EMPLOYER'S LIABILITY FOR SEXUAL HARASSMENT

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I. Introduction

"I am amazed," said Huband J.A., "to think that sexual harassment has been equated with discrimination on the basis of sex. I think that they are entirely different concepts."[1] "It is nonsense," said Twaddle J.A., "to say that harassment is discrimination."[2] What human rights commissions and advocates feared in 1978 has now come to pass in Manitoba. The reasoning in *Bliss* v. *A.G. Canada*[3] has now been extended to the interpretation of human rights legislation. One suspects that human rights adjudicators, legal scholars, writers and jurists will view the opinions of the Manitoba Court of Appeal in *Janzen and Govereau* v. *Platy Enterprises Ltd.*[4] with even greater amazement than was felt by Huband J.A. That view will be warranted, for the opinions in the *Janzen* case run counter not merely to several,[5] but to a great many decisions of adjudicators under human rights legislation, several arbitration decisions, and opinions of courts both at first instance and upon appeal, in Canada and the United States of America.[6]

The facts in *Janzen* were as follows. The complainants had both been waitresses at one of the three restaurants owned by Platy Enterprises Ltd. in Winnipeg. Both complained of a similar pattern of sexual harassment by Tommy the cook. Dianna Janzen was employed at the restaurant from late August until the end of October, 1982. After a few uneventful weeks, Tommy began to bother her. His attentions took the form of touching various parts of her body at unexpected moments and often at times when, due to her duties, she was unable to fend him off. When she protested, he would laugh it off. Eventually, he "got the message." His physical harassment of her stopped, but he then began to make life extremely difficult for her, as a cook can do for a waitress who depends on him to provide orders on a timely basis. He continued to pick on her. Eventually she quit her job, but not before attempting to discuss the problem with Philip Anastasiadis.

Philip was a director of the company, and its president. He managed the restaurant at which the complainants worked, and was responsible, *inter alia*, for the hiring, discipline and discharge of employees. He also did the cooking and supervised the first shift. Tommy the cook was in charge during the evening shift, from 5 p.m. until midnight. When Philip was not

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1. *Janzen* v. *Platy Enterprises Ltd.* (1986), [1987] 1 W.W.R. 385 at 390, 43 Man. R. (2d) 293 (Man. C.A.) [hereinafter Janzen cited to W.W.R.].
2. *Ibid.* at 422. Matas J.A. did not participate in the judgment.
3. (1978), [1979] 1 S.C.R. 185, 92 D.L.R. (3d) 417, 23 N.R. 527, [1978] 6 W.W.R. 711 [cited to D.L.R.].
4. *Supra*, note 1.
5. As suggested by Huband J.A., *ibid.* at 394.
6. As Huband J.A. appears to acknowledge later in his judgment, *ibid*, at 401.

present, Tommy supervised the restaurant, and could decide whether or not to send employees home early. He had no authority to hire or fire, but Philip encouraged the waitresses to believe that, in his (Philip's) absence, Tommy had such authority. There was no evidence that Philip was even present when Tommy engaged in sexual harassment of staff members, or that he approbated such conduct. However, when Ms. Janzen attempted to speak to him about it, he put her off before she even had a chance to indicate the nature of her complaint, saying: "If it is about Tommy, I can't do anything about it."[7] He then left. Two weeks later she again raised the matter with Philip and, having received what she described as an unsympathetic response, decided to resign. According to Philip, she gave her notice of resignation before raising the complaint.

Philip testified that he did in fact speak to Tommy, who denied the validity of the complaint. Philip also alleged that he had called a staff meeting to inquire of the other waitresses whether they had had similar experiences or had similar complaints. However, the adjudicator did not find him to be a credible witness and rejected his evidence on both points.

The second complainant, Tracy Govereau, joined the staff of the restaurant in the middle of October, 1982. After approximately a week, Tommy began a pattern of sexual harassment very similar to that which had recently ended with Ms. Janzen — a variety of sexual advances, attempted kisses, pats, hugs and suggestive remarks, all of which, according to the findings of the adjudicator, Tommy knew or ought to have known were unwanted. Tommy persisted in his aberrant conduct despite forceful objections. Near the middle of November, after discussing the matter with another waitress, Ms. Govereau complained to Philip. His response, according to Ms. Govereau, was to blame her for what had taken place. He gave her the feeling that he did not take the complaint seriously. Philip denied that any such meeting took place but, again, the adjudicator did not believe him. Ms. Govereau's evidence that a meeting took place was corroborated by an independent witness whom the adjudicator found to be totally credible.

Although Philip denied any knowledge of Ms. Govereau's complaints until after she had left her employment with Platy Enterprises, and stated that, as a result, he had not talked to Tommy about them, the physical harassment by Tommy did cease when the complaint was made. It was replaced, according to Ms. Govereau, by a campaign of mental harassment conducted both by Philip and Tommy. There were complaints about the quality of her work, including rudeness to customers, which eventually led to her dismissal. Philip gave her two weeks' notice, but Ms. Govereau ceased working for the company three days later. Again, the adjudicator preferred the evidence of Ms. Govereau and another waitress which indicated that the criticisms of Ms. Govereau's work were not justified.

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7. *Janzen* v. *Platy Enterprises Ltd.* (1985), 6 C.H.R.R. D/2735 At D/2756 (Man. Bd. of Adjudication); see also *supra*, note 1 at 391.

Both Ms. Janzen and Ms. Govereau brought complaints under section 6 of the *Manitoba Human Rights Act*,[8] alleging discrimination upon the basis of sex. Tommy the cook did not give evidence at the adjudication hearing. He had long since disappeared from the scene. Since the six month limitation period had expired, it would have been too late to claim against Philip in his personal capacity. As Huband J.A. observed,[9] the whole point of the exercise was to fix the corporate employer with responsibility for Tommy's behaviour. The Board of Adjudication[10] found Tommy and the corporation jointly and severally liable, on grounds which will be discussed in due course. The Board awarded each of the complainants lost wages and general damages as compensation for the psychological harm (i.e., injury to feelings and loss of self-respect) which each of them had suffered. The board also required the employer to submit a written undertaking to comply with the provisions of section 6 of the *Human Rights Act*, and to establish and maintain in all of its restaurant premises a program designed to ensure freedom from sexual harassment.

Upon appeal,[11] Monnin J. upheld the finding of corporate liability for the actions of Tommy, but reduced the amount of damages for injury to feelings and self respect. He deleted from the board's order the requirement that the employer provide a letter of undertaking. Although the order was reasonable and one with which the respondent should have wished to comply, it was outside the scope of subsection 28(2) of the *Act*. He also rejected the contention that the adjudication process was *ultra vires* because it offended section 96 of the *Constitution Act, 1867*. The employer appealed from this decision. The complainants, in turn, cross-appealed the reduction in the quantum of damages and the deletion from the board's order of the requirement that Platy undertake to adopt a program to facilitate an harassment-free atmosphere in its workplaces.

Hence there were four issues before the Court of Appeal, namely:

(i) Did the sexual harassment constitute discrimination under the *Manitoba Human Rights Act*?

(ii) Was the company liable for Tommy's conduct?

(iii) Was the decision of the board of adjudication *ultra vires* insofar as it offended section 96 of the *Constitution Act, 1867*?

(iv) Were exemplary damages appropriate in this case?

This article shall deal only with points (i) and (ii).

8. S.M. 1974, c.65, C.C.S.M. H175.

9. *Supra*, note 1 at 390.

10. Yude M. Henteleff, *supra*, note 7.

11. *Janzen* v. *Platy Enterprises* (1985), [1986] 24 D.L.R. (4th) 31, [1986] 2 W.W.R. 273, 38 Man. R. (2d) 20 (Man. Q.B.) [hereinafter cited to W.W.R.].

II. Sexual Harassment as Discrimination

Sexual harassment as a phenomenon of the workplace is not new. Nor is it confined to harassment of women by men, though this is by far the most prevalent and significant context. It may be committed by women against men, or by homosexuals against members of the same sex. According to a Canadian survey published in 1983, women reported far more exposure to all forms of unwanted sexual attention than did men. Forty-nine percent of women (as compared to 33% of men) stated that they had experienced at least one form of this kind of harassment.[12] The frequency of sexual harassment directed against women was also significantly higher. In the case of sexual harassment experienced by women, most (93%) of the harassers were men, while men complained of harassment by women (62%) and men (24%).[13] The victims of sexual harassment are not confined to any particular group, identifiable by age, sex, class, educational background, income or occupation, although younger single women (and, interestingly, those at the lower end of the economic scale) tend to suffer the most. One characteristic that victims usually share in common is their vulnerability to economic sanctions both real and threatened.

Harassment takes many forms, ranging from rape or gross physical abuse to more subtle psychological tactics and pressures which undermine the victim's job performance and threaten his or her livelihood. The pressure may be direct, such as a refusal to hire, or termination for non-compliance with certain sexual demands. It may also take other less readily detectable forms such as denial of promotion, demotion, transfers, assignment to less desirable work, or poor job evaluations. Unsolicited and unwelcome sexual overtures, gestures, taunts, leering, coarse or obscene jokes, cartoons, graffiti and such degrading activities as spying on shower facilities, may create a work environment as intolerable as is the presence of dangerous working conditions. Harassment may not only take its toll upon the victim's physical capacity to perform the work, but may cause such fear and anxiety, such a degree of humiliation or embarrassment, such psychological or emotional distress as to make it difficult if not impossible to function effectively in the workplace. Obviously, this kind of

12. Canadian Human Rights Commission, Research and Special Studies Branch, *Unwanted Sexual Attention and Sexual Harassment: Result of a Survey of Canadians* (Ottawa: Minister of Supply and Services Canada, 1983) at 5-6. Other surveys put the Canadian figures on harassment of females much higher. See e.g., Marlene Kadar, "Sexual Harassment: Where We Stand: Research and Policy," (1983) 3 *Windsor Y.B. Access Just.* 358 at 363, which cites studies placing the rate at 80% or more; see also Arjun P. Aggarwal *Sexual Harassment in the Workplace* (Scarborough, Ont.: Butterworths, 1987) at 3.

13. *Unwanted Sexual Attention and Sexual Harassment, supra*, note 12 at 9. That either men or women can be subjected to harassment resulting from gender bias was recognized in *Watt* v. *Regional Municipality of Niagara* (1984), 5 C.H.R.R. D/2453 at D/2457 (Ont. Bd. of Inquiry); *Treasury Board* v. *Robichaud* (1985), 6 C.H.R.R. D/2695 at D/2706 (Fed. C.A.); *Foisy* v. *Bell Canada* (1985), 6 C.H.R.R. D/2817 at D/2825 (Que. S.C.); *Zarankin* v. *Johnstone* (1984), 5 C.H.R.R. D/2274 At D/2274 note 1 (B.C. Bd. of Inquiry) aff'd (*sub nom. Johnstone* v. *Zarankin* (1985), 6 C.H.R.R. D/2651 (B.C.S.C.)). The board in *Zarankin* was able to find one U.S. case on harassment by women — namely, *Heubschen* v. *Dept. of Health and Social Services* 547 F. Supp. 1168 (W.D. Wis. 1982). None of the reported Canadian cases involve harassment by women and only one case dealt with harassment of a homosexual nature; see *Romman* v. *Sea-West Hldgs. Ltd.* (1984), 5 C.H.R.R. D/2312 (C.H.R.C.) (harassment of male deckhand by male skipper of tug boat).

harassment threatens the very livelihood of its victims. Some have dubbed the effect of exposure to this type of environment "the sexual harassment syndrome,"[14] though similar effects may result where the harassment is based on other grounds such as race, colour or ethnic origin.

