COMMENTS
CHRONIQUE DE JURISPRUDENCE

Robichaud v. *R.*: Confirmation of Employers' Liability for Human Rights Violations by Employees

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The recent landmark decision of the Supreme Court of Canada in the case of *Robichaud* v. *R.* confirms the notion that an employer is liable for the discriminatory acts of its employees. The author supports this decision, which favours giving a broader construction to the concept of employers' liability. He argues that the case re-affirms the jurisprudential trend found in the decisions of human rights tribunals across Canada. He further argues that the decision extends even to actions by non-supervisory personnel, notwithstanding that *Robichaud* deals with a supervisor's actions. The author concludes that the Supreme Court has determined that the *Canadian Human Rights Act* imposes a statutory duty on employers to provide safe and healthy working environments.

Récemment dans l'affaire *Robichaud* c. *R.*, la Cour suprême du Canada a fait jurisprudence en confirmant la responsabilité d'un employeur pour les actes discriminatoires de ses employés. L'auteur appuie cette décision, qui favorise une interprétation large de la responsabilité de l'employeur. Il soutient qu'elle renforce le courant jurisprudentiel des tribunaux de droits de la personne au Canada. Il soutient par ailleurs que l'arrêt s'applique même aux gestes posés par du personnel non surveillant, bien que *Robichaud* ne concernait que les actions du personnel surveillant. La Cour suprême, conclut l'auteur, a reconnu que l'employeur a une obligation légale de garantir un environnement de travail sain, en vertu de la *Loi Canadienne sur les droits de la personne.*

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On July 29, 1987 the Supreme Court of Canada handed down a landmark decision in *Robichaud* v. *R.*[1] In so doing, the court reversed the decision rendered by the Federal Court of Appeal[2] and held that the employer in this case, the Department of National Defence, was liable for the actions of its employee, Dennis Brennan, who had sexually harassed the applicant, Bonnie Robichaud. The Supreme Court decision alleviated the uncertainty and confusion regarding an employer's potential liability for the conduct of its employees, which had been created by the lower court's decision.

I. Background

Bonnie Robichaud began employment as a cleaner with the Department of National Defence at its Command Base in North Bay, Ontario in 1977. She was later promoted to the position of lead hand effective November 20, 1978, subject to a six-month probation period lasting until May 20, 1979. Throughout the period, Brennan was foreman of the Cleaning Department on the base and had full responsibility for the cleaning operation. He supervised two area foremen who, in turn, supervised the lead hands, including Robichaud.

In January 1980, she filed a complaint with the Canadian Human Rights Commission alleging that she had been sexually harassed by her supervisor, Brennan, and subsequently discriminated against and intimidated by her employer, the Department of National Defence.

A Human Rights Tribunal was appointed under section 39 of the *Canadian Human Rights Act*[3] to inquire into Robichaud's complaint. The Tribunal dismissed the complaint against Brennan and against his employer, notwithstanding the fact that it found that a number of encounters of a sexual nature had occurred between Brennan and Robichaud.[4] However, an appeal to a Review Tribunal was allowed, where it was found that Brennan had sexually harassed Robichaud and, further, that the Department of National Defence was strictly liable for the actions of its supervisory personnel.[5]

Both Brennan and the Crown (as represented by the Treasury Board, acting for the Department of National Defence) filed applications under

[1][1987] 2 S.C.R. 84, 87 C.L.L.C. 17,025, 8 C.H.H.R. D/4326, (*sub nom. Brennan* v. *R.*) 75 N.R. 303 [hereinafter *Robichaud* cited to S.C.R.].

[2]*Brennan* v. *R.* (1985), [1984] 2 F.C. 799, 57 N.R. 116, (*sub nom. R.* v. *Robichaud*) 6 C.H.R.R. D/2695 (C.A.) [hereinafter *Brennan* cited to F.C.].

[3]S.C. 1976-77, c.33.

[4]*Robichaud* v. *Brennan* (1982), 3 C.H.R.R. D/977 (Human Rights Trib.).

[5]*Robichaud* v. *Brennan* (14 February 1983), (Human Rights Review Trib.) [unreported].

section 28 of the *Federal Court Act*,[6] thereby requesting the Federal Court of Appeal to review and set aside the decision of the Review Tribunal. Both applications were heard at the same time. Brennan's application (which included a challenge to the concept that sexual harassment was a form of sex discrimination) was dismissed, but that of the Crown was allowed (MacGuigan J. dissenting). The Federal Court of Appeal, in setting aside the decision of the Review Tribunal, referred the matter back to it on the grounds that Robichaud's complaint against the Crown was not sustainable. The latter decision was appealed to the Supreme Court of Canada.

