T.D. 8/92
Decision rendered on July 30, 1992

CANADIAN HUMAN RIGHTS ACT
R.S.C., 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

CHANTAL BOUVIER
Complainant

- and -

MÉTRO EXPRESS AND RÉGENT LACROIX

Respondents

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

DECISION

TRIBUNAL:

Daniel Proulx - Chairman
Marie-Ange Alcindor-Coulanges - Member
Jean-Pierre Ménard - Member

APPEARANCES:

François Lumbu
Counsel for Canadian Human Rights Commission

Juan Manzano
Counsel for Loomis Courier Service

DATES AND PLACE OF HEARING: January 14, 15 and April 22, 1991
Ottawa, Ontario

On March 8, 1990, this tribunal was convened to examine the complaint

filed on February 16, 1987 by Chantal Bouvier against Régent Lacroix and Metro Express, and to determine whether the acts described in the complaint were a discriminatory practice on the basis of sex (sexual harassment) in connection with employment under sections 7 and 13.1 (which became section 14 in 1988) of the Canadian Human Rights Act (hereinafter referred to as the C.H.R.A. or the Act).

I. THE FACTS

The complainant was hired by Régent Lacroix on behalf of Metro Express and worked for that company from April 9 to September 10, 1986. She claims that starting in June she was subjected to continuous jokes and acts of a sexual nature by her superior, Régent Lacroix, and that because of this she was ultimately obliged to resign.

Before considering the testimony of the complainant and of the respondent Lacroix, in detail, we should immediately note that, although at the outset the complaint was directed against the company, Metro Express, the Commission decided not to summon the company before the tribunal. That decision seems to have been made on the basis of the fact that Metro Express had been sold to a new courier firm, Loomis Courier Service Ltd. (hereinafter referred to as Loomis) on May 5, 1988. Accordingly Loomis Courier was summoned by the Commission.

Because Loomis claimed that it was not bound by the obligations of its predecessor and accordingly it had nothing to do with this matter, the question arises as to which of Metro Express and Loomis, or both, is liable for the harassment committed by the employee, Mr. Lacroix, if the tribunal finds that there was in fact harassment. This is why, using the powers conferred on us by s. 50 C.H.R.A., the tribunal decided to summon the president of Metro Express, William Onofre. Mr. Onofre, however, did not respond to the tribunal's invitation and did not attend the hearings.

One final point of a procedural nature should be noted before we proceed. At the beginning of the hearing, counsel for Loomis asked that the matter be heard in camera. Counsel for the Commission had no objection to this request, nor did the respondent Lacroix. The Act does permit a tribunal to order that a hearing be in camera, as follows:

Sec. 52. A hearing of a Tribunal shall be public, but a Tribunal may exclude members of the public during the whole or any part of a hearing if it considers that exclusion to be in the public interest.

In view of how important it is that the judicial process in our society be public, and particularly in the area of human rights where the educational aspect of the process plays a leading role, and in view of the decisions in Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175 and Edmonton Journal v. Alberta, [1989] 2 S.C.R. 1326, we refused the request by Loomis that the

hearing be held in camera. As Madam Justice Wilson noted in the latter case, which dealt with the public nature of trials in separation and divorce cases, it is sometimes necessary in the interest of all the parties for even the intimate and delicate details of their marital life to be disclosed:

But in addition to the interest of the public at large in an open court process there may be compelling arguments in its favour related to the interests of litigants generally. Many may feel vindicated by the public airing of the injustices they feel they have suffered alone and without any support in the community. Indeed, this may be the first time that a spouse is able to speak openly about events that have taken place in the privacy of the home. They may welcome the public endorsement for what they have suffered in private ignominy. (p. 1361)

We believe that these comments also apply to cases of sexual harassment complaints. Nonetheless, in view of the real possibility in this case that Loomis might suffer unfair prejudice in the form of damage to its reputation if we subsequently agree that Loomis in fact had nothing to do with this case, we decided that it was in the public interest to make an order prohibiting publication, that order to cover only the names of the parties and the period of the inquiry and hearing. The Commission and the respondent, Mr. Lacroix, did not object to such an order.
Only four witnesses were heard in this case: the complainant herself, a fellow worker, Mr. Lacroix and a representative of Loomis.

Testimony of Chantal Bouvier

At the time when she accepted Mr. Lacroix's offer to work for Metro Express as a clerk-receptionist, Ms. Bouvier had just started a full-time labour market entry course given by the Canada Employment Centre during normal working hours, for which she was paid about $150 per week. She

therefore stopped going to the training course, which was to have lasted about two months, seeing Mr. Lacroix's offer as an ideal opportunity to enter the labour market.

Accordingly, she started working in the Metro Express offices in Vanier on April 9, 1986. Her work consisted primarily in answering the telephone and correctly passing messages to the various company drivers for use in delivering packages. She also had to put waybills in order and file them.

Counting her, there were ten employees working in the Vanier offices under the supervision of Régent Lacroix: about eight drivers, the head driver (a Mr. Piché) and the complainant. She was thus the only woman working in this location.

The Vanier offices consisted in a large open warehouse. There were no separate rooms as such. Régent Lacroix and Chantal Bouvier each had a desk, one behind the other, so that when the

respondent was sitting he could watch the complainant, but she could not see him. The other employees did not need desks since their work involved courier deliveries in the trucks used for that purpose.

The complainant stated that at the beginning she liked this new working experience, which was in fact her very first experience of working full-time. She had barely reached the age of majority, and this was her first time out in the working world. However, the complainant stated that starting in June, and repeatedly thereafter until she resigned on September 10, 1986, it became impossible for her to do her work in peace because of the verbal and physical harassment by her immediate superior, Mr. Lacroix.

She stated that Régent Lacroix constantly commented on her "nice" legs and buttocks. He asked her why she didn't wear miniskirts, why she wore a slip that hid her legs and even why she didn't slip into a bikini to get a tan outside on her break, when all the drivers were on the road and the two of them were alone in the office. The complainant also stated that Régent Lacroix made jokes about her undergarments with the other drivers.

