DECISION RENDERED ON JUNE 30, 1982
T.D. 6/82

CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS TRIBUNAL

BETWEEN:
BONNIE ROBICHAUD, and
THE CANADIAN HUMAN RIGHTS COMMISSION,

Complainants,
AND:

The original complaint, dated January 26, 1980, was submitted by Mrs. Bonnie Robichaud. She was represented by counsel in all proceedings before me. The same counsel appeared on behalf of the Canadian Human Rights Commission, which, without objection, became a party to these proceedings.
Mr. Dennis Brennan was named in the complaint as the individual who sexually harassed Mrs. Robichaud. The employer was named in the complaint as "The Department of National Defence, North Bay, Ontario" and the allegations of harassment, discrimination and intimidation were made against that entity as well. Subsequently, it became apparent that, as a matter of law,

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Brennan's employer was Her Majesty the Queen in Right of Canada as represented by The Treasury Board, and with the agreement of all parties' counsel the appropriate changes in the style of cause were made. It is to be noted that Section 63(1) of the Act provides that the Act is binding on Her Majesty in Right of Canada.

My jurisdiction to hear and determine this matter was conceded by counsel for all parties. No objections were made regarding the processing of the complaint, the reference of the complaint to inquiry by a Human Rights Tribunal, or my appointment as the Tribunal. A pre-hearing conference was convened before me on March 17, 1981, in the presence of counsel for all parties, at which certain admissions of fact were made and procedural matters agreed upon. I understand that a pre-hearing conference had not been

resorted
to previously by Tribunals, and I can report that it was of value in the
present case. Hearings for the reception of evidence were held in North Bay,
Ontario, for five days in July, 1981, and four days in November, 1981,
producing almost sixteen hundred pages of typewritten transcript of testimony
and a large number of exhibits. The hearings were, with the agreement of
counsel for all parties, conducted in camera pursuant to Section 40(6) of the
Act, and all witnesses were excluded. The proceedings resumed for three days
in January, 1982 for the reception

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oral argument on behalf of the complainants and the respondent Mr.
Brennan. Written argument on behalf of the employer and written argument in
reply on behalf of the complainants was completed February 18, 1982. The
subsequent delay in preparation of the present Decision is my responsibility,
explained, in part, by the complexity of the case and mass of evidence and
argument requiring my consideration.

Section 7(b) of the Canadian Human Rights Act reads as follows:
7. It is a discriminatory practice, directly or indirectly,
...
(b) in the course of employment to differentiate adversely in
relation to an employee, on a prohibited ground of

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discrimination.
Section 3 of the Act designates "sex" as a prohibited ground for
discrimination. Section 41 of the Act establishes a Tribunal's powers, after
inquiry, to dismiss a complaint, or if the complaint is substantiated, to
make various types of orders. Clearly, the intent is that the Tribunal is to
determine whether or not a discriminatory practice, as alleged in the
complaint referred to it, has been established. Counsel for the complainants
conceded that the onus was on him to establish that the complaint was
substantiated. While the nature of this onus was subject to some dispute, I
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to

hold that the allegations contained in the complaint were not of a criminal or quasi-criminal nature and, accordingly, the onus resting on the complainants was to prove their case on a reasonable balance of probabilities. The serious consequences in terms of the reputations of Mrs. Robichaud and Mr. Brennan suggest great caution and care in weighing the evidence, but I am not prepared to impose on the complainants any higher onus of proof than the widely-accepted civil onus.

It is to be noted that the French version of Section 7(b) of the Act omits any reference to "in the course of employment." It is inconceivable that Section 7 intended to prohibit discrimination outside the workplace and this is confirmed by the marginal note "Emploi" beside the French version of Section 7. No dispute arose out of this glaring non-concordance of the English and French versions. Likewise, the translation of "differentiate adversely" as "défavoriser" gave rise to no dispute, and argument proceeded on the assumption that a basic issue of interpretation and application of Section 7 was whether or not sexual harassment in the course of employment was adverse differentiation on the ground of sex.

As it emerged through argument, the general nature of Mrs. Robichaud's complaint may be stated as follows. She alleges that in March, April and May, 1979,

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- 5 Mr. Brennan was involved with her in conversations, approaches and conduct, of a sexual nature, which she perceived as sexual harassment. Thereafter, actions were taken in relation to her employment which she alleges were motivated by her sex, female. In my opinion, this latter allegation amounts to an allegation that her terms and conditions of employment were changed, in a manner adverse to her, either because she complained of Mr. Brennan's alleged sexual harassment, or because she refused any further participation in sexual activity with Mr. Brennan, or because she was a woman.

Mrs. Robichaud's allegation of "intimidation" is less readily characterized. It may be that she is alleging that she was placed in a state of fear by Mr. Brennan's conduct. Or, it may be that she is alleging that the

environment of her place of work was, through the acts of Mr. Brennan and the

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employer, fearful to her. The approach taken by her counsel was to argue that an environment was created which discriminated against her adversely. But this, in turn, relies on the allegation that she had been sexually harassed. Intimidation thus becomes a consequence of the alleged sexual harassment, rather than being a separate and distinct ground of complaint, and I will so treat it.

A number of facts were admitted or were not contested. Mrs. Robichaud commenced her employment at

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- 6 Canadian Forces Base North Bay on October 3, 1977, as a cleaner. She has a Grade 12 education, is married, and when she testified in July, 1981, she was 36 years of age. She has five children. Mr. Brennan commenced his employment, as Foreman of the Cleaning Department, subsequent to Mrs. Robichaud becoming a cleaner. He has re-married after the dissolution of his first marriage. He was 49 years of age when he testified. In the autumn of 1978, Mrs. Robichaud applied for the position of lead hand cleaner. This position entails the normal duties of a cleaner as well as the supervision of other cleaners. Mrs. Robichaud was the only female applicant for the lead hand position, although there were other female cleaners. Mr. Brennan was a member of the appointment board that interviewed Mrs. Robichaud for the lead hand position. While it was suggested that there was some significance to Mr. Brennan sitting as a member of the appointment board, that significance was not made clear to me. However, in view of Mrs. Robichaud’s success in the competition for the position of lead hand, it must be inferred that she was viewed by Mr. Brennan, and by the employer, as qualified. In fact, she must have been viewed as being highly qualified, since she stood second in the ranking of candidates, the top candidate having that ranking only by reason of his seniority.

Mrs. Robichaud took up her duties as a lead hand,
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only female lead hand on the Base, on November 20, 1978. She was subject
to a six-month probation period which she successfully completed on May 20,
1979.

There are several lead hands in the Cleaning Department. They are supervised by two Area Foremen who, in turn, are supervised by the Foreman,
Mr. Brennan. Mr. Brennan is supervised by the Base Assistant Administrative
Officer and, ultimately, the Base Commanding Officer. Assignment of Mrs.
Robichaud's geographic workplace, duties, workload, and cleaners to supervise
was done mainly by the Area Foreman, subject to the supervision and, at times, the intervention, of Mr. Brennan.

In November, 1978, Mrs. Robichaud became a member of the executive of the local of her union, and as such, took a union course on the processing
of grievances. As well, her employer sent her on a French language training
course and two supervisory skills courses.

