

**FEDERAL COURT OF APPEAL CONFIRMS "REASONABLE WOMAN" TEST FOR
SEXUAL HARASSMENT**

Stadnyk v. Canada (Employment and Immigration Commission)
[2000] F.C.J. No. 1225 (F.C.A.P.)

Facts

The Appellant entered the public service of Canada in 1981 as a firefighter. When her employment was terminated, she alleged sexual harassment and wrongful dismissal. She was reinstated in 1988, and returned to her previous employment. During litigation involving the sexual harassment allegations, the Appellant was the subject of media attention, much of which she herself had sought.

In early 1989, the Appellant applied for the position of Public Information Officer with the Canada Employment and Immigration Commission (the "CEIC"). During her interview with the CEIC, the interviewer put to the Appellant two scenarios of sexual harassment and asked the Appellant how she would react to those scenarios. During the interview, the Appellant also revealed that she intended to write a book about her experience with sexual harassment in the public service.

The Appellant was not awarded the Information Officer position. She filed a complaint under the *Canadian Human Rights Act* (the "CHRA") alleging that she was harassed during her job interview and that she had been refused employment on the ground of her gender. The interviewer at the CEIC claimed that she asked the two questions regarding sexual harassment because the Appellant had applied for a position as Public Information Officer. In light of the publicity that the Appellant had sought in respect of her earlier sexual harassment allegations, the CEIC interviewer felt that if the Appellant were to suffer further sexual harassment and similarly make her allegations known in the media, this would conflict with her role as Public Information Officer. The main reason that the Appellant was not given the job was that the CEIC interviewer felt that the Appellant's book about sexual harassment in the public service would conflict with the duties of the position in question.

Canadian Human Rights Commission

The Commission concluded that sexual harassment could occur between members of the same sex, and went on to consider what is the proper test in law for sexual harassment. The Tribunal concluded that the appropriate test is the "reasonable woman." The often-applied "reasonable man" test is insufficient in the circumstances because what to a man may seem to be "normal" in personal relations, may be viewed as threatening by a woman.

On applying the "reasonable woman" test, the Tribunal concluded that the Appellant was not acting reasonably in her response to the interviewer's questions. Accordingly, the Tribunal dismissed the Appellant's complaint.

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Human Rights Review Tribunal

The Review Tribunal upheld the conclusion of the original Tribunal. Specifically, the Review Tribunal concluded that a public critic of the government could not be an effective and credible Information Officer. Further, the Review Tribunal found that the Appellant was not being asked to condone or tolerate sexual harassment, nor was she being denied recourse to internal public service procedures for addressing sexual harassment. The Review Tribunal concluded that the public service could ask an applicant for the position of Information Officer about possible conflicts of interest where the applicant had been openly critical of the government in the past.

Federal Court, Trial Division

The Trial Division dismissed the application for judicial review.

Federal Court of Appeal

The Federal Court of Appeal dismissed the appeal.

The standard of review at the Court of Appeal was whether the Trial Division properly exercised its powers of judicial review as defined by the *Federal Court Act*. The standard of review was correctness for questions of law, and patent unreasonableness for questions of fact. Neither test was met in this case.

In particular, the Federal Court of Appeal agreed that the proper test for sexual harassment is the "reasonable woman" test, where the complainant is a woman. The Court of Appeal agreed that there was no basis for any of the lower tribunals or court to find that a reasonable woman would perceive the questions asked in the interview as sexual harassment.