The Customer Isn’t Always Right:
Exploring the Protective Ambit of the Employment Protection in the Ontario Human Rights Code through Customer-on-Worker Harassment

by

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ABSTRACT

This thesis argues that the “right to equal treatment with respect to employment” under section 5(1) of the Ontario Human Rights Code extends to protect workers from customer harassment. In so doing, this thesis aims to provide an account of section 5(1) and the way in which it imposes duties on parties who do not fit the traditional definition of an employer. This project argues that the statutory language of section 5(1) demonstrates a legislative intent to cover relationships outside of the paradigmatic employer-employee relationship and that it is broad enough to cover customer-worker interactions. This thesis will further argue that there is sufficient proximity between customers and employees to justify extending a duty onto customers to refrain from harassment. Finally, this project demonstrates that broader policy considerations justify extending section 5(1) coverage to address customer-worker harassment.
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# TABLE OF CONTENTS

**INTRODUCTION** .................................................................................................................. 1

**Part I – Setting out the Problem** .......................................................................................... 6

A. The Social Area of Employment in the Code .............................................................. 7
B. Harassment: A Working Definition ........................................................................ 12
C. Customer-on-Worker Harassment: State of the Law ..................................... 20
D. The Centrality of the Traditional Employer-Employee Relationship .......... 31
E. Recognizing New Categories of Relationships Covered under Section 5(1) ..... 34

**Part II – The Legislative Text** .......................................................................................... 37

A. Section 5(1) Is Capable of Including Customer-Worker Relationships ........ 38
   1. *Legislative Evolution* ............................................................................................... 40
   2. *Cross-Jurisdictional Comparison* ......................................................................... 44
B. Section 5(1) and the Other Employment Provisions ...................................... 50
C. The Reasoning in *McCormick* Does Not Apply to the Ontario Code ........ 53

**Part III – Past Cases and Proximity** ............................................................................. 56

A. Past Cases as Principled Roadmap .......................................................................... 57
B. Non-Employer Actors with Section 5(1) Duties ...................................................... 59
   1. Type 1 Actors (“Employer-Like”) ........................................................................... 61
   2. Type 2 Actors (Control Terms and Conditions Alongside Employer) ........ 65
   3. Type 3 Actors (“Employee-Like”) .......................................................................... 71
C. Developing a Theory of Proximity from the Case Law .................................... 76
D. Sufficient Proximity between Customers and Workers ..................................... 79

**Part IV – Policy Considerations** .................................................................................... 83

A. Salutary Benefits of Extending Duties to Customers ............................................. 84
   1. *Conventional Employees* ...................................................................................... 84
   2. *Independent Contractors* .................................................................................... 86
   3. *Assignment Employees and Dependent Contractors* ....................................... 91
B. Deleterious Concerns: Indeterminate Liability and Unfairness ..................... 94
C. Alternatives to Addressing Customer Harassment .......................................... 97

**CONCLUSION** .................................................................................................................. 103

**BIBLIOGRAPHY** ............................................................................................................... 105
INTRODUCTION

On May 14, 2010, Zuo Xing Ye awoke to a call on his cellphone. It was just past midnight and he was stressed – even for a real estate agent as he was. He had been working for the last couple of months with a client, Gregory Mitrovic, in order to sell Mr. Mitrovic’s condo. In February, Mr. Ye found a buyer and Mr. Mitrovic accepted the offer. But a few days later, Mr. Mitrovic changed his mind and sought to resile from the purchase agreement. Mr. Ye politely informed his client that there was no way to get out from under the agreement, and this set Mr. Mitrovic off. For the next month, Mr. Mitrovic bombarded Mr. Ye with calls to his home and to his office arguing that the agreement should be cancelled. Mr. Mitrovic peppered his calls with racial insults and threatened to get Mr. Ye fired. In April, Mr. Ye thought he had finally put Mr. Mitrovic’s torrent of calls to rest when the buyer agreed to cancel the sale. But when Mr. Ye picked up his phone in the early hours of May 14, Mr. Mitrovic struck again with another volley of racially-charged verbal attacks:

You’re a disgusting piece of shit, Chinese fucking crap. You know you come in our country and all you do is fuck us. [...] You’re a fucking loser in life and you, you’re going to go back to China. I don’t want you in my country, you understand. Get out of here. You’re going back to fucking China you know why? Because you’re a piece of shit in my fucking country [...] Suck my cock, Henry Ho, you fucking piece of shit Chinese cock sucker. [...] you’re a fucking rat…because you’re rats, you fucking Chinese fucking cocksuckers…You people are rats. There is billions of you because (you are) rats breed…

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1 Commission des droits de la personne et des droits de la jeunesse c Mitrovic, 2013 QCTDP 16 (CanLII) at para 16.
The months of hate-filled calls left Mr. Ye shaken and worried, not only for himself, but for the wider Chinese community he felt was also attacked.\(^2\) Maybe he shouldn’t have taken on Mr. Mitrovic as a client?

Mr. Ye brought a human rights application against Mr. Mitrovic for the months-long barrage of harassing calls, and unsurprisingly, won.\(^3\) But, here is where the story gets interesting: Mr. Ye lives and works in Quebec – where there is a freestanding right to be free from harassment.\(^4\) In Ontario, while there is no standalone harassment provision, section 5(1) of the Human Rights Code (the “Code”) guarantees every person a broad right to “equal treatment with respect to employment without discrimination because of race.”\(^5\) While section 5(1) appears at first glance capacious enough to protect working individuals from harassment directed by customers, adjudicators to date have not extended section 5(1)’s coverage to customers like Mr. Mitrovic.

\* \* \*

This project aims to make the case that section 5(1) should be extending to impose duties on customers to refrain from harassment. In so doing, this project intends to explore the contours of the right protected by section 5(1) and the ways in which relationships are deemed sufficiently proximate to warrant the application of section 5(1).

There appear to be two competing accounts of the protective ambit of section 5(1). On one account the “right to equal treatment with respect to employment” is viewed as being restricted to relationships that exhibit the high degree of control and

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\(^2\) *Ibid* at paras 11-16, 24-25
\(^3\) *Ibid*.
\(^4\) *Charter of Human Rights and Freedoms*, CQLR, c C-12, s 10.1 [Quebec Charter].
\(^5\) *Human Rights Code*, RSO 1990, c H.19, s 5(1) [Code].
dependency found in the traditional employment relationship, where an employer largely controls the terms and conditions of work. A second account views section 5(1) in light of its aspirational and broadly cast language to be capacious enough to include any interaction having some loose connection with a person engaging in employment. Neither of these accounts appears to properly capture the protective ambit of section 5(1). Modelling the contours of section 5(1) off of the classic employment relationship fails to capture the broad and aspirational intent behind a provision cast so broadly. Further, extending section 5(1) duties only to parties who exercise employer-like control over a worker is to ignore clear legislative cues and jurisprudential developments that impose section 5(1) duties on a variety of non-employer actors, like unions, employment agencies and employees. On the other hand, extending section 5(1) duties to circumstances where there is some connection to work, employment or an employed person, is to cast the right protected at section 5(1) too broadly and fails to provide a workable roadmap.

This project is a beginning attempt at sketching out an account of section 5(1), given that there is little to no academic writing about the scope and strictures of the provision. As such, this thesis is limited to a consideration of whether customers owe duties to workers not to engage in harassment; I have left a consideration of further duties customers might have for another day. I propose a methodology of admitting new categories of actors that considers three elements: the statutory language of the Code,

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6 See e.g. McCormick v Fasken Martineau DuMoulin LLP, 2014 SCC 39, [2014] 2 SCR 108 at paras 24-26, where the Supreme Court proposed a control/dependency test based on the features of a classic employer-employee relationship [McCormick].
7 See e.g. Chaudhry v Choice Taxi Cornwall Inc, 2012 HRTO 391 (CanLII) at para 4, where the Tribunal proposed a loose “nexus” test [Chaudhry].
8 See e.g. Code, supra note 5 at ss 5(2), 7(2), 23(4).
prior decisions interpreting the scope of section 5(1) and policy considerations militating in favour or against extending duties. I adopt this structure in the balance of the project.

In Part I, I set out the problem at the heart of this project – whether customers can and should be held liable under section 5(1) for engaging in harassment. As a matter of background, I provide an overview of section 5(1), the other employment-related provisions and the Code as a whole, as well as a working definition of harassment. I argue customers have not been included within the ambit of section 5(1) because of a persistent misconception that the provision protects only relationships modelled off of the traditional employment relationship, marked by a high degree of control and dependency.

In Part II, I examine the design of section 5(1), its legislative evolution and how it compares to other employment provisions in Canadian human rights statutes. I argue that the broadly cast and aspirational structure of section 5(1) reflect a legislative intent to cover relationships beyond the mould of the traditional employment relationship. The legislator deliberately adopted a broadly cast right capable of evolving over time, without any preconceived strictures. The legislator also inserted legislative cues that clearly indicate that non-employer actors – who exercise a level of control below that of an employer – are capable of having section 5(1) duties, including employment agencies and employees. Given the breadth of section 5(1), it is capable of encompassing customer-worker interactions.

In Part III, I delve into prior cases that have considered the scope of section 5(1) and examine the sort of non-employer actors recognized as having section 5(1) duties. I trace out three categories of actors, and note that the Tribunal will extend section 5(1) duties on a sliding scale, depending on the protected interest at stake (e.g. the right to a
harassment-free work environment, the right to be accommodated) and depending on the degree of control exercised by the actor over the protected interest. I propose that proximity is established where the impugned actor exercises sufficient control (and the worker is sufficiently dependent on the actor) \textit{in relation to the protected interest in question}. I conclude that customers are sufficiently proximate to workers in relation to harassment. The right to a harassment-free work environment is an interest protected by section 5(1). Further, in any given interaction, customers control their inclination to engage in harassment, while workers depend on customers to refrain from harassment because they are required to interact with customers as a function and requirement of their employment. Those elements of control/dependency – albeit light – are sufficient to trigger section 5(1) duties between employees of a common employer or workers sharing a common work environment.

Finally, in Part IV, I will consider the benefits of extending a section 5(1) duty to customer-worker interactions. The extension will allow employees to hold customers directly responsible for harassing conduct, it will allow independent contractors – who have no identifiable employer – to have some measure to protect themselves from customer harassment. I also consider whether “customers” as a group is a workable category to extend section 5(1) liability to, as well as alternatives to the human rights regime in addressing harassing conduct.
Part I – Setting out the Problem

This first part of the project aims to map out the problem at the heart of this project – that is whether customers can and should be held liable under section 5(1) for engaging in harassment. In order to equip the reader, I provide an overview of how section 5(1) sits alongside other employment protections in the Code and provide a working definition for harassment. I identify three characteristics in harassment: it involves intentional conduct, it is a practice of discrimination, and it is harmful.

I then explain the relevance of this project: exploring whether customers have duties under section 5(1) provides us a portal through which to explore the contours of the provision’s protective ambit and to propose a methodology to account for the sorts of relationships covered by the provision. The state of the law on customer-worker harassment reveals certain fault lines in the section 5(1) case law: some workers are able to commence human rights proceedings against their customers, while others are denied. The case law appears to extend section 5(1) duties to relationships modelled off of the traditional employment relationship, despite the broad language contained in section 5(1) and a number of legislative cues indicating that non-employer actors can owe duties. The methodological tools provided to date to determine whether to extend duties under the Code either mistakenly use the traditional employment relationship as the only paradigm or are so loosely structured that they fail to provide much guidance. I attempt to sketch out some methodological tools to assist in examining whether customers might have duties under section 5(1). I propose a methodology that involves: first, examining the statutory language of the Code to determine whether section 5(1) can admit customers within its ambit and the outline the contours of the right; second, looking to past case law
that has interpreted the provision to identify the elements of proximity necessary to ground liability; and third, considering broader policy considerations to determine the appropriateness of extending coverage. This methodology will be deployed later in Parts II, III and IV.

A. The Social Area of Employment in the Code

The Code operates on a number of axes: (a) it sets out certain guarantees (i.e. a right to equal treatment and freedom from harassment), (b) in respect of particular “social areas” (e.g. services, employment, accommodation), and (c) and in respect of a number of enumerated grounds of discrimination (e.g. race, sex, religion).

The Tribunal’s jurisprudence has adopted the term “social area” to designate five areas in which the Code guarantees a broad right to equal treatment: (a) services, goods and facilities, (b) occupancy of accommodation, (c) contracts, (d) employment, and (e) membership in a vocational association. Insofar as the five “equal treatment” provisions mirror each other in grammatical structure, the methodology applied to one social area might apply across all social areas. Further, the scope of each social area is critical as they define the very jurisdiction of the Tribunal.

This project examines the scope of one of the Code’s five social areas – employment. Much like other areas of the Code, the social area of “employment” is protected by a combination of broad guarantees and specific prohibited acts. There are four main provisions dealing with discrimination with respect to employment:

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9 See e.g. Corcoran v Roman Catholic Episcopal Corporation of the Diocese of Peterborough, 2009 HRTO 1600 (CanLII) at para 9.

10 See e.g. Kim v Camenetzki, 2013 HRTO 1590 (CanLII) at para 14 [Kim], where the Tribunal held: “For the Code to apply to an interaction between individuals that allegedly involved a discriminatory action or comment, the interaction must have occurred within one of these social areas. If the interaction did not occur within one of these social areas, the Code does not apply, even if the interaction did involve discriminatory actions or comments, and the Tribunal does not have jurisdiction to deal with the Application” [emphasis added].
(a) s. 5(1): which establishes a general right to equal treatment with respect to
employment;

(b) s. 5(2): which establishes a right to freedom from harassment in the workplace;

(c) s. 7(2): which establishes a right to freedom from sexual harassment in the
workplace; and

(d) ss. 23 and 25: which specifically prohibits certain discriminatory acts under the
protective ambit of s. 5(1).

The Code is unique among human rights statutes in Canada, in that it confers a
broad right to equal treatment in respect of employment – instead of prohibiting specific
discriminatory acts. Section 5(1) sets out the broad employment protection as follows:

5. (1) Every person has a right to equal treatment with respect to
employment without discrimination because of race, ancestry, place of
origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation,
gender identity, gender expression, age, record of offences, marital
status, family status or disability.\textsuperscript{11}

The Code does not define the parameters of “employment” and does not set out a list of
persons who owe duties under s. 5(1) – instead leaving the scope of employment and
persons having duties under s. 5(1) to the Tribunal and courts to elaborate.

By way of contrast, the B.C. \textit{Human Rights Code} (the “B.C. Code”) deals with
employment-related discrimination by setting out a prohibitory clause typical of
Canadian human rights codes. Section 13(1) of the B.C. Code provides:

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or
(b) discriminate against a person regarding employment or any term or
condition of employment

\textsuperscript{11} \textit{Code}, supra note 5, s 5(1) [emphasis added].
because of [list of prohibited grounds of discrimination].

The B.C. Code goes on define “employment” and “person” such that the availability of the B.C. Code’s employment provision is narrowed to conventional employer-employee relationships (and contractors to the extent that they can demonstrate they are dependent on their principal).

In contrast, section 5(1) of the Ontario Code is not similarly constrained. Because of the open-textured language in section 5(1) and the absence of constraints comparable to the B.C. ones, I will argue later in this project that section 5(1) admits an expansive interpretation to cover a broad set of relationships beyond the strictures of a conventional employer-employee relationship, and beyond a relationship defined by a high degree of vulnerability and dependence.

In addition to the broad protection set out in section 5(1), the Code contains explicit provisions dealing with harassment occurring in employment: sections 5(2) and 7(2). I argue that the harassment provisions constitute explicit examples of acts prohibited under the broad guarantee of equal treatment under section 5(1): they do not limit the scope of section 5(1). Indeed, the Tribunal has endorsed the view that harassing conduct on the basis of a prohibited ground of discrimination constitutes an infringement of the broad right to equal treatment – as we will explore in Part II of this project.

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12 Human Rights Code, RSBC 1990, c 210, s 13(1) [BC Code].
13 See ibid, s 1, which defines “employment” as including “the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent’s services relate to the affairs of one principal” and “person” as including “an employer, an employment agency, an employers’ organization, an occupational association and a trade union”.
14 See Code, supra note 5, s 7(3), which prohibits sexual solicitation across all social areas in relation to a “person in a position to confer, grant or deny a benefit or advancement”, which complements the other harassment in employment provisions.
15 See e.g. Taylor-Baptiste v Ontario Public Service Employees Union, 2012 HRTO 1393 (CanLII) at para 27 [Taylor-Baptiste].
That said, as a matter of background, it is worth canvassing the Code’s harassment provisions.

Section 5(2) prohibits harassment in the workplace:

5 (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.\(^\ref{fn16}\)

Meanwhile, section 7(2) prohibits sexual harassment in the workplace, adopting similar, if not redundant language to s. 5(2):

7 (2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee.\(^\ref{fn17}\)

Harassment in employment is prohibited under sections 5(2) and 7(2), provided that the beneficiary of the right is an “employee”, the harassment occurs in the “workplace”, and the harassment is committed by the “employer” (including an agent) or “another employee”.

What is worth noting about sections 5(2) and 7(2) is that they explicitly recognize that employees (independent of them being agents of an employer) have duties under the Code in relation to other employees. In other words, the Code itself explicitly recognizes that actions other than those of an employer can give rise to a breach under the Code, and a standalone basis on which to advance a human rights application.

Sections 23 and 25 of the Code round out the employment-related provisions in the Code, specifying concrete acts that constitute violations of section 5(1). They

\(^{16}\) *Code, supra* note at 5, s 5(2) [emphasis added].

\(^{17}\) *Ibid*, s 7(2) [emphasis added].
prohibit: (a) advertisements and applications for employment that classify or indicate qualifications by a prohibited ground of discrimination\(^\text{18}\), (b) employment agencies from discriminating against a person in receiving, classifying or disposing of applications, or referring an applicant to an employer\(^\text{19}\), (c) requiring enrolment in a benefits or pension plan that draws a distinction on a prohibited ground of discrimination.\(^\text{20}\) Each provision is framed as an example of the protective ambit of section 5(1). Section 23(1), for instance, provides:

23. (1) The right under section 5 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.\(^\text{21}\)

Sections 23 and 25 provide two central insights about the scope of section 5(1). First, these provisions evince a legislative intention to create a broad and comprehensive right to equal treatment. The prohibited acts enumerated in sections 23 and 25 are not meant to be independent causes of action, but rather examples of the broad and general right under section 5(1). Second, these provisions confirm that section 5(1) is meant to apply to relationships outside of the strict employer-employee relationship, including the acts of employment agencies and prospective employers.\(^\text{22}\)

While the social area of employment under the Code is constituted by a number of different provisions, section 5(1) is by far the central animating provision governing discrimination in employment in Ontario. While sections 23 and 25 explicitly provide that they are derivative of section 5(1), the harassment provisions at ss. 5(2) and 7(2) are

\(^{18}\) Ibid, ss 23(1), 23(2).

\(^{19}\) Ibid, s 23(4).

\(^{20}\) Ibid, s 25(1).

