The Claimant's Unwelcome Burden: Rethinking *Janzen* in Sexual Harassment Adjudication

Kimia Shiri*

Workplace sexual harassment remains a pervasive issue at institutional, national, and global levels. Although the Supreme Court of Canada's decision in Janzen v Platy Enterprises Ltd, [1989] 1 SCR 1252, recognized sexual harassment as a form of sex discrimination, the legal framework has not kept pace with evolving social norms. This paper critiques the Janzen test and argues against an objective assessment of the "unwelcomeness element" in the adjudication of sexual harassment complaints before the British Columbia Human Rights Tribunal. While Canadian sexual assault law has undergone significant reform to eliminate reliance on stereotypes, myths, and improper inferences, comparable developments have not occurred in the human rights context for sexual harassment law. The unwelcomeness element of Janzen continues to operate in a manner that risks overlooking several, important intersectional nuances. The law must undergo significant change to address the disproportionate burden placed on claimants, as well as these nuances. These legal factors influence both liability and potential remedies.

* Kimia Shiri is a graduate of the Thompson Rivers University Faculty of Law and was admitted to the Bars of British Columbia and Alberta in 2025. After articling in British Columbia, she relocated to Alberta and now practises as a lawyer in Edmonton.

I. Introduction

In the wake of the 2017 #MeToo protests, the public found renewed momentum in condemning perpetrators of sexual violence and harassment in the workplace. In early 2020, this momentum intensified following the highly publicized conviction of Hollywood film producer Harvey Weinstein on charges of sexual assault. The #MeToo movement drew public attention to the prevalence of sexual harassment in the workplace and shined a light on the deficiencies of sexual harassment laws internationally. The intersection of historical and social factors that exacerbate sexual harassment and other forms of discrimination are essential considerations for the development of Canadian human rights jurisprudence.

It has now been 36 years since the Supreme Court of Canada introduced the legal test for sexual harassment in *Janzen v Platy Enterprises Ltd.*,[1] 20 years since the #MeToo movement first began, and 9 years since it became a global social media movement.[2] The *Janzen* test was foundational in establishing sexual harassment as a form of sex discrimination and it meaningfully advanced Canadian human rights law at the time the decision was rendered. However, this paper critiques the *Janzen* test on the basis that it imposes a disproportionate evidentiary burden on claimants, fails to engage with the claimant's subjective experience of consent and harm, and fails to accommodate claimants who have multiple grounds of disadvantage. Although this paper analyzes *Janzen's* shortcomings through tribunal jurisprudence in British Columbia, the critique extends to *Janzen's* operation across Canadian human rights jurisprudence and is intended to inform jurisprudential reform nationally.

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1 *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252 [*Janzen*].

2 Canadian Women's Foundation, "The Facts about the #MeToo Movement in Canada"(November 2021) https://canadianwomen.org/ the-facts/the-metoo-movement-in-canada/.

II. Adjudication of Sexual Harassment Claims in British Columbia

In *Janzen*, the Supreme Court of Canada defined sexual harassment in the workplace as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences" for the claimants.[3] As the SCC further held, sexual harassment constitutes a form of sex discrimination and as a result, it is prohibited under the human rights legislation of every Canadian jurisdiction.[4]

Workplace sexual harassment complaints are often dealt with through human rights legislation and adjudicated by a specialized tribunal.[5] In British Columbia, workplace sexual harassment complaints are dealt with through the *Human Rights Code*[6] and adjudicated by the British Columbia Human Rights Tribunal (the "**BCHRT**"). The *Canadian Human Rights Act*[7] is the governing legislation for federal employees and prohibits sexual harassment as a form of sex discrimination. The *Canada Labour Code*[8] goes further by imposing a positive obligation on employers to undertake reasonable efforts to ensure that no employee is subjected to sexual harassment through their organizational policies and practices. The *CHRA* and *CLC* statutes apply to industries falling within federal jurisdiction under section 91 of the

3 *Janzen* at pp 1253, 1284.

4 *Janzen* at pp 1253, 1284.

5 B. Hastie, "Workplace Sexual Harassment and the "Unwelcome" Requirement: An Analysis of BC Human Rights Tribunal Decisions from 2010 to 2016" (2020) 32:1 *Canadian Journal of Women & the Law* at p 62 [Hastie 2020].

6 *Human Rights Code*, RSBC 1996, c 210 [*Code*]

7 *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

8 *Canada Labour Code*, RSC 1985, c L-2 at ss 122.1, 124 [*CLC*], supported by the *Workplace Harassment and Violence Prevention Regulations*, SOR/2020-130 at s 10(1).

Constitution Act.[9] The *Code* governs all workplaces in British Columbia, aside from those arising in federally regulated workplaces.

The BCHRT is the specialized administrative body hearing sexual harassment claims under section 13 of the *Code*. Section 13 prohibits discrimination in employment based on protected grounds including, but not limited to, race, ancestry, place of origin, sex, and sexual orientation.[10] While this provision does not itself codify the prohibition on sexual harassment, it has the effect of prohibiting sexual harassment by virtue of the *Janzen* decision. Of further note, in *Bombardier,* the SCC established that a claimant is not required to prove that a respondent intended to discriminate, and discriminatory intent is not a required element of a discrimination claim. [11] The claimant need only establish a nexus between the protected characteristic and the adverse treatment. [12]

III. A Critical Analysis of the *Janzen* Framework

The *Janzen* test is the authoritative legal standard for adjudicating sexual harassment complaints in Canada. A claimant must show that the sexual conduct complained of was "unwelcome" (the "unwelcomeness element").[13] BC tribunal jurisprudence has elaborated on this element by asking whether, considering all the circumstances… "[a reasonable person would have known that the conduct in question was not welcomed by the claimant.]"[14] The unwelcomeness element imports an objective standard that can discount the

9 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

10 *Code* at s 13.

11 *Quebec (Commission des droits de la personne et des droits de la jenuesse) v Bombardier Inc.,* 2015 SCC 39 at para 32 [*Bombardier*].

12 *Bombardier* at para 49.

13 *Janzen* at p 1284.

14 *Mahmoodi v UBC and Dutton*, 1999 BCHRT 56 at para 136 [*Mahmoodi*].

claimant's subjective experience and appeal to stereotypes-laden assumptions about what conduct is deemed inappropriate or unwanted. The test for sexual harassment must guard against an unduly narrow focus on the claimant's outward behavior or apparent compliance, as doing so risks shifting the evidentiary burden.

Consider, for instance, a female immigrant worker from Ghana who is employed as a server and is subjected to repeated inappropriate comments and deliberate physical proximity by her supervisor. She does not object or report the conduct. As a newcomer, she is adapting to the cultural norms and is scared to jeopardize her employment as well as her immigration and financial stability. As a result, she continues working without outward resistance despite subjectively experiencing the conduct as humiliating. In this example, an adjudicative focus on the absence of active resistance or apparent acquiescence to the supervisor's conduct risks mischaracterizing the encounter as welcomed. However, intersecting vulnerabilities including immigration status, cultural norms, and an inherent power imbalance with the supervisor may constrain the claimant's ability to report or actively resist. It has long been established in the jurisprudence and legal scholarship that a claimant's "silence or passivity" in respect of sexually charged conduct does not automatically translate to acceptance, and that drawing that inference is a mistake of law.[15] With the current test in *Janzen,* there is a risk of placing a disproportionate burden on claimants to affirmatively demonstrate that sexually charged conduct was unwelcome, rather than placing the onus on the alleged harasser to establish that it was not.[16]

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15 *R v Ewanchuk*, [1999] 1 SCR 330 at para 51 [*Ewanchuk* SCC]; Hastie 2020 at p 84.

