SEXUAL HARASSMENT: MANITOBA'S STEP BACKWARD
A Case Comment on Govereau and Janzen v. *Platy Enterprises Ltd.*

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I. Introduction

While sexual harassment is as old as women's history, it is only in this last decade that the Canadian legal system has begun to recognize it as a prohibited form of activity under human rights legislation. No doubt the emerging social and political status of women in North America is an influential factor. But legal precedent had finally emerged, slowly but firmly establishing that sexual harassment is a barrier to equality of opportunity and thus is a cause of action under human rights and equal rights statutes.

Manitoba appeared to be part of that evolutionary movement until November 19, 1986 when the Manitoba Court of Appeal handed down its decision in *Govereau and Janzen* v. *Platy Enterprises Ltd.*.[1] Rejecting an apparently unanimous chain of authorities from Boards of Adjudication, superior courts and appellate courts in various jurisdictions in Canada, as well as appellate courts and Supreme court decisions in the United States, the Manitoba Court of Appeal held that the sexual harassment of two female waitresses by a male cook who had supervisory authority over them, did not constitute sex discrimination. They further held that a corporate employer is not responsible for the acts of discrimination of any of its employees unless it could be shown that the discrimination was pursuant to the employer's policy or had clearly been ratified by the employer. Finally, in the event discrimination could be proven within the meaning of *The Human Rights Act*,[2] damage awards were to be severely limited, the suggestion being that they not exceed $1,000 against an individual respondent and $5,000 against a corporate respondent.

This decision is a serious setback for women in this province (who are still more likely to be the ones in subordinate and hence vulnerable positions while their male counterparts are more likely to hold positions of power and authority). Should the decision be upheld in the Supreme Court of Canada and be followed in other jurisdictions, it will be a regressive step for human rights across the nation. The following critique will examine why this would be a negative development.

II. Sexual Harassment as a Form of Sex Discrimination

In a dramatic departure from precedent, Mr. Justice Huband began his judgment with the cryptic comment:

> I am amazed to think that sexual harassment has been equated with discrimination on the basis of sex. I think they are entirely different concepts. But adjudicators under human

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1. (1987), 43 Man. R. (2d) 293 (Man. C.A.).
2. *The Human Rights Act*, S.M. 1974, c. 65, C.C.S.M. H175.

> rights legislation, legal scholars and writers and jurists have said that the one is included in the other.[3]

His brother, Mr. Justice Twaddle agreed that "It is nonsense to say . . . that harassment is discrimination."[4]

If I can attempt to summarize the collective reasoning behind the Court of Appeal's refusal to view sexual harassment as a discriminatory practice, it is this: Human rights legislation is aimed at "discrimination in the generic sense" (i.e., against women as a group).[5] "Sex" for the purpose of the legislation means gender in the strictest sense and not individual physical attractiveness or "sex appeal."[6] The sexual nature of harassment does not mean that a woman selected for harassment was so selected because of her gender. Thus, except in rare instances where sexual harassment is directed at *all* women as a means of achieving a discriminatory purpose (e.g. termination of employment of all women), it is not sex discrimination.

It is interesting to note that this line of reasoning was put forward in many of the earlier American cases, often coupled with a similar argument to the effect that a victim of sexual harassment is not penalized because of her sex but because she rejected the sexual advances of her supervisor. Both arguments were ultimately rejected.[7] Mr. Justice Huband also alluded to the second argument that the corporate President's conduct did not constitute sexual harassment because, among other things, the sexual overtures had stopped either before or immediately after the women had complained to him.[8] Not only did Huband J.A.ignore the adjudicator's findings of fact that Philip (the corporate President) had directly participated in the negative repercussions to the victims following the rejected advances, but he also failed to see the penalization by the employer or supervisor as part of the sexual harassment itself. Catherine McKinnon points out the fallacy of this line of reasoning:

> . . . to say that a woman is fired not because of her sex but because she refuses to have sex with her male superiors or by the same token to tolerate his unwanted sexual advances is like saying that a black man was fired not because he was black, but because he refused to shuffle for his white superiors.[9]

In each case, the employee refused to conform to the demeaning stereotype imposed by the employer on persons of one sex or race and suffered the negative consequence precisely because she refused to so conform.

As indicated, the American courts (where the issue of sexual harassment was a matter of considerable litigation) ultimately rejected the arguments that have been advanced by the Manitoba Court of Appeal.

