SCC File No. 37041

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

APPELLANT
(Respondent)

AND:

EDWARD SCHRENK

RESPONDENT
(Appellant)

AND:

CANADIAN ASSOCIATION OF LABOUR LAWYERS, CANADIAN CONSTRUCTION ASSOCIATION, COMMUNITY LEGAL ASSISTANCE SOCIETY, WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND, RETAIL ACTION NETWORK, ALBERTA FEDERATION OF LABOUR AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 99, ONTARIO HUMAN RIGHTS COMMISSION, AFRICAN CANADIAN LEGAL CLINIC

INTERVENERS

FACTUM OF THE INTERVENER
WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND

(pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. In this appeal, West Coast LEAF seeks to ensure that principles of substantive equality are reflected in the application and scope of the protections against discrimination regarding employment in human rights law. Substantive equality cannot be achieved unless human rights laws fully reflect and apply to the whole range of workplace circumstances. It is especially vital that protection against discrimination in the workplace gives adequate recourse to workers with multiple, intersecting markers of disadvantage because of their increased vulnerability to deeply entrenched power dynamics that are not limited to formal chains of authority in the workplace.

2. West Coast Women's Legal Education and Action Fund ("West Coast LEAF") adopts the facts set out in the Appellant's factum.

PART II – QUESTION IN ISSUE

3. The issue on this appeal is whether s. 13 of the British Columbia *Human Rights Code*[1] protects all employees against discrimination related to their work, or whether it only protects employees who allege discrimination by a person who has been granted authority over them by their employer.

PART III – STATEMENT OF ARGUMENT

A. Key principles recognized in this Court's jurisprudence

4. This Court has recognized that protections in human rights legislation are so fundamental and universal that human rights law must be regarded as quasi-constitutional, and must be given a large and liberal interpretation consistent with its broad objectives.[2]

5. This Court has recognized that work is an essential aspect of human dignity. Our work informs our conceptions of self and self-worth in ways that extend far beyond the economic realm. As Dickson CJ noted in *Reference Re Public Service Employee Relations Act (Alta.)*:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, *as importantly*, a contributory role in society. A

[1] *Human Rights Code*, RSBC 1996, c. 210 as amended [*Code*].
[2] *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 at 547; *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1134-36; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 [*Robichaud*] at 89-90.

> person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.[3]

6. This Court has recognized that the overarching objective of human rights legislation is to achieve substantive equality for all members of society.[4] Substantive equality is equality broadly defined, and includes ensuring that all have meaningful opportunities to realize their aspirations through a social and legal framework that responds to their real needs.[5]

7. The purposes of the *Code* are set out in s. 3:

> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
>
> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

8. Because of the centrality and significance of work in most people's lives, the *Code*'s protections against discrimination in employment are among the most important tools to achieve the goal of substantive equality for which the *Code* was enacted. Most human rights complaints continue to arise in the context of employment.[6]

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[3] *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 368 (emphasis added); *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para. 83.
[4] *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union (Meiorin Grievance)*, [1999] 3 SCR 3 [*Meiorin*] at para. 41.
[5] *Withler v. Canada (Attorney General)*, 2011 SCC 12 [*Withler*] at para. 39; *Meiorin, supra* note 4.
[6] In 2015-2016, the largest percentage of complaints made to the Tribunal (59%) were in the area of employment (s. 13) with complaints in the area of services following at 26%. BC Human

B. Need for breadth in interpretation of *Code*

9. While the *Code* provides a means of redress for specific complaints, it primarily achieves its objectives by setting standards of conduct and establishing norms that support progress towards substantive equality for everyone. The *Code* and its jurisprudence have an instructive and directive effect on society. In the context of work, every collective agreement in the province is bargained in the shadow of the *Code* and its jurisprudence,[7] every workplace policy must reflect the requirements of the *Code*, and every management decision that may touch on the personal characteristics of employees must be consistent with the *Code*.

