CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

DONNA MOWAT

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
CANADIAN ARMED FORCES

Respondent

RULING ON OPENING STATEMENTS

MEMBER: J. Grant Sinclair 2003 CHRT 39
Paul Groarke 2003/11/21

I. INTRODUCTION

[1] The issue raised by this motion is whether the Canadian Human Rights Commission, in appearing before the Canadian Human Rights Tribunal, can deliver an opening statement consisting primarily of a general overview of the applicable law, and then withdraw from the hearing, but reserve its right to participate at some later time.

[2] The Commission's proposed method of proceeding in this case is a fundamental change in the way the Commission has traditionally represented the public interest before the Tribunal. The Canadian Armed Forces has objected to the Commission's manner of proceeding, arguing that this would be fundamentally unfair to its right to defend itself as the respondent in these proceedings.

II. FACTUAL HISTORY

[3] Donna Mowat filed a complaint of discrimination against the CAF, wherein she alleges that she has been the victim of sexual harassment during her employment with the CAF. Following an investigation into Ms. Mowat's complaint, the Commission referred the complaint to the Tribunal for hearing.

[4] In the course of a pre-hearing teleconference convened by the Tribunal, counsel for the Commission advised the other parties that it did not intend to participate in the hearing, beyond appearing at the commencement of the hearing to deliver an opening

statement. A subsequent exchange of correspondence clarified that it was the intention of the Commission to provide an opening statement:

... detailing the public interest in the complaint. The submission will set out the Commission's view of the legal issues in the case and will provide a detailed statement of the law relevant to [the] complaint. Commission counsel will not be present for the full duration of the hearing....

[5] Following receipt of this clarification, the CAF brought a motion before the Tribunal, asking the Tribunal to find that the proposed manner of participation by the Commission is improper and prejudicial to the CAF. In particular, the CAF objects to the Commission delivering an opening statement without having to support its submissions with facts proven before the Tribunal. The CAF also objects to the fact that the Commission did not provide the parties with the details of its position in advance of the hearing, as required by the Tribunal's Rules of Procedure. The CAF asks for an order that the Commission not be permitted to participate in the hearing in the manner that it proposes and for an order requiring the Commission to disclose the substance of its position in advance of the hearing.

[6] In the course of a second teleconference, Tribunal Vice-Chairperson Grant Sinclair directed that the Commission provide the parties with a copy of its proposed opening statement, so that the propriety of the Commission's proposed submission could be addressed in the course of the motion. A copy of the Commission's proposed opening statement is appended to this ruling.

III. THRESHOLD ISSUE

[7] Before addressing the substance of the CAF's motion, a threshold issue arises, namely, whether the Tribunal has the power to deal with the way in which the Commission intends to participate in this hearing.

[8] The Commission submits that the Tribunal has no authority to review decisions of the Commission made pursuant to the *Canadian Human Rights Act*, as supervisory jurisdiction over the Commission is confined to the Federal Court. According to the Commission, its status as an independent party appearing before the Tribunal means that it has the unfettered right to appear at a hearing. Section 50 of the *Act* grants the Commission party status, making it clear, the Commission says, that "the Commission does not have to apply to the Tribunal ... to have the scope of its participation considered by the Tribunal." The Commission submits that if the Tribunal were to attempt to review the way in which the Commission chose to represent the public interest in this case, it would be inconsistent with the Commission's status as an independent party.

[9] Although the Commission's written submissions were framed in absolute terms at the hearing of the motions, Commission counsel did concede that the Tribunal, as master of its own procedure, has the power to control the hearing process and to take action where the conduct of one party would result in unfairness to another party. By way of example, Commission counsel conceded that it would be open to the Tribunal to direct that the Commission deliver its summary of the law at the end of the hearing, rather than at its commencement.

[10] The CAF agrees that a decision by the Commission to participate in a given case is properly reviewable in the Federal Court, and not before the Tribunal. However, the CAF argues that when the Commission appears before the Tribunal, the Commission must comply with the principles of fairness and with the Tribunal's Rules of Procedure.

[11] As the Tribunal has previously noted, it is up to the Commission to decide how best to carry out the public interest mandate required of it under section 51 of the *Canadian Human Rights Act*.[1] It is not up to this Tribunal to second-guess the Commission in this regard. Rather, decisions made by the Commission in individual cases are properly reviewable in the Federal Court.[2]

[12] That said, it does not mean that the Commission can conduct itself without constraint in its appearances before the Tribunal, without regard for the Tribunal's Rules of Procedure, the requirements of procedural fairness and the rights of the other parties to a proceeding. Like any other party, the Commission is subject to the Tribunal's Rules of Procedure, and is, as well, subject to any evidentiary or procedural rulings that the Tribunal may make.

