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WORKPLACE SEXUAL HARASSMENT LAW IN CANADA AND THE UNITED STATES: A COMPARATIVE STUDY OF THE DOCTRINAL DEVELOPMENT CONCERNING THE NATURE OF ACTIONABLE SEXUAL HARASSMENT

Joseph M. Pellicciotti†

I. INTRODUCTION

This article reviews the general development of workplace sexual harassment laws in Canada and the United States, focusing upon the doctrinal development of actionable sexual harassment. Particularly, the article highlights the doctrinal development in Canada since the Canadian Supreme Court's 1989 landmark sexual harassment decision, *Janzen v. Platy Enterprises Ltd.*,¹ and in the United States since 1986 when the United States Supreme Court decided its first sexual harassment case, *Meritor Savings Bank v. Vinson*.²

By employing a comparative approach, this article seeks to determine the association of Canadian doctrine to that of the United States. Since American courts were the first of the two

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¹ 59 D.L.R.4th 352, 10 C.H.R.R. D/6205 (Can. 1989).

² 477 U.S. 57 (1986), *aff'd* *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *rev'd* 23 Fair Empl. Cas. (BNA) 37 (D.D.C. 1980).

nations to recognize workplace sexual harassment as illegal sex discrimination,³ they have been in a position to influence the decisions of the Canadian courts. Therefore, in determining the doctrinal relationship of the law between the two jurisdictions, this article specifically marks a general influence of United States law upon workplace sexual harassment law developments in Canada.

The article begins with a brief overview of the constitutional and statutory bases for the prohibition of workplace sexual harassment in Canada. Then, it will sketch the early development of Canadian and United States workplace sexual harassment law by reviewing the decisions of the courts. The article will also survey the human rights tribunals, review the *Janzen* and *Vinson* decisions of the high courts of the respective countries and proceed to consider the doctrinal development concerning the nature of actionable sexual harassment in the post-*Janzen* and post-*Vinson* periods. Throughout the paper, the focus is upon the commonalities and differences of Canadian and United States law regarding actionable workplace sexual harassment.

II. AN OVERVIEW OF THE CONSTITUTIONAL AND STATUTORY BASES FOR THE PROHIBITION OF WORKPLACE SEXUAL HARASSMENT IN CANADA

A. *Canada's Constitutional Guarantee of Equal Rights*

The Canadian Constitution Act of 1982 includes the Canadian Charter of Rights and Freedoms.⁴ The *Charter* entrenches

³ See *infra* text accompanying notes 59-92.

⁴ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*]. The *Charter* was effective April 17, 1982, except for Section 15, which had a delayed effective date of April 17, 1985. *Canada Act 1982* (U.K.), c.11, § 32(2). The Canadian Constitution is "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." *Canada Act 1982* (U.K.), 1982, c.11 § 52. This language, of course, is similar to that found in the United States Constitution. U.S. CONST. art. VI. However, unlike the United States Constitution, the *Charter* includes a "notwithstanding" clause allowing the federal Parliament or any of the provincial legislatures to declare that legislation "shall operate notwithstanding a provision included in section 2 [Fundamental Freedoms] or sections 7 through 15 [Legal Rights and Equality Rights]" of the *Charter*. *Canada Act 1982* (U.K.), 1982, c.11 § 33(1). Declarations made pursuant to the notwithstanding

a broad range of individual rights, categorized in terms of "fundamental rights,"⁵ "mobility rights,"⁶ "legal rights,"⁷ "democratic rights,"⁸ "equality rights"⁹ and "minority language educational rights."¹⁰ Within the context of prohibiting workplace sexual harassment, the equality rights fixed in section 15 of the *Charter* are material. The equality rights section provides the Canadian basis for the constitutional principle of equal protection under the law, and the section expressly pro-

clause are limited to a five-year period. *Canada Act 1982* (U.K.), 1982, c.11 § 33(3). Declarations under the clause may be re-enacted for another five-year period. *Canada Act 1982* (U.K.), 1982, c.11 § 33(3).s. 33(3).

⁵ "Fundamental rights" include the freedoms of conscience and religion, the freedom of "thought, belief, opinion and expression, including freedom of press and other media of communication," and the freedoms of peaceful assembly and association. See *Charter, supra* note 4, § 2.

⁶ "Mobility rights" include, the rights of Canadians "to enter, remain in, and leave Canada," and to move to and work in any province. See *Charter, supra* note 4, §§ 6(1)-(2). Mobility rights are subject to provincial residency requirements for the receipt of social services. *Charter, supra* note 4, §§ 6(3). The mobility rights section of the constitution does not preclude affirmative action programs designed to ameliorate the conditions of socially or economically disadvantaged individuals, if the rate of employment in a province is below the average Canadian employment rate. *Charter, supra* note 4, §§ 6(4).

⁷ "Legal rights" include safeguards for life, liberty and security and the right of an individual not to be deprived of life, liberty and security without "the principles of fundamental justice." *Charter, supra* note 4, § 7. Legal rights also include a number of criminal procedural protections familiar to Americans, e.g., the right to be secure against unreasonable search and seizure, the right not to be arbitrarily detained or imprisoned, the right to counsel, the right to a speedy trial ("to be tried within a reasonable time"), a privilege against self-incrimination (the right "not to be compelled to be a witness in proceedings against that person in respect of the offence"), the presumption of innocence, the right not to be subjected to cruel and unusual punishment, the right not to be denied "reasonable bail without just cause," and the protection against double jeopardy. See *Charter, supra* note 4, §§ 8-14.

⁸ "Democratic rights" include the right of citizens to vote; a general five-year limitation on the terms of both the federal and provincial legislatures; and the requirement for legislatures to meet "at least once every twelve months." See *Charter, supra* note 4 §§ 3-5.

⁹ "Equality rights" include the fundamental principle of equal protection under the law and a broad prohibition of discrimination, particularly discrimination based on "race, national or ethnic origin, color, religion, sex, age, or mental or physical disability." See *Charter, supra* note 4, § 15(1). See also, *supra* text accompanying note 11.

¹⁰ "Minority language educational rights" include the general guarantee that French and English minority language education will be supported by public funding in both primary and secondary school instruction. See *Charter, supra* note 4, §§ . 23(1)-(2). French and English are established in the *Charter* as the official languages of Canada. See *Charter, supra* note 4, § 16(1).

hibits discrimination based on "race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability."¹¹

The nature of discrimination within the meaning of section 15 of the *Charter* was first considered by the Canadian Supreme Court in 1989, in *Andrews v. Law Society of British Columbia*.¹² In *Andrews*, the Court was explicit; to establish a claim under section 15 of the *Charter*, individuals must demonstrate that they belong to a "discrete and insular minority" which has historically experienced discrimination, stereotyping or prejudice by virtue of a physical characteristic.¹³ The Court also described in *Andrews* the essence of the discrimination prohibited by section 15:

. . . [D]iscrimination may be described as a distinction, *whether intentional or not* but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.¹⁴

¹¹ Section 15 provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age, or mental or physical disability.

See *Charter*, *supra* note 4, § 15(1). Section 15(2) of the *Charter* protects the use of affirmative action programs from attack under § 15(1): "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." See *Charter*, *supra* note 4, § 15(2). Section 15 of the *Charter* was given a delayed effective date of April 17, 1985. See *Charter*, *supra* note 4. The purpose of the delay was to allow Canadian governments "to clean up their laws and to prepare to defend the ones they were not willing to change." MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* 240 (1989).

¹² 1 S.C.R. 143 (1989).

¹³ *Id.* at 182. See also *R. Turpin*, 1 S.C.R. 1296, 1332-33 (1989).

¹⁴ *Andrews*, 1 S.C.R. at 174-75 (emphasis added). Canadian courts have also interpreted human rights legislation consistent with the *Charter's* Section 15 definition. See *Fortune v. Annapolis Dist. School Bd.*, 20 C.H.R.R. D/100, D/104 (N.S. Bd. of Inq. 1992) ("Nova Scotia legislation must be interpreted consistent with the

Pursuant to section 1 of the *Charter*, enumerated rights and freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹⁵ Therefore, the language of section 1 imposes "reasonable" limits on the scope of the rights and freedoms enumerated in the *Charter*, to the extent that such limits "can be demonstrably justified in a free and democratic society." As a practical matter, section 1 of the *Charter* recognizes that a degree of judicial deference to legislative and administrative policy choices is necessary. Whether a law challenged as violative of section 15 rights, or as violative of any of the other of the *Charter's* enumerated rights, can find safe harbor within the reasonable limits exception depends upon the result of a "well-established" process of judicial inquiry.¹⁶ The inquiry initially considers the objective of the legislation. The legislation subject to judicial review "must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom.'"¹⁷ This means that the purpose of the law "must relate to concerns which are pressing and substantial in a free and democratic so-

requirements of § 15 of the *Charter*."). Under the definition, plaintiff "need not find a deliberate, conscious decision" to discriminate. *Fortune*, 20 C.H.R.R. at D/104. See also *Re Ont. H. R. Comm'n. v. Simpsons-Sears Ltd.*, 23 D.L.R.4th 321, 329 (Can. 1985). Canada's acceptance of adverse effect discrimination parallels the acceptance of the disparate impact theory in Title VII cases in the United States. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Disparate impact theory in the United States is now legislatively regulated. 42 U.S.C. §§ 2000e-2(k)(1)(A)(i) and (ii) (1989).

¹⁵ See *Charter*, *supra* note 4, § 1. A detailed discussion of the enumerated rights in the *Charter* and a consideration of the nature of the § 1 reasonable limits language are beyond the scope of this article. For an excellent analysis of the history and substance of the Constitution Act, 1982, including the rights enumerated in the *Charter*, see PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* (1992). For an illustrative review of the nature and scope of the Canadian constitution, including the enumerated individual rights, see RONALD I. CHEFFINS & PATRICIA A. JOHNSON, *THE REVISED CANADIAN CONSTITUTION: POLITICS AND LAW* (1986).

¹⁶ *Leshner v. Ontario* (No. 2), 16 C.H.R.R. D/184, 202 (Ont. Bd. of Inq. 1992) (citations omitted) ("The elements of the § 1 [reasonable limits] inquiry are well-established."). See also *R. v. Oakes*, 1 S.C.R. 103 (1986) (*Oakes* is the leading Canadian Supreme Court decision on the nature of the reasonable limits safe harbor; the Court set out the procedure to be followed in deciding if legislation infringing *Charter* rights can be justified under § 1). The standard for Section 1 inquiry is commonly referred to as the *Oakes* test. See *Ross v. New Brunswick School Dist. No. 15 and Attis*, 19 C.H.R.R. D/173, D/181 (N.B. Ct. of App. 1993).

¹⁷ *Leshner*, 16 C.H.R.R. at D/201.

ciety.”¹⁸ In addition, to reach safe harbor, it must be established that “the means chosen are reasonable and demonstrably justified.”¹⁹ This is demonstrated by applying a three-part, proportionality test. Under the test, the following components must be established:

(i) the measure in question must be carefully designed to achieve the objective in question and must not be arbitrary, unfair or based on irrational considerations, but rather must be rationally connected to the objective in question; (ii) the means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question; and (iii) there must be a proportionality between the effect of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as being of ‘sufficient importance’²⁰

Thus, to reach safe harbor via section 1 “there must be a rational connection, minimal impairment, and proportionality between the effect and the objective” of the law.²¹

The *Charter* applies to the actions of all Canadian legislatures, whether the activities are performed by the federal Parliament or by a provincial or territorial legislature.²² The *Charter* additionally applies “to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures.”²³ The *Charter* reaches the executive and administrative activities of the various Canadian governments.²⁴

However, the *Charter* does not reach purely private action.²⁵ In *McKinney v. University of Guelph*,²⁶ the Canadian

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Leshner*, 16 C.H.R.R. at D/202.

²² See *Charter*, *supra* note 4, § 32(1).

²³ *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery*, 2 S.C.R. 573, 602 (1986).

²⁴ *Id.* at 574.

²⁵ *Id.* *Dolphin Delivery* is the leading authority. See also, *Douglas/Kwantlen Faculty Ass'n. v. Douglas College*, 3 S.C.R. 570, 13 C.H.R.R. D/403 (Can. 1990); *Stoffman v. Vancouver General Hospital*, 3 S.C.R. 483, 13 C.H.R.R. D/337 (Can. 1990); *Harrison v. University of British Columbia*, 3 S.C.R. 451, 13 C.H.R.R. D/317 (Can. 1990); *McKinney v. University of Guelph*, 3 S.C.R. 229, 13 C.H.R.R. D/171

Supreme Court explained, "[t]he exclusion of private activity from the Charter was not the result of happenstance. It was a deliberate choice which must be respected."²⁷ The Court in *McKinney* admitted that it did not know precisely why the approach was taken, however, it did suggest reasons for doing so:

Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve rights of the individual. Others, it is true, may offend against the rights of individuals. This is especially true in a world in which economic life is largely left to the private sector where powerful private institutions are not directly affected by democratic forces. But government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity.²⁸

In *Stoffman v. Vancouver General Hospital*,²⁹ the Canadian Supreme Court set out the justification for limiting the application of the *Charter* to governmental action with greater precision. In doing so, the Court also acknowledged the "undue burden" which an application of the *Charter* to private conduct would impose upon the courts.³⁰ The reasons for the limitation, the Court stated, include:

... the historical association of bills of rights with the struggle to constrain the exceptional power of government to impose its will upon the individual or minority groups; the belief that the values which a bill of rights seeks to promote and protect can be better

(Can. 1990); Tremblay v. Daigle, 2 S.C.R. 573 (1989); Operation Dismantle Inc. v. The Queen, 1 S.C.R. 441 (1985); R. v. Big M Drug Mart Ltd., 1 S.C.R. 295 (1985); Hunter v. Southam Inc., 2 S.C.R. 145 (1984). A discussion of the outer reach of the Charter, i.e., to use the American terminology, the scope of Canadian "state action," is beyond the scope of this article. See Anne McLellan & Bruce P. Elman, *To Whom Does the Charter Apply? Some Recent Cases on s. 32*, 24 ALTA. L. REV. 361 (1986). See generally PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA (1992).

²⁶ 3 S.C.R. 229, 13 C.H.R.R. D/171 (Can. 1990).

²⁷ 13 C.H.R.R. at D/183-84 (LaForest, J., for the Court).

²⁸ *Id.* Of course, U.S. law, with its "state action" requirement, also precludes the application of constitutional protections to purely private action. See, *Shelley v. Kraemer*, 334 U.S. 1 (1948).

²⁹ 3 S.C.R. 483, 13 C.H.R.R. D/337 (Can. 1990).

³⁰ 13 C.H.R.R. at D/350 (Can. 1990).

and more flexibly achieved in the private sphere if left to the various specialized administrative or quasi-judicial bodies which are mandated and equipped to deal with discrimination in specific social and economic contexts; the concomitant apprehension that a generally applicable bill of rights would have an unduly chilling effect on the confidence which is essential to the meaningful enjoyment of the individual freedom a bill of rights seeks to protect; and the heavy if not impossible burden which application of the *Charter* to private conduct would impose on the courts.³¹

The Canadian principle that private action is immune from the restrictions of the *Charter* parallels United States law. For example, in *DeShaney v. Winnebago Social Services*,³² the United States Supreme Court, considering the scope of the application of the Due Process Clause of the Fourteenth Amendment, stated, "[i]ts purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation on the latter area to the democratic political process."³³

The exclusion of private activity from the reach of the *Charter* limits the impact of the Canadian Constitution as an anti-discrimination device significantly, since, as Canadian Professor Peter W. Hogg aptly stated, "(t)he real threat to egalitarian civil liberties in Canada comes not from legislative and official action, but from discrimination by private persons, such as employers, trade unions, landlords, realtors, employers, restaurateurs and other suppliers of goods and services."³⁴ To meet this "real threat to egalitarian civil liberties," the Canadian governments have promulgated human rights statutes which reach private action and forbid a broad range of discriminatory acts.

