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Canada's Approach to Eradicating Workplace Sexual Harassment: The Canadian Supreme Court's *Janzen v. Platy Enterprises Ltd.* and Its Relationship to the United States Supreme Court's *Meritor Savings Bank v. Vinson*

JOSEPH M. PELLICCIOTTI*

[T]he aim . . . 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.¹

I. INTRODUCTION

This Article analyzes the general nature and scope of Canadian law prohibiting workplace sexual harassment. First, it reviews Canada's constitutional protection of equal rights in the Canadian Charter of Rights and Freedoms ("Charter").² The constitutional review focuses upon the rights enumerated in section 15 of the Charter and the Charter's general application to governmental and private entities.³ Next, this Article outlines Canada's federal, territorial, and pro-

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1. COMMISSION DES DROITS DE LA PERSONNE DU QUÉBEC, GUIDELINES OF THE COMMISSION DES DROITS DE LA PERSONNE DU QUÉBEC IN MATTERS RESPECTING HARASSMENT IN THE WORKPLACE, Res. No. COM-297-5 (Oct. 9, 1987) (translation from French) (referring to Québec's goal of reducing harassment in the workplace).

2. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) [hereinafter Charter].

3. This Article does not provide an exhaustive analysis of the Canadian Constitution.

vincial legislative prohibitions against workplace sex discrimination, particularly sexual harassment. It reviews the judiciary's findings that sexual harassment violates Canada's anti-sex discrimination laws. Additionally, it examines the development of United States case law on the issue of sexual harassment and highlights the general influence of United States law on Canadian sexual harassment legal developments. This Article focuses on the Canadian Supreme Court's 1989 landmark sexual harassment decision in *Janzen v. Platy Enterprises Ltd.*⁴ and its relationship to the United States Supreme Court's first sexual harassment decision in *Meritor Savings Bank v. Vinson*.⁵

II. CANADIAN CONSTITUTIONAL PROTECTION OF EQUAL RIGHTS

A. *The Canadian Charter of Rights and Freedoms' Guarantee of Equal Rights*

The Charter is Canada's contemporary legal statement of the principle of equal protection of the law. This relatively recent enactment⁶ revised the Canadian Constitution and guaranteed various enumerated rights.⁷ Section 15(1) of the Charter 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, colour, religion, sex, age, or mental or physical disability."⁸

Similar to the United States Constitution,⁹ the Canadian Constitution, including the Charter, preempts provisional law. It provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to

Rather, it notes the general reach of section 15 of the Charter and provides necessary background to the discussion of anti-sex discrimination legislation and relevant case decisions.

4. 59 D.L.R.4th 352 (1989) (Can.).

5. 477 U.S. 57 (1986), *aff'g* *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *rev'g* 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

6. The Charter went into effect in 1982. See Charter, *supra* note 2.

7. For an excellent analysis of Canadian constitutionalism and the Constitution Act, 1982, see Ronald I. Cheffins & Patricia A. Johnson, *The Nature of Constitutions and Constitutionalism*, in THE REVISED CANADIAN CONSTITUTION: POLITICS AS LAW (1986), reprinted in PAUL W. FOX & GRAHAM WHITE, POLITICS: CANADA 81 (6th ed. 1987).

8. Charter, *supra* note 2, § 15(1). Section 15(2) of the Charter protects affirmative action programs from attack by providing: "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." *Id.* § 15(2).

9. See U.S. CONST. art. VI.

the extent of the inconsistency, of no force or effect.”¹⁰

B. Application of the Charter

1. Application to All Canadian Governments

Section 32(1) of the Charter provides that the Charter shall apply:

- (a) to the Parliament and government of Canada in respect to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect to all matters within the authority of the legislature of each province.¹¹

The Charter encompasses the federal, provincial, and territorial legislatures, as well as the executive and administrative branches of these governments.¹²

2. No Application to Purely Private Conduct

The Canadian Supreme Court has consistently held that the Charter does not reach purely private action.¹³ In a recent discussion, the Court used the United States as an example in explaining the reasons for the government action limitation on the reach of the Charter:

The exclusion of private activity from the *Charter* was not a result

10. CAN. CONST. (Constitution Act, 1982) pt. VII, § 52(1). Unlike the United States Constitution, the Charter contains a “notwithstanding” provision that allows the federal or provincial legislatures to declare that a law “shall operate notwithstanding a provision included in section 2 [Fundamental Freedoms] or sections 7 through 15 [Legal Rights and Equality Rights]” of the Charter. Charter, *supra* note 2, § 33(1). Any such declarations of exception are limited to a five-year period. *Id.* § 33(3). A declaration may then be re-enacted for another five-year period. *Id.* § 33(4). Only Québec has taken advantage of this exception opportunity. See Charter of Human Rights and Freedoms, S.Q., ch. 21, § 1 (1982) (Que.) (*amending* R.S.Q., ch. C-12, § 118) (1977) (Que.). However, this exception is no longer part of Québec’s Charter.

11. Charter, *supra* note 2, § 32(1). Section 32(2) of the Charter provides an exception to the effective date of section 15: “Notwithstanding subsection (1) [of section 32], section 15 shall not have effect until three years after this section comes into force” (*i.e.*, three years after the Charter proclamation date of April 17, 1982). *Id.* § 32(2).

12. Retail, Wholesale and Dep’t Store Union, Local 580 v. Dolphin Delivery, [1986] 2 S.C.R. 573, 574 (Can.).

13. See *id.*; see also Tremblay v. Daigle, [1989] 2 S.C.R. 530 (Can.); Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441 (Can.); R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 (Can.); Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (Can.). The most recent major Canadian Supreme Court pronouncement on the subject is McKinney v. University of Guelph, 76 D.L.R.4th 545 (1990) (Can.). For a discussion of McKinney’s import, see *infra* notes 18-46 and accompanying text.

of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. 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 [is] require[d] 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.¹⁴

Therefore, the Charter does not reach any type of discrimination in the private sector. As a result, the usefulness of section 15 as an anti-sex discrimination law is limited to those situations where, using United States terminology, "state action" exists.

3. Defining the Reach of the Charter

Due to the Charter's relative infancy, Canadian courts are only beginning the difficult process of determining its reach in the "state action" context. For example, in *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery*,¹⁵ the Canadian Supreme Court stated, "It would also seem that the *Charter* would apply 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."¹⁶

The activities of persons appointed by the government to carry out statutory purposes are clearly within the Charter's ambit.¹⁷ Thus, the government cannot evade the Charter's reach by appointing others to perform governmental acts. However, Canada's search for a clear articulation of the Charter's reach remains incomplete.

14. *McKinney*, 76 D.L.R.4th at 634. Of course, the United States approach also precludes constitutional protections of purely private action through its "state action" requirement. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948).

15. [1986] 2 S.C.R. 573 (Can.).

16. *Id.* at 602.

17. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (Can.) (Charter applies to an order of an arbitrator appointed by the federal Minister of Labour, pursuant to the Labour Code, R.S.C., L-1 (1970)).

4. *McKinney v. University of Guelph*

The Canadian Supreme Court's decision in *McKinney v. University of Guelph*¹⁸ illustrates its struggle to develop a general articulation of the Charter's application. In *McKinney*, the Court considered whether the Charter applied to college and university activities.¹⁹ Specifically, the Court considered whether section 15 of the Charter prohibited mandatory retirement requirements set by the educational institutions.²⁰

The Court recognized that Canadian colleges and universities are creatures of statute that carry out important public service functions.²¹ Such institutions rely on and receive significant public funding.²² Moreover, statutes determine their basic powers and governing structures.²³ Despite these significant government controls, the Court found that the institutions were legally autonomous entities that enjoyed independence from government:

The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to in-

18. 76 D.L.R.4th 545 (1990) (Can.).

19. *Id.* at 555.

20. *Id.*

21. *Id.* at 641. The Court stated:

From the early days of this country, several of the provinces acted to establish provincial universities, one of which, of course, was the University of Toronto which was established by the Ontario legislature in 1859. Its governing statute is now the *University of Toronto Act, 1971*, S.O. 1971, c. 56. Other universities were created out of specialized educational bodies under the direct control of the province, such as the University of Guelph, which was created in its present form in 1964 by the *University of Guelph Act, 1964*, S.O. 1964, c. 120. Others were founded by private groups for religious and linguistic purposes such as Sacred Heart College in Sudbury, which became Laurentian University with the passage of the *Laurentian University of Sudbury Act, 1960*, S.O. 1960, c. 151, as amended by S.O. 1961-62, c. 154, ss. 1-7. Others, like York University, were originally affiliates of older universities but later became separate universities: *York University Act, 1965*, S.O. 1965, c. 143. These statutes set out the universities' powers, functions, privileges and governing structure. While these vary from university to university, they are in general much the same. As well, the *University Expropriation Powers Act*, R.S.O. 1980, c. 516, gives them expropriation powers, a matter not in issue here. The *Degree Granting Act, 1983*, S.O. 1983, c. 36, restricts the entities that can operate a university and grant university degrees.