[13] As an adjudicative body dealing with the quasi-constitutional rights enshrined in the *Canadian Human Rights Act*, the Tribunal has not only the power, but the duty, to ensure the fairness of the process. The Tribunal has the power to preclude the Commission, for example, from asking leading questions while examining its own witnesses, calling inadmissible or irrelevant evidence, or making closing submissions that refer to facts not in evidence. So too does the Tribunal have the power to ensure that any representations that the Commission makes in a given case, whether by way of opening statement or otherwise, respect principles of fairness.

[14] In our view, the Commission's position mischaracterizes what the CAF is seeking. The CAF's objection does not involve a review of a decision of the Commission. Rather, it involves the determination of whether the procedure that the Commission intends to adopt in participating in this hearing conforms with the principles of fairness as well as the Tribunal's Rules of Procedure. As such, we are satisfied that the Tribunal has the power to deal with the CAF's objection to the Commission's proposal to deliver its proposed opening statement.

A. The CAF's Position As To The Commission's Proposed Participation

[15] The CAF argues that what the Commission is proposing to do is contrary to the purpose of an opening statement. An opening statement is designed to provide the trier of fact with a general understanding of what the facts and issues will be in the case. In referring to specific facts in an opening statement, counsel is subject to an implied undertaking, that is, a professional obligation to ensure that any facts that counsel refers to in his or her opening statement will be supported by the evidence.

[16] Although the Commission contends that it will restrict its comments in its opening statement to " ... the Commission's view of the legal issues in the case and will provide a detailed statement of the law relevant to [the] complaint...", the CAF says that a review of the proposed opening statement provided by the Commission illustrates how difficult it is to make legal submissions without grounding those submissions in the facts of the case. In particular, the CAF points to the Commission's proposed submission that:

There is no doubt that sexual harassment is not only a particular concern to women but a matter of public concern. It pervades the workplace, government, schools, law firms, medical profession, military, sports, and cultural institutions.

This demonstrates that the Commission intends to suggest to the Tribunal that there is a systemic problem of sexual harassment in the Canadian military. Given that the Commission does not intend to call any evidence in this case, it is clear that it will not be in a position to establish what it alleges. In the CAF's submission, the making of such an

unsupported allegation would amount to professional misconduct on the part of Commission counsel. Further, such a statement would be highly prejudicial to the CAF. Such an allegation could well influence the Tribunal member hearing the case when it considers the merits of Ms. Mowat's individual allegations of sexual harassment. This is more so coming from the Commission, a party with known expertise in the field.

[17] By allowing the Commission to refer to jurisprudence on a particular topic, the hearing could be prolonged, as it may become necessary for the CAF to call evidence to show why the law *does not* apply, even though the facts of the case do not otherwise raise the issue. For example, the Commission intends to refer to the law governing what should be included in a sexual harassment policy. The natural inference for the Tribunal to draw from this, the CAF says, is that the CAF's harassment policy may be inadequate. Prudence might then require the CAF to call the necessary evidence to establish affirmatively that its policy was sufficient, even though the actual facts of Ms. Mowat's case might not otherwise call into question the adequacy of the CAF's policy.

[18] Further, in order to decide what law is relevant to a specific case, the Commission has to presuppose a certain understanding of the facts of the case. By way of example, in its proposed opening statement, the Commission refers to the law relevant to the issue of retaliation. There is nothing in Ms. Mowat's complaint that even suggests that retaliation is in issue in this case. The only reference to allegations of retaliation are contained in Ms. Mowat's Statement of Issues. Thus, the CAF says, in making any reference to the question of retaliation, the Commission has to assume the facts as alleged by Ms. Mowat.

[19] The Commission contends that its opening statement is a neutral overview of the law, intended to assist both the parties and the Tribunal. The CAF disputes this, pointing out, for example, that the Commission did not refer to the existing Tribunal jurisprudence which decided that the retaliation provisions of the legislation do not have a retroactive effect. Thus they would not apply to the events in this case which occurred prior to June of 1998.[3] In this way, the Commission's opening statement unfairly favours the complainant, to the detriment of the CAF.

[20] In addition, the CAF says that the Commission has not complied with the disclosure obligations imposed on the parties by the Tribunal's Rules of Procedure. The Commission did not provide the parties with advance notice of its position as to how the public interest is engaged in this case. Had it not been for the Tribunal's direction that the Commission file a copy of its proposed opening statement prior to the return of this motion, the CAF says that it would have had no idea of what the Commission's position was until the first day of the hearing. This, the CAF says, is fundamentally unfair.

