

**PRINCE EDWARD ISLAND HUMAN RIGHTS PANEL**

**File 1040-99**

**BETWEEN:**

**THE REVEREND GAEL MATHESON**

**COMPLAINANT**

**AND:**

**PRESBYTERY OF PRINCE EDWARD ISLAND  
AND OTHERS**

**RESPONDENT**

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**DECISION ON DAMAGES**

**Hearing Dates:** February 26 and 27, 2007

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**Panel Members**

**Commissioner Ann Sherman, Panel Chair**

**Commissioner Richard W. Montigny**

**Commissioner Anne Nicholson**

**Prince Edward Island Human Rights Commission**

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## **INTRODUCTION**

1. On August 23, 2006, the Panel released its decision on the merits of the complaint filed by Rev. Gael Matheson against the Presbytery of Prince Edward Island and Others. The Panel found that Rev. Matheson was subjected to a difference of treatment on the basis of gender.
2. The parties agreed that if the Panel found that Rev. Matheson's complaint had merit, a separate hearing on damages and costs would be conducted. This hearing was held on February 26 and 27, 2007.

## **PRELIMINARY MATTER OF JURISDICTION**

3. As a preliminary matter Mr William Lea, Counsel for the Respondent, raised the issue of jurisdiction. He submitted that the Panel lacked jurisdiction to hear this matter and make a determination on damages and costs. He made a motion that the matter be referred by the Panel to the Trial Division of the Supreme Court of Prince Edward Island, pursuant to section 28.3 of the PEI *Human Rights Act*, which reads as follows:

*28.3 A Human Rights Panel may, at any stage of the proceedings, refer a stated case under the Rules of Court to the Supreme Court Trial Division, on any question of law arising in the course of the proceedings, and may adjourn the proceedings until the decision is rendered on the stated case.*

4. Counsel for the Respondent submitted that the decision on judicial review of Justice Jenkins (*Matheson v. Human Rights Commission* 2003 PECTD 87), stated that the only acts and omissions covered by the *Human Rights Act* are those that occurred within the period beginning one year prior to the date of Rev. Matheson's complaint. That is to say, beginning February 13, 1997 and continuing thereafter.
5. Mr. Lea stated that it is the Respondent's position that because the Panel did not find any acts of discrimination on the part of the Respondent during the statutory period, the Panel is without jurisdiction to grant any remedies to the Complainant.
6. In answer to the Respondent's motion, Mr. Gregory Howard, Counsel for the Human Rights Commission, noted that the Respondent has already filed for judicial review of the decision on liability and among the issues raised is the jurisdiction of the Panel. He suggested that the hearing on damages and costs was the smallest part of a very long hearing and should the matter be referred to the court on a stated case, the court would most likely send the matter back to the Panel for its decision.
7. In his final submission, Mr. Howard discussed Justice Jenkins's decision on

judicial review and noted that Justice Jenkins, wrote about “ongoing employment issues” in his decision. It is Mr. Howard’s position that the Complainant’s damages flow from these issues.

8. Mr. Peter Ghiz, counsel for the Complainant, noted that the matter of jurisdiction had not been previously raised before the Panel. Mr. Ghiz stated that testimony about earlier incidents provide context in this matter and, therefore, must be considered when making a determination on damages. In his final submission, Mr. Ghiz noted that the crystallizing point in this case, the withdrawal of Rev. Matheson’s ministerial licence, is the last event in a sequence of events.
9. The Panel reviewed the case submitted by the Respondent’s counsel: *Re Prince Edward Island Retail Gasoline Dealers Association* (1981), 37 Nfld. & P.E.I.R. 46 (C.A.) This was a reference from the Public Utilities Commission, which had been requested by the Prince Edward Island Retail Gas Dealers Association to regulate, by order, the hours of operation of retail gasoline outlets in the greater Charlottetown area. The parties opposing the application disputed the jurisdiction of the Commission to hear the application.
10. Counsel for the Respondent submitted that this case states that where a question of jurisdiction arises before a Commission, the Commission shall submit the question to the court.
11. The Public Utilities Commission was a regulatory board whose functions were completely different from that of the PEI Human Rights Commission. The Public Utilities Commission was a licensing Commission, whereas the PEI Human Rights Commission has no licensing powers. The PEI Human Rights Commission serves to protect individuals or groups against discrimination as enumerated in the PEI *Human Rights Act*.
12. After reviewing the case and listening to submissions by all parties to this preliminary matter, the Panel respectfully disagrees and denies the Respondent’s motion requesting that the question of jurisdiction be referred as a stated case. The *Gasoline* case clearly states in the final paragraph that its ruling pertains to instances that may arise in the future where “a question of the jurisdiction of the Public Utilities Commission [emphasis of the Panel] is raised. The Panel finds that this statement is not appropriately applied to the PEI Human Rights Commission.
13. The parties provided the Panel with pre-hearing briefs and the Panel heard oral submissions from all parties at the conclusion of the hearing. The Panel has reviewed the submissions of all parties and this is our decision on remedy.

