Guideline on Sexual Harassment

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NEW BRUNSWICK
HUMAN RIGHTS COMMISSION
COMMISSION DES DROITS
DE LA PERSONNE DU NOUVEAU-BRUNSWICK

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Please Note:

The New Brunswick Human Rights Commission (Commission) develops guidelines as part of its mandate to protect and promote human rights in the province. These guidelines are intended to help people understand their rights and responsibilities under the New Brunswick *Human Rights Act* (*Act*).

This guideline offers the Commission's interpretation of sexual harassment. For information on your rights and obligations in other situations of discrimination, please review the Commission's guidelines on those subjects or contact the Commission directly. This guideline is based on relevant decisions by boards of inquiry, tribunals, and courts, and should be read in conjunction with those decisions and with the relevant provisions of the *Act.* In case of any conflict between this guideline and the *Act*, the *Act* prevails.[1]

This guideline is not a substitute for legal advice. For clarification on any of its sections, please contact the Commission.

[1] The Commission acknowledges and thanks human rights commissions from jurisdictions across Canada for the opportunity to study and draw on their policies and documents on sexual harassment.

1.0 Introduction

The *Act* prohibits sexual harassment in employment, housing, public services, and in memberships of trade unions, professional or business organizations, and trade associations.[1] Employers and associations are liable under the *Act* for sexual harassment committed by their employees or representatives, if employers and associations do not exercise due diligence to prevent these incidents.[2]

Sexism is a prejudicial attitude that deploys stereotypes about sex roles and gender identities to denigrate individuals, usually women, because of their sex.

The *Act* protects both men and women from sexual harassment;[3] historically, however, because of their disadvantaged socioeconomic status, women have been the principal victims of sexual harassment.[4] Human rights law also recognizes same-sex sexual harassment, or sexual harassment committed by individuals against members of their own sex.[5] Another pervasive form of sexual harassment is gender-based sexual harassment; it is not motivated by sexual interest, but by sexist attitudes,[6] and stereotyping of sexual identities and gender roles.[7] In gender-based sexual harassment, individuals of either sex, who do not embody commonly accepted heterosexual roles, become victims of hostility, ridicule or malice. Bullying persons for their sexual orientation or subjecting them to homophobic insults falls within the purview of gender-based sexual harassment.

Courts have held that a single instance of sexual misconduct constitutes sexual harassment, especially if the solitary incident is deemed serious or severe.[8] Conversely, less offensive misconduct, if repeated, escalates in severity and establishes a coercive behavior pattern.[9] Because victims of sexual harassment suffer deep psychological scarring and devastating long-term consequences, damages awarded in sexual harassment cases have tended to spiral in recent years.[10]

1.0.1 Definitions of Sexual Harassment

Section 10(1) of the *Act* defines sexual harassment as "vexatious comment or conduct of a sexual nature that is known or ought reasonably to be known to be unwelcome".[11] The definition embeds subjective and objective criteria for establishing sexual harassment. Comment or conduct "that is known […] to be

The definition of sexual harassment embeds subjective and objective criteria for establishing sexual harassment.

unwelcome" forms the subjective component: the person committing the harassment knows that his or her conduct is wrong. Comment or conduct "that ought reasonably to be known to be unwelcome" covers the objective component: a neutral or "reasonable" third-person should be able to tell that the conduct is wrong.[12] The terms "comment or conduct" wedged in the definition encompass two broad patterns of sexual harassment behavior: verbal sexual harassment ("comment") and physical sexual harassment ("conduct"), both of which enclose a wide range of behavior permutations, as evidenced in the sexual harassment case law summarized in these pages. Tribunals have elaborated that the term "vexatious" (in the above definition) implies comment or conduct that is "annoying, distressing or agitating" to the victim.[13]

A single sexually explicit remark that is clearly demeaning and attacks the dignity and self-respect of a woman based on her gender will violate the *Act*.

In an early test case, which has been called the charter of sexual harassment law in Canada,[14] the Supreme Court of Canada authored a comprehensive definition of sexual harassment.[15] According to the Supreme Court, sexual harassment is "a form of sex discrimination"; it is "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for [its] victims." Sexual harassment is "abuse of power" and, in the workplace, it manifests as "abuse of both economic and sexual power". Workplace sexual harassment is a "demeaning practice […] that constitutes a profound affront to dignity" and tarnishes the "self-respect of the victim both as an employee and as a human being".[16]

The Supreme Court also hinted at two types of sexual harassment scenarios:

"Sexual harassment may take a variety of forms. [It] is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands […] 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".[17]

In *Robichaud*,[18] companion case to *Janzen*, the Supreme Court of Canada set down detailed stipulations for employer liability in acts of sexual harassment committed by employees.

Courts and tribunals have reiterated that sexual harassment is not merely or always about sexual predation, but has more complex, layered dimensions: "The focus of a sexual harassment inquiry is […] a multi-faceted assessment that looks at the balance

of power between the parties, the nature, severity and frequency of impugned conduct, and the impact of the conduct. The key indicia (and harm) of sexual harassment is the use of sex and sexuality to leverage power to control, intimidate or embarrass the victim".[19]

Sexual harassment, therefore, is hinged in social, economic, and gender contexts and connotations, and manifests in three principal forms: verbal, physical, and psychological.[20]

The focus of a sexual harassment inquiry is a multi-faceted assessment that looks at the balance of power between the parties, and the nature, severity, frequency, and impact of the impugned conduct.

To make a *prima facie* case of sexual harassment, a complainant has to show:

- That the alleged comments or conduct were sexual in nature;
- That they were unwelcome to the complainant; and
- That they had a negative impact on the complainant's work opportunities or environment, or on their enjoyment of housing and services, as the case may be.[21]

The burden to establish a *prima facie* case of sexual harassment rests on the complainant; once a *prima facie* case is established, the onus shifts to the respondent, either to refute the alleged conduct or to prove that the complainant consented to the sexual overtures.

In overarching terms, sexual harassment may be defined as a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay or career, or of their use of housing and services;
- Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or is linked to their enjoyment of housing facilities or services;
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating a hostile or offensive environment at work, or in housing or services.[22]

1.0.2 Sexual Harassment – Historical Perspective

Sexual harassment is a social practice that has prevailed in human societies across history[23] In past centuries, economically vulnerable women like domestic servants, slave women in the American south, and factory workers were typical victims of sexual harassment, exploited by men of superior social ranks.[24] In the last one hundred years or so, women have entered the workforce in growing numbers, mixing with men in traditionally male-dominated workspaces. Besides other forms of workplace discrimination, working women have faced a pervasive culture of sexual harassment, which was, until recently, taken by men as a privilege or perk of their jobs.[25]

> Sexualized exploitation has a history that spans centuries, but it was trivialized, hidden from political, social, legal arenas, and dismissed as "universal", "natural", or even "biological".

The first sexual harassment cases began to surface in US courts in the 1970s; these cases were inspired by a feminist jurisprudence advocated by women legal activists, who drew inspiration from the post-war human rights revolution, second-wave feminism, and late Twentieth-Century civil and women's rights movements. The term "sexual harassment" entered the legal vocabulary in 1975, used for the first time during the New York City Human Rights Commission's Hearings on Women and Work.[26]

In Canada, sexual harassment emerged on the judicial map in the 1980s, with a flurry of complaints before human rights tribunals;[27] most of these early cases originated in Ontario, and involved sexual harassment in the employment context.[28] In the absence of specific sexual harassment provisions in human rights codes, the early cases defined sexual harassment as discrimination based on sex. In 1981, the Ontario *Human Rights Code* was amended to incorporate specific provisions prohibiting sexual harassment; sexual harassment was added to the NB *Human Right Act* in 1987 as a protected ground. As of 2018, most Canadian jurisdictions have specific sexual harassment sections in their respective human rights legislations.[29]

Sexual harassment doctrine has inaugurated profound changes in the ways we understand gender justice, and values of equality, decency, and human dignity. From high-profile workplaces to sports arenas, from academia to churches, from the Armed Forces to cyberspace, and, more recently, through the media glitter of celebrity sexual misdemeanors and the #MeToo movement, sexual harassment is not only front-page news, it is a legal and moral question at the heart of present-day human rights jurisprudence and legal philosophy.

2.0 Types of Sexual Harassment

In the landmark *Janzen* case, the Supreme Court of Canada observed that categorizations of sexual harassment are not "particularly helpful";[30] however, tribunals continue to reference two main types of sexual harassment: "*quid pro quo*" and "poisoned work environment" sexual harassment. Many sexual harassment situations incorporate these two types of sexual harassment, or shift between forms of coercion that are characteristic of both sexual harassment scenarios; however, it is useful to separate the two typologies, in order to map the broad terrain on which sexual harassment scenarios unfold.

2.0.1 *Quid Pro Quo* Sexual Harassment

Quid pro quo (something for something) presents the classical sexual harassment scenario, wherein employment or promotion decisions are tied or made conditional to sexual favors. Stemming from American jurisprudence, the idea of *quid pro quo* sexual harassment was first articulated by Catharine MacKinnon in her seminal feminist tract on sexual harassment, and was later elaborated in a 1984 article published in *Harvard Law Review*.[31]

The consequence of rejecting a vexatious sexual advance may be refusal to hire, increase in workload, denial of promotion, or dismissal or forced resignation, among other things.