16 Hastie 2020 at p 68.

A. The Myopic Reasonable Person Standard

Who is the reasonable person and who defines the character of the reasonable person? The answer to this question is the subject of legal and ethical debate among legal scholars, as the reasonable person is characterized based on the norms and values held by society, and it is therefore an ever-changing social construct. The reasonable person construct applies in many diverse areas of the law, from tort law to human rights and criminal law. It is a fundamental objective legal standard which has the effect of attracting liability where a person's behavior departs from that of a prudent person and causes harm to another.[17] Cultural and social change are the main drivers of the dominant norms which ultimately shape the concept of the reasonable person. With the passage of time, the objective legal standard has become inherently troubling for litigants who belong to historically disadvantaged groups, as the objective standard reinforces systemic inequality by appealing to the shared characteristics of people generally rather than individual qualities and the lived experiences of individuals.[18]

In Canada, the reasonable person refers to a hypothetical person with "ordinary intelligence and prudence," who forms the objective legal standard used to determine whether the parties' conduct was reasonable in the circumstances. [19] As stated by law professor Mayo Moran, the concept of

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17 *Donoghue v Stevenson*, [1932] AC 562 [*Donoghue*]; *R. v. Hundal*, [1993] 1 SCR 867 [*Hundal*]:

> In tort law the reasonable person standard colors the entire legal analysis of harm and the standard of care expected of a person who has a duty of care, is that of the ordinary and prudent person; In criminal law, the reasonable person may be imported into the assessment of culpability for any offence where the standard of care involves objectively dangerous conduct.

18 M. Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford, 2003) at p 195 [Moran].

19 *Vaughn v Menlove*, (1837) 132 E.R. 490; L. Klar, *Tort Law,* 4th ed (Carswell: 2008) at 333-344.

reasonableness draws heavily on social norms, and "troubling or discriminatory social understandings of particular groups thereby seep into determinations of reasonableness under the objective standard." [20] Accordingly, the concept of the objective reasonable person standard is based on shared rather than individual qualities and may therefore fail to capture the unique lived experiences of individuals and the distinctive gender, political, social, racial, and ethnic identity of claimants.[21]

In *Janzen*, the Court did not explicitly engage with the reasonable person standard, but the objective reasonable person standard became embedded within the test for sexual harassment by virtue of the BCHRT decision in *Mahmoodi v University of British Columbia and Dutton*.[22] The Tribunal in *Mahmoodi* framed the inquiry as a hybrid subjective-objective inquiry, where the objective prong of the test asked whether a reasonable person in the respondent's position knew or ought to have known the conduct was unwelcome to the claimant. The Tribunal's analysis was heavily contextual in the circumstances of *Mahmoodi's* case, as they assessed the power differential between the parties as professor and student, recognized that the claimant's refugee status rendered the claimant's vulnerability more acute, and recognized that as a newcomer the claimant was socially isolated. [23] In this respect, the *Mahmoodi* decision addressed the unique vulnerability of individuals with intersecting grounds of disadvantage. In practice, however, the door *Mahmoodi* opened through its objective assessment of the unwelcomeness element of *Janzen* has operated to the disadvantage of claimants. As law professor Bethany Hastie stated in her paper, this conceptualization of a reasonable person standard has essentially provided

20 Moran at p 164.

21 Moran at p 32.

22 *Mahmoodi*.

23 *Mahmoodi* at paras 83, 141, 239.

"an entry point for gender-based myths and stereotypes to influence the legal analysis."[24]

What began as an inquiry into what a respondent ought to have known from the surrounding circumstances has, in subsequent cases such as *Han v Gwak and Nammi Immigration*[25] and *Kang v Hill*,[26] slid into an inquiry into whether the claimant behaved as a reasonable victim would have. If the claimant did not object, leave, protest, or report promptly, the inference that followed in the jurisprudence was that a reasonable person in the respondent's position could not have known the conduct was unwelcome.[27] The *Kang* decision shows how the Tribunal shifted the evidentiary burden for establishing sexual harassment onto the claimant by requiring them to demonstrate objection to the impugned conduct. In doing so, the decision endorses the stereotype that a claimant should outwardly protest the impugned conduct, and failure to do so leads to the inference that a respondent could not have known the conduct was unwelcome.[28] As discussed below, this risk is particularly acute for claimants whose intersecting identities shape their perception of the impugned conduct and the harm resulting from it.

B. Stereotypes, Myths, and Credibility in Sexual Harassment Adjudication

The objective reasonable person standard, based on the "normal" person of "ordinary" intelligence, is largely informed by dominant social norms.[29]

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24 B. Hastie, "An Unwelcome Burden: Sexual Harassment, Consent and Legal Complaints." (2021) 58:2 *Osgoode Hall Law Journal* at p 427 [Hastie 2021].

25 *Han v Gwak and Nammi Immigration*, 2009 BCHRT 17 [*Han*].

26 *Kang v Hill*, 2011 BCHRT 154 [*Kang*].

27 *Kang* at paras 46-58.

28 *Kang* at paras 50-51, 54, 57.

29 The use of dominant social norms is used interchangeably with the term "customary norms", both referring to what is considered acceptable or normal

Often, social norms align with legal norms[30] to ensure that any person seeking relief under the law is treated with dignity in the adjudicative process.[31] However, this is not always the case. Sexual assault and harassment are areas of the law where competing beliefs about rape, prior sexual histories, victim blaming, and consent have paved the way for systemic and gender-based discrimination in the complaint process. Historically, social and legal norms treated a claimant's intoxication or manner of dress as determinative factors in sexual assault cases, perpetuating harmful stereotypes that rape shield laws in Canada were ultimately enacted to dismantle.[32]

Looking beyond Canadian jurisdictions to California, the *People v Brock Turner*[33] case illustrates how myths and stereotypes introduced through defence cross-examination can migrate into the adjudicator's legal reasoning and conclusion. In the widely publicized 2016 California case of *Turner*, the victim's alcohol consumption became central to the defense' argument, effectively placing the victim's judgment and credibility on trial rather than the accused's.[34] What became particularly concerning was the Judge's

in a particular social context (for instance, a dominant or customary norm 50 years ago may have been that women who drink are partially at fault for any sexual assault they experience. However, in contemporary society today, this would be a subordinate norm and would be a prohibited inference to make in both social and legal settings).

30 Legal norms refer to practices that have developed in the judicial process based on customary norms in society (for instance, the development of rape shield laws is a legal norm developed in response to a societal norm of protecting victims of assault).

31 Moran at p 15.

32 *Criminal Code*, RSC 1985, c C-46 at ss 273.1, 273.2, 276–276.5, and 277 [*Criminal Code*].

33 *People v Turner*, No B1577162 (Sup Crt Cal, Santa Clara County, 2 June 2016).

34 "Chanel Miller: The Full '60 Minutes' Report on the Author and Sexual Assault Survivor" (22 September 2019), online (video): CBS News

decision at sentencing, which expressly treated the accused's intoxication as a mitigating factor, reasoning that "there is less moral culpability attached to the defendant who is legally intoxicated" (Transcript, p. 1196). The intoxication evidence was ultimately weaponized against the victim throughout proceedings. First, it was employed to undermine the claimant's credibility as a witness, and subsequently to reduce the accused's culpability for the assault. This reasoning led to a 55,000-signature petition calling for change, and shortly thereafter, the State of California enacted mandatory minimum sentences for sexual assault and closed the door on the loophole that allowed lenient sentences where the claimant was too intoxicated to physically resist.[35]

When the law fails to keep pace with prevailing social norms, public confidence in the justice system is undermined and survivors are left re-traumatized by the adjudicative process.[36] Humans are innately biased, and the imposition of an objective legal standard can still manifest into subjectively held beliefs about what is reasonable and normal in a particular situation. In *Saskatchewan Human Rights Commission v Whatcott*,[37] the SCC acknowledged the inevitable subjectivity associated with any objective legal standard, where they stated, "as long as human beings act in the role of judge

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https://www.cbsnews.com/video/chanel-miller-the-full-60-minutes-report-on-the-know-my-name-author-and-brock-turner-sexual-assault-survivor-2019-09-22/.

