

# Overholt Law Client Seminar



## Sexual Harassment in the Workplace

Overholt Law Client Seminar

Coast Langley City Hotel & Convention Centre

June 20, 2018

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# Sexual Harassment in the Workplace



## #MeToo

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# #Me Too

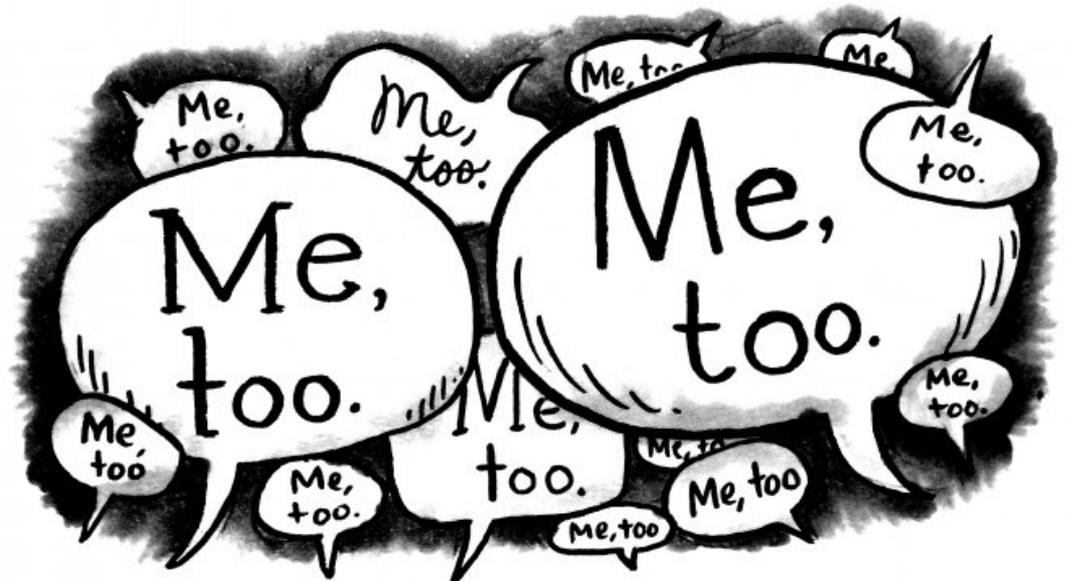
- A viral movement to demonstrate the widespread prevalence of sexual assault and harassment, especially in the workplace
- Made headlines after the public revelations of sexual misconduct allegations against Harvey Weinstein in Hollywood

# #Me Too

- The phrase originated in 2006 by Tarana Burke, an activist who began using the phrase on Myspace to “promote empowerment through empathy” among women of colour who had experienced sexual abuse
- Popularized over ten years later by actress Alyssa Milano to spread awareness about the ubiquity of sexual abuse and harassment

# #Me Too

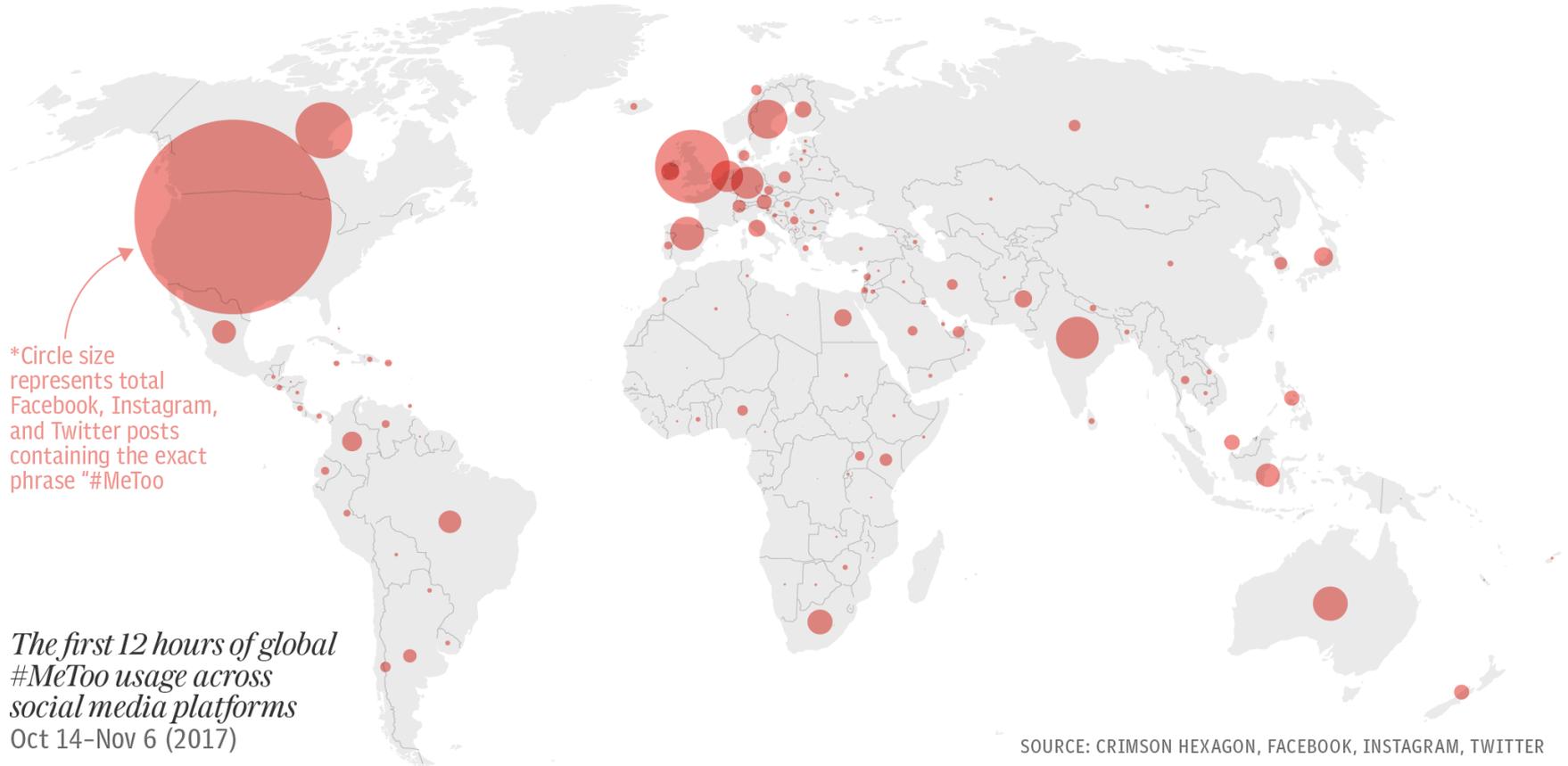
- Phrase was retweeted on Twitter over 500,000 times within one day
- Tens of thousands of women and men shared their experiences of harassment and abuse, often in their place of work