[21] The CAF also argues that it will be prejudiced if the Commission is permitted to reappear at some point in the hearing. It has no way of knowing when, or if, this will occur, or the nature of the Commission's participation. As a result, the CAF can not anticipate what questions it may need to ask of the complainant's witnesses, and what evidence it may need to call in order to address the position that the Commission may adopt later in the hearing.

[22] Finally, the CAF argues that a generic statement of the law, which is not tied in to the facts of the case will be of limited assistance to the Tribunal. And the limited utility of this type of opening statement is outweighed by the prejudice to the CAF that will accrue if the opening statement is permitted.

B. The Commission's Position

[23] The Commission denies that the CAF will be prejudiced in any fashion, if the Commission is permitted to deliver its proposed opening statement. According to the Commission, both the complainant and the respondent were advised early in the process that the Commission intended to limit its participation in this case. Further, the Commission says, its representations will be confined to a statement of the law governing the complaint. Given that the Tribunal is an expert Tribunal, the Commission says it will not be unduly influenced by Commission submissions regarding the law, should those submissions be made at the commencement of a hearing.

[24] The Commission disputes the CAF's assertion that the Commission has failed to identify a public interest in this case. According to the Commission, "the public interest in a complaint crystallizes when it is referred to the Tribunal on the basis that the Commission is satisfied that the complaint merits further inquiry." The Commission takes the position that the public interest lies in ensuring that the appropriate legal issues are adjudicated, and that legal principles are fully developed. This does not require that the Commission lead evidence in a given case.

[25] Counsel for the Commission submits that the Commission's role when appearing before the Tribunal, is more akin to that of a Crown Attorney. The Commission is not adverse in interest to any of the other parties. Rather, the interest of the Commission is to see that justice is done. Commission counsel did concede however, that its review of the law is meant to be neutral, the Commission is not "infallible".

[26] Further, the Commission says that, its review of the law is designed to assist not just the Tribunal, but the parties, in understanding the law relevant to the case in issue. While recognizing that a generic overview of human rights principles will be of limited assistance to an expert Tribunal well acquainted with human rights law, the Commission is interested in ensuring that parties appearing before the Tribunal are familiar with the relevant jurisprudence.

[27] The Commission agrees that it is improper for a party to refer to facts in an opening statement where those facts will not be proven by the party. According to the Commission, its proposed opening statement deals only with uncontested facts, and thus does not engage the implied undertaking principle. While conceding that the reference to a systemic problem of sexual harassment in the Canadian military is a contested fact, the statement is "innocuous" in the Commission's view and not prejudicial to the CAF. In any event, the Commission says, the implied undertaking is nothing more than a rule of practice and not of law.

[28] The Commission pointed out that, as an administrative tribunal, the Tribunal is not bound to follow the same rules and procedures applied by the courts. Rather, the Tribunal should be flexible and innovative in the way that it conducts hearings.[4] This flexibility and innovativeness should extend to receiving what the Commission refers to as a "non-traditional" opening statement.

[29] In the Commission's submission, the CAF has failed to demonstrate how it will be prejudiced if the Commission delivers its proposed opening statement, and then withdraws from the hearing. Its assertions of prejudice are entirely speculative, the Commission says, and as such, cannot be addressed by the Tribunal. According to the Commission: "The CAF has asked the Tribunal to engage in a speculative exercise that is not only improper, but which has forced the parties to expend considerable resources in response thereto." In any event, the Commission says, the CAF will have the full and

ample opportunity during the hearing itself to respond to any submissions made by the Commission in its opening statement.

[30] Finally, with respect to reserving its right to come back into the hearing, the Commission accepted that it would be subject to the direction of its Tribunal and any objections from the other parties. The Tribunal could address any prejudice that might accrue to the CAF at that point in the hearing.

C. The Complainant's Position

[31] Counsel for the complainant says that it would be helpful for the complainant to know what the Commission's view is of the public interest issues in her case. Counsel views the Commission as being on the side of his client, he "can always use allies", and the Commission's participation, albeit limited in scope, would help to "even the odds".

[32] The Commission's overview of the law is helpful, counsel says, and assisted him in fully appreciating the issues raised by his client's case. While he would like to see the information contained in the opening statement presented to the Tribunal, counsel is sensitive to the prejudice that the CAF could suffer if the Commission is permitted to deliver its opening statement.

[33] It does not matter to Ms. Mowat's counsel whether the Commission provides the information through an opening statement or in closing submissions. He does say, however, that it would have been helpful if he had received this information from the Commission much earlier in the process.

