SHARP Workplaces and Stand Informed Reference Manual for Lawyers: Advising clients with workplace sexual harassment and sexual assault complaints

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Community Legal Assistance Society (CLAS) is a non-profit law firm serving people in British Columbia since 1971. CLAS respects the dignity of all in our community and works towards positive social change by providing legal assistance and advancing the law to address the critical needs of those who are disadvantaged or face discrimination.

The Sexual Harassment Advice, Response, and Prevention for Workplaces (SHARP Workplaces) Legal Clinic was operated by CLAS and provided free legal advice to anyone who experienced workplace sexual harassment in BC between March 2020 and March 2024.

Stand Informed Legal Advice Services (Stand Informed) was launched in October 2023, and is operated by CLAS. Stand Informed provides free legal advice to anyone in BC who has experienced sexual assault.

All information in this manual is accurate as of January 2024.

Send comments to: standinformed@clasbc.net

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This is an educational resource for lawyers. It is not intended to provide legal advice.

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Writers*:*

Dante Abbey, Kristen Barnes, Elba Bendo, Jonathan Chapnick, Juliana Dalley, Megan Ellis, KC, Sara Forte, Menachem Freedman, Lisa Fong, KC, Chaslynn Gillanders, Darwin Hanna, Sara Hanson, Heather Hoiness, Rose Keith, KC, Jennifer Khor, Anna King, Jadine Lannon, Angela Leung, Kevin Love, Coral Lyster, Sarah Marsden, Karen Martin, Myrna McCallum, Suzette Narbonne, Clea Parfitt, Kerry Porth, Sarah Rush, Sonya Sabet-Rasekh, Adrienne Smith, Karen Snowshoe, KC, Laura Track, Melissa Van der Houwen, and Wendy van Tongeren.

Reviewers:

Rosanna Adams, Neil Chantler, Juliana Dalley, Sara Hanson, Liza Hughes, Anna King, Angela Leung, Coral Lyster, Aditi Master, Angela Wong, and Emily Zarychta.

Roster Lawyers:

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HOW THIS MANUAL IS ORGANIZED

The Sexual Harassment Advice, Response and Prevention for Workplaces (SHARP Workplaces) is a program implemented through a partnership between Community Legal Assistance Society (CLAS) and Ending Violence Association of BC (EVA BC) to address workplace sexual harassment in BC. SHARP Workplaces has two components:

- Legal advice for persons experiencing workplace sexual harassment, and
- Public legal education and training to raise awareness, prevent and improve responses to sexual harassment in the workplace.

SHARP Workplaces Legal Clinic, operated by CLAS, was established in 2020 to provide legal advice to people experiencing sexual harassment at work. In March 2020, CLAS provided on-boarding training for lawyers in key areas of substantive law relating to workplace sexual harassment and trauma-informed approaches. This manual is designed to be a resource for lawyers assisting clients who have experienced workplace sexual harassment and builds upon the foundational training provided by SHARP Workplaces. While SHARP Workplaces is no longer operating, we hope that lawyers providing advice to clients who have experienced sexual harassment may continue to find this manual useful.

Stand Informed Legal Advice Services (Stand Informed), also operated by CLAS, was launched in 2023 in response to SHARP Workplaces receiving inquiries from individuals who have experienced sexual assault not connected to the workplace. Before Stand Informed, no free legal advice services were available to someone who has experienced sexual assault in BC except for limited legal assistance from Legal Aid BC for issues of disclosure of private records or sexual history in a criminal sexual assault trial.

Between 2018 and 2020, EVA BC piloted the provision of trauma-informed Independent Legal Advice (ILA) and support for clients who experienced sexual assault in five communities across BC. The pilot demonstrated the need for such services. In May-June 2023, Stand Informed provided on-boarding training for lawyers in key areas of substantive law relating to sexual assault, gender-based violence and trauma-informed approaches. Additions have been made to this manual to be a resource for lawyers assisting clients who have experienced sexual assault.

The manual is divided into four parts:

- PART I: SHARP WORKPLACES AND STAND INFORMED LEGAL SERVICES AND OUR APPROACH
- PART II: SERVING CLIENTS WITH INTERSECTIONAL IDENTITIES
- PART III: LEGAL OPTIONS
- PART IV: PROVIDING LEGAL ADVICE AND COACHING TO ASSIST YOUR CLIENT

Part I introduces SHARP Workplaces and Stand Informed Legal Advice Services Programs (the "Programs"), explains our commitment to taking a trauma-informed approach, and gives an overview of how cases are referred to the roster or ad hoc lawyers. It also

includes a brief introduction to what constitutes workplace sexual harassment and describes trauma-informed approaches to working with clients.

Part II reflects the Programs' commitment to taking a trauma-informed approach to client services by providing background information to help lawyers better understand clients with intersectional identities and practical tips to help them provide respectful, trauma-informed services.

Part III provides an overview of the different legal options that may be relevant for a client with workplace sexual harassment and sexual assault complaints to assist the lawyer in advising the client.

Part IV provides practical tips for interviewing clients, providing legal advice, and assisting clients to write a complaint, navigate an internal workplace investigation, and negotiate a settlement. It also provides information on privacy and freedom of information requests, involving support workers, and advising bystanders, and contains tables that summarize the different legal forums, their jurisdiction, the available remedies and time limits, and the pros and cons of each option. The tables act as an at-a-glance guide to assess legal options and ensure all relevant options are considered with the client.

Several chapters also include helpful tips or sample drafts which lawyers can adapt for clients or give to them for reference. It is hoped that, over time, additional information and practical tools will be added. If other issues come to mind when you use this manual, we welcome your feedback and suggestions. Through SHARP Workplaces and Stand Informed we hope to support a community of lawyers who can share and exchange knowledge and experience to better support clients and address workplace sexual harassment and sexual assault complaints.

Note that this manual is designed to provide an overview of sexual harassment in the workplace, and sexual assault, and the related legislation and potential remedies. It cannot provide comprehensive information about the areas covered and is not intended to reproduce information readily available from other sources, such as the LSLAP Clinic Manual. It is not a substitute for the lawyer doing their own research.

We hope this manual will be of assistance in the journey to support a client in addressing or compensating for workplace sexual harassment or sexual assault that they may have endured, or to anyone assisting complainants experiencing sexual assault.

This is an educational resource for lawyers. It is not intended to provide legal advice.

Jennifer Khor
Supervising Lawyer and Project Manager
SHARP Workplaces & Stand Informed
Community Legal Assistance Society

PART I: SHARP WORKPLACES AND STAND INFORMED LEGAL SERVICES AND OUR APPROACH

CHAPTER 1: INTRODUCTION TO SHARP WORKPLACES AND STAND INFORMED

By Angela Leung, Coral Lyster, and Jennifer Khor

A. Background

In 2017, Me Too, a global social justice movement to raise awareness about sexual abuse and sexual harassment and empower survivors of sexual assault and sexual harassment to speak out about their experiences, began to attract public attention. Sexual harassment in the workplace emerged as a particular source of concern. In 2019, the government of Canada, through the Department of Justice Canada, made funding available across the country to address sexual harassment in the workplace. The Community Legal Assistance Society (CLAS) and Ending Violence Association of BC (EVA BC) secured funding until 2024 and together launched the Sexual Harassment Advice, Response, and Prevention for Workplaces (SHARP Workplaces) Program in 2020 to address sexual harassment in the workplace in British Columbia. The SHARP Workplaces program has two components: a legal advice clinic established by CLAS to provide legal advice and information to support complainants of sexual harassment in BC, and a public legal education and information component led by EVA BC to provide education and training on workplace sexual harassment to employers and employees in small businesses, non-profits, and Indigenous organizations. SHARP Workplaces' ultimate objective is to empower our clients and create a safe working environment for all British Columbians.

CLAS has been providing legal assistance to disadvantaged people since 1971, making it the longest-running non-profit legal aid organization in British Columbia. It specializes in human rights, housing, income security, workers' rights, and mental health law. CLAS's SHARP Workplaces legal advice clinic uses a mixed-service delivery model of staff lawyers and ad hoc or roster lawyers (ad hocs) to provide legal advice to anyone in BC, or with a claim in BC, who has experienced sexual harassment in the workplace. Clients can receive up to five hours' legal advice from a lawyer, although lawyers can request more time in certain circumstances. Due to funding restrictions, CLAS cannot provide legal representation. The lawyers advise clients on their legal options, which may include advising on provincial or federal human rights, employment and labour, workers compensation, and criminal law.

Sexual harassment is often a traumatizing experience, and so lawyers providing legal advice via SHARP Workplaces receive training in trauma-informed approaches. In addition, CLAS provides training on legal coaching, specific client relation skills, and substantive law related to assisting clients with workplace sexual harassment complaints so that lawyers can continue to develop their knowledge and skills. CLAS recruits lawyers throughout BC so that in-person service is available across the province as much as possible. Where in-person services are not possible, lawyers can provide legal advice over the telephone or via video calls. Because clients may be dealing with

additional issues arising from workplace sexual harassment, SHARP Workplaces takes a holistic approach to supporting them. Whenever possible, we provide clients with referrals to appropriate ancillary services, such as counselling, employment, and housing.

EVA BC is an umbrella organization serving over 300 community-based programs and initiatives that support survivors of sexual and relationship violence, child abuse, and criminal harassment. It develops resources, tools, and service standards; provides training for a variety of stakeholders; and educates both the public and government bodies on the needs of people who have experienced violence. EVA BC is developing trauma-informed and legally accurate public legal education and information (PLEI) materials to increase public awareness of sexual harassment in the workplace and build people's practical skills to prevent and respond to it. The materials include videos, guidelines on employees' rights, employers' obligations, policy templates, and response protocols. All SHARP Workplaces content is available via an online informational hub. EVA BC will also develop and deliver training on workplace sexual harassment for small businesses, non-profits, and Indigenous workplaces. That training will cover a variety of topics such as understanding workplace sexual harassment, employer obligations to ensure a safe, harassment-free workplace, responding to disclosures, conducting workplace investigations with a trauma-informed approach, managing safety, and transforming the workplace culture.

Sexual assault occurs frequently in British Columbia, but it is under-reported to police and few people seek help. In 2023, with funding from the Government of Canada through the Department of Justice Canada, CLAS was contracted by the BC Ministry of Public Safety and Solicitor General to provide Stand Informed Legal Advice Services (Stand Informed). Stand Informed fills a hole in the legal assistance available to people in BC; until now, anyone who experienced sexual assault had nowhere to turn for accessible legal advice. Stand Informed uses a mixed-service delivery model of staff lawyers and ad hoc or roster lawyers to provide legal advice to anyone who has been sexually assaulted in BC. Clients can receive up to three hours' legal advice from a lawyer, although lawyers can request more time in certain circumstances. Due to funding restrictions, CLAS cannot provide legal representation. The lawyers advise clients on their legal options, which may include advising on criminal law, provincial or federal human rights, civil law, and workers compensation.

Sexual assault is a traumatizing experience, and all lawyers providing legal advice via Stand Informed receive training in trauma-informed approaches through EVA BC. In addition, CLAS provides training on legal coaching, specific client relation skills, and substantive law related to assisting clients with sexual assault complaints so that lawyers can continue to develop their knowledge and skills. CLAS recruit lawyers throughout BC so that in-person service is available across the province as much as possible. CLAS also made connections with partners throughout the province for clients to access alternative safe space to meet with lawyers. Where in-person services are not possible, lawyers can provide legal advice over the telephone or via video calls. Because

clients may be dealing with additional issues arising from sexual assault, Stand Informed takes a holistic approach to supporting them. Whenever possible, we provide clients with referrals to appropriate ancillary services, such as counselling, advocate support, employment, and housing.

B. SHARP Workplaces and Stand Informed Client Referral Process

SHARP Workplaces and Stand Informed Programs (the "Programs") support a trauma-informed approach to client services that includes recognizing the importance of respecting a client's unique identity. The lawyers who work with us do not need to be experts on trauma or the clients' unique backgrounds to assist them. The objective is to serve clients with sensitivity and respect and minimize the risk of causing further trauma. If you create a respectful and safe atmosphere that helps your client trust you, you will collaborate more effectively with each other.

1. The Client Contact SHARP Workplaces or Stand Informed

The Programs have a centralized intake process. All email and phone inquiries and online applications are reviewed by the intake coordinator within two business days. The intake coordinator then contacts prospective clients via email or telephone to arrange a time to complete the intake process.

During the initial intake process, the client is asked to provide a summary of their workplace experience and their concerns; the intake coordinator then determines if the harassment is linked to the client's place of employment and could be considered sexual harassment. They do not have to confirm that the harassment was of a sexual nature, only that there is a possibility that it has a sexual component. For Stand Informed, the client will confirm with staff that the sexual assault they experienced took place in BC. The client is not required to provide details regarding the assault. The Programs do not have any financial eligibility requirements. Our only eligibility criteria are that we are satisfied that: the client's harassment is associated with their workplace and that the harassment can be considered sexual in nature for SHARP Workplaces; and, for Stand Informed, the client's assault can be considered sexual in nature. For SHARP Workplaces, either the client or the workplace must be in BC. For Stand Informed, the sexual assault must take place in BC.

Once the intake coordinator is satisfied that the client meets the eligibility criteria, they collect the client's full contact and demographic information. For SHARP Workplaces, they also ask the client if they are currently engaged in any legal process, if they are still in their workplace, and if they have any upcoming deadlines or events, such as a meeting with WorkSafeBC or their employer, or if they have forms that must be submitted by a certain date. They ask the client to provide any relevant documents—including any complaints they have submitted to their workplace, tribunals, or regulatory bodies—for the lawyer assigned to them to help both the lawyer and client make the most efficient use of the time available to them. The intake coordinator then advises the client that the SHARP Workplaces or Stand Informed will contact them

within approximately one week; this gives us time to complete the necessary conflicts check and determine which lawyer to assign to the case. If the intake coordinator identifies an ancillary issue, they make a note of the details. Contact information for the referral is usually provided to the client within the one-week time frame.

If there is no conflict within CLAS, the intake coordinator completes their assessment of the legal issues and identifies the client's location and any special needs before discussing the case with the supervising lawyer and assigning the client to either a staff lawyer at SHARP Workplaces or Stand Informed or an ad hoc lawyer. Due to the traumatic and sensitive nature of sexual assaults, Stand Informed clients are asked if they have a gender preference for their lawyers. Whenever possible, we place clients with a lawyer in their local community to minimize travel requirements, but we also offer a wide range of ways to provide service (e.g., in-person, teleconference, virtual).

2. The Client Is Referred to a Lawyer

SHARP Workplaces and Stand Informed take a number of factors into consideration when assigning a lawyer to a client. For example:

- The client's location.
- The complexity of the client's case.
- Do the client's legal issues require legal expertise in an area in which an ad hoc lawyer has significant experience?
- Does the client have any other special needs with which certain lawyers have more experience?
- Does the client identify as Indigenous and want an Indigenous lawyer? And if so, is an Indigenous lawyer or the Programs' Indigenous staff lawyer available to work on the case?
- Are any SHARP Workplaces or Stand Informed staff lawyers available to work on the case?
- For Stand Informed clients, do they have a gender or language preference?

If a case is being referred to an ad hoc lawyer, the intake coordinator reviews the ad hoc roster to find the next ad hoc lawyer who meets the current case requirements. The client's full name and date of birth and the other party's, or parties', names are then emailed to the ad hoc. If the ad hoc has a conflict—for example, if they are currently representing or have previously represented the harasser or the employer—or does not respond within 24 hours, the intake coordinator moves on to the next ad hoc who meets the necessary requirements. This continues until an ad hoc lawyer accepts the case.

When an ad hoc accepts the case, the intake coordinator sends the client a retainer agreement with the ad hoc's contact information on it. The client reviews the retainer agreement and signs it. If they have any concerns or questions about it, they can contact SHARP Workplaces or Stand Informed and speak to a staff lawyer about them. Once the

client's signed retainer agreement has been received, the intake coordinator prepares a referral package for the ad hoc lawyer. This package contains:

- a confirmation letter referring the client to the lawyer,
- the client's contact information,
- a copy of the signed retainer agreement,
- the intake notes, and
- any additional documentation provided by the client.

The referral package is emailed to the ad hoc lawyer, who then contacts the client to arrange an initial meeting. The Programs are dedicated to providing continuing support for both our clients and our ad hoc lawyers. If the ad hoc identifies a new ancillary issue during the course of providing service or needs help with a particular issue of law, they can contact the intake coordinator for additional referrals and assistance.

3. The Lawyer Provides Legal Advice

Be mindful of the five hours for SHARP Worplaces and three hours for Stand Informed – and remind the client about it when they first make contact. Talk to the client about their ability to accomplish any tasks with your support. The limited hours may not be enough to assist them, particularly if they have experienced trauma, so you can request an additional hours (five and two hours for SHARP Workplaces and Stand Informed, respectively), for a total of 10 hours for SHARP Workplaces, and 5 hours' legal advice for Stand Informed. The additional hours are not guaranteed and are granted based on funding availability and a number of factors including if the client's issue can be resolved, or the client can be assisted to a point where a referral is facilitated, within the extra hours. Clients are limited to one retainer with one SHARP Workplaces or Stand Informed lawyer.

Focus on helping the client understand their legal options and coach them on how to move their legal issue forward independently. If their issue cannot realistically be dealt with without legal representation, provide them with further legal referrals, such as to CLAS's Human Rights Clinic. The Programs' staff can help with this. (See Chapter 26: Meeting with the Client, A. What You Need to Tell the Client: Expectations and Limitations, for more information about this and about your and your client's options.)

4. The Client Is Helped to Advocate for Themselves

Do not spend the client's advice hours doing tasks for them that they could do themselves. At the outset of the retainer, encourage, empower, and coach clients to do as much possible to help themselves. This manual contains tips, checklists, and templates that clients can use. For more information about legal coaching for self-represented clients, see Chapter 30: Legal Coaching: Guiding Self-represented Litigants to Advance Their Case. The client may find it helpful to bring a support worker to the meetings, to help them navigate the legal processes and assist them with preparing documents. However, having a support person involved raises questions about maintaining confidentiality and privilege between a lawyer and their client, and see

Chapter 27: Involving Support People in Legal Relationships. If the client's matter is more complex and requires ongoing assistance, see the next section in this chapter, The Client Is Referred for Follow-Up Assistance.

Spend most of your time with a client on legal coaching, as it is highly unlikely you will be able to resolve the client's matter in the limited number of hours a if you take a hands-on approach. Most of the clients receiving advice through SHARP Workplaces or Stand Informed have to do some self-representation as they work to resolve their issue. If you complete tasks for a client, they will not learn how to move the issue forward on their own. For example, if you write a demand letter to an employer for a private settlement, the client may not understand the legalese in the letter. If you coach the client to write the letter themselves, or in the context of sexual assault, advice the client on how to report a complaint to the police, however, you empower them to be a part of the process and ensure they understand both the contents and the purpose of the letter. Furthermore, you then have time to coach the client on how to deal with a response.

If a client's matter is complex and likely to be drawn out, make best use of the time available by helping the client take control of their issue. Look at the most efficient way to use the legal advice hours. For example, if the client has already accumulated documents and taken some initial steps in dealing with their issue, do not spend time reviewing the paperwork. Instead, coach the client on their options and provide them with referrals so they can take any next steps confidently on their own. Empowering a client to self-represent may be more challenging for you if you are used to having sole control of a file, than for the client, who is embarking on a new experience.

5. The Client Is Referred for Follow-Up Assistance

Clients accessing SHARP Workplaces and Stand Informed experience a wrap-around service model. Our goal is to offer a holistic and trauma-informed approach that seeks to address all of a client's needs, not just their need for legal services. Clients seeking further support can be referred to support services for help with counselling, or employment, financial, or housing issues.

We are continually developing connections with organizations throughout the province to provide support to clients. In referring clients to other service providers, we also hope to help reduce the risk of re-traumatizing clients. With the client's permission, the Programs may share information with relevant organizations, so the client does not have to repeat or revisit traumatic details or provide the same information about themselves when they apply for services. Some common referrals are listed in Appendix I: Common Referral Resources for Clients. The Programs' staff may be able to assist in identifying more specific and local support services for the client. If a client requires additional support services, contact the intake coordinator for assistance. If you know of a resource or are an organization that should be added to our referral network, please contact SHARP Workplaces or Stand Informed so we can make that connection.

At all stages of interaction with clients, it is important to take a trauma-informed approach to create a sense of safety, choice, empowerment, and connection for the clients. SHARP Workplaces and Stand Informed understand that clients may be experiencing the most difficult and vulnerable moments of their lives. Taking a trauma-informed approach means integrating knowledge about how people are affected by trauma into our procedures, practices, and services. Being trauma-informed also means being open with yourself about your own history of trauma. Practicing self-care, which includes leaving a client's stories behind at the end of the day, is just as vital for lawyers as for clients. (See Chapter 3: Trauma-informed Practice, for more information on becoming trauma-informed.)

Last updated January 2024

CHAPTER 2: WORKPLACE SEXUAL HARASSMENT AND SEXUAL ASSAULT: BASIC DEFINITIONS

By Coral Lyster and Jennifer Khor

A. Introduction

Workplace Sexual Harassment

Workplace sexual harassment is about power. It is rooted in social constructs of gender and sexuality and reinforces and exacerbates unequal power hierarchies based on race, ethnic identity, disability, immigration status, and other social locations.[1] Social and employment status render some workers more vulnerable than others to sexual harassment and less able to pursue a remedy. Historic gender roles continue to influence employment status—women and non-gender-conforming persons are more vulnerable to, and more likely to experience, sexual harassment.[2] For example, most workers in the service industry are people who identify as women and who tend to work long, irregular hours; the positions are generally temporary and/or part-time positions, which have less job security and fewer benefits.[3]

Workplace sexual harassment may be broadly defined as any unwelcomed sexual behaviour or conduct that a person experiences at work, or in an environment connected to their work, and that negatively affects the work environment or has adverse effects on the person experiencing the harassment.[4] Sexual harassment includes any comments or conduct that is unwelcomed and involves a person's sex, gender, gender identity, gender expression, or sexual orientation. Sexual harassment in the workplace can take many forms—from non-verbal microaggressions to physical assaults—be subtle or overt, and be physical or psychological. It does not have to be overtly sexual in nature to qualify as sexual harassment—for example, comments directed at how a person expresses their gender through unwanted comments about the way they dress or the pronouns they use or referring to a colleague purposely using the gender with which they do not identify would be sexual harassment relating to gender.

Behaviour that constitutes sexual harassment includes:

- physical contact such as touching or hugging;

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[1] H. Bigras-Dutrisac, Al Herlingieri, N.D. McFadyen and B.J. MacQuarrie, B.J., *Exploring the Intersections of Sexual Violence and Precarious Work: A Literature Review* (London, ON: Centre for Research & Education on Violence Against Women & Children, Western University, 2020).

[2] D. Hango and M. Moyser, *Insights on Canadian Society: Harassment in Canadian Workplaces* (Ottawa: Statistics Canada, 2018). https://www150.statcan.gc.ca/n1/pub/75-006-x/2018001/article/54982-eng.htm

[3] Bigras-Dutrisac et al., *Intersections*.

[4] *Janzen v. Platy Enterprises*, [1989] 1 SCR 1252, 59 DLR (4TH) 352.

- sexual leering, gestures, teasing, or crude jokes, and comments or "compliments" of a sexual nature;
- unwanted displays of pornographic or suggestive materials, in person or using technology such as voicemail, text messages, emails, or posts on social media platforms like Facebook or Instagram;
- microaggressions, which can be verbal or nonverbal, intentional or unintentional negative messages that target people based on their marginalized group membership;
- derogatory or humiliating comments about someone's gender identity or expression;
- voyeurism and stalking;
- repeated unwanted invitations of a sexual or personal nature; and
- sexual behaviour a person feels they must accept to get hired, keep their job, or get a promotion.

A single instance of such behaviour may be sufficient to constitute sexual harassment. Often a pattern of behaviour is found to be sexual harassment.

Sexual Assault

Sexual assault can be broadly defined as intentional physical contact of any kind – such as hugging or touching – without consent. Sexual assault includes attempts or threats of unwanted sexual touching or contact. Consent must be actively communicated, voluntary and can be revoked at any time. Silence does not equal consent. See Chapter 25: Criminal Law for detailed discussion on consent. Workplace sexual harassment can include sexual assault if it takes place at the workplace or in context of the workplace. There is no time limitation to reporting sexual assault (see Chapter 29: Advising Clients on Their Legal Options: Summary Tables: Statute Jurisdiction, Issue Forums, Remedies, and Time Limits).

B. Microaggressions

Microaggressions are a particularly insidious aspect of workplace sexual harassment. Dr. Derald Wing Sue, professor of counselling psychology at Columbia University, defines them as:

> the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, which communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership. In many cases, these hidden messages may invalidate the group identity or experiential reality of target persons, demean them on a personal or group level, communicate they are lesser human beings, suggest they do not

> belong with the majority group, threaten and intimidate, or relegate them to inferior status and treatment.[5]

Microaggressions may form a pattern of behaviour that constitutes sexual harassment. They can sometimes be difficult to identify, both by those who are experiencing them and by those who witness them. Essentially, they reflect mainstream ideas about what is "normal" and are about singling out a target and communicating hidden messages. Be aware of how degrading comments can layer and compound to create intolerable work environments. Hidden messages may:

- discredit the target's group identity or experiences,
- insult them on a personal or group level,
- imply they do not belong, or
- intimidate, shame, or subject them to mistreatment.

The fact that they are "everyday" messages can make them difficult to identify, and it can be hard for the target to explain their impact. Microaggressions may seem insignificant, but collectively they can form a pattern of harassment. Sometimes our own identities and privileges make it difficult to recognize microaggressions and understand the harm they cause. (See also Chapter 13: Clients Who Are Racialized.)

C. Human Rights Perspective

Sexual harassment, sexual assault and sexist bullying are discrimination on the basis of Sex, a protected ground under the BC *Human Rights Code* (see Chapter 16: British Columbia Human Rights). There is similar protection for federally regulated organizations under the *Canadian Human Rights Act* (see: Chapter 17: The Federal Human Rights System).

The leading definition of sexual harassment from a human rights perspective is taken from *Janzen v. Platy Enterprises*, [1989] 1 SCR 1252, 59 DLR (4th) 352:

> Sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.

The Janzen definition has three elements: the conduct was of a sexual nature, was unwelcome, and had adverse consequences for the complainant. In *Mahmoodi v. University of British Columbia and Dutton*, 1999 BCHRT 56, at paras 135-136, it was confirmed that conduct that meets the definition of sexual harassment may be physical or psychological and overt or subtle, and may include verbal innuendos, affectionate gestures, repeated social invitations, and unwelcome flirting, in addition to more blatant conduct such as leering, grabbing, or sexual assault. A pattern of ongoing or persistent conduct is not necessarily required for the behaviour to be considered sexual

[5] D.W. Sue, "Microaggressions: More than Just Race," *Psychology Today* (November 17, 2010). http://www.psychologytoday.com/blog/microaggressions-in-everyday-life/201011/microaggressions-more-just-race

harassment, and, depending on the facts and situation, a single incident maybe enough to establish sexual harassment.

Where verbal sexual harassment is alleged, persistent conduct or an ongoing pattern of conduct may be required to meet the threshold. In *Parado v. School District No. 43*, 2003 BCHRT 71, at para 12, to decide if one incident of verbal behaviour met the threshold of sexual harassment, it was decided that various factors may be considered—for example, the severity of the comment, the nature of the relationship between the parties, the context in which the comment was made, whether an apology was offered, and whether or not the recipient of the comment was a member of a group historically discriminated against. Any sexual harassment that a person experiences at work is wrong and should not have happened, but it will likely be more difficult for a client to prove that one verbal incident occurred, especially if there were no witnesses. Clients should still be given all available legal options and referrals to support services, even if their options are limited.

1. Unwelcomed Conduct

The legal test for determining whether conduct was "unwelcomed" is from *Mahmoodi v. University of British Columbia and Dutton,* 1999 BCHRT 56, at para 140:

> taking into account all the circumstances, would a reasonable person know that the conduct in question was not welcomed by the complainant?

The test asks whether the harasser knew, or ought to have known, that the conduct was not welcomed. The complainant is not required to actively protest or object to the conduct. Without express objection, a complainant may have to lead evidence from which a decision maker can conclude a reasonable person would understand the conduct to be unwelcomed.

Gender-based myths and stereotypes are being recognized in the legal analysis and outcome of cases, especially the requirement that the complainant establish that the conduct complained of was "unwelcomed."[6] In *Basic v. Esquimalt Denture Clinic and another*, 2020 BCHRT 138, the Tribunal took judicial notice of gender myths and stereotypes, noting that "the reasonable person standard must be grounded in the social context of complaints involving sexual harassment…. taking into account the impact of gender myths and stereotypes in the assessment of whether the conduct was unwelcome."[7]

2. The Conduct Results in Adverse Job-Related Consequences for the Complainant or Detrimentally Affects the Work Environment

The last part of the *Janzen* definition requires that the conduct results in adverse job-related consequences for the complainant or detrimentally affects the work

[6] Bethany Hastie, *Workplace Sexual Harassment: Assessing the Effectiveness of Human Rights Law in Canada* (Vancouver: University of British Columbia, 2019).

[7] *Basic v. Esquimalt Denture Clinic and another*, 2020 BCHRT 138 at para. 100.

environment. An adverse job-related consequence is not limited to punitive consequences such as being fired or suffering a reduction in hours; it can include working in a hostile or poisoned work environment—for example, a person may feel they can no longer work effectively due to being bullied in subtle or overt ways.

See Chapter 29: Advising Clients on Their Legal Options: Summary Tables: Statute Jurisdiction, Issue Forums, Remedies, and Time Limits , for a detailed discussion of BC's *Human Rights Code* and the BC Human Rights Tribunal, and the federal human rights system.

D. Occupational Health and Safety and Employment Perspective

Workplace sexual harassment and violence are also prohibited by federal and provincial occupational health and safety legislation.[8] Conduct constituting sexual harassment and sexual assault may be captured in regulations and policies broadly addressing bullying, harassment, and violence (see Chapter 18: Workers' Compensation, and Chapter 20: Investigations of Harassment and Violence in Federal Workplaces). While the jurisdiction of the human rights regimes combined with mandatory workers compensation schemes has drawn into question the extent of a civil claim for damages related to workplace sexual harassment, the courts in BC have still found some basis for claims related to the contractual employment relationship (see Chapter 21: Civil Actions (Employment Law and Tort)).

E. Criminal Law Perspective

A number of criminal offences may result from workplace sexual harassment and sexual assault. These are discussed extensively in Chapter 25: Criminal Law. A common question is the difference between sexual harassment and sexual assault. The *Criminal Code of Canada* does not define "sexual assault"[9] but defines "consent" as "the voluntary agreement of the complainant to engage in the sexual activity in question."[10] Therefore, sexual assault can be defined as any sexual contact without consent.[11] The offence requires that the perpetrator has intent, but the Crown does not have to prove that the intent was specifically sexual. As an assault, sexual assault may result from force,[12] an act or gesture, and absent of consent.[13]

In the criminal context, the complainant's consent is key. Contrast this with the human rights context, where the unwanted nature of the sexual harassment is assessed based on an objective standard of a reasonable person. In human rights, workplace sexual

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[8] *Workers Compensation Act*, RSBC 2019, c. 1; *Canada Labour Code,* RSC 1985, c. L-2.

[9] *Criminal Code*, RSC 1985, c. C-46, s. 271.

[10] *Criminal Code*, RSC 1985, c. C-46, s. 273.1(1).

[11] "A Definition of Consent to Sexual Activity," Department of Justice, January 1, 2015, https://www.justice.gc.ca/eng/cj-jp/victims-victimes/def.html

[12] Touch is sufficient to constitute "force."

[13] *Criminal Code*, RSC 1985, c. C-46, s. 265.

harassment is any unwelcomed sexual behaviour or conduct that a person experiences at work, or in an environment connected to their work, and that negatively affects their work environment or has adverse effects on their work. Workplace sexual harassment can be unintentional or intentional. Sexual assault occurs when an intentional act of a sexual nature occurs without the consent of the person being assaulted and requires the intent of the perpetrator and the absence of the consent of the person being assaulted. Sexual assault is a form of workplace sexual harassment if it takes place in connection with the workplace.

Element	Sexual harassment: Human rights context	Sexual assault: Criminal context
Behaviour	Range of possible conduct of a sexual nature.	Of a sexual nature that interferes with the sexual integrity of the person; may include a threat or gesture.
Intent	Not required.	General intent required.
Consent	Absence of consent not required. Reasonable person test to assess "unwanted" conduct.	Absence of consent required. Consent must be given freely.
Impact	Adverse effects required.	None required for offence.

See Chapter 25: Criminal Law for a detailed discussion of the criminal nature of workplace sexual harassment and sexual assault.

Last updated January 2024

CHAPTER 3: TRAUMA-INFORMED PRACTICE[1]

By Myrna McCallum, adapted by Coral Lyster

A. What Is Trauma?

1. Introduction

Trauma can be defined as any event that "is extremely upsetting, at least temporarily overwhelms the individual's internal resources, and produces lasting psychological symptoms."[2] The definition is broad and subjective because individuals experience trauma in unique ways.

2. The Impact of Trauma

Anyone can be traumatized by any experience, and the severity of a particular incident does not determine its impact on anyone affected by it. Do not make assumptions about how people should react to a trauma. An individual who has been traumatized may experience humiliation, constant fear, shame, and hopelessness, and feel emotionally overwhelmed. They do not need to feel judged for their response or reaction as well.

3. Effects on Memory, Communication Ability, and Behaviour

Changes in a trauma survivor's brain can have profound effects. Trauma affects the Broca area, the part of the brain responsible for speech. As a result, the survivor may have difficulty talking about the incident(s) that caused the trauma and describing it in any detail.[3] The hippocampus can become smaller and its structure disrupted, all of which can affect a survivor's attention span, learning ability, and memory.[4] If connectivity in the corpus callosum, which connects the left and right sides of the brain, is affected, the two sides of the brain will not coordinate as effectively as they usually do, which affects complex processing of emotions.[5]

People who have been traumatized can experience extreme swings in emotion and may struggle to regulate their emotions. Changes in the amygdala can trigger the fight, freeze, or fawn response. Reduced activity in the pre-frontal cortex can make it difficult for a survivor to make decisions, responds, react, or regulate their emotions.

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[1] The materials in this section were adapted from training provided by Myrna McCallum to SHARP Workplaces lawyers in March 2020.

[2] J.N. Briere and C. Scott, *Principles of Trauma Therapy: A Guide to Symptoms, Evaluation, and Treatment*, 2nd ed. (Thousand Oaks, CA: SAGE Publications, 2015), 10.

[3] A.M. Hull, "Neuroimaging findings in post-traumatic stress disorder. Systematic review", *British Journal of Psychiatry: the journal of mental science* (Aug 2002) 181: 102-10 https://pubmed.ncbi.nlm.nih.gov/12151279/

[4] F.L. Woon, S. Sood, D.W. Hedges, "Hippocampal volume deficits associated with exposure to psychological trauma and posttraumatic stress disorder in adults: a meta-analysis", *Prog Neuropsychopharmacol Biol Psychiatry* (2010) 34: 1181–1188. https://doi.org/10.1016/j.pnpbp.2010.06.016

[5] K.R. Wilson, D.J Hansen, M. Li, "The traumatic stress response in child mal-treatment and resultant neuropsychological effects", *Aggress. Violent Behav*. (2011) 16(2): 87–97. https://doi.org/10.1016/j.avb.2010.12.007

Conversely, if changes occur in the survivor's brain's reward pathways, they will derive less pleasure from formerly enjoyable activities and may appear less motivated in general. As a result, a survivor may appear to be emotionally flat, which can lead to assumptions that they have not been traumatized.

B. Trauma-Informed Engagement

1. What Is a Trauma-Informed Lawyer?

A trauma-informed lawyer is one guided by the principle of doing no harm. They assess their own experiences of and reactions to trauma, and are honest with themselves about it. A trauma-informed lawyer knows about the neurobiological effects of trauma, especially in the context of sexual assault, on speech, memory, and behaviour; can identify traumatic symptoms; and is trained in strategies to adapt their interview approach to accommodate trauma. They also maintain professional boundaries between themselves and the client, leaving traumatic disclosures behind at the end of the day.

2. Trauma-Informed Advocacy

Being trauma-informed means taking an approach that recognizes that gender-based violence, sexual harassment, or assault can be traumatic and have lasting effects.[6] Provide choices whenever possible, explain the reason behind a process or procedure, ascertain a client's triggers and reduce their exposure to these triggers, and be adaptable in your processes and procedures to best accommodate the client. Be aware of your own trauma and capabilities as an advocate, and practise self-care if you are dealing with other people's trauma.

3. Interview Advice

Treat every client as if they have experienced trauma. Whether they are a complainant, respondent, or witness, a client can find an interview to be a stressful experience with the potential to trigger a traumatic response. Help minimize triggers by examining and adjusting your own behaviours and responses to accommodate a client's experience of trauma. Take a moment to ground yourself before an interview and ensure that you have any potentially helpful tools at hand in the interview room.

Maintain self-awareness during the interview and be aware of the signals you may be giving the client. Pay attention to your body language and the client's body language. Be flexible and be respectful of the client. Keep distraction aids within reach for the client to use if necessary during in-person interviews. Be transparent and clear with the client about your process and answer their questions as fully as possible. Ask them if you can

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[6] Status of Women Canada Report, *It's Time: Canada's Strategy to Prevent and Address Gender-based Violence: Glossary* (Government of Canada, n.d.), available at https://publications.gc.ca/collections/collection_2017/cfc-swc/SW21-172-2017-5-eng.pdf. See also Ending Violence Association of BC, *Gender-Based Violence, Harassment, and Bullying: Workplace Policy Guidelines for Response and Prevention* (Ending Violence Association of BC, 2019), https://endingviolence.org/resource-centre/.

do anything to make them feel more comfortable—for example, ask if they need to take a break.

Invite the client to make key decisions about the time, place, and manner in which you communicate. Allow them to ask as many questions as they want about what you will do with the information they give you. Let them decide where they sit in relation to you, where you sit (unless this compromises your safety), and when and how often you take breaks. Be patient and let the client answer in their own time. Ask if they want the lights turned up or down. Let them bring a support person to sit in a waiting area or in the interview room, if permissible. (See Chapter 27: Involving Support People in Legal Relationships for more on this.)

Ask open-ended questions and explain in a non-judgmental way why you need to clarify vague or confusing responses. If something does not make sense to you, preface your specific inquiry with "Help me understand why you chose…" or "I appreciate it's been a while since…" or "I realize this incident has been hard on you, so take your time in answering my next question…" If the client cannot remember specific details about an incident and there is no direct or corroborative evidence, look at the peripheral details to determine if they support the core complaint of sexual misconduct. If a client has prepared a written statement about the traumatic events, be open to using this and only asking questions to fill in the gaps.

4. Best Practices for a Trauma-Informed Approach

Keep in the mind the following points to help you adopt best practices for a trauma-informed approach:

- Make the client aware of all their options, legal and otherwise.
- Provide appropriate, well-researched referrals to ancillary or wrap-around services such as counselling, community support, or assistance with substance use.
- Demonstrate awareness of complex concerns and take them all into consideration.
- Empower the client to do whatever they choose and refrain from judging.
- Make them aware of any potential legal consequences of their decisions.
- Thank them for sharing their story with you and for showing courage in the face of a difficult situation.
- Be consistent, reliable, and predictable.

C. Cultural Humility, Bias, Intergenerational Trauma, and Stereotypes

1. The Benefits of a Trauma-Informed Approach

A trauma-informed approach can help the client feel in control and therefore safe, builds trust and respect between the lawyer and the client, minimizes the risk of re-triggering the client, and helps to ensure that when they leave, they are calm, stable,

and present in their own body. The client should feel that their personal security and need for support are a priority for the lawyer.

The do-no-harm approach protects you, your clients, and the reputation of your legal practice. It will not only improve the quality of your relationship with your clients and improve your credibility but will also help you identify when you are experiencing vicarious trauma (see Vicarious Trauma and Vicarious Resilience, below).

Several things can undermine a trauma-informed approach: lack of self-awareness about your own trauma and comfort levels, lack of cultural understanding, confusion over the evidentiary standard, investigator bias, impatience, insensitivity, or failure to make trust-building efforts. Be aware of these barriers and work towards avoiding them. Practise self-care and undertake continuing education about trauma-informed practice to stay aware and informed.

2. Understand and Practise Cultural Humility

The foundational principle of cultural humility is relationship building. A relational approach is diametrically opposed to a transactional approach, which is the approach often preferred by lawyers and some advocates.

Cultural humility has been defined as "a process of self-reflection and discovery in order to build honest and trustworthy relationships."[7] It is essentially developed by letting go of assumptions about a person based on their culture and creating space for learning who they are as a person. The distinction between cultural humility and cultural competence is subtle yet significant. Cultural competence addresses the ability of a person to effectively work with and across different groups of people and positions in the role of an expert in another person's culture. Cultural humility is an ongoing process of recognizing that the person in front of you is the expert.

> The interpersonal component of cultural humility is also focused on learning … through listening and partnership building. Cultural humility is a foundation for developing the type of environment that promotes an appreciation for understanding other cultures. Cultural humility combined with crucial conversation skills provides an opportunity to talk about involving intercultural pain, cultural misunderstandings, and the development of cultural understanding. In effect, humility should be a lifelong process as well as a goal.[8]

Tips for practising cultural humility:

- Confront your own biases.
- Practise critical self-examination.

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[7] K.A. Yeager and S. Bauer-Wu, (2013). "Cultural Humility: Essential Foundation for Clinical Researchers," *Applied Nursing Research* 26, no.4 (2013): 251-56, https://doi.org/10.1016/j.apnr.2013.06.008

[8] V. Hughes et al., "Not Missing the Opportunity: Strategies to Promote Cultural Humility among Future Nursing Faculty," *Journal of Professional Nursing* 36, no. 1 (January–February 2020): 28-33, https://www.sciencedirect.com/science/article/pii/S8755722319300869

- Develop a capacity for empathy and taking a fresh perspective.
- Practise active and mindful listening.
- Develop skills of inquiry and ask open-ended questions.

3. Be Aware of Myths, Stigma, Bias, and Stereotypes

Be fully informed about rape myths, victim blaming, social stigmas, discrimination risks, physical risk factors, retaliation risks, and cultural taboos related to sex, sexual harassment, and sexual assault. Understand safety needs and be aware of the available resources to support clients. SHARP Workplaces staff can help lawyers identify appropriate resources for clients.

Increasing Access for Clients Who Have Mental Health or Substance Abuse Issues

Clients with mental health concerns can face challenges relating to attention and concentration, memory and recall, motivation, social skills, and executive and planning skills. To accommodate such challenges, move slowly and intentionally, remove as many administrative barriers as possible, allow the client to feel heard, manage your time in the best interests of the client, and be flexible within the limits of the services you can provide. Explain your process and the information you need from them, and why you need it, to help them feel included and in control of a potentially intimidating process.

Increasing Access for Clients Who Have Disabilities

Two different lenses can be applied to disability: the medical model and the social model. The medical model frames a person who uses a wheelchair as disabled because their body does not allow them to walk. The social model frames a person who uses a wheelchair as disabled because social structures (stigma, architecture, etc.) present obstacles to the person. Speak directly to your client, not to a companion or interpreter. Offer to shake hands when you are introduced; people with limited hand use can usually shake hands.[9] Face hard-of-hearing or Deaf clients directly so they can lip-read. Speak in a normal tone of voice. If a client has a visual disability, identify yourself and any others present and tell them if you are leaving the room.[10] Do not offer assistance without asking permission first. If the client accepts the offer of help, ask for instructions on how to proceed. Listen carefully to clients who have difficulty speaking. Do not interrupt. Give them the option of writing, for example, instead of speaking and pay attention to non-verbal responses like a shake of the head. Do not touch a client's mobility aids without their consent.[11]

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[9] Assuming hand-shaking resumes as a socially acceptable form of greeting post-pandemic.

[10] Disability Alliance BC, *Right to Be Safe: Creating Inclusive Services for Women with Disabilities Experiencing Violence* (Disability Alliance BC, 2016), https://disabilityalliancebc.org/rtbsguideupdate/

[11] Disability Alliance BC, *Right to Be Safe.*

Recognizing the Experience of Indigenous Peoples

In *R. v. Holmes*, 2018 ABQB 916, Justice Langston noted:

> This is an Aboriginal offender. She is in a system which is imposed upon Aboriginal people, and I use that word deliberately. Our history, in relation to Aboriginal people, is one of deliberate destruction. We have systematically destroyed their culture, their way of living. We have done everything we can to take from them their sense of spirituality and identity. I'm not saying anything new.

Justice Langston went on to acknowledge the unique circumstances of Indigenous Peoples within the context of a justice system that has "over run Indigenous people, Indigenous communities, Indigenous families, Indigenous culture and Indigenous spirituality."

The recognition offered by Justice Langston is significant for three reasons:

1. It acknowledges the flaws inherent within Canada's legal processes.
2. It validates the harm the justice system does to Indigenous Peoples.
3. It offers an opportunity to do better.

It is important to recognize that the law and the justice system have been, and are, used as a colonial tool because no legal process has likely been designed by Indigenous Peoples for Indigenous Peoples. Consider the perspective of Indigenous Peoples: Given Canada's history of colonialism, are Indigenous Peoples to blame for the poverty in their communities, for example? Cultural humility means being aware of your own ingrained biases. See: *R. v. Pelletier*, 2016 ONCJ 628 (CanLII).

D. Responding to a Disclosure

When you receive a disclosure from a client regarding sexual harassment, a helpful acronym to remember is **LIVES**:

- **L**isten,
- **I**nquire,
- **V**alidate,
- **E**nhance safety, and
- **S**upport.

Listening means listening actively to verbal and non-verbal cues. Inquiring means phrasing questions as invitations to speak and helping the client to identify and express their needs and concerns. Validating means assuring survivors that they are not to blame and that you will help support them in their next steps. Enhancing safety means assessing the client's safety in the workplace and community, helping them make a safety plan, and ensuring confidentiality. Supporting means focusing on the client's immediate needs such as safety or workplace accommodations and referring them to support resources as needed.

1. Practise Grounding Techniques

Grounding techniques can help a lawyer or their client focus on the present in a calming way. Some simple grounding techniques to share with a client are: Clap or rub your hands together, hear the noise, and feel the sensation in your hands and arms. Take a short walk and notice how each step feels. Look around and notice what is in each direction. Name qualities of large and then small items. Notice your feet and plant them into the ground. Notice the textures of your clothing and the surface of the chair. Take 10 slow breaths and focus your attention on each breath. Say the number as you exhale. Remind yourself of who you are now. Say your name, age, and current location. Say what you are doing in the moment and what you will do next.

2. Recognize Limits to Confidentiality

Trust between a lawyer and their client is essential for an effective solicitor-client relationship. It can be more challenging to develop trust with a client who has experienced trauma and may be distrustful of the system. Lawyers have an ethical duty to maintain confidentiality of client information[12] but some limits apply. If a child needs protection, or you learn about a child being neglected or abused by their parent or caregiver, for example, you have a duty to report the situation except where the information is privileged as a result of the solicitor-client relationship.[13] This exception does not extend to all confidential information that has been shared with a lawyer. If there is a risk that a survivor or someone else (including those in the workplace) may be at imminent risk of severe injury or death, a lawyer can disclose information. If a court orders a lawyer to release their records to the court, they must comply. In this type of situation, seek guidance from the Law Society or Bencher.

E. Vicarious Trauma and Vicarious Resilience

1. Vicarious Trauma

Vicarious or secondary trauma, also known as compassion fatigue, is not burnout; burnout can be remedied with a vacation. Vicarious trauma can develop slowly over time and arises when a professional becomes preoccupied with the story or history of a client. It can trigger numbness, hyperarousal, or a plethora of other psychological symptoms that have a negative impact on personal and professional relationships. The risk factors include a personal history of trauma, repeated exposure to detailed accounts of sexual and physical assault, witnessing physical injury, and a lack of organizational support.

Before you work with a client who has experienced trauma, assess your own triggers or experiences in the context of the subject matter. If you have unresolved trauma from

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[12] Law Society of BC, *Code of Professional Conduct for British Columbia, section 3.3: Confidentiality* (Law Society of BC, n.d.), https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/chapter-3-%E2%80%93-relationship-to-clients/#3.3

[13] *Child, Family and Community Service Act,* RSBC 1996, c. 46, s. 14(2).

your childhood but still intend to advocate for the survivor, ensure you have a solid support system, including a therapist. Be honest with yourself about how you cope when triggered, traumatized, or overwhelmed and make a plan. Be confident about establishing your own boundaries and saying that you cannot accept the case or that you need a break, from either the particular case or your work in general. The client should not find themselves trying to take care of you and your needs.

Remind yourself that you are not a therapist or crisis counsellor. Maintain clear boundaries with your client regarding time, space, and the focus of discussion. Explain your role as an advocate and its limitations as often as necessary.

After you have been exposed to a traumatic story or evidence, take time to decompress: wash your hands in very cold water, debrief with a colleague or supervisor, take your pet for a walk in the forest, take a brisk walk alone, or give yourself at least five minutes to intentionally release the information you just learned. Distinguish your experience from the client's. Do not let the traumas of others follow you home. If you do, you could eventually experience anxiety, depression, addictions, or other mental health concerns.

2. Vicarious Resilience

The concept of vicarious resilience was developed by psychotherapists to address the transformation that occurs in clinicians who are regularly exposed to the trauma of others. Vicarious resilience recognizes that the ability to learn how to overcome adversity can be transferred to the helping professional simply by witnessing resilience. It builds on the concept of resiliency in the face of severe trauma and other adversities, and occurs when survivors of trauma survive by adopting coping strategies and using successful adaptive processes.

Useful Resources

Trauma-informed Practice Training:

Golden Eagle Rising Society. *Trauma-Informed Legal Practice Toolkit*, 2020: https://www.goldeneaglerising.org/photos/trauma-informed-legal-practice-toolkit

Justice Institute of BC, Trauma-Informed Practice (TIP) Foundations Curriculum: https://www.jibc.ca/trauma-informed-practice-tip

Martin, Chris (Workplace Equity Educator, Sexual Assault Support Centre of Waterloo Region). *Responding to Sexual Harassment Disclosure* (PLEAC webinar). January 26, 2020. https://www.youtube.com/watch?v=gcXG4xaYZAo

McCallum, Myrna. *The Trauma-informed Lawyer* podcast: https://thetraumainformedlawyer.simplecast.com/

SHARP Workplaces Webinars: Trauma- and Violence-Informed Legal Practice

Hughes, Liza. Gender Diversity and Trauma-Informed Approaches to Workplace Sexual Harassment Claims. May 2021.

Porteous, Tracy. Ending Violence Association of BC. Gender-Based Violence and Trauma-Informed Approaches to Workplace Sexual Harassment Claim. May 2021.

Barkaskas, Patricia. Service-focused Lawyering: Cultural competency and violence-informed approaches for working with Indigenous clients. May 2021.

Vicarious Resilience:

Hernández, P., D. Gangsei, and D. Engstrom. "Vicarious Resilience: A New Concept in Work with Those Who Survive Trauma." *Family Process* 46 no. 2(2007): 229-41. https://doi.org/10.1111/j.1545-5300.2007.00206.x

Vicarious Trauma:

Srdanovic, Michelle. "Vicarious Traumatization: An Occupational Hazard for Helping Professionals." *Visions Journal* 3, no. 3 (2007): 15–16. https://www.heretohelp.bc.ca/sites/default/files/visions-trauma-victimization.pdf

Resources last updated January 2024

PART II: SERVING CLIENTS WITH INTERSECTIONAL IDENTITIES

CHAPTER 4: WORKING WITH CLIENTS WHO HAVE INTERSECTIONAL IDENTITIES

A. Introduction

Part of conducting a trauma-informed and culturally safe practice is being open to lifelong learning about how to be sensitive to a client's unique needs and circumstances, including their exposure to inequality. Clients with multiple intersectional identities often experience overlapping forms of inequality. This chapter therefore provides some basic information about intersectional identities, including a definition of the concept and why it matters. Having even a basic understanding of intersectionality will help you serve your clients with sensitivity and respect.

B. What Is Intersectionality?

The term "intersectionality" was coined by the US law professor Kimberlé Crenshaw in 1989 to describe how different forms of inequality can work together to intensify the impact of one another.[1] When asked in a 2020 interview how she would explain the concept of intersectionality today, Crenshaw responded:

> These days, I start with what it's not, because there has been distortion. It's not identity politics on steroids. It is not a mechanism to turn white men into the new pariahs. It's basically a lens, a prism, for seeing the way in which various forms of inequality often operate together and exacerbate each other. We tend to talk about race inequality as separate from inequality based on gender, class, sexuality or immigrant status. What's often missing is how some people are subject to all of these, and the experience is not just the sum of its parts.[2]

C. Why Intersectionality Matters

A key element of conducting a trauma-informed and culturally safe practice is to understand both the combined systemic barriers and inequalities that particular groups of clients may have faced in their employment and also the broader systemic factors that could affect the lawyer-client relationship and a client's ability to access justice. You are informed by your own gender identity, ethnic background, culture, and lived experience, and so becoming familiar with the broader social context of intersectional identities can help you fully understand clients' legal needs, many of which may not be communicated at the outset or be apparent from the information they provide.