# #Me Too

- The “Weinstein Effect” has become a global trend in which people come forward with their own stories of sexual harassment in and out of the workplace
- Numerous celebrities have had allegations levied against them in recent months

# #Me Too >> Now What?



# #Me Too >> Now What?

- Outside of the entertainment world many industries have seen an increase in allegations being made.
- Too early to determine the full scope of the “Weinstein Effect” and the impact it is having on the Canadian workplace

# #Me Too >> Now What?

- February 8, 2018 – Angus Reid Institute published a survey (“#MeToo: Moment or Movement?”)
- Found 52% of women and 22% of men surveyed said they had been sexually harassed
- 28% of women and 14% of men experienced non-consensual sexual touching at work

# #Me Too >> Now What?

- Canadian employment and human rights law has developed significantly in the past 25 years to address sexual harassment in the workplace
- Our seminar today is intended to address the current state of the law and anticipated developments



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# Sexual Harassment

## Defining it and dealing with Office Romances

OLC Seminar

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June 20, 2018

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# Defining Sexual Harassment



# Definition

- Sexual Harassment has 3 key elements. It involves conduct:
  - of a sexual nature which is gender based,
  - that is unwelcome, and
  - that detrimentally affects the work environment or leads to adverse job-related consequences.

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

# Definition

- Sexual harassment can be:
  - male against female;
  - female against male;
  - male against male;
  - female against female; and
  - from or targeted at someone who does not identify as male or female.

# Definition

## Element 1: “Conduct of a Sexual Nature”

- Wide range of conduct
  - Physical
  - Verbal
  - “Environmental”all with a sexual connotation

I'M NOT A  
DOG, DON'T  
WHISTLE AT  
ME.

# Definition

## Element 1: “Gender Based”

- Behaviour specifically relating to gender
- May:
  - A) reference gender explicitly; or
  - B) occur because of the gender (conduct done to embarrass someone because of their gender)

# Definition

## Element 2: Unwelcome Conduct

- Objective analysis: what would a “reasonable person” consider to be unwelcome?



# Definition

## Element 2: Unwelcome Conduct

- Not everything is clearly “unwelcome”
  - If the conduct could not be deemed objectively unwelcome, the person offended would need to expressly object.
  - After an objection, further similar conduct would be deemed unwelcome

# Definition

## Element 3: Detrimentially Affects Work Environment / leads to Adverse Work Consequences



- Sexual harassment in the workplace can:
  - Create an “unsafe” workplace
  - Endanger the target’s continued employment
  - Negatively impact the target’s work performance
  - Undermine the target’s sense of dignity and self-worth

# *Janzen v. Platy Enterprises Ltd*



- Two female waitresses were employed at a restaurant owned by Platy Enterprises Ltd.
- President of Platy Enterprises Ltd. was also the manager of the restaurant

# *Janzen v. Platy Enterprises Ltd*

- Waitress #1: “J” (21 years old)
  - J was sexually harassed repeatedly by a male employee in charge of cooking on evening shifts
  - He touched various parts of her body and made sexual advances towards her
  - J objected to the conduct to no avail
  - Overt sexual conduct ceased after a month but changed to uncooperative and threatening behaviour, unjustifiable criticism of J and generally poor treatment
  - Manager was informed but did nothing, then terminated J’s employment

# *Janzen v. Platy Enterprises Ltd*

- Waitress #2: “G”
  - G was also sexually harassed by the same employee
  - She too complained.
  - Following a conversation with the manager, the physical harassment towards G ended, but was replaced with a pattern of verbal abuse, both by the employee at issue and the manager himself.
  - The manager then terminated her employment

# *Janzen v. Platy Enterprises Ltd*

- J & G filed complaints with the Manitoba Human Rights Commission.
- Commission found J & G were subjected to sexual harassment and sex discrimination.
- Individual employee and Platy Enterprises Ltd. jointly and severally liable for:
  - Lost wages
  - Exemplary damages

# *Janzen v. Platy Enterprises Ltd*

- Case went to the Supreme Court of Canada.
- The SCC decision set out multiple helpful points:
  - Sexual harassment is a form of *sex discrimination*
  - Discrimination does not require uniform treatment of all members of a particular group.
    - The fact that some, but not all, female employees were subjected to sexual harassment does not invalidate that the sexual harassment was on the basis of sex.