In order to fully appreciate the Supreme Court's decision, one must examine the reasoning of the Federal Court of Appeal in reversing the Review Tribunal's finding that the employer, the Treasury Board, was liable for the sexual harassment caused by its employee. Speaking for the majority, Mr Chief Justice Thurlow stated:

> In my opinion, the decision of the Review Tribunal is not sustainable and should not be allowed to stand.
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> First, it is based on the concept that under the Canadian Human Rights legislation applicable to this case the Crown is strictly liable for the actions of its supervisor, Brennan. In my opinion there is no basis in law for applying such a concept. The applicable law is that established by the Act and there is no federal common law or federal civil law to supply such a concept in its interpretation. What the statute does is to declare certain types of discrimination to be illegal and to provide in section 4 that such discrimination may be the subject of a complaint under Part III of the Act and 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."
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> To be subject to the making of an order under this provision a person must be engaging or must have engaged in a prohibited discriminatory practice. In my opinion the section means that if a person has personally engaged in a discriminatory practice or if someone else does it for him on his instructions he may be subjected to an order. But nothing in the wording purports to impose on employers an obligation to prevent or to take effective measures to prevent employees from engaging in discriminatory practices for their own ends. And I see nothing in the section or elsewhere in the statute to say that a person is to be held vicariously or absolutely or strictly liable in accordance with common law tort or criminal law principles for discrimination engaged in by someone else, whether an employee or not. Compare *Re Nelson et al. and Byron Price & Associates Ltd.*
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> It appears to me that under the applicable legislation in the case of a corporation the authorization that will attract liability must come from the director level. In the case of the Crown, I see no basis for concluding that the conduct of public servants or officials lower than that of the public official or body under whose authority and management the public operation is carried on, in this case the Minister of National Defence or the Treasury Board, would

[6]R.S.C. 1970 (2d Supp.), c. 10.

> engage the liability of the Crown. Nothing in the findings of either Tribunal or in the record suggests that Brennan had authority from such sources to harass Mrs. Robichaud. Nor is there any basis for thinking that anyone in such a position or indeed in any position senior to that of Brennan authorized or even knowingly overlooked, condoned, adopted or ratified Brennan's actions in harassing Mrs. Robichaud.[7]

II. Implications of the Federal Court of Appeal Decision

The Federal Court of Appeal dealt with the question of whether or not the Crown (Department of National Defence) should be held vicariously responsible for Brennan's inappropriate sexual aggression. The court adopted the reasoning in *Nelson* v. *Byron Price and Associates Ltd*,[8] and decided that the Crown was not responsible, that there was no basis in law for imposing strict liability upon an employer for the discriminatory acts of an employee, and that it would take a clear statutory directive to create such vicarious liability.[9]

The impact of this decision was devastating in that it overruled principles of employer liability that had been accepted by most human rights tribunals in earlier cases, such as *Kotyk* v. *Canadian Employment and Im-*

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[7]*Supra*, note 2 at 826-27.

[8](1981), 27 B.C.L.R. 284, 81 C.L.L.C. 14,107, 2 C.H.R.R. D/385, (*sub nom. Re Nelson and Byron Price and Associates Ltd*) 122 D.L.R. (3d) 340 (C.A.) [hereinafter *Nelson* cited to B.C.L.R.].

[9]It may be noted that Mr Justice MacGuigan dissented, stating that the employer (the Treasury Board) could be found liable upon the wording of section 7 of the *Canadian Human Rights Act*, *supra*, note 3, which prohibits adverse differentiation in the course of employment, either "directly or indirectly". He acknowledged that "indirect responsibility" does not necessarily entail employers' "absolute liability". The very words "directly or indirectly" connote some form of participation by those deemed responsible. An employer must, therefore, have at least an opportunity of disclaiming liability by reason of *bona fide* conduct. Further, the harasser (Brennan) was the "directing mind" of the government with respect to the cleaning operation at the Department of National Defence facilities where he and the complainant were employed. According to MacGuigan J., where there is a clear delegation of authority to a servant in a particular area of responsibility, his acts are the acts of the employer — in this case, the Treasury Board. He concluded that the employer is responsible for due care and concern, which was not shown in the instant case, and that consequently, the Treasury Board is liable for the discriminatory actions of its employee, Brennan. MacGuigan J. stated the following, *supra*, note 2 at 845:

> I also agree with the contention of the respondent Canadian Human Rights Commission that vicarious liability is a clear implication of the *Seneca College* decision. If the development of a common-law tort of discrimination, as accepted by the Ontario Court of Appeal, is pre-empted by the legislative development of a human rights code, it can only be supposed that such a development would leave those discriminated against with rights of enforcement at the very least as broad as those which they would have had at common law, and would therefore include some concept of employer liability.

migration Commission.[10] According to the Federal Court of Appeal, an employer, and in particular a corporate employer, could no longer be held liable for "indirectly" causing discrimination on prohibited grounds, or for "constructive discrimination". If the court's words are read literally, they suggest that only the person who actually commits discriminatory actions is liable under the Act. Although the case related more specifically to sexual harassment, the principle of liability to which the court referred would apply equally with respect to all kinds of discriminatory practices. Thus, any refusal of services by a government official to a person because of that person's colour or physical handicap would not attract any more liability on the part of the Crown than would an act of sexual harassment, unless vicarious liability or some other related concept of indirect employer liability was expressly spelled out in the Act.

Moreover, although a corporate employer would be held liable for the harassing conduct of any of its "directors", there would be no liability for the conduct of other supervisory personnel, unless their conduct was specifically authorized. In essence, the court decided that the common law doctrines of vicarious, absolute and strict liability do not apply to discriminatory conduct which is found to be in violation of the Act. Further, in cases where the Crown is the employer, the decision required that the act of harassment must have been committed or authorized by the minister under whose responsibility the department falls, before any liability will be imposed on the Crown.