The Issues
Mrs. Robichaud alleges that she was sexually harassed,
discriminated against, and intimidated by Mr. Brennan. It is alleged on her
behalf that the employer is also liable for these wrongs against her, either
directly, or vicariously or "indirectly" in the terms of

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issue in the present case is, therefore, whether sexual harassment constitutes "adverse differentiation" on the ground of "sex."

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If one holds that sexual harassment does constitute adverse differentiation on the ground of sex, one is brought to the further issue of
mixed fact and law: what is the nature of the sexual harassment that is prohibited, and did it occur in the present case? As will be seen in further
portions of this Decision, the determination of this issue effectively determines the disposal that must be made of Mrs. Robichaud's complaint of
sexual harassment.

If one determines that what occurred between Mrs. Robichaud and Mr. Brennan was sexual harassment and that it was of a form prohibited by Section 7(b), then issues of the liability of the employer arise: did the employer directly, or indirectly, or vicariously harass Mrs. Robichaud, through condonation or otherwise? Is the employer as a matter of law liable for this?

Mrs. Robichaud alleges adverse differential treatment following her complaint of sexual harassment. Clearly, if that treatment were founded upon her gender and not her complaint it would fall within Section 7(b). If it were in retaliation for her resistance to sexual harassment by Mr. Brennan, it is arguable that it would equally fall within Section 7(b). Furthermore, if that treatment was in retaliation for Mrs. Robichaud complaining of her harassment, it is arguable that that would contravene either Section 7(b) or Section 45 of the Act. These issues

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have to be addressed, again in terms of the motivation for her alleged adverse differential treatment, if such is established as a finding of fact.

Finally, as I pointed out earlier, intimidation was alleged by Mrs. Robichaud. As I see it, this allegation amounts to saying that one of the consequences of the alleged sexual harassment was that Mrs. Robichaud was placed in a state of fear. The intimidation is linked to the alleged harassment and is not a separate ground of complaint. It therefore does not raise a distinct issue of law, though it is a matter of fact which may require consideration in the course of this Decision.

The Incidents of Alleged Sexual Harassment

As indicated earlier in this Decision, Mrs. Robichaud and Mr. Brennan are in direct conflict concerning whether or not various incidents of alleged sexual harassment did occur. For the purposes of this Decision, it is essential that I set out, in some detail, the allegations Mrs. Robichaud made in her testimony. These allegations indicate conduct between Mrs. Robichaud and Mr. Brennan of the most intimate sexual nature. It would serve little purpose, in terms of the relevance of this Decision to future human rights

complaints, to set out Mrs. Robichaud's testimony in detail in this Decision,

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is a document subject to public perusal. Accordingly, I proposed to counsel for the parties that my review of the evidence in this regard be set
out in a Supplementary Decision, to be made available only to counsel, and to
be shown by them to the parties they represent in their discretion. My impression of counsel is that this discretion will not be misused. Counsel
agreed with my proposal. Therefore, the details of the incidents of sexual
harassment alleged by Mrs. Robichaud and denied by Mr. Brennan are set out in
a separate Supplementary Decision, published to counsel for the parties only,
subject to the restrictions on further publication agreed upon by them and
me.

Unfortunately, my determination of credibility of Mrs. Robichaud rests considerably on my assessment of her testimony regarding the incidents
of alleged sexual harassment. It follows that some of what I must say about
credibility must also appear only in the aforementioned Supplementary Decision. However, for the purposes of those who may have occasion to refer
to this Decision in the future, I have set out below the general nature of
the detailed allegations Mrs. Robichaud made regarding the alleged incidents
of sexual harassment, and as well, my observations of what her testimony in
that regard provides me by way of assistance in assessing her credibility.

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While the Supplementary Decision is intended only for publication to counsel for the parties, and to the parties in the discretion of counsel,
it must be recognized that its further publication is subject to available
legal procedures.

I can summarize the Supplementary Decision in the following paragraphs. Mrs. Robichaud testified that from mid-March, to late May, 1979,
a number of encounters between her and Mr. Brennan occurred. These

encounters
included conversations of a sexual nature, a proposition of sexual intercourse by Mr. Brennan, masturbation of Mrs. Robichaud by Mr. Brennan,
fellatio, "fondling" of Mr. Brennan's penis by Mrs. Robichaud, and the initiation by Mr. Brennan of sexual intercourse with Mrs. Robichaud when he
was unable to achieve an erection. In her demeanour, Mrs. Robichaud gave the
impression of being a truthful person. Her testimony regarding these encounters was of such an intimate and embarassing nature, accompanied by a
feeling of humiliation that must have been created by giving the testimony,
that it could reasonably be expected only to be the truth. Her propensity to
tell the truth was confirmed by other evidence.

Mr. Brennan denied the occurrence of any of these sexual
encounters. His demeanour was that of a person who was not telling the truth.
In other aspects his testimony

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inconsistent or was contradicted. On the whole, I find that Mrs. Robichaud's testimony that these sexual encounters occurred is to be preferred to Mr. Brennan's denial. I find also that Mrs. Robichaud's testimony is sufficiently credible to satisfy the onus resting on the complainants to establish that the sexual encounters occurred.

The Legal Issues as to Sexual Harassment
It will be noted that in what I have just said about the testimony of Mrs. Robichaud and Mr. Brennan, I have carefully refrained from characterizing the incidents to which she testified and which I have found
did occur as "sexual harassment." This is because I think that I am obliged
to make a determination as to the nature of the sexual encounters that are
prohibited by the Canadian Human Rights Act. It will be recalled that Section
7(b) of the Act makes no express reference to sexual harassment. But, in the
light of the interpretations placed on similar terms in similar human rights
legislation in other jurisdictions, I am strongly persuaded that some sexual
encounters, which might be characterized as "sexual harassment," do fall
within Section 7(b).

The pertinent provision of the Ontario Human Rights Code 1 reads as follows:

1 R.S.O. 1980, c. 340; repealed and replaced by the Human Rights Code, 1981, S.O. 1981, c. 53, in force, June 15, 1982.

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4. (1) No person shall,
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(g) discriminate against any employee with regard to any term or condition of employment,

because of ... sex ... of such ... employee.

Unless some significance can be attached to the difference between "discriminate" in the Ontario Code and "differentiate adversely" in Section 7(b) of the federal Act (and I can see no such significance), I would treat the intent and meaning of the two provisions as the same. A valuable exposition of the Ontario Code's provision is set out in Bell and Korczak v. Ladas and The Flaming Steer Steak House Tavern Inc. (1980, Ontario Board of Inquiry, O.B. Shime, Q.C.) at pages 4 to 6:

Subject to the exception provided in Section 4(6), discrimination based on sex is prohibited by The Code. Thus, the paying of a female person less than a male person for the same job is prohibited, or dismissing an employee on the basis of sex is also prohibited. But what about sexual harassment? Clearly a person who is disadvantaged because of her sex is being discriminated against in her employment when employer conduct denies her financial rewards because of her sex, or exacts some form of sexual

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compliance to improve or maintain her existing benefits 1. The evil to be remedied

1 There is no intention to deal with the implications of bisexual conduct in the circumstances of this case. It is intended to deal with harassment of female employees by a male in authority and the principles equally apply to the harassment of a male employee by a female in authority as well as homosexual exploitation.

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is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work-place, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman. Where a woman's equal access is

denied or when terms and conditions differ when compared to male employees, the woman is being discriminated against. The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. There is no reason why the law, which reaches into the work-place so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative, psychological and mental effects where adverse and gender directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment.