\(^{21}\) Ibid, s 23(1) [emphasis added].

\(^{22}\) See for e.g. Code, ibid, ss 23 (1), (2), (4), 25(1).
– as will be argued in Part II - simply instantiations of the broad protection afforded by s. 5(1). In short, an inquiry into the protective scope of the Code in relation to employment must be focussed on section 5(1) and the meaning it can reasonably bear.

**B. Harassment: A Working Definition**

This project focuses on the duties customers or clients might owe to employees in relation to harassing conduct; this focus on harassment will ground a modest and preliminary inquiry into the duties customers or clients might owe under the Code’s employment protected sphere. If the argument succeeds, it may be that it can be extended to other forms of discrimination by customers, but I leave that project to another day. It is useful to start with harassment because it is one of the simplest and most direct forms of discrimination, in that it is readily ascertainable, blatant and involves an element of intent. Thus, I am not concerned with whether customers or clients might have a duty to accommodate or prevent adverse effect discrimination. Put more colloquially, harassment is an entry-level form of discrimination, which will allow us to test whether extending duties to customers/clients under the Code makes sense.

Unlike other discriminatory practices, the Code explicitly defines harassment at section 10(1): “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.”²³ Harassment may include epithets, jokes, taunts, remarks or gestures made orally or in writing.²⁴ Harassment must be connected to a prohibited ground of discrimination to be actionable.²⁵ While the statutory

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²³ *Ibid*, s 10(1).
²⁴ See e.g. *Dhillon v F.W. Woolworth Co.*, 1982 CarswellOnt 4024 (Ont Bd Inq) (WL Can), 3 CHRR D/743 (Ont Bd Inq) at paras 12, 25, 68 [*Dhillon*].
definition requires a “course of vexatious comment or conduct”, the Tribunal has extended harassment to include a single serious incident.  

The common threads in the jurisprudence and academic literature reveal further contours of harassment. I highlight three characteristic elements of harassment: that (a) it involves intentional conduct, (b) it is a practice of discrimination, and (c) it has a harmful impact.

First, it is important to underscore that harassment is different from other forms of discrimination – in that it requires a degree of intent and it is – in all cases – an act, as opposed to an omission. The potential scope of perpetrators captured are limited by these two characteristics. Unlike an adverse effect claim, one can only be found liable for harassment when one has taken some positive action that one knew or ought to have known was unwelcome. I return to this point in Part IV.

Second, harassment constitutes a discriminatory practice in that it denies a safe work environment to its targets, and does so on the basis of a prohibited ground of discrimination. Further, harassment relies on stereotypes, caricatures or epithets that reinforce historic patterns of dominance and inferiority between groups.

Even before the enactment of the language contained in the current Code, human rights boards of inquiry recognized that racially-motivated harassment constituted discrimination with regard to a “term or condition of employment”, as the Code read before 1981. *Dhillon v. F.W. Woolworth Co.* (“Dhillon”) considered the case of a

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26 See for e.g. *Murchie v JB’s Mongolian Grill*, 2006 HRTO 33 (CanLII) at para 112 [*Murchie*]; *Romano v 1577118 Ontario Inc.*, 2008 HRTO 9 (CanLII) at paras 64-65.
warehouseman of South Asian descent who, along with other South Asian colleagues, faced a sustained period of verbal and written harassment in the form of epithets (e.g. “Paki”), racial insults (e.g. “Paki the dog”, “Paki stink”, “Pakis eat shit”), caricatures (e.g. imitating spoken Punjabi), and racially-charged graffiti on the washroom walls.29

*Dhillon* is a seminal case in Ontario human rights jurisprudence as it is the first time that racially-motivated harassment in the form of “bigoted remarks” in the employment context was found to fall within the ambit of the provision on employment.30 As the Board of Inquiry remarked: “The atmosphere of the workplace is a “term or condition of employment” just as much as more visible terms or conditions, such as hours of work or rate of pay”.31 The Board recognized that harassment constitutes discrimination insofar as it adversely impacts the emotional and psychological working conditions of the targets of harassment.32

More importantly, harassment is discriminatory because it relies on stereotypes, epithets and ideas that reinforce certain power structures of inequality between dominant and minority groups. The Supreme Court in *Janzen v. Platy Enterprises* (“*Janzen*”), for instance, noted that racial slurs reinforced perceived racial inequalities, similar to the role of sexual harassment in subjugating women.33 The Court noted that sexual harassment “underscore[s] women’s difference from, and by implication, inferiority with respect to the dominant male group” and “remind[s] women of their inferior ascribed status”.34

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29 *Dhillon* at paras 12, 25, 68.
30 1970 Code, *supra* note 28, s 4(1), which read: “No person shall […] (g) discriminate against any employee with regard to any term or condition of employment because of race […] of such person or employee.”
31 *Dhillon, supra* note 29 at para 107.
32 *Ibid* at para 79.
33 *Janzen, supra* note 27 at para 56.
the same fashion, harassment on a prohibited ground, whether race or sexual orientation, for instance, reinforces pre-existing structures of inequality, whether between Whites and non-Whites, or between heterosexuals and queer persons. Ashleigh Rosette and her colleagues have written about how racial slurs – and by extension harassing conduct on the basis of a prohibited ground of discrimination – perpetuate “hierarchical legitimizing myths”, whereby socially dominant groups are cast as being “better and more worthy of social and organizational benefits than subordinate groups”.  

Harassing conduct, in other words, is inherently discriminatory as it targets individuals based on group characteristics and relies on “hierarchical myths” about the relative social position of groups in order to subordinate its target. Rosette et al., for instance, have written about the impact of racial slurs:

The content and the linguistic terms that characterize racial slurs are in themselves discriminatory. There is a straightforward comprehension that the remark is meant to send a denigrating message to a target because of the target’s racial heritage and to distinguish the targets from other racial groups. Racial slurs place targets into inferior outgroups and aggressors into superior in-groups.

The use of racial slurs – like other forms of harassment based on a prohibited ground of discrimination – do not operate neutrally and evenly across social groups, but rather, often operate to perpetuate the social dominance of dominant groups to the detriment of subordinate groups. For instance, while many words can be used to describe LGBT persons in a denigrating light, and often in association with intimidation (i.e. faggot, dyke, sissy, tranny, etc.), it is difficult to imagine a comparable set of epithets

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36 Ibid.
37 Ibid.
for members of the dominant heterosexual community with the same viscerality, force and threat of violence. Words and gestures have varying socially-significant meanings based on their historical and current association with perpetuating oppression, subjugation and violence.

In *Naraine v. Ford Motor Co.*, Constance Backhouse warned against equating all forms of name-calling in a vacuum detached from history and power – in a manner she called: “false parallelism”. In that decision, Backhouse wrote:

The attempt to draw analogies between Scottish and English name-calling and jokes [...] is problematic, since it implies that people of ethnicities and colours are equally situated. The labels “Limey” and “Scottie,” are not used in any such fictional balanced environment, but in a society where Anglo-Saxon heritage has typically been a hallmark of economic, social and political dominance. The harm which arises from name-calling and racial jokes occurs because the group which is targeted is one which is seriously disadvantaged compared to the dominant group. The jokes and epithets combine insidiously with patterns of economic and social discrimination to isolate and subordinate the individuals identified. To equate “Paki” with “Limey” is to obliterate the hierarchical distinctions which feed upon ethnic and racial distinctions. ³⁸

In short, harassment based on a prohibited ground of discrimination is by definition discriminatory, insofar as it relies on words, gestures and notions that instantiate and perpetuate superiority/inferiority between groups.

Finally, workplace harassment can be viewed as engaging three levels of interests: (1) individual interests, including dignitary, psychological integrity, and the economic interests associated with remunerative work (2) group interests, which include the right to difference and to perpetuate difference, and (3) societal interests, which include concerns for cohesion and commitments to multiculturalism and diversity. These three types of harms underlie the policy rationale in prohibiting harassment in the workplace.

The Supreme Court has long recognized the impact of harassment on an individual’s dignitary, psychological and economic interests. In Janzen, the Court described the impact of sexual harassment on its victims:

Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to content with unwelcome sexual actions or explicit sexual demand, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.\(^{39}\)

These views on sexual harassment can be extended to victims of other forms of harassment. Richard Delgado has written at length about the impact of racial harassment:

The racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted. Such language injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood.\(^{40}\)

Social scientists confirm that racial insults, for instance, cause psychological harm by tending to create in victims the very “traits of ‘inferiority’” that the insult ascribes to them.\(^{41}\) According to Rosette et al., “[t]argets of racial slurs experience lower life satisfaction, a higher incidence of posttraumatic stress disorder, and worse health conditions.”\(^{42}\)

It is not much of a stretch to understand that the adverse psychological and dignitary consequences of harassment carry over into the pecuniary interest of the victims.

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\(^{39}\) Janzen, supra note 27 at para 56.


\(^{42}\) Rosette et al, supra note 35 at 1404.
of harassment, insofar as the harassment may force targeted individuals to leave their employment or may hinder their ability to secure new employment.43

In addition to engaging individual interests, harassment impacts group and societal interests. The Supreme Court has recognized that group and societal interests are engaged when an individual is targeted by discriminatory conduct. In *R. v. Keegstra*, Chief Justice Dickson accepted the proposition that hate propaganda affects not only any individuals targeted, but that it also affects the entire group subject to hate propaganda:

…I expressly adopt the principle of non-discrimination and the need to prevent attacks on the individual’s connection with his or her culture, and hence upon the process of self-development [citation omitted]. Indeed, the sense that an individual can be affected by treatment of a group to which he or she belongs is clearly evident in a number of other Charter provisions not yet mentioned, including ss. 16 to 23 (language rights), s. 25 (aboriginal rights), s. 28 (gender equality) and s. 29 (denominational schools). Hate propaganda seriously threatens both the enthusiasm with which the value of equality is accepted and acted upon by society and the connection of target group members to their community.44

Harassment can be viewed in the same light, as affecting both group interests and societal interests. First, harassing conduct that targets an individual on the basis of membership in a certain group detrimentally impacts all members of that group. As Delgado has written about racial slurs, “Not only does the listener learn and internalized the messages contained in racial insults, these messages color our society’s institutions and are transmitted to succeeding generations”.45 As described earlier, harassment based on a prohibited ground of discrimination relies on and perpetuates historical dynamics between groups whereby victims are cast as “inferior outgroups” and aggressors as

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43 See for e.g. Delgado, *supra* note 40 at 139.
44 *R v Keegstra*, 1990 CarswellAlta 192 (WL Can), [1990] 3 SCR 697 at paras 82-83 [emphasis added].
“superior in-groups”. By perpetuating “hierarchical legitimizing myths”, harassing conduct adversely impacts all members identified with the targeted group in terms of their social standing, self-esteem and their connection with that group. It is well established in social psychology that an individual draws her sense of self based on the commonly–held positive and negative features associated with the social group she is associated with.

Second, harassment, like hate speech, insofar as it perpetuates “hierarchical legitimizing myths” undermines the social cohesion and support required to sustain our commitments to equality, multiculturalism and diversity. Not only does harassment devalorize and marginalize certain segments of the population, derogatory jokes – based on race, for instance – have been linked to “physical violence against racial minority groups, as slurs can precipitate the onset of violence when tensions between racial groups already exist”.

In light of the harms canvassed above, there are abundant policy reasons to seek to prohibit harassment. Not only does harassment cause serious individual harms – including adverse impacts on pecuniary and dignitary interests as well as psychological and bodily integrity – it has wider societal consequences. Individual acts of harassment contribute more broadly to perpetuating the devalorization of certain segments of the population and to undermining our commitments to living in plural and diverse societies.

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46 Rosette et al, supra note 35 at 1405
47 Ibid.
49 See ibid, in which the authors refer to this theory as “Social Identity Theory”.
50 These principles are drawn from the Supreme Court’s decisions on hate speech, see for e.g. Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11, [2013] 1 SCR 467 at paras 23, 66 [Whatcott]; Keegstra, supra note 44 at paras 49, 78, 80, 82.
51 Rosette et al, supra note 35 at 1404.
In that way, harassment on the basis of a prohibited ground of discrimination is different from other tortious conduct. Harassment not only has consequences on specific targeted individuals, but it also has broader social consequences that elevate the importance behind prohibiting this sort of conduct and calls out for a public response.

C. Customer-on-Worker Harassment: State of the Law

The problem at the core of this project is whether customers or clients have duties under the Code to refrain from harassing an individual in the course of that individual’s employment. This section will explain why this question matters, review the case law in relation to the acts of customers and clients, and outline the problems arising from the current case law.

Interactions between customers and each of the following four types of workers will be considered:

a) \textit{conventional employees}: employees employed in a standard employment relationship who interact with customers (e.g. a bank teller dealing with a customer at a branch);

b) \textit{assignment employees}: employees employed by an employment agency or an ordinary employer but assigned to work with an outside client (e.g. cleaning staff hired by a cleaning company but assigned to work with a third-party company);

c) \textit{dependent contractors}: self-employed individuals who work for a primary client (e.g. a self-employed graphic designer who works almost exclusively with one studio);
d) **independent contractors**: self-employed individuals who work for a number of clients (e.g. a journalist who works with a number of news outlets).

What these four fact patterns have in common is that they involve individuals engaged in remunerative work, which brings them into contact with third-parties that have the potential to affect their working conditions and workplace, and these workers are required as a function and requirement of their employment to interact with these customers. As will be explored later in this section, the four categories of workers have varying access to human rights proceedings against harassing customers/clients. Being able to bring a claim is contingent on establishing an employer-employee or employer-employee-like relationship. While conventional employees may hold their employer responsible for customer harassment, they are not entitled to hold customers directly liable under the Code.\(^{52}\) Independent contractors, meanwhile, are denied any action against harassing clients under s. 5(1). Meanwhile, assignment employees and dependent contractors are permitted to initiate human rights proceedings directly against clients/customers only if they are able to make out that their client/customer acts as a “*de facto* employer”.\(^{53}\)

Whether customers or clients have duties under the Code’s employment provisions matters significantly. First, the question forces us to confront the practical realities of who is afforded protection under the Code. Changing labour market patterns require reconsideration of the scope of discrimination to match new forms of employment.

\(^{52}\) *Laskowska v Marineland of Canada Inc.*, 2005 HRTO 30 (CanLII) at para 51 [Laskowska].
From a pragmatic perspective, the scope of the Code’s employment provisions has a direct bearing on the day-to-day lives of millions of working Ontarians. Work plays a fundamental role in securing remuneration, enabling self-worth and grounding dignity.\footnote{Guy Davidov, “The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection” (2002) 52:4 UTLJ 357 at 387-88 [Davidov].} In many ways, the Code is one of the foundational pieces of employment legislation, alongside the Employment Standards Act, the Occupational Health and Safety Act and the Labour Relations Act.\footnote{Employment Standards Act, 2000, SO 2000 c 41; Occupational Health and Safety Act, RSO 1990, c O.1; Labour Relations Act, RSO 1990, c L.2.} All act as a public policy bulwark against the common law principle of freedom of contract, guaranteeing a minimum floor in the treatment of workers. Of the five social areas protected under the Code, employment-related applications make up the vast majority of the Tribunal’s docket.\footnote{Andrew Pinto, Report of the Ontario Human Rights Review 2012 (Toronto: Queen’s Printer 2012) at Appendix E [Pinto].} Between 2008 and 2012, employment cases formed 76% of the Tribunal’s work, far outstripping good, services and facilities cases (22%), accommodation cases (5%), vocational association cases (1%), and contract cases (0.7%).\footnote{Ibid.} The scope of the employment protection in the Code – who is protected and in what way – matters in a fundamentally practical manner to millions of individuals.

Determining the outer edge of the employment protection under the Code is particularly significant given the growing trend in the Canadian labour market away from standard employment relationships to an increasing reliance on more flexible and less formal work arrangements.\footnote{Judy Fudge, Eric Tucker & Leah Vosko, The Legal Concept of Employment: Marginalizing Workers (Ottawa: Law Commission of Canada, 2002) at 11 [Fudge et al].} In particular, the rise of employment agencies and the increasing reliance on self-employment has meant that many individuals – while
engaging in or performing their occupation – are not strictly considered in employer-employee relationships. In many cases, particularly self-employed individuals, the only characterization that can be given to a relationship between a working individual and the recipient of that work is that of worker and customer. Insofar as Code jurisprudence fails to keep pace or adapt to the changing labour landscape in Canada, there is a real risk that the protective ambit of the “equal treatment with respect to employment” provision may be hollowed out. Exploring the limits of employment protection is all the more important when the social science data – as will be canvassed in Part IV – underscores that non-standard work positions are increasingly and disproportionately filled by women, visible minorities and lower-income individuals – the very groups of individuals who are the most vulnerable to human rights infringements.59

Second, we need an account of the criteria for admitting new categories of relationships within the protective ambit of “equal treatment with respect of employment” capable of putting the jurisprudence on a principled and consistent path. As will be explored later in this part of the project, courts and tribunals have been inconsistent with their methodological approach in determining what sort of relationships trigger duties under s. 5(1) of the Code – failing to provide a structured or principled roadmap in dealing with the evolving nature of employment. Exploring whether to admit customers and clients as having duties under s. 5(1) requires us to consider and build up a workable analytical approach in determining the applicability of s. 5(1) – which may assist in defining the contours of the employment protection going forward. Further, determining whether clients or customers have duties under s. 5(1) will require us to

identify the very interests and objectives meant to be protected by s. 5(1), as well as the meaning of “employment” in the context of the Code.

In short, by exploring whether customers or clients might have duties under section 5(1), this project examines the very contours of section 5(1) and the analytical structure by which its contours should be determined.

To date, the Tribunal has admitted a wide array of relationships as coming within the protective ambit of section 5(1), including employer-employee\(^{60}\), union-member\(^{61}\), employee-employee\(^{62}\), volunteer organization-volunteer\(^{63}\), and employment agencies and job seekers\(^{64}\). However, the Tribunal has explicitly refused to recognize the customer-worker relationship, instead developing a patchwork jurisprudential response to incidents of customer harassment.\(^{65}\) Three trends are evident. First, conventional employees are entitled to initiate a claim against their employers for failing to secure a safe work environment, including failing to properly investigate incidents of customer harassment. Conventional employees, however, are not entitled to bring a human rights claim against customers directly. Second, assignment employees and dependent contractors may initiate claims against customers as long as they can make out that the customer acts as a “de facto employer”. Third, those classified as independent contractors find no relief under the Code. A look at the jurisprudence shows that not only is the Tribunal inconsistent with respect to the same category of worker-customer relationships, it has produced a set of problematic outcomes that will be explored in this section.

\(^{60}\) See e.g. Janzen, supra note 27.
\(^{61}\) See e.g. Central Okanagan School District No 23 v Renaud, [1992] 2 SCR 970 [Renaud].
\(^{62}\) See e.g. Baisa v Skills for Change, 2010 HRTO 1621 (CanLII) [Baisa].
\(^{63}\) See e.g. Rocha v Pardons and Waivers of Canada, 2012 HRTO 2234 (CanLII) [Rocha].
\(^{64}\) See e.g. Kosovic v Niagara Caregivers and Personnel Ltd, 2013 HRTO 433 (CanLII) [Kosovic].
\(^{65}\) See for e.g. Kim v Camenitiki, supra note 10.
For present purposes, a customer is defined as a party that receives (or intends to receive) goods or services provided by an entity. A worker comes into contact with a customer because she is employed (or self-employed) by the entity providing the goods or services to the customer.