III. The Supreme Court of Canada

In this context, the only issue before the Supreme Court was whether or not an employer could be held responsible, under the Act, for the unauthorized discriminatory acts committed by its employees in the course of their employment.

The high court took this opportunity to address the issues that had, until then, presented difficulties in the development of a coherent public policy and consistent judicial standards concerning sexual harassment. It reversed the Federal Court of Appeal and held that an employer could indeed be held liable under the Act for the actions of its employees, and further held that the employer, in this case, was so liable.

In arriving at its decision, the Supreme Court provided the following analysis of the Act, and for that matter, all human rights statutes in Canada:

(i) that the Act incorporates certain goals basic to our society;

[10](1983), 83 C.L.L.C 17,012, 4 C.H.R.R. D/1416 (Human Rights Trib.), aff'd by (*sub nom. Chuba* v. *Kotyk*) (1984), 84 C.L.L.C. 17,005, 5 C.H.R.R. D/1895 (Human Rights Review Trib.).

—it seeks to give effect to the principle of equal opportunity for individuals by eradicating invidious discrimination;

—the statute is essentially concerned with the removal of discrimination, as opposed to punishment of anti-social behaviour;

—it is directed to redressing socially undesirable conditions quite apart from the reasons for their existence;

(ii) that the Act must be given such fair, large and liberal interpretation as will best ensure the attainment of its goals;

(iii) that human rights legislation does not focus on motive or intention, that its purpose is to alleviate the discriminatory effects of certain activities, and to this end, it establishes what are essentially civil remedies, rather than punitive remedies;

(iv) that theories of employer liability developed in the context of criminal or quasi-criminal conduct, because they are fault-oriented, are therefore of little value;

(v) that "vicarious liability" in tort law, because of its restrictive limitation to acts occurring "in the course of employment", also cannot meaningfully be applied to the present statutory scheme;

—that the phrase "in the course of employment", as used in the Act, given a purposive interpretation of the legislation, ought to be construed as meaning "work or job-related";

(vi) that the remedial objectives of the statute would be stultified if the remedies enumerated therein were not available against the employer:

—Who but an employer could order reinstatement?

—Who but an employer could compensate for lost wages and expenses?

—Who but an employer could remedy undesirable effects?

—Who but an employer could provide the most important condition: a healthy work environment?

(vii) that a Human Rights Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment;

(viii) that the employer's liability is purely statutory — it is unnecessary to attach any label to this type of liability.[11]

[11]As summarized by the author.

IV. The Basis for Employers' Liability

Initially, there existed no human rights statutes in Canada which explicitly held an employer to be directly responsible for the discriminatory conduct committed by any of its employees in the course of their work. It is noteworthy that the Act and the Ontario *Human Rights Code* were subsequently amended to incorporate therein the concept of vicarious liability by holding any employer liable for the discriminatory conduct of its employees.[12] However, the Ontario *Human Rights Code* specifically exempts employers from liability for acts of sexual harassment committed by their employees.[13] Thus, prior to the Supreme Court decision in *Robichaud*, human rights tribunals struggled to find legal grounds upon which to hold an employer responsible for discriminatory conduct of employees. By and large, to impose liability, such tribunals relied upon one of the established concepts of strict liability, vicarious liability or direct liability via the organic theory of corporate responsibility. The theory of vicarious liability under tort law makes the employer liable for employees' acts done in the course of employment. However, the organic theory of corporate responsibility is based on the premise that the wrongdoer was the "directing mind" of the legal entity, such that his/her acts became the acts of the corporation. This raises a series of issues:

(i) whether the expression "directly or indirectly" in section 7 of the Act is sufficient to impose strict liability on an employer;

(ii) whether an employer may be found liable based on the common law tort doctrine of "vicarious liability";

(iii) whether an employer can be held liable if it has not actively or knowingly participated in the discriminatory practice; and

(iv) whether the wrongdoer was the "directing mind" of the organization.

V. Application of Vicarious Liability in Human Rights Cases

In 1975, a British Columbia Board of Inquiry extended the principle of vicarious liability to discrimination cases by holding an employer responsible for the discriminatory conduct of its employee. *Oram* v. *Pho*[14] was the first case of its kind in Canada. The case involved a complaint against a restaurant owner for a barperson's refusal to serve the complainant because of the length of the latter's hair. In analyzing the legal issues, the

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[12]*Canadian Human Rights Act*, *supra*, note 3, s. 48(5); *Human Rights Code*, S.O. 1981, c. 53, s. 44(1). In other Canadian jurisdictions, human rights statutes have not yet made employers specifically liable for the discriminatory conduct of their employees.

[13]*Human Rights Code*, *ibid.*, s. 44(1) by reference to s. 4(2).

