyk and Allary v. Canadian Employment and Immigration Commission and Chuba (1982) 4 CHRR D/1416, affirmed by the Review Tribunal at (1984) 5 CHRR D/1895.

These cases adopted a considerable body of law which has been developed in Ontario Human Rights tribunal decisions and American cases, exceedingly useful reviews of which are contained in Olarte et al v. DeFilippis and Commodore Business Machines Ltd. (1983) 4 CHRR D/1705 and Maria Giouvanoudis (nee) Makri v. Golden Fleece Restaurant & Tavern Ltd. and Steve Carras (1984) 5 CHRR 16 D/1967. Both the Federal Act and the Ontario Code, since the filing

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this complaint, have been amended to expressly include sexual harassment as a prohibited ground of discrimination.

The earliest case in Ontario is Cherie Bell v. Ernest Ladas and Flaming Steer Steakhouse Tavern Inc. (1980) 1 CHRR D/155, a decision of O.B. Shime in which he recognized not only the obvious and overt forms of discrimination on the basis of sex but indicated that there could be more subtle forms of conduct which would fall within the prohibited category. In para. 1389 he stated:

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"The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment..."

He also raised the caution that normal social intercourse between employer and employee is not and should not be prohibited.

That caution was affirmed in Aragona v. Elegant Lamp Co. Ltd. and Fillipitto (1982) 3 CHRR D/1109 when Professor Ed Ratushny said:

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"... sexual references which are crude or in bad taste, are not necessarily sufficient to constitute a contravention of Section 4 of the (Ontario) Code on the basis of sex. The line of sexual harassment is crossed only where the conduct may be reasonably construed to create, as a condition of employment, a work environment which demands an unwarranted intrusion upon the employee's sexual dignity as a man or woman. The line will seldom be easy to draw..."

[Emphasis added]

The concept of an affront to dignity was confirmed in Janice Howard and Edyth Broda v. Robert Lemoignan (1982) 3 CHRR D/1150 at para. 10164:

"This Board also agrees ... that an affront to the dignity of an individual resulting from different treatment because of that individual's sex constitutes discrimination."

The "negative psychological and emotional work environment" concept of the Bell case was further developed in Sucha Singh Dillon v. F. W. Woolworth Company Limited (1982) 3 CHRR D/743. Professor Cumming in that decision discussed in detail both the Bell case and that of Bundy v. Delbert Jackson, (1981) 641 F. 2d 934 (U.S. Court of Appeals). He drew an analogy between racial and sexual harassment with respect to the work environment and concluded in para. 6724:

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"...The atmosphere of the workplace is a 'term or condition of employment' just as much as more visible terms or conditions, such as hours of work or rate of pay. The words 'term or condition of employment' are broad enough to include the emotional and psychological circumstances in the workplace."

The Bundy v. Jackson case is the leading American authority and is of considerable assistance in the particular circumstances of this case. The court discussed the concept of a poisoned work environment and suggested that no tangible actions need to be taken against an employee for that employee to have suffered harassment. Nor is it always necessary to show resistance to the harassing conduct. Professor Cumming in his discussion of the Bundy case in Giouvanoudis supra concluded in para. 16904:

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"... sexual harassment that does not otherwise adversely affect the woman's employment may nonetheless be discrimination on the basis of sex, if it simply makes the work environment unpleasant."

That view of Bundy v. Jackson was confirmed in the Tribunal and Review Tribunal decisions in Robichaud supra and in the Tribunal decision of Mitchell v. Travellers Inn (Sudbury) Limited (1981) 2 CHRR 5390.

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The other principal area of harassment to be reviewed in this case is

that of enforced socialization. It has been variously described as forms of social contact such as invitations to dinner or as in the Kotyk and Allary case, supra, the embellishment of work-related travel with an employer's sexual agenda which the employee feels compelled to accept because she judges that her probation or her opportunities for advancement may be jeopardized if she refuses. This conduct, of course, must go far beyond the realm of flirtation to be considered harassment. And further, it must have clear negative employment consequences for the complainant.

The test to be applied in finding discrimination is based on the perception of a reasonable person. See, for example, Re Canadian Union of Public Employees and Office and Professional Employees' International Union, Local 491, 4 LAC (3d) 385, at p. 402:

"The Canadian Human Rights Commission guidelines of Autumn, 1981, suggest that sexual harassment occurs if 'a reasonable person ought to have known that such behaviour was unwelcome' ...

In applying such a 'reasonable person' test, the characteristics of that mythical being became very important, for the reasonable woman might well perceive conduct as offensive when the reasonable man would not. Even if the grievor failed, for a period, to reject the

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advances which she describes, the 'reasonable woman' would undoubtedly find the sexual propositions, the touchings, and the chasing around the desk as unwelcome and demeaning. Unless the woman employee clearly invites such advances, she should not be subjected to them in the workplace."