# *Janzen v. Platy Enterprises Ltd*

- Crucial fact making this sexual harassment = sex discrimination is that only female employees ran the risk of this treatment here.
- Sexual attractiveness cannot be separated from gender.
  - Arguing they were sexually harassed because they were sexually attractive, not because they were female, and thus, no sexual discrimination, strains credibility here.
  - No male employee would have been subjected to this disadvantage

# *Janzen v. Platy Enterprises Ltd*



- As the offending employee was acting in respect of his employment position when he sexually harassed J & G, the employer is responsible.
  - Offender had some authority over J & G and was considered “next in line in authority to the employer.”
- *Janzen* has been cited in other decisions approximately 550 times since its release, including in decisions released in 2018

# Legal Consequences

- Constructive Dismissal Complaints
- Human Rights Complaints
- WorkSafeBC Complaints
  - WorkSafeBC Investigations and workplace reviews
  - Serious cases: worker claim for compensation for a mental disorder arising from bullying and harassment

# Legal Consequences

- Grievances (Unionized workplaces)
- Civil Lawsuits
- Criminal Proceedings

# Other Consequences

- Internal complaints to manage
- Smaller talent pool to draw from
  - Prospective candidates may self-select out
- Lower employee moral
- “Poisoned” work environment

# Other Consequences

- Lost management and human resources time managing complaints
- Employee departures
  - You invested a lot to train them, and now they're gone
- Reputational damage

# Q & A

- You work in a company where sexual commentary, jokes, and banter are not only common, but appear to be a source of generally accepted humor all the way up to the top of senior management. You think some of the behaviour goes too far, but have passively participated in this behaviour. You are a relatively new employee and want to fit in.

# Q & A

A long-serving employee, Colleague X, sets his desktop screen saver to display rotating images of topless woman. You work next to Colleague X and think he has gone too far, so you ask him to consider changing it. He counters, confused that you would have a problem with it in light of your participation in other jokes around the office. You agree that you have laughed at others' jokes, but say you find the screensaver goes too far and is unprofessional. Further, you have concerns that customers could potentially see the screen saver.

# Q & A

Colleague X says “No one else around here has said anything so what’s your deal? Are you a faggot?”

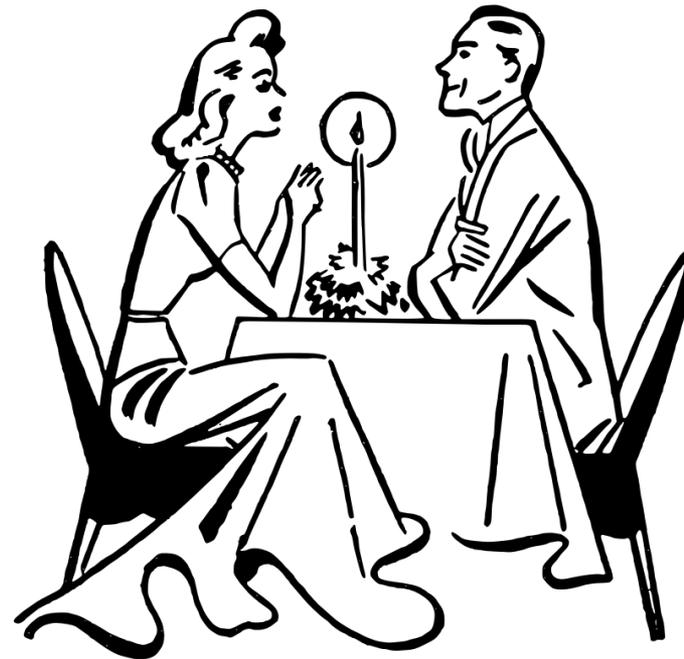
You are in fact, heterosexual and say “No”, but your colleagues rolls his eyes and leaves.

The next day you arrive at work and log in to your computer. The background of your desktop is filled with pictures of naked men.

# Q & A

1. Was Colleague X's screen saver "sexual harassment"?
  - a) What if you were female?
  - b) What if you were gay?
  
2. Was changing the background on your computer "sexual harassment"?
  - a) Does it matter that you're not gay?
  
3. Does the fact you participated in some of the sexual commentary in the past make any difference?

# Inter-office Romance



# Inter-Office Romances

- Romance occasionally mutually blossoms between co-workers
- Inter-Office Romance can be problematic:
  - where there is a direct reporting relationship between the two; and
  - even where there is not.

# Inter-Office Romances

- Issues / Perceptions:
  - Favouritism / preferential treatment
  - Conflict of interest
  - Human rights complaints
  - Risk of a breakup causing issues around the office
  - Sexual harassment complaints

# Inter-Office Romances

- Conflict of Interest
  - arises where an employee's decision-making is clouded by a relationship with the subordinate employee
- To mitigate conflicts of interest:
  - may need to transfer an employee to another department, or rearrange the direct reporting lines

# Inter-Office Romances

- Policy on office romances:
  - Must report as soon as a dating relationship begins
  - With consultation, new reporting lines will be arranged (if necessary)
  - Cooperation expected and agreement to minimize disruptions to the office environment based on it



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# Off-Duty Sexual Harassment

