Document Body

TD-7/83
Decision rendered on April 25, 1983

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
S.C. 1976-77, C.-33, as amended

And in the Matter of a Hearing Before a Human Rights Tribunal appointed under Section 39 of the Canadian Human Rights Act

BETWEEN:
Jane Kotyk

and
Barbara Allary,
Complainants
and
Canadian Employment and Immigration Commission

Respondent
and
Jack Chuba
Interested Party
Heard Before: Susan M. Ashley
Tribunal

Appearances: R. Juriansz, Esq., Counsel for the Complainants
R. MacLean, Esq., Counsel for the Respondent
K. Wasylyshen, Counsel for the Interested Party

French version to follow
Version française à suivre

>I.
Introduction
This matter involves complaints brought by Barbara Allary and Jane Kotyk against the Canadian Employment and Immigration Commission, under sections 7 and 10 of the Canadian Human Rights Act (S.C. 1976-7, C-33).

The complaint forms signed by Jane Kotyk (Exhibit C-2) and Barbara Allary (Exhibit C-11) are identical, and allege that

"During the course of employment with Canada Employment and Immigration Commission (1) have been subjected to differential treatment by the CEC Manager, Jack Chuba."

Both complaints alleged discrimination on the basis of sex and marital status, ongoing since July 1980; both complaints were dated February 8, 1981, at Yorkton, Saskatchewan.

The evidence at the hearing brought out allegations of sexual harassment involving Mr. Chuba, against the two women complainants. However, the complaint was brought against the Canada Employment and Immigration Commission (hereinafter referred to as CEIC) and not the individual. Counsel for the complainants stated that their purpose was not only to show the employer liable on the principle of vicarious liability, but to prove that the employer failed "to take all reasonable steps to provide a working environment free of harassment, and that the liability that attaches to the Canada Employment and Immigration Commission attaches to it because of its own acts rather than because of the acts of Mr. Chuba per se." (Vol. I. p. 11) They sought to prove that the employer did not have an adequate mechanism of responding to employee complaints, and that the method of dealing with these complaints did not

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- 2 adequately
protect women employees from harassment.
Before getting to the complaint itself, I will dispose of the preliminary objections that were raised. At the first day of the hearing, Mr. Wasylyshen made motions that his client be added as a party, and that the entire matter be dismissed for the reasons stated herein. These matters were dealt with orally at the hearing. Mr. Chuba was added as a party, and the motion for dismissal was denied. I will set out reasons in writing for my decision on these matters. The objection relating to jurisdiction of the Tribunal on the various grounds stated was raised in the final written argument. It should be noted that after Mr. Chuba was added as a party, the nature of the case changed in that the complainants' allegations against Mr. Chuba himself came in issue.

II. Preliminary Motions and Objections
a) Application of Mr. Chuba to be added as a party to the hearing
Mr. Chuba sought to be added as a party to the complaint at the commencement of the hearing. No objection was raised by counsel for the complainants or the respondent, although Mr. Juriansz for the complainants explained that the complaint had not been brought against Mr. Chuba personally but against the employer for the reasons explained above. It is evident, however, that even if this was the only basis for the complaint, Mr. Chuba's reputation and his status as a federal public servant could be affected by the outcome of the case, since it was from incidents such as his allegedly improper conduct in this case that the employer was supposed to protect the complainants and other

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employees.

Section 40(1) of the Act states that:
"A Tribunal shall, after due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the Tribunal, any other interested party, inquire into the complaint in respect of which it was appointed and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, of appearing before the Tribunal, presenting evidence and making representations to it."

At his request, Mr. Chuba was added to the proceedings as an "interested party", and given the opportunity to "present evidence and make representations" as required by the section. Having made Mr. Chuba a party, it seemed clear that he should be given the opprotunity to prepare his case, and a two month adjournment was granted to provide this opportunity.

b) Motion for Dismissal
(i) At the initial hearing, Mr. Wasylyshen, counsel for Mr. Chuba, made a motion for dismissal on the basis of natural justice, in that his client had not been given an opportunity to defend himself before the Tribunal.

Mr. Chuba was not given notice of the hearing quite simply because the complaint was not against him, but against the employer. However, once it had been ruled that Mr. Chuba would be added as an "interested party", at his own request, he was granted an adjournment for the purpose of having an opportunity to prepare his case. All necessary steps have been taken to ensure that the requirements of natural justice were met, and on this argument the motion fails.

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ii) Mr. Wasylyshen also sought to have the complaint dismissed on the ground that the Canadian Human Rights Commission (hereinafter referred to as the Commission) did not comply with Section 36(4)(a) of the Act, which outlines the duties of the Commission after receiving the report of the investigator. The section states that

"After receipt of a report mentioned in subsection (1), the Commission

(a) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and

(b) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).

Mr. Wasylyshen referred to a letter addressed to him by Ms. Lorna Leader, the Commission's investigator, dated May 12, 1981. It begins by referring to the complaints by Kotyk and Allary

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against the CEIC, stating that,
"As we discussed by telephone on April 27, 1981, I've completed the investigation of complaints filed by Barbara Allary and Jane Kotyk against Canada Employment & Immigration Commission alleging discrimination on the grounds of sex and marital status. I have recommended substantiation of the complaint..."

She then outlines her recommendations and ends by saying that "... Should you or your client, Jack Chuba, wish to make additional material available for the use of the Commission in their deliberation, you may send it directly to the Commission or forward it to our Winnipeg office. The date of the Commission meeting will be the 25th or 26th of May, 1981.

You will be advised of the Commission decision approximately three weeks after the Commission meeting."

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He was never so advised and Mr. Wasylyshen contends that this is fatal to the hearing. The Act requires that the Commission advise the complainant and "the person against whom the complaint was made" of the action to be taken on the investigator's report. This was done. The parties at the time - Ms. Kotyk, Ms. Allary and the CEIC - were informed that a Tribunal would be appointed. The Commission has a discretion under s. 36(4)(b) to notify "any other person whom it considers necessary to notify...". There is no requirement to notify anyone other than the parties mentioned in paragraph (a), and although Mr. Chuba could have been notified under paragraph (b), I cannot find that the failure to do so was fatal, because of the use of the discretionary ward "may". The fact that the investigator advised Mr. Wasylyshen that he would be notified of the Commission's decision and he was not so advised indicates a lack of courtesy but nothing more.

(iii) Mr. Wasylyshen also claimed that his client did not have a fair hearing before the investigator (Vol. I. page 23). I refer to Prior v. Canadian National (Review Tribunal under the Canadian Human Rights Act, decision released February 10, 1983) on the role of the investigator. (S)He is not a trier of fact. (S)He has no decision making function. His/her function is to recommend to the Commission that the complaint go to a Tribunal or that no further action be taken. The Commission is not bound to accept the

investigator’s recommendation. The investigator’s role is to look at the facts and decide whether there are sufficient facts

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possibly support the allegations made. The investigator does not exercise a judicial or even a quasi-judicial function, and does not conduct a "hearing" or take evidentiary rules into account. (S)He talks to the parties informally to determine if facts exist

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which might indicate a breach of the Act. The decision as to whether the provisions of the Act have been breached on cases that have not been settled is one for the Tribunal, independent of recommendation of the investigator, conciliator or the Commission. The duties of the investigator are set out in section 35 of the Act. Section 35(a) provides that the Governor in Council may make regulations prescribing procedures to be followed by investigators and authorizing the manner in which complaints are to be investigated. To date there are no regulations under this section prescribing any specific course of conduct to be taken by investigators.

In any case, Mr. Chuba was interviewed by the investigator, who reported her findings of fact from this interview and from interviews with other people. She fulfilled her functions under the Act and I cannot find anything in her conduct which has deprived Mr. Chuba of receiving a fair hearing.

c) Jurisdiction of the Tribunal
(i) The Act is a penal statute and must be strictly construed Mr. Wasylyshen raised this argument presumably to guide the Tribunal in its interpretation of the Act, and also to set the stage for determining the Act to be a penal one for the purposes of bringing the Charter of Rights provisions into play. I do not accept this position. I refer to Attorney-General of Canada

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Canadian Human Rights Commission (Federal Court, (1980) I C.H.R.R.D/91) in which Mr. Justice Thurlow states that

"... The statute (Canadian Human Rights Act) is cast in wide terms and both its subject-matter and its stated purpose suggest that it is not to be interpreted narrowly or restrictively."

Hufnagel v. Osama Enterprises Ltd. (1982) 3 C.H.R.R. D/922 also discussed this point, and disagreed with the suggestion that the Act was penal and thus required a strict interpretation, on the basis of the scheme of the Act as a whole, and the penalties imposed for discriminatory conduct.

Further, section 2 of the Act states that the purpose of the Act is to

"... extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:

(a) every individual should have an equal opportunity with other individuals to make for himself of herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or

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ethnic origin, colour, religion, sex or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap..."

I have no hesitation in concluding that the Canadian Human Rights Act, by the specific wording of section 2, by an overall reading of the Act, and by reference to the case cited, is a remedial rather than a penal statute, and as such should be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." (Interpretation

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- 8 Act,
R.S. Can. 1970, 1-23, s.11)
(ii) The provision "shall" is imperative in section 36(4); accordingly, any subsequent action done pursuant to the enactment is null and void.

Mr. Wasylyshen put forward in his written argument that the use of the imperative "shall" in section 36(4)(a) implies that the failure by the Commission to notify Mr. Chuba of its decision on receipt of the investigator's report renders further proceedings null and void. As stated earlier, I do not accept this argument, since Mr. Chuba was not "the person against whom the complaint was made" at that time. This "person" was the CEIC. The section goes on to give to the Commission, by use of the word "may", a discretion to "notify any other person whom it considers necessary to notify of its action." I cannot find that the use of "shall" in paragraph (a) carries over to (b), particularly in light of the specific use of the discretionary "may" in that paragraph. The Commission did not notify Mr. Chuba because he was not a party, and I do not agree that because they did not advise him under (b) when they had a discretion to do so renders the proceedings void.