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3. *Supra*, note 1 at 295.
4. *Ibid.* at 319.
5. *Ibid.* at 301.
6. *Ibid.* at 319 per Twaddle J.A.
7. See, for example, *Williams* v. *Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) rev'd on other grounds *sub nom. Williams* v. *Bell*, 587 F. 2d 1240 390 F. Supp. 161 (D. Ariz. 1975). More recently *Bundy* v. *Jackson*, 641 F. 2d 934 (1981) (U.S.C.A.); *Meritor Savings Bank* v. *Vinson*, 106 S. Ct. 2399 (1986).
8. *Supra*, note 1 at 43.
9. Catherine McKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1978) at 189.

Thus, in *Bundy* v. *Jackson*, the U.S. Court of Appeal, referring to an earlier decision, stated:

> . . . we heard arguments there that whatever harm the victim suffered was not sex discrimination, since her supervisor terminated her job because she had refused sexual advances, not because she was a woman. We rejected those arguments as disingenuous in the extreme. The supervisor . . . made demands on her that he would not have made on male employees. 'But for her womanhood . . . participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation was to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy . . . [D]iscrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination.[10]

It should be noted that "sex" here is used precisely in the context of "gender."

More recently, in June 1986, five months before the Manitoba Court of Appeal's ruling in *Govereau and Janzen*, the United States Supreme Court unanimously affirmed that sexual harassment of a nature which created a hostile or abusive working environment, was sex discrimination. It was a violation of Title VII, even where no economic benefits were affected.[11] In so ruling, Justice Rehnquist for the court adopted a broad interpretation of the statutory provisions, stating:

> The phrase 'terms, conditions or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment.[12]

The fact that all women employed by the bank under the supervisor's authority were not harassed does not appear to have been determinative in the Supreme Court's decision.

The line of reasoning adopted by the Manitoba Court of Appeal to the effect that the women were victimized simply because they were personally attractive to the cook, also appears to have been rejected, either expressly or by implication, by a unanimous chain of Canadian authorities. By way of example, a Review Tribunal under the Canadian *Human Rights Act* in *Jane Kotyk; and Barbara Allary* v. *Canada Employment and Immigration Commission and Jack Chuba*, demonstrated the contrary line of reasoning. Quoting Constance Backhouse:

> Whether or not the attention is directed solely at one individual, so long as it is sex-based, it is discriminatory. Womanhood is the *sine qua non* of the sexual harassment. But for her femaleness, the victim of sexual harassment would not have been propositioned; she would not have been requested to participate in sexual activity if she were a man.[13]

Similarly, an adjudicator from British Columbia demonstrated the fallacy of the "some but not all" objection to sexual harassment as sex discrimination:

> Although it might be thought that sexual harassment would not amount to sex discrimination unless all employees of the same gender were equally recipients of it, that is fallacious. So long as gender provides a basis for differentiation, it matters not that further differentiation on another basis is made. An analogy would be a complaint of sex discrimination against

10. *Supra*, note 7 at 942.
11. *Supra*, note 7.
12. *Ibid.* at 2404.
13. (1983) 5 CHRR D/1895 upheld (*sub nom. Jack Chuba* v. *Canadian Human Rights Tribunal*) Nov. 1984, F.C.A.D.

> an employer who decided to dismiss all of his married female employees but none of his male employees and none of his unmarried female employees. The decision would affect one group adversely—female employees—even though it would not affect every member of that group. Similarly, an employer who selects only some of his female employees for sexual harassment and leaves other female employees alone is discriminating by reason of sex because the harassment affects only one group adversely.[14]

The primary legal concern about sexual harassment is that such conduct creates an artificial barrier for a particular employee or group of employees of one gender which is not placed before employees of the other gender.

Mr. Justice Huband characterized those decisions which recognize this concern as "creative interpretations" that have "gone too far" in stretching the meaning of discrimination under human rights statutes. He said if legislators wished to prohibit sexual harassment in the workplace, they are quite capable of saying so in clear and explicit terms.[15] He was even critical of the Parliament of Canada for doing so by equating harassment with discrimination, claiming it was a "torturing of the Queen's English" to do so.[16] It is respectfully submitted that the question is not one of language in this case but one of analytic reasoning. To justify his restrictive interpretation of Manitoba's *The Human Rights Act*, Huband J.A. relied on the fact that the legislatures of Ontario, Quebec and Newfoundland and the Canadian Parliament have all taken steps to amend their legislation to specifically define and prohibit sexual harassment. It is, however, significant that the decisions in these jurisdictions prior to the amendments were unanimous in concluding that sexual harassment was a form of sex discrimination. As several adjudicators point out, the amendments were intended to clarify and educate, not to change the interpretation of the legislation.[17]