## **REMEDIAL AUTHORITY**

14. The Panel's authority to award remedies is established in s. 28.4(1)(b) and (6) of the PEI *Human Rights Act*:

### *28.4 (1) A Human Rights Panel*

...

(b) *subject to subsection (2), may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:*

(i) *to cease the contravention complained of;*

(ii) *to refrain in future from committing the same or any similar contravention;*

(iii) *to make available to the complainant or other person dealt with contrary to this Act, the rights, opportunities or privileges that the person was denied contrary to this Act;*

(iv) *to compensate the complainant or other person dealt with contrary to this Act for all or any part of wages or income lost or expenses incurred by reason of the contravention of this Act;*

(v) *to take any other action the Panel considers proper to place the complainant or other person dealt with contrary to this Act in the position the person would have been in but for the contravention.*

...

(6) *A Human Rights Panel may make any order as to costs that it considers appropriate.*

15. The aim of human rights legislation is to “make whole” the victim of the discrimination. The Supreme Court of Canada in *Robichaud v. Canada (Treasury Board)* (1987), 8 C.H.R.R. D/4326 (SCC) has articulated that employers are responsible for all discriminatory acts committed by their employees and

supervisors in the course of employment. However, an employer may reduce its liability for damages if it responds promptly and effectively to an employee's concern by applying a sexual harassment policy.

16. The Panel notes that courts have also stated that it is important to make whole the victim but not to over-compensate an individual who has experienced discrimination. The Federal Court of Canada in *Chopra v. Canada (Attorney General)* 2006 FC 9, at para. 42 stated as follows:

*A corollary of this principle of restoring the victim to his/her rightful place is that the victim is not overcompensated - that human rights awards do not result in unrealistic or windfall compensation. Such a result would otherwise undermine the integrity of the strong social justice purpose of the legislation.*

17. The Panel has considered this corollary in awarding its damages. In this case, the damages will appear to be large, however, it is important to recognize that the damages flow across a rather long time period. The Panel is of the opinion that it is not a windfall, regardless of the amount, when a complainant is fairly compensated for proven losses which have accumulated over a period of years.
18. The Panel has also considered the Complainant's duty to mitigate. In *Canada (Attorney General) v. Morgan* (1991), 21 CHRR D/87 the Federal Court of Appeal confirmed that it is the responsibility of the complainant to make efforts to reduce the amount of her loss by making reasonable efforts to find alternate employment. The duty to mitigate will be dealt with more completely later in the decision.
19. Finally, the Panel accepts that the common law principle of reasonable notice does not apply to the case at hand. As noted in *Morgan, ibid*, a human rights complaint is different from a wrongful dismissal action, which deals with a lack of proper notice or a contravention of the terms of a contract. Therefore, the Panel acknowledges that this is not a case where the employer need only compensate for a period of reasonable notice.

## **REMEDIES SOUGHT**

### **Submissions of the Complainant**

20. Counsel for the Complainant submitted that she was seeking the following:

1. The release of her ministerial licence;
2. Loss of past income from the date she stopped receiving her salary and benefits to present, plus interest;
3. Loss of future income to age 65, the date of her planned retirement; or
4. In the alternative, reinstatement to a Charge within the Presbyterian Church in Prince Edward Island or some other position acceptable to her;
5. Reimbursement of the under-funding of her pension;
6. Payment of the amount that her travel allowance/reimbursement was underpaid;
7. Damages for the discrimination that she endured;
8. Damages for pain and suffering arising from the emission of noxious fumes into the Manse; and
9. Reimbursement of her legal costs.

### **Submissions of the Respondent**

21. The principal submission of the Respondent is that no remedy ought to be awarded to the Complainant because none of the acts of discrimination occurred within the statutory period outlined by Justice Jenkins in his decision on judicial review. Therefore, the Respondent submits that the Panel is without jurisdiction to grant a remedy.
22. Further, the Respondent submitted that the Panel does not have jurisdiction to order the release of the Complainant's license; any amounts for the education allowance, the Complainant's underfunded pension, or travel allowance; an award for interest; an award for costs; or other out-of-pocket expenses.
23. The Respondent also made submissions in the alternative, that if the Panel did

have jurisdiction to proceed to award damages flowing from the discrimination, the Respondent submitted the following would be an appropriate remedy:

1. Loss of one year's income in the amount of \$43,852.00;
2. General damages in the amount of \$5,000.00;
3. Simple, not compound, interest at the Canada Savings Bond rates;
4. Costs, on a party-and-party basis, in the amount of \$54,000.00.

