January 30, 1998

SUBMISSION OF THE WEST COAST LEAF ASSOCIATION TO THE ROYAL COMMISSION ON WORKERS' COMPENSATION ON THE INCLUSION OF SEXUAL HARASSMENT IN WORKERS' COMPENSATION LEGISLATION, REGULATIONS AND POLICY

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1.0 West Coast LEAF Association

West Coast LEAF Association is the British Columbia branch of the national Women's Legal Education and Action Fund (LEAF). LEAF is a federally incorporated, non-profit organization founded in 1985 to secure equal rights for women in Canada as guaranteed by the *Canadian Charter of Rights and Freedoms* (the *Charter*). To this end, LEAF engages in strategic equality rights litigation, equality research, law reform advocacy, and public legal education. Through such work, LEAF has developed expertise regarding the interaction between equality and the many areas of law having a particular impact on women.

LEAF has been involved in several cases relating to women in the workforce over the years. In *Brooks v. Canada Safeway*, LEAF intervened before the Supreme Court of Canada, and successfully argued that pregnancy discrimination should be prohibited under human rights legislation as discrimination on the basis of gender.[1] West Coast LEAF has made submissions to government on workplace issues, including pregnancy discrimination[2] and employment standards.[3] LEAF has also been involved in cases dealing with issues of sexual harassment. LEAF was an intervenor before the Supreme Court of Canada in the case of *Janzen v. Platy Enterprises,* where the Supreme Court of Canada held that sexual harassment amounts to discrimination on the basis of gender. [4] Moreover, LEAF sponsored the plaintiff in the *Colgate Palmolive* case, where the plaintiff received benefits for her injuries by a workers' compensation appeals tribunal after enduring vicious sexual and racial harassment over several years[5].

This submission represents the views of West Coast LEAF, and has been endorsed by LEAF National.

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[1] *Brooks, Allen and Dixon v. Canada Safeway*, [1989] 1 S.C.R. 1219.
[2] *Submission of the West Coast LEAF Association on the Human Rights Act and Pregnancy Discrimination* (Vancouver: West Coast LEAF, 1993).
[3] *Submission of the West Coast LEAF Association to Standards for a Changing Workplace: A Review of Employment Standards in British Columbia Commission of Inquiry* (Vancouver: West Coast LEAF Association, 1993).
[4] *Janzen and Govereau v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.
[5] Hearings Officer Decision, Workers' Compensation Board, 29 June 1990 (90/HO/636).

1.1 Executive Summary

This submission draws a number of conclusions and makes a number of recommendations regarding current workers' compensation legislation in British Columbia and its treatment (or lack thereof) of sexual harassment in the workplace.

This submission concludes:

1. Sexual harassment is a significant workplace issue for women, particularly women who are disadvantaged due to race, culture, physical disadvantagement sexual identity, immigration status, or their isolation within the workplace

2. Sexual harassment in the workplace creates a dangerous and unproductive workplace environment for everyone; the victim, her co-workers and the employer;

3. Employers have a responsibility to provide a safe workplace to their employees. Workers' compensation must assist in and enforce this responsibility in the context of sexual harassment;

4. Existing human rights and civil remedies for sexual harassment do not adequately meet the needs of all women who are harassed in their workplace. Sexual harassment is a workplace issue and workers' compensation should also be available to deal with compensation claims, prevention and education;

5. Current workers' compensation legislation in British Columbia fails to provide adequate preventive measures and compensation remedies for dealing with sexual harassment;

   (a) In terms of prevention, it remains to be seen whether recent hazard and violence regulations can be used successfully by victims to prompt employer responses to harassment. Without the express inclusion of sexual harassment and corresponding education about its sensitivity, these new regulations may offer little practical remedy to harassment victims.

   (b) Like prevention, the compensation mandate of the WCB does not expressly recognize injuries suffered as a result of sexual harassment as a basis of claim. Present claim categories of "personal injury" and "occupational disease", and the traditional physical injury focus of the commission, do not adequately deal with sexual harassment claims;

6. The WCB's *Sensitive Claims Guidelines* are a good starting point for dealing with procedural issues and disclosure of complainant's personal records. These guidelines, however, must be strengthened in terms of their protection of complainants' equality and privacy interests.

In light of the foregoing, our recommendations are as follows:

1. Multiple statutory remedies should be available for sexual harassment, including remedies under the workers' compensation system;

2. Sexual harassment should be expressly incorporated into the WCB scheme, and a proactive infrastructure for enforcement, prevention and education should be put in place.

3. In order to remove any dispute as to whether harassment creates a possible hazard, workers' compensation regulations should be amended to expressly include sexual harassment as an improper activity. Further, training should be provided to WCB staff in order to develop the necessary expertise for investigating and adjudicating sexual harassment matters;

4. Complementary regulations should be established to set out appropriate preventive actions to be taken by employers;

5. The Saskatchewan model should be implemented in B.C.'s forthcoming occupational health and safety legislation;

6. The *Workers' Compensation Act* should explicitly include injuries flowing from sexual harassment as a compensable injury;

7. The Sensitive Claims Guidelines, or other policy relating to adjudication of sexual harassment claims, should recognize that corroboration is not required for a claim to be accepted, and should be amended to properly protect complainant's equality and privacy interests;

8. Workers' compensation legislation and the Sensitive Claims Guidelines should be amended to provide for a trained and independent disclosure review committee to assist in the determination of what information should be disclosed within the context of a sexual harassment claim;

9. Before any amendments to workers' compensation legislation, regulations, policy or draft guidelines are implemented, there should be a consultative process including representations from women workers, particularly those identified as vulnerable in Part 1.3.

1.2 Background and Process

Current workers' compensation legislation and its corresponding policies significantly affect women in a variety of ways. West Coast LEAF consulted widely with a number of organizations before deciding to focus our submission on the issue of how the workers' compensation scheme affects women through its treatment of sexual harassment in the workplace. This submission is grounded in the experiences and expertise of the many individuals and groups we contacted, including:

- B.C. Federation of Labour
- DisAbled Women's Network (DAWN) Canada
- Injured Workers' Human Rights Group
- International Teamster Women's Caucus

- Kamloops Women's Resource Centre
- Lower Mainland and BCIT Tradeswomen
- Vancouver Association of Women and the Law
- West Coast Domestic Workers Association
- Women in Trades, Technology, Operations, and Blue Collar Work (WITT)
- Workers' Compensation Advocacy Group

We note our concern that the issue of sexual harassment has not, thus far in the Royal Commission's hearing processing, been expressly acknowledged or responded to by the Commission.