The Tribunal has recognized that entitlement to a discrimination-free work environment includes the right to be free from harassment from customers.\textsuperscript{66} However duties fall only on employers and are limited to: (a) investigating a complaint of discrimination, and (b) refraining from condoning or furthering a discriminatory act that has already occurred.\textsuperscript{67}

In \textit{Laskowska v. Marineland of Canada Inc.}, an employee was sexually touched by the owner of Marineland’s brother who was visiting the facility.\textsuperscript{68} The Tribunal provided the following rationale for the duty to investigate:

\begin{quote}
It would make the protection under subsection 5(1) to a discrimination-free work environment a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it. If that were so, how could it determine if a discriminatory act occurred or a poisoned work environment existed? The duty to investigate is a “means” by which the employer ensures that it is achieving the Code-mandated “ends” of operating in a discrimination-free environment and providing its employees with a safe work environment.\textsuperscript{69}
\end{quote}

The duty to investigate includes three broad elements: (a) a complaint mechanism (including whether a suitable anti-harassment policy and complaint mechanism is in place, as well as adequate training to management and employees), (b) a proper response and investigation (i.e. whether the complaint was treated seriously, promptly and

\textsuperscript{66} See e.g. \textit{Laskowska, supra} note 52 at para 51.

\textsuperscript{67} \textit{Ibid}.

\textsuperscript{68} \textit{Ibid} at para 1. While \textit{Laskowska} deals specifically with an incident of sexual harassment, the general principle that employers have duties to safeguard a safe work environment has been found to apply in cases of harassment on grounds other than sex, see for e.g.: \textit{Kim, supra} note 10 at para 18.

\textsuperscript{69} \textit{Ibid} at para 51 [emphasis added].
sensitively, and whether the employer’s investigation and response was reasonable), and (c) a proper resolution of the complaint (i.e. whether the employer took reasonable steps to secure a healthy, discrimination-free work environment, and communicated its findings and action to the complainant). Employers are not required to satisfy each element; rather the response must be, on the whole, reasonable.

While employers may be held liable when customer harassment occurs, the Tribunal has explicitly held that customers may not themselves be held liable, a position confirmed in *Kim v. Camenietzki*. Kim was a psychologist/case worker of Korean descent employed by the Workplace Safety and Insurance Board (the “WSIB”). She denied a worker certain WSIB benefits. In response, the worker’s treating doctor – Camenietzki – wrote to Kim making a racially-charged statement, suggesting that her position was “bizarre, given that [he] live[s] in Canada and not in North Korea”. Kim brought a human rights application against Camenietzki under s. 5(1), but it was denied on the grounds that s. (5) protection does not impose duties on “third parties” that employees are required to deal with in the course of their employment.

The Tribunal’s decision relies primarily on the fact that Kim and Camenietzki did not share an “employment relationship”:

> [17] Section 5 provides a right to be free from discrimination “with respect to employment”. In this case, there was no employment relationship between the applicant and the respondent. The respondent is not the applicant’s employer, supervisor or co-worker, but rather a third party the applicant was required to have dealings with in the course of her employment.

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72 *Kim, supra* note 10 at para 20.
74 *Ibid* at paras 17-20.

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Section 5 creates a positive obligation on an employer to ensure that an employee’s right to equal treatment in employment without discrimination or harassment on the enumerated grounds is not infringed. This has been found to mean that if an employee experiences discrimination or harassment on an enumerated ground in the course of her employment, including from a person who is not the employer, the employer’s agent or another employee, the employer is required to do something (see, Laskowska v. Marineland of Canada Inc., 2005 HRTO 30).

For example, if a sales clerk in a store is subject to racial harassment by a customer of a store, the clerk is entitled to expect her employer to take appropriate steps, which could include insisting that the customer stop the harassment. If the store failed to take appropriate steps, the Tribunal could find that the employer had failed to ensure the clerk’s Code-protected right to work free from discrimination and harassment (see, for example, Ankamah v. Chauhan Food Services, 2010 HRTO 20240).

However, the Code would not apply to the customer who was the harasser and the employee could not bring an Application against the customer. This would also be true if the customer happened to be in the course of his employment at the time of the alleged harassment.

In other words, the current jurisprudence views customers as mere third parties that a worker is required to have dealings with in the course of employment who owe no duties under section 5(1) in the absence of an “employment relationship”.

This reasoning is problematic for a number of reasons. First, the requirement that the parties be in an “employment relationship” is not consistently invoked to trigger s. 5(1) liability. For instance, unions and fellow employees have been found to have duties under s. 5(1) even though they are not in an “employment relationship” with a given worker. Second, while an employee is entitled to a process (i.e. an investigation) to deal with the past harassing conduct, the Tribunal’s interpretation of s. 5(1) fails to provide a substantive remedy that holds the harasser accountable. This interpretation has produced situations where because an employer’s investigation was sufficient, an employee is left

75 Ibid [emphasis added].
with no remedy even though customer harassment is found to have occurred. Third, the Tribunal’s interpretation effectively precludes independent contractors – who may have no identifiable “employer” – from any relief under the Code for customer-related harassment. I will return to explore these concerns more fully below, in Part IV.

While the Tribunal has resisted extending duties to customers when the victim is employed in a standard employment relationship, it appears open to imposing Code duties on customers when the latter acts as a “de facto employer” to the worker. This applies in two situations: (a) assignment employees, who are employed by a primary employer, but who are assigned to work for a client, and (b) dependent contractors, who can demonstrate that they are in an employment-like relationship with a given client. Two examples help to clarify the approach in dealing with alternative forms of employment – *Loomba v. Home Depot Canada* (“*Loomba*”) and *Sutton v. Jarvis Ryan Associates* (“*Sutton*”).

*Loomba* dealt with assignment employment arrangements. The applicant was employed by a security company, but was assigned to work for Home Depot as a security guard. He was Sikh and wore a turban. Home Depot’s assistant manager refused to allow him to work without a hard hat and subjected him to rude and offensive behaviour because of his turban. The applicant brought a human rights application against Home Depot and the assistant manager. The assignment employment relationship raised questions about whether Home Depot’s conduct was captured by section 5(1), that is,

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76 See e.g. *Kim*, supra note 10.
77 *Loomba*, supra note 53 at para 102; *Sutton*, supra note 53 at para 98.
78 *Loomba*, *ibid* at para 1.
79 *Ibid*. 

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whether the relationship was “with respect to employment”. In brief reasons, the Tribunal held that the corporate respondent was liable under s. 5(1):

Given that the corporate respondent was the de facto employer on site and established the terms and conditions of the workplace, I find that the section 5 prohibition of discrimination with respect to employment applies to the respondents’ relationship with the complainant and retainer of his services.80

Meanwhile, Sutton dealt with dependent contractors. The applicant operated her own bookkeeping company and provided services to the corporate respondent, JRA.81 The applicant brought harassment claims on the basis of sex against JRA. JRA argued that the applicant was an independent contractor and that if she was an employee, it was “of her own firm”. 82 After examining a significant amount of evidence, including the applicant’s working hours, her working location, her remuneration, how she was viewed by and interacted with clients and staff and how work was assigned to her, the Tribunal determined that the parties were in a relationship covered by s. 5(1).83 While the applicant was not strictly in an employment relationship, she was a contractor that was sufficiently “dependent” on JRA:

[98] In the circumstances of this Application, although the applicant had independent bookkeeping clients through her company and provided services under the umbrella of JRA, she was significantly dependant on the firm for a number of things, including assignment of work, use of facilities, setting of her charge out rate to clients of the firm and supervision of the work performed by firm members.

[99] Previous Tribunal decisions have found relationships characterized as self-employment or independent contractors under taxation or other legislation to be covered by protection offered under employment provisions of human rights statutes.

80 Ibid at para 102 [emphasis added].
81 Sutton, supra note 53 at para 14.
82 Ibid at para 16.
83 Ibid at paras 14-16, 98-100.
In my view, there is sufficient evidence to conclude that this Application concerns a matter with respect to employment. […]

The Tribunal appears alive to the fact that non-traditional forms of employment – like assignment employment, self-employment and independent contractors – are types of employment that need to be addressed by the Tribunal from a “purposive and functional” approach in order to determine whether an impugned relationship is “with respect to employment”. The Tribunal has gone so far as to say that:

The absence of a direct employment relationship is not necessarily determinative of whether the alleged circumstances come within the purview of section 5 because of the broad language of the provision which provides for a right to equal treatment “with respect to” employment.

While this appears to acknowledge the open-textured nature of section 5(1), the Tribunal’s focus on examining the markers of control and dependence found in traditional employment relationships narrows its approach.

The Tribunal’s de facto employer approach is problematic for a number of reasons that will be explored at length in Parts II and IV. First, the approach incorrectly presumes that all employment arrangements should be measured against the standard employment relationship to determine what counts as “with respect to employment”. The fact that unions and fellow employees have been recognized as regulated by the Code illustrates that the sole focus on the standard employment relationship is unduly restrictive. In addition, the Tribunal’s approach places significant burdens on employees to establish the applicability of the Code, and this is particularly onerous when the monetary damages at issue are relatively modest. It is open to employers in every case to

84 Ibid at paras 98-100 [emphasis added] [citations omitted].
85 Ibid.
86 Foster v Domclean Ltd, 2012 HRTO 1226 (CanLII) at para 14 [Foster].
allege that a worker and the client are legal strangers, and require the applicant to prove the relationship.

Finally, independent contractors are shut out completely from any protection under the Code solely because of the structure of their employment, and even though they may have no choice but to come into contact with certain customers in the course of their employment. Although the contract “social area” in the Code (s. 3), which provides every person with the right “to contract on equal terms without discrimination” may provide some protection to independent contractors, for present purposes I am primarily interested in the ways in which independent contractors are similar to other workers and yet are left out of the protection of the employment provisions of the Code.

In short, the Tribunal to date has refused to recognize customers as a distinct category of individuals having duties under s. 5(1), even though it recognizes customer harassment as sufficient to trigger liability the Code – on the part of an employer. Conventionally employed workers are entitled to a process – through their employer – in the form of an investigation, but are precluded from holding harassing customers directly responsible. Assignment employees and dependent contractors are afforded protection as long as the client is a de facto employer. Independent contractors find no relief under s. 5(1) for customer harassment.

D. The Centrality of the Traditional Employer-Employee Relationship

One way of explaining the Tribunal’s resistance to extending duties to mere customers on the one hand, while extending duties to customers who act like employers, is that adjudicators appears to be operating within a model that uses the traditional employment relationship – marked by a high degree of control and dependency – as the

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87 See e.g. Ketola v Value Propane Inc, 2002 CanLII 46510 (Ont Bq Inq).
paradigm in extending duties under section 5(1). Conventional employees are directed to turn to their employers for relief when customer harassment occurs, assignment employees and dependent contractors have relief against customers only when they can make out that the latter behave like employers, and independent contractors – without an identifiable employer – find no relief.

The Supreme Court’s recent decision in McCormick v. Fasken Martineau DuMoulin LLP ("McCormick") represents the continuing reliance on the traditional employer-employee relationship model in determining the scope of human rights protection with respect to employment. In McCormick, the Supreme Court attempted to set out a test for determining in what circumstances the B.C. Code’s employment provision would apply. The applicant, an equity partner at a law firm, brought a challenge under the B.C. Code to his firm’s partnership agreement requiring equity partners on reaching 65 to divest their ownership shares. The partnership agreement allowed affected partners to enter into a separate arrangement with the firm to continue working as an employee or non-equity partner, but such arrangements were stated to be “the exception”. The Supreme Court held that the B.C. human rights tribunal had no jurisdiction to consider the application, as the applicant was not in the “type of workplace relationship” covered by B.C.’s employment provision. The Court set up a framework to determine the existence of an “employment relationship” sufficient to trigger human rights liability based on the elements of control and dependency – the “control/dependency test”:

88 McCormick, supra note 6 at para 1.
89 Ibid.
90 Ibid at para 3.
Deciding who is in an employment relationship for purposes of the Code means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. In other words, the test is who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations? The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace [ …].

The Court found that partners will not normally be considered to be in an “employment relationship for purposes of human rights legislation”, because partners, collectively, act as the employer, and otherwise have control over workplace conditions and remuneration. On the facts of McCormick, the Court found that the applicant was not sufficiently dependent on the law firm and otherwise had control over his working conditions by having the right to participate in firm decisions.

The control/dependency test proposed by McCormick is ultimately focussed on identifying employers and employer-like actors who exercise a sufficiently high degree of control over the applicant. In Parts II and III of this project, I will argue that the statutory language of the Code and the jurisprudential treatment of section 5(1) demonstrate that the control/dependency test fails to properly account for the breadth of section 5(1). First, the statutory language of the Ontario Code and its legislative evolution – as compared to the B.C. Code evinces an intention on the part of the Ontario legislator for section 5(1) to apply to parties beyond the traditional employment relationship. Second, McCormick is otherwise wrongly decided because its fails to account for the number of non-employer actors – like unions, employment agencies and

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91 Ibid at para 23.
92 Ibid at para 28.
93 Ibid at para 33.
94 Ibid at paras 41-42.
co-workers – who do not exercise the same level of control as the traditional employer, and yet have section 5(1) duties. *McCormick* wrongly assumes that a single standard of control and dependency – modelled on the traditional employer-employee relationship – should apply to determine whether section 5(1) duties apply in all cases. Instead, this project will argue the degree of control/dependency necessary to trigger section 5(1) duties can vary depending on the specific interest at issue. For instance, the degree of control/dependency necessary to trigger a duty to not to harass may be lower than the degree of control/dependency necessary to trigger a duty to accommodate.

**E. Recognizing New Categories of Relationships Covered under Section 5(1)**

As canvassed above, parties that have duties under the Code include: employers, fellow employees, unions, recruitment agencies, and customers (insofar as they act as *de facto* employers). However, the Tribunal and courts have yet to develop a consistent and coherent methodology.

While the Supreme Court has articulated a test (the “control/dependency” test) for determining whether an “employment relationship” exists for the purposes of the B.C. Code in *McCormick*, for reasons that will be fully explored in Part II, this test must be rejected as an overarching methodology in determining the scope of section 5(1). The case focussed solely on where an “employment relationship” exists. It does not provide an account that makes sense of non-employer parties that have duties under the Code, including unions, employment agencies, and other employees.

The Tribunal has applied different tests, or at times, no test to justify how a party comes within the ambit of section 5(1). Sometimes the Tribunal has adopted a

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95 *Ibid* at para 25.
“purposive and functional” approach.\(^96\) This largely tracks the Supreme Court’s “control and dependence” test articulated in *McCormick*, and is subject to the same criticism.

Occasionally, the Tribunal has applied what can be called a “nexus” test. For example, in *Chaudhry v. Choice Taxi of Cornwall Inc.*, a taxi company that refused to allow the applicant to join the company as a shareholder or to receive dispatch services, and allowing him to drive under the company’s banner, was held liable for discrimination “with respect to employment”\(^97\). The applicant was required to show that “some nexus or link in the chain of discrimination between the respondent and the [applicant]”\(^98\). However, the Tribunal has never specifically explained what constitutes a sufficient “nexus or link in the chain of discrimination” to allow a respondent to be held liable under section 5(1). As a result, the “nexus test” is simply invoked to admit a new category of relationship without setting out consistent criteria for when certain relationships will be recognized. Most saliently for this project, despite the potentially expansive breadth of the “nexus test”, the Tribunal has failed to explain why customers continue not to fall within the ambit of section 5(1)\(^99\).

While a complete methodology for determining the scope of section 5(1) is beyond this project, I propose certain methodological tools useful in justifying imposing duties on new categories of relationships. There are three steps in determining whether a given relationship falls within the ambit of section 5(1). First, it is necessary to consider whether the legislation precludes an extension of the duty by examining the applicable statutory provisions. These provisions may offer clues as to the sort of relationships that

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\(^96\) See e.g. *Chappell v Securitas Canada Limited*, 2012 HRTO 874 (CanLII) at para 22

\(^97\) *Chaudhry*, supra note 7 at para 4.

\(^98\) *Ibid* at para 132.

\(^99\) See e.g. *Kim*, supra note 10.
ought to be covered by section 5(1). For instance, employers, employees and employment agencies are specifically mentioned as having duties under the Code.\footnote{See e.g. \textit{Code}, supra note 5, ss 5(2), 23(4).} Second, prior decisions where duties have been found to exist under section 5(1) may reveal the common factors that constitute sufficient proximity between two parties so that the relationship is brought within the ambit of section 5(1). I intend to propose a definition of proximity that modifies the control/dependency test in \textit{McCormick}, such that proximity is established where the impugned actor exercises sufficient control (and the worker is sufficiently dependent on the actor) in relation to the protected interest in question. In order to determine whether a certain class of actors exercises sufficient control/dependency, we can look at classes of actors that have been recognized to have duties in relation to the protected interest in question, whether by statute (e.g. employees with a common employer have duties not to harass one another\footnote{\textit{Ibid}, s 5(2).}) or by case law (e.g. unions have duties not to impede employers from accommodating their employees\footnote{See e.g. \textit{Renaud}, supra note 61.}) and assess whether this class of actors in question are analogous. Third, policy considerations that militate in favour of or negative any duties a party might have under section 5(1) must be canvassed. This project applies this methodological approach in considering whether customers ought to have duties under section 5(1) in Parts II, III and IV.
Part II – The Legislative Text

This part of the project examines the first of three critical considerations identified in Part I as keys to understanding the scope of section 5(1) – the statutory language of the Code guaranteeing equal treatment with respect to employment. I argue that the statutory language at section 5(1) is capable of covering customer-employee relationships. First, the design of section 5(1) – as it has evolved over time and as it compares to other equivalent provisions in other provinces – demonstrates a legislative intent that the provision be applied broadly to cover relationships beyond the classic employer-employee relationship and that section 5(1) was designed to allow the Tribunal to recognize new categories of relationships where circumstances warranted it. Second, section 5(1)’s guarantee of “equal treatment with respect to employment” provides for a broad protection against work-related harassment. I reject the argument that section 5(2) is an exhaustive expression of protections afforded in relation to harassment (i.e. that it is restricted solely to employer or employee harassment). I show how section 5(1) encompasses the other employment provisions found in the Code; those other provisions provide clear cues from the legislator as the sort of parties having duties under section 5(1) – including several non-employer actors like employees and employment agencies. Finally, in light of the foregoing review of the statutory language, design and evolution of section 5(1) and the employment provisions in the Code, I show how the McCormick decision does not apply to the Code, and otherwise, fails to properly account for the breadth of section 5(1).
A. Section 5(1) Is Capable of Including Customer-Worker Relationships

This section will argue that the language contained at section 5(1) is capable of encompassing customer-worker relationships within its protective ambit based on: (a) statutory interpretation principles applicable to human rights legislation, (b) the specific design of section 5(1), (c) the legislative evolution of section 5(1) over the course of four enactments and (d) the design of employment provisions in other jurisdictions.