Moreover, he required her to wear a dress at all times, which the complainant found ridiculous since she never saw customers in the warehouse (except occasionally for one or two merchants who had a business on the same street) and the work place was somewhat dusty.

Then, according to the complainant, the respondent's sexual comments were gradually turned into actions, and even into sexual advances during June, July and August. For example, on at least two occasions Régent Lacroix had undone a button on her shirt. The complainant described this incident as follows (Transcript, vol. 1, p. 34):

[TRANSLATION]

I had always, I always left two buttons undone, as any other woman does, when you are wearing summer clothes, a summer blouse, you always leave two buttons undone.

He had no business coming up and undoing another of my buttons and saying let me do it. I pushed him away and he said "let me do it, it won't hurt you, it would look better if you let some cleavage show".

Another incident: she had hurt her foot and was sitting down, and Régent Lacroix came over to help her hold the bag of ice she had put on her ankle. However, he took the opportunity to rub the complainant's thigh, saying "let's see what nice legs she has" (Transcript, vol. 1, p. 36).

Another incident: one day it was raining, and while Lacroix was alone with the complainant, as usual, he invited her to have sexual relations in an isolated area of the warehouse, where he kept a pillow and blanket. The complainant described this incident as follows (Transcript, vol. 1, p. 35):

[TRANSLATION]

It was always the same thing, over and over, it was never and then in June as well, I forgot to mention, it was raining outside. He said that he had a pillow and a blanket and a table in back where they put their packages, their boxes and things like that.

He said "I could close the office, no one would be here to see us, we could ... well, this would be a good time to get it on". He said that right to me.

So I stayed on my guard, I stayed neutral, I didn't do anything, I didn't respond to his opinion, I stayed in my chair, I didn't move, but I did stay on my guard.

The final incident: on September 10, when the complainant got up from her desk, Régent Lacroix gave her a "slap" on the buttocks. The complainant was indignant. She completed her work for the day, which was then close to being over, and decided not to come back. She telephoned Lacroix the next day to tell him of her decision but did not disclose the real reason to him, nor did he ask her the reason she had decided to quit her job.

She then wrote a letter, dated September 18, 1986, to Gaston Lambert, the comptroller in the accounting department of Metro Express in Montreal, to complain about the treatment she had suffered at the hands of Régent Lacroix. She never received a reply to that letter. However, in Exhibit C-7, which is a letter to the Commission from Tony Ravenda, the regional operations manager, the sender confirmed that he had received a letter from the complainant in which she reported the sexual harassment to which she had been subjected.

The complainant then contacted Mr. Ravenda by telephone (as confirmed by Exhibit C-7). According to the complainant, Mr. Ravenda offered to settle the matter by paying her $500. The complainant then told him that she had been the victim of sexual harassment and that she wanted her rights to be recognized. She also talked on the telephone with the president of the company, William Onofre. Mr. Onofre stated that he would call her back, but he did nothing about it.

How did the complainant react during these three months while she was the subject of sexual comments and actions? So long as the issue was only inappropriate words, she chose not to say anything, not to react to his dirty jokes; she stated: [TRANSLATION] "I was inexperienced, I did not know how to answer", "I stayed at my desk", "I didn't dare to do anything" (transcript, vol. 1, pp. 3334). However, when he started touching the complainant, she stated that she told him several times to stop, but that his answer to everything was: "I'm the boss, I can do whatever I want" (transcript, vol. 1, pp. 41 and 98).

Moreover, the complainant did not dare to confront Mr. Lacroix too much for fear of losing her job and making her fiancé who worked in the same place as a driver, lose his job. That is the reason why, except near the end, she did not even talk to her fiancé about all these incidents of sexual harassment to which she had been subjected. She knew that he would get excited and that

Régent Lacroix could make him lose his job. This would have been very serious since her fiancé had just bought a new truck and absolutely had to work so that he could pay for it. The drivers were actually, as of July 1986, independent brokers and not employees of Metro Express.

Despite all this, the complainant ultimately told her fiancé the facts toward the end of the summer. Lacroix became enraged and ordered the complainant to shut up, reminding her that what happened at the office should stay in the office. Some time later, on about September 5, Lacroix warned the complainant that he was not satisfied with her services and that she had two weeks to improve her work or else he would have to fire her.

The complainant herself stated that she had never received the slightest complaint from Régent Lacroix prior to that, or from any driver except perhaps Piché, the head driver, once or twice because she had not understood or filed a telephone message correctly. Apart from those isolated incidents there was nothing. She was therefore astonished when the respondent threatened to fire her.

The rest of Chantal Bouvier's testimony related to lost income resulting from her resignation and the moral damages she claimed to have suffered because of this painful experience. We shall return to this when we deal with damages.

Testimony of Marcel Chartrand

The Commission called a second and last witness: Marcel Chartrand, who was a delivery person for Metro Express at the same time as the complainant. Essentially, Mr. Chartrand corroborated the complainant's testimony with respect to the incidents of which he had personal knowledge.

Thus he confirmed that he was present during the incident of the injury to the complainant's ankle and saw Régent Lacroix put his hand on her thigh and say that she had "nice legs". He stated that the complainant was very uneasy during this, that she sat there "frozen" and that she left at the end of the day without saying a word.

He also stated that he had seen Régent Lacroix undo the complainant's blouse on a day when she was complaining of the heat. Chartrand said that he warned Lacroix at the time that that was inappropriate. In fact it

seems that the complainant confided in him from time to time and told him that Lacroix was "annoying", that he was asking her to wear skirts, that he liked to see her wear blouses with lower necklines, and so on, even though almost no one from the general public came into the warehouse.

Chartrand was present when the drivers told dirty jokes about the complainant's underwear, and Lacroix took part in these jokes.

According to him, the complainant tried fairly well to live with these jokes even if they were sometimes inappropriate.

He stated that in terms of work performance he never had the slightest problem with the complainant and that he never heard another driver complain about her work.