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[1] UN Women, "Intersectional Feminism: What It Means and Why It Matters Right Now," *Medium* (July 1, 2020), https://un-women.medium.com/intersectional-feminism-what-it-means-and-why-it-matters-right-now-7743bfa16757

[2] K. Steinmetz, "She Coined the Term 'Intersectionality' over 30 Years Ago. Here's What It Means to Her Today," *Time* (February 20, 2020), https://time.com/5786710/kimberle-crenshaw-intersectionality/

Many of the topics and tips addressed elsewhere in this manual are also applicable in the broader scope of this section. In particular: Chapter 1, SHARP Workplaces and Stand Informed Client Referral Process; Chapter 26: Meeting with the Client: What You Need to Tell the Client: Expectations and Limitations, What the Client Needs to Tell You, Client Interview Guidelines; Chapter 29: Advising Clients on Their Legal Options: Summary Tables: Statute Jurisdiction, Issue Forums, Remedies, and Time Limits and Chapter 33: Negotiations.

Useful Resources

Crenshaw, K. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics." *The University of Chicago Legal Forum* 1989, no. 1 (1989): 8. https://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8/

Crenshaw, Kimberlé. "I Wanted to Come Up with an Everyday Metaphor that Anyone Could Use." *Newstatesman.com*, n.d. https://www.newstatesman.com/lifestyle/2014/04/kimberl-crenshaw-intersectionality-i-wanted-come-everyday-metaphor-anyone-could

Crenshaw, Kimberlé. "The Urgency of Intersectionality" TEDWomen, October 2016. https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality?language=en

CHAPTER 5: CLIENTS WHO IDENTIFY AS WOMEN

By Elba Bendo

A. Understanding Economic Insecurity and Gender Inequality in the Labour Market

While people's lived experiences are unique and shaped by intersecting identities, there are some commonalities in the forms of gendered discrimination and harassment that persist in the labour market and workplaces in BC.

Economic insecurity disproportionately impacts people who identify as women and those facing interlocking forms of marginalization. Approximately 13% of women and 16% of racialized women in BC live in poverty, higher than the rate for either racialized men or white women. The disparity is even more pronounced for Indigenous women, with approximately 31% of First Nations women and 33% of Inuit women in BC living in poverty. Rates of poverty are also higher among senior women, with about 15.5% of BC women aged 65 and older living in poverty, compared to 10% of men in the same group.[1]

The same marginalized communities are overrepresented in low-wage work and disproportionately impacted by the gender pay gap. BC is the third-worst province in Canada when it comes to the gender pay gap. Women in BC earn around 22.6% less than men annually.[2] Indigenous women, women who are members of a visible minority, women with disabilities, and transgender persons experience even more profound pay discrepancies on average: Indigenous women earn almost 50% less than non-Indigenous men;[3] women with disabilities earn, on average, approximately 22% less than their male counterparts with disabilities.[4] Furthermore, while there are currently no statistics for the pay gap between transgender and cisgender peoples, recent research has found that the median income of trans-Ontarians was just $15,000.[5] Economic inequality follows women throughout their lives, with older women in BC receiving approximately

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[1] West Coast LEAF, *2018 CEDAW Report Card: How Is BC Measuring Up in Women's Rights?* (December 2018), 29-30, https://westcoastleaf.org/wp-content/uploads/2023/05/West-Coast-Leaf-CEDAW-2018-Dec-5-web.pdf

[2] Calculated using median weekly earnings. Women earn 17.2% less than men when using median hourly earnings, but hourly figures obscure the precariousness of so-called women's work, which is disproportionately part-time, casual, or temporary Conference Board of Canada, *Gender Wage Gap* (April 2017), https://www.conferenceboard.ca/hcp/gender-gap-aspx/

[3] The average employment income for women in BC with an "Aboriginal identity" was $27,482, while their "non-Aboriginal identity" female counterparts made $34,520 and men with a "non-Aboriginal identity" made $52,758. (Statistics Canada, Data tables, 2016 Census, https://www150.statcan.gc.ca/n1/en/catalogue/98-400-X2016268)

[4] Amanda Burlock, *Women with Disabilities* (Statistics Canada, Government of Canada, May 29, 2017), https://www150.statcan.gc.ca/n1/pub/89-503-x/2015001/article/14695-eng.htm

[5] Lori E. Ross and Anita Khanna, *What Are the Needs of Lesbian, Gay, Bisexual, Trans, and Queer (LGBTQ+) People that Should Be Addressed by Canada's Poverty Reduction Strategy (CPRS)?* (A joint submission from the Canadian Coalition Against LGBTQ+ Poverty (CCALP), n.d.), http://lgbtqhealth.ca/projects/docs/prsjointsubmission.pdf

20% less than their male counterparts in federal pension benefits and almost 50% less in private retirement payments.[6]

One root cause of the disproportionate amount of economic insecurity experienced by women is the gendered division of labour: women often perform significantly more unpaid work than men, their work is often undervalued, they face statistical discrimination in the labour market,[7] and they are often overrepresented in precarious and low-wage employment.[8] The lack of access to affordable childcare and adequate care for other dependents negatively affects women's ability to increase their earning potential as it often pushes them into part-time, low-wage, and often precarious work.

B. Intimate Partner Violence and Work

The unequal division of labour is also a root cause of gender-based violence.[9] A recent study from the Canadian Labour Congress found that over one third of respondents had experienced intimate partner violence (IPV) in their lifetime.[10] Women and other people who experience gender-based discrimination were between two and four times more likely than cismen to experience IPV.[11] In addition to being widespread and disproportionately experienced by marginalized groups, IPV negatively affects a worker's ability to retain employment, which in turn makes it harder for them to escape a violent relationship. People with a history of experiencing IPV change jobs more often, are more likely to work in casual or part-time roles, and have lower incomes.[12] Steady employment and living wages are crucial for anyone who wants to leave a violent relationship so they can relocate, access services, and support themselves and their dependents.

C. Harassment at Work

While much work has been done to address gendered stereotypes, harassment and discrimination on the basis of gender, gender identity, and gender expression persist in

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[6] Iglika Ivanova, *Poverty and Inequality Among British Columbia's Seniors* (Canadian Centre for Policy Alternatives, Vancouver, 2017), 6, https://www.policyalternatives.ca/SeniorsInequality

[7] Ingrid Robeyns, "Hush Money or Emancipation Fee? A Gender Analysis of Basic Income," in *Basic Income on the Agenda: Policy Objectives and Political Chances*, eds. Robert van der Veen and Loek Groot (Amsterdam: Amsterdam University Press, 2000), 127.

[8] Mark Smith and Genevieve Shanahan, "Is a Basic Income the Solution to Persistent Inequalities Faced by Women?" *The Conversation* (March 7, 2018), https://theconversation.com/is-a-basic-income-the-solution-to-persistent-inequalities-faced-by-women-92939

[9] Julieta Elgarte, "Basic Income and the Gendered Division of Labour," *Basic Income Studies: An International Journal of Basic Income Research* 3, no.3 (February 2008): 3-4, doi: 10.2202/1932-0183.1136

[10] C.N. Wathen, J.C.D. MacGregor, and B.M. MacQuarriewith the Canadian Labour Congress, *Can Work be Safe, When Home Isn't? Initial Findings of a Pan-Canadian Survey on Domestic Violence and the Workplace* (London, ON: Centre for Research & Education on Violence Against Women and Children, 2014), 5, https://www.heu.org/sites/default/files/uploads/can%20work%20be%20safe%20when%20home%20isn%27t.pdf

[11] Wathen et al., *Work*, 5.

[12] Wathen et al., *Work,* 2.

many workplaces in BC, particularly in traditionally male-dominated industries,[13] service industries[14]—especially in those where staff rely on gratuities—isolated workplaces, and precarious employment environments where there is a particularly significant power imbalance between the employee and the employer.[15]

People who identify as women and people of marginalized genders continue to face significant forms of harassment at work. For example:

- Sexual harassment (e.g., sexual solicitation by a manager, client, or colleague).
- A poisoned work environment (e.g., posting of explicit gendered material on shared platforms).
- Gender-based harassment, described as behaviour that "polices and reinforces traditional heterosexual gender norms."[16]
- Violence (e.g., sexual assault).

While sexual harassment can affect anyone, the people most vulnerable to harassment at work are women in low-wage or precarious jobs, members of visible minority groups, older women, sexual and gender minorities, and people with disabilities.[17]

Canadian law recognizes sexual harassment as "an abuse of power that reinforces a woman's historic lower status compared to men."[18] It is incredibly harmful to those who experience it and can affect every aspect of their lives including their ability to work and earn a living, their performance at work, and their mental health. It also undermines the full participation in the workplace of people who identify as women and people who experience gender-based marginalization.[19] Furthermore, people who witness harassment against a colleague or who are working in a poisoned work environment may experience low productivity, high absenteeism, and other forms of physical, material, and emotional harm. (See Chapter 2: What Is Workplace Sexual Harassment? for more information.)

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[13] Susan Harwood, "*The Hidden 'Extras" for Women in Policing: Sexual Harassment, Discrimination and Workplace Bullying*," *The Journal for Women and Policing*, no. 23 (Summer 2009), https://cdn.atria.nl/ezines/email/JournalforWomenandPolicing/2009/No23.pdf

[14] Kaitlyn Matulewicz, "Law and the Construction of Institutionalized Sexual Harassment in Restaurants," *Canadian Journal of Law and Society* 30, no.3 (2015): 401-19, doi: 10.1017/cls.2015.12

[15] Andrea M. Noack and Leah F. Vosko, *Precarious Jobs in Ontario: Mapping Dimensions of Labour Market Insecurity by Workers' Social Location and Context* (Commissioned by the Law Commission of Ontario, 2011), http://www.lco-cdo.org/en/vulnerable-workers-call-for-papers-noack-vosko

[16] Elizabeth J. Meyer, "Gendered Harassment in Secondary Schools: Understanding Teachers' (Non) Interventions," *Gender and Education* 20, no. 6 (November 2008): 555, doi: 10.1080/09540250802213115

[17] Employment and Social Development Canada, *Harassment and Sexual Violence in the Workplace Public Consultations: What We Heard* (Government of Canada, 2017), 11, https://www.canada.ca/en/employment-social-development/services/health-safety/reports/workplace-harassment-sexual-violence.html

[18] Ontario Human Rights Commission, *Policy on Preventing Sexual and Gender-based Harassment* (updated May 2013), http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment-0

[19] *Supra* note 17 at 12.

D. Applying a Systemic Equality Lens

In addition to using the trauma-informed and culturally safe tools described in Chapter 3: Trauma-informed Practice, if you focus on addressing systemic barriers your client may be facing, your legal advocacy can improve. In the context of working with clients who identify as women, consider implementing the following practices.

1. Remove Gender Biases from Your Practice

Understanding and addressing the role gender plays in day-to-day life and the workplace is an ongoing process. In order to effectively remove gender bias from your work you may have to go beyond learning about the law as it is understood today and learn about its evolution and how to critique it. This will help you apply a critical lens to a client's concerns. Read about typical myths and stereotypes that permeate the legal system and question whether these assumptions appear in your work.

2. Make Safety a Priority

A systemic equality lens mandates lawyers to practise in a way that recognizes that violence, whether at work or outside of work, is prevalent among people who identify as women and that, because of the impact of trauma on survivors of violence, clients may not willingly share information about the violence they have experienced. With that in mind:

- Always practise in a trauma-informed way to provide effective legal representation for clients who may have experienced trauma you do not know about.
- Learn how you can effectively screen for historical or ongoing violence. Assessing whether a client has experienced violence or is at risk of experiencing violence can help you connect them with services and supports and provide safety-specific legal options.
- Ensure the client is able to fully exercise their autonomy over the legal process.

People who identify as women have varying experiences with the legal system. Many women—particularly Indigenous women, racialized women, trans women, women living in poverty, and women engaging in sex work—may be sceptical about the ability of the legal system to address human rights or employment violations. Research shows that workers who experience discrimination or sexual harassment find it very difficult to enforce their basic employment rights.[20] Clients who identify as women face numerous barriers to accessing justice for discriminatory or harassing conduct at work. For example:

- Fear of retaliation or fear that reporting could impede their career advancement or result in losing their job.
- Concerns around confidentiality and efficiency in the complaints process.

[20] *Ibid* at 6.

- A normalization of the behaviour in question and a dismissive attitude among supervisors, many of whom fail to even conduct an investigation when harassment is reported.
- The fact that the harassment is often perpetrated by someone in a position of authority.[21]

Clients who identify as women face particularly complex barriers and may need extra support in exercising autonomy over any legal proceedings. You may need to lay out all of their options in clear and accessible language. While you do not want to discourage the client from exercising their rights to seek redress, you must provide them with an informed and realistic assessment of the opportunities and challenges they are likely to face. You may want to explain that myths and stereotypes continue to influence the assessment of a survivor's credibility as a witness, or to walk them through the hearing process including the time and emotional commitment required to pursue a case to the end.

[21] *Ibid* at 10.

CHAPTER 6: CLIENTS WHO IDENTIFY AS MEN

By Menachem Freedman

A. Sexual Harassment of People Who Identify as Men: Some Context

People who identify as men and have experienced sexual harassment can feel even more alone and alienated than their woman-identifying counterparts. There is currently little research and public interest in this sort of sexual harassment, few organizations deal with it, and very few cases refer to a person who identifies as a man experiencing sexual harassment. Many stereotypes therefore not only persist but also dominate in this area. The client, respondent, decision maker, and any third parties may all find themselves struggling with their own internalized biases and preconceptions. Recognize and counteract these biases as much as possible, and prepare the client for the particular challenges of pursuing their complaint as a person who identifies as a man.

Sexual harassment in the workplace against people who identify as men may be more prevalent than many people assume, or Canadian case law suggests, but the reporting rates are low. For example, only one in five complaints to the U.S. Equal Employment Opportunity Commission in 2018 concerned this type of complaint,[1] and research in Canada suggests that 70% of male survivors compared to 59% of female survivors did not report adult sexual assault or abuse to the police.[2]

The case law in Canada does not reflect a 1:5 ratio, as the vast majority of cases dealing with sexual harassment in the workplace are brought by people who identify as women. Anecdotal evidence suggests that people who identify as men who bring a complaint about sexual harassment in the workplace are very much a minority group.

Regardless of the numbers, sexual harassment of people who identify as men is just as profound and damaging as sexual harassment of people who identify as women. As noted above, people who identify as men and have experienced sexual harassment may struggle with internalized stereotypes and biases that colour their experience and hinder their ability to pursue their case. They may feel ashamed of their strong emotions, find it difficult to express their emotion, and be unable to talk openly about the harassment and how it made them feel. They may also fall prey to accepting or believing in common biases or prejudices.

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[1] Michael Alison Chandler, "Men Account for Nearly 1 in 5 Complaints of Workplace Sexual Harassment with the EEOC," *Washington Post* (April 8, 2018), https://www.washingtonpost.com/local/social-issues/men-account-for-nearly-1-in-5-complaints-of-workplace-sexual-harassment-with-the-eeoc/2018/04/08/4f7a2572-3372-11e8-94fa-32d48460b955_story.html

[2] Melissa Northcott, "A Survey of Sexual Assault Survivors," *Victims of Crime Research Digest*, no. 6 (Department of Justice, Government of Canada, 2013), https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd6-rr6/p3.html#ftn1

For example, a client who identifies as a man and has experienced sexual harassment may feel:

- culturally equipped to see themselves as a victimizer or defender of victims, but not as a victim;
- that they were harassed because they were not "strong enough" to defend themselves and this makes them "less of a man";
- that they are less masculine because they are going to a lawyer or making a complaint, rather than directly confronting the perpetrator, including through violence; or
- that the gender or sexual identity of the harasser has implications for their sexuality, for example:
    - they were targeted because they are really gay/straight, or the harassment has made them become gay/straight; and
    - they feel confused or dubious about their sexuality because they experienced arousal, an erection, or an orgasm during an assault.[3]

Some other common biases and stereotypes around the sexual harassment of people who identify as men include:

- The person who identifies as a man was not sexually harassed by a member of the same/opposite sex, because the perpetrator is not/is gay, or is younger and more attractive. This is based on a stereotype that frames sexual harassment as motivated by sexual desire, and not power and domination.
- A person who identifies as a man cannot be harassed by a woman, and sexual attention from a woman can never be bad, damaging, or abusive.
- Gay men always want sex and invite sexual attention.
- A person who identifies as a man and is big, strong, or muscular cannot have been harassed by someone physically smaller and weaker because they would have "fought back." Beyond the legal implications of responding with force, this ignores many non-physical power dynamics, such as those between a manager and a subordinate.
- Harassing a person who identifies as a man is, for cultural or biological reasons, less serious or damaging than harassing a person who identifies as a woman.

B. Working with Clients Who Identify as Men

When you meet for the first time with a client who identifies as a man, be mindful of these biases, which may be internalized to varying degrees by anyone involved in the case. Ask the client if they would prefer to speak to a lawyer who identifies as a man or

[3] These are physiological reactions that do not in any way imply that the individual wanted, invited, or enjoyed the assault. It is normal for victims to have questions about their sexuality after an assault, but sexual harassment should not define an individual's sexuality.

who identifies as a woman, a courtesy often extended to people who identify as women who have experienced harassment.

People who identify as men and have experienced sexual harassment may show more hostility and aggression than sadness and fear when recounting their experiences. They may also seek to downplay not only the harassing conduct, framing it as a joke or harmless flirtation, but also the impact the harassment has had on their mental and physical health and their relationships.

As the client may not be aware of some of the stereotypes and biases above, or be uncomfortable raising them, it may be helpful to be proactive by bringing them up and discussing them. This type of sexual harassment is rarely discussed, so let the client know that people who identify as men do experience harassment and are entitled to the same legal protections under law as other people who experience harassment. Assure them that they have done the right thing by seeking legal assistance, rather than trying to deal with the matter on their own. (See also Chapter 3: Trauma-informed Practice.)

Useful Resources

1in6: https://1in6.org/

BC Society for Male Survivors of Sexual Abuse: https://bc-malesurvivors.com/

RAINN (Rape, Abuse & Incest National Network): https://www.rainn.org/articles/sexual-assault-men-and-boys

CHAPTER 7: CLIENTS WHO ARE CHILDREN OR ADOLESCENTS

By Suzette Narbonne and Sarah Rush

A. History, Stigma, and Prejudices

Children can legally work in BC from the age of 12. Sexual harassment in the workplace is a difficult experience for anyone, but children have unique needs when they reach out for help. If a child or adolescent comes to you for help, place a high priority on establishing client safety, choice, and control to protect their emotional, spiritual, physical, and social needs. This means looking particularly carefully at how the interview space is set up, the language you use, and how you structure the interview and establish trusts.

Historically, the law has treated children as lacking the capacity to make important decisions on their own. Even now, they cannot legally make a decision about many things that adults are presumed to be capable of deciding. For example, while a child under 16 must be enrolled in an education program, they do not have the right to choose that program. If they are under 19, they cannot apply for a driver's licence without their guardian's consent.

Before a child under the age of 14 can give evidence under oath or solemn affirmation, the presiding judge must first conduct an inquiry into their ability to understand the nature of the oath or solemn affirmation and to communicate their evidence. This test applies only to children or to a person "whose mental capacity is challenged."[1] In the context of family law proceedings, children may express their views and preferences but are not allowed to participate equally in a matter that will impact them profoundly except for the most exceptional circumstances. The prevailing paternalistic, rather than evidence-based, views effectively diminish the impact of the young person's voice and support the widely held belief that children can be re-programmed to change their opinions on significant matters.

While parents encourage their children to "stand up for themselves," their voices are often muted by adult prejudices and biases.

These multiple barriers to access to justice can leave children feeling unheard and, consequently, powerless. Therefore, impress on a young client that you take their concerns seriously and that you are their lawyer.

[1] *Evidence Act*, RSBC 1996 c. 124 s. 5.

If you cannot represent a young client based on their instructions, you cannot act for them. Help the parent(s) understand the value and importance of your hearing the child on their terms. For example, ask the young client if they would be open to your trying to reach an agreement on an outcome and then determine how best to work towards that outcome. Help the parent(s) to understand that you can work towards a common goal while respecting the child's instructions. However, you cannot replace the child's instructions with those of the parent without clear agreement.

B. Accommodating, Interviewing, and Representing a Young Client

1. Introduction

In addition to following the advice in Chapter 3: Trauma-informed Practice, there are a few points to keep in mind when you are working with children and adolescents.

2. Office Space

Seeing a lawyer can be a very daunting task, and law offices are not designed with young people in mind. Look at your own offices: What does the waiting room look like? Who greets clients? Are they offered food and water? What does the interview room look like? Do you have "fidget toys," drawing paper, and pens available for young people to use in your interview room? (These allow younger clients to move their hands and, in turn, to help process and regulate emotions.) A warm, friendly space is essential to establish safety and trust.

3. Conducting the Interview

Do not pressure reluctant or agitated young people into disclosing their story.[2] Throughout the interview, monitor their verbal and non-verbal body language and look for signs that they are distressed or agitated. Give them the option of frequent breaks or ending the interview early. Face-to-face interviews can feel intimidating, so offer to interview the client in a context where you are not facing each other—for example, you could go for a walk or sit down side by side to draw while you talk. Opting for more frequent but shorter interviews can help keep a young client engaged; it also allows more time for relationship building. To reduce the client's stress when they are disclosing difficult material, you could interview them in a cyclical way by opening up the discussion around difficult material (e.g., trauma, workplace experiences) while monitoring them for signs of distress. If they do show any signs of stress or trauma symptoms, change the topic to something safer (e.g., their favourite sport, best friends, school activities, or books) until they seem ready to return to the challenging topic.

[2] K. Saywitz, L. B. Comparo, and A. Romanoff, A., "Interviewing Children in Custody Cases: Implications of Research and Policy for Practice," *Behavioral Sciences & the Law* 28, no. 4 (2010): 542-62, doi: 10.1002/bsl.945

As with all client interviews, establishing trust is critical for success. Rapport building requires time, which is limited. To make best use of time, structure your early meetings to focus on building rapport and trust first and gathering information second. Creating rapport allows you to establish a foundation on which more challenging discussions can take place.

Give the client the opportunity to make choices, collaborate, and exercise control throughout the process. Collaboration consists of sharing power and expertise, so engage their thoughts, beliefs, values, and strengths at every step of the process. Trauma often leaves people feeling powerless and with limited control over their lives, so allow the youth to take an active lead in the process. At each stage, they should be able to make decisions that are best for them. They should consent to each action you propose to take and be able to decide at any point in the process that they no longer want to take part in the process or work with a lawyer.

Children and youth generally have limited knowledge about the legal system. Use age-appropriate language to explain the legal process and legal concepts. It can be helpful to draw out who will be involved in the process and to explain each role thoroughly. One technique is "ask, tell, ask." Ask the youth if they understand a concept, explain the concept to them, and then confirm they have understood. Try to mimic the language that the youth uses without being patronizing.

Help the young person understand the nature of solicitor client confidentiality. Most adolescents are used to having no control over any information that they share. If they have a confidential space where they can speak to you, they are likely to feel less anxious and more confident about sharing their story. Tell them that you cannot share anything they tell you without their permission. Speak to them in private, with no one else there. If they want to bring a support person into the meeting, you can allow that person into the interview space while you explain the ground rules, which include prohibiting the support person from asking the young person about your discussion with them. After you have built some rapport—for example, by speaking about matters unrelated to the legal issue—ask the support person to leave the interview room. This shows the young person you are a safe person to speak with.

Be aware of the power of language. Something as simple as talking about a "meeting" or "chat" instead of an "interview" can help a child or adolescent feel more comfortable and safe. Do not ask leading questions. Allow the client to tell you their story in their way, and check in often to make sure you understand. Be patient. Respect their pace and do not try to fill any silences.

There is no one way to interview children and adolescents. Have a readily available toolbox of evidence-based techniques, practices, and methods that you can tailor to the age or needs of the adolescent.[3] The sidebar below presents an example of how to conduct an interview with a young client.

[3] Saywitz, Comparo, and Romanoff, "Interviewing Children."

Scenario: Julie is 14 years old. She has come to see you because the father of the children she babysits was making her feel uncomfortable when he drove her home after babysitting. She is confused and upset, and does not know if it was wrong or not. Her mother wants her to talk to a lawyer.

How to proceed: It is not unusual for a parent to call on behalf of their child, so before you book the appointment, make sure that Julie actually wants to speak with a lawyer. Sometimes well-meaning parents drive the litigation process, but it is the adolescent who should decide if they want to proceed. The staff person who arranges your bookings should make clear to the parents that the appointment is for Julie and that she will meet in private with you and that while they are welcome to accompany their daughter, they will be asked to wait in the waiting area during the interview.

When Julie and her mom arrive at the office, the receptionist should greet them at the door and offer them a place to sit, a snack, and a drink. There should be things for them to distract themselves with—fidget toys, puzzles, doodle pads and pens, and books of short stories or jokes. The waiting area should feel welcoming.

Go to the reception area yourself to meet Julie and her mom. Introduce yourself to both of them. Explain your role and that you will be meeting with Julie alone. Bring her into your office. If she has a book or something from the reception room in her hands, invite her to bring it with her.

If you must sit behind a desk, make sure that there are interesting things to look at and touch in the interview space. An unusual piece of art or a photo of your pet can be a conversation starter. If you notice her looking at something, tell her a story about it. You are breaking the ice and letting her know that this does not have to be hard.

Tell her what she can call you and ask her what she prefers to be called. Explain your role—that is, that you are a lawyer and that everything she tells you is completely confidential. You will not share it with anyone unless she decides that she wants you to do so. Keep the conversation friendly and do not be afraid of humour or laughter. You are building trust and rapport.

Building rapport and trust is an art; it needs the appropriate use of warmth and humour, engagement with the listener's interests, friendliness, attention, and timing. Get to know Julie; ask her about her interests and talk about yours.

Tell Julie you are making notes for yourself—remind her that everything she says is confidential and that includes your notes. Adolescents in this type of situation often ask adults to go over their notes with them before they leave so be mindful of that as you write. During the interview, read back to Julie what she has said to you to make sure that you understand.

Let her know that this is not a marathon. If she wants a break, she can have one.

Be genuine. If she tells you about a game or app that you are not familiar with, admit it. Young people do not expect adults to share all their interests but they do expect you to be honest.

If Julie has brought notes, tell her that that was a great idea and ask her to put the notes aside for the time being. Tell her you will give her time to review the notes before the interview is over.

Let her tell her story at the pace she wants and in the way she wants. Do not interrupt. If you cannot keep up, but it is clear she needs to get it all out first, put down your pen and listen. When she has finished speaking, you can pick up your pen and start reflecting back on what you heard so she knows that you understand, and you can make notes. If she gets stuck, ask questions like “What did that look like?” or “How did you feel?” If she stops but is clearly looking for a way to say something, respect her silence. Ask open-ended questions, not leading ones.

Before the interview ends, give Julie an opportunity to review her notes with you if she brought some. Ask her if there is anything else she wants to discuss about the issue. Using age-appropriate language, be honest with her about possible options and evidentiary burden. Ask her to explain back to you what she understood you to mean. Take ownership of any confusion—let her know that it is your job to help her understand.

Finally, establish clearly what the next steps will be and who will be taking them. Ask her if she would like you to explain any of the plan going forward to anyone or if she would like you to write it down for her. Before she leaves, ask her if the interview was helpful.

CHAPTER 8: CLIENTS WHO IDENTIFY AS QUEER, TRANS, OR NON-BINARY

By Adrienne Smith

A. History, Stigma, and Prejudices

In addition to following the advice in Chapter 3: Trauma-informed Practice, there are a few points to keep in mind when you are working with clients who identify as queer, trans, or non-binary.

Until 1973, homosexuality was listed in the *Diagnostic and Statistical Manual* (DSM), which defines common mental illnesses for diagnostic purposes, as a mental illness. Gender identity disorder was not removed from it until 2013, only to be replaced with the label gender dysphoria. For many transgender people, a psychiatric diagnosis is a precondition for access to gender-affirming medical care, and until 2015, sterilizing genital surgery was required in BC in order to legally change a person's gender marker. Because of the stigma that accompanies most mental illness diagnoses, many trans people have experienced being pathologized by medical services, and most still face access to barriers for primary care. Many trans clients engage in survival activities in the grey and black markets because of widespread prejudice against them. Most have a history of repeated, and often violent, negative interactions with the police, criminal justice system, and mental health services. Despite the widespread incidence of sexualized assault in the queer, trans, and non-binary community, sexual assault support services have been the purview of women's organizations until recently, often with trans-exclusionary policies. Trans women in particular are rejected because care providers almost without exception question the validity of their identity.[1] Lesbian survivors of sexual assault are often not believed or are excluded from women's services because their attackers were not men. Members of the queer, trans, and non-binary community, particularly Black and Indigenous members, are at risk of arrest or harm when they call for police support in a time of crisis. As a result, transgender and other queer and non-binary community members may be extremely distrustful of doctors, lawyers, social workers, and other justice system actors.

Gender dysphoria—profound distress caused by a person's physical body, reproductive anatomy, and appearance—is a prominent barrier to social participation for some trans people. It can be debilitating and is often a precursor to suicidal thoughts and actions. It is also the label listed in the *DSM 5* that is used to pathologize trans people. Not all trans people feel this. Events such as unwelcome touching, careless language around naming body parts, sexual assault, STI testing, and pregnancy can exacerbate dysphoria.

[1] Z. Sharman, *The Remedy: Queer and Trans Voices on Health and Health Care* (Vancouver, BC: Arsenal Pulp Press, 2016).

B. Evolution of the Law

Although previously protected under "sex" or "sexual orientation", since 2016 "Gender identity or expression" has been explicitly recognized in the *BC Human Rights Code* [RSBC 1996] c. 210, and added as a prohibited ground in 2017 in the *Canadian Human Rights Ac*t (RSC, 1985, c. H-6) to signal to transgender people that their rights are protected in law. Transgender people are protected by the duty to accommodate principle in human rights law. This includes using a person's chosen name and gender as soon as they express their preference. They do not need to undergo any surgery, medical intervention, or legal name or gender change to access this right. Trans people can use the bathroom, change room, and uniform of the sex with which they identify. Non-binary people can choose either facility when only binary choices are available, and as a community they are increasingly advocating for gender-neutral facilities. This accommodation is an obligation on the employer up to the point of undue hardship.[2]

Queer, trans, and non-binary members may be understandably fearful that information about their gender identity or sexual orientation will be revealed. A three-member panel of the BCHRT in *Oger v. Whatcott* no 7 2019 BCHRT 58 describe contemporary transphobia in some detail. In the same way that it can be homophobic to ask a queer, trans, and non-binary person about their sex life, it can be transphobic to make unwelcome references to or questions about a person's assigned sex, gender identity, name, or anatomy. Trans people often report harassment, abusive language, assault, and sexual assault in the workplace. Unexplained terminations are also common.

Other significant cases to be aware of are:

Sheridan v. Sanctuary Investments, 1999 BCHRT 4. The respondent discriminated against Ms. Sheridan, who identified as transsexual, by telling her not to use the women's washroom.

Dawson v. Vancouver Police Board (No. 2), 2015 BCHRT 54. The respondent discriminated against Ms. Dawson, a transgender woman, when police referred to her with masculine pronouns and her assigned name.

School District No. 44 (North Vancouver) v. Jubran, 2005 BCCA 201*.* Discrimination based on sexual orientation does not require a complainant to prove what their sexual orientation is or was perceived to be. Homophobic insults are discriminatory regardless of sexual orientation.

C. Working with Clients Who Identify as Queer, Trans, or Non-Binary

Understand that a key feature of contemporary transphobia is the repeated and intentional misuse of personal information like a person's legal name, birth-assigned

[2] See *BC Human Rights Code,* RSBC 1996, c. 210; *Sheridan v Sanctuary Investments,* [1999] BCHRT 4; *Ferris v. OTEIU*, Local 15, 1999 BCHRT 55; *Dawson v. Vancouver Police Board* (No. 2), 2015 BCHRT 54.

pronoun, and trans status. Poorly secured or maliciously shared employer records can be catastrophic for this community.

Trans clients may think they have to use their legal name and pronouns when they talk to a lawyer. Some people in this community use “he/him” or “she/her”; others use “they/them,” “ze/hir,” or other combinations. Ask the client for their name and pronouns when you meet them and use these consistently. Then ask if they prefer to use a different legal name and pronouns—for example, their deadname—when dealing with employers, police, courts, etc. This is because a person may feel comfortable being out to you, but in court, meetings with the employer, or in official correspondence, they may prefer to be stealth and not reveal their sexual orientation or gender identity. Do not ask questions beyond pronouns unless you have a good reason for doing so. If you need to collect information that would be compromising or dangerous to the client if it were revealed, explain to them why you need to know and how the information will be stored and protected. Record the client’s name and pronoun choices in your notes and be careful not to out them, especially to the court and police. Be particularly conscious that members of this community may not be documented and may not be able to trust court-appointed translators from their own ethnic or cultural communities because of stigma against queer, trans, and non-binary people.

Do not make any assumptions about the sexuality or relationship status—including monogamy or polyamory—of any client. When discussing spouses or partners, do not assume a feminine-presenting person has a boyfriend or husband, or that a masculine-presenting person has a girlfriend or wife. People of all genders have relationships with people of all genders. This community may have special vocabulary for sexual activity. Ask gently about unfamiliar terms, or search the term online later to make sure you are clear on the facts without expecting your client to explain their community to you.

The queer, trans, and non-binary community is not homogeneous, although its members share the experience of discrimination and stigma from mainstream society, and many (particularly BIPOC and transfeminine people) are at elevated risk of sexual assault and workplace harassment. They may face multiple and intersecting forms of structural discrimination in their daily lives; many are survivors of intense trauma. Many characteristics of this community are protected under federal and provincial human rights legislation, but aside from a few noteworthy litigants, most human rights contraventions against this community go unchallenged.

Clients in this community may doubt that protective laws apply to them, or that anyone will believe their claims of sexual harassment in the workplace. Gay, lesbian, queer, and trans clients may have experienced being turned away from conventional support services because their attacker is not a man perpetrating violence against a woman. Many live in poverty or precarious circumstances, which makes them vulnerable to assault, sexual assault, harassment, and exploitation.

Some clients in this category will be distrustful of lawyers and reporting processes that involve police because of their lived experience. They can be deeply hurt by some fundamental expectations that straight and cisgender lawyers may have (e.g., that a

person's gender can be ascertained from how they dress or their name, or that their intimate partner must be a husband or a wife rather than a partner or some other word). Some clients, particularly those who are not out, will be reluctant to give information that could expose their status—for example, their legal name (deadname) or photograph (which might not match their appearance) on government ID—or complete details about a workplace because routine workplace discrimination sometimes forces this community into the grey and black market, where they work unofficially. This community has also experienced a rise in members who are migrants who have come to Canada to escape dangerous conditions elsewhere, so questions about work permits, citizenship, and visas may alarm such clients.

D. Language

Language is key to establishing trust and respect. To avoid triggering gender dysphoria, use the language trans clients use to describe their bodies and experiences themselves. Use generalized terms such as "top," "bottom," "chest," and "crotch," rather than specific terms like "penis," "vulva," "vagina," "breast," etc.

In addition, the following terms and their definitions will help you to use respectful language and create an environment of trust with the client. They are grouped by category.

1. Biological Sex

These terms describe what is happening in a person's body.

Sex: A biological description that considers anatomy, chromosomes, and hormone sensitivity. Society is arranged by a sex binary of male and female, which erases intersex people. Sex is often conflated with gender, but they are significantly different for trans people. It is impolite and transphobic to refer to trans people by their assigned sex, or to ask them what sex they were "born as." Clients may have government ID that shows an assigned sex that does not match their gender—the process of changing it is administratively difficult and very expensive. A mismatch can out a trans person. If you need to collect this information, explain why you need it (e.g., the Law Society identity verification rules) and how it will be protected.

Intersex: A person whose body exhibits physical characteristics that defy the sex binary of male and female. Intersex people are identified at birth if they have anomalous genitals. Some find out they are intersex at puberty, others when they try to conceive. Western society used to describe intersex people as hermaphrodites or with the term disorders (or differences) of sexual development (DSD). These terms are hurtful. There is tremendous social stigma against intersex people, and so clients may be very reluctant to tell you if they are intersex. The opposite of intersex is endosex, which means that a person has physical characteristics that match what is expected for their sex.

2. Gender Identity

These terms describe how a person identifies emotionally or psychologically.

Gender: A socially constructed category that describes a person's internal feelings of being a man, woman, or something else. Some people do not identify with the binary genders of man and woman and are **non-binary**, **agender** (no gender), or **pangender** (all genders). Always focus on a client's self-identified gender and not their assigned sex.

Transgender: An identity whereby the sex assigned at birth to a person is different from the gender with which they identify. Older literature classified trans people in subcategories like pre-op and post-op transsexual, and MTF or FTM. These terms are now understood to be hurtful. The opposite of transgender is **cisgender**, which means that the sex assigned at birth to a person matches the gender with which they identify. In many jurisdictions a psychiatric diagnosis is a precondition of accessing gender-affirming healthcare. This care is difficult to access and not available to people with other uncontrolled medical conditions. At one point surgery, a legal name change, and gender change defined what made a person trans, but these notions can reinforce barriers to services for trans people. Best practice is to not require any professional certification and to treat people as the gender with which they identify.

Two-Spirit: A distinctly Indigenous identity that reclaims gender identity and expression that existed in some Indigenous communities before colonialism imposed a gender binary through the residential school system. It refers to a person who identifies as having both a masculine and a feminine spirit.[3]

3. Sexual Orientation

These terms describe how a person has sexual relationships.

Lesbian: A person who identifies as a woman and has sexual relationships with other women.

Gay: A person who identifies as a man and has sexual relationships with other men. Some men describe themselves as MSM (men who have sex with men) rather than gay.

Queer: A person who has sexual and/or romantic relationships that in other contexts might be described as gay, lesbian, or bisexual. Many people who identify as queer reject these categories or identify with sex and gender in a more complicated way than the binary divisions of man and woman, gay and lesbian or bisexual. Queer can also describe an identity: genderqueer. This word is a slur that has been reclaimed by this community. Do not use it unless you are queer.

Asexual: A person who does not seek out or crave sexual relationships with other people. Asexual people may still feel romantically attracted to others and may have physical relationships that are not motivated by sex.

QTBIMPOC: An acronym for queer, trans, Black, Indigenous, mixed race, and people of colour. Members of this community experience oppression more frequently and with

[3] Researching for LGBTQ2S+ Health, *Two-Spirit Community* (n.d.), https://lgbtqhealth.ca/community/two-spirit.php

more severity than people who are straight, cisgender, male, and white because discrimination and harassment are intersectional.

Useful Resources

Employment Rights:

Canadian Labour Congress, *Workers in Transition* booklet. https://canadianlabour.ca/workers-in-transition-guide/

Gender-Neutral Language:

British Columbia Law Institute, Gender-Free Legal Writing: Managing the Personal Pronouns. http://www.bcli.org/sites/default/files/GenderFree.pdf

Government of Canada, Department of Justice, Legistics: Gender-Neutral Language. https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p15.html

Human Rights:

Trans Rights BC: https://www.transrightsbc.ca/

Wellness and Legal Services:

Catherine White Holman Wellness Centre provides low-barrier wellness services and operates a summary legal advice clinic to trans and gender diverse people: https://cwhwc.com/

CHAPTER 9: CLIENTS WHO IDENTIFY AS INDIGENOUS

By Karen Snowshoe

A. Historical and Contemporary Background Issues

Clients who identify as Indigenous may experience multiple and intersecting forms of structural oppression and discrimination, which Mary Eaton summed up when she wrote that "intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone."[1]

To work respectfully with clients who identify as Indigenous, you must understand the historical context within which intersectional forms of structural oppressions occur. Some examples of current social and historical issues that may have directly or indirectly affected clients who identify as Indigenous include:

- colonization, including the suppression of Indigenous laws, culture, language, etc.;
- attendance or residency at Indian residential or day schools, the 60s Scoop, and the ongoing overrepresentation of Indigenous children in the child welfare system;
- the disproportionate victimization of Indigenous women, girls, and 2SLGBTQQIA people;
- the overrepresentation of Indigenous people in the criminal justice system; and
- specific legislation regarding Indigenous peoples in Canada (including unequal treatment of Indigenous women under the Indian Act).

(See also Chapter 15: Indigenous Workplaces: Special Considerations and Chapter 3: Trauma-informed Practice.)

B. Taking an Indigenous-Centred Approach

Adopting an Indigenous-centred approach will help you understand the diversity and complexity of experience of every client who identifies as Indigenous. In addition to understanding the historical and social context in which an individual was raised (or descended from), understand the intersectionality of clients who identify as Indigenous by paying particular attention to their individual life circumstances. For example:

- Does the individual have ties to a certain Indigenous community and/or Nation?
- What is the history of that particular community, and how does it differ from other communities within the same Indigenous Nation?
- Is the client's community based on-reserve, off-reserve, or both?
- Is the client dealing with any other legal issues or matters?

[1] Mary Eaton, cited by Carol Aylward, *Intersectionality: Crossing the Theoretical and Praxis Divide*. Journal of Critical Race Inquiry, Volume 1, Number 1, 2010 at 9.

- Was the client particularly vulnerable to sexual harassment in the workplace?
- Are there any aggravating factors that made or make the workplace sexual harassment worse?
- Does the client face any barriers to accessing supports?

The law professor Patricia Monture-Angus offers a unique insight into some of the challenges facing people who identify as Indigenous:

> As a Mohawk woman who came to study Canadian law, I am forever balancing the teaching, rules, and principles of both systems. This balancing act probably leads me to different understandings about the structure and shape of Canadian law.
>
> This is not a visibility that operates solely because I come from a "different" culture. It becomes visible because of both my tradition and gender, realities that operate concurrently in interlocking ways.[2]

Be humble and open to new ways of understanding and interpreting the vast diversity of the Indigenous historical and lived experience.

C. Barriers to Disclosing Workplace Sexual Harassment

Clients who identify as Indigenous may face a number of barriers to coming forward with an allegation of workplace sexual harassment: They may feel shame, guilt, or both about what happened. The harassment may have triggered memories of earlier trauma.

They may not trust the process for handling the complaint. For example, the client may fear that they will be judged or will not be believed, or that there will be negative repercussions (e.g., retaliation or job loss) especially if the harassment included threats.

D. Interviewing a Client Who Identifies as Indigenous

As explained in Chapter 3: Trauma-informed Practice, creating a safe space is crucial for interviewing any client who has experienced, or is experiencing, workplace sexual harassment. Clients who identify as Indigenous may have experienced historical trauma (direct, inter-generational, or both) and ongoing trauma, in addition to the experience that has caused them to seek legal help.

In addition to following the advice in Chapter 3: Trauma-informed Practice about providing a safe space for clients, consider the following:

- Before you meet, ask the client if they have supports in place (e.g., family, friends, Elder, or a therapist).
- Invite them to bring their supports to the interview (see Chapter 27: Involving Support People in Legal Relationships.)
- Have a list of local community resources ready to share.

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[2] Patricia Monture-Angus, "Standing against Canadian Law: Naming Omissions of Race, Culture and Gender," in *Locating Law: Race/Class/Gender Connections*, ed. Elizabeth Comack (Halifax: Fernwood Publishing, 1999), 77.

- Avoid wearing black/white or grey/white as this can be a trigger for survivors of Indian residential schools.
- Honour the client's strength and courage in coming forward to speak about a difficult experience.
- Honour the client's resiliency.

See also Chapter 15: Indigenous Workplaces: Special Considerations.

Useful Resources

Guide for Lawyers Working with Indigenous Peoples. The Advocates' Society, the Indigenous Bar Association, the Law Society of Ontario, May 2018. https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/IndigenousPeoples/First_Supplement_to_the_Guide_for_Lawyers_Working_with_Indigenous_Peoples_Final_English_AODA.pdf

Rodgers, Alexandra. *Envisioning Justice for Migrant Workers: A Legal Needs Assessment.* Migrant Workers Centre, March 2018 (provides a useful review of the issues and barriers faced by migrant workers in Canada).

Government of Canada, Library and Archives Canada. *Report of the Royal Commission on Aboriginal Peoples*. 2016. https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx

National Centre for Truth and Reconciliation. Various reports issued or created by the Truth and Reconciliation Commission including Commission Reports, 1847 Ryerson Report, 1869 Gradual Enfranchisement Report, 1867 Indian Act, and 1969 White Paper Policy. http://nctr.ca/reports.php

National Inquiry into Missing and Murdered Indigenous Women and Girls. *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. 2019. https://www.mmiwg-ffada.ca/final-report/

BC First National Indigenous Justice Centres:

https://bcfnjc.com/indigenous-justice-centres-in-british-columbia/

CHAPTER 10: CLIENTS WHO IDENTIFY AS DISABLED

By Karen Martin

A. Introduction

"Disability" encompasses a broad range of categories, and many people have multiple disabilities that encompass one or more of them. The most common categories of disability you are likely to encounter are:

- Pain-related disabilities: Limit the amount or kind of activities a person can do because of long-term or recurring pain.
- Mobility-related disabilities: Cause difficulty walking, using stairs, or standing for long periods.
- Agility-related disabilities: Can affect activities such as bending, dressing, and getting in and out of bed.
- Hearing-related disabilities: Make it difficult for a person to hear what is being said in conversation with one or more people or on the telephone.
- Seeing-related disabilities: Make it difficult to see ordinary print or someone's face from four metres away.
- Speech-related disabilities: Make it difficult to speak, to be understood, or both.
- Learning-related disabilities: Attention challenges, hyperactivity, or dyslexia can all make it difficult to learn.
- Emotional-related disabilities: Limit the amount or kind of activities a person can do because of emotional, psychological, or psychiatric conditions.
- Memory-related disabilities: Limit the amount or kind of activities a person can do because of periods of confusion or difficulty remembering.
- Developmental and intellectual disabilities: Create cognitive limitations.

People with disabilities may also identify with some of the intersectional identities discussed elsewhere in this chapter.

B. Historical and Contemporary Issues

1. Historical and Systemic Background

Canada has a long history of segregation, institutionalization, stigmatization, and discrimination against people with disabilities and Deaf people. This systemic discrimination affected all aspects of their lives: education, employment, housing, health care, family life, and human rights. For example:

- Forced sterilization under the *BC Sexual Sterilization Act* from 1933 to 1973.
- Documented systemic sexual, physical, and psychological abuse at Woodlands residential school for children with intellectual disabilities from 1950 to 1996.
- Documented systemic sexual, physical, and psychological abuse at the residential Jericho Hill School for the Deaf and Blind from 1922 to 1995.

- Prior to the February 10, 2012, Supreme Court of Canada decision in the case of *R. v. D.A.I.* [2012] 1 SCR 149, people with intellectual disabilities were generally not allowed to testify on their own behalf in sexual assault and abuse cases, which meant crimes against them went largely unpunished.

2. Contemporary Systemic Issues: Violence and Abuse

People with disabilities are more likely than people without disabilities to experience violence and abuse. For example:

- 60% of women with disabilities are likely to experience some form of violence during their adult lives.[1]
- Women with disabilities are four times more likely to have experienced sexual assault than women without disabilities.[2]
- According to the Canadian 2014 General Social Survey (GSS) on Victimization, 38% of all women with a disability were physically or sexually abused by an adult before they were 15 years old; 48% of women with a cognitive disability and 50% of women with a mental health-related disability.[3]
- According to the GSS on Victimization 2014, 74% of women with a disability who were in government care as children reported having experienced physical or sexual abuse by an adult before they were 15.[4]
- The GSS on Victimization 2014 shows that of all self-reported violent crime incidents (sexual assault, robbery, physical assault), in 45% of those where the victim was female, the victim had a disability.[5]
- Women with multiple disabilities experience higher rates of violence.[6]
- Women who have a cognitive disability and also identify as LGTBQ2S+ have the highest rates of violent victimization, at 680 incidents per 1,000.[7]
- Almost 80% of women with disabilities have experienced physical violence by their intimate partner.[8]Adult men with disabilities experience sexual abuse more often than men without disabilities.[9]

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[1] DAWN Canada, *Fact Sheet on Women with Disabilities and Violence* (n.d.), https://dawncanada.net/issues/women-with-disabilities-and-violence/

[2] DAWN Canada, *Fact Sheet on Women with Disabilities and Violence* (n.d.), https://dawncanada.net/issues/women-with-disabilities-and-violence/

[3] Samuel Perrault, *Criminal Victimization in Canada, 2014* (Statistics Canada, Government of Canada, 2015), https://www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/14241-eng.htm

[4] Perrault, 2015.

[5] Perrault, 2015.

[6] Perrault, 2015.

[7] Perrault, 2015.

[8] The Right to Be Safe, InFocus project, DAWN Canada and the Canadian Association of Community Living (unpublished), https://dawncanada.net/projects/infocus/

[9] The Right to Be Safe, InFocus project (unpublished).

- Among men with intellectual disabilities, between 32% and 54% have been sexually assaulted.[10]

C. Stigma, Discrimination, and Barriers

People with disabilities are at particular risk of experiencing:

- isolation;
- poverty—many people with disabilities live well below the poverty line whether they are on provincial disability benefits or work part-time or seasonally;
- continued social and cultural exclusion from employment, education, housing, and community services because their disabilities are not accommodated; and
- discrimination and inequity.

They may experience difficulties accessing:

- employment and education,
- adequate and accessible housing,
- health services,
- assistive equipment and devices,
- accessible transportation,
- accessible services, and
- accessible community buildings.

The key areas of accessibility and inclusion for clients who identify as disabled can be broadly categorized as:

- attitudinal,
- communication- and technology-related,
- organizational, and
- architectural and physical.

The text below looks at some common barriers faced by people who identify as disabled and how you can improve accessibility and inclusion for them. (See also Chapter 3: Trauma-informed Practice for tips on creating an inclusive, welcoming atmosphere for clients.)

1. Attitudinal Barriers

- Many people with disabilities find other peoples' attitudes towards them to be the biggest barrier they face and often they internalize the stigmatization.
- Be aware of your own misconceptions about people with disabilities and the entrenched social attitudes that exclude people with disabilities.
- Take disability-awareness training.

[10] The Right to Be Safe, InFocus project (unpublished).

- Treat a client who has a disability with dignity and respect. Use person-first terminology: rather than “disabled person,” say “person with a disability.”

2. Communication- and Technology-Related Barriers

- Give clients multiple options for contacting you.
- Make information and forms available in alternative formats.
- Ensure your website and printed information are written in plain language for clients with intellectual disabilities, learning disabilities, or English as another language.
- Explain what consent means. Do not assume that the client understands this concept.
- Ensure that website information is screen-reader friendly for people with visual disabilities.
- Read printed information aloud to people with visual disabilities.
- If you are working with a client who is blind, tell them when you are leaving and entering the room. Never get up and walk away without telling them.
- If you are working with a client who is Deaf, speak to them and not to their sign language interpreter.
- If you are working with a client who is hard of hearing, speak in your normal voice. Do not raise your voice or talk slower.
- Ensure that clients with intellectual disabilities understand the information you are giving them.
- Take into account that some people with disabilities cannot use or do not have access to technology to get information or forms.
- Talk with clients who have a brain injury that affects their memory about the best ways to support them to remember appointments and important dates and information.
- People with communication disabilities, especially hearing and speech-related disabilities, are often spoken to as if they are children because they communicate differently. Speak to them as you would any adult client. If you do not understand something a client with a speech-related disability says, ask them in a respectful way to repeat it. For example: “I want to make sure that I have fully understood what you have said, can you please say it again? I want to make sure I get it right.”

3. Organizational Barriers

- Use the universal symbols of access when you promote your service in the community so people know your service is inclusive.
- Ask all clients if they have disability access or accommodation needs. Do not assume anything. Let clients know that this is voluntary. A person should always have the choice to disclose about their disability because of the stigmatization associated with having a disability. For example, you could ask: “Do you have communication needs?’” or “What is the best way for me to communicate with

you?" or "What is the best way for me to provide information to you?" or "Do you have mobility access needs?" or "How can I accommodate your mobility access needs?"

- Plan appointments based on the access needs the client has identified.
- Allow more time for appointments with clients with communication disabilities.
- Take frequent breaks when you have a long meeting with a client who has a disability. Tell them at the beginning of the meeting that they can ask to take a break at any time they need to.
- For trust and confidentiality reasons, allow Deaf clients to choose their sign language interpreter.
- Allow disability advocates or support workers to accompany clients to appointments if they need this support. (See Chapter 27: Involving Support People in Legal Relationships, for more on this.)
- Consult and build relationships with disability organizations in your area.