It is well settled that human rights legislation should be interpreted in a liberal and purposive manner. The Supreme Court first recognized the quasi-constitutional status of human rights codes in *Insurance Corporation of British Columbia v. Heerspink*103, and courts have subsequently relied on the principles emerging from that decision, namely: (a) “protected rights are to receive a broad interpretation, while exceptions and defences are narrowly construed”104 and (b) “key provisions of the legislation are adapted not only to changing social conditions but also to evolving conceptions of human rights”105.

A liberal and purposive interpretation means that human rights codes should be interpreted to fulfil the objectives for which they were enacted even where there is no express statutory basis. In *Ontario Human Rights Commission v. Simpson-Sears Limited*, for instance, the Supreme Court – relying on a liberal and purposive approach of the Code – found a duty to accommodate despite the absence of an “express statutory base”106, but instead on the basis that a duty to accommodate was a “natural corollary” to the right to equal treatment protected under the Code.107

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105 Ibid at 19.1
107 Ibid at 22.
A liberal and purposive interpretation also means that when the legislature intends to limit the scope of human rights provision, it must do so clearly. As the Tribunal has itself recognized: “it is not open to the Tribunal to read in a limitation that the legislature has not created”, because so doing would not advance the purpose and policy behind the provision.

Section 5(1) contains a number of design elements that illustrate a legislative intent for the provision to be interpreted broadly and liberally in relation to “equal treatment with respect to employment”.

First, unlike all other provincial human rights statutes and as a break from earlier enactments of Ontario’s Code, section 5(1) vests a positive right to equal treatment in “every person”, as opposed to prohibiting certain actors in engaging in discriminatory conduct (e.g. “No employer shall…”). The shift from the “no employer shall” language contained in pre-1981 enactments to the expansive and open-textured language of establishing a “right to equal treatment” is a clear indication on the part of the Ontario legislature that section 5(1) is to be interpreted in an expansive fashion, beyond the strictures of the employer-employee relationship.

Second, the Code does not attempt to define the parameters of “employment” or to enumerate a closed list of specific circumstances that will constitute a breach of the “right to equal treatment with respect to employment”. As will be elaborated below, the expansive language of section 5(1) and the lack of any definitional strictures on “employment” evince a legislative intent to allow the Tribunal and the courts to elaborate the natural limits of the right.

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108 Rocha, supra note 63 at para 25.
109 Ibid.
Third, the Code contains an explicit preamble setting out the broad and aspirational purposes behind the Code, including:

(a) the recognition of the dignity and worth of every person,

(b) the protection of equal rights and opportunities without discrimination,

(c) the “creation of a climate of understanding and mutual respect for the dignity and worth of each person”, and

(d) the goal of ensuring that “each person feels a part of the community and able to contribute fully to the development and well-being of the community”. ¹¹⁰

All of these stated goals militate in favour of an expansive interpretation of section 5(1), particularly insofar as it promotes mutual understanding and respect and recognizes the individual dignity of each person.

These three distinctive traits of the current Ontario Code are underscored by the historical and cross-jurisdictional analysis below.

1. Legislative Evolution

A review of the sequence of human rights enactments in Ontario in relation to employment illustrates a clear intention on the part of the legislature to ensure that section 5(1) encompasses relationships beyond the employer-employee relationship and to encourage the Tribunal to interpret the provision expansively.

It is well established that the legislative evolution of a given statute is a useful interpretive tool to reveal legislative intent. ¹¹¹ It is also a well-established principle of statutory interpretation that amendments to the wording of a legislative provision are

¹¹⁰ Code, supra note 5, preamble.
¹¹¹ Sullivan, supra note 104 at 23.21. In Gravel v St. Léonard (City), [1978] 1 SCR 660 at 667, the Supreme Court held that: “Legislative history may be used to interpret a statute because prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it.”
made for a particular purpose – namely “to clarify meaning, to correct a mistake, to change the law”. Legislative changes to a provision are presumed to be purposeful. As Ruth Sullivan indicates: “[a] legislature would not go to the trouble and expense of amending a provision without any reason.”

For our purposes, it is important for us to consider the historical evolution of human rights legislation in Ontario in respect of employment. There have been four enactments of human rights protection in relation to employment: in 1951, 1962, 1981 and 1990. The 1981 enactment represents a watershed moment in the evolution of the general provision dealing with employment, and as such, this analysis will focus on key differences between the 1962 and 1981 enactments.

Ontario was the first jurisdiction in Canada to enact anti-discrimination legislation in respect of employment in 1951 in the form of two statutes: the *Fair Employment Practices Act* and the *Female Employees’ Fair Remuneration Act*. The earliest Canadian provision prohibiting discrimination in employment and the direct predecessor to section 5(1) is found at section 3 of the *Fair Employment Practices Act*:

> No employer or person acting on behalf of an employer shall refuse to employ or to continue to employ any person or discriminate against any person in regard to employment or any term or condition of employment because of his race, creed, colour, nationality, ancestry or place of origin.

As discussed further below in the cross-jurisdictional analysis, section 3 of the *Fair Employment Practices Act* can be considered the principal forerunner of employment provisions in Canadian human rights legislation, as its content and form have been

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112 Sullivan, ibid at 23.22.
113 Ibid.
114 The *Fair Employment Practices Act, 1951*, SO 1951 c 24 [FEPA].
115 The *Female Employee’s Fair Remuneration Act, 1951*, SO 1951, c 26.
116 FEPA, supra note 114, s 3 [emphasis added].
adopted by other provinces in their human rights statutes, many of which maintain this language to date.

In 1962, the Ontario legislature folded the 1951 enactments along with other acts into the first *Human Rights Code* in Ontario (the “1962 Code”). The 1962 Code’s employment provision remained nearly identical to the 1951 version:

> No employer or person acting on behalf of an employer shall refuse to employ or to continue to employ any person or discriminate against any person with regard to employment because of his race, creed, colour, nationality, ancestry or place of origin.¹¹⁸

Both versions explicitly restricted employment duties to employers or their agents. Both statutes also attempted to enumerate specific acts that were prohibited “No employer […] shall refuse to employ or continue to employ any person or discriminate against any person with regard to employment”. The other social areas were dealt with a bit differently, under provisions prohibiting “any person” from denying or discriminating against any person “with respect to accommodation, services or facilities”.¹²⁰

In 1981, the Ontario Legislature enacted a revised and expanded Human Rights Code (the “1981 Code”). Indeed, the legislature signalled the dramatic changes to human rights law in Ontario by naming the statute: “An Act to revise and extend Protection of Human Rights in Ontario”. While the 1981 Code expanded the number of prohibited grounds of discrimination, most significantly for our purposes, the 1981 Code also expanded the scope of protection afforded in the social area of employment. In respect of the five social areas identified by the Code, the legislature abandoned the language

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¹¹⁸ *Ibid*, s 4(1) [emphasis added].
¹¹⁹ *Ibid*.
prohibiting certain specific acts (e.g. “No employer shall…; No person shall…”) in favour of creating broadly cast rights in the form of “Every person has a right to equal treatment with respect to [social area] without discrimination because of [prohibited grounds].” This introduced, for the first time, a broad right to equal treatment with respect to employment:

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.123

The 1981 enactment represents a critically important expansion of the employment provision. The principles of statutory interpretation indicate that substantive changes to legislation are presumptively purposeful.124 The changes to what is now section 5(1) were not simply cosmetic, or to clarify or correct the law, but rather change the state of the law. The adoption of a broadly articulated right was a concerted decision of the Ontario legislature to pivot section 5(1) away from a focus on the traditional employer-employee relationship and towards a right capable of imposing duties on a variety of actors capable of exercising some degree of control over employment-related interests. First, the legislature clearly knew how to limit the ambit of section 5(1) by restricting duties to “employers” or to “persons acting on behalf of employers”, as earlier Codes did, and as it did in its 1981 enactment of a workplace harassment provision, which provided that “Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer, or by another

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122 Ibid, ss 1-5.
123 Ibid, s 4(1) [emphasis added]. This language was tracked word-for-word, with the addition of further prohibited grounds, and maintained in the 1990 enactment of the Code – now found at s 5(1).
124 Sullivan, supra note 104 at 23.22.
employee [...]”125 Similarly, the legislature could have enumerated a closed list of circumstances in which the protection would be triggered, as in the past (e.g. decisions where employers “refuse to employ” or “continue to employ”, or discrimination in terms or conditions of employment).126 Further, the legislature could have otherwise limited the scope of section 5(1) by defining and circumscribing “employment”, as other provincial codes had already done. The 1973 enactment of the BC Code, by contrast, provided a definition for “employment”.127

Despite the available tools to circumscribe the employment protection, the Ontario legislature adopted a broad, aspirational and positive “right to equal treatment with respect to employment”, without any definitional strictures. In light of the legislative evolution of section 5(1), the adoption of section 5(1) appears to demonstrate a clear intention on the part of the Ontario legislature to widen the employment protection beyond the strictures of the employer-employee relationship.

2. Cross-Jurisdictional Comparison

Comparing section 5(1) to its counterparts across the country further supports a legislative intent for the provision to be given an expansive interpretation. Section 5(1) represent a high water mark for Canadian human rights provisions dealing with employment, while most other provinces have decided to retain more limited provisions reflecting the language in Ontario’s 1962 enactment. As Sullivan notes:

When two statutes dealing with the same subject or enacted to achieve the same purpose use similar or identical words, the courts may readily conclude that the words have the same meaning and effect. Conversely, when statutes that otherwise are similar use different words or adopt a

125 Code (1981), supra note 121, s 4(2) [emphasis added].
126 See e.g. FEPA, supra note 114, s 3; Code (1962), supra note 28, s 4(1).
different approach, this suggests that a different meaning or purpose was intended.\textsuperscript{128}

While the Supreme Court has held that essentially similar provisions in human rights statutes across provinces should generally be given a common interpretation, in \textit{Berg v. University of British Columbia}, it placed a limit on this principle: when “[…] the wording clearly evinces a different purpose on behalf of a particular provincial legislature”.\textsuperscript{129} The employment provisions from across provincial human rights statutes demonstrate substantially different approaches in wording and structuring the protection.

The employment provisions across Canadian human rights statutes can be divided into three categories: (a) provisions that provide limited protection, either because they restrict duties to “employers” or limit prohibited discrimination to certain acts, (b) provisions that provide broad protection, but contain limitations on the scope of “employment”, and (c) provisions that provide broad protection with no defined limitations. It is important to note that this cross-jurisdictional analysis is focussed on the scope of the employment provision contained in these statutes. Some jurisdictions, like Quebec and Nova Scotia have standalone prohibitions against harassment\textsuperscript{130} or broad guarantees on equality.\textsuperscript{131} The focus of this project, however, is the scope of section 5(1) in relation to other comparable employment provisions.

\footnotesize{\textsuperscript{128} Sullivan, \textit{supra} note 104 at 13.43 [emphasis added].
\textsuperscript{129} \textit{Berg v University of British Columbia}, [1993] 2 SCR 353 at 373.
\textsuperscript{130} \textit{Quebec Charter, supra} note 4, s 10.1 [\textit{Quebec Charter}; \textit{Human Rights Act}, RSNS 1989, c 214 s 5(2) [\textit{NS Human Rights Act}].
\textsuperscript{131} \textit{Quebec Charter, ibid}, s 10.}
a) Category 1: Limited Protective Ambit

The first category of provisions generally limits the protective ambit of the employment provision by specifying that that only “employers” have duties. The employment provision of the *Alberta Human Rights Act*, for instance, provides:

**No employer shall**

(a) refuse to employ or refuse to continue to employ any person, or

(b) discriminate against any person with regard to employment or any term or condition of employment,

because of [prohibited grounds of discrimination].

The employment provision contained in the *Alberta Human Rights Act* is substantially similar if not identical to the provisions contained in its Saskatchewan, New Brunswick, and Newfoundland and Labrador equivalents. All of these provisions limit the protective ambit to “employers”, and otherwise reflects the form and substance of pre-1981 Ontario enactments of human rights protection in relation to employment. While some of these jurisdictions may have expansive definitions of “employers”, beyond the strictures of master-servant relationships, the duties owed under these provisions are still restricted to employers or employer-like persons.

Prince Edward Island’s employment provision is further constrained by limiting its scope solely to decisions by persons to “refuse to employ or to continue to employ any individual”.

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132 *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 7(1) [emphasis added].
136 See e.g. *ibid*, s 14(10)(a).
137 *Human Rights Act*, RSPEI 1988, c H-12, s 6(1).
b) Category 2: Broad Protection with Some Limits

The second category of employment provisions provide for a broad scope of potential categories of covered relationships, by not restricting duties solely to “employers” or employer-like persons. These provisions, however, are limited partly in the subject matter intended to be covered. The employment provision in the Quebec Charter of Human Rights and Freedoms’ (the “Quebec Charter”), for instance, uses a broad “no one” prohibition, but limits its application to specific elements of employment. Section 16 of the Quebec Charter provides:

No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.138

Similarly, the B.C. employment provision, while not limiting the duties to employers on the face of its provision, defines “employment” as “includ[ing] the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal”.139 While this sort of definition, relying on the word “includes”, would not normally limit the provision, the Supreme Court’s decision in McCormick, as discussed further below, has insisted that this definition circumscribes the scope of the B.C. provision to relationships of control and dependence.140

The Manitoba and Nova Scotia provisions, similar to the BC provision are expansive in providing that “[n]o person shall” discriminate with respect to employment,

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138 Quebec Charter, supra note 4, s 16.
139 BC Code, supra note 12, s 1, “employment”
140 McCormick, supra note 6 at para 21.
yet their respective Codes arguably constrain the scope of these provisions by defining “employment or occupation”141 or by defining “employer”.142

Before considering the third (and most expansive) category of employment provisions, it is instructive to examine the legislative evolution of the B.C. provision. Dominique Clément has written that the B.C. experience with human rights legislation reflects vastly different political visions of the role of human rights legislation.143 The content and scope of B.C. human rights legislation has expanded and contracted depending on the government in power, with right-of-centre Social Credit (“Socred”) and Liberal governments constricting the scope of human rights protections, while left-of-centre New Democratic Party (“NDP”) governments have expanded their scope.144

The Socreds introduced the first Human Rights Act in B.C., in 1969, which contained an employment provision not dissimilar to the earliest Ontario enactments:

No employer shall refuse to employ, or refuse to continue to employ, any person, or discriminate against any person in regard to employment or any term or condition of employment […]145

In 1973, an NDP government enacted a substantially expanded Human Rights Code, which established an expansive and positive “right to equality of opportunity” in respect of “occupation” and “employment”, akin to section 5(1):

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141 The Human Rights Code, CCSM, c H175, s 14(1), 14(13) [Manitoba Code]. Arguably, the Manitoba Code is much more expansive than the BC Code insofar as the Manitoba Code, defines “employment or occupation” more expansively as including “work that is actual or potential, full-time or part-time, permanent, seasonal or casual and paid or unpaid” and “work performed for another person under a contract either with the worker or with another person respecting the worker’s services” (Manitoba Code, s 14(13)). That said, the definition appears to still tie employment to a contractual or contract-like relationship.
142 NS Human Rights Act, s 3, 5(1).
144 Ibid.
145 Human Rights Act, SBC 1969, c 10, s 5.
Every person has the right of equality of opportunity based upon bona
fide qualifications in respect of his occupation or employment, or in
respect of an intended occupation, employment, advancement, or
promotion; and without limiting the generality of the foregoing,

(a) no employer shall refuse to employ, or to continue to employ, or to
advance or promote that person, or discriminate against that person in
respect of employment or a condition of employment; […]\textsuperscript{146}

Eleven years later, in 1984, with a Socred government back in power, the employment
 provision reverted back to the more constrained language contained in the 1969
 enactment, paired with a definition for “employment” – which persists today:

No person shall

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person with respect to employment or any term or
condition of employment, […]\textsuperscript{147}

The B.C. experience is instructive in that it illustrates how the statutory language chosen
to express a human rights protection reflects deliberate political choices on the part of the
legislature as to the breadth of protection intended.\textsuperscript{148} A legislature deliberately intends
to craft a more expansive employment provision when it constructs the provision as a
positive right to equality in relation to employment, and, in turn, intends to constrict its
ambit by reverting to a “No person shall” construction of the provision. The Ontario
legislature’s decision to maintain its open-ended language, while B.C. has not, reinforces
the legislature’s intention to cast a broadly defined right in relation to employment.

\textsuperscript{146} BC Code, 1973, supra note 127, s 8(1) [emphasis added].
\textsuperscript{147} Human Rights Act, SBC 1984, c 22, s 8(1), now B.C. Code, s 13(1).
\textsuperscript{148} Clément, supra note 143 at 299.
c) Category 3: Broad Protection

Section 5(1) stands alone in a third category of human rights provisions dealing with employment, in that it is the only provision cast as a broad, aspirational and positive right “to equal treatment with respect to employment”, with no legislative constraints on the scope of “employment” or “employer” (as in Category 2 provisions), and no attempt to limit duties to “employer” or employer-like persons (as in Category 1 provisions).

In short, section 5(1) – in light of its legislative evolution and compared to its other provincial counterparts – is an exceptional provision. Its legislative evolution indicates a legislative intent to establish a plenary right to equal treatment with respect to employment without limiting or defining in advance the actors that might have duties in relation to that right. In so doing, the legislature appears to have intended to leave the elaboration of the scope of duties under that right to the Tribunal and to courts. In light of this, section 5(1) is fully capable of imposing duties on customers insofar as they engage in conduct that affects the broadly crafted right to equal treatment in respect of employment.

B. Section 5(1) and the Other Employment Provisions

As canvassed earlier in Part I, the Code contains a set of provisions that complement the broad right to equal treatment with respect to employment contained at section 5(1). For instance, section 5(2) prohibits harassment in the workplace, section 7(2) prohibits sexual harassment in the workplace, and sections 23 and 25 contain a number of prohibited acts, including a prohibition on employment agencies from

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149 Code, supra note 5, s 5(2).
150 Ibid, s 7(2).
discriminating in dealing with applications and referrals.\textsuperscript{151} While sections 23 and 25 are explicitly framed as concrete examples of infringements of the right under section 5(1), sections 5(2) and 7(2) are not similarly framed.

On one reading, sections 5(2) and 7(2) can be read as exhaustive legislative statements on the scope of harassment prohibited under the Code. In the case of section 5(2), which provides that: “[e]very person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee […]\textsuperscript{152}, one might argue that the Code’s prohibition on harassment extends only to employees in relation to harassment in the workplace committed by an employer or another employee.