[14](8 August 1975), (B.C. Bd of Inquiry) [unreported].

board stated that if the restaurant owner's liability was contingent upon his personally having contravened the provisions of the British Columbia *Human Rights Code*,[15] this

> would provide a convenient loophole through which the owners and managers of public houses and other establishments which offer services or facilities customarily available to the public could cscape responsibility for violations of the Code by having an agent or servant effect the denial and enforcing the discriminatory policy rather than doing so personally. Fortunately, the common law of this country is not so short-sighted. The law provides that a master is responsible for the wrongful acts done by his servant in the course of his employment.[16]

A few years later, in the case of *Nelson* v. *Gubbins*,[17] another British Columbia Board of Inquiry, which ruled similarly that the employer was "vicariously liable" for its employee's contravention of the British Columbia *Human Rights Code*, was reversed on appeal where Mr Justice Taylor reasoned that section 17(2)(c) of that statute only grants to the Board the power to make orders for the payment of aggravated damages against the "person who contravened the Act", and therefore cannot be read to allow such orders to be made against other persons on the theory of vicarious liability. The British Columbia Court of Appeal affirmed Taylor J.'s decision and indicated that the authority to impose vicarious liability must necessarily be found within the legislation.[18] Mr Justice Craig, for a unanimous court, stated:

> I have no doubt that the legislation is remedial and that in accordance with s. 8 of our Interpretation Act ... it should be given such "fair, large and liberal ... interpretation as best ensures the attainment of its objects". But I have no doubt, also, that in striving for this interpretation a court should not ascribe a meaning to words in the legislation which would normally be inconsistent with the grammatical and ordinary sense of the words used in the Act as a whole. I think that there is much to be said for the view that an employer should bear responsibility, in some form, for discriminatory conduct of an employee in the course of his employment but that is a decision for the legislature, not for a court. Our sole concern is whether s. 17 of the Human Rights Code provides for vicarious liability. The operative phrase throughout s. 17 is "person who contravened this Act". In this case, the only conclusion is that the board found that the respondent did not contravene the Act. Notwithstanding this finding, the board concluded that the respondent was "vicariously liable" for the contraventions by Mrs. Gubbins. While this result may be desirable, it cannot, in my opinion, be inferred from the legislation. To find the respondent "vicariously liable" would require reading words into the statute which are, in my opinion, not justified.[19]
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[15]R.S.B.C. 1979, c.16.

[16]*Supra*, note 14 at 24.

[17](1979), 17 B.C.L.R. 259, 106 D.L.R. (3d) 486 (S.C.).

[18]*Supra*, note 8.

[19]*Ibid.* at 290-91.

> If the legislature had intended that an individual in the position of the respondent should be amenable to any of the orders which may be made under s. 17, it would have been a simple matter for the legislature to have enacted words to the effect that any employer whose servant contravened the Act in the course of his employment would be deemed to have contravened the Act. The legislature has not done so either expressly or impliedly.[20]

The *Nelson* approach to denying employer liability for discriminatory conduct of employees has never been widely accepted by human rights tribunals. It would appear that most human rights tribunals have either ignored *Nelson*, or have imposed liability on employers on the basis of legal doctrines other than vicarious liability, such as the "organic theory of corporate liability". There was little or no change in judicial thinking with regard to employer liability in discrimination cases for about 5 years until the restrictive *Nelson* approach was resurrected in the Federal Court of Appeal's decision in the instant case. It then became evident that judicial opinion in Canada was split into two opposing camps. One camp was inclined to hold an employer liable for the discriminatory conduct of its employees — particularly supervisory employees — notwithstanding the fact that human rights statutes had not expressly provided for such responsibility; the other camp refused to similarly hold an employer liable, unless such liability was expressly provided for by statute. The first group consisted of a majority of human rights tribunals in most Canadian jurisdictions, while the second group was dominated by the Federal Court of Appeal,[21] and the British Columbia[22] and Manitoba[23] Courts of Appeal. Canadian adjudicators have by and large embraced human rights statutes with open arms, and have given them a fair and broad interpretation in order to enhance their legislative agenda. Those same adjudicators, however, have been criticized by certain appellate courts for acting with "Messianic zeal".[24]

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[20]*Ibid.* at 291.

[21]*Brennan*, *supra*, note 2.

[22]*Nelson*, *supra*, note 8.

[23]*Janzen* v. *Platy Enterprises Ltd* (1986), [1987] 1 W.W.R. 385, 43 Man. R. (2d) 293, 8 C.H.R.R. D/3831 (C.A.) [hereinafter *Janzen* cited to W.W.R.]; *Dakota Ojibway Tribal Council* v. *Bewza* (1985), [1986] 2 W.W.R. 225, 37 Man. R. (2d) 207, (*sub nom. Bewza* v. *Dakota Ojibway Tribal Council*) 7 C.H.R.R. D/3225 (C.A.) [hereinafter *Dakota Ojibway Tribal Council* cited to W.W.R.].