The Court of Appeal's narrow interpretation of the legislation is particularly surprising and disturbing in light of the guidelines to interpreting human rights legislation which were mandated by the Supreme Court of Canada in *Ontario Human Rights Commission et al.* v. *Simpson Sears Ltd.*[18] and in *Craton* v. *Winnipeg School Division No. 1.*[19] In *Craton*, the Supreme Court of Canada recognized human rights legislation as fundamental and the rights protected thereunder as fundamental. In addition, in the *Simpson Sears* case, the Court clearly sanctioned a broad and purposive interpretation of human rights legislation as remedial legislation so as to achieve the public policy of equality of opportunity in our society. The Manitoba Court of Appeal has clearly failed to give Manitoba's *The Human Rights Act* such a broad and purposive interpretation.

III. Corporate Liability

At Adjudication,[20] Adjudicator Yude Henteleff found Grammas the cook and Platy Enterprises, his employer, jointly and severally liable on two grounds. Henteleff concluded on the facts that Grammas was a "person acting on behalf of the employer" within the meaning of section 6(1) of

14. *Zarankin* v. *Johnstone* (1984), 5 CHRR D/2274, 2276.

15. *Supra*, note 1 at 24.

16. *Ibid.* at 13.

17. *Supra*, note 14 at 2276-77. More recently, see *Boehm* v. *National System of Baking Ltd.* (1987), 8 CHRR D/4110 *per* Peter A. Cumming, Q.C.

18. (1985), [1985] 1 S.C.R. 536, 64 N.R. 161.

19. (1985), [1985] 2 S.C.R. 150, (*sub nom. Winnipeg School Division No. 1* v. *Craton*) [1985] 6 W.W.R. 166.

20. (1985), 6 CHRR D/2735 (Board of Adjudication).

The Human Rights Act. In addition, he found that Grammas was part of the "directing mind" of the corporation, and as such, the corporation was responsible for his conduct. On both grounds, there was clear evidence on which to base these conclusions of law. Philip (the President of the corporate Respondent) himself testified that Grammas was in charge of the restaurant in his absence on most evening shifts; he controlled the waitresses' hours of work (and hence their income); he had authority to deal with customer complaints; and most significantly, he admitted telling the waitresses that Grammas could fire them. "I thought that the girls had to have somebody to be kind of afraid of or respect or whatever."[21]

The Court of Appeal rejected both these grounds and exonerated Platy Enterprises of any corporate liability for the actions of Grammas or for Philip's part in not ensuring that the workplace was free from sexual harassment, given that he was aware of the situation. Huband J.A. found that Grammas' "strange and amorous pursuits" were of a purely personal nature and that Grammas was no more than a co-worker who happened to be cooking on the evening shift. One is mindful of the comments of Mr. Justice Monnin who heard the initial appeal at the Queen's Bench. He noted that findings of fact "should not be lightly overturned" by appellate courts. The Adjudicator had found that Grammas exercised managerial authority in the operation of the restaurant and that he was authorized by Philip to do so. While Huband J.A. characterizes Grammas as a mere co-worker, the Adjudicator's findings of fact (which should not be lightly overturned) indicated that Grammas was definitely not perceived by the waitresses to be a co-worker; that he did not behave as a co-worker; that the perception that he was the boss was encouraged by Philip; that the power and authority this gave him was abused; and that Philip, once he knew of the situation, did not discourage it. These circumstances in themselves should have been sufficient for the Court of Appeal to find that Grammas was part of the directing mind of the corporation when he exercised his delegated authority, or that, at the very least, he was "a person acting on behalf of an employer." In addition, because Philip, who unquestionably was the directing mind of the corporation, knew of Grammas's conduct and did little or nothing to discourage it, his conduct in itself ought to have rendered the corporate Respondent directly liable for Grammas's acts of sexual harassment.

The Court of Appeal, while accepting the organic theory of corporate liability as applicable to human rights cases, appears to have applied it too narrowly in the facts of this case. Huband J.A. rejects Grammas as a directing mind of the corporation simply because he was not an officer or director or person in a senior management position and (as he finds) exercised no managerial responsibilities. Given the clear findings of fact that Grammas did exercise certain managerial responsibilities, it is submitted that few adjudicators or judges would have restricted the ambit of the organic theory of corporate liability in the manner of our Court of Appeal. For example, in *Olarte* v. *Commodore Business Machines Ltd.*, Peter Cumming found a corporation responsible for the acts of sexual harassment by one of its supervisors. In doing so, he writes:

21. (1986) 7 CHRR D/3309, D/3314 (Man. Q.B.).