One final aspect of Mr. Chartrand's testimony concerned the harassment policy at Metro Express. In response to the question as to whether there was such a policy at Metro Express, Chartrand described the following event. During that same summer, 1986, the delivery people had a change in status from employees of the firm to independent contractors. At a meeting on this subject, which took place on a Saturday and which the president of Metro Express and other management staff from Montreal attended, Chartrand specifically sought information on this point. He wanted to know whether there was a sexual harassment policy at Metro Express and what the drivers' obligations in this area were going to be. He received the following reply (transcript, vol. 1, pp. 117-118):

[TRANSLATION]

We had a meeting one Saturday, Chantal wasn't there. Paul was there, all the drivers, all of them were gathered there about the incorporation and given that we were to be incorporated and that we were to be our own bosses, we wanted to know, to asked the question, whether the company had established a harassment policy earlier because since we were to be our own bosses we could really get shafted on this one, or listen, you, if you don't like it you don't have to take it, or go on home, we wanted to know whether we had any protection, and the answer was brief, the answer I got is

that we are not discussing that, we are discussing the incorporation, and so from the answer I got and everyone got that day there was no harassment policy or whatever we needed to protect ourselves, and even less for Ms. Bouvier.

Testimony of Régent Lacroix

Mr. Lacroix, who was not represented by counsel at the hearings, first wanted to give some details on Ms. Bouvier's hours of work. There had been some hesitation on this point during her testimony which we have not discussed as yet because we shall return to it a little later.

With respect to the accusations of sexual harassment, the respondent believed generally that the complainant had quite simply misunderstood his comments, which were intended as compliments, and his actions or attitudes, which were merely those of a responsible employer. It should be noted here that this was the first time the respondent had had a female employee directly under his supervision at Metro Express, that is, in relation to whom he stood in direct authority.

For example, the respondent categorically denied that he had suggested that Ms. Bouvier not wear slips that hid her legs. With respect to the dress code at work, the respondent stated that he simply asked Ms. Bouvier to "dress neatly". However, he denies that he forbade her to wear pants, thereby requiring her always to wear dresses or skirts. Finally, he denied having stroked her

thigh during the incident of the injured ankle and having invited her to have sexual relations with him in an isolated corner of the warehouse one rainy day in June.

The respondent did not, however, deny all the comments attributed to him by the complainant, but interpreted them differently. He himself described what he called compliments he paid the complainant about her person and her style of dress, in response to questions by the Tribunal, as follows (transcript, vol. 2, p. 216):

[TRANSLATION]

Q. You said that when Ms. Bouvier dressed in tight clothes you sometimes commented that she had a nice figure ...

A. Mmmm hmmm.

Q. OK. Do you remember the words you used to say that to her?

A. Well, I told her that the clothes she had on showed off her nice figure, she had a nice body.

With respect to the blouse incident, he stated that it happened, but that far from undoing another button, rather he had grasped the two edges of the blouse and suggested that the complainant do up a button because he found her blouse too low-cut. He did not deny that Marcel Chartrand told him that what he had done in that incident was inappropriate, but he emphasized that Chartrand did not say anything to him about it until after the complainant had left Metro Express, that is, after September 10,

1986. Similarly, he did not deny the bikini incident, but rather said that he had said the opposite to the complainant: that the front of the Metro Express offices was not an appropriate place for her to get a tan during her breaks, and that if she wanted to get a sun tan she should go home or wear a bikini (which, to his mind, was obviously out of the question).

The respondent also confirmed that he had made jokes about the complainant's undergarments with the drivers, but only when she was not there. Moreover, when questioned by the Tribunal as to his responsibilities in this respect, the respondent had never believed he had any and did not see why he would not have participated in these dirty jokes with the other employees. According to him, the complainant could only have learned about these jokes from her fiancé, who was working as a delivery person at Metro Express at the same time.

The respondent acknowledged that the final incident of the slap on the buttocks on September 10, 1986, the day the complainant resigned, had happened, but asserted that it was in no way a sexual act. On the contrary, he asserted that in a moment of anger he administered a punishment to her because she refused to use some cards that had been prepared by the head driver, Piché, for taking messages. Moreover, he confirmed that the complainant telephoned him the day after that incident to tell him that she was not coming back to work, that he did not ask her why she had made that

decision and that he did not think he should apologize for his somewhat unusual action.

With respect to the complainant's work performance between April 9 and September 10, 1986, Mr. Lacroix's testimony is somewhat difficult to recount because it seemed a little confused and inconsistent. First, he stated that Ms. Bouvier's performance was entirely satisfactory at the beginning. When he was asked to specify what he meant by "at the beginning", he stated that he meant April and May, that is, the time when the complainant was working full-time. When she went to part-time at the end of May, some drivers started complaining about the complainant's work.

The respondent was not able to say who these drivers were, how many of them there were and what the exact nature of their complaints was. Only the head driver, a Mr. Piché, was identified by the respondent as having been dissatisfied with the complainant's performance because of the fact that she did not always use the cards for filing orders which he had prepared.

The respondent stated right at the outset that he had given the complainant a warning on September 5, 1986, in the form of a two-week probationary period, because Piché wanted her to be fired. He subsequently added, in response to questions by counsel for the Commission, that the warning on September 5 was not the first. He claimed that he had already told Ms. Bouvier on several occasions previously that her work performance was not satisfactory and that

he had even talked to the regional operations manager in Montreal, Tony Ravenda. Except for one incident relating to the message cards prepared by the head driver, Piché, at the beginning of September, however, Mr. Lacroix was unable to specify in what way the quality of the complainant's work was poor or caused trouble for the drivers or the company before that.

The respondent could not explain why he had been accused of sexual harassment. He stated that the complainant had never made him aware that his conduct or the language he used toward her was unacceptable. According to him, the complainant was acting solely out of revenge, probably because she had been unable to keep a full-time job with Metro Express after May.

He suggested the theory of a conspiracy with the drivers Chartrand and Bilodeau (the complainant's fiancé), who had both been in financial difficulties at the end of the summer of 1986 and decided to harass the company by making complaints to the Labour Relations Board and the Canadian Human Rights Commission.