### **PANEL DECISION ON NON-MONETARY REMEDIES**

24. The powers of the Panel, as outlined in s. 28.4 of the *Act*, are quite broad. Section 28.4(1)(b)(v) directs that a Human Rights Panel may “take any other action the Panel considers proper to place the complainant...in the position the person would have been in but for the contravention.” This provision must be interpreted liberally in order to comply with the remedial intention of the legislation. The Supreme Court of Canada has held on numerous occasions that the correct approach to the interpretation of human rights legislation is a large and liberal one: see *Insurance Corporation of B.C. v. Heerspink* (1982), 3 C.H.R.R. D/1163 at D/1166; *Ontario Human Rights Commission v. Simpson-Sears Ltd.* (1985), 7 C.H.R.R. D/3102 at D/3105; *Action travail des femmes v. Canadian National Railway Company* (1987), 8 C.H.R.R. D/4210 at D/4224.

### **The Release of the Complainant's Ministerial Licence**

25. The Respondent claims that to order the reinstatement of the Complainant's ministerial licence would be contrary to the *Charter of Rights and Freedoms*, however, the Panel does not agree with this analysis. In our view, the withholding of Rev. Matheson's licence is an administrative function by a self-governing body, rather than a matter of freedom of religion. This case concerns the duty of an employer to an employee under the PEI *Human Rights Act*.
26. Rev. Matheson's licence was withdrawn following a ruling from the 123<sup>rd</sup> General Assembly of the Presbyterian Church of Canada in 1996. Her licence was to be held pending her completion of personal and professional counseling to be arranged by the PEI Presbytery.
27. Rev. Matheson refused to attend counseling. In her testimony she stated that she felt the process would be flawed and she did not trust the Presbytery or

- have faith in the Rev. Bert Van Cook, who was to arrange for the counseling. She said that he was not supportive, he made a comment about her behaving like a battered woman, and he made the motion at Presbytery, on November 22, 1996, to sever her tie with her Charge.
28. The Panel noted in its decision in this case that while there was un-contradicted evidence that several male ministers had their pastoral ties severed “there is no evidence that the male ministers had their licences suspended by Presbytery.”
  29. The withholding of Rev. Matheson’s pastoral licence has meant that she has been unable to work as a Minister in the Presbyterian Church in Canada or in other Churches.
  30. The Panel orders the Presbytery of Prince Edward Island to release Rev. Matheson’s ministerial licence.

### **Letter of Apology**

31. The Panel orders that the Respondent provide the Complainant with a letter of apology for the discriminatory treatment she experienced while employed as the Minister of the Murray Harbour North Charge. This letter of apology shall address the findings of discrimination as outlined in the Panel’s decision on liability, dated August 22, 2006. The letter of apology shall be reviewed and approved by the Panel.

### **Letter of Reference**

32. The Panel orders the Respondent to provide the Complainant with a positive letter of reference, which details the duties she performed while she was a minister. The letter of reference shall be reviewed and approved by the Panel.

### **PANEL DECISION ON MONETARY AWARDS**

33. The Panel considered the Complainant’s entitlement to monetary awards and sets out its analysis under the headings listed below.

### **General Damages**

34. The Complainant requested an award for general damages in the amount of \$75,000.00. The Panel recognizes that the appropriateness of an award for general damages is determined by a number of factors. Further, it acknowledges that there is no statutory maximum for general damage awards in this jurisdiction.

35. We accept the criteria as set out in *Wigg v. Harrison*, 1999 Carswell NS 491, [which applied the test as set out in *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 (Ont. Bd. of Inquiry)], which should be considered when awarding damages in cases of sexual harassment. The criteria are as follows:

**a) The Nature of the Harassment**

The Panel's decision on liability found that the Respondent discriminated against the Complainant on the basis of sex by its response to the anonymous letters she received while a minister with the Presbyterian Church. Further, it found that the Respondent failed to take the appropriate steps to resolve the stalking and sexual harassment and failed to provide a workplace free from discrimination. Therefore, we find that the nature of the harassment was both verbal and physical.

**b) The Degree of Aggressiveness and Physical Contact in the Harassment**

The evidence at the hearing on liability indicated that Elmer MacPherson regularly drove by the Manse or called the Manse looking for Rev. Matheson. The Panel recognizes that stalking is a criminal offence. In this case, the Complainant was persistently pursued, and therefore, we find the nature of the harassment was quite aggressive.

**c) The On-Going Nature or Time Period of the Harassment**

Evidence provided during the liability hearing indicated that Elmer MacPherson harassed Rev. Matheson on the basis of her gender, starting in 1987 and continuing until his conviction under the *Criminal Code of Canada* in 1991. She received the harassing letters during the same time period.

The harassment and its consequences, continued until the Complainant had her

ministerial licence removed in 1996. The effects of the harassment permeated and affected every aspect of the Complainant's life.

**d) The Frequency of the Harassment**

The evidence heard at the liability hearing indicated that Elmer MacPherson regularly drove by the Manse or called the Manse looking for Rev. Matheson. The evidence also indicated that several harassing letters were sent to the Complainant. The Panel acknowledges that the incidents may have occurred during limited time frames but we also recognize that there were a lot of negative consequences which flowed from these acts.