IV. ANALYSIS

[34] The law governing the proper content of opening statement before the courts is clear. In *Brochu v. Pond*[5], the Ontario Court of Appeal recently adopted to following statement from *Halsbury's Laws of England*, as quoted in Sopinka's, *The Trial of an Action*[6] :

> The object of an opening statement is to give the court a general notion of what will be given in evidence ... In his opening, counsel states what he submits are the issues and the questions between the parties which have to be determined, what are the facts of the case, the substance of the evidence he has to adduce and its effect on proving his case, and he will refer to the relevant correspondence between the parties and other documents. He will remark upon any point of law involved in the case, *but the opening is not the occasion for detailed argument on legal questions, or an extensive examination of the authorities*. In opening, counsel may refer to those facts of which the court takes judicial notice. Neither in opening or at any stage of the trial may counsel assert his personal opinion on the facts or the law, *or mention facts which require proof but which it is not intended to prove*, or which are irrelevant to the issue to be tried.

Similarly, in *Modern Trial Advocacy, Canadian Ed.*[7], it is noted that:

> The courts and commentators are virtually unanimous that opening statements may only be used to inform the court of "what the evidence will show". *Counsel may not argue during opening, but is restricted to offering a preview on the anticipated testimony, exhibits, other evidence, and an outline of the issues.*

[35] It is true that much of the case law dealing with the proper bounds of opening statements has arisen in the context of jury trials. The relevant principles are nevertheless of general application. While counsel may have greater latitude when it comes to the identification of the legal issues in non-jury trials [8], the same prohibition against making reference to facts not intended to be proven holds true.[9] So too does the prohibition against the making of legal argument in an opening statement.[10]

[36] The rules regarding the proper content of opening statements have evolved over the generations and are designed to ensure the fairness of the trial process. The opening statement that the Commission proposes to deliver at the commencement of the hearing in this case demonstrates the unfairness that can result when counsel are permitted to stray from the accepted bounds of an opening statement.

[37] Contrary to the submissions of the Commission, the proposed opening statement does deal with contested facts. The allegation that there is a widespread problem with sexual harassment in the Canadian military can hardly be said to be "innocuous". The claim that sexual harassment permeates the CAF invites the inference that Ms. Mowat's individual claim of sexual harassment is well founded. Such an unsupported assertion on the part of the Commission clearly operates to the detriment of the CAF.

[38] We agree with the CAF that the Commission's overview of the law is not entirely neutral. Despite the Commission's assertion that its review of the case law is non-partisan, and does not favor one side over the other, the example cited by the CAF with respect to the issue of retaliation demonstrates the difficulty in providing a truly non-partisan summary of the law.

[39] The delivery of a summary of the law also has the potential to complicate the hearing. When legal submissions are made at the close of a hearing, both the parties and the Tribunal have a clear understanding of the facts, and the ability to distinguish relevant from irrelevant legal issues. If a party makes submissions on an irrelevant legal issue, an opposing party may object and the Tribunal is in a position to deal with the objection. If the authorities are reviewed in detail before the evidence comes in, the Tribunal has no way of knowing what is relevant, and what is not. The Commission cannot assist in explaining the relevance of its submissions, should there be an objection, because it cannot refer to the facts of the case.

[40] We accept the submissions of the CAF that it will be prejudiced if the Commission is permitted to provide its overview of what it says is the relevant case law at the commencement of the hearing. Not only does the determination of what law is relevant to the case presuppose the existence of certain facts, it also has the potential to prolong the hearing. While a hearing should take as long as necessary to allow each side the full opportunity to be heard, a party should not, in our view, be permitted to put issues `on the table' that require a response from another party, and then leave the hearing, without having established that the issue is, in fact, germane to the case.

[41] It is noteworthy that the Commission has not provided the Tribunal with a satisfactory explanation as to why it should be permitted to deviate from the general practice, and deliver a summary of the law at the beginning of the hearing, rather than at the end as would ordinarily be the case. The Commission suggested that this would assist the parties to a particular complaint by providing them with an overview of what the Commission thinks is the applicable law. There is nothing however to prevent the Commission from delivering such a summary to the parties at any time in the process.

[42] The Commission has also neglected its obligations under the Tribunal's Rules of Procedure. These Rules are designed to ensure that arguments and evidence are disclosed in a timely and efficient manner, so that each of the parties is made aware, in advance of the hearing, of the case that they have to meet. To this end, Rule 6 imposes certain disclosure obligations on parties appearing before the Tribunal. Under the Tribunal Rules, the Commission and the CAF are obliged to provide written notice of the material

facts that it seeks to prove in support of its case, as well as the legal issues raised by the case. Similar obligations are imposed on complainants, where the complainant's position varies from that of the Commission. Provision is also made for reciprocal documentary disclosure, as well as the provision of witness lists and `will-say' statements.