4. Architectural and Physical Barriers

- Ensure your service location is close to transit and has accessible parking.
- Ensure that pathways to the building, entrances, and the interior of the building are wheelchair accessible.
- If your service location is not wheelchair accessible, talk with your client about an accessible, private place where you can meet. Consider keeping a list of potential locations in your community.
- Ensure that there are slip-resistant surfaces and non-glare lighting inside and outside of your office space.
- Ensure that signage is large print and in high-contrast colours.
- Have quiet/low stimulus rooms for clients who are on the autism spectrum.

In short, a service is accessible for people with disabilities when it is easy to:

- find out about,
- get to,
- understand, and
- use.

Useful Resources

CAMH. Understanding Stigma (online course).
https://www.camh.ca/en/education/continuing-education-programs-and-courses/continuing-education-directory/understanding-stigma

Disability Alliance BC offers various training on disability topics: www.disabilityalliancebc.org

DABC Disability Law Clinic: https://disabilityalliancebc.org/program/disability-law-clinic/

CHAPTER 11: CLIENTS WHO ARE LIVING WITH MENTAL HEALTH CONCERNS

By Dante Abbey

A. Introduction

Mental health concerns include mental disorders, brain injuries, developmental disabilities, and personality disorders. There is a huge, complex range of diagnoses, perspectives, and approaches to mental health, so your client's circumstances will be unique.

A full discussion of the challenges, barriers, and experiences of people living with mental health is beyond the scope of this publication. Mental health concerns can affect anyone at any time and may not be immediately evident. Stress and trauma, both of which are common when someone is pursuing a complaint relating to sexual assault in the workplace, can exacerbate or even cause mental health concerns. A client with mental health issues may become overwhelmed partway through the process. It is common for a person living with a mental health concern to suddenly lose the trust and faith of those around them if they suffer a relapse or disclose their diagnosis, leading to social isolation and a loss of social and emotional supports. Be ready to accommodate your client at any stage of the process. (See also Chapter 3: Trauma-informed Practice).

B. History, Stigma, and Prejudice

Our understanding of mental health issues has developed only in recent decades, although prejudice and stigma remain.

Prior to the latter half of the 20th century, people living with mental health concerns were all but excluded from participating in society. They were often labelled "lunatics," "insane," "mad," or "feeble-minded." A lack of effective treatments meant they had no from relief from their symptoms, and they were often reliant on family support to survive. Depending on the local culture, they may have been supported at home or locked away.

In 18th-century Europe and North America, people with mental health issues were committed to asylums, where they were often subject to physical restraints and poor conditions. Asylums were poorly regulated, if at all, until the 19th century, when there were some attempts at humanitarian reform. Those reforms emphasized rehabilitation at least as much as containment, albeit more often in theory than practice.

The early 20th century brought some advances in psychiatric care, but they often included shocking experimental procedures such as lobotomies, and prejudice lingered, with some people advocating eugenics. From 1933 to 1973, British Columbia's *Sexual Sterilization Act* forced the sterilization of hundreds of people who it was believed might pass on "mental disease or mental deficiency" to their children.

The anti-psychotic and mood-stabilizing drugs introduced in the late 20th century provide long-term relief from many mental health diagnoses. Many people can now achieve remission, although finding the correct treatment can be a frustrating and lengthy process. Without a trusting therapeutic relationship with their doctor, people with mental health issues may still experience patronizing and controlling medical treatment.

In BC, the *Mental Health Act* can be used by medical professionals to impose treatment on people. While enforced treatment may achieve a remission, it can also break any trust between a person with a mental health issue and the medical system. Hospital detention can also result in the loss of housing and employment, either because of discrimination or simply because the person is in detention and cannot attend to their needs. There are also concerns that psychiatric detention is under-regulated; for example, there are no legislative controls on solitary seclusion.

Changes in social attitudes towards mental health issues may have reduced the prevalence or intensity of prejudices against people living with mental health concerns but prejudice persists and may severely affect a client's life and interactions. Furthermore, as noted above, because some mental health concerns may not be immediately apparent, a person living with a mental health concern is at risk of losing the trust and faith of those around them if they suffer a relapse or disclose their diagnosis, which in turn can lead to social isolation and a loss of social and emotional supports.

A client with mental health issues may be perceived as, for example:

- incapable of functioning,
- irrational or immoral,
- incapable of exercising good judgment or making good choices,
- unreliable, untruthful, or not credible,
- unintelligent or unreasonable, or
- violent, aggressive, or dangerous.

The client's choices or preferences may therefore be ignored or overridden, or people may not believe what they say about their experiences. Some mental health concerns—or the prejudices associated with them—may increase a person's vulnerability to exploitation by others. In addition to their sexual harassment case, they may also be dealing with physical, emotional, or financial abuse by family, friends, colleagues, caretakers, or other professionals in their lives. Abusers may rely on other people writing off a client's lived experience as "crazy."

Other sources of prejudice can arise from the fact that people with mental health concerns may also have substance use issues—which triggers the stigmas associated with drug use, such as criminality—or be unable to work—which triggers the stigmas associated with poverty, such as laziness.

In short, people living with mental health concerns are often left feeling unheard, marginalized, feared, and that their autonomy is not respected.

C. Working with a Client Who Has Mental Health Concerns

If a client with mental health concerns is not functioning at their best, their symptoms may interfere with their ability to interact with you or pursue their complaint. Be flexible and make any extra accommodations the client may need. In addition to following the general guidelines laid out in Chapter 26: Meeting with the Client, and Chapter 3: Trauma-informed Practice, there are a few points to keep in mind when working with a client who has mental health concerns.

When you are speaking to a client with a mental health concern, place the person before the mental disorder. For example, they are a person with schizophrenia, not a schizophrenic. Clients may refer to themselves as survivors, mental health consumers, or other terms. Use the terms that the client uses.

1. Scheduling

- Remind clients to bring any necessary documents to the meeting if they have not already sent them to you.
- Some people with mental health concerns may struggle with motivation, anxiety, or disorganization and so may miss their appointment or be late. Psychiatric medications can be very sedating, which can make morning appointments difficult. Ask what day or time is best for the client to meet.
- If the client is in hospital, they may not be able to attend a meeting. You may need to contact their social worker to make an appointment or visit them. Be aware that patient phones in hospitals are not private and a privileged conversation may not be possible.
- Explain to the client that they can bring a support person to the meeting. (See Chapter 27: Involving Support People in Legal Relationships for more on this.)

2. Structuring the Interview

- Establish the parameters of the service at the outset, as outlined in Chapter 26: Meeting with the Client.
- The client is seeing you as a specialist, so they will expect you to lead the interview. However, if they have experienced being talked over or shut down, they may insist on telling their story first. They may need to vent about their experience or may speak in a stream of consciousness. Listen carefully and do not force the agenda. If useful and relevant information is coming out, let it flow. Take notes of any questions and circle back to them later.

3. Listening

- Follow the guidelines in Chapter 26, Client Interview Guidelines.
- Do not assume that the client's experiences are delusional, fantastic, or paranoid. Do not agree or disagree with them. Explain that they will need to convince a judge or adjudicator that their evidence is true. Ask for corroborating evidence from witnesses or documents that support their evidence.

- Do not assume that a person with a mental health concern lacks capacity to think and act independently. They will most probably be able to provide adequate instructions. Seek practice advice from the Law Society practice advisors when in doubt.

Communication Tips

Keep the following six points in mind when you are communicating with a client who has mental health issues:

1. Use a conversational style with open questions.

2. Check with the client that you have understood what they are saying by paraphrasing.

3. Gently interrupt the client and ask them to slow down so that you can take notes if they seem unable to stop talking or are speaking rapidly.

4. Allow the client time to gather their thoughts if they are slow to respond to your questions.

5. Take a break if the client becomes agitated, angry, or upset.

6. Ask specific questions if the client struggles to provide details, or ask them if someone else can provide the details you need.

4. Safety and Boundaries

- People with mental health concerns are no more likely to be violent than people without them, so standard safety measures for any first meeting are appropriate. If possible, set up the meeting room so that you sit closer to the door, with the client sitting across a table or desk. If a client is getting agitated, insulting, or belligerent, tell them it will be easier for you to help if they stop the behaviour or, if time allows, ask if they would like to take a break (e.g., get some water). If necessary, end the interview and set boundaries before you schedule a next appointment.
- Consider training in non-violent intervention and de-escalation techniques.

5. Following Up

- At the end of the interview, restate the problem the client would like addressed. Confirm dates and timelines, potential parties, witnesses, and any corroborating evidence they have identified.
- Some clients may become confused when presented with multiple options or have difficulty choosing. Ask if they would like you to suggest the best option in your opinion. They are there because you are a specialist, and they are looking to you for advice.

- Keep your legal advice simple and straightforward. Break down the process into smaller steps, and make sure the client understands the purpose of each step. Avoid rushing an explanation, as this may cause stress or misunderstanding, especially if the client has trouble processing a lot of information at once. You may need to repeat information several times.
- Consider writing down the procedural steps and your advice, so they can review them later. Clearly mark important timelines for the client, and ensure steps are completed well in advance of legal deadlines. If the client needs to do anything on their own, set bring-forward reminders to call or write to them to remind them what they need to do.
- If the client needs more direct assistance, ask if they have any reliable family or other professionals who can help them with basic forms or staying organized.

Useful Resources

BC Mental Health and Addiction Services: http://www.bcmhsus.ca

Brain Injury Association: https://braininjurycanada.ca/en/brain-injury-associations/

Canadian Mental Health Association (CAMH): https://cmha.ca

CAMH Understanding Stigma (online course): https://www.camh.ca/en/education/continuing-education-programs-and-courses/continuing-education-directory/understanding-stigma

Health Employers Association of BC E-Learning Modules: https://www.heabc.bc.ca/Page4270.aspx (while these are intended for healthcare workers, some modules may assist with identifying risks for violence prevention and de-escalation strategies)

Motivation Power and Achievement Society: https://www.mpa-society.org

CHAPTER 12: CLIENTS WHO ARE NEWCOMERS TO CANADA

By Sonya Sabet-Rasekh and Juliana Dalley

A. Introduction

According to the UN High Commissioner for Refugees, 70.8 million people had been forcibly displaced worldwide by the end of 2018; of those, 25.9 million were refugees and 3.5 million were asylum seekers.[1] In Canada, migrant workers and temporary foreign workers make up a significant part of the labour force. Therefore, it is highly likely that people in the legal field will interact at some point with individuals and families who may have concerns or needs that unique to newcomers.

Newcomers to Canada have diverse experiences, backgrounds, and reasons for coming to Canada. An immigrant's experience of freely settling in Canada as a permanent resident will not mirror the experience of a migrant's or refugee's experience of forced migration and displacement. And within migrant and refugee communities themselves, there is great diversity. For example, not all people who identify as refugees have experienced war or conflict; other forms of violence and persecution related to sex, gender identity, gender expression, sexual orientation, disability, race, religion, or political beliefs are also common reasons for leaving a country.

B. Legal Categories of Immigration Status

Individuals or families may immigrate to Canada in a number of ways—for example, as skilled workers, entrepreneurs, migrant workers, or refugees; or via sponsorship by family members.

1. Permanent Resident Status

The newcomer is legally permitted to live in Canada but is not a citizen. Permanent residents may receive a number of benefits that citizens receive, such as some social benefits and the ability to live, work, or study anywhere in Canada, but they cannot vote or run for political office. To maintain their status, permanent residents must have lived in Canada for at least 730 days during the previous five years. They can apply for citizenship after five years if they have lived in Canada for a total of 1,095 days during those five years (see below). Permanent resident status can be removed if, for example, an adjudicator such as the Immigration and Refugee Board determines after an inquiry that the newcomer is no longer a permanent resident.

2. Temporary Resident Status

Newcomers may come to Canada through temporary resident status by obtaining a work permit, study permit, or a visitor's visa. Most visitors with a visa can stay in Canada

[1] UNHCR, *Global Trends: Forced Displacement in 2018* (2019), https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html

for up to six months, but a border office may approve a shorter stay. A visitor may apply to extend their visitor status but may not study or work in Canada.

A study permit allows foreign nationals to study at certain institutions in Canada and is usually valid for the length of the study program, plus 90 days. If a student does not finish their courses before the end date of the permit, they must leave Canada or apply to extend their stay. In order to work in Canada with a study permit, they must meet certain requirements.[2]

Most newcomers, other than permanent residents and people who have citizenship but who lived elsewhere, need a work permit to work in Canada. The Temporary Foreign Worker Program (TFWP) allows employers in Canada to hire foreign nationals to fill labour and skill shortages. Work permits issued under the TFWP are "employer-specific," meaning the newcomer can only work for one employer, and usually in one position, in Canada, although some temporary foreign workers may have open or unrestricted work permits. Some, but not all, temporary foreign workers may have the opportunity to apply for permanent residence. Currently Temporary Foreign Workers working in agriculture, retail, and as cleaners cannot apply for permanent residence.

3. Refugees and Asylum Seekers

By the end of 2018, two thirds of all refugees worldwide came from just five countries: Syria, Afghanistan, South Sudan, Myanmar, and Somalia.[3] The 1951 Convention Relating to the Status of Refugees defines a refugee as "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[4] The Canadian *Immigration and Refugee Protection Act*, which draws on the same definition of a refugee, defines a "person in need of protection" as "a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally (a) to a danger […] of torture […] or a risk to their life or to a risk of cruel and unusual treatment or punishment."[5]

Refugees or asylum seekers who have resettled from overseas may become permanent residents through the Government-Assisted Refugees Program or private sponsorship if their refugee claim has been approved by the Immigration and Refugee Board. Once their refugee claim has been approved, they may receive Protected Person status, which allows them to stay in Canada to apply for permanent resident status.[6]

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[2] See https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/study-permit/prepare-arrival.html for more information about the requirements.

[3] UNHCR, *Global Trends.*

[4] UNHCR, *Convention and Protocol Relating to the Status of Refugees* (n.d.), https://www.unhcr.org/3b66c2aa10

[5] https://laws-lois.justice.gc.ca/eng/acts/I-2.5/section-97.html

[6] Canada for Me, "Immigration for Refugees and Protected Persons" (n.d.), https://www.canadaforme.com/service/refugees-protected-persons-immigration

4. Undocumented Newcomers

Undocumented newcomers do not have authorized immigration status in Canada. For example, they may have overstayed their visas or work or study permits, made an unapproved refugee claim, or entered Canada unofficially.

5. Citizenship

To be eligible to apply to become a Canadian citizen, a newcomer must be a permanent resident, have lived in Canada for three out of the last five years (a total of 1,095 days), have been filing taxes, pass a knowledge test about Canada, and be able to prove their language skills. Even if they meet these requirements, though, they will not be eligible for citizenship if they are prohibited under the *Citizenship Act*—for example, if they are serving a prison sentence or are on parole or probation in Canada; if they are serving a sentence outside Canada; or if they are charged with, on trial for, or involved in an appeal for an office committed outside Canada that is equivalent to an indictable office in Canada.

C. Challenges Faced by Newcomers

Newcomers to Canada may experience a variety of challenges in their attempts to settle in the community: they may struggle to overcome language barriers and find employment in their fields; and they may lack knowledge and understanding of the Canadian workplace culture and employment standards and rights, making it difficult for them to access and enforce those rights.

Many newcomers, particularly those without permanent residency or citizenship, have a precarious immigration status, which often impedes their ability to pursue their legal rights or seek redress for any wrongdoing. Because many temporary foreign workers have employer-specific work permits, it can be very difficult for them to change their jobs. They may have also been coerced by their employers to perform unauthorized work, which threatens their immigration status and puts them at risk of removal from Canada. Undocumented newcomers are especially vulnerable, as any attempt to seek redress for any wrongdoing may draw the attention of the authorities. Migrant workers and live-in caregivers are frequent targets for various forms of exploitation and abuse in the workplace. For example, migrant live-in caregivers who provide care for children, seniors, or people with disabilities in private homes, often in the private home of their employer, experience high rates of sexual harassment, exploitation, and abuse.[7] Their precarious immigration status and dependence on their employer for continued employment make them highly vulnerable to harassment and abuse.

The challenges are compounded by the fact that many newcomers are dealing with the loss of their homeland, way of life, and support network. They may have lost loved ones or friends, incurred financial losses, or had their career or education interrupted.

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[7] Sandy Welsh, et al., "'I'm Not Thinking of it as Harassment': Understanding Harassment Across Race and Citizenship," *Gender & Society* 20, no. 1 (February 2006): 100.

Overall, for some newcomers, especially those who have been forcibly displaced, the immigration experience may be characterized by grief and loss, in addition to various levels of trauma, from the trauma associated with displacement and moving to a new country to the trauma associated with war, threats, violence, and the loss of loved ones.

Once in Canada, newcomers may continue to face discrimination and racially motivated attacks. Although Canada portrays itself as the bastion of multiculturalism, there has been a rising tide of xenophobia, Islamophobia, and racism in recent years.[8] Harmful stereotypes that sexualize and paternalize immigrant and refugee women further compound the discrimination they experience as newcomers. For example, Muslim women who choose to wear a hijab are often the subject of patriarchal conflicts about women's autonomy. These conflicts are often characterized by Islamophobic and stereotypical views of the religion and its adherents. Therefore, when assisting immigrant and refugee identified clients who claim to have been sexually harassed in the workplace, be mindful of the intersecting effects of that harassment on the basis of race, ethnicity, place of origin, or religion.

Human rights jurisprudence has recognized that the protected grounds of race, colour, ancestry, and place of origin can collectively intersect to describe a set of characteristics that may be the basis of discrimination against migrant workers. Migrant workers who have experienced sexual harassment also experience discrimination on the protected ground of race. In *PN v. FR and another (No. 2)*, 2015 BCHRT 60, the BC Human Rights Tribunal considered a human rights complaint from a live-in caregiver who was severely exploited including being subjected to sexual harassment and assault in the context of her work. It found the complainant, a young mother from the Philippines, had experienced adverse treatment on the intersecting grounds of age, sex, family status, colour, ancestry, and place of origin. Other cases have considered the unique vulnerabilities of migrant workers to sexual harassment and exploitation.[9] Human rights law has been observed to be better equipped to address exploitation of migrant workers given that it requires a contextual understanding and analysis of discrimination, sensitivity to issues of credibility and testimony, and broad remedial powers.[10]

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[8] In 2018, there were 780 incidents of police-reported hate crimes in Canada on the basis of race or ethnicity and 639 on the basis of religion. See Statistics Canada, Table 35-10-0066-01, Police-reported Hate Crime, by Type of Motivation, Canada (selected police services), https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510006601

[9] See, for example, *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675, where the Ontario Human Rights Tribunal awarded more than $200,000 to two women from Mexico hired under the TFWP who had experienced sexual violence and harassment at their workplace.

[10] See, for example, Natalie Drolet and Bethany Hastie, "The Potential of Human Rights Law to Address the Harms of Labour Exploitation and Human Trafficking" (CLE Human Rights Conference paper, 2016): 11.1.9, https://mwcbc.ca/reports/

D. Working with Clients Who Are Newcomers to Canada

Clients who are newcomers to Canada face many significant barriers to coming forward with a workplace sexual harassment claim. For example:

- Stigma associated with sexual harassment and assault: This is prevalent in many communities and is one of the most significant barriers to filing a complaint. For newcomer clients, the stigma may further be exacerbated by feelings of isolation or concerns about the impact on, or repercussions, in their communities for their own families or for themselves within their families if they came forward about sexual harassment.
- Language barriers: They may not readily understand the nature of comments directed at them until a later date and may not feel able to report sexual harassment.
- Limited understanding of workplace culture: The client may struggle to understand whether certain conduct is appropriate in the workplace.
- Limited knowledge of and access to information about BC employment and human rights protections: Newcomer clients may not be aware that certain conduct is illegal in the workplace in BC. Furthermore, they may not be aware of the time limitations for making complaints.
- Lack of trust in law enforcement and the legal system: Due to their experiences in their former country, their experiences in Canada, or both, clients who are newcomers may believe that legal institutions do not or cannot provide meaningful assistance.
- Lack of cultural safety in legal procedures for complainants: This can make the process of filing a complaint an uncomfortable and unsafe experience. For example, requiring a Muslim woman who wears a niqaab to reveal her face in a proceeding can make a stressful legal process feel not only more stressful but also less safe.
- Problematic and racist stereotypes: Newcomers may be concerned about encountering stereotypes about their cultures if they report sexual harassment and that they may be treated unfairly as a result.
- Precarious citizenship and immigration status: A newcomer client may hesitate to come forward with a complaint about sexual harassment in the workplace in case they jeopardize their prospects of remaining in Canada or bringing family members to Canada.
- Costs of a legal proceeding and legal representation: Costs are a significant obstacle accessing justice for many newcomers, as they are likely to work in low-income jobs. The cost of a legal proceeding or the need to miss work to attend legal appointments or meetings can significantly affect the financial security of a client and their family.

Ensure that any client who is a newcomer to Canada obtains legal advice about their immigration status before proceeding with a complaint so they can make informed decisions and exercise their legal rights while minimizing any risks to their immigration

status. For example, an employer may respond to a complaint by reporting the newcomer to the Canada Border Services Agency (CBSA) to start removal proceedings. This may be a particular risk if a newcomer has done unauthorized work or is undocumented. Newcomers who have experienced workplace sexual harassment can be referred to the Respect at Work Legal Clinic, a program of the Migrant Workers Centre, which provides legal assistance to migrant workers in the areas of immigration and employment law.

In addition to following the guidelines and advice in Chapter 26: Meeting with the Client, and Chapter 3: Trauma-informed Practice, there are few extra points to bear in mind when you are working with a newcomer with precarious or no immigration status.

- If you are not sure how to pronounce the client's name, ask them how to pronounce it.
- If English is not the client's main working language, consider having a certified interpreter present, as the client may feel more comfortable speaking freely in their primary language.
- Be open to meeting the client with a support person such as a trusted family member or friend. You may wish to offer this as an option if the client seems to be finding the interview or legal process stressful. However, exercise discretion, as the client may not be comfortable disclosing certain information in the presence of others, including family members or service providers from the same cultural community. (See Chapter 27: Involving Support People in Legal Relationships for more information on support people.)
- A client may be more comfortable speaking about a personal matter such as sexual harassment with someone of the same gender. Accommodate such preferences where possible.
- Be attentive to any mental health concerns the client has. If they are angry, stressed, or need to vent or express their pain or frustration, remain calm and use your best listening skills to de-escalate the situation. Acknowledge what you hear and actively empathize. (See also Chapter 11: Clients Who Are Living with Mental Health Concerns.)
- With respect to the use of law enforcement, be mindful of the trauma a client who identifies as a refugee may have because of past conflicts, state violence, and persecution. Law enforcement or uniformed personnel may trigger that trauma.
- Keep at hand a list of resources and services, particularly for mental health support, to give to a client in need.
- Be mindful that a newcomer client may have cultural practices and values that differ from your own. Provide them with legal advice and information and refrain from judging.
- Newcomer clients are likely to be racialized. For more on this, Chapter 13: Clients Who Are Racialized.

Useful Resources

Immigrant Services Society of BC (ISSofBC) (provides support to newcomers): https://issbc.org/about-us

Migrant Workers Centre (MWC): https://mwcbc.ca/how-to-get-legal-help/

Rodgers, Alexandra. *Envisioning Justice for Migrant Workers: A Legal Needs Assessment.* Migrant Workers Centre, March 2018 (provides a useful review of the issues and barriers faced by migrant workers in Canada). https://mwcbc.ca/downloads/MWC_Envisioning_Justice_for_Migrant_Workers_Report.pdf

Immigration & Refugee Legal Clinic: https://www.irlc.ca/

SHARP Workplaces and Stand Informed Training Webinars:

Lehal, Kamalji. Immigration Issues in Cases of Sexual Assault and Sexual Harassment. June 2023.

Resources last updated January 2024

CHAPTER 13: CLIENTS WHO ARE RACIALIZED

By Sonya Sabet-Rasekh

A. Racialization

Canada is an increasingly diverse country.[1] This does not mean that racism is not a problem. The experience of racialized people in Canada confirms that racism is very much a problem in the country.

The term "visible minority" is frequently used both in general conversation and by institutions like Statistics Canada to refer to people who are non-white in colour and race and are not Indigenous. There is ongoing significant debate about its use, and several other terms have been suggested: People/Person(s) of Colour (POC); Black, Indigenous, and People/Person(s) of Colour (BIPOC), which works towards undoing Indigenous invisibility and anti-Blackness in public discourse; and racialized people. Some people may prefer more specific language (e.g., Black, Latinx, Chinese).

In this section, the term "racialized" is used because it recognizes that the barriers that clients face stem from racial prejudice in Canadian society and are not a product of their identities. However, it is important to respect a person's identity. If you are unsure how a person identifies, tactfully ask.

B. Race and Privilege

Any discussion of the barriers faced by racialized clients requires a discussion of white privilege. Although the term has recently played a significant role in contemporary public discourse, it has been around for a long time as a legislative, cultural, and systemic norm. It was first used by Peggy McIntosh, who referenced it in "White Privilege: Unpacking the Invisible Knapsack,"[2] among other papers. In *Me and White Supremacy*, Layla F. Saad defines white privilege as describing the "unearned advantages that are granted because of one's whiteness or ability to 'pass' as white."[3] It is separate from but can intersect with other forms of privilege, such as class, gender, sexuality, age, and able-bodied privilege. A person may not have class privilege but still have white privilege. It refers to the systemic and implicit advances that white people or those who "pass" as white have due to race.

White privilege affects everyone in their daily life and may influence how laws, policies, practices, and legal systems treat people. Humanity's diversity in skin colour and other physical traits belies the fact that humanity is a single race. However, race is a deeply held social construct in which ideas of racial hierarchies continue to have real effects on

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[1] Statistics Canada, *Ethnic Diversity and Immigration: Canada Year Book, 2011* (Government of Canada, page last modified January 17, 2018), https://www150.statcan.gc.ca/n1/pub/11-402-x/2011000/chap/imm/imm-eng.htm

[2] Peggy McIntosh, "White Privilege: Unpacking the Invisible Knapsack," *Peace and Freedom* (July/August, 1989), https://psychology.umbc.edu/files/2016/10/White-Privilege_McIntosh-1989.pdf

[3] Layla F. Saad, *Me and White Supremacy* (Illinois: Sourcebooks, 2020).

individuals and groups and differences in how they are treated because of physical traits like skin colour.

C. Barriers and Inequities

Racialized people face barriers and inequities because of their race and the existence of white supremacy in Canada's legal, political, social, and cultural institutions and systems.

1. Racism

Racism, racial discrimination, is a major barrier for racialized people. White supremacy and ideas about racial hierarchies are present in how society is organized and influence the norms and assumptions that reinforce the practices of our institutions. This provides advantages to those who are considered "white," and subjects those who are "non-white" to inequities and systemic discrimination. Racism can appear in interpersonal interactions such as jokes, slurs, abuse, and harassment, and in institutional policies and practices that systemically exclude or adversely treat certain groups of people. It also manifests in hate crimes against racialized groups. In 2018, BC experienced a significant (11%) rise in reported race-motivated hate crimes from 2017.[4] Reported race-motivated hate crimes have continued to increase across Canada with a 10% increase in 2019 with 46% of all hate crimes motivated by hatred of a race of ethnicity.[5] In Vancouver, there has been an increase of 717% in anti-Asian hate crimes, from 12 incidents reported in 2019 to 98.[6]

2. Attitudes, Assumptions, and Stereotypes

Humans are socialized to notice and identify physical and social characteristics such as skin tone, cultural habits, language, and accents. When we link these perceptions to a specific group of people on the basis of race, we may think, say, or do things that marginalize or discriminate against that group despite our best intentions. Assumptions about people based on physical or social characteristics can create disadvantages in racialized communities. Be vigilant about your unconscious assumptions and work to unlearn them.

While it can be helpful to be sensitive to a person's cultural views, concerns, or experiences, do not assume that all people in a particular group are the same. Stereotypes ignore the diversity within a specific group and can perpetuate false assumptions about the group, which results in discrimination. For example, racialized people are often seen as immigrants even if they were born and raised in Canada. Such

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[4] Statistics Canada, *Police-reported Hate Crimes, by Type of Motivation, Province or Territory, 2017 and 2018* (Government of Canada (n.d.)), https://www150.statcan.gc.ca/n1/daily-quotidien/200226/t002a-eng.htm

[5] Statistics Canada, *Police-reported Hate Crime in Canada, 2019* (Government of Canada (n.d.)), https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00002-eng.htm

[6] Vancouver Police Department, Report to the Vancouver Police Board Year-end 2020 Year-to-Date Key Performance Indicators Report (February 3, 2021), https://vancouverpoliceboard.ca/police/policeboard/agenda/2021/0218/5-1-2102P01-Year-end-2020-KPI-Report.pdf

an assumption communicates the message that they do not "belong" or are "outsiders." Stereotypes can also work to keep groups out of certain professions, neighbourhoods, and services.

Racialized women often experience harmful stereotypes that sexualize, objectify, and paternalize them. For example, harmful and erroneous stereotypes about Asian women as "submissive" members of the "model minority" can make them vulnerable to sexual harassment and abuse; Muslim women's decisions to wear a hijab or niqaab are often seen through the lens of Islamophobic and stereotypical views of the religion and its adherents; and Black women have long faced negative stereotypes rooted in a history of racism and slavery in Canada and the United States, such as being "hyperemotional" or "angry," and so their claims of sexual harassment are often not taken seriously. When assisting racialized women who claim to have experienced sexual harassment, be mindful of the intersecting effects of that harassment on their race.

3. Microaggressions

This term describes the daily indignities and slights faced by marginalized people, including racialized people. They are often based on biases, stereotypes, and assumptions about a particular group, are closely tied to implicit biases that a person outside of a group may not be aware of, and may influence harmful behaviour toward racialized people. They include jokes, hidden insults (e.g., telling a racialized person that their English is pretty good, even if it is their main working language), and subconscious actions and behaviour (e.g., a white woman clutching her purse as a Black man walks by). However, they are more than just insults and insensitive comments. They are harmful because they are related to the person's membership in a group that has been discriminated against or is subject to stereotypes. The comments or actions happen casually, frequently, and generally without intention to cause any harm, but they can take a significant toll on the mental health and well-being of the people at whom they are directed.

4. Employment

Despite a strong willingness to work, unemployment rates are higher for racialized Canadians than non-racialized Canadians. Approximately 9.2% of racialized Canadians were unemployed in 2016, compared to 7.3% of non-racialized Canadians.[7] In addition, the unemployment rate is gendered; racialized women had a higher rate of unemployment in 2016, 9.6%, than racialized men, 8.8%.[8] In July 2020, in the midst of the COVID-19 pandemic, South Asian, Arab, and Black people had the highest rates of unemployment (17.8%, 17.3%, and 16.8% respectively); non-racialized people had an

[7] Sheila Block, "Behind the Numbers: Racialized Canadians Continue to Face Barriers to Decent Work," Canadian Centre for Policy Alternatives [*Block, "Behind the Numbers"*], https://monitormag.ca/articles/racialized-canadians-continue-to-face-barriers-to-decent-work/

[8] *Block, "Behind the Numbers"*

unemployment rate of 9.3%.[9] Many racialized people experience pre-employment barriers that limit their access to stable, secure, and decent work. For example, employers often discriminate against job applicants with non-English names, even if they did not intend to do so; and foreign credentials and qualifications are not all recognized equally in Canada. Therefore, racialized people, especially women, are more likely to be in precarious jobs with the associated job insecurity and instability, low income, limited benefits, and irregular hours. The precarity of employment for racialized people can increase their vulnerability to harassment, abuse, and exploitation at work, including sexual harassment. In addition to hiring-related barriers, racialized people also experience barriers to promotion and gaining access to networks and mentorship.[10]

5. Racial Profiling

Racial profiling involves making assumptions about an individual because they belong to a specific race and taking actions for reasons of safety security or public protection based on those stereotypes rather than on reasonable suspicion. Many racialized people are suspected, targeted, and aggressively monitored by law enforcement, security, the justice system, and schools. Since 9/11, racial profiling has worsened for people who are Muslim or perceived to be Muslim. Racism in the Canadian justice system may appear via the racially biased attitudes and conduct of adjudicators, judges, lawyers, and other court officials; adjudication decisions and the availability of certain remedies; the availability of legal representation; and the assumed neutrality of the law. One particular area of concern has been the use of street-checks, or carding, to target racialized people. Street-checks have been used by police departments throughout Canada, including the Vancouver Policy Department (VPD), to gather personal information from individuals outside of an investigation. VPD data confirm that Indigenous people and Black people have been significantly over-represented in the numbers of street-checks performed by the VPD over the past decade.[11] Racialized people are also over-represented in the justice system because of such deep-seated racial biases.[12]

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[9] Statistics Canada, *Labour Force Survey* (Government of Canada, July 2020), https://www150.statcan.gc.ca/n1/daily-quotidien/200807/dq200807a-eng.htm

[10] Mohsen Javdani, "Visible Minorities and Job Mobility: Evidence from a Workplace Panel Survey," IZA Discussion Paper No. 12736 (posted November 10, 2019), https://ssrn.com/abstract=3483974

11 "BC Civil Liberties Association, Civil liberties and First Nations Groups Launch Complaint on Discriminatory Police Stops; Call for Investigation" [Release] (June 14, 2018), https://bccla.org/news/2018/06/release-civil-liberties-and-first-nations-groups-launch-complaint-on-discriminatory-police-stops-call-for-investigation/

[12] In 2018/2019, Indigenous adults accounted for 31% of admissions to provincial/territorial custody and 29% of admissions to federal custody, while representing approximately 4.5% of the Canadian adult population (Jamil Malkieh, *Adult and Youth Correctional Statistics in Canada, 2018/2019* (Statistics Canada, Government of Canada: December 21, 2020), https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00016-eng.htm). See also: *R. v. Gladue*, [1999] SCJ No. 19 at paras. 61, 64-65; R. *v. Parks*, [1993] OJ No. 2157 at p. 342; CLA, *A Recent History of Racial Profiling and Policing* (May 18, 2015), https://ccla.org/a-recent-history-of-racial-profiling-and-policing/; Tom Cardoso, "Bias Behind Bars: A Globe Investigation Finds a Prison System Stacked Against Black and Indigenous Inmates," *Globe and Mail* (Published: October 24, 2020; updated: November 11, 2020), https://www.theglobeandmail.com/canada/article-investigation-racial-bias-in-canadian-prison-risk-assessments/

D. Working with Clients Who Are Racialized

People who are racialized face many significant barriers to coming forward with a workplace sexual harassment claim. For example:

- Language barriers: They may not readily understand the nature of comments directed at them until a later date and may not feel able to report sexual harassment.
- Stigma associated with sexual harassment and assault: This is prevalent in many communities and is one of the most significant barriers to filing a complaint. Problematic stereotypes and assumptions about certain groups of people and how they act or should act can further exacerbate the stigma already associated with sexual harassment. For example, stereotypes relating to the sexualization of racialized women influence how their complaints are treated by society.
- Lack of trust in law enforcement and the legal system: Due to their experiences in their communities, their personal experiences, or both, clients who are racialized may distrust law-enforcement and the legal system, and may believe that legal institutions do not or cannot provide meaningful assistance. Problematic and racially biased treatment by police, lawyers, legal advocates, adjudicators, investigators, or even their own employers exacerbate the stress a client who is racialized already experiences with the harassment.
- Immigration status: If the client who is racialized identifies as an immigrant or refugee, a precarious citizenship and immigration status may prevent them from coming forward with a complaint about sexual harassment in the workplace in case they jeopardize their prospects of remaining in Canada, bringing family members to Canada, or supporting family members elsewhere. Migrant workers are particularly vulnerable. (See Chapter 12: Clients Who Are Newcomers to Canada for more on this.)
- Costs of a legal proceeding and legal representation: Costs are a significant obstacle accessing justice for many racialized clients who are likely to experience the negative effects of income inequality.[13] The cost of a legal proceeding or the need to miss work to attend legal appointments or meetings can significantly affect the financial security of a client and their family.

In addition to following the guidelines and advice in Chapter 26: Meeting with the Client and Chapter 3: Trauma-informed Practice, there are few extra points to bear in mind when you are working with a person who is racialized.

- Listen to clients who are racialized and learn from what they share. Just because you may not see racism does not mean it is not there.

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[13] Sheila Block, Grace-Edward Galabuzi, and Ricardo Tranjan, *Canada's Colour Coded Income Inequality* (Canadian Centre for Policy Alternatives, December 2019), https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2019/12/Canada%27s%20Colour%20Coded%20Income%20Inequality.pdf

- Be wary of dismissing a racialized client's concerns relating to race and racism as "being sensitive."
- Respect a client's identity and dignity. If you are not sure what a client or community prefers to be called, ask them. Similarly, if you are not sure how to pronounce the client's name, ask them how to pronounce it.
- Do not assume a client's race or ethnicity and do not ask "Where are you from?" The question implies that they do not belong and are outsiders.
- With respect to the use of law enforcement, be mindful of any trauma or concerns a client who is racialized may have because of racial biases in the Canadian police and justice system.
- Avoid viewing white or European cultures as the norm and other races, ethnicities, or cultures as "exotic." Be mindful that a client may have cultural practices and values that differ from your own. Provide them with legal advice and information and refrain from judging.
- Be aware of any racial privilege you may have and how it can impact your interactions with the client and your perceptions of their experience.
- Be constantly vigilant about your own biases and assumptions and your comfort level with the topic of racism. You may have to unlearn prejudices.
- If the racialized client is a newcomer to Canada, see Chapter 12: Clients Who Are Newcomers to Canada.

Useful Resources

Cole, Desmond. *The Skin We're In: A Year of Black Resistance and Power.* Penguin Random House, 2020.

DiAngelo, Robin. *White Fragility: Why It's So Hard for White People to Talk about Racism.* Penguin Random House, 2018.

CHAPTER 14: CLIENTS WHO ARE SEX WORKERS

By Kerry Porth

A. Introduction

Sex workers are women, men, transgender individuals, and non-binary individuals. The vast majority of sex workers are women; transgender and non-binary individuals account for about 15% of workers in the sex industry and men about 10%.[1]

Some sex workers are LGBTQ2SIA+.[2] Some are living with a disability. Some are parents.

Indigenous and Black women are over-represented in street-based sex work because of systemic racism, discrimination, poverty, and the legacy of colonization.[3] Asian women in Vancouver are over-represented in massage parlour-based sex work and also suffer racial discrimination.[4]

In Canada, about 5% to 20% of sex work takes place on the streets. This means that 80% to 95% is taking place behind closed doors in homes, hotel rooms, massage parlours, and micro-brothels.[5]

Sex work is not inherently violent, but issues such as the location of the work (indoors versus outdoors), its quasi-criminal status, and the associated stigma contribute to the high levels of violence and exploitation that some sex workers experience.[6]

Like people in any occupation, some sex workers use drugs and alcohol. Problems with dependency on illicit substances are more common for street-based sex workers as drug use presents a barrier to working in indoor locations such as massage parlours, escort agencies, and micro-brothels because of workplace rules.[7]

Sex workers face barriers to accessing health care and other social services because of social stigma and fears of being outed as sex workers and consequently losing disability

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[1]Art Hanger and John Maloney, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Report of the Standing Committee on Justice and Human Rights and Report of the Subcommittee on Solicitation Laws, Government of Canada, 2006), https://www.nswp.org/sites/nswp.org/files/SSLR-REPORT-06E.pdf

[2] LGBTQ2SIA+ is an acronym for Lesbian, Gay, Bisexual, Transgender, Transsexual, Queer and Questioning, Two-Spirit, Intersex, Asexual, Plus.

[3] M. Raguparan, "'If I'm Gonna Hack Capitalism': Racialized and Indigenous Canadian Sex Workers' Experiences within the Neo-Liberal Market Economy," *Women's Studies International Forum* 60, no. 1 (January 2017): 69-76.

[4] K. Mackenzie and A. Clancey. *Im/Migrant Sex Workers, Myths and Misconceptions: Realities of the Anti-trafficked* (SWAN Vancouver Society, 2015), https://swanvancouver.ca/wp-content/uploads/2022/10/Realities-of-the-Anti-Trafficked-SWAN-Toolkit.pdf

[5] Hanger and Maloney, *Challenge of Change.*

[6] J. Lowman and L. Fraser, *Violence against Persons Who Prostitute: The Experience* (Ottawa: Departments of Justice and Solicitor General, 1995).

[7] S. Goldenberg et al. "Police-related Barriers to Harm Reduction Linked to Non-fatal Overdose Amongst Sex Workers Who Use Drugs: Results of a Community-based Cohort in Metro Vancouver, Canada," *International Journal of Drug Policy* 76 (2020), doi:102618

or social assistance benefits, housing, and other employment or being rejected by family members or having their children removed.[8]

"Sex worker" is the most appropriate term to use when talking about people who work in the sex industry. "Prostitute" is laden with stigma and is rejected by most sex workers. The term "sex worker" can, however, sometimes be seen as political language and not all sex workers will use the term to describe themselves. In particular, women who identify as Indigenous may reject this term either because it reinforces negative stereotypes that all Indigenous women are sexually available or because it simply does not reflect their experience. Sometimes Indigenous women will refer to their engagement in sex work as "hustling," which encompasses a variety of survival income-generating activities. The law currently uses the expression "providing sexual services."

B. Sex Work and the Law

At present, sex work in Canada is criminalized under the *Protection of Communities and Exploited Persons Act*, SC 2014, c. 25. While sex workers are not directly targeted by the laws in this act, their work remains criminalized and in certain circumstances they may be subject to charges. The current laws are quite complicated and many sex workers are confused about which activities are criminalized and which are not. In short, it is illegal to purchase sex; communicate for the purpose of purchasing sex; conduct sex work near a school, playground, or daycare centre; advertise sexual services (except when a sex worker advertises their own services and as long as the advertisement does not explicitly offer sexual services); and habitually keep the company of or benefit materially from sex workers, unless you are in a legitimate family or business relationship and can prove that you are not forcing or encouraging the sex workers to sell sex, are not involved in a commercial sex enterprise together, and are not offering alcohol or drugs to induce someone to engage in sex work.

Several new laws around sex work have been ruled unconstitutional in *R. v. Anwar*, 2020 ONCJ 103 (CanLII) in Ontario, and the Government of Canada was mandated to do a review of the new laws in 2020. As of February 2021, the review has not yet been initiated.

In New Zealand, where sex work is decriminalized, sex workers have been successful in addressing sexual harassment in the workplace. Being a sex worker should not mean that sexual harassment is accepted as an occupational hazard.[9]

Immigration and Refugee Protection Regulations prohibit all temporary residents of Canada from engaging in sex work, whether they are on a work or study permit, or a visitor's visa. Migrants found to be engaging in sex work are arrested, detained, and

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[8] L. Lazarus et al. "Occupational Stigma as a Primary Barrier to Health Care for Street-based Sex Workers in Canada," *Culture, Health & Sexuality* 14, no. 2 (2012): 139-50.

[9] Ministry of Justice, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (New Zealand Government, 2008), https://prostitutescollective.net/wp-content/uploads/2016/10/report-of-the-nz-prostitution-law-committee-2008.pdf

deported by Canada Border Services Agency. An individual who has been trafficked into the sex industry may be able to obtain a Temporary Resident Permit. (See also Chapter 12: Clients Who Are Newcomers to Canada.)

C. Employment Issues for Sex Workers

Sex workers working for sex businesses such as massage parlours, escort agencies, and micro-brothels have no access to labour protections because sex work in Canada is criminalized. Laws against material benefit from the prostitution of another person (*Criminal Code* s. 286.2) and procuring (*Criminal Code* s. 286.3) criminalize all normal business activities involved in sex businesses, and typical workplace complaints about scheduling or harassment are likely to trigger a criminal investigation into the business. This in turn is likely to result in the business being closed down, the owners or operators being charged with sex work offences, and the complainant losing their job.

Many sex workers also have mainstream part- or full-time work and use sex work to supplement their income. In most circumstances, these individuals take precautions to avoid having their participation in sex work disclosed to their mainstream employer and co-workers. There have been many reported cases of sex workers being fired from their jobs because of their participation in sex work, or suffering sexual or other forms of harassment after being outed as a sex worker. These cases tend not to be formally documented.

D. Working with a Client Who Is a Sex Worker

Many sex workers take great pains to hide the fact that they engage in sex work, including from close family and friends. Confidentiality is vital if someone discloses that they engage in sex work; that means not documenting the sex work in most cases. Someone may engage in sex work for only a short time in their life and having it documented can pose risks for them in the future.

In addition to following the guidelines and advice in Chapter 26: Meeting with the Client, and Chapter 3: Trauma-informed Practice, there are few extra points to bear in mind when you are serving and assisting a person who is a sex worker.

- Do not assume that the person's sexual harassment complaint is related to their sex work. It may relate to mainstream employment.
- When the client discloses that they are a sex worker, consider carefully if you need to document that information in their file.
- Use the language the client uses to describe their sex work but avoid pejoratives that some sex workers might use such as "hooker" or "whore."
- Avoid prying too deeply into the sex worker's work. Ask yourself if you really need to know what you are asking about.
- Do not suggest that the client consider exiting sex work. They may not want to or be in a place where they can reasonably consider doing so.

- Be aware of the pervasive stigma associated with sex work. If you hold strong negative feelings about sex work, consider referring the client to someone whose views are more neutral.

Useful Resources

Belak, Brenda and Bennet, Darcie. "Evaluating Canada's Sex Work Laws: The Case for Repeal." Pivot (blog post), December 6, 2016. https://www.pivotlegal.org/evaluating_canada_s_sex_work_laws_the_case_for_repeal

CHAPTER 15: INDIGENOUS WORKPLACES: SPECIAL CONSIDERATIONS

By Cynthia Callison, Chaslynn Gillanders, Darwin Hanna, and Kirsten Barnes

A. Introduction

There are a number of issues to consider when you are representing a worker who is experiencing sexual harassment in an Indigenous workplace on- or off-reserve.

There are many different Indigenous cultures across Canada, and each Indigenous person has had a unique personal experience. Indigenous Peoples include First Nations, Inuit, and Métis Peoples. There are at least 200 First Nations in BC alone. Each of those First Nations has a different culture and language. In BC, there are over 34 Indigenous languages. Approximately 40% of First Nation members live in their communities and on reserve lands. Indigenous people in BC also live in urban and suburban areas.

Many Indigenous people have experienced trauma. (See Chapter 3: Trauma-informed Practice for more on this.) The trauma may reveal itself in a number of different ways such as rage, confusion, and shame and can affect a person's memory, behaviour, and ability to communicate.

(See also Chapter 9: Clients Who Identify as Indigenous.)

B. Trauma through Colonialism

As outlined in the *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (MMIWG Report), the trauma experienced by Indigenous people originates from the "colonial structures, evidenced notably by the *Indian Act,* RSC 1985, c. I-5, the Sixties Scoop, residential schools, breaches of human and Inuit, Métis and First Nations rights, leading directly to the current increased rates of violence, death and suicide in Indigenous populations."[1] In order to take an intersectional approach to investigating a complaint by an Indigenous person about sexual harassment in the workplace, you must understand how the history of violence has influenced the experience of Indigenous Peoples today.

Trauma has affected not only the Indigenous People who directly experienced it but also their children in a variety of ways. This transmission of trauma by survivors to the next generation is referred to as intergenerational trauma. Intergenerational trauma is the transmission of cumulative mental, emotional, and physical harm experienced by communities, families, and individuals from one generation to the next. For example,

[1] National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), https://www.mmiwg-ffada.ca/final-report/.

research has shown that the neglect and abuse arising from the Indian residential schools has had an impact on the well-being of Indigenous people today.[2]

When you are representing an Indigenous worker on a complaint about sexual harassment in the workplace, take a trauma-informed and culturally sensitive approach (see Chapter 3: Trauma-informed Practice) to reduce the trauma and enhance the worker's safety.

Indigenous people in Canada who bring complaints such as sexual harassment complaints experience being over-policed and under-protected, and are subjected to systemic racism and indifference. Indigenous women have experienced colonial violence that normalizes the violence committed against them.

The Truth and Reconciliation Commission's (TRC) *Calls to Action*[3] includes a call to action for the legal profession to receive cultural competency training:

> 27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism. When working with Indigenous Peoples in Canada it is important to have an understanding of the histories, cultures, laws and the legal rights.

Many Indigenous people do not trust the courts and similar processes as a result of these traumatic experiences. The TRC is calling on lawyers to take an intercultural competency course and adopt a trauma-informed legal practice. It is hoped that this will improve the relationship between Indigenous people and the law.

Many workplaces in Indigenous organizations have to address and resolve sexual harassment complaints. The Assembly of First Nations undertook an investigation to address harassment in their workplace and published their findings in their *Panel Final Report*:

> The AFN Chiefs-in-Assembly ordered an independent, fair, and impartial investigative review of the AFN (the "Review") to assist in gauging levels of systemic gender- and sexual orientation–based discrimination experienced by people involved with the AFN, with an aim to ending such discrimination and all

[2] Peter Menzies, "Intergenerational Trauma from a Mental Health Perspective," *Native Social Work Journal* 7 (2010): 63-85.
[3] Truth and Reconciliation Commission of Canada, *Calls to Action* (2015), http://www.trc.ca/assets/pdf/Calls_to_Action_English2.pdf.

other forms of violence, including sexualized violence, lateral violence, bullying, and cyber-bullying in the organization.[4]

The report documented the following sexual misconduct and harassment:

> 1. Summary of Dominant Themes
>
> Some clear themes emerged from the interviews, written submissions, and survey results. Each theme is contextualized below, in no specific order of priority.
>
> - Sexual misconduct and predatory practices
> - normalizing bad behaviour
> - abuse of power, position, authority, and technology
> - use of suggestive body language, comments, and tone
> - invasion of personal space
> - unwelcome touching
> - Harassment and discrimination
> - lateral violence, bullying, and verbal harassment
> - lack of personal boundaries
> - microaggressions
> - gaslighting
> - gender-based discrimination
> - Demoralized work culture
> - fear of reprisal
> - feeling unsafe
> - lack of confidence in leadership
> - lack of effective training
> - lack of an independent reporting or complaint process
> - breach of confidentiality[5]

It also noted that many of the interviewees feared reprisal as one of the reasons for the under-reporting of harassment claims:

> Generally, interviewees and survey respondents presented with significant fear and frustration from working in an environment that felt unsafe, oppressive, and, at times, abusive. The lack of a clear and confidential reporting process was cited as the main reason why those who experienced inappropriate behaviour did not report the behaviour to anyone within the AFN. Most participants expressed a fear of reprisal by those in positions of power if they reported

[4] Dr. Gwendolyn Point, Debbie P. Hoffman, Amanda Barnaby Lehoux. AFN Resolution 13 Panel Final Report. (June 30, 2023) at page 10 [*AFN Resolution 13*], https://www.aptnnews.ca/wp-content/uploads/2023/07/FinalEnglishVersion23-06-30.pdf.

[5] *AFN Resolution 13* at page 25.

inappropriate behaviour. They also feared that their stories would be minimized or would be disclosed, given a perceived or real lack of confidentiality.[6]

These findings are likely applicable to many other Indigenous workplaces.

The report recommended that a restorative justice facilitator be engaged to address the harassment in the workplace:

> The Panel recommends that the AFN retain a Restorative Justice Facilitator who is, ideally, Indigenous. When we say "Restorative Justice Facilitator," we do not mean someone who is a mediator or a conflict-resolution specialist. This person must be trauma informed and have the skills required to assist the AFN in designing a restorative process to repair harm, address the causes of inappropriate behaviour, restore relationships, and hold space. There must be accountability to those who have experienced harm at the AFN, as relayed to the Panel and outlined in this Report.[7]

It also provided recommendations for mandatory training to address harassment in the workplace:

> The Panel's recommendations are as follows:
>
> Mandatory Training for Everyone at the AFN (Including New Hires and Newly Elected Chiefs):
>
> Outsource mandatory training that is Indigenous and AFN specific in the following areas:
>
> a. microaggressions, bullying (including cyber-bullying), violence (including lateral violence), discrimination (including gender- and sexual orientation–based discrimination), and harassment
> b. basic assertiveness
> c. unconscious bias
> d. equity, diversity, and inclusion
> i. gender pronouns
> ii. culturally appropriate ways to work with and support 2SLGBTQQIA+ individuals
> e. cultural humility, emotional intelligence, and building resilience
> f. preparation for the potential psychological hazards associated with the job
> g. how to set personal boundaries in the workplace
> h. communications and having difficult conversations
> i. triggers (activators), dysregulation, self-regulation, and the window of tolerance
> j. a trauma-informed workplace and a trauma-informed approach

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[6] *AFN Resolution 13* at page 33.