35 Harvard Law Review, "Recent Election" (2019) 132:4 *Harvard Law Review* at p 1371; T. Salinger, "Recall Petition Started Against California Judge Who Sentenced Former Stanford Swimmer to Six Months for Rape" *New York Daily News* (7 June 2016) https://www.nydailynews.com/news/crime/recall-petition-started-judge-stanford-rape-case-article-1.2663260.

36 See C. Miller, *Know My Name: A Memoir* (Viking, 2019) – a memoir written by the complainant in the *People v Turner* case and her harrowing experience of seeking justice in the US legal system.

37 *Saskatchewan Human Rights Commission v Whatcott*, 2013 SCC 11 [*Whatcott*].

or arbitrator, there will be a subjective element in the application of any standard or test to a given fact situation."[38] While public confidence in the justice system is premised on impartial decision making, social norms are constantly evolving and how they shape the law will necessarily reflect the subjective values and experiences of those applying it, as demonstrated by the *Turner* case.

The legal standard of the reasonable person can be particularly troubling where there is no settled understanding of the social norm. Moran suggests that "where there is a deeper tension between the legal and the customary norm," we must revisit the implications of the reasonable person standard and its connection to the "ordinary" person.[39] This characterization of a "deep tension" between legal and social norms has been a hallmark of sexual assault cases in Canada historically, where troubling misconceptions about rape and consent pervaded the legal analysis.[40] The court's discretion to interpret sexual assault complaints through myths and stereotypes enabled discriminatory inferences to take hold as a widespread institutional problem.[41] Even after the introduction of rape shield legislation, decision-makers still continued to employ flawed reasoning in their analysis of sexual assault claims. In *R v Wagar*, the Alberta Court of Appeal overturned a decision of the lower court on the basis that there were doubts as to the trial judge's understanding of sexual assault, and in particular, "the meaning of consent and restrictions on evidence of the complainant's sexual activity imposed by section 276 of the *Criminal Code*."[42] Further, the ABCA was persuaded by the Crown that the trial judge's decision-making was

38 *Whatcott* at para 33.

39 Moran at p 15.

40 Moran at p 15.

41 Moran at p 15.

42 *R v Wagar*, 2015 ABCA 327 at para 4 [*Wagar*].

influenced by sexual stereotypes and stereotypical myths that have "long been discredited."[43]

Several myths and stereotypes have historically pervaded the legal analysis of sexual assault in Canadian criminal law, but they now constitute prohibited lines of questioning and reasoning, including:

- A claimant's sexual history impacts the likelihood that they consented at the time of the alleged assault.[44]
- A woman who dresses provocatively is "asking for it."[45]
- A lack of protest equals consent.[46]
- A lack of reporting or delayed reporting means it was not assault.[47]

Historically, in sexual assault law, the courts' inquiry into consent often measured the claimant's behavior against that of a "reasonable" victim. The evidentiary burden would shift onto the claimant to justify what they were wearing, how much they were drinking, and their overall behaviour in the interaction. This shift permitted judicial reliance on myths and stereotypes in the adjudication of sexual violence complaints. In *R v. Ewanchuk*, 1998 ABCA 52 (overturned on appeal), McClung JA effectively reversed the onus of proof onto the claimant to prove an "obvious lack of consent," rather than placing the burden on the accused to establish that consent had been

43 *Wagar* at para 4.

44 Section 276(1) of the *Criminal Code* illustrates that a defendant in a sexual assault case cannot introduce evidence of the claimant's history of sexual activity; see *R v Darrach*, 2000 SCC 46 at paras 1-3.

45 *Ewanchuk* SCC at para 51.

46 *Ewanchuk* SCC at para 103.

47 *R v W(R)*, [1992] 2 SCR 122 at p 136.

affirmatively given. [48] In the ABCA decision, the analysis displaced the claimant's subjective experience and employed an internally held belief about how a reasonable victim would behave. The SCC overturned the decision on appeal, confirming that consent is a "subjective inquiry" into the "claimant's state of mind" at the time of the sexual activity in question.[49]

Since *Janzen* emerged 36 years ago, there has been a meaningful evolution in both legal and social understandings of consent, sexual assault, sexual harassment, and prohibited lines of questioning during the cross-examination of claimants. The ABCA decision in *Ewanchuk* which minimised non-consensual sexual contact as "hormonal rather than criminal," would be widely denounced in contemporary Canadian society.[50] Rape myths and gender stereotypes that once infiltrated legal reasoning are now statutorily prohibited in the adjudication of sexual assault claims under the *Criminal Code,*[51] and would likely be appealed if a decision-maker were to permit evidence and reasoning that led to prohibited adverse inferences about the claimant. While the BCHRT has rejected stereotype-based reasoning in recent years,[52] the unwelcomeness element in *Janzen* inevitably allows for scrutiny of a claimant's conduct.

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48 *R v Ewanchuk*, 1998 ABCA 52 at paras 18, 21 [*Ewanchuk* ABCA] (implying that the claimant ought to have employed physical resistance as evidence of non-consent).

49 *Ewanchuk* SCC at para 26.

50 *Ewanchuk* ABCA at para 21.

51 *Criminal Code* at s 276.

52 See *Basic v Esquimalt Denture Clinic and another*, 2020 BCHRT 138 at para 104 [*Basic*].

IV. Disproportionate Burden on Claimants of Sexual Harassment

As discussed by law professor Bethany Hastie of UBC, the unwelcomeness element in *Janzen* contains a significant limitation by inviting increased scrutiny of a claimant's conduct and credibility.[53] The *Janzen* test risks shifting the analytical focus of the harassment to the claimant, an approach that modern criminal law has largely moved away from. While tribunals recognize that the *Janzen* analysis is heavily contextual, this contextual flexibility cuts both ways and provides the adjudicating body with a high degree of interpretive flexibility in how sexual harassment is assessed.

The unwelcomeness element effectively requires victims of unwanted sexual conduct to account for their own behavioral response to that conduct. In Canadian criminal law, the courts have evolved past traditional lines of questioning that perpetuate gender-based stereotypes about consent and rape. An adjudicator or defence may once have sought to contextualize a claimant's behaviour in relation to sexual assault allegations by questioning them on what they were wearing, how much they had to drink, or whether they really said "no," but this is now a prohibited line of questioning and reasoning in sexual assault proceedings across Canada.[54] Further, lack of reporting or delayed reporting for sexual violence in Canada is connected to the "fear of the criminal justice process," which can be traced to the historical and poor treatment of sexual assault victims in criminal courtrooms.[55] The lesson from the criminal law context is that when adjudicators impose disproportionate burdens on claimants or draw adverse inferences from their

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53 Hastie 2021.

54 L. Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials," (2019) 44:2 *Queen's Law Journal* at p 326.

55 E. Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill University Press, 2018) at p 3 [Craig].

conduct in respect of a sexual harassment claim, they risk reproducing the very barriers that the *Janzen* test is designed to address.

While Canadian criminal law has dispensed with prohibited lines of reasoning premised on troubling understandings of autonomy, sex, and consent,[56] the unwelcomeness element in *Janzen* has not been reformed in a similar way to ensure the protection of victims. The burden on claimants to show that the conduct complained of was unwelcome in an "objective" sense trigger outdated beliefs about consent and undermines the claimant's subjective belief about a sexually objectionable environment. The test systematically disadvantages those whose indifference reflects structural circumstances rather than genuine acceptance of the impugned conduct.