[43] Nothing in these Rules obliges the Commission to participate in a given case. Similarly, nothing compels the Commission to call evidence, to cross-examine opposing witnesses, or to make legal arguments. These are questions for the Commission to decide, in accordance with the public interest mandate conferred on it by section 51 of the *Act*. However, if the Commission is going to participate in a hearing, the other parties are entitled to know, well in advance of the hearing, the position that the Commission will be taking at the hearing. In particular, the parties are entitled to know what the Commission views as the public interest in a particular case, so as to enable the party to lead the necessary evidence and make the necessary arguments to address that interest, as the party may see fit.

[44] It is not sufficient for the Commission to say that there is a public interest in every case referred to the Tribunal by the Commission, and nothing more. In this case, but for the intervention of the Tribunal, Ms. Mowat and the CAF would have had no indication from the Commission until the first day of hearing, as to what the Commission's view of the public interest in the case would be. This is contrary to the Tribunal's Rules, and does not benefit the process.

V. CONCLUSION AND ORDER

[45] For the foregoing reasons, we have concluded that the Commission's proposed manner of participation in this hearing does not comply with the principles of fairness or the Tribunal's Rules of Procedure. Accordingly, the Commission will not be permitted to deliver an opening statement in the form and manner that it has proposed. The Tribunal member assigned to hear this case on the merits will deal with any issues arise out of the decision.

_____*signed by*_____

J. Grant Sinclair

_____*signed by*_____

Dr. Paul Groarke

OTTAWA, Ontario
November 21, 2003

[1] *Quigley v. Ocean Construction Supplies*, [2001] C.H.R.D. No. 46 (C.H.R.T.)

[2] *Parisien v. Ottawa-Carleton Regional Transit Commission*, [2002] C.H.R.D. No. 23 (C.H.R.T.)

[3] *Marinaki v. Canada (Human Resources Development)*, [2000] C.H.R.D. No. 2 (C.H.R.T.)

[4] *Grover v. Canada (National Research Council - NRC)*, [1994] F.C.J. No. 1000, para. 40, Tab J, *Canada (Attorney General) v. Moore*, [1998] 4 F.C. 585, para. 48 (T.D.), Canadian Human Rights Tribunal Interim Rules of Procedure, Rule 1.

[5] (2002), 62 O.R. (3d) 722, at pp. 726-7.

[6] 2d Ed. (Toronto and Vancouver: Butterworths, 1998) at p. 74.

[7] (Notre Dame: National Institute for Trial Advocacy, 1995), at 312.

[8] *Sopinka*, supra. at p. 76.

[9] *Di Domenicantonio v. Canadian National Railway Co.*, [1988] N.B.J. No. 133 (N.B.C.A.) (at QL p. 18)

[10] Lubet, supra., at p. 318

PARTIES OF RECORD

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APPEARANCES:

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Salim Fakirani Dan Pagowski	For the Canadian Human Rights Commission
Sandra Nishikawa Derek Allen	For the Respondent

Tribunal File No.: T822-7203

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

DONNA MOWAT

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

CANADIAN ARMED FORCES

Respondent

OPENING SUBMISSION OF THE CANADIAN HUMAN RIGHTS COMMISSION

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Tribunal File No.: T822-7203

CANADIAN HUMAN RIGHTS TRIBUNAL

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The Canadian Human Rights Commission represents the public interest in this complaint and it is in pursuant to section 51 of the *Canadian Human Rights Act* [*Act* that the Commission makes these submissions.

The ultimate public interest role of the Canadian Human Rights Commission is to advance the purpose of the *Canadian Human Rights Act* [*Act*, that is, to give effect to the principles that ll individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have [...] without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted [...] [Section 2 of the *Act*]

In short, the core public interest may be described as the advancement of equality through redress for past discrimination and prevention of future discrimination.

The Commission views this complaint as raising important human rights principles and we take this opportunity to review these principles. In this particular case, the Tribunal will be asked to consider human rights law in the following areas: (a) An employer's obligation to provide a harassment free work environment and the liability associated with an employer who fails to do so; (b) Adverse differential treatment by an employer and the refusal to continue to employ an individual because of the employee sex.

RELEVANT STATUTORY PROVISIONS

Section 7 of the *Act* makes it a discriminatory practice either refuse to employ or continue to employ any individual and/or to directly or indirectly differentiate adversely in the course of employment on a prohibited ground of discrimination.

Sub-section 14(1)(c) of the Act makes it a discriminatory practice to harass an individual on a prohibited ground of discrimination in matters related to employment. Sub-section 14(2) provides that sexual harassment shall be deemed to be harassment on a prohibited ground of discrimination. Thus, the statutory framework recognizes sexual harassment as a form of sex discrimination.