1.3 Women and Workplace Harassment

A. Definition of Sexual Harassment

In the 1989 *Janzen* case, the Supreme Court of Canada held that :

> " sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job consequences for the victims of harassment".[6]

According to the 1996 Annual Report of the Canadian Human Rights Commission, sexual harassment remains a significant workplace issue for women.[7] Sexual harassment in the workplace includes a promise of reward in exchange for sexual favours. It includes a threat, either stated or unstated, that if the victim doesn't go along with the harassment there will be job consequences. Sexual harassment can also occur without any promise of reward, or threats. Conduct which makes the workplace an intimidating, hostile, or offensive place can also be characterized as harassment. The result of this conduct is sometimes called 'a poisoned work environment.'

Consequences of harassment can be severe, and may include economic loss, as well as health related consequences. An employee who has been harassed might not get a desired shift, may be demoted, denied a promotion, or lose her job. It is also increasingly recognized that sexual harassment in the workplace may cause stress, depression and related physical symptoms, including "weight loss, diarrhoea, sleeplessness, headaches, [and] fatigue".[8] These consequences may make the employee unable to perform her job functions properly or at all, and may increase workplace hazards. Ultimately, the consequences of sexual harassment are felt by all workers, the employer,

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[6] See supra note 4 at 1283-4.

[7] Canadian Human Rights Commission, *Annual Report* (Ottawa: The Commission, 1996).

[8] Fay Faraday, "Dealing with Sexual Harassment in the Workplace: The Promise and Limitations of Human Rights Discourse" (1994), 32 Osgoode Hall Law Journal 34 at 61, citing M. Cornish & L. Trachuk, "The Bonita Clark Case: Sexual Harassment in Non-Traditional Work" in *Legal Issues for Women* (Vancouver: Continuing Legal Education Society of B.C., 1988).

and to society in general due to its negative effect on productivity and the work environment.

Women in general may be reluctant to complain about sexual harassment. They may believe the chances of a successful complaint are hopeless, they may think sexual harassment might worsen after a complaint, they may not know that certain behaviour amounts to sexual harassment, or what remedial avenue to follow. The costs of complaining may be high, both in monetary terms, in terms of social ostracism and possible retaliation, as well as the toll on the emotional well-being and stability of the victim. Women may have difficulty proving harassment, as there are often no witnesses to such behaviour, or they may wish to avoid the likelihood of being blamed themselves for the harassment.

B. Enhanced Risk

As noted by one commentator, "sexual harassment in the workplace is the abuse of (overwhelmingly) male economic and sexual power to undermine (overwhelmingly) female economic security, personal integrity, and safety. It constitutes sex discrimination because it creates a barrier to women's equal participation in the workforce".[9] Sexual harassment of women who are vulnerable in other ways - either because they are disabled, or lesbian, or because they belong to a race, culture or religion different from the dominant group in society- can be even more devastating and create an even greater barrier to women's equal participation in the workforce.

An examination of Canadian immigration policy and economic history shows that certain jobs, such as factory work and domestic services, are predominantly held by members of minority communities. Within those communities, women often hold the most vulnerable and poorly paid positions.

Domestic workers who are employed on a live-in basis are particularly vulnerable to sexual harassment, due to the fact that their workplace is also their home. Such workers can face harassment and intimidation by their employers, or from the employer's family members. An example of such sexual harassment is exemplified in the human rights case of *Guzman v. Dr. and Mrs. T.*[10] In *Guzman*, a live-in domestic worker suffered serious, ongoing sexual harassment by one of the employer's children. The Human Rights Council found the employers vicariously liable for the sexual harassment perpetrated by their son, and the domestic worker was awarded damages for nonpecuniary losses, and for lost wages.

Live-in domestic workers are often isolated by virtue of the private nature of the workplace. Many domestic workers are immigrants to Canada, whose immigration requirements to complete

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[9] Faraday, ibid. at 34, citing *Janzen*, supra note 4.

[10] *In the Matter of the Human Rights Act S.B.C. 1984, c. 22(as amended) And in the Matter of a complaint before the British Columbia Council of Human Rights, Leonida Guzman Complainant and Dr. & Mrs. T. Respondent* (B.C. Council for Human Rights, Unreported, January 14, 1997); See also *Singson v. Pasion and Moore* (B.C. Council on Human Rights, Unreported # 341, March 1996).

a certain number of months of live-in work makes it less likely that they will raise complaints related to their employment for fear of jeopardizing their immigration status here in Canada. This is particularly true in light of the sensitive nature of sexual harassment claims. For such women, proving claims of harassment is also very difficult, given that there are rarely witnesses to the events.[11]

Other workplace environments have also been reported to pose an enhanced risk of harassment and violence to women, due to the nature of the position. For example, women working in the service industry as waitresses, flight attendants, and hospital workers may all be particularly vulnerable to sexual harassment.[12]

Moreover, women who work in trades, technologies, and blue collar work are also more vulnerable to sexual harassment in the workplace. For many of these women, where a traditionally all-male environment may be the norm, sexual harassment is pervasive. Women in these occupations are often significantly outnumbered by their male counterparts and, accordingly, they often lack the support of female colleagues.[13] While having female colleagues does not necessarily make it any easier to speak out against harassment, being isolated from other women can make standing up to harassment more difficult and the harassment even more intense.

Standing up to harassment, however, does not necessarily ensure positive results. For example, women in the construction industry, who are hired on a project by project basis, may risk their chances of being hired for subsequent jobs if they are seen as "troublemakers". More generally, employers are often unwilling to acknowledge that the problem of harassment exists, or unsure of how to take positive steps to ensure that it is eliminated.[14]

Not only are certain women more vulnerable to harassment, but in some cases, the harassment they endure is of a more insidious nature because it combines the element of racism with the sexual harassment. For example, in a case before the B.C. Human Rights Commission where a young black woman was sexually harassed by her Middle Eastern employer, the evidence revealed that he had said to her "that's how black people make their living, by doing blow jobs".[15] An example of the consequences of racial and sexual harassment[16] in a factory setting is found in the *Colgate-Palmolive* case.[17] A black woman who worked at a Colgate-Palmolive

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[11] Domestic workers may also be excluded from the application of workers' compensation legislation altogether, depending on their work arrangements.

[12] Anita Braha, *Women and Workers' Compensation. An Analysis of Selected Issues* (Vancouver: Ministry of Women's Equality, 1993) at 33-34, note 91.