The prohibition of such conduct is not without its dangers. One must be cautious that the law not inhibit normal social conduct between management and employees or normal discussion between management and employees. It is not abnormal, nor should it be prohibited, activity for a supervisor to become socially involved with an employee. An invitation to dinner is not an invitation to a complaint. The danger or the evil that is to be avoided is coerced or compelled social contact where the employee's refusal to participate may result in a loss of employment benefits. Such coercion or compulsion may be overt or subtle but if any feature

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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.

Again, The Code ought not to be seen or perceived as inhibiting free speech. If sex cannot be discussed between supervisor and employee neither can other values such as race, colour or creed,

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which are contained in The Code, be discussed. Thus, differences of opinion by an employee where sexual matters are discussed may not involve a violation of The Code; it is only when the language or words may be reasonably construed to form a condition of employment that The Code provides a remedy. Thus, the frequent and persistent taunting by a supervisor of an employee because of his or her colour is discriminatory activity under The Code and, similarly, the frequent and persistent taunting of an employee by a supervisor because of his or her sex is discriminatory activity under The Code.

However, persistent and frequent conduct is not a condition for an adverse finding under The Code because a single incident of an employee being denied equality of employment because of sex is also prohibited activity.

Except for the concluding paragraph of this excerpt relating to persistence,
which paragraph seems to lack a rationale and which seems to run contrary to
United States cases interpreting similar provisions, I find this excerpt to
be highly persuasive. With great respect, I would adopt its reasoning as my
own. It is a rationale which has been

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in a number of succeeding Ontario and New Brunswick cases, for example:

Cox and Cowell v. Jagbritte Inc. et al. (1981, Ontario Board of Inquiry, Cummings) (persistent and resisted grabbing, kissing, touching, propositioning, resulting in complainant's resignation; held, violation of Ontario Code consisting of sexual harassment);

Hughes and White v. Dollar Snack Bar and Jeckel (1981, Ontario Board of Inquiry, Kerr) ("unwelcome physical contact by the respondent with areas of [complainant's] body that are commonly associated with sexual advances," objected to by the complainant, causally connected with dismissal; held, sexual harassment);

Mitchell v. Traveller Inn (Sudbury) Limited (1981, Ontario Board of Inquiry, Kerr) (refused proposition resulting in denial of employment; held, sexual harassment);

Doherty and Meehan v. Lodger's International Ltd. (1981, N.B. Board of Inquiry, Goss) (complainants refused to wear uniforms only women required to wear; employment terminated; held, violation established, consisting of both refusal to continue to employ because of sex, and discrimination because of sex, adopting Bell and Korczak decision's wide interpretation of "sex").

In Coutroubis and Kekatos v. Sklavos (1981, Ontario Board of Inquiry, Ratushny) the complainants' resistance to one incident of hugging, grabbing and kissing was overcome by force by the respondent. There were other incidents of resisted non-forceful sexual approaches. The complainants, as a result, left their employment. It was

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that this was a case of prohibited discrimination and damages were ordered. This Decision preceded the Bell and Korczak Decision.

Finally, two "racial slur" cases can be cited, to demonstrate that the creation of a discriminatory work environment through repeated racial

insults constitute prohibited conduct under the Ontario Code, even in the absence of specific adverse employment consequences such as dismissal: Simms v. Ford Motor Co. of Canada (Ontario Truck Plant) (1972, Ontario Board of Inquiry, Krever); and, Singh v. Douglas Limited (1980, Ontario Board of Inquiry, Kerr). By extension of these Decisions, it can be argued that, to establish sexual harassment all that needs to be proven is persistent sexual approaches, creating a negative work environment, without actual employment consequences.

A number of cases determined by courts and tribunals in the United States, interpreting and applying provisions similar to those in question in the present case, take the same approach as that taken by Mr. Shime in the Bell and Korczak Decision: discrimination (or "adverse differentiation," by implication) on the ground of sex is a concept broad enough to encompass what would generally be called "sexual harassment." A selection of

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pertinent American authorities are ably canvassed in the Cox and Cowell Decision (cited above) and I can do no better than to include in full a photocopy of pages 5 to 16 of that Decision, as Appendix "A" to this Decision. There are a number of other United States cases which could be cited, but I think that the Appendix "A" excerpt from the Cox and Cowell Decision is sufficient material from which to deduce some helpful insights for the purposes of the present Decision.

For the purposes of the determination of the present case, it is essential to recognize the nature of the conduct dealt with in the Bell and Korczak case and all the other cases referred to above. In the Bell and Korczak case, the alleged sexual harassment consisted of comments by the employer which the complainants took to be sexual propositions and, in the case of Mrs. Korczak, the employer’s unsolicited and unwelcome slapping her "rear end." The complaints were dismissed because, on a balance of probabilities, it had not been established that these sexual encounters were connected with the subsequent terminations of the complainants. In each of the other cases, one finds one or more of the following: rejected

sexual
propositions, actually followed by adverse consequences in terms of employment such as discharge;

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sexual propositions accompanied by express or implied threats or promises
establishing a condition of employment; unsolicited and undesired physical
contact of a sexual nature such as hugging, kissing, touching, etc.; or,
unwelcome conversations of a sexual nature creating a negative work
environment. In not one case is there an alleged or proven course of conduct
between employer or superior, and employee, of the sort described in the
present case by Mrs. Robichaud.

The present case is distinguishable in a number of respects. First, on a number of occasions, Mrs. Robichaud indicated to Mr. Brennan that his
sexual advances were unwelcome. One occasion was in March, and at least two
were in April, 1979. In each case, the rejection or protest was followed by
sexual encounters in which it must be assumed she participated voluntarily.
One must suspect the sincerity of her protests, or at least infer that Mr.
Brennan could perceive her protests as being insincere. Each time he made a
sexual approach, he only risked receiving another, and final, rejection. The
protest of May 25, 1979, appears to have been, in large part, effective. Mr.
Brennan did engage in conversation of a sexual nature, thereafter, on June
18, but, that conversation seems only to have involved Mr. Brennan's inquiring about Mrs. Robichaud's personal and sex life.

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rejection of these enquiries seems to have been accepted by Mr. Brennan on that occasion as final, since no further sexual encounters occurred. I can
only conclude that Mrs. Robichaud's rejection and protests were inconsistent
with her conduct, except for the protest on May 25, 1979, and were not apt to
put Mr. Brennan on notice that his conduct was perceived by Mrs.

Robichaud as
harassment.

Secondly, the conduct of Mr. Brennan alleged by Mrs. Robichaud, and found by me to have occurred, was of such a nature that I can only surmise, objectively, from her evidence, that it was not unwelcome. Being masturbated, performing fellatio, "fondling" another's penis, and awaiting the return of someone who has failed to achieve an erection are clearly consistent only with a high degree of voluntary participation. In contrast, being hugged, kissed, slapped on the "rear end" or subjected to unwelcome and unsolicited conversations, and conduct of that sort, carry no connotation, in themselves, of voluntariness. I would think that if a prima facie case is presented that conduct of this latter sort did occur, no assumption of voluntariness can be made, as it can in the present case, and an onus would shift to the respondent to lead evidence to establish voluntary participation.