**e) The Age of the Victim**

At the time of the harassment, Rev. Matheson was a young, new minister in the community. When she started her ministry in the community, she was 33 years old. The Complainant is now 60 years of age and the Panel finds that the discrimination she experienced deprived her of a significant part of her career and calling as a minister.

**f) The Vulnerability of the Victim**

Rev. Matheson was a young woman, attempting to fulfil her ministry in her first Charge. She was the minister of a four point Charge in a rural area and lived alone in the church Manse. The efforts she made to attempt to get help resulted in her being held responsible by the Church.

**g) The Psychological Impact of the Harassment upon the Victim**

There can be no doubt that there was a psychological impact upon Rev. Matheson. The evidence demonstrated that the harassment, and the Respondent's lack of response to it, contributed significantly to the deterioration of the relationship between Rev. Matheson and her Charge.

Her employment was derailed and the consequences which flowed from the

harassment resulted in her being removed from her Charge in 1996. In addition, Rev. Matheson was forced to deal with the blame for the incidents and the deterioration of the pastoral relationship being placed on her.

The Panel accepts the statement in *Hill v. Misener* (No. 2), June 9, 1997 [CHRR Doc. 97-215 at s 31-21] (N.S. Bd. Inq.), an unreported case which states the following:

*In a physical injury, damages in the range of \$2,000 to [sic] represent an extremely minor physical problem which resolves quickly. People who sustain minor physical injuries do not question who they are, they do not question their self-worth, they do not question their value as human beings. An injury to one's self-respect, dignity and self-worth is an injury that is far more destructive and painful and takes a longer time to heal than a minor physical injury.*

*General damage awards which have not properly applied the compensatory principals do not reflect the serious nature of discrimination and fail horribly to uphold the principles which have been established by human rights legislation.*

36. In general, Rev. Matheson testified that the publicity surrounding her human rights complaint, the subsequent judicial reviews, and the hearing have continued to damage her reputation and impair her ability to work. She gave evidence of two occasions when she heard that these matters were responsible for her not being successful in obtaining employment.
37. She also testified that parents withdrew their children from piano lessons because of the publicity surrounding the allegations of sexual interference with the children in the Gaelic Choir. Rev. Matheson found this to be extremely hurtful and upsetting.
38. Rev. Matheson's hurt and humiliation has increased over the past 10 years from the time when her tie was severed and her licence withheld. When she started to seek restitution, she became increasingly humiliated as many of the details of what had transpired within the four point Charge became public.
39. Rev. Matheson has suffered hurt and humiliation as a result of having her livelihood taken away from her and beyond that, she feels she is a woman who has a calling. She knew she wasn't welcome in the Murray Harbour North Charge but she fought back, becoming increasingly litigious and formal in her submissions to various courts of the Church, because she wanted to continue in

her ministry. The ultimate damage to the Complainant occurred when the Church she had grown up in and wished to minister within removed her ability to make a living or follow her calling.

40. The concept of pain and suffering is discussed in *Bushey v. Sharma (No.2)* (2003), 48 C.H.R.R. D/136 (Canadian Human Rights Trib.), a sexual harassment case. We agree with the following statement of the Canadian Commission at paragraph 140 of its decision and find that it shares a common thread with and is applicable to the matter before us:

*There is no question that the respondent's harassment of the complainant caused a major disruption in her life and significantly affected her well-being. She testified as to the effect that his behavior had on her emotional state, which included bouts of crying, a growing impatience with work colleagues and others, a pronounced fear of coming into contact with the respondent and a sense of violation and embarrassment. Several of the witnesses were well acquainted with the complainant. They testified as to how independent and strong willed the complainant was prior to the respondent's harassment, and how her temperament worsened demonstrably during the course of the period when she was harassed. Her performance at her job also deteriorated as a result of the stress she was experiencing and the measures that she adopted to avoid coming into contact with the respondent.*

41. The Panel was provided with case law on damage awards from all parties. We carefully reviewed the submissions placed before us and have determined that this is a complaint which warrants a larger amount of general damages. The Panel finds support for this premise in the case of *Quereshi v. Toronto (City) Board of Education* (2006), 51 C.C.E.L. (3d) 285. In this case, a teacher brought a complaint of discrimination against a school board. This decision was appealed to the Ontario Superior Court of Justice (Divisional Court) and the damage award upheld. At paragraph 62, the Court states as follows:

*With respect to the general damage figure of \$25,000.00, we disagree with the Board's suggestion that the award should be*

*reduced. The award of \$25,000.00 is entirely justified given the impact of the discrimination upon the Appellant, over a five-year period, and the findings of fact of the Tribunal. The Tribunal cites precedent for this amount in Bubb-Clarke v. Toronto Transit Commission, [2002] O.H.R.B.I.D. No. 6 (Ont. Bd. of Inquiry).*