[13] Kate Braid, "Foreigners to the Culture: Women in Trades and Technologies," in *women's Education des femmes* (Fall 1991).

[14] *Burton v. Chalifour Bros. Construction*, (B.C. Council of Human Rights, Unreported, December 15, 1994).

[15] See *Webb v. Cyprus Pizza* (1985), 6 CHRR D/2794.

[16] See also Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993), 6 Canadian Journal of Women and the Law 25 for a discussion of sexual harassment in cases involving members of racial minorities.

[17] See supra note 5. See also the similar case of Decision 636/91 (1992), 21 WCATR 277 (Ontario), in which a female correctional officer was compensated for sexual harassment.

factory in Ontario endured six years of extremely vicious sexual and racial harassment, before suffering physical and psychological damage that finally forced her to quit her job, and prevented her from working in the years following her constructive dismissal.

Some lesbian women are also subjected to a particular kind of sexual harassment in the workplace. Comments directed at a woman's sexual orientation, such as "Hey, baby, what you need is a real man" or "One night with me will fix you", serve to undermine a woman's integrity and create a hostile work environment. In other cases, the harassment may be more subtle, for example when an employer or co-workers imply that a woman is "too masculine" for the job. In other cases, where a woman is in a position of power or authority, she may be referred to as a "lesbo" or "dyke" (whether or not she is a lesbian) in an attempt to demean her position and authority. By labelling her as such, her subordinates are able to avoid feeling emasculated by having a woman perform a "man's job". [18]

For women with disabilities, sexual harassment can be aggravated by harasser perceptions which do not recognize these women as independent and suggest that physically challenged women should be happy if they are getting any "sexual attention" at all. A sexual harassment co-ordinator at a Canadian university recalls a case where a woman who had been sexually harassed and eventually assaulted brought a claim against her harasser. Incredibly, the harasser's response when confronted was that he didn't know what all of the fuss was about since it was the only way in his view that the victim was going to get sex.[19] Incidents and dangerous attitudes like these may not be that uncommon, however, women with disabilities are so underrepresented in the workforce that evidence of sexual harassment is difficult to find.[20]

Thus while all women, and indeed all workers are in need of protection from sexual harassment in the workplace, it must be recognized that some women, by virtue of their multiply disadvantaged status, due to either race, culture, physical disadvantagement, sexual orientation, immigration status or their isolation within the workplace, are the most vulnerable to such harassment.

1.4 Remedies for Sexual Harassment

Entitlement to workers' compensation requires an injury or disease to have arisen out of and in the course of a claimant's employment which disables the claimant from earning her full wages. Even severe and persistent harassment is only compensable if there is medical evidence showing that the harassment caused the disability.[21] Once accepted, a claim entitles a worker to compensation for lost wages , medical expenses, and (if the disability requires a change of occupation) vocational rehabilitation.

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[18] See Carolyn Grose, "Same-Sex Sexual Harassment; Subverting the Heterosexist Paradigm of Title VII" (1995), 7 Yale J. of Law and Feminism 375.

[19] Ann Robinson, Faculte de droit in l'Universite de Laval.

[20] Conversation with representative of DisAbled Women's Network ("DAWN") Canada.

[21] Personal correspondence with James Sayre, Workers' Compensation Advocacy Group, January 14, 1998.

Generally speaking, in cases where the worker's injury is caused by a third party (i.e. a perpetrator of sexual assault or sexual harassment), the *Workers' Compensation Act* provides that the injured worker may elect to pursue a remedy for damages by way of a civil claim or a claim to compensation under the WCB regime.

If the worker claims compensation, the WCB is subrogated to the civil right of action, and the worker will be deemed to have foregone any independent civil action. On the other hand, there is some uncertainty in the law as to whether sexual harassment can form the basis of a civil claim, given the availability of remedies under human rights legislation.[22]

Currently, human rights tribunals are the most frequently used forum for sexual harassment complaints. The increasing number of human rights complaints, however, without an increasing level of resources at the B.C. Human Rights Commission, has led to a serious backlog in processing human rights cases.[23] Indeed, some alleged perpetrators of sexual harassment are now bringing court actions seeking to have the claims against them dismissed because of the time delays.[24]

The recent cases of *Belliveau-St. Jacques*[25] and *Beaudest v.Genest*[26] have raised some issues in regards to the availability of multiple remedies. While the Supreme Court of Canada held in *Belliveau* that a sexual harassment claim based on an employment injury must be made under workers' compensation legislation and precludes an employee from seeking human rights remedies, *Beaudest* appears to temper this restriction by suggesting that claimants who suffer an employment injury due to sexual harassment and have to proceed under WCB may not be precluded from seeking additional damages through human rights, provided that the remedy sought is not available through their concurrent WCB claim (i.e. punitive damages).

While West Coast LEAF supports an increase in the level of resources at the Human Rights Commission in order to deal with the backlog of complaints, and to process future complaints more expeditiously, we do not believe that this is an adequate solution in itself. Sexual harassment is a workplace issue. Workers' compensation should recognize its responsibilities in this regard. Therefore, **West Coast LEAF recommends that multiple statutory remedies be available for sexual harassment, including remedies under the workers' compensation system.**

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[22] For example, see *Chaychuk v. Best Cleaners and Contractors Ltd.* (Unreported decision of B.C.S.C., 1995), where the plaintiff's civil claim for sexual harassment was struck. *Contra*, see *Biron v. Kashuba* (B.C.S.C., Jan. 1996).
[23] See T. Barrett, "Delay at the heart of issue in Blencoe Case", *Vancouver Sun*, 27 November, 1997; A1, A2.
[24] See ibid, referring to the case of Robin Blencoe.
[25] [1996] 2 S.C.R 345.
[26] [1997] J.T.D.Q. no. 12 (5 March 1997 - J. Rivest).

Conclusions

There are obvious advantages to dealing with sexual harassment under the workers' compensation system. As will be discussed in the next section, the occupational health and safety jurisdiction of the WCB makes it uniquely placed to deal with the prevention of sexual harassment in the workplace. Moreover, the creation of an alternate system to deal with workplace harassment may help to alleviate the current scarcity of resources in hearing harassment claims and claims for compensation may be processed more quickly. The structured claims process of the WCB may be more in tune with the needs of employee victims and may ultimately be less costly for both workers and employers.

Remedy through the workers' compensation system could also have an important role in alleviating disparities between workers in terms of available remedies. While some workers have access to remedies for sexual harassment through their employers' policies, or for unionized workers, through collective agreements, this does not include all, or even the majority of workers in B.C. This inequity could be rectified by providing a minimum level of remedies for sexual harassment under workers' compensation legislation.