[7] *AFN Resolution 13* at page 48.

k. power imbalances and abuse of power
l. colonial trauma
m. healing through ceremony[8]

A restorative justice facilitator could be appointed and/or mandatory training requirements could be introduced as part of any process to address and resolve sexual harassment claims in the workplace.

C. Identifying the Appropriate Jurisdiction for a Case

When you are working with a person who identifies as Indigenous on a sexual harassment complaint, consider whether federal law (e.g., *Canadian Humans Rights Act*, *Canada Labour Code*) or provincial law (*Human Rights Code*, *Employment Standards Act*) is more appropriate, particularly if the employer is a First Nation, a Band, located on an Indian reserve, or a corporate body controlled by a Band or First Nation (e.g., society or corporation). WorkSafeBC has jurisdiction over First Nation and Band employers, and any other employer on-reserve, to address workplace claims concerning sexual harassment. The jurisdiction issue applies equally to Indigenous and non-Indigenous employees—for example, a non-Indigenous employee of a Band or First Nation must seek recourse to the *Canadian Human Rights Act* or *Canada Labour Code* for a sexual harassment- or employment-related complaint.

1. *Indian Act*

Pursuant to s. 91(24) of the *Constitution Act, 1867* the federal government has "exclusive Legislative Authority" over "Indians, and Lands reserved for Indians." The *Canada Labour Code* applies to "work, undertaking or business outside exclusive authority of the legislatures of the provinces" (s. 2). The *Indian Act*, RSC, 1985, c. I-5 regulates most activities on-reserve and provides for governance by the Council of the Band. A Band may also be called a First Nation or Nation. The *Indian Act* does not contain provisions concerning employment law or human rights. Most First Nations will have a human resource policy with sections on addressing sexual harassment (e.g., zero tolerance) and conducting investigations.

2. First Nation/Band Employer

The employment relations of a First Nation will typically be subject to the *Canada Labour Code*, RSC, 1985, c. L-2 as a Band falls within the *Code* definition of a "federal work, undertaking or business" (s. 2) and the human rights of employees will generally be governed by the *Canadian Human Rights Act*, RSC, 1985, c. H-6.

A First Nation is a unique legal entity as it derives its power and authority from inherent Aboriginal rights, the *Indian Act,* and through delegated authority by agreement. The *Indian Act* does not set out a constitution or a purpose for a First Nation. A First Nation is not deemed a natural person in law. As stated in *Tsilhqot'in Nation v. British Columbia* (sub nom. *Xeni Gwet'in First Nations v. British Columbia*), 2007 BCSC 1700 at para. 455, a

[8] *AFN Resolution 13* at page 50-51.

Band "lack[s] many of the abilities of natural persons, corporations, municipalities and even unincorporated associations." The distinct nature of Bands has not prevented the courts from providing them with legal capacity in various situations. For example, the Supreme Court of British Columbia held the following in *Wilson v. British Columbia*, 2007 BCSC 1324 at para. 50:

> [50] An Indian Band has been considered to be legally capable as:
>
> - an employer for the purposes of the Canada Labour Code (see P.S.A.C. v. Francis, 1982 CanLII 195 (SCC), [1982] 2 S.C.R. 72).

Some First Nations have self-government through an agreement with government—for example, Westbank First Nation, Tsawwassen First Nation, Nisga'a Nation, Tla'amin First Nation, Maa'nulth Nation, etc. These self-governing Nations will generally be subject to the *Canadian Humans Rights Act*, *Canada Labour Code*, and WorkSafeBC. Depending on the nature of their business, their controlled corporations and societies may be subject to the provincial *Human Rights Code*.

Many First Nations incorporate companies and societies under provincial (e.g., *Societies Act*) and federal law (e.g., *Canada Business Corporations Act*) for the purpose of establishing a separate legal entity for community development and wellness purposes.

3. Provincial Laws of General Application

Provincial laws of general application apply to First Nation employers located on-reserve by being referentially incorporated through section 88 of the *Indian Act*, unless those provincial laws are inconsistent with the *Indian Act* or another act of Parliament (e.g., *Canada Labour Code*). Accordingly, the *Human Rights Code,* RSBC 1996, c. 210 and *Employment Standards Act*, RSBC 1996, c. 113 govern employment relationships on-reserve provided that the employer does not fall within the definition of a "federal work, undertaking or business."

Where an employee is under federal jurisdiction, the *Canada Labour Code* applies in determining workplace claims for wages, severance and possible reinstatement (see Chapter 19: Employment Standards— Federally Regulated Workplaces, and Chapter 20: Investigations of Harassment and Violence in Federal Workplaces), The *Canadian Human Rights Act* applies (see Chapter 17: The Federal Human Rights System), and workers' compensation claims for federal employees are managed by WorkSafeBC (see Chapter 18: Workers' Compensation).

4. Is the Employment Federal or Provincial?

A two-part functional test was confirmed by the Supreme Court of Canada to determine if an employee's work is governed federally or provincially.[9] First, ask "Are the nature, operations, and habitual activities of the entity a federal undertaking (e.g., a First Nation, First Nation health society)?"

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[9] *NIL/TU,O Child & Family Services Society v. B.C.G.E.U.*, [2010] SCC 45, [2010] SCR 696.

If the answer is yes, the employment relationship is federally regulated. If the employer is a First Nation or Indian Band, the jurisdiction is likely federal.

If the answer is no, or not determined, ask "Would provincial legislation of the entities' labour relations impair the core of the federal head of power which is 'Indianness'?" The "core of Indianness" requires that the activities deal with the status and rights of Indians and be at the centre of what the employer does and who they are. As recognized in *Westbank First Nation v. British Columbia (Labour Relations Board*), 2000 BCCA 163 the "means" of the business must be distinctly Aboriginal. It is not enough that the "ends" will be received by Aboriginal peoples.[10]

If the answer is no, it is provincially regulated (e.g., Band school, First Nation regional body). If the answer is yes, it is federally regulated.

If an employer is related to the Indian Band but is separate and autonomous from the Band and its activity is not obviously federal in nature, such as a health department, it will likely be deemed provincially regulated.

Provincially regulated Indigenous workplaces include, for example:

- an on-reserve ambulance service,
- a child and family welfare agency,
- an addiction treatment centre,
- a lending, investing, and consulting service, or
- an employer of a Band who negotiates hydroelectric projects on behalf of the Band.

If the employer is federally regulated, a complaint should be filed under federal legislation (i.e., the *Canada Labour Code*, *Canadian Human Rights Act*, or both); if the employer is provincially regulated, the complaint should be filed under the provincial legislation (i.e., *Human Rights Code*, *Employment Standards Act*, or both).

D. Smaller Workplaces and Isolated Communities

When a sexual harassment complaint is made against an employer or a colleague in a smaller workplace or isolated community there are many specific factors to consider. Smaller communities often have limited sources of employment. In the face of limited alternative employment opportunities, vulnerable populations may be reluctant to file complaints regarding sexual harassment because of fear of intimidation or the threat of retaliation.

The importance of the integrity of the investigation and maintaining a good relationship between the complainant and respondent are magnified in smaller communities because they tend to be close-knit and many people are related. Given how close-knit many Indigenous communities are, workers who bring forward complaints about sexual

[10] *Westbank First Nation v. British Columbia (Labour Relations Board),* 2000 BCCA 163.

harassment in the workplace are likely to be particularly concerned about confidentiality. Reassure the client that confidentiality is paramount.

E. Cultural Considerations

Indigenous traditions have been consistently undermined over time, although many have survived, and others are being revived and revitalized. When a worker brings forward a complaint of sexual harassment in the workplace in an Indigenous community, you must take cultural considerations into account.

The inadequate responses to sexual harassment issues in smaller workplaces and isolated communities are often a result of a lack of awareness about how to address the issue. Bands and Indigenous organizations also lack sufficient funds to proactively develop comprehensive and effective policies and procedures and to investigate and address bullying and harassment.

Many Indigenous groups have traditional dispute resolution processes. An Elder or other knowledgeable people within an Indigenous community can advise on how to undertake an investigation and support the complainant. Elders traditionally fulfilled the roles that are now undertaken by judges, lawyers, and the police. Today, they provide guidance and advice.

Many Indigenous communities see the need for restorative justice which restores balance and harmony rather than retributive justice such as punishment.

Indigenous complainants often feel more comfortable with service providers who reflect their experience or culture. It is challenging for both Indigenous and non-Indigenous service providers to be culturally competent because there is such a wide range of Indigenous cultures across Canada. One way to become culturally competent is to be culturally humble by acknowledging that you are not familiar with all the Indigenous cultures across Canada.

Conducting interviews in a culturally humble and trauma-informed way will ensure the process considers the unique circumstances of Indigenous Peoples in Canada.

F. Taking a Trauma-informed Approach to an Investigation

During an investigation into a complaint by an employer or independent investigator, a trauma-informed approach to interviews is crucial. The investigation must be designed to ensure it does not re-traumatize the victim. Trauma comes in many different forms. It is important to understand the trauma and how trauma impacts a victim's response to the investigation.

Understanding intergenerational trauma, work to develop a collaborative relationship with the client and seek solutions that do not further traumatize them. In addition to following the guidelines and advice in Chapter 26: Meeting with the Client, and Chapter 3: Trauma-informed Practice, consider including the following for a meeting with the client:

- Conduct a traditional opening, including acknowledgement of the territory, a traditional closing, and possibly smudging with sweet grass or sage.
- Try to minimize the number of items between you and the client to minimize the barriers.
- Ensure everyone involved in helping the client is culturally knowledgeable and practises cultural humility.
- Allow an Elder to be present.
- If you are an Indigenous person, sharing your Indigenous identity may help to relax the client and build rapport and trust.
- An eagle feather may give strength to the client.
- Try to be relational rather than transactional. Transactional interactions are meant to be short-term; they are about getting the work done as quickly as possible. To help the client feel comfortable sharing their story, take a relational approach. For example, give the client your full attention, give them all the time they need, and let them decide when to take a break.

If the client and complainant live in an isolated community, they will continue to be in contact after the investigation into the claim because of the size of the community. Lawyers and investigators should make best efforts to avoid causing further division. In small communities, news and rumours can have serious implications. You must consider confidentiality and address retaliation in policies and procedures, dispute resolution and settlement.

Indigenous people need the support of traditional healers to help them on their healing journey. Traditional healing with conventional therapeutic methods is an effective way to address trauma. Indigenous people who live in remote locations may find it difficult to access services such as counselling. Work with the community and/or employer to ensure support services are available to all those involved to avoid further harm or trauma.

Useful Resources

Dr. Gwendolyn Point, Debbie P. Hoffman, Amanda Barnaby Lehoux. AFN Resolution 13 Panel Final Report. (June 30, 2023), https://www.aptnnews.ca/wp-content/uploads/2023/07/FinalEnglishVersion23-06-30.pdf

Government of Canada, 1996. *The Report of the Royal Commission on Aboriginal Peoples*. https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx

Law Society of BC., Why Reconciliation Matters: Indigenous intercultural competency and lawyer competence. https://www.lawsociety.bc.ca/our-initiatives/truth-and-reconciliation/

National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019. *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. https://www.mmiwg-ffada.ca/final-report/

Truth and Reconciliation Commission of Canada, 2012. *Calls to Action*. http://www.trc.ca/assets/pdf/Calls_to_Action_English2.pdf

United Nations, 2007. United Nations Declaration on the Rights of Indigenous Peoples. https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

Last updated August 2023

PART III: LEGAL OPTIONS

CHAPTER 16: BRITISH COLUMBIA HUMAN RIGHTS

By Laura Track

A. Introduction

Human rights in BC are protected by BC's *Human Rights Code* (RSBC 1996, c. 210) (the *Code*). The *Code* protects people from discrimination in the areas of employment; tenancy; unions and professional associations; publications; and accommodations, services and facilities that are customarily available to the public. It applies to provincially regulated workplaces and services. Complaints of discrimination in federally regulated industries must be brought to the Canadian Human Rights Commission.

The BC Human Rights Tribunal hears and decides complaints alleging violations of the *Code*. It is governed by the *Code* and the *Administrative Tribunals Act*, SBC 2004, c. 45 and its Rules of Practice and Procedure[1]. Also note the Tribunal's various Practice Directions.[2]

There are a number of advantages to using the human rights complaint process to address situations of workplace sexual harassment.

First, it is fairly accessible. It costs nothing to file a complaint, but parties are responsible for their own legal costs. Complainants may get free legal help from CLAS's Human Rights Clinic. The Human Rights Clinic represents many low-income complainants, but many complainants navigate the process either without a lawyer or with limited coaching and advice from the Clinic, SHARP Workplaces (if the complaint is related to sexual harassment), or a private lawyer. The Tribunal has discretion to apply its rules flexibly and is generally willing to provide extensions and other accommodations, particularly to self-represented litigants.

Second, a human rights complaint offers the option of a mediated settlement that addresses the complaint more quickly and potentially more satisfactorily than an adversarial hearing. The Tribunal provides extensive support for mediations and negotiated resolutions and offers the parties an Early Settlement Meeting (ESM) early in the process. Many complaints are resolved at the ESM stage. Parties can also request an additional mediation at any stage of the process. The Tribunal will provide them with a mediator and space in which to conduct the mediation at no cost. Since the start of the COVID-19 pandemic, mediations are generally conducted by video-conference (Zoom or Teams), or over the phone.

[1] http://www.bchrt.bc.ca/law-library/rules/index.htm

[2] http://www.bchrt.bc.ca/law-library/practice-directions/index.htm

Third, the Tribunal has broad remedial powers to address sexual harassment. Remedial orders are injury- and impact-focused, and they can include both individual and systemic remedies. Individual remedies include compensation for injury to dignity, feelings, and self-respect; lost wages; and reimbursement of other expenses incurred because of the discrimination, such as trauma counselling. Systemic remedies may include orders that the respondent obtain training on sexual harassment and develop policies and procedures for addressing it.

A final advantage is that the complainant has significant control over the human rights process, which can return a sense of agency and autonomy to a person who has experienced trauma and disempowerment because of discrimination. The complainant decides how to frame their complaint, whether to settle and for what, whether and how to engage the media, and which witnesses and experts to call at a hearing. They have significantly more control over a civil process like a human rights complaint than, for example, in the context of criminal proceedings. The burden of proof is also lower: the standard is proof on a balance of probabilities, rather than the high criminal standard of proof beyond a reasonable doubt.

One disadvantage of the human rights process is that it can be very slow. The Tribunal is currently experiencing inordinate backlog and delay. The very first stage of the process, in which the Tribunal screens the complaint to ensure it alleges a violation of the *Code* and was filed within the one-year time limit, currently takes at least a year. This is very frustrating for complainants, who do not know what is happening with their complaint and whether it will be accepted for filing for a very long time.

Another potential disadvantage is that injury to dignity awards are not particularly high in BC,[3] though they have been trending upwards over the last few years.[4] The process is presumptively public, which can be a deterrent for some vulnerable complainants, although privacy protections are possible (see below). The law and the process can also be technical and difficult for lay people to understand and follow, particularly if they face barriers relating to literacy, English language proficiency, access to computers and telephones, and other structural barriers and injustices. There is very limited legal help available to complainants for the framing and drafting of their complaint at the outset, although this is something that SHARP lawyers can assist with in cases involving workplace sexual harassment.

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[3] The highest award from the Tribunal prior to 2021 was $75,000 (*Kelly v. University of British Columbia (No. 4)*, 2013 BCHRT 302, aff'd *University of British Columbia v. Kelly,* 2016 BCCA 271), although this case is an outlier. The highest award for a case involving sexual harassment is $50,000 (*PN v. FR and another (No. 2)*, 2015 BCHRT 60), although this case is also an outlier and involved multiple intersecting grounds of discrimination. In *Francis v. BC Ministry of Justice (No. 5)*, 2021 BCHRT 16, $175,000 was awarded for injury to dignity in a case of racial discrimination and retaliation.

[4] *Araniva v. RSY Contracting and another (No. 3),* 2019 BCHRT 97 at para. 145.

Note that the *Code* protects a Western concept of individual rights and does not reflect an Indigenous approach and understanding of human rights as rights belonging to Indigenous Peoples.

B. The Law

Section 13 of the *Human Rights Code* prohibits discrimination in employment:

Discrimination in employment

> **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
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
>
> (2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).
>
> …
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Workplace harassment is discriminatory when the behaviour relates to one or more of the prohibited grounds of discrimination set out in s. 13. Sexual harassment is discrimination on the basis of sex.

Sexual harassment may also involve other protected characteristics such as, for example, gender identity, gender expression, race, colour, disability, or sexual orientation. When the grounds of discrimination intersect or overlap, complainants may claim multiple grounds of discrimination in their complaint.

C. Test for Sexual Harassment

The general test to establish discrimination was affirmed by the Supreme Court of Canada in *Moore v. British Columbia*, 2012 SCC 61 [*Moore*]. In a discrimination complaint, a complainant must establish that: (1) they have a characteristic protected by the *Code*, such as sex; (2) they experienced an adverse impact or adverse treatment in an area protected by the *Code*, such as employment; and (3) their protected characteristic was a factor in the adverse impact or treatment: *Moore* at para. 33. Once a complainant establishes their case of discrimination, the burden shifts to the

respondent(s) to justify their conduct or practice. If the conduct or practice cannot be justified, discrimination will be found to have occurred: *Moore* at para. 33.

Sexual harassment is a form of discrimination on the basis of sex: *Janzen v. Platy Enterprises*, 1989 CanLII 97, [1989] 1 SCR 1252 [*Janzen*]. The Supreme Court of Canada in *Janzen* set out the following definition of sexual harassment:

> Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment … When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. 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 contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being: p. 33.

As set out in *Janzen*, sexual harassment is unwelcome conduct of a sexual nature that negatively affects the worker. The effects on the worker may include job-related economic consequences (e.g., being terminated or denied a promotion for not participating; having their hours cut for reporting the incident), or the creation of a hostile, toxic, and unsafe working environment.

Sexual harassment is an abuse of power.[5] As the Supreme Court of Canada said in *BC Human Rights Tribunal v. Schrenk*, 2017 SCC 62:

> Economics is only one axis along which power is exercised between individuals. Men can exercise gendered power over women, and white people can exercise racialized power over people of colour. The exploitation of identity hierarchies to perpetrate discrimination against marginalized groups can be just as harmful to an employee as economic subordination.

In other words, power is multidimensional. Power imbalance is often a significant factor in sexual harassment complaints.

Conduct does not have to meet the test set out in *Janzen* to constitute discrimination on the basis of sex contrary to s. 13 of the *Code*. In *The Sales Associate v. Aurora Biomed Inc. and others (No. 3)*, 2021 BCHRT 5, the employer repeatedly called the complainant "beautiful lady" or "beautiful girl" rather than using her name. He also occasionally told her to smile more, and not to be so serious, and at least once he answered a question by telling her "you don't need to talk, just smile." The Tribunal did not assess his behaviour through the lens of "sexual harassment" set out in *Janzen*.

Rather, the Member found that the comments were not inherently sexual. The employer was not intending to flirt with the complainant or pursue a sexual relationship, and she never felt that he was. Rather, the comments were "misguided, non-sexual, attempts to be friendly and warm" (at para. 113). Nevertheless, his conduct discriminated against the complainant on the basis of her sex because the comments degraded and demeaned her and exemplified the "subtle forces which continue to reinforce, perpetuate, and exacerbate the disadvantage faced by many women in their workplaces":

> Women have long fought for the right to be evaluated on their merits. One persistent barrier to that goal is the conflation of a woman's worth with her appearance. Society continues to impose expectations on women to be pleasing to the people around them, particularly men. Their appearance and outward manner are important components of that. While telling a woman to smile may feel like harmless banter, it imposes a burden on her to please people in a way that is disconnected from the tasks of the job, and the skills she brings to it. Calling her "beautiful" or commenting on her appearance reinforces the message that her value is in how she is seen by others and not in the strength of her ideas, her skills, and her contributions to the work. And finally, calling a grown woman a "girl" in the context of her employment infantilizes and patronizes her. It signals that she is not an adult worthy of being taken seriously in their profession. Most often, these are not burdens or messages shared with men. The impact of this type of behaviour is to subtly reinforce gendered power hierarchies in a workplace and, in doing so, to deny women equal access to that space. (at para. 116)

We now return to the test for sexual harassment from *Janzen*: unwelcome conduct of a sexual nature that negatively affects the worker.

1. Conduct of a Sexual Nature

Conduct constituting sexual harassment may be physical or psychological, overt or subtle, and may include verbal innuendoes, affectionate gestures, repeated social invitations, and unwelcome flirting, in addition to more blatant conduct such as leering, grabbing, or sexual assault.[6] Verbal sexual harassment can include sexual innuendo, jokes, taunts, and comments about a person's appearance or sexual habits, as well as quid pro quo harassment, where a supervisor or person in a position of authority makes sexual advances, invitations or demands against a subordinate employee, offering them favours or the avoidance of punishment as long as they submit to the behaviour.

[6] See *Mahmoodi v. University of British Columbia and Dutton*, 1999 BCHRT 56 at paras. 135–136.

2. Unwelcomeness

As set out above, the Supreme Court of Canada in *Janzen* held that sexual harassment is unwelcome conduct of a sexual nature that negatively affects the worker. The test's unwelcomeness requirement can be onerous for complainants and is potentially problematic. Unlike in sexual assault law, in which consent must be affirmatively provided, in sexual harassment law, the complainant bears the burden of proving that the respondent's conduct was unwelcome. In some circumstances, the unwelcomeness requirement is easily met (e.g., physical touching or explicit sexual invitations or advances). In others, the complainant may need to lead evidence that the respondent knew or ought to have known that the behaviour was unwelcome.

The unwelcomeness requirement has been criticized for inviting undue scrutiny of the complainant's own conduct and for improperly placing the onus on victims of harassment, mostly women, to protest and avoid sexual harassment. As described by law professor Bethany Hastie:

> The "unwelcome" element, both in principle and in practice, produces problematic consequences for complainants of sexual harassment under human rights law. Specifically, the "unwelcome" element allows for the introduction of gender-based myths and stereotypes that may negatively influence the analysis and outcome of the complaint. These stereotypes arise where there is a presumption of consent, where a complainant is required to disprove her consent, or where her response is less than a clear and unequivocal rejection of sexual advances, and they may be used to cast suspicion on the complainant's credibility.
>
> Bethany Hastie, "An Unwelcome Burden: Sexual Harassment, Consent and Legal Complaints," Osgoode Hall Law Journal 58.2 (2021): 419-45 at 422.

Establishing that the respondent knew or ought to have known that the conduct was unwelcome does not require a complainant to establish that they actively protested against the conduct. Tribunals have found that non-verbal cues and body language can be sufficient to communicate to a respondent that the behaviour was unwelcome.

See, for example, *Bento v. Manito's Rotisserie & Sandwich*, 2018 HRTO 203, at para 108:

> […] a complaint, protest, or objection by an applicant is not a pre-condition to a finding of harassment and it does not mean that the behaviour or conduct wasn't unwelcome.[7]

The Tribunal has also held that the particular context of the workplace, and the complainant's own behaviour, may have an impact on whether the respondent could

[7] See also *Mahmoodi v. University of British Columbia and Dutton*, 1999 BCHRT 56 at paras. 140-141 [*Mahmoodi*].

reasonably have understood their conduct to be unwelcome. Certain behaviour that could be sexual harassment in one context may not be sexual harassment in a context where that behaviour is normalized, or where the complainant has participated in the behaviour in the past. In *Sleightholm v. Metrin and another (No. 3)*, 2013 BCHRT 75, for example, an employer's conduct in taking his subordinates to lunch, hugging and blowing kisses at them was not found to constitute sexual harassment because that behaviour was "normal" for the office they were in and was not protested by the complainant or any other employee (para. 73). In these types of cases, a complainant may have to take active steps to alert the respondent that the behaviour is unwelcome if they are to succeed in a human rights complaint.

In *Mahmoodi*, the Tribunal set out the following considerations when assessing whether conduct is unwelcome:

> i) A complainant is not required to expressly object unless the respondent would reasonably have no reason to suspect it was unwelcome;
>
> ii) Behaviour may be both tolerated and unwelcome;
>
> iii) Not only overt, but also subtle indications of unwelcomeness may be sufficient to communicate that conduct is unwelcome; and
>
> iv) The reasons for submitting to conduct may be closely related to the power differential between the parties and the implied understanding that lack of co-operation could result in some form of disadvantage. (paras. 140-141).

In more recent cases, the Tribunal has rejected the notion that the test for unwelcomeness is an "objective" one. In *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158 [*Ms. K*], the Tribunal Member stated that she was "unaware of any binding authority that requires a complainant to prove that a reasonable person would know that the conduct was not welcomed" (at para. 82). The Tribunal preferred an approach to the analysis by which a complainant can prove that conduct was unwanted, by establishing that the conduct had an adverse impact on them, as required under the *Moore* test for discrimination set out above (*Ms. K* at para. 89).

3. Adverse Consequences

The Court of Appeal in *Friedmann v. MacGarvie*, 2012 BCCA 445, noted that the adverse treatment required to meet the *Moore* test for sexual discrimination can be the sexual harassment itself, because this conduct adversely affects the work environment: para. 22. The adverse consequences of sexual harassment may also include the complainant's continued employment being put at risk, their work performance being negatively affected, or their personal dignity being undermined.[8]

[8] See *Janzen.*

There is no requirement to establish a pattern or repetition of unwelcome sexual conduct, but the Tribunal has held that not every negative incident connected to sex will be considered discriminatory harassment contrary to the *Code*.[9]

In assessing whether a single incident of verbal conduct is sufficient to meet the threshold for sexual harassment, various factors may be considered.[10]These are referred to as the *Pardo* factors:[11]

- the egregiousness or virulence of the comment,
- the nature of the relationship between the parties involved,
- the context in which the comment was made,
- whether an apology was offered, and,
- whether or not the recipient of the comment was a member of a group historically discriminated against.

While the complainant's subjective feelings about adverse impacts are relevant, they are not determinative. The circumstances and entire context of the situation must be considered on an objective basis.[12]

D. Who May File a Complaint?

The protections conferred by the *Code* are broad. Section 13 of the *Code* protects "a person" from discrimination "regarding employment or any term or condition of employment." The protections extend to people working part-time, in an unpaid capacity (interns or volunteers), seasonally, temporarily, on contract, during their probation period, or under the table. It protects non-citizens, temporary foreign workers, live-in caregivers, and others working in the province, whether they have official legal status here or not.

Most complaints are filed by individuals on their own behalf. A group of individuals may file a complaint together as a group—for example, if they have all experienced sexual harassment by the same employer. Each individual must be identified in the complaint. An individual or group of people may also file a representative complaint on behalf of a class of individuals.[13]

A person can also file a complaint on behalf of someone else, either with their consent or, if they lack capacity, without their consent. Many such complaints are brought by parents on behalf of their children.

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[9] *Eva obo others v. Spruce Hill Resort and another*, 2018 BCHRT 238 at para. 80 [*Eva*].

[10] *Eva* at para. 80.

[11] *Pardo v. School District No 43*, 2003 BCHRT 71 at para 12.

[12] *Employee v. The University and another (No. 2)*, 2020 BCHRT 12 at paras. 187, 191.

[13] *Kirchmeier and others v. University of British Columbia (No. 2)*, 2017 BCHRT 186 (CanLII).

Each type of complaint has a specific form. The forms are available on the Tribunal's website[14] and also see "BC Human Rights Resources" in Useful Resources at the end of this chapter.

E. Time Limit to File a Complaint

Under s. 22 of the *Code*, complainants have one year from the date of the discrimination to file a human rights complaint.

If the complainant alleges a continuing contravention of the *Code*, it must be filed within one year of the last alleged instance of discrimination (s. 22(2)). A continuing contravention generally requires the complainant to show "a succession or repetition of separate acts of discrimination of the same character."[15] The leading case on continuing contraventions is *School District v. Parent obo the Child*, 2018 BCCA 136.

If the Tribunal determines that the allegations that occurred outside the one-year time limit could amount to a continuing contravention, the entire complaint will be accepted for filing. However, if it determines that the allegations that occurred outside the one-year time limit could not form part of a continuing contravention, only the part of the complaint that includes the timely allegations will be accepted for filing. Therefore, if the discrimination has been ongoing for some time, a complainant should err on the side of caution and file their complaint as soon as possible.

Where the alleged discriminatory conduct involves a decision (such as a decision to deny the complainant a job opportunity), pursuing an internal appeal process that reaffirms the initial decision does not create a continuing contravention of the *Code*.[16] Similarly, pursuing a grievance will not extend the time limits to file a complaint.[17] If a complainant wishes to pursue a grievance or other process, they should still file their complaint within one year of the alleged discriminatory conduct and may then request that the complaint be deferred pending the outcome of the other process pursuant to s. 25 of the *Code*.

Under s. 22(3), the Tribunal has discretion to accept late-filed complaints if it finds that there is no substantial prejudice to any person in doing so and that it is in the public interest to accept the complaint. Public interest factors include the length of and reason for the delay, whether the complainant had access to legal advice, and whether the complaint raises issues that are unique, novel, or unusual such that their adjudication would address gaps in the jurisprudence.[18] In *Spalek v. Provincial Health*

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[14] http://www.bchrt.bc.ca/law-library/forms/index.htm#fc

[15] See, for example, *Lynch v. BC Human Rights Commission*, 2000 BCSC 1419 and *Dove v. GVRD and others (No. 3)*, 2006 BCHRT 374 at para. 17.

[16] *Callaghan v. University of Victoria*, 2005 BCHRT 589 at paras. 8 - 9, aff'd 2006 BCSC 1503.

[17] *Bissell v. Jeld-Wen of Canada*, 2005 BCHRT 99 at para. 32.

[18] *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220

Services Authority, 2021 BCHRT 169 [*Spalek*], the Tribunal also considered the fact that the issues in the complaint involved a particular and vulnerable group (at para. 33). The list of factors is not exhaustive.

In *Khalafpour v. Vancouver Native Housing Society*, 2017 BCHRT 235 at para. 32, the Tribunal held that sexual harassment claims are not novel, and that the jurisprudence is fairly settled. However, a sexual harassment complainant with a compelling reason for the delay, such as significant health issues with supporting medical evidence, may be able to convince the Tribunal to accept a late-filed sexual harassment complaint. Trauma and the mental health impacts of the discrimination may constitute a compelling reason for filing a complaint late that will justify its acceptance in the public interest: *Spalek* at paras. 32-37.

F. Who May Be Named as a Respondent?

The employer—that is, the company or other institution at issue—should always be named as a respondent in a human rights complaint.

Section 44(2) of the *Code* makes an employer liable for the acts and omissions of its employees when the employee acts within the scope of their authority.

An employer is liable for sexual harassment committed by an employee when those actions fall within the context of the employment relationship. Whether or not the employer knew about the harassment, and whether or not the employer took swift and effective action to address the issue, does not affect its potential liability for its employee's actions, although this may be relevant to the amount of any award ordered.

As noted in *Khalafpour v. Vancouver Native Housing Society*, 2017 BCHRT 235 (CanLII) at para. 32, where an employer's failure to address a complaint of sexual harassment results from their lack of process and policy, this could constitute a breach of the Code.

Individuals may also be liable for sexual harassment under s. 13 of the Code. In *Daley v. BC (Ministry of Health)*, 2006 BCHRT 341, sexual harassment was held to have a "measure of individual culpability" such that it furthers the purposes of the *Code* to hold individual harassers individually liable.

The Tribunal has an information sheet on applications to dismiss a complaint against an individual respondent.[19] It also issued a Practice Direction in November 2019 to permit early applications to dismiss a complaint against an individual respondent.[20]

[19] http://www.bchrt.bc.ca/law-library/guides-info-sheets/dismissal-apps/9.htm

[20] http://www.bchrt.bc.ca/law-library/practice-directions/app-to-dismiss-complaint.htm

G. Filing the Complaint

The forms used to commence a human rights complaint are available on the Forms page of the Tribunal's website.[21] There is also an option for online filing. The form can be filled out in Adobe or printed out and filled out by hand and mailed, emailed, or delivered in person to the Tribunal's office. Unless the allegation is very brief, it can be useful to write "See attached" on the form and tell the story in numbered paragraphs in an attached document. Chronologies generally work well.

Complaint forms (and responses) are not akin to pleadings in civil court. They must allege an arguable contravention of the *Code* and give the respondent the information they need to know the case they have to meet. The complaint does not need to outline all the background and context surrounding the allegations, but it should reference every alleged instance of discrimination.

A complainant can amend a complaint to add details to the complaint at any time, but there are some restrictions on when they can add additional allegations.[22] The leading case on the difference between details and new allegations is *Powell v. Morton and others (No. 2)*, 2005 BCHRT 282.

Keep the one-year time limit in mind and advise the client accordingly. Complainants may be reassured to know that they do not need to file any evidence at the same time as they file their complaint. They do that later in the process.

The Tribunal screens all complaints filed to make sure they disclose an arguable contravention of the *Code* that is within the Tribunal's jurisdiction and were filed within the one-year limitation period. The Tribunal may send the complainant a letter requesting further information or details about the complaint, or requesting submissions on why a complaint should be accepted even though it was filed late.

H. Privacy and Anonymization

Human rights proceedings are presumptively public. The hearing is open to the public and the Tribunal's decisions are posted on its website and on CanLII. Sometimes they attract media attention. Some complainants want their "day in court" and welcome the accountability and attention to the issue a public decision will generate in their case. Others worry about repercussions for their families, future career prospects, or general privacy if sensitive information is revealed.

Public access to the complaint file and proceedings is governed by Rule 5 of the Tribunal's Rules of Practice and Procedure. A few highlights:

- Under Rule 5(6), a party can apply to limit public disclosure of personal information, such as their name or witnesses' names. They must show why their

[21] http://www.bchrt.bc.ca/law-library/forms/index.htm

[22] See Rule 24 of the Tribunal's Rules of Practice and Procedure.

privacy interest outweighs the public interest in access to the Tribunal's proceedings. Factors the Tribunal will consider include:

  - the stage of the proceedings,
  - the nature of the allegations,
  - the private details in the complaint,
  - the harm to reputation, and
  - other potential harm.[23]

- Under Rule 5(2), the Tribunal can exclude the public from the hearing room in certain circumstances, although this is rare.
- Under Rule 5(7), in cases involving minors, the Tribunal will presume that the minor's privacy interests outweigh the public interest in access to the Tribunal's proceedings.
- Under Rule 5(3), the Tribunal will place a case on the public hearing list 90 days before the hearing is scheduled to begin. The list includes the parties' names, case number, area(s) and ground(s) of discrimination, and place and date of the hearing.
- Under Rule 5(10), when the complaint is listed on the hearing list, the public may also access the complaint form, response form, amendments, Tribunal hearing notices, and preliminary decisions.
- Under Rule 5(8) and (9), the public may make a request for the complaint file under the *Freedom of Information and Protection of Privacy Act*.

Under Rule 23.1, documents disclosed as part of the Tribunal's disclosure process are confidential. A participant may not use a document obtained through the disclosure process for any purpose other than the complaint process, unless they have the other party's consent or an order from the Tribunal, or the document has been entered into evidence at a hearing.

I. Protection from Retaliation

Section 43 of the *Human Rights Code* protects people from retaliation because they have filed a complaint, might file a complaint, or are named in or might be named in a complaint. It also protects potential witnesses and anyone who helps or might help someone file a complaint.

The respondent named in a retaliation complaint does not need to be the respondent in a previous complaint or possible future complaint. For example, a prospective

[23] There are many Tribunal decisions regarding anonymization in sexual harassment complaints. The Tribunal has said that "certain types of allegations are more likely to attract the public's attention, including cases involving allegations of sexual harassment or impropriety", justifying anonymity: *J.Y. v. Various Waxing Salons*, 2019 BCHRT 106. However, mere speculation about potential damage to one's reputation, career, or psychological well-being may not be enough to justify anonymization, even in cases involving allegations of sexual harassment: see *Hilger v. Dr. Terry Abel Dentistry and another*, 2023 BCHRT 32.

employer could not use the fact that someone filed a human rights complaint against a former employer to deny that person a job.

To make a separate complaint of retaliation, use Form 1.4 Retaliation Complaint.[24]

J. Mediation

The Tribunal encourages both parties to participate in an Early Settlement Meeting (ESM). An ESM is optional and both parties must agree to participate. It is confidential and proceeds on a without prejudice basis. ESMs can be a fast and efficient process for getting to a resolution and many complaints get resolved at ESMs. They allow the parties to think creatively and can lead to outcomes the Tribunal could not have ordered, such as an apology or reference letter, for example.

The main disadvantage to participating in an ESM is that it can slow the process down. While the parties can generally schedule an ESM within four to six months of a complaint being accepted for filing by the Tribunal, if there is no settlement, this time is effectively lost.

As of 2022, ESMs are now scheduled after a respondent has filed their Form 2 Response to the complaint. While this is helpful for providing a clearer picture of the case, there has still been no disclosure of documents. This can sometimes make negotiations more challenging.

Obtain as much information and documentary evidence from the complainant as possible prior to an ESM to build as accurate a picture of the circumstances as possible in order to advise the complainant on what they may be entitled to and should be seeking at the mediation. The Tribunal has a number of helpful resources for preparing for an ESM on its website.[25]

Since the start of the COVID-19 pandemic, mediations are generally conducted by video-conference (Zoom or Teams), or over the phone. It may be possible to request an Indigenous mediator if the complainant is Indigenous, as well as the use of an Indigenous process such as a healing circle. Accommodations, like an in-person mediation, may be possible if necessary to make the process accessible. It is generally permissible for the complainant to have a support person with them for the mediation. This person will also have to agree to keep the mediation discussions confidential. The mediator may or may not reach out to counsel or the parties in advance of the mediation.

Mediations generally begin with a joint session with all parties on the line or in the same room. If the client does not wish to participate in a joint session because it will be too difficult or upsetting for them, tell the mediator. The mediator can conduct shuttle

[24] http://www.bchrt.bc.ca/law-library/forms/index.htm

[25] https://www.bchrt.bc.ca/complaint-process/mediation/

negotiations by communicating information and offers back and forth between the parties.

To make best use of time at an ESM, consider the following preparatory steps:

- Prepare an opening statement setting out what the complaint is about to read during the joint session.
- Complainants can provide important and powerful information about the impact the conduct has had on them. Ask the client if they want to speak during the joint session.
- Research the injury to dignity awards the Tribunal has made in sexual harassment complaints and give the client a realistic assessment of what the Tribunal might award in their case. The Clinic publishes an Awards Chart of all injury to dignity awards going back many years and updates it quarterly.[26] However, because there are few final decisions involving sexual harassment, and in light of the Tribunal's recent comments that "the trend for these damages is upwards,"[27] it can be difficult to predict the amount of damages a complainant would receive if they were successful at a hearing.
- Calculate lost earnings, loss of employment benefits, and expenses incurred because of the alleged discrimination.
- Consider whether there are any documents that would be helpful to have at the mediation. Pay stubs and receipts can help the parties agree on compensation; other documents may help persuade the respondent of their liability. Print copies of these for the respondent and the mediator.
- Consider having a preliminary conversation with the respondent's lawyer to discuss the parties' positions before the mediation. You may be able to narrow down the contentious issues and gain a sense of what documents might be useful at the mediation and avoid any surprises or wasted time at the mediation.
- If possible, prepare a template settlement agreement and bring it to the ESM. The Tribunal will generally allow you to use a computer at its offices to make adjustments, or you can use your own laptop. If you have the agreement saved to a USB stick, the Tribunal can print it for you for the parties to sign.

K. Disclosure

If the complaint is not settled at an ESM, the next stage of the process is disclosure.

Both parties have an obligation to disclose all relevant documents they have or could get to the other side. Any document that touches on any of the issues raised in the complaint or the response should be disclosed.

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[26] https://bchrc.net/legal-information/remedies/

[27] *Araniva v. RSY Contracting and another (No. 3)*, 2019 BCHRT 97 at para. 145.

L. Applications to Dismiss

The respondent may make an application to dismiss the complainant's case without a hearing. Since 2022, the Tribunal only allows applications to dismiss in certain cases, when it assesses that submissions under s. 27(1) of the *Code* may further the just and timely resolution of the complaint.[28] Usually, applications to dismiss argue that the complaint has no reasonable prospect of success and should be dismissed under s. 27(1)(c) of the *Code*. A number of other grounds for seeking a dismissal are set out in s. 27(1) of the *Code*.

The respondent bears the burden of persuading the Tribunal that the complaint should be dismissed on a preliminary application. The Tribunal weighs all the evidence to make this determination but does not make findings of fact. A complainant is not required to establish their case: the complaint must simply be based on more than mere speculation or conjecture. If there are "foundational or key issues of credibility, then the matter must go to a hearing."[29]

The Tribunal publishes guides to these applications and its practice direction on page limits for submissions on applications to dismiss on its website.[30]

M. Preparing for a Hearing

Very few cases reach a hearing at the BC Human Rights Tribunal. In 2020–21, the Tribunal issued 21 final decisions after a hearing—1% of the total number of complaints closed that year.

Ways to help complainants to prepare for a hearing:

- Help them prepare the documents they plan to rely on at the hearing. For example, offer to prepare books of documents (one for the complainant, one for the respondent, one for the witness giving evidence, and one for the Tribunal Member). In general, the Tribunal prefers that these books be prepared electronically as PDFs, with each document tabbed. Note that the rules of evidence are less strict than in civil or criminal court. Under s. 27.2 of the *Code*, the Tribunal may accept any evidence or information it considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law.
- Coach the client on how to introduce documents and keep track of the documents entered as exhibits.

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[28] Case Path Pilot Practice Direction: http://www.bchrt.gov.bc.ca/law-library/practice-directions/case-path-pilot-practice-direction.htm

[29] *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para. 67.

[30] http://www.bchrt.bc.ca/

- Help the client consider the necessity of expert evidence in their case. For example, medical evidence about the impact of the discrimination can be helpful. Be aware of Rule 21 and the deadlines for disclosing expert reports.[31]
- Help the client prepare their own testimony, and conduct a mock cross-examination with them.
- Help the client put together a list of questions to ask the respondent's witnesses.
- Point the client to relevant case authorities.
- Ghostwrite or otherwise support the client to prepare their opening and closing submissions.

N. Costs

Section 37(4) of the *Code* allows the Tribunal to order costs against a party who has engaged in improper conduct during the course of the complaint or has violated the Tribunal's rules or orders.

The threshold for awarding costs is high. Costs awards are rare and generally low. However, in 2019–20 the Tribunal made two significant costs awards against complainants for their conduct.[32]

Decisions including costs awards are summarized in the Clinic's Awards Chart (see above).

O. Enforcing a Tribunal Order

Under s. 39 of the *Code*, a Tribunal order must be enforced in BC Supreme Court. The Clinic has published a step-by-step guide on enforcing a Tribunal order or settlement agreement.[33]

P. Reconsideration

The Tribunal has a limited power to reconsider its decisions. Under Rule 36(1) it may only reconsider its decisions if it is satisfied that the interests of fairness and justice require it. Under Rule 36(2) a party must apply for reconsideration within 14 days of the date on which the circumstances that form the basis of the application came to their attention or could have come to their attention if they had exercised reasonable diligence, whichever is earlier. The evidence required is set out in Rule 36(3).

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[31] Rule 21.

[32] *Yaniv v. Various Waxing Salons (No. 2)*, 2019 BCHRT 222 ($6,000 in costs for improper conduct) and *Gichuru v. Vancouver Swing Society (No. 3)*, 2020 BCHRT 1 ($10,000 for improper conduct).

[33] https://bchrc.net/wp-content/uploads/2019/12/Enforcement-Guide.pdf

Under Rule 36(5) an application for reconsideration does not affect the time limit in s. 57 of the *Administrative Tribunals Act* for filing an application for judicial review in respect of a final decision.

Q. Deferral

Under Rule 16, the Tribunal may defer the consideration of a complaint until the outcome of another proceeding, or to another date if:

- another proceeding is capable of appropriately dealing with the substance of the complaint, or
- it is fair and reasonable in all of the circumstances to do so.

Grievances are an example of a proceeding that may be "capable of appropriately dealing with the substance of the complaint."[34] Labour arbitrators have jurisdiction to apply the *Code* and award damages for injury to dignity due to discrimination. Most other proceedings—such as residential tenancy hearings, WorkSafeBC complaints, and criminal proceedings—are not capable of appropriately dealing with human rights complaints, because they lack this jurisdiction.

It may be "fair and reasonable" to defer a complaint in a variety of circumstances, including while awaiting the results of an internal investigation or because a party has a medical issue that prevents them from participating in the process. Either party can make an application for deferral under Rule 16(3). Supporting evidence, such as medical information, is required.

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[34] See Rule 16(1)(a), http://www.bchrt.bc.ca/law-library/rules/html-version.htm

Useful Resources

Indigenous Peoples' Exclusion from BC's Human Rights System:

Walpetko We'dalx Walkem, Ardith QC, *Expanding Our Vision: Cultural Equality and Indigenous Peoples Human Rights* (January, 2020). http://www.bchrt.bc.ca/shareddocs/Indigenous/expanding-our-vision.pdf

Cases on the Intersectional Nature of Human Rights Complaints:

Radek v. Henderson Development (Canada) and Securiguard Services (No. 3), 2005 BCHRT 302 at paras. 463-67.

PN v. FR and another (No. 2), 2015 BCHRT 60 at paras. 90-92.

Upwards Trend of Injury to Dignity Awards Recognized in Sexual Harassment Cases:

Araniva v. RSY Contracting and another (No. 3), 2019 BCHRT 97: $40,000

Ms. K v. Deep Creek Store and another, 2021 BCHRT 158: $45,000

Ms. L v. Clear Pacific Holdings Ltd. and others, 2024 BCHRT 14: $100,000

SHARP Workplaces and Stand Informed Webinars:

Track, Laura. Community Legal Assistance Society. Human Rights Complaints: When is it an option in situations of sexual assault? June 2023

Track, Laura. Community Legal Assistance Society. Human Rights and Workplace Sexual Harassment. April 2021.

BC Human Rights Clinic:

See "Resources" and BC Human Rights Clinic Remedies Chart. Also see "Resources for Stand Informed Lawyers" for examples on how to file a Human Rights complaint and completing Form 1.1 Individual Complaint Form.

BC Human Rights Tribunal: http://www.bchrt.bc.ca/

CLAS's BC Human Rights Clinic: https://bchrc.net/

Resources last updated January 2024

CHAPTER 17: THE FEDERAL HUMAN RIGHTS SYSTEM

By Menachem Freedman

A. Introduction

If the client is an employee of a federal government body or a federally regulated business, their human rights entitlements are set out in the *Canadian Human Rights Act*, RSC 1985, c. H-6 (the *CHRA*), and their recourse is through the two-tier system set out in the *CHRA*.

This section sets out the legal protections for people who experience sexual harassment under the *CHRA*, with a focus on the differences between the federal human rights system and the BC provincial system. Many legal concepts and strategies are similar between the two systems. Review Chapter 16: British Columbia Human Rights on the provincial system in tandem with this one.

Generally, however, the federal system is unique in that it is a two-tier system in which complaints are first investigated by the Canadian Human Rights Commission (CHRC). If the complaint does not settle and the CHRC finds sufficient merit, only then does the complaint move to a hearing before the Canadian Human Rights Tribunal (CHRT). Therefore, only complainants whose cases are selected by the CHRC will "have their day in court," and the process can be long.

Anecdotally, many lawyers in BC consider the *CHRA* process a last resort because of the delay caused by the two-tier system and the CHRC's gatekeeping function. A civil claim, if it is available and appropriate—it carries its own risks and problems—gives the client more control over the process. If the client is going to pursue the *CHRA* process, emphasize as strongly as possible that it may take a long time.

B. Jurisdiction

The *CHRA* is federal legislation and so applies to federal employers. The organizations subject to the *CHRA* are:

- federal departments, agencies, and Crown corporations,
- chartered banks,
- airlines,
- interprovincial communications and telephone companies,
- interprovincial transportation companies, like buses and railways that travel between provinces,

- First Nations governments and some other First Nations organizations, and
- other federally regulated industries, like uranium mines.[1]

While this list is helpful, the ultimate test for whether an employer is captured by federal or provincial jurisdiction stems from ss. 91-92 of the *Constitution Act,* 1867 and the pith and substance test developed in constitutional jurisprudence on the division of powers.[2] This can lead to some surprising conclusions, like a trade union representing workers at mostly federally regulated worksites being subject to provincial human rights legislation.[3]

C. Special Treatment of Certain Employers

The CHRC has certain special rules and procedures for dealing with complaints from particular large employers, such as Canada Post, Air Canada, and the federal government. If a complaint may be subject to special rules, call the Commission to understand how the process might differ and what to expect. Otherwise, you will be notified of any special procedures after you file the complaint.

1. Indigenous Organizations

Regarding Indigenous organizations, the *CHRA* was amended in 2008 (effective 2011) to apply to the *Indian Act*, RSC 1985, c. I-5 (*"Indian Act"*) and certain Indigenous organizations governed by federal law. The CHRC gives as an example an (*Indian Act*-created) Band council, which would be subject to the CHRA, while a gas station on reserve could be subject to provincial human rights law.[4] As these questions may touch on Aboriginal law and issues of sovereignty, exercise caution when deciding where to file a human rights complaint against an Indigenous organization. See Chapter 15: Indigenous Workplaces: Special Considerations.

Another part of this amendment was a requirement that the *CHRA* "be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality" when a complaint is made against a "First Nations" government.[5]

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[1] See https://www.chrt-tcdp.gc.ca/resources/guide-to-understanding-the-chrt-en.html for more on this.

[2] For relatively recent Supreme Court of Canada cases dealing with the division of powers, see *Rogers Communications Inc. v. Châteauguay (City)*, [2016] 1 SCR 467; *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3.

[3] *Reekie v. International Longshore and Warehouse Union Local 400*, [2005] BCHRTD No. 245, but see *Murray v. BCR Marine Ltd*., [2008] BCHRTD No. 354.

[4] Your Guide to Understanding the Canadian Human Rights Act – page 1 https://www.chrc-ccdp.gc.ca/en/resources/your-guide-understanding-the-canadian-human-rights-act-page1

[5] *An Act to amend the Canadian Human Rights Act*, SC 2008, c. 30.

2. Practical Solutions When Jurisdiction Is in Question

The risk of providing the wrong advice on jurisdiction is that, by the time the issue is discovered or decided, the client will have run out of time to make a complaint before the correct body.

Given that the tests for sexual harassment are very similar in both the provincial and federal systems and that there is no cost for filing a complaint in either system, the most prudent solution—and the one endorsed by the BC Human Rights Tribunal (BCHRT)[6]—may simply be to file a complaint in both systems if there is a concern over jurisdiction. The most likely result is that one of the two bodies will go ahead and decide the jurisdictional question, but timeliness will not be an issue if that body declines jurisdiction.

3. Brief Overview of Sexual Harassment Law in the *CHRA*

The following list contains a number of brief notes with case references, relating to the theory of sexual harassment law in the *CHRA* as compared to BC's *Human Rights Code* (the *Code*):

- Sexual harassment complaints are generally brought under both s. 7, discrimination in employment on prohibited ground (e.g., sex, sexual orientation, gender identity or expression) and s. 14(2), which specifically prohibits sexual harassment.
- The test for sexual harassment is very similar to that in the *Code*, though there appear to be fewer recent decided cases, and there is a relatively less progressive and victim-centric jurisprudence to rely on.[7]
- The *CHRA* recognizes that complaints can be intersectional under s. 3.1.
- Employers are presumed liable for the acts or omissions of their employees, etc., pursuant to s. 65, unless they "did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof" pursuant to s. 65(2). This is different from the BC approach, where these factors are relevant only to quantum and not liability. In a case where the employer rebuts the presumption and is "saved" by s. 65(2), the complaint may proceed against the individual harasser only.
- Protection against retaliation is only available once a complaint has been filed pursuant to s. 14.1, which is less expansive than the BC approach, which protects potential complainants.

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[6] *Ferguson v. Vancouver Skycap*, 2016 BCHRT 163 at para 48.

[7] *Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces) (re Franke),* [1999] FCJ No. 757 is a 1999 case that continues to be cited as the key case on the test.

- In 2018, 64% of complaints were employment-related, and 20% of them included allegations of harassment.

D. Process Part 1: The CHRC

The CHRC serves three main functions: gatekeeping, investigation, and mediation. A complaint can only proceed to a hearing if it is referred by the CHRC after its own process is complete.

Anyone can file a complaint with the CHRC, including the CHRC itself and a group or class of people. However, if the victim does not consent, under *CHRA*, s. 40, the CHRC may refuse to deal with the complaint. Once a complaint is filed, it goes through three stages: inquiry and screening, investigation, and commission.

The CHRC process is private—none of the information it gathers is accessible to anyone but the parties (unless there is a judicial review).

1. Inquiry and Screening

This is a threshold stage in which the CHRC determines whether to investigate the complaint. Important considerations include jurisdiction, timeliness, and whether the complainant should exhaust other avenues before pursuing the complaint or pursue the complaint in a different venue (s. 41(1)).

