IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA)

BETWEEN:

DIANNA JANZEN and TRACY GOVEREAU,

(Complainants) Appellants,

- and -

PLATY ENTERPRISES LTD., and PLATY ENTERPRISES LTD., carrying on business under the firm name and style of PHAROS RESTAURANT, and TOMMY GRAMMAS,

(Respondents) Respondents,

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF),

Intervenor

FACTUM OF THE WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)

(FOR THE NAMES AND ADDRESSES OF THE SOLICITORS FOR THE PARTIES AND THEIR RESPECTIVE OTTAWA AGENTS SEE INSIDE FOLLOWING TITLE PAGE)

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I N D E X

PART I

STATEMENT OF FACTS

1. The Intervenor concurs with the Statement of Facts of the Appellant save that it adds the following:

(a) Diana Janzen testified that the physical and emotional consequences of the harassment she endured included insomnia, vomiting and inability to concentrate. The Adjudicator accepted this evidence "Totally".

- See Reasons for Decision of the Adjudicator, Case on Appeal, V. II, 496; Evidence of Janzen, V. I, 133.

(b) The Adjudicator found that the harassment of Tracy Govereau by Tommy and Phillip was "devastating" to her. In this regard, Govereau testified that she "felt dirty, wasn't relaxed, couldn't sleep or concentrate in class". The adjudicator specifically found that the criticism of Govereau's work by Tommy and Phillip was "persistent and unjustified".

- See Reasons for Decision of the Adjudicator, Case on Appeal, V. II, 497; Evidence of Govereau, V. I, 204-5.

(c) The Adjudicator found that the acts of Tommy and Phillip created a "poisoned work environment" for both complainants.

- See Reasons for Decision of the Adjudicator, Case on Appeal, V. II, 496-98.

(d) The witness Enns, whose evidence was accepted completely by the Adjudicator, testified that the physical (although not overtly sexual) contact that Tommy imposed upon her bothered her and made her feel apprehensive.

- See Evidence of Enns, Case on Appeal, V. I, 281; Reasons for Decision of the Adjudicator, V. II, 497.

PART II

POINTS IN ISSUE

(A) Is sexual harassment within the ambit of the prohibition against sex discrimination in s. 6 (1) of the Manitoba Human Rights Act?

(B) Is an employer liable for sexual harassment perpetrated against its employees by its supervisory employees?

PART III

ARGUMENT

I. SEXUAL HARASSMENT IS SEX DISCRIMINATION AND IS THUS WITHIN THE AMBIT OF s. 6(2) OF THE MANITOBA HUMAN RIGHTS ACT

A. PURPOSIVE APPROACH

1. This Court has consistently articulated a purposive approach to human rights legislation, wherein it has sought to identify the social evil to be removed, and has given such legislation a "fair, large and liberal interpretation as will best ensure the attainment of [its] objects".

Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84, 88-90

Action Travail des Femmes v.C.N.R., [1987] 1 S.C.R. 1114, 1132-1138

O'Malley v. Simpsons-Sears Ltd. [1985] 2 S.C.R. 536

2. In cases involving the Canadian Human Rights Act, this Court has enunciated one purpose of human rights legislation as follows:

> "...to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her life without being hindered by discriminatory practices...."

It is submitted that this description properly characterizes a central purpose of the Manitoba Human Rights Act, as well.

Robichaud v. Canada (Treasury Board), supra, 89

Action Travail des Femmes v. C.N.R., supra, 1134

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3. This Court has recognized that the special nature and purpose of human rights legislation gives such legislation "not-quite constitutional" status.

Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, 157-158

Robichaud v. Canada (Treasury Board), supra, at 89

4. Save for section 15, the Canadian Charter of Rights and Freedoms was in effect at the time the complaints in the case at bar arose. The Charter applies to provincial human rights legislation.

Appellants' Factum, Statement of Facts, 1, 4

Re Blainey and Ontario Hockey Association (1986), 26 D.L.R. (4th) 728, 736 (Ont. C.A.), leave to appeal refused June 26, 1986, S.C.C., approved in Dolphin Delivery Ltd. v. Retail, Wholesale, & Department Store Union, Local 580, [1986] 2 S.C.R. 573, 595-6

5. In the course of addressing Charter rights, this Court has enunciated certain basic aspects of equality that, the Intervenor submits, should also inform the construction of human rights legislation, in view of the quasi-constitutional nature of the latter. In particular:

(a) This Court has acknowledged that a commitment to social justice and equality is one of the fundamental values of society.