A. Developments in the U.S.A.

Little was heard of sexual harassment as a form of discrimination on the basis of sex until the mid to late 1970's. In the United States, a number of studies conducted by both popular magazines and academics in the 1970's, had identified the problem as being not merely epidemic but *pandemic*. Upwards of 7 out of 10 working women reported experiences of harassment in some form or another.[15] It was not until 1980, however, that the first Canadian case recognizing sexual harassment as a form of sexual discrimination was decided.[16]

In the United States, Title VII of the *Civil Rights Act, 1964* makes it unlawful for an employer "... to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[17] Initially courts of first instance showed considerable reluctance to accept the notion that sexual harassment in the workplace constituted a form of sexual discrimination. In a series of decisions, the courts denied liability on the part of the employer on the grounds that the conduct complained of was no more than a personal proclivity of the individual supervisor, that the employer could not be liable for behaviour which he had not authorized and which formed no part of his policy, or that to impose liability would open the floodgates and potentially turn every innocent invitation to dinner into a federal lawsuit.[18] The tide began to turn, however, in 1976 when the District Court of the District of Columbia held that sexual harassment amounted to disparate treatment and hence discrimination on the ground of sex.[19] Thereafter, the notion that sexual harassment constituted unlawful discrimination contrary to Title VII of the U.S. *Civil Rights Act,*

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14. See Constance Backhouse and Leah Cohen, *The Secret Oppression: Sexual Harassment of Working Women* (Toronto: MacMillan of Canada, 1978) at 45.

15. Perhaps the most influential American study is Catherine A. MacKinnon's *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1974) which was based on a project that began late in 1974 and resulted in publication of the book in 1979. Popular and scholarly studies in the United States suggest that anywhere from 42% to 88% of women surveyed have experienced harassment in the workplace. See, e.g. Joan Vermeulen "Employee Liability under Title VII for Sexual Harassment by Supervisory Employees," (1981) 10 Cap. U.L. Rev. 499 at 527.

16. *Re Bell and Korczak* (1980), 27 L.A.C. (2d) 227, 1 C.H.R.R. D/155 (*sub nom. Bell* v. *Ladas*) (Ont. Bd. of Inquiry [hereinafter *Bell* v. *Ladas* cited C.H.R.R.].

17. 42 U.S.C. ss. 2000e - 2(a)(1).

18. See e.g. *Corne* v. *Bausch and Lombe Inc.*, 390 F. Supp. 161 (D. Ariz. 1975); *Miller* v. *Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1977); *Tomkins* v. *Public Service Electric and Gas Company*, 422 F. Supp. 553 (D.N.J. 1976). For useful summaries of the development of the law in this area see Walter S. Tarnopolosky and Williams F. Pentney, *Discrimination and the Law* (Don Mills, Ont.: Richard De Boo Limited, 1985) chapter VIII, and Aggarwal, *supra*, note 12 at 12 ff.

19. *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) (D.C. Cir. 1978).

1964 was accepted in a series of decisions of appellate courts, including a unanimous decision of the Supreme Court of the United States.[20]

The basis on which these cases proceed is that disparate treatment of individuals on prohibited grounds, for example, race or sex, amounts to discrimination. Animosity towards the group is not essential. Nor is it necessary, in order to establish discrimination on the ground of sex, that each and every member of the group be prejudiced; thus height or weight requirements may be discriminatory because they have a disproportionate effect on employment opportunities for women even though some women may satisfy those requirements.[21] Again, in *Phillips* v. *Martin Marietta Corporation*,[22] the Supreme Court held that a company's refusal to employ mothers but not fathers of pre-school age children was *prima facie* sex discrimination. There, not all women were excluded, but only those with school age children.

Similarly, in order to establish a *prima facie* case where the complaint relates to sexual harassment, it is sufficient to show that but for his or her gender the victim would not have become the target of the other person's sexual demands.[23] It is not necessary to demonstrate that all men or women, as the case may be, were subject to harassment. It is enough that gender was a significant factor. Further, the courts have specifically rejected the argument that sexual harassment could not be gender discrimination because a woman could also harass a man, or because a homosexual superior could harass an employee of the same gender. The test in each instance is whether the victim would have been harassed had he or she been of a different gender. In *Bundy* v. *Jackson*,[24] the court said: "Only by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination — where a bisexual supervisor harasses men and women alike." In practice the vast majority of complaints are made by women against men.

In 1980, the Equal Opportunity Commission promulgated guidelines defining sexual harassment and the scope of an employer's liability. The Commission's guidelines imposed upon the employer an obligation to take all steps necessary to prevent sexual harassment from occurring, including adopting appropriate policies, disapproving of the practice, informing employees of their rights and developing methods of sensitizing all concerned.[25] The guidelines are not binding upon the courts. However, as an administrative interpretation of the *Act* by the enforcing agency, they

20. *Tomkins* v. *Public Service Electric and Gas Co.*, 568 F. 2d 1044 (2d Cir. 1977) reversing the decision of the District Court, *supra* at note 18; *Barnes* v. *Costle*, 561 F. 2d 983 (D.C. Cir. 1977) reversing the decision at first instance; *Garber* v. *Saxon Business Products Ltd.*, 552 F. 2d 1032 (4th Cir. 1977); *Miller* v. *Bank of America*, 600 F. 2d 211 (9th Cir. 1979); *Henson* v. *Dundee*, 682 F. 2d 897 (11th Cir. 1982); *Katz* v. *Dole*, 709 F. 2d 251 (4th Cir. 1983); *Bundy* v. *Jackson*, 641 F. 2d 934 (D.C. Cir. 1981); *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 91 L Ed. 2d 49 (1986) [hereinafter *Meritor* cited to L. Ed. 2d.ù.

21. See e.g., *Dothared* v. *Rawlinson*, 97 S. Ct. 2720 (1977).

22. 400 U.S. 542 (1971), 91 S.Ct. 496 (1971).

23. See *Barnes* v. *Costle*, *supra*, note 20 at 990; *Bundy* v. *Jackson*, *supra*, note 20, at 943.

24. *Supra*, note 20 at 942.

25. 29 C.F.R. s.1604.11 (1980).

are treated by the courts as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[26]

Under these guidelines, sexual harassment is defined as "unwelcome sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature."[27] The guidelines provide that such conduct constitutes sexual harassment whether or not it is directly linked to the grant or denial of an economic *quid pro quo* if such conduct has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile or offensive work environment.[28]

In formulating its guidelines on sexual harassment, the Equal Opportunity Commission drew upon a lengthy line of opinion dealing with discrimination on the grounds of race and color. It had been held that the phrase "terms, conditions or privileges of employment" encompassed a working environment which has been polluted by ethnic or racial discrimination. The cases recognized that such an atmosphere may affect the emotional and psychological stability of minority groups and have the effect of denying equality of opportunity in the workplace.[29] The extension of principles developed in cases dealing with harassment based on race and national origin to cases of sexual harassment was unanimously reaffirmed as recently as June of 1986 by the Supreme Court of the United States.[30]

B. The Response of Canadian Courts and Tribunals

It is clear that American developments carried no weight at all with the Manitoba Court of Appeal in *Janzen*. The list of cases considered by the Court did not include any from the United States, but that does not mean that it was totally unaware of them. Several of the Canadian decisions cited to the Court do refer to American authorities, and the Court itself cited Tarnopolsky's *Discrimination and the Law*[31] which analyses the key authorities prior to 1982. One suspects, however, that the examination of American developments was not only second-hand, but also rather cursory. Twaddle J.A. did not refer to them at all, and Huband J.A. dismissed them with the somewhat peremptory statement: "I am not impressed with recent American authorities representing as they do a complete volte-face in the development of the jurisprudence on this subject in the United States."[32] It is true, as noted above, that the early American decisions by courts of first instance were not consistent. Still, the cases which had rejected sexual harassment as a form of discrimination were subsequently either overruled or

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26. *Bundy* v. *Jackson*, *supra*, note 20 at 974; see also *Meritor*, *supra*, note 20 at 58.
27. *Supra*, note 25 at 2.1604.11(a).
28. *Ibid.*
29. See *Rogers* v. *E.E.O.C.*, 454 F. 2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957, 32 L. Ed. 2d 343 (1972). See also *Meritor*, *supra*, note 20 at 59.
30. *Meritor*, *supra*, note 20 at 59.
31. See Tarnopolsky, *supra*, note 18.
32. *Supra*, note 1 at 404–405.

discarded. Since 1977, appellate courts have consistently taken the opposite view (i.e., that sexual harassment does constitute a form of sexual discrimination). I note, however, that the most recent decision of the Supreme Court of the United States in *Meritor Savings Bank* v. *Vinson*,[33] could not have been cited to the Court of Appeal since it was not brought down until three weeks after the Manitoba hearing. Nevertheless, a clear pattern had already become apparent well before that decision.

As in the United States, the earliest Canadian decision on harassment concerned allegations of discrimination not on the ground of sex, but rather on that of race or color. Subsection 4(1) of the *Ontario Human Rights Code* prohibited discrimination "against any employee with regard to any term or condition of employment, because of race ... colour ... sex, nationality, ancestry or place of origin of such person or employee." In 1970, Professor Krever (now of the Ontario Court of Appeal) expressed the opinion that in the context of the *Ontario Human Rights Code*, the word discrimination means "to treat differently or to make the employee's working conditions different (usually in the sense of less favourable) from those under which all other employees are employed."[34] Thus, for example, to permit a situation wherein a black employee would be made to run the gauntlet of racial abuse — causing him to be repeatedly humiliated by insulting language — was tantamount to foisting upon him a condition of employment different from those imposed on white employees. That would constitute discrimination. Professor Krever's comments were *obiter dicta* since, on the facts of the case, he found that the use of a racial epithet was an isolated event which occurred in the context of an angry argument. This was not sufficient to establish tolerance of humiliating and insulting language as a condition of employment. Furthermore, the suspension of the complainant was based on the complainant's insubordination and was not motivated by his race or colour. Nonetheless, it is submitted that although a *dictum*, Professor Krever's opinion was correct. Not only is it consistent with the approach taken by the United States Supreme Court,[35] but it has been consistently adopted by subsequent Canadian authorities as well.[36]

If the negative psychological and emotional work environment caused by racial abuse of one section of the workforce constitutes discrimination, then by parity of reasoning, sexual harassment which creates a hostile or offensive environment for members of one sex is equally

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33. *Meritor, supra*, note 20. The U.S. Supreme Court decision was brought down on June 26, 1986, five months before the date of the decision of the Court of Appeal in the *Janzen* case.

34. *Simms* v. *Ford Motor Co.* (4 June 1970), at 18 [unreported].