Thus while the workers' compensation system cannot guarantee a remedy system without flaw, it can provide a number of valuable resources to the battle against sexual harassment in the workplace.

We will now examine the workers' compensation regime in B.C. to identify ways in which coverage for sexual harassment arguably exists, thereby revealing how it can be improved.

1.5 Workers' Compensation and Sexual Harassment - Current Regimes In B.C. and across Canada

The B.C. Workers' Compensation Board's dual responsibilities for prevention of work related injury and disease, and providing compensation for work related injuries and illnesses are both significant in terms of identifying how sexual harassment in the workplace can be interpreted to fall within the mandate of the WCB. While sexual harassment could be interpreted to fall within the jurisdiction of the WCB as the legislation and regulations are currently drafted, this interpretation has not been widely adopted by claims adjudicators. **West Coast LEAF recommends that sexual harassment be expressly incorporated into the WCB scheme and that a proactive infrastructure for enforcement, prevention and education be put in place.**

This section will examine B.C.'s existing approach to sexual harassment and contrast it with the systems in other Canadian jurisdictions. West Coast LEAF also makes a number of recommendations for the improvement of the WCB' handling of sexual harassment in B.C.

A. Occupational Health and Safety - Prevention

Occupational Health and Safety versus Compensation

As currently structured, occupational health and safety generally entails a statutory liability scheme whereas workers' compensation is based on a no-fault approach to compensation. Workers' Compensation addresses the injury after the accident or illness takes place. It provides compensation for lost income and ensures that workers receive appropriate treatments and rehabilitation. To the extent that the employer contributions are proportional to the number of claims made against that employer, the system provides an indirect incentive to maintain safe workplaces.

Occupational health and safety goes beyond the indirect incentives of workers' compensation and directly regulates workplace health and safety.[27] The responsible agency creates binding health and safety standards and inspects workplaces to guarantee compliance. They also provide information and training on health and safety issues. The legislation contains punitive provisions (fines) to enforce the legislation and requires each workplace to establish a health and safety committee to monitor the workplace on a continuing basis. Workers gain the statutory right to refuse unsafe work, and the employers may not subject employees to reprisals for taking advantage of the legislation.

Occupational health and safety provides direct and proactive mechanisms to guarantee workplace safety, and it places responsibility for workplace health and safety on both employers and workers.

1. British Columbia

The B.C. WCB derives its occupational health and safety authority from several pieces of legislation - the *Workers' Compensation Act*, the *Workplace Act*, and the *Hazardous Products Act* (Workplace Hazardous Materials Information System or WHMIS Regulations).

Applicable Legislation

The *Workers Compensation Act* (the "Act")[28] allows the WCB to make general or specific regulations regarding health and safety hazards. These regulations are applicable to employers, workers and all other persons working in or contributing to the production of an industry within the scope of Part I of the Act. The WCB is authorized to inspect places of employment for compliance with the regulations, can issue corrective or closure orders where workplace practices fall short of required safety procedures and can issue levies of additional assessments on employers found to be in breach of applicable health and safety regulations. The Act also authorizes the WCB to carry on general educational programs for employers and employees (and the general public).

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[27] For example, see the statement of purpose for the ***Saskatchewan Occupational Health and Safety Act*** described at the Ministry of Labour's website: http://www.gov.sk.ca/govt/labour/mandate.htm

[28] RSBC 1996, c. 492

The *Workplace Act*[29] provides the WCB with inspectional jurisdiction over all non-industrial indoor environments (including shops and offices). The *Workplace Act* authorizes the Lieutenant Governor in Council to make general and specific regulations necessary to protect the health, safety and comfort of persons working in or contributing to the operation of a factory, office, or shop. Under the *Workplace Act*, employer penalties must be made through the courts.

Remedies under the Existing Legislative Regime

The existing legislative regime in British Columbia makes no explicit mention of sexual harassment. It is plausible, however, that sexual harassment could be construed as an occupational health and safety hazard under the general wording of both existing and proposed regulations to the *Workers' Compensation Act.*

Sections 4.27 to 4.31 of B.C. Regulation 296/97, which deal with the protection of workers from violence in the workplace, allow the WCB to perform a risk of injury assessment where a worker has a reasonable apprehension of harm (through either past threatening statements or behaviour). Where a risk of injury is found, the employer is required to take certain prescribed measures to eliminate the risk.[30]

There is little doubt that sexual harassment in the workplace causes its victims to reasonably fear injury. Particularly in isolated and non-traditional work environments, women who are the victims of harassment often fear sabotage by their harasser and report finding themselves in dangerous workplace situations through either pressure or confusion brought on by the harassment or direct physical threat or attempt of harm.[31] This reality suggests that sexual harassment victims should be able to initiate occupational health and safety investigations where they reasonably apprehend injury - either directly or indirectly - resulting from the actions of their harasser.

In addition to the occupational obligations of employers in connection to incidents of violence, the current scheme could also be interpreted to allow sexual harassment claims in its provisions relating to workplace conduct. Here, the employer has the responsibility to report on and investigate the occupational safety of a workplace where a complaint is made that a worker or the employer is creating a "hazard" or is engaging in improper activity or behavior[32], and to ensure that corrective actions are taken in response to the incident.

It is arguable that sexual harassment, as a form of workplace violence which undermines victim workers' ability to work safely, could be interpreted as falling within the type of activity

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[29] RSBC 1996, c. 493

[30] BC Reg. 296/97

[31] Kate Braid Submission, supra note 13.

[32] Improper activity or behavior is defined by the regulation to include actual or attempted physical force causing injury, threats of such force, horseplay, practical jokes, and similar conduct.

prohibited by the regulations set out above. Once again, however, whether the WCB could successfully assist a victim of sexual harassment in the workplace with these regulations will depend on the mindset of the persons administering the occupational safety response section, particularly with respect to the issue of whether the victim "reasonably apprehends injury". **West Coast LEAF recommends that in order to remove any dispute as to whether harassment creates a possible hazard, these regulations should be amended to expressly include sexual harassment as an improper activity. West Coast LEAF further recommends that training be provided to WCB staff in order to develop the necessary expertise for investigating and adjudicating sexual harassment matters.**

Recognition of claims for injuries resulting from sexual harassment would arguably serve as a preventive - as well as a remedial - measure. It would alert employees to the severity of harassment and its destructive impact on a workplace. It would also increase the accountability of employers to provide a workplace free of harassment, and would help to deter employers from providing or perpetuating unsafe working conditions. It would reduce losses by encouraging recognition of, and subsequently measures for dealing with, harassment at an early stage. Moreover, it would encourage communication among employees and employers about sexual harassment as a matter of workplace safety, thereby helping to increase awareness about this issue.