B. *Canada's Human Rights Laws and the Prohibition of Workplace Sexual Harassment*

All Canadian jurisdictions have enacted human rights laws prohibiting distinct discriminatory acts, including sexual dis-

³¹ *Id.*

³² 489 U.S. 189 (1989).

³³ *Id.* at 196.

³⁴ PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 52-3 (1992).

crimination in employment.³⁵ The federal government, Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Quebec, and the Yukon Territory also specifically prohibit employment harassment, including workplace sexual harassment.³⁶ The reason for legislation which expressly prohibits workplace sexual harassment, however, is less important because of the 1989 Supreme Court of Canada decision, *Janzen v. Platy Enterprises Ltd.*,³⁷ which defined illegal sex discrimination to specifically include acts of workplace sexual harassment.³⁸

The key federal legislation proscribing workplace discrimination is the *Canadian Human Rights Act*.³⁹ This statute makes it "a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination."⁴⁰ The prohibited grounds of discrimination under the federal

³⁵ In the federal jurisdiction, *Canadian Human Rights Act*, R.S.C. 1985 c. H-6 as am. R.S.C. 1985, c. 31 (1st Supp.) and R.S.C. 1985 c. 32 (2d Supp.); in Alberta, *The Individual's Rights Protection Act*, R.S.C. 1980, c. I-II, as am S.A. 1985, c. 33; in British Columbia, *Human Rights Act*, S.B.C. 1984 c. 22; in Manitoba, *The Human Rights Code*, S.M. 1987, c. 45; in New Brunswick, *Human Rights Act*, R.S.N.B. 1973, c. H-11, as am S.N.B. 1985 c.30; in Newfoundland, *Human Rights Code*, S. Nfld. 1992, c. H-14; in Nova Scotia, *Human Rights Act*, R.S.N.S. 1989, c. 214; in Ontario, *Human Rights Code*, S.O. 1990, c. H-19; in Prince Edward Island, *Human Rights Act*, S.P.E.I. 1988, c. H-12; in Quebec, *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12 as am S.Q. 1978, c. 7, § 112, and S.Q. 1980, c. 11, § 34, and S.Q. 1982, c. 61; in Saskatchewan, *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, as am. S.S. 1989, c. 23; in the Northwest Territories, *Fair Practices Act*, R.S.N.W.T. 1974, c. F2, as am. by S.N.W.T. 1981, c. 6 (3d Sess.); in the Yukon Territory, *Human Rights Act*, S.Y. 1987, c.3.

³⁶ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, §§ 14.1-14.2; Alberta's *Individual's Rights Protection Act*, R.S.A. 1980, c. I-II, § 9, as am, S.A. 1985, c. 33 and S.A. 1990, c. 23; Manitoba's *Human Rights Code*, S.M. 1987, c. 45, §§ 19(1)-(2) [sexual solicitation]; New Brunswick's *Human Rights Act*, R.S.N.B. 1973, c. H-11, § 7.1(2), as am. S.N.B. 1985, c. 30 and S.N.B. 1987, c. 26, § 1; Newfoundland's *Human Rights Code*, S. Nfld. 1992, c. H-14, §§ 12, 13(1)-(2); Nova Scotia's *Human Rights Act*, R.S.N.S. 1989, c. 214, § 5(2) as am. R.S.N.S. 1991, c. 12, § 1; Ontario's *Human Rights Code*, S.O. 1990, c. H-19, §§ 7(2); Quebec's *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, § 10(1); Yukon's *Human Rights Act*, S.Y.T. 1987, c. 3, §§ 13(1)-(2).

³⁷ 59 D.L.R.4th 352, 10 C.H.R.R. D/6205 (Can. 1989).

³⁸ See *infra* notes 139-163 and accompanying text.

³⁹ R.S.C., ch. H-6 (1985), amended by R.S.C. ch. 31 (1985, 1st Supp.), R.S.C. ch. 32 (1985, 2d Supp.).

⁴⁰ *Id.* s. 7.

statute include "race, national or ethnic origin, colour, religion, age, sex, marital status, disability and conviction for which a pardon has been granted."⁴¹

In addition, the *Canadian Labour Code* supplements the *Canadian Human Rights Act* as to the federal prohibition of sex discrimination by establishing the principle that employees are entitled "to employment free of sexual harassment."⁴² The labour code also mandates employers to make "every reasonable effort to ensure that no employee is subjected to sexual harassment," and in line with the demand requires the issuance by the employer of a policy statement concerning sexual harassment.⁴³ Canadian federal law reaches only those within the jurisdiction of the federal government. Unlike discrimination laws in the United States, such as Title VII of the Civil Rights Act of 1964⁴⁴ which serves as a powerful vehicle for broad, national regulation by Congress via the constitutional authority of the commerce clause,⁴⁵ federal legislation in Canada has a significantly more limited span. Essentially, federal human rights legislation in Canada reaches federal governmental entities, key private, inter-provincial operations in communications and transportation, federally-chartered banks, and some mining operations.⁴⁶ The Canadian provincial and territorial laws reach

⁴¹ *Id.* s. 3(1).

⁴² R.S.C., ch. 9, s. 17 (1985).

⁴³ *Id.*

⁴⁴ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e to 2000e-17 (1988)) [hereinafter Title VII]. Title VII prohibits employer discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000e-2002(a)(1) (1988) (stating that it is unlawful for an employer to fail or refuse to hire, discharge, or otherwise discriminate against an employee or applicant for employment with respect to the terms, conditions, or privileges of employment on the grounds of race, color, religion, sex, or national origin).

⁴⁵ U.S. CONST. art. I.

⁴⁶ See *Constitution Act, 1867* (U.K.), Part VI, §§ 91-95 (listing powers of the federal Parliament and provincial legislatures). A discussion of Canadian federalism and the jurisprudence surrounding the constitutional distribution of authority between the federal government and the provinces are beyond the scope of this article. For a discussion of Canadian federalism in the labor context, see *Bell Canada v. Quebec* (commission de la sante et de la securite du travail), 51 D.L.R.4th 161 (Can. 1988); *Canadian Nat'l Ry. v. Courtois*, 51 D.L.R.4th 271 (Can. 1988). See also *Regina v. Crown Zellerbach Canada Ltd.*, 49 D.L.R.4th 161, 188 (Can. 1988) (holding that the federal government may regulate the dumping of waste in provincial waters under "the natural concern doctrine of the peace, order and good

those unprotected by the federal legislation within their respective jurisdictions.

Canadian human rights statutes maintain a preferential status in judicial review.⁴⁷ The laws are "of a special nature, not quite constitutional but certainly more than ordinary."⁴⁸ Each case resting upon such legislation requires a "fair, liberal interpretation to advance the objects of the legislation."⁴⁹ As with United States civil rights laws,⁵⁰ the purpose of Canadian human rights laws is remedial. The laws seek to eradicate discrimination.⁵¹ Canadian courts have an obligation requiring them to give effect to the purpose of the legislation.⁵² This obligation was made manifest by former Canadian Supreme Court Chief Justice Dickson in *Action travail des femmes v. CN*.⁵³ Justice Dickson wrote:

Human rights legislation is intended to give rise, amongst other things, to individual rights of great importance, rights capable of

government power of the Parliament of Canada"). See generally J.R. MALLORY, *THE STRUCTURE OF CANADIAN GOVERNMENT* 367-399 (1984).

⁴⁷ See *Winnipeg School Div. No. 1 v. Craton*, 2 S.C.R. 150 (1985).

⁴⁸ *Re Ont. Human Rights Comm'n. v. Simpsons-Sears Ltd.*, 23 D.L.R.4th 321, 329 (Can. 1985). See also *Action Travail Des Femmes v. Canadian Nat'l Railways Co.*, 40 D.L.R.4th 193, 207-09 (Can. 1988).

⁴⁹ *Robichaud v. The Queen*, 40 D.L.R.4th 577, 580 (Can. 1987). See also *Dickson v. University of Alberta*, 2 S.C.R. 1103, 1121 (1992); *Re Bhinder and C.N.R.*, 23 D.L.R.4th 481, 500 (Can. 1985); *Insurance Corp. of British Columbia v. Heerspink and Director, Human Rights Code*, 2 S.C.R. 145, 157-58 (1982).

⁵⁰ See *Barnes v. Costle*, 561 F.2d 983, 994 (D.C. Cir. 1977), *rev'd Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974) ("(T)he courts have consistently recognized that Title VII must be construed liberally to achieve its objectives; as we ourselves recently noted, it 'requires an interpretation animated by the broad humanitarian and remedial purposes underlying the federal proscription of employment discrimination.'") (footnote omitted) (quoting *Coles v. Penny*, 531 F.2d 609, 616 (D.C. Cir. 1976)).

⁵¹ *Robichaud*, 40 D.L.R.4th at 582 ("[Human rights legislation] is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the 'almost constitutional' nature of the rights protected.").

⁵² *Ont. Human Rights Comm'n. v. Simpsons-Sears Ltd.*, 23 D.L.R.4th 321, 329 (Can. 1985). See also *Re Saskatchewan Human Rights Commission and Canadian Odeon Theaters Ltd.*, 18 D.L.R.4th 93, 108-9 (Can. 1985) ("Generally human rights legislation has been given a broad interpretation to ensure that the stated objects and purposes are fulfilled. A narrow restrictive interpretation which would defeat the purpose of legislation, that is, the elimination of discrimination, should be avoided.").

⁵³ 40 D.L.R.4th 193 (Can. 1987).

enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize these rights and to enfeeble their proper impact.⁵⁴

III. THE EARLY DEVELOPMENT OF UNITED STATES AND CANADIAN WORKPLACE SEXUAL HARASSMENT DOCTRINE

A. *Early Doctrinal Jurisprudence in the United States*

United States law incorporates two theories, or types, of sexual harassment.⁵⁵ They are commonly referred to as "quid pro quo" and "hostile environment" sexual harassment.⁵⁶ Quid pro quo sexual harassment is "when an employer alters an employee's job conditions or withholds an economic benefit because the employee refuses to submit to sexual demands."⁵⁷ This type of sexual harassment is usually the easier of the two types to recognize, since the focus for inquiry in the quid pro quo case is upon discerning whether tangible employment benefits were effected as a consequence of sexual harassment. Hostile environment sexual harassment exists where conduct of a sexual nature, unwelcome to the employee, "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."⁵⁸ Unlike the operative review in the quid pro quo case, the search for a hostile environment does not focus upon whether the sexual harassment effected tangible employment benefits. Instead, the observation is upon the nature of

⁵⁴ *Id.* at 206.

⁵⁵ See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-67 (1986).

⁵⁶ See, e.g., *Carrero v. New York City Housing Authority*, 890 F.2d 569, 577 (2d Cir. 1989).

⁵⁷ *Id.* at 577. See also *Henson v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982) ("An employer may not require sexual consideration from an employee as a quid pro quo for job benefits."); *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977), *rev'd Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974). Examples of quid pro quo sexual harassment include instances where the employer conditions an employee's promotion on the employee consenting to sexual demands or terminates or discharges an employee for refusing demands for sexual intercourse.

⁵⁸ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. Sec. 1604.11(a)(3) (1985)).

the conditions which the employee was forced to endure in the workplace.

Quid pro quo sexual harassment was the first type of sexual harassment to be recognized by the American courts. The recognition came about in the 1970's after initial, unsuccessful attempts by plaintiffs to equate sexual harassment with illegal sex discrimination under Title VII.⁵⁹ The first reported Title VII sexual harassment case was *Corne v. Bausch & Lomb*.⁶⁰ The federal district court determined that sexually-oriented conduct displayed by the plaintiff's supervisor, and claimed by the plaintiff as violative of Title VII, was simply a matter of the "personal proclivity, peculiarity or mannerism" of the supervisor. Moreover, Title VII did not make sexually-oriented conduct that has "no relationship to the nature of the employment" illegal.⁶¹ Other United States courts agreed, holding that Title VII was inapplicable to sexual harassment claims. The courts in these early cases did not perceive the sexually-oriented conduct complained of as gender based, but instead, as simply discrimination based upon the individual characteristics of sexual attractiveness of the complainant, or upon the particular individual's refusal to engage in sexual conduct.⁶²

The first case accepting the quid pro quo theory of sexual harassment under Title VII was *Williams v. Saxbe*.⁶³ In this 1976 federal district court case, an employee alleged that a previously good working relationship she had with her supervisor soured after she refused her supervisor's sexual advances.⁶⁴ The employee asserted that after she refused the advances her supervisor exhibited a pattern of workplace harassment to-

⁵⁹ Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. s. 2000e to 2000e-17 (1988)).

⁶⁰ 390 F.Supp. 161, 10 Fair Empl. Prac. Cas. (BNA) 289 (D.Ariz. 1975). The first federal district court sexual harassment case, although not reported until after *Corne* was reported, is *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974).

⁶¹ *Corne*, 390 F.Supp. at 163.

⁶² See *Tompkins v. Public Ser. Elec. & Gas Co.*, 422 F.Supp. 553 (D.C.N.J. 1976); *Miller v. Bank of America*, 418 F.Supp. 233 (N.D.Cal. 1976); *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974).

⁶³ 413 F.Supp. 654 (D.D.C. 1976), *rev'd on other grounds*, *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

⁶⁴ *Id.* at 655.

wards her.⁶⁵ The court held that the retaliatory actions taken by the male supervisor against the female employee, who declined his sexual advances, constituted an actionable Title VII claim.⁶⁶ Further, the court stated that, "[t]aking the facts of the plaintiff's complaint as true, the conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated."⁶⁷

After the decision in *Williams*, several federal circuit courts reversed earlier district court holdings which refused to accept the quid pro quo theory as a basis for a Title VII sexual discrimination action. In *Garber v. Saxon Business Products, Inc.*,⁶⁸ a woman who was discharged from her employment brought a Title VII action alleging that she was discharged for rejecting her male supervisor's sexual advances.⁶⁹ The trial court, employing the general approach at the time, dismissed the woman's complaint for failure to state a valid Title VII claim.⁷⁰ The Fourth Circuit reversed and remanded to the trial court for further action in line with its finding that the plaintiff's allegations exhibited "an employer policy or acquiescence in a practice of compelling female employees to submit to the sexual advances of their male supervisors in violation of Title VII."⁷¹

In *Barnes v. Costle*,⁷² a former employee alleged that her job was abolished because she did not consent to having a sexual affair with her male supervisor.⁷³ The district court failed to find a Title VII claim since the plaintiff, in the trial court's view, "was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with

⁶⁵ *Id.* at 655-56 (the harassment included "unwarranted reprimands, refusals to inform her of matters for the performance of her responsibilities, refusal to consider her proposals and recommendations, and refusal to recognize her as a competent professional").

⁶⁶ *Id.* at 661.

⁶⁷ *Id.* at 657-58.

⁶⁸ 552 F.2d 1032 (4th Cir. 1977).

⁶⁹ *Id.*

⁷⁰ *Garber v. Saxon Business Products, Inc.*, 14 Empl. Prac. Decisions (CCH) 7586 (E.D. Va. 1976), *rev'd*, 552 F.2d 1032 (4th Cir. 1977).

⁷¹ *Garber*, 552 F.2d at 1032.

⁷² 561 F.2d 983 (D.C. Cir. 1977), *rev'd Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974).