Section 14.1 of the *Act* makes it a discriminatory practice for an employer against whom a complaint has been filed to retaliate or threaten to retaliate against the individual who filed the complaint.

Subsection 65 (1) of the *Act* provides liability to an employer for the discriminatory acts of its employees that occur in the course of employment. Section 65(2) exculpates an employer provided that it did not consent to the commission of the act or omission and that it exercised all due diligence to prevent the act or omission from being committed, and subsequently mitigated or avoided the effects of the act or omission.

SEXUAL HARASSMENT GENERALLY

There is no doubt that sexual harassment is not only a particular concern to women but a matter of public concern. It pervades the workplace, government, schools, law firms, medical profession, military, sports, and cultural institutions. Harassment, including sexual harassment can create a negative or hostile work environment which can interfere with an employee job performance and result in an employee being refused a job, a promotion, training opportunity, or may even result in the employee leaving employment. When sexual harassment occurs in the workplace, it is an attack on the dignity and self-respect of the victim both as an employee and as a human being.

In *Janzen v. Platy Enterprises* [1989] 1 S.C.R. 1252 Supreme Court of Canada acknowledged that women have a right to a workplace that is free from discriminatory attitudes and behavior, and furthermore, women have the ability to seek broad remedies available under human rights statutes when this right is violated. *Janzen, supra*, concerned complaints made by two female waitresses who had been sexually harassed by a cook at the defendant's restaurant. The nature of the incidents included inappropriate touching and sexual remarks. The allegations included a threat of terminating employment when the sexual advances were resisted. Ms. Janzen quit her job after a co-owner refused to do anything when confronted with the allegations. The Supreme Court of Canada up-held the decision of the original adjudicator who found that the two women had been subjected to persistent and abusive sexual harassment and had been victims of sex discrimination contrary to the human rights legislation in Manitoba. The adjudicator awarded exemplary damages and damages for loss of wages and found the cook and the employer joint and severally liable for the discrimination.

The Supreme Court recognized that sexual harassment may take a variety of forms, including physical and/or psychological dimensions. Sexual harassment manifests itself in milder forms such as verbal innuendo and inappropriate affectionate gestures to extreme behaviour amounting to attempted rape and rape. Actions such as pinching, grabbing, hugging, patting, leering, brushing against and touching can each be forms of physical seexual harassment. Proposals of physical intimacy, including subtle hints which may lead to the requests for dates and sexual favours, would demonstrate psychological sexual harassment. [see: *Janzen v. Platy Enterprises* [1989] 1 S.C.R. 1252 at para 49.]

Chief Justice Dickson, writing for the Court, provided a non-exhaustive definition of sexual harassment:

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment. *Janzen v. Platy Enterprises* [1989] 1 S.C.R. 1252 at para 56.

In Canada (*Human Rights Commission*) v. *Canada (Armed Forces) and Franke*, [1999] F.C.J. No. 757 (T.D.)(QL), [hereafter *Franke* Madame Justice Tremblay-Lamer applied and elaborated the*Janzen, supra*, test in assessing sexual harassment. In *Franke*, the

complainant alleged that the employer, Canadian Armed Forces, had discriminated against her contrary to section 7 and 14 of the *Act*. The complainant alleged that the pattern of conduct of her superior officers created a hostile work environment and that her a non-commissioned senior in rank to her inquired about her dating habits and made suggestive gestures towards her and showed her a postcard depicting a bare-breasted women. The complainant also alleged that the commanding officer referred to her in derogatory terms.

In a 2-1 Tribunal decision, the majority held that the complainant has not been subjected to sexual harassment and had not suffered differential treatment based on her sex. The Federal Court upheld the majority decision of the Tribunal and found that the Tribunal applied the correct test for sexual harassment and its findings were not patently unreasonable. There was evidence that the complainant did not view the conduct in question as harassment at the time it occurred. In her decision, Justice Tremblay-Lamer elaborated on the *Janzen* test to be applied for sexual harassment. Two recent decisions of the Canadian Human Rights Tribunal (*Bushey v. Sharma* dated June 5, 2003 and *Woiden et al. v. Lynn* dated June 17, 2002) succinctly summarize Justice Tremblay-Lamer elaboration of the test. In*Woiden et al.*, the Tribunal summary is as follows:

(i) The acts that are the subject of the complaint must have been unwelcome. The Tribunal must therefore look at a complainant's reaction at the time of the incident and assess whether she expressly, or by her behaviour, demonstrated that the conduct was unwelcome. The Court recognized that a verbal o is not required in all cases and that a repetitive failure to respond to suggestive comments constitutes a signal to a harasser that his conduct was unwelcome. Fear of losing her job, for instance, may force an employee to endure objectionable conduct. The appropriate standard against which to assess a complainant's conduct will be that of a reasonable person.