Id.

22. Public funding of the Canadian educational institutions is significant: "The operating grants alone range, according to the evidence, between a low for York of 68.8 percent of its operating funds to a high for Guelph of 78.9 percent." *Id.* at 641. The Canadian legislature also provides funds for most capital expenditures and special funding "earmarked to meet specific policies," and "defines tuition fees within a formula that limits the universities' discretion within a narrow scope." *Id.*

23. Structural control is, in the main, achieved through the terms of the enabling acts. See *supra* note 21 for a listing of the acts.

fluence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom. In a word, these are not government decisions. Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment.²⁴

The Court noted that the United States, whose Bill of Rights is

24. *McKinney*, 76 D.L.R.4th at 641. In *Harrison v. University of British Columbia*, 77 D.L.R.4th 55 (1990) (Can.), the Canadian Supreme Court applied the *McKinney* rationale to similar facts. The University of British Columbia had established a mandatory retirement policy in 1939. The respondents, who retired from university employment at the age of 65 pursuant to the university's policy, challenged its validity, in part, under the Charter. The Court, applying the precedent established in *McKinney*, found the Charter inapplicable. The Court stated:

The relatively minor factual differences in the two cases do not affect the matter. The fact that in the present case the Lieutenant-Governor appoints a majority of the members of the university's board of governors or that the Minister of Education may require the university to submit reports or other forms of information does not lead to the conclusion that the impugned policies of mandatory retirement constitute government action. While I would acknowledge that these facts suggest a higher degree of governmental control than was present in *McKinney*, I do not think they suggest the quality of control that would justify the application of the Charter The respondents also sought to establish government control of the university by means of the *Financial Administration Act*, the *Auditor General Act*, and the *Compensation Stabilization Act*. These Acts, no doubt, apply to the university in that they monitor and regulate the expenditure of public funds it receives. However, I agree with the Court of Appeal, that "the fact that the university is fiscally accountable under these statutes does not establish government control or influence upon the core functions of the university and, in particular, upon the policy and contracts in issue in this case."

Harrison, 77 D.L.R.4th at 73 (citations omitted). However, governmental control over the decision-making of a college can rise to a level sufficient to invoke the application of the Charter. In *Douglas/Kwantlen Faculty Ass'n v. Douglas College*, 77 D.L.R.4th 94 (1990) (Can.), the Canadian Supreme Court considered the status of colleges created pursuant to the College and Institute Act, R.S.B.C., ch. 53 (1979). Referring to Douglas College, which was created under the College and Institute Act, the Court stated:

The affairs of the college are managed and directed by a board of seven members, all of whom are appointed by the Lieutenant Governor in Council at pleasure (s. 6). The Minister, however, exercises direct and substantial control over the college pursuant to ss. 2 and 3. Thus the Minister may establish policy or issue directives regarding post-secondary education and training, may provide services considered necessary, approves all by-laws of the Board and provides the necessary funding—in the 1985/86 calendar year, for example, 83% of its operating funds. The college submits an annual budget to the Minister. Briefly put, the college is simply a delegate through which the government operates a system of post-secondary education in the province, as its status as a Crown agency makes immediately evident. It is quite unlike universities like the University of British Columbia described in *Harrison v. University of British Columbia*, . . . which, though largely dependent on government funding, manages its own affairs.

Douglas/Kwantlen Faculty Ass'n, 77 D.L.R.4th at 106.

the "great constitutional exemplar,"²⁵ also refuses to find "state action" in similarly regulated entities that receive public funds and render public services.²⁶ The Court acknowledged the existence of United States cases holding that significant government funding constitutes state involvement that is sufficient to trigger constitutional guarantees, but distinguished such cases as being "largely confined to cases of racial discrimination which was the prime target of the 14th Amendment."²⁷ The Court stated that "these judicial intrusions, devised to meet a problem particular to the United States, should not be imported here."²⁸ Finally, the Court refused to consider United States cases holding that state universities are state actors,²⁹ on the ground that "Canadian universities . . . are private entities."³⁰

The *McKinney* majority opinion offers a narrow view of the Charter's reach. For the Charter to apply, entities other than the federal, provincial, and territorial legislatures, and the executive and administrative branches of these governments, must be organized or governed such that they are, in effect, part of "the government apparatus" or are "implementing governmental policy."³¹ While the existence of sufficient governmental action rests on the facts of each case, the Canadian Supreme Court apparently requires the facts to show a

25. See *supra* text accompanying note 14.

26. *McKinney*, 76 D.L.R.4th at 643 (citing *Greenya v. George Wash. Univ.*, 512 F.2d 556 (D.C. Cir. 1975); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Blum v. Yaretsky*, 457 U.S. 991 (1982)) (order of signals is as presented by the Canadian Supreme Court). For additional supporting authority, the Canadian Supreme Court could have cited *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school, whose income was derived primarily from public sources and which was regulated by public authorities, did not act under color of state law when it discharged employees).

27. *McKinney*, 76 D.L.R.4th at 643 (citing *Greenya*, 512 F.2d at 560). It is a general rule in the United States that public contributions of even great sums of money do not make the receiving entity a state actor. See *Blum*, 457 U.S. at 991; *Kohn*, 457 U.S. at 830.

28. *McKinney*, 76 D.L.R.4th at 643 (citing W.S. Tarnopolsky, *The Equality of Rights in the Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV. 242, 256 (1983)).

29. *E.g.*, *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) ("A state university without question is a state actor."). The decision of the Third Circuit Court of Appeals in *Krynicky v. University of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985), is also notable. In *Krynicky*, the court applied the "symbiotic relationship test" to find the University of Pittsburgh and Temple University state actors. See *Krynicky*, 742 F.2d at 98. The court found that the state has "so far insinuated itself into a position of interdependence with . . . [the acting party] that it must be recognized as a joint participant in the challenged activity." *Id.* (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

30. *McKinney*, 76 D.L.R.4th at 643. *But see Douglas/Kwantlen Faculty Ass'n*, 77 D.L.R.4th at 94.

31. *McKinney*, 76 D.L.R.4th at 643.

direct and a clearly definable connection between the government and the entity's action:

There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision to make it an act of the government, but there is nothing here to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities.³²

The Canadian approach clearly incorporates the United States Supreme Court's "nexus" approach: "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself."³³ Additionally, the Canadian Supreme Court follows the United States in recognizing that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."³⁴

5. Justice Wilson's Dissent in *McKinney v. University of Guelph* and the Influence of United States Law

Justice Wilson's dissent in *McKinney* attacked the majority's "very narrow test of government action" in which "only those entities which actually are 'government' will fall within the ambit of the *Charter*."³⁵ Justice Wilson argued that the majority overly relied on United States tradition, which holds government action suspect and continually seeks to limit government's reach:

Unhappy with the injustices the Americans perceived were perpetrated against them by the British, the American people were left with a deep distrust of powerful states. The United States Constitution enshrines the belief of the American people that unless the state is strictly controlled it poses a great danger to individual liberty. Its primary focus, articulated in the bulk of its provisions, is against "state action." Canada does not share this history.³⁶

32. *Id.* For a case in which the Canadian Supreme Court found sufficient governmental participation in its mandatory retirement decision, see *Douglas/Kwantlen Faculty Ass'n*, 77 D.L.R.4th at 94.

33. *Jackson*, 419 U.S. at 351.

34. *Burton*, 365 U.S. at 722; see also *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967).

35. *McKinney*, 76 D.L.R.4th at 572 (Wilson, J., dissenting).

36. *Id.* at 573 (Wilson, J., dissenting).

Justice Wilson acknowledged that it was natural in the early stage of Charter jurisprudence to look to United States constitutional tradition.³⁷ Yet, she posited that Canada needed independence from United States influence, and that it needed to develop a distinct legal perception of its government's proper role.³⁸ In discussing the historical development of the Canadian state,³⁹ Justice Wilson noted that, unlike citizens of the United States, "Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of a just Canadian state."⁴⁰

Contending that the majority's approach prevented the government from protecting against unjust private action, Justice Wilson offered a more flexible approach to defining the Charter's reach.⁴¹ She proposed the consideration of three questions in instances in which an entity is not "self-evidently" part of government.⁴² Her approach incorporated three tests for considering the existence of governmental action: the "control test," the "government function test," and the "statutory authority and the public interest test":

1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?
2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?
3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?⁴³

37. "Naturally, at that early stage of Canadian *Charter* jurisprudence, the American constitutional tradition was heavily relied upon." *Id.* (Wilson, J., dissenting).

38. *Id.* (Wilson, J., dissenting).

39. *See id.* at 574-79 (Wilson, J., dissenting).

40. *McKinney*, 76 D.L.R.4th at 582 (Wilson, J., dissenting).

41. *Id.* at 592 (Wilson, J., dissenting).

42. *Id.* (Wilson, J., dissenting).