35. See *Rogers* v. *E.E.O.C., supra*, note 29.

36. See e.g., *Singh* v. *Domglas Ltd.* (1981), 2 C.H.R.R. D/285 (Ont. Bd. of Inquiry); *Dhillon* v. *F.W. Woolworth Co.* (1982), 3 C.H.R.R. D/743 (Ont. Bd. of Inquiry); *Kotyk and Allary* v. *Canadian Employment and Immigration Commission* (1983) 4 C.H.R.R. D/1416 (Federal Tribunal), aff'd (1984) 5 C.H.R.R. D/1895 (Federal Review Tribunal) and (1985) 4 C.H.R.R. D/1272 (Fed. C.A.); *Wei Fu* v. *Her Majesty in right of the Province of Ontario* (1985) 6 C.H.R.R. D/2797 (*sub nom. Fu* v. *Ontario Government Protective Services*) 85 C.L.L.C. para. 17007 (Ont. Bd. of Inquiry); *Ahluwalia* v. *Metropolitan Toronto Board of Commissioners of Police* (1983) 4 C.H.R.R. D/1757 (Ont. Bd. of Inquiry) [hereinafter *Ahluwalia*]. On racial discrimination, see also *Fuller* v. *Canadian Plastics Ltd.* (1981) 2 C.H.R.R. D/419 (Ont. Bd. of Inquiry).

objectionable.[37] The analogy between racial and sexual discrimination has been drawn in a number of Canadian cases.[38]

The first Canadian case which can be cited as authority for the proposition that discrimination on the basis of sex could take the form of harassment was decided in 1980. In *Bell* v. *Ladas*,[39] Owen Shime justified this conclusion in the following terms:

> Clearly a person who is disadvantaged because of her sex is being discriminated against in her employment when the employer denies her financial rewards because of her sex, or exacts some form of sexual compliance to improve or maintain her existing benefits. *The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the workplace, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman.* Where a woman's equal access is denied or when terms and conditions differ when compared to male employees, the woman is being discriminated against.[40]

Although this statement refers to harassment of female employees by male co-workers or superiors, in a footnote Shime notes that the same principles apply equally to harassment of male employees by women and to cases of homosexual exploitation as well. The central problem is the same in all of these situations: the victims have had imposed upon them conditions of employment which were not inflicted on employees of the opposite gender. They suffer disparate treatment because of their sex.[41] That is the basis on which they are singled out.

Although he does not cite the American authorities referred to above, Mr. Shime goes on to espouse the view that the range of conduct prohibited includes not only the allowance or denial of an economic benefit, but also perpetuation of a "negative psychological and emotional work environment." He states:

> There is no reason why the law, which reaches into the work-place so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative, psychological and mental effects where adverse and gender

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37. See *Henson* v. *Dundee*, 682 F. 2d 897 (11th Cir. 1982) at 902, cited in *Meritor*, *supra*, note 20 at 59.

38. See, e.g., *Potapczyk* v. *MacBain* (1984), 5 C.H.R.R. D/2285 at para. 19341 (Fed. Review Tribunal), rev'd on other grounds (1985) 6 C.H.R.R. D/3064 (Fed. C.A.); *Watt* v. *Regional Municipality of Niagara* (1984), *supra*, note 13; *Webb* v. *Cyprus Pizza* (1985), 6 C.H.R.R. D/2794 (B.C. Human Rights Council).

39. While some later Canadian decisions have been content to limit their citation of authorities to *Bell* v. *Ladas*, others have made extensive use of American authorities. See, e.g., *Cox and Cowell* v. *Jagbritte Inc.* (1982), 3 C.H.R.R. D/609 (Ont. Bd. of Inquiry); *Giovanoudis* v. *Golden Fleece Restaurant* (1984), 5 C.H.R.R. D/1967 (Ont. Bd. of Inquiry); *Zarankin* v. *Johnstone*, *supra*, note 13; *Watt* v. *Regional Municipality of Niagara*, *supra*, note 13; *Robichaud* v. *Brennan* (1983), 4 C.H.R.R. D/1272 (Fed. Review Tribunal); *Fullerton* v. *Davey C's* (1983), 4 C.H.R.R. D/1626 (Ont. Bd. of Inquiry).

40. *Supra*, note 16 at para. 1388. For commentary on this decision see C. Backhouse, "*Bell* v. *The Flaming Steer Steak House Tavern*: Canada's First Sexual Harassment Decision" (1981) 19 *U.W.O.L. Rev.* 141.

41. See *Bundy* v. *Jackson*, *supra*, note 20, cited in *Kotyk and Allary* v. *Canadian Employment and Immigration Commission* (1984), 5 C.H.R.R. D/1895 at paras. 16284–85 (Federal Review Tribunal).

directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment.[42]

Since 1980, the opinions expressed in *Bell* v. *Ladas*[43] have been cited as authoritative in at least forty reported decisions by adjudicators,[44] and by a number of review panels operating under federal labour legislation.[45] In addition, the notion that sexual harassment which affects the terms and conditions of employment can constitute discrimination on the basis of sex has been accepted by the Appellate Division of the Supreme Court of Nova Scotia,[46] the Federal Court of Appeal,[47] and the Ontario Divisional Court;[48] in decisions of first instance in the Supreme Court of British Columbia[49] and the Superior Court of Quebec;[50] and by a growing number of arbitrators.[51]

The Quebec Workers' Compensation Board has ruled that the experience of adverse health consequences resulting from sexual harassment by a co-worker may be a compensable injury.[52] Finally, although there do not appear to have been any Canadian cases on point, it might be noted that in other common law jurisdictions a person who quits his or her job because of sexual harassment may have a right to sue for constructive dismissal.[53] Such remedies do not, however, depend upon a finding of discrimination in the sense in which that term is used in human rights legislation (i.e., where toleration of unwanted sexual advances has been made a condition of continued employment). Still, the possible existence of alternative civil or criminal remedies should not be determinative of or circumscribe the scope of legislation intended to protect civil rights and to provide equal access to the job market.

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42. *Bell* v. *Ladas, supra*, note 16 at para. 1389.

43. *Ibid.*

44. See, e.g., *McPherson* v. *Mary's Donuts* (1982) 3 C.H.R.R. D/961 (Ont. Bd. of Inquiry); *Robichaud* v. *Brennan* (1982) 3 C.H.R.R. D/977 (Fed. Tribunal); *Hughes* v. *Dollar Snack Bar* (1981) 3 C.H.R.R. D/1014 (Ont. Bd. of Inquiry).

45. See, e.g., *Robichaud* v. *Brennan* (1983), *supra*, note 39 and *Kotyk and Allary* v. *Canadian Employment and Immigration Commission* (1984), 5 C.H.R.R. D/1895 (Federal Review Tribunal).

46. *Re Mehta and Mackinnon et al.* (1985), 19 D.L.R. (4th) 148 at 158, [1985] 6 C.H.R.R. D/2861 (N.S.S.C. App. Div).

47. *Treasury Board* v. *Robichaud* (1985), *supra*, note 13.

48. *Commodore Business Machines Ltd. and DeFilippis v. Ministry of Labour for Ontario et al.* (1984), 5 C.H.R.R. D/2833, aff'g (*sub nom. Olarte et al.* v. *DeFilippis and Commodore Business Machines Ltd.*) (1983), 4 C.H.R.R. D/1705.

49. See e.g., *Johnstone* v. *Zarankin* (1985), *supra*, note 13 and *Fields* v. *Ueffing* (1985) 6 C.H.R.R. D/2711 (B.C.S.C.) where the Court directed a new hearing in a sexual harassment case after the B.C. Human Rights Council had refused to admit evidence corroborating the alleged sexual harassment. See also *Fields* v. *Willie's Rendezvous Inc.* (1984) 6 C.H.R.R. D/2550 where ultimately the complaint was upheld.

50. *Foisy* v. *Bell Canada* (1984), 84 C.L.L.C. 17008, 18 D.L.R. (4th) 222, 6 C.H.R.R. D/2817 (Que. S.C.).

51. See *Re Canadian Union of Public Employees, Local 491* (1982) 4 L.A.C. (3d) 385 (Ontario); *Re Government of Province of Alberta and Alberta Union of Provincial Employees* (1982) 5 L.A.C.(3d) 268 (Public Service Grievance Appeal Bd., Alberta); *Re Canada Post Corporation and Canadian Union of Postal Workers* (1983) 11 L.A.C. (3d) 13 (Canada); *Re Canada Cement Lafarge Ltd. and Energy and Chemical Workers' Union, Local 291* (1986) 24 L.A.C. (3d) 202 (Ontario) and the cases cited therein.

52. For discussion of this case see: H.C. Jain and P. Andiappan, "Sexual Harassment in Employment in Canada: Issues and Policies," (1986) 25 *Industrial Relations in Management* 758 at 768.

53. See *Monge* v. *Beebe Rubber Co.* 316 A. 2d 549 (Sup. Ct. N.H. 1974) cited in Backhouse and Cohen, *supra*, note 14 at 139 and M. Rubenstein, "The Law of Sexual Harassment at Work," 12 *Indus. L. Jo.* 1 at 8–9 and the case cited therein.

Can the decision of the Manitoba Court of Appeal in *Janzen* stand in light of the current unanimity of opinion which presently exists among administrators of human rights legislation,[54] adjudication boards, and courts in other jurisdictions, and which opinion expresses the precise opposite view? In considering this question it is helpful to examine the reasoning of the Court.

Firstly, the point was made that discrimination and harassment are different concepts. In the context of human rights legislation the word discriminate means to treat differently; and, in the specific context of discrimination in employment, it means "to make the employee's working conditions different (usually in the sense of less favourable) from those under which all other employees are employed."[55] Harassment means to vex by repeated attacks, or to trouble or worry.[56] Referring to the ordinary dictionary meanings of the term, Huband J.A. concluded that while sexual harassment is socially unacceptable conduct and may, in some situations, give rise to civil or criminal liability, it cannot be equated with sexual discrimination.[57] He does recognize that it may be possible to "conjure up a hypothetical situation where the two would merge into one." For example, an employer wishing to hire men only might ostensibly comply with the *Act* by hiring women as well as men, and then, by an orchestrated program of sexual harassment, make working conditions so miserable for women that they resign. Apparently however, according to Huband J. A., short of such a scenario the two concepts do not coincide.

That discrimination and harassment are different theoretical concepts cannot be denied. The words obviously have different meanings. It is submitted, however, that the bare statement of the Court of Appeal to this effect does not address the real point in issue. The premise upon which the American and other Canadian cases proceeded was that sexual harassment may be said to give rise to discrimination where it is directed against, or has a disparate impact upon, members of one of the protected groups (whether they be identified by race, religion, national origin, gender or any other of the specified grounds). It should be noted that the Supreme Court of Canada has accepted the proposition, rooted in American jurisprudence, that discrimination need not be intentional. A job requirement or qualification that is seemingly neutral may properly be described as discriminatory if it has a disproportionate impact upon members of a particular race or adherents of a particular religion.[58] By parity of reasoning,

54. I note, however, that Backhouse and Cohen, *supra*, note 14 at 118 record the fact that at one stage the chairman of the Alberta Human Rights Commission, M.Wyman, took the view that sexual harassment was not covered by the prohibition of discrimination on the ground of sex. His view was apparently based on American decisions which have since been overruled.

55. Per H. Krever, *supra*, note 34. See also *Re Mehta and Mackinnon et al.* (1985), 19 D.L.R. (4th) 148 at 155, and *Nelson and Atco Lumber Ltd.* v. *Borho* (1976), 1 B.C.L.R. 207 (S.C.).

56. *Shorter Oxford Dictionary*, 3rd ed. (revised) (1973), cited by Huband J.A., *supra*, note 1 at 395.

57. *Supra*, note 1 at 395.

58. *Re Ontario Human Rights Commission and O'Malley v. Simpson Sears Ltd.* (1985), [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321, 7 C.H.R.R. D/3120; *Re Bhinder and Canadian National Railway* (1985), [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481, 7 C.H.R.R. D/3093.

certain requirements (for, example, those specifying height and weight) may be discriminatory if they have disproportionate impact upon members of a particular gender. It seems strange to classify as discriminatory unintentional conduct affecting some (but not all) members of a protected group and yet not to treat as discriminatory intentional conduct unless it affects all members of the group.