Testimony of Harry Eamon

Mr. Eamon, who has been employed by Loomis since November 1985, was transferred to Montreal in May 1988 to assume the position of regional manager of the company for Quebec, and then of vice-president, Eastern Canada. Mr. Eamon was examined by his counsel to provide the Tribunal with an explanation of the sale

contract which Loomis entered into with the numbered company 121112 Canada Inc. (hereinafter referred to as 121112) on May 5, 1988, and to clarify the relationship between the two companies.

Mr. Lumbu objected to Mr. Eamon's testimony in so far as it related to the interpretation of the sale contract, on the ground that this witness had not taken part in negotiating the contract and in any event the interpretation of a contract is a question of law. In accordance with its normal practice, the Tribunal chose to allow the witness to express his opinion on the contract in question. Obviously, however, Mr. Lumbu's objection to the interpretation of the contract is entirely correct and accordingly Mr. Eamon's opinion as to the meaning and effect of a contract will have no effect on how the contract will be interpreted. It merely provides the Tribunal with information on the position taken by Loomis from a legal point of view, on which position this Tribunal must rule in law. On the other hand, Mr. Eamon's testimony as to the relationship between the two companies and the discussions he had with the Commission since the sale of Metro Express are relevant, since it dealt with questions of fact which are within the witness's personal knowledge.

Thus Loomis's position with respect to the sale contract signed by 121112 and Loomis on May 5, 1988 was that Loomis had purchased not the numbered company, the president of which was William Onofre, but solely certain assets of the company: the name

Metro Express, its customer list, its trucks, its office equipment, and so on. In his view, as shown in a letter from the office of the Inspector General of Financial Institutions of the Government of Quebec dated January 10, 1991, 121112 still exists; it operates other courier services, it is up to date under the Companies Information Act, R.S.Q., c. R-22, since it filed an activities report in September 1990, and its president is still William onofre (Exhibit I-3).

He added that Loomis did not purchase 121112's accounts receivable or assume its legal obligations. Finally, in his view, the complainant's employer is not and never was Loomis, but rather was 121112 and its president, William Onofre. When Loomis purchased the assets of Metro Express, the business operated by 121112, Loomis did not re-hire the employees of Metro Express, except for some of them, and only after they were laid off by 121112. In any event, at the time of the sale, neither the complainant nor the respondent appeared on the list of Metro Express employees. There is no way that Loomis can have been their employer and therefore it has nothing to do with this matter.

Mr. Eamon stated that the relationship between 121112 and Loomis is exclusively a business relationship, that is, it relates solely to courier deliveries. There is no connection of any nature between the two companies, which are two entirely separate entities. They have no manager, board of directors or shareholder

in common. Moreover, Loomis has even executed a seizure against 121112 and the business it was operating under the trade name capitaine courrier for unpaid debts during 1990. When questioned by the Tribunal as to a clause in the sale contract under which the president of 121112, William Onofre, was nonetheless hired to work for Loomis as a consultant for a period of twelve months following the sale of Metro Express, from May 5, 1988 to May 5, 1989, the witness answered that this was in fact a contract for services under which Onofre was available to answer questions for Loomis and advise Loomis when necessary as to the Quebec and Ontario markets. Onofre did not physically work in the Loomis offices.

Loomis was made aware for the first time of the complaint filed by Ms. Bouvier through a letter which the investigations unit of the Commission sent to it on December 6, 1988. This letter, which was addressed to Mr. Eamon himself in his capacity as regional manager of Loomis, informed him that the complaint in question was going to be brought to the attention of the authorities of the Commission so that they could rule on it, given that the attempts at conciliation between the two parties had not produced a settlement. The letter, which was accompanied by all the documents which had been filed with the Commission, gave Loomis thirty days to submit its comments.

What did Mr. Eamon do when he received this letter? Did he contact William Onofre, who at that date was still under contract

to Loomis? No. Rather, he decided to send the letter to the company's lawyers, who prepared the company's reply to the commission in a letter signed by the president of Loomis and dated February 23, 1989. Moreover, Mr. Eamon stated that, despite the fact that there was a one-year contract with William Onofre which ended on May 5, 1989, neither the company nor he himself has had any contact whatsoever with 121112 or its president since the letter of December 6, 1988 was received by the Commission. In any event, he knew from one of his employees, Steve MacDonald, who had previously worked for Metro Express, that William Onofre was aware of this case. There was only one attempt, which was unsuccessful, to contact William Onofre, about one week before this case came on for hearing, at the beginning of January 1991. Apart from that, all mail addressed to 121112 and received by Loomis was sent on unopened to 121112 or an employee of 121112 came by to get it from Loomis's offices from time to time.

ii. THE LAW

Our job in this case is to answer three distinct questions:

(A) What constitutes sexual harassment under the Act, and was the conduct of the respondent Lacroix sexual harassment? (B) If so, was the employer liable for the conduct of its employee, and if so, which of 121112 and Loomis bears this liability? (C) To what compensation is the complainant entitled if she was the victim of sexual harassment?

(A) Was the complainant subjected to sexual harassment?

Subsection (1) of section 13.1 of the C.H.R.A. (now s. 14) prohibits harassment in matters related to employment; subsection (2) provides that "sexual harassment shall... be deemed to be harassment on a prohibited ground of discrimination". However, the Act does not define the substance of this particular form of discrimination. We must refer to the definition given to it in the case law on the subject in which legislation having the same object as the C.H.R.A., namely the elimination of discrimination, particularly in the work place, has been applied.

The Supreme Court of Canada had occasion to consider the concept of sexual harassment in the well-known decision in Janzen v Platy Enterprises Ltd., [1989] 1 S.C.R. 1252. In that case, the Court was required to

determine whether sexual harassment constituted discrimination on the basis of sex under the Manitoba Human Rights Act. At the time when the incidents in that case took place, that Act did not deal specifically with sexual harassment. The Court nonetheless unanimously found that sexual harassment was in fact a form of discrimination on the basis of sex.

Writing for the Court in that case, Chief Justice Dickson specified what "sexual harassment" must be understood to mean, the various forms it may take and the resulting burden of proof that rests on a potential victim.