As sexual harassment can result in significant losses to employees, employers, and the community in general, prevention should be a priority. **West Coast LEAF recommends that complementary regulations be established to set out appropriate preventive actions to be taken by employers.**

These complementary regulations should require employers to do the following:

a) adopt effective workplace harassment and discrimination policies and procedures;
b) implement or educate employees about existing programs which will provide confidential sources of assistance to employees particularly in the areas of emotional, psychological and psychiatric assistance;
c) follow policies in response to all complaints - verbal or written - and to keep written records of all investigations; and
d) educate employees and management about sexual harassment policies through training and yearly updates.[33]

2. Occupational Health and Safety in other Canadian Jurisdictions

Saskatchewan's occupational health and safety legislation addresses harassment expressly, and a series of Labour Relations Board decisions indicate that the Ontario legislation might also cover

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[33] Based on the recommendations made in the Verdict of the Coroner's Jury in the inquest into the death of Theresa Vince and Russel Davis, released on December 2, 1997. Both deceased had been employed at Sears in Chatham, Ontario. Theresa Vince was sexually harassed and ultimately murdered by Russell Davis at work on June 5, 1996> Russell Davis then committed suicide.

harassment. These examples illustrate two ways in which OHAS legislation can apply to sexual harassment and outline the benefits and limitations of each approach.

Saskatchewan

Saskatchewan is the only jurisdiction to expressly include "harassment" in its occupational health and safety legislation.[34] "Harassment" includes "any objectionable conduct, comment or display" that is (i) directed at a worker, (ii) made on the basis of one of the enumerated grounds (including sex), and (iii) "constitutes a threat to the health or safety of the worker" (Section 2(l) ***O.H.S.A.*** (Sask.)). The *O.H.S.A.* places the responsibility for preventing harassment on both employers and workers (sections 3(c) and 4(b)). The Occupational Health and Safety Council provides support to workplace committees, provides education and training on health and safety, investigates accidents and enforces safety standards.

Workplaces must have a health and safety committee representative of management and workers, which implements and enforces health and safety policies and programs, maintains records on safety issues, and investigates any refusals of work or other complaints (section 19 ***O.H.S.A.***).[35] All employers, in consultation with the workplace health and safety committee, must develop and implement a written policy designed to prevent harassment, which must define harassment and set out the complaint procedure, including penalties.

If a complainant is uncomfortable with the process outlined in the policy, or if the process fails, s/he may report the incident to the Occupational Health and Safety Council. If the Council receives a complaint of harassment, there will be an investigation to examine the employer's actions, the effects of the harassment, the reason for the failure of the policy's process or absence of a policy, and the ways in which the policy could be improved.

The Council also carries out routine inspections. Unlike physical hazards however, it is difficult to find evidence of sexual harassment in most cases. As a result, inspectors can only review the workplace policy on harassment to ensure that it is adequate and has been implemented. If the policy is inadequate, the inspector can order the employer to make changes. The proactive focus of Saskatchewan's system is desirable because it does not place responsibility for raising concerns about sexual harassment solely on the victim(s). As well, the pursuit of remedies under this legislation does not bar the complainant from bringing claims under other statutory regime.

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[34] ***Occupational Health and Safety Act***, S.S. 1993, c.o-1.1; Ontario Ministry of Labour, "Review of the Occupational Health and Safety Act". (Toronto: February, 1997).

[35] Section 36 of the Occupational Health and Safety Regulations, 1996, o-1.1 Reg. 1; typically a separate group of people will administer the sexual harassment policy, usually human resources personnel. All matters are confidential and there is usually more than one person available to hear complaints.

Ontario

Ontario's *Occupational Health & Safety Act*[36] does not expressly mention sexual harassment. Recent Labour Relations Board decisions conflict as to whether sexual harassment falls within the scope of the Act[37]. While the L.R.B. debates this issue, the Ontario government is in the process of reforming the occupational health and safety legislation and has solicited submissions on a wide range of issues, including the coverage of sexual harassment. Given this state of uncertainty, it is our position that the Saskatchewan scheme is preferable model. **West Coast LEAF recommends that the Saskatchewan model be implemented in B.C.'s forthcoming occupational health and safety legislation.**

B. Compensation Claims

1. British Columbia

As the B.C. *Workers' Compensation Act* is currently worded, compensation is only payable to a worker in connection with either a "personal injury" or an "occupational disease" arising out of the worker's employment.

i. Personal Injury

Victims of sexual harassment, who often suffer emotional and psychological injury from their harassment rather than physical injury, do not fit easily within the parameters of compensable injury under the existing regime. While psychological impairment (as well as physical injury) is accepted as personal injury, claims based on psychological injuries are required to be substantiated by evidence that the worker is psychologically disabled, and to the linked to some tangible workplace event. Currently, psychological disablement cannot be evidenced by a claimant's subjective complaints of emotional distress alone. Victims of sexual harassment in the workplace may have a difficult time meeting the requirements of this basis of compensation.

Moreover, it may be problematic in itself to require the victims of sexual harassment in the workplace to characterize themselves as psychologically disabled in order to deem them entitled to compensation. Victims of sexual harassment will not all have the same reaction to their harassment and it should not be only those driven to psychological impairment which get compensation. Reactions may be complicated (as in the case of sexual assault) and manifest

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[36] 1995 S.O., c. 1; the Workplace Health and Safety Agency, a branch of the Ontario Ministry of Labour, administers the *O.H.S.A.* This agency has duties and powers similar to Saskatchewan's occupational health and safety agency.