[24]*Janzen*, *ibid.* at 402, where Huband J.A. stated:

> Professor Cumming [in *Olarte* v. *Commodore Business Machines Ltd*] concedes that adjudicators have approached their task with something akin to Messianic zeal. Since sexual harassment is a naughty thing, a strained interpretation of the law is justified. ... [H]e writes as follows:
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> > There is no doubt that Boards of Inquiry, by their creative interpretation of the *Human Rights Code*, have made a substantial penetration into the workplace in order to eradicate an insidious form of discrimination.
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> The problem is that their "creative interpretations have gone too far in stretching

VI. Employers' Liability Under the Organic Theory

The leading case dealing with the organic theory is *Lennard's Carrying Co. Ltd* v. *Asiatic Petroleum Co.*[25] In that case, a corporation owned a ship which was unseaworthy. By virtue of British legislation at the time, the owner of a ship could not be held liable for any loss or damage which arose through no fault of his own. Lennard, the managing director of the corporation, was aware that the ship was unseaworthy. He failed to take the necessary steps to prevent it from going to sea in such a condition, and consequently, a loss occurred. Thus, the issue was whether the shipowner corporation could be held liable notwithstanding the statutory requirement that the owner of the ship be personally liable.

The House of Lords concluded that there was "actual fault" on the part of the corporation because Lennard was the corporation's directing mind, and hence, his acts or omissions became the acts or omissions of the corporation itself. Viscount Haldane L.C. wrote:

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.[26]

His Lordship went on to say that in the absence of testimony by Lennard to the contrary, it was open to the court to conclude that he was "the directing mind of the company".

Thus, stemming from Viscount Haldane's judgment in the *Lennard's* case, courts have elected to treat the acts of certain corporate officials as those of the corporation itself, thereby engaging the personal liability of the corporation. This is sometimes referred to as the "organic theory", under which fault is attributed to the corporation, which is regarded as an extension of those managing its affairs. It must be emphasized that this liability is distinct from the concept, in agency law, of vicarious liability arising out of the master-servant relationship. In the case of *R.* v. *St. Lawrence Corp.*,[27] the Ontario Court of Appeal expanded the scope of the organic theory of corporate responsibility by holding that a large corporation might conceiv-

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the meaning of discrimination as it is used in the statute in order to make a "penetration into the workplace", which is unwarranted and unintended. If legislators wish to prohibit sexual harassment in the workplace, or anywhere else, they are quite capable of saying so in clear and explicit terms.

[25][1915] A.C. 705, [1914-15] All E.R. Rep. 280, 84 L.J.K.B. 1281, 113 L.T. 195 (H.L.) [hereinafter *Lennard's* cited to A.C.].

[26]*Ibid.* at 713.

[27][1969] 2 O.R. 305, 7 C.R.N.S. 265, 5 D.L.R. (3d) 263 (C.A.).

ably have separate and numerous directing or operating minds in its various divisions or branch offices.

The organic theory has been applied in a number of cases involving issues of human rights. Prime examples of this application are the decisions in *Iancu* v. *Simcoe County Board of Education*[28] and *Olarte* v. *Commodore Business Machines Ltd*,[29] both adjudicated by Professor Peter Cumming. In the *Olarte* case, after reviewing the development of the law relating to employers' liability for breaches of human rights statutes by employees, Cumming stated that an employer may breach the *Human Rights Code* in the following situations:

(i) personal action: where the employer himself, by his own personal action, directly or indirectly, intentionally infringes a protected right;

(ii) constructive discrimination: where the employer does not intend to discriminate, but his acts have a discriminatory effect nonetheless;

(iii) authorizes or condones discrimination: where the employer himself takes no direct action of discrimination, but authorizes, condones, adopts or ratifies an employee's discriminatory act or where the employer knew or should have known, as a reasonable person would have known, of the commission of discriminatory conduct and did not take reasonable steps to put an end to, or at least minimize the discrimination, abuse or practice;

(iv) organic theory of corporate responsibility: where the employer is a corporate entity, and an employee is in contravention of the human rights legislation, and that employee is part of the "directing mind" of the corporation, then the employer corporation is itself personally in contravention because the act of the employee becomes the act of the corporation; and

(v) common law of agency: where an employee unlawfully (i.e. in contravention of legislation) causes a breach of contract between his employer and a complainant, then the employer is liable for the contravention of the said legislation under the common law in respect of agency, for the act of the employee-agent is the act of the employer-principal so far as the third-party complainant is concerned.[30]

Thus, as has been illustrated under the "organic theory", where an employee is part of the "directing mind" of a corporation, then the employer

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[28](1983), 4 C.H.R.R. D/1203 (Ont. Bd of Inquiry).

[29](1983), 83 C.L.L.C. 17,028, (*sub nom. Olarte* v. *DeFilippis*) 4 C.H.R.R. D/1705 (Ont. Bd of Inquiry), aff'd by (*sub nom. Re Commodore Business Machines Ltd and Min. of Labour for Ontario*) (1984), 49 O.R. (2d) 17, 14 D.L.R. (4th) 118, (*sub nom. Commodore Business Machines Ltd* v. *Ontario Minister of Labour*) 84 C.L.L.C. 17,028, 6 C.H.R.R. D/2833 (Div. Ct).

[30]As summarized by the author.

corporation finds itself personally liable. However, the important questions remain as to which employee may be considered a directing mind of the corporation, and when such is the case.

Where an employee is also the sole shareholder, a director or the manager of a corporation, there is obviously little difficulty in considering him a "directing mind". However, other situations require individual analysis to determine the exact authority, control and discretion the employee exercises in personnel functions. This should be considered a precedent with respect to the characterization of that employee as a "directing mind".