This reading should be rejected for two reasons. First, the right set out in section 5(1) – to equal treatment with respect to employment without discrimination – is expansive enough to subsume the protections against harassment. Section 5(1) independently prohibits harassment beyond the strictures of section 5(2) and 7(2) because harassment constitutes a practice of discrimination that violates the right to equal treatment, as shown in Part I. Second, while statutory interpretation principles will normally presume against tautology, that presumption “can be rebutted when the redundancy serves a purpose”.\textsuperscript{153} In the case of sections 5(2) and 7(2), the legislator appears to separately enumerate a prohibition against harassment and sexual harassment in order to make explicit, what was otherwise implicitly protected under the broad plenary right at section 5(1). This view is supported by the Minister of Labour’s

\textsuperscript{151} Ibid, ss 23, 25.
\textsuperscript{152} Ibid, s 5(2).
\textsuperscript{153} Sullivan, supra note 104 at 8.29.
statements at the introduction of sections 5(2) and 7(2) in the 1981 enactment of the Code:

Harassment, defined as engaging in a course of vexatious comment or conduct, is specifically prohibited in the context of employment and accommodation and protection from sexual harassment is made explicit.154

In other words, section 5(2) and 7(2) – redundancies into themselves155 – were separately articulated as rights from section 5(1) in order to clarify and make explicit a worker’s right to be free from both varieties of harassment.156 The Court in Janzen, for instance, noted that sexual harassment provisions were inserted into provincial human rights statutes in order “to clarify and educate” – to make clear that sexual harassment was a form of sex-based discrimination prohibited by general employment provisions.157

In short, section 5(2) and 7(2) are merely instantiations of the broad right set out by section 5(1). Incidentally, this is the reading that the Tribunal and courts have given to the relationship between sections 5(1) and 5(2).158

Given that section 5(1) encompasses the other employment provisions, these provisions, in turn, help to inform the substantive ambit of section 5(1). The legislator has provided cues as to the sort of actors that might attract liability under the right to equal treatment with respect to employment.

It is not surprising that sections 5(2) and 7(2) expressly provide that employers are prohibited from engaging in harassment. What is more interesting, however, is that

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154 Ontario, Legislative Assembly, Debates (15 May 1981), at 12:10 pm (Hon Robert Elgie) [emphasis added].
155 Section 7(2) simply repeats section 5(2)’s content with reference only to “sex, sexual orientation, gender identity or gender expression” as prohibited grounds of harassment (Code, supra note 5, ss 5(2), 7(2)).
156 See e.g. Janzen, supra note 27 at para 58.
157 Ibid.
158 See e.g. Taylor-Baptiste, supra note 15 at para 27.
those provisions also explicitly provide that harassment “by another employee” is prohibited. Further, s. 23(4) expressly prohibits employment agencies from discriminating against a person in dealing with applications, or referring an applicant to an employer. 159 The inclusion of fellow employees and employment agencies into the Code’s employment provisions provide a number of helpful clues about the scope of section 5(1). Their inclusion demonstrates a legislative intention to hold parties outside of the employer-employee relationship liable under section 5(1) insofar as they affect interests related to equal treatment with respect to employment. Further, their inclusion demonstrates that relationships do not need to display the elements of control/dependence – at the level found in a traditional employer-employee relationship – in order to trigger section 5(1) liability. Finally, the inclusion of fellow employees and employment agencies offers us legislative cues that allow us to map out models – distinct from the employer mould – of the sort of relationships capable of triggering section 5(1) liability. Those non-employer moulds will be explored in Part III and will assist in developing a more comprehensive account of the scope and operation of section 5(1).

C. The Reasoning in McCormick Does Not Apply to the Ontario Code

Before drilling further into defining the scope of section 5(1), it is worth making a few brief comments about the applicability of the Supreme Court’s reasoning in McCormick in light of our conclusions about the statutory language of section 5(1). Given the substantive differences in the construction and legislative evolution of the B.C. and Ontario employment provisions, the reasoning in McCormick does not apply to constrain the scope of section 5(1).

159 Code, supra note 5, s 23(4).
First, the Supreme Court placed significant emphasis in its decision on the definition of “employment” in the B.C. Code and construed that definition as constraining “employment” to relationships of control/dependency analogous to the relationships set out in the definition (i.e. master and servant, master and apprentice and principal and agent). The Ontario Code does not contain any such statutory strictures, and on the contrary, contains explicit language that includes relationships that do not necessarily have high degrees of control/dependency in the mould of the classic employer-employee relationship within the ambit of section 5(1) – for example, other employees and employment agencies.

Second, the legislative evolution of the B.C. and Ontario employment provisions militates in favour of distinguishing the two provisions. While the Ontario legislature moved from a provision prohibiting discrimination to one extending a positive and broadly cast right in “equal treatment with respect to employment” in 1981, the B.C. legislature made an opposite move in 1984 to repeal a broad positive “right to equality of opportunity” in respect of employment or occupation in favour of a provision prohibiting discrimination in respect of “employment” narrowly defined. To date, the Tribunal appears to have agreed with the distinction between the two Codes so as not to apply the McCormick reasoning to constrain the scope of section 5(1).

Part II has sought to demonstrate that section 5(1) – by virtue of its legislative evolution and construction – is capacious enough to encompass customer-employee relationships within its protective ambit. The aim of the next two section will be

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160 McCormick, supra note 6 at para 21.
161 Code, supra note 5, ss 5(2), 7(2), 23(4)
162 Swain v MBM Intellectual Property Law LLP, 2015 HRTO 1011 (CanLII) at paras 22-23, 25 [Swain]; but see: Wing v Niagara Falls Hydro Holding Corporation, 2014 HRTO 1472 (CanLII) at para 44 [Wing].
determine whether the inclusion of customers is appropriate in light of analogies and insights that can be drawn from past jurisprudence (Part III), as well as broader policy considerations (Part IV).
Part III – Past Cases and Proximity

In Part II, this project established that the statutory language in section 5(1) is capable of covering customer-employee relationships in relation to work-related harassment. This part of the project will investigate whether a sufficiently proximate relationship exists between customers and employees such that liability should attach under section 5(1) in relation to harassing conduct. I will be examining an assortment of relationships (outside of the traditional employer-employee relationship) that have been recognized by adjudicators as being covered by section 5(1) in order to develop an account of the proximity necessary between parties to ground liability.

First, I will provide an explanation for the usefulness of past Tribunal and court jurisprudence in determining the scope of section 5(1). Given the broad and open-textured articulation of the right at section 5(1), decisions considering concrete cases involving employment actors other than employers provide the necessary fodder to begin outlining the contours of section 5(1).

Second, I will propose a typology to categorize different non-employer actors that have been held to have duties under the Code. This project will propose and examine three categories of non-employer actors capable of having duties under the Code: (a) Type 1: parties who act like an employer by controlling the terms and condition of work, (b) Type 2: parties who intervene in an employment relationship by setting or condoning working terms and conditions alongside a principal employer, and (c) Type 3: parties who do not control working terms, but who are able to affect working conditions.

Third, I will propose an account of how proximity appears to operate under section 5(1) – that is proximity is established where the impugned actor exercises
sufficient control (and the worker is sufficiently dependent on the actor) in relation to the protected interest in question. In other words, proximity is not determined by a fixed level of control/dependency modeled on the traditional employer-employee relationship, but rather what is sufficient to establish proximity (i.e. the level of control/dependency) will depend on the work-related issue in question. Put simply, proximity asks whether the impugned actor has control over a protected work-related interest, and whether the worker is vulnerable to the impugned actor in relation to that interest.

Finally, I will argue that customers have duties under section 5(1) to refrain from engaging in harassment. The right to a harassment-free work environment has been recognized as an interest protected by section 5(1). There is sufficient proximity between customers and workers – to impose a duty on customers to refrain from harassing a worker while in the course of her employment: customers control their own inclination to harass, customers are capable of adversely affecting the work environment and workers are required to interact with them in the course of their employment.

A. Past Cases as Principled Roadmap

The jurisprudence arising out of Tribunal and court decisions on section 5(1) assists the project of tracing the contours of the right to equal treatment with respect to employment. The consideration of past jurisprudence is not only useful, but also necessary in light of the chief conclusions arising from the statutory interpretation analysis in Part II – that the legislator has deliberately crafted a broadly-cast right with few statutory strictures, and that it intended for the Tribunal and the courts to elaborate the contours of the right over time. As I indicated in Part I, the Tribunal’s “nexus” test to date – which requires “some nexus or link in the chain of discrimination between the
respondent and the [applicant]”\textsuperscript{163} – is so open-ended that it fails to provide a substantive or workable basis to determine which relationships ought to come within the ambit of section 5(1).

In reviewing concrete decisions where the Tribunal or courts have found that non-employer actors have duties under section 5(1) allows us to better understand the common indicia of proximity sufficient to trigger the right to equal treatment. By extension, this analysis will allow us to develop a principled roadmap to better trace the outer contours of the right and develop a means by which to admit new categories of actors within the ambit of section 5(1). This methodology follows the age-old process of incremental inductive reasoning native to common law systems whereby concrete fact patterns and decisions are examined to formulate an understanding of a given right, as Denise Réaume has described it, “without having, at the outset, a complete theory of the abstract concept at our disposal.”\textsuperscript{164}

I should note some limitations about the proposed methodology of inductive reasoning. The Tribunal – which generates the vast majority of the concrete decisions considered – does not conform to the doctrine of \textit{stare decisis}, insofar as it does not see itself bound by its previous decisions. The Tribunal, as a result, has developed inconsistent and at times contradictory decisions.\textsuperscript{165} Further, and related in part to the non-precedential nature of Tribunal decisions, is the Tribunal’s practice of releasing brief reasons – or at times no substantive reasons – for admitting new actors under section

\textsuperscript{163} Chaudhry, \textit{supra} note 7 at para 132.


\textsuperscript{165} See e.g. Swain, \textit{supra} note 162 at paras 22-23, 25 (where the Tribunal held that the McCormick decision applies to the Code); Wing, \textit{supra} note 162 at para 44 (where the Tribunal held that the McCormick decision does not apply to the Code).
5(1).\textsuperscript{166} Notwithstanding those caveats, it is important to note that, while the Tribunal does not operate on a precedential basis, its jurisprudence on relationships sufficient to trigger section 5(1) liability has been surprisingly consistent. Once a non-employer-employee relationship has been recognized as falling within section 5(1), the Tribunal has a practice of consistently extended section 5(1) coverage to that relationship and citing the authority that gave rise to that coverage.\textsuperscript{167} Further, while some Tribunal decisions may have brief or no reasons for extending coverage, the concrete facts undergirding those decisions allow us to understanding the underlying rationale in extending coverage.

\textbf{B. Non-Employer Actors with Section 5(1) Duties}

While the Supreme Court’s decision in \textit{McCormick} would suggest that the only “employment relationship” sufficient to ground a claim under human rights legislation is in the mould of the employer-employee relationship, the Tribunal, courts and the Supreme Court itself, has recognized a number of non-employer actors with section 5(1) duties, including unions, employment agencies, employees and certain customers.\textsuperscript{168} This project proposes to categorize these non-employer actors into three broad types based on their shared characteristics.

Type 1 actors include parties who act like an employer by controlling the terms and conditions of work related to a given position. This includes:

- \textit{volunteer or unpaid work cases}: cases in which organizations are held liable under s. 5(1) to their volunteers, despite the applicant not being remunerated by the organization; and

\textsuperscript{166} See e.g. \textit{Rocha}, supra note 63, where the Tribunal provided no substantive reasons for admitting volunteer organizations within the ambit of section 5(1).
\textsuperscript{167} See e.g. \textit{Loomba}, supra note 53 at para 101, which enumerated the sort of situations in which section 5(1) will apply, as recognized by previous past decisions.
\textsuperscript{168} See e.g. \textit{Renaud}, supra note 61; \textit{Baisa}, supra note 62; \textit{Sutton}, supra note 53; \textit{Loomba}, supra note 53.
(b) dependent contractor cases: cases in which customers have been held liable as
“de facto employers” under s. 5(1) because of their control over dependent
contractors.

Type 2 actors include parties who are involved in setting terms and conditions of
work alongside a principal employer. This includes:

(a) union cases: cases in which unions are held liable under s. 5(1) for
formulating or approving work rules or conditions in coordination with an
employer;

(b) employment agency cases: cases in which an employment agency has been
held under s. 5(1) for their role in formulating or approving work rules or
conditions, as well as cases involving ability management companies
delegated responsibilities to approve accommodation requests; and

(c) assignment employee cases: cases in which customers have been held liable
under as “de facto employers” under s. 5(1) because they control work rules
and conditions at the worksite.

Type 3 actors include parties who do not set terms and conditions of work, but are
otherwise capable of adversely affecting the workplace and are parties with whom a
worker is required to have contact in the course of employment. This includes:

(a) common employer cases: cases in which a co-worker is found liable under
section 5(1) for harassment directed at another co-worker, where both
employees share a common employer; and
(b) *shared work environment cases*: cases in which a worker is found liable under section 5(1) for harassment directed at another worker, where both do not share a common employer, but a common work environment.

1. *Type 1 Actors (“Employer-Like”)*

   The first category of non-employer actors can be grouped together based on their control of the working terms and conditions of a given position. It should come as no surprise that parties that exercise control over a worker’s working terms and conditions, in an analogous fashion to employers, would fall within the ambit of section 5(1). What is notable about the two types of employer-like actors considered in this section – volunteer organizations and customers who contract with dependent contractors – is that while they exert similar control to employers over workplace conditions, they constitute cases where the worker theoretically has a significant amount of agency.

   The Tribunal has recognized that volunteers/unpaid workers and voluntary organizations constitute a covered relationship for the purposes of section 5(1). In *Rocha v. Pardons and Waivers of Canada*, a woman was denied an unpaid placement at an organization on the basis of her age. The Tribunal held that the fact that the applicant had offered to work without pay with a view to achieving paid employment, did not remove the matter from the protective ambit of section 5(1), and that otherwise, “volunteer employment can be considered ‘employment’ for the purposes of the *Code*.”

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169 *Rocha*, supra note 63 at paras 22-23; *Roberts v St. Leonard’s Community Services*, 2014 HRTO 1283 (CanLII) at para 8 [Roberts]; *Sprague v Yufest*, 2016 HRTO 642 (CanLII) at para 10 [Sprague].

170 *Rocha*, ibid at para 12.

171 *Ibid* at paras 22-23.
While the Tribunal in *Rocha* failed to provide substantive reasons for admitting unpaid work into the ambit of section 5(1), it relied on a line of B.C. cases that admitted volunteer work within that province’s employment provision. In *Nixon v. Vancouver Rape Relief Society* (“*Nixon*”), the B.C. human rights tribunal held that the B.C. equivalent of section 5(1) applied to a prospective volunteer of a rape crisis centre who was denied the volunteering opportunity because she was not born a woman.\(^{172}\) The B.C. tribunal held that the volunteer relationship came within employment because: (a) the work done by volunteers is essential to it fulfilling its mandate\(^{173}\), volunteers are subjected to a formal recruitment, interview and training process\(^{174}\), the organization has a clear set of expectations and guidelines for its volunteers\(^{175}\), the work performed by volunteers and paid staff was in substance in the same.\(^{176}\) While the *Nixon* decision was overturned on other grounds, the Tribunal has held in a number of decisions that volunteering constitutes employment, including a prospective volunteer in a drug addiction centre and volunteer on a provincial political campaign.\(^{177}\)

The volunteer cases are notable for a number of reasons. First, they illustrate that the Tribunal will adopt a functional approach in examining relationships, in other words, whether one party behaves like an employer in setting terms and conditions, and the other party behaves like an employee in performing the duties of paid staff, despite the absence of remuneration. Volunteer organizations have section 5(1) duties insofar as they behave like employers in setting working conditions in relation to a given position. Second, the

\(^{172}\) *Nixon v Rape Relief Society*, 2000 BCHRT 32 [*Nixon*], subsequently set aside on judicial review by *Vancouver Rape Relief Society v Nixon et al*, 2003 BCSC 1936 (CanLII) but on other grounds.

\(^{173}\) *Ibid* at para 64.

\(^{174}\) *Ibid* at paras 64-68.

\(^{175}\) *Ibid* at para 70.

\(^{176}\) *Ibid* at para 71.

\(^{177}\) See e.g. *Roberts*, *supra* note 169; *Sprague*, *supra* note 169.
volunteer cases illustrate that section 5(1) is capable of admitting relationships that do not have all the markers of the traditional employer-employee relationship. In the case of volunteer positions, while there may be the absence of economic dependence (because remuneration is not part of the bargain), the non-pecuniary social and psychological interest attached to work, paid or unpaid, is sufficient to ground a claim. As Guy Davidov has written, work fulfills many social and psychological needs in individuals:

[F]irst, work enables people to interact, meet and be with one another; second, work has an intrinsic meaning for the individual as a source of self-identity, self-realization and fulfillment; and third, work plays an important role in the achievement of social status and prestige. […]

It is widely accepted that work is essential in imparting meaning to our lives. Work gives us opportunities for personal expression and creativity. It is a source of intellectual progress and individual advancement. It shapes our personal identities, facilitating self-development and self-realization. It is a venue for individual contribution and self-expression. Work provides the means to dignity, self-respect, and self-esteem; it is part of our conception of human flourishing. It is a major framework for social interactions; indeed, many employed people spend more time interacting with colleagues at work than with friends or members of their families. Work provides opportunities to meet our basic need, as social beings, to belong. It influences one's social standing and is necessary to maintain a feeling of ‘usefulness to the world.’ It is an important aspect of being part of a community, of feeling like a citizen, of feeling that your service is wanted and having an interest in being involved. It gives us structure that is necessary for using and enjoying our leisure time as well. With all this in mind, it is hardly surprising that, according to consistent evidence, most people would work even if it were not economically necessary.

All this is true for any kind of work, not only wage work.

In other words, the volunteer cases indicate that the non-pecuniary social and psychological interests contained in work – separate and apart from the pecuniary interests contained in work – are sufficient to trigger the application of section 5(1).

178 See e.g. Davidov, supra note 54 at 387-88.
179 Ibid at 387-88 [citations omitted].
The Tribunal has also recognized section 5(1) duties extend to customers who retain dependent contractors to work for them. Like the volunteer cases, the dependent contractor cases turn on the extent to which a given relationship functions as an employer-employee relationship, despite the absence of key markers of a traditional employment relationship (i.e. fixed remuneration, security of tenure and exclusivity).

In *Sutton*, the Tribunal held that an accounting firm was liable under section 5(1) for failing to investigate an allegation of sexual harassment that occurred during a firm-sponsored retreat. The applicant ran her own bookkeeping company and was retained by the firm for her services. The respondent argued that that no employment relationship existed between the parties, because the applicant ran her own company, was not paid an income, but rather billed for her services, and that the parties had a profit sharing arrangement in respect of clients she brought to the firm. Despite her status as a contractor, the Tribunal held that the customer-contractor relationship fell within the scope of section 5(1) because the applicant was “significantly dependent on the firm” for the assignment of work, use of facilities, setting her charge out rate to clients and supervision of her work by firm members.