Sexual harassment is discrimination where the victim suffers disparate treatment because of his or her gender. It is no answer to suggest that not all employees of a particular gender were victimized. An employer should not be able to escape liability by arguing that he only harassed a segment of the female workforce, that is, those he found attractive. It is submitted that the correct test is whether the complainant would not have suffered harassment but for her gender.[59]

Sexual harassment has been described by an American author as "women's most dangerous occupational hazard."[60] In Canada, it has been called "a rampant feature of all working environments."[61] The studies which have been made do tend to indicate that sexual harassment in the workplace is primarily directed against women. Complaints by men against women are relatively rare, and indeed, do not appear to have been the subject of any reported decision. In over six years of reporting there is only one Canadian decision on homosexual harassment,[62] and the hypothetical bisexual who importunes members of both sexes equally[63] has yet to make an appearance in the reports. This does not establish, of course, that the intention of Parliament or the legislatures was to include harassment within the concept of sexual discrimination. However, one might expect that a tribunal which has been sensitized to the nature of the problem would recognize that harassment which poisons the work environment may well undermine the victim's ability to perform and hence to retain a job. Where different treatment is meted out according to gender, it seems reasonable to categorize this as sexual discrimination.

In the *Janzen* case,[64] Twaddle J.A. accepted the view that intention was not an essential element of discrimination and dealt with the decisions concerning adverse effect discrimination.[65] However, in his view these cases were distinguishable because what all of them had in common was that the complainant had been treated differently because he or she fell into a distinct category, a category on the basis of which discrimination was prohibited.[66] "Only if the woman was chosen on a categorical basis, with-

59. See *Bundy* v. *Jackson*, *supra*, note 20 at 942 and *Kotyk*, *supra*, note 42 at para. 16284.

60. B.L. Harragon, *Games Mother Never Taught You* (New York: Rawson Associates, 1977) at 302, cited in Tarnopolsky and Pentney, *supra*, note 18 at 8.18.

61. Backhouse and Cohen, *supra*, note 14 at 1.

62. See *Romman* v. *Sea-West Hldgs. Ltd.*, *supra*, note 13.

63 See *Bundy* v. *Jackson*, *supra*, note 20 at 942, n. 7.

64. *Supra*, note 1 at 421.

65. *Ibid*, at 419-421.

66. *Ibid*, at 420.

out regard to individual characteristics," he said, "can harassment be a manifestation of discrimination. Whether or not that is the case is a matter of fact."[67] According to this reasoning, in order to establish discrimination on the basis of sex it would be necessary to prove, whether by direct or circumstantial evidence, that the gender (as distinct from the physical attractiveness) of the victim formed the basis of the disparate treatment. Twaddle J.A. acknowledged that in most cases of sexual harassment the gender of a woman is unquestionably a factor, and that if she were not a woman the harassment would not have occurred. However, in his opinion this is not decisive. If the effective cause of the harassment was a desire to discourage women from seeking or continuing in employment, or a contempt for women generally, that would be evidence of discrimination; but this would not be the case if the victim were selected at random or because of some individual characteristic.[68] Although the sex of the victims and the sexual nature of the harassment afford some evidence of the basis of their selection, this is not conclusive. The views of Huband J.A. are in accord with those of Twaddle J.A. Looking at the section as a whole, he concluded that it is aimed at discrimination in a generic sense (that is, at discrimination aimed at blacks, members of religious sects, or women as groups).[69]

It might well be thought that the opening words of subsection 6(1) of the Manitoba *Act* reflect a broader intent than that attributed to the statute by the Court of Appeal. The section declares that "every person has the right of equality of opportunity based on bona fide qualifications . . . ." A *prima facie* case of discrimination would presumably be established if the individual were treated adversely, without regard to individual merit. It is not necessary to demonstrate a total denial of employment, training, promotion or advancement in order to establish that a complainant was not afforded an equal opportunity. Certainly the words of the section could be construed as expressing an intent to protect the individual from denial of employment, training, promotion, or from termination based on the fact that the individual was black, Jewish, Catholic, a Jehovah's Witness, Liberal, Conservative or a man or woman, rather than upon his or her personal qualities or experience.[70] However, in *Janzen*, this broad approach to the interpretation of the section was specifically rejected by Huband J.A.[71]

In support of its position, the Court of Appeal relied upon two authorities. The first was the decision in *University of Saskatchewan Board of Governors* v. *Saskatchewan Human Rights Commission*[72] which, in the opinion

67. *Ibid*, at 422.

68. *Ibid*, at 423.

69. *Ibid*, at 398.

70. See *Hufnagel* v. *Osama Enterprises Ltd.* (1982), 3 C.H.R.R. D/92 at paras. 8215 ff. Canadian legislation does not require that gender be the only reason for an employer's conduct in order to establish sexual discrimination. See, for example, *Doherty and Meehan* v. *Lodger's International* (1982), 3 C.H.R.R. D/268 at para. 5710.

71. *Supra*, note 1 at 402–403.

72. (1976), [1976] 3 W.W.R. 385, 66 D.L.R. (3d) 561 (Sask. Q.B.).

of Huband J.A.,[73] adopts an approach opposite that apparent in the line of adjudications commencing with and following *Bell* v. *Ladas*.[74] In the Saskatchewan case, the University had refused to permit a sessional lecturer to supervise practice teaching in public schools because he was a homosexual. The University obtained an order prohibiting the Human Rights Commission from proceeding with an inquiry. In granting the order, Johnson J. held that the provision of *The Saskatchewan Fair Employment Practices Act* which prohibited employment discrimination because of sex had no application. Sex meant gender. Accordingly, the *Act* only prohibited discrimination on the basis of a person's gender (whether the person was a man or a woman) and not upon the basis of sexual orientation, sexual proclivities or sexual activities.

This decision does not appear to have been drawn to the attention of Mr. Shime, who decided *Bell* v. *Ladas*. Further, it either was not referred to or was ignored by many other adjudicators who subsequently followed Mr. Shime's reasoning. Huband J.A. found this to be surprising. However, as he himself admitted, the issue in the Saskatchewan case was different because it did not involve a situation in which the complainant was treated differently because of his gender.

It appears to be generally accepted that discrimination on the basis of sexual orientation is not the same as discrimination on the ground of sex. Certainly legislators have recognized the difference during debates regarding the adoption or expansion of human rights legislation.[75] Adjudicators who have considered the matter have had no difficulty in accepting both the inclusion of sexual harassment and the exclusion of sexual orientation in the concept of discrimination on the ground of sex.[76] They accept the view that sex in this context means gender. Similarly, American courts have held that prohibitions of sex discrimination do not protect homosexuals, lesbians or transsexuals.[77] The issues are not the same. What was involved in the *Janzen* case was not an attempt to define the protected class by reference to the kind of sexual activity involved. Rather, the argument was that sexual harassment was the means by which a disadvantage was caused to a class of persons clearly protected by the *Act*, namely, women.

The second authority relied upon by the Manitoba Court of Appeal and cited by Twaddle J.A. was the decision of the Supreme Court of Canada in *Bliss* v. *Attorney General of Canada*.[78] There the issue before the Court

73. Supra, note 1 at 401.

74. *Supra*, note 16.

75. See Ontario Legislative Assembly, *Debates* at 4043 (2 June 1982). The Standing Committee on Resource Development, in adopting explicit provisions regarding sexual harassment, rejected a proposal to include sexual orientation.

76. See, e.g., *Giouvanoudis* v. *Golden Fleece Restaurant*, *supra*, note 39 at D-1974.

77. See Tarnopolsky and Pentney, *supra*, note 18 at 8-2, and the cases cited therein. Further judicial support for the exclusion of sexual orientation may be found in the dissenting opinion of Dickson J. (Estey J. concurring) in *Gay Alliance Towards Equality* v. *Vancouver Sun* (1979), 97 D.L.R. (3d) 577, at 595-96 (S.C.C.).

78 *Supra*, note 3.

was whether statutory conditions of entitlement to unemployment insurance benefits which applied only to pregnant women violated the right of equality before the law. Subsection 1(b) of the *Canadian Bill of Rights* recognizes the right to such equality before the law "without discrimination by reason of ... sex." As Mr. Justice Pratte indicated in the Federal Court of Appeal,[79] the question was "not whether the respondent had been the victim of discrimination by reason of sex but whether she had been deprived of the right to equality before the law" guaranteed under subsection 1(b). However, he went on to reject the view of the umpire that the application of the conditions constituted discrimination by reason of sex. Although in one sense the section in question applied to women as distinct from men, it had no application to women who were not pregnant. If it treated pregnant women differently from other unemployed persons (male or female) it was because they were pregnant and not because they were women. Writing for the Supreme Court of Canada, Ritchie J. expressed himself to be in agreement with Mr. Justice Pratte's reasoning. "Any inequality between sexes in this area," he said, "is not created by legislation but by nature."[80] The same line of reasoning prompted courts in both the United States and Britain to hold that the denial of benefits or jobs to pregnant women was not gender based discrimination.[81]

The decision in the *Bliss* case[82] has since been criticized as perpetuating the inequality of the sexes.[83] In a number of jurisdictions human rights legislation has been amended to make it clear that, for the purposes of the prohibition against discrimination, sex includes pregnancy. Alternatively, some legislatures have added pregnancy as a separate ground upon which discrimination is forbidden.[84]

Where there has been no legislative initiative precluding the application of the *Bliss* case to human rights legislation, the authorities have split.[85] Some have treated the decision as being *in pari materia* and have felt compelled to apply it or have adopted similar reasoning without expressly

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79. *Bliss* V. *Attorney General Of Canada* (1978), [1978] 1 F.C. 208, 77 D.L.R. (3d) 609 at [cited to D.L.R.].

80. *Supra*, note 3 at 422.

81. See *Geduldig* v. *Aiello*, 417 U.S. 484, 94 S.Ct. 248, 41 L. Ed. 2d 256 (1974); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed. 2d 343 (1976); *Nashville Gas* v. *Satty*, 434 U.S. 136, 54 L.Ed. 2d 356 (1977); *Turley* v. *Alleders Dept. Stores* (1979), [1980] I.C.R 66, [1980] I.R.L.R. 4 (Employment Appeal Tribunal) (U.K.).

82. *Supra*, note 3.

83. See, e.g. M. Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study" (1980) 18 *Osgoode Hall L.J.* 336; J. MacPherson, "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade" (1980) 1 C.H.R.R. C/7 at C/11; D. Reaume, "Women and the Law: Equality Claims Before Courts and Tribunals" (1980) 5 *Queen's L.J.* 3 at 19-23.

84. See *Canadian Human Rights Act*, S.C 1976-77, c.33, s.3(2); *Individual Rights Protection Act*, R.S.A. 1980 c. I-2, s.7(1.1); *Charter Of Human Rights And Freedoms* R.S.Q. 1977, c.C-12, s.10: *Saskatchewan Human Rights Code*, S.S. 1979, c.S-24.1, s.2(O).