Timeliness: Regarding timeliness, the presumptive limitation period is one year from the last act or omission, with residual discretion to increase that period "if appropriate."[8]

Exhausting other avenues: The CHRC may require the complainant to exhaust other avenues, such as an internal harassment complaint or union grievance before it accepts and investigates the complaint (s. 41(1)(a)). It will then only deal with the complaint if it determines that the grievance, employer investigation, etc., has not substantially dealt with the allegations. This provision may also be used in complaints where a civil action has also been filed, even if that civil action does not make a claim for human rights damages.

Complainants should move quickly to both file a *CHRA* complaint and exhaust their internal avenues. If they begin the process of using internal avenues, they will avoid the delay caused when a complaint is filed and rejected months later so that the internal process can be engaged. However, the internal avenues may take a long time to exhaust, and so a complaint should be filed at the outset of exploring them to avoid issues with timelines and deadlines.

[8] Section 41(1)(e) and see *Gauthier v. Canada (Attorney General)*, [2018] FCJ No. 538, including lower court decisions.

2. Investigation

If a complaint makes it past the screening process, an investigator is assigned:

- The investigator interviews the complainant, respondent, and witnesses, and reviews documents provided by the parties.
- Voluntary mediation may be attempted with the assistance of the investigator in two forms:
    - Early resolution: this is on the record and information gathered may form part of the report.
    - Preventive mediation: this is confidential.
- If mediation fails or does not occur, the investigator issues a report with their findings regarding the complaint. The report may include reference to offers to settle. Both parties will have an opportunity to submit a maximum 10-page response to it.

3. Commission: Referral, Dismissal, or Settlement

The CHRC reviews the report and the parties' submissions and decides whether to refer the complaint to the CHRT or not. The CHRC may also require the parties to undertake mediation (called conciliation) at this stage. Conciliation is confidential but mandatory.

Throughout the CHRC process, if the parties settle, they may submit the settlement to the CHRC for approval in accordance with the rules. If approved, the settlement may be enforced as if it were a federal court decision (*CHRA*, s. 48).

E. Process Part 2: The CHRT

The CHRT process is very similar to the BCHRT process; the main difference is simply that a complainant cannot get to the CHRT unless the complaint has been referred by the CHRC. The BCHRT and BC's Office of the Human Rights Commissioner (BCHRC) are separate and independent; the BCHRC does not deal with individual complaints.

The CHRT process is public, but the parties can request a confidentiality order.[9]

At the CHRT stage, the role of the CHRC changes from relatively neutral investigator to more active participant. It may appear and make representations "in the public interest" before the CHRC. Often, these submissions are in support of the complaint, although the CHRC does not directly represent the complainant.[10]

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[9] Section 52 of the CHRA. See *N.A. v. 1416992 Ontario Ltd*., [2018] CHRD No. 33 at paras 15-30; *Kelsh v. Canadian Pacific Railway*, [2019] CHRD No. 51 at paras 210-216. The CHRT may anonymize names, seal certain records and documents, and exclude witnesses. From the case law, it appears that the bar for a confidentiality order is relatively lower than in the court system, as long as the applicant can show some undue hardship, and particularly when the parties consent.

[10] In 2018-2019, the CHRC intervened 209 times—which far exceeded its target of 85 tribunal or court interventions.

There are five main stages to a hearing:

1. Mediation: This is voluntary and conducted by a tribunal member. If the parties consent, the same tribunal member can then hear the complaint under a mediation-adjudication model.
2. Interlocutory motions are made in accordance with the rules.
3. The parties draft a statement of particulars, which include:
   a) the position on the facts, law, and remedy,
   b) the list of documents, and
   c) the list of witnesses and a summary of testimony.

   The CHRC may not put its record before the CHRT, so any useful documents that were produced for the CHRC should be produced again.
4. A case management conference is held to deal with any outstanding matters.
5. A hearing is held. On average, CHRT hearings last five days.

1. Remedies

Remedies under the CHRT are very similar to those under the BCHRT and are set out in s. 53(2). They include:

- Compensatory monetary remedies: Lost wages,[11] costs, and expenses incurred due to the discrimination.[12] The CHRT can also award compensation for "pain and suffering"—equivalent to injury to dignity—but this is capped at $20,000 per respondent.[13]
- Punitive damages: Up to $20,000 can be awarded in addition as "special compensation" against a respondent when the discrimination was wilful or reckless.[14]

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[11] These can be awarded up to the time of a hearing, as they were in *N.A. v. 1416992 Ontario Ltd*., [2018] CHRD No. 33.

[12] These expenses (s. 53(2)(d)) included some relocation costs for a victim of stalking to change addresses: *Bushey v. Starma*, [2003] CHRD No. 15.

[13] The BCHRT will look to previous awards and only award the maximum amount in the most egregious circumstances. Pain and suffering are discretionary and difficult to predict. In *Green v. Thomas*, 2016 CHRT 13, the Tribunal awarded only $5,000 in pain and suffering damages for a series of harassing acts, including physical ones, which had a lasting effect on the complainant. More recently, in *Young v. Via Rail Canada Inc*. 2023 CHRT 25 [*Young*], CHRT awarded Ms. Young $12,000 for pain and suffering experienced, the lasting effects of which were clearly visible to the CHRT during the hearing, as a result of discriminatory conduct by fellow employee Mr. Sawchuk under *CHRA* ss. 53(2)(e). The *CHRT* also awarded $3000 under *CHRA* s. 53(3) for VIA's reckless conduct and $6359.85 pursuant to *CHRA* 53(2)(c) for lost overtime wages plus retroactive interest. In *Youmbi Eken v. Netrium Networks Inc.* 2019 CHRT 44 [*Youmbi Eken*], the CHRT awarded the complainant, Ms. Youmbi Eken, $7000 for pain and suffering, and $6,912.20 for lost wages. The CHRT recognized that demonstrating pain and suffering symptoms are not easy to do, and a medical record is not mandatory for establishing pain and suffering (at paras. 71-72).

[14] Section 53, *CHRA*. *Canada (Attorney General) v. Johnstone*, 2013 FC 113, at para. 155, aff'd 2014 FCA 110; further consideration in *Duverger v. 2553-4330 Québec Inc. (Aéropro)*, [2019] CHRD No. 18 at paras 304-309.

- Systemic remedies: Like the BCHRT, the CHRT can order the respondent to cease breaching the CHRA and take measures to prevent future breaches, such as training.[15]
- Other non-monetary awards to address the discrimination: These could include reinstating an employee to a position they lost because of the discrimination. In the case of harassment, the CHRT has ordered a harassing supervisor reassigned and permanently distanced from the complainant.[16]

The CHRT cannot order an individual respondent to give an apology[17] or award legal costs.

N.A. v. 1416992 Ontario Ltd. 2018 CHRT 33 demonstrates some of the potential pitfalls of the *CHRA* process. This case involved a female employee who endured some disturbing and sexual comments from a co-worker and was then publicly berated and fired by her employer for complaining. N.A. (her name was anonymized) was awarded a combined total $60,000 in pain and suffering and special compensation from the employer and individual respondent, and four years' wages.

However, the events occurred in 2012, the complaint was filed with the CHRC in June 2014, and the CHRT decision was rendered December 2018. The delays arising from various aspects of the two-tiered system remain a major concern for anyone considering a CHRA complaint.

2. Judicial Review

A discussion of judicial review of CHRC and CHRT decisions is beyond the scope of this manual, but note that the deadline to file for judicial review before the federal court is 30 days from the decision.

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[15] See *Young* and *Youmbi Eken.*
[16] See, for example, *Cassidy v. Canada Post Corp*., [2012] CHRD No. 29.
[17] *Canada (Attorney General) v. Stevenson*, 2003 FCT 341.

Useful Resources

Canadian Human Rights Commission: https://www.chrc-ccdp.gc.ca/en

CHRC Annual Reports: https://www.chrt-tcdp.gc.ca/transparency/AnnualReports/annual-reports-en.html

Complaint Rules: https://www.chrc-ccdp.gc.ca/sites/default/files/chrc-complaint-rules.pdf

Dispute Resolution Operating Procedures. Computation of Time: https://www.chrc-ccdp.gc.ca/sites/default/files/drop_pord-eng.pdf

Stand Together: The Canadian Human Rights Commission's 2022 Annual Report to Parliament: https://chrcreport.ca/

Canadian Human Rights Tribunal:

A Guide to Understanding the Canadian Human Rights Tribunal: https://www.chrt-tcdp.gc.ca/documents/guide-eng.pdf

Canadian Human Rights Tribunal: https://www.chrt-tcdp.gc.ca/index-en.html

Rules of Procedure: https://www.chrt-tcdp.gc.ca/procedures/rules-of-procedure-en.html

Resources updated January 2024

CHAPTER 18: WORKERS' COMPENSATION

By Kevin Love

A. Law and Policy Framework

At a very broad level, the workers' compensation system has two components:

1. prevention, which ensures workplaces are healthy and safe, and
2. compensation, which compensates and provides benefits to workers who are injured at work.

It is administered by the Workers' Compensation Board, which operates as WorkSafeBC. Clients may use the terms "WCB," "the Board," or "Worksafe," but they all mean the same thing.

There are broadly four sources of law or rules relevant to the workers' compensation system[1]:

1. The *Workers Compensation Act,* RSBC 2019, c. 1 (the *WCA*), which sets out the legislative framework.
2. Various regulations, the most important of which is the *Occupational Health and Safety Regulation,* B.C. Reg. 296/97 (the *OHS Regulation*).
3. Board policy, which is binding on all decision makers (*WCA*, ss. 339(2) and 303(2)). The two main policy manuals are:
    - The *Rehabilitation Services and Claims Manual* (the *RSCM*), which governs compensation and benefits. Volume I contains the compensation policies that apply to claims covered by the law as it existed before significant amendments to the *WCA* came into force on June 30, 2002. Volume II contains the policies that apply to claims covered by the post-June 2002 laws.
    - The *Prevention Manual*, which governs occupational health and safety.
4. Practice directives, which are not binding but provide additional direction on certain topics.

B. Prevention

The *WCA*, *OHS Regulation,* and *Prevention Manual* set out a complex regulatory framework to regulate health and safety at work. Broadly speaking, workers' rights can be grouped into four categories:

1. The right to know about hazards in the workplace.

[1] They can all be found at https://www.worksafebc.com/en/law-policy.

2. The right to participate in the process of identifying and resolving workplace hazards, including through Joint Health and Safety Committees (Joint Committees).[2]
3. The right to refuse to do unsafe work.
4. The right not to be retaliated against for exercising health and safety rights or participating in workplace health and safety activities.[3]

C. Workplace Sexual Harassment and Assault

The *OHS Regulation* and *Prevention Manual* have a number of policies that specifically address violent, harassing, and abusive behaviour. They are presently undergoing a much-needed review and may change in the near future. Broadly speaking, the policies address three types of behaviour:

1. **Improper conduct**: Covers violence by one worker towards another. Improper conduct means "the attempted or actual exercise by a worker towards another worker of any physical force so as to cause injury, and includes any threatening statement or behaviour which gives the worker reasonable cause to believe he or she is at risk of injury."[4]
2. **Workplace violence**: Covers violence against a worker by someone other than another worker of the employer. It covers "the attempted or actual exercise by a person, other than a worker, of any physical force so as to cause injury to a worker, and includes any threatening statement or behaviour which gives a worker reasonable cause to believe that he or she is at risk of injury." Verbal abuse or harassment is not generally covered by these policies unless the worker reasonably believes they are at risk of injury.[5]
3. **Bullying and harassment**: Covers "inappropriate conduct or comments by any person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated." Actions taken by an employer or supervisor relating to the management and direction of workers or the place of employment are excluded.[6]

At a high level, these policies require employers to implement procedures, policies, training, and other work arrangements to assess, address, and investigate these

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[2] Employers with 20 or more employees must have a Joint Health and Safety Committee that includes worker representatives. Employers with more than 9 employees but fewer than 20 must have a worker health and safety representative. (See *WCA*, ss. 125 and 139).

[3] For more information, see the BC Federation of Labour's Health & Safety Centre's Rights and Responsibilities page at https://www.healthandsafetybc.ca/resources/rights-and-responsibilities/.

[4] *OHS Regulation,* ss. 4.24–4.26 and *Prevention Manual*, policy item R4.25-1.

[5] *OHS Regulation,* ss. 4.27–4.31 and *Prevention Manual*, policy items R4.27-1, R4.28-1, R4.29-1, R4.29-2, R4.30-1, and R4.31-1.

[6] *Prevention Manual*, policy items P2-21-2, P2-22-1, and P2-23-2.

hazards. The Board generally will not investigate the actual harassment or assault. Instead, it investigates whether the employer's policies and procedures addressing violence, bullying, harassment, and improper conduct comply with legal requirements.

D. Reporting and Investigations Under the *WCA*

Workers have an obligation to report any hazard that is likely to endanger the worker or any other person to their supervisor or employer.[7] They should therefore report bullying, harassment, and other violence even if someone else is the target. It is obviously important that people other than the person being targeted speak up. However, workers can find themselves in a difficult position if the person being targeted does not want to report the incident.

Employers also have reporting obligations. They must immediately report to the Board any serious injury to a worker.[8] Employers must also investigate any accident or incident that resulted in an injury to a worker requiring medical treatment or that had the potential for causing serious injury. The Employer must send their investigation reports to the Board.[9] This raises some issues around privacy in cases of sexual assault or harassment.

Workers who believe their workplace is unsafe or that their employer's policies and practices do not meet legal requirements can report directly to WorkSafeBC at 1-800-621-SAFE. Workers who are in emotional distress following a workplace injury can call the Board's crisis line at 1-800-624-2928.

An ongoing issue for worker advocates is the role of joint committees and worker health and safety representatives (worker representatives) in addressing workplace bullying and harassment. The *WCA* gives both joint committees and worker representatives a key role in preventing, addressing, and investigating workplace hazards and workplace injuries (s. 36). When an investigation is required under the *WCA*, the employer must generally involve the worker representative or a worker from the joint committee (s. 70). A report describing any corrective action must then be provided to the joint committee or the worker representative. If there is no joint committee or worker representative, the report must be posted in the workplace (ss. 175-176).

Although harassment and assault are clearly workplace hazards, joint committees and worker representatives are often not involved in these investigations or made aware of the findings of any investigation. The person who was targeted may not even be told the outcome of the investigation. This means workers may not know if they are being

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[7] In practice, the *WCA* does not contain a mechanism to punish workers for breaching their duty to report.

[8] *WCA*, s. 68. Other incidents must be immediately reported to the Board, such as fires and explosions, but they are not relevant to sexual assault or harassment.

[9] *WCA*, s. 69.

exposed to an ongoing hazard, whether any corrective measures have been taken, and whether those measures effectively eliminate the risk.

There are currently very difficult issues surrounding privacy and confidentiality in cases of bullying, harassment, or other violence in the workplace, and it is hoped that the Board will clarify these in its amendments to the current policy. However, workers who feel unsafe at work should be able to look to their joint committee or worker representative for assistance.

E. Prohibited Action Complaints

The *WCA* has protections for workers who face retaliation by their employer or union for exercising an occupational health and safety right or participating in occupational health and safety activities. This includes protections for workers who report bullying, harassment, or other violence in the workplace (ss. 47-50).

Three criteria must be satisfied for the worker to establish a *prima facie* case of prohibited action:

1. The worker participated in a protected health and safety activity. This includes exercising any right or duty under the Occupational Health and Safety Provisions of the *WCA*, testifying in a work-related coroner's inquest, or giving information about health and safety to their employer, another worker, a union, or the Board (s. 48). Simply filing a claim for WCB benefits is not generally sufficient in and of itself to meet this criterion.[10]
2. The employer did something that falls within the definition of "prohibited action." Prohibited action includes a very wide range of behaviour, including suspension, lay-off, dismissal, demotion, loss of opportunity for promotion, transfer of duties, change of location of workplace, reduction in wages or change in working hours, coercion or intimidation, imposition of any discipline, reprimand, or other penalty, and the discontinuation or elimination of the worker's job (s. 47).
3. There is a causal connection between the protected health and safety activity and the discriminatory action.[11]

If a *prima facie* case is established, the burden moves to the employer to prove that the protected health and safety activity played no role in its behaviour.[12] The Board applies a taint principle—that is, the protected health and safety activity does not have to be the employer's only, or even primary, motivation. Prohibited action will be established

[10] WCAT-2015-03765.

[11] WCAT Decision No. A1901228 at para. 80.

[12] WCAT Decision No. A1901228 at para. 81.

if the protected health and safety activity played any role in the employer's behaviour.[13]

The *WCA* sets out a broad range of remedies in cases of prohibited action, including reinstatement, removing any discipline from the worker's record, and reimbursing out-of-pocket expenses (s. 50). The Board can also award future lost wages instead of reinstating the worker. These damages are not limited to the "reasonable notice" type damages available in employment law and should reflect the worker's actual lost earnings.[14]

In addition, the *WCA* allows the Board to order that an employer pay any wages they were required to pay under the *WCA* (s. 50(2)(c)). For example, employers are required to pay joint committee members during meetings and educational leaves (ss. 40-41). The Board's power to order payment of lost wages is limited to wages that were required to be paid under the Occupational Health and Safety Provisions of the *WCA* or wages that were lost because of the prohibited action. The Board does not have a general power to enforce unpaid wages as a matter of contract or employment law or award punitive damages or damages in the nature of general pain and suffering.[15]

The deadline to file a complaint is:

- in the case of discriminatory action, one year from the date of the action alleged to be discriminatory, or
- in the case of a failure to pay wages required to be paid under the Occupational Health and Safety Provisions of the *WCA*, 60 days (s. 49(3)).

All complaints must be in writing. If the worker's complaint is successful and an order is made to remedy the prohibited action, the Board can impose sanctions if the employer fails to comply with that order. The Board generally expects the employer to comply with the order, including paying money owed to the worker, even if the employer has filed an appeal. This often makes collection easier for the worker than it may be in other circumstances. Employers who want to avoid complying with an order pending an appeal must generally obtain a stay of that order from the independent Workers' Compensation Appeal Tribunal (WCAT).

F. WCB Benefits

The *WCA* provides a range of compensation and benefits for workers with work-related medical conditions. It does not, however, provide general health insurance for conditions that are unrelated to the worker's job.

The *WCA* provides benefits for three major categories of work-related conditions:

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[13] WCAT Decision No. A1901228 at paras. 96 and 97.

[14] WCAT-2011-00152 at paras. 97-98.

[15] WCAT-2007-01377 at para 19.

- personal injury,
- occupational disease, and
- mental disorder.[16]

Sometimes it can be difficult to tell what category a worker's condition falls into. For example, certain soft-tissue injuries could be categorized as either a sprain or strain—which is generally considered a personal injury—or tendinitis—which is generally considered an occupational disease. If there is uncertainty, the Board will assess the condition both ways based on policy language.[17]

There is no burden of proof on workers. The Board should investigate and make a decision based on the available evidence. If the evidence is insufficient to make a decision one way or the other with confidence, the Board should investigate further.[18] If the evidence for and against the worker is evenly weighted, the Board should decide in the worker's favour (ss. 339(3) and 303(5)).

The Board generally refers to conditions covered by the *WCA* as compensable conditions. Sometimes, a compensable condition may lead to other health consequences for a worker. For example, a worker may develop depression as a result of the physical pain associated with a compensable back injury. Or they may injure their ankle while doing physiotherapy for a compensable knee injury. As long as the compensable condition was of causative significance in producing the subsequent condition, the subsequent condition should also be accepted as compensable.[19] The Board often uses the term compensable consequence to describe these conditions. Conditions that are not covered by the *WCA* are generally called non-compensable conditions.

1. Personal Injury

To be accepted, a personal injury must arise out of and in the course of the worker's employment (s. 134). For example, a worker who is injured after fainting on the job may be "in the course" of their employment, but if the fainting episode is a random event, there may be little evidence to show it "arose out of" the worker's employment. However, if the worker was doing strenuous work in a hot environment prior to fainting, there may be evidence to conclude the fainting spell "arose out of" the worker's employment.

If the worker's injuries were caused by an accident—which is broadly defined and includes intentional conduct by someone other than the worker (s. 1)—and one of the requirements is met (i.e., the injury arose out of OR in the course of the worker's

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[16] The *WCA* has separate provisions for non-traumatic hearing loss (ss. 145,198,226, and 250).

[17] RSCM II, chapter 4, policy item #27.00.

[18] RSCM II, policy #97.00.

[19] RSCM II, policy items #22.30 and #22.40.

employment), the other requirement is presumed unless the evidence rebuts that presumption (s. 134(3)).

Claims must generally be filed within one year of the date of injury, though it is possible to secure an extension (s. 151(3)).

2. Occupational Disease

Occupational disease is covered if the disease is due to the nature of the worker's employment (s. 136). However, work does not have to be the only cause, or even the most significant cause, of the occupational disease. The worker's employment need only be of "causative significance," meaning "more than a trivial or insignificant aspect."[20]

If a worker has an occupational disease but is not disabled from earning full wages, they are only eligible for healthcare benefits (s. 136(3)).

Pinpointing the exact cause of certain diseases—for example, cancer—can be very difficult. Therefore, certain occupational diseases are presumed to be due to the nature of the worker's employment if certain conditions are met (s. 137). Although presumptions are very helpful for workers, they are not conclusive. A presumption with respect to causation can be rebutted if the evidence shows that a claimant's work was not of causative significance. Most occupational diseases to which a presumption applies are listed in schedule 1 to the *WCA*.[21] For example, some cancers are presumed to be due to the worker's employment if the worker is exposed to known carcinogenic chemicals. It is crucial to remember that a worker's claim can be accepted even if they do not meet the criteria for the presumption in schedule 1. The claim will just have to be accepted using the usual rules, without the benefit of any presumption.

Claims for occupational disease must generally be filed within one year of the date the worker is disabled by the occupational disease, which is generally taken to be the date the worker can no longer perform their regular work-related duties.[22] It is possible to secure an extension, particularly in cases where the Board could not recognize the occupational disease at the time of disablement because the necessary medical or scientific evidence was not available (s. 152).

3. Mental Disorders

The rules governing claims for mental disorders are different depending on what is alleged to have caused the mental disorder. If the mental disorder results from a physical injury that the Board has accepted as compensable, it is adjudicated as a

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[20] RSCM II, policy item #26.23.

[21] For example, ss. 139-140 of the *WCA* contains a presumption for firefighters who develop certain cancers and heart diseases and s. 144 contains a presumption for certain workers who are exposed to communicable diseases.

[22] *WCA*, s. 151(3) and RSCM II policy #32.50 and #93.21.

compensable consequence of that physical injury. In these cases, the physical injury must be of causative significance in producing the subsequent mental disorder.[23] For example, if a worker with an accepted back injury later develops depression because of the pain and impact of the injury, the depression will be adjudicated as a compensable consequence of the back injury.

The rules governing claims for mental disorders that do not result from a compensable physical injury are much stricter. Under s. 135(1) of the *WCA*, to be accepted, the mental disorder must:

1. be diagnosed by psychiatrist or psychologist as a condition in the *DSM-5*,
2. be a reaction to one or more traumatic events or "predominantly caused" by significant workplace stressors, including bullying and harassment, and
3. not be caused by a decision relating to the worker's employment made by the worker's employer.

Policy #C3-24.00 of the RSCM II (Policy #24.00) defines "traumatic event" as an emotionally shocking event. The definition of significant work-related stressors, including bullying and harassment, is less clear. Board policy and practice are somewhat contradictory. Significant work-related stressors are defined in Policy #24.00 as stressors that are unusual in intensity, duration, or both compared to what the worker normally experiences in the workplace. If the worker's employment is inherently mentally stressful, for example, the claim may be denied because the stressors are not unusual for that worker. But Policy #24.00 also says that a stressor may be significant even though the worker has had previous work-related exposure to it. Similarly, Compensation Practice Directive #C3-3 – Mental Disorder Claims (PD C3-3) confirms that a claim should not be denied simply because a worker works in a high-stress or high-conflict position, but then goes on to confirm that the stressors must be excessive in intensity and duration compared with the normal pressures and tensions of the worker's employment. Interpersonal conflict will generally only be considered a significant stressor if it is threatening or abusive. Policy #24.00 is presently under review.

PD C3-3 also provides some guidance on the definition of bullying and harassment. In general terms, both bullying and harassment reflect conduct that is intended to, or should reasonably have been known would, intimidate, humiliate, or degrade an individual. There is no specific guidance in policy or practice with respect to what constitutes sexual assault or sexual harassment.

The standard of causation is different depending on whether the worker's claim is based on a traumatic event(s) or significant stressor(s). Under s. 135(1)(a) of the *WCA*,

[23] RSCM II, policies #C3-22.00 and #C3-22.30.

- if the claim is based on one or more traumatic events, the traumatic event(s) need only be a significant contributing factor in causing the mental disorder, and
- if the claim is based on one or more significant stressors, the stressor(s) must be the "predominant cause" of the mental disorder.

Even if work contributed to the mental disorder, the claim will be denied if events in the worker's personal life contributed to it to a greater extent.

The *WCA* creates a presumption of causation for workers in certain occupations who develop a trauma-related mental disorder following exposure to a traumatic event. Currently the presumption applies to correctional officers, emergency medical assistants, firefighters, police officers, sheriffs, nurses, emergency response dispatchers, and healthcare assistants.[24]

The provisions excluding mental disorders caused by a decision relating to the worker's employment made by the employer are applied broadly and likely incorrectly in many cases. Practice Directive #C3-3 at least clarifies that routine management decisions that are communicated in an abusive or threatening way may be considered significant workplace stressors, even if they relate to the worker's employment.

The time limit for claiming for a work-related mental disorder is one year from when the worker first experiences psychological change resulting from exposure to a work-related traumatic event or significant stressors.[25]

4. Disability Benefits

Disability benefits can be for "temporary" or "permanent" disability. A condition is considered temporary while the injury heals but will generally be considered permanent if significant change is unlikely over the next 12 months, or any foreseeable change is consistent with the normal fluctuations in the condition. For example, people with arthritis may have good days and bad days, but if those fluctuations are an accepted aspect of the arthritis, it will be considered permanent. The date a condition is considered to be permanent is often called the plateau date.[26]

Temporary Disability Benefits

Temporary disability benefits are often called "wage loss benefits". Temporary disability benefits can be for temporary **total** disability under s. 191 of the *WCA* if the worker cannot work at all, or temporary **partial** disability under s. 192 if they can return to work in some capacity. For example, immediately after an injury, the worker may be unable to work at all and would receive temporary total disability benefits. At a

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[24] *WCA*, s. 5.1(1.1) and (4); *Mental Disorder Presumption Regulation,* B.C. Reg. 136/2018, s. 1.

[25] *WCA*, s. 151(3); *Practice Directive #C3-7 (Interim) – Mental Disorder Claims – Time Limits for Application.*

[26] RSCM II, policy item #34.54.

later point, the worker may be ready to start a graduated return to work program that allows them to earn some income, albeit with limited working hours. The worker would then receive temporary partial disability benefits.

Temporary disability benefits pay 90% of the worker's average lost earning capacity (ss. 191 and 192). A worker who is temporarily totally disabled will get 90% of their pre-injury net earnings; a worker who has some capacity to work will get 90% of the difference between their pre-injury net earnings and what they are capable of earning post-injury. The benefits for the first 10 weeks of a worker's claim are based on what the worker was earning at the time of injury.[27] After 10 weeks, the benefits are generally based on the worker's average net earnings in the 12-month period before the injury, but there are many exceptions to this.[28]

Temporary disability benefits will stop:

- when the worker fully recovers, or
- if the worker does not fully recover, when their condition is deemed unlikely to change significantly over the next 12 months.[29]

If the worker does not fully recover and is left with a permanent disability, they are assessed for permanent disability benefits. Permanent disability benefits are sometimes informally called a pension, which is potentially confusing because the term "pension" could refer to various private or public pension benefits.

Permanent Disability Benefits

Permanent disability benefits can also be for permanent **total** disability or permanent **partial** disability (ss. 194-196).

Permanent partial disability benefits can be assessed using one of two different methods. The Board uses whichever results in the higher benefit rate for the worker:

The Permanent Functional Impairment Method (The "PFI Method")

The PFI Method assesses the worker's benefits based only on the nature and degree of the injury. The Board has developed rating scales that assign a percentage to different impairments (s. 195(3)). For example, all workers who lose their right thumb in an accident will be considered 20% disabled regardless of whether the worker is a right-handed carpenter or a left-handed lawyer. The fact that the lawyer may fully restore their pre-injury earnings while the carpenter may be unable to continue their trade does not matter. A worker who is rated 20% disabled would then get 20% of the benefits a totally disabled worker would get (i.e., 20% of 90% of their pre-injury net earnings).

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[27] *WCA*, s. 220; RSCM II, policy item #65.00.

[28] *WCA*, s. 211-219; RSCM II, policy items #66.00-#67.66.

[29] RSCM II, policy items #33.00 and #34.54.

The Loss of Earning Method (The "LoE Method")

The LoE Method calculates the worker's benefits based on the actual difference between what the worker was earning before the injury and what they are capable of earning after the injury.[30] For example, if the Board determines that a worker earning $4,000 per month before the injury can return to work as a customer service agent earning $3,000 per month, the worker's permanent disability award would be 90% of the difference. Note that the worker's post-injury earnings are not necessarily what the worker is actually earning. The Board can use the earnings it determines the worker could earn in a suitable and reasonably available occupation, regardless of whether the worker is actually working.[31]

5. Vocational Rehabilitation

Under s. 155 of the *WCA*, the Board may provide assistance to help aid an injured worker back to work or to lessen or remove the worker's disability. However, workers must temper their expectations, as it is very unlikely the Board will train a worker for an entirely new career. The Board generally proceeds in phases, starting with support to return the worker to their previous job. If that is not possible, it will explore different or modified work with the same employer. If this is not possible either, it will explore work opportunities in the same industry or in a new industry that makes use of the worker's existing skills and experience. Only if all these options fail will the Board provide skills training for an entirely new career.[32]

The Board may provide the worker with wage loss equivalency benefits while they are participating in a vocational rehabilitation program even though the worker's temporary disability benefits have ended.[33] It can also cover certain expenses related to the worker's job search.[34]

6. Health Care

Section 156 of the *WCA* states that the Board can pay for any health care reasonably necessary to treat a compensable condition. All health care is ultimately subject to the direction, supervision, and control of the Board (s. 157), but if there is a range of equally effective treatment options at a similar cost, it will generally let the worker choose.[35] The Board will cover the cost of psychologists and other counsellors when necessary to treat a worker's compensable condition.[36]

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[30] *WCA*, ss. 196; RSCM II chapter 6, Policy item #40.00.

[31] RSCM II, policy item #40.00.

[32] RSCM II, chapter 11, policy #C11-87.00.

[33] RSCM II, chapter 11, policy # C11-88.00.

[34] RSCM II, chapter 11, policy # C11-88.30.

[35] RSCM II, chapter 10, policy item #C10-73.00.

[36] RSCM II, chapter 10, policy item #C10-77.00.

Section 156(1.1) of the *WCA* and *Practice Directive #C10-6 (Interim) — Preventative Health Care* authorize WorkSafeBC to provide healthcare services and supplies before a worker's compensation claim is decided if medical evidence indicates that without such services or supplies the worker's health is at risk of significantly deteriorating.

7. The Review and Appeal System

The Board makes the initial decisions. Most decisions are communicated to the worker in a letter from their case manager.

In most cases, a worker who is dissatisfied with the Board's decision can ask for a review by the Board's internal Review Division. Exceptions to this are listed in s. 268(2) of the *WCA.* Appeals concerning discriminatory action complaints go directly to WCAT without a review. The deadline to request a review is 90 days from the date the decision was made for most compensation matters, and 45 days from the date the decision was made for most occupational health and safety matters.[37]

If, after a review, the worker is still dissatisfied, they can appeal to the WCAT. The deadline to do this is generally 30 days from the date the review decision was made.[38] As mentioned previously, some Board decisions, including decisions concerning discriminatory action complaints, get appealed straight to WCAT without passing through the Review Division. The deadline for most of these appeals is 90 days from the date the Board's decision was made.[39]

A worker may submit new evidence at any stage of the review and appeal process and both the Review Division and WCAT can change any decision. However, the Review Division and WCAT will generally only deal with issues that were addressed in the decision under review. For example, if a worker is appealing the denial of a back injury claim and also feels they should be compensated for a shoulder injury arising from the same accident, the shoulder injury would likely have to be submitted to the Board for an initial decision and not simply raised for the first time in a review or appeal.

WCAT can reconsider one of its own decisions if:

- new evidence has become available or been discovered, or
- WCAT committed a jurisdictional error, including a breach of the rules of procedural fairness and natural justice. WCAT has no ability to reconsider its decisions for substantive errors.[40]

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[37] *WCA*, s. 270(1); *Time Period For Review Regulation,* B.C. Reg. 164/2015.

[38] *WCA*, s. 293(1).

[39] *WCA*, s. 293(2).

[40] *WCA*, 310 and s. 307(5); WCAT's *Manual of Rules of Practice and Procedure*, rules 20.2.1 – 20.2.2.1.

A worker can only apply for reconsideration on each ground once.[41] There is no specific time limit to apply for reconsideration, but it is best not to delay unreasonably, because the power to reconsider is ultimately discretionary.

8. Employer and Worker Immunity from Claims

The workers' compensation system is founded on the "historic compromise." Workers gain access to benefits that are funded entirely by employers and payable irrespective of fault or negligence by the employer, but give up their right to sue for personal injury arising out of and in the course of their employment. Employers are forced to fund the workers' compensation system but gain immunity from lawsuits.

The immunity extends to all employers and workers covered by Part I of the *WCA*, which is the vast majority of workers and employers (s. 127). It extends not only to the worker's specific employer and co-workers but to all employers and all workers. For example, if a worker employed by company A is injured at work by the actions of a worker employed by company B while working on a multi-employer job site, company B and its workers are still immune from personal injury lawsuits.

If an employer believes that a worker is claiming for personal injury, occupational disease, or death arising out of and in the course of employment, they can ask WCAT to certify the work status of the parties and whether the injury, disability, or death of the worker arose out of and in the course of the worker's employment. WCAT will certify an answer to those questions and the Court will then apply that opinion to decide whether the claim can proceed (s. 311).

If a worker is injured on the job by someone who is neither a worker nor an employer, they can either sue or claim compensation (s. 128). For example, if a worker is sexually assaulted by a customer, the customer is not immune from lawsuits. If the worker decides to claim compensation, the Board has a subrogated right to claim against the third party, in this case the customer. If the Board recovers more than the amount of benefits paid to the worker, the excess is forwarded to the worker (s. 130(4)). If the worker decides to sue and recovers less than the benefits the worker would otherwise have been entitled to under the *WCA*, the worker is entitled to compensation to the extent of the difference (s. 129).

Not all actions by a worker or an employer will necessarily fall within the immunity detailed in s. 127 of the *WCA*. For example, if a worker develops anxiety following a social media attack by a co-worker based entirely on personal matters that have no connection to the workplace, the anxiety may not be considered to have arisen out of or in the course of the employment.

Claims that are not related to personal injury—for example, wrongful dismissal or breach of contract—are not barred by s. 127 of the *WCA*. However, the status of claims

[41] *WCA*, s. 310(4); WCAT's *Manual of Rules of Practice and Procedure*, rules 20.2.5.

for damages that can in some way be viewed as personal injury are less clear. The most notable example would be aggravated damages. There is currently very little guidance on the issue in BC.[42]

Adding to the complication and potential unfairness in BC is the BC Court of Appeal's decision in *Downs Construction Ltd. v. Workers' Compensation Appeal Tribunal*, 2012 BCCA 392 (*Downs*). It would be reasonable to think that a worker's right to sue should only be taken away if they can potentially claim WCB benefits. However, the *Downs* decision accepted that some workers will be precluded from doing both. The worker in *Downs* had sought civil damages, alleging that she was humiliated by her project manager in front of clients. At the time, WCB benefits for mental injury could only be paid for an acute reaction to a sudden and unexpected traumatic event. The Court held that the *WCA* barred all claims for work-related personal injury, even if the *WCA* also precluded benefits for that worker.

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Although the provisions governing work-related mental disorders have since been amended, be aware that the test to determine if a claim is barred is *not* whether the worker is eligible for WCB benefits but whether the injury arose out of and in the course of employment.

Useful Resources

SHARP Workplaces and Stand Informed Webinars

Dorsch, Christina. Workers Advisers Office. Workers Advisers Office BC's handling of Workplace Sexual Harassment Complaints. December 2023.

Stevens, Jenn and Parkin, Ben. WorkSafeBC. WorkSafeBC Handling of Workplace Sexual Harassment Claims. January 2022.

Love, Kevin. Community Legal Assistance Society. The WCB System's Role in Preventing, Investigating, and Compensating Workplace Sexual Assault and Harassment. April 2021.

Last updated March 2023

[42] The *Morningstar v. WSIAT*, 2021 ONSC 5576 provides some helpful guidance from Ontario.

CHAPTER 19: EMPLOYMENT STANDARDS

By Sarah Marsden

A. Introduction

This section contains an overview of the *Employment Standards Act* of British Columbia, the associated *Employment Standards Regulations*, and the basic remedies available, with an emphasis on the issues most likely to arise in the context of workplace sexual harassment cases. For a more detailed review of the *Employment Standards Act*, see the useful resources list at the end of this section.

B. Jurisdiction

The BC *Employment Standards Act,* [RSBC 1996], c. 113 (the *Act*) and the *Employment Standards Regulations,* BC Reg. 396/95 (the *Regulations*) provide minimum standards for working conditions—for example, wages, overtime, leaves and holidays, and termination—for most workplaces in BC. The Act does not apply to federally regulated industries such as banks, telecommunications, air transportation, road transportation that crosses provincial or international borders, or Indigenous Band councils (and some community services on reserve). Federally regulated workplaces are subject to the *Canada Labour Code* and associated regulations, and are not covered in depth in this chapter.

Federally Regulated Workplaces

Federally Regulated Workplaces: claims for wage loss, severance, constructive dismissal, workplace harassment protection & Employment Insurance considerations [1]

An employee under federal jurisdiction that is sexually harassed in the workplace may have a claim for wages, severance, and reinstatement in the following circumstances:

Complaint: wages, severance, and reinstatement

- An employee that is unjustly dismissed may make a complaint under section 240(1) in Part III of the *Canada Labour Code* for wages (e.g., from date of termination to date of adjudication decision) and for reinstatement. An employee can also use the same process to claim unpaid wages. The complaint form can be accessed online: https://www.canada.ca/en/employment-social-development/services/labour-standards/reports/filing-complaint.html

[1] Researched Cynthia Callison, Chaslynn Gillanders, Darwin Hanna, Kristen Barnes, and Jennifer Khor

Complaint form:
https://catalogue.servicecanada.gc.ca/apps/EForms/pdf/en/ESDC-LAB1190.pdf

The reinstatement remedy is not available under the *Employment Standards* Act, which also sets limits on compensation for length of service (but see below for information on common law notice periods).

Constructive Dismissal

Unjust dismissals under the *Canada Labour Code* include situations of constructive dismissal.[2] An employee that has had their job title and job duties reduced may have a constructive dismissal claim against their employer. This claim does not arise until the employment situation is terminated (laid off or fired). While the employee is still employed, a lawyer may assist the worker to raise concerns regarding an improper change in employment to their supervisor and request the job duties, job title, etc., be reinstated.

Employment Insurance

The employee may apply for Employment Insurance (EI) and challenge the reason for termination if the employer enters a code for firing. The client may say that there was no "misconduct". The employer has the burden to prove there was misconduct for EI coverage to be denied. Additionally, an employee may claim EI after leaving a workplace due to sexual harassment even if the record of employment indicates the employee quit. More information is available in the Employment Insurance Digest of Benefit Entitlement Principles: https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest.html.

Harassment and Violence Prevention, and Complaint Process

Under the Work Place Harassment and Violence Prevention Regulations, SOR-2020-1303, federal employers must develop a workplace harassment and violence prevention policy, assess risks, provide training, have processes to resolve complaints and provide supports, federal employers must develop a workplace harassment and violence prevention policy, assess risks.

More information about the requirements for employers can be found here:

https://www.canada.ca/en/employment-social-development/programs/workplace-health-safety/harassment-violence-prevention.html.

If an employer is not meeting the requirements, more information about the complaint process can be found here:

https://www.canada.ca/en/employment-social-development/programs/workplace-health-safety/harassment-violence-complaint.html.

C. Employees and Employers

The provisions of the *Employment Standards Act* apply to employees, subject to various exclusions based on occupation, as described below. In general, "employee" is defined broadly in s. 1:

> **"employee"** includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall;[4]

People may be found to be employees even where there is a contract stating that they are an "independent contractor". While the common law test for defining an employment relationship is subordinate to the definition given in the *Act*,[5] similar factors may be used by the Director of Employment Standards (the Director) or the Employment Standards Tribunal (the Tribunal) to determine if someone is an employee. For example, in a 2019 case, the Tribunal considered whether the employer controlled the working conditions, the manner of payment (in this case, a standard hourly wage was an indicator of an employee-employer relationship), which party bore the risk of financial loss or potential for benefit, and which party provided the tools necessary for the work.[6] The *Act* applies equally to workers with and without a written contract of employment.

Where a person is a "controlling mind" of a business, they may be excluded from the definition of "employee" as they are a business partner.[7] An unpaid person doing work

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[2] https://www.canada.ca/en/employment-social-development/programs/laws-regulations/labour/interpretations-policies/constructive-dismissal.html

[3] *Work Place Harassment and Violence Prevention Regulations*, SOR-2020-130 (2021), https://laws-lois.justice.gc.ca/eng/regulations/SOR-2020-130/.

[4] *Employment Standards Act*, RSBC 1996, c. 113 [*ESA*], s. 1.

[5] *United Specialty Products Ltd.* (23 November 2012), BCEST # RD127/12.

[6] *David A. Gillies* (25 March 2019), 2019 BCEST 27.

[7] See, for example, *Re Briggs* (26 October 2006), BCEST #D108/06).

normally done by an employee will be seen as an employee,[8] but true volunteers—that is, people giving their services freely for charitable reasons with no expectation of pay—will not.[9] Employees in training, or who are on a trial period with an employer, are considered to be employees within the meaning of the *Act*.[10] Employees on medical leave retain their employee status under the *Act*.[11]

"Employer" is defined under the *Act* as follows:

> **"employer"** includes a person
>
> (a)who has or had control or direction of an employee, or
>
> (b)who is or was responsible, directly or indirectly, for the employment of an employee;[12]

"Employer" is defined in the case law to be broader than traditional concepts of "master and servant" under common law[13] and is given a liberal interpretation.

1. Exclusions

There are many exclusions from all or part of this *Act*, most of which are found in the *Regulations.* An exhaustive listing is beyond the scope of this chapter, but as a general guide:

- the *Act* does not apply at all to professional occupations (doctors, lawyers, accountants, architects, and several others), to students employed by their schools, babysitters ("sitters" in the *Regulations*),[14] and recipients of welfare or Employment Insurance who are participating in employment programs;[15] and
- a wide range of workers are excluded from specific sections of the *Act*, ranging from farm workers, to teachers, to truck drivers.[16]

It is crucial to confirm whether the *Act* applies, or specific components of it, to a client's situation before advising.

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[8] *Re Brali Enterprises Inc.* (9 October 2013), BCEST #D079/13).

[9] *Re Shawnee Venables* (31 January 2018), 2018 BCEST 11.

[10] See, for example, *Re Selena Elrod* (18 April 2018), 2018 BCEST 39), and *Re Smith (c.o.b. Coastal Canada Consulting Services)* (17 September 1997), BCEST #D416/97).

[11] Re Cretan Enterprises Ltd. (c.o.b. Golphis Steak & Lobster) (16 November 1999), BCEST #D486/99 (Thornicroft).

[12] *ESA*, s. 1.

[13] *Re McPhee* (19 April 1997), BCEST #D183/97.

[14] "Sitter" is defined under section 1 of the *BC Employment Standards Regulations* as a person who is employed in a private residence solely to attend to a child or a disabled, infirm, or other person but is not a nurse, domestic, therapist, live-in home support worker, or employee of a business that provides these services or a daycare facility. Therefore, these workers are not excluded from the *ESA* by virtue of this provision.

[15] *Employment Standards Regulations,* BC Reg. 396/95 [*Regulations*], ss. 31-32.

[16] *Regulations* ss. 33-37.16.

2. Hiring Practices

Part 2 of the *Act* governs hiring practices and includes a prohibition on making false representations about job availability and conditions, a prohibition on charging fees for jobs or job information, and special contract and registry requirements for domestic workers.

3. Wages, Gratuities, Special Clothing, and Recordkeeping

Part 3 of the *Act* deals with wages, tips, special clothing, and employers' record-keeping obligations. Section 16 of the *Act* requires employers to pay at least minimum wage, which at time of writing is $16.75 an hour under section 15 of the *Regulations*,[17] and prohibits employers from withholding tips except to distribute them among staff.[18] Resident caretakers, live-in home support workers, and farm workers are subject to special wage rates and calculations.[19]

Part 3 also sets out requirements concerning the timing of wage payments during work and after termination, method of payment, wage statements and payroll records, among others. Under s. 25 of the *Act*, employers must provide special clothing if they require employees to wear it.

4. Breaks, Hours of Work, and Overtime

Under Part 4 of the *Act*, employers must allow an unpaid 30-minute meal break after five hours of work. They must pay overtime after eight hours a day, or 40 hours a week, and give employees a minimum of eight hours between shifts and 32 hours free of work per week unless there is an averaging agreement in place, or in the case of 32 hours' free from work only, the employer pays 1.5 the regular wage (ss. 35-37). With regard to overtime, employers can be found responsible for overtime pay not only if they direct employees to work extra hours but also if they indirectly allow it (s. 35(1)); overtime pay is 1.5 times the regular hourly wage after eight hours, and double the regular wage after 12 hours (s. 40). While there are workers excluded from these sections, as described above, they are often still subject to s. 39 of the *Act*, which is a blanket prohibition on hours of work that are "excessive" or "detrimental to the worker's health and safety." There is no set number of hours considered to be "excessive," and the individual circumstances must be considered. In some Tribunal cases, the claimant has been required to provide proof of how their working hours have affected their health.[20]

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[17] *Regulations* s. 15.

[18] *ESA*, ss. 30.3-30.4.

[19] *Regulations,* ss. 16-18.1.

[20] See, for example, *Re Dingman* (5 January 2010), BCEST #D002/10.

5. Statutory Holidays

If an employee has been an employee of an organization for 30 days and has worked 15 of them, they are entitled to have paid statutory holidays off work, or a replacement day off by agreement between the parties; if they have to work on a statutory holiday, they are entitled to be paid as usual for that day plus 1.5 times their regular wages for any time up to 12 hours, and double time thereafter (ss. 44-48).

6. Leaves

Under Part 6 of the *Act* (ss. 49.1) employees are entitled to five days of paid illness or injury leave, plus three days of unpaid illness or injury leave (after 90 consecutive days of employment). The number of paid illness or injury days is prescribed by regulation, so it is always helpful to confirm before advising (see *Regulations* s. 45.031).

Under Part 6 of the *Act* (ss. 50-53), employees are also entitled to the following unpaid leaves:

- Illness or injury leave for up to three days (after 90 consecutive days of employment).
- Maternity leave of up to 17 weeks.
- Parental leave of up to 61 or 62 weeks,[21] plus a potential additional five weeks based on the child's need.
- Family responsibility leave of up to five days to deal with health, education, or care needs for a child or immediate family member.
- Compassionate care leave of up to 27 weeks to care for a family member who is terminally ill.
- Up to 36 (child) or 16 weeks (adult) to care for a family member with an illness or injury whose life is at risk.
- Reservists' leave.
- Leave following the disappearance of a child in connection with a crime, for up to 52 weeks.
- Leave following the death of a child of up to 104 weeks.
- Bereavement leave of up to three days following the death of an immediate family member.
- Jury leave.

Employees who are on unpaid leave are entitled to have their vacation entitlement, length of service, and employer pension and benefit contributions calculated as if their employment had been continuous (s. 56).

[21] Section 51(1)(a) of the *ESA* provides up to 61 consecutive weeks of unpaid leave for a parent who has taken maternity leave under section 50. Other parents may take up to 62 weeks.

Workplace Sexual Harassment and Sexual Violence

Of specific relevance to clients who have experienced workplace sexual harassment is s. 52.5, which allows for unpaid leave of 10 days plus an additional 15 weeks for employees who have experienced "domestic or sexual violence." "Sexual violence" includes sexual abuse by any person and attempts to commit sexual abuse by any person. The leave must be requested for specific reasons, including medical, victim services, counselling, relocation, and legal/law enforcement.

"Sexual abuse" is not a defined term, and at time of writing there has been no Tribunal consideration of s. 52.5, but it may be a relevant leave for workers affected by sexual harassment. It provides an option to increase job security and should be considered alongside the employer's duty under human rights law to accommodate to the point of undue hardship on the basis of temporary or permanent disability or to address barriers arising from discrimination on the basis of sex, sexual orientation, gender identity, or gender presentation, which may include time off, reduced hours, or other accommodation (see Chapter 16: British Columbia Human Rights and Chapter 17: The Federal Human Rights System).

The *Act* includes special temporary unpaid leave for people unable to work because of the impact of COVID-19.[22] This leave covers time off in the following situations:

- The employee has been diagnosed with COVID-19 and is acting in accordance with the instructions of a medical health officer, doctor, or nurse.
- The employee is in quarantine or self-isolation in accordance with the order of a provincial health officer, an order under the *Quarantine Act*, guidelines of the BC Centre for Disease Control, or guidelines of the Public Health Agency of Canada.
- The employer has directed the employee not to work because of concerns about COVID-19 exposure.
- The employee is providing care for their child (under 19, or over 19 and still in the employee's care).
- The employee is outside of BC and cannot return to work because of a border closure.

This leave lasts for as long as the employee is in one of the above situations, and the employer cannot require them to provide a medical note, but they can require the employee to provide "reasonably sufficient proof" of their situation (s. 52.12(4)).

7. Vacation and Vacation Pay

Part 7 of the *Act* requires employers to provide a minimum amount of paid vacation (two weeks after one year of service).

[22] See *ESA* s. 52.12.

8. Termination of Employment

In non-unionized work environments, there is no freestanding right to job security or continuation (but note the unpaid leave entitlements described above). Employers may terminate employees at will and, under the *Act*, must either provide a specified amount of notice in advance of the termination date or pay the equivalent amount in wages. The notice required is one week after three consecutive months of employment, two weeks after one year of employment, three weeks after three years of employment, and one additional week thereafter per year of service, to a maximum of eight weeks (s. 63).

Unlike in common law, the employee is not under any obligation to mitigate, and mitigation should not be considered in calculating compensation owing for length of service under section 63.[23]

The right to notice or compensation for length of service does not apply to casual on-call employees, definite-term employees, employees with specific work that is to be completed within 12 months, contracts that are impossible to perform due to unforeseeable events unrelated to receivership or insolvency, and employees at construction sites. It also does not apply where an employee has been offered and has refused "reasonable alternative employment" by the employer (s. 65). As with mitigation, the Employment Standards Branch (the Branch) and the Tribunal must consider the statutory requirements and should not integrate elements of common law that might alter this obligation, such as the doctrine of estoppel where an employee has accepted an alternative position.[24]

Under s. 2 63(3)(c) of the *Act*, employees who quit or retire are generally not eligible for compensation for length of service. However, the *Act* includes the statutory equivalent of constructive dismissal; pursuant to s. 66, the Branch may determine that the employment has been terminated where "a condition of employment is substantially altered" even if an employee stops working. The Tribunal describes substantial change as being "sufficiently material that it could be described as being a fundamental change in the employment relationship" and has adopted a list of factors to consider in determining whether something amounts to a substantial change:

- The nature of the employment relationship.
- The conditions of employment.
- The alterations that have been made.
- The legitimate expectations of the parties.
- Whether there are any implied or express agreements or understandings.

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[23] See, for example, *Phil Van Enterprises Ltd.,* BC EST #D284/96.

[24] See *Isle Three Holdings Ltd. (Re),* BC EST # RD124/08.

With regard to the final point above, in *RL7 Mechanical Ltd. (Re)*, 2019 BCEST 107, the Tribunal upheld a decision in which the employer's unilateral reduction of the employee's wage by 10% was sufficient to find that there was a substantial change amounting to deemed termination.

"Conditions of employment" are defined in s. 1 of the *Act* as "all matters and circumstances that in any way affect the employment relationship of employers and employees."

In *Helliker (Re)*, BC EST #D338/97 Reconsideration of BC EST #D357/96, at 5, the Tribunal elaborated on the meaning of "matter and circumstance:"

> Second, "matter and circumstance" are individual concepts and are intended to address the reality that an employment relationship can be affected not only by a unilateral alteration in the terms of employment but also by a change in the job situation, exemplified by conduct inconsistent with an intention to continue the employment relationship, such as threats of dismissal or demotion, harassment or badgering an employee to quit.