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Thirdly, and closely connected with the second point, Mrs. Robichaud could testify that on only two occasions did Mr. Brennan hint at what might be a threat to secure her compliance. On one occasion, in April, 1979, Mrs. Robichaud testified, Mr. Brennan, in response to her assertion that she was leaving his office, told her that he was "the boss" and that if she left he would charge her with disobedience. On a second occasion, in early May, Mr. Brennan said to her, "Without my support, you'll fall flat on

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your face." As I indicated in my Supplementary Decision, I find that I have insufficient evidence on which to base a conclusion that on either of these occasions, Mr. Brennan was, in fact, threatening her in order to secure her compliance with his sexual demands. What I am prepared to find is that, on the first occasion, Mrs. Robichaud would have been sufficiently knowledgable in employment discipline matters to recognize that a "charge of disobedience" would be unsuccessful if it, indeed, were a charge of failing to comply

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a sexual demand. On the second occasion, Mr. Brennan's statement is, on its
face, a statement which is accurate, and the evidence of the surrounding
circumstances does not establish that his statement was really a threat of
employment consequences in retaliation if she were to resist his sexual
demands.

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Mrs. Robichaud testified that in early April, she was assigned a
smaller area of which to supervise the cleaning, and more cleaners to
supervise in cleaning that area. I cannot infer that this increase in her
responsibility and, it follows, her status, was a veiled bribe to secure from
her sexual favours. The later reduction in her staff to supervise, and her
assignment to other areas of the Base, which followed her complaint of sexual
harassment to others, including Mr. Brennan's superior, might constitute a
form of retaliation. This must be considered later in this Decision.

These three distinguishing factors can be summarized as follows.
First, Mrs. Robichaud's resistance or protests to Mr. Brennan about his
sexual advances, to which she testified, were nullified by her subsequent
participation in further sexual conduct, except for the last protest, which
succeeded in its objective. Her protests were not such as to drive home to
Mr. Brennan that his conduct was, in her view, persistent and unwelcome.
Secondly, the nature of the sexual encounters about which Mrs. Robichaud
testified must raise an inference that she was a voluntary participant in
those encounters. Thirdly, there is insufficient evidence on which to found
a conclusion that Mrs. Robichaud's participation was secured by threats or
promises related to her employment.

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In my opinion, formed largely by a perusal of the cases cited
earlier in this Decision, the pertinent distinctive characteristics of the
sexual encounters which must be considered to be prohibited by Section 7(b)
of the Act are, first, that they be unsolicited by the complainant, and

unwelcome to the complainant and expressly or implicitly known to be unwelcome by the respondent. (These are the factors which remove the situation from the normal social interchange, flirtation or even intimate sexual conduct which Parliament cannot have intended to have denied to supervisors and the people they supervise in the workplace.) Secondly, the conduct complained of must be persisted in in the face of protests by the subject of the sexual advances, or in the alternative, though the conduct was not persistent, the rejection of the conduct had adverse employment consequences. Thirdly, if the complainant cooperates with the alleged harasser, sexual harassment can still be found if such compliance is shown to

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have been secured by employment-related threats or, perhaps, promises. It will be noted that I differ with one aspect of Mr. Shime's Decision in the Bell and Korczak case; more precisely, that I think persistence is, in many circumstances, but not all, a necessary characteristic of the prohibited conduct. For example, I am sure that I would agree with Mr. Shime that a single instance of a refusal of a sexual request, followed by adverse employment-related action such as discharge

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- 26 which is adequately shown to have been motivated by the refusal, would satisfy the requirements of either the Ontario Code or the Canadian Human Rights Act. Indeed, this rationale is the foundation for the rejection of the complaint in the Bell and Korczak case. But I also think that a rejection of a sexual approach would have to be followed either by persistent requests and repeated rejections, or by established adverse employment consequences, in order to be considered "sexual harassment." In other words, persistent conduct might be an alternative to adverse employment consequences, when the conduct consists of sexual approaches which are rejected.

In the present case, what I find is that even if the sexual approaches by Mr. Brennan to Mrs. Robichaud were unsolicited by the latter, they were not rejected in such a way as to make it clear to Mr. Brennan that they were unwelcome. No doubt, Mr. Brennan's approaches were persistent; no

doubt, they were rejected, in the "piece of tail" incident, and were protested in general terms on several other occasions. The point is, it cannot be concluded that, until the final protest, May 25, 1979, Mr. Brennan
must have known that his advances were unwelcome. Two rejections or protests
consecutively, without an intervening act by the complainant of voluntary
participation

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sexual conduct might have convinced me that persistence and, therefore, harassment had occurred. Such is not the case here, so far as the evidence
reveals. It was not until June 18, 1979, when Mr. Brennan attempted to engage
Mrs. Robichaud in conversation having sexual overtones, following her protest
to him of May 25, without an intervening incident of voluntary participation
by her, that Mr. Brennan must have known that his advances were unsolicited
and unwelcome and that he was obliged to refrain from any further advances.
The testimony of Mrs. Robichaud clearly reveals that this obligation was
indeed satisfied. No further sexual approaches occurred.

Furthermore, as I have indicated previously, I cannot conclude that Mrs. Robichaud's participation in sexual conduct with Mr. Brennan was secured
by his employment-related threats or promises. That uncoerced conduct stands
as a nullification of the impact that her rejection and protests should otherwise have.

In other words, Mrs. Robichaud, by her voluntary participation in sexual conduct with Mr. Brennan, such participation not having been secured
improperly, lost the benefit that otherwise should attach to her early

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rejection and later protests. Only her protest of May 25, 1979, and her clear
rejection of conversation with sexual overtones on June 18 can be taken to
have significance. But, in view of her conduct prior to those dates, I cannot
fault Mr. Brennan for his final approach, that of June 18: I cannot characterize that as improper "persistence" in all the circumstances. And,
when his

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- 28 approach
on that date was rejected, he acted properly by refraining from further approaches. It follows that the conduct of Mr. Brennan in the sexual encounters with Mrs. Robichaud cannot, in themselves, be held to constitute conduct prohibited by Section 7(b) of the Act.

Adverse Differentiation: Employment Consequences

It is obvious that Section 7(b) of the Act is intended to prohibit the imposition of adverse employment conditions based on a person's gender. As well, as I held earlier in this Decision, the imposition of adverse employment conditions in retaliation for the rejection of an employer's or supervisor's sexual advances would likewise be contrary to the intent of Section 7(b). It therefore becomes necessary to assess the evidence in the present case to determine whether either type of adverse differentiation has been established.

The imposition of adverse employment conditions might also be in retaliation for the victim of alleged sexual harassment complaining, either to her superiors or to the Canadian Human Rights Commission. I cannot interpret Section 7(b) of the Act as prohibiting retaliatory action having this motivation, since it would not, in itself, be based on "sex." I am strengthened in this determination by the existence of Section 45 of the Act, which makes it an offence to threaten, intimidate or discriminate against an individual because that individual has made a complaint. It is highly unlikely that

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- 29 Parliament
intended to prohibit the same sort of conduct in two different sections of the Act. Thus, even if the alleged intimidation of Mrs. Robichaud had been established, it would not constitute a ground of complaint under Section 7(b) of the Act. As well, I cannot find that intimidation of her has a causal connection with her rejection of Mr. Brennan, as an employment consequence.