R. v. Oakes, [1986] 1 S.C.R. 103, 119

(b) This Court has acknowledged the importance of promoting the equality of particular groups.

R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R. 295, 337-338

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Société des Acadiens v. Association of Parents, [1986] 1 S.C.R. 549, 579

Caldwell v. Stewart, [1984] 2 S.C.R. 603, 626

6. The principles set forth in paragraphs 1-5 above compel recognition that sexual harassment is a form of sex discrimination because it denies women equality of opportunity in employment because of their sex.

7. Notwithstanding that the present complaints arose before April 17, 1985, it is submitted that section 15 of the Charter should be considered in construing section 6(1) of the Manitoba Human Rights Act. In fact, that Act continued in force until December 10, 1987, when Manitoba's Human Rights Code was proclaimed. Further, terms that are common to human rights legislation and the Charter, such as "sex" and "race", among others, should be interpreted in a consistent manner. To do otherwise would undermine respect for the law, and undermine the consistent development of equality jurisprudence and section 15 jurisprudence in particular.

8. In Andrews v. Law Society of British Columbia, (argued in this Honourable Court in October, 1987, decision reserved), this Intervenor argued that the primary purpose of section 15 is to alleviate the disadvantages of the disempowered, including women. Sexual harassment in the workplace is a significant barrier to women's equality. Hence, section 15 confirms that sexual harassment is a form of sex discrimination.

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B. THE SEXUAL HARASSMENT OF WORKING WOMEN CONTRIBUTES TO WOMEN'S INEQUALITY

9. Sexual harassment in employment consists of the unwanted imposition of sexual requirements at work.

> Brennan v. The Queen (Treasury Board) and Robichaud, [1984] 2 F.C. 799, 821 (F.C.A.), reversed on other grounds sub nom Robichaud v. Canada (Treasury Board), supra
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> Zarankin v. Johnstone (1984), 5 C.H.R.R. D/2274, D/2274-5
>
> Catharine MacKinnon, Sexual Harassment of Working Women (New Haven and London: Yale University Press, 1979), 1

10. Sexual harassment both mirrors and reinforces a fundamental imbalance of power between men and women in the workplace and in society.

11. Victims and perpetrators of sexual harassment can be male or female. However, the victims are largely female, and the perpetrators largely male. This is so because of sex inequality in society. Because women have not yet attained equal economic status with men, the hiring, firing and advancement of women in the workplace is most frequently in the hands of men. Men are thus in a social position of economic dominance over women. Because the sexes have not yet attained sexual equality, men are socialized to aggressively initiate sexual interchanges with women, often heedless of women's desires. Men are thus in a social position of sexual dominance over women. Sexual harassment utilizes economic dominance to effect sexual coercion and sexual dominance to effect economic coercion. When sexual harassment is

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permitted to occur, the sexual proclivities of some men become employment standards for their female employees.

MacKinnon, Sexual Harassment of Working Women, supra, 1-27, and 143-192

Constance Backhouse and Leah Cohen, The Secret Oppression: Sexual Harassment of Working Women (Toronto: Macmillan of Canada, 1978) 39-41

Arjun P. Aggarwal, Sexual Harassment in the Workplace, (Toronto: Butterworths, 1987), 1-4

12. Attitudes, beliefs and traditional practices have as great an impact on the behaviour of the sexes as does biology. Non-biological constructs of sex, including gender identification and sex role behaviour, create some of the greatest barriers to women's equality. Such barriers are appropriate targets for human rights laws.

13. Our society has traditionally assigned to males the prerogative to initiate intimacy and has conditioned them to find female powerlessness and submission erotic. This is a socially constructed aspect of gender identification and sex role behaviour. As reflected in sexual harassment, this social construct of sex creates a significant barrier to women's equality. This understanding of sexual harassment was grasped in one of the earliest adjudications on a sexual harassment complaint under the Manitoba Human Rights Act. In Hufnagel v. Osama Enterprises Ltd., adjudicator Paul Teskey found that the plain and ordinary meaning of the word "sex" included "sexual instincts, desires or other manifestation pertaining

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to sex...arising from differences of consciousness of sex". He concluded that sexual harassment is sex discrimination.