As stated previously, the *Nelson* doctrine was revived in the *Brennan*[31] decision, where the Federal Court of Appeal ruled that employers' liability for the discriminatory conduct of employees must be found within the four corners of the statute. Encouraged by this decision, the Manitoba Court of Appeal in the *Janzen*[32] case stated that

> the approach taken by Craig, J.A., in the *Nelson* case ... and Thurlow, C.J., in the *Brennan* case ... makes good sense. If this sort of liability is to be imposed, it is not too much to expect that the statute will so specify in clear terms.[33]

This same court had followed the *Nelson* doctrine earlier, in the *Dakota Ojibway Tribal Council* case,[34] when it refused to hold one "partner" liable for the discriminatory conduct of the other partner. Mr Justice Twaddle stated:

> [T]he personal nature of an act of discrimination is such that in my view it cannot amount to a contravention of the *Act* by anyone other than the discriminator unless a partnership or corporate policy to discriminate can be established or the partnership or corporation is shown to be an accomplice to the act of discrimination. This is consistent with the decision of the British Columbia Court of Appeal in *Re Nelson and Byron Price & Assoc.* ... albeit that the British Columbia *Code* is more specific as to the need for mens rea.[35]

The Federal Court of Appeal decision in *Brennan* was reluctantly followed by Professor Robert Kerr in *Gervais* v. *Agriculture Canada*,[36] wherein he stated:

> This brings me to the question of whether the Department can be held liable to this harassment. The present law on this issue must be determined in accordance with the decision of the Federal Court of Appeal in *R.* v. *Robichaud* ... . Although, if the question were open to me to decide, I should find

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[31]*Supra*, note 2.
[32]*Supra*, note 23.
[33]*Ibid.* at 407.
[34]*Supra*, note 23.
[35]*Ibid.* at 232-33.
[36](1986), 7 C.H.R.R. D/3624 (Ont. Human Rights Trib.).

> the dissent of Mr. Justice MacGuigan to be far more appealing to reason, I am bound by the majority decision ... .[37]

However, the *Brennan* and *Nelson* decisions have been either ignored or passed over by human rights tribunals in other jurisdictions.[38] In these cases, corporate employers were held liable for acts of sexual harassment committed by their employees. In *Ratzlaff* v. *Dimas*,[39] a Saskatchewan Board of Inquiry went even further and found a "partnership" firm liable for the discriminatory conduct (in this case, sexual harassment) of one of the partners. The tribunal stated that this was "equally true whether as a partner, Sections 12 and 14 of *The Partnership Act* are considered, or in the case of a corporation, the owner is responsible for the actions of those acting on his behalf."[40]

In the instant case, the Supreme Court examined the common law theories of employer liability, within the context of the policy and purpose of human rights statutes, and ruled that none of these are directly applicable in situations involving issues of human rights. The court reasoned that the theories of employer liability, as developed in the context of criminal or quasi-criminal conduct, are inapplicable to human rights statutes because the said theories are "fault-oriented", whereas the central purpose of human rights legislation is remedial, that is, to eradicate anti-social conditions, regardless of the motives or intentions of those who create them. For similar reasons, the theory of employers' vicarious liability, as developed under the law of torts, is also inapplicable to human rights statutes. The high court itself pointed out the inapplicability, to the *Canadian Human Rights Act*, of the limitation that the act complained of must have been done "in the course of employment" as developed under the doctrine of vicarious liability in tort.

VII. Employers' Liability for Sexual Harassment by Non-Supervisory Employees

The issue of whether an employer should also be held liable for acts of sexual harassment committed by non-supervisory employees has been debated both in Canada and the United States. Such harassment may not have any "direct" job-related consequences (such as discharge or suspension), but it nevertheless could create a hostile and poisonous working environment. Further, it is argued that an employer should be held liable for "co-worker"

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[37] *Ibid.* at D/3629.

[38] *Mueller* v. *Esperado Holdings Ltd* (1986), 7 C.H.R.R. D/3405 (Sask. Bd of Inquiry); *Thompson* v. *Champion Foods Ltd* (1985), 8 C.H.R.R. D/3905 (Alta Bd of Inquiry); *Joss* v. *T & C Gelati Ltd* (1986), 8 C.H.R.R. D/3941 (B.C. Human Rights Council).

[39] (1986), 7 C.H.R.R. D/3402 (Sask. Bd of Inquiry).

[40] *Ibid.* at D/3404.

sexual harassment because such an employee's conduct can have a serious impact on a co-worker's ability to successfully perform his/her job. Thus, co-worker sexual harassment can lead to the same results as sexual harassment by a supervisor. Who else, other than an employer, is in a position to provide a healthy and safe working environment?