## Can Off-Duty Conduct have On-Duty Implications?

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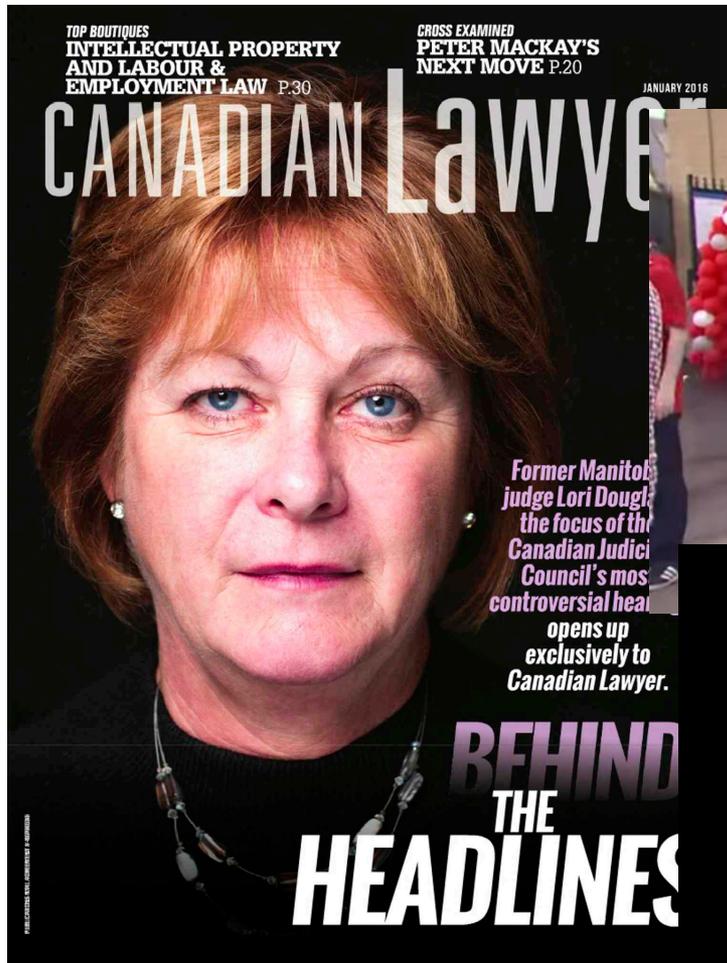
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# Outline

1. Examples of inappropriate off-duty conduct, including on social media
2. Under what circumstances can it constitute “just cause”?
3. Employer Obligations: workplace policies, and fair investigations
4. Privacy Issues



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Global News  
November 3, 2015



Former CBC Radio host Jian  
Ghomeshi (Photo: Natalie  
Behring/Getty Images)  
October 30, 2014



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Off-Duty Conduct

**WHAT CONSTITUTES JUST CAUSE?**

# Without Cause Termination

- Dismissal at any time upon provision of notice or pay in lieu of notice (severance)
- Subject to the Human Rights Code
  - Cannot fire someone due to their gender, religion, disability, family status, etc.

# Just Cause Termination

- Threshold to establish just cause is a very high standard
- Punishment must be proportional response to the type of misconduct
- The entire context of the employment relationship must be considered\*
- No entitlement to notice or pay in lieu of notice = summary dismissal

# Discipline for Off-Duty Conduct

- An employee can be terminated for cause as a result of off-duty behaviour
- Test:
  - The conduct of the employee harms the employer's reputation or product\*
  - Behaviour renders the employee unable to perform their duties satisfactorily
  - Employee's behaviour lead to refusal, reluctance or inability of other employees to work with them

# Discipline for Off-Duty Conduct



- Test, continued:
  - The employee has been guilty of a serious breach of the Criminal Code rendering his conduct injurious to the general reputation of the employer and its employees\*
  - The employee's conduct places difficulty in the way of the company properly carrying out its function of efficiently managing its work and directing its workforce.

*Re Millhaven Fibres Ltd. v. Oil, Chemical and Atomic Workers I.U. Loc 9-670*



Regrettable Incidents of Off-Duty Conduct

# **STRAIGHT FROM THE HEADLINES**

# Madam Justice Lori Douglas



- Late husband took sexually explicit photos of her and posted them online on a hard-core sex site
- The allegation was she failed to disclose the photos when she applied to become a judge in 2004, and that the pictures could undermine public confidence in the justice system
- She offered to retire in exchange for avoiding the CJC hearing

# High School Office Assistant



- Quebec School Board suspended a high school office assistant after discovering she was also a porn video star on the side
- Student found out and posted it on Facebook

# Hydro One: Shaun Simoes

- Terminated for cause after shouting, on camera, a sexist slur at a female City TV reporter who was covering a Toronto FC match
- Nothing he was wearing or what he said identified him as a Hydro One employee, but he was recognized

# *Whitehouse v RBC Dominion Securities Inc., 2006 ABQB 372*



- The employee was a 51 year old Vice-President and investment advisor with a 16 year employment history
- The employee was called into his supervisor's office the next day after an investigation but denied the events until he was told there was videotape evidence, at which point he acknowledged the incident
- He was then immediately terminated for cause

# *Whitehouse v RBC Dominion Securities Inc., 2006 ABQB 372*



From the RBC Code of Conduct:

- The cornerstone of financial services is trust. RBC companies require employees whose integrity is beyond reproach.

\*\* You are to avoid any conduct or association - **either inside or outside of work** - which could bring your honesty, integrity or trustworthiness into question, or which could be detrimental to RBC's security or to its reputation within the community.



Is There a Place for Morality Clauses?

## **WORKPLACE POLICIES**

# Workplace Policies

- *Social Media Policy*
  - Address interactions and comments by employees on social media sites\*
  - Define what is and is not considered "acceptable use" both on the company's network and outside of it.
  - Be clear as to what disciplinary action will be taken, up to and including termination, if policies are not followed.

# “Morality” Clauses

- *Off Duty Conduct Policy*
- Employment provision that specifies what is unacceptable employee behaviour off duty
  - For example, certain criminal acts that could damage the employer’s reputation or brand by association (sex assault, indecent exposure)\*
- Breach of the clause can result in summary dismissal for cause

# Social Media and Privacy



# BRIEF CONCLUSIONS

***So, when can you fire an employee for their off-duty conduct?***



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# Sexual Harassment in the Workplace