The reasoning in *Sutton* has been applied in a number of other decisions, that is that contractors who are sufficiently dependent on the customers that retain them come within the protective ambit of under section 5(1). The dependent contractor cases clarify that section 5(1) extends coverage to relationships because of how they function,

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180 *Sutton*, supra note 53 at para 142.
181 *Ibid* at para 16.
182 *Ibid* at paras 98-100.
as opposed to how they might appear in law. Further, section 5(1) imposes duties by way of analogy: section 5(1) applies to customers who retain dependent contractors because they act like a recognized category of covered persons—employers.

What the volunteer and dependent contractor cases have in common is that the organization retaining the applicant’s services exercises control over the applicant’s terms and conditions in relation to the position in question. While these organizations may lack certain features of the traditional employer-employee relationship, volunteer organizations and firms retaining dependent contractors are actors analogous to employers.

2. Type 2 Actors (Control Terms and Conditions Alongside Employer)

Unlike Type 1 actors, Type 2 actors do not fully control the terms and conditions of a given worker, but play some role in developing or setting working terms and condition alongside another actor. This section will canvass three examples of Type 2 actors who have been recognized as having section 5(1) duties: unions, employment agencies and customers retaining assignment employees.

The Supreme Court’s decision in Central Okanagan School District No. 23 v. Renaud is and remains the leading decision on the duties of unions under the employment provision of human rights codes. In Renaud, the Court held that a union can be held liable under a human rights statute’s employment provision under two scenarios: (i) if it participates in the “formulation of the work rule that has the discriminatory effect on the complainant”\textsuperscript{184} and (ii) if it impedes “the reasonable efforts of an employer to accommodate” an employee.\textsuperscript{185} The Renaud decision underscores that a union’s duties

\textsuperscript{184} Renaud, supra note 61 at 990.
\textsuperscript{185} Ibid at 991.
under section 5(1) are circumscribed and context-specific. The Court held that when a union is a “co-discriminator” with the employer, in the first scenario, it shares a joint responsibility with the employer to formulate an accommodation, while in the second scenario, a union’s duty only arises when its “involvement is require to make accommodation possible”.186

The circumscribed nature of a union’s duties under section 5(1) has been confirmed by the Tribunal. The Tribunal has rejected claims that a union has a duty to accommodate in relation to a rule strictly developed and controlled by the employer187 or in relation to the level of representation provided in respect of obtaining a permanent accommodated position (where the union did not formulate a work rule and did not impede attempts to accommodate)188.

The union cases provide us with a few important insights about section 5(1). First, actors outside of the employer-employee mould are capable of having duties. Unions clearly do not utilize employees or gain the benefit of their services, nor do they bear the burden of remuneration. In no way can we qualify unions as employers or employer-like. Second, the cases reminds us that section 5(1) is concerned about identifying work-related interests and the extent to which an actor exercises control over those interests. Unions have duties insofar as they might participate in formulating work rules or impeding accommodations. Finally, the union cases remind us that being found to owe duties under section 5(1) is not an all-or-nothing proposition, but rather duties under section 5(1) can be limited and circumscribed, depending on the extent that an actor controls work-related interests.

186 Ibid at 992-993.
187 See e.g. Gungor v Canadian Auto Workers Local 88, 2011 HRTO 1760 (CanLII) at paras 31, 40.
188 Browne v Toronto Transit Commission, 2014 HRTO 554 (CanLII).
Unlike other non-employer actors, the Code explicitly provides that employment agencies have duties under section 5(1) in relation to “receiving, classifying, disposing of or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer”.\(^{189}\) The Tribunal has confirmed that even when an employment agency might be acting only in a “recruiting and referral capacity”, discriminatory conduct by employment agencies would breach an applicant’s right to equal treatment with respect to employment.\(^{190}\) In *Kosovic v. Niagara Caregivers and Personnel Ltd.*, the Tribunal held that an employment agency had breached its section 5(1) duties by using an application form that required applicants to supply their age.\(^{191}\) What may explain the legislative decision to include employment agencies within section 5(1) is that while they may not employ job seekers, these agencies act as gatekeepers for prospective employers. In that way, employment agencies share control and responsibility over hiring and recruitment decisions with employers.

The Tribunal’s decision in *Payne v. Otsuka Pharmaceutical Company Ltd.* illustrates how parties that intervene in recruiting workers will be found to have duties separate and apart from the ultimate employer, even when the party doing the recruiting is not formally an employment agency. In *Payne*, the Canadian Ophthalmological Society (the “COS”) organized a conference, with the assistance of an event planning company, Intertask.\(^{192}\) One of the attendees invited by the COS – Otsuka Pharmaceuticals – requested the conference organizers to assist in finding a suitable receptionist to staff its

\(^{189}\) *Code, supra* note s 23(2).
\(^{190}\) *Kosovic, supra* note 64 at para 35.
\(^{191}\) *Ibid.*
booth at the conference.\textsuperscript{193} Intertask, in turn, contracted with an employment agency that offered up one of its employee’s – the applicant – for the position.\textsuperscript{194} When the Otsuka’s representative arrived at the conference, he refused to work with the applicant because she was Black and requested Intertask to find another booth receptionist. Intertask proceeded to locate another receptionist for Otsuka who was White.\textsuperscript{195}

The Tribunal held that Otsuka and the employment agency were liable under section 5(1) as co-employers.\textsuperscript{196} More interestingly, the Tribunal held that the COS and Intertask were liable for their involvement in recruiting the applicant and for condoning and furthering Otsuka’s discriminatory act by hiring a White receptionist to replace the applicant. In coming to its findings, the Tribunal held:

\begin{quote}
The nature of when a third party or collateral person would be drawn into the chain of discrimination is fact specific. However, general principles can be determined. The key is the control or power that the collateral or indirect respondent had over the complainant and the principal respondent. The greater the control or power over the situation and the parties, the greater the legal obligation not to condone or further the discriminatory action. The power or control is important because it implies an ability to correct the situation or do something to ameliorate the conditions.\textsuperscript{197}
\end{quote}

The Tribunal noted that duties under section 5(1) sit on a spectrum with the “traditional employer-employee relationship” on one end and a “mere bystander” on the other, contingent on the degree to which an actor exercises control or power over the parties and are capable of remedying the situation.\textsuperscript{198} The Tribunal concluded that the conference organizers did not “fall on the far end of the continuum of a duty owed: e.g. traditional
employer-employee relationship." While not having duties of an employer to engage in a full investigation, the Tribunal held that the conference organizers had a duty to conduct some investigation into the matter and at the very least not condone the discriminatory act by proceeding to act on Otsuka’s discriminatory hiring criteria by hiring a non-Black employee.

The employment agencies cases underscore a few elements of section 5(1). First, the cases confirm that actors that fall outside the mould of the traditional employer – and who at times may be legal strangers in relation to a worker – are capable of having section 5(1) duties. Second, section 5(1) actors may have overlapping duties with other section 5(1) actors. Third, these duties may be circumscribed by the extent to which the actor exercises control over the work-related interest.

The last example of Type 2 actors are persons who retain assignment employees – that is customers who retain the services of a company who, in turn, assign one of their employees to work with the customer. These sorts of arrangements are common in security and cleaning services, where workers are assigned by their employer to work at different worksites controlled by their employer’s clients.

In Loomba, the Tribunal dealt with an application brought by a Sikh applicant who was employed by a security company and assigned to work at Home Depot by his employer. While the applicant was assigned to work at Home Depot, an assistant store manager refused to allow the applicant to work at the site because the applicant refused to

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199 Ibid at 26-27.
200 Ibid.
201 See e.g. Loomba, supra note 53; Foster, supra note 86.
202 Loomba, ibid at para 1.
wear a hard hat. The assistant store manager proceeded to subject the applicant to rude and offensive comments because of the applicant’s turban.

The Tribunal held that the relationship between Home Depot and the applicant was covered by section 5(1), despite the two parties being legal strangers. In justifying extending section 5(1) duties to the client of the applicant’s employer, the Tribunal noted:

Given that the corporate respondent [Home Depot] was the *de facto* employer on site and established the terms and conditions of the workplace, I find that the section 5 prohibition of discrimination with respect to employment applies to the respondents’ relationship with the complainant and retainer of his services.

In other words, given that Home Depot set the terms and conditions of work at the assigned worksite – and thereby exercised control over the applicant’s work-related interests – a customer can come to have section 5(1) duties. In that way, assignment employers share duties with the principal employer in relation to the terms and conditions under their control. The assignment employee cases are helpful in understanding section 5(1) for a number of reasons. The cases remind us that customers – and otherwise legal strangers – are capable of being having section 5(1) duties. The cases also remind us that the focus of section 5(1) is to determine what work-related interests are affected and to determine whether the impugned party sufficiently controls the work-related interests in question.

In short, Type 2 actors offer another relational pattern in which section 5(1) duties can be imposed – that is on third-parties who intervene in a primary employment relationship by having some control over the terms and conditions of work. Importantly, Type 2 actors do not have an employer-employee relationship with a given worker, either.

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203 Ibid.
204 Ibid.
205 Ibid at para 102.
because they do not utilize the worker, do not have responsibility in remunerating the worker or because they do not fully control the terms and conditions of work. Duties are extended to Type 2 actors as a function of the work-related matters within their control. As such, Type 2 actors sit on a continuum with section 5(1) duties intensifying as their relationship with a given worker approximates the traditional relationship between employer and employee.

3. Type 3 Actors ("Employee-Like")

The last category of non-employer actors to be considered – Type 3 actors – are distinct from the two preceding categories because they do not set workplace terms and condition, but are in position to control workplace conditions. Type 3 actors include employees with a common employer, and more broadly, workers who share a common workplace.

Employees are explicitly recognized as having duties in the Code – under section 5(2) – that is to refrain from engaging in harassing conduct in relation to other employees. As this project showed in Part II, the other employment provisions – like section 5(2) – inform the scope of the right to equal treatment contained at section 5(1). Indeed, the Tribunal has recognized employees as having specific duties under section 5(1), outside the particular strictures of section 5(2).

In Baisa v. Skills for Change, the Tribunal held that an employee was prohibited by section 5(2) and section 5(1) from making sexually harassing jokes and from making negative comments relating to a co-worker’s marital and family status (i.e. comments about the applicant being a single mother). The Tribunal held the employee liable

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206 Code, supra note 5, s 5(2).
207 Baisa, supra note 62 at paras 48, 50.
under section 5(1) because his comments “served to poison the applicant’s work environment”.\textsuperscript{208} Of note in \textit{Baisa} was the fact that the applicant and respondent were mere colleagues, and not in a hierarchical relationship.

Similarly, in \textit{Harriott v. National Money Mart}, the Tribunal held that a course of sexually harassing conduct by a co-worker to another constituted a breach of both sections 5(2) and 5(1). In explaining the application of section 5(1), the Tribunal held:

\begin{quote}
It is well-settled law that the prohibition against discrimination in section 5(1) affords employees the right to be free from a poisoned work environment in relation to Code-protected grounds. […]
\end{quote}

Taking all of the above into account, Mr. Wade’s comments and conduct created an uncomfortable, unwelcome, unprofessional, sexualized atmosphere in the branch of which he was manager, which adversely affected the applicant and the other female employees working there.\textsuperscript{209}

In other words, a fellow employee not only has duties to refrain from engaging in harassment in the workplace under section 5(2), but he or she also has a broader duty to refrain from conduct that adversely affects a worker’s right to a safe work environment under section 5(1).

While the harassing co-worker in \textit{Harriott} was the applicant’s supervisor, the Tribunal makes no requirement of supervisory control by one party over the other to ground liability. Indeed, that is consistent with the statutory language at section 5(2) that does not require formal control by the respondent, in order to ground a claim under section 5(2). In \textit{Brooks v. Total Recovery}, for instance, the Tribunal held an employee liable under section 5(1) for harassing a fellow employee, without requiring any formal elements of control or dependency to be made out. The Tribunal noted, however, that the

\textsuperscript{208} \textit{Ibid} at para 51.

\textsuperscript{209} \textit{Harriott v National Money Mart}, 2010 HRTO 353 (CanLII) at paras 110, 112, citing \textit{Smith v Menzies Chrysler}, 2009 HRTO 1936 (CanLII) at para 151 [\textit{Smith}].
fact that the respondent was a very senior manager in the organization only served to “increase the impact and effect of the comments on the applicant”. 210

What we learn from the employee cases is that the right to a non-poisonous work environment is a work-related interest protected under section 5(1). Further, section 5(1) captures employees in relation to other employees, even though there is no formal legal relationship between them and no requirement for them to be in a hierarchical relationship. While the case law does not explicitly lay this out, we can hypothesize a few reasons about what makes employees with a common employer sufficiently proximate such that they owe each other duties to refrain from harassing one another under section 5(1). Employees with a common employer are required as a function of their employment to have contact with one another. This often means that these employees will be routinely in each other’s physical or electronic workplaces, which make them captive to one another, and therefore vulnerable to having their workplaces poisoned by the harassing conduct of another employee. In that way, employees exercise control over the working conditions of their fellow employees by deciding to engage or refrain from harassing conduct. In turn, employees are dependent on and vulnerable to their fellow employees insofar as they are captive in their workplaces because they are required to have contact with one another as a function of their employment.

The Tribunal has expanded the coverage of section 5(1) beyond employees with a common employer, to workers that share a common work environment. In Sutherland v. Bradstock, for instance, the applicant worked for an energy company and shared an office with the respondent, who ran his own business that acted as the energy company’s regional distributor. While the applicant and respondent were strictly strangers one to the

210 Brooks v Total Credit Recovery, 2012 HRTO 1232 (CanLII) at para 36.
other, without a common employer, the Tribunal held that the respondent could be found liable under section 5(1) for harasing and dismissive comments made to the applicant about her maternity leave.\footnote{211} In arriving at that decision, the Tribunal held:

\begin{quote}
I am satisfied that the allegations made by the applicant against the respondent fall within the scope of “with respect to employment”. It appears clear that a nexus or link appears to exist with regards to the parties. They both work for Just Energy in the same office. They have routine and regular contact in relation to the applicant’s job function of recruiting regional salespersons. The respondent depends on the applicant’s work in order to carry out his own job responsibilities. It appears their respective jobs require that they maintain an ongoing liaison in relation to determining the types of regional salespersons who would be appropriate to hire, as well the coordination, training, and retention of these salespersons. The applicant’s allegations occur within the context of the respondent’s involvement in and impact on her employment.\footnote{212}
\end{quote}

Despite the Tribunal’s reference to the parties working for Just Energy, it is important to clarify that the decision makes clear that the respondent “worked” for Just Energy as its distributor, not as an employee. However, despite the fact that the parties did not share a common employer, the Tribunal focussed on the fact that the parties were required to share a common physical workplace and to have contact with one another in the course of discharging their work responsibilities.

Similarly, in Loomba, an assignment employee case canvassed above, the Tribunal held Home Depot’s assistant store manager independently and personally liable for his harassing conduct towards the applicant.\footnote{213} The Tribunal made that finding despite the fact that the assistant store manager and the applicant were true strangers, without a common employer. Instead, the parties shared a common work environment

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\begin{itemize}
\item \footnote{211} Sutherland v Bradstock, 2011 HRTO 619 (CanLII) at para 32 [“Sutherland”]
\item \footnote{212} Ibid.
\item \footnote{213} Loomba, supra note 53 at para 120.
\end{itemize}
and their respective work arrangements brought them together in the course of employment.

Finally, in *Sutton*, a dependent contractor case canvassed above, the Tribunal similarly determined that two contractors working for a common client had duties one to the other.\(^{214}\) As discussed above, the applicant was a dependent contractor to an accounting firm and was invited by the firm to a work retreat. At the retreat, she encountered the personal respondent, McColl, who was a client of the firm and had been retained to provide catering at the event.\(^{215}\) While the Tribunal dismissed her allegations of sexual harassment against McColl, the Tribunal would have held that McColl was in breach of section 5(1) had the allegations been made out.\(^{216}\)

What the three cases illustrate is that section 5(1) is capable of covering relationships between legal strangers, not only between employees of a common employer, but also between parties who share a common workplace. While the case law does not explicitly state this, proximity between the parties appears to be established by the fact that workers sharing a common workplace are required to have physical or electronic contact with one another in order to discharge their responsibilities in the course of their employment. In that way, workers sharing a common workplace exercise some degree of control over the working conditions of one another insofar as they can decide to engage or refrain from harassing one another, and they are dependent on one another to maintain a poison-free work environment because they share a common workplace where they must be as a function of their employment.

\(^{214}\) *Sutton*, supra note 53 at para 100.
\(^{215}\) *Ibid* at para 2.
\(^{216}\) *Ibid* at para 100.
In other words, Type 3 actors offer a third and distinct relational model in thinking about section 5(1) duties – at least in respect of the duty not to harass.

C. Developing a Theory of Proximity from the Case Law

The non-employer actor cases canvassed above provide us with concrete fact patterns that allow us to draw some conclusions about the protective ambit of section 5(1) and the types of relationships that are captured by it.

First, section 5(1) applies to relationships outside the mould of the employer-employee relationship. The non-employer cases provide many examples of relationships that are covered but that do not satisfy the high degree of control and dependence expected in *McCormick*. For instance, a union cannot be considered an employer or employer-like to the extent that unions do not “utilize” their members, do not bear the burden of remunerating them, do not determine the nature of work to be performed or engage in discipline or discharge. Yet, unions, like other Type 2 actors, exercise control over certain work-related matters and thereby engage section 5(1) in respect of those matters. Further, the non-employer cases demonstrate that section 5(1) duties can exist between complete legal strangers where no contractual relationship exists. Assignment employees and customers, employees with a common employer, and workers with a shared workplace, are three clear examples where section 5(1) will apply between parties despite there being no contractual relationship between them.

Second, section 5(1) does not impose an all or nothing sets of duties, but rather section 5(1) duties can vary, overlap or be circumscribed depending on the actor’s ability

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217 See e.g. the Crane factors used to identify whether there is sufficient control/dependency canvassed in *McCormick, supra* note 6 at para 24.

218 See e.g. *Loomba, supra* note 53; *Baisa, supra* note 62; *Harriott, supra* note 209; *Brooks, supra* note 210; *Sutherland, supra* note 211; *Sutton, supra* note 53;
to affect work related interests. Section 5(1) duties sit on a continuum and intensify based on the degree a given actor is capable of controlling the work-related interest, and the degree to which the worker is dependent on or vulnerable to the actor.

The Type 2 actor cases illustrate best the way in which section 5(1) duties can vary, overlap and be circumscribed. Unions, for instance, have duties under section 5(1) only to the extent they formulate, alongside with the employer, work rules or impede attempts to accommodate an employee – all of which is tailored to the matters within the union’s control.\(^{219}\) Similarly, employment agencies and customers retaining assignment employees have duties to the extent they control some aspect of work terms or conditions, which may overlap or complement the duties imposed on the underlying primary employer.\(^{220}\)

In the case of a worker’s interest to a non-poisonous work environment, we can see the ways in which the three types of model relationships might impose overlapping and complementary duties. In Loomba – the case involving a Sikh security guard assigned by his primary employer to work at Home Depot, and who was in turn harassed by an assistant general manager – we can observe the three types of actors at play in a given employment web. The applicant’s primary employer (as a Type 1 actor) would likely have a responsibility to investigate and might have a duty to find an alternative secure working environment. The customer / on site employer (as a Type 2 actor) might have a duty to investigate in cooperation with the primary employer, and perhaps a duty to discipline its own employee – the assistant general manager. Finally, the assistant general manager in his personal capacity (as a Type 3 actor) had a basic duty not to

\(^{219}\) See e.g. Renaud, supra note 61.
\(^{220}\) See e.g. Otsuka, supra note 192; Loomba, supra note 53.
engage in harassing conduct that poisoned the applicant’s work environment. In this way, we can see how section 5(1) duties can arise and apply to different actors in varying, overlapping and complementary ways out of the same fact scenario.