10. We are arguably at a mid-point in working toward the substantive equality the *Code* was enacted to foster. Many of the core concepts of human rights law have been elucidated, and much of the application of the *Code* is now understood. Many forms of discrimination, including in employment, are less prevalent than they once were. But therein lies a danger: adjudicators must not lose sight of the extent to which the progress to date is reliant on an ongoing broad and robust application of the *Code*. Positive steps towards substantive equality have occurred because the *Code*, as it has been interpreted, has required them, and because consequences continue to follow failures to meet those requirements.

11. The effectiveness of the *Code* in continuing to work towards substantive equality in the workplace and elsewhere is dependent on it having the broadest possible application. This means that the language of the *Code* must be unrestrained by additional requirements or limitations. The task of this Court is to resist all but the most essential elements of analysis in order to keep the *Code* limber enough to respond to workers' real experiences as they arise in diverse types of workplaces. To hold otherwise risks stultifying the Code and limiting the realization of its objects.

12. The decision of the British Columbia Court of Appeal in this case introduced a new limitation: that only the actions of a person clothed with authority by the employer could amount

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Rights Tribunal, *Annual Report 2015-2016* (Vancouver: BCHRT, 2016) at 3 (online: http://www.bchrt.bc.ca/shareddocs/annual_reports/2015-2016.pdf].

[7] *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation (Parental Leave Grievance)*, [2017] BCCAAA No. 6, 2017 CanLII 5258 (BC Lab. Arb.) at para. 52.

to discrimination regarding employment under the *Code*. The *Code* does not call for this limitation. No need for this limitation was identified by the Court, and the Court did not explain how adoption of this limitation furthered the purposes of the *Code*.

C. Effect of limitation on remediation of discriminatory harassment

13. The Court of Appeal's finding that discrimination "regarding employment" requires an actor clothed with authority by the employer particularly threatens the effectiveness of the *Code* in addressing claims of discriminatory harassment in the workplace.

14. Harassment in the workplace is not defined or constrained by traditional lines of supervisory or economic authority. Workplaces are complex social, cultural environments which provide workers with potential benefits and costs across a very wide spectrum of human experience. A sense of dignity, self-worth and belonging in the workplace is dependent on one's experience of the *entire* workplace environment. Workplaces are not merely repositories for economic relationships, and do not only confer economic benefits to workers. To achieve substantive equality in the workplace, the *Code* must be interpreted in a manner that fully reflects the impact of the whole workplace on workers.

15. Everyone coming into a workplace is different. They are differently able, differently fluent in the language of the workplace, differently steeped in Canadian culture, differently educated, differently resilient, differently burdened by other responsibilities, and differently free of oppressive experiences to date. Individuals bearing attributes associated with historical disadvantage carry the weight of their experiences of disadvantage with them. Many individuals have intersecting characteristics protected by the *Code*. The risk of adverse treatment and exposure to discrimination has been recognized as profoundly greater for individuals with intersecting protected characteristics.[8] Diversity and perceptions of difference often lie at the heart of discriminatory harassment.

16. The effects of this diversity are not constrained by job titles or the positions individuals occupy in a workplace hierarchy. Recognizing only harassment that follows traditional lines of

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[8] *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 at paras. 463-465; *Withler*, *supra* note 5 at 63; *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at paras. 544-562.

authority does not recognize the effect of these differences on who gets harassed, and how harassment affects that person. The *Code* is directed at the effects of actions on the complainant.

17. Workplaces also have their own cultures and matrices of formal and informal power dynamics. For instance, in many workplaces, work remains highly gendered. Many fields of employment remain non-traditional workplaces for women; others remain non-traditional for men. Workers in certain types of work also tend to be characterized by race, immigration status, language or place of origin. Power dynamics can be at play in the presence and experience of harassment and must be understood in order to fully address discrimination in the form of harassment. In addition, where traditional hierarchies are reversed, harassment can be used as a tool to restore more traditional power dynamics.

