

SEXUAL HARASSMENT IN THE WORKPLACE. By Arjun P. Aggarwal. Butterworths, 1987. Pp. 230. (\$39.95)

Until recently, legal recourse for sexual harassment was effectively unavailable in Canada. Individuals who suffered sexual harassment could only avail themselves of the *Criminal Code* provisions in those limited circumstances where the offence amounted to such an extreme manifestation of "harassment" so as to constitute a sexual offence.¹ However, following the landmark decision in the case of Cherie Bell² in 1980, sexual harassment has been recognized as discriminatory conduct based on sex under federal and provincial human rights legislation. In addition, the *Canadian Human Rights Act*³ and a number of provincial human rights statutes⁴ have been amended so as to explicitly prohibit sexual harassment as discriminatory behaviour.

The author's intention in writing *SEXUAL HARASSMENT IN THE WORKPLACE* was to "examine and analyse decided sexual harassment cases, legislative provisions and public policies".⁵ The Canadian jurisprudence following the *Bell* case provides the basic framework for the analysis of this social problem. By examining the case law, the author reveals the social conditions and attitudes which have contributed to the widespread and pervasive abuse of power through unwanted sexual attention. He also deals with the need for the prevention of sexual harassment and the implementation of employers' policies relating to sexual harassment in the workplace. On the whole, this book is an important contribution to this rapidly developing area of anti-discrimination law. It provides the legal practitioner with a useful analysis of the case law while at the same time, being true to its purpose presents these principles in a way which is also beneficial to "employers, personnel managers, affirmative and equal opportunity administrators, union representatives, women's organizations and all others who are involved in the practice or administration of human rights legislation".⁶

There is little doubt that sexual harassment is predominantly a problem faced by working women. A 1983 survey by the Canadian Human Rights Commission concluded that approximately 1.5 million Canadians believed that they had been sexually harassed.⁷ This survey showed that 49 percent of women and 33 percent of the men surveyed

¹ See C. Backhouse & L. Cohen, *THE SECRET OPPRESSION: SEXUAL HARASSMENT OF WORKING WOMEN* (Toronto: The MacMillan Co., 1978) at 108-16.

² *Bell v. The Flaming Steer Steak House Tavern Inc.* (1980), 1 C.H.R.R. D/155.

³ S.C. 1976-77, c. 33.

⁴ The Ontario, Quebec and Newfoundland Acts have been amended to prohibit sexual harassment.

⁵ P. vii.

⁶ *Ibid.*

⁷ *UNWANTED SEXUAL ATTENTION AND SEXUAL HARASSMENT: RESULTS OF A SURVEY OF CANADIANS* (Ottawa: Canadian Human Rights Commission, 1983).

said that they had experienced unwanted sexual attention. According to the survey, single women between the ages of 18 and 29 with annual incomes of less than \$11,000 and with no post-secondary education were the most likely to suffer sexual harassment.

The socio-economic factors which have contributed to women being especially vulnerable to unwanted sexual attention have been discussed in detail in previous works on this subject.⁸ Aggarwal makes a brief reference to these factors in the introduction of the book where he states that most women are employed in low-status, low-paying jobs, and most are in the clerical and service areas where they are usually subject to male supervision.⁹ He adds that, due to fear of losing their jobs, many women have silently endured sexual harassment as a "normal" occupational hazard.¹⁰ This underlying theme, that sexual harassment is a serious problem faced by women in the workforce, is expressed throughout the book.¹¹ The author's failure to use gender-neutral language in defining and analyzing sexual harassment is a natural consequence of the vast majority of cases involving female victims. Future editions of the book would be enriched if the author were to use non-gender language, where possible.