In addition to direct changes in material terms—for example, demotion, reduction in pay, or reduction in hours—that may be part of a workplace sexual harassment case, it could be argued that such harassment itself amounts to substantial alteration of conditions, especially where an employee has refused to work or has stopped work because of harassment. If an employee has been subject to changes in working conditions as part of workplace sexual harassment, they should also consider the broader remedies available under the BC *Human Rights Code*, which can be pursued concurrently, as well as remedies under common law, in which the notice period is significantly longer (see below). Although s. 82 of the *Act* bars future claims for "wages" after there has been a determination under the *Act* in respect of those wages, a claim for compensation for length of service under the *Act* does not bar a claim for severance at common law, as the latter pertains to the termination provisions of a contract and not "wages."[25]

Under s. 63(3)(c) of the *Act*, the employer's obligation to give notice or compensation for time served is nullified if the employment is terminated for "just cause." Just cause is not defined in the *Act*, and the Employment Standards Tribunal uses common law principles. The burden of proof is on the employer. Regarding performance issues, just cause requires progressive discipline, establishment of work standards, and the employee's failure to meet those standards on a continual basis.[26]

Where the employee is engaged in deliberate and intentional misconduct—including serious breach of trust, actions prejudicing the employer's interest, or repudiation of

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[25] See *Colak v. UV Systems Technology Inc.*, 2007 BCCA 220, leave to appeal refused 2007 CanLII 66743 (SCC).

[26] *Re British Columbia (Director of Employment Standards)* (8 April 2003), BCEST #RD122/03.

the employment contract—just cause may be established without progressive discipline.[27] See Chapter 21: Civil Actions (Employment Law and Tort).

D. Processes

1. Filing a Complaint with the Employment Standards Branch

An employee who wants to claim unpaid wages or other compensation under the *Act* must make a complaint in writing within six months of the last day of their employment (s. 74(3)). Unusually, the Employment Standards Branch (the Branch) and the Tribunal have interpreted the last day of employment as being the first day of the six-month period, so this limitation date should always be calculated as six months minus one day.[28] If the claim concerns the employer's false representations or unlawful fees, the complaint must be made within six months of the date of contravention (s. 74(4)). An employee can submit a claim to the Branch by mail, fax, in person, by e-mail, or via the online form.[29] Claimants must include records of hours worked and other records with their initial claim, but even if these are unavailable, they should file their claim as soon as possible.

Section 95 of the *Act* allows claims against multiple employers; if multiple employers are responsible for employment or under common control of direction, they may be held jointly and severally liable. Section 96 creates personal liability for up to two months' unpaid wages for officers and directors of employing corporations, with certain limitations.

2. Confidentiality Request

In cases of sexual harassment, claimants may also wish to use s. 75 of the *Act*, which allows them to request their identity be kept confidential (unless disclosure is required for a proceeding or in the public interest). The complaint form does not include an option for this, but claimants can include this request in a cover letter. Alert clients that the names of employers in violation of the *Act* may be published (s.101) and, if a matter goes to the Tribunal, that it publishes its decisions, including party names. (See also Chapter 28: Privacy Law and Sexual Harassment.)

3. Initial Stages and Settlement

Once a claim is filed, the Director (or delegate) must accept and review the complaint, unless the complaint is out of time, outside the scope of the *Act*, frivolous, vexatious, or in bad faith; the claimant has not taken the required steps to resolve the complaint; there is inadequate evidence; or the matter has been subject to a proceeding or award

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[27] See, for example, *Re Jenkins* (15 July 2002), BCEST #D314/02 (Katz).

[28] See, for example, *Re Brad* (17 September 1997), BCEST #D429/97.

[29] The form is available at https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/complaint-process.

already (by a court, tribunal, or arbitrator), is resolved, or would be properly dealt with by way of a grievance under a collective agreements, pursuant to s. 3(7).

The Branch will generally ask the parties to attend mediation to attempt to resolve the dispute, usually via conference call. Under s. 91 of the *Act,* if a party does not comply with a settlement agreement, the director can file the settlement agreement in Supreme Court for enforcement. If the matter is not settled, the parties may still be encouraged to produce an Agreed Statement of Facts to use at the hearing stage.

4. Complaint Hearing

If the matter is not resolved or a party does not attend, the matter proceeds to a complaint hearing, which is also conducted by phone before an adjudicator. The Branch does not publish formal rules, but in its online policy materials it makes clear that documents should be provided in advance and witnesses may be examined.[30] Parties can expect to receive direction from the Branch on timing and procedure. The formal rules of evidence do not apply and there is no discovery process, but parties are expected to provide evidence far enough in advance for the other party to have the opportunity to review it. Parties can represent themselves, or be represented by a lawyer or a layperson in both mediation and hearings.

5. Enforcement and Investigations

The Director (or delegate) can make orders for testimony and disclosure and to maintain order at a hearing (ss. 84-84.2). The Director (or delegate) also has the power to vary or cancel a determination (s. 86). This is not an avenue of appeal, per se, but can be a way for claimants to address clear errors in a decision by requesting a variance or cancellation.

Under s. 76(2), the Director (or delegate) can conduct investigations "to ensure compliance with the *Act* and the regulations," which they may do either as the result of an individual complaint or independently of a complaint. Likewise, the director (or delegate) is given entry and inspection powers under s. 85 that do not rely on the filing of a specific complaint.

The Director (or delegate) has enforcement powers with regard to individual remedies: under s. 87, unpaid wages constitute a lien, charge, and secured debt in favour of the director; the director (or delegate) also has the authority to make third-party orders with regard to amounts owing under determinations (s. 89) and to seize assets (s.92).

[30] https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm

6. Appeals

Appeals of first-level determinations by the Director—for example, those resulting from a hearing at the Branch—are heard by the Tribunal, which also derives its jurisdiction from the *Act*. Under s. 112 of the *Act,* appeals must be filed within 30 days of the appellant's receipt of the decision (if served by registered mail), or within 21 days of receipt (if served in person). The grounds for appeal are limited under statute to one or more of the following:

- error in law,
- failure to observe a principle of natural justice, or
- new evidence not available at the time of the hearing.

To start an appeal, appellants must deliver a completed Form 1 specifying the grounds for appeal and a copy of the original determination and any written reasons (s. 112 (2)). The Tribunal's materials request a full written argument and documentation; the Tribunal may refuse to accept for filing appeals that do not contain submissions in addition to the grounds of appeal.[31]

Under section 114 of the *Act*, the Tribunal has the jurisdiction to dismiss appeals without hearing in specified circumstances, specifically:

- the appeal is not within the jurisdiction of the Tribunal;
- the appeal was not filed within the applicable time limit;
- the appeal is frivolous, vexatious, or trivial or gives rise to an abuse of process;
- the appeal was made in bad faith or filed for an improper purpose or motive;
- the appellant failed to diligently pursue the appeal or failed to comply with an order of the Tribunal;
- there is no reasonable prospect that the appeal will succeed;
- the substance of the appeal has been appropriately dealt with in another proceeding; or
- one or more of the requirements of s. 112 (2) have not been met.

Once the Tribunal accepts an appeal for filing, it provides a copy of the appeal to the respondent and the director and requests the record submitted to the director for the original decision under appeal.

The Tribunal can confirm, vary, or cancel the original order, or refer it back to the director for redetermination (s. 115). It can also reconsider its own decisions. An application for reconsideration must be made within 30 days of the date of the decision under reconsideration (s. 116).

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[31] Appeal Form 1 is available online at https://www.bcest.bc.ca/app/uploads/sites/883/2023/03/Appeal-Form-Revised-2023-07-03.pdf.

The Tribunal is not bound by the rules of formal evidence and may consider any evidence it deems necessary or appropriate. It may decide to conduct a settlement meeting. Parties may appear on their own at a settlement meeting or may be represented by a lawyer or any other person).[32] The decision is made based on the record and written submissions from the parties; there is no oral hearing. While s. 112(2) of the *Act* requires a written request for appeal specifying the grounds of appeal, a copy of the original decision, and payment of any applicable fee, the Tribunal makes clear in its appeal guidelines that it expects full submissions within the appeal deadline, as follows:

An appellant must do all of the following within the appeal period:

[…]

> a) deliver the completed Appeal Form (Form 1), written reasons and argument supporting each ground of appeal, and any supporting documents to the Tribunal;
>
> b) deliver a complete copy of the determination and a complete copy of the written reasons for the determination to the Tribunal.[33]

Counsel may argue that additional submissions and documents could follow the initial appeal, but in practice the Tribunal may deny such requests or refuse filing if it deems the initial filing to be incomplete without full submissions.

7. Remedies Offered

If the Director (or delegate) finds that a party has contravened the *Act* or *Regulations*, they have broad powers under section 79 of the *Act* to order parties to remedy or cease doing an act, post notice of determinations or standards, pay wages, employ a payroll service for the payment of wages, and repay investigation costs. In the case of contraventions about false representations (s. 8), retaliation (s. 83), or leaves and jury duty (Part 6), the Director (or delegate) can also order an employer to hire or reinstate an employee and pay lost wages, pay compensation instead, and pay out-of-pocket expenses. In the case of a breach of s. 39 (excessive hours), the director can order an employer to limit an employee's hours.

Usually, unless an employee is seeking reinstatement within the director's specific authority to order it, the most useful remedies for claimants are compensatory, such as for unpaid wages, including overtime wages, or compensation for length of service. Pursuant to s. 80 of the *Act,* claims for compensation can only "look back" one year

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[32] Employment Standards Tribunal, Rules of Practice and Procedure – Revised December 9, 2020, https://www.bcest.bc.ca/app/uploads/sites/883/2023/03/Rules-of-Practice-and-Procedure-Revised-09-Dec-2020.pdf.

[33] Employment Standards Tribunal, *How to Prepare and File an Appeal* — Revised 30 November 2020. http://www.bcest.bc.ca/

from the time of termination or the date of the complaint, whichever is earlier. If a client had two years of unpaid overtime wages prior to their termination, they can only claim one year's worth. Minimum statutory standards are not implied terms of employment contracts—for example, if the client with two years' worth of unpaid overtime wages had no overtime provisions in their contract, they would not be able to use a lawsuit in contract to obtain the prior year's overtime wages and would be limited to the remedies provided by the processes under the *Act*.[34]

8. Interaction with Other Venues

Using a combination of venues to seek a remedy may be the better option for some clients. While the *Act* process is often the only way to obtain compensation for statutory holiday pay, vacation pay, and overtime wages for people without explicit contractual terms, the common law often gives a stronger remedy in the case of termination. Notice periods for wrongful dismissal are usually significantly longer than the periods used to calculate compensation for length of service, and they may include aggravated and punitive damages. As noted above, s. 82 does not appear to bar a claim for damages in a wrongful dismissal suit where there has been a claim for compensation for length of service.[35] Section 118 of the *Act* preserves the right to sue, subject to the limits on actions to recover wages given in s. 82.

Likewise, the remedies available under human rights law can be used in tandem with the *Act* process. Human rights law allows for remedies for lost wages and injury to dignity where the client proves discrimination in the workplace under the BC *Human Rights Code* (the *Code*), as well as systemic and other remedies unavailable through the *Act*. Claims for lost wages under the *Code* may be limited by the application of s. 82 for any periods for which wages were awarded by the Branch. For example, if a client had obtained an award for three weeks' wages, those three weeks could not be claimed before the BC Human Rights Tribunal (the BCHRT), although any remaining periods of lost wages could still be claimed. The BCHRT has consistently held that the "protections, objectives, and provisions" of the *Act* cannot be said to have dealt sufficiently with a human rights claim in general.[36]

9. Legislation Specific to Migrant Workers

The Branch is also responsible for dealing with complaints under the *Temporary Foreign Worker Protection Act,* [SBC 2018]. c.45,[37] which provides for a number of rights and obligations specific to the hiring of temporary foreign workers in BC. As

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[34] *Macaraeg v. E Care Contact Centers Ltd.* (2008 BCCA 182).

[35] *Fuggle v. Airgas Canada Inc.*, 2002 BCSC 1696, *Goodkey v. Dynamic Concrete Pumping Inc.*, 2003 BCSC 546.

[36] See, for example, *Vasil v. Mongovius and another (No. 2),* 2008 BCHRT 11 (CanLII).

[37] *Temporary Foreign Worker Protection Act,* [SBC 2018]. c.45, https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/18045.

discussed in Chapter 12: Clients Who Are Newcomers to Canada and Chapter 13: Clients Who Are Racialized, migrant workers are particularly vulnerable to employment exploitation.

Useful Resources

Employment Law

CLE BC. *Employment Standards in British Columbia: Annotated Legislation and Commentary* (updated regularly). Available online (subscription-based access) at https://store.cle.bc.ca/productdetails.aspx?title=Employment-Standards-in-British-Columbia-Annotated-Legislation-and-Commentary-Print&pid=B3086520 and in print (law libraries).

Law Students' Legal Advice Program. "Employment Law Chapter" (updated annually): https://www.lslap.bc.ca/uploads/2/9/3/5/29358111/09_-_employment.pdf

Neumann, Peter, and Jeffrey Sack. *Etext on Wrongful Dismissal and Employment Law* (updated regularly; contains multiple sections dealing specifically with statutory minimums and remedies). https://commentary.canlii.org/w/canlii/2012CanLIIDocs1

Employment Standards Branch

Employment Standards guidelines and factsheets: https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards

Employment Standards Tribunal cases, while not binding, can be a helpful source of guidance and are available online, as are the Tribunal's Rules of Practice and Procedure: http://www.bcest.bc.ca/

Government of British Columbia. Guide to the *Employment Standards Act and Regulation* (policy guidelines organized by section): https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm

Resources last updated January 2024

CHAPTER 20: INVESTIGATIONS OF HARASSMENT AND VIOLENCE IN FEDERAL WORKPLACES

By Jonathan Chapnick

A. Introduction

Part II of the *Canada Labour Code*, RSC, 1985, c. L-2 (*Code*) and the *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130 (*WHVP Regulations*) jointly provide a framework for preventing and addressing harassment and violence in workplaces that are under federal jurisdiction. Among other things, the *WHVP Regulations* contain procedures for reporting and investigating occurrences of workplace harassment and violence, including sexual harassment and sexual violence. This chapter explains those procedures.[1]

B. What Are the WHVP Regulations?

The *WHVP Regulations* are a set of regulations made under the *Code*. Before 2021, the legal framework for preventing and addressing workplace harassment and violence was composed of a patchwork of provisions set out in various parts of the *Code* and the *Canada Occupational Health and Safety Regulations*, SOR/86-304 (*COHSR*). On January 1, 2021, the *Code* and the *COHSR* were amended and the *WHVP Regulations* were established. This combination of actions modified and consolidated the legal framework, with the stated aim of strengthening it.[2]

1. Application

The *WHVP Regulations* and Part II of the *Code* apply to industries and workplaces in the federally regulated private sector (e.g., air transportation, including airlines and airports; banks; road transportation services, including trucks and buses, that cross provincial or international borders; telecommunications, including telephone and Internet); and the federally regulated public sector (e.g., federal public service, Library of Parliament).[3]

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[1] Unless otherwise indicated, all citations in this chapter are to the *WHVP Regulations*.

[2] See Employment and Social Development Canada, News Release, "Government of Canada takes strong action against harassment and sexual violence at work" (Government of Canada, November 7, 2017), available at https://www.canada.ca/en/employment-social-development/news/2017/11/government_of_canadatakesstrongactionagainstharassmentandsexualv.html; Mayra Perez-Leclerc, "Bill C-65: An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1" [Legislative Summary] (Ottawa: Library of Parliament, 2019), available at https://publications.gc.ca/site/eng/9.880026/publication.html) ; Employment and Social Development Canada, Interpretations, policies and Guidelines (IPGs): Labour Program, Work Place Harassment and Violence Prevention (WHVP) – 943-1-IPG-104, available at https://www.canada.ca/en/employment-social-development/programs/laws-regulations/labour/interpretations-policies/104-harassment-violence-prevention.html (retrieved April 19, 2023) [*WHVP IPG*].

[3] Legislative Summary at 4.

The process for resolving complaints about harassment and violence under the *WHVP Regulations* apply only to occurrences that took place (or of which an employer first became aware) on or after January 1, 2021. Prior occurrences are covered by the provisions of the *Code* and *COHSR* that were in force at the time.[4]

2. Nature and Scope of the Regulations

The purpose of Part II of the *Code* is to prevent accidents, injuries, illnesses, and occurrences of harassment and violence arising out of or in the course of employment (s. 122.1). Section 125(1)(c) and ss. 125(1)(z.161) to (z.163) of the Code identify several duties that employers have in terms of preventing workplace harassment and violence.[5] Section 125(1)(z.16) requires employers to "take the prescribed measures to prevent and protect against harassment and violence in the work place, respond to occurrences of harassment and violence in the work place, and offer support to employees affected by harassment and violence in the work place."[6]

The "prescribed measures" are set out in the *WHVP Regulations*. Among other things, the *WHVP Regulations* require employers and employees to jointly develop a "work place harassment and violence prevention policy" (WHVP Policy), conduct harassment and violence risk assessments, develop and implement preventive measures, and develop and implement training (ss. 5-12). Employers must also inform employees about nearby "medical, psychological or other support services" related to harassment and violence (s. 13).[7] In addition, ss. 14-34 of the *WHVP Regulations* stipulate that there must be a "resolution process"—including procedures for reporting and investigating occurrences of harassment and violence—in place to address occurrences of harassment and violence. The employer's WHVP Policy must contain a summary of this process.

C. What Is "harassment and violence" under the *WHVP Regulations* and the *Code*?

For the purposes of the *WHVP Regulations* and Part II of the *Code*, "harassment and violence" is broadly defined in s. 122(1) of the *Code* as "any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause

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[4] See *WHVP IPG*, "Background."

[5] For example, the duty to investigate, record, and report occurrences of harassment and violence, and the duty to ensure managerial and non-managerial employees receive training in harassment and violence prevention and are informed of their rights and obligations relating to harassment and violence.

[6] The obligations set out in s. 125(1)(c) (investigate, record, and report) and s. 125(1)(z.16) (take prescribed measures to prevent and protect, respond, and offer support) apply to former employees in relation to an occurrence of harassment and violence that "becomes known to the employer within three months" of the cessation of employment (*Code*, s. 125(4)).

[7] See *WHVP IPG*, s. 13, Q1 for examples of "other support services."

offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment."[8]

Case law and federal government interpretation guidelines provide further guidance on the types of actions and behaviours that may, or may not, be considered "harassment and violence" within the meaning of the federal statutory scheme.[9] For example, the *WHVP IPG* (see note 1) states that a single action or comment may amount to harassment and violence.[10] It also provides examples of harassment and violence, and the guideline confirms that retaliation and discriminatory harassment (i.e., harassment based on a prohibited ground of discrimination under the *Canadian Human Rights Act*, RSC 1985, c. H-6 (*CHRA*)) constitute harassment within the meaning of the *WHVP Regulations* and Part II of the *Code*.[11]

The federal concept of harassment and violence is similar to WorkSafeBC's definition of "bullying and harassment."[12] It encompasses harassing and violent behaviour by any person towards an employee and is not limited to employee-on-employee harassment and violence.[13] In addition, the language of s. 122(1) suggests that the test for determining whether impugned conduct is harassment and violence involves an objective assessment of the behaviour—that is, whether a reasonable person would expect the conduct to cause offence, humiliation, or other injury or illness to an employee.

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[8] To date, no specific actions or behaviours have been "prescribed" for the purpose of this definition (*WHVP IPG*, s. 122, Q2).

[9] See, for example, *Joss v. Treasury Board (Agriculture & Agri-Food Canada)*, 2001 PSSRB 27; *Spooner v. Treasury Board (CSC)*, 2009 PSLRB 60; *CNR Company v. Teamsters Canada Rail Conference*, 2022 CanLII 10394 (CA LA); *Van-Kam Freightways Ltd. v. Teamsters Local Union No. 31*, 2023 CanLII 19775 (CA LA).

[10] *WHVP IPG*, s.122, Q1.

[11] *WHVP IPG*, s. 122, Q3. Harassment can include spreading malicious rumours or gossip, cyberbullying, making offensive jokes or remarks, playing unwanted practical jokes, social exclusion or isolation, unwanted remarks about a person's appearance, tampering with a person's belongings, deliberately impeding a person's work, vandalism, persistently criticizing, undermining or belittling a person, misusing authority to create hardship for a person (e.g., maliciously changing work guidelines, withholding information, setting impossible deadlines, maliciously blocking applications for leave or professional development), intruding on a person's personal space, public or private ridicule, verbal threats or intimidation, unwelcome physical contact, sexual innuendo, unwanted advances or requests, displaying offensive visuals, and making aggressive or rude gestures. Violence can include hitting and kicking, spitting, squeezing and pinching, swearing or shouting in an offensive manner, verbal abuse, and contact of a sexual nature.

[12] WorkSafeBC, *Prevention Manual*, Item P2-22-1, "Worker Duties – Workplace Bullying and Harassment" (effective November 1, 2013, revised April 6, 2020).

[13] For further information about and an analysis of WorkSafeBC's definition of bullying and harassment, see Chapter 18: Workers' Compensation of this current manual and WorkSafeBC, OHS Guideline G-P2-21(1)-3, "Bullying and Harassment" (issued November 1, 2013, revised April 6, 2020).

D. How Are Harassment and Violence Issues Resolved under the *WHVP Regulations*?

Under the *WHVP Regulations*, most harassment and violence issues are resolved pursuant to the "resolution process" outlined in ss. 14-34, a summary of which must be in the employer's WHVP Policy. The resolution process as outlined in the *WHVP Regulations* does not, however, cover occurrences of harassment and violence where the "responding party" (i.e., the person alleged to have engaged in harassment and violence) is neither the employer nor an employee and:

1. exposure to harassment and violence is a normal work condition for the employee who allegedly experienced the harassment and violence; and
2. the employer has measures in place to address that workplace harassment and violence (s. 15(2)).

1. Notice of Occurrence

Under the *WHVP Regulations*, to make a complaint or otherwise begin the resolution process, the "principal party" (i.e., the employee who allegedly experienced the harassment and violence) must report an occurrence of harassment and violence by providing their employer, or the employer's "designated recipient," with "notice of an occurrence" (s. 15(1)).[14] Alternatively, a witness to harassment and violence can initiate the resolution process by providing a notice of occurrence (s. 15(1)).[15] A notice of occurrence can be provided verbally or in writing (s. 15(1)) and must include the names of the principal party and responding party, the date of the occurrence, and a detailed description of the harassment and violence (s. 16). There is no time limit on providing a notice of occurrence.[16]

During the resolution process, the employer or designated recipient must provide monthly status updates to the parties involved (s. 34).[17]

2. Initial Review and Response

When an employer or designated recipient receives a notice of occurrence, they must review it to determine if it contains all the required information (s. 19(1)).[18] If the notice is incomplete in the sense that the employer cannot determine the principal party's identity, the *WHVP Regulations* deems the occurrence to be resolved and the

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[14] A "designated recipient" is a person (e.g., office manager, external consultant) or work unit (e.g., Human Resources department) designated by the employer to receive notices of occurrence (*WHVP Regulations*, ss. 1(1) and 14).

[15] A witness can provide a notice of occurrence anonymously (*WHVP Regulations*, s. 15(4)).

[16] *WHVP IPG*, s. 125, Q1.

[17] For guidance on the information that should be included in the monthly status updates, see *WHVP IPG*, s. 34, Q1.

[18] *WHVP IPG*, s. 19, Q1. For the remainder of this chapter, I will refer to "the employer or designated recipient" collectively as "the employer."

employer is not required to take any further action (s. 19(2)).[19] If the notice is complete, the employer must contact the principal party within seven days of receiving it to provide information about their *WHVP Policy*, the resolution process, and the employee's right to be represented during the process (s. 20).

At this stage in the process, the *WHVP Regulations* do not require the employer to contact the responding party.[20] There is no requirement to contact the responding party until the investigation stage (see s. 26). According to the *WHVP IPG*, the employer should only contact the responding party in the early stages of the resolution process "if the principal party agrees that it is appropriate."[21]

3. Reasonable Effort to Resolve (Informal Resolution)

After the initial review and response stage, the employer and the principal party (and the responding party, if they have been contacted) "must make every reasonable effort to resolve" the alleged occurrence within 45 days of the date of the notice of occurrence (*WHVP Regulations*, s. 23(1)). At this stage of the resolution process, the employer and the principal party (and the responding party, if they have been contacted) are required to review the notice of occurrence to determine whether the alleged occurrence amounts to harassment and violence within the meaning of the Code (*WHVP Regulations*, s. 23(2)). This is meant to be an attempt at informal resolution of the matter.[22] The *WHVP Regulations* also provide for optional conciliation at this stage of the process (s. 24).

4. Investigation

If the matter is not resolved informally, the principal party can request a formal investigation. In that case, it appears that the employer *must* trigger the investigation procedures under the *WHVP Regulations*.[23] First, they must provide "notice of investigation" to the principal party and responding party (s. 26). Then they must select

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[19] *WHVP IPG*, s. 19, Q1.

[20] Section 21 of the *WHVP Regulations* sets out the requirement that the employer contact a witness who provides a notice of occurrence. Section 22 sets out the requirements related to contacting the responding party.

[21] *WHVP IPG*, s. 20-22, Q4.

[22] According to the *WHVP IPG*, the employer and the principal party (and the responding party, if they have been contacted) should meet (either virtually or in person) to conduct their review of the notice of occurrence (*WHVP IPG*, s. 23, Q1 and Q2).

[23] Section 25 of the *WHVP Regulations* states that an investigation "*must* be carried out if the principal party requests it" [emphasis added]; see also WHVP IPG, s. 23, Q2. The previous language in section 20.9 of the *COHSR* was similarly directive in relation to workplace violence complaints: "If the matter is unresolved, the employer *shall* appoint a competent person to investigate the work place violence" [emphasis added]. The Federal Court of Appeal, however, interpreted this *COHSR* provision as allowing an employer to "review a complaint with a view to determine whether, on its face, it falls within the definition of work place violence," and permitting the employer to decide against appointing an impartial investigator in situations where it was "plain and obvious that the allegations do not relate to work place violence even if accepted as true" (*PSAC v. Canada*, 2015 FCA 273 at paras. 33-34). See also *CFIA v. PSAC*, 2020 OHSTC 4 (CanLII) and *Burlacu v. Attorney General of Canada*, 2021 FC 864.

a person to act as the investigator, either by choosing from a list of investigators drawn up and agreed-upon by all the parties or by appointing a person with the mutual agreement of the parties (s. 27(1)). If there is no agreed-upon list of investigators and the parties cannot agree on a person within 60 days of the notice of investigation being issued, the employer must select a person from the roster of investigators established by the Canadian Centre for Occupational Health and Safety (s. 27(1)(b)(ii)).[24]

Once the investigator has been selected, the investigation process will typically resemble that of a third-party workplace investigator conducting an internal workplace investigation for an employer. The investigator should conduct interviews and collect evidence, assess the credibility and reliability of the evidence collected, make findings of fact (on a balance of probabilities) regarding the occurrence, analyze and draw conclusions about the facts (e.g., determine whether the responding party engaged in harassment and violence within the meaning of the *Code*), and prepare a report.

The *WHVP Regulations* stipulate that the investigator's report must include a general description of the occurrence, the investigator's conclusions—"including those related to the circumstances in the workplace that contributed to the occurrence"—and the investigator's "recommendations to eliminate or minimize the risk of a similar occurrence" (s. 30(1)). The report must protect the identities of the persons involved, and the employer must provide a copy of the investigator's report to the parties, the workplace health and safety committee (or the health and safety representative in a smaller workplace), and the designated recipient (if a designated recipient was involved in the resolution process) (s. 30(2) and (3)). The employer and the workplace health and safety committee (or the health and safety representative) must jointly determine which recommendations to implement (s. 31).

While the investigation is ongoing, the employer and the parties may continue to attempt to resolve the matter informally through negotiation or conciliation.[25] However, once the investigator has issued their report, informal resolution under s. 23 (negotiation) or s. 24 (conciliation) of the regulations is no longer an option (ss. 23(1) and 24).

The *WHVP Regulations* do not provide a procedure for appealing the investigator's process, findings, conclusions, or recommendations. However, according to the *WHVP IPG*, investigations under the *Regulations* may be subject to judicial review by the Federal Court of Canada.[26]

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[24] See Canadian Centre for Occupational Health and Safety, "Work Place Harassment and Violence Prevention Regulations Roster of Investigators," https://investigator-enqueteur.ccohs-cchst.ca (retrieved April 19, 2023).

[25] *WHVP IPG*, s. 24, Q1.

[26] *WHVP IPG*, s. 30, Q1. It is unclear whether the Federal Court of Canada has jurisdiction under section 18.1 of the *Federal Courts Act*, RSC, 1985, c. F-7 (*FCA*) to review an investigator's process or decision under the *WHVP*

E. Is There Oversight of the Resolution Process under the *WHVP Regulations*?

The resolution process under the *WHVP Regulations* is subject to some external oversight by at least two public bodies: first, the Employment and Social Development Canada's Labour Program and then, the Canada Industrial Relations Board.

1. Employment and Social Development Canada's Labour Program

First, if an employee feels that their employer did not follow the requirements of the *Code* or the *WHVP Regulations* for conducting the resolution process, the employee can make a complaint to the Employment and Social Development Canada's Labour Program (Labour Program) (*Code*, s. 127.1(8)).[27] The Labour Program must investigate the employee's complaint unless it determines that the complaint amounts to an "abuse of process" or has already been "adequately dealt with" in another forum (*Code*, s. 127.1(9)). In its investigation of the complaint, the Labour Program will not determine whether the employee's allegations of harassment and violence are substantiated. Rather, the role of the Labour Program is limited to ensuring that the employer complied with the resolution process requirements stipulated in the *WHVP Regulations*.[28]

If the employer is found to be non-compliant, the Labour Program's first level of enforcement usually involves an "Assurance of Voluntary Compliance," or "AVC," which is the employer's written commitment to correct their contraventions described in the AVC and provide written confirmation of compliance by a specified date. If the employer does not complete the corrective actions set out in the AVC, or if the Labour Program determines that a "situation of danger" exists, the Labour Program will issue a "direction," which is a written order directing the employer to cease and correct its contraventions within a specified period.[29]

If they disagree with a Labour Program direction (or the Labour Program's process in issuing the direction), an employer, employee, or employee's union can appeal to the

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Regulations. This question seems to depend, at least in part, on whether an investigator under the regulations is a "federal board, commission or other tribunal" within the meaning of s. 2 of the *FCA*. See *Anisman v. CBSA*, 2010 FCA 52 for the Federal Court of Appeal's analysis for determining whether a person or organization is a "federal board, commission or other tribunal" under the *FCA.*

[27] Before referring their complaint to the Labour Program, the employee must first submit it to their supervisor or to the person their employer designated to receive these types of complaints, and attempts must be made to resolve the complaint internally (see *Code*, ss. 127.1(1) to (1.2) and *WHVP Regulations*, s. 10(2)(k)).

[28] *WHVP IPG*, s. 4, Q1. For more information on the Labour Program, see Employment and Social Development Canada, "Labour Program," retrieved April 19, 2023, available at https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour.html; and Employment and Social Development Canada, "Workplace health and safety compliance," retrieved April 19, 2023, available at https://www.canada.ca/en/employment-social-development/services/health-safety/compliance.html [*Health and Safety Compliance*].

[29] *Health and Safety Compliance*. See *Code*, s. 145.

Canada Industrial Relations Board (CIRB) (*Code*, s. 146). An AVC (and the Labour Program's process in issuing the AVC) cannot be appealed to the CIRB, but it is subject to judicial review by the Federal Court of Canada.[30]

2. Canada Industrial Relations Board (CIRB)

Second, if an employee believes their employer has penalized them in any way (e.g., dismissed, suspended, demoted, disciplined, or threatened them, or laid them off) for initiating or participating in the resolution process or otherwise taking action or exercising their rights under the *Code* or the *WHVP Regulations*, the employee can file a reprisal complaint to the CIRB (*Code*, ss. 133(1) and 147). There is a 90-day limitation period for these types of complaints (*Code*, s. 133(2)).

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[30] See *Joseph v. Canada School of Public Service*, 2022 CIRB 1015.

CHAPTER 21: CIVIL ACTIONS (EMPLOYMENT LAW AND TORT)

By Rose Keith, KC

A. Jurisdiction

Employment relationships are contractual, and so contract law governs the relationship between an employer and employee. The terms of a contract can be written, verbal, or implied, or a combination of all three. The British Columbia *Employment Standards Act* (the *Act*) and the *Canada Labour Code* (the *Code*), impose minimum requirements on all employment relationships. The provisions of the *Code* apply to federally regulated enterprises such as banking, while all other employment relationships are governed by the *Act.* Employers and employees cannot contract out of the minimum requirements of either the *Act* or the *Code.* Typically, beyond the minimum requirements of employment standards legislation, further contractual terms either implied by common law or specified in a written employment agreement will govern the employment relationship between employer and employee. Canadian courts have jurisdiction over disputes concerning compliance with contractual terms.

The employment relationship may also give rise to tort actions, including where the employee is the victim of sexual assault or harassment. The employer has a duty to provide a safe and harassment-free workplace and may be directly liable for any failure to do so. An employer may also be vicariously liable for harm or damage caused to an employee because of the actions of another employee or a customer/client of the employer.

However, while civil claims for sexual harassment have been historically pursued, the recent inclusion of bullying and harassment provisions in workers compensation legislation may impede future claims. It may be necessary to consider pursuing these claims through WorkSafeBC. The Courts retain jurisdiction over breach of contract cases, even where the underlying facts found the basis for a claim for which the workers compensation tribunal maintains exclusive jurisdiction. Decisions from the Ontario Workers Compensation Board[31] suggest that this is the better approach and recent BC Supreme Court authority also confirms this. The Workplace Safety and Insurance Appeals Tribunal (WSIAT) in *Morningstar v. Hospitality Fallsview Holdings Inc.* 2019 ONWSIAT 2324 barred not just the plaintiff's claim for damages for sexual harassment but also her claim for constructive dismissal based on harassment on the basis that the Tribunal had exclusive jurisdiction. The decision was appealed[32] with the court finding that the reasoning and conclusions of WSIAT were unreasonably. The

[31] See, for example, *Morningstar v. Hospitality Fallsview Holdings Inc.* 2019 ONWSIAT 2324.

[32] *Morningstar v. Hospitality Fallsview Holdings Inc. 2021 ONSC 5576.*

WSIAT had found that the facts were inextricably linked to the workplace injury and that therefore the action for constructive dismissal must be barred.

The Ontario Supreme Court considered what it means for the facts to be "inextricably linked" to the workplace harassment. They concluded that it would be unreasonable to bar an action for constructive dismissal simply because the same facts that relate to that action also incidentally support an action for personal injury concluding:

> …To focus on the facts as linked to the workplace accident, but to disregard both the claim for constructive dismissal in its own right and the nature of the benefits sought in the action, abrogates to the WSIAT more authority than was ever intended to be granted to it.

The British Columbia Supreme Court has also confirmed this approach in *Deol v. Dreyer Davison LLP*[33]. The British Columbia Supreme Court held that "general damages for breach of an employment contract stand in place of reasonable notice and are distinct from claims for personal injury," so that the plaintiff's claim for constructive dismissal was permitted to proceed, though her claims for damages for personal injury were left to the worker's compensation tribunal. Also, in *Ashraf v. SNC Lavalin ATP Inc*.[34] the Alberta Court of Appeal allowed a claim for constructive dismissal to proceed, as it claimed compensation distinct from that available under the Alberta *Workers' Compensation Act (WCA)*. The Court noted, at para. 11:

> The *WCA* asserts no jurisdiction to compensate claims for constructive dismissal and it is not suggested that there exists a collective agreement or any statutory scheme which could assume jurisdiction to address that claim. If the judgment appealed from were allowed to stand, the appellant would be left without a forum to advance that claim, as would every other claimant for constructive dismissal who alleged that the workplace abuse leading to termination also caused stress or other psychological injury. With respect, we conclude the chambers judge erred in striking the claim as it relates to the claim for constructive dismissal.

The authorities from the British Columbia Supreme Court and The Workers' Compensation Appeal Tribunal (WCAT) that have considered the "worker/worker" bar indicate that claims relating to damages arising from sexual assault or harassment in the workplace may fall under the purview and jurisdiction of WorkSafeBC rather than the courts. Conversely, the court will maintain jurisdiction over claims of constructive dismissal as a result of a failure to provide a safe and harassment-free workplace brought by victims of sexual harassment.

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[33] *Deol v. Dreyer Davison LLP*, 2020 BCSC 771 (CanLII) at para 93.

[34] *Ashraf v SNC Lavalin ATP Inc.*, 2015 ABCA 78 (CanLII).

An employee may pursue a civil claim if they have lost their job in the context of sexual harassment in the workplace. They may have a claim for damages arising from the wrongful dismissal and a claim for aggravated or punitive damages arising from the sexual harassment. Any claim that they have for damages relating to the sexual harassment itself will fall under WorkSafeBC's jurisdiction.

People who have experienced sexual harassment in the workplace have access to a number of remedies. Under human rights legislation, sexual harassment is discriminatory, and the victim may be entitled to compensation, reinstatement, and other relief.[5] Under workplace legislation, a worker may have a claim for compensation if the sexual harassment leads to a diagnosable mental disorder.[35] In the civil courts, an individual may assert tort claims and claims for breach of contract. A wrongful dismissal in the context of sexual harassment may result in an award for aggravated and/or punitive damages for the manner of dismissal.[36]

B. Processes

1. What Are the Terms of the Contract?

While the employment relationship is similar to any other contractual relationship, the Supreme Court of Canada has specifically recognized the special nature of the employment relationship. Therefore, an employment contract contains protections not normally seen in a typical contract, most notably the requirement to comply with statutorily imposed minimum terms and conditions of employment.

The starting point for determining what protections and remedies are available is to determine the contractual terms that govern the employment relationship. In a written employment agreement, these terms are specified. If there is no formal written agreement, consider whether there were any written communications, including emails and text messages, that might be useful to prove the terms on which the parties agreed. A contract of employment can be partly written, partly oral, or entirely oral, depending on the facts. An oral contract is legally enforceable, but its specific terms are more difficult to prove.

If the employment agreement is written, consider whether it is enforceable: Have the requirements for a valid and enforceable contract, including whether consideration was provided for the agreement, been met? To determine the enforceability of an employment contract, consider the following:

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[5] *BC Human Rights Code*, RSBC 1996, c. 210 and *Canadian Human Rights Act*, RSC 1985, c. H-6.

[35] *Workers Compensation Act*, RSBC 1996, c. 492.

[36] *Deol v. Dreyer Davison LLP*, 2020 BCSC 771.

1. Was the agreement entered into before or after the employee-employer relationship was established? If entered into after the employment had begun, was fresh consideration provided for entering into the agreement?
2. Are the terms of the agreement ambiguous? Terms of the agreement that are ambiguous will be subject to the *contra preferentum* rule and will be interpreted against the drafter, who is almost always the employer.
3. Do the written terms comply with at least the minimum requirements of the relevant employment standards legislation? If not, they are not enforceable. Parties are not able to contract out of the minimum terms of the *Act* or the *Code.*[8]

In a wrongful dismissal case, the most pertinent term in an employment contract may be one providing for a specific notice period in the event of termination without cause. Not all employment contracts include notice terms. Even if the contract includes a notice term, consider whether it is enforceable—it must comply with the minimum notice requirements of the *Act,* s. 63(3). If it does not, it will be struck out and the common law obligation to provide reasonable notice will apply instead.

The amount of notice required under common law is determined with reference to specific facts about the employee, the employment relationship, the nature of the work, and any other factors that may affect re-employment. These are commonly referred to as the *Bardal* factors, after the Ontario High Court of Justice decision in *Bardal v. Globe & Mail Ltd.*,[9] where the court held:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.[10]

These factors must be considered carefully in any given case. Notice at one month per year of service is sometimes the starting point for negotiations, but it is not the rule of thumb. Short-term employees are sometimes entitled to much more than one month per year of service, while long-term employees may be entitled to less. The longest notice periods awarded by the courts pursuant to the common law have been around 24 months.

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[8] *Employment Standards Act*, RSBC 1996, c. 113; *Canada Labour Code*, RSC 1985, c. L-2.

[9] *Bardal v. Globe & Mail Ltd.* (1960), 24 DLR (2d) 140 (Ont. H.C.) [*Bardal*].

[10] *Bardal,* at 81.

2. Has There Been a Breach of the Terms of the Contract?

Once the terms of the employment contract have been determined, the next step is to consider whether the employment contract has been breached.

An employment contract can be terminated by either party at any time on either a "with cause" or "without cause" basis. If it is terminated on a with cause basis by the employer, the employer bears the onus of proving the existence of cause, which generally involves proving that the employee's actions have so irreparably harmed the employment relationship that it cannot continue. Cause is very difficult to establish, particularly if there have been no prior warnings. It must be fundamental and go to the root of the employment agreement.

To terminate an employment contract without cause, the employer must simply provide adequate notice of its termination to avoid breaching the employment contract. Adequate notice must be determined based on the facts of any particular situation. The common law imposes an obligation of "reasonable notice" which can be set aside with specific contractual terms as long as they are in compliance with employment standards minimums.[37]

A constructive dismissal is a fundamental, without notice change to the terms or conditions of employment—for example, if an employee's conditions at work change for the worse after they reject the advances of a superior. If those changes are fundamental, they may support a constructive dismissal claim—but consider whether such a claim would be under WorkSafeBC's jurisdiction rather than the courts'.

3. Determination of Damages

If there has been a breach of the terms of the contract of employment, the employee is entitled to be put in the position they would have been in had the breach not happened. All aspects of an employee's compensation must be considered, including wages, variable compensation, bonuses, extended benefits, and any other perks they were entitled to. Damages will depend on the notice period to which the employee was entitled pursuant to the employment contract or the common law if the contract is does not specify a notice period.

4. Resolution of a Claim

Employment disputes can be resolved informally through negotiation and typically begin with the employee quantifying the loss that they have suffered because of the breach of contract. Negotiations can be conducted in any format—in writing, via electronic communication, or verbally. Settlement negotiations should typically be "without prejudice."

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[37] *Employment Standards Act*, RSBC 1996, C. 113, s. 63; *Canada Labour Code*, RSC 1985, c. L-2, s. 235.

If the dispute cannot be resolved through informal negotiations, the client has the option of litigation in the BC Supreme Court, provincial court, or civil resolution tribunal. If the only issue is notice/damages, summary trial proceedings can be effective. The limitation period for commencing litigation is two years from the date of termination.

There are a number of considerations to bear in mind when negotiating the resolution of a wrongful dismissal case. In general, wrongful dismissal cases are resolved by the employer either paying the employee a lump sum or continuing to pay the employee's salary through the notice period, with the payment stopping upon re-employment of the employee, with or without a reduced lump sum payout. The settlement amount is net of required statutory deductions, which is different from the regular taxes deducted from an employee's pay. Employers should be withholding as required for lump sum payments of retiring allowances, or at the following rates:

- 10% on amounts up to and including $5,000
- 20% on amounts over $5,000 up to and including $15,000
- 30% on amounts over $15,000

Employees can mitigate the tax consequences of lump sum payments by having amounts paid directly into an RRSP and having no withholdings taken from amounts that are attributable to legal fees. Withholdings should not be taken on payments meant to reimburse for costs incurred because of the loss of extended benefits.

Other items to consider in any resolution include:

- provision of outplacement services,
- provision of a reference/reference letter,
- enforceability of non-competition clauses, and
- EI overpayments.

C. Civil Claim for Sexual Assault

By Jennifer Khor

While there is no independent tort action for sexual harassment,[38] a client may have a civil action in tort against the harasser, where the sexual harassment equates to sexual assault or battery. Where acts are unauthorized, intentional wrongs, if there is a significant connection between the creation or enhancement of a risk and the wrong that ensues, employers may be held vicariously liable for wrongs committed by their employees.[39] In addition to general damages, past income loss, cost of future care, and

[38] *Bhadauria v. Seneca College of Applied Arts and Technology*, 1981 CanLII 29 (SCC), 2 SCR 181 (SCC); *Caychuk v. Best Cleaners and Contractors Ltd.* [1995] B.C.J. No. 1203 (B.C.S.C.).

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

aggravated and punitive damages may be awarded.[40] There is no time limit for bringing a claim relating to sexual assault, or a claim relating to misconduct of a sexual nature if the misconduct occurred when the client was a minor.[41] These claims would be difficult for a client to pursue on their own. See Chapter 22: Civil Actions (Tort Claims for Sexual Assault).

Last updated May 2023

D. Flow Charts for Reference

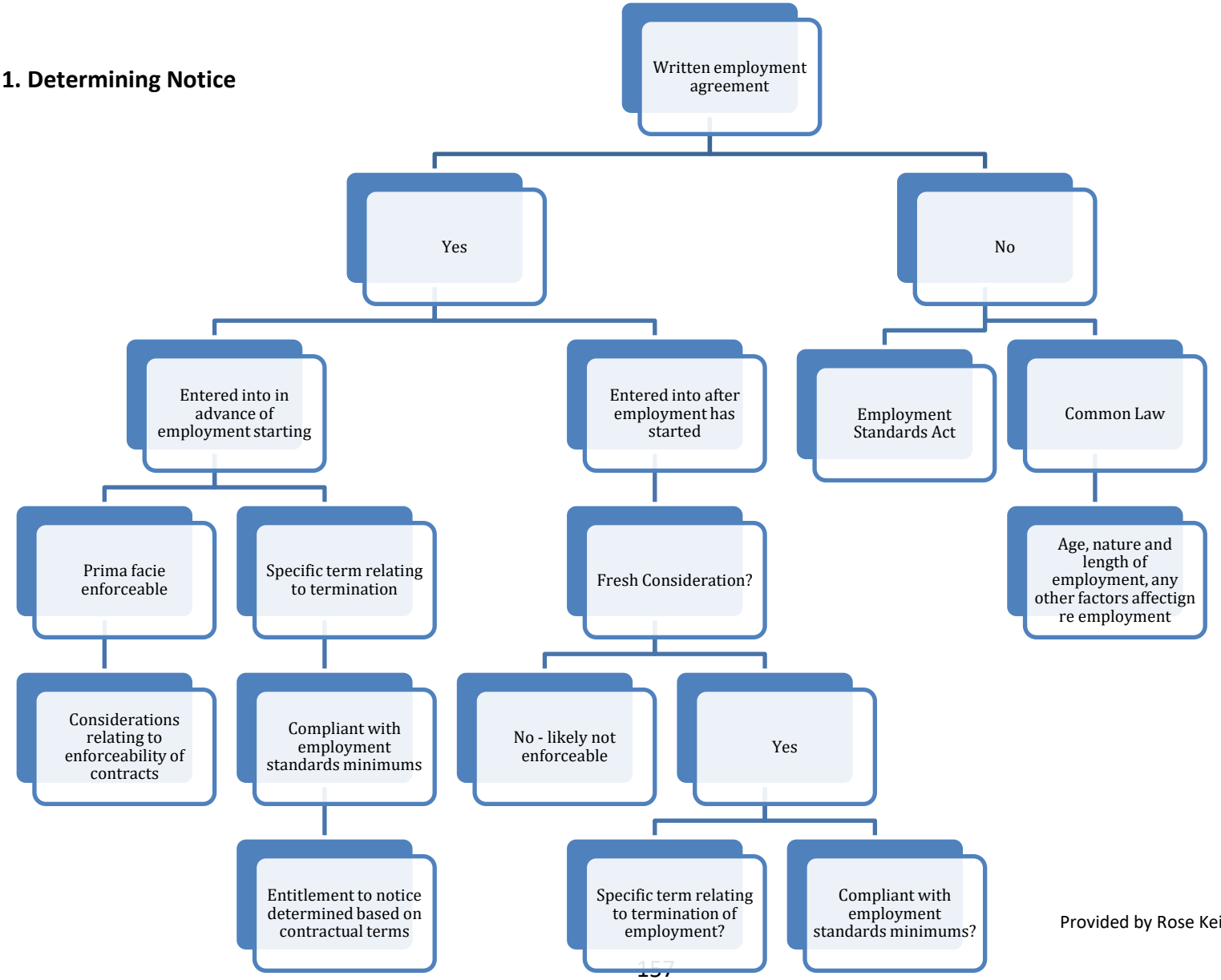
Use the following flow charts for quick reference:

1. Determining Notice
2. Termination of Employment
3. Damages
4. Civil Actions for Sexual Assault

[40] See *Corfield v. Shaw*, 2011 BCSC 1529, *LeBlanc v. Canada (Attorney General),* 1999 BCJ 1273, *Silvera v. Olympia Jewellery Corp.,* 2015 ONSC 3760, *Hudson v. Youth Continuum Inc*., 2012 ONSC 4421, *B. (M.) v. 2014052 Ontario Ltd*., 2012 ONCA 135, *T. (K.) v. Vranich*, 2011 ONSC 683.

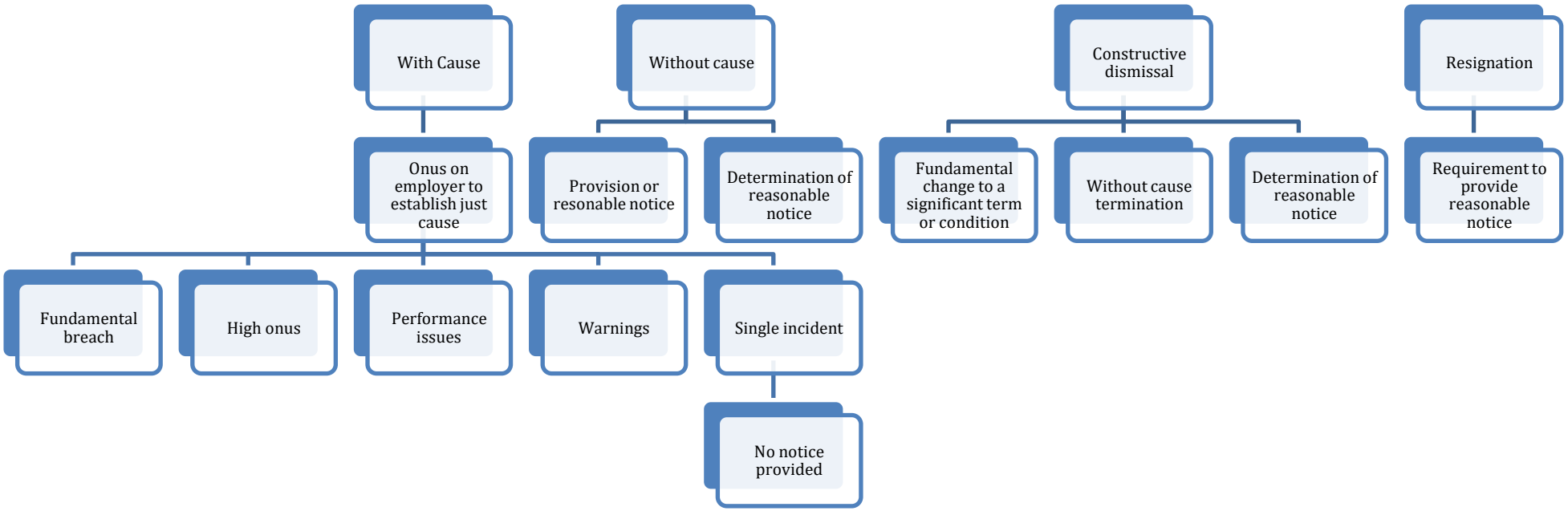
[41] *Limitation Act*, SBC 2012 c. 13, s. 3(1)(i) and (j).