18. The Court of Appeal's focus on control and economic dependency leaves unchecked discriminatory conduct that occurs where "gender, race and class positions imbue harassers with informal power, even when targets possess greater organizational authority than do their harassers."[9] Harassment on this basis is particularly acute for women in positions of formal power who hold authority over men. Research indicates that this form of harassment may be utilized or performed to "equalize" power differentials with women supervisors.[10]

19. Harassment and other forms of discrimination are expressions of power which may take many interpersonal forms and are not restricted to the exercise of economic power or workplace authority.[11] Arjun Aggarwal describes this complexity in relation to sexual harassment:

> Sexual harassment is a complex issue involving men and women, their perceptions and behaviour, and the social norms of the society. Sexual harassment is not confined to any one level, class or profession. It can happen to executives as well as factory workers. It occurs not only in the workplace and in the classroom, but even in parliamentary chambers and churches. Sexual harassment may be an expression of power or desire or

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[9] Heather McLaughlin, Christopher Uggen & Amy Blackstone, "Sexual Harassment, Workplace Authority, and the Paradox of Power," (2012) 77(4) *Am. Sociological Rev.* 625 at 626.
[10] Lindsey J. Chamberlain et al, "Sexual Harassment in Organizational Context" (2008) 35(3) *Work and Occupations* 262 at 284; Kevin Stainback, Thomas N. Ratliff & Vincent J. Roscigno, "The Context of Workplace Sex Discrimination: Sex Composition, Workplace Culture and Relative Power" (2011) 89(4) *Social Forces* 1165 at 1181.
[11] *Janzen v. Platy Enterprises Ltd*., [1989] 1 SCR 1252 at 1280, citing Arjun P. Aggarwal, *Sexual Harassment in the Workplace* (Toronto: Butterworths, 1987).

> both. Whether it is from supervisors, co-workers, or customers, sexual harassment is an attempt to assert power over another person.[12]

The experience of harassment and discrimination itself is inherently disempowering for the person experiencing that conduct, including as a bystander. This is true regardless of who carries out the harassment.

20. The Respondent's position is premised on a traditional, outdated understanding of the workplace as involving linear, hierarchical relationships between workers and their superiors. Modern workplaces encompass the intersection and co-existence of diverse groups of people, including workers on a site who may be employed by different employers, and people present for reasons other than their own employment, including clients, patients, customers and students. All of these people contribute to the environment experienced by workers at work and any of them may engage in harassing behaviour which will have an impact "regarding the complainant's employment". Dignity and self-esteem in the workplace are dependent on the actions of *everyone* in the environment, not simply on those with workplace authority over a worker in a traditional hierarchical arrangement. If the Tribunal can only address harassment in relation to traditional lines of authority, the law will fail to reflect the reality of work now and in the future, contrary to the principle that the law must evolve as society evolves.

D. Limitation imposed is contrary to existing law

21. The Court of Appeal held that, in order for conduct affecting a complainant to be considered discrimination "regarding employment," authority granted by the complainant's employer must be present, and therefore economic dependence and control must exist between the complainant and the harasser. This represents an extraordinary narrowing of the *Code* and is wholly contrary to established and longstanding interpretations of human rights legislation to date, particularly by this Court in *Robichaud*.[13]

22. In *Robichaud* this Court held that under human rights law, employers are responsible for all acts of their employees in the course of employment. An employer's liability was not limited to only those circumstances where the respondent is clothed with authority over the complainant. If the Court of Appeal's new limitation were to be adopted by this Court, it would prevent future

[12] *Ibid*.
[13] *Robichaud, supra* note 2.

adjudicators from finding discrimination in cases where human rights codes were previously found to apply, to the great detriment of progress towards the objective of fostering substantive equality for which human rights codes have been enacted.