85. See Tarnopolsky and Pentney, *supra*, note 18 and R. Juriansz, "Survey of Anti-Discrimination Law" (1984), 16 *Ottawa L. Rev.* 117 at 145 ff.

citing the *Bliss* decision.[86] Others have rejected its application either directly or by implication.[87]

Critics have not only pointed out that the observations of the various levels of court in the *Bliss* case were *obiter dicta* and concerned the interpretation of a different statute (that is, the *Canadian Bill of Rights*), but they have also challenged the very reasoning upon which the Court proceeded.[88] More specifically, critics have pointed out firstly that pregnancy is a condition unique to women. To say that pregnancy is not a matter of sex (in the sense of gender) is to ignore the different reproductive roles which distinguish women from men. To deny employment or benefits on the basis of pregnancy places women at a disadvantage. It affects women and no one else. Secondly, the fact that all women are not pregnant all of the time does not make pregnancy any less a circumstance of gender. Is it necessary in other situations for all members of a class or category to be affected in order to establish discrimination? If an employer finds it necessary to reduce the size of his staff and selects those who are to be laid off not on the basis of their individual qualifications or capabilities, but because they are black, East Indian or Jewish, is it any less discrimination on prohibited grounds because he retains some employees who are black, East Indian or Jewish? Can he escape liability by retaining a token member of each group? In cases involving discrimination on the ground of race it has not been required that the discrimination be directed against all members of the race.[89] In substance, the argument of the critics is that the *dicta* in the *Bliss* case are wrong, and that in any event, reasoning which is regarded as controversial in the context of the *Canadian Bill of Rights* ought not to be carried over into the interpretation of other human rights legislation.[90]

Even if the *Bliss* case is correct about the lack of relationship between sex discrimination and the differential treatment of pregnant women, it does not inevitably follow that sexual harassment practiced by one sex against the other is not discrimination on the basis of sex. The two situations are distinguishable from each other in that harassment, unlike pregnancy, is something which may adversely affect both sexes and thus the peculiar susceptibility of women to this condition does not derive from nature. Again, the fact that men as well as women may be affected does not preclude a finding of discrimination. As noted earlier, in one American

86. See, e.g., *Breton* v. *La Societe Canadienne des Metaux Ltee.* (1981), 2 C.H.R.R. D/532 (Que. Prov. Ct.); *Nye* v. *Burke* (1981), 2 C.H.R.R. D/538 (Que. Prov. Ct.); *Brooks* v. *Canada Safeway Ltd.* (1986), 7 C.H.R.R. D/3185 (Man. Q.B.); aff'd (1986), C.H.R.R. D/3475 (Man. C.A.).

87. See *Tellier-Cohen* v. *Treasury Board* (1982), 3 C.H.R.R. D/792 (Federal Tribunal), aff'd (1983), 4 C.H.R.R.D/1169 (Federal Review Tribunal); *Holloway* v. *Macdonald* (1983), 4 C.H.R.R. D/1454 (B.C. Bd. of Inquiry); *Paton* v. *Brouwer & Co.* (1984), 5 C.H.R.R. D/1496 (B.C. Bd. of Inquiry).

88. See, in particular, *Holloway* v. *McDonald, supra*, note 87; and *Giouvanoudis* v. *Golden Fleece Restaurant, supra*, note 39 at paras. 16,996 to 17,006.

89. See *R* v. *Drybones*, (1969), [1970] S.C.R. 282 (the example given by Professor Cumming in *Giouvanoudis, supra*, note 39 at para. 16,998).

90. In the *Giouvanoudis* case, *supra*, note 39 paras. 17,002 to 17,006, the Board gives further reasons for treating discrimination against pregnant women as discrimination on the ground of sex. With respect, it is not clear that the Board does not beg rather than answer the question.

case, refusal of employment directed against mothers — but not fathers — of school age children was sufficient to establish a *prima facie* case of sex discrimination. Not all women were excluded, but only those with school age children. It was enough that gender was a factor contributing in a substantial way to the determination of employability.[91] Certainly the American appellate courts have shown no compunction about ignoring the reasoning of earlier cases on pregnancy when dealing with sexual harassment in the context of the Title VII of the *Civil Rights Act, 1964*.[92] Canadian tribunals and courts have — until the decision of the Manitoba Court of Appeal in *Janzen* — shown a similar disinclination to apply the reasoning in *Bliss* to sexual harassment cases.[93]

The Parliament of Canada and the legislatures of Quebec, Newfoundland and Ontario have introduced amendments proscribing harassment on the basis of a prohibited ground.[94] The Manitoba Court of Appeal found support for its position in the fact that the legislature of Manitoba had not yet done the same. However, a study of the history of these amendments strongly suggests that their respective enactments stemmed from a desire to clarify the law.[95] It was feared that the reasoning of the Supreme Court of Canada in the *Bliss* case might be applied to the interpretation of anti-discrimination legislation.[96] The legislatures wished to make it clear that they did contemplate protection against harassment when the original legislation was enacted. The purpose of the amendments was to remove any doubt that might have existed on this point.

For example, the Canadian Human Rights Commission had taken the position that unwanted and unsought sexual attention resulting in unfavourable treatment was properly dealt with as a discriminatory practice based on sex.[97] There was a growing public perception of sexual harassment as a major barrier to employment equity for women. In three successive years following the *Bliss* case, the Commission recommended as a

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91. *Phllips* v. *Martin Marietta Co,. supra*, note 22, cited in Barnes v. costle, supra, note 20.

92. *Supra*, note 17.

93. See *Giouvanoudis* v. *Golden Fleece Restaurant, supra*, note 39.

94. *Supra*, note 1 at 396 (per Huband J.A.) at 421-22 (per Twaddle J.A.). See *Canadian Human Rights Act*, S.C. 1976-77, c.33, as am. S.C. 1980-81-82-83, c. 143; *Ontario Human Rights Code*, S.O. 1981, c.53, s. 6 (2)-(3) (harassment in the workplace on other prohibited grounds is covered by s.4 (2)); *Newfoundland Human Rights Code*, R.S.N. 1970, c.262, s.10.2, introduced S.N. 1983, c.62, s.3 (prohibits sexual solicitation); *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c.C-12, s.10.1 (introduced S.Q. 1982, c.61, s.4). The B.C. Human Rights Commission recommended that protection against sexual harassment be made explicit notwithstanding the fact that the practice of the Commission has been to accept complaints under s.8 as allegations of discrimination without reasonable cause. See B.C. Human Rights Commission, *I'm Okay: We're Not So Sure About You* (Report of the B.C. Human Rights Commission on Extensions to the *Code*, February 1983) at 45. Boards of Inquiry in British Colombia have in fact treated harassment as discrimination on the basis of sex as well as discrimination without reasonable cause. Under the more restrictive language of the current *Human Rights Act*, S.B.C. 1984, c.22, the Commission continues to treat sexual harassment as discrimination.

95. As recognized in *Re Mehta and MacKinnon* (1985), 19 D.L.R. (4th) 148 at 158 (N.S.S.C., App. Div.).

96. Ibid.

97. See, for example, *1978 Annual Report of the Canadian Human Rights Commission* (Ottawa: Ministry of Supply and Services, March, 1979) (Commissioner: R.G.L. Fairweather) at 9.

matter of urgency that Parliament make it clear that adverse differential treatment referable to conditions of pregnancy and sexual harassment constituted discrimination on the basis of sex and would not be tolerated. The Commission was not seeking new powers, but merely confirmation of the validity of its previous interpretation.[98]

Ultimately, in 1983, Parliament responded by enacting amendments which not only deem discrimination against pregnant women to be discrimination on the basis of sex, but which also forbid the adoption of policies or practices which tend to deprive a person of employment opportunities on any of the prohibited grounds.[99] Later, the *Canada Labour Code* was amended by the introduction of Division V.9 which clarifies the meaning of sexual harassment and imposes upon the employer positive obligations designed to ensure freedom from sexual harassment in the workplace.[100] Throughout the debates it is clear that the commonly accepted view was that prohibition of sexual discrimination included a prohibition of sexual harassment. The purpose of the amendments was to make explicit an offence which was already implicitly covered by the existing legislation.[101] Further, by expressly forbidding harassment Parliament hoped to make more individuals aware of the protection they already enjoyed under the *Act*.[102]

One final point may be made. Most Canadian human rights statutes contain, either in the preamble or in the body of each respective act, a statement of public policy declaring that every individual should enjoy an equal opportunity in life or be equal in dignity and rights without regard to sex and the other prohibited grounds of discrimination.[103] Reference

98. See *1979 Annual Report of the Canadian Human Rights Commission* (Ottawa: Ministry of Supply and Services, March, 1980) (Commissioner: R.G.L. Fairweather) at 8; *1980 Annual Report of the Canadian Human Rights Commission* (Ottawa: Ministry of Supply and Services, March, 1981) (Commissioner: R.G.L. Fairweather) at 8; *1981 Annual Report of the Canadian Human Rights Commission* (Ottawa: Ministry of Supply and Services, March, 1982) (Commissioner: R.G.L. Fairweather) at 10; and 1982 Annual Report of the Canadian Human Rights Commission (Ottawa: Ministry of Supply and Services, March, 1983) (Commissioner: R.G.L. Fairweather) at 9–10. Statistics compiled by the Commission indicate that harassment on the ground of sex is not the most common basis of complaint at the federal level. Between 1980 and 1984, out of 250 harassment complaints, 78 related to sex and 103 to race or colour. See *1984 Annual Report of the Canadian Human Rights Commission* (Ottawa: Ministry of Supply and Services, March, 1985) (Commissioner: R.G.L. Fairweather) at 33. In 1985, out of a total of 36 complaints 15 were based on race or colour and 8 on sex. See *1985 Annual Report* at 37.

99. *Canadian Human Rights Act*, S.C. 1976–77, c.33, ss. 3(2) and 10, as am. S.C. 1980–81–82–83, c.143, ss. 2 and 5.

100. S.C. 1983–84, c.39, s.12.

101. See, e.g., Canada, H.C. *Debates* at 15274–15275 (22 February 1982); Canada, H.C. *Debates* at 4397 (5 June 1984).

102. Adjudicators appear universally to have treated the legislative changes as confirming that sexual harassment constitutes discrimination on the basis of sex. See, e.g., *Olarte* v. *DeFilippis* (1983), 4 C.H.R.R. D/1705 at para. 14644 (Ont. Bd. of Inquiry); *Giouvanoudis, supra*, note 39 at para. 16896; *Piazza* v. *Airport Taxi Cab (Malton) Association* (1986), 7 C.H.R.R. D/3196 at para. 25555 (Ont. Bd. of Inquiry).

103. See, e.g., the *Canadian Human Rights Act*, S.C. 1976–77, c.33, s.1, as am. S.C. 1980–81–82–83, c.143, s.1.; *Individual Rights Protection Act*, R.S.A. 1980, c.I–2, as am. S.A. 1985, Preamble, s.2, s.16(1); New Brunswick Human Rights Act, R.S.N.B., 1973, c.H-11, preamble, as am. S.N.B. 1985, c.30, ss. 2(a) and (b); *Human Rights Act*, C.S.N.S. C. H-24, as am., preamble; *Ontario Human Rights Code*, S.O. 1981, c.53, preamble; *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c.C–12, preamble. The exceptions are British Columbia, Newfoundland, Manitoba and the Yukon.

has frequently been made to these statements to justify treating the legislation as remedial rather than penal and adopting a broad, liberal interpretation.[104]

Although Manitoba is one of the few exceptions in that the *Manitoba Human Rights Act* contains no general statement of policy, the opening words of subsection 6(1) do embody the notion of "equality of opportunity." The use of that concept to encourage adoption of a broad, liberal approach[105] has now been rejected by the Manitoba Court of Appeal.[106] It is submitted that a review is in order. It ought to be recognized that the statutory declarations of public policy found in the majority of Canadian human rights legislation reflect social and political values which are common to all. The overall policies and purposes are the same, even if formulated in slightly different language.[107]

In brief, it is submitted that even in the absence of explicit prohibitory provisions, harassment in the workplace generally contravenes human rights legislation and, in particular, that sexual harassment of women falls within the ambit of discrimination on the basis of sex. Moreover, in order to find contravention of the legislation it should not be necessary to show that an aggressor victimized all women. Rather, it should suffice to establish that gender was a substantial factor contributing to the selection of the victim.