Hufnagel v. Osama Enterprises Ltd. (1982), 3 C.H.R.R. D/922, D/924-925

14. As a result of the generally disadvantaged status of women in Canadian society, men frequently hold positions in the employment hierarchy in which they control the working conditions, promotional opportunities and employment tenure of female subordinates. Sexual harassment is a way of exploiting this economic control to secure sexual access to women. This Court has dealt with a case in which a victim who proved sexual harassment by her male supervisor recovered in a claim for sex discrimination made against her employer.

Robichaud v. Canada (Treasury Board), supra

15. Even when men do not hold superior positions, in a formal sense, in the employment hierarchy, they may use sexual harassment as a tool for maintaining dominance and reminding women of their dependent, vulnerable, and precarious status in the workplace. This Court has recognized that the sexual harassment of women by male co-workers constitutes one means of systemic discrimination on the basis of sex.

Action Travail des Femmes v. C.N.R. et al, supra

16. Whether women are harassed by co-workers or superiors, they are subjected to sexual harassment because of their sex. They are vulnerable because of their sex and the form of harassment used against them is selected because of their sex.

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17. In situations of sexual harassment, women must satisfy sexual standards for their employment. Men typically labour under no such disability. A double standard is thus created at work: one for women that includes sexual requirements, one for men that does not.

18. Sexual harassment is pandemic in women's employment. It occurs in female job ghettos such as waitressing as well as in so-called "non-traditional" employment.

> M.A. Hickling, "Employer's Liability for Sexual Harassment", forthcoming, (1988) 17 Man. L.J. 124, manuscript at 3-4
>
> Backhouse and Cohen, The Secret Oppression, supra, 1-37, 39-41

19. Sexual harassment leads to job loss, as it did in the case on appeal. While many victims are fired, at least 50% of victims leave their jobs because of a "poisoned work environment", in which sexually harassing acts do not lead to direct employment consequences such as firing or denial of benefits, but so sully the work environment that they cause an employee anxiety and debilitation.

> Aggarwal, Sexual Harassment in the Workplace, supra, 3, 20-23, 81-84

20. Sexual harassment not only deprives women of a livelihood but deprives them of their physical and mental health. The unwelcome verbal and physical attentions endured by the Appellants Janzen and Govereau and the subsequent persistent and unjustified criticisms of their work resulted in both women suffering from physical and psychological symptoms of stress disorder.

> Intervenor's Statement of Facts, paragraph 1

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21. A recent Royal Commission on Equality in Employment concluded that processes for dealing quickly and effectively with sexual harassment in the workplace are necessary to eliminate women's inequality.

> Judge Rosalie Silberman Abella, Equality in Employment: Royal Commission Report, (Ottawa: Supply and Services Canada, 1984), 268, Recommendation 107

C. THE ANALYSIS OF SEX DISCRIMINATION ADOPTED BY THE MANITOBA COURT OF APPEAL IS INCONSISTENT WITH THE PURPOSIVE APPROACH AND MODERN EQUALITY JURISPRUDENCE

22. The Intervenor adopts the Appellants' argument that the sex discrimination provisions of the Human Rights Act are not confined to addressing discrimination based "solely" on sex. Discriminatory activities which select the victim on the basis of the prohibited ground plus an additional factor, have been recognized by numerous courts and adjudicators as discrimination on the probited ground.

> R. v. Drybones, [1970] S.C.R. 282
>
> Brennan v. The Queen (Treasury Board), supra
>
> Re: Mehta and MacKinnon (1985), 19 D.L.R. (4th) 148 (N.S.C.A.)
>
> Rand v. Sealy Eastern Ltd. (1982), 3 C.H.R.R. D/938
>
> Phillips v. Martin Marietta Corporation, 91 S. Ct. 496 (1971)
>
> Sprogis v. United Air Lines Inc., 444 F. 2d 1194 (7th Cir. 1971)
>
> Bundy v. Jackson, 641 F. 2d 934 (D.C. Cir. 1981)

23. The Intervenor submits that it is conceptually more accurate to state the problem of "sex-plus"

discrimination as a problem of the appropriate definition of "sex" for human rights purposes.