43. *Id.* (Wilson, J., dissenting). These questions raise issues familiar to United States jurisprudence. The United States Supreme Court has employed various approaches in determining whether state action exists. One such approach is the "nexus" approach. *See supra* note 33 and accompanying text. The Court has also employed the "symbiotic relationship" approach. *See supra* note 29. Another approach, the "governmental compulsion" test, determines whether the public entity compelled an act. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970). Finally, under the restrictive "public function" test, the Court considers whether the function is traditionally performed by the government and exclusively reserved to government. *See Jackson*, 419 U.S. at 345. Justice Wilson's call in *McKinney* for independence from the United States constitutional tradition makes her unable to rely on United

Justice Wilson asserted that these questions would constitute mere "guidelines"⁴⁴ for a reviewing court. Nevertheless, she indicated that an affirmative answer to any one of the questions would be a "strong indicator" that the entity is part of government and is therefore within the Charter's reach.⁴⁵

Justice Wilson, concerned that a restrictive approach would disable the government from protecting its citizens against unjust private action, argued for a flexible approach to finding governmental action. Government regulation by statute, however, can prohibit workplace discrimination in those instances where the Charter does not apply.⁴⁶

III. CANADIAN STATUTES

A. Anti-Discrimination Legislation

The Canadian Human Rights Act ("Act") established federal anti-workplace discrimination law.⁴⁷ The Act extends to all matters "within the legislative authority of Parliament."⁴⁸ Federal authority reaches not only federal government entities, but also private, inter-provincial operations in the areas of communications and transportation.⁴⁹ The Act also governs federally-chartered Canadian banks and

States case law to support her broader approach for determining the reach of the Charter. For example, *Krynicky* would assist Justice Wilson's position. See *supra* note 29.

44. *McKinney*, 76 D.L.R.4th at 593 (Wilson, J., dissenting).

45. *Id.* (Wilson, J., dissenting).

46. Relevant Ontario legislation only prohibited age discrimination against persons between the ages of 18 and 65. Human Rights Code, S.O., ch. 53, § 9(a). The *McKinney* appellants were not within the protected class. There was no statute to protect the appellant employees.

47. R.S.C., ch. H-6 (1985) (Can.).

48. *Id.* § 2.

49. Interviews with Stewart Beaty, Director of Policy & Communications; Joselyn Bisette-Aubry, General Counsel; and Glenys Parry, Director of Complaints & Procedures, Canadian Human Rights Commission, in Ottawa, Canada (Aug. 14, 1990) [hereinafter Canadian Human Rights Commission Interviews].

An analysis of the constitutional distribution of legislative authority between the federal government and the provinces is beyond the scope of this Article. For a detailed discussion of the distribution of such authority in the labor regulation context, see *Bell Canada v. Québec* (Commission de la santé et de la sécurité du travail), 51 D.L.R.4th 161 (1988) (Can.); *Canadian Nat'l Ry. v. Courtois*, 51 D.L.R.4th 271 (1988) (Can.). Both cases involved attempts by provinces to regulate the working conditions, labor relations, and management of "federal undertakings." The Canadian Supreme Court recently considered whether the federal government has authority to regulate. See *Regina v. Crown Zellerbach Canada Ltd.*, 49 D.L.R.4th 161, 188 (1988) (Can.) (holding that the federal government has authority to regulate the dumping of waste in provincial waters under "the natural concern doctrine of the peace, order and good government power of the Parliament of Canada").

some mining operations.⁵⁰ Federal law protects approximately one million Canadian workers, or approximately ten percent of the Canadian workforce.⁵¹ The various territorial and provincial anti-workplace discrimination laws protect the remainder of the workforce.⁵²

Canadian human rights statutes are "of a special nature, not quite constitutional but certainly more than ordinary."⁵³ Each case involving these statutes requires a "fair, liberal interpretation to advance the objects of the legislation."⁵⁴ As with United States civil rights law,⁵⁵ the purpose of Canadian human rights law is to eradicate discrimination.⁵⁶

B. Anti-Sexual Harassment Legislation

Every Canadian jurisdiction prohibits sex discrimination in employment.⁵⁷ Six jurisdictions also specifically prohibit harassment in the workplace.⁵⁸ Additionally, the need for special legislation dealing with sexual harassment has lessened due to the Canadian Supreme Court's *Janzen v. Platy Enterprises Ltd.* decision, which defined sex discrimination to include sexual harassment.⁵⁹ The *Janzen* decision

50. Canadian Human Rights Commission Interviews, *supra* note 49.

51. *Id.*

52. Canada's 13 basic political jurisdictions can be divided into the following three categories: (1) the federal government; (2) the territories, specifically the Northwest Territories and Yukon; and (3) the 10 Canadian provinces, specifically the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Québec, and Saskatchewan. This Article's Appendix provides a citation to each jurisdiction's human rights law, with a particular citation to and description of the key anti-workplace sex discrimination provisions.

53. *Re Ontario Human Rights Comm'n and Simpsons-Sears Ltd.*, 23 D.L.R.4th 321, 329 (1985) (Can.); *see also* *Action Travail des Femmes v. Canadian Nat'l Ry.*, 40 D.L.R.4th 193, 207-09 (1988) (Can.).

54. *Robichaud v. The Queen*, 40 D.L.R.4th 577, 580 (1987) (Can.).

55. *See, e.g., Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), *rev'g* *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974). In *Barnes*, the court stated, "[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.'" *Id.* at 994 (footnote omitted) (quoting *Coles v. Penny*, 531 F.2d 609, 616 (D.C. Cir. 1976)).

56. *See Robichaud*, 40 D.L.R.4th at 582.

57. *See infra* Appendix.

58. *See* Canadian Human Rights Act, R.S.C., ch. H-6, §§ 14.1-2 (1985); Newfoundland Human Rights Code, S. Nfld., ch. 62, §§ 14(1)-(2) (1988); Manitoba Human Rights Code, C.C.S.M., ch. H-175, §§ 19(1)-(2) (1987); Ontario Human Rights Code, S.O., ch. 53, §§ 6(2)-(3) (1981); Québec Charter of Human Rights and Freedoms, R.S.Q., ch. C-12, § 10(1) (1977); Yukon Human Rights Act, S.Y.T., ch. 3, §§ 13(1)-(2) (1987).

59. *Janzen v. Platy Enters. Ltd.*, 59 D.L.R.4th 352 (1989) (Can.).

plays a role in defining Canadian sexual harassment law that is similar to the role played by the United States Supreme Court's decision in *Meritor Savings Bank v. Vinson*⁶⁰ in defining United States law.

IV. PRE-*JANZEN V. PLATY ENTERPRISES LTD.* CANADIAN JUDICIAL INTERPRETATION

The first Canadian case to equate sexual harassment with prohibited sex discrimination was *Bell v. Ladas*.⁶¹ In *Bell*, the Adjudicator, Owen B. Shime, considered the scope of sex discrimination under Ontario's Human Rights Code. In doing so, he wrote the following:

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 utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work place, 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.⁶²

Bell involved two women employees, Cherie Bell and Anna Korczak, who alleged acts of sexual harassment against Ernest Ladas, the officer and owner of their corporate employer.⁶³ The women complained that Ladas propositioned them and made sexually-oriented insults.⁶⁴ Adjudicator Shime dismissed both complaints, finding that Bell's testimony was unreliable and that Korczak simply failed to carry her burden of proof.⁶⁵ Although *Bell* is significant for Adjudicator Shime's dicta, his proposition was not forcefully applied until

60. 477 U.S. 57 (1986), *aff'g* *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *rev'g* 23 Fair Empl. Prac. Cas. (BNA) (D.D.C. 1980).

61. 1 C.H.R.R. D/155 (Ont. Bd. Inq. 1980).

62. *Id.* at D/156.

63. *Id.*

64. *Id.*

65. *Id.*

one year later in *Coutroubis v. Sklavos Printing*.⁶⁶

The view first espoused in *Bell* and given force in *Coutroubis* is that sexual harassment constitutes prohibited sex discrimination.⁶⁷ Other Canadian tribunals soon accepted that view.⁶⁸ In early Canadian cases, the various administrative tribunals and courts recognized that the Canadian legal theory of sexual harassment owed its first clear articulation to United States case development.⁶⁹ Canadian triers of fact considered United States cases and often adopted them as authority for similar holdings.⁷⁰ Although at least one early decision expressed some concern about relying on United States authority,⁷¹ Canadian courts nevertheless used such authority, particularly decisions based on United States statutory law, rather than the United States Constitution.⁷²

V. THE UNITED STATES APPROACH TO DEFINING SEXUAL HARASSMENT

A. Early United States Case Development of Sexual Harassment Theories

The United States lower courts began to define the scope of illegal sexual harassment in the mid-1970s. The early cases primarily involved an employer's retaliatory actions against an employee be-

66. 2 C.H.R.R. D/457 (Ont. Bd. Inq. 1981).