(ii) The conduct must be sexual in nature. This encompasses a broad range of conduct. Requests for sexual favours and propositioning fall within the ambit of acts that are sexual in nature and that constitute a psychological form of sexual harassment. Verbal sexual harassment includes gender-based insults, sexist remarks, comments about a person looks, dress, appearance or sexual habits. Physical forms of sexual harassment include pinching, grabbing, hugging, kissing and leering. Persistent questioning about an employee personal sex life has been held to constitute sexual harassment. The Tribunal determination of what is "sexual in nature" should again be assessed to the standard of a reasonable person in the circumstances of the case, keeping in mind the prevailing social norms.

(iii) Ordinarily, harassment requires an element of persistence or repetition, but in certain circumstances even a single incident may be severe enough to create a hostile environment. The objective reasonable person standard is used to assess this factor as well.

(iv) The final factor arises where a complaint is filed against an employer regarding the conduct of one of its employees. Fairness requires that in such cases, the victim of the harassment, whenever possible, notify the employer of the alleged offensive conduct. This factor is no longer relevant to the present case, in light of the settlement that the Complainants reached with the employer before the matter was referred to the Tribunal. [at para 103]

With respect to the reasonable person standard, the Federal Court of Appeal held that in cases of sexual harassment where the alleged victim is a woman, the reasonable standard should be adapted to that of a reasonable woman. (*Stadynyk v. Canada (Employment and Immigration Comm.*) (2000), 38 C.H.R.R. 01290 at para 25 (F.C.A.)) Justice Tremblay-Lamer decision in*Franke*, supra, suggests that, in determining how a reasonable person would react in similar circumstances, a Tribunal should e sensitive to stereotyped norms of what constitutes acceptable conduct and consider the context in which the impugned conduct took place.[*Franke*, F.C.T.O., supra, at para 41.]

In *Swan v. Canada (Armed Forces)*, (1994) 25 C.H.R.R. 0/312 (Can. Trib.) at para. 73, a Canadian Human Rights Tribunal confirmed that t is not necessary for harassment to be the sole reason for the actions complained of for a complainant to succeed. The harassment need not even be intentional by the perpetrator of the harassment. This case concerned a native Canadian who alleged that he was subjected to racial slurs, jokes and harassment while with the Canadian Armed Forces.

The Tribunal clearly states that *the Canadian Human Rights Act* does not take into consideration the conduct of the Complainant and even though the Complainants may participate in or instigate objectionable conduct they may still file a complaint and succeed in their claim. (*Swan v. Canadian Armed Forces*, decision of the Canadian Human Rights Tribunal dated October 18, 1994 at p. 8) This is in keeping with the remedial purpose of the *Act*. The Tribunal in Swan accepted that individual may feel powerless to do anything but accept the behavior because of their desire to fit into the peer group. In substantiating the complaint, the Tribunal ordered that a written apology be provided to the complaint but it held that it did not have the power to award lost wages. However, the Tribunal stated that if they had the power to award lost wages, they would have awarded the complainant for any remaining time left on his employment contract to a maximum of four years provided that at least four years remained on his employment contract at the time of his release. The complainant had requested four years. The Tribunal also noted that if the complainant had no remaining time on his employment contract, it would make no award as to lost wages. In determining this issue, the Tribunal appropriately considered whether or not the harassment that the complainant experienced was a factor in his decision to leave his employment. Furthermore, the Tribunal observed that the harassment need not be the sole factor in a decision to leave. [*Swan*, Tribunal decision at p. 15.]

The Commission and the complainant filed an application for judicial review only on the issue of the refusal to award lost wages. The Federal Court Trial Division allowed the application. Therefore, a victim of the harassment described in section 14 of the Act can be compensated for any or all lost wages incurred as a result of the discriminatory practices.

The *Act* and the jurisprudence make it clear that an employer is liable for all discriminatory acts committed by its employees in the course of employment. Section 65(2) of the Canadian Human Rights Act exculpates employers if they did not consent to the commission of the harassment and exercised **all due diligence** to prevent the harassment from being committed and, subsequently, to mitigate or avoided its effects. In *Robichaud v. R*, the Supreme Court of Canada noted that the xistence of a policy against sexual harassment and a mechanism to handle employee complaints could

provide an employer with a good defence which could partially reduce liability. The Court stated:

[A]n 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, it at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability [at p. 12]

In referring to the *Robichaud* decision, Aggarwal and Gupta note that the Supreme Court is informing employers that it is their actions, and not their words, that are they key factors in assigning liability to sexual harassment cases. [Aggarwal, 2000 at p. 264.]