In the initial chapter, the author provides a background to this area of the law by tracing its development through human rights legislation. The two generally recognized types of sexual harassment are discussed. Aggarwal describes sexual harassment "that results in some direct consequence to the worker's employment status or some gain or loss of tangible job benefits" as sexual coercion.¹² Sexual annoyance is defined as "sexually related conduct that is hostile, intimidating or offensive to the employee, but nonetheless has no direct link to any tangible job benefit or harm".¹³

In the United States, as in Canada, there has historically been extreme reluctance to recognize sexual harassment as discrimination based on sex. It was not until four years before the *Bell* case that a Federal District Court held for the first time that sexual harassment was discrimination on the basis of sex under Title VII of the *United States Civil Rights Act, 1964*.¹⁴ Aggarwal reviews the position of the United States' federal judiciary prior to this decision and summarizes

⁸ See Backhouse & Cohen, *supra*, note 1 and C. MacKinnon, *SEXUAL HARASSMENT OF WORKING WOMEN* (New Haven: Yale University Press, 1979).

⁹ Pp. 1-2.

¹⁰ P. 2.

¹¹ P. 4; Aggarwal concludes the introduction by stating that "sexual harassment is a most serious and pressing problem facing women today".

¹² P. 8; see W. Tarnopolsky & W. Pentney, *DISCRIMINATION AND THE LAW* 2d ed. (Don Mills: Richard De Boo, 1985) at 8, 25-26, where the authors refer to this as *quid pro quo* harassment.

¹³ P. 8; see W. Tarnopolsky & W. Pentney, *ibid.*, where the authors refer to this as "poisoned environment" harassment.

¹⁴ *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

why these courts interpreted Title VII restrictively in holding that sexual harassment was not sex discrimination.¹⁵ Some judges held that sexual harassment was "a personal proclivity" or that it was based on the willingness to engage in sexual activity and not gender whereas others felt that a broad interpretation of Title VII would "open the flood gates" to a large volume of litigation under the Act. The discussion of the American law is instructive since the Canadian law on this subject has followed the principles laid down in those early cases. The summary of the American case law to date shows that sexual harassment is now actionable as discrimination based on sex whether it amounts to sexual coercion or sexual annoyance.

The remaining part of the chapter follows the development of sexual harassment law in Canada since the *Bell* case. The author quotes the decision of Chairman Shime in the *Bell* case at length. He shows how this decision not only established the precedent of sexual harassment as sex discrimination through human rights statutes, but also provided human rights tribunals and courts with the basic philosophy and reasoning for determining harassment cases.

The author emphasizes that sexual harassment is now generally recognized as discrimination based on sex. Unfortunately, he does not assess the underlying theoretical basis of this view. The philosophy behind the *Bell* decision is that sexual harassment is discrimination based on sex since the unequal treatment suffered by the victim would not exist if not for the mere fact that the victim was a woman. As one writer has said, "womenhood is the *sine qua non* of sexual harassment".¹⁶ This reasoning is equally applicable where the victim is male. However, where the miscreant harasses both men and women this theory breaks down since it cannot be said that one individual is suffering from discriminatory treatment based on sex when co-employees of the other sex are also harassed. In this situation, failing specific statutory provisions prohibiting sexual harassment, a board of inquiry would have to adopt a much broader theory in order to hold that such conduct is discrimination based on sex.

Discussing why sexual harassment should be discrimination based on sex is important when one considers that this concept is not universally accepted. For example, in *Janzen v. Platy Enterprises*,¹⁷ a recent decision of the Manitoba Court of Appeal, the Court unanimously held that sexual harassment was not discrimination based on sex under the *Human Rights Act* of Manitoba. This decision reflects a very narrow interpretation of the Act and is similar to the approach taken in early harassment cases. As the author points out, this is the

¹⁵ Pp. 15-16.

¹⁶ C. Backhouse, "*Bell v. Flaming Steer Steak House Tavern: Canada's First Sexual Harassment Decision*" (1981) 19 U.W.O.L. REV. 141.

¹⁷ *Janzen v. Platy Enterprises*, [1987] 1 W.W.R. 385 (Man. C.A.) (Matas J.A. did not participate in the judgment).

only Canadian decision to reject the approach to sexual harassment as discrimination based on sex.¹⁸ Since the publication of this book, leave to appeal has been granted by the Supreme Court of Canada in this case.¹⁹ It is to be hoped that the court will reconcile the principles relating to sexual harassment in those provinces where such conduct is not specifically prohibited by legislation.