67. See *Bell*, 1 C.H.R.R. at D/155; *Coutroubis*, 2 C.H.R.R. at D/457.

68. See, e.g., *Kotyk v. Canadian Employment & Immigration Comm'n*, 4 C.H.R.R. D/1416 (Can. H.R. Comm'n 1983); *Deisting v. Dollar Pizza Ltd.*, 3 C.H.R.R. D/898 (Alta. H.R. Comm'n 1982); *Doherty v. Lodger's Int'l Ltd.*, 38 N.B.R.2d 217 (N.B. Bd. Inq. 1981); *Torres v. Royalty Kitchenware Ltd.*, 3 C.H.R.R. D/858 (Ont. Bd. Inq. 1982); *Mitchell v. Traveller Inn Ltd.*, 2 C.H.R.R. D/590 (Ont. Bd. Inq. 1981); *Cox v. Jagbritte Inc.*, 3 C.H.R.R. D/609 (Ont. Bd. Inq. 1981); *Hughes v. Dollar Snack Bar*, 3 C.H.R.R. D/1014 (Ont. Bd. Inq. 1981); *Phillips v. Hermiz*, 5 C.H.R.R. D/2450 (Sask. H.R. Comm'n 1984). For appellate court authority equating sexual harassment with illegal sex discrimination, see *Re Mehta and MacKinnon*, 19 D.L.R.4th 148 (1985) (N.S.); *Foisy v. Bell Canada*, 18 D.L.R.4th 222 (1984) (Que.).

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

70. See generally ARJUN P. AGGARIVAL, *SEXUAL HARASSMENT IN THE WORKPLACE* 12 (1987).

71. See *Doherty*, 38 N.B.R.2d at 235. The court feared that decisions using United States authority would be based on the United States Constitution, rather than on the Charter. See *id.*

72. See, e.g., *id.* The courts generally relied on title VII of the Civil Rights Act of 1964, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e-(17) (1988)). See, e.g., *id. Re Mehta and MacKinnon* exemplifies the typical decisional approach: "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." *Re Mehta and MacKinnon*, 19 D.L.R.4th at 158.

cause of the employee's refusal to respond to sexual demands. Such retaliation is quid pro quo sexual harassment.

The plaintiff employees were initially unsuccessful in equating acts of sexual harassment with sex discrimination under title VII of the Civil Rights Act of 1964 ("Title VII").⁷³ In the first reported case of sexual harassment, *Corne v. Bausch & Lomb*,⁷⁴ an Arizona district court found that the conduct at issue was simply a matter of the "personal proclivity, peculiarity or mannerism" of the supervisor.⁷⁵ According to the court, Title VII did not make sexually-oriented conduct illegal when it had "no relationship to the nature of the employment."⁷⁶ In other early cases, courts agreed that Title VII did not apply, viewing the conduct not as discrimination based on sex, but as discrimination based on an individual characteristic of sexual attractiveness or on a refusal to engage in sexual conduct.⁷⁷

1. Quid Pro Quo Theory

The quid pro quo theory was first recognized as a viable Title VII theory of recovery in *Williams v. Saxbe*.⁷⁸ In *Williams*, a federal government worker alleged that she had a good working relationship with her supervisor until she refused his sexual advances.⁷⁹ Thereafter, the employee faced a pattern of retaliatory action.⁸⁰ The district court held that the supervisor's retaliatory actions amounted to illegal sex discrimination under Title VII.⁸¹ After *Williams*, several appellate courts reversed decisions unsympathetic to the quid pro quo the-

73. Title VII forbids workplace 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 individual with respect to the terms, conditions, or privileges of employment because of race, color, religion, sex, or national origin).

74. 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977). Although reported after *Corne*, the first federal district court sexual harassment case was *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974), *rev'd sub nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

75. *Corne*, 390 F. Supp. at 163.

76. *Id.*

77. See *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of Amer.*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Barnes*, 13 Fair Empl. Prac. Cas. (BNA) at 123.

78. 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

79. *Id.* at 655.

80. *Id.*

81. *Id.* at 661.

ory.⁸² By the end of the decade, the quid pro quo theory was firmly established within the lower courts and incorporated into Equal Employment Opportunity Commission ("EEOC") guidelines.⁸³

2. Hostile Environment Sexual Harassment

In addition to quid pro quo sexual harassment, United States courts recognize hostile environment sexual harassment. Unlike the quid pro quo theory, the hostile environment theory does not focus on the effect of sexual harassment on job benefits. Instead, it focuses on the working conditions that an employee is forced to endure. Hostile environment sexual harassment exists when conduct of a sexual nature, unwelcome to an employee, is sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."⁸⁴

The Court of Appeals for the District of Columbia, in *Bundy v. Jackson*,⁸⁵ was the first circuit to recognize the hostile environment theory. In *Bundy*, an employee alleged that her supervisors forced her to endure a pattern of harassment, including repeated requests for sex and listening to details regarding the employee's sexual proclivities.⁸⁶ While the employee experienced no loss of job benefits, the supervisor's conduct was "standard operating procedure" in the plaintiff's workplace.⁸⁷ Overturning the district court's denial of relief, the appellate court found that Title VII sex discrimination could exist "where an employer created or condoned a substantially discriminatory work environment regardless of whether the complaining

82. See, e.g., *Miller v. Bank of Amer.*, 600 F.2d 211 (9th Cir. 1979), *rev'g* 418 F. Supp. 233 (N.D. Cal. 1976); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977), *rev'g* 422 F. Supp. 553 (D.N.J. 1976); *Corne v. Bausch & Lomb*, 562 F.2d 55 (9th Cir. 1977), *vacating* 390 F. Supp. 161 (D. Ariz. 1985); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), *rev'g* *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974).

83. On November 10, 1980, the EEOC issued Final Guidelines on Sexual Harassment in the Workplace ("Guidelines"), identifying sexual harassment as a form of illegal sex discrimination under Title VII. See 45 Fed. Reg. 74676-7 (1980) (codified at 29 C.F.R. § 1604.11 (a)-(f) (1990)). The EEOC Guidelines adopt both the quid pro quo and hostile environment theories of recovery for sexual harassment. See *id.* The Canadian courts have quoted the EEOC Guidelines with approval. See, e.g., *Janzen v. Platy Enters. Ltd.*, 59 D.L.R.4th 352 (1989) (Can.). For a discussion of hostile environment sexual harassment, see *infra* notes 84-90 and accompanying text.

84. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)), *aff'g* *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *rev'g* 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

85. 641 F.2d 934 (D.C. Cir. 1981).

86. *Id.* at 940.

87. *Id.*

employees lost any tangible job benefits as a result of the discrimination."⁸⁸ The court stated that liability was necessary; otherwise, an employer could harass a worker "with impunity by carefully stopping short of firing the employee or taking any other tangible action against her in response to the resistance, thereby creating the impression . . . that the employer did not take the ritual of harassment and resistance 'seriously.'"⁸⁹ Other courts soon accepted the *Bundy* reasoning.⁹⁰

B. *The United States Supreme Court's Decision in Meritor Savings Bank v. Vinson*

A decade of developing workplace sexual harassment theories of recovery under Title VII culminated in the United States Supreme Court's decision in *Meritor Savings Bank v. Vinson*.⁹¹

1. Factual Background

In 1974, plaintiff Mechelle Vinson began working for Meritor Savings Bank.⁹² She started as a teller-trainee and was eventually promoted to assistant bank manager.⁹³ At trial, it was undisputed that plaintiff's employer based her promotions solely on merit.⁹⁴ After Meritor Savings Bank terminated plaintiff in 1978 for excessive use of sick leave, she sued both the bank and her supervisor, Sidney Taylor, for illegal sex discrimination under Title VII.⁹⁵

Plaintiff testified that her supervisor made repeated sexual demands of her in the workplace.⁹⁶ His sexual contact with plaintiff included frequent acts of sexual intercourse, public fondling, and, on several occasions, rape.⁹⁷ Plaintiff's employer and supervisor denied the allegations.⁹⁸ Her employer further argued that, if any sexual harassment occurred, the bank was unaware of it and did not approve

88. *Id.* at 943-44.

89. *Id.* at 945.

90. *See, e.g.,* *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

91. 477 U.S. 57 (1986), *aff'g* *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *rev'g* 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980).

92. *Id.* at 59.

93. *Id.* at 59-60.

94. *Id.* at 60.

95. *Id.*

96. *Vinson*, 477 U.S. at 60.