42. Further, in the case of *Abouchar v. Metropolitan Toronto School Board* (1999), 35 C.H.R.R. D/175, an Ontario Board of Inquiry set out the authority for higher awards of general damages in cases which become very public. The Board stated at paragraph 26 of its decision:

*Nonetheless, in making an award of this quantum, I am taking into account the fact that the circumstances surrounding the discrimination and the treatment of Mr. Abouchar's application in both competitions, were public and even notorious events within the French language community of Toronto at the time...There is support in the case law for awarding a higher amount of general damages when a complainant is publicly humiliated by the experience of discrimination: Morgan v Canada (Armed Forces) (1989), 10 C.H.R.R. D/6386 (Can. Human Rights Trib.) (para. 45273).*

43. The discrimination that Rev. Matheson endured took place over a long period of time and the Complainant is still being affected to this day by the consequences of trying to seek a resolution in this matter. It is clear to the Panel that Rev. Matheson has endured public humiliation that will stay with her for the rest of her life.
44. Accordingly, the Panel finds the Complainant is entitled to \$50,000 in general damages.

#### **Damages for Pain and Suffering - Emission of Noxious Fumes into the Manse**

45. The Complainant has claimed \$10,000 for the pain and suffering she endured as a result of the fumes emitted from the furnace in the Manse. Medical records for the Complainant were tendered into evidence indicating that she suffered from nausea and headaches.
46. While these medical records do provide proof that the Complainant was not well, the Panel was not provided with a method to quantify this except by way of an award for general damages.

47. Further, the Panel finds that there is insufficient evidence that gender discrimination caused the release of noxious fumes. Therefore, the Panel declines to award an amount for damages for pain and suffering related to the Manse.

### **Loss of Past Income**

48. If a complainant has left or has been removed from her employment because of discrimination experienced in the workplace, she is generally entitled to compensation for loss of income. However, this is subject to the Complainant's duty to mitigate.
49. Rev. Matheson claims that she is entitled to compensation for her wage loss, amounting to the income that she would have earned from the time her pastoral tie was severed to the present day. She also submitted evidence as to the income that she did earn during this time, which she acknowledges is to be deducted from her claim for income loss.
50. Counsel for the Respondent had submitted that no remedy, including loss of income, should be awarded in this matter because the Panel lacks the jurisdiction to make such an award. The Panel disagrees and has dealt with the issue of its jurisdiction earlier in this decision.
51. Alternatively, counsel for the Respondent submitted that the Complainant failed to discharge her duty to mitigate her losses. Accordingly, he submitted that because she should have been able to find suitable employment within a year, an appropriate amount for loss of income would be one year's stipend and taxable allowance (\$43,852.00).

### **Duty to Mitigate**

52. In reviewing the claim of damages for lost wages, the principle followed by the Panel was to restore the complainant to the position she would have been in had the discrimination not occurred. However, in making an award for lost wages, the Panel was required to consider the Complainant's duty to mitigate.

A description of the duty to mitigate, which has been enunciated in many cases, is found in *McGregor on Damages*, 14<sup>th</sup> edition at p.150:

*1) The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to*

*him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.*

53. The Panel heard testimony from Rev. Matheson that she attempted to mitigate her losses by applying for work other than in the ministry. She stated that she applied for professional, educational, musical, clerical and unskilled work. Rev. Matheson submitted additional evidence of her search for work, to be found at Exhibit 184. This consisted of job advertisements for positions she had applied for, some job application letters, documentation regarding the piano lessons she taught, and her application to be a substitute teacher. However, none of the employment Rev. Matheson obtained was full-time.
54. Rev. Matheson testified that she taught piano in Souris and in three locations in Charlottetown. She applied unsuccessfully for numerous positions: a veterinary assistant position; a customer service manager position at Indigo; a sales position at Sober's Music; a clerical position with the Federal Government of Canada; a position at the University of Prince Edward Island ("UPEI") teaching history; a position at UPEI teaching English as a second language; a clerical position at UPEI; a chaplaincy position at UPEI; and positions at the UPEI and Confederation Centre libraries.
55. She stated she was successful in obtaining work playing the organ at St. John's Anglican Church in Milton in 1999 but was unsuccessful in applying to play the organ at St. Andrew's United Church in Vernon Bridge in 2001. However, she received an organist position at St. Andrew's in 2004. She states she lost this position because of the publicity generated by her human rights hearing. She was successful in obtaining very limited employment as a substitute teacher and did some tutoring.
56. Rev. Matheson testified that the publicity surrounding her complaint, the subsequent judicial reviews, and the hearing all impaired her ability to work. She told the Panel that when she applied for a position in the Chaplaincy Centre at UPEI, a member of the Selection Committee told her that her human rights complaint was taking too long and needed to be resolved before she could be hired.
57. The Panel considers that Rev. Matheson's age increasingly contributed to her inability to obtain employment. There was no evidence presented that indicated she was discriminated against based on her age, however, the Panel recognizes that age is often a factor considered (illegally) when evaluating an individual's prospects for success in obtaining employment.