[37] *Moore v Barmaid's Arms*, [1995] Doc 3284.94-OH (O.L.R.B.) and *Au v Lyndhurst Hospital*, [1997] O.L.R.D. No. 2523 (O.L.R.B.), where sexual harassment was found to be included within the scope of the Act, and *Musty and Meridian Magnesium Products* (1996), 33 C.L.R.B.R. (2d) 161 (O.L.R.B.), where it was found that sexual harassment is not included within the Act; see also Keith, N.A. and Freedman, A. "Sexual Harassment: don't take it to the O.L.R.B." in *Workplace News*, October, 1997 and Keith, N.A. "Sexual Harassment & O.H. & S. in *Accident Prevention*, September/October, 1996.

themselves in different ways - all equally worthy of compensation. Moreover, women should not have to prove themselves mentally unstable to get compensation - such a characterization could be used to undermine both the victim's credibility and recollection.

ii. Sexual Harassment as Stress

To date, sexual harassment claims under the existing WCB regime have been made under the auspices of a personal injury caused by "stress". This approach is arguably problematic, however, as the WCB has been extremely reluctant to accept compensation claims for stress where the psychological stress injury is a result of anything other than a purely physical injury. That is, where a stress injury has been brought on by psychological harassment (for example, name calling, whistling, gestures, pictures in the coffee room, etc.), it is unlikely that the WCB would accept such a claim. Although there is nothing in the definition of stress to limit its availability to anxiety relating from physical sources, adjudicators have been reluctant to accept claims for stress compensation where non-physical sources are cited.

iii. Occupational Disease

In British Columbia, the term "occupational disease" is defined by the *Workers' Compensation Act* to include the diseases listed in Schedule B to the Act and any other diseases designated by the WCB. "Disease" is defined as a disablement resulting from exposure to contamination. While stress has been identified as a disease in Quebec, it has not been recognized in British Columbia. Few of the diseases listed in Schedule B are psychologically based. As currently drafted, this compensation basis appears to offer little to sexual harassment victims.

iv. B.C. WCB's Record to date on Claims for Sexual Harassment

A recent publication speculates that the Workers' Compensation Board is able to compensate psychological injuries arising from sexual harassment.[38] However, claims for sexual harassment almost always fail at the adjudication and Review Board levels. At the Appeal Division, there is only one reported case.[39] A worker developed a psychological disorder while her sexual harassment complaint was being investigated. Her relationship with the investigator was the cause of the injury, particularly one specific interchange between them. The Panel decided that her injury was compensable under Paragraph 13.20 of the *Rehabilitation Services and Claims Manual* 1995. They determined that "personal injury", defined in s. 5 of the Act, should receive an open-ended interpretation and that the test is not more stringent for psychological injuries.

The Panel urged the Board of Governors to develop a policy on psychological injuries that arise from sources other than trauma. Paragraph 13.20 classifies psychological injuries as "personal injuries" only where the condition was induced by trauma, but some decisions, including this

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[38] Watters, F. "Harassment and Sexual Harassment " in *Harassment Law for Litigators*, the Continuing Legal Education Society of B.C., October 1995

[39] *Decision 1058* (1996) Annual Report - 1996.

one, have given a very broad interpretation to the meaning of trauma.[40] In 1993, the Board of Governors decided to refer all claims involving abusive and harassing behaviour to the Human Rights Commission.[41] This was a temporary measure which was to be replaced by a formal policy, but to this date, no such policy has been reported. The lack of a policy causes confusion and lack of certainty.

2. Compensation Claims in other Canadian Jurisdictions

Ontario

The Ontario Workers' Compensation Board's policy places severe limitations on compensation for psychological injuries.[42] Compensation for psychological injuries is available only if the injury arises from an organic brain injury or a compensable physical injury. Compensation is also available if the injury arises from the combination of a prolonged work-related disablement and socio-economic factors, and for psychological injuries resulting from a traumatic event.[43] Psychological injuries that develop gradually over time are not compensable; thus, most claims based on sexual harassment will not be successful.

While the Ontario W.C.A.T. has recognized that claims based on sexual harassment *may* be possible through workers' compensation,[44] this approach has not yet been endorsed in all cases. Thus far, W.C.A.T. has directed sexual harassment claimants to the Ontario Labour relations Board and has refused to fully deal with the issue.

Recent amendments to the workers' compensation scheme in Ontario in *Bill 99*[45], adopt the Jackson Report[46] recommendation that the Act not compensate chronic occupational stress. Accordingly, workers' compensation does not yet allow for claims for psychological injuries where the injury develops gradually.[47] Stress arising from a traumatic incident will still be compensable, but as discussed above, this is rarely applicable to sexual harassment.

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[40] see also Munro, C. "Psychological Disabilities and Workplace Stress" , 1994 W.C.R. 10-2.
[41] Decision of the Governors 47, July 19 1993, W.C.R. 9-4.
[42] Ontario W.C.B. *Operational Policy Manual*, Document No. 03-03-03; Jackson, Cam Jackson Report; Humphrey, C.E. & Edwards, C.A. *The Employer's Health and Safety Manual: **Ontario***. (Toronto: Carswell, 1997); and Jay, Paul "Chronic Stress Claims will no Longer be Compensated" in *Workplace News*, October, 1997.
[43] Humphrey & Edwards at p. 2-19.
[44] See the comments of Chairperson MacDowell of the O.L.R.B. in *Musty v Meridian* (1996), 33 C.L.R.B.R. (2d) 161 AT P 176; also affirmed in *Dougherty v Ontario*, Decision No. 142/94, Ontario Ministry of Labour, MOLINDEX Record No. 18665.
[45] An Act to secure the financial stability of the compensation system for injured workers, to promote the prevention of injury and disease in Ontario and to revise the Worker's Compensation Act and make related amendments to other Acts, 1st session, 36th Legislature, Ontario, 1996.
[46] "New Directions for Workers' Compensation Reform: Report by Cam Jackson" (Toronto: Ontario W.C.B., 1996), p. 30.
[47] Humphrey & Edwards, supra. at p 2-26

It should be noted that recent moves to consolidate workers' compensation with occupational health and safety indicate that the ground in Ontario is changing quickly in this area. It is unclear what these changes may mean for sexual harassment complainants and the system in general.

Quebec

In 1986, the Quebec Health and Safety Commission Review Board decided that sexual harassment in the workplace may be compensable in cases where it causes injury or loss.[48] The injuries must be work-related, and more specifically, there must be workplace factors capable of causing the disorder, a medical relationship between the disorder and the harassment, and an absence of non work-related causes.

Alberta

Alberta takes a very restrictive approach to psychological injuries. They are only compensable if they result from a head or brain injury or they are an emotional reaction to a physical injury, a physical disability or a treatment process, or a reaction to a "single traumatic work-related incident that is sudden, as well as frightening or shocking, and has a specific, identifiable time and place."[49] A psychological injury that develops gradually is not compensable. Because of this restrictive policy, there have been no successful claims based on sexual harassment.