There is no evidence of adverse employment conditions imposed prior to Mrs. Robichaud's protest to Mr. Brennan on May 25, 1979. In fact, although she was the only female applicant for the lead hand position, she

received a
high rating on her promotion interview and became the first, and only, female
lead hand cleaner on the Base. It appears that on several occasions she had
difficulty in supervising male cleaners during the period prior to the end of
her probation, but this reflects more the novelty of having a female in
charge of male cleaners, and, perhaps, some resentment in that regard. But

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this is not evidence of adverse differentiation against her in her conditions
of employment. It also appears that during this period she received adequate
support from her superiors. It is to be noted that she was sent on a course
on safety and supervision and a course on supervisory techniques--one of the
few to receive this opportunity.

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- 30 She
was also sent on language training in the summer of 1979. If
differentiation based on gender or retaliation for rejecting Mr. Brennan's
advances occurred, it must have been in the period after Mrs. Robichaud's
protest to Mr. Brennan on May 25, or, more likely, after her final rejection
of him on June 18, 1979 or her complaint to the Base Assistant Administrative
Officer on June 28, 1979.

On May 24, 1979, Mrs. Robichaud told her doctor and her husband
about Mr. Brennan's sexual demands on her. She testified (transcript, page
491) that this was the first time she had told someone about the matter.
However, elsewhere (transcript pages 502 and 606), her testimony was that she
had, in late May or early June, first told the union local president, Mr.
Costello, that Mr. Brennan was sexually harassing her. I think that she must
have been somewhat confused in this regard. Considering the reluctance (to
which she testified) to seek the assistance of a third person, considering
the lack of action by Mr. Costello, and considering the highly intimate and
embarrassing nature of what she had to say, I think it more likely that her
earliest complaint to a third party was to her doctor and to her

husband on
May 24.

As noted earlier, Mrs. Robichaud firmly told Mr. Brennan, on May 25, that she would no longer put up

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- 31 with
his sexual demands. My assessment of her testimony and all the circumstances leads me to the inference that, at this point in time, she had
determined that she had to end whatever relationship existed between her and
Mr. Brennan, strengthened in part in her resolve by the fact that she had now
drawn in two others, her doctor and her husband. Although it was strongly
suggested in cross-examination and in argument, I can find little foundation
for concluding that she took these actions in order to protect her position
as a lead hand. There is insufficient evidence that she perceived her performance, or thought that others would perceive it, as being below standard so that her position would be in jeopardy. I think that she simply
wanted to be rid of a burden which had been troubling her for some time.

It is unclear whether Mrs. Robichaud's firm protest to Mr. Brennan on May 25, 1979, had any immediate employment consequences, but my inclination is to find that it had none. On June 18, as I have set out earlier in this Decision, Mr. Brennan attempted to engage Mrs. Robichaud in
a conversation having sexual overtones but was rebuffed by her. On June 28,
she was summoned to a meeting in the office of Capt. Adlard, the Base

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Assistant Administative Officer. Capt. Adlard and Mr. Brennan were present.
She was informed that letters of complaint, and

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- 32 a
petition, complaining of her performance as a lead hand had been received.
At this meeting, she announced that Mr. Brennan had been sexually harassing
her for the past two months, although she "hoped by this time that it had
stopped" and "felt it possibly could have" (transcript, page 505). Clearly,
these comments by her are consistent with her testimony that she had

firmly
told Mr. Brennan to leave her alone on June 18 (as well as on May 25) and
that he had made no further approaches. Capt. Adlard's response to Mrs. Robichaud's accusation of Mr. Brennan was, in effect, to say that whatever
relationship there had been must cease and that he did not wish to intervene
or to see the matter pursued further. Mr. Brennan was, obviously, upset. He
denied the allegation, and threatened civil action for slander.

It is quite apparent that this was the first opportunity for anyone superior in the hierarchy to Mrs. Robichaud other than Mr. Brennan to know
that she was alleging sexual harassment against Mr. Brennan. She gave no
details at this time to Capt. Adlard of the nature of the incidents which she
perceived as constituting harassment. At that point in time, in the light of
what I have already determined, the encounters between Mrs. Robichaud and Mr.
Brennan did not, in fact or law, constitute an infringement of Section 7(b)
of the Act so that, even if she had

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- 33 provided
Capt. Adlard with all the details to which she testified at the hearings by me, Capt. Adlard would have been justified in taking the stance
he did; even more so, considering the generality of Mrs. Robichaud's accusation, and considering her admission that the encounters with Mr. Brennan had probably stopped. Capt. Adlard was justified in attempting to
gloss over the matter, at the same time warning both that whatever relationship had existed was to cease. I cannot now, in retrospect, impose on
him a higher duty of enquiry or action. It appears also that Capt. Adlard and
others in Base management took steps thereafter to separate Mrs. Robichaud
and Mr. Brennan geographically and they also, subsequently, arranged that
Mrs. Robichaud's chain of command was to be through her Area Foreman directly
to the Assistant Base Administrative Officer, bypassing Mr. Brennan. These
moves were a reasonable response in the circumstances. In view of this, and
other circumstances which I infer from the evidence, I am unwilling to find
that the employer must be deemed to have condoned Mr. Brennan's alleged sexual harassment (which I have found not to have been such) or, it

follows,
to be liable for his conduct in any other way, vicariously or indirectly.

There remains to be considered a number of changes that occurred in relation to Mrs. Robichaud's

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- 34 employment.
First, suspiciously soon after her final rejection of Mr. Brennan on June 18, 1979, letters of complaint were written by various cleaners and a petition complaining about her was circulated among the cleaners. A second petition was circulated, dated July 29. The circumstances surrounding these letters and petitions are such as to lead to a strong suspicion that they were instigated by Mr. Brennan. However, although several of the letter-signers and petition-signers were called as witnesses, none could provide evidence to confirm that suspicion. On the basis of the evidence available to me, I cannot conclude that Mr. Brennan must have been the instigator and, therefore, was probably retaliating for Mrs. Robichaud's rejection of him or for her complaint to Capt. Adlard. In this regard, I must say, I am left in very serious doubt. The case of the complainants, on this branch of the case, has not been established on a reasonable balance of probabilities, in spite of the strong suspicion I harbour about the role Mr.
Brennan may have played.

Certainly, I cannot fault the employer. Clearly, no member of Base management other than Mr. Brennan is subject to any suspicion of having instigated the letters and petitions against Mrs. Robichaud. Indeed, Base management disassociated itself from those letters and petitions when in August, 1979, through the grievance procedure

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- 35 which
Mrs. Robichaud resorted to, the letters and petitions, along with a "memorandum of shortcomings" relating to her were torn up in the presence of herself and her union representative. (How the letters and petitions, albeit in torn condition, became available for the purposes of the present

proceedings, remains as one of the several unsolved mysteries in this case.)