## Policies and Best Practices

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# Introduction

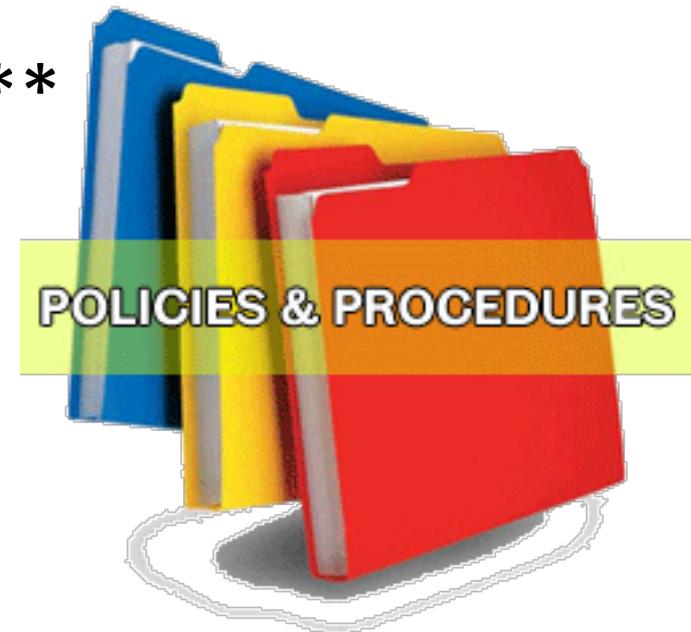
- Policies that minimize the risk of litigation
  - What are the best policies and things to avoid?
  - How should employers communicate workplace policies and rules?
  - How to make training meaningful and effective?
  - Why is training a good idea?

# Workplace Policies 101

- Policies must be tailored to your workplace
  - Must be clearly communicated to employees and brought to their attention and enforced
  - Cannot breach *Human Rights Code* or right to privacy
  - Employee must be made aware of possible consequences

# Types of Policies

- Respectful workplace policy
- Code of Conduct
- Conflict of Interest
- Whistleblower protection \*\*
- Bullying & Harassment \*\*



# Drafting Effective Communications

- A well drafted company policy:
  - Protects your business;
  - Outlines expectations clearly for employees; and
  - Helps to mitigate or reduce liability.



# Rules

# Drafting Effective Communications

- What policies does your organization have?
- Have they been drafted with legal advice?
- What policies *should* you have?
- Do they clearly set out the process whereby employees can bring complaints forward to management?



# Drafting Effective Communications

- Do they confirm that complaints cannot be kept confidential once brought to HR/Mgmt's attention?
- Have employees been advised of the policies?
- Do employees "buy-in" to the policies? Are they balanced and fair?
- Are consequences for breach clear?
- Does management support the policies in action?

# Communication

- If possible, reference your workplace policies in your employee contracts
- For new policies, have a sign-off procedure to acknowledge employees have been introduced to and understand the new policy



# Bullying and Harassment Policy



- According to WorkSafeBC, “bullying and harassment”:
  - Includes any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated

# Bullying and Harassment Policy

- Employer obligations:
  - Develop a policy statement to prevent and address workplace bullying and harassment
  - Take steps to prevent or minimize bullying and harassment
  - Develop and implement reporting procedures
  - Develop and implement procedures for dealing with incidents and complaints

# Bullying and Harassment Policy



- Employer obligations (continued):
  - Inform workers about the policy statement and steps taken to prevent or minimize bullying and harassment
  - Train supervisors and workers about recognizing, responding to, and reporting incidents and complaints of bullying and harassment
  - Annually reviewing the policy statement and procedures for reporting and dealing with incidents and complaints

# Bullying and Harassment Policy

- What might this policy look like:
  - Conduct Statement
  - Definition
  - Rules/Direction
  - Application
  - Annual Review



# Whistleblower Protection



# Whistleblower Protection

- Remove barriers to reporting misconduct
  - What is retaliation
  - Policy statement
  - How to report
- BCHRT and WorkSafeBC have existing policies against retaliation for filing complaints

# Workplace Training



# Workplace Training

- When is training appropriate?
  - When you are introducing a new policy or re-introducing an updated policy
  - When you have a number of new hires
  - When there has been an incident



# Workplace Training

- What might your training cover?
  - What is harassment
  - What are your company policies
  - What does a respectful workplace look like
  - How to deal with harassment
  - Opportunity for discussion and questions

# Handling Complaints

- Do you have expertise in this area?
- Is there an appropriate individual in the organization to handle complaints?
- If not, should you consider outside resources?



**COMPLAINT**

TO: \_\_\_\_\_

WHOSE FAULT:  MINE  OURS  
 YOURS  OTHER:

DESIRED OUTCOME:  APOLOGY  LITIGATION  RESTITUTION  
 EXPLANATION  PROMOTION  CHANGE

COMPLAINANT: \_\_\_\_\_  ANONYMOUS

DATE: \_\_\_\_\_

TIME: \_\_\_\_\_



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# Sexual Harassment in the Workplace