⁷³ *Id.* at 984.

her supervisor."⁷⁴ The D.C. Circuit disagreed, finding that the plaintiff had been a target of the supervisor's sexual design precisely because of her gender.⁷⁵ The appellate court held that a Title VII claim could be based on the particular sexual harassment allegations in the case.⁷⁶

A similar result occurred in *Tomkins v. Public Serv. Elec. & Gas Co.*⁷⁷ where the plaintiff alleged that her continued employment "was conditioned on her submitting to the sexual advances of a male supervisor."⁷⁸ The Third Circuit reversed the trial court's finding that a valid Title VII claim was lacking, opining:

[T]itle VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status-evaluation, continued employment, promotion, or other aspects of career development on a favorable response to those advances or demands and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.⁷⁹

Hostile environment sexual harassment was first recognized in 1981 by the District of Columbia Court of Appeals in *Bundy v. Jackson*.⁸⁰ In *Bundy*, an employee of the District of Columbia municipal government complained that she had experienced frequent sexual intimidation from her supervisors. Specifically, the plaintiff alleged that her supervisors would continually request that she have sexual relations with them, and one inquired of the plaintiff's sexual penchant.⁸¹

The district court determined that the sexual intimidation experienced by the plaintiff was "standard operating procedure" in her department.⁸² Nevertheless, the trial court denied the

⁷⁴ *Barnes v. Train*, Civ. No. 1828-73 (D.D.C.), memorandum opinion at 3 (Aug. 9, 1974) (Also cited at 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974)).

⁷⁵ *Barnes*, 561 F.2d at 990 ("But for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited.").

⁷⁶ *Id.*

⁷⁷ 568 F.2d 1044 (3d Cir. 1977). See also *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb, Inc.*, 562 F.2d 55 (8th Cir. 1977).

⁷⁸ *Tomkins*, 568 F.2d at 1045.

⁷⁹ *Id.* at 1048-49.

⁸⁰ 641 F.2d 934 (D.C.Cir. 1981).

⁸¹ *Id.* at 940.

⁸² *Id.* at 939.

plaintiff relief, reasoning that sexual harassment which did not actually result in the loss or denial of tangible job benefits was simply not actionable under Title VII.⁸³ The district court found that the plaintiff's supervisors "did not take the 'game' of sexually propositioning female employees 'seriously', and that . . . rejection of their advances did not evoke in them any motive to take any action against the plaintiff."⁸⁴

However, the appellate court held that Title VII sexual discrimination may occur "where an employer created or condoned a substantially discriminatory work *environment* regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination."⁸⁵ The court observed that unless such legal liability existed, the employer could harass an employee "with impunity by carefully stopping short of firing the employee or taking any other tangible action against her in response to her resistance, thereby creating the impression . . . that the employer did not take the ritual of harassment and resistance 'seriously'."⁸⁶

American courts soon followed the lead of the D. C. Circuit Court. In 1982, the Eleventh Circuit decided *Henson v. City of Dundee*⁸⁷ and held that:

A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions or privileges of employment. There is no requirement that an employee subjected to such disparate treatment prove in addition that she has suffered tangible job detriment.⁸⁸

An additional important early case accepting the hostile environment theory of recovery under Title VII is the 1983 Fourth Circuit case, *Katz v. Dole*.⁸⁹ *Katz* involved a former federal air traffic controller who alleged that she experienced substantial workplace sexual harassment from Federal Aviation Adminis-

⁸³ *Id.*

⁸⁴ *Bundy*, 641 F.2d at 940.

⁸⁵ *Id.* at 943-44.

⁸⁶ *Id.* at 945.

⁸⁷ 682 F.2d 897 (11th Cir. 1982).

⁸⁸ *Id.* at 902.

⁸⁹ 709 F.2d 251 (4th Cir. 1983).

tration employees, including supervisory personnel.⁹⁰ The court stated that "(w)hen such harassment pervades the workplace, or is condoned or carried out by supervisory personnel, it becomes an illegal and discriminatory condition of employment that *poisons the work environment*."⁹¹ As a result, the court found the conduct "actionable under Title VII."⁹²

B. *Early Doctrinal Jurisprudence in Canada*

The doctrinal development of sexual harassment law in Canada was similar to the development of the law in the United States in that the early Canadian decisions focused upon the same central issue, that is, whether acts of sexual harassment in the workplace amounted to sex discrimination prohibited by a jurisdiction's human rights law. *Bell v. Ladas*,⁹³ a 1980 Ontario human rights adjudication board case, was the first Canadian decision to equate sexual harassment with prohibited sex discrimination.

In *Bell*, the plaintiffs, Cherie Bell and Anna Korczak, female employees of The Flaming Steer Restaurant, complained of acts of sexual harassment by Ernest Ladas, the officer and controlling shareholder of the corporate employer. Both plaintiffs alleged that they had been propositioned by Ladas, and were also forced to endure a series of his sexually-oriented verbal insults. The tribunal adjudicator, Owen B. Shime, dismissed the plaintiffs' complaints. However, he did not dismiss the complaints because he failed to find that sexual harassment was equivalent to a form of prohibited sexual discrimination. Rather, he dismissed the complaints because he determined that Bell's testimony was unreliable, and that Korczak simply failed to carry her burden of proof.

As to the central issue of whether sexual harassment was a form of illegal sex discrimination, which is actionable under the Ontario *Human Rights Code*'s prohibition of sex discrimination, Adjudicator Shime made the necessary equation. In *obiter dicta*, Shime wrote:

⁹⁰ *Id.* at 253.

⁹¹ *Id.* at 254 (emphasis added).

⁹² *Id.* at 256.

⁹³ *Re Bell and Korczak*, 27 L.A.C.2d 227, 1 C.H.R.R. D/155 (Ont. Bd. of Inq. 1980), *sub nom.* *Bell v. Ladas* [hereinafter cited to C.H.R.R.].

But what about sexual harassment? Clearly a person who is disadvantaged because of her sex, is being discriminated against in her employment when employer conduct 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 utilizations 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 or conditions differ when compared to male employees, the woman is discriminated against.

*The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment.*⁹⁴

The first Canadian case to actually find an employer liable for illegal sex discrimination because of workplace sexual harassment was *Coutroubis v. Sklavos Printing*⁹⁵ decided in 1981 by the Ontario Board of Inquiry. Soon, the principle that sexual harassment amounted to prohibited sex discrimination, as first espoused in *Bell* and then given force in *Coutroubis*, was accepted by other tribunals across Canada.⁹⁶

While the development of legal doctrine in Canada and the United States was similar in the sense that the early Canadian decisions focused on the issue of whether acts of sexual harassment amounted to prohibited sex discrimination, unlike the

⁹⁴ *Id.* at D/156 (emphasis added).

⁹⁵ 2 C.H.R.R. D/457 (Ont. Bd. of Inq. 1981).

⁹⁶ See *Kotyk v. Canadian Employment & Immigration Comm'n.*, 4 C.H.R.R. D/1416 (Can. H. R. Comm'n 1983); *Phillips v. Hermiz*, 5 C.H.R.R. D/2450 (Sask. H. R. Comm'n 1984); *Deisting v. Dollar Pizza Ltd.*, 3 C.H.R.R. D/898 (Alta. H. R. Comm'n 1982); *Hughes v. Dollar Snack Bar*, 3 C.H.R.R. D/1014 (Ont. Bd. of Inq. 1981); *Torres v. Royalty Kitchenware Ltd.*, 3 C.H.R.R. D/858 (Ont. Bd. of Inq. 1982); *Doherty v. Lodger's Int'l. Ltd.*, 38 N.B.R.2d 217 (N.B. Bd. of Inq. 1981); *Cox v. Jagbritte Inc. (Super Great Submarine)*, 3 C.H.R.R. D/609 (Ont. Bd. of Inq. 1981) (reviewing the development of American sexual harassment jurisprudence); *Mitchell v. Traveller Inn Ltd.*, 2 C.H.R.R. D590 (Ont. Bd. of Inq. 1981). As for early appellate court authority equating sexual harassment with illegal sex discrimination, see *Re Mehta and MacKinnon*, 19 D.L.R.4th 148 (N.S.C.A. 1985); *Foisy v. Bell Canada*, 18 D.L.R.4th 222 (Que. S.C. 1984).

American experience, Canadian sexual harassment law did not develop in steps. In Canada, the law did not develop by first accepting the quid pro quo perspective and later adopting the hostile environment type of sexual harassment.⁹⁷

In *Bell*, Adjudicator Shime, at the outset, viewed the nature of sexual harassment broadly. This Canadian approach was made explicit in *Cox v. Jagbritte Inc.*⁹⁸ In *Cox*, the Ontario Board of Inquiry considered the historical development of sexual harassment law in the United States. It rejected a narrow, quid pro quo approach for dealing with sexual harassment complaints, and specifically approved of the approach taken by the United States Court of Appeals for the District of Columbia in *Bundy v. Jackson*.⁹⁹ It equated the rationale in *Bundy* with that presented in *Bell*, and held that sexual harassment was not limited to situations involving the loss of tangible job benefits, but also included those situations involving a hostile work environment.¹⁰⁰

While the evolution of Canadian sexual harassment law failed to proceed in lockstep with the American experience, early Canadian tribunals did draw heavily upon American authority to support their decisions. In Canadian cases, human rights tribunals and courts commonly recognized that the legal theory of sexual harassment owed its first clear articulation to the American cases.¹⁰¹ Canadian triers of fact commonly considered the United States precedents in their deliberations, and they frequently adopted those decisions as authority for similar Canadian holdings.¹⁰² There was an early concern about using

⁹⁷ See *supra* notes 55-92 and accompanying text.

⁹⁸ (Super Great Submarine), 3 C.H.R.R. D/609 (Ont. Bd. of Inq. 1981).

⁹⁹ 641 F.2d 934 (D.C. Cir. 1981) (the first American case recognizing the availability of an hostile environment sexual harassment theory of recovery in Title VII cases). See *supra* notes 80-86 and accompanying text.

¹⁰⁰ *Cox*, 3 C.H.R.R. at D/612-16.

¹⁰¹ See, e.g., *Watt v. Regional Municipality of Niagara*, 5 C.H.R.R. D/2453 (Ont. Bd. of Inq. 1984).

¹⁰² See, e.g., *Cox v. Jagbritte Inc. (Super Great Submarine)*, 3 C.H.R.R. D/609 (Ont. Bd. of Inq. 1981) (reviewing the historical development of American sexual harassment jurisprudence); *Giouvanoudis v. Golden Fleece Restaurant*, 3 C.H.R.R. D/1967 (Ont. Bd. of Inq. 1984). See also, A. AGGARWAL, SEXUAL HARASSMENT IN THE WORKPLACE 16 (1992) ("In the absence of Canadian jurisprudence on this subject, the Canadian Boards of Inquiry, Tribunals and courts have frequently examined or referred to, and even adopted, U.S. court cases and other authorities.").

United States authority to support sexual harassment doctrinal development in Canada due to a fear that such decisions would have a U.S. constitutional basis inappropriate in Canada.¹⁰³ Nonetheless, the authority was liberally employed throughout the Canadian judicial system. The Canadian tribunals came to correctly view the American decisions as based, not on the United States Constitution, but upon United States civil rights statutes.¹⁰⁴ An example of the typical Canadian approach to considering American authority in adjudicating sexual harassment cases is found in the 1985 Nova Scotia Court of Appeal case, *Re Mehta and MacKinnon*.¹⁰⁵ In *Mehta*, the court opined, "[a] review of the decisions, *including the American authorities*, leads me to the conclusion that sexual harassment as a term or condition of employment is prohibited by s. 11A(1) of the Nova Scotia *Human Rights Act*."¹⁰⁶

The line of Canadian cases equating sexual harassment with illegal sex discrimination, which began with *Bell* in 1980, continued uninterrupted until the Manitoba Court of Appeal departed from that precedent in 1986, in *Janzen v. Platy Enterprises Ltd.*¹⁰⁷ The Manitoba court's decision set the stage for the appeal to the Canadian Supreme Court, and the Canadian high court's landmark 1989 *Janzen* decision.¹⁰⁸

IV. THE UNITED STATES AND CANADIAN SUPREME COURT DECISIONS IN THE *VINSON* AND *JANZEN* CASES

A. *The United States Supreme Court's Vinson Decision*

The United States Supreme Court handed down its first sexual harassment decision in 1986, in *Meritor Savings Bank v. Vinson* (hereinafter *Vinson*).¹⁰⁹ The plaintiff in the case,

¹⁰³ See *Doherty v. Lodger's Int'l Ltd.* (1981), 38 N.B.R.2d 217, 235 (N.B. Bd. of Inq. 1981).

¹⁰⁴ See *id.* Of course, the key statute is Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. s. 2000e to 2000e-17 (1988)).

¹⁰⁵ 19 D.L.R.4th 148 (N.S.C.A. 1985).

¹⁰⁶ *Id.* at 158 (emphasis added).

¹⁰⁷ 33 D.L.R.4th 32, 8 C.H.R.R. D/3831 (Man.C.A. 1986), *rev'd* 59 D.L.R.4th 352, 10 C.H.R.R. D/6205 (Can. 1989).

¹⁰⁸ *Janzen*, 59 D.L.R.4th 352, 10 C.H.R.R. D/6205 (Can. 1989).

¹⁰⁹ 477 U.S. 57 (1986). The Supreme Court has decided two sexual harassment decisions. The second is *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993). See *infra* notes 235-49 and accompanying text.

Michelle Vinson, was fired from her employment with the defendant bank for the excessive use of sick leave. She sued alleging sexual harassment against the bank and her supervisor at the bank, Sidney Taylor. The plaintiff testified before the trial court that her supervisor made sexual advances toward her. Initially, the plaintiff refused the advances, but she eventually agreed to engage in sexual relations with Taylor out of anxiety over the possible loss of her job. The plaintiff testified that Taylor made repeated demands on her, resulting in frequent acts of sexual intercourse over approximately a three-year period until 1977 when the plaintiff began a steady personal relationship with another man, and Taylor's sexual demands ceased.

The plaintiff also testified that her supervisor fondled her in public, exposed himself, followed her into the women's restroom, and, on several occasions, raped her. Vinson testified that other women employees were also fondled by Taylor. The plaintiff neither reported the claimed sexual harassment, nor used an existing bank grievance procedure to complain of Taylor's conduct. However, she testified that her failure to employ these procedures was due to a fear of her supervisor. The plaintiff's supervisor and the defendant bank denied the plaintiff's allegations. The bank also claimed that if Taylor did engage in acts of sexual harassment against Vinson, the sexual harassment was unknown to the bank and performed without the bank's approval.

The trial court denied Vinson relief without resolving the conflicts in the testimony.¹¹⁰ Instead, the court found that if Vinson and her supervisor did enter into a sexual relationship, "that relationship was a voluntary one having nothing to do with her [Vinson's] continued employment at [the bank] or her advancement or promotions at the institution."¹¹¹ Therefore, the district court concluded that, absent harassment directly affecting tangible economic benefits, the plaintiff could not be a victim of sexual discrimination under Title VII. The trial court also noted that the bank had an express policy against employment discrimination, and no complaint was filed against Taylor by the plaintiff. The court stated that since the bank had no

¹¹⁰ *Vinson*, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

¹¹¹ *Id.* at 42.

notice of the conduct, it was not liable for the alleged actions of Taylor.

The District of Columbia Court of Appeals reversed the trial court.¹¹² The appellate court determined that a Title VII claim for sexual harassment could be supported by either the quid pro quo or the hostile environment theory for sexual harassment. The appellate court, concluding that the plaintiff's allegations met the requirements for the establishment of an hostile environment type of sexual harassment, found that the trial court's failure to consider the theory justified a reversal and remand.