In Aragona supra, at para. 9762 the Board stated:  
"However, in the present case, the proven conduct was freely accepted and enjoyed by the other employees. In the circumstances,

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Aragona supra and Kotyk and Allary supra. At para. 12251 of the Kotyk decision, the Tribunal said:

"...The test of whether the advances are unsolicited or unwelcome is objective in the sense that it depends upon the reasonable and usual limits of social interaction in the circumstances of the case. The complainant should not need to prove an active resistance or other explicit reaction to the activity complained of, other than a refusal or a denial, unless such might reasonably be necessary to make the perpetrator aware

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that the activity was in fact unwelcome or exceeded the bounds of usual social interaction. It is likely that a single unrepeatable act is not harassment unless it results in the denial or removal of a tangible benefit available or offered to other persons in similar circumstances, or unless it amounts to an assault, or it is a

proposition of such a gross or obscene nature that it could be reasonably be considered to have created a negative or unpleasant emotional or psychological work environment. A 'normal' proposition or suggestion would probably not have this result. ... However, repetition of otherwise unactionable conduct may constitute harassment when it can reasonably be considered to have created a poisoned work environment."  
[Emphasis added]

#### FINDINGS.

Counsel urged that the evidence gives rise to the conclusion that Mr. MacBain's conduct fell within the legal principles set out above and amounted to sexual harassment. Accordingly, they submitted that the Tribunal should find discrimination against Ms. Potapczyk because of her sex in contravention of paragraphs 7 and 10 of the Canadian Human Rights Act. In support thereof, three theories were advanced by counsel:

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- 47 1.

The Grand Design Theory.

Ms. Cornish, on behalf of the Complainant, argued that Mr. MacBain had pursued Ms Potapczyk when she lived and worked in Niagara-on-the-Lake and eventually hired her for sex related purposes rather than because of any ability on her part to perform the job of Special Assistant. Given Ms. Potapczyk's inexperience in the political area and her training in a totally foreign discipline, Ms. Cornish argued that Mr. MacBain's motivation in hiring her was because of her sexual attractiveness. After she acceded to his urgings that she could nevertheless perform the job of Special Assistant despite her lack of qualifications, she moved to Ottawa in anticipation of assuming what she thought would be a challenging position.

He then embarked, so the theory goes, on a course of conduct which Ms. Cornish described as a "Jekyll and Hyde approach". He would follow a pattern of being alternately abusive and attentive. As to the former, he would not provide her with any responsible work, failed to train her as he promised to do, subjected her to insulting personal comments and alleged, falsely, that

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others had been critical of her work. Ms. Cornish submitted that his overall purpose in such behaviour was to make the Complainant more vulnerable, ultimately, to his sexual advances by impairing her ability to function. He thereby treated her

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than would have been the case if the employee had been a man.

We are not convinced on the evidence that Mr. MacBain ever had such a plan in mind either in hiring Ms. Potapczyk or in the manner in which he treated her while she was employed by him. His behaviour in this regard is open to various interpretations devoid of a sexual connotation. For example, it is not clear what qualities would best serve to make for a proficient Special Assistant. The fact that Ms. Potapczyk lacked political experience may not be of great importance so long as she had sufficient familiarity with Mr. MacBain's riding and constituents. Moreover, the erratic behaviour on the part of Mr. MacBain as an employer is consistent with his being a poor

administrator in the delegation of work, the ordering of priorities and the general handling of employees. The fact that he may lack proper managerial or personnel skills cannot lead us to the conclusion that, on the balance of probabilities, he allowed sex related motivations to govern his work relationship with the Complainant. There is not sufficient evidence before us to lead us to the inference put forth by Ms. Cornish that Mr. MacBain, either consciously or subconsciously, attempted to place Ms. Potapczyk in a position of psychological dependence whereby he would ultimately be able to take sexual advantage of her.

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- 49 2.

The Dinner Invitation.

Ms. Cornish and Mr. Juriancz also advanced the theory that in January of 1983 an attempt was made by Mr. MacBain at coerced social contact by seeking to arrange a private dinner at the Complainant's apartment for the ostensible purpose of discussing problems that she was encountering at work. She was cautioned that it be kept a secret from the other women in the office. After she indicated that she was busy and could not be present for dinner on that occasion and showed no desire to reschedule the private tête-à-tête, her job duties changed immediately and dramatically. Ms. Potapczyk was now called in by Mr. MacBain to take lengthy dictation even though she had no shorthand skills. She was also given tapes of dictation to transcribe, but she had no experience in using a dictation transcriber. In addition, she was given general clerk-typist duties - work which she had not been asked to do before and which had been the sole responsibility of Linda Paniccia. Accordingly, as argued by Ms. Cornish and Mr. Juriansz, the terms of employment of Miss Potapczyk were adversely changed in retaliation for her refusal to take up Mr. MacBain's invitation to a private dinner at her apartment. This, they submit, amounts to sexual harassment in that there is an attempt by Mr. MacBain at coerced socializing. Compliance with such socializing is made a term of employment and

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refusal to comply results in a loss of job or deterioration in the job conditions.