A second group of employment consequences allegedly flowed from Mrs. Robichaud's rejection of Mr. Brennan and/or her complaint to Capt. Adlard. For a time, she was ostracized by her fellow workers. Her responsibility in regard to accident reporting and safety was shortly after her complaint taken away from her. Two days after her complaint to Capt. Adlard, she was ordered to clean a certain swimming pool on both weekend days, a shared rotated chore which it was not her turn to do. She was ordered to empty the garbage from more than her usual number of work sites. On the day after her complaint to Capt. Adlard, her requests to leave work early and to postpone her annual vacation were denied by Mr. Brennan. After her three-week vacation, which begain within a few days of the complaint, she was re-assigned to the cleaning of Barrack Block 13, identified by her as the "punishment block." Her testimony was that this work site was formerly the responsibility of two cleaners and she was to look

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- 36 after it herself, with the partial-time help of one other cleaner who would be the only cleaner she supervised. Her access to this cleaner, who had work assignments elsewhere as well, was expressly limited.

These changes in Mrs. Robichaud's employment all came soon after her complaint to Capt. Adlard on June 28, 1979. They spanned a period of several weeks and were the subject of a number of grievances filed by Mrs. Robichaud pursuant to Section 90 of the Public Service Staff Relations Act in late July, 1979. Most of those grievances were redressed through the grievance process, in favour of Mrs. Robichaud. I can find no evidence that the changes complained of were motivated by an intention on the part of the employer, as distinct from Mr. Brennan, to differentiate adversely against Mrs. Robichaud because she was a woman or because she had complained about Mr. Brennan. Nor do the circumstances of the changes provide any foundation for a conclusion that the employer in any way condoned Mr. Brennan's allegedly sexually harassing conduct. Steps were taken to remedy the

situation when Mrs. Robichaud's dissatisfaction became known to higher management and the matter should, as against the employer, be considered closed.

I disregard, in addition, Mrs. Robichaud's complaints regarding her employment treatment after August,

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- 37 1979, more particularly, the circumstances of her assignment to, and removal from, the cleaning of the Base elementary school in the autumn of 1980 (transcript, page 688 and following). I can find here no indication that she was being discriminated against because of her gender and certainly no indication that she was being discriminated against because of her rejection of Mr. Brennan's advances. It may appear that she was treated differently, and adversely, because she had, by then, complained to the Canadian Human Rights Commission. However, there is strong reason to infer, from the testimony of the school principal, Mrs. Wardlaw (whom I found to be entirely credible) that Mrs. Robichaud was preoccupied with, and vociferous about, the nature of her complaints against Mr. Brennan and that this was what precipitated her differential treatment, if such there was. The motivation for her later treatment is what is important, and I cannot find that that motivation was improper.

On the whole, therefore, I cannot hold the employer (excluding Mr. Brennan) in any way responsible for adverse differential treatment of Mrs. Robichaud after her complaints about Mr. Brennan became known to Base management. The employment changes in respect of her were motivated properly and were not retaliatory or evidence of condonation of Mr. Brennan's conduct. Where there

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- 38 was legitimate reason for her to complain, as in respect of the letters and petitions complaining about her, or as in respect of the nature of her work and her supervision, reasonable steps were taken to remedy the matter. I will not fall into the logical fallacy of assuming "after this, therefore because of this", i.e., to assume that changes in Mrs. Robichaud's employment, to the

extent that Base management was responsible for them, must have been caused

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by her rejection of Mr. Brennan's advances and by her complaint to Capt.
Adlard and the Commission. The causal connection has not been established.
She was not discriminated against because of her gender. Her complaint against the employer must, accordingly, be dismissed.

Base management did not know of some of the changes in Mrs. Robichaud's employment that followed soon after her complaint to Capt. Adlard. The orders
to Mrs. Robichaud were, in some cases, passed to her directly by Mr. Brennan
and, in other cases, passed to her by her area foreman. I have carefully
assessed the extensive evidence about these circumstances and, as in the
instance of the complaining letters and petitions, I am left in doubt. If it
had been established that most or all the work changes affecting Mrs. Robichaud originated with Mr. Brennan and had little or no rational basis in
the requirements of the job, I might have found that the

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- 39 balance
of probabilities was tipped against Mr. Brennan. But the causal connection between Mrs. Robichaud's rejection of Mr. Brennan's sexual advances, and the subsequent treatment of her which she perceived as adverse,
has not been established. I harbour a serious suspicion that Mr. Brennan had
a dominant role in the making of these changes. But that suspicion is not
enough on which to base a finding that he was responsible and that he acted
in retaliation against Mrs. Robichaud. Reluctantly, I must hold that Mrs.
Robichaud's complaint against Mr. Brennan, consisting of adverse differentiation based on her rejection of his sexual advances, has not been
established on a balance of probabilities. That aspect of her complaints
against Mr. Brennan must also fail.

Conclusion
I have determined that, as a matter of fact, sexual encounters occurred between Mrs. Robichaud and Mr. Brennan. I do not believe his denial
that they occurred. As a matter of law, I have adopted the interpretation of
Section 4(1)(g) of the Ontario Human Rights Code set out in the Board

of
Inquiry Decision in the Bell and Korczak case as being equally the correct
interpretation to be placed on Section 7(b) of the Canadian Human Rights Act.
Accordingly, I have held that some sexual encounters between employers and
supervisors, and employees, are

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- 40 "
sexual harassment" and are prohibited. I have attempted to identify the characteristics of the sexual encounters that are prohibited. The encounters
of Mrs. Robichaud and Mr. Brennan, in themselves, did not manifest these
characteristics and were not a violation of Section 7(b) by Mr. Brennan.

I have held that persistent sexual advances by an employer or supervisor, in the face of an employee's repeated firm rejections and protests, uninterrupted by voluntary participation in sexual conduct by the
employee, would constitute prohibited sexual harassment. Such is not the case
here. I have held that rejected sexual advances causally connected to adverse

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employment consequences would also constitute prohibited sexual harassment.
While I am left in considerable doubt, I cannot find that the causal connection, to any action by Mr. Brennan, has been established.

As to the liability of the employer, in this case the management of CFB North Bay except for Mr. Brennan, I have determined that the actions taken in
respect of Mrs. Robichaud's conditions of employment, to the extent that they
were the responsibility of Base management, were not improperly motivated. To
the extent that those actions may have been the responsibility of Mr. Brennan, they are not actions for which Base management, and hence, the

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- 41 employer,
can be held liable. I cannot find that either Mr. Brennan or the employer adversely differentiated against Mrs. Robichaud on the basis of her
gender, as distinct from the alleged sexual harassment by Mr. Brennan.

In the result, all the complaints of violation of Section 7(b) of the Canadian Human Rights Act made by Mrs. Robichaud and the Canadian

Human
Rights Commission against Mr. Brennan and Her Majesty in Right of Canada as
represented by the Treasury Board, as employer, must be held not to have been
established on a balance of probabilities. Accordingly, the complaints must
be dismissed.

Appreciation
I wish to conclude with an expression of appreciation to counsel
for the parties. During the long and arduous presentation of the evidence in
this case, they displayed unfailing patience, vigour, competence and humane
consideration for the human sensitivities of all concerned. This Decision
cannot demonstrate the extent of counsels' conscientious attention to detail;
I simply could not summarize the multitudinous aspects of the case that they
painstakingly drew out in evidence. Nor can I express adequately my
appreciation of counsels' thorough assessment of the issues and the related
jurisprudence pertinent to this case. I regret that my lack of

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adjudicative
stamina has stood in the way of my presenting a full summary of
their so carefully prepared arguments. I ask counsel now to display again
their humane consideration, in gently explaining this Decision to the
individual complainant and the individual respondent.

Ottawa, Ontario, June 26th, 1982.