Q*uid pro quo* sexual harassment was recognized by Canadian tribunals early in the development of sexual harassment law in Canada; one tribunal articulated the concept as follows: "*Quid pro quo* harassment, in which the employer or a supervisory employee requires an employee of the opposite sex to submit to sexual advances as a condition of obtaining or maintaining employment, or benefits".[32] This form of sexual harassment is "blackmail at work […], offering or withholding employment advantages conditional to sexual submission".[33] A more recent decision described *quid pro quo* sexual harassment as "an individual dynamic […] aimed at subjecting a woman to embarrassing sexual demands made by a single harasser, in consideration for maintaining or improving the woman's working conditions".[34]

Most early sexual harassment cases presented classic *quid pro quo* scenarios, involving dismissal, reprisals or other employment disadvantages suffered by complainants for refusing to comply with the sexual advances of a workplace superior.[35]

Example– Quid Pro Quo Sexual Harassment in Employment

The complainant worked as a bartender at a bar owned and managed by the respondent. The respondent made sexually suggestive comments to the complainant, touched her inappropriately or brushed up against her during work, and made sexual advances and overtures in other overt ways: he objected when the complainant's male friends visited the bar, asked questions about her personal life, commented on her physical attractiveness, and wrote discriminatory and threatening letters to her after her employment ended. The complainant continually resisted the sexual advances and insinuations; eventually, the respondent terminated her employment on a flimsy pretext. In making an award for damages, the Tribunal noted that the termination was an act of retaliation for non-compliance with sexual demands.[36]

Example – Quid Pro Quo Sexual Harassment in Employment

The respondent, owner of a furniture business, hired the 19-year-old complainant as a trainee on a part-time basis. Five weeks into her employment, the respondent propositioned the complainant for sex, promising to reward her with a job promotion. When the complainant refused the proposed *quid pro quo* arrangement, her employment was summarily terminated.[37]

Example – Quid Pro Quo Sexual Harassment in Housing

A single mother and her young son rented two rooms in the respondent's house, sharing the kitchen and bathroom with him and two other tenants. From the outset of the tenancy, the respondent made sexual overtures, commenting on the complainant's appearance, and inquiring about her sexual experience and preferences. On two occasions he left notes for her, once with a condom enclosed, asking her to wake him when she came home from work. In a final escalatory episode, the respondent grabbed the complainant and threw her on a bed, but she managed to escape. When his advances were not reciprocated, the respondent resorted to threats and eventually evicted the complainant on a 15-day notice.[38]

Example – Quid Pro Quo Sexual Harassment in Services

A professor invited his student to his home twice to discuss her admission to the graduate program and write a reference letter for her. He created a romantic environment for the meetings, talked about his private life, and made overt sexual advances on the student. The student tolerated the physical intimacy, believing that the professor was coveting sexual favors in exchange for supporting her admission and granting a reference.[39]

2.0.2 Poisoned Work Environment Sexual Harassment

Less clear, but more pervasive, is the situation in which sexual harassment simply makes the work environment unbearable. Unwanted sexual advances become a daily part of a woman's work life, but she is never promised or denied anything explicitly connected with her job.

In poisoned work environment sexual harassment, victims are not subjected to outright requests for sexual favors; instead, there is a pattern of disparaging sexual comments, innuendoes, taunts, and humor in the workplace, which demeans and demoralizes the victims.[40] Poisoned work sexual misconduct does not accompany reprisal or threats of reprisal, but has the effect of souring the work experience for the employee. The intimidation, hostility, and offensive environment of a sexualized workplace interferes with the job performance of victims, diminishes their sense of self-worth, and places them in a contentious, unequal, and discriminatory work setting. The Supreme Court of Canada has endorsed the notion of poisoned work environment sexual harassment.[41]

Tribunals have described the conditions that create a poisoned work environment: “In the human rights context, a poisoned work environment will be found in two circumstances: 1. If there has been a particularly egregious, stand-alone incident, or 2. If there has been serious wrongful behavior sufficient to create a hostile or intolerable work environment that is persistent or repeated”.[42] The test of a neutral third-party or “reasonable bystander” is applied as objective criteria for establishing a finding of poisoned work environment sexual harassment.[43] The terms “reasonable man” and “reasonable woman” have also been used in the same context.[44]

A poisoned work environment is created in two ways: 1. Through a particularly egregious, stand-alone incident, or 2. By serious wrongful behavior that is persistent or repeated.

Tribunals have held that the environment that prevails in a workplace constitutes its terms or conditions of employment; consequently, when

sexual harassment pollutes a work environment, it becomes part of the terms and conditions of employment in that workplace.[45] By examining the frequency, nature, and seriousness of the sexual harassment, courts determine if enduring the discriminatory conduct and comments "had become a condition of the applicant's employment".[46] While it may not result in overtly adverse employment consequences or active reprisals, poisoned work sexual harassment leads to detrimental psychological, emotional, and professional consequences for victims, impacting their self-confidence, productivity, and motivation for career advancement.[47]

Human rights law contemplates the circumstances of sexual harassment from the perspective of the victim, not from that of its perpetrator.

Human rights law recognizes that in situations of poisoned workplace sexual harassment:

- It is not a defense that sexual or gender-related remarks, jokes or innuendoes used in the workplace were not directed at the victim or anyone in particular.[48]
- It is not a defense that participants tolerated the environment.[49]
- It is not a defense that other employees were treated in the same way as the complainant.[50]
- It is not a defense that the complainant's vivacious personality and provocative style of dressing invited sexual attention.[51]

Example – Poisoned Environment Sexual Harassment in Employment

The complainant worked as server in a restaurant, where the cook made vexatious, sexually-charged comments about her, about women generally, and about customers and other female employees. The cook remarked about the complainant's weight, used words like "boobs" and "bum" in reference to her, and talked about other women in graphic language, voicing his sexual fantasies about them. The tribunal held that the respondent's conduct created a poisoned work environment for the complainant: it was "serious wrongful behaviour […] persistent or repeated [and] sufficient to create a hostile or intolerable work environment".[52]

Example – Poisoned Environment Sexual Harassment in Employment

In this recent decision, the Supreme Court of Canada has broadened the meaning and scope of workplace sexual harassment. The complainant, an engineer on a road construction project, was sexually harassed by a site foreman; the site foreman worked for a different company that was one of the contractors on the project. The respondent

argued that his conduct did not fall within the purview of the *Code* (British Columbia), because it was not done in the course of an employment relationship: he was not the complainant's employer or work superior and did not have economic power over him. Upholding a liberal and purposive interpretation of human rights law, the Supreme Court of Canada held that the *Code* contemplates circumstances of sexual harassment from the perspective of the victim, not from that of its perpetrator; *Code* protections extend to all acts that have a sufficient nexus to the employment context, including discrimination by coworkers who may have a different employer. The Court noted that the relevant section of the *Code* prohibits a "person" (not "employer") from discriminating against another person "regarding employment"; thus, it extends protection from discrimination in employment to all persons who share a workplace.[53]

2.0.3 Poisoned Environment Sexual Harassment in Housing and Services

A poisoned environment is also created in housing or services, if individuals exercising authority in those settings exploit their power to demand sexual favors. Tribunals have laid down that the Supreme Court of Canada's workplace sexual harassment analysis in *Janzen* applies to cases of sexual harassment in tenancy and services. Investigating a landlord's sexual harassment of his tenant, the Tribunal stated: "The reasoning of the Supreme Court of Canada […] with respect to sexual harassment in the workplace is, by analogy, applicable to the sexual harassment experienced by the [tenant]".[54]

Example – Poisoned Environment Sexual Harassment in Housing

The complainant rented an apartment in a building owned by the respondent. In the course of her tenancy, the respondent gave her a number of gifts and made many inappropriate comments. He referred to her as "a beautiful woman", asked if her boyfriend was in the apartment when he came to pick up the rent, and referred to himself as a "sexy, 40s, hardworking man". He also made derogatory comments about a male visitor, and touched the complainant's backside when he was showing her a bicycle. It was held that the respondent created a hostile environment for the complainant, and sexually harassed her in the terms and conditions of her tenancy: "A female tenant is entitled to quiet enjoyment of her apartment free of sexual harassment in the same way that a female employee is entitled to a work environment free of sexual harassment".[55]

Example – Poisoned Environment Sexual Harassment in Housing

The complainant lived in a small apartment building with her daughter. The owner of the building made a vulgar comment about the complainant and her daughter's breast sizes to the building superintendent. The Tribunal concluded that the remarks created a

sexualized and poisoned environment for the complainant and her daughter as tenants, making them feel uncomfortable and unsafe in their own home, and conscious of the way they dressed. The owner of the building was held responsible for making the comment, and held liable for the conduct of the superintendent (his agent) who publicized the remarks.[56]

Example – Poisoned Environment Sexual Harassment in Services

A professor held two meetings with his student at his home. He created a nonprofessional, sexualized environment, with sensual music, candles, wine, and dinner; he talked about his love life, gave a present to the student, and seduced her into sexual intimacy. It was held that in providing a service customarily available to the public, the professor created a poisoned environment and abused his authority over a vulnerable pupil to discriminate against her because of her sex (sexual harassment).[57]

3.0 Power and Sexual Harassment

Human rights law recognizes that sexual harassment is not always about sex, desire or sexual interest, but about power and gender inequality.[58] The Supreme Court of Canada has stated: “Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace, thereby negatively altering the working conditions of employees who are forced to contend with sexual demands”.[59]

> Sexual harassment is not primarily about sexual attractiveness, but about economic power and gender inequality.

Most often, perpetrators of sexual harassment are in a position of power (economic, official, social) over their victims, and sexual harassment is an abuse and demonstration of that power, as much as it is an expression of sex discrimination and sexual exploitation. In most sexual harassment situations, there is a power disparity between the victim and the victimizer – the latter could belong to the cast of managers, supervisors, building superintendents, and professors, depending on the harassment context.[60] In a case marked by unequal power between the contending parties, the Tribunal observed: “Normal sexual or social activity may become sexual harassment where a power differential exists between the parties. Sexual harassment occurs where a person in a position of authority abuses that power, both economically and sexually”.[61]

Because of the unequal power dynamic in sexual harassment situations, many victims are reluctant to take action or speak out, for fear of reprisals or other untoward consequences.[62] However, silence of the victim does not imply consent, especially when the harasser has leverage to benefit or harm the victim: “The reasons for submitting to conduct may be closely related to the power differential between the parties and the implied understanding that lack of co-operation could result in some form of disadvantage”.[63]

Example – Power and Sexual Harassment in Employment

A coworker sexually harassed his female colleague over a 14-year-period, making derogatory gender-related comments about her, poking fun at her body type, ridiculing her manner of walking and dressing, and denigrating her work performance. The Tribunal marked the case as an example of male privilege and power in the workplace, which stemmed from deeply ingrained practices of gender inequality that allowed men to harass women: "Hostility [takes] the form of asserting power over women, giving

women orders, making comments on their performance". Even when such insults are "totally non-sexual", they constitute sexual harassment based on sex.[64]

3.0.1 Power and Sexual Harassment in Housing and Services

While the power dynamic is most visible in the employment context, because of the monetary and career stakes attached to employment, the power factor also adheres in housing and services. House owners and landlords can exercise power and coercion against vulnerable tenants, just as teachers, professors or physicians can wield power over students and patients in the services context.