It is to be noted that a Canadian Human Rights Commission policy statement holds an employer vicariously liable even in situations where the harassment is carried out by non-supervisory personnel.[41] In the United States, the Equal Employment Opportunity Commission Guidelines also hold an employer responsible for harassment by co-workers.[42]

Thus, an important question arises. Does the decision of the Supreme Court of Canada extend to the actions of non-supervisory employees? Notwithstanding the fact that in *Robichaud*, the harasser (Brennan) was a supervisory employee, it is submitted that the court's observations may be interpreted to the effect that an employer will be held liable for the discriminatory conduct of all its employees — supervisory or non-supervisory. This position is supported by the following statement by Mr Justice La Forest:

> Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory.[43]

VIII. Employer Policy and Procedures

The Supreme Court has stated, in no uncertain terms, that an employer is absolutely liable for the discriminatory acts of its employees. Does this mean that an employer automatically becomes liable for his agent's actions, even when that agent is engaged in activities that are contrary to his employer's policies, that the employer and its agent are inseparable — they are one and the same? It would appear not, as the decision in *Robichaud* seems to recognize that the existence of a policy against sexual harassment and a mechanism to handle employee complaints could provide an employer with

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[41]See Canada, Human Rights Commission, *Harassment Policy* (February 1983), which states:
Any act of harassment committed by an *employee* or *agent* of any employer in the course of employment shall be considered to be an act committed by that employer.[emphasis added]

[42]*E.E.O.C. Guidelines*, s. 1604.11(d), states the following:
[W]ith respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."

[43]*Supra*, note 1 at 95.

a good defense which could partially or totally reduce liability. The court stated:

> [A]n employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability.[44]

It would appear that the court is informing employers that it is their actions, and not their words, that are the key factors in assigning liability in sexual harassment cases.

Therefore, the court has concluded that the *Canadian Human Rights Act*, by implication, intends to impose absolute liability on employers for the discriminatory conduct of their employees. It is now for the legislature to decide whether to maintain this broad definition of liability, or to somehow limit it through recourse to the legislative process. For this reason, the court clearly distinguished between the issues of employer liability and the remedies available if liability is established. However, it is interesting to note that the United States Supreme Court recently held that an employer assumes absolute liability for acts of sexual harassment committed by its supervisory employees, regardless of whether the employer was aware, or should have been aware of the discriminatory conduct. *Meritor Savings Bank* v. *Vinson*[45] (cited with approval by the Supreme Court of Canada in the instant case[46]) went on to state that the mere presence of policies prohibiting the misconduct, and absence of knowledge of the misconduct, are not sufficient to insulate the employer from liability. Thus, an effective harassment policy does not necessarily provide total immunity for the employer, but may result in remedies being awarded which are different (lesser) than those awarded in the case of an employer who does nothing at all to protect and preserve the human rights of its employees.

IX. Implications for Public Policy

It is extremely significant that the Supreme Court of Canada, in determining the issue of employer liability, departed from the traditional approach, which is based on theories developed under the common law. It reviewed the *Canadian Human Rights Act* in its totality, and determined that its basic purpose is to "identify and eliminate discrimination", and that in the context of employment, these objectives cannot be achieved without attributing to the employer responsibility for its employees' conduct. The court concluded that in order for these objectives to be achieved,

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[44] *Ibid.* at 96.

[45] 89 L. Ed. (2d) 567 (1986).

[46] *Supra*, note 1 at 95.

the remedies must be effective as well as be consistent with the "almost constitutional" nature of the rights protected.

The Supreme Court of Canada has now determined that there exists a statutory obligation which requires employers to provide safe and healthy working environments, as it is the purpose and policy of human rights statutes to eradicate any socially undesirable working atmospheres. When an employee acts in violation of such statutory policy, the employer becomes statutorily liable. The court has indeed paved the way for human rights tribunals, not only in sexual harassment cases, but in all cases involving violations of human rights. Thus, future human rights tribunals will not be forced to undertake legal gymnastics in order to hold an employer liable for its employees' unauthorized discriminatory conduct, unless the legislature statutorily restricts this liability. For example, the Ontario *Human Rights Code* specifically exempts employers from liability in relation to acts of sexual harassment committed by employees or agents.[47]

Moreover, the Supreme Court of Canada has recognized that sexual harassment does not necessarily occur only in the course of employment, as would normally be expected. It is suggested that the phrase "in the course of employment" should be given a broad interpretation, and should be understood as meaning "work related". Thus, the court gave the statute as liberal and broad an interpretation as could have been anticipated. The court's broad interpretation of this phrase is consistent with the objectives of human rights statutes. However, such a broad interpretation could lead to very serious consequences if it were applied in cases not involving issues of human rights. For example, application of this interpretation in torts or workers' compensation cases would lead to results not intended by the court. On the other hand, this same court has often indicated that human rights statutes are special, and that the broad interpretation given to these statutes should not be extended to other types of statutes.

The *Robichaud* decision is of great importance in all cases involving human rights violations, and not only with respect to sexual harassment situations specifically. It is welcomed by women's groups who encouraged Robichaud in her eight-year fight up to the highest court, as well as by all those interested in improving, protecting and enforcing human rights policies. The decision strengthens the abilities of human rights boards and commissions in the implementation of their legislative objectives and policies.

The greater significance of the decision rests in the reasoning of the court rather than in the result. The court adopted a pragmatic approach

[47]*Supra*, note 13.

and asked itself the following question: How can the objectives of the *Canadian Human Rights Act* be achieved? It emphasized that the employer alone is in a position to enforce human rights in the work place. For example, the employer alone can: (i) implement the policies of human rights legislation; (ii) create a healthy work environment; (iii) reinstate an employee who has been dismissed; (iv) provide benefits to the victim of the human rights violation, and (v) punish the wrongdoer, the person who violated the human rights provisions — in the present case, the harasser.