The appellate court stated that any voluntariness on Vinson's part in the alleged relationship with Taylor was immaterial, as long as the evidence otherwise established that Taylor's actions made Vinson's toleration of the sexual harassment "a condition of her employment."¹¹³ The court surmised that the trial court's finding of voluntariness could have been based on evidence concerning Vinson's personal fantasies and her particular mode of dress in the workplace. The appellate court determined that such evidence had no legitimate place in the litigation. Finally, the appellate court held that a strict liability standard should be imposed on the employer bank for the supervisor's sexual harassment. The court determined that the employer will be held liable even absent notice of improper activities by the supervisor. The court defined supervisor broadly as an individual having "the mere existence or even the appearance of a significant degree of influence in vital job decisions."¹¹⁴

In 1985, the Supreme Court granted certiorari to review the appellate court decision in *Vinson*.¹¹⁵ The case was argued on March 25, 1986 and decided on June 19, 1986.¹¹⁶ In its decision, the Court put to rest any question as to the application of Title VII in the sexual harassment context. The Court stated that "(w)ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor

¹¹² *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985).

¹¹³ *Id.* at 146.

¹¹⁴ *Id.* at 150.

¹¹⁵ *Meritor Savings Bank v. Vinson*, 474 U.S. 1047 (1985).

¹¹⁶ *See Vinson*, 477 U.S. 57 (1986).

'discriminate(s)' on the basis of sex" under Title VII.¹¹⁷ The Court also determined that the hostile environment type of sexual harassment, as well as the quid pro quo theory of recovery, was available as a basis for the Title VII litigation. The Court stated, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."¹¹⁸

In *Vinson*, the Court also discussed the nature of actionable workplace sexual harassment in a hostile environment case. Not all conduct that may be termed "harassment" is actionable under Title VII. The Court stated that to be actionable the "conduct must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹¹⁹ In considering *Vinson's* allegations, the Court found "not only pervasive harassment but also criminal conduct of the most serious nature."¹²⁰ The alleged conduct, the court stated, was "plainly sufficient to state a claim of 'hostile environment' sexual harassment."¹²¹ Therefore, the Court did not provide an exacting analysis of the standard for determining the existence of sufficiently severe or pervasive conduct.

The Court in *Vinson* did state that voluntariness, "in the sense that the complainant was not forced to participate against her will," is not a defense to a Title VII sexual harassment suit.¹²² Therefore, the Court found the trial court's focus on the "voluntariness" of *Vinson's* relationship with Taylor was an error. Instead, the Court stated, "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."¹²³

On the other hand, the court of appeals in its decision mandated that evidence of *Vinson's* "dress and personal fantasies"

¹¹⁷ *Id.* at 64.

¹¹⁸ *Id.* at 66.

¹¹⁹ *Id.* at 67.

¹²⁰ *Id.*

¹²¹ *Vinson*, 477 U.S. at 67.

¹²² *Id.* at 68.

¹²³ *Id.* See *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559, 565 (8th Cir. 1992) ("(T)he threshold for determining that conduct is unwelcome is 'that the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive.'" (quoting *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988)).

be excluded at trial since the appellate court viewed voluntariness as immaterial. The Supreme Court disagreed with the appellate court:

While 'voluntariness' in the sense of consent is not a defense. . . , it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome.¹²⁴

The evidence, the Court determined, is "obviously relevant" to the question of unwelcomeness.¹²⁵ However, the Court did caution trial courts that the decision to admit such evidence should involve a thorough consideration of the potential for unfair prejudice to the plaintiff.

As previously noted, the *Vinson* trial court found no basis for employer liability without employer notice of the supervisor's wrongful conduct. The court of appeals, however, found employer notice unnecessary, and it imposed a strict liability standard on the employer bank. Before the Supreme Court, three views were argued regarding the nature and scope of employer liability. Predictably, the plaintiff urged the Court to accept the court of appeals' strict liability standard. The employer bank argued that the failure of the plaintiff to use the grievance procedure made available to her by the employer, or otherwise give the employer notice of the alleged misconduct by the supervisor, served as a complete defense to the employer. The Equal Employment Opportunity Commission (hereinafter the "EEOC") appeared before the Court as *amicus curiae*. In arguing the issue of employer liability to the Court, the EEOC departed from its own guidelines¹²⁶ which called for the imposition of strict liability on the employer in such a case,¹²⁷ and argued, instead, for a two-level liability standard. The EEOC continued to call for a strict liability standard in the quid

¹²⁴ *Vinson*, 477 U.S. at 69.

¹²⁵ *Id.*

¹²⁶ *Final Guidelines on Sexual Harassment*, 45 Fed. Reg. 74676-74677 (1980) (codified at 29 C.F.R. Sec. 1604.11(a)-(f) (1994)).

¹²⁷ 29 C.F.R. Sec. 1604.11(c) (1994) (imposing a strict liability standard on employers for the acts of supervisors "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.").

pro quo case. However, as to the hostile environment case, they EEOC proposed to the Court a different standard:

If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, e.g., by the filing of a charge with the E.E.O.C. or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all of the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.¹²⁸

The Court responded frankly to the various invitations offered by the participants. It indicated that the debate over the appropriate standard of employer liability had "a rather abstract quality about it given the state of the record" in the case.¹²⁹ The operative point was that the district court failed to resolve the conflicts in testimony at the trial level. Therefore, the Court held:

We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were 'so pervasive and so long continuing. . . that the employer must have become conscious of [them].'¹³⁰

The Court declined "the parties' invitation to issue a definitive rule on employer liability,"¹³¹ but it did offer some assistance.

It stated that Congress intended courts to look to the principles of agency law for guidance and wanted to place some limits on Title VII employer liability for acts of employees. The Court held that the appellate court was wrong in its decision concluding that employers are "always automatically liable for

¹²⁸ *Vinson*, 477 U.S. at 71 (quoting Brief for United States and EEOC as Amici Curiae 26).

¹²⁹ *Vinson*, 477 U.S. at 72.

¹³⁰ *Id.* (quoting *Taylor v. Jones*, 653 F.2d 1193, 1197-99 (8th Cir. 1981) (holding the employer liable for racially hostile working environment based on the employer's constructive knowledge)).

¹³¹ *Id.*

sexual harassment by their supervisors.”¹³² Thus, the Court rejected the strict liability standard in a hostile environment case. On the other hand, by refusing to accept the application of blanket rules as to employer liability, the Court also held that an employer’s absence of notice “does not necessarily insulate that employer from liability.”¹³³ The rather bleary commentary was clarified to some extent through a discussion by the Court of the value of an existing employer policy against discrimination and an available employer grievance procedure. The Court rejected the employer bank’s position that “the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent’s failure to invoke that procedure, must insulate petitioner [the bank] from liability.”¹³⁴ The facts were seen as relevant by the Court, but it also found that the facts were not “necessarily dispositive” as to the issue of employer liability.¹³⁵

The Court determined that the bank’s anti-discrimination policy in *Vinson* was simply too general. The policy failed to specifically address sexual harassment, and as a result, the policy failed to “alert employees to their employer’s interest in correcting that form of discrimination.”¹³⁶ Also, the Court found the bank’s grievance procedure flawed. The Court found that the bank’s position that the plaintiff’s failure to utilize the procedure should be an employer defense “might be substantially stronger if its procedure was better calculated to encourage victims of harassment to come forward.”¹³⁷ The grievance procedure initially required an employee to file a complaint with her supervisor, and in the plaintiff’s case it was Taylor, the alleged harasser. The Court stated that “it is not altogether surprising that respondent (Vinson) failed to invoke the procedure and report her grievance” to Taylor.¹³⁸

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Vinson*, 477 U.S. at 72.

¹³⁶ *Id.* at 72-73.

¹³⁷ *Id.* at 73.

¹³⁸ *Id.*

B. *The Canadian Supreme Court's Janzen Decision*

The plaintiffs in *Janzen v. Platy Enterprises Ltd.*,¹³⁹ Dianna Janzen and Tracy Govereau, worked as waitresses at the Pharos Restaurant, owned and operated by Platy Enterprises Ltd. in Winnipeg, Manitoba. Both individuals complained of pervasive sexual harassment on the part of the restaurant's cook, Tommy Grammas (hereinafter the "cook"). The conduct plaintiffs complained of included sexual advances and sexually-oriented physical contact. The cook did not hold an ownership interest in the restaurant, did not serve as a corporate officer, and had no actual disciplinary authority over the waitresses. However, he did represent to the waitresses that he had the authority to fire them, and the representation was apparently supported by the employer corporation's president and manager, Eleftheros, a\k\ a Phillip Anastasiadis (hereinafter Anastasiadis).

Both waitresses complained of the cook's conduct to Anastasiadis, however, his response was unhelpful. As to Janzen, Anastasiadis treated the matter lightly and even insinuated that Janzen was at fault for the cook's behavior. He failed to halt the cook's misconduct, and as a result, Janzen quit. Anastasiadis asked Govereau why she let the cook treat her the way he did. After Govereau met with Anastasiadis, the cook's overtly sexual behavior toward Govereau stopped. However, that conduct was replaced with open hostility exhibited by both Anastasiadis and the cook toward Govereau. Govereau was eventually terminated by Anastasiadis, allegedly, because of her poor work.

Janzen and Govereau filed complaints with the Manitoba Human Rights Commission alleging sex discrimination in violation of section 6 of the Manitoba Human Rights Act.¹⁴⁰ The complaints were heard jointly by a human rights adjudication board, where the Adjudicator found that both individuals were victims of illegal sexual harassment. The Adjudicator applied

¹³⁹ 59 D.L.R.4th 352, 10 C.H.R.R. D/6205 (Can. 1989) (hereinafter cited to C.H.R.R.).

¹⁴⁰ S.M., c. 65, s. 6(1) (1974). In 1987, after the filing of the complaints by the waitresses, the Human Rights Act was repealed and replaced with the Manitoba Human Rights Code, S.M., ch. 45 (1987-88). Section 19 of the code expressly prohibits sexual harassment. S.M., ch. 45, ss. 19(1)-(2) (1987).

the equation first established in *Bell*, concluding that the sexual harassment amounted to illegal sex discrimination under the Manitoba Human Rights Act. The Adjudicator found the employer, as well as the cook, liable, and noted that:

[t]he clear intent of Sec. 6(10), in respect of discrimination arising therefrom, is not only to make the employer liable for any acts of sexual harassment directly committed by such employer, but also makes him responsible for any such acts committed by a person in authority during the course of his employment.¹⁴¹

The Adjudicator also said:

[a]fter consideration of all of the evidence, it is my conclusion that Tommy (the cook) was a person in such authority that his acts became those of the employer, The complainant Janzen was made aware of this to the extent that Tommy was in such a preferred position, that if she subjected herself to sexual harassment, she was to blame for it. Accordingly such harassment had become a condition of her continued employment since Phillip (Anastasiadis) either couldn't or wouldn't do anything about it.¹⁴²

The employer appealed to the Manitoba Court of Queen's Bench, but this court upheld the Adjudicator's decision.¹⁴³ Thereafter, an appeal was taken to the Manitoba Court of Appeal, where Justices Huband and Twaddle each set out comprehensive separate opinions for the appellate court.¹⁴⁴

Justice Huband expressed his amazement that sexual harassment had been equated with sex discrimination in other Canadian decisions since he viewed sexual harassment and sex discrimination as separate concepts. He used an analogy to explain his position, "[w]hen a schoolboy steals a kiss from a female classmate, one might well say that he is harassing her; vexing her; harrying her; - but he surely is not discriminating against her."¹⁴⁵ Justice Huband also analyzed Sec. 6(1) of the Manitoba Human Rights Act, concluding that the law only forbids discrimination in a purely generic sense. Justice Huband's view was that a prohibition in the generic sense mandates that

¹⁴¹ *Janzen*, 6 C.H.R.R. D/2735, D/2753 (Man. Bd. Adjud. 1985).

¹⁴² *Id.* at D/2768.

¹⁴³ *See* 7 C.H.R.R. D/3309 (Man. Q.B. 1986).

¹⁴⁴ *Janzen*, 33 D.L.R.4th 32, 8 C.H.R.R. D/3831 (Man.C.A. 1986), *rev'd* 59 D.L.R.4th 352, 10 C.H.R.R. D/6205 (Can. 1989) (hereinafter cited to C.H.R.R.).

¹⁴⁵ *Id.* at D/3834.

the discrimination is against women as a group. Sexual harassment, he determined, could not logically be sex discrimination since all women are not the victims of sexual harassment.

Justice Twaddle agreed that sexual harassment could not be a form of actionable sex discrimination. He believed that the legislative intent was to prohibit differentiation on the basis of categorical groupings, particularly, the category of women, not to prevent differentiation on the basis of personal characteristics. He wrote that:

Harassment is as different from discrimination as assault is from random selection. The victim of assault may be chosen at random just as the victim of harassment may be chosen because of categorical distinction, but it is nonsense to say that assault is random selection just as it is nonsense to say that harassment is discrimination. The introduction of a sexual element, be it the nature of the conduct or the gender of the victim, does not alter the basic fact that harassment and assault are acts, whilst discrimination and random selection are the methods of choice.

The fact that harassment is sexual in form does not determine the reason why the victim was chosen. Only if the woman was chosen on a categorical basis, without regard to individual characteristics, can the harassment be a manifestation of discrimination.¹⁴⁶

Similar to Justice Huband, Justice Twaddle concluded that sexual harassment based upon a woman's personal sexual appeal could not constitute illegal sex discrimination. He wrote that, "[w]here the conduct of an employer is directed at some but not all persons of one category, it must not be assumed that membership of the category is the reason for the distinction having been made."¹⁴⁷

The decision of the Manitoba appellate court generated unfavorable scholarly comment.¹⁴⁸ The case was then appealed to the Supreme Court of Canada, which accepted review. The Court proceeded to consider two central issues. First, whether sexual harassment represents a form of illegal sex discrimina-

¹⁴⁶ *Id.* at D/3845.

¹⁴⁷ *Id.* at D/3846.

¹⁴⁸ See, e.g., Ivankovich, *Sexual Harassment in the Workplace—Two Steps Backward: Janzen & Govereau v. Platy Enterprises Ltd.*, 24 ALBERTA LAW REV. 359 (1987); Burka, *Sexual Harassment: Manitoba's Step Backward A Case Comment on Govereau and Janzen v. Platy Enterprises Ltd.*, 16 MANITOBA L. J. 245 (1987).

tion, and if so, whether an employer may be held liable for sexual harassment through its employees' workplace acts.

The Supreme Court distinguished the Manitoba appellate court determination from other Canadian cases, noting that none of the other cases considering the issue since *Bell* had failed to equate sexual harassment with sex discrimination. The Court also noted that United States law equated sexual harassment with sex discrimination. The Canadian high court stated that "(t)he Manitoba Court of Appeal departed *radically* from this apparently unbroken line of judicial opinion."¹⁴⁹

The Court considered the meaning of the terms "sex discrimination" and "sexual harassment." The Court defined sex discrimination as "practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender."¹⁵⁰ As to the definition of sexual harassment, itself, the Court admitted that many definitions have been advanced. Common among the various definitions, though, "is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands."¹⁵¹ After reviewing a number of the definitions of sexual harassment found in the law, the Court held that:

Emerging from these various legislative proscriptions is the notion that sexual harassment may take a variety of forms. Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity. *This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particularly blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must*

¹⁴⁹ *Janzen*, 10 C.H.R.R. at D/6223 (Can. 1989) (*emphasis added*).

¹⁵⁰ *Id.* at D/6224.

¹⁵¹ *Id.* at D/6225.

*endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour.*¹⁵²

The Court acknowledged the common practice in the United States of formally categorizing sexual harassment in the contexts of either “quid pro quo” or “hostile environment” sexual harassment:

The American courts have tended to divide sexual harassment into two categories: the ‘quid pro quo’ variety in which tangible employment-related benefits are made contingent upon participation in sexual activity, and conduct which creates a ‘hostile environment’ by requiring employees to endure sexual gestures and posturing in the workplace. Both forms of sexual harassment have been recognized by the American courts including the United States Supreme Court¹⁵³

The Canadian Court also acknowledged that the common practice in the Canadian human rights tribunals was to also “rely on the quid pro quo/hostile environment work environment dichotomy.”¹⁵⁴ Nevertheless, while the Canadian courts have often followed the approach of American courts in the development of sexual harassment law doctrine, in this instance, the Canadian Supreme Court specifically found the American categorization of the two types of sexual harassment unhelpful:

While the distinction may have been important to illustrate forcefully the range of behaviour that constitutes harassment at a time before sexual harassment was widely viewed as actionable, . . . there is no longer any need to characterize harassment as one of these forms. The main point in allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards for refusing to participate in sexual activity.¹⁵⁵

The Court, perhaps concluding that an exhaustive definition of sexual harassment was impossible, and, certainly, in the particular case, simply unnecessary, avoided an attempt to do so. In-

¹⁵² *Id.* at D/6226 (emphasis added).

¹⁵³ *Id.* at D/6226 (citations omitted).

¹⁵⁴ *Id.*

¹⁵⁵ *Janzen*, 10 C.H.R.R. at D/6226 (Can. 1989).

stead, the Court took a liberal approach, defining broadly sexual harassment to include "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment."¹⁵⁶

The Court considered the particular rationale used by the Manitoba Court of Appeal in its decision. The Manitoba court viewed sexual harassment as flowing from the individual characteristics of the particular victim to whom the harasser was attracted, not from the gender of the victim. Since the Manitoba court interpreted the relevant anti-discrimination legislation as being designed to eradicate solely generic or categorical discrimination, the statute, the Manitoba court concluded, could not be applicable to prohibit sexual harassment.¹⁵⁷ The Supreme Court bluntly rejected the appellate court's reasoning:

To argue that the sole factor underlying the discriminatory action was the sexual attractiveness of the appellants and to say that their gender was irrelevant strains credulity. Sexual attractiveness cannot be separated from gender. The similar gender of both appellants is not a mere coincidence, it is fundamental to understanding what they experienced. All female employees were potentially subject to sexual harassment by the respondent That his discriminatory behaviour was pinpointed against two of the female employees would have been small comfort to other women contemplating entering such a workplace. Any female considering employment . . . was a potential victim of Grammas and as such was disadvantaged because of her sex. A potential female employee would recognize that if she were a male employee she would not have to run the same risks of sexual harassment. . . . It is one of the purpose of anti-discrimination legislation to remove such denials of equal opportunity.¹⁵⁸

¹⁵⁶ *Id.* at D/6227. The Court elaborated:

When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. *Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it.* By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

Id. (emphasis added).

¹⁵⁷ See *supra* notes 146-47 and accompanying text.

¹⁵⁸ *Janzen*, 10 C.H.R.R. at D/6232.

The Supreme Court, finding that sexual harassment did equate with actionable sexual discrimination, quoted the American *Bundy v. Jackson* decision to support its position, "sex discrimination within the meaning of title VII is not limited to disparate treatment founded solely or categorically on gender. Rather, discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination."¹⁵⁹

The Canadian Supreme Court dealt in *Janzen* in less detail with the issue of the scope of employer liability for acts of workplace sexual harassment, since the Court had considered the issue of employer liability two years earlier in *Robichaud v. Canada (Treasury Board)*.¹⁶⁰ In *Robichaud*, the Court considered the liability of an employer under the federal *Canadian Human Rights Act*. That decision, which was handed down subsequent to the Manitoba Court of Appeal decision in *Janzen*, found that the federal law required employers to be liable for work-related acts. The Court did not base the employer's liability directly on the traditional doctrine of vicarious liability. Instead, the basis for liability was established within the language of the human rights statute, itself:

Hence, . . . the statute contemplates the imposition of liability on employers for all acts of their employees 'in the course of employment,' interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions.¹⁶¹

The Manitoba statute applicable in *Janzen* employed the words "in respect of employment," but the Court in *Janzen* saw no real significance in the difference between that specific language and the relevant operating language in the Canadian Human Rights Act (which employed the words "in the course of employment"). Since the conduct of the cook in *Janzen* was viewed by the Court as clearly work-related, and employers are

¹⁵⁹ *Id.* at D/6233 (quoting *Bundy*, 641 F.2d at 942).

¹⁶⁰ 40 D.L.R.4th 577, 580, 8 C.H.R.R. D/4326 (Can. 1987) (*hereinafter cited to C.H.R.R.*).

¹⁶¹ *Id.* at D/4333.

liable for actions of their employees which are work-related, the employer in *Janzen* was found liable.¹⁶²

V. DOCTRINAL DEVELOPMENT CONCERNING THE NATURE OF
ACTIONABLE SEXUAL HARASSMENT IN THE POST *VINSON*
AND *JANZEN* Periods

A. *Doctrinal Development in the United States*

The Supreme Court in the *Vinson* case stated that not all conduct that in some way may be called "harassment" is actionable under Title VII. To be actionable, the Court explained, the "conduct must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹⁶³ However, the Court determined that the plaintiff's specific allegations in *Vinson* established "not only pervasive harassment but also criminal conduct of the most serious nature,"¹⁶⁴ and those activities were "plainly sufficient to state a claim of 'hostile environment' sexual harassment."¹⁶⁵

Therefore, the Court failed to provide a description of the elements necessary to establish the existence of the requisite sufficiently severe or pervasive conduct. Post-*Vinson* lower courts, therefore, were left to develop their own approaches to determine the "sufficiently severe or pervasive" threshold. Unfortunately, as the Kansas trial court stated in *Campbell v. Kansas State University*,¹⁶⁶ "(t)he [post-*Vinson*] courts have not been entirely consistent in determining the threshold of pervasive or severe conduct necessary to maintain a hostile environment claim."¹⁶⁷

The existence of the particular inconsistency noted in *Campbell* does not mean that the post-*Vinson* lower courts were inconsistent in all respects as to issues central to the determination of actionable workplace sexual harassment. Post-*Vinson* lower courts commonly agreed that "the required showing of se-

¹⁶² *Janzen*, 10 C.H.R.R. at 6234 ("(T)he respondent Platy Enterprises must be held liable for the actions of the cook Grammas.").

¹⁶³ *Vinson*, 477 U.S. 57, 67 (1986).

¹⁶⁴ *Id.* at 67.

¹⁶⁵ *Id.*

¹⁶⁶ 780 F.Supp. 755 (D.Kan. 1991).

¹⁶⁷ *Id.* at 761.

verity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.”¹⁶⁸ Therefore, lower courts in the post-*Vinson* period accepted the principle that continuous and concerted harassing conduct need not be particularly severe or extreme to be actionable under Title VII as an illegal hostile environment, while singular or limited acts of extremely severe conduct may be actionable. As a result, post-*Vinson* courts commonly agree that “a showing of pervasiveness lessens the required showing of severity, and conversely, a showing of severity lessens the required showing of pervasiveness.”¹⁶⁹ However, as a practical matter, although a single, extreme act can conceivably be sufficient to impose liability,¹⁷⁰ “generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident.”¹⁷¹

Post-*Vinson* lower courts also have commonly considered the existence of both overtly sexual and non-sexual harassment in determining the existence of an hostile environment. For example, in *Hicks v. Gates Rubber Co.*,¹⁷² the Tenth Circuit Court of Appeals concluded that evidence of physical threats and violence against the plaintiff may be considered in determining the existence of sufficient severity.¹⁷³ Also, the court in *Hicks* stated that evidence of sexual harassment against other employees is admissible to demonstrate the existence of an hostile

¹⁶⁸ *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). See also *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990); *Carrero v. New York City Housing Authority*, 890 F.2d 569, 578 (2d Cir. 1989).

¹⁶⁹ *Trotta v. Mobil Oil Corp.*, 788 F.Supp. 1336, 1349 (S.D.N.Y. 1992).

¹⁷⁰ See *Campbell v. Kansas State University*, 780 F.Supp. 755, 762 (D.Kan. 1991) (“... a single isolated incident-while perhaps not pervasive-may nevertheless be so severe as to amount to an actionable violation of Title VII.”).

¹⁷¹ *King v. Bd. of Regents of U. of Wisconsin System*, 898 F.2d 533, 537 (7th Cir. 1990). See also *Babcock v. Frank*, 783 F.Supp. 800, 808 (S.D.N.Y. 1992).

¹⁷² 833 F.2d 1406 (10th Cir. 1987).

¹⁷³ *Id.* See also *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988); *Hall v. Gus Const. Co., Inc.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (holding that the offensive conduct need not necessarily have “explicit sexual overtones”); *McKinney v. Dole*, 765 F.2d 1129, 1138-39 (D.C.Cir. 1985); *Smolsky v. Consolidated Rail Corp.*, 780 F.Supp. 283, 294 (E.D.Pa. 1991) (“A consideration of the sexual and non-sexual must be made to determine if the hostile environment was created.”).

environment, and that where racial discrimination is also raised in a case, the trier of fact may aggregate the evidence of the racial and sexual enmity in establishing the presence of an actionable hostile environment.¹⁷⁴

In *Andrews v. City of Philadelphia*,¹⁷⁵ the Third Circuit Court of Appeals effectively articulated the overall perspective via use of a theatrical analogy, “[a] play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.”¹⁷⁶ The *Andrews* court opined, “[t]o constitute impermissible discrimination the offensive conduct is not necessarily required to include sexual overtones in every instance or that each incident be sufficiently severe to detrimentally affect a female employee.”¹⁷⁷ In the particular sexual harassment action, the plaintiffs, female police officers, presented evidence with some overtly sexual overtones. However, most of the evidence the plaintiffs submitted lacked these characteristics. Instead, the plaintiffs offered evidence involving the “recurrent disappearance of plaintiffs’ case files and work product, anonymous phone calls, and destruction of other property” of the plaintiffs.¹⁷⁸ The evidence submitted established a working environment in which the plaintiffs faced a predominantly male police force, including a large number of male officers who were sexist and also actively antagonistic toward women in the workplace. While much of the conduct underlying the sexual harassment claim was not, in essence, overtly sexual, it was directed toward the plaintiffs because they were women. The court stated that the trial judge “should look to all of the incidents to see if they produce a work environment hostile and offensive to women of reasonable sensibilities.”¹⁷⁹

¹⁷⁴ 833 F.2d at 1416. See also *Broderick v. Ruder*, 46 Fair Empl. Prac. Cas. (BNA) 1272 (D.D.C. 1988) (the court considered acts directed to employees other than the plaintiff, alone, in finding the existence of a hostile environment).

¹⁷⁵ 895 F.2d 1469 (3d Cir. 1990).

¹⁷⁶ *Id.* at 1484.

¹⁷⁷ *Id.* at 1485. The court also stated: “Pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment.” *Id.*

¹⁷⁸ *Id.* at 1486.

¹⁷⁹ *Id.*

Nonetheless, the central issue remains as to what is the appropriate basis for the determination of the pervasive or severe conduct necessary to maintain an hostile environment claim. Post-*Vinson* courts have been inconsistent as to this foundational issue. Courts have differed as to the proper level of attention to give to the issue of the extent of the alteration of the conditions of the plaintiff's employment and to the related question of the victim's psychological well-being.¹⁸⁰

In the initial years after the *Vinson* decision, the courts tended to approach the Supreme Court's requirement of sufficient severity and pervasiveness strictly. A good example of this approach is found in the Seventh Circuit Court of Appeals' 1986 decision, *Scott v. Sears, Roebuck & Co.*¹⁸¹ In *Scott*, the plaintiff, Maxine Scott, was employed by Sears, Roebuck & Co ("Sears") as an automobile mechanic trainee.¹⁸² A senior mechanic named Gadberry was assigned to train Scott as to "the techniques for fixing automobile brakes."¹⁸³ Scott complained that Gadberry would "repeatedly" engage in acts of sexual harassment against her, creating an hostile environment.¹⁸⁴ Specifically, the plaintiff alleged that Gadberry had "repeatedly propositioned her, would wink at her and also suggested he give her a rubdown."¹⁸⁵ The plaintiff also alleged that Gadberry would respond to requests for assistance by saying, "What will I get for it?"¹⁸⁶ She further alleged that another Sears employee "slapped her on the buttocks and that (a third) mechanic . . . once told her he knew she must moan and groan while having sex."¹⁸⁷ The Seventh Circuit stated that the "threshold issue . . . is whether the instances of harassment alleged by the plaintiff rise to a level of 'hostility' offensive enough to be considered actionable."¹⁸⁸ The court proceeded, "[h]ence, the question becomes did the demeaning conduct and sexual stereotyping cause such anxiety and debilitation to the plaintiff that working

¹⁸⁰ See *infra* notes 181-234 and accompanying text.

¹⁸¹ 798 F.2d 210 (7th Cir. 1986).

¹⁸² *Id.* at 211.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Scott*, 798 F.2d at 211.

¹⁸⁷ *Id.* at 211-12.

¹⁸⁸ *Id.* at 213.

conditions were 'poisoned' within the meaning of Title VII?"¹⁸⁹ The court concluded that the conduct did not reach the necessary level of severity to be actionable, as the court found insufficient, concrete examples of the plaintiff being offensively propositioned.¹⁹⁰ The court determined that Gadberry's winks and suggestions of a "rub-down" were not "so pervasive or psychologically debilitating that they affected Scott's ability to perform on the job," and that the acts of the other mechanics were "too isolated and lacking the repetitive and debilitating effect necessary to maintain a hostile environment claim."¹⁹¹

A similar determination was reached by the Sixth Circuit Court of Appeals in *Rabidue v. Osceola Refining Co.*,¹⁹² where the plaintiff, Vivienne Rabidue, asserted charges of sexual harassment "primarily as a result of her unfortunate acrimonious working relationship with Douglas Henry."¹⁹³ Henry, Rabidue's co-employee (who maintained no supervisory authority over the plaintiff), was described by the court as "an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff."¹⁹⁴ The obscenities were extremely vile.¹⁹⁵ The plaintiff and other women employees at the workplace, as well, "were annoyed by Henry's vulgarity."¹⁹⁶ The plaintiff and Henry, "on the occasions when their duties exposed them to each other, were constantly in a confrontation position."¹⁹⁷ In addition to Henry's vulgarity and obscenities, the plaintiff and other women employees were exposed to "pictures of nude or scantily clad women" displayed at the workplace by male employees.¹⁹⁸ The court stated that the plaintiff must show that "the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working

¹⁸⁹ *Id.* (citing *Bundy v. Jackson*, 641 F.2d 934, 944 (D.C.Cir. 1981)).

¹⁹⁰ *Id.* at 214.

¹⁹¹ *Id.* at 214 (*emphasis added*).

¹⁹² 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

¹⁹³ *Id.* at 615.

¹⁹⁴ *Id.*

¹⁹⁵ *See id.* at 624 (Keith, C.J., concurring in part, dissenting in part) for information as to the specific obscenities used.

¹⁹⁶ *Id.* at 615.

¹⁹⁷ *Id.*

¹⁹⁸ *Rabidue*, 805 F.2d at 615.

environment that affected seriously the psycho logical (sic) well-being of the plaintiff."¹⁹⁹ The plaintiff, the court found, did not meet this standard. The court determined that Henry's obscenities "were not so startling as to have affected seriously the psyches of the plaintiff or other female employees."²⁰⁰ The court further stated that the vulgarity of one employee did not "substantially" affect "the totality of the workplace," and the male employees sexually-oriented posters were deminimis as to their effect on the work environment, "when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places."²⁰¹ As a result, the court did not find the conduct complained of sufficiently severe or pervasive to result in a working environment that could be considered intimidating, hostile, or offensive, and, therefore, illegal.