97. *Id.*

98. *Id.* at 61.

it.⁹⁹

The district court denied plaintiff relief without resolving conflicting testimony between plaintiff and her employer.¹⁰⁰ The court stated that, even if plaintiff and her supervisor had engaged in sexual relations, "that relationship was a voluntary one having nothing to do with her continued employment . . . or her advancement or promotions" ¹⁰¹ The court concluded that, absent sexual harassment affecting economic benefits, plaintiff was not a victim of Title VII sex discrimination.¹⁰² The court noted both the employer's policy against employment discrimination and the fact that plaintiff had not filed a complaint against her supervisor.¹⁰³ Under those circumstances, the court held that plaintiff's employer, absent notice, was not liable for her supervisor's alleged actions.¹⁰⁴

2. The Court of Appeals Decision

The court of appeals reversed the district court's decision, indicating that a claim under Title VII for sexual harassment could be based on either a quid pro quo or hostile environment theory of recovery.¹⁰⁵ It found that plaintiff's allegations met the definition of illegal hostile environment sexual harassment.¹⁰⁶

The court held that any voluntariness in the alleged sexual relationship between plaintiff and her supervisor was immaterial because the facts indicated that the supervisor's actions made plaintiff's toleration of harassment "a condition of her employment."¹⁰⁷ The court concluded that any evidence concerning plaintiff's personal fantasies and mode of dress that might have contributed to the trial court's finding of voluntariness was immaterial.¹⁰⁸

The court also determined that employers should be held to a strict liability standard for sexual harassment by a supervisor.¹⁰⁹ It

99. *Id.*

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

101. *Id.* at 42.

102. *See id.* at 43.

103. *Id.* at 41-42.

104. *Id.* at 42.

105. *See* Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1981), *aff'd sub nom.* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

106. *Id.* at 145.

107. *Id.* at 146.

108. *Id.* at 146 n.36.

109. *Id.* at 47.

broadly defined the concept of supervisor to include an individual having "the mere existence—or even the appearance of—a significant degree of influence in vital job decisions."¹¹⁰

3. The United States Supreme Court Decision

The United States Supreme Court confirmed in *Vinson* that Title VII liability attached to instances of sexual harassment. It stated that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex" under Title VII.¹¹¹ The Court expressly found that both hostile environment sexual harassment and quid pro quo sexual harassment were actionable under Title VII, stating that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."¹¹²

As to the scope of actionable hostile environment sexual harassment, the Court stated that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII."¹¹³ Actionable conduct "must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."¹¹⁴ In *Vinson*, the plaintiff's allegations were "not only pervasive harassment but also criminal conduct of the most serious nature."¹¹⁵ Therefore, since the alleged conduct in *Vinson* was "plainly sufficient to state a claim of 'hostile environment' sexual harassment,"¹¹⁶ the Court did not provide a detailed analysis of its approach for determining sufficiently severe or pervasive conduct.

The Court found that voluntariness was not a Title VII defense, and that the district court erred in focusing on plaintiff's alleged voluntary participation in sexual activities with her supervisor.¹¹⁷ The Court explained that the "correct inquiry" was whether plaintiff "by

110. *Vinson*, 753 F.2d at 150. The Seventh Circuit Court of Appeals has defined a supervisor as one who has been "delegated the power to make employment decisions." *Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985).

111. *Vinson*, 477 U.S. at 64.

112. *Id.* at 66.

113. *Id.* at 67 (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Henson*, 682 F.2d at 904).

114. *Id.* (quoting *Henson*, 682 F.2d at 904).

115. *Id.*

116. *Vinson*, 477 U.S. at 67.

117. *Id.* at 68.

her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."¹¹⁸

The Court also disagreed with the appellate court's exclusion of evidence regarding plaintiff's mode of dress and personal fantasies. The Court stated that, "[w]hile '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."¹¹⁹ However, the Court further stated that trial judges should consider the potential for unfair prejudice to plaintiffs in admitting such evidence.¹²⁰

As to the critical issue of the standard of employer liability for sexual harassment, the Court considered three possibilities. The first, argued by plaintiff, was the strict liability standard advanced by the District of Columbia Circuit Court of Appeals.¹²¹ The second, urged by her employer, was that an employee's failure to provide an employer with notice, through the employee's failure to use the employer's grievance procedure, constituted an absolute defense to any employer liability.¹²² The third, posited by the EEOC as amicus curiae, was a two-level standard of employer liability. The EEOC asserted that strict liability should apply to the employer in a quid pro quo case. It urged the following standard in a hostile environment case:

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 liabil-

118. *Id.* As the harasser's conduct must be unwelcome, evidence of the plaintiff's disapproval of the conduct is relevant. The plaintiff's express disapproval of the conduct is particularly important from an evidentiary perspective in cases where the plaintiff may have initially condoned sexually-oriented conduct, but later found the continued conduct offensive and unwelcome. See EEOC Decision 84-1, 33 Fair Empl. Prac. Cas. (BNA) 1887, 1890 (1983). Initially condoning the conduct does not result in a waiver of legal protections. See *Swentik v. USAIR, Inc.*, 830 F.2d 552 (4th Cir. 1987). The *Swentik* court found that "plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.'" *Id.* at 557 (citing *Katz*, 709 F.2d at 254). The *Swentik* court also stated that "[t]he trial judge must determine whether plaintiff welcomed the particular conduct in question from the alleged harasser." *Id.*

119. *Vinson*, 477 U.S. at 69.

120. *Id.* at 70.

121. *Id.*

122. *Id.*

ity absent actual knowledge of the sexually hostile environment (obtained, *e.g.*, by the filing of a charge with the EEOC 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 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.¹²³

The Court noted that the issue of liability had "a rather abstract quality about it given the state of the record" in this case.¹²⁴ As noted, the trial court had not resolved the conflicting testimony between plaintiff and her supervisor.¹²⁵ The Court reminded the parties:

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]."¹²⁶

The Court, therefore, declined "the parties' invitation to issue a definitive rule on employer liability."¹²⁷ However, the Court provided some limited guidance on the subject by refusing to accept the appellate court's notion that employers are "always automatically liable for sexual harassment by their supervisors."¹²⁸ The Court indicated that Congress intended to place limits on an employer's liability under Title VII, and that it directed the lower courts to "look to agency principles" for guidance.¹²⁹ However, the Court also found that an employer's lack of notice "does not necessarily insulate that employer

123. *Id.* at 71. The EEOC departed from its Guidelines in its argument to the Supreme Court. Under the EEOC Guidelines, employers are strictly liable for the acts of agents and 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." 29 C.F.R. § 1604.11(c) (1990). The EEOC Guidelines do not distinguish between quid pro quo and hostile environment sexual harassment with regard to employer liability for supervisory acts.

124. *Vinson*, 477 U.S. at 72.

125. *Id.* at 61.

126. *Id.* (quoting *Taylor v. Jones*, 653 F.2d 1183, 1197-99 (8th Cir. 1981)) (alteration in original).

127. *Id.*

128. *Id.* The majority opinion subscribed to this position. Justice Marshall, in a concurring opinion, accepted a strict liability standard for supervisory misdeeds in both the quid pro quo and hostile environment cases. *Id.* at 78 (Marshall, J., concurring). See *infra* note 191 and accompanying text for a discussion of the Canadian Supreme Court's approval of Justice Marshall's approach.

129. *Vinson*, 477 U.S. at 72.

from liability."¹³⁰ The Court rejected the employer's argument that it was insulated from liability because of its grievance procedure and anti-discrimination policy.¹³¹ Although plaintiff's failure to use the employer's grievance procedure was relevant, it was not "necessarily dispositive."¹³²

The Court criticized the employer's anti-discrimination policy for failing to expressly address the sexual harassment concept in that it "did not alert employees to their employer's interest in correcting that form of discrimination."¹³³ The Court also criticized the employer's procedure for filing and processing grievances.¹³⁴ The procedure required the employee to initially file the grievance with the employee's supervisor.¹³⁵ Because, in *Vinson*, the supervisor was the alleged harasser, the Court stated that "it is not altogether surprising" that the plaintiff failed to follow the procedure.¹³⁶

VI. THE CANADIAN SUPREME COURT'S DECISION IN *JANZEN V. PLATY ENTERPRISES LTD.*

The line of Canadian cases accepting the United States-influenced *Bell v. Ladas*¹³⁷ approach to defining sexual harassment as sex discrimination continued unbroken until the Manitoba Court of Appeal's decision in *Re Janzen and Platy Enterprises Ltd.*¹³⁸ This initial departure led to the Canadian Supreme Court's landmark *Janzen* decision, which has been central to the development of Canadian law.

A. *Factual Background*

Dianna Janzen and Tracy Govereau worked as waitresses at the Pharos Restaurant in Winnipeg, Manitoba.¹³⁹ They alleged a series of acts of sexual harassment, including overt sexual advances and touching, by the restaurant cook, Tommy Grammas.¹⁴⁰ Platy Enterprises Ltd. was the owner and employer-corporation of the restaurant.¹⁴¹

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 72-73.

134. *Vinson*, 477 U.S. at 73.

135. *Id.*

136. *Id.*

137. 1 C.H.R.R. D/155 (Ont. Bd. Inq. 1980).

138. 33 D.L.R.4th 32 (Man. Ct. App. 1987).

139. *Janzen v. Platy Enters. Ltd.*, 59 D.L.R.4th 352, 355 (1989) (Can.).