The following, first, is the definition adopted by Chief Justice Dickson, at page 1284:

... I am of the view 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-related consequences for the victims of the harassment.... Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it.

The general nature of this definition is striking. Sexual harassment thus includes any "unwelcome conduct of sexual nature that detrimentally affects" a person or the work environment. But what forms of conduct may amount to "unwelcome conduct of a sexual nature"? Adopting the point of view expressed by legal authors on this point, the Supreme Court referred, inter alia, to the description of sexual harassment given by Backhouse and Cohen in The Secret Oppression: Sexual Harassment of Working Women (1978), at page 38:

Sexual harassment can manifest itself both physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. It can, however, escalate to extreme behaviour amounting to attempted rape and rape. Physically, the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against, and touching. Psychological harassment can involve a relentless proposal of physical intimacy, beginning with subtle hints which may lead to overt requests for dates and sexual favours.

Referring next to various legislative definitions of sexual harassment in order to be able to identify the various forms which

sexual harassment may take, the Court cited s. 247.1 of the Canada Labour Code, R.S.C. 1985, c. L-2, as amended by c. 9 (lst Supp.), s. 17, which reads as follows:

247.1... "sexual harassment" means any conduct, comment, gesture or contact of a sexual nature

(a) that is likely to cause offence or humiliation to any employee; or

(b) that might, on reasonable grounds, be perceived as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.

The conclusions which the Court drew from its consideration of the Canada Labour Code are very important because, contrary to the situation in Janzen, that Code applies to the employment relationship in question here.

By virtue of the presumption of the coherence of legislation relating to the same subject matter, that is, legislation in pari materia (on this point, see: P.-A. COTE, The Interpretation of Legislation in Canada, Y. Blais, 1984, pp. 269 et seq, and L.-P. PIGEON, Rédaction et interprétation des lois, 2nd ed., Quebec City: Éditeur officiel, 1978, p. 44), we must assume that Parliament intended to give the concept of harassment in the C.H.R.A. the same meaning as is found in the Canada Labour Code. These two statutes have a common subject matter and object: the eradication of sexual harassment in the labour market.

This is particularly evident in the fact that para. 247.4(2) (g) of the Canada Labour Code refers specifically to the

Canadian Human Rights Act in reference to issuing a policy statement concerning the rights of employees in respect of sexual harassment. The Court's findings, particularly in respect of the burden of proof that rests on the victim, were as follows (at page 1282 of Janzen):

Emerging from these various legislative proscriptions is the notion that sexual harassment may take a variety of forms. Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to

comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity. ... Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour.

In short, sexual harassment consists in unwelcome behaviour of a sexual nature which is an affront to the personal dignity of another person. It may be blatant or subtle, and may take many forms, but the evidentiary burden on the victim is only that of establishing that the conduct complained of was (1) of a sexual nature, (2) unwanted and (3) humiliating.

The Court added that sexual harassment was an abuse of power. Since sexual harassment, as set out in s. 247.1 of the Canada Labour Code, amounts to imposing on someone else any "conduct,

comment, gesture or contact of a sexual nature ... that is likely to cause offence or humiliation to any employee", it is obvious that such a situation is particularly likely to arise when the harasser is in a position of authority over the victim. However, we do not believe that the definition given by Mr. Justice Dickson must be interpreted as meaning that such an abuse of power can be committed only by a superior in a business.

Clearly, harassment may be engaged in by fellow workers when the large majority of them are male, and, for example, they constantly, as a group, subject one or more of their female fellow workers, who are in a minority, to sexually humiliating attitudes or behaviour in the work place.

Moreover, the Canada Labour Code provides, in the definition of sexual harassment found in s. 247.1, that sexual harassment consists either in comments or gestures of a sexual nature that are likely to cause humiliation to an employee, which does not require that the person who engages in such conduct be a representative of the employer, or in comments or gestures that an employee might reasonably perceive as placing a condition of a sexual nature on employment or promotion, which necessarily implies, on the other hand, that it is a superior with direct authority over the employee who is engaging in the conduct.

In other words, while abuse of power is one of the characteristics of sexual harassment, that does not necessarily mean that the victim must prove that the harassment was committed by a superior. If, however, such evidence is available, it will

undoubtedly be an aggravating factor which a Tribunal may take into account in assessing the physical and moral damages suffered by the victim.

In this case, there is no doubt that the complainant was sexually harassed, and that the harassment was committed by her superior, the same person who hired her: the respondent, Régent Lacroix. Clearly the "compliments", as he put it, which he frequently addressed to the complainant over more than three months constituted comments of a sexual nature which were likely to cause offence or humiliation. Obviously, it is completely inappropriate for an employer to repeatedly tell one of his employees that she has a nice body, that she has "nice legs"; to recommend that she dress in a particular manner or put on a bikini at break; and to make dirty jokes about the colour or type of her undergarments. To invite her, even as a joke, to "get it on" in an isolated area of the office is an even more disagreeable instance of sexual comment.

It is also clear that the respondent went further than simple inappropriate remarks. He engaged in unequivocal sexual gestures toward his employee, Chantal Bouvier, by undoing a button of her blouse to reveal her chest, on more than one occasion and in the presence of witnesses, including Michel Chartrand; by stroking her thigh; and even by giving her a slap on the buttocks, an extremely humiliating incident which finally brought about the complainant's departure.

There is no doubt in our mind that the version of the facts given by the complainant was straight forward and credible, and reflected the reality of her experiences during the period from June to September 1986 in the offices of Metro Express. The testimony of the courier driver, Mr. Chartrand, was also frank and direct, and therefore just as trustworthy as the complainant's. on the other hand, the testimony of the respondent was devoid of credibility, as demonstrated by the far-fetched and sometimes even contradictory explanations he provided as justification for some of his actions. For example, he said that he did not undo a button on Ms. Bouvier's blouse, but rather did up a button; he subsequently admitted, although he disputed the dates of the event, that Marcel Chartrand had

pointed out to him that his action was inappropriate. Why would Mr. Chartrand have criticized him for this if he had done something so inoffensive? The whole of the respondent's testimony as to his conduct toward the complainant thus appears scarcely to be trustworthy, and the Tribunal has no hesitation in accepting the complainant's testimony over that of the respondent.