Tribunals have commented on the inherent power imbalance that underlies sexual harassment in housing and services:

- "In the context of accommodation, the jurisprudence indicates that power imbalances between owner and occupant are to be taken into account in cases in which sexual harassment is raised".[65]
- "A [building] superintendent is in a position of power over tenants. […] An abuse of this power can have a significant effect on a tenant's enjoyment of her living space".[66]
- A student cajoled into a sexual relationship with her professor was "in a relatively weak and vulnerable position" because of the professor's power to influence her academic future.[67]

Example – Power and Sexual Harassment in Housing

The respondent was both the landlord and employer of the complainant; he made many sexual approaches to her, but she refused to reciprocate the sexual advances and left his employment. In retaliation, the respondent (as landlord) began to harass her at her home, yelling obscenities through the door, calling her degrading, sexualized names ("fucking bitch", "tramp", "slut"), and making threats of eviction and rent increase.[68]

Example – Power and Sexual Harassment in Services

A physician initiated a sexual relationship with his drug-addict patient, providing her prescription drugs in return for sexual favors. The Supreme Court of Canada rejected the argument that the patient consented to the sexual relationship voluntarily: "The unequal power between the parties and the exploitative nature of the relationship

removes the possibility of the appellant providing meaningful consent to the sexual contact".[69]

4.0 Unwelcomeness and Consent in Sexual Harassment

Statutory definitions of sexual harassment state one test that is crucial to a finding of sexual harassment: it has to be shown that the alleged comments or conduct were "unwelcome". If evidence substantiates that the comments or conduct were welcomed by the complainant, the inquiry shifts to the grey area of consent. Consent and unwelcomeness, therefore, are opposite ends of the sexual harassment compass. If the sexual overtures were unwelcome, sexual harassment is irrefutably established; however, if the advances were reciprocated or welcomed, it may indicate consent and the sexual harassment claim could fail.[70]

> Individuals convey their protest against unwelcome sexual conduct in different ways; a sexual advance may incite a strong refusal and outrage or may be met by stony silence and evasion.

While consent is both difficult to establish or refute, courts lean toward victim testimonies to make a determination about consent. If a marked power imbalance defines the parties in a sexual harassment complaint, it is very difficult to establish that the complainant consented to sexual contact voluntarily. Therefore, unless consent was expressed in unambiguous terms, tribunals tend to assume that coercion, implicit or explicit, was a factor in it.

Example – Consent and Unwelcomeness in Sexual Harassment

A graduate student alleged sexual harassment by her supervisor, even though evidence indicated that the student participated in the sexual encounters. Disregarding the argument for consent, the court ruled that consent was not voluntary, because the power imbalance between the student and the supervisor was too stark to ignore: "[The student] was in a relatively weak and vulnerable position in her dealings with [her professor]. He was not only her supervisor, he was also responsible for research for the Ministry in her area of interest. He had influence in funding decisions of the Ministry that could accept her thesis […] He was in a position of authority over her".[71]

The unwelcomeness test is applied objectively by courts, and assessed on the basis of evidence. Tribunals have repeatedly emphasized that complainants are not required to prove that they resisted the advances aggressively, or indicated their unwelcomeness in explicit ways.[72] Human rights jurisprudence recognizes that individuals convey displeasure at offensive sexual conduct in a variety of ways, and that a reasonable person[73] should read these signs for what they mean.[74] Subtle indications, through gestures, facial expressions, body language, and other hints should be enough to convey rejection.[75]

4.0.1 Signs of Unwelcomeness in Sexual Harassment

The following cases illustrate some of the subtle mechanics by which victims convey their disapproval in sexual harassment situations:

- The complainant expressed her resentment at the respondent's unwelcome conduct by simply walking away from him.[76]
- The complainant indicated her unwillingness to reciprocate her manager's sexual solicitations "by remaining cool or not responding to comments or invitations".[77]
- The complainant did not explicitly repel the sexual advances, but reacted by tensing up her body and refusing to make eye contact.[78]
- The complainant's many subtle behavioral signals should have been enough to convey that the conduct was unwelcome.[79]
- The doctrine of implied consent cannot be pleaded in sexual assault and sexual harassment.[80]

Furthermore, even if a person appears to participate in distasteful activity – vulgar jokes or sexual teasing, for example – it does not imply consent to or condonation of that behavior.[81]

Example – Consent and Unwelcomeness in Sexual Harassment

The complainant, a man of aboriginal ancestry, was subjected to a sequence of racial slurs, provocation, and homophobic harassment during his military training. He appeared to participate in the conduct, but his participation was held to be non-consensual; it was his way to fit in and belong in a military culture that thrived on bawdy jokes, horseplay, and sexual and racial chauvinism. In awarding damages, the Tribunal also noted the multiple (or intersectional) *Code* grounds that were violated in the case – ancestry, race, and sexual orientation.[82]

5.0 Intersectionality and Sexual Harassment

Victims of sexual harassment are often disadvantaged by other vulnerabilities that are recognized grounds of discrimination in human rights codes: race, ancestry, sexual orientation,[83] disability,[84] national origin, family status, and so on.

Women of color or visible minorities, for example, are more vulnerable to sexual harassment;[85] harassers tend to assume that these women could be readily exploited, and would be docile to male dominance or economic power.[86] Temporary foreign workers who depend on their employers for keeping their residential status, and migrant workers who work as domestics, caregivers or live-in nannies are similarly vulnerable because of intersectional grounds. Likewise, persons with mental and physical disabilities, and individuals who espouse non-traditional gender identities, face a higher risk of sexual harassment.

> Persons who identify with multiple or intersecting *Code* grounds – race, ancestry, disability, age, gender expression, etc. – are more vulnerable to sexual harassment.

Tribunals and courts have recognized the intersectional factor in sexual harassment cases, paying attention to the multiple levels of discrimination that contextualize such victimizations. Intersectional vulnerability might lead to higher damages against respondents; however, tribunals have also stated that an intersectional complaint does not necessarily escalate the damages amount, even though it allows courts to understand the layered experience of discrimination suffered by complainants.[87]

5.0.1 Case Law – Intersectional Sexual Harassment

Example – Intersectionality (Race and National Origin) and Sexual Harassment in Employment

Two sisters, the complainants in the case, came from Mexico under the federal government's temporary foreign worker program for low-skill occupations, and worked at the corporate respondent's fish processing plant. The personal respondent, owner and principal of the company, subjected the complainants to sexual solicitations and advances, ranging from unwanted touching to sexual assault. The respondent threatened to send the sisters back to Mexico if they did not comply with his demands, and used other intimidating tactics to cower them into submission. Both the corporate

respondent and the personal respondent were held liable for sexual harassment in employment. In making an award for damages, the tribunal noted the particular vulnerability of migrant workers, who become easy targets of sexual predation and other discriminatory conduct because of their curtailed rights and economic dependence on a single employer.[88]

Example – Intersectionality (Ancestry and Family Status) and Sexual Harassment in Employment

The complainant, a single mother of Aboriginal ancestry, started work as a painter with the respondent painting company, where the personal respondent was a partner and main painter. A few days into her employment, the personal respondent began to direct degrading, graphic sexual remarks at her, and to pretend in front of people that she was his girlfriend. His comments were often mixed with racial slurs, and sometimes alluded to the complainant's single mother status. The respondent also started to touch the complainant when they were alone in his truck, for she depended on him for transportation to and from work. These offensive advances culminated in an egregious incident of attempted sexual assault. The Tribunal contextualized the sexual harassment with the multiple grounds of discrimination and the uniquely vulnerable status of the complainant – her identity as a socially and economically vulnerable single mother of Aboriginal origin.[89]

Example – Intersectionality (Race and Ancestry) and Sexual Harassment in Employment

The complainant, a woman of mixed Black and Metis ancestry, suffered sexual discrimination, sexual solicitations, racial harassment, and reprisal in the workplace, including touching, kissing, straddling, assault, and unwanted displays of pornography. In assessing damages, the tribunal awarded separate amounts for racial and sexual harassment, acknowledging the complainant's aggravated trauma owing to the intersectional nature of her vulnerability.[90]

Example – Intersectionality (Race and National Origin) and Sexual Harassment in Housing

The complainant, a woman of Thai origin, worked for several years at a shoe store owned by the respondent. She also rented an apartment above the store, which was owned by a company that belonged to the respondent. The respondent sexually harassed the complainant for many years, both in the store and in the apartment. He was held liable for sexual harassment in housing for acts committed in the apartment,

and for sexual harassment in employment for violations that took place inside the store.[91]

Example – Intersectionality (Family Status and Social Condition) and Sexual Harassment in Housing

The case involved a single mother of a young child who was harassed by her landlord. In making a finding of sexual harassment against the respondent and arriving at a damages award, the Tribunal noted the compounded vulnerability of the complainant – her single mother (family) status, with a small child and few financial resources and options (social condition).[92]

6.0 Behaviors That Constitute Sexual Harassment

Sexual harassment behaviors span a wide spectrum, from gender-based slurs, sexual banter or teasing to more explicit sexual solicitations and unwelcome physical contact.[93] The following list puts together an inventory of behaviors that human rights courts and tribunals have recognized as sexual harassment; the list may still not be exhaustive, as sexual harassment jurisprudence is in constant flux:

Sexual harassment includes sexually oriented jokes; patronizing name calling; sexually laced comments about someone's body; rough and vulgar language; display of pornographic material; leering or other gestures with suggestive overtones; unwelcome invitations; unnecessary physical contact; as well as sexual touching and physical assault.