(iii) Charter of Rights Provisions
Mr. Wasylyshen contends that the failure of the Commission to notify Mr. Chuba under s. 36(4) constitutes a violation of Mr. Chuba's right to make a full answer and defense to the 'charges' brought aginst him, and also that he was not tried "within a reasonable time" as required under s. 11(b) of the Charter.

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I have already dealt with the question of the Commission's duties under s. 36 and found that their failure to notify someone who was not a party is not a defect. Mr. Wasylyshen contends (Argument, page 7) that the fact that Mr. Chuba was added as an "interested party" only at his own request was not relevant. Once again, I state that the Commission appointed a Human Rights Tribunal to inquire into complaints against the CEIC, as evidenced by the Complaint Forms (Exhibits C-2 and 11) and the Appointment of Tribunal form (Exhibit C-1). The Commission complied with s. 36(4) by notifying in writing the person against whom the complaint was

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made (CEIC) of its action under s. 36(3) and its appointment of a Tribunal under s. 39(1). Mr. Chuba joined the proceedings as an "interested party" under s. 40(1), at his own request, after which he participated fully in the entire proceedings.

As to the "reasonable time" argument, it must be noted that s. 11 of the Charter wherein this right falls relates it to rights held by "any person charged with an offence". Taken in the context of the 'Legal Rights' section of the Charter (ss. 7-14), it is noted that sections 7, 8, 9, 10 and 12 refer to rights held by "everyone"; section 13 refers to the right to freedom from self-incrimination by a witness, and s. 14 speaks of the rights of a party or a witness to an interpreter. Only s. 11 uses the wording "any person charged with an offence", and then gives certain specified rights to this category of persons. The general wording in ss. 7-10 and 12 is contrasted with the specific

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 wording
or ss. 11, 13 and 14, and indicates an intention to differentiate between the different sets of rights. Also, the heading to s. 11 is entitled "proceedings in criminal and penal matters", and is further indication that s. 11 is not meant to apply in proceedings such as these. I refer also to Juric v. Ivankovic, (unreported) wherein Mr. Justice Legg of the Court of Queen's Bench for Alberta dealt with whether the rights given to persons "charged with an offence" under s. 11 of the Charter have any application to a proceeding under the Alberta Maintenance and Recovery Act. He found that those proceedings were civil in nature and not within the meaning of the word "offence"; therefore, s. 11 of the Charter did not apply.

In any case, I do not find merit in the suggestion that the time lapse between the filing of the complaint and the commencement of the Tribunal hearing was unreasonable. The complaints filed by Ms. Kotyk and Ms. Allary were dated February 8, 1981. The appointment of the Tribunal by Mr. Gordon Fairweather, the Chief Commissioner (Exhibit C-1) is dated April 8, 1982. The first hearing was scheduled for July 13, 1982, and was adjourned to August 17 at the request of the respondent. Upon Mr. Chuba being added as an "interested party" on August 17, the matter was once again adjourned until October 25, 1982 to give Mr. Chuba and his

solicitor the opportunity to fully prepare their case. While the time period might be considered lengthy, I do not find that it was "unreasonable" in light of the complicated nature of the case. The length of time which elapsed from the date Mr. Chuba was

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as an "interested party" (August 17, 1982) to the actual date of the first hearing on the merits (October 25, 1982) cannot be considered an unreasonable period.

(iv) Sexual harassment is 'ultra vires' Parliament
Counsel for the respondent and the "interested party" contend

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that Parliament does not have legislative jurisdiction over the matter of sexual harassment as a sub-category of sex discrimination, since this area is in the nature of "property and civil rights" and as such falls within the exclusive legislative competence of the provinces. They argue that Parliament can only legislate in this area if it is necessarily incidental to or an integral part of a federal work, business or undertaking. To this effect they cite Construction Montcalm Inc. et al [1979] 1 S.C.R. 754 at 755 and Reference re Validity of Industrial Relations and Disputes Investigation Act etc. [1955] 3 D.L.R. 721 at 722 (S.C.C.).

The Montcalm case does say that the provinces have primary jurisdiction over labour relations, but that Parliament has jurisdiction over the conditions of employment of a federal undertaking, that is, one whose "normal and habitual" activities are a federal matter. The Reference re Validity of Industrial Relations etc. case confirms that the Parliament of Canada has the competence to enact collective bargaining legislation to govern the labour relations of employees and employers whose operations fall within the works, undertakings, business or activities coming within the classes of subjects assigned by the B.N.A. Act to Parliament. It

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on to say that such legislation does not fall within provincial authority to legislate in relation to property and civil rights in the province, and correspondingly, provincial legislation is inoperable where Parliament has so legislated.

I refer also to the decision of the Federal Court of Canada on an appeal of a Canadian Human Rights Review Tribunal decision Re Canadian Human Rights Commission, Cooligan and McKenny et al v. British American Bank Note Co. Ltd. (decision No. A-182-81, dated February 7, 1983) wherein Mr. Justice LeDain stated that:

"The matter of employer and employee relations falls within federal legislative jurisdiction when the undertaking, service or business in which they are

involved is a federal one in the sense that it is subject to general regulation by Parliament by virtue of one of the heads of federal jurisdiction, general, or specific."

The Canadian Human Rights Act deals with many aspects of the employer and employee relationship, in the regulation of government departments and other federal undertakings. I find that allegations of sex discrimination, and more specifically of sexual harassment as a type of sex discrimination, by employees in undertakings otherwise under federal legislative jurisdiction, against their employers or supervisors, are 'intra vires' Parliament.

(v) Sexual harassment is not a type of discrimination prohibited by the Canadian Human Rights Act.

This objection to jurisdiction was raised by both Mr. MacLean for the respondent and Mr. Wasylyshen for Mr. Chuba. They contend

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that adverse differentiation because of sex as prohibited by the Act does not include sexual harassment.

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As part of this argument, it was suggested that the introduction to Parliament of specific amendments to the Act dealing with harassment (Bill C-141 (1st Session, 32nd Parliament, 29-30-31 Eliz. Il 1980-81-82)) implies that the topic was not previously covered in the Act. On the contrary it is my interpretation of the Bill that the amendments propose to clarify the law relating to this type of discrimination, and to leave no doubt, if ever there were doubts, as to its coverage under the Act. Clause 7 of the Bill deals with harassment on prohibited grounds of discrimination (race, religion, sex, etc.) and for clarity, and "without limiting the generality" of that provision, adds that sexual harassment shall be deemed to be harassment on a prohibited ground of discrimination. The fact that the Bill mentions the subject of sexual harassment does not necessarily lead to the conclusion that it was not previously covered by the Act.

Counsel also contend that sexual harassment is not primarily a matter of gender-based discrimination, but is gender-related only to the extent that different people have different sexual preferences; they contend that sexual harassment as a concept cannot be said to apply to only one gender and thus is not sex discrimination. Supporting the view that "sex" in its normal meaning in this context refers to the gender of a person, not one's sexual activities, propensities or orientation, counsel for the respondent cites Re Board of Governors of the University of Saskatchewan et al and the Saskatchewan Human Rights Commission (1976) 66 D.L.R. (3d) 561.

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The first case in Canada dealing with the definition of sexual harassment and the question of whether it is sex discrimination as prohibited by human rights legislation was Bell and Korczak v. Ladas and The Flaming Steer Steak House (1980) 1 C.H.R.R. D/155 (Ontario Board of Inquiry, per O.B. Shime, Q.C.). The Board was interpreting s. 4 of the Ontario Act which at that time stated:

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

(There does not appear to be any substantial difference between the meaning of the words "discriminate against" (Ontario) and "adversely differentiate" (Canada).) In holding that sexual harassment fell within the prohibition of discrimination because of sex, the Board stated the following (para. 1388 et seq.):

"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 compliance to improve or maintain her existing benefits. The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work-place, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman. Where a woman's equal access is denied or when terms 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

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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 effect 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 loss of employment beiefits. Such coercion or compulsion may be overt or subtle but if any feature of employment becomes reasonably dependent on reciprocating a social relationship proferred 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, which are contained in the

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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 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.

A Canadian Human Rights Tribunal adopted this statement in Robichaud et al. v. Brennan et al (1982) 3 C.H.R.R. D/977, although

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Tribunal found on the facts that there had been no sex discrimination. That conclusion was reversed by a Review Tribunal. The decision of the Review Tribunal (unreported, decision rendered February 21, 1983, per Dyer, Mullins and Robson) did not deal with the merits of the issue, merely saying that the complainant had "established a prima facie case of sexual harassment", taking it as a 'given' that such behaviour was prohibited by the Act.

The statements in the Bell case have been adopted by Ontario Boards of Inquiry in the following cases: Hughes and White v. Dollar Snack Bar and Jeckel (1982) 3 C.H.R.R. D/1014, Mitchell v. Traveller Inn (Sudbury) Ltd. (1981) 2 C.H.R.R. D/590, Cox and Cowell v. Jagbritte Inc. and Gadhoke (1982) 3 C.H.R.R. D/609, Torres v. Royalty Kitchenware Ltd. and Guercio (1982) 3 C.H.R.R. D/858, MacPherson, Ambo and Morton v. "Mary's Donuts" and Doshoian

(1982) 3 C.H.R.R. D/961, and Aragona v. Elegant Lamp Co. Ltd. and Fillipitto (1982) 3 C.H.R.R. D/1109.

An Alberta Board of Inquiry under similar provisions of the Individual's Rights Protection Act adopted the Bell decision in Deisting v. Dollar Pizza (1978) Ltd., Papaconstantiou and Nickolakis (1982) 3 C.H.R.R. D/898. A Manitoba Board of Adjudication has also adopted the Bell decision, stating that the revelant legislating was virtually identical: Hufnagel v. Osama Enterprises Ltd. (1982) 3 C.H.R.R. D/922. A New Brunswick Board of Inquiry adopted the Bell decision in Doherty and Meehan v. Lodger's International Ltd. (1982) 3 C.H.R.R. D/628, also interpreting similar provisions.