It is open to the Supreme Court of Canada to find that sexual harassment as a form of discrimination is not confined to the limited range of circumstances suggested in the Manitoba Court of Appeal. The Supreme Court's earlier decision in the *Bliss* case is not decisive of the issues. Nor should the possibility that legislatures might step in to deal specifically with harassment deter the Court from following the lead set in Canada as early as 1970. Treating harassment as a form of discrimination is not the only way to deal with the problem; but it is a legitimate and appropriate solution.[108]

III. The Employer's Liability

Huband J.A. was amazed not only by the thought that sexual harassment could be equated with discrimination, but also that an employer could be held vicariously or personally responsible for the acts of an em-

104. See Interpretation Act, R.S.C. 1970, c.I-23, s.11. See also *Blake* v. *Laconte* (1980), 1 C.H.R.R. D/24 (Ontario Board of Inquiry); *Bell* v. *Ladas*,. *supra*, note 16, at para. 1387; *Torres* v. *Royalty Kitchenware* (1982), 3 C.H.R.R. D/858 at para. 7704 (Ont. Bd. of Inquiry); *Kotyk*, *supra*, note 36.

105. See *Hufnagel* v. *Osama Enterprises Ltd.* (1982) 3 C.H.R.R. D/922 at D/925. It might be noted that in Manitoba, adjudicators have also admitted as guides, manuals or statements of policy published by Human Rights Commissions. See, e.g.,*Janzen* v. *Platy Enterprises*, *supra*, note 7 at D/2235 and *Makara* v. *Osama Enterprises* (1985) 6 C.H.R.R. D/2935. The decision of the Manitoba Court of Appeal would appear to negative such use.

106. *Supra*, note 1 at 403 (per Huband J.A.).

107. See: J. MacPherson, "Sex Discrimination in Canada: Taking Stock at the Start of a New Decade," (1980) 1 C.H.R.R. C/7.

108. For a critique of the existing legal mechanisms, see S. Goundry, "Sexual Harassment in the Employment Context: The Legal Management of Working Women's Experience," (1985) 43 *U.T. Fac. L. Rev.* 1. The legislative responses have not been entirely satisfactory.

ployee, save under the rarest of circumstances. Yet, as he acknowledged, adjudicators, scholars and judges have said otherwise.[109]

Four possible bases have been canvassed in the cases for imposing liability upon the employer where the individual miscreant is not the employer himself. First, it may be argued that the employer is vicariously liable for the conduct in question. Secondly, it may be alleged that the employer authorized, condoned, adopted or ratified the conduct. Thirdly, it may be established that the offender is the "directing mind and will" of a corporate employer. Finally, it is possible that the employer is under a personal (as distinct from a vicarious) responsibility to ensure that the workplace is free from harassment.

A. Vicarious Liability

The starting point of any discussion in Canada must be the decision in *Nelson* v. *Gubbins*.[110] As it then stood, the British Columbia *Human Rights Code* simply declared in paragraph 8(1)(a) that "no employer shall refuse to employ, . . ." etc. The Court had held that the common law notion of vicarious liability had no application to proceedings launched pursuant to paragraph 8(1)(a) of the *Code*. Thus a corporate employer could only be made liable for its own actions and not those of its employees. Since the case was not appealed to the Supreme Court of Canada, it is arguable that it remains open for that Court to hold that in the context of remedial legislation such as this, the concept of vicarious liability ought to be applied. It had been assumed by legislators and administrators of human rights legislation that corporations could be made liable for the conduct of employees acting within the scope of their employment. Indeed, to disallow the application of the principle of vicarious liability would significantly weaken the protection afforded by thestatutes.[111]

The legislature of British Columbia responded by amending the *Code* to render employers vicariously liable for the conduct of employees acting within the scope of their employment.[112] However, in the meanwhile the courts have approved the approach taken in the *Nelson* case and have refused to impose vicarious liability in the absence of clear and explicit language providing for its application. In *Treasury Board* v. *Robichaud*,[113] the Federal Court of Appeal concluded that a provision which rendered it a discriminatory practice to directly or indirectly differentiate on the basis of a prohibited ground was not sufficient to justify im-

109. *Supra*, note 1 at 390.

110. (1979), 106 D.L.R. (3d) 486, 17 B.C.L.R. 259 (S.C.), aff'd (*sub nom. Re Nelson and Bryon Price & Associates Ltd.*) (1981), 122 D.L.R. (3d) 340, 27 B.C.L.R. 284 (C.A.) [hereinafter *Nelson* cited to D.L.R.].

111. For proposals for reform of the federal *Act*, see H.C. Standing Committee on Justice and Legal Affairs (20 Dec. 1982) 114:10 to 114:11.

112. First introduced into the previous *Human Rights Code*, R.S.B.C. 1979, c.186, s.19(2) by the *Miscellaneous Statutes Amendment Act* (No. 2), S.B.C. 1981, c.21, s.123. See now *Human Rights Act*, S.B.C. 1984, c.22, s.21(2).

113. *Supra*, note 13 at para. 22278. Compare MacGuigan J. at paras. 22319 to 22323. It is interesting to note that although the appeal was funded by the Department of National Defence, it was launched on the advice of Dr. MacGuigan's department. See H.C., *Debates* (20 March 1984) at 2242-3. He then sat on the appeal.

position of vicarious liability in the absence of evidence that the person responsible for the conduct complained of was acting on the employer's orders. This view disregards the fact that there is some evidence that the application of the principle of vicarious liability had been contemplated by the legislation.[114]

A number of provincial jurisdictions, including Manitoba, prohibit discriminatory practices by an employer or "a person acting on behalf of an employer."[115] This choice of language may well reflect the view that the employer should be liable for the conduct of a person acting on his or her behalf.

It might also be noted that pursuant to Title VII of the American *Civil Rights Act*,[116] (which defines employer as including any agent of the employer) both the Equal Opportunity Commission[117] and the courts have accepted the proposition that an employer is responsible not only for its own acts but for those of its agents and supervisory employees. While there appears to have been some divergence of opinion as to the precise scope of the employer's liability, even the more conservative wing of the Supreme Court of the United States has accepted the view that reference may be made to common law agency principles for guidance.[118]

In the *Janzen* case, both the adjudicator[119] and Monnin J. of the Manitoba Court of Queen's Bench[120] appear to have considered that the employer could be made liable on the basis of common law agency principles. In the opinion of the Court of Appeal, however, the language of the Manitoba *Act* was not explicit enough to justify the imposition of vicarious liability. *Respondeat superior* did not apply. Further, on a strict construction of the section, the only persons besides the employer who could be made liable were those who implemented a discriminatory policy on the employer's behalf. Tommy the cook, being neither the employer nor — in the court's opinion — a person acting on behalf of the employer, could discriminate with impunity. Had the legislation simply provided that "no person" shall discriminate, Tommy would have been liable. If the individual supervisor, acting on his employer's instructions or implementing the employer's established policy discriminates, he is personally liable. If,

114. See the recommendation in the *1981 Annual Report of the Canadian Human Rights Commission*, *supra*, note 98 at 11 and proceedings of the H.C. Standing Committee on Justice and Legal Affairs (20 Dec. 1982) 114:10-11. Adjudicators had consistently held that the ordinary notion of vicarious liability applied. See, e.g. *Cox* v. *Jaqbritte Inc.*, *supra*, note 39, at para. 5598; *McPherson* v. *Mary's Donuts*, *supra*, note 44, at para. 8536; *Kotyk*, *supra*, note 36, distinguishing the *Nelson* case, *supra*, note 110, on the basis that the federal *Act* covered indirect discrimination.

115. See, e.g., *Human Rights Code*, R.S.N.B. 1973, c.H-11, s.3(2); *Individual's Rights Protection Act*, R.S.A. 1980, c.I-2, s.7; *Human Rights Act*, S.M. 1974, c.65; *Newfoundland Human Rights Code*, R.S.N. 1970, c.262, s.9(1).

116. *Supra*, note 17 at s.2000(e)(6).

117. *Supra*, note 25 at 2.1604.11(c).

118. See *Meritor*, *supra*, note 20. The difference of opinion related to whether the employer was liable for the acts of a supervisor regardless of knowledge or other mitigating features. The Circuit Court of Appeals had held the employer strictly liable; the Supreme Court remanded the case without issuing a definitive rule on the scope of an employer's liability.

119. *Supra*, note 7 at para. 22546.

120. *Supra*, note 11 at 286-7.

however, he acts outside the scope of his authority, on a frolic of his own, neither he nor the employer is liable.

These consequences may be dictated by the language of the *Act*, but they are curious indeed and in fact so strange and irrational as to raise a serious question as to whether such a result could have been intended. In the case of discrimination in the employment context, the only really effective remedy is one which requires action by the employer. Boards of directors seldom pass resolutions authorizing discrimination contrary to human rights legislation. If a corporation cannot be made vicariously liable for the conduct of persons authorized to carry out its functions, the complainant is left with no effective remedy in most cases. It may seem unjust to impose liability for damages against a legal entity which has been guilty of no fault. Yet, it seems equally unjust to refuse a complainant any effective remedy when an injustice has clearly been committed.

Even if the statute had contemplated vicarious liability, the Manitoba Court of Appeal would not have found the company liable upon the facts. In its view, Tommy the cook was not acting on the employer's behalf. "However one might describe the conduct of Tommy the cook in this case," said Huband J.A., "there can be no dispute that he was not acting on behalf of an employer."[121] Vicarious liability could only arise if the employee was acting within the scope of his express, implied or ostensible authority. In Huband J.A.'s opinion, Tommy had no express or implied authority to harass waitresses and there was no basis for a finding of ostensible authority. Further, his actions were not performed during the course of his employment. "Patting the buttocks of a waitress is *dehors* his job as a cook."[122] Whilst the employer might be liable if Tommy negligently dumped too much pepper in the soup, upon ordinary tort principles the employer could not be liable for wilful conduct which was not referable to acts Tommy was authorized to perform.[123]

Despite Huband J.A.'s comment, the scope of Tommy's authority was in fact a matter of dispute and although the learned justice found no basis to support an allegation that Tommy was acting with ostensible authority, there was some evidence to suggest otherwise. As noted earlier, the president and director of the company (Philip) had told the employees that Tommy had authority to hire and fire in his absence. Moreover, it was not disputed that in Philip's absence Tommy supervised the operation of the restaurant. Both the adjudicator and Monnin J. had thought this afforded sufficient evidence to estop the company from denying that it had placed Tommy in a position of authority over the other employees. If he could be liable for negligently performing his duties in the kitchen, there is some basis for arguing that he ought to be liable for wilfully abusing his supervi-

121. *Supra*, note 1 at 407.

122. *Ibid.* at 408.

123. *Ibid.* at 411. Although Twaddle J.A. devoted relatively little space to the matter of authority, he appears to have agreed that Tommy's conduct was unauthorized. *Supra*, note 1 at 424.

sory authority in harassing his fellow employees. The misuse of power or authority by supervisors provides one of the most common contexts for sexual harassment.