- Propositions of physical intimacy or sexual contact;[94] unwelcome invitations or requests for dates,[95] whether explicit or implicit;[96]

  Example: *The complainant, a 24-year-old woman of Chinese descent, was hired by the respondent, a man in his 50s, to work in his office. At the conclusion of the interview, the respondent gave her a hug; on her first day at work, he hugged her again and kissed her on the mouth. He then suggested that he wanted the complainant to be his special friend.*[97]

  Example: *The complainant, a successful career accountant, worked for a thriving medium-sized elevator company for about 10 years. The owner of the company began to create business excuses to spend more time with the complainant, taking her on work lunches, meetings, visits to clients and worksites, and to attend work-related social functions. While the complainant welcomed these opportunities, the Tribunal noted that the owner's behaviour bordered on enforced socialization or "secret dating".*[98]

- Unnecessary physical contact such as kisses, hugs,[99] holding hands, touching, patting, pinching, slapping, etc.;[100]

  Example: *The complainant, an 18-year-old student, obtained employment as a front-desk agent at a hotel. She was sexually harassed by two of the owners, who constantly demanded hugs from her, and also tried to coax her into more intimate physical contact.*[101]

  Example: *The complainant, a heavy equipment operator, was the only female employee at a road construction site. Her employer made numerous intimate solicitations, including holding her hands, romantic gestures, expressions of love, and a final aggravated sexual contact.*[102]

- Vulgar or lewd gestures, whether directed at an individual or part of general banter and sexualized mannerisms;[103]

  Example: *The respondent repeatedly exposed himself to the complainant, texted her vulgar images and messages, including one of his genitalia, besides subjecting her to a constant barrage of sexual comments.*[104]

  Example: *At an office party, an inebriated manager grabbed his crotch and asked the complainant to take his picture. This conduct, along with other inappropriate behaviors, was deemed sexual harassment.*[105]

- Leering, ogling or inappropriate staring;[106]

  Example: *A single mother of a teenaged son worked as customer service representative at a money mart. She was sexually harassed by the branch manager, who constantly leered at her breasts and other parts of the body, instead of making eye contact when speaking to her. The manager also engaged in other offensive conduct: standing too close to the complainant at the till, touching her hand when they exchanged bank notes, brushing against her in the narrow passageway, and so on. The conduct constituted sexual harassment creating a poisoned work environment.*[107]

- Sex-specific name-calling,[108] sexist jokes,[109] poking fun at people's body type or gender expression,[110] talking about sexual activities or exploits,[111] exhibiting or exposing one's body;[112]

  Example: *The respondent denigrated the complainant's sexuality by vexatious comments about her figure, labelling her with gendered names like "fat cow"; he mocked her gait, shouting "waddle, waddle" and "swish, swish", the latter to insinuate the rustling of nylons as she walked.*[113]

  Example: *The complainant worked as a used car salesman for a family owned car dealership. He was constantly mocked for his sexual orientation, and subjected to sexual vulgarisms in this all-male workplace. Among numerous other incidents, a coworker removed his pants in the complainant's presence and taunted him by rotating his hips.*[114]

  Example: *The respondent was in the habit of addressing his female employees with appellations like "sweetheart," "hun," and "dear", which, along with other sexualized innuendoes, created a poisoned work environment and violated the women's right to be free from discrimination in employment.*[115]

- Displaying or sharing (including electronically) pornographic or other sexually offensive materials;[116]

  Example: *A supervisor displayed a nude statue in his office, and referred to it to make sexually inflected jokes and comments about women's bodies. He also pinned posters of nude women at his workstation. A female employee complained about the images and the sexualized work atmosphere, and the derogatory comments about women and women's bodies. According to the tribunal, sexual harassment "includes any unwelcome conduct of a sexual nature that detrimentally affects a person in the work environment";*

the statue and posters humiliated and harassed the complainant, and created a poisoned work environment.[117]

Example: *The complainant was in the office of his general manager and saw the photo of a nude woman on his computer screen. The manager did not conceal the photograph or seem embarrassed by it, and later printed its copies and circulated them to the male members of the staff.*[118]

Example: *The complainant shared an office with male coworkers. To mock his sexual orientation, his coworkers engaged in a sequence of offensive activities, creating a sexually charged, poisoned workplace. In one incident, a coworker watched porn in the office with the volume turned up, to the sheer discomfiture of the complainant.*[119]

- Sexually vexatious[120] comments (verbal, textual, or online) about a person's looks, parts of body,[121] sexual preferences,[122] physical attractiveness or unattractiveness;[123]

Example: *The complainant began working as a delivery driver for the respondent; after a few weeks they entered into a consensual sexual relationship, which the complainant broke off after learning that the respondent was not separated as he claimed. Post break-up, for four months, the respondent texted sexually degrading messages to the complainant, which eventually forced her to take a long leave of absence.*[124]

Example: *The complainant worked at the front desk in an office; a few days into her employment, her manager commented about her physical attractiveness, and showed her a magazine article about the sex drive of women in their 40s, asking her if that applied to her.*[125]

Example: *In this case of same-sex sexual harassment, the respondent, a senior employee, began to compliment the complainant, a young entrant in the job, about his physical appearance, and to suggest that they meet socially. The sexual harassment continued for nine months, culminating in an egregious act of sexual approach.*[126]

- Invasion of personal space, standing or sitting too close, brushing up or rubbing against a person;

Example: *The owner and manager of the bar, where the complainant worked as a bartender, constantly invaded her personal space: he would stand too close to her at the bar, brush up against her when they passed each other, put his hands on her waist when he stood behind her, and lean into her body when he reached for something near the cash register. He also made excuses for putting his arms around her and hugging her.*[127]

Example: *The manager at a money mart stood too close to the complainant at the till, pressed his body against her back when called to assist her with customers, and deliberately bumped into or brushed against her when they crossed paths in the office.*[128]

- Spreading sexual rumors about a person, by word of mouth, through emails, text messages or online;[129]

  Example: *The complainant, an epileptic single mother of two teenaged children, worked as head bartender at the respondent's dance club. When they moved to a new location, the respondent started introducing her to visitors as his girlfriend and a stripper.*[130]

- Requiring employees to dress in a sexually suggestive or gender-specific way.[131]

7.0 Duties of Employers, Housing, and Service Providers

Employers, housing, and service providers have a responsibility to provide work, housing, and service environments that are free from all manner of sexual harassment – verbal, physical, and psychological. Employers, housing, and service providers are liable for the sexual harassment committed by their employees or representatives in the course of their employment, if the employers, housing or service providers do not exercise due diligence to address these incidents.[132]

7.0.1 The Supreme Court of Canada on Employer Liability

In a test case on employer liability in sexual harassment committed by employees, the Supreme Court of Canada held that the Department of National Defense was responsible for the acts of sexual harassment of one of its employees.[133] The case established general rules of employer liability, consistent with a broad and purposive interpretation of human rights legislation.[134] According to the Supreme Court, the *Code* (the Canadian *Human Rights Act,* in this instance) contemplates imposing liability on employers for all acts of employees done "in the course of their employment".[135]

> Employers, housing and service providers have a duty to ensure that their environments are free from sexually intimidating conduct, even if no one objects to it or everyone seems to participate in it.

The Supreme Court of Canada emphasized the critical duty of employers to provide a harassment-free work environment to their employees: "Only an employer can remedy undesirable effects [of discrimination]; only an employer can provide the most important remedy—a healthy work environment".[136]

Employers, housing, and service providers have a duty to investigate all complaints of sexual harassment promptly and efficiently. Human rights jurisprudence has established that this duty involves taking reasonable steps to address the allegations of discrimination, and that "a failure to do so will itself result in liability under the *Code*".[137]

Under human rights law:

- An employer's duty to address sexual harassment is triggered immediately upon receiving notice of an incident, or when they become aware of harassing behavior, even if it has not been reported.[138]

- In assessing liability, courts look favorably on employer due diligence in sexual harassment complaints only if the due diligence measures provided tangible relief to the complainant.[139]
- Employers are liable for sexual harassment committed by third-parties.[140]
- A partnership is liable for the sexual harassment committed by one of the partners, if the harassment occurred in the regular course of business; it is not material that the other partners were not personally culpable in the matter.[141]

7.0.2 Vicarious Liability in Housing and Services

The principle of employer liability in sexual harassment enshrined in human rights law extends to housing and service providers and their agents, representatives or employees.

Example – Vicarious Liability in Housing

A young female tenant in an apartment building received a number of obscene late-night phone calls, which were traced by the police to the caretaker of the building. The tenant changed the locks on her doors, and informed the owners of the property; she requested payment for the locks, and asked that the caretaker be dismissed. Even though the owners acted quickly and removed the caretaker from his position, the Board of Inquiry found them liable for the conduct of their employee.[142]

Example – Vicarious Liability in Housing

A campground resident was harassed by the site manager, who uttered a couple of sexually degrading comments about her. The Tribunal held that the campground owners were liable for the sexual misconduct, for they had an obligation to ensure that tenants were free from sexual harassment by their employees: “In the workplace context, employers are generally required to promptly and seriously deal with a harassment complaint, have a complaint mechanism in place and communicate its actions to the complainant. […] This duty also applies in the housing context”.[143]

Example – Vicarious Liability in Services

The complainant suffered verbal and physical gender-based harassment at the hands of his peers during three years of high school. Although not a homosexual, he was perceived as one, and was physically bullied and barraged with homophobic slurs and invectives ("homo", "queer", "faggot", etc.). The Tribunal acknowledged that there were differences between sexual harassment in employment and in school settings, because

school boards had to deal with a large body of students and provide equal opportunities to all. However, in the present case, the school board, despite acting diligently to address the concerns of the complainant, failed to remedy the underlying issues, and was thus liable for the discriminatory conduct.[144]

7.0.3 Specific Duties of Employers, Housing, and Service Providers

Employers, housing, and service providers have specific duties to prevent sexual harassment and address sexual harassment complaints in their respective contexts.[145]

The duties arise in three broad phases, which outline the obligations to prevent and redress sexual harassment:

1. Pre-complaint (e.g. having a sexual harassment policy in place);
2. Post-complaint (e.g. practicing due diligence in all modalities of complaint response and resolution); and
3. After complaint resolution (e.g. ensuring reintegration of the employee in the workplace).[146]

Employers, housing, and service providers are required to:

- Ensure a workplace, housing or service environment that is free from discrimination and sexual harassment;[147]
- Have an effective anti-sexual harassment policy, with clearly outlined duties and responsibilities, and a transparent complaint mechanism process;[148]
- Educate and raise awareness of supervisors, employers, and employees on the anti-sexual harassment policy, including duties and rights, and procedures for dealing with complaints;[149]
- Take immediate steps to investigate and remedy allegations of sexual harassment, when notified of an incident;[150]
- Ensure that the complaints are resolved in a timely manner, and with sensitivity, confidentiality, and respect toward the parties involved;[151]
- Deal with the complaint with seriousness and responsibility,[152] and provide the complainant with requisite resources relevant to the complaint process;
- Communicate the process and progress of the investigation to the complainant in an effective and unambiguous manner;[153]
- Ensure a healthy, discrimination-free environment when the complainant returns to work,[154] or to the housing or service premises.