24. It is submitted that in the case at bar, and the companion case, Brooks v. Canada Safeway Ltd., the Manitoba Court of Appeal has confined the definition of "sex" to "biological gender". This narrow definition fails to recognize that in Canadian society, and many other societies, to be female is also to be economically unequal and sexually subordinated.

Brooks v. Canada Safeway Ltd. (1986), 42 Man. R. (2d) 27 (Man. C.A.)

25. One reason why the Manitoba Court of Appeal chose such a narrow definition of "sex" was that it assumed that no other definition would permit a Court to determine whether conduct was discriminatory based on a clear and unequivocal categorization. Because, in the case at bar, the cook harassed some women but not all women the Court concluded that the cook's behaviour distinguished between persons to whom the cook was attracted and those to whom he was not, rather than between men and women.

Reasons for Decision of Mr. Justice Huband Case on Appeal, V. II, 519-520, 524-5; Reasons for Decision of Mr. Justice Twaddle, Case on Appeal, V. II, 569-571, 575-76

26. An understanding of "sex" that imports social as well as biological constructs into the definition allows us to recognize that the behaviour of the cook and the owner of Pharos effectively subsumed all female employees into a pool of potential victims to whom the

cook could assert a right of sexual access if and when he chose. It was small comfort to those who were not the immediate object of such harassment to know that they had no control over whether or when sexual intimacy might be imposed upon them. Thus, the witness Carol Enns felt bothered and apprehensive although the cook's physical attentions to her were not overtly sexual. The end result is that not only were the individual complainants prevented from earning a living on a basis of equality, but all female employees were subordinated.

Intervenor's Statement of Facts, paragraph 1(d)

27. Another reason why the Manitoba Court of Appeal could not accept that the actions of the cook and owner of Pharos were sex discrimination was that the victim was a particular woman rather than women as a class or category. The Court allowed that sexual harassment could be sex discrimination only where the activity was a pretext for attacking women generally. Thus, it required that there be an intention to strike at women as a class or group, and not as individuals, before either sexual harassment or discrimination on the basis of pregnancy could be prohibited under the Human Rights Act.

Reasons for Decision of Mr. Justice Huband, Case on Appeal, V. II, 520

Reasons for Decision of Mr. Justice Twaddle, Case on Appeal, V. II, 569, 571

28. The Intervenor submits that this Court has made clear that an intent to discriminate is not required to find a violation of human rights legislation.

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Action Travail, supra, 1134-1338

Robichaud, supra, 89-90

O'Malley, supra, 547-549

29. Each woman is a member of the gender group "women". Each man is a member of the gender group "man". Most discrimination is directed against individuals one at a time on the basis of their membership in a group (for example, exclusion from accommodation or hiring only for menial, low-paid work), rather than against groups all at once (for example, facially discriminatory statutes or, at the most extreme, genocidal policies.) Similarly, most discrimination is not visited equally upon all members of a targetted group (for example, some women may not be hired on the basis of their sex, while other women who better satisfy standards applied only to women, are hired.) Such practices are still recognized as discriminatory.

30. The analysis of sex discrimination adopted by the Manitoba Court of Appeal founders on assumptions about what is "natural" that are, in fact, based on gender stereotypes.

31. Just as this Court, in Bliss, concluded that any discrimination on the basis of pregnancy was discrimination by nature and not by Parliament, so the Manitoba Court of Appeal sees a male prerogative to initiate intimacy, whether in private life or in the employment sphere, as "natural". The conduct of the cook is described as "amorous". A "school boy stealing kisses" is offered as an analogy. It is the

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Manitoba Court of Appeal's failure to see that sex role behaviour is a product of social and cultural factors and appears natural only from a particular perspective, that leads the Court to see sexual harassment in inappropriately romantic and innocent terms.