R. D. Abbott
Human Rights Tribunal

>Appendix
"A" to the Human Rights Tribunal Decision in Robichaud and C.H.R.C.

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v. Brennan and H. M. The Queen (Canada).
The Ontario Human Rights Code, R. S. O
1970, C. 318, as amended

IN THE MATTER OF: The Complaints of Teresa Fay Cox and Debbie Cowell,
both of Guelph, Ontario, that they were
discriminated against in employment by reason of
being dismissed, being refused employment, or being
refused to be continued to be employed, and/or with
regard to a term or condition of employment,
because of their sex by Jagbritte Inc., and Super

Great Submarine and Good Eats and Jagjit Singh
Gadhoke, and their servants and agents, 298
Victoria Road North, Guelph, Ontario.

A HEARING BEFORE: Peter A. Cumming, a Board of Inquiry appointed
under the Ontario Human Rights Code by the
Honourable Robert G. Elgie the 8th day of May,
1980.

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- 5 Excerpt
from Cox and Cowell v. Jagbritte Inc. et al.. (1981, Ontario Board of
Inquiry, Cummings)

only when the language or words may be reasonably construed to form
a condition of employment that The Code provides a remedy. Thus,
the frequent and persistent taunting by a supervisor of an employee
because of his or her colour is discriminatory activity under The
Code and, similarly, the frequent and persistent taunting of an
employee by a super visor because of his or her sex is
discriminatory activity under The Code. (p. D/136)

Thus, although The Board makes it a strict necessity that a complainant
show that sexual compliance was a "condition of employment", it also
appeared
willing to give a broad meaning to that phase:

The forms of prohibited conduct that, in my view, are
discriminatory run the gamut from overt gender based activity, such
as coerced intercourse to unsolicited physical contact to
persistent propostions 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. There is
no reason why the law which reaches into the work-place so as to
protect the work environment from physical or chemical pollution or
extremes of temperature, ought not to protect employees as well
from negative, psychoglgical and mental effects where adverse and
gender directed conduct emanating from a management hierarchy may
reasonably be construed to be a condition of employment. (p.
D/156).

The issue as to whether human rights legislation may be invoked by
victims of sexual harassment has been dealt with in a series of recent
United

States’ cases. The applicable statute in the U.S. is The Civil Rights
Act of
1964, as amended by the Equal Employment Opportunities Act of 1972 42
U.S.C.
s.s. 2000 e et seq. Sebsection 2(a) of the latter Act provides:

2 (a) Employers. It shall be an unlawful employment practice for an
employer >

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ..... sex ....

The first case dealing with the applicability of that statute to a sexual harassment situation was Corne v. Bausch and Lomb, Inc. 390 F. Supp. 161 (1975), (U.S.D.C. Ariz.) The two plaintiffs in that case had been subjected to repeated sexual advances by their supervisor. Frey, D.J. held that the plaintiffs had failed to state a cause of action under the Civil Rights Act.

The Court stated that sex discrimination cases had always been founded on company policies, not on the "personal proclivity" of a supervisor. Further, there was no sex discrimination per se in the Court's opinion since, if males had also been victims of harassment, there would be no grounds for a suit. Frey, D.J. continued:

Also, an outgrowth of holding such activity to be actionable under Title VII [of the Civil Rights Act] would be a federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual. (p. 163).

That interpretation however, did not long persist. A conflicting judgement was handed down the following year in Williams v. Saxbe 413

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- 7 F. Supp. 654 (1976), (U.S.D.C. D.C.). There, the plaintiff had been fired for her failure to accept the sexual invitations of her supervisor. Richey, D.J. held that sexual harassment was prohibited sex discrimination under the Civil Rights Act:

It was and is sufficient to allege a violation of Title VII [of the Civil Rights Act] to claim that the rule creating an artificial barrier to employment has been applied to one gender and not to the other. (p. 659).

In Barnes v. Costle 561 F.2d 983 (1977), (U.S.C.A. D.C. Cir.), the plaintiff had been promised a promotion within 90 days of her hiring. Her boss soon began making sexual advances by suggesting after-hours

rendezvous,
making sexual remarks and indicating that the plaintiff's employment
status
would be enhanced if she complied with his requests. These advances
were all
resisted by the plaintiff. The supervisor then began to harass the
plaintiff
and eventually abolished her position.

Robinson, C.J. found that the plaintiff's boss had acted in a
retaliatory fashion. As such, the plaintiff's sexual compliance had
indeed
become a term of her employment:

[R]etention of her job was conditioned upon submission to sexual
relations - an exaction which the supervisor would not have sought from
any male. (p. 989).

The Court read the Civil Rights Act as a general prohibition against
all
sex-based discrimination. As such, it was held, it should be construed
liberally in its application to novel employment circumstances.

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This same interpretation of the Civil Rights Act was applied in the
case
of Garber v. Saxon Business Products 552 F.2d 1033. (1977), (U.S.C.A.
4th
Cir.) In a per curiam judgement; the Court stated that sexual
harassment,
where employees are compelled to submit to sexual advances as part of
their
employer's policy and the employer acquiesces in such practices, gives
rise
to a cause of action against the employer.

Thus, the Courts were willing in these cases to interpret the words
"discriminate against any individual ... because of such individual's
sex" is
Section 2 of the Civil Rights Act in a broad way. Since greater
expectations
were made of women employees in these cases, they had been
discriminated
against on the basis of sex.

A more restrictive interpretation however, was placed on the words
"terms, conditions or privileges of employment" in section 2 of the
Act. For
the plaintiff to succeed, she must show that her continued employment
was
contingent on her acceptance of a supervisor's sexual advances. Also,
it may
be necessary, in order to assert that one's employer is liable in a

particular case, to show that the harassment is part of an employment policy,
whether explicit or implicit: Garber.

In Munford v. James T. Barnes & Co. 441 F. Supp. 459. (1977), (U.S.D.C. Mich.), the plaintiff was told by her supervisor that her job might depend on
submission to his sexual advances. In fact, the

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- 9 supervisor
told the plaintiff that she must accompany him on a business trip and stay in a motel and have sex with him or be fired. She was fired. The
plaintiff complained to a more senior supervisor, but that person refused to
act.

After reviewing the cases referred to above, the Court stated:
Reading the case law as a whole, one must infer that two distinct but interrelated questions comprise the issue of whether sexual harassment constitutes sex discrimination under Title VII. First, the court must decide whether sexual harassment is the type of activity contemplated by
the Act's proscription, and secondly, the court must consider what constitutes an employment practice for which an employer may be liable. (p. 465)

The Court went on to find that the Civil Rights Act prohibits "any impediment to employment which affects one gender but not the other" (p.
465). Further, since the employer refused to act on the complaint of the
plaintiff, it had given its tacit support to the harassment and was therefore
liable.

In Tomkins v Public Service Electric and Gas Co. 568 F. 2d 1044 (1977), (U.S.C.A. 3rd Cir.), the plaintiff was hired by the defendant company and
proceeded to advance in her position as a secretary. Her supervisor then
invited her to lunch, allegedly to discuss the plaintiff's employment evaluation. At that tine, the supervisor made sexual advances and advised
that compliance would be necessary for a "satisfactory working relationship".
When the plaintiff rejected the advances, the supervisor threatened her with
recrimination should she make any complaint and physically restrained her
from leaving the restaurant.