Having provided the reader with the background to the law in Canada, chapter two delves into the characteristics of sexual harassment. Sexual harassment, because it can be manifested in many ways, is extremely difficult to define. The rather lengthy working definition which the author arrives at is essentially an outline of the scope of conduct which has been deemed sanctionable by the courts and human rights tribunals.²⁰ Since the *Bell* case, these decision-makers have been cautious not to be over-zealous in defining what conduct amounts to sexual harassment, so as not to undermine normal social interaction between supervisors and employees and among co-workers. As Aggarwal points out, each decision must be considered on its facts to determine whether or not the behaviour goes beyond acceptable social interaction between the parties involved. This cannot be a static test. The conduct must be measured against the norms of "socially acceptable behaviour" and the "reasonable and usual limits of social interaction" in the community.²¹

By reference to the case law, the author identifies six characteristics which have emerged in defining the parameters of sexual harassment. These include the unsolicited and unwelcomed nature of the sexual encounters, the power implications inherent in coerced and forced behaviour, the persistence of the encounters, sexually stereotyping behaviour including sexual jokes and profane language and the job-related consequences of these acts. This part of the book is extremely useful as it provides the legal practitioner with a catalogue of the constituent elements of the prohibited conduct derived from sexual harassment cases and from analogous principles of anti-discrimination law. For example, most sexual harassment cases are determined on the basis of the intensity and gravity of the behaviour and its perception by the harassee rather than on the motive and design of the harasser. In view of the dearth of cases dealing with the intent of the harasser, the author cites the representative decision of the Supreme Court of Canada in *Ont. Human Rights Commission v. Simpson-Sears Ltd.*,²² which held that it is not necessary to prove that the discrimination was intentional to find a violation of human rights legislation.

¹⁸ P. 40.

¹⁹ *Leave to appeal granted* June 25, 1987.

²⁰ P. 45.

²¹ P. 86.

²² *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536.

In chapter three, the practical problems dealing with proving cases of sexual harassment are discussed. Aggarwal emphasizes how in most cases women will not complain for a fear of embarrassment, feelings of guilt, or because they are economically vulnerable. It is this silence which has contributed to the fact that sexual harassment has become a hidden problem in the workplace.

Chapter three goes on to assess the inherent difficulties in pleading a sexual harassment case. Generally, a complainant, or the Human Rights Commission which carries the complaint, bears the onus of establishing a *prima facie* case of discrimination. The analogy with rape is made and the author states that in most sexual harassment and rape cases, there will most likely be no witnesses or written evidence, thereby presenting the victims with serious evidentiary problems in proving their case. Aggarwal shows how the case law has dealt with these evidentiary problems. His survey of the cases in Canada reveals that in almost all instances the cases were won or lost on the credibility of the witnesses, particularly the complainant and the respondent.²³ Human Rights Tribunals have also admitted information dealing with the respondent's prior treatment of other employees, circumstantial evidence, similar fact evidence and any evidence which is more probative than prejudicial, even if it would not be admissible in a court of law. This part of the book concludes with a checklist of what the complainant must plead and prove in cases where there is sexual coercion, sexual harassment by a co-workers and where the harassment amounts to sexual annoyance.²⁴

In chapter four, the author deals with the issue of employer's liability for sexual harassment of its employees by supervisory staff and co-employees. He shows how the courts and tribunals have found employers responsible for the discriminatory conduct of its employees on the basis of theories developed in criminal, tort and corporate law. In particular, Aggarwal makes reference to those cases which have held employers liable based on vicarious liability or which have adopted the organic theory of corporate responsibility where the wrongdoer is deemed to be a "directing mind of the corporation". He points out, however, that it is difficult in some cases to determine on what basis the respondent employer is being held liable. In this context, the decision of the Federal Court of Appeal in *Canada (Treasury Board) v. Robichaud*²⁵ is examined in detail. This case dealt with the sexual harassment of a government employee by a person in a position of authority. The majority of the Court held that the employer could not be held responsible for the discriminatory conduct of its employee under tort or criminal law principles. Aggarwal states that this decision is far-reaching because "it overrules the principles of employer liability

²³ P. 101.