1. Determining Notice



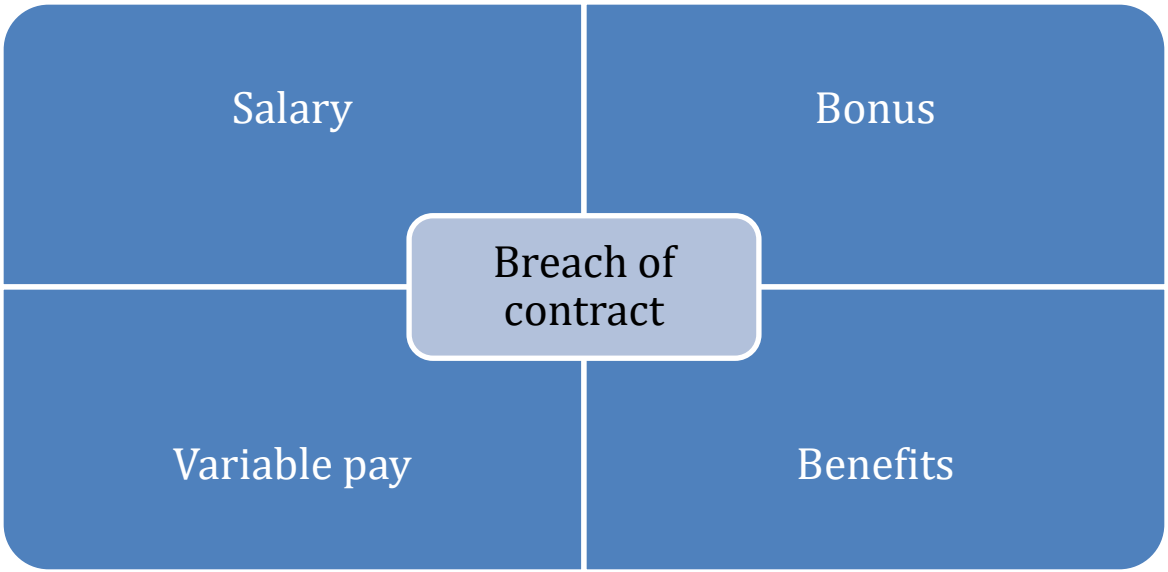
Provided by Rose Keith, KC, Harper Grey LLP

2. Termination of Employment



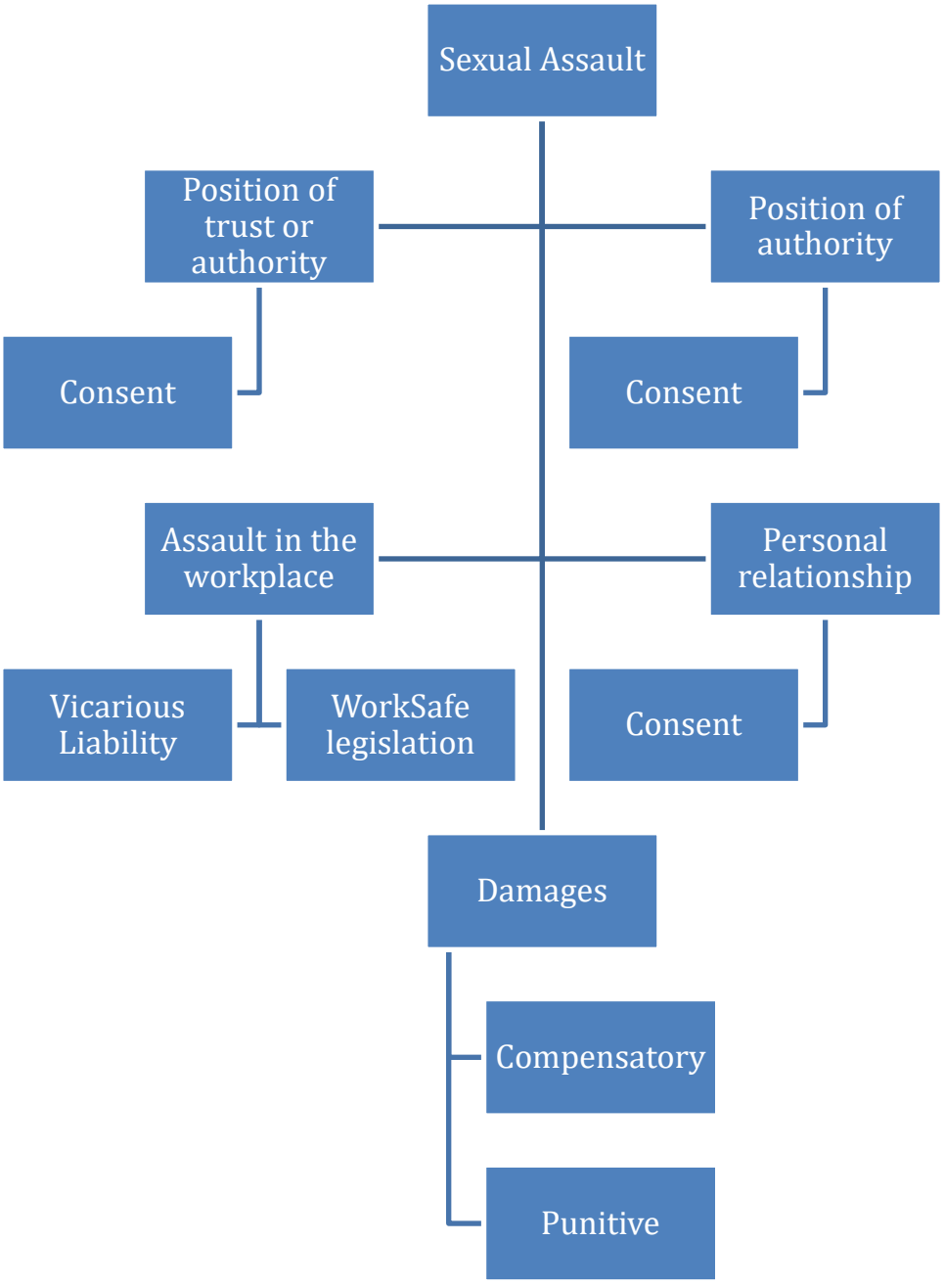
Provided by Rose Keith, KC, Harper Grey LLP

3. Damages



Provided by Rose Keith, KC, Harper Grey LLP

4. Civil Actions for Sexual Assault



Provided by Rose Keith, KC, Harper Grey LLP

CHAPTER 22: CIVIL ACTIONS (TORT CLAIMS FOR SEXUAL ASSAULT)

By Megan R. Ellis, KC

A. Introduction

A client may have a civil claim in tort for sexual assault. This chapter discusses understanding and assessing the claim, the evidence required, common issues of privacy that arise, and damages available.

An assault is causing someone to fear bodily harm. It need not include actual touching.

A sexual assault is an assault committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated.

Battery, which does require actual touching without consent, is actionable without proof of harm.[1]

In addition, there are other related torts:

- Intimidation
- Intentional infliction of mental suffering
- Malicious prosecution
- Breach of privacy
- Defamation
- Internet harassment
- False imprisonment
- Breach of fiduciary duty

In *Ahluwalia v. Ahluwalia* 2022 ONSC 1303, the court recognized a new tort of family violence. This case involved rather exceptional circumstances and this new development may or may not survive on appeal.

If the sexual assault, battery, or other tort occurred in the context of a common-law or marital relationship, the claim for damages should be included in the relief sought in the family law proceeding and not as a separate lawsuit.

B. Initial Contact

Initial contact may be made by the victim or by their parent, sibling, or spouse. However well-intentioned the caller, it is key that the actual victim initiate a contact, both to ensure the accuracy and completeness of the information, and to confirm that taking this step is what they want to do. It is important for sexual assault survivors to make their own choices and engage with you, as a legal professional, directly. Well-

[1] *T.O. v. J.H.O.* 2006 BCSC 560.

intentioned family and friends are not helping a survivor take their own power back. Indeed, they are often pushing for the survivor to take steps before they are ready to do so. So, while providing some preliminary information may be helpful, early on it is important to clarify that the survivor must be the one to make contact and make decisions about what they want to do.

An exception to this is, of course, when the survivor is a young child. Generally, parents should be advised against taking any legal steps while their child is a minor. This is because many of the effects of sexual abuse and assault do not manifest themselves until the survivor is engaged in intimate relationships and/or in the workplace. It is not possible to know what the long-term effects of the sexual assault(s) will be, and therefore it is not possible to quantify damages. In addition, it is important that the survivor exercise control over the process, and this cannot be done until after the age of majority. Even teenagers should be discouraged from bringing a claim until later in life; they have enough going on in their lives without the disruption and very personal probing involved in a civil claim. An exception to this advice would be where the perpetrator is likely to die or to leave the country (with their assets).

It may be helpful to consider whether there is evidence, typically in the form of records—for example, medical records, school records, or social worker records—that can be collected and preserved so that the survivor can access and use it in the future.

C. Early Screening

It is advisable to do some screening early on to determine whether there is any benefit to the survivor providing all of the details of the incident(s) at this early stage. It may be that a few questions will elicit a determination that a lawsuit is neither practical nor advisable for some months or years, or even ever. It is important to be realistic about the prospects of a successful outcome. The financial and emotional costs of civil claims for damages for sexual assault/abuse are significant and false hope is not a benefit to the client. Nor is passing them on to another professional to whom they will have to tell their story again with the same outcome.

Survivors will often say that they do not care about the money; they just want the perpetrator to recognize what they have done. Most abusers never recognize, acknowledge, or take responsibility for their actions. When a survivor seeks this type of recognition from a perpetrator, they continue to give up their power to the abuser. Essentially, they are looking to the abuser for the answer to their loss. Furthermore, apologies from sexual abusers are empty; they will provide them when they believe it is in their interests to do so.

D. Compensation

One of the early questions is whether the perpetrator has the funds to pay a settlement or a judgment, and/or whether there is an institution that may be found vicariously liable for the perpetrator's sexual assaults.

It is important not to underestimate:

1. The costs of bringing a civil claim. Even when a lawyer will take it on a contingency fee basis, disbursements will usually be between $5,000 and $15,000. Expert evidence is necessary to prove the nature and extent of psychological injuries.[2]
2. Legal Aid BC used to provide funds for disbursements in civil cases, with the proviso that they be repaid if the claim was successful, but they no longer do this. There are companies that will fund disbursements at a very significant cost, but some lawyers will not deal with them and have a term to that effect in their contingency fee agreements. Some lawyers will agree to carry disbursements until the conclusion of the case.
3. The difficulty, expense, and delay involved in collecting on a judgment, particularly if the defendant does not own real estate in BC.

You should consider whether the perpetrator's employer may be vicariously liable to the plaintiff. This will depend on the workplace environment of the employment relationship created by the institution and the extent to which they contributed to the perpetrator's ability to carry out their wrongful behaviour. Consider first whether there is legal precedent for vicarious liability arising out of the role of the perpetrator. If not, the relevant factors may include, but are not limited to:

a) the opportunity that the organization afforded the employee to abuse their power;
b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
c) the extent to which the wrongful act was related to friction, confrontation, or intimacy inherent in the organization;
d) the power balance between the employee and the survivor; and
e) the extent to which potential victims are vulnerable to the wrongful exercise of the employee's power.[3]

Note that the above is not a child-centred perspective. While children may see all adults in schools, sports clubs, churches, etc. as people in authority, the courts will look

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[2] *T.O. v. J.H.O.* 2006 BCSC 560.

[3] *Bazley v. Curry*, 1999 CanLII 692 (SCC), [1999] 2 SCR 534, *E.B. v. Order of the Oblates of Mary Immaculate in the Province of B.C.* 2005 SCC 60.

at the role conferred on the adult by the institution. Note too that these lines are shifting somewhat, and that cases will depend on their specific facts.

Consider whether there is a basis for a claim in negligence. Is there a person or entity that had a duty of care to the survivor and breached that duty of care? To establish liability in negligence, it will likely be necessary to prove that the person or entity knew, or ought to have known, about the danger posed by the perpetrator or by the circumstances in which they placed the survivor. In historical abuse cases courts will not impose a 21st-century lens on the question of what the institution or person ought to have known.

E. Concurrent Criminal Proceedings

Callers sometimes ask whether they should report the abuse to the police. This depends on what they want to accomplish. If they want the perpetrator to be exposed and prevented from having access to other vulnerable people—and perhaps even incarcerated—they will have to go through the criminal system. In this case, you should make clear that this result is statistically unlikely. If they would be satisfied with holding perpetrator to account and made to pay compensation, the civil system is likely a better option.

If a police report has already been made, civil proceedings should not be initiated until the criminal proceedings, including sentencing and any appeals, have been concluded. There are two reasons for this:

1. There is no effective way to ensure the disclosure required in a civil case—for example, medical and counselling records—does not seep into the criminal proceedings and effectively provide the defence with more personal information then they would normally have access to.
2. Initiating a lawsuit or sending a demand letter provides the perpetrator with a basis to argue that the allegations are financially motivated.

F. Financial Supports

1. Crime Victim Assistance Program (CVAP)

One of the benefits of making a report to the police, or doctor, social worker, counsellor, or other, is that the survivor can then access the Crime Victim Assistance Program (CVAP). The program provides funding for counselling and for certain expenses incurred as a result of the criminal act. There does not need to be a conviction or even a prosecution for someone to access this program. Note that the amount provided for counselling is much less than the amount most counsellors charge. It is often difficult to find counsellors who are available, and even more so at the low CVAP rate.

When an action seeking damages arising from the criminal act is started, the plaintiff must notify CVAP. They will likely have to repay some or all of the benefits received.

2. Residential Historical Abuse Program (RHAP)

This program is administered by the various health authorities. It funds counselling for anyone who experienced sexual abuse while under the age of majority and in the care of the provincial government. Survivors do not need to make a report to the police or provide "proof" in order to apply to this program. They need only have been in the care of the government, whether it was a foster home or any other government-operated institution.

G. Workplace Sexual Assaults

If someone is sexually assaulted in their workplace, they should file a WorkSafeBC claim. The coverage should include wage loss and other related expenses, including therapy and, in some circumstances, retraining. If the survivor files a WorkSafeBC claim, they may still be able to proceed with a claim against the individual perpetrator, although the benefits paid out may have to be repaid from the proceeds of the lawsuit. WorkSafeBC has a sensitive claims unit and survivors should be advised to request that their claim be directed to that unit. See Chapter 18: Workers' Compensation.

Consideration should also be given to whether it is advisable to advance a human rights complaint, although that is beyond the scope of this section. See Chapter 16: British Columbia Human Rights or Chapter 17: The Federal Human Rights System.

H. Limitation Periods

In BC there is no limitation period for claims arising from:

- sexual assault,
- sexual misconduct against a minor, or
- assault and/or battery against a minor, a person who is in an intimate and personal relationship with the perpetrator, or a person who is in a relationship of dependency with the perpetrator.[4]

I. Bans on Publication

Potential plaintiffs commonly express concern about being publicly identified as a survivor of sexual assault or abuse.

In the criminal process, a judge must order a ban on publication of information that could identify the complainant if they are asked to do so.

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[4] *Limitation Act S.B.C. c. 13,* sections 3(i), (j),(k).

In a civil proceeding, you can apply for a ban on this type of information when the claim is filed. It is advisable to have the ban use the wording from the *Criminal Code*, as media outlets are very familiar with those terms.

If there is a publication ban of this nature in the criminal proceeding, there should also be a ban in the civil proceeding, otherwise it would be essentially impossible to not violate the terms of the ban in the criminal proceeding. This was noted in *A.B. v. C.D.* 2022 BCSC 2145 by Justice Gray, who ordered a ban on the identity of the schoolteacher abuser and the school district where the abuse took place to ensure that the terms of the criminal ban were strictly complied with.

It is not advisable to include a provision that the ban expires at any time. If a plaintiff decides that they want to lift a court-ordered ban, they can bring an application to do so. However, a built-in expiry date may place the perpetrator in a better position to argue that it should not be extended. The Court of Appeal in *B.G. v. The Queen in Right of B.C.*, 2004 BCCA 345 overturned the decision of a trial judge to set aside a ban on publication after the case was dismissed. The court recognized the "chilling effect the prospect of termination (of a ban on publication) might have on those pursuing similar civil claims for historic sexual abuse."

The registry should be advised when the Notice of Civil Claim is filed that an application for a ban on publication is being made. The best practice is to ask the registry to hold onto the file while counsel goes up to chambers to speak to it (before a judge). The draft order is then signed by the judge and entered, and the ban is noted on the front of the file. A sealing order is more difficult to obtain but will generally not be necessary to protect the identity of the plaintiff.

If the matter is settled without the commencement of proceedings, the defendant is likely to seek protection of their identity. In that case, the survivor may or may not agree to including that term in the settlement. If they agree but then seek to renege, the defendant has remedies in contract.

J. Demand Letters

There may be circumstances in which counsel is not prepared to take a case on a contingency fee basis, or a client does not want to commit to a civil claim but wants to confront the abuser by a letter and seek payment from them. It is crucial that this letter be written by a lawyer so that there can be no danger of the client writing something than can be considered to constitute the offence of extortion. The survivor cannot threaten to make a criminal complaint if the abuser does not meet the demand.

Best practice is to set out in the letter a detailed description of the incidents of assault/abuse and the impact those actions have had on the client. It can be helpful to refer to the heads of damage and some supporting case law for the amounts of the potential claim. When you are writing the demand letter, assume that it will be read at some point by another lawyer. Draft it in such a way that the abuser will feel exposed

by seeing their actions in black and white, and the lawyer will find the claim convincing. Serving the letter personally is likely to persuade the perpetrator that the matter is serious, with potentially significant consequences.

It is advisable to take into account the abuser's ability to pay. There is no point in sending a demand letter seeking $500,000 if it is obvious that they do not have the means to pay that amount, but they could potentially pay $100,000. If an abuser says that they want to pay but do not have the means to pay the amount demanded, it is a good idea to require them to make a Statutory Declaration setting out their financial circumstances.

A demand letter should conclude with the assertion that if payment is not made, a civil claim will be brought. An abuser may agree to pay the requested amount, or at least enter into negotiations, in order to avoid the costs of dealing with a civic claim and the associated public exposure.

It is often advisable to start with a demand letter before initiating a civil claim. One exception to this would be where there is a concern that the abuser may take an opportunity of the notice to move some or all of their assets.

If the lawyer does not want to take a case on a contingency fee basis, it is reasonable to do a limited retainer, either on an hourly rate or a contingency fee basis, to prepare and serve a demand letter, and to negotiate any resulting settlement. It is not reasonable to charge the same percentage for this kind of limited retainer as for the much greater risk of taking on a lawsuit; nor is it reasonable to take the case on a contingency basis and drop it when a demand latter does not result in a settlement.

K. Types of Remedies

1. Pleadings: Heads of Damages

- general damages
- aggravated damages
- punitive damages
- special damages
- past loss of earnings
- loss of future earning capacity
- loss of an interdependent relationship;
- the recovery of the past and future costs of health care services attributable to the sexual assaults, pursuant to the BC *Health Care Costs Recovery Act*, SBC 2008, c. 27 (the *HCCRA*).
- an order prohibiting publication of the plaintiff's name or any information that could identify them

- costs
- interest pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79.

2. Pleadings: Checklist of Injuries

The following list includes injuries caused by sexual abuse or assault. All survivors will have experienced some—but not all—of these injuries:

- the relationships between the plaintiff and their parents and siblings have been harmed;
- the plaintiff has suffered from the loss of some of their memories of childhood;
- the plaintiff has suffered post-traumatic stress disorder (PTSD);
- the plaintiff finds it difficult to trust people and to form or sustain intimate relationships;
- the affections between the plaintiff and their family have been alienated;
- the plaintiff's marital relationship(s) has (have) been impaired;
- the plaintiff has suffered from addictive behaviour, including drug and alcohol addiction;
- the plaintiff's feelings about pregnancy, birth, and parenting have been affected;
- the plaintiff has suffered from social isolation;
- the plaintiff has engaged in high-risk sexual behaviour;
- the plaintiff has had ongoing difficulties with people in authority;
- the plaintiff's education was interrupted;
- the plaintiff has suffered continuing humiliation and embarrassment;
- the plaintiff has suffered from an inability to concentrate;
- the plaintiff has suffered from an inability to express emotions;
- the plaintiff has suffered from depression and anxiety;
- the plaintiff has suffered suicidal ideation and periods of self-harm;
- the plaintiff has suffered headaches and other physical pain;
- the plaintiff has suffered from eating disorders;
- the plaintiff has suffered from sleep disorders;
- the plaintiff was not able to undergo healthy and normal emotional and sexual development;
- the plaintiff has an impaired ability to experience sexual enjoyment;
- the plaintiff has suffered from periods of uncontrollable anger;
- the plaintiff has suffered from feelings of lack of self-worth and low self-esteem;
- the plaintiff continues to fear the defendant;
- the plaintiff has suffered from body dysmorphia;
- the plaintiff has suffered from a lack or loss of an interdependent relationship.

3. Health Care Costs

The *HCCRA* obliges a plaintiff to:

- include a health care services claim for past and future health care costs in their legal proceeding under the *HCCRA*,
- notify the Ministry of Health of their claim within 21 days of commencement, and
- not settle a claim that releases a defendant from liability under the *HCCRA*.

The plaintiff must notify the Ministry of an upcoming mediation or trial. The Ministry will then:

- review its records of the medical services provided to the plaintiff that they determine are causally related to the sexual assault, and
- quantify the claim.

The Ministry asserts that the monies can be recovered only from the defendant, and that the plaintiff gets paid out first. However, their claim can be a potential obstacle to negotiations. The Ministry keeps no records of how much it recovers from sexual assault and abuse claims so there is no way of knowing whether the extra time and trouble involved in addressing these claims generate any value. The plaintiff's counsel can claim a fee equivalent to 15% of the money recovered under the *HCCRA*, should they feel comfortable doing so.

Last updated May 2023

Useful Resources

SHARP Workplaces and Stand Informed Training Webinars

Allison, Gwendoline. Advising Complainants in Criminal Sexual Assault Cases (June 2023)

Ellis KC, Megan. Civil Claims for Sexual Assault (May 2023)

Resources last updated Janauary 2024

CHAPTER 23: GRIEVANCE AND ARBITRATION (UNIONS)

By Sara Hanson

A. Jurisdiction

Employees who work in a unionized workplace and are members of the workplace union have their employment relationship governed by a collective agreement. Collective agreements are written contracts negotiated between the union that represents the employees at the workplace and the employer. They set out the terms and conditions of members' employment rather than individual employment contracts.

Many collective agreements have a "no-discrimination" clause that incorporates the prohibition of discrimination based on the grounds set out in the BC *Human Rights Code* or the *Canadian Human Rights Act.* Some collective agreements also have explicit terms prohibiting sexual harassment in the workplace.

Regardless of whether a collective agreement explicitly prohibits discrimination based on sex, "human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract."[1] This means that a violation of an employment-related statute, including human rights legislation, is also a violation of the collective agreement, which can be grieved through the arbitration process.

In BC, s. 89(g) of the *Labour Relations Code*, which governs labour relations in provincially regulated industries, gives arbitrators the power to "interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement."

All collective agreements must have a provision that an employer must have just cause to dismiss or discipline an employee governed by the collective agreement. They must also have provisions setting out the procedure for filing a grievance and referring the matter to arbitration if it does not get resolved.

B. Processes

1. The Grievance Procedure

Union members who have experienced sexual harassment at work and want to grieve it as a breach of the collective agreement must file a grievance within the timelines set out in their respective collective agreement. Each specific agreement contains the relevant timelines, but union members can also inquire about pending deadlines with their representative (shop steward). Some collective agreements contain exceptions to the grievance process. The exceptions may contain a specific process for dealing with

[1] *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 at para. 28.

workplace sexual harassment complaints distinct from the normal investigation of allegations made and the participation of the complainant.[2]

If the union decides not to pursue the grievance, the employee cannot sue the employer in court for any breach of the collective agreement but may file a human rights complaint with the BC Human Rights Tribunal or the Canadian Human Rights Commission.

If the employee feels they have been treated unfairly because the union has decided not to pursue their grievance, they can file a complaint under s. 12 of the BC *Labour Relations Code,* which prohibits a union from acting in a manner that is "arbitrary, discriminatory or in bad faith" when it comes to representing employees. These complaints must be filed with the BC Labour Relations Board.[3] A Section 12 complaint should be filed as soon as possible, and no later than three months after the union decided not to pursue the grievance.

For federally regulated employees, complaints against unions are made under s. 37 of the *Canada Labour Code* to the Canada Industrial Relations Board ("CIRB"). These complaints must be made within 90 days of the union's decision not to pursue the specific grievance.[4]

If a grievance is filed on behalf of a member, the member will be known as the "grievor," and the union will go through the grievance procedure set out in the relevant collective agreement. This procedure usually involves two to three meetings in which the union presents its position on the grievance to the employer and tries to seek a resolution. If, for example, the employee was unjustly terminated or quit their employment because of sexual harassment, the union may try to have the member reinstated to their employment or seek financial compensation in lieu of reinstatement.

If the union and the employer cannot reach a resolution, the union decides whether to refer the grievance to arbitration. If the union decides not to proceed to arbitration and the employee disagrees with this decision, the employee can file a complaint against the union pursuant to s. 12 of the BC *Labour Relations Code* or s. 37 of the *Canada Labour Code*.

If the union files a grievance on behalf of the employee, the employee can still file a complaint against their employer with either the BC Human Rights Tribunal or the Canadian Human Rights Commission, but the complaint will likely be put on hold until

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[2] For example, some of the collective agreements with the health authorities have a separate article that deals specifically with workplace harassment, including sexual harassment, under the provisions of the *Human Rights Code*. The union would not be filing a grievance in this case, as they would use this specific provision to deal with the harassment.

[3] See https://www.lrb.bc.ca/bargaining-agent-administration#AboutUNRep

[4] See https://www.cirb-ccri.gc.ca/en

the grievance procedure has concluded (either by way of settlement or a decision from an arbitrator). Filing a grievance does not extend the timeline for filing a complaint with either the BC Human Rights Tribunal or the Canadian Human Rights Commission. If the employee decides to pursue a complaint instead of going through arbitration, they must file their complaint within the one-year time limit. Additionally, if the employee settles their grievance or pursues it through to arbitration, they will likely be barred from continuing with a human rights complaint.

2. Arbitration

If the union refers the grievance to arbitration, the union and the employer will agree on an independent third-party arbitrator to hear the case. An arbitration is a more informal process than going to court, but they are essentially very similar. At this stage, both the union and the employer will likely each retain a lawyer to represent them at the arbitration. The union's lawyer only represents and takes instructions from the union; they do not represent the employee, as the grievance "belongs to the union."

In a grievance involving sexual harassment, the union's lawyer will likely have to call the employee as a witness so they can testify about what happened. The employer's lawyer will then have an opportunity to cross-examine the employee. After the union has called all its witnesses, the employer calls their witnesses, who will also be cross-examined by the union's lawyer.

If the grievance alleges that the employee was unjustly dismissed or disciplined, the employer has to prove that they had just cause for their actions and will call their witnesses first.

Because the arbitration process is informal, the arbitrator may attempt to mediate before or during the arbitration, and the parties may settle the matter. Since the grievance belongs to the union, the union can settle the matter even if the grievor wants to proceed to a full arbitration.

After all the witnesses have testified, both parties make closing arguments. The arbitrator then makes a decision, which, depending on how complicated the case is, could take a number of months.

One of the benefits of filing a grievance and going to arbitration is that the union takes charge of the case and hires the lawyer, so the employee does not incur any legal fees. However, that also means the employee has less control over the process than if they filed a human rights complaint. In an arbitration, the union still makes all the decisions, but it does so in consultation with the employee.

The union's duty of fair representation extends to all of its members. This means that in cases where one member of the union has sexually harassed another member, the union must ensure it represents both members fairly. In these circumstances, the

union may refer either the grievor or the complainant to outside legal counsel for advice to ensure fair treatment of both parties.

3. Remedies Offered

Labour arbitrators have broad remedial powers. In cases involving unjust dismissal, the ordinary remedy is an order that the terminated employee be reinstated to their employment with back pay. If the employment relationship is no longer viable—for example, because of sexual harassment—the arbitrator can award damages in lieu of reinstatement along with back pay.

Arbitrators also have jurisdiction to order punitive or aggravated damages, as well as damages for a breach of human rights legislation. In BC, arbitrators have awarded compensation for injury to dignity, feelings, and self-respect pursuant to s. 37(2)(d)(iii) of the *Human Rights Code,*[5] although in other cases concerning a breach of the Code, the arbitrator may award general damages or damages for mental distress to the individual who was sexually harassed.

In the federal context, an arbitrator can also award damages for a breach of the *Canadian Human Rights Act.* However, under ss. 53(2)(e) and 53(3), those damages are limited to $20,000 for pain and suffering, and $20,000 for wilful or reckless discrimination.

C. Checklist for Advising Self-Represented Clients

- Is the client in a union?
    - If yes, has a grievance been filed?
    - If no, check the timelines in the collective agreement and consider whether the client wants to file a grievance through their union.
- If a grievance has been filed, or the client plans to file one, remind the client that the grievance process will not extend the timeline to file a complaint with the BC Human Rights Tribunal or the Canadian Human Rights Commission.
- If they may want to pursue a human rights complaint, they should also file it within the one-year timeline and ask either the Tribunal or Commission to defer the complaint while the grievance process is ongoing.
- Remind the client that the outcome of the grievance procedure (i.e., a settlement or a decision from an arbitrator) will likely prevent them from continuing to pursue a human rights complaint.

[5] See *Okanagan College v. Okanagan College Faculty Assn.*, 2008 Carswell BC 3407 at paras. 24–25.

CHAPTER 24: SELF-REGULATED PROFESSIONS AND OTHER INDEPENDENT BODIES

By Heather Hoiness and Lisa Fong, KC

A. What Are Self-Regulated Professions?

Self-regulated professions are occupations that have been granted express statutory authority to license practitioners—and discipline licensees—through professional associations. For the purpose of this chapter all such professional associations are referred to as professional regulators, but they are commonly called colleges, societies, or associations (e.g., the College of Physicians and Surgeons of British Columbia, the Law Society of British Columbia, the Association of Professional Engineers and Geoscientists of the Province of British Columbia).

A professional regulator is a body created by statute to oversee a specific profession or related professions by ensuring licensed professionals are meeting their legal and ethical responsibilities to the public. The statutory mandate of professional regulators is not to act on behalf of a member but to address misconduct regardless of whether that misconduct is committed in the workplace by a co-worker, client, employer, or member of the public. It is to protect the public and maintain public confidence in the profession and includes setting and enforcing standards for professional conduct for their licensees (referred to in this chapter as members but also commonly referred to as registrants). One way professional regulators carry out this mandate is through investigatory and disciplinary proceedings against members when required.

Thus, if a client has a complaint, begin by asking whether the person who harassed them is a member of a professional regulator to consider whether a complaint to a professional regulator is an option.

B. Which Professions Are Self-Regulated in BC?

There are dozens of self-regulated professions in BC, including but not limited to a variety of designated health professions under the *Health Professions Act (*"*HPA"*).[1] Other self-regulated professions in BC include five professional regulatory bodies named in the *Professional Governance Act* ("*PGA*"):

- Association of BC Forest Professionals (ABCFP).
- Applied Science Technologists and Technicians of BC (ASTTBC).
- BC Institute of Agrologists (BCIA).

[1] The legislature has enacted the *Health Professions and Occupations Act*, SBC 2022, chapter 43 to replace the *Health Professions Act*. For a current list of professional associations regulating designated health professionals, see https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/partners/colleges-boards-and-commissions.

- College of Applied Biology (CAB).
- Association of Professional Engineers and Geoscientists of the Province of British Columbia, known as Engineers and Geoscientists British Columbia (EGBC).

These five self-regulating professions are well established under their own legislation. The *PGA* represents a change in how they are regulated but not their longstanding statutory obligations.

Other self-regulated professionals include:

- lawyers (governed by the Law Society of British Columbia pursuant to the *Legal Professions Act*),
- social workers (governed by the British Columbia College of Social Workers of pursuant to the *Social Workers Act*),
- architects (governed by the Architectural Institute of British Columbia pursuant to the *Architects Act*), and
- chartered accountants (governed by Chartered Professional Accountants British Columbia pursuant to the *Chartered Professional Accountants Act*).

The Commissioner for Teacher Regulation, an independent statutory decision maker appointed under the *Teachers Act*, is empowered to receive complaints about the conduct of teachers who hold a BC Ministry of Education certificate. While the regulation of teachers is thus not self-regulating like the other professions discussed in this chapter, the Commissioner's powers of investigation and discipline parallel those of other professions. Similarly, the BC Financial Services Authority licenses and supervises professionals in the financial service sector, such as real estate professionals under the *Real Estate Services Act*.

These are only a selection of self-regulated professions in BC. If there is a possibility that a respondent is a member of a self-regulated profession not listed above:

- ask the client if they know if the respondent is a member of a self-regulated profession, or
- search online to determine if the respondent's profession is regulated.

If a respondent's profession is regulated, check the relevant professional regulators' website to determine if it maintains an online membership directory and if the respondent is a member, or was a member at the time of the harassment. For disciplinary purposes, legislation often defines "member" or "registrant" as including past members to ensure someone cannot escape liability simply by resigning their membership.

C. What Is the Scope of a Professional Regulator's Jurisdiction in the Context of Sexual Harassment?

Generally, complaints of professional misconduct against members of professional regulators involve allegations by patients or clients that the member acted incompetently or unethically within the bounds of their professional practice. However, a professional regulator's jurisdiction is not limited to that context, although a respondent's lawyer may argue that it is.

The courts have found that it is settled law that "reprehensible conduct outside actual practice of the profession may render a professional person liable to disciplinary action if it can be said to be significantly more reprehensible in someone of his particular profession than in the case of others."[2]

For example, in *College of Physicians and Surgeons of Ontario v. Rathe*, 2013 ONSC 821, the court upheld the discipline committee's finding that the licensee had engaged in professional misconduct by, among other things, "engag[ing] in conduct unbecoming a physician by acting in a hostile and aggressive manner at a school concert"; "disgraceful, dishonourable or unprofessional conduct by acting rudely and inappropriately towards the son of a patient"; and "disgraceful, dishonourable or unprofessional conduct when he assaulted a female driver in a road rage incident." The court commented, "As a family physician, he had a responsibility to control his anger so as not to subject members of the public to verbal abuse"[3]

The notion that the profession itself will determine and enforce standards important to upholding the integrity of that profession and the public's trust in it is key to self-regulation: "it is well settled that off-duty conduct can give rise to discipline when it has a negative impact on the individual's ability to carry out their professional obligations or where the conduct has a negative impact on, or conflicts with the core values of, the profession" (*Klop v. College of Naturopathic Physicians of British Columbia*, 2022 BCSC 2086 at para. 110). Professional regulators are unlikely to tolerate conduct that undermines the public's trust in the profession. Allegations of sexual harassment or assault of a co-worker, or people who are not patients/clients of the member, would very likely fall into the category of conduct that undermines the integrity of the profession, and therefore is tantamount to professional misconduct. However, each case turns on its own facts and the applicable legislation.

Legislation may distinguish between misconduct relating to a professional role (e.g., on-duty conduct) and misconduct outside a professional role (e.g., off-duty conduct). For example, the *HPA* recognizes "professional misconduct" as part of the wider

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[2] *Ratsoy v. Architectural Institute of British Columbia*, 1980 CanLII 662 at para. 12 (BC SC). See also *Erdmann v. Complaints Inquiry Committee*, 2013 ABCA 147 at paras. 20-21; and *Sazant v. College of Physicians and Surgeons of Ontario*, 2012 ONCA 727 at paras. 97-98, leave to appeal refused, [2012] SCCA No 549.

[3] *Rathe* at para. 24.

concept of “unprofessional conduct”. The *PGA* and the *Legal Profession Act* instead provide for separate categories of “professional misconduct” and “conduct unbecoming” a registrant or the profession. Off-duty conduct that is unprofessional conduct may include conduct that violates a law, such as conduct that amounts to a crime and an offence, but may extend to any conduct that sufficiently, negatively impacts a person’s ability to fulfil their professional role, or that impacts the profession generally.

When advising clients who have a potential claim against a regulated professional, emphasize that it is common for respondents to challenge the professional regulator’s jurisdiction to investigate and prosecute complaints that fall outside the confines of the member’s professional practice—for example, if co-workers met on the weekend for purely social reasons and the member sexually assaulted their co-worker during that social encounter. While such a jurisdictional challenge would likely be unsuccessful based on established precedent, it would add stress and time to the investigation of the complaint.

D. The Complaint Process

Each professional regulator has its own process for addressing complaints against its members, guided by its constituting legislation, regulations, and bylaws. However, there are many similarities in the overall process.

First, the registrar of the professional regulator reviews the complaint. Typically, they inform the member of the complaint made against them, provide them with a copy of the complaint, and ask for a response at the outset. The complainant receives a copy of the response and has an opportunity to reply. The registrar can dismiss the complaint if it is frivolous or vexatious or otherwise meets statutorily defined criteria for dismissal without any further investigation.

The registrar can, and often will, refer the complaint to an investigation committee. The investigation committee should thoroughly investigate the complaint—including, where necessary, interviewing the complainant, member, and witnesses, and gathering and assessing relevant documents—before deciding to proceed to a hearing. The credibility and reliability of the complainant and respondent will most likely be assessed as part of the investigation.

If the investigation committee decides that a complaint is without merit, or stems from conduct of a non-serious nature, it may dismiss the complaint, or issue a letter of direction or criticism which reminds the respondent of relevant professional standards. If the investigation committee decides the complaint meets its charging standard, the complaint is referred to the discipline committee and a citation or notice is issued to the respondent. The citation will set out the precise allegations against the respondent.

The professional regulator may settle the complaint before a hearing, or before referring a complaint to the discipline committee, via a consent order with the

respondent. The timing of this step differs between professional regulators, but in all cases the terms of the consent order are determined between the professional regulator and the respondent, not the complainant. While a professional regulator may consult with a complainant before entering a consent order, it is ultimately the regulator who decides which terms are acceptable. Specific legislation may, however, provide a complainant a right to seek a review of a consent order by another regulatory authority. For example, the *HPA* provides for reviews of some kinds of complaint dispositions by the Health Professions Review Board.

If the complaint goes to a hearing, a panel of the discipline committee hears the matter and decides whether the member has breached the constituting legislation, regulations, bylaws, profession's code of ethics, or other relevant professional standards. The panel generally comprises members of the profession who volunteer on the discipline committee, but it may include non-members if the statute permits or requires lay people to form a portion of the discipline committee.

A professional standard may exist even when it is not explicitly set out in a written code; a panel may ascertain such a standard by reference to evidence of a common understanding within the profession as to expected behaviour of a reasonable professional, or by deducing it from the profession's fundamental values.[4]

The burden of proof that a member or registrant has contravened a written or unwritten professional standard is the civil standard—a balance of probabilities—and the professional regulator must prove the allegations set out in the citation. The professional regulator is therefore quasi-Crown-like in terms of its obligations to the respondent and the public. A discipline hearing is not, however, a criminal proceeding.[5]

If the professional regulator proves the allegations at the hearing, the discipline committee imposes a penalty on the member—for example, suspension from practice for a period of time or permanently, educational requirements, and fines payable to the professional regulator.

Clients must understand certain fundamental realities of the professional regulatory complaint process, including the following:

- The process is lengthy. It often takes well over a year, even two years, for an investigation to be concluded and a decision to be made about whether the complaint should proceed to a hearing. Furthermore, if a criminal investigation or proceeding is already occurring, a regulatory body may delay its own investigation process, to await the evidence and the outcome of the criminal matter.

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[4] *Walsh v. Council for Licensed Practical Nurses*, 2010 NLCA 11, (2010) 317 D.L.R. (4th) 152 (N.L.C.A.); and *Yazdanfar v. College of Physicians and Surgeons of Ontario*, 2013 ONSC 6420 at para. 36.

[5] *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at para. 54 ("Disciplinary proceedings are neither civil nor criminal, but rather *sui generis*….")

- As in criminal proceedings, complainants are witnesses. They have little control over what happens with their complaint once it has been submitted, including, for example, whether the professional regulator agrees to settle the complaint with the member by way of a consent order or pursue the allegations if the complainant wishes to withdraw the complaint.
- If a complaint goes to hearing, the lawyer prosecuting the complaint is the professional regulator's lawyer. They do not represent the complainant's interests, although they may overlap.
- The types of penalties that may be imposed on members are set out in the constituting legislation. They are not designed to compensate complainants but to protect the public and deter future similar misconduct by the respondent or other members of the profession.
- Depending on relevant legislation, information or findings arising from an investigation or a professional discipline hearing may be inadmissible in a civil proceeding, such as a lawsuit between a complainant and the respondent.[6]

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[6] For example, *HPA* s. 53(3) provides that, "The records relating to the exercise of a power or the performance of a duty under Part 2.1 or Part 3 are not compellable in a court or in proceedings of a judicial nature insofar as the laws of British Columbia apply…."

CHAPTER 25: CRIMINAL LAW

By Wendy van Tongeren and Anna King

A. Introduction

The *Criminal Code of Canada,* RSC 1985, c. C-46 (the "*Code*") does not contain a specific sexual harassment offence. Instead, several criminal offences may arise from workplace sexual harassment. Similarly, sexual assault is not defined in the *Code*.[1] However, sexual assault can be a form of workplace sexual harassment if it happens in the context of the workplace, either at work or in settings connected to the workplace.

The client must understand that there is no vicarious liability in criminal law. Criminal charges arising from sexual assault or workplace sexual harassment cannot be sworn against a company for failing to protect an adult employee or failing to adequately investigate a workplace allegation. If criminal charges are sworn, they will be against the individual perpetrator and parties to the offence only.[2]

Note that a comprehensive review of the criminal law related to sexual assault and harassment—including sexual offences against complainants under the age of 16—is outside the scope of this chapter.

B. Offences

Many different criminal offences could potentially be charged as part of workplace sexual harassment and sexual assault allegations. Sometimes more than one charge is appropriate. The majority of offences related to sexual assault and workplace sexual harassment are listed in PART VIII Offences Against the Person and Reputation in the *Code.*[3] The offences are punishable by summary conviction or are indictable offences and liable to imprisonment.[4] See I. Sections of *Criminal Code of Canada* (RSC 1985, c. 46) related to the investigation and prosecution of workplace sexual assault and criminal harassment.

1. Workplace Sexual Harassment

Workplace sexual harassment is addressed through various offences in the *Code*, including criminal harassment (s. 264(1)), harassing communications (s. 372(3)), threats and retaliation against employees who provide information to law enforcement

[1] *Criminal Code*, RSC 1985, c. C-46 [*Criminal Code*] s. 271.
[2] There are offences of criminal negligence causing death or bodily harm, but they require a very high degree of culpability—that is, "wanton or reckless disregard for the lives or safety of other persons" (*Criminal Code* ss. 219-221). Likewise, while it is possible to be a "party" to a sexual offence, the individual has to have aided or abetted the principal and intended for the offence to happen, which is a very high standard.
[3] *Criminal Code,* Part VIII (ss, 214-320.1) Offences Against the Person and Reputation.
[4] *Criminal Code,* ss. 463(a), (b) and (c).

officials (s. 425.1), mischief (s. 430), and voyeurism (s. 162), which involves surreptitiously watching or recording a person without their consent.[5]

Criminal harassment occurs when an individual engages in behaviour that causes the complainant to feel harassed and fear for their safety.

> **264 (1)** No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.
>
> **Prohibited conduct**
>
> **(2)** The conduct mentioned in subsection (1) consists of
>
> > (a) repeatedly following from place to place the other person or anyone known to them;
> >
> > (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
> >
> > (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
> >
> > (d) engaging in threatening conduct directed at the other person or any member of their family.

To prove beyond a reasonable doubt that a person has committed the offence of criminal harassment, the Crown must prove five things:

- The accused did one or more of the prohibited conduct described in s. 264(2);
- The complainant was subjectively harassed (i.e., they felt harassed);
- The accused knew that the complainant felt harassed or was reckless or willfully blind as to whether the complainant felt harassed;
- The conduct caused the complainant to fear for their safety or the safety of anyone known to them; and
- The complainant's fear was, in all the circumstances, reasonable.[6]

One instance of threatening conduct can be enough, depending on the circumstances.[7]

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[5] *Criminal Code,* ss. 264(1), 372(3), 425(1), 430. See *R. v. Jarvis*, 2019 SCC 10 and *R. v. Trinchi,* 2019 ONCA 356 (CanLII).
[6] See *R. v. Sillipp,* 1997 ABCA 346 (CanLII) at para 18 for a discussion of the elements of the offence.
[7] See *R. v. Hyra*, (2007), 221 CCC (3d) 494 (Man. C.A.) at para 22.

The complainant does not necessarily have to fear for their physical safety. It is enough for them to reasonably fear for their emotional or psychological well-being, which could include fear of mental, emotional, or psychological trauma, or feeling uncertain about what an individual is capable of, what their intentions might be, or what consequences might follow.[8] The behaviour could include making repeated telephone calls, or sending repeated emails or other messages; sending unwanted gifts; showing up uninvited at places where the complainant is, etc.

Sometimes the police will start by warning the individual and then, if the behaviour persists despite the warning, refer charges to the Crown. If the individual has been warned but persists in their harassing behaviour, this will usually satisfy the criteria that the accused knew that the complainant felt harassed or was reckless or willfully blind that the behaviour was harassing the complainant.

2. Sexual Assault

The definition of "assault" applies to sexual assaults under section 265(2) of the *Code*.[9] Assault is any intentional application of force to another person without that person's consent.[10] "Force" requires only intentional touching.

> **265.** (1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose…
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Other charging sections include[11]:

- sexual Interference of a person under 16 (ss. 151-153)
- sexual exploitation of a person with a disability by a person in a position of trust (s. 153.1)
- publication of an intimate image without consent (s. 162.1), which includes "transmitting" or "distributing" intimate images, and sharing intimate images with others, such as by text or social media
- choking or administering stupefying substances with intent to assist the commission of an indictable offence (s. 246)
- uttering threats (s. 264.1), which requires a threat of physical harm or a threat to damage property

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[8] See, for example, *R. v. Wisniewska*, 2011 ONSC 6452 (CanLII) at paras 34-36.
[9] *Criminal Code*, s. 265(2).
[10] *Criminal Code*, s. 265(1)(a).
[11] *Criminal Code*, ss. 151-153, 162.1, 246, 264.1, 271-273, 278-279, 348, 430.

- sexual assault (s. 271)
- sexual assault causing bodily harm or with a weapon, or choking, suffocating, strangling (s. 272)
- aggravated sexual assault (s. 273)
- spouse may be charged with an offence under ss. 271, 272, or 273 even if spouses not living together (s. 278)
- kidnapping or unlawful confinement (s. 279)
- breaking and entering with intent, did commit indictable offence (s. 348)
- mischief (s. 430), which requires damage to or interference with a person's property

Sexual assault has been defined in case law and requires the Crown to prove beyond a reasonable doubt:

- the external circumstances (*actus reus*):
    - touching
    - sexual nature of the touching
    - absence of consent (i.e., the complainant's subjective feelings)
- the mental element (*mens rea*):
    - the intention to touch
    - the suspect had knowledge, or was reckless or wilfully blind to a lack of consent, either by words or actions, from the person being touched.[12]

The sexual nature of the touching depends on the circumstances but can include touching any part of the body. The test is an objective one: when viewed in light of all the circumstances, the sexual context of the assault must be apparent to a reasonable observer. Sexual touching can be underneath or over top of someone's clothing.

3. Consent

Sexual assault is a general intent offence, which means the accused does not have to have intended the touching to be sexual in nature.[13] However, lack of consent is a necessary element of a sexual assault, and it is addressed in various sections of the *Code.*[14] Consent must be present at the time the sexual activity in question takes place, not at some earlier time, and it can be revoked at any time (s. 273.1 (1.1)).[15] The "sexual activity in question" means the complainant must have agreed to the particular sexual act. This includes wearing a condom, if that is a condition of the consent.[16]

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[12]See *R. v. Ewanchuck*, 1999 CanLII 711 (SCC), [1999] 1 SCR 330 [*Ewanchuck*] and *R. v. Chase* (1987), 1987 CanLII 23 (SCC) for a discussion of the elements of the offence.
[13] *R. v. Litchfield*, [1993] 4 SCR 333.
[14] *Criminal Code*, s. 265, 273.1(1)
[15] *R. v. J.A.*, 2011 SCC 28 (CanLII), [2011] 2 SCR 440, para 40.
[16] *R. v. Kirkpatrick*, 2022 SCC 33.

The provisions of s. 265(3) of the *Code* apply to all general assaults, including sexual assaults. This section confirms that no consent is obtained where the complainant submits or does not resist because of:

- the application of force to the complainant or to another person,
- threats or fear of the application of force to the complainant or to another person,
- fraud, or
- the exercise of authority.

In addition, for sexual assaults, no consent is obtained if:

- the agreement is expressed by the words or conduct of a person other than the complainant,
- the complainant is unconscious,
- the complainant is incapable of consenting to the activity for any other reason,
- the accused induces the complainant to engage in the activity by abusing a position of trust, power, or authority,
- the complainant expresses, by their words or conduct, a lack of agreement to engage in the activity, or
- the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity (s.273.1(2)).

Note that lack of consent may also be present for other reasons (s. 273.1(3)).

Intoxication and consent is a very fact-specific determination. If a complainant is too intoxicated to be able to consent, there is no consent, as they lack the capacity to consent.

"Lack of capacity to consent" has been defined as:

> Therefore, a complainant lacks the requisite capacity to consent if the Crown establishes beyond a reasonable doubt that, for whatever reason, the complainant did not have an operating mind capable of:
>
> 1. appreciating the nature and quality of the sexual activity; or
> 2. knowing the identity of the person or persons wishing to engage in the sexual activity; or
> 3. understanding she could agree or decline to engage in, or to continue, the sexual activity.[17]

This test was accepted by the BC Court of Appeal in *R. v. Capewell,* 2020 BCCA 82.

[17] *R. v. Al-Rawi,* 2018 NSCA 10 (CanLII) at para 66.

Different consent laws apply for children and youth, but those are beyond the scope of this chapter.[18] A charge of sexual exploitation (s. 153) may arise if the complainant is 16 or 17 years old and the accused is older and in a position of authority, the complainant is dependent on them, or the relationship is exploitive. In this case, a judge can infer an exploitive relationship with a young person from the nature of the circumstances of the relationship, even if the young person has consented.

4. Mistaken Belief in Consent

An accused may believe the complainant is consenting when they are not. It is not a defence that the accused believed that the complainant consented to the activity if the accused's belief arose from:

- the accused's self-induced intoxication,
- the accused's recklessness or willful blindness, or
- any of the previously listed circumstances in s. 273.1(2) (e.g., where an accused abuses a position of authority, or the complainant expresses a lack of agreement to engage in the activity).[19]

Also, it is not a defence if the accused believed the complainant was consenting where:

- the accused did not take reasonable steps to ascertain that the complainant was consenting, or
- there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.[20]

In *R. v. Barton*, 2019 SCC 33, the Court clarified that s. 273.2 means that consent has to have been **communicated**, either through words or conduct. To argue the defence of "mistaken belief in consent," therefore, the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct. The Court emphasized that "an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent."[21]

It is not a defence for the accused to state that they believed that the complainant, in the complainant's own mind, wanted them to touch the complainant but did not express that desire. The accused's speculation about what was going on in the complainant's mind provides no defence.[22]

An accused cannot argue that they were intoxicated and so did not understand that the complainant was not consenting. The only situation where this can be argued is if the

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[18] *Criminal Code* ss. 150.1(1), 150.1(5) and 150.1(6).
[19] *Criminal Code* s.33.1(1); s.273.2.
[20] *Criminal Code* s. 273.2(b) & (c).
[21] *R. v. Barton*, 2019 SCC 33, para 107.
[22] *Ewanchuck*, at para 46.

accused was so intoxicated that they were essentially in a state of automatism. This is extremely rare and does not apply to what most people would understand as being "drunk" or "high."[23]

The idea of "implied consent" to sexual assault does not exist in Canadian law, as the Court held in *R. v. Ewanchuk*, [1999] 1 SCR 330.[24]

The headnote describes the facts**:**

> The complainant, a 17-year-old woman, was interviewed by the accused for a job in his van. She left the van door open as she was hesitant about discussing the job offer in his vehicle. The interview was conducted in a polite, business-like fashion. After the interview, the accused invited the complainant to see some of his work which was in the trailer behind the van. The complainant purposely left the trailer door open, but the accused closed it in a way which made the complainant think that he had locked it. There was no evidence whether the door was actually locked. The complainant stated that she became frightened at this point. The accused initiated a number of incidents involving touching, each progressively more intimate than the previous, notwithstanding the fact that the complainant plainly said "no" on each occasion. He stopped his advances on each occasion when she said "no" but persisted shortly after with an even more serious advance. Any compliance by the complainant was done out of fear and the conversation that occurred between them clearly indicated that the accused knew that the complainant was afraid and certainly not a willing participant. The trial judge acquitted the accused of sexual assault relying on the defence of implied consent and the Court of Appeal upheld that acquittal. At issue here are whether the trial judge erred in his understanding of consent in sexual assault and whether his conclusion that the defence of "implied consent" exists in Canadian law was correct.

In the result, the appeal by the Crown was allowed and a conviction was entered, and the case was sent back to the judge for sentencing.

J. McLachlin states at paragraph 103:

> MCLACHLIN J. -- I agree with the reasons of Justice Major. I also agree with Justice L'Heureux-Dubé that stereotypical assumptions lie at the heart of what went wrong in this case. The specious defence of implied consent (consent implied by law), as applied in this case, rests on the assumption that unless a woman protests or resists, she should be "deemed" to consent (see L'Heureux-Dubé J.). On appeal, the idea also surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions find their

[23] *R. v. Brown,* 2022 SCC 18; *R. v. Sullivan* 2022 SCC 19.
[24] *Ewanchuk*, at para 31.

roots in many cultures, including our own. They no longer, however, find a place in Canadian law.