23. Prior to *Robichaud*, supervisory authority was thought to be required for liability under human rights legislation. See, for example, *Shaffer v. Canada (Treasury Board)*,[14] where racial discrimination was not affixed to the employer because the offending employee did not occupy a supervisory role. The Court of Appeal's decision here is an attempt to turn back the clock 30 years to an understanding of human rights law operating before *Robichaud.*

24. The Court of Appeal's requirement that a relationship of economic dependence and control be present in order for conduct affecting a complainant to be considered discriminatory equally requires a very narrow reading of s. 44(2) of the *Code*, which provides that acts done by employees of a company are deemed to be acts done by that company.

25. In *Thessaloniki Holdings Ltd et al v. Human Rights Commission (Sask.),*[15] the court sustained a decision of the Saskatchewan Board of Inquiry holding an employer liable for the sexual harassment of a female server by a male cook who had no supervisory authority over her. At paragraph 8, the court observed:

> Clearly, social policies underlying the Saskatchewan *Code* will be frustrated if s. 16(1) is interpreted to exclude sexual discrimination by fellow workers who have no supervisory role. Sexual harassment in the workplace will continue unless the employer is held accountable.

26. In *Nixon v. Greensides*,[16] the Saskatchewan Board of Inquiry held an employer liable for the actions of a customer and business associate constituting sexual harassment against the complainant, an employee. At paragraph 21, the Board observed:

> There can be no doubt that sexual harassment in the workplace is destructive, degrading and humiliating for the victims of harassment. This case is also a prime example of the

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[14] *Shaffer v. Canada (Treasury Board)*, 1984 CanLII 5 (CHRT).
[15] *Thessaloniki Holdings Ltd v. Saskatchewan (Human Rights Commission)*, [1991] 6 WWR 590, 95 Sask R 286 (SKQB). See also, *Smith v. Zenith Security*, 2002 BHRCT 25; *Burton v. Chalifour Bros. Construction Ltd*., [1994] BCCHRD No. 41, 21 CHHR D/501 (QL).
[16] *Nixon v. Greensides*, 1992 CanLII 8184 (SK Bd. Inq.) [*Nixon*], aff'd *Greensides v. Saskatchewan (Human Rights Commission)*, (1993) 111 Sask R, 1993 CanLII 8953 (SKQB).

> negative [e]ffects the harassment can have on other employees, and the adverse impact upon the employer's business in general. . . The remedial objectives of the Act would not be met if a restrictive or narrow interpretation were put upon the Act or put upon an employer's obligation to provide a healthy workplace free from sexual harassment for its employees.

The Board held that a customer's harassment of an employee fell into the same category as harassment by her co-workers.[17] The Board was cognizant of the constellation of effects of harassment on both the victim and others in her workplace through the creation of an "intimidating, hostile or offensive working environment."[18]

27. *Robichaud* and other cases remedying discriminatory harassment where harassers are not those in supervisory positions over complainants properly reflect the complexity of power by recognizing that workplace authority is only one basis for harassing conduct.

28. In *Guzman v. Dr. and Mrs. T*,[19] the Tribunal's predecessor British Columbia Council of Human Rights (the "Council"), addressed the case of a live-in caregiver who had been sexually harassed by the 13-year old son of her employers while her employers were away. The complainant testified that she was frightened and extremely embarrassed by the conduct which carried on for months and ultimately required her to resign. The Council found that the complainant's emotional and physical vulnerability was profound, and that she suffered tremendous emotional injury as a consequence of the harassment. The Council held the employers responsible for the conduct which had occurred. It is unlikely that such a case would now meet the Court of Appeal's requirement that the complainant must be economically dependent on the offending person in order for the *Code* to apply.