Tribunal jurisprudence following *Janzen* has not settled either the analytical framework for assessing unwelcomeness or the question of who bears the evidentiary burden of proving the unwelcomeness element. As the case-law review below demonstrates, human rights adjudication lacks the same statutory safeguards that criminal law has developed to guard against stereotype-laden assumptions and reasoning in sexual harassment cases.

A. *Kang* and *Han*: Adverse Inferences and the Persistence of Stereotype-Based Reasoning

In *Han*, the BCHRT found the respondent had made sexual comments towards the claimant, but also found the claimant was “a person with strong opinions “and “entirely capable of making her thoughts and feelings known.”[57] The Tribunal found that based on her character, she would have spoken to the alleged harasser had the comments made her uncomfortable.

56 Craig at p 167.

57 *Han* at para 35.

In effect, the Tribunal's perception of the claimant as an assertive individual led to the flawed inference that her silence implied consent.[58]

Similarly, in *Kang*, a claimant alleged sexual harassment under section 13 of the *Code* against her supervisor when he discussed intimate topics at work and confessed his romantic feelings for her. [59] The Tribunal concluded that the claimant did not establish, on a balance of probabilities, that the respondent's actions or words were unwelcome or that they had an adverse impact on employment. The tribunal member stated that the claimant had asked "highly personal questions" about the respondent's marriage early in the employment relationship which indicated to the respondent that she was not "averse to discussing such intimate matters in the workplace."[60] The characterization of the complaint demonstrates misconceptions about consent and its impact on the legal determination of "unwelcomeness." To suggest that consent at an earlier point in time translates to consent at later point in time is one of the flawed inferences that has long been abandoned in criminal law.

The Tribunal's portrayal of consent in *Kang* and *Han* is indicative of how the analysis of the unwelcomeness element and consent can perpetuate stereotypes leading to flawed inferences in legal analysis. The culture of consent in Canada has evolved, such that a claimant who does not protest sexual advances is no longer assumed to have automatically consented.[61] To place the onus on the claimant to demonstrate a lack of consent or to justify their lack of protest in human rights proceedings, is an affront to the dignity of the claimant.

58 *Han* at paras 32 and 35.

59 *Kang* at para 1.

60 *Kang* at para 50.

61 Craig at p 3.

B. *Deep Creek, Byelkova* and *Employee*: Recognizing the Disproportionate Burden

Several recent decisions at BCHRT have recognized the disproportionate burden on claimants to prove the unwelcomeness element in *Janzen*. In the *Employee v The University and another (No. 2),* the BCHRT stated "it has been thirty years since *Janzen* was decided, and it may be time to revisit whether this requirement unfairly places the burden of establishing a lack of consent on a claimant."[62] The tribunal member went on to reject three gender-based myths and stereotypes raised by the respondent as an argument to suggest the conduct complained of was not "unwelcome." They found that 1) lack of protest; 2) participation in prior behaviour; and 3) delay in reporting, are myths and stereotypes which will not factor in the analysis of the "unwelcome" element.[63] The *Employee* decision engaged with the flawed unwelcomeness element in *Janzen*, but the tribunal did not undertake to explore how the test can be reshaped in light of changing dominant and legal norms.

Another noteworthy decision made by the BCHRT in recent years is *Ms. K v. Deep Creek Store and another.*[64] In *Deep Creek*, the Tribunal declined to follow tribunal precedent from *Mahmoodi* in guiding the application of the unwelcomeness element in *Janzen*.[65] Instead, the Tribunal proposed a modified test where a claimant still needed to show the unwelcome nature of the impugned conduct but did not have to establish it in an objective sense. The tribunal member stated they are bound by the decisions in *Dutton v*

62 *Employee v The University and another (No. 2)*, 2020 BCHRT 12 at para 175 [*Employee*].

63 *Employee* at paras 178-180.

64 *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158 [*Deep Creek*].

65 *Deep Creek* at para 78.

BCHRT[66] and *Bartman v Twohey et al*[67] for the principle that sexual harassment necessarily requires the decision maker to find the conduct was unwelcome.[68] However, they also noted that there is no appellate authority that requires them to follow *Mahmoodi* and establish that a *reasonable person* would know the conduct was not welcomed. On that point, the Tribunal in *Deep Creek* determined that where a claimant establishes an adverse impact standard from the impugned conduct, it necessarily follows that the conduct was unwelcome. The tribunal member summarized the test as follows:

> In summary, to find sexual harassment contrary to the *Code*, the Tribunal must determine that the conduct is unwelcome or unwanted. The burden on the complainant is to prove that they were adversely impacted by the sexualized conduct. If they do so, it is implicit in that finding that the conduct is unwelcome. It is open to a respondent to challenge an alleged adverse impact, so long as they do not rely on gender-based stereotypes and myths. [69]

Following the lead in *Deep Creek*, the Tribunal in *Byelkova v Fraser Health Authority and another (No. 2)* adopted similar reasoning, where they determined a claimant must show a nexus between the alleged sexual harassment and the adverse effect in employment. [70] Recent tribunal decisions reflect an evolution in how consent and unwelcomeness are understood, but that evolution is fragile without legal reform. There is no statutory framework to prohibit inferences rooted in stereotypes within BC tribunal proceedings, and no appellate authority displacing the objective

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66 *Dutton v BCHRT*, 2001 BCSC 1256 [*Dutton*].

67 *Bartman v Twohey et al*, 2004 BCSC 1211 [*Bartman*].

68 *Deep Creek* at para 89.

69 *Deep Creek* at para 93.

70 *Byelkova v Fraser Health Authority and another (No. 2)*, 2021 BCHRT 159 at para 119 [*Byelkova*].

unwelcomeness standard. In *Basic*, a 2020 tribunal decision, the respondent led evidence that the claimant wore "provocative attire," "engaged in sexual banter in the workplace," and performed "inappropriate internet searches."[71] While the tribunal rejected this evidence and determined it was rooted in stereotypes and myths, *Basic* illustrates how stereotypes continue to migrate into proceedings as late as 2020, despite a shift in legal and customary norms.

While *Deep Creek* demonstrates a meaningful step towards reducing the evidentiary burden on claimants, the decision is not a binding precedent on other tribunal panels. Nonetheless, the BCHRT should not await legislative or appellate intervention to shift the legal analysis of sexual harassment claims in the human rights context. The interpretive flexibility required to re-orient the unwelcomeness element currently exists within the *Janzen* test itself, as shown in *Deep Creek*. The reasonable person must be properly contextualized to consider how a person in the claimant's position would have perceived the conduct, rather than predominantly focusing on how the claimant outwardly responded. Returning to the earlier scenario of the Ghanian female who was a recent immigrant worker, the analysis should ask how a person in her position would experience the conduct. The factors to be considered include her economic dependence on the job, her responsibility to support her family, the power imbalance created by a long-tenured male supervisor in a position of authority, her precarious immigration status, and her understanding of culturally appropriate responses to superiors. The analysis cannot begin and end with whether the claimant's outward behavior demonstrated rejection of the conduct, as this would constitute a mistake of law. Future jurisprudence should assess how intersecting vulnerabilities can impact the claimant's experience and response to discriminatory conduct. The next section analyzes how intersectionality shapes claimants' experiences

71 *Basic* at paras 129, 131-133.

of sexual harassment, their understanding of those experiences, and the harms they suffer.