> It seems to me that, generally speaking, whenever an employee provides *some* function of management, that he is then part of the "directing mind."[22] (emphasis added)

In *Brennan* v. *R.*,[23] Mr. Justice MacGuigan of the Federal Court of Appeal, in a dissenting opinion, examines the organic theory and its application in the more stringent area of criminal law. With reference to both superior and appellate court decisions, he concludes that where there is evidence of a delegation of authority to a servant "*in a particular area of responsibility*, he is the directing mind and will of the corporation *in that area* so as to render it criminally liable for his acts . . . even when the servant is acting entirely for his own behalf."[24] On the less strict standard of balance of probability, given Grammas' particular area of delegated authority over the waitress, Adjudicator Henteleff appears to have applied the organic theory properly.

Aside from the organic theory, both the Adjudicator and Mr. Justice Monnin of the Queen's Bench found the corporate Respondent vicariously liable for Grammas's conduct. However, the Court of Appeal refused to follow suit, stating that there was nothing in the legislation which would justify an employer's vicarious liability for an employee's actions unless the employee acted pursuant to the employer's discriminatory policy. For this extremely narrow interpretation of the legislation, the Court of Appeal relied on *Re: Nelson et al. and Byron Price and Associates Ltd.*.[25] However, in doing so, the Court of Appeal failed to consider some important differences between the B.C. legislation and the Manitoba legislation. First, that case concerned an award of "aggravated damages" under paragraph 17(2)(c) of the B.C. *Human Rights Code* which required evidence that "the person who contravened the Act" did so "knowingly or with a wanton disregard."[26] The Court in *Nelson* held that this wording necessitated a personal contravention. Unlike paragraph 17(2)(c) of the B.C. Code, subsection 28(2) of Manitoba's *The Human Rights Act*[27] allows for awards "against the party who contravened the Act" without any requirement of knowledge or wanton disregard. More significantly, however, subsection 6(1) is substantially broader than the provision of the B.C. Code which was at issue in *Nelson*. It provides that "no employer *or person acting on behalf of an employer*" (emphasis added) shall discriminate in employment.

Finally, it is important to note the broader social policy reasons for recognizing a form of employer liability in human rights legislation which goes beyond the narrow reasoning of the Manitoba Court of Appeal. On hearing the appeal of *Brennan* v. *R.*,[28] the Supreme Court of Canada recently ruled that an employer was liable under *The Canadian Human Rights Act* for the actions of a supervisor who had sexually harassed a female employee.

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22. (1983) 4 CHRR D/1705 upheld by Divisional Court.
23. (1985), [1985] 2 F.C. 799, 6 CHRR D/2695 (F.C.A.D.), rev'd on appeal to the Supreme Court of Canada, (*sub nom. Robichaud and the Canadian Human Rights Commission* v. *R.* (29 July 1987), 19326/19344 (S.C.C.).
24. *Ibid.*, D/2708-9.
25. (1981), 122 D.L.R. (3d) 340 (B.C.C.A.).
26. R.S.B.C. 1979 c.186.
27. *The Human Rights Act*, S.M. 1974 c.65, C.C.S.M. H175.
28. *Supra*, note 23.

The Court examined the purpose and intent of human rights legislation and concluded that its remedial objectives of removing discrimination and redressing socially undesirable conditions would be stultified if the words were given a narrow interpretation and human rights remedies were not available as against the employer. In the words of Laforest J., writing for the Court:

> [O]nly an employer can remedy undesirable effects; only an employer can provide the most important remedy—a healthy work environment. The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the Act's carefully crafted remedies effective. . . . if the Act is to achieve its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.[29]

The Court found it unnecessary to attach a label to this type of statutory liability but indicated it served a purpose similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions.