8.0 For More Information

For further information about the *Act* or this guideline, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at http://www.gnb.ca/hrc-cdp or email us at hrc.cdp@gnb.ca

New Brunswick Human Rights Commission
P.O. Box 6000
Fredericton, NB E3B 5H1
Fax 453-2653

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Endnotes

[1] New Brunswick *Human Rights Act*, R.S.N.B. 1973, ss. 10(1)-10(5).
[2] New Brunswick *Human Rights Act*, R.S.N.B. 1973, s. 10(6). For the scope of employer liability, see the latter sections of this document.
[3] *Bell v The Flaming Steer Steakhouse* (1980), 1 CHRR D/155 (Ont. Bd. Inq.) [*Bell*]: Canada's first sexual harassment decision dealt with the harassment of female employees, but it noted that "these principles equally applied to the harassment of a male employee by a female in authority as well as homosexual exploitation" (at D/156).
[4] Despite major strides in sexual harassment law in recent years, sexual harassment of women continues to be endemic in workplaces, and in other contexts. According to a 2014 poll, 43 percent of women reported being sexually harassed in the workplace. "Canadian Public Opinion Poll on Sexual Harassment". The Angus Reid Institute: http://angusreid.org/wp-content/uploads/2014/12/2014.12.05-Sexual-Harassment-at-work.pdf. In *Janzen v Platy Enterprises Limited*, [1989] 1 SCR 1252, 10 CHRR D/6205 [*Janzen*], the Supreme Court of Canada noted: "Perpetrators of sexual harassment and victims of the conduct may be either male or female. However, in the present sex-stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female" (44452).
[5] The first same-sex sexual harassment decision in Canada was rendered in *Romman v Sea-West Holdings Ltd.* (1984), 5 CHRR D/132.
[6] Sexism is a prejudicial attitude that deploys stereotypes about sex roles and gender identities to denigrate individuals, usually women, because of their sex; for example, it is a common sexist assumption that men are aggressive and dominant, and women should be timid and subservient. Sexism is widely prevalent in social discourse, popular culture, language conventions, and the media. Oxford Reference:
http://www.oxfordreference.com/search?source=%2F10.1093%2Facref%2F9780199532919.001.0001%2Facref-9780199532919&q=sexism
[7] Statistics Canada has recently published standards that spell out the distinction between sex and gender. While sex is "typically assigned at birth based on a person's reproductive system and other physical characteristics", gender refers to what a "person internally feels […] and/or publicly expresses in their daily life". Therefore, while sex relates to a person's biology, gender is a social construct; a person's gender identity may shift along the gender spectrum over time, and may be different from the sex he or she was assigned at birth. Statistics Canada, 2018:
http://www23.statcan.gc.ca/imdb/p3Var.pl?Function=DEC&Id=24101
[8] *Murchie v JB's Mongolian Grill (No. 2)*, 2006 HRTO 33 (CanLII): The kitchen supervisor at a restaurant was held to have sexually harassed the complainant, the restaurant assistant manager; the harassment involved one incident of physical touching. *Wamsley v Ed Green Blueprinting*, 2010 HRTO 1491 (CanLII): The sexual harassment incident in this printing office setting involved one incident of physical contact – a service technician smacked the complainant (an office employee) on the buttocks with a rolled-up blueprint. *Haykin v Roth*, 2009 HRTO 2017 (CanLII): A single vulgar remark made by a real estate agent to his client was ruled as sexual harassment in services. *Gregory v Parkbridge Lifestyle Communities Inc.*, 2011 HRTO 1535 (CanLII) [*Parkbridge*]: The complainant rented a trailer campground, and also worked for the trailer resort in various capacities. At a party among neighbors and friends, the manager of the campground commented on the complainant's breasts and asked about her sex life. The Tribunal observed: "In appropriate circumstances, a single incident, if serious, will meet the definition of harassment. Repeated conduct is not essential to a finding that the *Code* has been violated. A sexually explicit remark that is clearly demeaning and attacks the dignity and self-respect of a woman based on her gender will violate the *Code*". *Habachi c Commission des droits de la personne*, [1999] R.J.Q. 2522 [*Habachi*]: Two students dropped out of a course after both experienced a single incident of sexual harassment by their professor. *Mitchell v Traveller Inn Ltd.*, (Ont. Bd. Inq. 1981) [*Mitchell*]: One inappropriate sexual overture, which culminated in the complainant's dismissal from employment, was deemed sexual harassment. *Coutroubis v Sklavos Printing* (1981) [*Coutroubis*]: Two complainants, each

of whom was harassed once by the same employer, lost their jobs in the aftermath of these incidents; both were held to have suffered sexual harassment in the workplace.

[9] *Dhanjal v Air Canada* (1996), 28 CHRR D/367 (CHRT).

[10] *Sanford v Koop*, 2005 HRTO 53 (CanLII): The decision enumerated factors that tribunals consider while assessing appropriate damages in sexual harassment cases; the factors include: Humiliation experienced by the applicant; hurt feelings experienced by the applicant; loss of dignity; loss of self-esteem; loss of confidence; experience of victimization; vulnerability of the applicant; and, the seriousness, frequency, and duration of the offensive treatment. *ADGA Group Consultants Inc. v Lane*, 2008 CanLII 39605 (ON SCDC): Tribunals are reluctant to set the monetary compensation too low, for that trivializes the social importance of the *Code* and grants a "licence fee" to discriminate (par. 153). See also, *Vipond v Ben Wicks Pub and Bistro,* 2013 HRTO 695 (CanLII): "The low end of the monetary spectrum involves circumstances of a few incidents, less serious incidents, and/or incidents that did not include physical touching. Conversely, the high end of the monetary spectrum includes multiple incidences, incidences of a serious nature and physical assault and/or reprisal or loss of employment" (par. 55). An early case, *Torres and Royalty Kitchenware Limited and Guercio* (1982), enumerated seven factors to determine damages in sexual harassment cases: 1. The nature of the sexual harassment (verbal or physical); 2. The degree of aggressiveness and physical contact; 3. The ongoing nature (duration) of the harassment; 4. The frequency of the harassment; 5. The age of the victim; 6. The vulnerability of the victim; and, 7. The psychological impact on the victim.

[11] New Brunswick *Human Rights Act*, R.S.N.B. 1973, s. 10(1).

[12] "Policy on Preventing Sexual and Gender-based Harassment". Ontario Human Rights Commission, 2013. http://www.ohrc.on.ca/sites/default/files/policy%20on%20preventing%20sexual%20and%20gender-based%20harassment_2013_accessible_1.pdf

[13] *Streeter v HR Technologies*, 2009 HRTO 841 (CanLII) [*Streetcar*]: "The term 'vexatious' clearly imports a subjective element into the definition of harassment. The comment or conduct must be annoying, distressing or agitating to the person complaining" (par. 33). See also: *Miller v Sam's Pizza* (1995), 23 CHRR D/433 (NS Bd. Inq.) [*Miller*].

[14] Walter Tarnopolsky and William Pentney. *Discrimination and the Law*. Toronto: Thomson and Carswell, 2004 [*Tarnopolsky*].

[15] *Janzen*, *supra* note 4: The case involved two waitresses who worked at the respondent's restaurant, and were sexually harassed by the restaurant's cook. One of them left the employment as a result of the harassment, while the other was terminated. The manager/owner did not engage in sexual harassment, but failed to take action when the complaints of sexual misconduct were brought to his notice.

[16] *Ibid*.

[17] *Ibid.* The Court added: "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".

[18] *Robichaud v Canada (Treasury Board),* [1987] 2 SCR 84, 1987 CanLII 73 [*Robichaud*]. For a discussion of the case, see section 7.

[19] *Smith v Menzies Chrysler*, 2009 HRTO 1936 (CanLII) [*Chrysler*]. For the dynamics of power in sexual harassment, see section 3.

[20] Sexual harassment can leave victims with long-term psychological harm; tribunals consider these psychological consequences when computing general damages or ordering remedial measures.

[21] A recent case reiterates this principle: "In order to establish a case of harassment based on one or more *Code* grounds, the onus is on the applicant to prove that (1) the personal respondent was her employer, her employer's agent, or another employee; (2) the personal respondent engaged in a course of vexatious comments or conduct towards her that was known or ought reasonably to have been known to be unwelcome; (3) the personal respondent harassed her in the workplace; and (4) the personal respondent harassed her because of her sex". *Bento v Manito's Rotisserie & Sandwich*, 2018 HRTO 203 (CanLII) [*Bento*].

[22] "Preventing Sexual Harassment". *A Glossary of Terms*. University of New Mexico. https://hr.unm.edu/docs/eod/preventing-sexual-harassment-glossary-of-terms.pdf

[23] Reva B. Siegel. “A Short History of Sexual Harassment”. *Directions in Sexual Harassment Law*. Eds. Catharine MacKinnon and Reva B. Siegel. New Haven: Yale University Press, 2004 [*Siegel*].

[24] Winston Langley. *Encyclopedia of Human Rights Issues Since 1945*. Westport: Greenwood, 1999 [*Langley*]. According to Lin Farley, one of America’s pioneering anti-sexual harassment activists, sexual harassment needs to be understood in the “micropolitics of the patriarchy”. Farley defines sexual harassment as ‘‘unsolicited nonreciprocal male behavior that asserts a woman’s sex role over her function as a worker.’’ Lin Farley. *Sexual Shakedown: The Sexual Harassment of Women on the Job*. New York: Warner Books, 1980 [*Farley*].