V. Intersectionality in the Adjudication of Sexual Harassment Claims

Workplace sexual harassment constitutes an affront to the dignity of employees who experience it.[72] When sexual harassment intersects with other protected grounds such as race, socio-economic status, or disability, the resulting experience is qualitatively distinct.[73] The Tribunal should examine how protected grounds intersect and give rise to consequences unique to the claimant's structural position in society. The intersectionality analysis[74] should also inform how tribunals make sense of the structural conditions influencing a claimant's response to unwelcome conduct.

A. Intersectionality as a Theoretical Principle: Crenshaw's Framework

Kimberle Crenshaw, a civil rights advocate and a leading scholar in race theory, coined the term "intersectionality." Intersectionality is defined in the Merriam Webster dictionary as the "complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and

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72 *Janzen* at p 1284.

73 K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1989:1 *University of Chicago Legal Forum* at pp 140, 149 [Crenshaw].

74 In this section, "multiple minority identities," "multiple-ground analysis," and "intersectional analysis" are used to describe analytical approaches that consider how discrimination may arise from the interaction of two or more protected grounds or marginalized identity characteristics, rather than from any single ground in isolation (which will be referred to as single ground analysis or single-axis analysis).

classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups."[75] When interviewed by the Columbia Law School in New York almost 20 years after introducing the term, Crenshaw was asked whether using the term for a purpose other than black women is a misunderstanding. [76] Her response was as follows:

> Intersectionality is a lens through which you can see where power comes and collides, where it interlocks and intersects. It's not simply that there's a race problem here, a gender problem here, and a class or LBGTQ problem there. Many times that framework erases what happens to people who are subject to all these things.[77]

In her scholarship, Crenshaw ultimately argues that protected-ground categories have problematically been built around the experiences of the dominant members of each disadvantaged group.[78] To describe the impact of assessing a single ground versus multiple ground discrimination claim, Crenshaw draws an interesting analogy to a basement. She suggests that people disadvantaged by multiple factors are stacked at the bottom of the basement, while those with a single disadvantage have their heads pressed against the ceiling. Above the ceiling is a small, privileged room, which admits only those who can show that "but for" a single axis of disadvantage they would already belong upstairs. As a result, those disadvantaged on multiple grounds are left in the basement, as the single axis framework is not

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75 *Merriam-Webster Dictionary* (Merriam-Webster Inc., 2026) "intersectionality".

76 Columbia Law School, "Kimberlé Crenshaw on Intersectionality, More than Two Decades Later" (8 June 2017) https://law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later [Columbia Law School].

77 Columbia Law School.

78 Crenshaw at pp 143, 149.

equipped to understand the unique discrimination and burden they face to help draw them out.[79]

The earlier example discussed in this paper regarding a Ghanian female immigrant worker who is subjected to unwanted sexual harassment illustrates the analytical gap contemplated by Crenshaw in the single axis-analysis. That is, those disadvantaged on multiple intersecting grounds not only experience discrimination differently but are harmed by it differently. In 2026, the *Code* recognizes a broader array of protected grounds than in 1989,[80] and adjudicators must be attentive to the ways those grounds intersect to produce forms of disadvantage that a single-axis analysis cannot capture. A Ghanaian immigrant worker who fears employer reprisal and is unfamiliar with Canadian workplace norms faces intersecting vulnerabilities that the *Janzen* framework is not equipped to recognize. The *Janzen* test allows for emphasis to be placed on the claimant's outward conduct rather than the structural conditions that shape it. Sexual harassment should be assessed through an intersectional lens, as protected grounds shape the claimant's experience and understanding of harassment.

The principle of intersectionality in sexual harassment law has been critically studied and the subject of conceptual debate in scholarship but has not been subject to many empirical studies in Canada. Although, empirical research has shed light on discrimination and the theory of intersectional disadvantage. In an empirical study of workplace discrimination in Canada, a General Social Survey (GSS) collected information from 19,609 workers

79 Crenshaw at pp 151-152.

80 See Bill 27, *Human Rights Code Amendment Act, 2016*, 40th Parl, 5th Sess, British Columbia, 2016 (assented to 28 July 2016), SBC 2016, c 26 (addition of gender identity to the *Code)*; Bill 18, *Human Rights Code Amendment Act, 2021*, 42nd Parl, 2nd Sess, British Columbia, 2021 (assented to 25 November 2021), SBC 2021, c 39 (addition of Indigenous identity to the *Code*).

regarding their identities and experiences of discrimination.[81] The data showed that a "person's identification with two marginalized groups increases the chances of discrimination and augments further with three marginalized identities."[82] Thus, intersectionality strongly predicts disadvantage and the detrimental effects faced by discrimination. The empirical research from the GSS strongly suggests that pre-existing disadvantage is not merely correlated with experiences of sexual harassment, but also shapes the impact faced by those with multiple-marginalized identities. While the GSS provides valuable insight into experiences of discrimination, it is acknowledged that the scope extends beyond sexual harassment specifically and reflects the experiences of a single survey population at one point in time.

Even Canadian government data collection on workplace sexual harassment reflects a primarily single-axis approach. The 2020 Survey on Sexual Misconduct at Work, released by Statistics Canada, frames its central findings through gender alone and reports the experiences of visible minority women, Indigenous women, women with disabilities, and LGBTQ2+ workers as comparisons against their non-counterpart groups rather than examining the intersections among these axes.[83] The report stated that 94% of workplace sexual harassment complaints were filed by women, and that persons with disabilities and visible minorities were disproportionately represented among claimants.[84] Women with disabilities reported the highest rates of workplace harassment of any group surveyed, with 58%

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81 P. Nagnia & T. Arora, "Discrimination in the Workplace in Canada: An Intersectional Approach," (2021) 46:2 *Canadian Journal of Sociology* [Nagnia & Arora].

82 Nagnia & Arora at p 147.

83 Statistics Canada, *In 2020, one in four women and one in six men reported having experienced inappropriate sexualized behaviours at work in the previous year*, Catalogue No 11-001-X (2021) [Statistics Canada 2021].

84 Statistics Canada 2021.

reporting lifetime exposure compared to 41% among women without disabilities.[85] The inference that could be drawn from this is that a young woman with a disability likely faces a much higher statistical risk than a woman who does not identify with those additional factors. Although the federal government's data is limited by its primarily single axis analysis, it supports the inference that overlapping forms of social disadvantage are associated with a higher incidence of sexual harassment.

B. Objective Standards and Dominant Group Default: A Parallel Between *Law v. Canada* and *Janzen*

Crenshaw's foundational critique is that discrimination law often treats protected grounds as separate, self-contained categories and defines those categories through the experiences of the most dominant or socially visible members of each disadvantaged group.[86] In doing so, it overlooks those whose discrimination arises at the intersection of multiple grounds. The *Janzen* and *Law v. Canada (Minister of Employment and Immigration)*[87] decisions reflect a structurally similar problem. In both decisions, the reasonable person construct risks importing dominant-group assumptions into an inquiry meant to advance substantive equality. In *Janzen*, the "reasonable person" standard governs the assessment of unwelcomeness; in *Law*, the context-sensitive reasonable person governed the dignity analysis. Although both standards are framed as objective, they operate through dominant social assumptions and overlook the intersecting identities that shape the harm.

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85 Statistics Canada, *Gender Results Framework: A new data table on workplace harassment*, Catalogue No 11-001-X (2024) at p 6 [Statistics Canada 2024].

86 Crenshaw at pp 143, 149.

87 *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 [*Law*].