## Workplace Investigations

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# Investigations

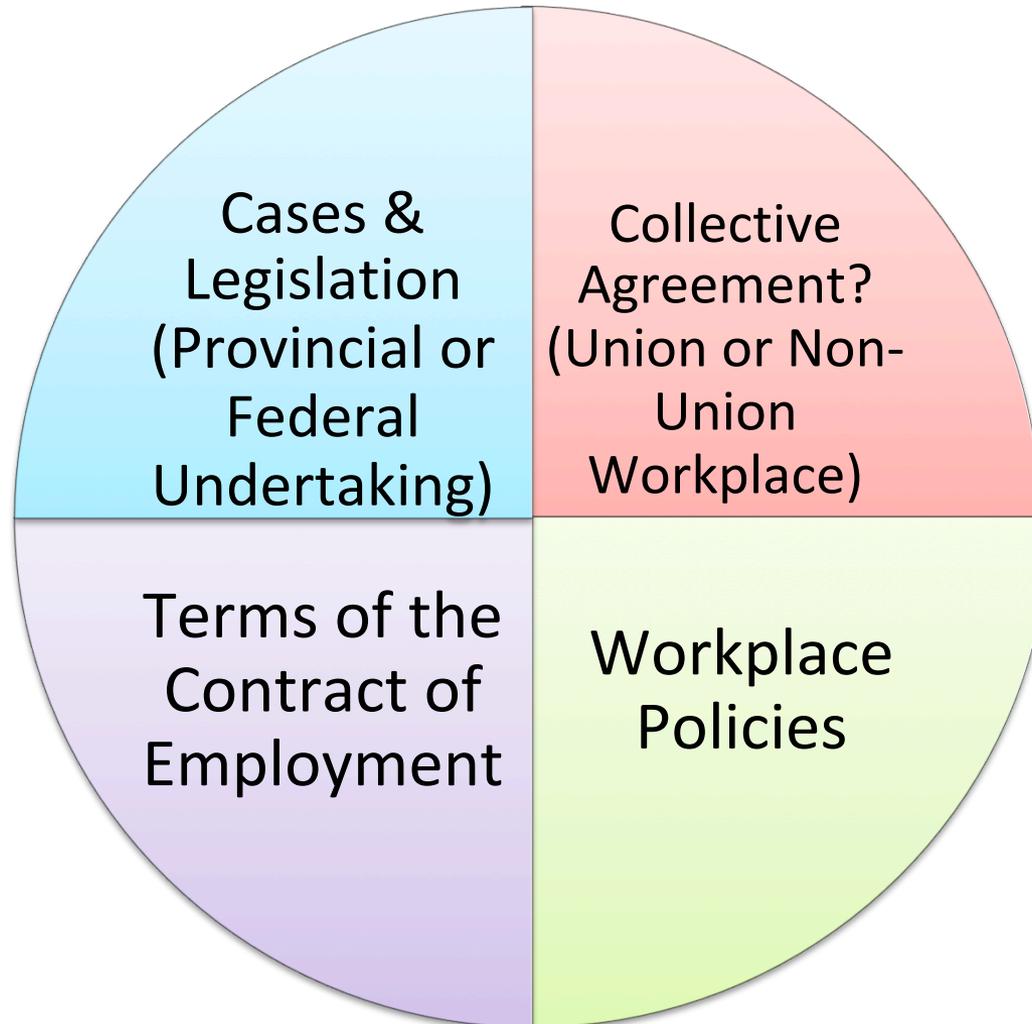
1. The Legal Framework
2. Managing the process of employee complaints and investigations
3. Conducting complaint investigations

# Introduction

- The proper conduct of workplace investigations by employers is coming under greater scrutiny by the Courts, tribunals and labour arbitrators
- Employers and Human Resources personnel are being held to a high standard of professionalism and fairness in handling of complaints and investigations
- The consequences of a flawed investigation may be significant in terms of liability (e.g. Human Rights Complaints) and employee morale

# 1. The Legal Framework

# Legal Framework



# Legal Framework, cont'd

## Relevant legislation:

- ❖ *Labour Relations Code*
- ❖ *Human Rights Code*
- ❖ *Workers' Compensation Act*
  - *Occupational Health and Safety Regulation*
- ❖ *Privacy legislation: PIPA, PIPEDA, FOIPA*

## 2. Managing the Complaint Process

# Managing the Complaint Process



- Ensure you understand the nature of the complaint
  - Get it in writing
- Be proactive and seek legal advice where necessary
- Walk-the-talk: advise in accordance with and adhere to the policies your organization creates
- Ensure a fair process

# Managing the Investigation Process

- Determine whether the investigation should be conducted by an internal or external investigator
- Review the investigator's qualifications & whether the person or organization is the appropriate choice in light of the nature of the complaint
- Confirm in writing the engagement terms and scope of the investigation
  - Is the investigator to do something more than gather evidence and make findings (i.e.. Make recommendations)?

# Managing the Investigation Process, cont'd



- Conduct investigations to a professional standard or ensure those conducting them do so
  - Document the evidence of witnesses
  - Keep an open-mind; there are 2 sides to every story, be objective
- Consider the need for expert evidence
- Explore all relevant sources of evidence

# Managing the Investigation Process, cont'd



- Give the respondent an opportunity to respond to the allegations
- Ensure that the response to the complaint is based on facts, not opinions
- Track expenses in connection with the investigation

# Managing the Investigation Process, cont'd



- Privacy issues:
  - The investigation process is confidential
  - Once the complaint is submitted in writing; duty to acknowledge and respond
  - Restrict the investigation to matters related to the complaint
  - Create separate file for investigation apart from employee personnel file

# 3. Conducting Complaint Investigations

# The Case Law

- Provide illustrations of what “to do” and “not to do”
- Case Types:
  - Failure to Investigate
  - Negligent Investigations
  - Unfair Investigations

# The Case Law: Failure to Investigate

***Chandran v. National Bank of Canada, 2011***

**ONSC 777, [appeal of damage award affirmed in  
2012 ONCA 205]**

- Failure to Investigate Case
- \*Don't Jump to Conclusions\*

# The Case Law: Failure to Investigate

- 9 out of 11 employees interviewed made “unsolicited” comments regarding Mr. Chandran
- Allegations:
  - condescending remarks
  - volatile behaviour
  - embarrassed employees
  - bullying behaviour
- HR Manager reported to supervisor the allegations but not the names of those who had made the complaints

# The Case Law: Failure to Investigate

- Supervisor and HR director met with Mr. Chandran
- Mr. Chandran denied allegations; asked for more detail
- Bank refused further detail, conducted no investigation, issued a disciplinary letter and transferred Mr. Chandran to a new position with no supervisory duties.