²⁴ Pp. 113-14.

²⁵ [1984] 2 F.C. 799.

accepted almost unanimously by the courts and tribunals so far".²⁶ He argues that those cases which support a liberal interpretation of employer responsibility based on vicarious liability or on the organic theory of responsibility are more in tune with the philosophy of human rights legislation. In fact, the concerns expressed by the author were laid to rest when on July 29, 1987, subsequent to the publication of this book, the Supreme Court of Canada rendered its judgment in the *Robichaud* case.²⁷ The Court unanimously held that the employer was liable under the Act for the discriminatory conduct of its employees. The reasons for the judgment of Mr. Justice La Forest²⁸ supported a very broad interpretative approach to human rights legislation emphasizing that the "remedial objectives of the Act would be stultified if the above remedies were not available as against the employer".²⁹ These reasons, adopted by the majority of the Court, reflect a liberal approach to interpreting human rights statutes, rather than applying theories of employer liability developed in the context of criminal conduct or under the law of tort.³⁰

By outlining the various remedies available to a victim of sexual harassment, it is shown that the option chosen for redress should be tailored to the circumstances in each case. A victim can avail him or herself of his or her employer's internal complaint procedures or use the grievance procedure leading to arbitration where the employee is covered by a collective agreement. Aggarwal suggests that, in light of the enactment of section 15 of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada may in the future recognize the right of a civil action for the tort of discrimination, including for acts of sexual harassment. The most common form of relief, where there is not an internal employee complaint procedure, would be those remedies available under human rights statutes. The cases cited demonstrate how Human Rights Tribunals, in keeping with the purpose of this legislation, have generally limited damages to a form of compensation for the victim as opposed to punitive damages. These would include damages for loss of earnings, loss of dignity and humiliation.³¹ Aggarwal assesses other remedies and concludes that in most cases, due to the bitterness resulting from the harassment, reinstatement is not an appropriate remedy to be sought by complainants. One of the primary objectives of human rights legislation is to educate employers and provide employees with a workplace which is free from discrimination. As is illustrated, orders by Human Rights Tribunals can be

²⁶ P. 130.

²⁷ *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84.

²⁸ Judgment concurred in by Dickson C.J.C., McIntyre J., Lamer, J., Wilson J. and L'Heureux-Dube J., and concurring reasons by Le Dain J.

²⁹ *Robichaud v. Canada (Treasury Board)*, *supra*, note 26 at 93.

³⁰ *Ibid.* at 89-92.

³¹ Pp. 165-72.

far-reaching in those sexual harassment cases where they require the employer and the harasser to cease and desist from any further harassment of employees or require the employer to ensure that its employees are made aware of principles of the relevant human rights legislation or the law relating to sexual harassment.³²

The final chapters of the book deal with the prevention of sexual harassment through actions of employers and unions. The author demonstrates how the law can be a vehicle for social change by referring to recent decisions which have held that an employer has a legal obligation to provide a working environment free from sexual harassment. He also points out that it is in the best interest of the employer to prevent sexual harassment as it can be a hidden cost due to absenteeism and declining productivity. For example, one American study cited states that sexual harassment of federal government employees cost an estimated \$189 million in a two-year period from May 1978 to May 1980.³³ The essential elements of a sexual harassment policy are discussed and an example of such a policy and procedure is included. This is a useful precedent for employers who wish to take preventative steps and establish an internal complaint procedure. The author goes further and suggests that unions should protect their members from sexual harassment by developing a comprehensive strategy for negotiating sexual harassment clauses in collective agreements, by providing support for victims, by educating its members and by continued union co-operation in the development of procedures.³⁴

This book should be considered as required reading for all those who are in some way affected by sexual harassment or can effect changes to this discriminatory behaviour. To the victims, it provides an assessment of their options and sets forth the case they must meet to obtain relief. For unions and employers, the book provides the impetus for developing policies which protect workers from unwanted sexual attention. It is hoped that this book will be accessible to those individuals in many disciplines who aspire to attain a workplace that is free from all forms of discrimination.

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³² P. 183.

³³ Pp. 187-88.

³⁴ P. 219.

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