[25] Constance Backhouse, who authored the first Canadian book on sexual harassment with Leah Cohen (*The Secret Oppression: Sexual Harassment of Working Women*. Toronto: Macmillian, 1978), describes the historical lineaments of sexual harassment: “Sexualized economic exploitation had a history that spanned centuries, but its victims considered the practice so shameful that it had remained a problem without a name. It was conducted in private […], trivialized as […] simply a ‘personal’ matter […] and hidden from political, social, legal arenas. It was also dismissed as ‘universal’, or ‘natural’, or even ‘biological’, [preventing] any possibility of change”. Constance Backhouse. “Sexual Harassment: A Feminist Phase That Transformed the Workplace”. *14 Arguments in Favour of Human Rights Institutions.* Eds. Shelagh Day, Lucie Lamarche, and Ken Norman. Irwin Law: Toronto, 2014 [*Backhouse*].

[26] Lin Farley, testifying before these hearings, articulated one of the first definitions of sexual harassment: "Unwanted sexual advances against women employees by male supervisors, bosses, foremen or managers […] It often means that a woman is hired because she is pretty, regardless of her qualifications; that a woman's job security is eternally dependent on how well she pleases her boss, and he often thinks sexual companionship is part of the job description; and that women are fired because they have aged or they are too independent or they say 'no' to sexual byplay" (Quoted in Siegel, *supra* note 23).

[27] According to Tarnopolsky and Pentney (*supra* note 14), a total of 23 sexual harassment cases were brought before boards of inquiry between 1980 and 1984. The number of cases increased from the mid-1980s onwards, particularly after the landmark Supreme Court decision in *Janzen* (*supra* note 4). Some of the early sexual harassment cases include the following: *Coutroubis*, *supra* note 8, the first case to rule in favor of a sexual harassment complainant; *Mitchell v Traveller Inn Ltd.* (1981); *Cox v Jagbritte Inc.* (1981); *Torres v Royalty Kitchenware Ltd.* (1982)*; Hughes v Dollar Snack Bar* (1981)*; McPherson v Mary's Donuts* (1982)*; Aragona v Elegant Lamp Co. Ltd.* (1982); *Howard v Lemoignan; Graesser v Porto* (1982); *Pachouris v St. Vito Italian Food* (1983); *Robinson v The Company Farm Ltd.*(1984); *Olarte v Commodore Business Machines Ltd.* (1983); *Giouvanoudis v Golden Fleece Restaurant* (1983); *Watt v Regional Municipality of Niagara* (1984); and *Piazza v Airport Taxicab (Malton) Association* (1984). Source: Deborah Ann Campbell. “The Evolution of Sexual Harassment Case Law in Canada”. School of Policy Studies: Queen’s University, 1992.

[28] *Bell, supra* note 3, the first Canadian sexual harassment decision, held that sexual harassment constituted discrimination based on sex, which was prohibited under the Ontario *Human Rights Code*; the allegations in the case were not substantiated by evidence, but the decision was important for noting the wide spectrum of behaviours that constitute sexual harassment: “The forms of prohibited conduct that […] 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” (D/156).

[29] New Brunswick, Newfoundland, Nova Scotia, Ontario, Quebec, Manitoba, Yukon, and the Canadian Human Rights Commission have added specific sexual harassment and/or sexual solicitation provisions in their human rights codes. The human rights codes of Alberta, British Columbia, PEI, Northwest Territories, Nunavut, and Saskatchewan do not have specific sexual harassment sections; however, that does not impact sexual harassment complaints in those jurisdictions, because sexual harassment is dealt with as discrimination based on sex, as established by the Supreme Court in *Janzen* (*supra* note 4) – a binding precedent for all provincial jurisdictions.

[30] The Supreme Courted observed: “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" (*Janzen*, *supra* note 4). More recent cases that have discussed the conceptual frameworks of *quid pro quo* and poisoned work sexual harassment include, among others: *Hanes v M & M Ventures Inc*., 1998 CanLII 19191 (SK HRT); *Kang v Hill and another (No. 2)*, 2011 BCHRT 154 (CanLII); and, *Carewest (George Boyack Nursing Home) v Alberta Union of Provincial Employees*, 2016 CanLII 30015 (AB GAA).

[31] Catherine A. MacKinnon. *Sexual Harassment of Working Women: A Case of Sex Discrimination*. New Haven: Yale University Press, 1979 [*MacKinnon*]; "Sexual Harassment Claims of Abusive Work Environment Under Title VII". *Harvard Law Review* 97.6 (1984) 1449-1467. MacKinnon notes: In *quid pro quo* sexual harassment, "sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity" (32).

[32] *Hughes and White v Dollar Snack Bar* (1982), 3 CHRR D/1014 [*Hughes*]. *Bell* (*supra* note 3), the inaugural sexual harassment case in Canadian jurisprudence, also referenced *quid pro quo* harassment, even though it did not use the term itself: "If any feature of employment becomes reasonably dependent on reciprocating a social relationship proffered by a member of management, then the overture becomes a condition of employment and may be considered to be discriminatory".

[33] *Habachi*, *supra* note 8: "The consequence of rejecting a vexatious sexual advance may be refusal to hire, increase in workload, denial of promotion, or dismissal or forced resignation, among other things".

[34] *Commission des droits de la personne et des droits de la jeunesse v Caisse populaire Desjardins d'Amqui*, 2003 CanLII 48209 (QC TDP). Langley (*supra* note 24) lists the potential consequences victims of *quid pro quo* sexual harassment face when they rebuff the sexual advances: "Hostility, insults, job dismissals, job refusals, unfavorable references, demotion, non-promotions, transfers, ridicule, loss of status, and damaged self-esteem".

[35] Some early *quid pro quo* harassment cases include the following: *Coutroubis*, *supra* note 8: The respondent sexually harassed two of his employees, both of whom resisted the advances; as a result, one of the employees left the employment (constructive dismissal), while the other was fired. *Giouvanoudis v Golden Fleece Restaurant*, (1984) 5 CHRR D/197: The employer demanded sexual favors from a prospective employee; when she refused, her job offer was withdrawn. See also: *McPherson v Mary's Donuts* (1982), 3 CHRR D/91 and *Graesser v Porto* (1983), 4 CHRR D/1569.

[36] *Smith v The Rover's Rest*, 2013 HRTO 700 (CanLII) [*Rover's Rest*].

[37] *Bishop v Hardy* (1986), 8 CHRR D/3868 (Ont. Bd. Inq.).

[38] *Hill-LeClair v Booth (No. 3)*, 2009 HRTO 1629 (CanLII) [*Hill-LeClair*].

[39] *Mahmoodi v University of British Columbia and Dutton*, 1999 BCHRT 56 (CanLII) [*Mahmoodi*].

[40] Mackinnon (*supra* note 31) described hostile work environment in the following terms: "Less clear, and undoubtedly more pervasive, is the situation in which sexual harassment simply makes the work environment unbearable. Unwanted sexual advances [become] a daily part of a woman's work life […] but [she is] never promised or denied anything explicitly connected with her job". This type of sexual harassment arises when "sexual harassment is a persistent condition of work" (32).

[41] *Janzen*, *supra* note 4: **"**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" (44451).

[42] *George v 1735475 Ontario Limited*, 2017 HRTO 761 (CanLII) [*George*]. See also: *General Motors of Canada Ltd. v Johnson*, 2013 ONCA 502 (CanLII).

[43] *George*, *supra* note *42*: "There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created".

[44] Feminist legal activists contend that male bias ignores the experiences of women, so the "reasonable woman" (instead of man) criterion should be used in sexual harassment inquiries (Siegel, *supra* note 23).

[45] *Chrysler*, *supra* note 19**: "**Human rights jurisprudence has long accepted that the 'emotional and psychological circumstances in the workplace' that underlie the work atmosphere constitute part of the terms and conditions of employment […] If sexually charged comments and conduct contaminate the work environment, then such circumstances can constitute a discriminatory term or condition of employment". In an early sexual harassment case (*Dhillon v F.W. Woolworth Company Limited* (Ont. Bd. Inq., 1982)), the Board observed that workplace atmosphere is a "term or condition of employment", equally with the more visible terms or conditions like work hours or rate of pay. Similarly, the emotional

and psychological tenor of a workplace, which gets impaired by sexual harassment, is part of its employment terms or conditions.

[46] *George*, *supra* note 42.

[47] In *Chuvalo v Toronto Police Services Board*, 2010 HRTO 2037 (CanLII), the Tribunal stated that the poisoned work sexual harassment experienced by the claimant "stripped her of her dignity as a woman" (par. 193). *Bell, supra* note 3: Sexual harassment behaviour "may reasonably be perceived to create a negative psychological and emotional work environment" (155).

[48] *J.D. v The Ultimate Cut Unisex*, 2014 HRTO 956 (CanLII) [*J.D.*]: An employee in a hair saloon looked at pictures of women in fashion magazines and commented about their bodies and sexual attractiveness; the comments were deemed sexually offensive. *Hooper v Dante's Dance Club Inc.*, 2006 CanLII 63630 (NB LEB) [*Hooper*]: The Board acknowledged that a wide range of comments and gestures may be construed as sexual, even if not made directly to the complainant. *Miller*, *supra* note 13: "Sexual harassment is a broad concept encompassing a wide range of comments and conduct that do not necessarily have to be specifically directed at the complainant (par. 122). *Nova Scotia Construction Safety v Nova Scotia Human Rights Commission*, 2006 NSCA 63 (CanLII) [*Nova Scotia*]: Generalized sexually demeaning behaviour leads to the "sexualization of the workplace" and poisons the work environment. Images, graffiti or cartoons representing women in degrading ways displayed in a work, housing or service environment would comprise this manner of indirect sexual harassment.

[49] *J.D*., *supra* note 48: The respondent made inappropriate sexual jokes and asked questions about the complainant's personal and sex life; the complainant tried to diffuse the awkwardness of these situations by short, evasive answers or by changing the subject. *Harriott v National Money Mart*, 2010 HRTO 353 (CanLII) [*Harriott*]: "An employer bears an obligation to ensure a harassment-free workplace exists, regardless of whether employees tolerate it" (par. 106).

[50] *S.S. v Taylor,* 2012 HRTO 1839 (CanLII) [*Taylor*]: The respondent left vulgar text and voice messages for the complainant; the Tribunal rejected the argument that these were "recycled" messages that were also sent to other members of staff. *Chrysler*, *supra* note 19: A male employee was subjected to a vexatious and sexually charged environment in a male-centric workplace. The Tribunal disagreed that men were expected to tolerate a locker-room environment in such workplaces; the sexual misconduct was in violation of the *Code*-protected rights of "mutual respect, inherent dignity and worth of every person". See also: *Hughes*, *supra* note 32.