Although we agree with the concept that sexual harassment includes conduct which is in the nature of intimidation or reprisals that negatively affect an employee's position or benefits and which is administered merely because the employee declines to enter into a social relationship with a superior, we are not satisfied that there is sufficient evidence to demonstrate this infringement of the law in this case. Our reasons are three-fold:

(a) the new tasks that were assigned to Ms. Potapczyk by Mr. MacBain may have arisen by reason of Mr. Grigoroff's report to him that Ms. Potapczyk should be put to work;

(b) Mr. MacBain may have been outraged by Miss Potapczyk's complaint to the Liberal executive of his riding and he may



have lashed out in response to the executive's intervention in the matter;

(c) he may have concluded that he wanted Ms. Potapczyk to leave his employment because, in his view, she lacked the ability to perform

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as a competent Special Assistant and this was his awkward attempt to force her to resign.

We cannot condone any of the aforesaid motives if indeed they served as the catalyst for Ms. Potapczyk's newly assigned duties; but if in fact they were the reasons for Mr. MacBain's behaviour, they do not contravene the Canadian Human Rights Act. Such conduct may be crude and objectionable and may give rise to a cause of action for constructive wrongful dismissal outside of the jurisdiction of human rights legislation. Counsel argued, however, that we should draw adverse inferences against Mr. MacBain because of his failure to testify and therefore we should not speculate as to other reasons for his changing Ms. Potapczyk's duties. They urged us, therefore, to accept the interpretation that they posited. On the evidence, however, we cannot conclude on the balance of probabilities that Mr. MacBain punished Ms. Potapczyk by, in essence, demoting her for the reason that she declined his dinner invitation. Other factors might also suggest that Ms. Potapczyk's disinterest in a private dinner was not that important to Mr. MacBain. When the pre-arranged date for the dinner arrived, Mr. MacBain did not even mention it to Ms. Potapczyk and that date passed without comment. And yet counsel stressed that the date for the dinner invitation was

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great significance to Mr. MacBain. It is hard to believe that he would allow the opportunity to pass by without so much as raising it with Ms. Potapczyk at the relevant time if it was of such importance in his life.

### 3. Humiliating Environment.

It was submitted by counsel that the facts give rise to a conclusion

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that Mr. MacBain's conduct amounted to a form of sex discrimination since the women in Mr. MacBain's office were subjected to an uncomfortable and humiliating environment which would not have been the case had they been male employees. There is no question that he did subject them to physical closeness in a persistent fashion beyond that which was necessary for him to relate to his female staff in a professional way. This type of crowding was not welcome by the women. They found it uncomfortable and objectionable and although they did not expressly confront him over this conduct, their body language was such that any reasonable person observing the scene would have concluded that the women were being subjected to physical discomfort which they did not appreciate. It was obvious to Mr. Grigoroff who was such an observer and he felt it necessary to tell Mr. MacBain directly that he should refrain from such conduct. Mr. MacBain was expressly warned by

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Grigoroff that if he continued it would only get him into trouble. This admonition had no effect whatsoever on Mr. MacBain who continued as before.

It is well accepted that the nature of the workplace is a term of condition of employment and if an individual is subjected to physical or even psychological abuse or mistreatment because of his or her sex, then a wrong under the Canadian Human Rights Act has been committed. What has troubled us is the fact that all three women were intelligent, well-educated and assertive with respect to other grievances and complaints that they had against Mr. MacBain and yet none of the women raised this issue of closeness with him. For example, when Ms. Casucci felt that Mr. MacBain was having an affair with Ms. Potapczyk she was so troubled by it that she confronted Mr. MacBain; when Ms. Casucci and Ms. Paniccia found to be distasteful the odd goodbye kiss given by Mr. MacBain as they left the elevator for their apartment on separate floors of the same building in which they all resided, they asked him to stop and he did; Ms. Potapczyk herself confronted Mr. MacBain over issues relating to his failure to train her as promised and over the apparent criticisms that he said others had with respect to her work performance. There was little timidity about these matters. Yet, the practice of physical closeness was

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that they apparently endured with discomfort and without verbal objection. It is also of interest to note that no mention is made of this in Ms. Paniccia's lengthy letter of resignation in which she outlines in some detail the distressing and abusive conduct to which she claims she was subjected.

It is not necessary that women expressly object to their employer that they find the conduct distasteful as a pre-condition to their lodging a Complaint under the Canadian Human Rights Act. To insist upon such a requirement may serve only to create a worse situation for a woman who is already in a vulnerable position. A complaint may in certain circumstances be provocative and attract even more severe adverse conseq