B. Condonation

Speaking for the Court of Appeal in the *Nelson* case,[124] Craig J.A. indicated that had he been satisfied that the respondent company had "authorized, condoned, adopted and ratified" the discriminatory conduct, he would have upheld the decision of the board of inquiry. In its ordinary dictionary sense the word condone means simply to forgive a miscreant's conduct. One suspects, however, that both the board and the learned trial judge in *Nelson* may have contemplated that condonation involved tacit support, acquiescence, active approval, or at least a failure to take corrective action rather than mere forgiveness. According to this understanding a company might well be held liable if, upon hearing of an employee's wrongful conduct, it did nothing to prevent or remedy such conduct. This kind of an omission could be construed as "condonation," "ratification" or "adoption." In this situation the employer's liability could be regarded as personal (as distinct from vicarious).[125]

In the *Janzen* case, the adjudicator had held that on the facts Philip had condoned Tommy's wrongdoing. On review, Monnin J. rejected this conclusion.[126] Whilst Philip was not the most understanding and responsible employer, he had not at any time condoned Tommy's action. Huband J.A. agreed with Monnin J., noting that Philip had offered Ms. Janzen a position in another restaurant and that the harassment had ceased before she made her complaint. Similarly, in the case of Ms. Govereau the harassment had ceased as soon as she complained. In the opinion of Twaddle J.A., condonation in its ordinary sense of forgiveness of wrongdoing was not enough to warrant imposition of liability upon Philip. Adoption of Tommy's conduct "would be required at the very least to bring . . . [it] within the meaning of the words 'on behalf of the employer'."[127] The facts of the case might well justify the conclusion that Philip had not approbated Tommy's conduct; he simply failed to be aware of it or neglected to take decisive action to ensure that it would not be repeated. However, the basic issue raised pursuant to paragraph 6(1)(a) of *The Manitoba Human Rights Act* was whether the employer was discriminating against the complainants in respect of employment or any term or condition of employment. An employer may as effectively render tolerance of harassment a term or condition of employment by his failure to deal with complaints as by adopting the actions of a supervisor or fellow employee of the complain-

124. *Supra.* note 110 at 345.

125. See, e.g., *Dhaliwal* v. *B.C. Timber Ltd.* (1983) 4 C.H.R.R. D/1520 at para. 13386. The language of Craig J.A. has frequently been adopted by adjudicators.

126. *Supra*, note 11 at 287.

127. *Supra*, note 1 at 426.

ant. What difference does it make how the message is sent if the meaning is clear?

It may be that mere forgiveness of an employee's misconduct is not enough to fix the employer with liability for the same. Again, while a single act of harassment might warrant disciplinary action, it does not follow that the mere failure to discipline should automatically render the employer liable for that harassment. However, failure to take action when the offence is repeated may well be evidence that the employer is making tolerance of sexual advances a condition of employment. In this particular case, although Philip may not have approved of Tommy's conduct, he failed to take effective action to stop its recurrence.

C. The Organic Theory of Liability

When the British Columbia Court of Appeal rejected the application of the principle of *respondeat superior* in the *Nelson* case,[128] boards turned their attention to alternative methods of imposing liability upon a corporate employer. For example, a corporation may incur "personal" as distinct from vicarious liability on the basis of what has become known as the organic theory of corporate liability. If a board of directors were to pass a resolution authorizing the commission of a wrongful act, the corporation would be liable not on the basis of vicarious liability but because the act would be deemed to be that of the corporation itself. In *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.*, Viscount Haldane L.C. put the proposition in the following terms:

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own: its active and directing will must consequently be sought in the person of someone who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.[129]

Accordingly, in that case the corporation was held liable for the acts and omissions of its managing director.

The application of the organic theory of corporate responsibility has presented no difficulty in the majority of reported Canadian cases. Typically, the operation is small and closely held. The person engaging in harassment is commonly a company officer, a director, the legal or beneficial owner of all or a substantial number of shares, intimately involved in the management of the business, and readily recognizable as the company's directing mind and will or as part of it.[130] Considerably more difficulty may be involved in identifying the directing mind and will of a large corpo-

128. *Supra*, note 110.

129. (1915), [1915] A.C. 705 at 713 (H.L.).

130. See, e.g., *Bell* v. *Ladas*, *supra*, note 16; *McPherson* v. *Mary's Donuts*, *supra*, note 44; *Hughes* v. *Dollar Snack Bar*, *supra*, note 44; *Giouvanoudis* v. *Golden Fleece Restaurant*, *supra*, note 39.

ration or governmental agency. Such a determination appears to depend upon the degree of independent discretion which has been delegated to the individual concerned. Some authorities suggest that even though vicarious liability may have no application in the human rights context, the organic theory of corporate liability can be invoked whenever a person is performing some function of management. Thus the delegation to a foreman of the right to hire, fire or discipline has been treated as sufficient to fix the employer with liability for all conduct of the foreman within the area of his responsibility.[131]

If in every case the delegation of power to make decisions on a company's behalf led to the application of the organic theory, the result would be tantamount to imposing vicarious liability upon the employer. This approach could not, of course, be reconciled with the decision in the *Nelson* case.[132] Others have taken a more cautious approach and have declined to treat foremen and the lower echelons of management as part of the directing mind and will of a large corporation or government department.[133]

The Court of Appeal in *Janzen* did not question the propriety of the application of the organic theory to human rights cases. Quite the contrary, it recognized that it is appropriate to apply the theory where the facts so warrant.[134] The problem arose in determining whether Tommy the cook was part of the directing mind and will of the company. The adjudicator had found that when Tommy carried out the supervisory functions ostensibly delegated to him by Philip, he was to that extent part of the directing mind and will of the company. Hence, the company was responsible for his actions.[135] Upon appeal, Monnin J. expressed the opinion that while Tommy might well not have been a directing mind of the respondent, the company was precluded from arguing this because it had represented Tommy to the employees as having authority over them.[136] However, in the Court of Appeal Huband J.A. had not the slightest hesitation in rejecting this conclusion.[137] Tommy was not a director or officer of the company; nor did he hold a senior management position. He was merely the cook and performed limited supervisory functions. Whilst Philip had left the staff with the impression that Tommy had the right to hire and fire, this was hardly the stuff that makes "the directing mind and will of the corporation, the very ego and centre of the personality of the corporation." On this aspect of the rule it is submitted that Huband J.A.

131. See, e.g., *Olarte* v. *DeFilippis* (1983), 4 C.H.R.R. D/1705, esp. paras. 14839 ff. and the dissenting opinion of MacGuigan J. in *Treasury Board* v. *Robichaud, supra*, note 13. Reference might also be made to *Dhillon* v. *F.W. Woolworth Co., supra*, note 36; *Kotyk, supra*, note 36; *Ahluwalia*, supra, note 36, esp. paras. 15,046 to 15,048. In the latter case, Professor Cummings accepts the view that on the balance of authorities there is no vicarious liability in the absence of a specific provision to that effect.

132. *Supra*, note 110.

133. See *Dhaliwal* v. *B.C. Timber Ltd., supra*, note 125 at paras. 13,386 to 13,398 and 13,407 (personnel officer of mill); *Treasury Board* v. *Robichaud, supra*, note 13 at para. 22,279 (per Thurlow C.J.).

134. *Supra*, note 1 at 410.

135. *Supra*, note 7 at para. 22,662.

136. *Supra*, note 11 at 286.

137. *Supra*, note 1 at 410.

was clearly right. The fact that Philip had represented to the other employees that Tommy the cook had disciplinary powers does not establish that he was the brains of the company or its directing mind. To suggest otherwise stretches credulity to unreasonable lengths.

D. Employer's Responsibility to Provide a Workplace Free from Harassment

As we have seen, since 1970 it has been recognized by adjudicators in Canada that under human rights legislation employees are entitled to terms and conditions of work which do not require them to endure harassment on the basis of any of the prohibited grounds of discrimination. The employer is under a concomitant obligation to provide a working environment which is free of discrimination. In order to achieve that end adjudicators have insisted that when employers become aware or ought to be aware of the problem, they should take prompt and appropriate remedial action. They cannot simply stand idly by and wash their hands of the matter. It is their personal responsibility to take reasonable steps to eradicate the discrimination and prevent its recurrence.[138]

Still, the obligation which adjudicators have imposed is not absolute. Employers may minimize risk by adopting and publicizing an anti-discrimination policy and policing its administration.[139] They may escape liability by demonstrating an absence of actual or constructive knowledge[140] and that prompt investigation and eradication of the discrimination was effected upon learning of the wrongful acts.[141]

The position reached by these authorities is similar to that produced by statutory amendments.[142] Subsection 48(b) of the *Canadian Human Rights Act*[143] permits the employer to exculpate himself by establishing that he did not consent to the act or omission, that he exercised all due diligence to prevent the act or omission from occurring, and that he exercised due diligence after the act or omission.

The rule reflected in the authorities referred to above is also akin to the approach taken in the United States where liability is not absolute. Em-

138. *Simms* v. *Ford Motor Co.*, *supra*, note 34. See also *Kotyk*, *supra*, note 36 where, for the purposes of federal legislation, failure to take reasonable steps to prevent recurrence is characterized as a form of indirect discrimination.

139. *Ibid.* See also *Dhillon* v. *F.W. Woolworth Co.*, *supra*, note 36 at para. 6691; *Robichaud* v. *Brennan*, *supra*, note 44 (Fed. Trib.); *Robichaud* v. *Brennan*, *supra*, note 39 (Fed. Review Trib.); *Wei Fu* v. *Her Majesty in the Right of Ontario*, *supra*, note 36 at para. 22,922.

140. *Simms* v. *Ford Motor Co.*, *supra*, note 34; *Olarte* v. *DeFilippis*, *supra*, note 131 at paras. 14834–46 and at D/1744; *Ahluwalia*, *supra*, note 36 at paras. 15,037 and 15,072.

141. See, e.g., *Fullerton* v. *Davey C's*, *supra*, note 39 and *Ahluwalia*, *supra*, note 36 at para. 15,072. See also *Romman* v. *Sea-West Holdings Ltd.*, *supra*, note 13 where failure to act after an incident was reported was held sufficient to create liability. Cf. *Robichaud* v. *Brennan*, *supra*, note 44 where the Federal Tribunal found that reasonable steps had been taken.

142. See, e.g., the *Canadian Human Rights Act* S.C. 1976–77, c.33, as am. S.C. 1980–81–82–83, c.143, s.23. It will be noted that under later amendments to the *Canada Labour Code*, the right of the employee to freedom from sexual harassment and the duty of the employer to make every reasonable effort to secure that freedom received statutory endorsement. See *Canada Labour Code*, ss. 61.8 and 61.9, introduced by S.C. 1983–84, c.39, s.12.

143. *Supra*, note 142.

ployers are not always automatically liable for sexual harassment by supervisors or others.[144] Thus where a supervisor contravenes the employer's anti-discrimination policy without the employer's knowledge, the employer may be relieved of responsibility if steps are taken to rectify the situation when discovered.[145] If, however, the employer has notice of the harassment and does virtually nothing to stop or even investigate it, he will be liable.[146]

Recognition that the employer may be liable even if he himself does not directly commit a wrongful act may also be derived from the comments of Craig J.A. in the *Nelson* case.[147] The employer may be personally liable if he authorizes, condones, adopts or ratifies a wrongful act. Moreover, inaction may in some circumstances suffice to establish personal liability.[148]

However, apart from these comments of Craig J.A.[149] there is little in the decided cases to suggest that Canadian courts will readily infer an obligation on the part of the employer to take measures to ensure that employees enjoy freedom from harassment in the workplace. In fact, in the *Robichaud* case the Federal Court of Appeal was invited to do so but declined.[150] Although that decision might have been distinguished on the basis of the language of the remedial provisions found in the statute involved,[151] it was instead accepted as authoritative by the Court of Appeal in *Janzen*.[152] If this view prevails, then a specific statutory provision akin to section 61.9 of the *Canada Labour Code* will be necessary before Canadian courts adopt the broad basis for liability developed by the courts in the United States and applied quite independently by boards in Canada since 1970.

It is submitted that it is open to courts — adopting the broad liberal approach dictated by the various *Interpretation Acts* — to hold that an employer who permits a discriminatory climate to persist in the workplace is guilty of imposing a condition of employment in violation of paragraph 6(1)(a) of *The Manitoba Human Rights Act* and similar legislation. If one accepts the view that the legislation confers upon the employee a right to a workplace free from harassment,[153] the imposition of a corresponding duty on the employer to deal with infringements of that right would ap-

144. See *Meritor*, *supra*, note 20.

145. See *Barnes* v. *Costle*, *supra*, note 20.

146. *Bundy* v. *Jackson*, *supra*, note 20. See also the E.E.O.C. Guidelines, *supra*, note 25.