[51] *Harrison v Nixon Safety Consulting and others (No. 3)*, 2008 BCHRT 462 (CanLII) [*Harrison*].

[52] *Bento*, *supra* note 21.

[53] *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCJ 62 (CanLII).

[54] *Dietrich v Dhaliwal*, 2003 BCHRT 6 (CanLII).

[55] *Friedmann v MacGarvie,* 2012 BCCA 445 (CanLII).

[56] *Schuller v Parlee (No. 2)*, 2014 HRTO 1524 (CanLII).

[57] *Mahmoodi*, *supra* note 39.

[58] MacKinnon (*supra* note 32) makes this observation in her monograph: "Sexual harassment is not primarily about sexual attractiveness, but about economic power and gender inequality" (40). *Wagner v Bishop*, 2010 HRTO 2546 (CanLII): "It is not necessary to show sexual attraction in order to establish 'harassment because of sex'" (par. 25).

[59] *Janzen*, *supra* note 4.

[60] *Shaw v Levac Supply Ltd.* (1990), 14 CHRR D/36 (Ont. Bd. Inq) [*Levac*].

[61] *Mahmoodi*, *supra* note 39.

[62] Tribunals have consistently stated that a manager-employee or boss-subordinate relationship is defined by a power imbalance, which causes many employees to keep quiet or not overtly resist sexually unwelcome conduct. *Streetcar*, *supra* note 13: The Tribunal noted that because of the power imbalance in the supervisor/employee relationship and "the perceived consequences of objecting to a supervisor's behaviour, an employee may go along with the unwelcome conduct" (par. 35). In this case, the supervisor had power to influence the complainant's job with the company.

[63] *Mahmoodi*, *supra* note 39.

[64] *Levac*, *supra* note 62.

[65] *Parkbridge*, supra note 8.

[66] *Kertesz v Bellair Property Management*, 2007 HRTO 38 (CanLII).

[67] *Dupuis v British Columbia (Ministry of Forests) 1993*, 20 CHRR D/87 [*Dupuis*].
[68] *Reed v Cattolica Investments Ltd.,* (1996), 30 CHRR D/331 (Ont. Bd. Inq.).
[69] *Norberg v Wynrib* (1992), 2 SCR 226, 1992 CanLII 65 (SCC): Although the case relates to sexual assault and the tort of battery, it offers insights on the boundaries of consent in coercive sexual relations between parties of unequal power.
[70] In *Canada (Human Rights Commission) v Canada (Armed Forces) and Franke* (1994), 34 CHRR D/140, the Tribunal observed: "If the evidence shows that the complainant welcomed the conduct, the complaint will fail" (D/143). Aggarwal and Gupta, in their acclaimed treatise on sexual harassment in Canada, state: "Sexual harassment becomes unlawful only when it is unwelcome" (63). Arjun P. Aggarwal and Madhu M. Gupta. *Sexual Harassment in the Workplace*. 3rd. Ed. Toronto: Butterworths, 2000.
[71] *Dupuis*, *supra* note 69.
[72] *MacBain v Canada (Human Rights Commission*) *(No. 2)* (1984), 5 CHRR D/2285 (CHRT): A complainant only needs to establish that the comments or conduct were known to be unwelcome or ought to have been known to be unwelcome; the complainant is not required to reject the comments or conduct explicitly.
[73] For variations on the meaning of "reasonable person", see footnote 44.
[74] *Miller*, *supra* note 13: "The signals of unwelcome conduct vary from individual to individual and may vary in strength depending on the incident, the comment or the behaviour. A sexual advance may incite a strong refusal and outrage or may be met by stony silence and evasion" (D/447). The "reasonable person" criteria was also noted in *Nova Scotia*, *supra* note 48: "Properly framed, the question that ought to be asked by the tribunal is how a 'reasonable person', rather than the actual respondent, placed in such an environment under similar circumstances, would have reacted".
[75] In *Mahmoodi*, *supra* note 39, the Tribunal noted that subtle indications of displeasure are enough to convey unwelcomeness: "A complainant is not required to expressly object to the conduct unless the respondent would reasonably have no reason to suspect that it was unwelcome" (par. 140). *Zarankin v Johnstone* (1984), 5 CHRR D/2274 (B.C. Bd. Inq.) [*Zarankin*]: The Board held that overt protest would not be required where a "reasonable person" would know that the conduct was unwelcome and the complainant did nothing to invite or encourage the actions.
[76] *Garron v Vanton* (1992), 18 CHRR D/148.
[77] *Bouvier v Metro Express* (1992), 17 CHRR D/313.
[78] *Rover's Rest*, *supra* note 36.
[79] *Zarankin supra* note 75: The complainant was subjected to frequent coarse remarks, pats on the buttocks, and hands around the shoulders, but she tried to deflect these overtures politely because she was afraid of losing her job. When her harasser invited her into a back room, she pretended to laugh it off as a joke.
[80] *R. v Ewanchuk*, [1999] 1 SCR 330, 1999 CanLII 711 (SCC): While the case involved sexual assault (not harassment), the Supreme Court of Canada held that sexual contact must be accompanied by express, contemporaneous (or ongoing) consent. The Court rejected the idea that sexual consent could be implied: "The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law" (par. 31).
[81] *Taylor*, *supra* note 51.
[82] *Swan v Canadian Armed Forces*, 1994 CanLII 10252 (CHRT).
[83] *Crozier c Alsselstine* (1994) 22 CHRR D/244: A lesbian woman was subjected to sexual solicitation in exchange for promises of advancement in employment. Her gender identity and expression were seen as intersectional factors that contributed to her vulnerability as a sexual harassment victim.
[84] Backhouse, *supra* note 25: "Women with disabilities reported that stereotypes about mental and physical disabilities were interlaced with coercive sexual overtures" (229).
[85] *Olarte c De Filippis and Commodore Business Machines Ltd*., (1983), 4 CHRR D/1705: This early sexual harassment case involved the sexual harassment of immigrant women workers by their employers; the women were doubly jeopardized by grounds of sex and national origin.

[86] Historically, stereotypes about the sexuality of women of "other" races have been widely circulated; clichés about the eroticized oriental female, for example, were familiar tropes of colonial discourse. See: Edward Said. *Orientalism*. New York: Vintage Books, 1978.
[87] *S.H. v M […] Painting*, 2009 HRTO 595 (CanLII) [*Painting*].
[88] *O.P.T. v Presteve Foods Ltd*., 2015 HRTO 675 (CanLII). See also: *PN v FR and another (No. 2)*, 2015 BCHRT 60 (CanLII).
[89] *Painting*, *supra* note 89.
[90] *Baylis-Flannery v DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28 (CanLII).
[91] *A.B. v Joe Singer Shoes Limited*, 2018 HRTO 107 (CanLII).
[92] *Hill-LeClair*, *supra* note 38.
[93] *Miller*, *supra* note 13*,* provides a comprehensive catalog of sexual harassment conduct: "Sexual harassment has been described as including verbal abuse or threats; sexually oriented jokes, remarks, innuendoes, or taunting; derogatory or patronizing name calling; comments of a sexual nature about weight, body shape, size or figure; rough and vulgar humour or language; display of pornographic material; practical jokes which cause awkwardness or embarrassment; leering, ogling or other gestures with suggestive overtones; lewd gestures; unwelcome invitations or requests; unnecessary and inappropriate physical contact such as patting, pinching, stroking or suggestively brushing up against someone else's body; as well as sexual touching or physical assault" (par. 122).
[94] *Harrison*, supra note 53: The complainant worked as a safety officer at a safety consulting company, where the project manager continually propositioned her for sex, at one time offering her free tires (which she needed for her car) in exchange for sexual intimacy.
[95] *M.K. v [...] Ontario*, 2011 HRTO 705 (CanLII): The complainant worked as a server at a diner owned by the respondent, who subjected her to unwelcome sexual attention, writing letters soliciting sex, touching her in a sexual way, pressing his body against her, exposing himself indecently, and so on. *Soroka v Dave's Custom Metal Works and others*, 2010 BCHRT 239 (CanLII): The 21-year-old complainant received a series of sexually suggestive texts from her supervisor, which culminated, after she complained to the owner/manager, in her being laid off.
[96] *Mitchell*, *supra* note 8: The Board ruled that the conduct in the case constituted sexual harassment because requests for sexual favors need not be explicit to be a violation of the *Code*; one of the requests was implicit, and the other was "nearly explicit in its sexual connotation".
[97] *Kwan v Marzara and another (No. 3)*, 2009 BCHRT 418 (CanLII): The Tribunal noted that the age disparity between the parties, and the respondent's position of power, made the complainant more vulnerable and the harassment more egregious.
[98] *Horner v Peelle Company Ltd*., 2014 HRTO 1211 (CanLII). In *Broadfield v DeHavilland-Boeing of Canada Ltd*. (1993), 19 CHRR D/347, the Tribunal elaborated on the phenomenon of enforced socialization: Persistent requests for dates by managers or others in a position to confer or deny employment related benefits is "enforced socialization" – victims develop a sense that refusal to comply with the requests would produce adverse employment consequences.
[99] *Jensen v Ulanowicz*, 2012 HRTO 559 (CanLII): The complainant rented commercial space from the respondent to set up a gym business; she also borrowed money from him to purchase the gym equipment. The respondent, 40 years her senior, touched the complainant inappropriately once, hugged her in an intimate way, and made two inappropriate comments. The Tribunal found that the respondent was leasing a facility, and sexually harassed the complainant in his capacity as landlord of that facility.
[100] *Birchall v Andres*, 2013 HRTO 1469 (CanLII): The case involved a series of unwanted hugs and kisses inflicted on the complainant, in addition to other sexual indecencies.
[101] *Arias v Desai*, 2003 HRTO 1 (CanLII).
[102] *Ratzlaff v Marpaul Construction and another*, 2010 BCHRT 13 (CanLII).
[103] *Vanderwell Contractors (1971) Ltd. v Chartrand*, 2001 ABQB 512 (CanLII): Even if subordinate employees appear to consent to workplace sexual banter, the power imbalance of the parties makes such consent irrelevant.
[104] *C.U. v Blencowe*, 2013 HRTO 1667 (CanLII) [*Blencowe*].
[105] *Davison v Nova Scotia Construction Safety Association*, 2005 NSHRC 4 (CanLII) [*Davison*].
[106] In theoretical terms, leering is analogous to the male gaze, which dehumanizes and objectifies women and women's bodies.