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At least two Ontario cases have also decided that harassment or "slurs" relating to a person's race are prohibited by a general prohibition of discrimination on the basis of race: Singh v. Domglas (1980) 2 C.H.R.R. D/285, and Dhillon v. F.W. Woolworth Ltd. (1982) 3 C.H.R.R. D/743. I do not find any significant difference in the analysis, whether the discrimination be based on race or sex.

A variety of United States cases dealing with sexual harassment were canvassed in the Cox and Cowell case (supra). It was generally accepted that they demonstrate a development of the law in the United States roughly equivalent to that in Ontario, as established in the Bell decision. A similar review of United States law in racial slur cases was undertaken in the Dhillon decision, again with similar conclusions.

The Robichaud case (supra), the only case to date which has dealt with sexual harassment under the Canadian Human Rights Act, did a review of the cases and summed up the elements that were necessary to justify a complaint of sexual harassment under s. 7(b) of the Act. (The Review Tribunal, while overturning the initial decision, did not take exception to this analysis.) At para. 8717:

"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

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had adverse employment consequences. Thirdly, if the complainant cooperates with the alleged harassment, sexual harassment can still be found if such compliance is shown to have been secured by employment-related threats or, perhaps, promises."

In the Robichaud case, Professor Abbott found on the facts of the case that sexual harassment had not occurred. The Review Tribunal did not dispute his analysis, but reached a different conclusion on the facts. They went further, to find that the individual respondent had engaged in sexual harassment by reason of his creation of a "poisoned" work environment. I will deal with this point later.

In Hughes and White (supra), the Ontario Board stated as a general proposition that (at para. 9022):

"... harassment based on a factor in respect of which discrimination is unlawful is inherently in violation of the Ontario Human Rights Code since it singles out the victim for treatment on the basis of that factor. Thus, it is no defence that other employees are similarly treated."

There is now sufficient authority to state clearly that sexual harassment does constitute sex discrimination or adverse differentiation on the basis of sex, and as such is prohibited conduct under the Canadian Human Rights Act.

Therefore, I find that the Tribunal has jurisdiction to deal with the complaint before it.

Evidence:
a) as against Jack Chuba
(i) Jane Kotyk
Jane Kotyk has been an employee of the Canada Employment
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in Yorkton, Saskatchewan since February 1979, and began her current position of Employment Counsellor on June 6, 1979. In this position she was subject to a year’s probation, which ended on June 1, 1980. Mr. Chuba was the manager of the centre at Yorkton for the period relevant to these complaints. Mr. Gary Enmark became her immediate supervisor early in 1980.

At the time of her employment, Ms. Kotyk was separated from her husband under very difficult circumstances. There was evidence that Mr. Kotyk had a drinking problem, and when drunk would phone his ex-wife at home and at the office making abusive comments and

suggestions. Ms. Kotyk's difficulties with her husband were well known to Mr. Chuba, as Mr. Kotyk had made the accusation to Mr. Chuba that Ms. Kotyk had obtained her job improperly. Mr. Chuba stated that these calls to the office, both to himself and to Ms. Kotyk, occurred during the entire 1979-1980 period.

In July 1980 an incident occurred which was to have later bearing on the allegation of sexual harassment. Ms. Kotyk has alleged throughout that Mr. Chuba was constantly delving into her personal problems, asking questions about her sex life, and suggesting that she should "open up" to him. She recounts several incidents where such conversations occurred, and her response was that her problems with her husband were not interfering with her work, and that she did not want to discuss such personal matters. She relates her refusal to enter into such discussions with Mr. Chuba to the fact that a letter - a minor reprimand - was placed in her personal file.

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Mr. Enmark, her immediate supervisor, gave testimony that Mr. Chuba had directed him to talk with Ms. Kotyk and to place the letter in the file. (III-329) Although there had been some minor problems with Ms. Kotyk's performance, Mr. Enmark felt that they were not serious enough to warrant the measures taken. The letter was dated July 22, 1980, signed by Mr. Enmark, and said among other things:

"... We discussed the fact that you have very serious personal problems. Your responsibility is to straighten out your personal affairs so that they do not interfere with the performance of your job duties. Because of your problems and probably other circumstances there are frictions building between you and other staff members. As I suggested to you, you should be more open and honest in dealing with the other staff members... You are aware that this copy will be going to your personal file and a copy to you. Use it for directions for your future." (Exhibit C-4)

Mr. Chuba denies having ordered this reprimand to be placed in her file (V-651), even though he admitted in cross-examination that he had told Ms. Kotyk that she should be more "open and honest", as the memo suggested. Weighing the evidence relating to this incident, I accept the testimony of Ms. Kotyk and Mr. Enmark that it was at Mr. Chuba's direction that the reprimand was placed in Ms. Kotyk's file. The question as to the effect of this reprimand will be dealt with later.

Shortly after this, Ms. Kotyk says Mr. Chuba called her into his office, asking her "quite personal" questions about her status, and whether she was still involved with her ex-husband. This was during conversations dealing with office matters. She says that their conversations always seemed to end up on her personal life.

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says that he asked her if she was still having sex with her ex-husband. Her reaction was shock, stating that she did not want to discuss her personal life. Mr. Gil Johnson, the Regional Director for the CEIC had visited the office on August 11, 1980 and spoke with Ms. Kotyk about a phone call her husband made to him. She says that after this visit, Mr. Chuba spoke to her and said that if she was having any problems she should discuss them with him and not Mr. Johnson; as he was leaving her cubicle after this conversation, he grabbed her thigh in anger. This evidence was not contradicted.

At the end of July 1980, she asked Mr. Enmark to complete her evaluation, so that her probation period could finish. Mr. Enmark suggested that Mr. Chuba should do her evaluation, since he had not been her supervisor for the full period. (It was her understanding that she remained on probation until her evaluation was completed, although apparently this was not the case.) The evaluation was not done at that time. In her words,

"Because at that point I was still understanding that I was under probation and that it was important that I pass my probation, and I felt once my probation was passed I would have a little more job security than I did." (III-208)

At the staff barbecue on August 21, 1980, Ms. Kotyk alleged that Mr. Chuba told her he "thought it was time for an involvement." (II-64) She refused. She stated that, after

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manipulating the situation in order to drive her home, he made sexual advances to her in the vehicle. Her response was:

"I had told him, no, I wasn't interested. I told him he was married and that I wouldn't get involved with him. And he wasn't taking no for an answer so I just stated

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that if he wouldn't drive me home, I would go back to the house and it would be an embarassing situation for all of us. Then he took me and dropped me off at home." (II-66)

Mr. Chuba's characterization of this incident is quite different. He says that:

"... We ended up in the car together; she told me she for sometime wanted to have an affair with me, to be a mistress. I didn't object; I said, "Well, perhaps that might be a good idea ... We went to Nadine's place; we sat there for a little while. We were leaving, we went back to Jaycee Beach; we parked until, I'd say, midnight

or even further. She wanted very badly to have an affair that night, and I said we could find a better time and a better place." (V-623)

Mr. Chuba alleged that a future meeting at his cabin was arranged on the night of the barbecue, so that they could embark upon the affair. No witnesses were called for either Ms. Kotyk or Mr. Chuba to lend credence to either story.

Ms. Kotyk says that during August and September Mr. Chuba approached her several times, pressuring her for an "involvement". She describes incidents where he wanted her to go for coffee, frequently during office hours, to discuss "certain matters". On one of these occasions, shortly after the barbecue, he said that "he could provide special favours for me", such as not forcing her to use annual leave days for medical treatment when her sick leave was used up. (II-69)

Mr. Chuba's response to these allegations is that during this period he and Ms. Kotyk were involved in an office romance; he does not deny going for coffee frequently and being seen with her often in the office. He did not deal, either in direct or cross-examination, with the alleged promise of "special favours",

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- 23 although
he did admit that he had promised Ms. Kotyk that he would never fire her. In his words:

"... She'd be coming to see me, or I would go to see her about the calls he (Mr. Kotyk) made; in the office, yes. I sort of felt sorry for her and I did promise that I would never fire her; I made that pledge to her."

(V-622)
H explained further in cross-examination:
(Mr. Juriansz)
Q. "... you promised Jane Kotyk that you would never fire her. How can a good manager made such a promise? What if the employee stops performing.

A. She wasn't performing that well then, because she had these personal problems. She still appeared to me like the most innocent girl that I had ever met.

Q. Did you make the promise because you were involved with her?

A. No, I made this promise, I'm sure, before I was involved with her.

Q. .... Why would a manager made a promise to an employee that he would never fire her?

A. Because she was continuously saying that "he is trying to antagonize you to fire me, in order so you would fire me." And I says, "Well, look, he's not going to antagonize me into firing you, period." (V-689)

Ms. Kotyk alleges that during the August - September period Mr. Chuba started "picking on me as to my stability and sanity" (II-72), making such comments as

"How I could have so many problems and yet be such a pleasant and polite person, and with all those problems, there was a way to relieve them.

Q. What was the way to relieve them?
A. Sex, and I told him I wasn't interested. I wasn't interested in men. I was handling my problems well, work was therapy for me." (II-72)

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- 24 She cites him saying that sex would relieve her problems on other occasions as well. These discussions frequently took place in her cubicle or in Mr. Chuba's office. An example of her reaction to these proposals:

"... When he would get enough 'No's', that he would be getting upset and angry, he would tell me that I could live like a hermit all my life and what was wrong with me..." (II-72)

and further
"I had told him, no, I wasn't interested, he was married, I wasn't going to get involved. I wasn't going to be a

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third party. He would get upset and go to the point of degrading me, like who did I feel I was to say no to him. He would get into my work. He spent a lot of time in my cubicle. He even got to the point of asking me why I was seeing so many good looking young men as clients. We work in rotation. He made me feel very inferior. He would get very angry and upset and stomp out of my cubicle when I told him I wasn't interested."