Further, the court noted that human rights statutes are remedial in nature, and are intended to create social change as well as eradicate socially undesirable behaviour (in the context of the workplace). Once again, it emphasized that protected human rights are special, "quasi-constitutional" or "fundamental" in nature. In other words, the high court has associated human rights legislation with the "Equality Rights" set out in the *Canadian Charter of Rights and Freedoms*,[48] and has afforded this legislation nearly the same protection as it has to the *Charter*. The decision draws no distinction between individual employers, corporate employers or governments as employers. In fact, the court imposed liability without any reference whatsoever to whether the employer was a sole proprietor, a corporation or a division of municipal, provincial or federal government, nor did its analysis attribute any importance to the size of the employer. In other words, the Supreme Court implicitly stated that the employer's identity, in such cases, is totally irrelevant. The determining factor is that an employer is in a position to control its employees, and thus must share the responsibility for its employees' conduct, when such conduct affects other employees' terms and conditions of employment.

The court made it clear that it was not dealing with the issue of "whether sexual harassment in the course of employment constitutes discrimination on the grounds of sex" and, as such, it made no determination on that issue. However, in light of the overall approach it adopted, it appears evident that the Supreme Court has implicitly endorsed the argument that sexual harassment does, in fact, amount to discrimination on the grounds of sex, for the purposes of human rights legislation.

The Supreme Court of Canada has granted the Manitoba Human Rights Commission leave to appeal from the Manitoba Court of Appeal decision in the *Janzen* case.[49] In that case, the appellate court reversed the Board of Adjudication on the ground that sexual harassment does not amount to sex discrimination. If the *Robichaud* decision is any indication of the high

[48]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

[49]*Supra*, note 23. Leave was granted 25 June 1987: [1987] 2 S.C.R. ix.

court's understanding and appreciation of human rights legislation in Canada, it appears likely that it will reverse the *Janzen* decision, as it reversed the Federal Court of Appeal decision in the instant case.

In a democratic society, social change does not occur simply through the enactment of a piece of legislation. A coherent understanding and appreciation of the legislation is required, as well as support from the administration and the judiciary. If the courts fail to appreciate the social objectives of the legislation, or are in conflict therewith, they may stall the progress of social change through the interpretive process. History has not forgotten the frustration of President Roosevelt with the United States Supreme Court in regard to his "New Deal" legislation. That court's decision in *Schechter Poultry Corp.* v. *United States*[50] held that the *National Industrial Recovery Act* was unconstitutional, notwithstanding that this legislation was intended to bring the nation out from deep economic depression.

The Supreme Court of Canada is facing a challenge during this decade similar to that faced by the United States Supreme Court during the New Deal Era (in terms of social change). Whereas the latter experienced difficulty in embracing Roosevelt's legislative objectives, the Canadian high court has accepted the challenge with great enthusiasm, and has exhibited a knowledgeable understanding and appreciation of Canadian social goals. This is clearly illustrated in its decisions in a trilogy of human rights cases.[51]

In the instant case, the Supreme Court went directly to the root of the problem by emphasizing the basic objectives of the *Canadian Human Rights Act* and stating that it (and for that matter, all human rights legislation in Canada) is social legislation which is enacted with a clear purpose and vision, that is, to eliminate socially undesirable conditions which, in this regard, amount to unhealthy working conditions.

Conclusious

There are numerous implications for employers in the Supreme Court decision. They may be briefly summarized as follows:

—employers are responsible for the due care and protection of their employees' human rights in the workplace;

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[50]295 U.S. 495, 79 L. Ed. 1570 (1935).

[51]*Ontario Human Rights Commission* v. *Simpsons-Sears Ltd* [1985] 2 S.C.R. 536, 86 C.L.L.C. 17,002, 7 C.H.R.R. D/3102, (*sub nom. Re Ontario Human Rights Commission and Simpsons-Sears Ltd*) 64 N.R. 161, 23 D.L.R.(4th) 321; *Canadian National Railway Corp.* v. *Canadian Human Rights Commission* [1987] 1 S.C.R. 1114, 87 C.L.L.C. 17,022, 8 C.H.R.R. D/4210 (*sub nom. Action Travail des Femmes* v. *Canadian National Railway Corp.*) 76 N.R. 161; *Robichaud* v. *R.*, *supra*, note 1.

—employers are liable for the discriminatory conduct of, and sexual harassment by, their agents and supervisory personnel;

—sexual harassment by a supervisor is automatically imputed to the employer when such harassment results in a tangible job-related disadvantage to the employee;

—explicit company policy forbidding sexual harassment and the presence of procedures for reporting misconduct may or may not be sufficient to offset liability;

—employers will be pressured to take a more active role in maintaining a "harassment-free" work environment;

—employers will feel a greater discomfort with intimate relationships that develop between supervisors and their subordinates due to the legal implications, and this may motivate employers to discourage such office relationships;

—employers' intentions to have effective sexual harassment policies are insufficient. In order to avoid liability, the policies must be functional and must work as well in practice as they do in theory.