The *Rabidue* court drew a distinction as to the question of the presence of liability in the instant case and in other cases, where conduct actually included "sexual propositions, offensive touchings, or sexual conduct of a similar nature that was systematically directed to the plaintiff over a protracted period of time."²⁰² "The precedential cases addressing a sexually hostile and abusive environment," the court opined, "have all developed more compelling circumstances" than presented in the instant case.²⁰³ The *Rabidue* court imposed objective and subjective tests for assessing the existence of an hostile environment. Under the objective standard, plaintiff was required to establish that the conduct interfered with a reasonable person's work performance and affected "seriously the psychological well-being of that reasonable person under like circumstances."²⁰⁴ This, the court stated, must be demonstrated "regardless of whether the particular plaintiff was actually offended by the defendant's conduct."²⁰⁵ Under the subjective standard, plaintiff would have the additional requirement of demonstrating that "she

¹⁹⁹ *Id.* at 619.

²⁰⁰ *Id.* at 622.

²⁰¹ *Id.*

²⁰² *Id.* at 622 n.7.

²⁰³ *Id.*

²⁰⁴ *Rabidue*, 805 F.2d at 620 (emphasis added).

²⁰⁵ *Id.*

was actually offended by the defendant's conduct and that she suffered some degree of injury as a result of the abusive and hostile work environment."²⁰⁶ The objective test is designed to prevent someone of more than "average" sensitivity from recovering.²⁰⁷ The *Rabidue* approach mandated the trial court to consider a broad range of specific factors, including:

[T]he nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.²⁰⁸

The *Rabidue* approach was followed in several post-Vinson decisions.²⁰⁹ In one of those decisions, *Lipsett v. Rive-Mora*,²¹⁰ the federal district court summarized the authority supporting the restrictive approach epitomized by *Rabidue*. The trial court in *Lipsett* stated that for an actionable Title VII claim to exist "courts have consistently held that the harassment must reach a certain level of severity which affects the employee's psychological well-being."²¹¹ Additionally, the trial court stated that Title VII can not offer an actionable claim:

for each and every crude joke or sexually explicit remark made on the job, *Downes v. F.A.A.*, 775 F.2d 288, 293 (Fed.Cir. 1985); nor for 'every sexual innuendo or flirtation,' *Ferguson v. E.I duPont de*

²⁰⁶ *Id.*

²⁰⁷ See *Lipsett v. Rive-Mora*, 669 F.Supp. 1188, 1199 (D.Puerto Rico 1987), *rev'd*, *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) (Title VII is not available "to vindicate the 'petty slights of the hypersensitive.'").

²⁰⁸ *Rabidue*, 805 F.2d at 620. See also *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995) ("Speech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments," agreeing specifically with the operative comment in *Rabidue*).

²⁰⁹ See *Weiss v. Coca-cola Bottling Co.*, 990 F.2d 333 (7th cir. 1993); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989); *Highlander v. K.F.C. Nat. Management Co.*, 805 F.2d 644 (6th Cir. 1986); *Trotta v. Mobil Oil Corp.*, 788 F.Supp. 1336 (S.D.N.Y. 1992); *Lipsett v. Rive-Mora*, 669 F.Supp. 1188 (D.Puerto Rico 1987), *rev'd*, *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Hollis v. Fleetguard, Inc.*, 668 F.Supp. 631 (M.D.Tenn. 1987); *Pease v. Alford Photo Industries, Inc.*, 667 F.Supp. 1188 (W.D.Tenn. 1987).

²¹⁰ *Lipsett v. Rive-Mora*, 669 F.Supp. 1188 (D.Puerto Rico 1987), *rev'd*, *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

²¹¹ *Lipsett*, 669 F.Supp. at 1199.

Nemours and Co., Inc., 560 F.Supp. 1172, 97-98 (D.Del. 1983); nor for 'trivial or merely annoying vulgarity', *Rabidue v. Osceola Refining Co.*, 584 F.Supp. 419, 433 (D.Mich. 1984) *aff'd.*, 805 F.2d 611 (6th Cir. 1986); nor isolated incidents and occasional use of offensive language as part of casual conversation in the workplace, *Volk v. Coler*, 638 F.Supp. 1555, 1558-59 (C.D.Ill. 1986).²¹²

The trial court opined that a Title VII action is unavailable "to vindicate the 'petty slights of the hypersensitive.'"²¹³ According to the *Lipsett* district court, the majority of cases finding actionable environmental sexual harassment "have involved situations of marked hostility and abuse of a clearly exploitative or humiliating nature because of the victim's membership in a protected group."²¹⁴ In addition to persistent sexual demands, sexual intercourse, criminal battery and rape as alleged in *Vinson*,²¹⁵ the trial court named some other examples. They were, "physical contact, threats, demeaning pranks and comments on plaintiff's chest size, about her sex life, graphic description of male employees' sex life" in the presence of the plaintiff, showing the plaintiff pornographic books, and requesting that she participate in a sexually explicit home video;²¹⁶ near daily exposure to the most vile sexual terms over a several month period;²¹⁷ and male hazing of female workers, including "graffiti and cartoons making blatant sexual mockeries of plaintiffs, placing of prophylactic devises and wet vibrators in one of plaintiff's beds, stealing their work instruments, breaking their equipment, exclusion from meals and touching of buttocks, breasts, waist and hair on various occasions."²¹⁸

²¹² *Id.*

²¹³ *Id.* (citing *Zabkowicz v. West Bend Co.*, 589 F.Supp. 780, 784 (D.Wis.1984)).

²¹⁴ *Id.*

²¹⁵ See *supra* text accompanying note 120. See also *Moylan v. Maries Country*, 792 F.2d 746 (8th Cir. 1986) (alleged rape).

²¹⁶ *Lipsett*, 669 F.Supp. at 1199 (citing *Egger v. Local 276, Plumbers & Pipefitters Union*, 644 F.Supp. 795 (D.Mass. 1980)).

²¹⁷ *Id.* (citing *Moffett v. Gene B. Glick Co., Inc.*, 621 F.Supp. 244 (N.D.Ind. 1985)).

²¹⁸ *Id.* (citing *Bechman v. City of New York*, 580 F.Supp. 226 (E.D.N.Y. 1983)). While the trial court's decision in *Lipsett* provides a useful summary of authority supporting a strict approach to determining sufficient severity or pervasiveness, on appeal, a panel of the First Circuit Court of Appeals reversed the trial court's decision. *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988). The appellate court found evidence of sufficient severity. *Id.* at 905. The appellate decision conformed to a liberal approach toward finding sufficient severity and pervasive-

The lead decision opposing the restrictive approach exemplified in *Scott* and *Rabidue* is *Ellison v. Brady*.²¹⁹ The Ninth Circuit Court of Appeals' decision focused upon the victim's perspective. This developed, as a result, a doctrinal approach for determining actionable workplace sexual harassment which was considerably more favorable to plaintiffs. In this case, the plaintiff, Kerry Ellison, an Internal Revenue Service agent assigned to an IRS office in California, alleged a pattern of harassment by a co-worker, Sterling Gray.²²⁰ Gray, who held no supervisory authority over Ellison, had allegedly sought to develop a personal relationship with the plaintiff and asked her for a date.²²¹ Gray was told by Ellison that she was "not interested" in developing a personal relationship.²²² Gray persisted in his attempts to develop the relationship, and his efforts included "bizarre" pleas in notes and letters to the plaintiff.²²³ The communications, making clear references to sex, clearly "frightened" the plaintiff.²²⁴ In fact, the plaintiff used terms such as "frightened" and "frantic" to describe her emotional reaction to the advances of Gray.²²⁵ However, despite the bizarre conduct, there was "no evidence that Gray harbored ill-will toward Ellison."²²⁶ The circuit court refused to employ the strict adherence to the severity and persuasiveness standard, stating frankly: "We do not agree with the standards set forth in *Scott* and *Rabidue*, and we choose not to follow those decisions."²²⁷ The court viewed the strict approach employed in *Scott* and *Rabidue* as improperly focusing upon the severity of the outcome of the harassment and requiring, as a precondition to relief, that the plaintiff's psychological well-being be seriously affected. The *Ellison* court stated:

ness taken by another group of post-Vinson courts. See *supra* note 219 and accompanying text.

²¹⁹ 924 F.2d 872 (9th Cir. 1991). See also *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990); *Carrero v. New York City Housing Authority*, 890 F.2d 569, 578 (2d Cir. 1989); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988).

²²⁰ *Ellison*, 924 F.2d at 873.

²²¹ *Id.* at 873-74.

²²² *Id.*

²²³ *Id.* at 874.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Ellison*, 924 F.2d at 880.

²²⁷ *Id.* at 877.

Neither *Scott's* search for 'anxiety and debilitation' sufficient to 'poison' a working environment nor *Rabidue's* requirement that a plaintiff's psychological well-being be 'seriously affected' follow directly from language in *Meritor[Savings Bank v. Vinson]*. It is the harasser's conduct which must be pervasive or severe, not the alteration of the conditions of employment. Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation.²²⁸

The *Ellison* court further held that, "[a]lthough an isolated epithet by itself fails to support a cause of action for hostile environment, Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance."²²⁹

In the effort to evaluate the severity or pervasiveness of the sexual harassment, the *Ellison* court determined that a "focus on the perspective of the victim" was necessary.²³⁰ The court stated:

If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.²³¹

In the particular case, focusing on the victim's perspective required the application of a reasonable woman standard rather than the reasonable person standard used in other cases such as *Rabidue*. The *Ellison* court adopted the reasonable woman standard primarily because the court believed "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."²³² The court stated further "[c]onduct that many men consider unobjection-

²²⁸ *Id.* at 877-78.

²²⁹ *Id.* at 878.

²³⁰ *Id.* See also *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988); *Smolsky v. Consolidated Rail Corp.*, 780 F.Supp. 283, 294 (E.D.Pa. 1991); *Harris v. International Paper Co.*, 765 F.Supp. 1509, 1515 (D.Me. 1991); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (M.D.Fla. 1991).

²³¹ *Ellison*, 924 F.2d at 878.

²³² *Id.* at 879.

able may offend many women.”²³³ The *Ellison* court determined that a woman plaintiff would state a prima facie case of hostile environment sexual harassment “when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.”²³⁴

The United States Supreme Court reconsidered the central issue regarding the nature of sufficient severity and pervasiveness in its second, and, to date, only other sexual harassment decision, *Harris v. Forklift Systems, Inc.*²³⁵ In *Harris*, the Court reviewed an appeal from the Sixth Circuit Court of Appeals, which had applied the strict, psychological injury requirement set out in *Rabidue*.²³⁶ The Supreme Court reaffirmed the *Meritor* standard requiring actionable sexual harassment to be “sufficiently severe or pervasive.”²³⁷ However, the Court in *Harris* took the position that the *Meritor* standard set “a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.”²³⁸ Sexual harassment, the court stated, is actionable “before the harassing conduct leads to a nervous breakdown.”²³⁹ It is error to rely upon a showing of psychological injury as a precondition to establishing actionable sexual harassment:

Such an inquiry may needlessly focus the factfinder’s attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person’s psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.²⁴⁰

While the Court in *Harris* made it clear that psychological injury need not be established for the plaintiff to prevail, the Court failed to conclusively define the nature of hostile environment sexual harassment. The Court acknowledged that hostile

²³³ *Id.* at 878.

²³⁴ *Id.*

²³⁵ 114 S.Ct. 367 (1993).

²³⁶ *Harris v. Forklift Systems, Inc.*, 976 F.2d 733 (6th Cir. 1992).

²³⁷ *Id.* at 370.

²³⁸ *Id.*

²³⁹ *Id.* at 371.

²⁴⁰ *Id.*

environment sexual harassment "by its nature" cannot be the subject of "a mathematically precise test."²⁴¹ Instead, the Court stated, an hostile environment must be determined by looking to "all the circumstances," including the frequency and severity of the harassing conduct; whether the conduct is physically threatening or humiliating, or merely offensive; and whether the conduct unreasonably interferes with the work performance of the employee.²⁴² Psychological injury is relevant to the existence of hostile environment sexual harassment, but it is only one factor to be considered along with the others.²⁴³

Additionally, in searching for hostile environment sexual harassment, the Court in *Harris* made it clear that both objective and subjective elements are a proper part of the case analysis. The complained of conduct must establish an objectively hostile environment, and the victim of the harassment must subjectively perceive the environment to be abusive.²⁴⁴ The Court failed to decide in *Harris* the question of the degree of appropriate attention that should be applied in considering the objective element. In other words, the Court did not directly address whether the *Ellison* "reasonable victim" standard,²⁴⁵ or the more traditional "reasonable person" standard, should apply to the analysis. However, the Court did use the "reasonable person" language in the its opinion, even though the Court did not expressly decide the issue. For example, the Court stated, "[c]onduct that is not severe enough or pervasive enough to create an objectively hostile or abusive work environment - an environment that a *reasonable person* would find hostile or abusive - is beyond Title VII's purview."²⁴⁶ At another point in its decision, after holding that psychological harm need not be shown as a precondition to actionable sexual harassment under Title VII, the Court stated that Title VII "[c]ertainly . . . bars

²⁴¹ *Harris*, 114 S.Ct. at 372.

²⁴² *Id.* at 371. See also *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 594 (7th Cir. 1995) ("In determining whether a working environment is 'hostile' or 'abusive', all the circumstances may be considered," including, specifically, those listed in *Harris*).

²⁴³ *Id.*

²⁴⁴ *Id.* See *Dey v. Colt Construction & Dev'l. Co.*, 28 F.3d 1446, 1454 (7th Cir. 1994) ("*Harris* . . . makes clear that we must evaluate the relevant factors from both an objective and subjective viewpoint.").

²⁴⁵ See *supra* notes 230-34 and accompanying text.

²⁴⁶ *Harris*, 114 S.Ct. at 370 (emphasis added).

conduct that would seriously affect a *reasonable person's* psychological well-being."²⁴⁷ This language has led some lower courts to conclude that the Supreme Court favors the reasonable person standard.²⁴⁸ Other post-*Harris* lower courts, however, have simply determined that "*Harris* did not explicitly decide whether a reasonable person or reasonable woman (or victim) standard applies."²⁴⁹ The issue will not be resolved until ultimately re-visited and decided by the Supreme Court.

B. *Doctrinal Development in Canada*

Post-*Janzen* tribunals have commonly cited the *Janzen* decision for the proposition that sexual harassment is a form of illegal sex discrimination.²⁵⁰ The tribunals also have adhered to the broad definition of actionable sexual harassment supplied by the Canadian Supreme Court in *Janzen*. The adherence of the lower tribunals to a broad definition is often exemplified by the tribunals' citation to the following language of then-Chief Justice Dickson, writing for the majority in *Janzen*:

²⁴⁷ *Id.* at 371 (emphasis added). See *supra* text accompanying note 242.

²⁴⁸ See *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 594 (7th Cir. 1995) ("The test is an objective one, *not* a standard of offense to a 'reasonable woman'."); *Dey v. Colt Construction & Co.*, 28 F.3d 1446, 1454 (7th Cir. 1994).

²⁴⁹ *Currie v. Kowalewski*, 824 F.Supp. 57, 59 (N.D.N.Y. 1994). See also *Fuller v. City of Oakland, Cal.*, 47 F.3d 1522, 1527 (9th Cir. 1995) ("Whether the workplace is objectively hostile must be determined from the perspective of a reasonable person *with the same fundamental characteristics.*") (emphasis added); *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 753 (3d Cir. 1995) (To be actionable, the discrimination must "have detrimentally affected a reasonable person of the same protected class in that position.").