Mr. Chuba denies ever having engaged in conversations with Jane Kotyk wherein he said that sex would relieve her problems. (VI-704) It should be noted that Barbara Allary said similar comments were made to her, which Mr. Chuba also denied. I accept the evidence of Ms. Kotyk that these conversations did take place.

Another incident occurred at Mr. Chuba's cabin at Good Spirit Lake in early September, 1980. Ms. Kotyk stated that, on the pretext of going for coffee to discuss her evaluation, Mr. Chuba

drove north to his cabin. She says that he persisted in talking about her personal problems and her stability; once again he commented that sex would be good for her. (II-74) On the way to the cabin she said that

"he had stopped and wanted to neck, and I said no, and he grabbed me. I told him to leave me alone and we had better go back, and he apologized for what he did." (II-79)

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- 25 Mr.
Chuba, on the other hand, says that the rendezvous at the cabin was pre-arranged, that they in fact went to the cabin, that they were preparing to have intercourse, but that he refused to have sex with her because of fear that his wife would find out that they had been at the cabin. He stated that it was on this occasion that they planned a further meeting at Foam Lake.

Once again, there was no other evidence from witnesses which would tend to corroborate either version of the events on this occasion. There is evidence from Ms. Suzanne Gray, a social worker in Yorkton, who Ms. Kotyk started seeing in October 1980 because of her marital problems. In the course of their discussions, Ms. Kotyk had indicated to her that she "felt she was being harassed by her manager", she felt "she was being pushed into an affair", that "her job was somehow threatened", and "that her probationary report was being held over her head". (III-268) It should be noted that Gary Enmark gave evidence that Ms. Kotyk came to him again in October and November about her probation report. He said that

"She was upset. She said that she wanted her evaluation done because she felt that she was being pressured.

(Mr. Juriansz)
Q. Did she say by whom?
A. No.

Q. Did you ask?
A. Well, no, I didn’t ask because I assumed that I knew who was putting pressure.

Q. Why did you assume that a particular person was putting pressure on her?

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- 26 -
A. Well, in the office at the time there was only myself and one other person that could be putting pressure work-wise on her and it wasn’t me, so I assumed that it must have been the manager." (III-333)

The next incident occurred on a two day trip that Ms. Kotyk was required to take to Wadena and Wynyard to meet with some of her clients. She had received authorization to stay at Foam Lake for the night, rather than coming back to Yorkton and going out again the next day. It was Mr. Chuba's responsibility to give travel authorization. Before the trip. Mr. Chuba once again stated that it would be a "good time to spend some time together and I said 'no'." She stated that Mr. Chuba came to the motel where she was staying. Her evidence:

"... He had grabbed at me a couple of times and I sat in the corner by the table. He shoved those papers aside and said he wasn't interested in the work, that all he wanted was sex. I had told him it wasn't my lifestyle to get involved in sex, involved with a married man. I had asked him to leave me alone, we could discuss the work that he wanted to discuss. I had asked him how his wife would feel if she knew that he was here and he just sort of laughed it off. We hassled some.

Q. What do you mean by "hassled some"?
A. He wouldn't leave me alone. He kept grabbing for my bust. He made me feel very dirty and ugly and upset and angry, and I haven't been able to say it to anyone. I swore on the Bible. He made me have sex. I feel so ugly, I wish I could cut every part of my body out that he touched. I'm an honest person. I still feel so dirty every place he grabbed me.

...
A. Mr. Chuba hassled me and hassled me. I told him to leave me alone. I brought up about the fact his wife - he said he couldn't go home because he told her he was going to Regina. My main concern was that I wasn't going to

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have any involvement with him and I didn't know how I was going to handle it. My job was very important to me. He

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hassled me for quite a while.
Q. What do you mean by hassled you?
A. Grabbing at me, telling me that sex would be good for me and how could I stay without sex for so long, that I couldn't be normal. (II-80-1)

Mr. Chuba's explanation of these events was that the meeting was prearranged and that the sexual activities were consensual. He stated that a few days after the Foam Lake incident, they talked, and in his words:

"She would say, "I don't feel too comfortable having sex with a guy whose wife I know." I said, "That's fine. I swear I'll never touch you sexually again." Sexually

meant having intercourse. But she said, "I still want to carry on in another fashion, short of sex." I said, "that's fine." ... After Foam Lake, she was the agressor, you might say." (V-627)

Once again, because of the nature of the incident, there is no corroborating evidence for either party's version of the facts.

Ms. Kotyk testified that in mid-September, her ex-husband took her son without her knowledge or permission. Her son was eventually found in Saskatoon. She testified that Mr. Chuba kept saying that it was important for her to talk about her problems. He said he would drive her to her in-laws' farm in an attempt to locate her son. She says that:

"He drove out towards P.V. Mart and then turned around and came back into town. I told him I wanted to go back to the office. I would be all right there. He drove past town. He kept driving and trying to break me down, that I needed a shoulder to cry on, I needed someone's sympathy and I needed sex to relieve all the tensions.

I told him I didn't. I told him, as long as I was in the office I would be okay. Then he'd tell me that he

couldn't see how I was holding myself together as well in a situation like that, and he was driving out on the highway towards Churchbridge. Then he got to Langenberg and stopped at a ballpark. He grabbed me around my neck and he wanted to kiss me and I wouldn't and he grabbed me on my breast again. I told him to leave me alone. I couldn't get out of his seatbelt and he got angry again.

Then I got out of the belt and I got out of the car. I told him to take me back or else I would walk back. I got out of the car and I stood there for a while. Then he got out. He stomped away mad and he sat in the car. He said, "If you want to go back, get in". He drove back and most of the way nobody said anything. About halfway back he said he was sorry for what he did. He dropped me

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off near the office and he said he didn't want to take me to the office because his wife was supposed to be there. And I walked back into the office and I went to my cubicle." (II-8405)

This evidence was not contradicted, nor did Mr. Chuba deal with it in direct or cross-examination.

Ms. Kotyk told of how she avoided Mr. Chuba at the office (II-87), and after a while

"he started becoming friendly again and I kept giving him the cold shoulder and he just went more into my work. My placements were usually higher than the men, sometimes the men all put together, and it didn't seem that it was good enough for him. Then he'd become kind and he'd want me to start thinking about taking the front-end supervisory position. Then he started putting pressure on me to handle immigration matters with employers that were mine when, basically in the office Keith Elliott had handled all the immigration ... It was October or November, Mr. Chuba put a lot of pressure on the employment staff to alienate me from them."

She testified that she frequently worked in the evenings at the office, and he often came in to discuss having an affair. She stopped working in the evening to avoid him and began coming in early in the morning. She described an incident that occurred early one morning

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"Yes. He was trying to be very nice. I didn't know that he was in the office. I went to take my coat off and he pinned me against the closet. He said that I looked very nice today and that he wanted a good morning kiss, or something like that. I don't remember, but Mrs. Young had walked in on us, so he turned away and went to his office.

And one other time was in the staff room.
Q. What happened in the staff room?
A. I had gone to start making coffee and I turned around and he was standing right beside me and he pinned me against the cupboard. Mrs. Young came in again." (II-89-90)

Ms. Kotyk described her emotional state after all of these incidents:

"At that point I was really in rough shape. I was waiting for my evaluation to be done. Basically I was afraid of not having my job. I liked my job and I didn't want to leave. I liked doing what I was doing and I needed the money because I was supporting my children on my own." (II-90)

The evidence as to her emotional state and the fact that she was anxious about her probationary report was corroborated by Ms. Gray and Mr. Enmark.

Her evaluation report (Exhibit C-6) was eventually done, and signed by Mr. Enmark on November 24 and by Ms. Kotyk on December 17. In late December or early January Mr. Chuba called her into his office supposedly to discuss her evaluation and to sign it. Once again he talked about sex. This was apparently the

culminating incident to this complaint, and I will set down the discussion in full:

(at II-93)
"... Mr. Chuba called me to the office and he wanted to know why I was giving him the cold shoulder and being so rude to him.

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- 30 -
(Mr. Juriansz)
Q. Did he indicate why he was calling you to his office?
A. Yes, he wanted to discuss my evaluation. He said he still wanted to be friends and that I could let down some and not be such a hermit and recluse, and I had to be abnormal. And I just told him that was my lifestyle. I wanted to clean up what I had... and I told him about the Commandments. There was a Bible sitting in his bookcase and I had told him he can't break.. I told him all the Commandments were the same, you couldn't break one and feel that it was okay. He told me to throw it in the corner.

Q. "It" being...?
A. The Bible. Then he called me a hermit again. He brought out the evaluation and he signed it. I don't know if he dated it then. I know he signed it and he threw it at me and he told me I'd better think seriously about coming across or I would have difficulty with my job.

Q. Do you remember his exact words, or were those his exact words?

A. They were very similar to that, I don't remember. I told him I couldn't change my lifestyle, that I was just the way I was. I would handle my problems and as long as they weren't affecting my work inside the office, I didn't feel that it was any of his business to bother me about them, and I told him if there was any difficulty with my work to let me know and I would improve it.

I also told him that I would do my work well and I didn't want any hassle from him. He kept calling me a hermit and abnormal. He said it about three times and I finally broke down and cried and I sat there for about five

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minutes because I couldn't... I'd walk out and face the whole admin. staff."