The comments and gestures were thus clearly sexual in nature; they were humiliating or offensive to the complainant and they were unwanted.

It is clear from the evidence that, in view of her age (she had barely reached the age of majority) and the fact that this was her first job, and in view also of the fact that she did not want to hurt her fiancé who was already employed by Metro Express, the complainant did not always openly and energetically protest her

boss's conduct. The unease she felt and her attitude, which amounted to remaining cool or not responding to her boss's comments or invitations, was nonetheless consistent and was by nature, in the Tribunal's view, such as to give the respondent to understand clearly that the sexual conduct in which he was engaging was not wanted by the complainant. In any event, she also objected explicitly to his comments on several occasions.

We therefore find that the complainant was a victim of sexual harassment within the meaning of s. 13.1 C.H.R.A. (now s. 14), committed by Régent Lacroix, and that this was the reason why the complainant was forced to quit her job. Her work place had become intolerable. Placed in this context, the complainant's poor performance and the fact that she was placed on a two-week probationary period at the beginning of September 1986 seem clearly to be pretexts. We are therefore of the opinion that they amounted in reality to constructive dismissal. On this point, see: Janzen v. Platy Enterprises (1985), 6 C.H.R.R. D/2735, at D/2768; Cox v. Jagbritte (1982), 3 C.H.R.R. C/609, para. 5593-5594; see also GAGNON, LEBEL & VERGE, Droit du travail, 1987, P.U.L., p. 75; G. W. ADAMS, Canadian Labour Law, 1985, Canada Law Book, p. 497.

(B) The employer's liability in respect of harassment

It was established in Robichaud v. Canada (Treasury Board), (1987) 2 S.C.R. 84 that employers are responsible for the actions

of their employees in situations of discrimination or harassment. The question on which the Supreme Court had to rule was whether an employer is responsible for the unauthorized discriminatory acts of its employees in the course of their employment, under the Canadian Human Rights Act.

Mr. Justice La Forest, recalling that this type of legislation is essentially concerned not with seeking out offences and punishing the offenders, but with eradicating invidious discrimination in some key areas of activity such as employment, held that a large and liberal interpretation based on the remedial objective of the C.H.R.A. required that the remedies set out in the Act, inter alia reinstatement and compensation for both economic damages and injury to feelings or self-respect suffered by victims of discrimination, be effective. The remedial objective could not be achieved if a narrow interpretation were followed with the result that an employer was not held liable for the discriminatory practices of its employees. Moreover, since intention is beside the point in respect of discrimination, the fact that the harassment was committed without the knowledge of the employer does not affect the employer's liability: Robichaud, supra, pp. 92-94.

It is also important to note that subs. 65(1) C.H.R.A. expressly provides that "any act or omission committed by a director [or] employee... of any person, association or

organization in the course of the employment ... of the ... director [or] employee ... shall ... be deemed to be an act or omission committed by that person, association or organization". Subsection 65(2) sets out the conditions which the employer must fulfil in order to discharge the obligations imposed on it by reason of discriminatory acts committed by its employees. The employer must establish (1) that it did not consent to the commission of the act, (2) that it exercised all due diligence to prevent the act from being committed, and (3) that it subsequently exercised all due diligence to mitigate or avoid the effects thereof.

It emerged from the evidence in this case that while the harassment initially occurred without the consent of the management of the business' (1) the management took no steps to prevent it from occurring and (2) it did nothing to try to mitigate or avoid the effects of the harassment committed by the respondent Lacroix once it was informed. The driver, Mr. Chartrand, testified that he had raised the issue of whether there was a policy on sexual harassment at Metro Express at a meeting attended by the managers of the business. The answer he received was clear and specific:

there was not and there would be no discussion of such a policy at that meeting.

The complainant's uncontradicted testimony concerning the approaches she made to management after she resigned was that the

regional operations manager (Tony Ravenda) and the president of the company (William Onofre) did absolutely nothing to attempt to stop the sexual harassment engaged in by their employee, Lacroix. After numerous telephone calls and after sending a letter setting out the working conditions to which she had been subjected, the only thing that the complainant succeeded in obtaining was an oral offer to settle the whole thing for a payment of $500. The employer is therefore fully liable under s. 65 C.H.R.A.

The problem which arises in this case is therefore not whether the employer is responsible for the harassment committed by the employee, Lacroix, but rather (1) who his employer was in 1986, at the time these discriminatory acts were committed, and (2) whether the employer's obligations at that time in this respect were passed on to Loomis, which purchased the assets of Metro Express two years later.

It is clear that the employer of both the complainant and the respondent Lacroix, at the least the firm for which they worked, was Metro Express. However, it is in evidence that that firm belonged to a numbered company, 121112 Canada Inc., the president of which is named William Onofre. That company also operated other courier firms, including Capitaine Courrier. We therefore find that the real employer was 121112 which, as was established in evidence, still exists and is in good standing under the Quebec Companies Information Act, and the president of which is William

Onofre.

Did the transfer of the assets of Metro Express to Loomis also operate as a transfer of the legal obligations of 121112? On this point, counsel for the Commission argued that there had been a sale of a business within the meaning of s. 44 of the Canada Labour Code, the consequence of which is that the purchaser (Loomis) of the business is bound by the obligations of the vendor (121112) under sections 44 to 46 and 189 C.L.C. If this were not so, the purchaser would in any event be bound to assume the vendor's legal obligations under the contract of sale, since clause i(l) (a) of the

contract specifies that it acquired the right to represent itself as the successor of the vendor and to use its trade name (Metro Express).

Moreover, learned counsel argued, clauses such as 7(4) of the contract, by which the vendor remains liable for any action for damages brought against it for unjust dismissal before the date of the sale, cannot be invoked against third parties and provide the purchaser only with a recursory action ultimately against the vendor.