²⁵⁰ See *Crozier v. Asselstine*, 22 C.H.R.R. D/244, D/246 (Ont. Bd. Inq. 1994); *Vanton v. British Columbia Council of Human Rights*, 21 C.H.R.R. D/492, D/499 (B.C. Sup.Ct. 1994) ("It is beyond doubt that sexual harassment constitutes discrimination based on sex."); *Veitenheimer v. Orange Properties Ltd.*, 20 C.H.R.R. D/462, D/465 (Sask. Bd. Inq. 1992); *Wagner v. Kersey-Reimer Enterprises Ltd.*, 15 C.H.R.R. D/413, D/415 (B.C. H. R. Council 1991) ("It is well settled that sexual harassment constitutes sex discrimination within the meaning of human rights legislation, citing *Janzen*."); *McLellan v. Mentor Investments Ltd.*, 15 C.H.R.R. D/134, D/135 (N.S. Bd. Inq. 1991); *Karlenzig v. Chris' Holdings Ltd.*, 15 C.H.R.R. D/5, D/7 (Sask. Bd. Inq. 1991); *Janzen v. British Columbia*, 14 C.H.R.R. D/257, D/260 (B.C. H. R. Council 1991); *Primack v. Azim Enterprises Co.*, 14 C.H.R.R. D/150, D/153 (B.C. H. R. Council 1991) ("The [*Janzen*] Court then affirmed that sexual harassment constitutes discrimination on the basis of sex within the meaning of human rights legislation."); *Shaw v. Levac Supply Ltd.*, 14 C.H.R.R. D/36, D/53 (Ont. Bd. Inq. 1990).

I am of the view that *sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment*. It is, as Adjudicator Shime observed in *Bell v. Ladas*, . . . , and has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. *By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.*²⁵¹

In *White v. Nu-Way Cleaners Ltd.*,²⁵² the British Columbia Council of Human Rights stated, "[i]t is clear from these statements [in *Janzen*] that the Supreme Court of Canada requires a broad definition of sexual harassment"²⁵³ In *Shaw v. Levac Supply Ltd.*,²⁵⁴ the Ontario Board of Inquiry stated:

The words emphasized in the passages quoted earlier from the *Janzen* case, . . . , would seem to indicate that the 'broad definition' laid down in that case extends to some of the behaviour that occurred in the case before me. According to the guidelines established by the American Equal Employment Opportunity Commission, verbal conduct of a sexual nature will constitute sexual harassment when such conduct has the effect of creating an offensive working environment. After citing that guideline with approval, Chief Justice Dickson [writing for the Court in *Janzen*] went on to say that sexual harassment may take a variety of forms and that it encompasses inappropriate comments.²⁵⁵

²⁵¹ *Janzen v. Platy Enterprises Ltd.*, 59 D.L.R.4th 352, 375 (Can. 1989) (emphasis added) (citation omitted). See *Aavik v. Ashbourne*, 12 C.H.R.R. D/401, D/408 (Nfld. H. R. Comm. 1990).

²⁵² 14 C.H.R.R. D/443 (B.C. H. R. Council 1991).

²⁵³ *Id.* at D/448. See also *Vanton v. British Columbia Council of Human Rights*, 21 C.H.R.R. D/492, D/499 (B.C. Sup.Ct. 1994) ("In the *Janzen* decision the Supreme Court of Canada defined 'sexual harassment' broadly"); *Karlenzig v. Chris' Holdings Ltd.*, 15 C.H.R.R. D/5, D/8 (Sask. Bd. Inq. 1991) ("In *Janzen v. Platy Enterprises Ltd.*, supra, Chief Justice Dickson indicated that sexual harassment in the workplace should be broadly defined").

²⁵⁴ 14 C.H.R.R. D/36 (Ont. Bd. Inq. 1990).

²⁵⁵ *Id.* at D/54. The Board of Inquiry in *Shaw* went on to find that the specific conduct before it, while not involving the more common activities of sexual solici-

It is now well-settled in Canada that sexual harassment involves "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment."²⁵⁶

It is remarkable that, beginning with the first Canadian decision in 1980 equating sexual harassment with prohibited sex discrimination,²⁵⁷ there has been general adherence to the principle that sexual harassment requires a broad definition.²⁵⁸ *Janzen* provided the ultimate stamp of approval to this principle of liberality, and post-*Janzen* decisions have continued to apply a standard which finds actionable unwelcome sexual conduct. Even in those, "situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour."²⁵⁹ What we commonly call in the United States a hostile environment (and what Canadians tend to call a "poisoned work environment") serves as a basis for actionable sexual harassment in post-*Janzen* Canada.²⁶⁰

tion and sexually-oriented touchings, involved conduct which denigrated the complainant's sexuality as a woman (a co-employee called the complainant a "fat cow"; she was made fun of for the way she walked and for her figure) and amounted to actionable sexual harassment.

²⁵⁶ *Janzen*, 59 D.L.R.4th at 375. See *Vanton v. British Columbia*, 21 C.H.R.R. D/492, D/499 (B.C. Sup. Ct. 1994); *Arbogast v. Empire-Int'l. Investment Corp.*, 20 C.H.R.R. D/150, D/154 (B.C. H. R. Council 1993) ("It is well-established that unwelcome conduct of a sexual nature that detrimentally affects the work environment of an employee constitutes discrimination on the basis of sex; it is no defence that only some employees are subjected to the sexual harassment." (citing *Janzen*, 59 D.L.R.4th at 375.)).

²⁵⁷ *Re Bell and Korczak*, 27 L.A.C.2d 227, 1 C.H.R.R. D/155 (Ont. Bd. of Inq. 1980), sub nom. *Bell v. Ladas*.

²⁵⁸ Of course, the aberration is Manitoba Court of Appeal decision, *Janzen v. Platy Enterprises Ltd.*, 59 D.L.R.4th 352, 10 C.H.R.R. D/3831 (Man.C.A. 1986), *rev'd* 59 D.L.R.4th 352, 10 C.H.R.R. D/6205 (Can. 1989).

²⁵⁹ *Janzen*, 10 C.H.R.R. at D/6226.

²⁶⁰ See *Bruce v. McGuire Truck Stop*, 20 C.H.R.R. D/145, D/147 (Ont. Bd. of Inq. 1993) ("There is now substantial human rights jurisprudence which establishes that a poisoned work environment can amount to discrimination . . ."); *Kotyk v. Canadian Employment & Immigration Comm'n.*, 4 C.H.R.R. D/1416, D/1428 (Can. H. R. Comm'n. 1983) (Can. 1983) ("Even if I were to find that there was no concrete employment consequences, there is no question but that her environment was 'poisoned.'").

As in the United States,²⁶¹ for workplace sexual harassment to be actionable, the complainant must be "unwelcome" to the conduct in a Canadian case must be "unwelcome" to the complainant.²⁶² An excellent, post-*Janzen* case discussing the issue of unwelcome conduct is *Dupuis v. British Columbia*.²⁶³ In *Dupuis*, the tribunal considered whether illegal sexual harassment had occurred even though the complainant had voluntarily entered into sexual intercourse with her supervisor. The tribunal cited *Meritor Savings Bank v. Vinson*²⁶⁴ to support its position that voluntary conduct by the complainant is not determinative on the issue of unwelcomeness.²⁶⁵ The tribunal stated that "[v]oluntariness is merely a fact to consider in determining whether the conduct was unwelcome."²⁶⁶ In determining whether the conduct was unwelcome, "[e]vidence that the complainant explicitly put the alleged harasser on notice that the conduct was unwelcome will be very persuasive."²⁶⁷ However, the tribunal stated, "indication of unwelcomeness may be implicit; an overt refusal may not be necessary."²⁶⁸ For example, the complainant's "body language can suffice to demonstrate objection."²⁶⁹ The tribunal in *Dupuis* further stated:

Though a protest is strong evidence, it is not a necessary element in a claim of sexual harassment. Fear of repercussions may prevent a person in a position of weakness from protesting. A victim of harassment need not confront the harasser directly so long as

²⁶¹ See *supra* note 123 and accompanying text.

²⁶² *Janzen v. Platy Enterprises Ltd.*, 59 D.L.R.4th 352, 375 (Can. 1989) ("(S)exual harassment in the workplace may be broadly defined as *unwelcome conduct* of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment.") (emphasis added).

²⁶³ 20 C.H.R.R. D/87 (B.C. H. R. Council 1993).

²⁶⁴ 477 U.S. 57 (1986), *aff'd* *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *rev'd* 23 Fair Empl. Cas. (BNA) 37 (D.D.C. 1980).

²⁶⁵ *Dupuis*, 20 C.H.R.R. at D/93. The tribunal also cited *Dyson v. Louie Pasin Plaster & Stucco Ltd.*, 11 C.H.R.R. D/495 (B.C. H. R. Council 1990). See also *Quebec (Comm. des droits de la personne) v. Habachi*, 18 C.H.R.R. D/485, D/493 (Que. H. R. Tribunal 1992).

²⁶⁶ *Dupuis*, 20 C.H.R.R. at D/93.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

her conduct demonstrates explicitly or implicitly that the sexual conduct is unwelcome.²⁷⁰

The tribunal also stated that a two-part standard must be employed to determine unwelcomeness. The standard requires that the trier of fact first "assess, whether, considering all the circumstances," the complainant's conduct was "consistent with her allegation that the conduct was unwelcome," and, second, assess "whether there is evidence that the alleged harasser knew or ought to have known that the conduct was unwelcome."²⁷¹

Of course, as in United States law,²⁷² not all unwelcome conduct is necessarily actionable in Canada as a form of prohibited sexual harassment. The issue was framed in a frank and effective manner in the post-*Janzen* decision *A. v. Quality Inn*,²⁷³ when the Ontario Board of Inquiry held:

It seems axiomatic that not all behaviour between adult males and females in the workplace is sexual harassment; that is, having males and females together in one place does not, in itself, constitute sexual harassment. By the same token, having males and females together does create a sexually charged atmosphere. The Victorians recognized this and even covered table legs to shelter those entering a room from being exposed to 'bare legs' and thus be embarrassed by the resulting imaginings that might follow. It is also clear that in present day society there have been many incidents where female employees have been raped and fondled and made the butt of jokes because of their femaleness. Males and females in our society are now attempting to draw a line between an acceptable level of recognition that when people are together a certain amount of camaraderie exists, often with sexual overtones, and on the other hand, a recognition that females are often vulnerable in their employment situation and this

²⁷⁰ *Id.* at D/94. See also, *Anderson v. Guyett*, 11 C.H.R.R. D/415 (B.C. H. R. Council 1990).

²⁷¹ *Dupuis*, 20 C.H.R.R. at D/94. See also *Contenti v. Gold Seats Inc.*, 20 C.H.R.R. D/74, D/79 (Alta. Bd. of Inq. 1992) ("It is often stated as an objective, or 'reasonableness,' standard, that the harasser 'knew or ought to have known' that his conduct was unwelcome to the complainant.").

²⁷² See *supra* note 119 and accompanying text.

²⁷³ 20 C.H.R.R. D/230 (Ont. Bd. of Inq. 1993).

vulnerability can lead to sexual exploitation. The drawing of new boundaries is always a difficult and delicate matter.²⁷⁴

While drawing the appropriate boundary between acceptable and unacceptable workplace conduct is, indeed, a difficult task, as a Newfoundland Ad Hoc Human Rights Commission explained, "[t]here is, however, some line [to be crossed] where . . . bad taste will constitute harassment."²⁷⁵ In *Aragona v. Elegant Lamp Co.*,²⁷⁶ a pre-*Janzen* Ontario Board of Inquiry found that the line is crossed "only where the conduct may be reasonably construed to create, as a condition of employment, a work environment which demands an unwarranted intrusion upon the employee's *sexual dignity* as a man or a woman."²⁷⁷ The emphasis in Canadian jurisprudence upon a judicial search for an unwarranted intrusion upon the employee's sexual dignity is strong and continues. For example, in the post-*Janzen* decision *Bouvier v. Metro Express*,²⁷⁸ the Canadian Human Rights Commission held:

In short, sexual harassment consists in unwelcome behaviour of a sexual nature which is an affront to the personal dignity of another person. It may be blatant or subtle, and may take many forms, but the evidentiary burden on the victim is only that of establishing that the conduct complained of was (1) of a sexual nature, (2) unwanted and (3) humiliating.²⁷⁹

In *Bouvier*, the commission found that the complainant had endured frequent comments of a sexual nature from her superior for over three months. Her superior had commented on the complainant's "nice legs," recommended that the complainant dress in a particular manner and put on a bikini, made dirty jokes concerning the complainant's undergarments, and invited the complainant to "get it on." He had also made sexually-oriented gestures toward the complainant, such as undoing a but-

²⁷⁴ *Id.* at D/234. Compare with a recent American case, *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 430 (7th Cir. 1995) ("The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women. . . . It is not designed to purge the workplace of vulgarity. Drawing the line is not always easy.").

²⁷⁵ *Aavik v. Ashvourne*, 12 C.H.R.R. D/401, D/409 (Nfld. H. R. Comm'n 1990).

²⁷⁶ 3 C.H.R.R. D/1109 (Ont. Bd. of Inq. 1982).

²⁷⁷ *Id.* at D/1110 (emphasis added).

²⁷⁸ 17 C.H.R.R. D/313 (Can. H. R. Trib. 1992).

²⁷⁹ *Id.* at D/326.

ton on her blouse, stroking her thigh, and slapping her on the buttocks.²⁸⁰ The slapping, the commission stated, was "an extremely humiliating incident which finally brought about the complainant's departure" from the job.²⁸¹ The Commission stated that "[t]he comments and gestures were thus clearly sexual in nature; they were humiliating or offensive to the complainant; and they were unwanted."²⁸² The Commission found that "there is no doubt that the complainant was sexually harassed."²⁸³

In determining the existence of actionable sexual harassment in the context of the hostile or "poisoned" work environment, Canadian tribunals do generally require evidence which establishes a "course" of conduct.²⁸⁴ As in the United States,²⁸⁵ singular or isolated instances may be sufficiently severe to be actionable.²⁸⁶ However, also as in the United States,²⁸⁷ repeated incidents normally provide better evidence of an actionable claim of hostile environment, although the strength of the evidence in a case generally depends upon the number of incidents presented and the intensity of each incident. The British Columbia Council of Human Rights presented the commonly-shared principle well in the post-Vinson decision *Wagner v. Kersey-Reimer Enterprises Ltd.*²⁸⁸ In *Wagner*, the tribunal referenced approvingly to a *Harvard Law Review* article, and, quoting the article stated:

'... a finding that offensive conduct is a condition of the workplace should require a showing that such conduct occurs with some frequency. Nevertheless, because the effect of only one or a few physical advances or threats may be as devastating as that of re-

²⁸⁰ *Id.* at D/326-27.

²⁸¹ *Id.* at D/327.

²⁸² *Id.*

²⁸³ *Id.* at D/326.

²⁸⁴ See *Aavik v. Ashbourne*, 12 C.H.R.R. D/401, D/409 (Nfld. Ad Hoc H.R. Comm'n 1990) ("I am not persuaded that the evidence establishes a 'course' of conduct such as would constitute 'harass[ment].'").

²⁸⁵ See *supra* note 170.

²⁸⁶ See *Bruce v. McGuire Truck Stop*, 20 C.H.R.R. D/145, D/147 (Ont. Bd. of Inq. 1993) ("(T)his Board would find the single outrageous event of the showing of the pornographic film in full view of the young unsuspecting complainants in the workplace sufficient to constitute a course of conduct amounting to harassment.").

²⁸⁷ See *supra* notes 168-71 and accompanying text.