29. In *Cajee v. St. Leonard's Youth and Family Services Society*,[20] the Council held the respondent Society liable for sexual harassment. The Society contracted with the complainant to provide foster care services in her home. The complainant was harassed and sexually assaulted in her home by a child care worker employed by the Society to assist her. The Council found that considering the criteria of control, remuneration and benefit, the relationship between the

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[17] *Nixon, supra* note 16 at para. 22.
[18] *Ibid.*
[19] *Guzman v. Dr. and Mrs. T.*, [1997] BCCHRD No. 1; 27 CHRR D/349 (BC Coun. HR) (QL).
[20] *Cajee v. St. Leonard's Youth and Family Services Society*, [1997] BCCHRD No. 2; 28 CHRR D/284 (BC Coun. HR) (QL)

complainant and the Society was one of employment. The Council further found that the childcare worker's conduct towards the complainant, which included conduct amounting to sexual assault, was sexual harassment for which the respondent was liable. Were the Court of Appeal's approach to be accepted by this Court, this case would no longer result in a finding of discrimination regarding employment.

30. In *Garneau v. Buy-Rite Foods and others,*[21] the Tribunal held the respondents, including three individuals, liable for harassment against the complainant on the basis of disability and sexual orientation. The complainant was himself a supervisor. He was subjected to bullying, harassment, assault, and discrimination by the sons of the store's owner. His self-esteem was affected, he testified to feeling depressed and suicidal, and he found the constant name-calling, including in front of customers and co-workers, hurtful and offensive. The Tribunal held that, "these slurs, exacerbated by the physical assaults and threats, had a profound impact; it made him powerless and, as he testified, to feel less than human."[22] The Tribunal found that the treatment affected the complainant "profoundly and adversely."[23] These circumstances called out for attention and remediation under the *Code*. Nonetheless, this case would have faced a substantial additional hurdle, and perhaps have been unsuccessful, if the complainant had had to prove that he was economically dependent on the sons who were harassing him or that the sons were clothed with authority over him.

E. Definition of discrimination regarding employment

31. The objective of substantive equality and the requirement that the *Code* be given a large and liberal interpretation as quasi-constitutional legislation, require that the *Code* be interpreted in a manner that gives full weight to the complex nature of workplaces and experiences of working, and the many ways substantive equality in the workplace can be denied or undermined by harassment.

32. In order to be able to respond to the wide variety of forces on a person in their employment, the *Code* protections against discrimination "regarding employment" must be understood as conduct impacting the complainant's experience of work or the work environment.

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[21] *Garneau v. Buy-Rite Foods and others*, 2015 BCHRT 77.
[22] *Ibid*. at para. 33.
[23] *Ibid*. at para. 34.

By contrast, the approach taken by the Court of Appeal reflects a narrow and impoverished understanding of the ways in which one's experience of work can be affected by others in the workplace, an understanding that has not been the law for 30 years.

33. If adopted by this Court, the Court of Appeal's approach would leave the experience of diverse workers in the workplace beyond the jurisdiction of the Tribunal to rectify, fundamentally denying them the promise of substantial equality in the *Code*. Moreover, the implications of this limitation may extend beyond the workplace.[24] The *Code's* application must not be narrowed in the manner suggested by the Court of Appeal, which is unnecessary, serves no purpose under the *Code*, and is fundamentally at odds with the objectives of the *Code*.

PART IV – SUBMISSIONS ON COSTS

34. West Coast LEAF does not seek costs and asks that none be awarded against it.

PART V – NATURE OF THE ORDER REQUESTED

35. West Coast LEAF does not request any orders.

All of which is respectfully submitted this 17th day of March, 2017.

SIGNED BY:

CLEA F. PARFITT and RAJWANT MANGAT

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West Coast Women's Legal Education and Action Fund

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[24] In *Purbah-Barker v. Collingwood Village Co-op*, 2016 BCHRT 95 at para. 39, the tribunal member raises the question whether other areas of discrimination in the *Code* must also be defined in terms of the exercise of control or authority after the Court of Appeal judgment in this appeal.

PART VI – TABLE OF AUTHORITIES

Authority Cited	**Paragraph(s)**
CASELAW	
British Columbia Public School Employers' Association v. British Columbia Teachers' Federation (Parental Leave Grievance), [2017] BCCAAA No. 6, 2017 CanLII 5258 (BC Lab. Arb.)	9
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