140. *Id.*

141. *Id.*

The president and manager of the employer-corporation was Eleftheros Anastasiadis.¹⁴² The cook did not hold an ownership interest in the restaurant, nor did he serve as an officer of the employer-corporation.¹⁴³ Although he did not possess any actual disciplinary authority over plaintiffs, the cook held himself out as having authority over their continued employment, and the manager supported his position.¹⁴⁴

Plaintiffs reported the cook's conduct to the manager, who was, at best, unsympathetic.¹⁴⁵ He treated the matter lightly and insinuated that Janzen had provoked the cook's conduct toward her.¹⁴⁶ The manager did nothing to stop it, and Janzen thereafter quit.¹⁴⁷ As to Govereau, the manager asked her why she allowed the cook to treat her in the manner that he did.¹⁴⁸ After a meeting between Govereau and the manager, the cook's sexually-oriented conduct stopped, but was replaced with open hostility and criticism by both the cook and the manager.¹⁴⁹ Eventually, the manager terminated Govereau, ostensibly because of a customer's complaint.¹⁵⁰

Plaintiffs filed their complaints with the Manitoba Human Rights Commission, alleging sex discrimination in violation of section 6 of the Manitoba Human Rights Act.¹⁵¹ Adjudicator Henteleff heard their complaints jointly.¹⁵² He found that both individuals were the victims of sexual harassment and that such harassment amounted to illegal sex discrimination.¹⁵³ He concluded that both the employer-corporation and the cook were liable:

The clear intent of Sec. 6(1) [of the Manitoba Human Rights Act], in respect of areas of discrimination arising therefrom, is not only

142. *Id.*

143. *Id.*

144. *Janzen*, 59 D.L.R.4th at 355.

145. *Id.* at 355-56.

146. *Id.* at 356.

147. *Id.*

148. *Id.*

149. *Janzen*, 59 D.L.R.4th at 356.

150. *Id.*

151. S.M., ch. 65, § 6(1) (1974). In 1987, after the plaintiffs in *Janzen* filed their complaints, the Manitoba Legislature repealed the Human Rights Act and replaced it with the Human Rights Code, R.S.M., ch. 45 (1987) (codified at C.C.S.M., ch. H-175 (1987)). Section 19 of the new Human Rights Code expressly prohibits sexual harassment. See C.C.S.M., ch. H-175, § 19 (1987).

152. The decision of Adjudicator Henteleff is reported at 6 C.H.R.R. D/2735 (Man. Bd. Adjud. 1985).

153. 6 C.H.R.R. D/2735 (Man. Bd. Adjud. 1985).

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.¹⁵⁴

Adjudicator Henteleff also stated:

After consideration of all of the evidence, it is my conclusion that [the cook] was a person in such authority that his acts became those of the employer, Platy. The complainant Janzen was made aware of this to the extent that [the cook] 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 [the manager] either couldn't or wouldn't do anything about it.¹⁵⁵

The employer-corporation appealed to the Manitoba Court of Queen's Bench, which in all major respects upheld the decision of Adjudicator Henteleff.¹⁵⁶ Thereafter, the Manitoba Court of Appeal broke the line of Canadian authority equating sexual harassment with sex discrimination.¹⁵⁷

B. The Manitoba Court of Appeal Decision

Justices Huband and Twaddle rendered comprehensive separate opinions in the appellate court decision. Justice Huband expressed his utter amazement at the development of the law, which equated sexual harassment with sex discrimination.¹⁵⁸ He considered the two as separate concepts and used the following example in his argument: "When 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."¹⁵⁹ Considering section 6(1) of the Manitoba Human Rights Act, he concluded that the section was aimed at discrimination in a generic sense.¹⁶⁰ He argued that sex discrimination required the discrimination to be against women as a group.¹⁶¹ Therefore, sexual harassment could not be sex discrimina-

154. *Id.* at D/2753.

155. *Id.* at D/2768.

156. *See Re Janzen and Platy Enters. Ltd.*, 24 D.L.R.4th 31 (Man. Ct. Q.B. 1986).

157. *See Re Janzen and Platy Enters. Ltd.*, 33 D.L.R.4th at 32.

158. "I am amazed to think that sexual harassment has been equated with discrimination on the basis of sex." *Id.* at 35-36.

159. *Id.* at 41.

160. *Id.* at 45.

161. *See id.* at 43.

tion, as all women are not the victims of sexual harassment.¹⁶² In developing this rationale, he adopted the position originally taken by the early United States sexual harassment cases.¹⁶³

Justice Twaddle also asserted that sexual harassment was not illegal sex discrimination.¹⁶⁴ He argued that the Manitoba Legislature intended, through its anti-workplace discrimination legislation, to prohibit differentiation based on categorical groupings such as sex, not to prevent differentiation on the basis of individual characteristics or qualifications.¹⁶⁵ He explained:

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.¹⁶⁶

Justice Twaddle further determined that sexual harassment based upon the particular sexual appeal of a woman could not constitute illegal sex discrimination: "Where 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."¹⁶⁷

The Manitoba Court of Appeal's decision in *Re Janzen and Platy Enterprises Ltd.* generated unfavorable scholarly comment.¹⁶⁸ The

162. *Re Janzen and Platy Enters. Ltd.*, 33 D.L.R.4th at 43.

163. *See supra* notes 73-77 and accompanying text.

164. *Re Janzen and Platy Enters. Ltd.*, 33 D.L.R.4th at 66.

165. *Id.* at 63-64.

166. *Id.* at 66.

167. *Id.* at 67.

168. *See, e.g.*, Ivan F. Ivankovich, *Sexual Harassment in the Workplace—Two Steps Backward: Janzen & Govereau v. Platy Enterprises Ltd.*, 26 ALTA. L. REV. 359 (1988); Mariann Burka, *Sexual Harassment: Manitoba's Step Backward, A Case Comment on Govereau and Janzen v. Platy Enterprises Ltd.*, 16 MAN. L.J. 245 (1987). Other jurisdictions subsequently failed to accept the Manitoba rationale. *See, e.g.*, Herman v. Rodin, 56 D.L.R.4th 180 (Sask. Ct. Q.B. 1989). Additionally, the Manitoba Legislature repealed the Human Rights Act and

Canadian Supreme Court reviewed the case and corrected the Manitoba Court of Appeal's deviation from the course taken by other Canadian courts.

C. *The Canadian Supreme Court Decision*

On May 4, 1989, the Canadian Supreme Court rendered its unanimous decision in *Janzen v. Platy Enterprises Ltd.*¹⁶⁹ There were two major issues raised in the decision: (1) whether sexual harassment is sex discrimination, and, if so, (2) whether the employer may be held liable.¹⁷⁰

1. Sexual Harassment as Sex Discrimination

The Canadian Supreme Court made it clear that, with the exception of the Manitoba Court of Appeal, all of the Canadian courts previously considering the issue had equated sexual harassment with sex discrimination.¹⁷¹ The Court looked at United States case law and found the same equation.¹⁷² The Court stated that "[t]he Manitoba Court of Appeal departed radically from this apparently unbroken line of judicial opinion."¹⁷³ It then considered whether the Manitoba Court of Appeal's deviation was acceptable.¹⁷⁴

In discussing this issue, the Court examined the meaning of the terms "sex discrimination" and "sexual harassment" in the workplace context.¹⁷⁵ 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."¹⁷⁶ In defining sexual harassment, the Court noted that common descriptions of sexual harassment include "the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering

replaced it with the Manitoba Human Rights Code, which expressly prohibits sexual harassment in the workplace. See *supra* note 151.

169. 59 D.L.R.4th 352 (1989) (Can.). Dickson, C.J.C., wrote the opinion of the Canadian Supreme Court, joined by Beetz, McIntyre, Wilson, La Forest, and L'Heureux-Dubé, JJ.

170. See *id.* at 369-82.

171. *Id.* at 369.

172. *Id.* at 371 ("Since the middle of the 1970's, courts in the United States, including the United States Supreme Court, . . . have also reached the conclusion that forms of sexual harassment constitute sex discrimination.").

173. *Id.*

174. *Janzen*, 59 D.L.R.4th at 371-79.

175. See *id.* at 371-81.

176. *Id.* at 372.

the working conditions of employees who are forced to contend with sexual demands."¹⁷⁷ The Court also reviewed legislative definitions of sexual harassment and concluded:

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 endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour.¹⁷⁸

The Court acknowledged the United States' practice of formally categorizing sexual harassment as either quid pro quo or hostile environment sexual harassment.¹⁷⁹ Although Canadian courts had frequently followed the United States courts' approach to sexual harassment law,¹⁸⁰ the Canadian Supreme Court found the United States quid pro quo/hostile work environment dichotomy 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.¹⁸¹

The Court did not attempt to exhaustively define sexual harassment; rather, it broadly defined the term "as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to

177. *Id.* at 373.

178. *Id.* at 374.

179. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

180. *See supra* notes 69-72 and accompanying text.