Saskatchewan

In Saskatchewan, the Board allows claims if there is "clear and convincing evidence" that the work stress was the "predominant cause", and the stress was "excessive and unusual in comparison to pressures and tensions experienced by the average employee."[50] The Board applies the same test to both psychological and physical injuries, but the investigative stage is more involved and time-consuming in the case of psychological injuries. There have been a number of successful claims for Saskatchewan.

Manitoba

Manitoba's policy appears to be similar to the more restrictive policies described above.[51] However, there is coverage for psychological injuries arising gradually. In the case of psychological conditions occurring prior to January 1, 1993, the policy instructs adjudicators to determine entitlement to benefits on the individual merits of the case. These claimants may receive compensation for injuries arising from harassment. For accidents occurring since January 1, 1993, psychological injury is compensable only if it is an "acute reaction to a traumatic event." This term is defined more broadly than in other jurisdictions. It is not limited

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[48] Claim 8518-466 (1986); Aggarwal, supra at pp. 273-4.
[49] Alberta W.C.B. *Policies and Information Manual*, BoD Resolution 96/10/53.
[50] Saskatchewan W.C.B. *Policy Manual*, Doc. # 3.1.4.
[51] W.C.B. of Manitoba *Policy Manual*, 44.20.60.

to discrete traumatic events, rather, it includes an ongoing series of events that are "not of minor occurrence". The claimant must prove that the incidents were serious.

Atlantic Canada

Newfoundland, P.E.I. and Nova Scotia also limit compensation of psychological injuries to cases where there is a close relationship between the psychological injury and a compensable physical injury or the injury arises from a single identifiable traumatic incident.[52]

In Newfoundland, there is no compensation for the gradual onset of psychological injuries, which usually excludes injuries arising from sexual harassment. Such claims are often referred to the Human Rights Commission, a "more appropriate" forum. There have been some successful claims based on sexual harassment, but it is difficult to identify common characteristics of these cases because claims are decided on a case by case basis.

P.E.I.'s *Workers' Compensation Act*[53] defines "occupational disease" as explicitly excluding stress. As a result, the Board decides very few claims based solely on psychological injury, and there have been no successful claims based on harassment.

Section 2(a) of Nova Scotia's *Workers' Compensation Act* defines "accident" as a chance event and precludes compensation of conditions developing gradually. In addition, neither the legislation nor the regulations identify psychological injuries as separate compensable conditions. There have been no successful claims based on sexual harassment.

Conclusions

Quebec, Saskatchewan and Manitoba compensate injuries arising from sexual harassment, while in Newfoundland, there is a more limited possibility of compensation. Still, those cases where favourable decisions have been made involve fact patterns which relate to serious levels of harassment. In those jurisdictions that do provide compensation, successful claimants are entitled to compensation for lost time, rehabilitation and retraining (if necessary), and medical aid (including counseling).

Currently, none of the provinces have a policy dealing specifically with sexual harassment. In most jurisdictions, the standard of proof for psychological injuries is higher than that for physical injuries. But even in Saskatchewan, where the standards are the same, the very nature of this type of injury automatically implies a more difficult burden on the claimant. In these jurisdictions, workers' compensation claims will not bar human rights proceedings, but there have been no cases challenging this overlapping jurisdiction.

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[52] Newfoundland W.C.C. *Client Services Manual*, Policy CM-08; P.E.I. W.C.B. *Policy and Practice Manual*, "Psychological Conditions"; Nova Scotia *Workers' Compensation Act*, R.S.N.S. 1989, c. 508, s. 2(a), "accident".
[53] R.S.P.E.I. 1994, c. 67.

In conclusion, the lack of a formal policy on the treatment of sexual harassment claims in B.C. and across Canada has led to confusion and uncertainty. **West Coast LEAF recommends that the B.C. WCB should explicitly include injuries flowing from sexual harassment as a compensable injury, and establish clear policy to this effect.** The WCB's expertise in compensation and rehabilitation, and the proactive approach of occupational health and safety would be beneficial additions to the statutory response to sexual harassment. The combination of statutory schemes under workers' compensation and human rights would provide a more effective response to the problem of sexual harassment in the workplace.

1.6 Sexual Harassment, Workers' Compensation and Women's Inequality

For diverse groups of women, the right to equality found in section 15 of the *Canadian Charter of Rights and Freedoms* is a tool with which to address the distribution of burdens and benefits in Canadian society, and the imbalances in power among different groups. Actual and socially constructed differences between women and men have been instrumental in the development of unequal divisions of resources, respect, and influence. These inequalities in turn impact upon access to education, employment opportunities, leadership roles, and social status.

The courts now recognize that the needs of different groups must be met for equality to be realized, and that equal treatment does not mean identical treatment. In fact, the Supreme Court of Canada has held that identical treatment may frequently produce serious inequality.[54]

Sexual harassment is, by its nature, a social practice that directly affects and directly harms women, because they are women. The Supreme Court of Canada has recognized that sexual harassment is used to "underscore women's difference from, and by implication, inferiority with respect to the dominant male group" and to "remind women of their inferior ascribed status."[55] Sexual harassment operates as both a symbol and reality of women's subordinate social status to men, both creating and perpetuating sex-based inequalities.[56]

In our submission, the way in which the law responds to sexual harassment raises issues of the equal protection and benefit of the law, and the equal right to security of the person for those most vulnerable to sexual harassment, women. Sexual harassment has been recognized as an issue of sex equality by the Supreme Court in *Robichaud v. Canada (Treasury Board)*[57], and in *Janzen and Govereau v. Platy.*[58]

The failure of B.C.'s workers' compensation scheme to adequately address sexual harassment contributes to women's inequality by failing to take available steps to prevent such harassment, and by failing to provide adequate remedies once sexual harassment has

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[54] *Andrews v. Law Society of B.C.* [1989] 1 S.C.R. 143 at 165.
[55] *Janzen*, supra note 4 at 1285.
[56] See Sheilah L. Martin, "Some Constitutional Considerations on Sexual Violence Against Women" (1994), 32 Alta. L. Rev. 535 at 551, who makes this point in relation to violence against women.
[57] *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84.
[58] see supra note 4.

occurred. The implementation of the recommendations made in this submission are necessary in order for the WCB, as a public body, to comply with the equality provisions of the *Charter*. The recognition of sexual harassment under workers' compensation legislation and policy would be one step towards creating a level playing field for women and men in the workplace.

1.7 Claims Procedures for Sexual Harassment

In addition to the substantive issue of including sexual harassment more explicitly under the workers' compensation scheme, there are procedural issues relating to how claims for compensation in cases of sexual harassment will be processed, and to the disclosure of personal records in such cases. The next two sections of this submission deal with these procedural issues.