Counsel for Loomis admitted at the outset that the purchase of the assets of Metro Express constituted the sale of a business within the meaning of s. 44 C.L.C. However, he vigorously objected to the relevance of that section, which relates to the continuation of a collective labour agreement when a business which falls under the jurisdiction of Parliament is sold, and to the jurisdiction of

this Tribunal to apply the Canada Labour Code. In his view, the jurisdiction of the Tribunal is limited to applying the provisions of the Canadian Human Rights Act, and not of other federal legislation or of private contracts of sale between companies.

In any event, he went on, s. 44 C.L.C. merely confirms the relative effect of the contracts when, as in this case, there is no collective agreement. Thus the question to be asked here is: who was the employer at the time when the respondent Lacroix harassed the complainant? In his view, there is no evidence that Loomis was their employer. On the contrary, it is in evidence that Loomis never hired them, that it merely purchased certain assets of 121112, and there was no other connection between Loomis and 121112 other than the business relationship relating to the delivery of packages. Thus 121112 was the parties, employer in 1986 and the complaint must be directed against it.

It is clear, as counsel for Loomis conceded, that there was a sale of a business here within the meaning of s. 44 C.L.C. If we examine the contract between 121112 and Loomis we find that there was a transfer of all of the assets of Metro Express, and of its goodwill and trade name, and that Metro Express as a business was identifiable and distinct from 121112; these are recognized as the essential conditions of a sale of a business, both in Quebec (see U.E.S., Local 298 v. Bibeault, (1988] 2 S.C.R. 1048, 1104-1106) and in the common law jurisdictions (see United Association of

collective agreement negotiated with the union are automatically transferred to the purchaser when the business is transferred. In Quebec, see: Adam v. Daniel Roy Ltée, [1983] 1 S.C.R. 683, at 688 and Bibeault, supra, p. 1112; in a common law jurisdiction, see Lester, cited above; Madam Justice McLachlin's reasons could not have been clearer: "Absent legislation, the effect of the transfer [of a business] is to terminate the relationship between the union and the employer, with the result that the employees would lose their bargaining rights. To meet this problem, successorship provisions, like s. 89 of the Newfoundland Labour Relations Act, have been passed".

With respect to purely legal obligations, the basic principle is also the same in both civil and common law; it may be stated as: no one is required to answer for the wrongful act of another. There have been significant legislative derogations from this principle. For example, both the common law (vicarious liability) and the Civil Code (Art. 1054) make employers liable for wrongful acts committed by their employees in the course of their employment.

Similarly, Parliament has enacted s. 189 C.L.C., which applies even if the employees are not unionized; it provides: "Where any particular federal work, undertaking or business in or in connection with the operation of which an employee is employed is, by sale, lease, merger or otherwise, transferred from one

employer to another employer, the employment of the employee by the two employers before and after the transfer of the work, undertaking or business shall, for the purposes of this Division [Division IV: Annual Vacations], be deemed to be continuous with one employer, notwithstanding the transfer." Although this derogation from the common law applies only to the legal obligations of the employer in respect of annual vacations, Parliament nonetheless has placed specific conditions on the application of this section, such as the requirement that an employee have worked for the first employer for at least one year without interruption, and that the employees be transferred to the new employer. See Bibeault, supra, p. 1108, for an interpretation of a similar provision, s. 96 of the Quebec Labour Standards Act.

The rationale of these fundamental principles of law is obvious: it would be unfair for a person who has never been personally bound by a contract to be forced to comply with obligations to which he or she has not agreed, just as it would be unfair for someone who has personally committed

no tortious act to be held liable for the tort and forced to compensate the victim thereof.

Counsel for the Commission asked us to apply the Canada Labour Code or, if we did not, to interpret the Canadian Human Rights Act in a large and liberal manner so as to make the purchaser of Metro Express liable for the legal and contractual obligations of 121112 Canada Inc.

It would appear that we do not have jurisdiction to apply the Canada Labour Code. The mandate of a human rights tribunal derives from a combination of several provisions of the C.H.R.A. For example, ss. 49 and 50 direct the tribunal to inquire into a complaint submitted to it by the Human Rights Commission. The complaint itself must, under ss. 4 and 39, relate to a "discriminatory practice", that is, one of the practices described in ss. 5 to 14 of the Act. In other words, the mandate of a human rights tribunal is to apply its enabling legislation. It has no jurisdiction to apply the Canada Labour Code, which would in any event be of no assistance to the complainant since, first, she was not unionized, and second, she had no worked for Metro Express for the minimum twelve months nor been transferred to a new employer.

We of course share the opinion that the C.H.R.A. is legislation that must be interpreted in a large and liberal manner, its aim being remedial and its status being quasi-constitutional. Mr. Lumbu made much of the fact that it was these principles which led Mr. Justice La Forest to refuse to apply the ordinary common law rules of vicarious liability in Robichaud, supra, and to substitute for them a more stringent and broader principle of liability based on the C.H.R.A.

A generous interpretation of a statute does not always amount to the simple addition of rules which are not found in the statute, especially if they greatly overstep the common law. Thus, when he

held that the ordinary rules of vicarious liability in tort law do not apply, Mr. Justice La Forest had to find a basis in the Act for expanding the rules of the employer's liability for discriminatory acts committed by its employees. By examining s. 41 C.H.R.A. (now s. 53), which provides specifically that there is a duty to reinstate an employee, and keeping in mind that effect must be given to the remedies which have been carefully designed by Parliament, Mr. Justice La Forest concluded that an employer

must be held liable for all discriminatory acts committed by its employees in the course of their employment, as opposed to only those acts which are job-related, properly speaking, as under the ordinary common law rule of vicarious liability. Mr. Justice La Forest therefore did not make up a principle of liability out of whole cloth without regard for the provisions of the Act.

We do not see any provisions under which we could interpret the Act as making a successor employer liable for discriminatory acts committed by a previous employer. This is particularly difficult to imagine in a case such as we have here, where the employees concerned, the complainant and the respondent Lacroix, were not even still employed by the business when it was transferred to the purchaser.