Third, section 5(1) duties appear to cover relationships of sufficient proximity, where an impugned actor exercises sufficient control (and the worker is sufficiently dependent on the actor) in relation to the specific protected interest in question. This notion of proximity requires us to first identify a work-related interest protected by section 5(1). Work-related interests include the right to non-discriminatory working terms and conditions and for our purposes, the right to a non-poisonous work environment. As the volunteer cases illustrated above, work-related interests can be pecuniary (i.e. related to remuneration, etc.) or non-pecuniary (the social and psychological benefits drawn from employment). We then need to determine whether the actor in question exercises control over specific work-related interest at issue or whether the worker in question is dependent on the actor in relation to that specific work-related interest.

The section above mapped out three relational models that have been found to be sufficiently proximate. A Type 1 or 2 actor is sufficiently proximate to a given worker in relation to particular working term or condition as long as that actor controls the specific working term or condition in question. The best example of this is a union’s duty to accommodate. Unions have section 5(1) duties to their members insofar as they control the formulation of a work rule or can impede an employer’s offer of accommodation, and insofar as their members are dependent on them to negotiate or accept reasonable accommodations. A Type 3 actor, as we have seen above, has duties not to harass individuals who – as a function of their employment or to fulfill their work
responsibilities – are required to have contact with the actor. Proximity exists between a Type 3 actor and a worker because the actor controls whether or not to direct harassing conduct towards the worker, and in turn, the worker is dependent on and vulnerable to the actor insofar as she is required to have contact with the actor – either because they share a common employer or a common workplace.

The three categories are not necessarily a closed list of relational models that will trigger section 5(1), but represent the accumulated jurisprudence on the sorts of relationships that have been recognized as sufficiently proximate.

**D. Sufficient Proximity between Customers and Workers**

As discussed earlier in this project, customers who behave sufficiently like employers (*de facto* employer) have held to have a section 5(1) duty to refrain from harassment. In this section, I will argue that mere customers – regardless of whether they behave like employers or not – are sufficiently proximate to employees in order to extend a section 5(1) duty to refrain from harassing conduct.

First, the right to a harassment-free work environment is a work-related interest protected under the “right to equal treatment with respect to employment.” As this project demonstrated in Part I, harassment is a practice of discrimination, which reinforces certain power structures between dominant and minority groups by perpetuating hierarchical legitimizing attitudes or myths.²²¹ Harassment in the workplace compromises an individual’s right to equal treatment with respect to employment by interfering with her dignitary, psychological and pecuniary interests associated with work. Importantly, while work is meant to be a “means to dignity, self-respect, and self-

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²²¹ Rosette et al, supra note 35 at 1405.
esteem”, harassment operates to expose workers to indignities and to undermine self-respect and self-esteem. Harassment not only has a harmful impact on the interests of targeted individuals, but also operates to subordinate groups that are affiliated with targeted individuals and undermines our common societal interests in sustaining the principles of equality, multiculturalism and diversity. For all of these reasons, it is clear why courts have confirmed that the right to a harassment-free working environment is protected by section 5(1). Further, the fact that the Tribunal has confirmed that customer harassment engages protection of section 5(1) in the employee setting on the part of the employer simply confirms that freedom from customer harassment is an interest protected under section 5(1).

Second, the nature of the relationship between customers and workers is such that sufficient proximity – modelled on the relationship between Type 3 actors – exists to extend duties onto customers with respect to the right to a harassment-free working environment. Workers – whether conventional employees or self-employed independent contractors – are required as a function and requirement of their employment to physically or electronically interact with customers – since serving customers is the essential objective of the entity employing the worker and customers are often the primary source of revenue for the entity. Apart from a provision providing otherwise, interacting with customers is an implicit requirement of most employment agreements. While independent contractors might be free to discontinue contact with a customer after an incident of harassment, the opportunity for the harassment to occur in the first place

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222 Davidov, supra note 54 at 388.
223 Whatcott, supra note 50 at paras 23, 66; Keegstra, supra note 44 at paras 49, 78, 80, 82.
224 Dhillon, supra note 29 at para 107.
225 Kim, supra note 10 at para 18; Laskowska, supra note 52 at paras 50-53; Ankamah v Chauhan Food Services, 2010 HRTO 2024 (CanLII) at para 32.
gives rise only because an independent contractor is required to interact with the customer as a function of her employment. Even if an independent contractor continues to interact with a harassing customer, she does so as a function of her employment; it would be inappropriate to deem that she acquiesced to future harassment by choosing to continue working with the customer – as I argue more fully in Part IV. In other words, like employees with a common employer or sharing a common workplace, workers are required to have contact with the customers they serve as a function of their employment. In that way, a customer exercises control over the working environment of a worker who is serving them by deciding whether to engage or refrain from harassment. In turn, a worker is dependent on and vulnerable to a customer she is serving because she is required to have this interaction as a function of her employment.

In other words, there is nothing functionally different between an employee being harassed by a colleague at work and an employee being harassed by a customer while at work. In both scenarios, the harassed party is required to interact with the harasser as a function of her employment, the comments have the same impact on the employees’ social and psychological interests at work, the comments similarly affect the employees’ right to a poison-free work environment, and the Code would seem to have the same policy objectives of prohibiting the conduct, altering the harasser’s future conduct and holding the harasser accountable.

This part of the project has sought to provide an overarching typology to explain cases emanating from courts and the Tribunal on the scope of section 5(1). The proposed typology groups cases into three categories depending on the proximity between the parties. Customers are capable of engaging section 5(1) duties, when they engage
dependent contractors (as Type 1 actors), contract for and direct assignment employees (as Type 2 actors), or when they engage in harassment in the course of contact that the applicant is required to have with the customer as a function of his or her employment (as Type 3 actors). These three types of actors – exercising varying degrees of control over employees – assists in tracing out a working theory about the necessary proximity to ground section 5(1) liability. While Part II established that the statutory language of the Code is capable of supporting the imposition of section 5(1) duties on customers, this part of the project has set out that customers are sufficiently proximate to workers who are serving them in order to justify the imposing of a duty to refrain from harassment. In the next segment, this project intends to look at some of policy considerations militating in favour and against extending a section 5(1) duty onto customers to refrain from harassment.
Part IV – Policy Considerations

In the preceding two segments, this project has established that the statutory language in section 5(1) is capable of covering customer-worker relationships and that customer-worker relationships are sufficiently proximate to impose liability on harassing customers, based on the indicia of proximity identified by the corpus of past jurisprudence. This part of the project intends to examine the last of the three key considerations identified at the beginning of this project: policy considerations.

I will consider the salutary benefits of extending duties to customers harassing employees under section 5(1), in relation to the four categories of employees identified in Part I. Allowing conventional employees to hold customers responsible for their harassing conduct through a direct cause of action ensures that customers are held accountable and provides a remedy that directly addresses the harassing conduct. Permitting independent contractors – with no identifiable employer on which they are dependent – to access section 5(1) against harassing customers safeguards a group that is otherwise vulnerable to customer harassment. This section will challenge the image that independent contractors are necessarily in control of their working terms and conditions, or are in a position to deal with customer harassment on their own. Finally, extending section 5(1) coverage to customers will allow assignment employees and dependent contractors to hold their clients accountable for harassing conduct without needing to engage in the onerous task of proving that their client acts like an employer.

I will also address the concern that extending duties to customers might lead to an unwieldy class of persons having liability under section 5(1). I will argue that the twin requirements that the conduct constitute “harassment” and be committed by a “customer”
offers a properly circumscribed class of persons. Finally, I will consider alternatives to dealing with customer harassment. I will argue that the tort of intentional infliction of mental suffering and the criminal law’s harassment provisions are ineffective substitutes.

A. Salutary Benefits of Extending Duties to Customers

This section will examine the benefits of extending a section 5(1) duty on customers to refrain from harassment through the lens of the four types of employees identified in Part I, that is: conventional employees, independent contractors, assignment employees and dependent contractors.

1. Conventional Employees

Extending section 5(1) duties to customers would allow conventional employees to hold customers directly accountable for harassing conduct, and thereby fulfill the remedial objectives of the Code. Courts and the Tribunal have repeatedly stated that the aim of the Code is provide an effective remedy to the victims of discrimination.226

As canvassed in Part I, while the current jurisprudence affords conventional employees a right against their employer to a complaint mechanism, a proper response and investigation, and a proper resolution of the complaint227, employees are denied a direct remedy against a perpetrator if he or she is a customer.228 In other words, the current state of the jurisprudence sits uneasily, as the Tribunal on the one hand recognizes that customer harassment breaches an employee’s section 5(1) right to a poison-free work environment and entitles that employee to a section 5(1) remedy against his or her

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226 See for e.g. Ontario Human Rights Commission v Farris, 2012 ONSC 3876, [2012] OJ No 3060 (QL) at para 36: “The aim of the Code is the removal of discrimination. The Code’s main approach is not to punish the discriminator, but rather to provide relief to the victims of discrimination. Remedies must be effective and consistent with the “almost constitutional” nature of the rights protected […]” [emphasis added].
227 Laskowska, supra note 52 at para 51.
228 Kim, supra note 10 at para 20.
employer\textsuperscript{229}, and yet, on the other hand, refuses to hold the party engaging in the harassing conduct accountable.

The current state of affairs leaves the harassed employee potentially without an effective remedy. First, it is possible to imagine a scenario where an employee is left with no remedy where an employer has fulfilled its narrow section 5(1) duty to properly investigate and secure the workplace. Indeed, in \textit{Baisa v. Skills for Change}, for instance, the employer was found to have discharged its procedural obligations under section 5(1) to “take reasonable and adequate steps to respond to allegations of potential violations of the Code raised by the applicant.”\textsuperscript{230} But for the fact that the perpetrator was a fellow employee, the applicant would have been left without recourse. The reason for this is that an employer’s obligation under section 5(1) in cases of customer harassment are procedural (a duty to investigate) and prospective (a duty to prevent future harassment). An employer has no obligation to substantively remedy a past incident of harassment faced by one of its employees. Second, it is possible to imagine circumstances where an employee chooses not to exercise her section 5(1) rights against her employer, either not to jeopardize the employment relationship or because she does not believe the employer is at fault.

Extending a section 5(1) duty to customers to refrain from harassment would allow conventional employees to access a substantive remedy against her harasser that directly addresses the past harassing conduct. A direct cause of action against customers would allow employees to hold customers responsible for harassing conduct and thereby allow the Code’s remedial purposes to be achieved – by vindicating the employee’s right to equal treatment with respect to employment, educating offenders about the values of

\begin{footnotes}
\footnote{229}{See e.g. \textit{Laskowska}, \textit{supra} note 52 at paras 50-53.}
\footnote{230}{\textit{Baisa}, \textit{supra} note 62 at para 74.}
\end{footnotes}
the Code, and by dissuading future incidents.  

A direct cause of action against customers would also complement an employer’s duty to investigate and secure the workplace under section 5(1).

2. Independent Contractors

Extending section 5(1) duties to customers would also allow independent contractors – who currently find no relief under the Code – to access protection under the Code in relation to incidents of customer harassment. This section will challenge the prevailing theories that attempt to justify the exclusion of independent contractors from section 5(1) protection. This section will argue that the portrait that all independent contractors are well positioned to bargain and to set their working terms and conditions is misguided, that the strict definitional division between independent and dependent contractors cannot be maintained, and that in any case, that even in cases where an independent contractor exercises bargaining power equal to or superior to a client’s, that fact should not exclude that individual from Code protection against harassment in employment.

There are a number of related and overlapping justifications for the exclusion of independent contractors from Code protection. First, independent contractors are conceived as possessing sufficient control over their working conditions compared to dependent contractors or employees. Under this theory, independent contractors are imagined as having “adequate bargaining power and are free to organize their work as

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231 Simpson-Sears, supra note 106 at paras 12, 22.
they see fit,”\textsuperscript{233} and therefore do not need the benefit of state-imposed protective legislation. Second, and relatedly, independent contractors are conceived as having made a decision to forgo the strictures and benefits of formal employment in favour of the risks and benefits of entrepreneurialism, including the opportunity to profit, flexibility and autonomy.\textsuperscript{234} Under this theory, independent contractors have chosen to forgo the protection of the Code in favour of the benefits of entrepreneurialism. Third, the distinction between independent contractors and employees is conceived as the dividing line between employment law and commercial law. Under this theory, Code protection should not be extended to independent contractors so as not to interfere with the contractual freedom of independent contractors and their clients to order their affairs and to assign risk as they see fit.\textsuperscript{235} Independent contractors and their clients are governed by free market competition and “the principles and institutions of commercial law”.\textsuperscript{236} Indeed, this is how the Supreme Court in McCormick conceived of the available recourse to independent contractors in instances of harassment. In that decision, the Court speculated that an equity partner, while not protected by the B.C. Code, might be able to seek private law remedies against harassment under the duty of fairness and good faith in partnership legislation.\textsuperscript{237}

These conceptions of independent contractors and justifications for their exclusion from Code protection are misguided for a number of reasons.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{233} \textit{Ibid.}
\item \textsuperscript{235} Fudge et al., \textit{supra} note 58 at 8.
\item \textsuperscript{236} \textit{Ibid.}
\item \textsuperscript{237} McCormick, \textit{supra} note 6 at para 47.
\end{enumerate}
\end{footnotesize}
First, the portrait of independent contractors as having adequate bargaining power and control over their working condition does not reflect the significant heterogeneity among workers classified as self-employed. In Canada, self-employed individuals can be subdivided into two categories: employer self-employed, which conforms most closely with the stereotype of entrepreneurship, and own account self-employed, who operate as single-worker units and are “most likely to experience low income and economic insecurity”.  

Judy Fudge, Eric Tucker and Leah Vosko have documented that much of the growth in self-employment in Canada has been driven by the own account self-employed ranks. Between 1976 to 2000, self-employed persons as a proportion of the total employed population grew from 12.2% to 16.2%. While the employer self-employed proportion of workers grew from 4.6% to 5.6% of the working population, the own account self-employed ranks increased from 6.3% to 10.3% of the working population. In 2000, 65% of self-employed workers were own account self-employed. Fudge, Tucker and Vosko have documented that a large proportion of the self-employed – particularly among the own account self-employed – “are in very precarious economic situations, receiving low remuneration and enjoying little in the way of employment security or employment-related benefits”. The growth in the own account self-employed ranks is part of a larger trend in the last two decades of the 20th century of Canadian businesses cutting labour costs by outsourcing and subcontracting.

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238 Fudge et al. supra note 58 at 13-14, 21.
239 Ibid at 15.
240 Ibid.
241 Ibid.
243 Fudge et al., supra note 58 at 16.
work.\textsuperscript{244} In this new labour landscape, conventionally employed individuals are
involuntarily pushed into self-employment on less secure and more contingent working
terms.\textsuperscript{245}

Further, the ranks of the self-employed – particularly on the more precarious end of
the spectrum – are disproportionately made up women, visible minorities and
immigrants.\textsuperscript{246} Leah Vosko and Nancy Zukewich posit that instead of being “pulled” into
self-employment by autonomy, many women are “pushed” into self-employment into
order to accommodate family care responsibilities.\textsuperscript{247} Fudge has similarly written that:

[...] the majority of women’s self-employment, especially that of the
solo variety, is precarious. For women, solo self-employment in
particular is often a strategy that they use to accommodate the unequal
burden of social reproduction and the need to earn income [...].”\textsuperscript{248}

Similarly, non-English speaking immigrants and visible minorities are overrepresented in
own account self-employment likely due to push factors related to systemic
discrimination and difficulty in integrating into paid employment.\textsuperscript{249} Fudge notes that
women and visible minorities engaged in self-employment make on average less than
their male and non-visible minority counterparts.\textsuperscript{250}

In short, the broad stroke portrait of the independent contractor as able to
muscularly defend his or her interests and determine his or her working conditions fails to
account for the heterogeneity that exists among the self-employed – in particular the
growing ranks of the own account self-employed whose working conditions can often be

\textsuperscript{244} Brian A Langille & Guy Davidov, “Beyond Employees and Independent Contractors: A View from
Canada” (1999-2000) 21 Comp Lab L & Pol’y J 7 at 31-33 [Langille & Davidov].
\textsuperscript{245} Ibid.
\textsuperscript{246} Vosko & Zukewich, supra note 234 at 77; Fudge, supra note 242 at 201, 211, 214-5.
\textsuperscript{247} Vosko & Zukewich, ibid at 70.
\textsuperscript{248} Fudge, supra note 242 at 215.
\textsuperscript{249} Ibid at 211.
\textsuperscript{250} Ibid at 212-213.
less secure than conventionally employed workers. Sidelining independent contractors from Code protection may have the perverse effect of denying protection to some of the most vulnerable workers.

Second, the strict division between independent and dependent contractors is becoming far more difficult to maintain. Implicit in the exercise of qualifying a worker as a dependent contractor has been the assumption that “there is an identifiable and specific ‘employer’.” Yet, as Brian Langille and Guy Davidov have argued, there is a growing number of workers who do not specifically fall into the traditional definition of “dependent contractor” because of the number and breadth of clients they serve. Langille and Davidov describes this group in the following way:

These are the independent contractors who are in need of similar protection. They are independent, in the sense that they serve different clients and can hardly be seen as dependent on any of them, and yet their position vis-à-vis these clients is not one that seems distinguishable from an employee with a single employer. Although independent – and hence considered independent contractors by current definitions – they are in need of protection much like employees. Unlike other independent contractors who are self-dependent entrepreneurs, these workers have such a weak market stance that, like employees, they cannot be said to be self-dependent.

This group of workers – “non-self-dependent contractors”, as Langille and Davidov qualifies this group – includes freelance reporters, photographers, proofreaders and editors, who may not have a single identifiable employer, but who have little market power to resist their client’s working terms.