58. The Supreme Court of Canada in *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, held that the onus falls on the defendant to prove that an employee has failed to take reasonable steps to mitigate his losses. This principle has been supported by numerous decisions, including *Morgan v. Canada (Armed Forces)* (1991)13 C.H.R.R. D/42. The onus has also been succinctly described in Levitt on the *Law of Dismissal in Canada*, at p. 234 as follows:

*The onus is on the employer to prove, first failure to mitigate on the employee's part and, secondly, that the employee would have found another comparable position if one had been searched for.*

59. The Panel notes that the Respondent did not call any witnesses at the hearing on damages. The only statement made by the Respondent as to the Complainant's efforts to mitigate her damages is contained in Respondent counsel's Submissions on Damages and Costs. As the Respondent did not tender any evidence, the Panel cannot find that it satisfied its onus to prove failure to mitigate on the Complainant's part or that she would have found another position had she searched.
60. The Panel, however, did consider the scope of Rev. Matheson's search for employment. The Complainant testified that she did not look outside of Prince Edward Island because she did not want to leave the Province due to her need to instruct legal counsel and deal with her human rights complaint. The Complainant testified that while she applied for other secular positions, she felt that she had a calling and her vocation was to be a minister. She said that her ministry is her life and that every aspect of her life has been adversely affected by her inability to pursue her vocation. Rev. Matheson said that she would not abandon her calling. She said her call precludes her from any occupation outside of the ministry.
61. The Complainant was willing to return to work full-time in a ministerial capacity, however, the Panel determines that she did not adequately pursue other full-time work opportunities outside of the ministry. The Panel finds that the Complainant did not completely fulfil her duty to mitigate and, accordingly, reduces the Complainant's award for loss of past income by a factor of 10%.

### **Calculation of Past Loss of Income**

62. The 1997 Basic Stipend and Allowance Schedule, marked as Exhibit 157, contains the rates of pay applicable to Rev. Matheson for the years 1997 to 2005. Included in the basic stipend is an amount for Sunday travel and a housing allowance.

63. We accept the Complainant’s submissions with regard to her stipend and taxable allowance for the years 1997 to 2005. We accept the proposed annual 3% increase on the allowance. The figures prepared by the Complainant’s counsel were not disputed by the Respondent, however, we have completed our own calculations as to total lost income as there appeared to be some mathematical errors in the submissions. As amounts were not available for the 2006 year at the time of the hearing, we have estimated the amount for the stipend as indicated in the table below. We note that the stipend amounts increased, on average, by 2% each year and accordingly, applied a 2% increase to the 2005 stipend. For the 2006 Allowance, we again employed counsel’s factor of 3%.

<b>Year</b>	<b>Stipend</b>	<b>Taxable Allowance</b>	<b>Total Lost Income</b>
1997	\$ 25,572	\$ 18,280	\$ 43,852
1998	\$ 26,152	\$ 18,828	\$ 44,980
1999	\$ 26,732	\$ 19,393	\$ 46,125
2000	\$ 27,312	\$ 19,975	\$ 47,287
2001	\$ 27,892	\$ 20,574	\$ 48,466
2002	\$ 28,472	\$ 21,192	\$ 49,664
2003	\$ 29,052	\$ 21,827	\$ 50,879
2004	\$ 29,632	\$ 22,482	\$ 52,114
2005	\$ 30,212	\$ 23,157	\$ 53,369
2006	\$ 30,816	\$ 23,852	\$ 54,668
<b>TOTAL</b>	<b>\$ 281,844</b>	<b>\$ 209,560</b>	<b>\$ 491,404</b>

64. The Complainant testified that she received some income during the time period for which she is claiming lost income. Counsel for the Complainant provided information relating to the income the Complainant earned in his Final Submissions on the Damages and Costs. The Panel adopts the figures submitted by counsel for the Complainant and notes that these numbers were not refuted by the Respondent. Accordingly, the Panel deducted the earned income of the Complainant in each year from the Total Income (reduced by the mitigation factor of 10%) she would have received. Further, the Panel estimated the 2006 income earned by the Complainant as it was not available at the time of the hearing. The Panel took an average of years 2003, 2004, and 2005 and determined that \$2,155.00 would be a reasonable amount to allot to the Complainant’s income for 2006. These calculations are indicated in the table below:

<b>Year</b>	<b>Total Lost Income (reduced by 10%)</b>	<b>Income Earned by the Complainant</b>	<b>Total Lost Income Awarded</b>
1997	\$ 39,467.00	\$ 0.00	\$ 39,467.00
1998	\$ 40,482.00	\$ 0.00	\$ 40,482.00
1999	\$ 41,513.00	\$ 2,210.00	\$ 39,303.00
2000	\$ 42,558.00	\$ 2,800.00	\$ 39,758.00
2001	\$ 43,619.00	\$ 3,575.00	\$ 40,044.00
2002	\$ 44,698.00	\$ 0.00	\$ 44,698.00
2003	\$ 45,791.00	\$ 1,496.00	\$ 44,295.00
2004	\$ 46,903.00	\$ 3,189.00	\$ 43,714.00
2005	\$ 48,032.00	\$ 1,781.00	\$ 46,251.00
2006	\$ 49,201.00	\$ 2,155.00	\$ 47,046.00
<b>TOTAL</b>	\$ 442,264.00	\$ 17,206.00	\$ 425,058.00

Accordingly, the Panel awards \$ 425,058.00 for lost income.

### **Reinstatement**

65. The Complainant wishes to continue her vocation as a minister, therefore, the Panel finds that reinstatement is an appropriate order. The Panel orders the Respondent to find an alternative Charge for the Complainant.
66. The Panel has ordered that Rev. Matheson's licence be returned to her, however the nature of ministerial work and the damage to Rev. Matheson's reputation by the discrimination and its subsequent effects within the Murray Harbour North Pastoral Charge, the Presbytery and the community at large may make it unrealistic that a Charge on Prince Edward Island would be willing to accept her as its Minister. If an acceptable Charge cannot be found, then the Panel orders the Respondent to find employment for the Complainant within the Presbyterian Church of Canada. The salary for any position offered to the Complainant

pursuant to this order shall be commensurate with the salary she would be earning as a minister.

### **Education Allowance**

67. An amount of \$500 per year is provided to ministers as an education allowance. The Panel understands that if not used by the minister, this allowance cannot be carried over for more than two years. To award an educational allowance to the Complainant for each year would be speculative as there was no evidence presented that would support this. Therefore, we grant an amount of \$1,000, representing two years of lost education allowances.

### **Travel Allowance Reimbursement**

68. The Complainant claimed \$3,998.90 for the alleged shortfall in the reimbursement of her travel expenses. Counsel for the Complainant acknowledged in his final submissions that she has no documents to support her claims. The Panel denies the claims for reimbursement of travel expenses. It is our position that without any evidence to support the shortfall, we are unable to make an award for reimbursement.

### **Out of Pocket and Medical Expenses**

69. The Panel's authority to award expenses incurred by reason of the contravention of PEI *Human Rights Act* is established in s. 28.4 (1)(b)(iv). This section is reproduced earlier in this decision.
70. The Panel has reviewed the documentation submitted by the Complainant during the course of the hearing on damages. After a careful examination of the documents, we determine that an appropriate amount to award for out-of-pocket and medical expenses is \$ 5,000.00.

### **Under-Funded Pension Claim**

71. The Complainant has claimed an amount for the under-funding of her pension by the Respondent. The Panel understands that there has been a determination by the Ontario Pension Commission and as such, declines to make an award based on the under-funding of the Complainant's pension.
72. The Complainant's evidence is that she has not received the payment despite the

determination of the Ontario Pension Commission. The Panel notes that during his final submissions, Counsel for the Respondent stated that if the pension was underfunded, the Respondent would make the payment to the Complainant. While we make no order with regard to the reimbursement of her pension underpayment, we encourage the Presbytery to abide by the statement made by their Counsel.

### **Lost Pension Contributions**

73. The Complainant's submissions relating to the Respondent's pension contributions have not been refuted. Therefore, the Panel accepts the figures provided by her counsel which indicate that the Respondent would have contributed \$1,830 for each year of work. The Complainant has claimed \$25,422.00 for present valued lost pension contributions for 16 years of work. This amount anticipates an award for future wages and not a reinstatement to the ministry. Therefore, as the Panel has ordered reinstatement, it must determine the amount of lost pension contributions to date.
74. The Panel notes that counsel for the Complainant used two financial websites<sup>1</sup> to assist with the calculation of lost pension income to age 65. We also used these websites to calculate the lost pension contributions based on past lost income. Based on the Complainant being reinstated, she will have 11 years of lost contributions instead of the 16 calculated by her counsel. Our calculations, using the financial websites indicated, result in a present value of \$17,810.00.
75. The Panel notes that because we reduced the lost income by a mitigation factor of 10%, it is necessary to reflect this reduction in the lost pension contributions. While recognizing that this is not an exact calculation, the Panel finds it appropriate to reduce the amount of \$17,810.00 by 10%. Therefore, the Panel awards \$16,029.00 for lost pension contributions.