181. *Janzen*, 59 D.L.R.4th at 375.

adverse job-related consequences for the victims of the harassment."¹⁸²

The Court then considered the Manitoba Court of Appeal's rationale. As previously noted, the Manitoba court linked sexual harassment to the harasser's sexual attraction to the victim.¹⁸³ In other words, the sexual harassment flowed from the personal characteristics, rather than the gender, of the victim. Since the Manitoba court interpreted the purpose of the Manitoba Human Rights Act to eradicate generic or categorical discrimination, the Act did not apply to prohibit sexual harassment aimed at individuals. The Canadian Supreme Court strongly rejected the Manitoba Court of Appeal's argument:

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 Grammas. 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 at the Pharos Restaurant 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 purposes of anti-discrimination legislation to remove such denials of equality of opportunity.¹⁸⁴

The Court, finding that sexual harassment amounted to actionable sex discrimination, completed its analysis of the issue by quoting the District of Columbia Circuit Court of Appeals: "[D]iscrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination."¹⁸⁵

2. Employer Liability for Sexual Harassment

The Canadian Supreme Court focused less on the issue of employer liability than on the issue of whether sexual harassment consti-

182. *Id.*

183. *See supra* notes 159-67 and accompanying text.

184. *Janzen*, 59 D.L.R.4th at 380.

185. *Id.* at 381 (quoting *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981)).

tutes sex discrimination, as it had previously considered the liability of employers in the 1987 case of *Robichaud v. The Queen*.¹⁸⁶ In *Robichaud*, the Court examined the liability of employers under the Canadian Human Rights Act.¹⁸⁷ The decision, handed down after the Manitoba Court of Appeal's decision in *Re Janzen and Platy Enterprises Ltd.*, announced that the law held employers liable for work-related acts.¹⁸⁸ The Court based the liability of employers upon the statute and not upon the doctrine of vicarious liability:

Hence, I would conclude that 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.¹⁸⁹

The *Robichaud* Court believed its approach was "sensible."¹⁹⁰ It argued that "the remedial objectives of the [Canadian Human Rights] Act [would] be stultified if a narrower scheme of liability were fashioned."¹⁹¹ The Court quoted at length from Justice Thurgood Marshall's concurring opinion in the United States Supreme Court's *Meritor Savings Bank v. Vinson* decision:

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt company-wide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nevertheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity.

....

A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to

186. 40 D.L.R.4th 577 (1987) (Can.).

187. See *id.* at 580-86.

188. *Id.* at 584.

189. *Id.*

190. *Id.* at 582.

191. *Robichaud*, 40 D.L.R.4th at 584.

recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong; it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.¹⁹²

Although the Manitoba statute used the language "in respect of . . . occupation or employment,"¹⁹³ the *Janzen* Court saw no significant difference from the *Robichaud*-considered Canadian Human Rights Act language of "course of employment."¹⁹⁴ The *Janzen* Court found that the statutory liability was the same.¹⁹⁵ Because the cook's conduct in *Janzen* was clearly work-related, employer liability attached.¹⁹⁶

VII. COMPARING THE APPROACHES OF CANADA AND THE UNITED STATES

A. Key Aspects of the Janzen-Vinson Relationship

The decisions of the Canadian Supreme Court and the United States Supreme Court in *Janzen v. Platy Enterprises Ltd.*¹⁹⁷ and *Meritor Savings Bank v. Vinson*¹⁹⁸ were the culmination of approximately a decade of case evolution. The United States development began earlier and served as the natural model for the Canadian development.

192. *Id.* at 584-85 (quoting *Vinson*, 477 U.S. at 75-77 (Marshall, J., concurring)) (alteration in original).

193. S.M., ch. 65, § 6(1) (1974).

194. *Janzen*, 59 D.L.R.4th at 382.

195. *Id.*

196. *Id.* The Court stated:

In light of this interpretation it cannot be argued that Grammas was not acting in respect of his employment when he sexually harassed the appellants. His actions were clearly work-related. Grammas' opportunity to harass the appellants sexually was directly related to his employment position as the next in line in authority to the employer. Grammas used his position of authority, a position accorded him by the respondent, to take advantage of the appellants. The authority granted to Grammas, both through his control in running the restaurant, including his control over food orders and work hours, and through his purported ability to fire waitresses, gave him power over the waitresses. It was the respondent's responsibility to ensure that this power was not abused. This it clearly did not do, even after the appellants made specific complaints about the harassment. So it is liable for the actions of Grammas.

Id.

197. 59 D.L.R.4th 352 (1989) (Can.).

198. 477 U.S. 57 (1986).

The two cases reached the high courts in different manners. The United States Supreme Court accepted a case in which the District of Columbia Circuit Court of Appeals had strongly advanced the proposition that sexual harassment amounted to sex discrimination.¹⁹⁹ The United States Supreme Court needed only to affirm that “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex” under Title VII.²⁰⁰ The Canadian Supreme Court, however, was forced to confute the Manitoba Court of Appeal’s rationale in announcing its decision.

1. The Quid Pro Quo/Hostile Environment Dichotomy

Both Supreme Courts equated sexual harassment with illegal sex discrimination; yet the cases differed in some respects. For example, the Canadian Supreme Court refused to accept the United States’ quid pro quo/hostile environment distinction, finding such dichotomy unhelpful.²⁰¹

In terms of developing a definition of sexual harassment, the Canadian Supreme Court’s decision to reject the quid pro quo/hostile environment distinction makes sense. The distinction reflects different factual situations that developed separately in United States case law as action theories. By the time the Canadian Supreme Court decided *Janzen*, both theories were well entrenched in United States case law. Except for the radical position taken by the Manitoba Court of Appeal, Canadian courts accepted both United States theories as actionable sexual harassment. The Canadian Supreme Court’s position, in effect, affirmed that hostile environment sexual harassment had come of legal age, thus broadening the definition of illegal sexual harassment.

2. Conduct Amounting to Actionable Sexual Harassment

The *Vinson* Court stated that not all conduct that might constitute harassment is actionable.²⁰² Actionable sexual harassment “must be sufficiently severe or ‘pervasive to alter the conditions of [the vic-

199. See *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1981), *aff’d sub nom.* Meritor Savings Bank v. *Vinson*, 477 U.S. 57 (1986).

200. *Vinson*, 477 U.S. at 64 (citation omitted).

201. See *supra* note 181 and accompanying text.

202. See *Vinson*, 477 U.S. at 67.

tim's] employment and create an *abusive* working environment.'"²⁰³ The Canadian Supreme Court in *Janzen* did not indicate a need for severity or pervasiveness. In fact, its definition of actionable sexual harassment was quite general: "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 the harassment."²⁰⁴ Conduct sufficient "to create an abusive working environment," as *Vinson* requires, represents a greater liability threshold than conduct which "detrimentally" affects the work environment.²⁰⁵

The true position of the Courts on this issue is unclear. The United States Supreme Court had no need to discuss the matter at length in *Vinson*, as the conduct in that case was "plainly sufficient to state a claim for 'hostile environment' sexual harassment."²⁰⁶ Post-*Vinson* United States cases have generally adhered to the requirement of severity or pervasiveness.²⁰⁷ In contrast, the Canadian Supreme Court in *Janzen* was quite general in its approach. Canadian lower courts are currently wrestling with the matter of the post-*Janzen* liability threshold.

In 1990, the Newfoundland Ad Hoc Human Rights Commission ("Commission") in *Aavik v. Ashbourne*²⁰⁸ reviewed lower court Canadian case authority to determine the liability threshold. The Commission cited *Daigle v. Hunter*²⁰⁹ for its quote of *Vinson*'s "sufficiently severe or pervasive" language.²¹⁰ It also cited *Daigle* for its inclusion of the following quote from *Aragona v. Elegant Lamp Co.*:²¹¹

[S]exual references which are crude or in bad taste are not necessarily sufficient to constitute a contravention of section 4 of the

203. *Id.* (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)) (emphasis added).

204. *Janzen*, 59 D.L.R.4th at 375 (emphasis added).

205. *Vinson*, 477 U.S. at 72.

206. *Id.* at 67.

207. See, e.g., *Hicks v. Gates Rubber Co.*, 928 F.2d 966 (10th Cir. 1991); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307 (7th Cir. 1989); *Dwyer v. Smith*, 867 F.2d 184 (4th Cir. 1989); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986); *Raley v. Board of St. Mary's County Comm'rs*, 752 F. Supp. 1272 (D. Md. 1990); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F. Supp. 294 (S.D.N.Y. 1987).

208. 12 C.H.R.R. D/401 (Nfld. Ad Hoc H.R. Comm'n 1990).

209. 10 C.H.R.R. D/5670 (N.B. Bd. Inq. 1988).

210. *Aavik*, 12 C.H.R.R. at D/408 (citing *Daigle*, 10 C.H.R.R. at D/5674; quoting *Vinson*, 477 U.S. at 67).

211. 3 C.H.R.R. D/1109 (Ont. Bd. Inq. 1982).