147. *Supra*, note 110.

148. See *Ahluwalia*, *supra*, note 36 at para. 15,045 where the Board considers the comments of Craig J.A. in this context.

149. *Supra*, note 110 at 345 ff.

150. *Treasury Board* v. *Robichaud*, *supra*, note 13 at para. 22278.

151. Complaints may be laid against "anyone found to be engaging or to have engaged in a discriminatory act." Thurlow C.J. interpreted this as limited to situations in which a person personally engaged in a discriminatory practice or instructed another to do so. *Ibid.* If one were to accept the proposition that permitting a discriminatory atmosphere to continue constitutes direct discrimination by the employer, could not the employer be said to have engaged in a discriminatory act?

152. *Supra*, note 1 at 406 (per Huband J.A.) and 424 (per Twaddle J.A.).

153. *Supra*, note 142.

pear to flow as a natural corollary; (a personal duty analogous, perhaps, to the non-delegable obligation of the employer at common law to take reasonable care for the safety of his workers).[154]

IV. Conclusions

As an occupational hazard, sexual harassment respects no geographical boundaries. It is as much a matter of concern in Victoria and St. John's as it is in Manitoba. It is perceived as a problem in all jurisdictions, in all spheres and at all levels of employment. Thus the issues raised by the Manitoba Court of Appeal in the *Janzen* case[155] are not of purely provincial concern. The reasoning of the Court could be extended to every jurisdiction which has not dealt specifically with the problem of sexual harassment. Indeed, its implications are not confined to the issue of sexual harassment since the same reasoning could be applied equally to harassment on the basis of race, religion, national origin and any of the other grounds upon which discrimination in employment is prohibited. The fears expressed in the late 1970's and early 1980's about the implications of the *Bliss*[156] decision for the interpretation of human rights legislation have now been realized. Hence *Janzen* is an important case and deserves to be examined with care.

It has been submitted that the reasoning of the Court of Appeal is flawed in a number of respects. First, it ignores a substantial body of authority, both Canadian and American (judicial and otherwise) which supports the view that disparate treatment of individuals because of their membership in one of the protected groups constitutes discrimination. Sexual harassment as a form of discrimination is not confined to situations in which the employer pays lip service to public policy by hiring women and then proceeds to make life in the workplace so intolerable that they are compelled to leave. Singling out persons on the basis of race or colour, and subjecting them to indignities and humiliations which create anxiety or fears, have long been regarded as discrimination where the circumstances are such as to justify the conclusion that submission to such treatment has become a term and condition of employment. To be compelled to suffer such treatment as a condition of continued employment is to be denied the very right of equal opportunity which human rights legislation is designed to foster.

On the particular facts of *Janzen*, there appears to have been more than enough evidence to raise a *prima facie* case of discrimination and to shift the evidentiary burden to the employer. Here Tommy the cook did not testify. He had long since disappeared. It would not have been unreasonable to infer that the fact that the harassed employees were female was a prime factor in Tommy's selection of them as his victims. There was nothing to indicate that he exhibited any bisexual tendencies.

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154. *Wilsons and Clyde Coal Ltd.* v. *English*, [1938] A.C. 57 (H.L.).

155. *Supra*, note 1.

156. *Supra*, note 3.

A further basic issue to consider is whether the Manitoba *Act* and similar legislation elsewhere offer an effective remedy for the problem of sexual harassment. According to the Court of Appeal in *Janzen*, on the wording of section 6 neither the employer nor the cook could be found liable under the Manitoba *Act*. However, as the Abella Commission observed in 1984,[157] where sexual harassment has been proven there should be available an immediate and effective remedy. The general perception reflected in the 1983 Report of the Canadian Human Rights Commission entitled *Unwanted Sexual Attention and Sexual Harassment*, is that employers are often remiss in that they fail to respond to allegations of harassment. The report suggests that only in a relatively small percentage of cases is the harasser transferred, fired or otherwise disciplined (if he himself does not resign); in 70% or more of the cases nothing happens.[158]

In the employment context, the complainant will often have no effective remedy unless responsibility can be brought home to the employer. The *Janzen* case is a good example. Even if the cook had been found personally liable for violating the Manitoba *Act*, a remedial order against him alone would have served little purpose. As we have seen, the Court of Appeal avoided that issue. According to its interpretation of the *Act*, the cook incurred no personal liability at all. He was not the employer. Nor was he a person acting on behalf of the employer. Hence, however reprehensible Tommy's conduct, no one could be responsible for it under the legislation in question.

What lines of attack might be used to render the employer liable? It may be that the Supreme Court of Canada could be persuaded that the remedial objectives of the Manitoba *Act* warrant the application of principles of vicarious liability. This could involve rejection of the reasoning in *Nelson*[159] and the cases which followed or accepted it. However, the *Nelson* decision could be distinguished from the *Janzen* case. In *Nelson*, what was at issue was the liability of the owner of a townhouse complex for the conduct of its manager in denying accommodation to the complainants because they were native Indians. But a section of the British Columbia legislation permitted a Board of Inquiry to make remedial orders against any person who had contravened its provisions. Therefore, the Court of Appeal in British Columbia did not find it necessary to apply the principles of vicarious liability. The Manitoba *Act*, on the other hand, prohibits discrimination in employment by an employer or a person acting on his behalf. Whilst the legislative intent could have been made clearer, this language can still reasonably be construed as evincing an intention to render the employer liable for the wrongful acts of his supervisory personnel. As stated above, the alternative interpretation suggested by the Court of Appeal in *Janzen* produces consequences so extraordinary that it is difficult to believe that the Manitoba legislature could have intended them. Again,

157. *Report of the Royal Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1984) (Commissioner: Judge Rosalie Silberman Abella).

158. *Ibid.* at 17.

159. *Supra*, note 110.

American courts have had no difficulty in interpreting similar language as rendering an employer liable for the wrongful acts of its "agents."

It is submitted that on the facts of the *Janzen* case, the cook had not become part of the directing mind and will of the corporation. Hence the Court of Appeal was correct in concluding that the company could not be found liable on the basis of the organic theory of corporate responsibility. The suggestion that the delegation of any authority justifies the application of this theory so distorts the concept of the directing mind and will as to be unacceptable. It does not provide a satisfactory basis for corporate liability in the majority of situations in which corporations clothe supervisors with authority in the workplace. There is, however, an alternative footing upon which liability could be imposed based on acceptance of the proposition that the language of the human rights legislation confers upon employees the right to a workplace free from discrimination. This falls within the employer's sphere of responsibility. If he fails to take prompt and effective action to deal with situations of which he is or ought to have been aware, then he is breaching his duty to provide a workplace free from discrimination. The responsibility is not vicarious but personal to the employer. It is further submitted that the legislation could reasonably be construed to confer upon the various tribunals charged with responsibility for handling complaints, the authority to apply this basis of liability.

The decision in the *Janzen* case sets back the cause of equality for women. It is my view that there was a sound basis for holding the employer responsible and, therefore, that the case was wrongly decided.

Author's Note

Since this article was written, three developments of note have taken place. First, the decision of the Manitoba Court of Appeal in the *Janzen* case, which forms the basis of the article, has been appealed to the Supreme Court of Canada.

Secondly, in December of 1987 Manitoba's new human rights code was proclaimed to be in force: (See *The Human Rights Code*, S.M. 1987, c. 45, C.C.S.M. H175). This new legislation goes far beyond a simple reversal of the *Janzen* case. It extends the list of prohibited grounds to include "pregnancy, the possibility of pregnancy, or circumstances related to pregnancy" and other "gender-determined characteristics or circumstances" as well as sexual orientation" (See subsection 9(2)). In addition, section 19 specifically outlaws harassment, not only on the basis of sex, but on any of the other grounds upon which discrimination is prohibited.

Section 10 of the new *Code* imposes vicarious liability on employers for the acts of officers, employees, directors or agents acting within the scope of their employment or their actual or apparent authority. However, the section appears to go beyond the common law insofar as it imposes

positive obligations upon employers. Employers can escape liability for the acts of servants or agents, etc., only if two requirements are met. First, they must establish not only that they did not consent to the contravention of the *Code*, but also that they took reasonable steps to prevent it. If employers do not establish policies or practices designed to prevent discrimination, they may find it difficult to satisfy this requirement. Secondly, after the contravention occurs employers must show that they took all reasonable steps to mitigate or avoid its effects.

Tribunals and commentators, both in Canada and the United States, have taken the view that employers should be liable for failure to take effective remedial action to eradicate harassment of which they are or ought to have been aware. Paragraph 19(1)(b) of the new Manitoba *Code* renders liable any person who, being responsible for an activity or undertaking to which the legislation applies, knowingly permits or fails to take reasonable steps to terminate harassment. Under this provision it does not appear to matter whether the harassment flows from the conduct of supervisory personnel, the complainant's fellow employees, or from customers and others who happen to be present in the workplace. The employer is responsible for ensuring that the workplace is free from harassment, whatever the source. Further, it should be noted that the liability is not confined to the employer alone but also extends to the offending personnel.

Clearly, paragraph 19(1)(b) applies where the person in charge has actual knowledge of the harassment. Will constructive knowledge suffice to ground liability? The bare language of paragraph 19(1)(b) suggests not. This conclusion is bolstered by the language of paragraph 19(2)(b) which, in defining sexual harassment, requires that the person making a sexual solicitation or advance "knows or *ought reasonably to know* that it is unwelcome." By way of comparison, no such reference to constructive knowledge is to be found in paragraph 19(1)(b).

The third and final development is the decision of the Supreme Court of Canada in *Robichaud and Canadian Human Right Commission* v. *H.M. The Queen* ((1987), 87 CLLC 17,025) handed down on July 29, 1987. This case involved the application of the *Canadian Human Rights Act*. It was not disputed that sexual harassment during the course of employment constituted discrimination on the grounds of sex. The sole issue before the Court was whether or not the actions of the complainant's supervisor could be attributed to the Crown as employer.

Repeatedly stressing the remedial nature of the legislation involved, the Supreme Court of Canada held that the Crown was liable. It did not base its decision on theories of vicarious liability developed in the field of tort law. The Court also bypassed consideration of theories of strict liability in quasi-criminal contexts. Instead, it based its judgement solely on the language of the *Act* and the need to provide an effective remedy for the problem of harassment. The employer was held responsible for providing a healthy work environment. Only by rendering the employer liable could the statutory objectives be achieved. The language of the decision suggests that the liability of the employer for the conduct of those he had placed in

positions of authority was strict, if not absolute. According to the Court, the purpose of the legislation was to identify and eliminate discrimination rather than to determine fault or punish conduct. The employer's intentions, motives and conduct were, in the opinion of Le Dain J., theoretically irrelevant to the imposition of liability, though they might have remedial consequences. Thus an employer who responded quickly and effectively to a complaint by instituting a scheme to remedy the discrimination and prevent its recurrence, would not be liable to the same extent (if at all) as an employer who failed to take any action whatever.

It is noteworthy that the Supreme Court of Canada cited by way of authority the opinion of Marshall J. in the *Meritor* case,[160] rather than the more conservative opinion expressed by Rehnquist J. for the United States Supreme Court. Marshall J. had adopted the view that an employer was liable for the acts of his supervisors or agents regardless of the state of his knowledge or other mitigating factors.

The language of the *Canadian Human Rights Act* differed somewhat from that of the Manitoba legislation considered in the *Janzen* case. However, assuming that the Court applies similar interpretive techniques, the *Robichaud* decision strongly supports the imposition of direct and personal liability upon the employer in *Janzen*.

160. *Supra*, note 20.