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After that incident, the plaintiff was transferred, given an inferior position, given poor evaluations, disciplined by lay-offs and threatened with
demotion. She was eventually fired.

Aldisert, C.J. stated that to succeed, a plaintiff must show
... that the acts complained of constituted a condition of employment, and that this condition was imposed by the employer on the basis of sex.
(p. 1046)

He went on to find that on the facts, both of these elements were present in the case. In reviewing the relevant case law, Aldisert, C.J. concluded:

The courts have distinguished between complaints alleging sexual advances of an individual or personal nature and those alleging direct employment consequences flowing from the advances, finding Title VII violations in the latter category. This distinction recognizes two elements necessary to find a violation of Title VII [of the Civil Rights
Act]: first, that a term or condition of employment has been imposed and
second, that it has been imposed by the employer, either directly or vicariously, in a sexually discriminatory fashion. (p. 1048)

There is an underlying concern in these cases about possible legal intervention into what may be essentially personal relationships, even though
the relationships take place in the workplace. In Heelan v. Johns-Manville
Corp. 451 F. Supp. 1382 (1978), Finesilver, D.J. stated:

Title VII should not be interpreted as reaching into sexual relationships which may arise during the course of employment,

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but which do not have a substantial effect on that employment. (p. 1388)
In that case, the plaintiff was credited with an excellent work record until she was put into the position of having to refuse her supervisor’s

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romantic advances. She was explicitly told that her advancement and indeed,
even her continued employment, was dependent on her having an affair with her
supervisor. She was eventually fired.

The Court set out the legal position of the plaintiff as follows:
Thus, to present a prima facie case of sex discrimination by way of

sexual harassment, a plaintiff must plead and prove that (1) submission to sexual advances of a supervisor was a term or condition of employment, (2) this fact substantially affected plaintiff's employment,
and (3) employees of the opposite sex were not affected in the same way by these actions. (p. 1389)

On the facts presented by the plaintiff, the Court found that her complaint had indeed been made out.

There must, of course, be a causal connection between the harassment and
adverse employment consequences. In some cases this was determined to be
inherent in the meaning of "a term or condition of employment": Barnes; Tomkins. In the Heelan case though, the burden of showing causation was made
separate from the burden of showing that the harassment was a "term or condition of employment". This makes the necessity of proving causation more
clear.

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In Fisher v. Flynn 598 F. 2d 663 (1979), (U.S.C.A. 1st Cir.) as assistant professor of psychology was dismissed after having refused the
sexual advances of her department head. Campbell, C.J., however, refused the
plaintiff's claim since she had failed to show that there was a causal connection between her refusal to comply with the sexual propositions and her
eventual dismissal. The Court stated that rather than there being an actionable complaint, the incident merely was a "unsatisfactory personal
encounter with no employment repercussion" (p. 666).

A similar result was reached in the case of Clark v. World Airways Inc. 24 E.P.D. P. 31,385 (1980). There, the plaintiff, during her first week of
employment, met the president of the defendant firm. He made off-colour remarks to her and touched her in ways that she found to be offensive. The
plaintiff rejected more explicit sexual advances and eventually resigned
because of the harassment she received.

The Court stated that even where a plaintiff resigns, rather than is dismissed, a claim may be brought under the Civil Rights Act. However, in
such a situation, the plaintiff will have greater difficulty in showing causation.

In any event, Greene D.J. found that the plaintiff had failed to show that her compliance with the president's sexual demands was a term of

her
employment. He stated that the Civil Rights Act does not apply with respect
to "sexual relationships arising during the course of employment that have no
substantial effect on that employment".

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- 13 (
p. 18,289).

In other words, a plaintiff has a heavy burden of proof to discharge. She must show that her rejection of sexual advances brought about her dismissal or created a situation where she could no longer remain in her job.
In the latter situation, it will be particularly difficult for the plaintiff
to show that her response to the harassment was warranted under the circumstances.

In the most recent U.S. decision, however, the Court showed a willingness to relax the burden of proof on the plaintiff in sexual harassment cases: Bundy v. Delbert Jackson 641 F. 2d 934 (1981), U.S.C.A D.C.
Cir.) In that case, the plaintiff had received propositions from her supervisors and rejected them. When she complained to a superior officer in
the institution, he too propositioned her. She then began to be criticized by
her supervisors and felt that her opportunities for promotion had been impaired.

The plaintiff’s argument in the case was that it should be unnecessary for her to show that there were tangible employment consequences, in the
sense than benefits were denied to her as a result of her rejection of sexual
propositions. Rather, it was argued, she should only have to show that her
employment circumstances were "poisoned" by the harassment.

The Court accepted that reasoning and decided that the principle in Barnes, supra should be extended:

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Thus, unless we extend the Barnes holding, an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking other tangible actions against her in response to her resistance, thereby creating the impression ... that the
employer did not take the ritual of harassment and resistance "seriously". (p. 945)

In so holding, the Court referred to cases where ethnic and racial slurs had been found to constitute a violation of the Civil Rights Act. Where the work environment alone is affected, there has been found to have been a breach of the Act. The Court stated that an analogy could be made between those cases and sexual harassment cases:

How then can sexual harrassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal? (p. 945).

The Court also found support in the Guidelines on Sexual Harrassment issued by the Equal Employment Opportunities Commission 29 C.F.R. s.1604..11:

(a) Harassment on the basis of sex is a violation of s.703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work

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environment.
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The evalution of these cases shows how the courts have attempted, in some instances, to read the Civil Rights Act broadly to bring sexual harassment within its prohibitions. The problem has become, then, one of determining what is prohibited harassment and what is purely a personal matter. In the Bundy case, the Court extended the meaning of "term or condition of employment" to cover all harassment in the workplace regardless of the presence or absence of tangible employment consequences. This interpretation, no doubt, goes a long way toward remedying an insidious form of sex discrimination. Yet, equally, it points out the need for specific legislation in the area.

Interestingly enough, the Bundy decision is very similar to the Ontario case of Bell, supra. There, Mr. O.B. Shine Q.C. stated that the "taunting" of female employees could amount to a violation of the Ontario Human

Rights
Code. Thus, the U.S. and Ontario position seems to be equally broad, and
equally in need of specific legislation.

In Ontario, there is pending legislation which will make specific reference to sexual harassment as a prohibited employment practice; Bill 7,
An Act to revise and extend Protection of Human Rights in Ontario (2nd reading: May 25, 1981). Section 6 of the Bill provides:

6. Every person has a right to be free from,
(a) a persistent sexual solicitation or advance made by a person in a position of authority who knows or ought reasonably to know that it is unwelcome, or

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(b) a reprisal or a threat of reprisal by a person in a position of authority for the rejection of a sexual solicitation or advance.

This provision makes it clear that harassment needn't have employment consequences in order to be a prohibited practice (s. 6(a)). Unwelcome solicitation in itself will constitute a violation of the Code. Retaliatory
action by a supervisor, for example, would fall under a separate prohibition
(s. 5(b)).

Sexual harassment in the workplace is a significant, real problem for working
women. 1

1 See, for example, Sexual Harassment: A Hidden Issue, The Project on the
Status and Education of Women, Association of American Colleges, 1818 R Street, N.W., Washington, D.C. ?; Catherine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination, New Haven: Yale University Press, 1979.