# The Case Law: Failure to Investigate

- **Failure to investigate:**
  - Bank said “We had no obligation to investigate as there was no formal complaint filed under our Human Rights Policy.”
  - Court found Mr. Chandran was not given an opportunity to defend himself and that he had no opportunity to present a possible “evidential challenge to the complaint”
  - The Bank did not engage in an inquiry to determine if the allegations were true

# The Case Law: Negligent Investigations

## ***Correia v. Canac Kitchens, 2008 ONCA 506***

- Investigation of illegal activity in the workplace
- Canac retained a private investigation firm
- Mr. Correia, 62 year old, long-term employee, terminated and arrested as a result of the investigation - theft

# The Case Law: Negligent Investigations

- After Mr. Correia was terminated and file passed to the police = wrong employee
- Mr. Correia was confused for another employee who was younger with a similar name
- Criminal charges against Mr. Correia were ultimately dropped

# The Case Law: Negligent Investigations

- **Claims:**
  - Wrongful dismissal
  - Negligent investigation
  - Intentional infliction of mental distress
  - Intentional interference with economic relations and inducing breach of contract
  - False arrest and false imprisonment
  - Malicious prosecution
  - Vicarious liability

# The Case Law: Unfair Investigation

***Vernon v. BC Liquor Distribution Branch, 2012 BCSC 133,***  
**add’nal reasons 2012 BCSC 445**

- Ms. Vernon, a 49 year old employee with 30 years of service and exemplary performance reviews was terminated. Employer alleged cause
- A particularly sensitive employee made a complaint against Ms. Vernon alleging various harassing behaviour
- Employer conducted investigation into the complaint

# The Case Law: Unfair Investigation

- Ms. Vernon told of the complaint:
  - not told job in jeopardy
  - not provided with a copy of the complaint
- Interview of Ms. Vernon was really an interrogation, biased, one-sided
- Interviews of complainant, Ms. Vernon and other employee witnesses were conducted by different people and they did not all have the complaint or other interview notes

# The Case Law: Unfair Investigation

- Ms. Vernon was given copy of complaint in an interview and asked to immediately respond
- Investigation concluded gross workplace misconduct – recommended the termination of her employment

# The Case Law: Unfair Investigation

- Decision:
  - Witnesses who spoke favourably of Ms. Vernon were accused of lying, chided and yelled at by the investigator
  - 30 year employee with zero complaints before this time and glowing reviews “should have given them cause to stop and reflect”
  - Suspension of 1.5 months while employer delayed investigation was egregious

# The Case Law: Unfair Investigation

- The Court found that the investigation was “flawed from the beginning to end”
- Investigation process was “neither objective nor fair”
- Award:
  - 18 months notice
  - damages for loss of pension
  - \$35,000.00 aggravated damages
  - \$50,000.00 punitive damages

# The Case Law: Sexual Harassment Investigations

- *Doyle v Zochem*, 2017 ONCA 130
  - Ontario Court of Appeal upheld over \$85K in damages awarded to an employee in a wrongful dismissal and sexual harassment case
  - Employer found to have conducted a “cursory” and “flawed” investigation

# The Case Law: Sexual Harassment Investigations



- 9 year employee, only female working in the plant
- Experienced years of sexual harassment and bullying
- Reported harassment to her supervisor in hopes that the harassment would finally stop

# The Case Law: Sexual Harassment Investigations

- Investigation mistakes:
  - Employee told she was “too soft”, should develop a thicker skin
  - Was not told to put her complaint in writing, was not aware of her alleged aggressor’s response, and never given opportunity to respond to his version of events
  - Employer issued a mere warning to her alleged aggressor that he should not conduct himself in the manner complained of; but no other discipline

# The Case Law: Sexual Harassment Investigations

- Trial judge concluded handling of the complaint was inadequate:

...[s]he simply decided to disbelieve [the employee], and that concluded her investigation (paragraph 235)

# The Case Law: Sexual Harassment Investigations

- Additional findings:
  - No proof that there was any workplace sensitivity training
  - Employee was terminated a few days later; told at termination she was “irresponsible” with her complaint because it meant her alleged aggressor’s “reputation was now on the line”

# Summary & Conclusions

- The legal standards for workplace investigations are not easily satisfied
- Education and training of management is necessary to meet the legal requirements for conducting investigations
- The law is developing to make an employer liable for the consequences of an investigation that is not properly conducted
- It is important to seek assistance outside your organization to ensure your investigation of workplace matters satisfies the expected standards.



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# Sexual Harassment in the Workplace



## Legal Proceedings

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# Legal Proceedings

- What happens when a sexual harassment complaint is not handled properly?
  - WorkSafeBC Bullying and Harassment Complaint
  - Human Rights Complaint
  - Civil Claims
    - Claims for damages in tort: (1) assault (2) battery (3) intentional infliction of mental suffering
    - Sexual harassment as just cause for dismissal

# Human Rights Complaints

- Sexual harassment is discrimination on the basis of sex – *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252
- Employers can be held liable for the sexual harassment of its employees if the sexual harassment falls within the employment relationship – *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84

# Human Rights Complaints

## Section 44(2) of the *Human Rights Code*

*44(2) An act or thing done or omitted by an employee, officer, director, official or agent of any person within the scope of his or her authority is deemed to be an act or thing done or omitted by that person*

# Human Rights Complaint

- *Torres v Royalty Kitchenware Ltd.* (1982), 3 CHRRD/858 at D/873 para. 7758 (Ont. Bd. Inq.)
  - Outlines factors to be considered in determining the appropriate quantum of damages in sexual harassment cases
  - Non-exhaustive list

# Human Rights Complaint

1. The nature of the harassment, that is, was it simply verbal or was it physical as well?
2. The degree of aggressiveness and physical contact in the harassment;
3. The ongoing nature, that is, the time period of the harassment;
4. The frequency of the harassment;
5. The age of the victim;
6. The vulnerability of the victim; and
7. The psychological impact of the harassment upon the victim.