Mr. Chuba denied that the conversation was as described by Ms. Kotyk, although he did admit in cross-examination that she would frequently bring up the Bible in conversations, and related a specific conversation:

A. "Yes, to get to that Bible thing, she would come into the office to talk about something. I would ask her something, she would say, "Come and read the Bible." I said, "What's this got to do with the conversation we're having here?" She did say "Well, I don't want to have -- I follow the ten commandments." I said, "What am I trying to do

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- 31 -
that contradicts your ten commandments?" I was having a conversation; she automatically assumed that if I talked to her, I was after sex. I said after the 9th of September, I was never, ever going to have sex with her."

and further
"In the conversation in December, she said, I believe she said, "I don't want to have sex with you." I said, "Did I call you here for sex? I didn't call you here for sex. I told you months ago I wasn't going to have sex with you." She assumed every time, in my opinion, that every time I talked to her, I was after sex. I don't know what she thinks she had that other women don't; she obviously thinks that everybody is after sex with her." (VI-718)

These quotes seem to confirm that the dialogue about the Bible did take place, and also appear to contradict Mr. Chuba's earlier statement that after Foam Lake, Ms. Kotyk was the agressor. The fact that Ms. Kotyk left Mr. Chuba's office in tears was corroborated by Barbara Allary. On balance I accept Ms. Kotyk's interpretation of the events at this meeting.

It should be noted that during the July - December 1980 period, Mr. Chuba never told Ms. Kotyk that she was no longer on probation even though he knew it to be the case, and knew that she was concerned about her job security.

(Mr. Juriansz)
Q. "... You told us in July of 1980 you promised you would never release Jane Kotyk, and I asked you, why didn't you assure her, reassure her, by telling her she was off probation. You told me she was still on probation; do you remember that?

A. I never even thought of probation; it never came to mind, it never occurred to me that she was worried about probation. She never brought the fact of probation to me. She brought the fact of losing her job... because

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before probation, you can lose one's job before or after probation.

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- 32 -
Q. ... I'm showing you a copy of Jane Kotyk's evaluation; it indicates that the date of her appointment to her position was the first day of June '79, so she would have been off probation the first day of June.

A. That's right.
Q. In '80.
A. That's right.
Q. So during your conversation in July, she would have been off probation.

A. Sir, I told you I could have told her; it never came to my mind; must I repeat myself ten times."

Gary Enmark's involvement in these complaints was brought into evidence. After Mr. Chuba was advised that allegations of sexual harassment had been made and that Mr. Enmark had spoken with Ms. Kotyk about them, Mr. Chuba made various requests of Mr. Enmark, in the form of memos (Exhibit C-14). These eight memos were sent between January and 28, and said such things as:

"... Please provide me with a written report, by 4.30 today, in relation to your liaison with the coordination of the noted Outreach..." (Jan. 23)

(re Training Request Input for 1981-2) "...I would like you to submit the noted input to me by Monday Jan. 26 in order that I may review it before the final draft is made for submission to R.O...." (Jan 23)

(re Native Outreach) "...In your Jan. 30th report to me, please report on the progress of the Outreach staff in terms of the knowledge they've gained of our programs. ... Also attach their statistical data sheets up to the end of Dec. 1980." (Jan. 23)

(re Manual Review)..."It has become apparent that no "Manual review" sessions have been held for a long time. ... I order you to immediately implement E A manual review sessions every Friday from 8 a.m. to 9 a.m. ... You will commence with Chapters 1 and 2..." (Jan. 27)

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- 33 Mr.
Chuba also informed the staff that hereafter during his absence from the office Mr. Gaitens would be in charge, rather than Mr.

Enmark, as had previously been the case (Exhibit C-15). Counsel for the respondent characterizes this behaviour as "going by the book", rather than simply a hostile reaction to Mr. Enmark's involvement with the complaints. These memos must be seen in context. While it was within Mr. Chuba's authority to send them,

it was not his habit to do so on a regular basis, particularly not a number of such memos within a short span of time. Mr. Chuba felt that Mr. Enmark had manipulated the office situation because he wanted the manager's job. Morale in the office in the month of January was extremely low. As well as the sexual harassment charges, grievances were about to be filed against Mr. Chuba relating to fraud and mismanagement.

There was nothing in the evidence to indicate that Mr. Enmark had "masterminded" the events, or that he was orchestrating Mr. Chuba's removal from the office. I found Mr. Enmark to be straightforward about his dealings with Mr. Chuba, and am satisfied as to his credibility.

After hearing all of the evidence, and observing the demeanor of the witnesses, I find, on balance, that Ms. Kotyk's evidence is more credible and is to be believed in preference to that of Mr. Chuba where there is a conflict. In particular, I find that Mr. Chuba's advances to Ms. Kotyk were unsolicited and unwelcome, and that she feared that her employment would be jeopardized if she refused his advances.

(ii) Barbara Allary
Barbara Allary was a Native Employment Counsellor at CEC Yorkton during the period relating to these complaints, and Mr. Chuba at all relevant times was the manager. Her complaint regarding sexual

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- 34 harassment
arises from three specific incidents which took place while she was travelling with Mr. Chuba on working trips. The first took place in July 1980 on a trip she and Mr. Chuba took to visit a native group in Langenberg. She says that on the drive back to Yorkton

"... he asked me how work was going, and I told him about the usual frustrations that goes along with the job. And he says, "Well, maybe some of those frustrations is from not getting enough sex,: and I says, "No." And he asked me if I wanted to have sex and I said, "No". So he dropped me back off at the office about quarter to 12 that same morning." (III-276)

The second incident happened within a month of the first, under similar circumstances. On the way back from a meeting in Kamsack,

"... We had lunch in the cafe and our meeting and on our way back to Yorkton we had hit a heavy rain storm. Again he asked me how was work going and again I replied, "The usual frustrations with the job" and he said, "Well, some of those frustrations, would it be from not getting enough sex?" And I said, "No". He said, "Well, it's raining pretty heavily.

No one's going to see us. Why don't we climb into the back of the stationwagon and have sex?" And I said, "No". The rain stopped and we returned to Yorkton." (III-277)

The third incident occurred in December 1980 on the way back from a meeting at the Poor Man's Indian Reserve. She says

"... We left, got in the car. He turned towards ... turned on the side, pub his hand on my thigh and said, "Isn't it about time that we had some sex?" and I said, "No, I just want to go back to Yorkton and get my work done" and we returned to Yorkton. Nothing further was done." (III-277)

She explains the gap between the July incidents and that in December by saying that, in the interim period, she took her own car on these trips rather than travelling alone with Mr. Chuba. She claims an amount of $50-60 on gasoline by taking her own car, because Mr. Chuba

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- 35 would
not authorize mileage for her, the policy being that when more than one person is travelling to the same place, only one car should be used. By December, she thought he had had time to "cool off", and decided to give it another try. She was not aware of Jane Kotyk's problems with Mr. Chuba until early January 1981.

Ms. Allary testified that she told Ruth Matheson, a fellow employee, about what happened on the Langenberg trip, and this was confirmed in Ms. Matheson's evidence. (IV-469) Mr. Chuba denied that these events took place, and offered no real explanation of why Ms. Allary would fabricate the story. Based on the evidence of Ms. Allary and the corroboration of certain particulars by Ms. Matheson, I find that these incidents did take place, as described by Ms. Allary.

There was no suggestion that there were employment reprisals or threats as a result of Ms. Allary's refusal to engage in sexual activities with Mr. Chuba, although she did state that their work became more closely monitored after the complaints were made. However, this seems to have occurred as a result of the serious deterioration in the office situation rather than as a direct result of the complaints made by herself or Ms. Kotyk. The only employment consequence noted in the evidence was the cost of gasoline from bringing her own car on day trips rather than travelling with Mr. Chuba. There was no evidence that Mr. Chuba made any sexual suggestions or advances to Ms. Allary in the office, or at any times other than those mentioned.

b) as against CEIC
(i) Jane Kotyk
The complainants suggest that CEIC is liable both by virtue of
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its vicarious liability as an employer for the acts of its employees under certain circumstances, and also because it did not take reasonable steps to deal with the complaints of Jane Kotyk and Barbara Allary, or to provide a workplace free of harassment.

Jane Kotyk first voiced her complaint of sexual harassment to her supervisor, Gary Enmark, on January 5 or 6, 1981, asking his advice about what to do. Mr. Enmark was going to a staff training seminar in Regina the following week, and said that he would discuss the matter with the appropriate people in the Regional Office in Regina. At about the same time. Ms. Kotyk had contacted Chris Lane of the Public Service Commission and Mr. Enmark had also apoken to Ms. Lane. On January 12 or 13, Gary Enmark spoke to Owen Brophy, Staff Relations Officer at Regional Office, about the complaints of Kotyk and Allary. This was the point at which the Regional Office first heard of the harassment complaints. Mr. Brophy set up a meeting between Mr. Enmark and Carol Porter, the Equal Opportunities for Women representative in Regional Office, which meeting took place the next day. On January 19, Carol Porter visiter Yorkton to speak to Kotyk and Allary, and to assess their complaints. Returning to Regina after the meeting, she immediately reported to Owen Brophy, and the next day to the Director General, Gil Johnson. Without making a determination that sexual harassment had occurred, she recommended to Mr. Johnson that he intervene personally with Jack Chuba. Johnson said that he would arrange a meeting with him at the airport, since Mr. Chuba would by flying in from Edmonton. At that point, Ms. Kotyk and Ms. Allary only wanted the harassment to cease, without reprisals against themselves or Gary Enmark, and the

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- 37 complaints
to be handled quietly. Shortly after these meetings, Ms. Porter called Jane Kotyk to see if the conduct had ceased, and was satisfied that it had.

In the January 23 - 30 period, the series of eight memos from Mr. Chuba to Mr. Enmark were sent. On January 23 Mr. Enmark phoned Owen Brophy about the office situation. It appears that these memos caused Kotyk and Allary to believe that reprisals were occurring against Gary Enmark and in the words of Carol Porter -- "it began to be seen that he (Enmark) was being retaliated against." (V-534) On January 30, Mr. Enmark and Mr. Gaitens in Yorkton spoke on a conference call to Murray Hooker, the Personnel Manager at Regional Office, and Owen Brophy. On the same day, Gil Johnson phoned Mr. Enmark, telling him that he had talked to Jack Chuba at the airport about the harassment allegations, and advised Mr. Enmark that he (Enmark) and Mr. Chuba should have a meeting on Monday to attempt to relieve some of the tension in the office.