[Ontario Human Rights] Code on the basis of sex. The line of sexual harassment 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. The line will seldom be easy to draw.²¹²

The Commission's post-*Janzen* decision advanced the proposition that there is a severity element in Canadian law, which requires that conduct reach a sufficient level. The Commission quoted *Torres v. Royalty Kitchenware Ltd.*²¹³ in support of its position:

[T]here are some employers (and employees) who simply are very crude and who speak in bad taste in discussing in the work place their relationships with the opposite sex, or in telling "sex jokes." It is not the intent or effect of the *Human Rights Code*, or the function of a Board of Inquiry to pass judgment on such persons.²¹⁴

The Commission held that there is "some line where such bad taste will constitute sexual harassment."²¹⁵ The Commission also proposed that liability has a pervasiveness element, stating that "the word 'harass' itself implies repetition with some degree of frequency."²¹⁶ Undoubtedly, the broad Canadian Supreme Court definition in *Janzen* requires further refinement.

3. The Standard for Employer Liability

While the *Janzen* Court provided little to delineate the boundaries of actionable sexual harassment, it did address the scope of liability. The *Vinson* Court, on the other hand, declined to articulate a definitive rule on employer liability. Instead, it provided merely a modicum of guidance.²¹⁷

After *Janzen*, it is clear that an employer will be liable for unauthorized discriminatory acts of employees if the discriminatory conduct is work-related.²¹⁸ The only certain principle evident in *Vinson* is that the extremes do not apply. An employer's lack of notice "does

212. *Aavik*, 12 C.H.R.R. at D/408 (citing *Daigle*, 10 C.H.R.R. at D/5674; quoting *Aragona*, 3 C.H.R.R. at D/1110).

213. 3 C.H.R.R. D/858 (Ont. Bd. Inq. 1982).

214. *Aavik*, 12 C.H.R.R. at D/409 (quoting *Torres*, 3 C.H.R.R. at D/861).

215. *Id.*

216. *Id.*

217. For a review of the United States Supreme Court's development of this issue, see *supra* notes 127-36 and accompanying text.

218. See *supra* notes 186-96 and accompanying text.

not necessarily insulate that employer from liability,"²¹⁹ and employers are not "automatically liable for sexual harassment by their supervisors."²²⁰

VIII. CONCLUSION: THE UNITED STATES-CANADIAN RELATIONSHIP

The United States' influence on the development of Canadian sexual harassment law is extensive. The Canadian courts have commonly considered and used United States case decisions as authority.²²¹ In contrast, United States courts have not used Canadian law in fashioning their decisions.

The United States does not need to rely on Canadian authority because it has many domestic tribunals generating persuasive case authority. Yet, while the need may not exist, the value of considering other jurisprudential authority from beyond United States borders remains. Since Canadian tribunals regularly utilize persuasive United States authority in conceptualizing Canadian sexual harassment law, perhaps United States courts should look to Canadian decisions for similar guidance.

This wider vision may benefit United States legal development. The *Janzen v. Platy Enterprises Ltd.*²²² decision regarding employer liability offers a good example. Coupled with the Canadian Supreme Court's earlier decision in *Robichaud v. The Queen*,²²³ *Janzen* provides a sensible and constructive legal analysis. The *Robichaud* Court's determination not to have the remedial objectives of the human rights law "stultified" by a narrower approach to employer liability is praiseworthy.²²⁴ Perhaps the United States Supreme Court will consider Canada's determination when ultimately advancing a clear ruling on the standard of employer liability in sexual harassment cases.

219. *Vinson*, 477 U.S. at 72.

220. *Id.*

221. See *supra* notes 69-72 and accompanying text.

222. 59 D.L.R.4th 352 (1989) (Can.).

223. 40 D.L.R.4th 577 (1987) (Can.).

224. *Id.* at 584.

APPENDIX

A LISTING OF CANADIAN HUMAN RIGHTS LAWS WITH
CITATION TO AND DESCRIPTION OF KEY ANTI-
WORKPLACE SEX DISCRIMINATION
PROVISIONS

I. FEDERAL

Canadian Human Rights Act, R.S.C., ch. H-6 (1985),
amended by R.S.C., ch. 31 (1st Supp. 1985);
R.S.C., ch. 32 (2d Supp. 1985)

7. It is 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.

3(1). For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

II. TERRITORIES

A. *Northwest Territories*

Fair Practices Act, R.S.N.W.T., ch. F2 (1974), *amended*
by S.N.W.T., ch. 6 (3d Sess. 1981)

3(1). No employer shall refuse to employ, or to continue to employ, a person or adversely discriminate in any term or condition of employment of any person because of race, creed, colour, sex, marital status, nationality, ancestry, place of origin, handicap, age or family of that person or because of a conviction of that person for which a pardon has been granted.

B. *Yukon Territory*

Human Rights Act, S.Y.T., ch. 3 (1987)

8. No person shall discriminate . . . (b) in connection with any aspect of employment or application for employment.

6. It is discrimination to treat any individual or group unfavourably on any of the following grounds: . . . (f) sex, including pregnancy, and pregnancy related conditions.

III. PROVINCES

A. Alberta

The Individual's Rights Protection Act, R.S.A., ch. I-2
(1980), *amended by* S.A., ch. 33 (1985)

7(1). No employer or person acting on behalf of an employer shall
(a) refuse to employ or refuse to continue to employ any person, or
(b) discriminate against any person with regard to employment or
any term or condition of employment, because of the race, reli-
gious beliefs, colour, sex, physical disability, marital status, age,
ancestry or place of origin of that person or of any other person.

B. British Columbia

Human Rights Act, S.B.C., ch. 22 (1984)

8(1). No person or anyone acting on his behalf shall (a) refuse to
employ or refuse to continue to employ a person, or (b) discrimi-
nate against a person with respect to employment or any term or
condition of employment, because of the race, colour, ancestry,
place of origin, political belief, religion, marital status, physical or
mental disability, sex or age of that person or because of his convic-
tion for a criminal or summary conviction charge that is unrelated
to the employment or to the intended employment of that person.

C. Manitoba

The Human Rights Code, S.M., ch. 45 (1987-88)

14(1). No person shall discriminate with respect to any aspect of an
employment or occupation, unless the discrimination is based upon
bona fide and reasonable requirements or qualifications for the em-
ployment or occupation.

9(1). In this Code, "discrimination" means . . . (b) differential
treatment of an individual or group on the basis of any characteris-
tic referred to in subsection (2).

9(2). The applicable characteristics for the purposes of clauses 1(b)
to (d) are . . . (f) sex, including pregnancy, the possibility of preg-
nancy, or circumstances related to pregnancy.

D. New Brunswick

Human Rights Act, R.S.N.B., ch. H-11 (1973), *amended*
by S.N.B., ch. 31 (1976); S.N.B., ch. 30 (1985)

3(1). No employer, employers' organization or other person acting

on behalf of an employer shall (a) refuse to employ or continue to employ any person, or (b) discriminate against any person in respect of employment or any term or condition of employment, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status or sex.

E. Newfoundland

The Human Rights Code, S. Nfld., ch. 62 (1988)

10(1). No employer, or person acting on behalf of an employer, shall refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment because of (a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, marital status, physical disability or mental disability; . . . but this subsection does not apply to the expression of a limitation, specification or preference based on a *bona fide* occupational qualification.

F. Nova Scotia

Human Rights Act, R.S.N.S., ch. 214 (1989)

12(1). No person shall deny to, or discriminate against, an individual or class of individuals, because of the sex of the individual or class of individuals, in providing or refusing to provide any of the following: . . . (d) employment, conditions of employment or continuing employment, or the use of application forms or advertising for employment, unless there is a *bona fide* occupational qualification based on sex.

G. Ontario

Human Rights Code, S.O., ch. 53 (1981), amended by S.O., ch. 64, § 18 (1986)

4(1). Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

H. Prince Edward Island

Human Rights Act, S.P.E.I., ch. 72 (1975), *amended by*
S.P.E.I., ch. 26 (1980); S.P.E.I., ch. 23 (1985)

6(1). No person shall refuse to employ or to continue to employ any individual on a discriminatory basis or discriminate in any term or condition of employment.

1(1). In this Act . . . (d) "discrimination" means discrimination in relation to the race, religion, creed, colour, sex, marital status, ethnic or national origin, age, physical or mental handicap or political belief as registered under section 24 of the Election Act R.S.P.E.I. 1974, Chap. E-1 of any individual or class of individuals.

I. Québec

Charter of Human Rights and Freedoms, R.S.Q., ch. C-12
(1977), *amended by* S.Q., ch. 7, § 112 (1978);
S.Q., ch. 11, § 34 (1980); S.Q., ch.
61 (1982)

16. No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

J. Saskatchewan

The Saskatchewan Human Rights Code, S.S., ch. S-24.1
(1979), *amended by* S.S., ch. 23 (1989)

16(1). No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term or condition of employment, because of his or their race, creed, religion, colour, sex, marital status, disability, age, nationality, ancestry or place of origin.