IV. Damages

The Board of Adjudication had originally awarded damages "in respect of feelings or self-respect" pursuant to paragraph 28(1)(d) of *The Human Rights Act* in the amount of $3500 to Janzen and $3000 to Govereau, exclusive of individually calculated lost wages. Mr. Justice Monnin of the Queen'sBench had reduced these awards to $1000 and $1500 respectively "in the context of damages in law as a whole."[30] The Court of Appeal concurred with the reduction and took the opportunity of emphasizing the guideline it had proposed for damages in human rights cases in its earlier decision in *Dakota Ojibway Tribal Council* v. *Bewza and Kotyk*.[31] The Court there had suggested that an award in damages was essentially punitive in nature and that therefore the quantum should be limited to $1000 maximum for individuals and $5000 maximum for corporations which are the maximum fines in a prosecution under *The Human Rights Act*.[32]

This attempt to limit damage awards appears to have no statutory basis or legal precedent. Furthermore, it ignores the fact that the primary purpose of damages under human rights legislation is to compensate the victim, not to punish the offender. In sexual harassment cases where the psychological injury is often severe, limiting the award as suggested by the Court of Appeal, will frequently necessitate ignoring the extent of the harm suffered by the victim.

As recently pointed out by Helen Orton of the National Steering Committee of the National Association of Women and the Law:

> [I]t is particularly important that redress under human rights legislation realistically compensate the victim for the financial and emotional costs of discrimination because the courts have already decided that such legislation effectively removes the right to sue for damages.[33]

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29. *Ibid* at 10.
30. *Supra*, note 21 at D/3314.
31. (1985), [1986] 2 W.W.R. 225, 37 Man. R. (2d) 207 (Man. C.A.).
32. *The Human Rights Act*, S.M. 1974, c. 65, C.C.S.M. H175.
33. Helena Orton, "Harassment Decision Can Have Devastating Effects," *Canadian Human Rights Advocate*, Vol. III, No. 2, 2.

V. Further Initiatives and Conclusion

Evaluation of human rights legislation and of the legal theory behind it is, for all intents and purposes, a very new development and understandably antedates many of the individuals on the Bench today. It has therefore been suggested that educating the judiciary about equality issues is a critical task.[34] It may be that the development of law in this area will depend on judges learning to appreciate the impact of sexual harassment as a barrier to equality of opportunity. With such awareness, there will be less inclination to view harassment in the workplace as a mere personal frolic, but rather as a clear manifestation of sex discrimination.

Commenting on the *Govereau and Janzen* decision at a recent conference of the Manitoba Bar Association, Mr. Paul Moist, a representative of the labour movement, noted that historically the efforts of labour unions at the bargaining table have out-paced legislators in this country.[35] He noted that the recent Manitoba Court of Appeal decision placed a heavier onus on the labour movement to negotiate specific contract language to prohibit sexual harassment, to heighten the awareness of their membership, and ultimately to lobby the legislature for legislative amendments that would once more recognize sexual harassment as a prohibited activity.

Indeed, for the vast majority of workers who remain non-unionized, the only realistic solution, unless the Supreme Court overturns this decision, is an amendment to current legislation. Following the Court of Appeal's decision, the Attorney-General of Manitoba, The Honourable Roland Penner, Q.C., announced that the government will amend *The Human Rights Act* to specifically prohibit sexual harassment. In keeping with that promise, Bill 47, a new *Human Rights Code,* was introduced in the last session of the Legislature and passed this July. The new *Code,* once proclaimed, will not only prohibit general harassment with respect to all of the enumerated grounds covered therein (including sex) but will also explicitly prohibit any unwanted sexual solicitation or advance.

While it appears Manitoba will likely follow the example of Ontario, Quebec, Newfoundland, and the Parliament of Canada and clarify prohibitions against discrimination by explicitly including harassment in the concept, it is regrettable that such steps are necessary to make legally visible that which is all too self-evident to its victims.

Also unfortunate is the fact that the new *Human Rights Code* is not the ultimate solution for a large portion of the population. Since the new *Human Rights Code* is not retroactive, it will not provide a remedy for numerous victims who have filed and will continue to file complaints prior to the new legislation coming into effect. For these victims, and for those in other jurisdictions who rely on general sex discrimination prohibitions for protection against sexual harassment, it is particularly reassuring that

34. *Ibid.* See also Jill Goodman, "Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go," (1981) *Capital University Law Review* 445 at 469.

35. Paul Moist (National Representative for Canadian Union of Public Employees), Notes to Speech at Man. Bar Assoc. Conference, Jan. 26, 1987.

the Supreme Court of Canada has recently granted leave to appeal the *Govereau and Janzen* decision. This fact alone, suggests that, despite the views expressed by the Court of Appeal, sexual harassment is a matter of real and national significance.