Mr. Johnson did not give evidence, but the circumstances of his airport meeting with Jack Chuba have been recounted in the testimony of Carol Porter, Mr. Chuba himself and Murray Hooker. Mr. Chuba’s recollection of the meeting is as follows:

"... I believe on the, oh, about the 20th or 21st of January, I flew in from Edmonton. I landed at the

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airport; Gil met me, he said he wants to talk to me, so we sat down and he said, "Jane Kotyk is complaining that you want to be more involved with her than she wishes to be." I said, "Oh, my gosh." He said, "She claims you are making sexual advances." So, I told him the story, not from way back, but I told him in a nutshell what happened. He said well, she doesn't want to have anymore ... he didn't mention anything about Jane or Barbara Allary that night, nor any night. He said all she wants is to stay clear of her; I said, "That's fine, that's fine; I won't." I said, "Well, who's going to handle her when she's all in a huff about these calls she gets in the office." He said, "Well

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perhaps her supervisor." I said to him I couldn't see her supervisor; they are always against each other, they're not friends at all; and they weren't. I had another call from Gil another night at home saying something to the effect maybe you should get together with Enmark and somehow make peace; I guess he'd got wind of those memos I'd written..." (V-644-5)

On Monday, February 2, Jack Chuba and Gary Enmark met in an attempt to restore peace in the office. Exhibit C-16 represents a summary of the meeting, signed by both Jack Chuba and Gary Enmark, and makes reference to each man's fear that the other was instigating an office conspiracy:

"Jack Chuba assured Gary that his suspicions of a conspiracy between Jack and Walter St. Cyr to get rid of Gary in order for Walter to return to Yorkton does not exist.

...
Gary also assured Jack that at no time has he instigated any staff to rally behind him against Jack. ..."

Also on February 2 a meeting occurred in Regina between Messrs. Brophy, Hooker, and Johnson; Murray Hooker testified that the whole issue was discussed, and a decision was made that they would not, at that time, interfere in the office. (V-551) He stated that he and Mr. Brophy felt that someone should be sent in, but the Director General felt not. It was only after the union became involved that the Director General sent Mr. Stephan, the Director of Employment and Insurance at Regional Office to Yorkton.

On February 5, John Grabowski, the union representative, presented Jack Chuba with the grievances relating to sexual harassment filed by Jane Kotyk and Barbara Allary, as well as the

grievances relating to fraud and mismanagement. On the same day Joe Stephan met with Jack Chuba at the Yorkton office and relieved him of his duties.

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The official response of Regional Office to the harassment allegations was to set up, on February 13, an Administrative Investigation Committee, consisting of three people, with Murray Hooker as Chairman. The mandate of the Committee was to deal not only with sexual harassment, but also with the allegations of fraud and mismanagement, and the general questions of office dynamics. These findings, reported to the Yorkton staff on March 31, were that the complaint of Jane Kotyk was founded, while that of Barbara Allary was unfounded, even though they believed that Mr. Chuba had made the advances alleged in her case. Their recommendations relating to harassment are as follows: (from page 6-7 of Exhibit C-18)

"1. In the best interest of Mr. Chuba, the grievors and the employees of the Yorkton CEC, an immediate transfer should be arranged for Mr. Chuba.

...
8. The Director General and/or the Director of Employment and Insurance and the Chairman of the Committee hold a meeting in the Yorkton CEC to discuss the report. However, the details of the sexual harassment grievances should not be disclosed as it is primarily between the two parties.

9. A regional policy be developed on the issue of Sexual Harassment and once completed be discussed with Regional and CEC management and staff.

10. Professional counselling be retained for Mr. Chuba with the intent of insuring he is aware and sensitive to the needs, aspirations and feelings of women and that he is able to cope with the consequences. Similar support should be available to the two women involved if it is required..."

Exhibit C-9 dated April 8, 1981, represents the response of Mr. Johnson to Jane Kotyk’s grievance, the decision having been made on the basis of the findings of the committee and the evidence presented

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- 40 at
the grievance hearing on March 17. It shows that her grievance respecting sexual harassment was allowed. The corrective actions suggested as a result of her grievance were as follows: (from page 3 of Exhibit C-9)

"1. That the manager be immediately removed from his normal workplace for a period of three months.

2. That the manager, while on another assignment, be afforded the opportunity on government time and expense to whatever means of counselling management deems appropriate to ensure that he understands the nature of

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his probable infraction and to ensure that he fully comprehends the probable consequences of any further occurrence.

3. That you, and others in the workplace who may feel the need for special assistance through staff counselling in order to readjust and properly integrate into the workplace in Yorkton CEC be afforded that opportunity.

4. That management clearly and openly discuss the issue of sexual harassment at management seminars and in other forums to ensure that management and supervision understand the implications of sexual harassment in the workplace.

5. That CEC Yorkton be granted special assistance through the intervention of O.D. Ccounselling for the staff with a view towards reestablishing effective working relationships within the framework of task-oriented behaviour.

6. That, after a period of three months, management reassess its position with respect to all the points mentioned above, and, in consultation with Union representatives, make whatever further changes are deemed necessary to ensure that this grievance is satisfactorily resolved."

It should be noted that the grievances relating to fraud and mismanagement were dismissed, and also that the complaints filed by Kotyk and Allary to the Human Rights Commission were dated February 8, 1981.

(ii) Barbara Allary
The events which occurred after the Carol Porter visit on January

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- 41 19
are very similar as related to the cases of Jane Kotyk and Barbara Allary. Ms. Allary did give evidence that, when she found out about Ms. Kotyk's complaint, she talked to the women in the office about the harassment and the general office situation. She may have done this in her capacity as President of her union local; as a result of these meetings, the union was called in. She also testified to having called Owen Brophy in Regina on February 5 at

about 9.30 a.m. the same day the grievances were filed, saying that if Mr. Chuba were not removed from the office by noon, they would go to the press. She testified that Joe Stephan came at about 11.30 and informed all staff that Mr. Chuba was being released from his duties.

The events recounted in the evidence relating to Jane Kotyk as against CEIC apply equally to Barbara Allary. However, while the Administrative Investigation Committee decided that Ms. Kotyk's allegations were founded, they decided against Barbara Allary. The result of their investigation, as stated at page 260 of Exhibit C-18 which contains their report, stated

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"The alleged sexual harassment in this grievance was based on the fact that the manager made sexual advances on three separate occasions, when travelling together on business. The Committee was unable to conclude that the manager was guilty of sexual harassment. Although the Committee does conclude his behaviour was unbecoming of an officer of the Commission."

In Appendix "E" of the Report (page 245), the Committee dealt in more detail with the facts of the complaint. While believing her statements that the incidents took place, they felt that perhaps her refusals were not clear enough to Mr. Chuba, and in their words "... Mr. Chuba could have concluded that Ms. Allary's "No" was not

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- 42 unequivocal
and he could have concluded that is was worth a second and even a third try." They say that

"Ms. Allary's way of dealing with his advances was to simply not allow herself to be in a situation where he could pursue the matter. Thus, she used excuses designed to ensure that they did not travel together. However, he would have no way of knowing that she was making up excuses to not travel with him. His refusal to pay her mileage on occasions when they could logically have travelled together was justified based on the regional policy that employees should travel in the same vehicle whenever possible."

It should also be noted that Barbara Allary's grievance was denied, the reason being stated in the reply to grievance signed by Gil Johnson on April 8, 1981, and forming part of Exhibit C-18 (at page 231)

"... While the information at my disposal does not rule out the possibility that sexual harassment could have occurred, it is by no means sufficient a base from which to confirm the probability of its occurence."

Findings
Having decided earlier that sexual harassment is prohibited activity under the Canadian Human Rights Act, the first question to be answered is: Did Jack Chuba sexually harass Jane Kotyk and Barbara Allary.

Although decisions such as Bell and Torres in Ontario state that the prohibition against sexual harassment is far reaching, most of the decisions have grappled to a greater or lesser degree with the dividing line between harassment and normal social interaction. The Bell case deals specifically with this issue, at para. 1390 of the report, already quoted.

The Manitoba Board in Hufnagel v. Osama Enterprises Ltd. (supra)

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- 43 adopted
a similar test at para. 8222:
"I would hasten to add a word of caution. Normal discussion or contact between management and employees, even if it be social in nature, is not intended to be prohibited by the Act. It goes without saying that interrelationships between human beings are complex and subjective motivations may often be mixed. Each situation must be carefully considered upon its facts to determine whether the conduct complained of is sanctionable..."

In Aragona v. Elegant Lamp Co. and Fillipitto (supra), the Ontario Board stated the proposition as follows:

"... Thus, sexual references which are crude or in bad taste are not necessarily sufficient to constitute a contravention of section 4 of the (Ontario) Code on the basis of sex. The line of sexual harassment is crossed only where the conduct may be reasonably construed to create, as a condition of employment, a work environment which demands an unwarranted intrusion upon the employee’s sexual dignity as a man or a woman."

Robichaud v. Brennan (supra) also dealt with the facts which differentiate office flirtation from sexual harassment, cited earlied in this decision.

It is clear that Mr. Chuba’s conduct in relation to Jane Kotyk went far beyond the realm of "office flirtation". It covered the entire gamut of prohibited activity as described by Mr. Shime in Bell: "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". Moreover, Mr. Chuba exploited Ms. Kotyk’s vulnerability caused by her marital problems, and knowing that she feared for her job, persisted in his conduct without informing her that she was now

job-secure. His conduct as a manager in this regard was inexcusable. Whether Ms. Kotyk actually asked Mr. Chuba to complete her evaluation is a matter of dispute. However, he admitted to knowing that she was insecure

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- 44 about
her job, and was fearful of losing it. He went so far as to promise never to fire her, but did not take the obvious step of informing her, as her manager, that she need not fear this, since her probation period was over. Surely, if they were having an affair, as he suggests, or if they were on terms of intimate friendship, he would have reassured her on this ground.