[107] *Harriott, supra* note 49.
[108] *Haight v W.W.G. Management Inc. (1989)*, 11 CHRR D/125 (BC HRC): The respondent addressed his subordinate female colleague with epithets like "slut" and "douche bag". *Nicholson v Gordon Fish Automotive Ltd. (1993)*: The manager used expletives like "bimbo" and "bitch" to refer to the complainant.
[109] *Chard v Newton*, 2007 HRTO 36 (CanLII): The complainant worked as a office assistant at a real estate office; the sales representative made sexually inappropriate jokes and comments, referenced women in derogatory terms. In *Levac*, *supra* note 62, the complainant commented that women, instead of working, should be at home looking after their children.
[110] *Watt v Regional Municipality of Niagara* (1984), 5 CHRR D/2453: The decision established criteria to assess when insulting jokes or comments become a term or condition of employment. See also: *Chu v Persichilli* (1988).
[111] *Chrysler*, *supra* note 19: The complainant's coworker vexed him by showing him a cellphone video of himself engaged in a sexually intimate encounter with a woman.
[112] *Lu v Markham Marble*, 2012 HRTO 65 (CanLII): Besides other sexual advances, on one occasion the respondent unzipped his pants and stood astride the complainant's desk.
[113] *Levac*, *supra* note 62.
[114] *Chrysler*, *supra* note 19.
[115] *Colvin v Gillies*, 2004 HRTO 3 (CanLII).
[116] *deSousa v Gauthier (2002)*, 43 CHRR D/128 (Ont. Bd. Inq.) : The complainant was the only woman worker in a car repair shop; lewd cartoons, pornographic materials, and sexual paraphernalia were constantly displayed in the shop, and in the washroom that she was required to clean.
[117] *Pond v Canada Post Corporation* (1994), CHRR Doc. 94-152 (CHRT).
[118] *Davison*, *supra* note 107.
[119] *Chrysler*, *supra* note 19. See also, *Harrison*, *supra* note 53, where the male respondent invited his female coworker to watch porn with her, besides engaging in other unbecoming conduct.
[120] *Streeter v HR Technologies*, 2009 HRTO 841 (CanLII): "Vexatious" conduct or comment refers to actions or words that are annoying, distressing or agitating to the person experiencing them; for example, conduct has been found to be vexatious where the person complaining finds the comments or conduct worrisome, discomfiting and demeaning (par. 33). *Hornsby v Paul's Restaurant Ltd*. (1994), 24 CHRR D/516 (BC HRC): The Tribunal noted that even if the respondent's comments were asexual, they still amounted to sexual harassment.
[121] *Davison*, *supra* note 107: At an office party, the company manager made lewd and demeaning comments about women's breast sizes. See also: *Fornwald v Astrographic Industries Ltd. (1996)*, 27 CHRR D/317 (BC HRC).
[122] *Painting*, *supra* note 89.
[123] *Levac*, supra note 62: The respondent made sexually derogatory comments about the complainant, disparaging her physical appearance and body type and suggesting that she was sexually unattractive. The Board held that to "to express sexual unattractiveness is to make a comment of a sexual nature" (D/55).
[124] *McIntosh v Metro Aluminum Products and another*, 2011 BCHRT 34 (CanLII).
[125] *Behm v 6-4-1 Holdings and others*, 2008 BCHRT 286 (CanLII).
[126] *Ewart v Kilburn*, (2007) CHRR Doc. 07-744 (NB Bd. Inq.).
[127] *Rover's Rest*, *supra* note 36.
[128] *Harriott*, *supra* note 49.
[129] *Farris v Staubach Ontario Inc*., 2012 HRTO 1826 (CanLII): The complainant faced a poisoned work environment from disparaging comments by coworkers, and the spreading of sexual rumors about her.
[130] *Hooper*, *supra* note 48.
[131] *Susan Ballantyne v Molly 'N Me Tavern* (1983), 4 CHRR D/1191 (Ont. Bd. Inq.); *Allan v Riverside Lodge* (1985), 6 CHRR D/2978 (Ont. Bd. Inq.).
[132] *Bell*, *supra* note 3: "The law is clear that companies are liable where members of management, no matter what their rank, engage in other forms of discriminatory activity […] The same general principle that imposes liability in those cases ought to apply where members of management team discriminate because of sex" (D/156).

[133] *Robichaud*, *supra* note 18 – the facts of the case were as follows: The complainant, lead hand for a team of cleaners in a federal department, was sexually harassed by the department foreman on several occasions, including verbal comments of a sexual nature, numerous physical encounters, and attempted sexual assault. The complainant was still under probation when the incidents took place; she told the foreman that his advances were unwelcome but did not complain for fear of losing her job, as the foreman was responsible for signing off on her satisfactory progress during the probationary period

[134] *Ibid.*: The Supreme Court noted that employer liability in human rights is neither "criminal or quasi-criminal liability" nor strictly the "tort-bound concept of vicarious liability", but a statutory liability (D/4333).

[135] In *Janzen* (*supra* note 4), the Supreme Court of Canada had deliberated on the meaning of the term, "in the course of employment": "The issue […] to determine is not whether the harassment occurred within the physical confines of the workplace, but whether it had work-related consequences for the applicant". Expanding on this notion in a subsequent case (*Simpson v Consumers' Assn. of Canada*, 2001 CanLII 23994 (ON CA)), the Ontario Court of Appeal suggested that conduct doesn't have to take place within business hours or in the physical confines of a workplace to constitute sexual harassment: "The term 'in the course of employment' does not require that the impugned actions of an employee fall within the four squares of a job description, but means only that these actions are in some way related or associated with the employment within a purposive interpretation of human rights legislation" (par. 72).

[136] *Ibid*. The Supreme Court of Canada quoted the US Supreme Court on employer liability: "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" (par. 17).

[137] *Moffatt v Kinark Child and Family Services*, 2000 CanLII 20862 (ON HRT) [*Moffatt*]: "It would make the protection […] to a discrimination-free work environment a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it" (par. 234).

[138] *Robichaud*, *supra* note 18: "For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps" (D/4334).

[139] *Ferguson v Muench Works Ltd.* (1997) 33 CHRR D/87 (BCCHR).

[140] *Nixon v Greenside* (1992), 20 CHRR D/469 (Sask. Q. B.): The manager of a neighbouring restaurant visited the respondent's bar and sexually harassed the complainant and other waitresses. The Board held that the employer was liable for the acts of the harasser, for it had breached its responsibility to ensure a harassment-free work environment for the employees.

[141] *Painting*, *supra* note 89. See also: *Szabo v Poley*, 2007 HRTO 37 (CanLII) and *McDonic Estate v Hetherington*, 1997 CanLII 1019 (ON CA).

[142] *Veitenheimer v Orange Properties Ltd*. (1992), 20 CHRR D/462 (Sask. Bd. Inq.).

[143] *Parkbridge*, *supra* note 8: "Persons in positions of power within organizations providing accommodation, such as landlords, have a duty, once aware of allegations of discrimination against their representatives, to ensure that credible allegations that their representatives have acted in a discriminatory manner are taken seriously". See also: *Wall v University of Waterloo* (1990), 27 CHRR D/44 (Ont. Bd. Inq.); *B.L. v Marineland of Canada Inc*., 2005 HRTO 30 (CanLII); and, *Bekele v Cierpich*, 2008 HRTO 7 (CanLII).

[144] *Jubran v Board of Trustees*, 2002 BCHRT 10 (CanLII).

[145] *Bennett v Hau's Family Restaurant*, 2007 NSHRC 1 (CanLII): The Tribunal reiterated employer responsibilities in sexual harassment situations: "Take the complaint and the complainant seriously; arrange private meetings to obtain details; speak with the parties to ascertain a full version of the facts; refrain from defending the harasser's actions prior to investigating the matter; interview others who were present at the time of the incidents in questions; state clearly to both parties that harassment is not tolerated in the workplace; report the steps that were taken to remedy the situation to the complainant".

[146] *Laskowska v Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII) [*Laskowska*] (pars. 59-60)

[147] *Smith v Ontario (Human Rights Commission)*, (2005), 52 CHRR D/89 (Ont. Div. Ct.): "Employers must make sure that their environments are free from this sort of behaviour, even if no one objects, and even if there is widespread participation in the behaviour". See also: *Naraine v Ford Motor Company*, 2006 HRTO 25 (CanLII).

Endnotes

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[148] See *C.K. v. H.S.*, 2014 HRTO 1652 (CanLII) for a reiteration of employer liability and duties, and the parameters of an effective employment anti-harassment policy.
[149] *Laskowska*, *supra* note 148.
[150] *Ghosh v Domglas Inc. (No.2)* (1992), 17 CHRR D/216 (Ont. Bd. Inq.): Employers who know that a poisoned work atmosphere exists, but continue to ignore it, discriminate against the concerned employees, even if they themselves are not directly involved in creating that atmosphere (par. 76). See also: *Moffatt*, *supra* note 139; *Dhillon v F.W. Woolworth Company* (1982), 3 CHRR D/743; *Olarte v DeFilippis and Commodore Business Machines Ltd.* (1982), 4 CHRR D/1705; and, *Persaud v Consumer's Distributing Ltd.* (1990), 14 CHRR D/23.
[151] "Developing a Workplace Anti-Harassment Policy". Canadian Human Rights Commission. https://www.chrc-ccdp.gc.ca/sites/default/files/template_anti-harassment_1.pdf. In *Bento*, *supra* note 50, the Tribunal found that the owner's failure to investigate the repeated complaints about the respondent's behavior created a poisoned work environment.
[152] *Karlenzig v Chris' Holdings Ltd*., 1991 CanLII 7916 (SK HRT).
[153] *Wall v University of Waterloo* (1995), 27 CHRR D/44 (Ont. Bd. Inq.).
[154] *C.K. v H.S.*, 2014 HRTO 1652 (CanLII): While the complainant did not return to work in this case, the Tribunal acknowledged the employer's actions in terminating the respondent and keeping the complainant's position open for a reasonable length of time.