In 1994, the WCB established a Sensitive Claims area to "adjudicate all sexual assaults and harassment where the employer is alleged to be the perpetrator of the conduct."[59] The criteria for Sensitive Claims Allocation and Transfer now provide that **all** claims for sexual assault and harassment are to be treated as sensitive claims. The Sensitive Claims Guidelines, which we understand to be in draft form and subject to further revision, are, generally speaking, a positive step toward ensuring that claimants for compensation in sexual harassment cases are treated with "sensitivity, professionalism, and empathy" as noted in the guidelines.

West Coast LEAF supports the proposed guidelines in part. More specifically, West Coast LEAF supports the use of trained claims adjudicators (unless otherwise requested by the claimant), and the efforts of the proposed guidelines to ensure complainant privacy and support in interviewing and file handling.

West Coast LEAF does, however, have some serious concerns with the way in which sexual harassment is portrayed in the *Adjudicative Guidelines* and Appendices. In Appendix I, the *Definitions and Allocation Guide*, it is noted that "generally speaking, the remedies for sexual harassment cases lie outside the provisions of the Board. . .[A]ny claims for sexual harassment need to be **closely scrutinized** to ensure that the provisions of the *Workers Compensation Act* are met" (emphasis added). This appears to set a heightened, and we would argue, unfair standard of proof for claims of sexual harassment, and may explain why it is so difficult to have such claims accepted. This again speaks to the need to ensure that adjudicators are educated as to the dynamics of harassment, and its consequences.

A second, and arguably more fundamental, concern lies in the requirement that "conflicting evidence be corroborated" in claims for sexual harassment (see *Adjudicative Guidelines*, p.3). In many instances of harassment, there will be no witnesses to corroborate the claimant's evidence. This is particularly so for women working in environments where they may be isolated - for example, domestic workers. Moreover, the requirement of corroboration is based on outdated myths as to women's alleged propensity to lie, and to falsely accuse men of sexual misdeeds. This

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[59] WCB, *Sensitive Claims Area (Draft) Guidelines, Appendix III.*

was recognized in the criminal arena in 1983, when amendments to the *Criminal Code* provided that "no corroboration is required in sexual offence cases.[60]

West Coast LEAF recommends that the Sensitive Claims Guidelines, or other policy relating to adjudication of sexual harassment claims, recognize that corroboration is not required for a claim to be accepted.

1.8 Sexual Harassment and Disclosure Issues

The disclosure of women's personal records has become a significant issue in legal proceedings in the last few years, particularly in cases relating to sexual assault. In the criminal arena, disclosure applications have come to be routinely used to challenge complainants' credibility, as well as to undermine their confidence and willingness to participate in court proceedings. In such applications, defence counsel seek access to any and all records relating to the complainant, including medical and counselling records, social services records, personal diaries, etc. Disclosure applications may make women more reticent to seek justice, or to seek counselling and treatment for their injuries. [61]

Importantly, disclosure applications are most often brought in cases where it is women who are telling their stories. Disclosure applications are based on discriminatory myths and assumptions about women, relating to their (un)reliability as witnesses, therapists and counsellors, and their alleged propensity to fabricate accusations against innocent men. Stereotypes relating to the sexuality of women of colour, Aboriginal women, women with disabilities, and lesbian women also underlie such myths and stereotypes. Moreover, many such disadvantaged women are likely to be subject to extensive documentation. [62]

Disclosure of women's personal records is thus not only an issue of privacy, it is also an issue of women's equality. Just as sexual violence and harassment are caused by, and perpetuate women's unequal position in society, so are disclosure applications rooted in, and productive of inequalities. And, just as it is women disadvantaged by their race, class, disability and/or sexual identity who are often most vulnerable to sexual assault[63] and harassment[64], so are these women most vulnerable to the inequalities inherent in disclosure applications.

Disclosure under Workers' Compensation Legislation and Policy

Currently, the disclosure of information in the workers' compensation context is governed by two acts - *Freedom of Information and Protection of Privacy Act* and the *Workers' Compensation Act*. As well, policy guidelines have been formulated by the WCB Board of Governors in the *Freedom*

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[60] S.C. 1980-81-82, C.125, s.19, enacting s.264.4.
[61] See Karen Busby, *Discriminatory Uses of Personal Records in Sexual Violence* Cases (January, 1996) at 2.
[62] See Factum of the Intervenor Coalition in *R. v. O'Connor* (1995 S.C.C.) at 3-8.
[63] See ibid. at 5.
[64] See supra pages 6-8 at "Enhanced Risk".

of Information and Protection of Privacy Policy and Procedure Manual[65], and in the *Sensitive Claims Guidelines.*[66]

Appendix III of the *Sensitive Claims Guidelines* sets out the policies for the disclosure of documents in sexual harassment cases. West Coast LEAF supports the notice provisions in the *Sensitive Claims Guidelines* relating to the potential for disclosure, and to the provision of legal services in such cases (see sections 6 and 7).

The guidelines speak of "two compelling needs, the need to protect the privacy of the sexual assault victim as much as possible, and the need to ensure disclosure of all relevant information to the employer", and note that these two needs "inherently conflict" (at p. 1). In our submission, it is not only the complainant's right to privacy which is at stake, but as noted above, her right to equality. Moreover, these rights are not necessarily in conflict with those of the employer to disclosure of relevant information.[67] The operative word in this context is "relevant". It is critical to remember that a fair hearing requires only that all **relevant** information be disclosed, as part of the search for "the truth". Irrelevant personal information need not and should not be disclosed, as to do so might subvert the search for the truth.

In order to assist the commission in its determination of relevancy, **West Coast LEAF recommends that the legislation and guidelines be amended to provide for an independent disclosure review committee.** This committee would be made up of trained individuals independent from the complainant and harasser (and/or employer) who would review sensitive file work to ensure that both the personal privacy of complainants is preserved *and* the procedural fairness of the system to both parties.

1.9 Invitation to further consultation and input

West Coast LEAF recommends that, before any amendments to workers' compensation legislation, regulations, policy or draft guidelines are implemented, there should be a consultative process including representations from women workers, particularly those identified as vulnerable in Part 1.3 to ensure service equity is achieved.

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[65] (1994), 10 Workers' Comp. Reporter 839.
[66] See supra note 59.
[67] See Factum of the Intervenor Coalition, supra note 62 at 3-4.