The incident in December or early January where he eventually signed her evaluation is significant in illustrating how he held

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the evaluation "over her head". She testified that the probation report was on the desk, he made the recurring comments about sex, she said she wasn't interested, angry words ensued, he signed the form in anger, and she left in tears. It would appear from this incident and by the other incidents related in the evidence, that there was a connection between his demands on her and the job evaluation. The obvious conclusion to be reached is that at this meeting, he finally realized that she didn't want to be involved sexually with him, and that he signed the evaluation realizing that he could not get his way.

Mr. Chuba's tactics in relation to Ms. Kotyk, with the exception of the incident in which he drove with her to Saskatoon to pick up her child who had been taken by her ex-husband, were insensitive, bullying and persistent. Her refusals were consistent and unequivocal.

The fact that Ms. Kotyk engaged in sexual intercourse with him at Foam Lake does not weaken the conclusion that Mr. Chuba engaged in discriminatory conduct. Her consent was based on her fears for her job and was preceded by a course of conduct which had as its

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- 45 object
to wear her down, and which succeeded in this intent. The conduct took place over a six month period, on a consistent, deliberate basis. His methods were such as to suggest that by demeaning her and constantly making sexual suggestions, he could ingratiate himself to her. There is no question but that Mr. Chuba's conduct was work-related and that it had adverse employment consequences. I refer specifically to the letter of reprimand and the circumstances surrounding the evaluation.

Even if I were to find that there were no concrete employment consequences, there is no question but that her work environment was "poisoned". The poisoned work environment theory was first enunciated in the American case Bundy v. Jackson, 641 F. (2d) 934

(U.S. Court of Appeals). There the Court extended the "discriminatory environment" race cases to sex by holding that subjecting a woman to sexual stereotyping, insults, and demeaning propositions "illegally poisoned" her working environment. This reasoning has been followed in relation to racial slur cases such as Dhillon (supra) and in sexual harassment cases such as Brennan (supra) and other provincial harassment cases. The working environment in this case was such that it would have been almost impossible to carry on work in a normal way, Because of Mr. Chuba's pressures, Ms. Kotyk's workplace became intimidating, hostile, and offensive. It speaks well of Ms. Kotyk's stamina and strength of character that she did not quit her job or apply for a transfer. Mr. Chuba's conduct in relation to Jane Kotyk constitutes sexual harassment and as such is adverse differentiation on the grounds of sex as prohibited by section 7 of the Act.

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- 46 -
Barbara Allary's case against Jack Chuba is less clear. In

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the three incidents to which she referred, her refusal to entertain his advances was sufficient to "turn him off". I have accepted Ms. Allary's version of the facts as against Mr. Chuba's, and having done so, I have accepted that she told him directly and clearly that his advances were unwelcome. It is significant that very soon after the July incident occurred Mr. Chuba tried again. Ms. Allary's reactions to these two advances was, rather than to deal with it yet again, to remove herself from situations where Mr. Chuba would make sexual advances to her. Mr. Chuba must have known the ordinary meaning of the word "no". I disagree with the interpretation of the Administrative Investigation Committee that Mr. Chuba might not have realized that her "no" was unequivocal and that he might have felt justified in going back for a "second or even a third try". People in Mr. Chuba's position - manager of a government office - must realize that there are great risks involved in taking this sort of advantage of their female employees. It is precisely the type of conduct that the Act is meant to prevent. I refer once again to section 2 of the Act, which states that persons should be able to make the life for themselves that they wish, "without being hindered in or prevented from doing so by discriminatory practices based on ... sex".

Ms. Allary's refusal to give in to Mr. Chuba's advances had employment consequences. Her job was not threatened, but she was forced to make alternate travel arrangements, at her own expense, to avoid travelling with Mr. Chuba. This was a sensible thing to do in the circumstances. There was no evidence regarding changes in her

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- 47 work
environment, other than the overall deterioration in the office environment, which cannot be directly attributed to Mr. Chuba's conduct towards her.

Mr. Chuba's conduct in relation to Barbara Allary consisted of unwelcome and unsolicited sexual propositions on three separate occasions and resulted in adverse employment consequences. This conduct constitutes sexual harassment and therefore is a violation of section 7 of the Act.

The complainants' case against the respondent CEIC is two-fold: 1) that it is liable, as the employer, for the sexual harassment perpetrated by its supervisory personnel; and 2) that it did not take steps to provide its employees with a workplace free from harassment, for which it is liable directly.

The question of CEIC's liability as Mr. Chuba's employer for his conduct is difficult, and the previous cases on sexual harassment in the provincial and federal jurisdictions are of little assistance. Counsel fot the respondent pointed to Nelson et al. v. Byron Price and Associates Ltd. 2 C.H.R.R. D/385 (B.C.C.A.), wherein the Appeal Court of British Columbia dealt with the question of vicarious liability under the British Columbia Human Rights Code. The court reversed a Board of Inquiry's finding of vicarious liability on the part of a rental agent for the conduct of a caretaker. Although part of the basis for the decision turned on the fact that the caretaker was apparently neither the agent or

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employee of the respondent, the Court said that there was no evidence that the respondent condoned the

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- 48 conduct,
so that any liability must be vicarious, and that since the B.C. Code does not provide for vicarious liability of an employer for the actions of an employee, the claim must fail. The Court went on to say that the question of whether the employer should be bound by a strict liability in these cases is a question for the legislature, and not the courts to decide.

However, the differences in wording between the B.C. Code and the Canadian Act must be noted. Section 4 of the Canadian Act provides that anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 41 and 42. Section 7 of the Act states that "it is a discriminatory practice, directly or indirectly, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination". Mr. MacLean for the respondent stated the argument as being

"whether or not "directly or indirectly" in section 7 are sufficient to apply strict liability to an employer, whether they import into the statute the essence of vicarious liability, whether or not under the Canadian Human Rights Act there can be no liability on the part of the employer where he has not actively or knowingly participated in the discriminatory practice." (at page 9)

Mr. Juriansz would distinguish the B.C. decision in Nelson on the basis that there, the Court saw nothing in the statute from which to attach vicarious liability to the employer, whereas in this case, the word "indirectly" is sufficient to attach vicarious liability to the employer.

There are many cases under the federal Act which state that the word "indirectly" implies that it is not necessary to prove an intention to discriminate to establish a breach of the Act. In other words, if this were a criminal charge, "mens rea" would not be

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- 49 a
necessary element. What this implies is that even if a respondent did not realize that his or her actions were discriminatory, if the result of the action was discriminatory, the Act would be breached. This must be related to the facts in this case. Mr. Chuba was the manager of the Yorkton office, the person in direct line of authority to the Regional Office, the agency's representative in the Yorkton area. Ms. Kotyk and Ms. Allary were employees not of Mr. Chuba but of CEIC. Mr. Chuba was carrying out, albeit very badly, the policies of CEIC in relation to probation, evaluation, travel authorization and reimbursement. It was in the course of his duties that he travelled out of town with Barbara Allary and Jane Kotyk; it was in the course of his duties

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to oversee Jane Kotyk's probation and evaluation report. The intention of Parliament to attach employer liability for the discriminatory acts of their supervisors can be read into s. 7 of the Act, without having to indulge in a tortuous interpretation process, although there are no clear precedents. Most of the cases in which employers have been found responsible for acts of supervisors or employees have been cases where the employer and the perpetrator of the discriminatory conduct have been the same. (Coutroubis v. Sklavos Printing, Mitchell v. Traveller Inn (Sudbury) Ltd., Cox and Cowell v. Jagbritte et al., Deisting v. Dollar Pizza et al., Torres v. Royalty Kitchenware Ltd and Guercio, MacPherson et al. v. Mary's Donuts and Doshoian, etc.) The Brennan v. Robichaud review Tribunal decision ascribes liability to the Department of National Defence as well as to the perpetrator, but it must be noted

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- 50 that
in that case the department's actions in relation to the complainant were certainly questionable. They did not investigate the complaint, and penalized the complainant for raising the matter. The question of the employer's liability in that case is now before the Federal Court.

Bell and Korczak v. Ladas and The Flaming Steer Steak House (supra) makes a clear statement that an employer should be liable at para. 1393:

"If a foreman or supervisor discriminates because of sex will the company be liable? The law is quite clear that companies are liable where members of management, no matter what their rank, engage in other forms of discriminatory activity. Thus, companies have been held liable where lower ranking members of the management team engage in anti-union activity or discriminate against employees because of race or colour, and the same general law that imposes liability in those cases ought to apply where members of the management team discriminate because of sex. Thus, I would have no hesitation in finding the corporate respondent liable for a violation of the Code if one of its officers engaged in prohibited conduct, indeed, the same liability would attach if the violator had a lower rank on the management team."

However, in that case, the issue did not have to be decided as the complaint was dismissed.

Counsel for the complainants also seeks to attach liability to CEIC for not providing a workplace free from harassment. He points specifically to the fact that CEIC had no policy or directive in place dealing with sexual harassment, that they had taken no step to inform their employees or senior staff that sexual harassment was prohibited conduct, that their collective attitude in dealing with the complaint was one of protecting the manager rather than dealing aggressively with the offending behaviour, and that they afforded no

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- 51 protection
from reprisals. Perhaps the largest defect uncovered in dealing with the complaints was that, after Ms. Porter had visited the complainants in Yorkton, after Mr. Brophy and Mr. Hooker had become involved, after all three had spoken with Mr. Johnson, recommending that the complaint be investigated as there seemed to be questionable conduct on the part of Mr. Chuba, Mr. Johnson made a decision not to investigate the complaints. His response was to meet with Mr. Chuba at the airport on an informal basis, and to tell him that if he was involved in anything with Jane Kotyk, he should stop. It is important that, only after the union became involved and after the phone call from Barbara Allary on February 5, wherein she threatened to go to the press, was Joe Stephan sent in. This decision was not made because of the harassment complaints (although this was one factor), but because of the grievances relating to fraud and mismanagement and the generally desperate office situation. It was only after all of this had occurred, when the whole situation was clearly out of hand, that the Administrative Investigation Committee was established to investigate all the charges.