Bliss v. A.G. Canada, [1979] 1 S.C.R. 183, 190

Reasons for Decision of Mr. Justice Huband, Case on Appeal, V. II, 510, 520

32. In Brooks, where benefits were denied not to all women, but only to some - those who were pregnant, the Manitoba Court of Appeal was unable to find sex discrimination. In the case at bar, the Court was unable to find sex discrimination because only some and not all women were victims. What the Court failed to see is that all women are potentially in the class for which protection is claimed. In the case of pregnancy, only women can ever be in the class; in the case of sexual harassment the class is composed overwhelmingly of women.

33. The Manitoba Court of Appeal's analysis of sex discrimination also founders on the assumption that, unless a male could be similarly situated, there can be no sex discrimination.

34. In Brooks, the Manitoba Court of Appeal could find no discrimination, let alone sex discrimination. It is submitted that the Court so concluded because a man could not become pregnant, and therefore could never be similarly situated. Thus, no general or "neutral" standard of treatment could be identified.

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35. If sex discrimination cannot be found unless a male can be similarly situated, then women can be further excluded and disempowered with impunity on the basis of characteristics unique to women (whether biological or social).

36. Brooks and Janzen together illustrate the fallacy of an approach to sex discrimination proscriptions that defines sex as mere biology. By that approach, women will only be assisted by human rights legislation where differential treatment occurs to all members of the group "women" as defined by biological gender, but not for reasons unique to that biology.

37. By the above test, the instances in which human rights legislation can be of real aid in securing equality for women are almost nil.

38. In support of its narrow view of sex discrimination proscriptions, the Manitoba Court of Appeal relied on Bliss v. A.G. Canada. As this Intervenor argues in Brooks, Bliss is distinguishable and, in the alternative, with respect, was wrongly decided.

Reasons for Decision of Mr. Justice Twaddle, Case on Appeal, V. II, 570

Hickling, "The Employee's Liability for Sexual Harassment", supra, 12-14

39. To define sex as mere biology is to defeat the purpose of human rights legislation. Gender related characteristics need not be immutable. This understanding is apparent in the legion of cases that

have concluded that the fact that both sexes are capable of being harassed or of harassing is irrelevant to the recognition of sexual harassment as sex discrimination. However, that fact should not obscure that it is overwhelmingly women who are disadvantaged by sexual harassment. Nevertheless, if man or woman should harass another on the basis of gender, that behaviour is a form of sex discrimination.

Hickling, "The Employers Liability for Sexual Harassment", supra, 5

40. Sexual harassment is neither unique to individual personalities nor biologically mandated. Sexual harassment of women by men would rarely occur if women and men were social equals.

41. The analysis of sex discrimination enunciated in Brooks and in the case at bar has rendered the Manitoba Human Rights Act an instrument that denies protection for the rights of women as individuals and frustrates the quest for the empowerment of women as a group. Thus does the equality analysis of the Manitoba Court of Appeal collapse in upon itself and the purpose of human rights legislation becomes not an end - to secure a measure of social justice and equality for the disempowered; but, as defined by Twaddle, J.A., a means - a means "to confine discrimination to discrimination by category". It is respectfully submitted that this is the antithesis of the purposive approach to the interpretation of human rights legislation.

Reasons for Decision of Mr. Justice Twaddle, Case on Appeal, V. II, 563

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42. To fail to recognize the sex inequality in sexual harassment is to neglect its negative impact on women's employment opportunities and is to reproduce the inequitable social situation of male superiority and female subordination. That inequitable situation is the very thing that human rights laws seek to eliminate when they proscribe sex discrimination as a factor in employment.

II. THE EMPLOYER IS LIABLE FOR SEXUAL HARASSMENT PERPETRATED AGAINST ITS EMPLOYEES BY ITS SUPERVISORY EMPLOYEES

43. In Robichaud, this Court has disposed of the second question to be addressed by the Intervenor. In this regard, the Intervenor adopts the arguments of the Appellants at paragraphs 27 and 28 of their Factum.

PART IV

NATURE OF THE ORDER SOUGHT

44. The Intervenor respectfully requests that this appeal be allowed and that an Order be made that the Respondents have discriminated against the Appellants contrary to section 6(1) of the Manitoba Human Rights Act.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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PART V

TABLE OF AUTHORITIES

A. Case Law

TABLE OF AUTHORITIES