# ***Gill v Grammy's Place Restaurant and Bakery Ltd., 2003 BCHRT 88***

- Employee experienced ongoing sexual harassment in the form of sexual comments and unwelcome behaviours
- Various allegations including unwelcome comments, unwelcome touching, groping, inappropriate gifts, rumors of an affair, and ultimately termination of employment

# ***Gill v Grammy's Place Restaurant and Bakery Ltd., 2003 BCHRT 88***



- Awarded loss of wages, costs for medical expenses, and injury to dignity in the amount of \$10,000.00
- Highest injury to dignity award at the time

# ***Gill v Grammy's Place Restaurant and Bakery Ltd., 2003 BCHRT 88***

- Tribunal spoke of the “extraordinary impact” the actions of the employer and stress of the situation had on the employee, her family, her social life, and her mental well being
- Harassment occurred over a prolonged period of time, contributed to diagnosis of PTSD, depression, and a suicide attempt

# *MacDonald v. Najafi and another (No. 2), 2013 BCHRT 13*



- Employee filed complaint against her supervisor and her place of work alleging sexual harassment
- Employer denied most of the allegations, and any comments that were not denied were described as “jokes” and not meant to be taken seriously

# *MacDonald v. Najafi and another (No. 2), 2013 BCHRT 13*

- “You are cold; maybe you need a man to keep you warm.”
- “Maybe you will not marry anyone; [then] I am your husband.”
- “Women steal everything from men in this country. But I shouldn’t talk about it here. Maybe some other time we will have that conversation.”

# *MacDonald v. Najafi and another (No. 2), 2013 BCHRT 13*

- Allegations that her supervisor would “whistle” at her
- Was offered “breakfast in bed”
- Told she was “hot and sexy”
- Left her place of work and filed a complaint (after calling the police)

# *MacDonald v. Najafi and another (No. 2), 2013 BCHRT 13*



- Awarded \$4,000 in injury to dignity

[The employer's] conduct was insensitive, demeaning, and persistent. There was a considerable disparity in age and position between [the supervisor] and [the employee], and she was in vulnerable financial circumstances that made it difficult to object or leave. However, all the conduct was verbal; there was no physical contact at all, it was relatively infrequent, and, on the evidence, the psychological impact on [the employee] was relatively modest.

# Civil Claims

- In January, four women filed civil claims against Souleppper Theatre Company and its founding artistic director, alleging sexual touching and harassment
- When asked why their clients had chosen a civil claim over criminal proceedings: “it gives them the control that was taken from them by the years of abuse”

# Civil Claims– Vicarious Liability



[73] The question a court must consider where there has been a sexual battery is whether the unauthorized acts of the employee are so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing authorized acts.

*Corfield v Shaw*, 2011 BCSC 1529

# Civil Claims– Vicarious Liability

[46] In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm.

*Bazley v Curry*, [1999] 2 SCR 534

# *Sulz v Minister of Public Safety et al., 2006 BCCA 582*

- Court of Appeal upheld an award of \$950,000 in damages to a former RCMP constable for mistreatment and harassment she suffered at the hands of her superior
- Court found her commanding officer had committed the tort of negligent infliction of mental suffering – held the province of BC vicariously liable for his actions

# *Sulz v Minister of Public Safety et al., 2006 BCCA 582*



- Accused superior described as “old school”; was aggressive, swore at the Plaintiff often, and threatened when she made mistakes at work
- Alleged to have made derogatory comments about her and her pregnancy; accused of “deliberately screwing the system”
- Other constables were warned not to ride with her because she was “manipulative and afraid of the dark”

# What about unquantified loss?

- More than financial damages at stake
- Workplace culture and unsafe work environment
- Reputational damage

# Sexual Harassment as Just Cause

- After the complaint has been filed and the investigation concluded – what happens if there's a finding that sexual harassment has occurred at your workplace?
- Does sexual harassment constitute just cause for termination of employment?

# ***Brazeau v International Brotherhood of Electrical Workers, 2004 BCCA 645***



- Employee alleged wrongful dismissal after he was dismissed for cause based on sexual harassment allegations
- Had developed an interest in a fellow union representative; sent her flowers and presents, complimented her appearance, etc.
- Feelings were not reciprocated – employee was persistent

# *Brazeau v International Brotherhood of Electrical Workers, 2004 BCCA 645*



- Behaviour escalated once his advances were rebuffed; stopped responding to direction, made disparaging comments about her appearance and sex life, etc.
- Trial judge found that the above constituted sexual harassment, but was not “serious” enough to warrant termination of employment

## ***Brazeau v International Brotherhood of Electrical Workers, 2004 BCCA 645***



[226] Having considered all of the facts, I do not place the plaintiff's conduct at the most serious end of the continuum of sexual harassment. I find that its persistence and duration, however, as well as the negative effect it had on Ms. Pynaker, preclude placing it in the least serious range. I conclude it falls in the middle of the spectrum.

# *Watkins v Willow Park Golf Course Ltd., 2017 ABQB 541*

- 13 years after *Brazeau*
- Employee sued his employer for wrongful dismissal after he was dismissed without notice
- Employer alleged he had engaged in verbal and sexual harassment of another employee (as well as other unprofessional behaviour)

# *Watkins v Willow Park Golf Course Ltd., 2017 ABQB 541*

- Employee admitted to being “smitten” with another employee who did not reciprocate those feelings
  - Attempted to hold hands with her at a work function
  - Multiple inappropriate text messages
  - Unwanted physical contact
  - Aggressive swearing/name calling as she continued to rebuff his advances

# ***Watkins v Willow Park Golf Course Ltd., 2017 ABQB 541***

- Court upheld termination
- Harassment was “of a type and level that is completely unacceptable in a professional workplace and which justifies, in fact demands, a response by the Defendant”

# Minimizing Liability

- Accept that sexual harassment can happen in any workplace and that your organization needs to be able to respond
- Make it a high priority to address complaints
- Ensure that your organization has the necessary policies and employment agreements in place to address sexual harassment
- Provide effective and regular training regarding your policies to ensure all employees understand the problem and can assist in maintaining a workplace without harassment

# Minimizing Liability

- Conduct independent investigations to a high professional standard when complaints are made
- Seek legal advice when complaints are received
- Ensure that your organization is proactive in addressing the pervasive problem of sexual harassment in the workplace

# QUESTIONS?

## Thank you for attending!

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