According to Black's Law Dictionary, ue diligence is defined as:

Such a measure of prudence, activity, or assiduity, as is properly to be exercised from, and ordinarily exercised by, a reasonable and prudent man [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

In exercising all due diligence in preventing the harassment from being committed and mitigating or avoiding its effect, an employer's responsibility include: a) Make it clear that harassment of any nature, including sexual harassment, will not be tolerated; b) Establish a harassment policy which sends a clear and unequivocal message to all employees that sexual harassment is unacceptable and contrary to the *Canadian Human Rights Act*; c) Make sure every employee understands the policy and procedures for preventing harassment as well as procedures for handling sexual harassment complaints; d) Inform supervisors and managers of their responsibility to provide a harassment- free work environment; and e) investigate and correct harassment complaints promptly and effectively, even if a, formal complaint has not been received. A failure to take appropriate remedial steps immediately would make an employer liable for sexual harassment to the fullest extent.

In terms of the mechanisms for reporting and investigating complaints, a sound harassment policy is one that affords multiple points at various levels of the organization for an individual to file a complaint. Multiple filing points allow an employee the ability to choose the one that is most comfortable to the particular individual based on the individual's circumstances. A sound harassment policy will ensure that all complaints are taken seriously and dealt with fairly and promptly. Furthermore, a sound harassment policy reinforces the principle that individuals found responsible of sexual harassment will be disciplined. Aggarwal suggest the following analysis in determining the seriousness of the penalty imposed by an employer against a person who is found responsible for sexual harassment:

Disciplinary measures may range from verbal reprimands and warnings for less serious offences, to suspensions without payor discharges for more serious offences. If the employer decides that a transfer will be necessary, it should be the harasser who is transferred and not the victim. However, before deciding upon the appropriate disciplinary action, factors such as the nature of the behaviour, the persistence of the behaviour, and whether or not the harasser displays co-operation and willingness to change, should be taken into consideration. [Aggarwal, Arjun and Madhu Gupta, *Sexual Harassment in the Workplace*, 3rd Ed. (Markhan, Ontario: Butterworths Canada Ltd.: 2000 at p. 457)

In *Gervais v. Canada (Agriculture Canada)*, [1988] C.H.R.D. No.8 (Can. Hum. Rights Rev. Trib.) (QL), the Canadian Human Rights Review Tribunal applied *Robichaud*, *supra*, and found the employer, Agriculture Canada, liable for sexual harassment as a result of the actions committed by one of its employees. In this case, the complainant alleged that her work environment undermined the dignity of women. There was evidence in the hearing that magazines were being kept in desk drawers and posters displayed in the work environment which was found to be crude and in bad taste. Despite the Review Tribunal's concern with the complainant's allegation concerning a poisoned work environment, it was satisfied that sexual harassment took place contrary to section 7 of the Act and, based on *Robichaud*, held that the employer, Agriculture Canada liable for the conduct of its employee. In considering the conduct of the employer in examining the potential for mitigation of employer damages, the Tribunal made the following important observations:

a)

Despite a thorough and exhaustive investigation of this incident, by union representatives, police authorities and investigators under the direction of J.J. Carties, the ultimate decision was to take no action at all. [...]

b)

The grievance of the Appellant [complainant] required a long and laborious review process during a period of time when she was undergoing severe physical and emotional stress and receiving medical treatment for the same. The request for transfer was the ultimate in ineffective bureaucracy. We agree with the Tribunal below that it is difficult to believe that the Department was taking every reasonable step to facilitate the transfer. [*Gervais, supra*]

The Review Tribunal concluded that Agriculture Canada's actions following the actions constituting the sexual harassment were neffective and indecisive and held that the employer was liable to the complainant for loss of wages and hurt feelings.

The jurisprudence makes it clear that for an employer to avoid liability the employer is obligated to respond promptly and effectively and it must conduct a meaningful and thorough investigation of matters complained of, as well as treating the complainant with sensitivity. (see *Swan, supra* at 14; *Hinds v. Canada (C.E.I.C.)* (1988),24 C.E.I.C. 65; and *Pitawanakwat v. Department of Secretary of State* (1992),19 C.H.R.R. C/10 (appealed on other grounds)).

In conclusion, it is important to note that the *Canadian Human Rights Act* does not contain any provisions to provide costs to a respondent, if it is successful in its defence. As per section 53(1), if the Tribunal finds that a complaint is not substantiated, the complaint is dismissed. If, however, the Tribunal substantiates the complaint, Section 53(2) provides the ability of the Tribunal to award various remedies including reinstatement, an award for lost wages, expenses incurred, hurt feelings and special compensation. The recent jurisprudence of the Tribunal has awarded legal expenses incurred by a complainant in pursuing a successful complaint.