In *Law,* Iacobucci J. recognized that a discrimination claim may place an "evidentiary focus upon a person or subgroup identified by several grounds."[88] While this marked an important recognition of intersectionality in human rights law, it was an incomplete step toward a fully operational intersectional framework. The SCC identified a hybrid objective-subjective legal standard for assessing discrimination complaints under section 15 of the *Charter*. The discrimination was to be assessed through the lens of "the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim."[89] The reasonable person was intended to be "context-sensitive" under the *Law* framework as it was concerned with the "perspective of a person in circumstances similar to those of the claimant."[90]

This standard was developed further in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*. In concurring reasons, L'Heureux-Dubé J. stated that the reasonable person must acknowledge "not only the circumstances of those like him or her but also appreciate the situation of others."[91] The section 15 *Charter* challenge in *Corbiere* concerned legislation that precluded band members living off reserve from voting in band elections. L'Heureux-Dubé J.'s concurring reasons explicitly recognized that Indigenous women affected by this legislation were "doubly disadvantaged on the basis of sex and race," and that the assessment of disadvantage under section 15(1) must account for the intersection of multiple grounds.[92] Notably, this intersectional analysis appeared in concurring rather than majority opinion, so it is not binding. However, *Law* and *Corbiere* affirmed

88 *Law* at para 37.

89 *Law* at para 7.

90 *Law* at para 61.

91 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 65 [*Corbiere*].

92 *Corbiere* at para 72.

in principle the importance of considering the lived realities of claimants in a discrimination analysis, and the *Law* framework was foundational for establishing the principle that subordinated groups may need to be treated differently to achieve substantive equality. However, the *Law* framework, particularly the human dignity legal test, was an abstract and unworkable doctrine that became an "additional burden on equality claimants."[93]

The objective reasonable person analysis in *Janzen* and the dignity inquiry in *Law* suffer from a shared operational problem. Each framework requires the claimant to prove their experience of harm against a normative benchmark of an objective (*Janzen*) or context-sensitive (*Law*) reasonable person. The reality is that an objective reasonable person standard is not neutral when it is applied across unequal social positions.[94] In both *Law* and *Janzen*, the claimant is disproportionately burdened, despite the intent of both tests being to advance equity. In *Janzen*, this imbalance allows stereotype-laden assumptions about reasonableness to inform the analysis of sexual harassment and reinforces the inequalities the framework was intended to address. In theory, both legal tests were designed to address discrimination; in practice, their application has often produced the opposite effect.

The SCC reformed the *Law* framework in response to the analytical problems associated with the claimant borne burden of proof in establishing the abstract notion of injury to dignity.[95] In a line of SCC decisions, the *Law* analysis was addressed and reframed: *R v Kapp*[96] reformulated the core test

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93 *R v Kapp*, 2008 SCC 41 at para 22 [*Kapp*].

94 C.A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) at p 181.

95 *Kapp* at para 22.

96 *Kapp* at paras 21-22.

and reduced the emphasis on the dignity inquiry; *Withler v. Canada*[97] abandoned the rigid comparator group analysis; and *Fraser v. Canada*[98] recently signaled towards intersectional reasoning by recognizing that adverse-effects discrimination can arise from the intersection of multiple grounds. This trajectory demonstrates the SCC's willingness to reconsider equality frameworks that have failed to operationalize their equality objectives in practice. Of note, the *Janzen* framework has not undergone comparable reform to address the disproportionate burden on claimants. The unwelcomeness standard developed through *Janzen* and further distilled in *Mahmoodi* govern sexual harassment adjudication in BC, but the way the test is applied has since become the subject of scrutiny. *Deep Creek* has departed from the *Mahmoodi* approach suggesting that the decisions currently binding on the BCHRT do not require the claimant to objectively prove conduct was unwelcome. This has left panels with a choice between two competing analytical frames in *Mahmoodi* and *Deep Creek*. Until appellate authority resolves the tension, the framework that governs claimants' cases will turn on which line a given panel elects to follow.

VI. Reforming the *Janzen* Framework

A. Beyond the Objective Standard: The *Deep Creek* Workaround

An objective standard for assessing unwelcome conduct generates a legal analysis detached from the social context in which harassment occurs, including but not limited to, workplace power dynamics, the claimant's lived experience, and the intersection of protected grounds that may compound the experience of sexual harassment and its discriminatory impact.

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97 *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 55-64, [2011] 1 SCR 396 [*Withler*].

98 *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras 30-32, 51 [*Fraser*].

In an attempt to fill an analytical gap left by *Janzen* in distilling the concept of unwelcomeness, the Tribunal in *Mahmoodi* adopted the objective reasonable person test, asking whether a reasonable person would know the impugned conduct was unwelcome. Although the "objective" reasonable person inquiry was, in theory, intended to focus the analysis on the alleged harasser's conduct, its practical effect directed the inquiry toward the claimant's behaviour and response.[99] Nonetheless, the BCHRT adopted *Mahmoodi*'s objective framework for assessing unwelcomeness in subsequent decisions.[100]

The BCHRT departs from *Mahmoodi*'s objective framework in *Deep Creek*. In *Deep Creek*, the Tribunal found that a complainant need only establish a nexus between the sexual conduct and its adverse impact to satisfy the unwelcomeness element.[101] In doing so, the Tribunal aligned the sexual harassment analysis with the *Moore* test for *prima facie* discrimination which currently governs all other claims under the *Code*.[102] The Tribunal's reasoning in *Deep Creek* illustrates recognition of the importance of a claimant's subjective experience of the alleged harassment and minimizes the unjust evidentiary burden on claimants to show conduct was objectively unwelcome. While the claimant still bears the burden with the adverse impact standard, it is less divorced from the social context in which sexual harassment occurs. The Tribunal's flexible interpretation of *Janzen* offers a workable interim solution. However, given that *Deep Creek* is persuasive rather than binding, there is no guarantee that subsequent BCHRT decisions will adopt it in future sexual harassment proceedings.

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99 Hastie 2020 at p 67.

100 See for example: *Basic* at paras 96-97; *Kafer v Sleep Country Canada and another (No. 2),* 2013 BCHRT 289 at paras 32-39.

101 *Deep Creek* at paras 90-95.

102 See *Deep Creek* at paras 75 and 77 citing *Moore v British Columbia (Education),* 2012 SCC 61.

In summary, *Deep Creek* marks an important step toward realigning the *Janzen* legal test with contemporary understandings of both consent and unwanted sexually charged conduct. Longer-term reform requires legislative intervention to prohibit adverse inferences drawn from myths and stereotypes in the unwelcomeness analysis.

B. Statutory Reform: Affirmative Consent and Prohibited Adverse Inferences

The affirmative consent model operates on the premise that consent necessarily involves "yes means yes," placing the burden of proof on the presence of an affirmative "yes" rather than an "affirmative no."[103] Section 273.1 of the *Criminal Code* defines consent as the "voluntary agreement of the claimant to engage in the sexual activity in question and notably excludes consent where the claimant expresses by words or conducts a lack of agreement, or where the accused induces participation by abusing a position of trust, power, or authority."[104] While this provision operates specifically in the criminal justice context, the underlying rationale that consent must be affirmatively established rather than assumed from silence, can be translated directly to the human rights setting.[105]

The criminal law's adaptation to changing societal norms demonstrates that Canadian law is not only capable of dismantling gender stereotypes embedded in historical legal standards, but that it has already done so in another area of the law. As mentioned earlier, the *Criminal Code* prohibits the use of sexual history evidence of a claimant and other stereotype-based

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103 B. Burger et al, "Saying No to 'Yes Means Yes': Limitations of Affirmative Consent for Mitigating Unwanted Behavior Online According to Women and LGBTQIA+ Stakeholders" (2025) https://dl.acm.org/doi/10.1145/3706598.3713236.

104 *Criminal Code* at s 273.1.