²⁸⁸ 15 C.H.R.R. D/413 (B.C. Council of H.R. 1991).

peated sexual propositions and innuendoes, the threshold for determining whether there has been repeated exposure should vary inversely with the offensiveness of the incidents.²⁸⁹

In assessing the evidence of sexual harassment, Canadian courts consistently employ an objective standard.²⁹⁰ Arjun P. Aggarwal, Canada's foremost authority on sexual harassment law, explains the Canadian approach:

Whether or not the alleged sexual conduct or behaviour constitutes sexual harassment must be determined by an objective test. For an objective test, the courts and tribunals have used the standard of a 'reasonable person' rather than the perception of a harassee or a harasser. Moreover, the conduct in question should be examined and tested against the norm of 'socially acceptable behaviour' and the 'reasonable and usual limits of social interaction' in the community.²⁹¹

The "reasonable person" measure, then, is the standard commonly employed in Canada.²⁹² However, this does not mean that the reasonable victim standard has not found its way into the Canadian jurisprudence. The impressive influence of American law on the development of Canadian sexual harassment law made such an event unavoidable. In 1993, in *Stadnyk v. Canada (Employment and Immigration Commission)*,²⁹³ the Canadian Human Rights Tribunal was presented specifically with the Ninth Circuit's decision in *Ellison v. Brady*,²⁹⁴ to assist the tribunal with its determination of a case in which the tribunal believed that the complainant "was genuinely offended and

²⁸⁹ *Id.* at D/416 (quoting Note, *Sexual Harassment Claims of Abusive Work Environment under Title VII*, 97 HARV. L. REV. 1449, 1458-9).

²⁹⁰ See *Lamers v. Pacific Building Maintenance Ltd.*, 14 C.H.R.R. D/235, D/242 (Sask. Bd. of Inq. 1991) ("...this Board must assess the evidence by way of an objective standard . . .").

²⁹¹ Arjun P. Aggarwal, *SEXUAL HARASSMENT IN THE WORKPLACE* 122 (1992).

²⁹² See *Barnes v. Thomas Stratton Warehousing Co. Inc.*, 22 C.H.R.R. D/427, D/433 (Nfld. Bd. of Inq. 1993); *Dupuis v. British Columbia (Ministry of Forests)*, 20 C.H.R.R. D/87, D95 (B.C. H. R. Council 1993); *Broadfield v. DeHavilland/Boeing of Canada Ltd.*, 19 C.H.R.R. D/347, D/366 (Ont. Bd. of Inq. 1993). See also Deborah Ann Campbell, *THE EVOLUTION OF SEXUAL HARASSMENT CASE LAW IN CANADA* 16 (1992) ("The conduct must be of a certain offensiveness and frequency, as judged by a reasonable person, such that it constitutes a term or condition of employment, in order to constitute [actionable] sexual harassment.") (emphasis added).

²⁹³ 22 C.H.R.R. D/173 (Can. H. R. Tribunal 1993).

²⁹⁴ 924 F.2d 872 (9th Cir. 1991). See *supra* notes and accompanying text.

sincerely believes that she was attacked and discriminated against because of her stance on, and experience with, sexual harassment.”²⁹⁵ Raymond W. Kirzinger, writing on behalf of the Commission, said:

The courts have been equally clear in stating that the subjective perception of discrimination on the part of the complainant is not sufficient of itself to substantiate a claim. Some reasonable and objective standard must be applied to the language, words, or conduct complained of.²⁹⁶

As to the application of the principal epitomized in the *Ellison* case, Chairman Kirzinger stated:

I am not aware that the *Ellison* case, . . . , has been considered or adopted by any Canadian court, or for that matter, that the reasonable victim standard has been adopted. However, in this particular case, I believe it is appropriate to consider the application of such an approach since we are dealing with a complainant who appears to have been extremely sensitive about any sexual harassment comments.²⁹⁷

The Commission proceeded to apply the reasonable victim standard in the case and, nevertheless, concluded that the complained of conduct was not offensive. The Commission “unequivocally” believed that the complainant fit the definition of the “rare hyper-sensitive employee, “and that “a reasonable female” would not have been offended.²⁹⁸ In 1995, in reviewing the *Stadnyk* decision, the Canadian Human Rights Review Tribunal stated, “[s]uch standard was adopted by the initial Tribunal . . . and we do not find any error in the application of such standard by the Tribunal Chairperson to the evidence and facts as found by him.”²⁹⁹

Of course, even if a “reasonable person,” rather than a “reasonable victim, standard is used, that standard requires a consideration of the particular context within which the alleged misconduct occurred. Professor Aggarwal makes two key points in this regard: First, “[t]he trier of fact must ‘adopt the perspec-

²⁹⁵ *Stadnyk*, 22 C.H.R.R. at D/191

²⁹⁶ *Id.* at D/191-92.

²⁹⁷ *Id.* at D/193.

²⁹⁸ *Id.* at D/193-94.

²⁹⁹ *Stadnyk v. Canada (Employment and Immigration Comm.)*, 22 C.H.R.R. D/196, D/201 (Can. H. R. Rev. Trib. 1995).

tive of a reasonable person's reaction to a similar environment under similar or like circumstances'; and second, "the 'reasonable person' standard should consider the victim's perspective and not stereotypical notions of acceptable behaviour."³⁰⁰ This "reasonable person" perspective arguably mandates a reasonable victim analysis in evaluating the evidence. Finally, Canadian tribunals also commonly employ a reasonable person approach to determine whether the requisite unwelcomeness exists in a given case. For example, in *Dupuis v. British Columbia*,³⁰¹ the British Columbia Human Rights Council stated:

While the perception of the alleged harasser is relevant in determining whether the conduct was unwelcome, the proper question to ask is whether a reasonable person would recognize that the conduct in those circumstances was unwelcome. What is reasonable will depend on all the circumstances, including the nature of the impugned conduct and the relationship.³⁰²

As with doctrinal development in the post-Vinson United States,³⁰³ post-Janzen Canadian tribunals have considered the existence of both overtly sexual and non-sexual harassment in determining the existence of actionable sexual harassment. The first Canadian tribunal to deal with the precise issue of whether negative and demeaning comments can amount to sexual harassment was the Ontario Board of Inquiry. The tribunal

³⁰⁰ Arjun P. Aggarwal, *SEXUAL HARASSMENT IN THE WORKPLACE* 73 (1992) (quoting the American cases, *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 650 (6th Cir. 1986) and *Rabidue*, 805 F.2d at 626, respectively).

³⁰¹ 20 C.H.R.R. D/87 (B.C. H. R. Council 1993).

³⁰² *Id.* at D/95. See also *Egolf v. Watson*, 23 C.H.R.R. D/4, D/17 (B.C. H. R. Council 1995) ("A reasonable person in Watson's [Respondent's] position ought to have realized that his conduct would be offensive to female employees."); *Barnes v. Thomas Stratton Warehousing Co. Inc.*, 22 C.H.R.R. D/427, D/433 (Nfld. Bd. of Inq. 1993) ("The issue then is whether a reasonable person in the place of the respondent would have known the comments were unwelcome."); *Contenti v. Gold Seats Inc.*, 20 C.H.R.R. D/74, D/79 (Alta. Bd. of Inq. 1992) ("It is often stated as an objective, or 'reasonableness,' standard, that the harasser 'knew or ought to have known' that his conduct was unwelcome to the complainant.") (citing *Janzen*, 10 C.H.R.R. at D/6210); *Butt v. Smith*, 20 C.H.R.R. D/39, D/44 (Nfld. Bd. of Inq. 1992) (conduct not the type that "ought reasonably to have been known to be unwelcome."); *Lampman v. Photoflair*, 18 C.H.R.R. D/196, D/208 (Ont. Bd. of Inq. 1992) ("(I)t must be considered whether Mr. Smith (the alleged harasser) knew or ought reasonably to have known that his conduct, in these various incidents, was unwelcome.").

³⁰³ See *supra* notes 172-79 and accompanying text.

did so in a post-*Janzen* 1990 decision, *Shaw v. Levac Supply Ltd.*³⁰⁴ The complainant in *Shaw* had been consistently lampooned, mimicked, and ridiculed by a co-worker for being fat and unattractive. However, the complainant had not experienced overtly sexual demands or solicitations in the workplace. The tribunal stated:

The question whether negative and demeaning comments of a sexual nature can amount to sexual harassment does not appear to have come before any Canadian court or human rights tribunal until now. Thus, it is not surprising that the discussion leading up to the definition formulated in the Supreme Court [in *Janzen*] concentrates on sexual activity involving demands or solicitations, since that was the factual context of the cases considered. However, since legal definition depends as much upon deduction from principle and policy as it does upon induction from the facts of past cases, it does not follow that the meaning of sexual harassment cannot extend to circumstances of a kind not yet considered.³⁰⁵

The tribunal, relying heavily on the language in *Janzen* to the effect that sexual harassment may take a variety of forms and encompasses inappropriate comments,³⁰⁶ found that the conduct in the case was actionable workplace sexual harassment. The tribunal held:

If such conduct is unwelcome and detrimentally affects the climate of the workplace and the climate of understanding and mutual respect which the legislation seeks to foster, and if such behaviour is an integral part of a course of conduct that drives its victim away by attacking her dignity and self-respect both as an employee and as a human being, can it be said that it is not sexual harassment merely because the harasser was not making a sexual advance or solicitation? In my opinion such conduct is a form of sexual harassment³⁰⁷

The issue was re-visited by the Ontario Board of Inquiry in 1993, in *Broadfield v. De Havilland / Boeing of Canada Ltd.*³⁰⁸ The complainant in *Broadfield* was the first female supervisor

³⁰⁴ 14 C.H.R.R. D/36 (Ont. Bd. of Inq. 1990).

³⁰⁵ *Id.* at D/53.

³⁰⁶ *Id.* at D/54.

³⁰⁷ *Id.* at D/55.

³⁰⁸ 19 C.H.R.R. D/347 (Ont. Bd. of Inq. 1993).

on an industrial plant floor. She was subjected to a course of severely abusive workplace conduct. The conduct included anonymous and obscene telephone calls and threats, the complainant's car was vandalized, and the complainant was the object of obscene comments. The tribunal determined that the workplace conduct was directed toward degrading the complainant because of her gender, and in this context was sufficiently pervasive to create a hostile working environment "as a virtual condition of her employment."³⁰⁹

VI. CONCLUSION

Workplace sexual harassment law doctrine in Canada and the United States has matured considerably in the post-*Vinson* and post-*Janzen* periods. This is not to say that further development is unnecessary. Issues remain to be clarified.³¹⁰ Also, the nature of workplace sexual harassment is not susceptible to precise definition,³¹¹ so questions regarding the appropriateness of workplace conduct in particular instances will remain. Nevertheless, the maturation permits the representation of three underlying notions which emerge from the review of the doctrinal development concerning the nature of actionable workplace sexual harassment.

First, the general scope of actionable workplace sexual harassment in both countries is similar. While the Canadian Supreme Court in *Janzen* found the American categorization of the quid pro quo and hostile environment types of sexual harassment unhelpful,³¹² the reality is that both forms of sexual

³⁰⁹ *Id.* at D/366. See also *Egolf v. Watson*, 23 C.H.R.R. D/4, D/17 (B.C. H. R. Council 1995) ("It is clear . . . , that conduct which denigrates a woman's sexuality or vexatious conduct which is directed at a woman because of her sex constitutes sexual harassment."); *Bailey v. Anmore (Village)*, 19 C.H.R.R. D/369, D/375 (B.C. Council of H.R. 1992) ("(I)t is not necessary that the conduct be overtly sexual; if the conduct is gender related such that it would not be directed at the other sex it may also fall within this definition of actionable sexual harassment).").

³¹⁰ For example, the question of the appropriateness of the reasonable victim standard still remains an issue in the United States, even after *Harris*. See *supra* notes 248-49 and accompanying text. Additionally, the issue of the extension of the reasonable victim standard to Canada is in issue after *Stadnyk*. See *supra* notes 293-99 and accompanying text.

³¹¹ See *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 372 (1993) (Hostile environment sexual harassment "by its nature" cannot be the subject of "a mathematically precise test.").

³¹² See *supra* note 155 and accompanying text.

harassment are illegal under the prevailing law of both countries. The categorization was deemed by the Canadian Court to be unhelpful only because, by the time *Janzen* was decided, Canadian and American doctrinal development had evolved beyond the point at which there could be a reasonable debate concerning the applicability of both types as forms of illegal sexual harassment. The Canadian Supreme Court was correct in *Janzen*, "[t]he main point in allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards for refusing to participate in sexual activity."³¹³ It is laudable that both countries' doctrines today rest squarely upon this cardinal principle.

Second, the influence of American decisional authority upon the development of Canadian sexual harassment law jurisprudence is impressive. From the beginning of the formulation of the law of workplace sexual harassment, Canadian human rights tribunals and courts have commonly recognized that the legal theory of sexual harassment owed its first clear articulation to the American cases.³¹⁴ Additionally, these tribunals frequently considered the United States precedents in their deliberations, and they often adopted those decisions as authority for similar Canadian holdings.³¹⁵ For example, the Canadian Supreme Court, itself, quoted the American *Bundy v. Jackson* decision to support its position in *Janzen* that "sex discrimination within the meaning of Title VII is not limited to disparate treatment founded solely or categorically on gender."³¹⁶ Additionally, the reasonable victim standard entered Canadian jurisprudence via *Stadnyk v. Canada (Employment and Immigration Commission)*,³¹⁷ because the American Ninth Circuit's *Ellison v. Brady*³¹⁸ decision was specifically presented to the Canadian Human Rights Tribunal in *Stadnyk* for its consideration in arriving at a determination of the case.³¹⁹

³¹³ *Janzen*, 10 C.H.R.R. at D/6226 (Can. 1989).

³¹⁴ See *supra* note 101 and accompanying text.

³¹⁵ See *supra* note 102 and accompanying text.

³¹⁶ *Janzen*, 10 C.H.R.R. at D/6233 (quoting *Bundy*, 641 F.2d at 942).

³¹⁷ 22 C.H.R.R. D/173 (Can. H. R. Tribunal 1993).

³¹⁸ 924 F.2d 872 (9th Cir. 1991). See *supra* notes and accompanying text.

³¹⁹ See *supra* notes 293-99 and accompanying text.

Third, even though a marked influence of American jurisprudence is evident in the Canadian law, it is a mistake to draw from that fact the conclusion that Canadian law has developed in lockstep with American legal development. It has not,³²⁰ to the credit of Canadian jurisprudence. Importantly, post-*Janzen* Canadian tribunals have been able to avoid what some post-*Vinson* American courts could not; that is, a preoccupation with the concepts of severity and pervasiveness, which led some American courts to concentrate erroneously upon the psychological well-being of the plaintiff and the degree by which that psychological well-being was adversely affected through the harassment.³²¹ It took another decision of the United States Supreme Court to finally put this inappropriate focus to rest.³²² The Canadian tribunals, instead, have demonstrated more sensitivity toward the general concept of workplace dignity. Canadian tribunals have tended to a greater extent to focus the review upon the question of whether the conduct in a case produces an unwarranted intrusion upon the employee's sexual dignity as a man or woman.³²³ This search for an unwarranted intrusion upon the employee's sexual dignity is appropriate, since, by focusing upon the question of workplace dignity, we develop a better perception of the role that the prohibition of sexual harassment plays in the workplace. As the Quebec *Commission des Droits de la Personne* wrote, the real aim of workplace sexual harassment law "is not to impose strict rules of proper conduct upon society, or to interfere in personal relations, but rather to recall that human beings are equal in worth and dignity, and therefore owe one another mutual respect."³²⁴

³²⁰ See *supra* the text accompanying note 97, for an example of the lack of lockstep development.

³²¹ See, e.g., the discussion concerning the *Scott* and *Rabidue* decisions, *supra* notes 181-208 and accompanying text.

³²² *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993).

³²³ See *supra* notes 276-79 and accompanying text.

³²⁴ COMMISSION DES DROITS DE LA PERSONNE DU QUEBEC, GUIDELINES OF THE COMMISSION DES DROITS DE LA PERSONNE DU QUEBEC IN MATTERS RESPECTING HARASSMENT IN THE WORKPLACE, Res. No. COM-297-5 (Oct. 9, 1987) (the English translation) (referring to the goal of the province of Quebec to reduce harassment in the workplace).