Third, and perhaps, most importantly, even if all independent contractors were of the employer variety – capable of controlling and bargaining their working conditions –

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251 Langille & Davidov, supra note 244 at 31-32.
252 Ibid at 30.
253 Ibid at 30 [emphasis added].
254 Ibid at 31-32.
that bargaining power should not exclude those individuals from being protected from harassment faced in the course of their employment. Distinguishing between independent contractors and employees may make sense when determining whether to apply legislation restricting the number of working hours or when assigning which party should bear the risk of paying pension premiums, but access to anti-harassment protection should not turn on whether a party has insufficient bargaining power. It would seem perverse, however, to require independent contractors to exercise their bargaining power to contractually protect themselves against harassment, or conversely, to allow a business to tacitly engage in harassment in the absence of any contractual language. Further, it is unclear how withdrawing one’s services from harassing customers – one advantage independent contractors have over conventionally employed persons – serves as an adequate remedy. It would mean that a single mother who operates a solo registered massage therapy practice and a first-generation immigrant operating a small convenience store would be denied human rights protection against harassment in employment based solely on the form their employment takes. The right to a poison-free work environment is a matter of public interest regardless of a worker’s employment status and should be met with a public remedy.

3. Assignment Employees and Dependent Contractors

Finally, extending section 5(1) duties to customers would remove the “legal stranger” defence raised by respondents in the course of human rights proceedings initiated by assignment employees and dependent contractors. While these two groups of employees are recognized as having recourse under section 5(1) against customers

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255 See Bernstein et al., supra note 232 at 207.
256 See Fudge et al., supra note 58 at 108.
who act like “de facto employers”, respondents in these cases routinely attempt to avoid liability by arguing that the applicant is a legal stranger – thereby forcing the applicant to prove – with added cost, time and uncertainty – that the respondent is indeed a “de facto employer”. Recognizing customers as having section 5(1) duties would cut off this regulatory avoidance tactic adopted by respondents.

In Sutton canvassed in Part III, for instance, the respondent strongly denied that there was any employment relationship between it and the applicant. As a result, the Tribunal considered a significant amount of evidence on the circumstances of the applicant’s relationship with the respondent to determine whether she was entitled to a poison-free work environment, including: her incorporation status, her other bookkeeping clients, how she was viewed by the respondent’s staff, where she performed work, how the respondent’s clients viewed her, how her work was reviewed and approved, who controlled her charge out rate, and the profit sharing arrangement between the parties. Had the jurisprudence firmly recognized customers as having section 5(1) duties in relation to harassment – the respondent – whether as a customer or a de facto employer would not have been able to rely on this sort of defence.

The burden of needing to make out a relationship of dependence, on pain of the Tribunal declining jurisdiction, is problematic for a number of reasons.

First, dependent contractors and assignment employees are left with no certainty as to whether they will be able to avail themselves of section 5(1) protection. Workers who are told that they are independent contractors or another party’s employee, or that

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257 See for e.g. Pereda, supra note 183; Garofalo, supra note 183; Szabo, supra note 183; Sutton, supra note 53.
258 Sutton, ibid at para 16.
259 Ibid at paras 15, 98.
they will need to prove that they are dependent on the respondent or that the respondent is a *de facto* employer, are likely to be confused about their status and their legal rights – and likely reluctant to pursue recourse. As Stephanie Bernstein has written about the ambiguous status of self-employed workers: “When workers are convinced they have no rights, even if they do, the best protective legislation will fail in its objectives.”

Second, dependent contractors and assignment employees who may very well be entitled to section 5(1) protection may be forced to discount their entitlement to damages in pre-hearing negotiations as respondents use the workers’ ambiguous employment status as leverage or as a factor that will increase the cost and length of the litigation.

Finally, making it more difficult for working individuals to avail themselves of section 5(1) simply incentivizes businesses to engage in disguised employment with the hope of skirting or reducing their employment obligations. If businesses understand that they can discourage human rights applications – in addition to reducing their tax burden and liabilities – by simply treating their employees as contractors, they will have every incentive reclassify these employees.

Extending section 5(1) coverage to customers would cut off this line of defence and clarify to dependent contractors and assignment employees that whether the respondent is a client or an employer, they are entitled to hold that company liable for harassment – without a lengthy evidentiary record about their relationship or the risk that the application may be refused for jurisdictional reasons.

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260 Bernstein et al., *supra* note 232 at 215.
261 Ibid.
263 Bernstein et al., *supra* note 232 at 215.
In short, the extension of section 5(1) duties to refrain from harassment to customers would provide a consistent and effective remedy to all individuals who face harassment in the course of their employment, regardless of the form their employment takes. The extension of such a duty would fulfill the remedial objectives of the Code by providing a direct cause of action against the actual perpetrators of harassment. Further, recognizing that customers have section 5(1) duties would help to clarify that all workers have human rights protection against harassment regardless of how their work provider/employer seeks to qualify their relationship.

B. Deleterious Concerns: Indeterminate Liability and Unfairness

While the extension of section 5(1) duties to customers will significantly advance the remedial objectives of the Code, it is necessary to consider whether such an extension might inadvertently lead to an indeterminate class of persons being captured. This section will argue that the twin requirements that the respondent be a customer and that the respondent’s action conform to the statutory and jurisprudential definition of harassment sufficiently and appropriately limits the scope of individuals captured by the extension. This section will also consider whether extending section 5(1) duties to refrain from harassment would be unfair to customers.

First, the proposed extension of the duty would apply only to customers – that is a party that receives (or intends to receive) goods or services provided by the applicant or the entity employing the applicant. This would limit the group of persons who might potentially be captured by the extension to a set of individuals readily and objectively ascertainable – namely persons who receive or intend to receive goods or services from the applicant or her employer. This would screen out persons who the applicant might
encounter in the course of employment, but who she is not strictly required to interact with as a function of her employment – for instance, someone she passes by on the street while on a coffee break, a protestor outside of her workplace, or the author of an editorial she read at work. The fact that the applicant is at work and interacts with someone is not sufficient to ground liability in this incremental extension of the scope of section 5(1). Rather, the fact that the respondent must be receiving or intend to receive goods or services from the applicant or her employer gives us a reasonable proxy that the applicant is required to interact with the respondent as a term or function of her employment.

Customers would complete the universe of persons an employee is likely to encounter as a function of her employment, including managers and fellow employees (already covered under section 5(1)) as well as suppliers (covered by the services social area under section 1).

Second, the definition of harassment itself limits the potential number of individuals captured by the extension. A respondent only engages the Code by deliberately engaging in a course of conduct that he or she knows or ought to know is vexatious or unwelcome. Unlike an adverse effects claim, a claim of harassment is only engaged when a section 5(1) party deliberately engages in a course of conduct; lack of action or an omission is insufficient to trigger the Code. A course of conduct requires multiple incidents of the vexatious or unwelcome conduct, unless the respondent commits a single but serious incident. In other words, a respondent does not commit harassment merely by accident, but after engaging deliberately in a course of conduct, which she knows or ought to know is unwelcome. The requirement that a respondent actively engage in a course of conduct, therefore, restricts further the potential scope of

\[264\] Murchie at para 117.
respondents to those who consciously engage in a number of acts (or a severe act) that the respondent ought to know is unwelcome.

In addition to concerns about indeterminate liability, this project should also consider claims that it might be unfair to extend duties to customers on the grounds that they are less likely to be exposed to formal human rights training or otherwise unaware of their human rights duties. While customers can include large sophisticated institutional respondents with robust human rights programming, customers might also be single unaffiliated parties with no exposure to human rights training. While that may be the case, the fact that an individual has not received human rights training has never been accepted as a defence to a human rights application. The Tribunal has held individual employees and own account self-employed individuals liable under section 5(1) without any regard of their prior knowledge of their human rights obligation.\textsuperscript{265} The reason behind this is that human rights decisions and remedies are meant to be educational in themselves for the parties before the application and the broader public at large to prevent discriminatory acts from being repeated.\textsuperscript{266}

In other words, extending section 5(1) duties to customers to refrain from harassment would be to extend those duties to a readily discernable and closed class of persons. These individuals cannot accidentally engage the Code but rather must deliberately engage in some course of conduct that they ought to know is unwelcome. Customers having fewer opportunities for human rights training than employees should not preclude the extension of section 5(1).

\textsuperscript{265} See e.g. \textit{Loomba, supra} note 53; \textit{Sutton, supra} note 53.
\textsuperscript{266} See e.g. \textit{Heintz v Christian Horizons}, 2008 HRTO 22 (CanLII) at para 242.
C. Alternatives to Addressing Customer Harassment

Finally, it is necessary to determine whether there are alternative legal mechanisms to deal with the underlying concerns raised by customer-driven harassment. I will examine two such potential alternatives: the civil tort of intentional infliction of mental suffering and the criminal prohibition on harassment. This section will conclude that neither of these mechanisms properly addresses the concerns underlying customer harassment.

The tort of intentional infliction of mental suffering is the most promising of the common law torts in addressing the issues and interests raised by workplace harassment. Indeed, there have been a number of decisions awarding intentional infliction of mental suffering damages arising from incidents of workplace harassment.267

The tort, however, presents a number of challenges for victims of work-related harassment. First, the elements of the tort are difficult to make out unless the harassment at issue is at the severe end of the spectrum. The tort of intentional infliction of mental suffering requires three elements to be made out: the impugned conduct must be (a) “flagrant and outrageous”, (b) “calculated to harm the plaintiff”, and (c) cause the plaintiff “to suffer a visible and provable illness.”268

The first requirement – that the defendant’s conduct be flagrant and outrageous – appears to require some sort of “value judgment” on the part of the court.269 Canadian courts have suggested that “flagrant and outrageous” means conduct that is more than a mere insult or unkind comment – raising the bar above the unwelcome and vexatious

267 See e.g. Strudwick v Applied Consumer & Clinical Evaluations Inc., 2016 ONCA 520 (CanLII)
[Strudwick]; Boucher v Wal-Mart Canada Corp., 2014 ONCA 419 (CanLII) [Boucher];
268 Strudwick, ibid at para 78.
standard established in human rights law.²⁷⁰ The “flagrant and outrageous” requirement appears to address the floodgate concern of every joke or insult becoming the subject of tort litigation. Under human rights law, this concern appears to be addressed by the requirement that harassment have some nexus with a prohibited ground of discrimination. However, it is not clear whether a course of conduct that is vexatious or unwelcome on the basis of a prohibited ground of discrimination would meet the “flagrant and outrageous” requirement under the tort of intentional infliction of mental suffering. The “flagrant and outrageous” requirement appears to require something more than merely vexatious or unwelcome, including: a superior severely harassing an employee who had deliberately exploited his knowledge of the victim’s fragile mental state²⁷¹, a group of work colleagues engaging in a extended period of sexual harassment, including grabbing and kissing the victim, leaving lewd messages on her desk, and ostracizing her from work functions²⁷², and an employer wrongly accusing an employee of theft, terminating him and handing him over to the police to be arrested.²⁷³

The second requirement – that the conduct be “calculated to harm the plaintiff – appears to raise the intentionality requirement under human rights law. While a respondent can be found liable under the Code for engaging in a course of conduct that he or she knows or ought to know is vexatious or unwelcome – an objective standard – a plaintiff under the tort of intentional infliction of mental suffering must make out a

subjective standard that the “defendant must have intended to produce the kind of harm that occurred or have known that it was almost certain to occur”.  

Finally, the tort’s third element imposes a significant hurdle by requiring that the plaintiff prove that she has suffered a “visible and provable illness.” Mental distress or hurt feelings short of diagnosed disorder is unlikely to give rise to liability. Examples of qualifying illnesses include: adjustment disorder with mixed anxiety and depressed mood, abdominal pain, constipation and weight loss, and a severe and lasting mental breakdown. A physical or physiological condition arising from harassment has never been a requirement under human rights law and would dramatically restrict relief for a significant range of claims including damages for injury to “dignity, feelings and self-respect”, which the Code statutorily empowers the Tribunal to order.

In short, the three requirements work to leave the tort of intentional infliction of mental suffering for the most severe sliver of cases of workplace harassment, and would likely be unable to address a significant segment of harassment that the Code was designed to address – namely harassment that falls below the threshold of a “visible and provable illness”, but still infringes a worker’s right to a non-poisonous work environment. While human rights damages for injury to dignity, feelings and self-respect is meant to recognize the “inherent value of the right to be free from discrimination,” the tort of intentional infliction of mental suffering would likely be available only for the most extreme forms of harassment.

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274 Boucher, supra note 267 at para 44.
275 Strudwick, supra note 267 at para 79.
276 Boucher, supra note 267 at para 52.
277 Boothman, supra note 271 at para 106.
278 Code, supra note 5, s 45.2(1)1.
279 Smith, supra note 209 at para 172.
Second, the damages at issue in harassment cases would likely make pursuing standalone cases in the civil justice system financial unviable or inappropriate. According to Andrew Pinto’s 2012 review of Ontario’s human rights regime, damages for injury to feelings, dignity and self-respect have largely hovered between $5,000, $10,000 and $15,000, “corresponding to low, medium and high damage awards.”  

While recent Tribunal decisions have allowed greater general damages awards, largely ranging between $20,000 to $25,000, at that amount, it would still be difficult to justify suing under the tort in civil court, where lawyer’s fees in a proceeding culminating in a three-day trial is likely to cost over $38,000. Litigants could conceivably advance harassment claims before the Ontario Small Claims Court – whose monetary jurisdiction was raised to $25,000 in 2010 – yet that Court’s lack of expertise in human rights matters and its design as a court to resolve small private and commercial disputes would make it an inappropriate venue to resolve harassment claims. In contrast, the Tribunal offers a specialized panel of adjudicators who work regularly with self-represented applicants, within a system that emphasizes early mediation and lightened procedural rules.

In short, the tort of intentional infliction of mental suffering offers a poor substitute for pursuing bread and butter harassment claims that currently proceed before the Tribunal. The tort would likely allow only severe cases of harassment to move

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280 Pinto at Part III.B.7(a).
281 Vipond v Ben Wicks Pub and Bistro, 2013 HRTO 695 (CanLII) at para 54; Granes v 2389193 Ontario Inc., 2016 HRTO 821 (CanLII) at paras 67-73. While damages for injury to feelings, dignity and self respect may be supplemented by damages for lost wages and other compensatory damages, human rights damages awards are largely driven by the award of general damages.
282 Ontario Civil Justice Review Committee, Ontario Civil Justice Review, First Report (Toronto: Queen’s Printer, 1995) at 11.3, Table 3 (Cost of the Typical Civil Case to Litigant).
283 Small Claims Court Jurisdiction, O Reg 626/00, s 1.
284 Pinto at Part III.B.2, III.B.5
forward, and the cost of civil justice would likely dissuade many from advancing less severe claims of harassment.

The criminal justice system also offers an alternative to the human rights regime, yet like the civil tort of intentional infliction of mental suffering, it offers an inadequate substitute. Section 264 of the *Criminal Code* prohibits persons from engaging in criminal harassment, defined as “repeatedly following from place to place […]; repeatedly communicating with […]; besetting or watching the dwelling-house, or place where the other person […] resides, works, carries on business or happens to be; […] or engaging in threatening conduct directed at the other person […].” While the conduct prohibited by section 264 captures some of the conduct prohibited by section 5(1), the criminal harassment provision is ultimately limited to severe forms of harassment that “causes [the victim] to fear for their safety or the safety of anyone known to them.” The “fear” requirement ultimately restricts the application of the criminal harassment provision to incidents where the victim objectively fears for their safety, which raises the bar well above the human rights standard of vexatious or unwelcome conduct. Harassing conduct that merely causes mental anguish or hurt feelings, but not fear, would not be captured by section 264 of the *Criminal Code*. The reason for this is that the criminal harassment provision was designed to “enable the police to take timely action that would save women from being the victims of violence before it was too late.” Viewed in that light, the criminal harassment provision appears clearly ill-fitted to address the sort of

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285 *Criminal Code*, RSC 1985, c C-46, s 264(2).
286 Ibid, s 264(1).
287 *R v Hyra*, 2007 MBCA 69, 214 Man R (2d) 215 at paras 12-13
harassment prohibited by section 5(1), that is harassment that infringes on an individual’s right to work in a non-poisonous work environment.

Part IV of this project has aimed to consider a constellation of policy considerations militating in favour and against recognizing section 5(1) as applying to interactions between customers and individuals engaged in employment. The extension of section 5(1) duties to customers would fulfill the remedial objectives of the Code by allowing conventional employees and independent contractors to directly hold customers responsible for engaging in harassment that infringes on their right to a safe working environment. The extension of section 5(1) duties to customers would also allow dependent contractors and assignment employees to hold customers accountable for harassing conduct without facing the prospect of respondents claiming that the parties are legal strangers or forcing applicants to prove that the respondent acted as their “de facto employer”. I also canvassed concerns around extending section 5(1) duties to customers as leading to indeterminate liability. This project concluded that the twin requirements that a respondent fit the definition of a customer and engage in harassment within the meaning of the Code restricts liability to an objectively ascertainable set of persons. Finally, I considered the possibility of addressing customer harassment by way of the civil tort of intentional infliction of mental suffering and the Criminal Code’s harassment provision. By addressing only the most severe forms of harassment, these two mechanisms fail to address the core interest protected by section 5(1), that is the right to a safe work environment. In short, extending section 5(1) duties to customers in the manner suggested by this project would provide an appropriate development in the scope of the Code’s employment protection.
CONCLUSION

This project has argued that customers have a section 5(1) duty to refrain from harassing workers that serve them in the course of their employment. Mere customers owe section 5(1) duties to workers – even though their relationship falls outside of the paradigmatic mould of the employer-employee relationship – because they exercise sufficient control and workers sufficiently dependent on customers in relation to securing harassment-free workplace.

By examining whether customers have duties under section 5(1), I have attempted to trace out some of the contours of the “right to equal treatment with respect to employment”. This project demonstrated that section 5(1) is an exceptionally broad human rights protection, compared to predecessor legislation and to its other provincial counterparts. Section 5(1) evinces a clear legislative intent to broaden the application of human rights to employment settings outside of the classic employer-employee relationship. Section 5(1) encompasses the other employment provisions and those provisions, in turn, inform the content of section 5(1). In that way, the legislature has offered legislative cues about the sort of non-employer actors capable of having section 5(1) duties, including employment agencies and employees.

Based on these legislative cues and jurisprudential developments, this project underscored how section 5(1) can apply to a wide array of relationships with varying degrees of control/dependency between the parties. This sliding scale of control/dependency helps to explain how certain non-employer actors can have section 5(1) duties – despite not exercising a high degree of control over a worker – as long as the non-employer actor exercises sufficient control/dependency over a worker in respect
a protected interest. This project argues that proximity is established for the purposes of section 5(1) where the impugned actor exercises sufficient control (and the worker is sufficiently dependent on the actor) in relation to a work-related interest protected by section 5(1). Like employees sharing a common employer or a common workplace, workers are required as a function and requirement of their employment to interact with customers. Given that situation, workers are dependent on customers exercising control over their inclination to engage in harassment, such that customers ought to have a duty to refrain from harassment.

Broader policy considerations militate in favour of extending section 5(1) duties to customers: conventional employees are entitled to hold customers directly responsible; independent contractors are afforded means to protect themselves from customer harassment; and assignment employees and dependent contractors have their rights against customers clarified and made easier to enforce.

Given the little academic commentary on the breadth and contours of human rights duties in Canada, this project has sought to provide an initial attempt at describing the right at section 5(1) and to encourage further discussion on how we conceptualize and attribute human rights duties between parties who are otherwise legal strangers.
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