105 Hastie 2020 at p 84.

reasoning about consent and unwanted sexual conduct. [106] This provision has changed the face of legal norms respecting sexual assault cases in Canadian criminal law and has offered much greater protection to survivors of sexual violence. Human rights proceedings concerning sexual harassment have not offered the same degree of statutory protection to claimants, and stereotypes and microaggressions can still implicitly influence the adjudication of a discrimination complaint, as demonstrated by earlier cases such as *Kang* and *Han.*[107]

While the principle of affirmative consent is not a legislated standard for sexual harassment in BC, it does often arise in the institutional context by way of policy. Educational institutions in BC are required under the *Sexual Violence and Misconduct Policy Act* to adopt sexual violence policies, and institutions can operationalize this by developing definitions of consent and other terms related to sexualized violence.[108] The University of British Columbia, for instance, has defined consent in its policy as the active, voluntary agreement to engage in sexual activity, specifying that it cannot be implied and cannot be assumed from silence or inaction. [109] Thompson Rivers University also has an institutional policy respecting sexualized violence which is a broad term synonymous with sexual misconduct, and it encompasses both sexual assault and sexual harassment. Consent is similarly

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106 *Criminal Code* at ss 273 and 276.1.

107 *Han*; *Kang*.

108 *Sexual Violence and Misconduct Policy Act,* SBC 2016, c 23 at s 2.

109 University of British Columbia, *Sexual Misconduct Policy*, Policy SC17 (October 2024) https://universitycounsel.ubc.ca/files/2024/12/Sexual-Misconduct-Policy_SC17.pdf.

defined in TRU's policy as voluntary, communicated expressly through words or conduct, revocable, and specific to each sexual activity. [110]

Consent across all contexts should be assessed in large part from the subjective perspective of the claimant rather than through an objective reasonable person lens. This approach is consistent with the Supreme Court's direction in *R v Ewanchuk* that consent is a "subjective inquiry" into the "state of mind of the claimant."[111] Assessing consent objectively, by reference to how a reasonable claimant would conduct themselves, risks reintroducing the very myths and stereotypes the affirmative model is designed to eliminate. The affirmative consent model would effectively displace the inference that silence constitutes acceptance, a stereotype-laden assumption that has long informed sexual assault and harassment law. At the legislative level, the *Code* could be amended to include provisions analogous to the rape shield framework built into the *Criminal Code*, prohibiting those involved in a proceeding from drawing inferences about the welcome nature of conduct from a claimant's silence, prior conduct, or failure to protest verbally or physically.[112]

In addition to the rape shield framework, the criminal law context has implemented statutory amendments to the *Judges Act* and the *Criminal Code* to mandate continuing judicial education on sexual assault, consent, systematic discrimination and social context.[113] The amendments require judges to provide reasons for decisions in sexual assault proceedings and mandates reporting on educational seminars by the Canadian Judicial

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110 Thompson Rivers University, *Sexualized Violence*, Policy BRD 25-0 (19 July 2023) https://www.tru.ca/__shared/assets/BRD_25-0_Sexualized_Violence40359.pdf .

111 *Ewanchuk* SCC at para 51.

112 *Criminal Code* at s 273.1.

113 *An Act to Amend the Judges Act and the Criminal Code*, SC 2021, c 8 at ss 2-3 [*Act to Amend the Judges Act*]

Council. [114] Equivalent guidance and training would help the BCHRT build consensus among its members on the foundational concepts that shape sexual harassment claims including, but not limited to, consent, unwelcomeness, "sexually charged" conduct, and the "reasonable person" standard in the human rights context. Further, professional development training in the realm of sexual harassment law will also ensure that tribunal members are attune to the nuanced ways that stereotypes migrate into proceedings, especially when led by the respondent.

C. From Theory to Practice: Operationalizing Intersectional Analysis

Sexual harassment adjudication must be attentive to the way in which a claimant's intersecting identities shape their subjective experience of the impugned conduct. Where applicable, adjudicators should meaningfully engage with the overlapping grounds of disadvantage to understand how intersecting identities inform both the sexual harassment analysis and the determination of an appropriate remedy under *Janzen*.

As discussed earlier, the reasonable person inquiry within the *Janzen* test is framed around the dominant and normative group in society, effectively failing to capture those with multiple minority identities. The *Janzen* test prioritizes sex discrimination in isolation from gender, socio-economic status, race, and other protected grounds. Where a claimant is a racialized woman, the test does not provide an analytical mechanism for adjudicating conduct that is both racial, gendered, and sexual. The intersection of the protected grounds produces a distinct form of harm that cannot be reduced to any one factor in isolation.[115]

Although human rights tribunals in Ontario and BC have engaged with intersectionality in human rights adjudication, the depth and consistency of

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114 *Act to Amend the Judges Act.*

115 Crenshaw at p 139.

the analysis vary considerably. Where more than one protected ground is engaged, tribunals have often pigeonholed the claim by separating the harm into its constituent grounds and treating them as parallel but distinct injuries, or by subordinating one ground to the others based on the evidentiary record.[116] Both analyses effectively ignore the unique form of discrimination the claimant experienced and the distinct harm that it caused. *Alexander v British Columbia* offers a clear illustration of this point. The claimant, a First Nations woman with a visible disability, was refused service at a liquor store on the store manager's assumption that she was drunk.[117] Although she alleged discrimination on multiple grounds, including race, colour, ancestry, and disability, the Tribunal disposed of the claim as one of disability discrimination only, declining to consider whether racialized stereotypes about alcohol use shaped the manager's perception.[118]

Despite the dominant single-axis approach to discrimination, the Women's Legal Education and Action Fund (LEAF) intersectionality paper, reveals two cases where tribunals take a more "robust understanding of intersectionality into their [analysis]."[119] In the Ontario case of *Baylis-Flannery v Dewilde (Tri Community Physiotherapy),*[120] and the BC case of

116 See OHRC, "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims" https://www.ohrc.on.ca/en/book/export/html/2467 [OHRC].

117 *Alexander v British Columbia (Ministry of Labour and Consumer Services, Liquor Distribution Branch)*, 1989 CanLII 9053 at paras 2-5, 10 CHRR 5871 (BC HRT) [*Alexander*].

118 *Alexander* at para 19.

119 Women's Legal Education and Action Fund (LEAF), *Intersectionality in Law and Legal Contexts* (LEAF, 2020) at p 8.

120 *Baylis-Flannery v Dewilde (Tri Community Physiotherapy)*, 2003 HRTO 28 [*Dewilde*].

Radek v. Henderson Development (Canada) and Securiguard Services (No. 3),[121] the tribunals in both cases recognized that discrimination claims must be assessed with respect to intersecting protected grounds, acknowledging that individuals' experiences of harassment will differ based on the intersection of factors.

In *DeWilde*, the HRTO engaged in a meaningful intersectional analysis of a Black woman's claim of racialized sexual harassment. Drawing on principles of intersectionality, the Tribunal held that the claimant's experience as a Black woman could not be reduced to the separate categories of race and sex discrimination. The Tribunal warned that a single-axis approach would risk reframing the case as sexual harassment that merely happened to involve a Black complainant, thereby concealing the racial dimension of the harm. [122] Although the Tribunal accepted that the evidentiary record could establish discrimination on the basis of either race or sex alone, it recognized that a single-axis analysis would fail to capture the distinct category of disadvantage produced by the claimant's intersecting minority identities. The Tribunal notably stated that "[the claimant] is not a woman who happens to be black, or a black person who happens to be female, but a black woman."[123]

This more integrated approach in *DeWilde* can be compared with the BCHRT's reasoning in *Radek*, where the Tribunal recognized the relevance of intersecting grounds but ultimately treated some aspects of the claimant's identity as secondary rather than constitutive. Although *Radek* marked an important step toward recognizing the value of an intersectional analysis, the language in the decision still implicitly suggests a hierarchy between primary

121 *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 [*Radek*].