All of the provisions of the Act relating to remedies deal with the employer's liability. section 65 in particular, which expands that liability by creating a presumption, clearly provides

that discriminatory acts committed by an employee of any person, association or organization shall be deemed to be an act committed by that person, association or organization. The evidence in this case is flawless: the complainant was never employed by Loomis and Loomis acquired Metro Express much later, about two years after the harassment complained of.

That does not mean, however, that a successor employer will never be liable for discriminatory acts committed by the employees of the previous employer. Thus, for example, if the sale of a business was simply a sham transaction between two closely related companies, such as companies with common directors or shareholders, obviously the use of such a subterfuge, designed to avoid the effect of the Act, would go directly counter to the Act, and accordingly should not be accepted as exempting the successor employer from liability. See, for example: Lester, supra, and Kearns v. P. Dickson Trucking Ltd., Can. Hum. Rights Trib., July 5, 1988.

In this case, the evidence is once again very clear: there was no legal relationship between the former employer (121112) and Loomis, which subsequently acquired Metro Express. There can therefore be no legal relationship between Loomis and the complainant. Accordingly, we must conclude that Loomis is not a party to this dispute and that no liability can be imputed to it for the acts committed by the respondent Lacroix.

(C) Damages

1. Economic damages

On the question of economic damages, para. 53(2)(c) C.H.R.A. provides that the Tribunal has the power to order that a person found to have engaged in a discriminatory practice compensate the victim ... for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice".

The Federal Court of Appeal recently had occasion to establish the principles by which we must be guided on this point, in Attorney General of Canada v. Morgan (November 4, 1991, unreported). Although Marceau and MacGuigan JJ.A. differed on several points, and as a result Mr. Justice MacGuigan dissented, there was unanimity on the principle that compensation could be awarded only for economic losses which resulted directly from the discriminatory act. In other words, there must be a clear causal connection between the compensation awarded and the discriminatory act.

Accordingly, a Tribunal is obliged to establish a limit on the period for which compensation will be awarded.

In this case, the complainant worked for the respondent Metro Express from April 9 to September 10, 1986, or for approximately five months. She worked there full-time for six or seven weeks at the beginning, and her weekly earnings were about $220 ($5.50/hour

x 40 hours). She was laid off for a week because of a reorganization during May, and re-hired on a part-time basis. She then worked for about 20 hours per week at the same hourly rate, for weekly earnings of about $110.

Because the complainant received unemployment insurance benefits of about $100 per week for a year during which she was unemployed, the economic damages caused by the harassment to which she was subjected are limited to the waiting period of about one and a half months which the Unemployment Insurance Commission imposed on her because she had left her job "voluntarily".

The complainant's economic damages for loss of income are therefore limited to that period, and amount to $660: $110/week x 6 weeks.

It was established in Morgan, supra, that the Tribunal has discretion both as to whether to award interest and as to the applicable rate, although it seems that the Bank of Canada rate should be the rule. Moreover, if interest is awarded, it will normally be simple interest, rather than compound, unless there are exceptional circumstances.

We are of the view that in order to compensate the complainant in this case fully for the economic losses suffered as a result of the discriminatory act to which she was subjected, she

is entitled to interest on the $660 at the Bank of Canada rate, which interest must be computed from the day on which she began to receive unemployment insurance benefits. Absent precise evidence as to that date, we determine it to have been November 1, 1986.

2. Injury to feelings and self-respect

The tests to be applied in assessing compensation for the psychological damage inflicted on a victim of sexual harassment, for which provision is made in para. 53 (3) (b) C.H.R.A., were set out in 1982 by Peter A. Cumming in an Ontario case which has been followed since that time: Torres v. Royalty Kitchenware Ltd. (1982), 2 C.H.R.R. C/858, para. 7758. Account must be taken of the nature of the harassment (verbal or physical), the degree of insistence or of physical contact, the duration of the harassment, the frequency of the acts, the age of the victim, the vulnerability of the victim and the psychological impact of the harassment on the victim.

In this case, the complainant was subjected to three months of continuous harassment, both verbal and physical. She was very vulnerable because she was young, this was her first job and she wanted to protect her fiancés job, since he worked in the same place. The respondent Lacroix was in a situation of power and clearly abused that power against his employee.

As f or the psychological impact of the harassment on the complainant, she testified to the fact that since that painful experience her social life has been disrupted in that she no longer knows how to behave around

other men, she has lost her selfconfidence, which meant that it took her a lot of time to find another job after leaving Metro Express, and she is no longer confident about going into stores alone, for fear of being assaulted.

Considering all of these factors together, we believe that the complainant is entitled to compensation in the amount of $2,000 for injury to her feelings and self-respect, with interest from the date she left Metro Express. If we examine the cases decided in the last three years (we have identified some fifteen decisions) relating to injury to compensation for feelings and self-respect awarded in sexual harassment cases, we find that, after weighing the various factors relating to the tests set out in Torres, human rights tribunals generally award between $1,000 and $2,500 for harassment which is similar to the harassment to which the complainant was subjected in this case. In view of the circumstances of the case, we believe that an award of $2,000 is appropriate.

Accordingly, we order the respondents Régent Lacroix and 121112 Canada Inc. jointly and severally to pay to the complainant:

1. the sum of $660 as economic damages for lost income, with interest from November 1, 1986, at the Bank of Canada rate, as of that date;

2. the sum of $2,000 as compensation for the injury to feelings and self-respect, with interest from September 11, 1986, at the Bank of Canada rate, as of that date.

As well, counsel for Loomis objected during the hearing to the filing of certain parts of the contract signed by 121112 Canada Inc. and Loomis on May 5, 1988, concerning the sale of the assets of Metro Express, for reasons of confidentiality or trade secrecy. We did not accede to his objection, since we believed that we had to be able to consult the contract as a whole in order to make an informed decision. Nonetheless, we ordered that pages 30 to 36 of the contract (Exhibit I-7) not be made public and that consultation of those pages be restricted to the members of the Tribunal and the solicitors of record. This order will continue in effect.

Dated this 12th day of June 1992.

Daniel Proulx, Chairman

Marie Ange Alcindor-Coulanges

Jean-Pierre Ménard