It seems clear that Mr. Johnson, the person directly responsible for initiating an investigation, did not feel that the complaints of sexual harassment were serious, despite the recommendations of his staff. I am not suggesting that the

employer conduct would necessarily have been blameworthy if they had investigated the complaints and found them to have been unfounded. However, the decision not to deal with the complaints at all is the point at issue. That decision suggests that the conduct of Mr. Chuba was condoned by the Director at Regional Office. The accounts of Mr. Johnson's meeting

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Mr. Chuba at the airport confirm that Mr. Chuba did not take the complaints at all seriously. On the other hand, despite certain adverse comments in the testimony as to the attitude of Mr. Hooker and Ms. Porter, they did realize that the complaints should be investigated and so recommended to Mr. Johnson.

What responsibility does an employer have to provide employees with a workplace free from the fear of sexual harassment? First, managers and supervisors must themselves be aware that sexual harassment is prohibited conduct under the Act. When a complaint is made, it must be dealt with as a serious matter, not by a gentle tap on the fingers, but as a potential breach of a statute. Employers should advise their employees that sexual interplay that has, or may reasonably appear to have, employment consequences either direct, in the nature of firing, loss of benefits, etc. or indirect, such as an adverse effect on the work environment - is improper. The distinction between flirtation and harassment should be clarified. Complaint mechanisms should be in place, so that complaints can be made confidentially and without fear of reprisals. Employers have a responsibility to advise their supervisory personnel and employees about the significance and

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consequences of sexual harassment. It is in everyone's interest employer and employee - that behaviour such as occurred in this case not be permitted to occur again

In summary, I find that the respondent must accept both direct and indirect liability, the former by virtue of responsibility for the discriminatory conduct of a member of its management staff for the reasons stated, and the latter because of the failure to provide a workplace free from harassment or the fear of harassment.

Sexual harassment is by its nature difficult to define. However,

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following can be said to be included in a definition, according to the Canadian cases. Sexual harassment is unsolicited or unwelcome sex or gender based conduct which has adverse employment consequences for the complainant. The adverse consequences may be a denial of an "equal opportunity with other individuals to make for him or herself the life that he or she is able and wishes to have" (s.2) because of the denial or removal of a tangible benefit available to other persons in similar circumstances, or the

creation of a negative or unpleasant emotional or psychological work environment. Sexual harassment within the above-noted terms, occurring in a workplace, perpetrated, condoned or allowed by an employer, is a discriminatory practice within the terms of the Act. The test of whether the advances are unsolicited or unwelcome is objective in the sense that it depends upon the reasonable and usual limits of social interaction in the circumstances of the case. The complainant should not need to prove an active resistance or other explicit reaction to the activity complained of, other than a refusal or denial, unless such might reasonably be necessary to make the perpetrator aware that the activity was in fact unwelcome or exceeded the bounds of usual social interaction. It is likely that a single unrepeated act is not harassment unless it results in the denial or removal of a tangible benefit available or offered to other persons in similar circumstances, or unless it amounts to an assault, or is a proposition of such a gross or obscene nature that it could reasonably be considered to have created a negative or unpleasant emotional or psychological work environment. A "normal" proposition or suggestion would probably not have this result. To this extent, the last-quoted paragraph in Bell, quoted earlier, is adopted. However, repetition of otherwise unactionable conduct may constitute harassment when it can reasonably be

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- 54 considered
to have created a poisoned work environment.

Damages
Section 4 of the Act states that

"A discriminatory practice, as described in section 4 to 13, may be the subject of a complaint under Part III, and anyone found to be engaging in a discriminatory practice may be made subject to an order as provided in section 41 and 42." (emphasis added)

The relevant portion of section 41 states:
"(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or have engaged in the discriminatory practice..." (emphasis added)

The exceptions contained in sections 41(4) and 42 have no bearing on the case at hand.

It therfore appears that a Tribunal has the authority to make an order against anyone found to have engaged in a discriminatory practice, regardless of the formal or nominate status of that person to the original complaint or in the action itself.

This apparently unrestricted authority must, of course, be subject to limitations imposed by the rules of natural justice, particularly the rule entitling every person to a fair hearing. The Tribunal is required to give a person the opportunity to hear the evidence and argument on behalf of the complainant and to present his or her own evidence and argument before an order can be made against that person.

In this case, Mr. Chuba became a party to the action upon his own application and after extensive discussion of the matter. He was represented by counsel and took a full part in the proceedings

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- 55 throughout
their course. The requirements of natural justice have therefore been met, and under sections 4 and 41(2) the Tribunal has jurisdiction to make an order against him, since he has been found to have engaged in discriminatory conduct.

The Tribunal's authority to grant damages is set out in section 41, subsection (3) of which states

"(3) In addition to any order the Tribunal may make pursuant to subsection (2), if the Tribunal finds that

(a) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

(b) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine."

Section 41(3) of the Act gives a Tribunal the option to make an award either under (a) for reckless discrimination or under (b) for suffering in respect of feelings or self-respect. It is not possible to do both. In her complaint, Jane Kotyk seeks damages against Jack Chuba under s. 41(3)(b) in relation to feelings and self-respect, in the amount of $5,000; against Jack Chuba under s. 41(3)(a) for wilful or reckless discrimination in the amount of $5,000; and against CEIC under 41(3)(b) in the amount of $5,000.

It is clear from the evidence that Jane Kotyk has suffered in respect of hurt feelings and particularly in terms of self-respect.

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- 56 I
have recounted instances in Ms. Kotyk's testimony where she described her feelings while these incidents were taking place and after they occurred. I have described the conduct as being

persistent, overwhelming, deliberate and demeaning. It was conduct carried out in the face of constant refusals. It must have been known to be unwelcome. The Review Tribunal decision in Foreman v. ViaRail (1980) 1 C.H.R.R. D/223 outlined the circumstances under which s. 41(3)(b) damages should be awarded, concluding that they should normally be awarded unless there is a good reason not to do so. In this case, a good case has been made for awarding substantial damages against Mr. Chuba. It is relevant in this case that, despite the impact of Mr. Chuba's conduct on her work environment, Ms. Kotyk did not lose or leave her job as a result of the conduct, and did not suffer financial disadvantage. On the other hand, the severity and the disabling nature of the conduct complained of would appear to offset this. These awards, in the absence of guidelines, are by nature arbitrary. Having taken all the circumstances of the case, as well as the nature of the awards made in the provincial cases, into account, I set the amount of Ms. Kotyk's damages against Mr. Chuba under s. 41(3)(b) at $2500.

It is appropriate that CEIC be liable for the same amount to Ms. Kotyk, because of their indirect responsibility for Mr. Chuba's conduct, and because of their direct responsibility for failing to provide a workplace free from the fear of this type of conduct. Had a strong policy or practice on sexual harassment been in place, the incidents leading to these complaints probably would not have

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- 57 occurred.
And it is hoped that, with examples such as these, employers will take appropriate steps to prevent similar cases from occurring in the future.

In her complaint, Barbara Allary seeks reimbursement for travelling expenses under s. 41(2)(c) damages against Jack Chuba under s. 41(3)(a) for $1000 and under s. 41(3)(b) for $1000; and against CEIC under s. 41(3)(b) for $1000. Again I point out that claims under 41(3) must be made in the alternative. The travelling expenses claimed related to approximately $60 in money spent on gas for out of town trips, occasioned by seeking to avoid contact with

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Mr. Chuba. These are a justifiable expense and should be reimbursed by CEIC.

There was no evidence adduced as to hurt feelings or loss of self-respect on the part of Barbara Allary. They may have existed, but there is simply nothing in the evidence upon which a s. 41(3)(b) award can be made. However, I am satisfied that Mr. Chuba did engage in this conduct "wilfully or recklessly" under section 41(3)(a) in that he knew or ought to have known that his advances were unwelcome, but persisted in them regardless of Ms. Allary's refusal.

The facts of Barbara Allary's complaint are must less extreme than Ms. Kotyk's. Allary was not the object of the same kind of sexual taunting, the personal intrusions, or the forced

intercourse. However, the fact that she had to change her travelling practices on out of town trips is evidence of a poisoned work environment since such trips were a required part of her job, and her alternate plans to avoid the discriminatory conduct resulted in a

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- 58 financial
disadvantage. The fact remains that CEIC had no policy to deal with the problem, and decided not to investigate, as explained earlier. Nowevertheless, the consequences of this lack of direction from Regional Office did not have as severe an impact on Barbara Allary as on Jane Kotyk.

Under s. 41(2)(a) a Tribunal may include as part of its order a direction that a person "cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures ... to prevent the same or a similar practice occurring in the future." This is an appropriate case for such an order.

The Tribunal therefore orders that:
1. Jack Chuba
(i) pay to the complainant Jane Kotyk the amount of $2500 as damages under s. 41(3)(b) of the Act;

(ii) pay to the complainant Barbara Allary the amount of $100 as damages under s. 41(3)(a) of the Act.

2. Canadian Employment and Immigration Commission
(i) pay to the complainant Jane Kotyk the amount of $2500 as damages under s. 41(3)(b) of the Act;

(ii) pay to the complainant Barbara Allary the amount of $60 as reimbursement for travelling expenses under s. 41(2)(c) of the Act;

(iii) undertake to establish such policies and practices to ensure that their employees are made aware of the law regarding sexual harassment.

Dated at Halifax, Nova Scotia, this 20 day of April, 1983.
Susan M. Ashley, Tribunal

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