122 *Dewilde* at para 145.

123 *Dewilde* at para 145.

and secondary grounds. The Tribunal characterized the complaint as "primarily" grounded in race/color/ancestry, while cautioning that the analysis "must not ignore her disability, and the possibility of compound discrimination which may have occurred."[124] While the Tribunal seemingly collapsed race, colour, and ancestry into a unified discriminatory experience connected to Indigenous identity,[125] it stopped short of fully integrating disability into that intersectional framework. Nonetheless, *Radek* is a fundamental decision that expressly recognized the relevance of intersectionality in human rights claims in BC and adopted the concern, articulated in *Dewilde,* that single-axis reasoning can conceal the effects of multiple-ground discrimination.[126]

Notably, the integrated approach to intersectionality in human rights adjudication was adopted in *Young Worker v. Heirloom and another*,[127] where the BCHRT used an intersectional lens to analyze the enumerated grounds of race and sex. In *Young Worker,* a 13-year-old Black girl alleged that her manager treated her differently because she was Black and female, citing incidents in which the manager blamed her for cash shortages, removed her from cashier duties, and characterized her as having a "bad attitude."[128] The Tribunal undertook a detailed intersectional analysis, referencing several decisions involving anti-Black stereotypes, stereotypes directed toward Black women and children, and gendered stereotypes concerning women in the workforce.[129] Ultimately, the Tribunal's intersectional assessment of race and sex, alongside the contextual social factor of age, led it to conclude that the

124 *Radek* at para 465.

125 *Radek* at paras 463-467.

126 *Dewilde* at para 145.

127 *Young Worker v. Heirloom and another*, 2023 BCHRT 137 [*Young Worker*].

128 *Young Worker* at paras 19, 31, 72.

129 *Young Worker* at paras 50-63.

manager's treatment of the claimant was influenced by racialized and gendered stereotypes directed at Black girls and women.[130] The Tribunal's reasoning reflected that race and sex were inseparable aspects of the complainant's lived experience rather than parallel or constituent grounds of discrimination. The decision reflects a more robust intersectional analysis grounded in the interaction of multiple marginalized identities.

An intersectional approach to sexual harassment adjudication would capture the distinct harms experienced by claimants belonging to one or more marginalized groups. *Young Worker* provides a strong example of how the intersectional analysis can be operationalized in the human rights context. However, before a comparable framework can be developed in the context of sexual harassment claims, tribunals must first reassess how the "unwelcome" criterion is evaluated through the lens of the reasonable person standard. Without reconsidering that threshold inquiry that has been interpreted to be "objective," more nuanced forms of intersectional analysis may remain underdeveloped.

VII. Conclusion

The *Janzen* framework, though a landmark decision in recognizing sexual harassment as sex discrimination, has left analytical gaps that the BCHRT has since struggled to navigate. First, the unwelcomeness element, assessed through an objective reasonable-person lens, effectively requires claimants to bear the evidentiary burden of establishing both non-consent and that the conduct was unwelcome. This paper argues that the reasoning is backwards as the evidentiary burden should rest on the respondent, not the claimant. Second, the unwelcomeness element ignores that whether conduct is unwelcome is a subjective experience shaped by the claimant's position, and the "reasonable person" against whom that experience is measured is

130 *Young Worker* at paras 100, 120.

modelled against the dominant group in society. Third, the *Janzen* test and the tribunal jurisprudence that followed have not meaningfully grappled with how multiple intersecting grounds of disadvantage shape the way harassment is experienced. The result is a framework that cannot accommodate intersectional analysis at either the liability or the remedial stage.

The first critique concerns the evidentiary burden *Janzen* imposes on claimants, which effectively puts them on trial rather than the respondent. *Kang* and *Han* are illustrative of this point. The unwelcomeness element collapses into a consent inquiry, and ultimately a claimant is required to show active resistance, without which the conduct is presumed both consensual and welcome. The criminal justice system has long abandoned this chain of inference. Yet stereotypes about how a "reasonable" claimant would respond to harassment continue to migrate into legal reasoning, in large part because human rights law has not legislated against them in the way the criminal sphere has. The *Act to Amend the Judges Act* and sections 273 and 276(1) of the *Criminal Code* expressly prohibit decision-makers and defence counsel from drawing inferences rooted in myths and stereotypes about consent. The BCHRT operates without comparable statutory safeguards, with the result that a claimant in the human rights system faces precisely the kind of evidentiary scrutiny that a claimant in the criminal system is statutorily protected from.

The second critique concerns the test's indifference to the claimant's subjective experience of consent and harm. The *Mahmoodi* decision conceptualizes the *Janzen* test for unwelcomeness through an objective reasonable-person lens, asking "whether a reasonable person, taking into account all the circumstances, would know the conduct was unwelcome."[131] This framing, while intended to shift the analysis onto the respondent's

131 *Mahmoodi*.

conduct, has practically shifted the evidentiary burden onto the claimant. The chain of inference that silence equals consent assumes that protest is the universal response to unwelcome conduct, ignoring the structural role of power asymmetries, fear of reprisal, and accommodation as a survival strategy within workplace hierarchies. While the *Mahmoodi* decision acknowledged power differentials and the possibility of tolerated yet unwelcome conduct in its reasoning, subsequent tribunal decisions followed *Mahmoodi* for its objective framing of unwelcomeness to the detriment of claimants. The framing strips out the contextual assessment of the claimant's response and folds back into the first critique by placing an undue evidentiary burden on the claimant to justify their own conduct.

The third critique concerns the *Janzen* tests' silence on multiple-axis discrimination. Protected grounds frequently overlap in ways that produce compound and distinctive forms of discrimination, and these overlapping dynamics should be recognized at both the liability and remedial stages of sexual harassment adjudication. The *Janzen* test treats sex as the operative axis of harm in isolation and leaves a gap in the analysis as to how other enumerated grounds in the *Code* shape claimant's experiences. When tribunals confront claims involving intersecting grounds, they typically respond by assessing each ground as a separate claim or by subordinating one ground to another, as seen in *Radek*. Neither approach captures what matters most about intersectional discrimination, that the harm is generated at the intersection and cannot be reconstructed by parting the discrimination into separate components. The single-axis approach to discrimination renders an entire category of claimants who have multiple marginalized identities, partially invisible to the *Janzen* doctrine.

This paper has identified several paths forward for the adjudication of sexual harassment claims at the BCHRT and beyond, ranging from analytical adjustments tribunals can make immediately to longer-term legislative and jurisprudential reform. In the short term, the BCHRT can

follow the *Deep Creek* approach and ground the unwelcomeness analysis in the adverse impact of the respondent's conduct rather than placing the evidentiary burden on the claimant to establish a lack of consent and the unwelcome nature of the impugned conduct. More broadly, tribunals should interpret the "unwelcome" criterion purposively and within the broader social context in which the conduct occurs, with attention to the remedial objectives of the *Code*. Once the threshold issues with the unwelcomeness element are resolved, tribunals can look to *Young Worker* and *Dewilde* as models for how intersectional analysis can be operationalized in legal reasoning where multiple grounds are engaged.

As a longer-term solution, the unwelcomeness element should be reoriented around an affirmative consent framework, and the *Code* should be amended to incorporate protections analogous to the statutory protections for claimants in the criminal sphere which prohibit adjudicators and defence from drawing inferences rooted in myths and stereotypes about sexual harassment. Further, the BCHRT's reception of *Janzen* through the *Mahmoodi* decision should be revisited, ideally through appellate authority to displace the objective unwelcomeness standard. The criterion should be redefined to centre pre-existing disadvantage and the subjective experience of claimants, building on the reorientation *Deep Creek* has initiated.