### **Gross-Up for Income Taxes**

76. The Panel recognizes that due to the quantum of the award for damages, the Complainant will be faced with a large tax burden. Courts and tribunals have allowed for a party to be awarded an amount to cover the additional income tax burden that will be incurred as a result of receiving a lump sum in one tax year. The Panel refers to a decision of the Canadian Human Rights Tribunal, *McAvinn v. Strait Crossing Bridge Ltd.*, 2110 CanLII 7954 (C.H.R.T.) at paragraphs 209 and

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<sup>1</sup> [www.investopedia.com](http://www.investopedia.com) to calculate the future value of an annuity  
[www.moneychimp.com](http://www.moneychimp.com) to calculate the present value

210 as follows:

*[209] The Commission and the complainant ask the Tribunal to provide for a gross-up amount to compensate for the tax consequences of receiving a lump sum in one year.*

*[210] Given that the task of the Tribunal is, insofar as possible, to put the complainant in the same position that she would have been in but for the discriminatory conduct of SCBL, the Tribunal is of the view that it would be unfair to Ms. McAvinn if she was to suffer a more onerous income tax burden by reason of receiving a lump sum than she would have incurred had the monies been paid to her as salary over the period extending from June 1, 1997 to the present day and beyond.*

77. Accordingly, the Panel orders the Respondent to pay to the Complainant an amount that is sufficient to cover the additional income tax liability that she will incur because she is receiving a lump sum award for her lost wages.

### **Legal Costs**

78. The Complainant is claiming legal expenses incurred as a result of the discriminatory actions of the Respondent. In his submissions on damages on behalf of the Complainant, Mr. Ghiz sought costs in the amount of \$161,921.00.
79. The Panel has fairly broad powers pursuant to s. 28.4 of the PEI *Human Rights Act*, which has been cited earlier in the decision. The Panel can make an award for expenses incurred by reason of the contravention of the *Act*; can take any other action it deems appropriate to place the Complainant back in the position she would have been in but for the discrimination; and may make any order as to costs that it considers appropriate.
80. In *Administrative Law in Canada*, 3<sup>rd</sup> ed. (Butterworths, 2001), Sara Blake states at pp. 114-115:

*A tribunal that has a discretion to award costs may not arbitrarily refuse to award costs in all cases. It must exercise its discretion in each case on the basis of relevant factors.*

*An award of costs should provide partial indemnification for the cost of participating in the proceedings. The amount of costs should be reasonable and should be on a party-and-party scale except in exceptional circumstances. When fixing costs, a tribunal should explain how it arrived at each amount awarded.*

81. The Panel has considered the Complainant's claim for costs. It finds that the costs that are appropriate for it to consider are those relating to the human rights hearing on liability and this subsequent hearing on damages. The costs claimed for the work of Margaret Best are not directly tied to these proceedings and as such, the Panel declines to make an award of costs for her account. The Panel notes that there was an assessment conducted by the Prothonotary of the Supreme Court of PEI relating to Ms. Best's account in 2004. The costs associated with the judicial reviews have been dealt with by the Supreme Court of Prince Edward Island.
82. The Panel has considered Mr. Ghiz's client ledger, included in his final submissions. We find that it is appropriate to consider the legal services provided between November 7, 2003 and October 15, 2006. This is the point from which the legal work for the Panel Hearing on liability began, with the Court's order that the matter shall be remitted to the Human Rights Commission. The client ledger concludes with the finalization of submissions and documents for the hearing on damages. Accordingly, the Panel feels that it is appropriate to award costs on a party-and-party scale based on the amount of \$102,310.50 plus applicable taxes. The Complainant shall also be awarded the full amount for the disbursements which appear on Mr. Ghiz's client ledger.

### **Interest**

83. Interest shall be payable in respect of all of the monetary awards made by the Panel in this decision. The interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank Rate (monthly series) as set by the Bank of Canada from time to time. The interest shall run to the date of payment.

### **ORDER**

84. The Panel orders the Respondent to do the following:
  1. Release the ministerial licence of the Complainant;

2. Provide the Complainant with a letter of apology to be approved by the Panel;
3. Provide the Complainant with a letter of reference to be approved by the Panel;
4. Pay \$ 50,000.00 to the Complainant for general damages;
5. Pay \$ 425,058.00 to the Complainant for loss of past income;
6. Reinststate the Complainant to a ministerial position or other employment position acceptable to her;
7. Pay \$1,000.00 for loss of educational allowance;
8. Pay \$ 5,000.00 to the Complainant medical and out-of-pocket expenses;
9. Pay \$17,810 to the Complainant for present valued lost pension contributions;
10. Pay to the Complainant an amount sufficient to cover any additional income tax liability;
11. Pay to the Complainant costs on a party-and-party scale based on the amount of \$102,310.50 plus applicable taxes. The Complainant shall be awarded the full costs of all the disbursements listed on the tendered client ledger.
12. Pay simple interest on all monetary awards, calculated as indicated. The interest shall run to the date of payment to the Complainant.

**Dated this 31<sup>st</sup> day of May, 2007**

Signed: Ann Sherman  
Ann Sherman, Panel Chair

Signed: J. A. Nicholson  
Anne Nicholson, Member

Signed: Richard W. Montigny  
Richard W. Montigny, Member

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