In addition, the accused cannot rely upon wrongfully admitted evidence of the victim's sexual history in determining apprehended consent.[25] This is one of the two main stereotypical myths prohibited in law:

- A sexually active woman lacks credibility.
- Evidence of engaging in sexual activity is evidence that a woman likely consented to sex with the accused.

5. Evidence of Complainant's Past Sexual Activity

The fact that the complainant consented to sexual activity with the accused or any other person in the past is not admissible to support an inference that the complainant is more likely to have consented to this sexual activity or is less worthy of belief.[26] The accused cannot argue that because the complainant consented in the past, they believed the complainant was also consenting now.

The fact that the complainant consented to sexual activity with the accused in the past is presumptively inadmissible at trial unless the Crown makes a specific application to the Court under s. 276.

Section 277 further states that evidence of "sexual reputation," whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

6. Positions of Power, Authority, or Trust

In some situations, consent can be vitiated by the abuse of authority. This may be applicable to workplace situations where an employee felt coerced or pressured into sexual activity by a supervisor or employer because of fear of reprisals if they did not acquiesce.

Two sections of the *Code* are relevant to this situation. Section 273.1(2)(c) is broader than s. 265(3)(d) and states that there is no consent if the accused "*induces* the complainant to engage in the activity by abusing a position of trust, power or authority" (italic added).[27] This means a complainant may well have "consented," but the question is whether that consent was nullified by the abuse of trust, power, or authority. The accused's belief in the complainant's consent is not a defence.

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[25] *R. v. B. (A.J.)* (2007).
[26] *Criminal Code*, s. 276(1).
[27] *Criminal Code*, s. 265(3)(d) and s. 273.1(2)(c).

Useful Resources

Shea, Courtney, "So Is Being Drunk a Defence for Sexual Assault Now?" contains a good discussion of how the recent ONCA decision of *R. v. Sullivan and Chan* 2020 ONCA 333 has not substantially changed sexual assault laws. https://www.refinery29.com/en-ca/2020/06/9860218/intoxication-defence-sexual-assault

Leading Case Law in This Area:

- *R. v. Lutoslawski,* 2010 ONCA 207 at para 12:

The section addresses the kinds of relationships in which an apparent consent to sexual activity is rendered illusory by the dynamics of the relationship between the accused and the complainant, and by the misuse of the influence vested in the accused by virtue of that relationship. The term "exercise of authority" in s. 265(3)(d) suggests a coercive use of authority to overcome resistance to a consent. Inducing consent by abusing the relationships set out in s. 273.1(2)(c) does not imply the same kind of coercion. An individual who is in a position of trust over another may use the personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity.

- *R. v. Snelgrove,* 2018 NLCA 59 at para 24, upheld at 2019 SCC 16:

Section 273.1(2)(c) does not require a finding of dependency by the complainant or a dominant position by the accused. Rather, s. 273.1(2)(c) is engaged when an accused abuses, that is, misuses or makes improper use of his position of trust or authority, thereby inducing, that is, persuading or enticing the complainant to consent to sexual activity.

- *R. v. Alsadi,* 2012 BCCA 183:

The issue is whether the respondent incited or induced the complainant to participate in the sexual activity by abusing a position of trust, power or authority. It is not whether she misapprehended her right to refuse his advances, or feared reprisals, or did not understand that she could say "no":

> …The question is why the complainant entered into the sexual relationship, not the extent to which she participated once she was there. There is little doubt on the judge's findings that the complainant was a willing participant, but whether she was a willing participant as a result of the respondent's abuse of a position of trust, power or authority is the question that determines whether her consent to participate was vitiated. (para 24-25).

C. Timing of Complaints

There are no statutory limitation periods for most offences if they are charged by indictment. If the Crown decides to proceed summarily, charges must be approved within 12 months of the date of the offence.

The SCC has recognized that complainants often delay disclosure for various reasons. A complainant's delay in disclosing sexual abuse cannot be the subject of any adverse

inference based on stereotypical assumptions of how people react to sexual abuse.[28] However, because memories fade and evidence is sometimes lost, for practical reasons it is preferable to report offences to the police as soon as possible.

D. Advising the Client What to Expect

The first stage of the criminal justice system is a police investigation. In BC, police do not lay criminal charges directly. Police agencies investigate crimes and refer their investigative materials, collectively termed Report to Crown Counsel ("RTCC"), to the BC Prosecution Service, otherwise known as Crown Counsel. Crown Counsel then decides to lay a charge by assessing the evidence against a two-part test:

(i) whether there is a substantial likelihood of conviction; and
(ii) whether it is in the public interest to proceed with charges.

The Federal Crown (the Public Prosecution Service of Canada) is responsible for prosecuting drug crimes, immigration offences, and other federal offences not contained in the *Criminal Code*.

See also Information for Clients: How to Make a Police Report (Handout), in this chapter, for a summary of this advice to give to the client.

1. Reporting an Incident to the Police

In an emergency, or if they are fearful for their immediate safety, complainants of sexual assaults or harassment should phone 911. They can arrange to make an in-person statement at the police detachment. In-person statements are generally audiotaped and videotaped at the detachment.[29]

If it is not an emergency matter, complainants of sexual assaults or harassment can call, or have a trusted person call, either the non-emergency number of their local police agency or victim services of the police office in the appropriate location:

- This gives them the chance to get information from police staff at the complaint desk about what they should expect before they go to the police office or detachment. For example:
    - Which police office do I go to?
    - Is there free public parking?
    - When I enter the office, who do I speak to?
    - Should I bring anything with me?
    - Can I bring a support person with me?
    - Will there be waiting time?

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[28] *R. v. D.D.*, 2000 SCC 43 (CanLII), [2000] 2 SCR 275, at para 63.
[29] See https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/coming-forward/reporting-a-crime for useful information on how to report a crime in BC.

- An advance check-in is particularly important if you have special needs, which can usually be accommodated by the police station and victim services.
- In Canada, some jurisdictions have local police agencies that are authorized to conduct criminal investigations; others use the RCMP. Normally, a police agency for a given location is responsible for crimes committed in its geographic location. For example, if a sexual assault takes place in Vancouver, BC, the Vancouver Police Department (VPD) should receive the complaint and conduct the investigation.
- Complainants should ask to speak to an officer who specializes in sexual offences and, if needed, can speak to them in their language of preference. Otherwise, they should request an interpreter. Not all jurisdictions have these officers, but they may, and it is preferable to make a statement to an officer who specializes both in these cases and in the complainant's preferred language if possible.
- An initial interview will be followed by a formal police interview, which may be scheduled for a later time, depending on the circumstances.
- The complainant can ask to make their statement to a female police officer, or a police office of preferred gender, if they wish.
- The complainant may bring a support person or victim support worker for the interview.
- If there is physical evidence of the offence, such as threatening text messages, emails, or notes, the complainant should bring it to the interview.
- Tell the complainant to be as detailed and open as possible with the police agency. Explain to them that they should disclose all details of the incident, including any that they think are not important, as they might be useful to the police investigation and omitting facts may lead to their credibility being questioned.

2. Forensic Interview of the Complainant

Describe to the client how the recorded statement, or narrative, can be used, so they better understand how to effectively tell their story to help build a strong case. Explain that the forensic interview can be used as evidence and that:

- The interviewer uses the information to inform other investigators what they must do to help with the case.
- The police use the narrative to write their RTCC to recommend charges and generally include information that will be helpful to the Crown (See D. Advising the Client What to Expect).
- Although the police may ask questions about previous sexual encounters, this evidence will not be permitted at trial unless the defence makes a successful application to have it admitted.

- The Crown listens to and reads the statement to decide whether there will be charges and, if so, what offences will be listed on the Information.
- The Crown, defence, and court must ensure that no evidence encourages or supports stereotypical myths—for example, a complainant's prior sexual encounters are neither relevant nor helpful in determining their credibility or whether they consented to the act that is referenced in the complaint. (See in this chapter: 5. Evidence of Complainant's Past Sexual Activity.)
- Similarly, the statement may reveal if private records are in the hands of third parties.[30] Whether any such records, in the possession of either a third party or the Crown, will be released to the defence is a matter for the court to determine, upon the defence making an application for same to the Court before or during the trial.
- The Crown relies on the complainant's statement to provide conditions for the release of a suspect in an interim release hearing (bail conditions).
- The defence receives the statement and recordings as well as a summary, description, and copies of all statements, reports, photos, etc. In some cases, private matters irrelevant to the investigation will be redacted.
- The complainant will view and read the statement with the Crown as part of their trial preparation to give them a chance to correct and/or explain any errors in the document or more serious content issues.
- The complainant can read the statement outside court to refresh their memory before they testify.
- While testifying, if the complainant cannot recall a detail, the Crown will show them the relevant portion of their statement. The complainant can read the content in silence, put the statement down, and answer the question with a refreshed memory.
- When the defence is conducting their cross-examination they will ask leading questions related to the statement. For example, they may:
    - read a portion of the statement and ask if it is correct, or
    - ask the witness whether an answer they gave in their evidence in chief is the truth, and then present to the witness a contradictory version of the same issue drawn from the previously recorded statement to demonstrate inconsistencies in the statement.
- Other witnesses may be asked to confirm facts in the complainant's statement both during the investigation and in court.
- The Crown and defence may seek assistance from an expert witness based on the content of the complainant's forensic statement, and experts may refer to the statement in their report or testimony.

[30] For more on restrictions on access to private records in the hands of third parties, see *Criminal Code*, ss. 278.1–278.98, and *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411.

- If the accused pleads guilty, the Crown will present facts from the statement and may show the video of the complainant's narrative of certain particularly egregious events.
- The judge will refer to the victim's statement in accepting the guilty plea and sentencing the suspect.
- Corrections personnel will refer to the complainant's statement to assist with programming or determining a release date and conditions for the offender.
- Parole personnel will look at the complainant's statement when assessing parole conditions.

If the client knows how their statement will be used, they will have a better understanding of how important it is for the investigation and prosecution and why. The goal is for the complainant to present their version of the events to paint an accurate picture of what happened. Ideally, a recorded forensic statement should be:

- accurate,
- thorough and complete,
- based on direct knowledge rather than facts heard from others (hearsay),
- written using the specific words spoken by the suspect where recalled, rather than paraphrasing, and
- substantiated/corroborated by external evidence—for example, photos, texts, recordings, a named thirty party—where possible.

Often more than one interview is required. In addition, the police will likely attend the crime scene and check for forensic evidence, take photographs, and seize exhibits, and interview people who may have evidence related to the allegations.

The client may find the police investigation difficult, because not all potential witnesses like to be approached by police and the suspect may have supporters and protectors.

3. Reporting to a Community Agency, and then the Police

A complainant may also contact a community-based victim service provider before they contact the police. To find a local service provider, they can call VictimLink BC at 1-800-563-0808 or email VictimLinkBC@bc211.ca. VictimLink provides service in up to 150 languages, including many North American Indigenous languages.

Numerous community-based victim services agencies (e.g., EVA BC) can provide assistance in multiple ways. For example:

- helping victims talk to police,
- providing information about the criminal justice system, including help with peace bonds,
- providing court support, including going to court with victims,

- helping victims complete a Crime Victim Assistance Program application[31] to apply for benefits,
- helping victims understand and prepare a Victim Impact Statement[32] and an emergency safety plan,
- talking about the experience and helping people deal with any emotions arising from being a victim of crime, and
- notifying victims about the status of offenders in custody at provincial institutions.

Many police agencies also have their own victim services, which can be accessed by calling or visiting the local police station or detachment.

4. Reporting to a Community Agency (Third Party) and Remaining Anonymous

A victim of a sexual crime who is 19 or older may report a sexual crime indirectly to the police by reporting to a person at a community-based victim services program. The program relays the report to the police without naming the victim. A community-based victim service program can be found by calling VictimLink BC.

This "Third Party Report" is a last resort option for survivors who would otherwise not provide information to the police. It is neither a substitute for a call to 911 nor a police investigation.

The third-party go-between will provide instructions to police to contact them during an investigation if they uncover information such as the identity of the alleged assailant, additional witnesses, or more victims of the same suspect. These options allow a victim to remain anonymous to both the police and the alleged assailant if the latter does not already know the victim.

5. Police Interview of the Accused

The police may want to interview the suspect, who is entitled to refuse to provide information and may refuse to accompany police to the detachment when invited to do so. If the evidence suggests the suspect poses a threat to the complainant or others, or there is a risk the suspect will destroy evidence or abscond, the police may arrest them, bring them to the police office, and process the arrest.

In this context the police must give the suspect an opportunity to speak to a lawyer before they speak to the police. They are still entitled to refuse to speak to the police, but the police may tell them about the evidence against them and invite them to give their side of the story.

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[31] See https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/victim-of-crime/financial-assistance-benefits.
[32] See https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/victim-impact-statements.

If the statement is properly taken by the police, the Crown will decide if it will be part of the trial. The suspect's police statements are also normally recorded and transcribed in BC and are provided to the defence.

E. After a Crime Is Reported

A description of the entire criminal process is beyond the scope of this manual. For further information about the criminal process and the supports available for complainants, see the BC Government's website for victims of crime.[33] Victim services workers can also provide significant information to the complainant about what to expect during the process.

If the complainant has any injuries, the police will take photographs of them and help the complainant access medical care. In sexual assault cases the police will request that the complainant attend an examination by a sexual assault nurse examiner (SANE) if necessary.

After charges are approved, the criminal process can be summarized as follows:

1. Suspect appears in court
2. Disclosure to the defence
3. Pretrial applications
4. Plea negotiations (ongoing)
5. Guilty plea (can happen any time)
6. Preparation and support of witnesses
7. Preliminary hearing
8. Pre-trial conferences
9. Trial
    i. Accommodations for witnesses at trial
    ii. Examination in chief and cross examination
    iii. Verdict
10. Presentence report
11. Restorative justice/collaborative sentencing
12. Sentencing hearing, including Victim Impact Statement

[33] https://www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime.

Practical Considerations During Criminal Proceedings

(By Anna King and Aditi Master)

- It may take several weeks, months, or even years for the police to complete the investigation and for Crown counsel to review the RTCC.
- Crown counsel is acting on behalf of the state and is not the complainant's lawyer. They will consult with the complainant but the decision to proceed with charges, which charges to lay, how to proceed with trial, and what sentence to ask for if there is a conviction are at the discretion of the Crown.
- If charges are approved, appropriate bail conditions will be put on the accused, including no contact orders, to protect the complainant from being contacted by the accused pending trial.
- The complainant can (i) apply for a ban on the publication of their name and other identifying information, or (ii) apply to revoke or alter the publication ban without giving notice to the accused or needing a hearing.[34] The court can also ban the identity of the accused from being revealed if necessary to prevent the complainant's identity from being known.
- The complainant does not need to go to court during the suspect's pretrial court appearances.
- There is no government-funded legal aid for complainants, although a lawyer can be appointed in some situations for discrete applications—for example, to respond to certain types of disclosure applications by the defence.

F. Accommodations for the Victim or Witness at Trial

Accommodations can be made available to support a witness when they testify. In 2001, Canada introduced reference aids to guide justice personnel in making accommodations to support witnesses when they testify. While being a victim of any crime brings some level of suffering, trials that publicly disclose intimate, personal information in a cultural context laden with stereotypical myths about the credibility of women and girls, and/or trials where vulnerable witnesses have special requests and/or needs—for example, trials testing evidence arising from alleged sexual crimes—will likely be more distressing for those involved than a property crime or dangerous driving trial. It is crucial to create a respectful environment for the witness. The complainant's age and any disabilities that affect their ability to communicate are also important factors.[35]

[34] *Criminal Code*, ss. 486.4 and 486.5. A publication ban under this section is mandatory if the Victim or Crown requests it.

[35] See *Criminal Code* ss. 486(1), 486(2)(b), 486.1(1), 486.1(2), 486.2(1), 486.2(2), 486.4(1), 486.4(2), 486.4(2.1), 486.4(3), and 486.5(1).

Experience and studies have demonstrated that the court should take steps to minimize trauma and treat complainants and witnesses with respect.

The following are some examples of significant concerns expressed by victims and witnesses in sexual offence trials:

- Dissemination of private, personal information to the accused, those present in the courtroom, and the public at large.
- Not being believed by those asking questions, the trier of fact (judge and/or jury), and other observers, whether known or at large.
- Having the accused in the same room has a chilling effect on the witness that prevents a full and candid testimony.
- The witness is fearful of retaliation towards, or efforts to harass, them to prevent them from speaking out. This could include the accused or their supporters inflicting harm on the witness and their friends and family.
- The witness fears that intimidating questions by the lawyers, particularly by the defence during cross-examination, will make it difficult for them to provide a full and candid account of the events.

Experienced and trained police officers, victim assistance workers, and Crown lawyers who interview the complainant have an opportunity to determine what accommodations could fairly and meaningfully assist in the interview process and eventually the trial testimony experience later, if necessary.

Where the Crown or witness applies for an accommodation(s), whether the Court allows or disallows the procedure requested, no adverse inference may be drawn.

Accommodations under the *Code* include:

- **Exclusion of public:** s. 486 allows the judge to order the public be excluded from all or part of the proceedings or permit the witness to testify behind a screen which blocks the witness from public view.
- **Support person**: s. 486.1 provides that a support person, chosen by the witness, may be present while the witness is providing testimony.
- **Testimony outside the courtroom:** s. 486.2 allows witnesses to give evidence outside the courtroom or behind a screen or other device. This is often done via CCTV or videoconferencing. It prevents the witness from seeing the accused while testifying, but the accused can see the witness during these alternative approaches to accommodate the witness.
- **Accused has limits on cross-examining witnesses:** s. 486.3 creates a presumption to allow a judge or justice to prohibit a self-represented accused from cross-examining certain witnesses—for example, people under the age of 18, victims in trials for criminal harassment and sexual assault (ss. 264, 271, and 273), and other witnesses—to enable the witness to give a full and candid

account.[36] Where such an order is made, counsel will be appointed to conduct the cross-examination and will be paid by the government.[37]

- **Non-disclosure of witness's identit**y:
  - Section 486.31(1) allows the Crown or witness to apply to the court for an order directing that any information that could identify the witness not be disclosed during the proceedings if such an order is in the interest of the proper administration of justice.
  - Sections 486.31(2) and (3) allow that the judge may hold a hearing in private to determine whether the order should be made relying on the 11 factors listed in s.486.31(3).

- **Order restricting publication for sexual offences:** as of October 26, 2023, ss. 486.4(1) and (2), 486.4 (2.1) and (2.2), 486.5, and 486.6 give victims the right to apply for, revoke, or alter publication bans. Victims must be informed as soon as feasible of the existence of a publication order by the Crown or the court and of their right to apply to revoke or alter it. Specifically:
  - Section 486.4(1) permits a judge or justice to make an order banning publication, broadcasting, or transmission of any information that could identify a victim or witness in a sexual offence proceeding. Under s. 486.4(2), it is mandatory for the judge or justice to inform both the victim and any witness under 18 years of age of this right, to make the publication ban order on application by the victim, prosecutor, or witness, and to inform the victim and witnesses who are the subject of the order of its existence and their right to alter or revoke it.
  - Section 486.4(2.1) allows the judge or justice to make an order to ban publication of any information that could identify a victim who is under 18 years of age in a proceeding to an offence not listed in s. 486(1). Under s. 486.4 (2.2), the judge or justice must inform the victim of their right to make an application for the order, make the order on application by the victim or prosecutor, and inform the victim of its existence and their right to alter or revoke it.
  - Section 486.4(3) allows the judge or justice to make an order for a publication ban if the offence relates to child pornography.
  - If the Crown prosecutor makes an application for a publication ban, they must inform the judge or justice that the victim and witnesses have been informed of the order and of their right to revoke or alter the order under s. 486.4(3.2).

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[36] See *R. v. D. C.*, 2008 NSCA 105 (CanLII), where the mother of a complainant was permitted to act as a support person later in the trial because the mother had finished her testimony including cross-examination.
[37] See *R. v. S. (B.)* (2007), 240 C.C.C. (3d) 375 (Que. C.A.).

- Under 486.51(2), applications to revoke or alter publication ban orders may not need a hearing. See BCSC Criminal Practice Direction – 7 (Effective January 22, 2024): Procedure for Applications to Vary or Revoke a Publication Ban Under s. 486.51 of the *Criminal Code* and Application to Vary or Revoke Publication Ban Under Section 486.51.
- Section 486.51(5) allows the applicant to apply to revoke or vary the publication ban without giving notice to the accused.
- Under s. 486.6(1.1), the Crown shall not prosecute victims who breach their own publication ban unless they knowingly failed to comply (s. 486.6(1.1)(a)); the privacy of another person who is also protected by a ban is compromised (s. 486.6(1.1)(b)); and where a warning is not appropriate (s.486.6(1.1)(c)).

- **Evidence of a victim or witness under 18**: A police officer conducting a forensic investigative interview will be aware that the audio/video recording statement that they are about to create may be used in court for the truth of the contents if certain preconditions exist:
  - *Criminal Code* ss.715.1(1) and 715.2(1) allow for a video-/audio-recorded interview to be admitted for the truth of the contents in the trial if the recording is made within a reasonable time from the date of the incident being spoken of and the witness testifies and adopts the contents of the recording, and
  - the victim or witness is either:
    - under 18 at the time of the incident described in the recording, or
    - has a mental or physical disability that interferes with their ability to communicate the allegations, and
  - the judge is of the opinion that the admission of the video recording would not interfere with the proper administration of justice.

  In addition, the judge may prohibit any other use of the video- or audio-recording referred to in s. 715.1(1).

Considering this legislated accommodation, the forensic interviewer should maintain high standards throughout the interview process, which will be seen by many stakeholders and potentially provide much-needed evidence for the trier of fact's consideration.

The interviewer may consider rules of evidence in deciding how to conduct the interview. For example:

- Because hearsay is not normally admissible to prove the truth of a fact, the interviewer will ask for a first-person account (without relying on hearsay).
- Because direct quotes (rather than paraphrasing) will be given more weight, when describing admissible conversation (such as *res gestae* or conversations

with the suspect), the witness can be encouraged to repeat the precise words used.

- Encouraging a comprehensive, clear narrative about the events from the witness without the use of leading questions is far more effective for this purpose.

In addition, the witness should be aware that the truth is paramount, and they may be cross-examined on the contents of the interview by the defence.

G. Remedies Offered/Possible Outcomes

1. Crime Victim Assistance Program

Complainants may be eligible for some financial assistance through the Crime Victim Assistance Program ("CVAP") if they have filed a police report and CVAP has confirmed there is some form of investigation by the police. Complainants can apply for help even if charges have not been laid or the offender has not been convicted.

In most cases, an application for financial assistance must be received within one year from the date the crime happened. However, if the crime is a sexual offence that took place after 1972, the victim can apply for assistance at any time.

CVAP will only provide benefits that are not covered under other programs, including medical and dental services, prescription drug expenses, and counselling.[38] However, it does not cover the following types of losses:

- Compensation for pain and suffering
- Property-related offences, including stolen or lost items or money
- Injury or loss from motor vehicle accidents
- Injury or loss from work-related incidents covered by workers' compensation

If the complainant needs to travel to court, they may be eligible for financial assistance for their travel costs.

2. Section 810 Recognizance (Peace Bonds)

Section 810 peace bonds are common in less serious circumstances and are used when there is not enough evidence of a criminal offence and/or the complainant is simply interested in keeping the person away from them. A peace bond may be substituted for a criminal charge after Crown counsel has reviewed the evidence and discussed the file with the complainant. There is also a common law form of a peace bond, but it is rarely used.

[38] See https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/victim-of-crime/financial-assistance-benefits for more information.

Section 810 of the *Code* requires that the complainant fears on reasonable grounds that another person will:

- cause personal injury to them or to their intimate partner or child or will damage their property, or
- commit an offence under s. 162.1 (i.e., will publish an intimate image of them without their consent).

Some points to note about peace bonds:

- There is no charge of a criminal offence, no conviction, and no criminal record.
- Police may lay the information based on their belief about what happened.
- Hearsay evidence can be relied upon in a hearing, and the standard is "reasonable grounds," which is less than the standard of beyond a reasonable doubt.
- There is no requirement that the accused intended to cause the complainant fear.
- The accused has to enter a recognizance with relevant conditions designed to protect the complainant. The conditions can include no contact with the complainant, not to go to certain locations, to attend counselling, etc.
- If the accused does not obey the order, a criminal charge is the next step and may result in a criminal record if the accused is convicted.
- Sometimes the peace bond route is used to negotiate a disposition.

3. Alternative Measures and Restorative Justice

Section 717(1) of the *Criminal Code* permits a suspect to be dealt with by alternative measures in appropriate circumstances. Alternative measures, if permitted, would include family group conferencing, community accountability panels, Indigenous justice programs, and a victim/offender reconciliation process; they are not appropriate for an offender who needs programming via Corrections and are not usually used for offenders charged with sexual offences or criminal harassment, as the Regional Crown Counsel, Director, or respective Deputy must approve of the plan.

Restorative justice (RJ) strategies help ensure the victim, Crown, court, and Corrections personnel hear about any mitigating circumstances that suggest an offender should be dealt with leniently. In the March 2020 edition of *The Walrus*, Viviane Fairbank's article, "How One Woman Reimagined Justice for Her Rapist," describes the dilemmas a victim faces when confronted with limited choices about how to protect themselves from further unwanted sexual conduct without the offender being imprisoned or otherwise

shamed and punished.[39] The article provides a very helpful insight into the kaleidoscope of emotions often overwhelming a victim who finds themselves at the intersections of fear, courage, anger, empathy, embarrassment, understanding, pain, insight, humiliation, connection, disbelief, compassion, denial, enlightenment, rejecting, caring, vengeance, forgiveness, and even love for an offender known to them.

Section 6(b) of the *Canadian Victims Bill of Rights*[40] offers a starting point to inform victims of the RJ approach. Note that restorative justice will not take place if the victim is not supportive of RJ and does not initiate it.

> ***6*** *Every victim has the right, on request, to information about*
>
> > ***(a)*** *the criminal justice system and the role of victims in it;*
> >
> > ***(b)*** *the services and programs available to them as a victim, including restorative justice programs; and* [author's emphasis]
> >
> > ***(c)*** *their right to file a complaint for an infringement or denial of any of their rights under this Act*.

One example of an RJ approach would be a collaborative sentencing process whereby an RJ facilitator(s) conducts a conciliation conference with the accused and victim (and others who may be helpful) after conviction and before sentencing. The facilitator writes a report for the court. One objective is to have the victim and offender develop a plan to remedy the harm that the offender has caused to the victim and related family, friends, and community. The plan may be incorporated into a sentencing plan if the Court agrees with the suggestions. The facilitator may also play a role in ensuring the plan is properly executed following sentencing.

Where the victim and convicted offender continue their relationship after sentencing, some scholars have expressed concern that the victim may assume the burden of correcting the sexual assaulter's deviant behaviour.[41]

4. Criminal Sanctions against the Offender and Victim Impact Statements

A variety of criminal sentences are available if an accused is found guilty at trial or pleads guilty—for example, discharges, suspended sentences, conditional sentences (e.g., house arrest), jail terms, and probation terms.

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[39] Viviane Fairbank, "How one woman reimagined justice for her rapist," *The Walrus* (March 2020), https://thewalrus.ca/how-one-woman-reimagined-justice-for-her-rapist.
[40] *Canadian Victims Bill of Rights*, SC 2015, c. 13, s. 2. https://laws-lois.justice.gc.ca/eng/acts/c-23.7/page-1.html.
[41] See, for example, Gillian Balfour and Janice Du Mont, "Confronting Restorative Justice in Neo-Liberal Times: Legal and Rape Narratives in Conditional Sentencing," in *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, Elizabeth A. Sheehy (Ottawa: University of Ottawa Press, 2012).

Crown counsel decides which sentence to ask for, and the judge imposes the sentence; the complainant does not usually play a role in determining the type of sentence. However, the complainant can write a Victim Impact Statement to be provided to the judge at sentencing, or read aloud in court, for their consideration when they are making their sentencing decision.

Probation conditions can be used either as a sentence or in addition to another sentence. They are useful for prohibiting the accused from contacting the complainant and can be ordered for up to three years.

5. Restitution: Sections 738 and 739 of the *Criminal Code*

There are limited situations in which the accused can be ordered to pay restitution to the complainant—for example, if there was a specific loss suffered as a direct result of the accused's actions, such as broken or damaged property, and there are receipts or other evidence to prove the value of the damage. Restitution will not be ordered to compensate a complainant for loss of income or for pain and suffering. It is ordered as either a term of a probation order or a standalone restitution order.

H. Interaction of Criminal and Civil Proceedings

If both the criminal and civil systems are involved in a case, advise the client about how they can interact. Ideally, if there is a criminal charge going forward, consult with a criminal law practitioner. Ensure that no publication bans ordered by the court during criminal proceedings are breached, and that they are adhered to during civil proceedings. See, in this chapter, "Order restricting publication for sexual offences" under F. Accommodations for the Victim or Witness at Trial, and Chapter 22: Civil Actions (Tort Claims for Sexual Assault) — I. Bans on Publication.

1. Timing: Where the Criminal Charge Finishes First

Finding of Guilt

First, ensure that the client understands the different burdens of proof in each forum. While a conviction in criminal court may be determinative of the civil action, at least regarding the liability of the individual perpetrator,[42] an acquittal in criminal court is not necessarily the end of the civil case.

Proof of the conviction or the finding of guilt (i.e., a discharge) is admissible in evidence in a civil action to prove that the person committed the offence, whether or not that person is a party to the civil action.[43]

If the criminal matter results in a guilty plea, find out what facts were accepted by the judge. The Crown and defence may have submitted a written agreed statement of facts

[42] See the BC *Evidence Act*, [RSBC] c. 124, [*Evidence Act*] s. 71.
[43] *Evidence Act,* s. 71(2).

to the court. If not, the transcript of the sentencing hearing can be obtained if there is some uncertainty about which facts were agreed to. The terms the Crown agreed to in a plea bargain do not necessarily constrain a client from arguing additional wrongs were committed in a civil court. Likewise, the judge's decision can be obtained if there is an issue with the findings of fact after trial.

Note that the Crown disclosure, or Particulars, comprises witness statements and police notes that are not usually presented to the judge as evidence at trial. Nothing in the Crown Particulars is a finding of fact in a criminal matter unless that fact was accepted by the judge during a guilty plea or trial.

Acquittal

An acquittal has little legal bearing on a finding of civil liability. It is not a statement of innocence but a finding that the Crown has not met the burden of proving beyond a reasonable doubt that the specific offence was committed. However, an acquittal where the judge made specific, adverse findings about the credibility of a client or their witnesses can be detrimental to a civil case.

Stay of Proceedings

The term "stay of proceedings" (or "SOP") in criminal matters means something different than it does in civil matters. A criminal stay of proceedings means the matter is concluded without a determination of guilt or innocence. Technically, a proceeding can be revived within one year of the stay, although this is rare in practice. The Crown can stay a proceeding at any time if they decide it no longer meets the charge approval standard. Judges can also stay matters, upon application by the accused, where there are significant Charter breaches, such as long delays in getting to trial. The criminal equivalent to a civil stay is called an adjournment.

If the Crown has stayed the proceedings, this should not be determinative of the civil matter. Stays are ordered for many different reasons, including, for example, breaches of the accused's Charter rights, police misconduct, long delays in getting to trial, or uncooperative witnesses. The Crown's reasons for staying the proceeding do not need to be disclosed and are a matter of Crown discretion.

Regina v. Jordan, 2016 SCC 27 altered the landscape of criminal trials, establishing a new framework for s. 11(b) of the Charter protection of having a trial within a reasonable time. Judges now often stay charges for delay if matters are not brought to trial within strict time frames, dating from when charges were approved by the Crown. The presumptive ceiling is 18 months for cases tried in provincial court, and 30 months for cases in the superior court (or cases tried in provincial court after a preliminary inquiry). The time is calculated from when the charges are approved by the Crown, not from when the offence occurred. A delay attributable to or waived by the defence does not count towards the presumptive ceiling. Therefore, the Crown will almost never

agree to an adjournment of trial requested by a complainant because of parallel civil proceedings.

2. Timing: Where the Criminal and Civil Process Run in Tandem

Stays of Civil Actions

A stay of civil actions because criminal charges relating to the same matter are pending is normally denied unless the applicant can demonstrate that their case is extraordinary or exceptional, or all parties agree to the stay.[44] This is the case whether the party requesting the stay of the civil matter is the plaintiff, respondent, or Crown.

In *Nash v. Ontario* (1995), 1995 CanLII 2934 (ON CA), 27 O.R. (3d) 1, at page 7, the court stated:

> The cases are clear that the threshold test to be met before a stay is granted is high. The mere fact that criminal proceedings are pending at the same time as civil proceedings is not sufficient ground for a stay of the latter.... Even the potential disclosure through the civil proceedings of the nature of the accused's defence or of self-incriminating evidence is not necessarily exceptional…

Gillis v. Eagleson, 1995 CanLII 7190 is a rare exception in which civil action was stayed because the accused also faced criminal charges in the United States and was not afforded the protection of either Canadian evidentiary rules or the US Fifth Amendment.

Stays of BCHRT Proceedings

By Laura Track

The BC Human Rights Tribunal ("BCHRT") may stay a complaint upon request from either party until a parallel criminal matter is resolved.[45] Depending on various factors, this can mean that the human rights matter will be stayed for months, or even years, until a trial is concluded, a guilty plea is entered, or the matter ends in another way, such as a stay of the criminal proceedings.[46]

The three-part test for a stay in the BCHRT is less restrictive than the "extraordinary" or "exceptional" test in other civil actions. However, a lawyer for a complainant in a human rights case could argue against a stay, given the protections against self-incrimination an accused has in the Charter and *Canada Evidence Act* (see below), and the case law that has been developed in the civil context. A complainant could also oppose the application for a stay on the basis that it did not meet the three-part test.

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[44] See *Schreiber v. Federal Republic of Germany*, 2001 CanLII 20859 (ON CA).

[45] See, for example, *Davidsen v. Vancouver Police Board and another,* 2011 BCHRT 331 (CanLII).

[46] See the BCHRT Rules of Practice and Procedure Rule 16 Deferral of Complaint and the BC Human Rights Code s. 27.3: Powers to make rules and order respecting practice and procedure.

Under the three-part test in *Davidsen v. Vancouver Police Board and another*, 2011 BCHRT 331 (CanLII), the applicant must:

1. demonstrate that there is a serious issue to be tried,
2. convince the court that it will suffer irreparable harm if the relief is not granted, and
3. persuade the court that the balance of convenience favours granting the stay.

Stays of Labour Arbitration Proceedings

By Sara Hanson

Labour arbitrators have the power to adjourn an arbitration pending the final disposition of a criminal trial upon an application brought by either the union or the employer. The granting of an adjournment is discretionary and there is no binding principle or rule to guide the decision to adjourn. Rather, as the arbitration board stated in *Re Shaw Baking Co,* 1998 Carswell Ont 6107, [1998] O.L.A.A. No. 63, at para 18, "the question an arbitration board must ask, in the event that there is no consent to an adjournment, is whether it makes good sense to grant the adjournment." In that case, the union sought to adjourn the arbitration because the grievor was facing criminal charges relating to the same facts that led to their discharge. The arbitration board decided that it made good sense to grant the adjournment because of "the danger of inconsistent decisions being rendered by the criminal court and this board of arbitration and leaving the employer in an untenable situation."[47]

In deciding whether to grant an adjournment pending the outcome of a criminal trial, arbitrators will generally be guided by the issue of prejudice and will consider whether any resulting prejudice can be avoided by attaching terms and conditions to the adjournment.[48]

In *McMaster University v. S.E.I.U.*, Local 532, 1993 Carswell Ont 1236, 30 CLAS 238, the arbitrator declined the union's request to adjourn an arbitration involving a grievor who had been charged with sexual assault because "it cannot be said with certainty when the criminal charges will be heard and the University has a legitimate interest in having the matter dealt with expeditiously." The arbitrator further noted that "there was no suggestion that [the grievor's] rights at the criminal trial would somehow be prejudiced by anything that transpired at these hearings given the provisions of Section 13 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and Section 5 of the *Canada Evidence Act*."

If a complainant brings a grievance alleging sexual assault in the workplace, the decision about whether to seek an adjournment will ultimately fall to the union. If the alleged abuser is also a union member, the union will have to consider its duty of fair

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[47] *Re Shaw Baking Co*, at para. 19.

[48] See *Winnipeg (City) v. CUPE, Local 500***,** 2002 CarswellMan 613, [2002] M.G.A.D. No. 57 at paras. 17-18.

representation to both the complainant and abuser in deciding whether to seek an adjournment pending the outcome of a criminal trial. (See also Chapter 23: Grievance and Arbitration (Unions).)

Prior Statements

Section 5(1) of the *Canada Evidence Act*[49] forbids witnesses from refusing to answer questions on the ground that the answer may tend to incriminate them or may tend to establish their liability to a civil proceeding at the instance of the Crown or of any other person. Section 5(2) protects an accused from having their evidence at a proceeding used against them in criminal charges, unless it is for a charge of perjury or giving contradictory evidence.

Further, s. 13 of the *Charter* also gives an individual who testifies in any proceedings "the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

These protections are mainly aimed at the accused in a criminal trial and do not apply if the accused gives contradictory testimony in another forum.

For complainants, the protections in the *Canada Evidence Act* and the *Charter* rarely apply, as complainants rarely give "incriminating" evidence against themselves. The SCC defined "incriminating" extremely narrowly in *R. v. Nedelcu*, 2012 SCC 59. This means testimony given by complainants in one forum could likely be used in another forum in an attempt to impeach the complainant if their evidence is not consistent. Discuss this with the client if it looks likely to be relevant to their case.

Disclosure and Undertakings

Criminal Disclosure (Particulars)
In criminal matters, the accused is entitled to disclosure of anything in the possession of the Crown or police that is potentially relevant to their defence, whether or not the Crown intends to use it as evidence.[50] The defence can also make applications to try to get material from third parties not in the possession of the Crown (e.g., psychological records). The accused will have an express or implied undertaking not to use the disclosure in any way other than to defend themselves in the criminal matter.

The complainant is not normally given access to the Crown materials, although the Crown will usually provide a copy of the complainant's own transcribed statement(s) to the police shortly before trial in order for the complainant to prepare for trial. The complainant is generally provided with this with an express or implied undertaking that it

[49] *Canada Evidence Act*, RSC, 1985, c. C-5.
[50] See *R. v. Stinchcombe* [1991], 3 SCR 326.

be used only for preparing for the criminal trial. They should not provide this to their civil counsel without an order authorizing them to do so.

A complainant can make a *Freedom of Information and Protection of Privacy Act* or *Privacy Act* request to the relevant police authority for disclosure of their own statement, in which case they would not be bound by the same undertaking, but they are unlikely to be given any other material regarding the criminal charge by the police force. In order to obtain more of the Crown or police file, counsel must use the procedure described in *Wong v. Antunes,* 2009 BCCA 278, where the Attorney General may argue against disclosure on various grounds.

Civil Disclosure

The implied undertaking rule, as stated in *Juman v. Doucette,* 2008 SCC 8 (CanLII), [2008] 1 SCR 157, prevents documents and discoveries as part of a civil settlement from being given to the criminal court without a court order, subject to certain exceptions. This does not apply to hearings in open court.

One of the exceptions is if the deponent has given contradictory testimony about the same matters in successive or different proceedings. Counsel in the civil case may need to seek leave in civil court before providing documents to a lawyer for the accused in the criminal charge.[51] Advise the client that they must not simply provide materials obtained in the civil procedure to the police or Crown without direction from the court.

Crown Concerns

The Crown's concern about a parallel civil process usually centres on the possibility that the evidence will be tainted, or perceived as tainted, before it gets to the criminal trial. Because the standard of proof in criminal matters is so onerous, any change in the complainant's or another Crown witness's evidence is generally problematic for the Crown. Civil counsel should therefore try to obtain the complainant's police statement through either an FOI request or a court order.

Useful Resources

SHARP Workplaces and Stand Informed Training Webinars

Hanson, Sara. Practical consideration in Parallel Proceedings for Workplace Sexual Harassment Claims (October 2023)

Ellis KC, Megan. Civil Claims for Sexual Assault (May 2023)

Resources last updated Janauary 2024

[51] See *SC v. NS,* 2017 ONSC 353 (CanLII).

I. Sections of *Criminal Code of Canada* (RSC 1985, c. 46) related to the investigation and prosecution of workplace sexual assault and criminal harassment

CODE SECTION	REFERENCE NAME	RELEVANCE
150.1(1)	Sexual offences: Consent no defence	Consent of complainant
153	Sexual exploitation	Ingredient of offence
162.1(1)	Publishing/selling/making available intimate images without consent	Ingredient of offence
162(1), (4), (5)	Voyeurism, voyeuristic recordings	Ingredient of offence
264(1)	Criminal harassment	Ingredient of offence
264.1(1)(a), 264.1(2)	Threats to cause death or bodily harm to persons	Ingredient of offence
264.1(1)(b), 264.1(1)(c), 264.1(3)	Threats to damage property or harm animal	Ingredient of offence
265, 266	Assault	Ingredient of offence
265, 267	Assault causing bodily harm or with a weapon	Ingredient of offence
265, 268(1)	Aggravated assault	Ingredient of offence
269	Unlawfully causing bodily harm	Ingredient of offence
271	Sexual assault (simpliciter)	Ingredient of offence
272(1), (2)(a)	Sexual assault with a weapon, threats to a third party, or causing bodily harm (prohibited or restricted firearm used, of any firearm and offence committed in connection with criminal organization)	Ingredient of offence
272(1),272(2) (a.1)	Sexual assault with a weapon, threats to a third party, or causing bodily harm (firearm used)	Ingredient of offence
272(1),272(2)(b)	Sexual assault with a weapon, threats to a third party, or causing bodily harm (complainant under the age of 16 years, committed on or after November 6, 2012)	Ingredient of offence
272(1),272(2) (a.2)	Sexual assault with a weapon, threats to a third party, or causing bodily harm (no firearm)	Ingredient of offence
273(1),273(2) (a.1)	Aggravated sexual assault (firearm used)	Ingredient of offence
273(1),273(2) (a.2)	Aggravated sexual assault (complainant under the age of 16 years, committed on or after November 6, 2012)	Ingredient of offence

273(1),273(2)(b)	Aggravated sexual assault (no firearm)	Ingredient of offence
273.1(1)	Meaning of consent	Ingredient of offence
273.2	Where belief in consent is not a defence	Ingredient of offence
275	Rules respecting recent complaint abrogated	Evidence/Credibility of victim
276(1)	Evidence of complainant's sexual activity	Sexual stereotypes/Evidence
277	Reputation evidence	Sexual stereotypes/Evidence
278	Spouse may be charged	
372(3)	Harassing communications	Ingredient of offence
423	Intimidation	Ingredient of offence
425.1	Threats and retaliation against employees re provision of information to law enforcement officials	Ingredient of offence
463(a)	Attempt to commit indictable offence punishable by life imprisonment (principal offence other than murder)	Ingredient of offence
463(b)	Attempt to commit indictable offence punishable by 14 years	Ingredient of offence
463(c)	Attempt to commit summary conviction offence punishable by 14 years	Ingredient of offence

J. INFORMATION FOR CLIENTS: HOW TO MAKE A POLICE REPORT (Handout)

This handout explains:

- the basic steps to take when you make a report to the police, and
- what to expect when you make a report to the police.

It also has some other information.

You can:

- make a report directly to your local police agency, or
- contact a community organization first and have a victim service worker help you arrange a police interview. To find a local organization, **contact VictimLinkBC** at **1-800-563-0808** or send an email to **VictimLinkBC@bc211.ca.** VictimLink provides service in over 110 languages, including up to 17 North American Indigenous languages.

Your local police agency will investigate the offence. Depending on where you live, this is the municipal police force (for example, the VPD) or the RCMP.

See https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/coming-forward/reporting-a-crime for useful information on how to report a crime in BC.

Call for Help

In an emergency (if you're being assaulted or you feel you're in immediate danger), call 911 and ask for the police. If you're hurt, you can ask for an ambulance.

If you call 911, you can:

- get help to prevent injury or other harmful outcomes;
- get medical or other help quickly;
- stop threats, or more harm or damage from being done; and
- help the police interrupt a crime or respond quickly to:
    - save evidence,
    - identify and get information from victims, witnesses, and bystanders about the incident, and
    - identify and arrest a suspect if necessary.

If it's not an emergency, call or have a trusted person call either the **non-emergency number** or **victim services** of your local police office in the appropriate location.

This will give you a chance to talk to someone and ask questions like:

- Which police office do I go to?

- Is there free public parking?
- Where do I go when I come into the office?
- Do I need to bring anything with me?
- Can I bring a support person with me?
- Will I have to wait?

Calling ahead is extra important if you have special needs. If you tell the police or victim services about your special needs ahead of time, they'll be better able to help you when you arrive.

Some points to keep in mind:

- Call the central office for your police agency. This might not be the closest detachment to you.
- Ask to speak to an officer who specializes in sexual offences. Some detachments don't have this type of officer, but ask anyway.
- You'll have a first interview and then a formal police interview to make a statement (give all the details about what happened). The formal interview might happen on a different day.
- On the day of your formal interview:
    - If you have physical evidence of the offence, such as threatening text messages, photos, or recordings, bring it with you.
    - You can bring a support person or victim support worker with you.
    - You can ask to make your statement to a female police officer if you prefer.
    - Your interview will be video-recorded and audio-recorded.
    - Be as detailed and open as you can with the police agency. Holding back details that you think aren't important or don't help your case isn't a good idea. If the court thinks you haven't been honest, it could damage your case. You might feel embarrassed about what's happened, but remember that you haven't done anything wrong.
    - Try to be as accurate and thorough as you can about what happened.
    - Focus on your direct knowledge (things you saw or heard, for example) rather than things you heard other people say. If you do repeat something someone else said, explain who told you.
    - If you can remember, repeat specific words (the exact words) that the suspect used.
    - The police might ask you to list of witnesses who could corroborate (confirm) the facts you tell the police officer.
- Often the police will need to have more than one interview with you. They'll likely attend the crime scene, check for forensic evidence (evidence of the crime), take photographs, seize exhibits (things that can be used as evidence in court), and interview other people who might have evidence about what happened.

You can also make a report to a community agency (third party) and remain anonymous. If you're 19 or older, you can report a sexual crime indirectly to the police by speaking to a person at a community-based victim services program. They'll give information about your report to the police without giving your name. Call VictimLink BC at 1-800-563-0808 or send an email to VictimLinkBC@bc211.ca to find a community-based victim service program. This is called making a Third Party Report.

Making a Third Party Report isn't the same as calling 911 or the non-emergency police number. And it won't start a police investigation. Criminal charges won't be laid against the suspect unless:

- you decide later to speak to the police, or
- other people make reports about the same person.

The police will contact the service organization if, during an investigation, they find out information such as the identity of the alleged assailant, additional witnesses, or victims of the same suspect. These options allow a victim to remain anonymous to both the police and the suspect (if the suspect doesn't already know the victims).

How Your Police Statement Will Be Used

Your recorded statement can be used in a few different ways:

- The interviewer uses the information to tell other investigators what they must do to help with the case.
- The police use it to write their Report to Crown counsel ("RTCC"). In their RTCC, the police recommend charges, and your statement might have information that's helpful to the Crown.
- Crown counsel is a lawyer who represents the state and public interest. They are not the complainant's lawyer.
- The Crown listens to and reads the statement and RTCC to decide if there will be charges and what offences will be on a form called the Information.
- The police might ask questions about your sexual history. The defence has to make a successful application to talk about this in court.
    - The Crown, Defence, and Court must "ensure that evidence is not elicited that encourages stereotypical myths." This means that a woman's sexual history isn't relevant or helpful to determine her credibility (decide how believable she is) or whether she consented to the act in her complaint.
- If the Crown approves charges, it relies on your statement to provide conditions for release of the suspect in a bail hearing.
- The defence gets your statement and the recordings of it as well as a summary, description, and copies of all statements, reports, photos, etc. Sometimes, private things that aren't connected to the investigation will be blacked out.

- The statement might show that third parties (people not involved in your case) have private documents, such as diaries or medical records. The court has to decide if the defence can see these documents. The defence has to make an application to ask to see them. If this happens, you'll get a lawyer free of charge to represent your interests for this part of your case only.
- You'll look at and read the statement with the Crown before the trial. There might be spelling mistakes or more serious mistakes that you can correct and/or explain.
- You can read the statement outside of court before you testify (tell the court what happened) to refresh your memory about what you said.
- If you can't remember a detail when you're testifying, the Crown will show you the relevant part of your statement. You can read the content in silence, put the statement down, and answer the question again with a refreshed memory.
- When the defence lawyer is asking you questions (called cross-examination), they'll ask leading questions (questions that are worded in a way that encourage you to give the answer the lawyer wants you to give) related to the statement.
- Other witnesses might be asked about what you say in your statement both during the investigation and in court.
- The Crown and defence lawyers might ask an expert witness (someone who has special knowledge of a certain topic) to speak or to write a report. The expert might refer to your statement in their report or testimony.
- If the suspect pleads guilty, the Crown will present facts from your statement and might show the video that was made during your police interview to draw attention to especially bad events.
- The judge might refer to your statement when they accept the suspect's guilty plea and sentence them.
- Corrections personnel will refer to your statement when they are making certain decisions about the offender, including programs for the offender, release date, and conditions, if necessary.
- Parole personnel will also look at your statement, if applicable.

Last updated January 2024

PART IV: PROVIDING LEGAL ADVICE AND COACHING TO ASSIST YOUR CLIENT

CHAPTER 26: MEETING WITH THE CLIENT

By Sara Forte

A. What You Need to Tell the Client: Expectations and Limitations

At the first client meeting, whether it is in person, by phone, or via video conference, make clear that your role is to help the client move forward with their legal issue. They need to know that you will provide them with confidential and non-judgmental legal advice. Discuss client and lawyer confidentiality and its limitations. (See also Chapter 26, Limits to Confidentiality.) It is crucial to discuss how you can help them while managing their expectations; be clear about the limitations of SHARP Workplaces advice, especially that we cannot help clients with litigation or represent them in court or tribunals. We are limited to providing five hours of advice and referrals to relevant services. In some circumstances it is possible to extend the time available in five-hour increments, but this is not guaranteed. Make it clear to clients that they will be coached to help them do most tasks themselves. If you submit a request for more hours, SHARP Workplaces looks at a number of factors to assess the request. For example:

- The merits of the case.
- The complexity of the case.
- The stage of the case.
- The likelihood of the matter being resolved within the extended hours.
- The client's vulnerability and ability to continue the process without legal assistance.
- Service capacity (funding availability).
- Demand for services.
- Availability of alternative services (e.g., BC Human Rights Clinic).

If you are close to helping the client resolve their complaint, SHARP Workplaces will probably grant an extension, but this is not guaranteed. If an extension is not granted, or the client prefers, you have the option of working directly with the client under a new retainer, but you should not discuss this option until all the legal advice hours have been used up and you must be very clear with the client that the new arrangement is not connected to the SHARP Workplaces program.

SHARP Workplaces can only help people who have been sexually harassed in the context of their workplace. We do not have a mandate to assist people who have been sexually harassed outside of a work context. When you are assessing a client's claim, be aware of other issues that could be related to a workplace sexual harassment and address them if they are relevant—for example, the client has been discriminated against under another characteristic protected under the BC *Human Rights Code*, such as race or disability. SHARP Workplaces legal advice services are available only to workers and employees, not to employers, although we may be able to provide referral information to employers and provide education and training on preventing and responding to sexual

harassment in workplaces through our public legal education and information (PLEI) initiatives led by EVA BC. If a client needs counselling or a new job, for example, because of the workplace sexual harassment, SHARP Workplaces can help them with referrals to the appropriate support services, as this falls under our trauma-informed approach to holistic client services. We can also make legal referrals where there may be other legal issues beyond the workplace sexual harassment—for example, tenancy issue referrals to TRAC, family law issues to Rise Women's Legal Centre, or for assistance with completing forms, Amicus Curiae or advocates. SHARP Workplaces staff will help lawyers identify appropriate referrals if necessary.

As noted above, a client can only receive one retainer with one SHARP Workplaces lawyer, although they may be reassigned to another lawyer in extenuating circumstances (e.g., the first lawyer has to withdraw for health reasons). If a client experiences another situation of sexual harassment that is unconnected with the original case, they can apply to SHARP Workplaces for further assistance. SHARP Workplaces will assess whether it is in the best interests of the client to refer the new case to the lawyer who assisted them with their first case or assign them a different lawyer.

Make clear to clients the limitations of the SHARP Workplaces advice services at the outset of the retainer and recognize the reality that clients may be self-representing at some point. Tailor meetings and discussions with the client to make best use of the time and empower the client to move forward alone. If you use file time to complete tasks without the client's involvement, they are likely to struggle to understand any progress made and how to self-represent going forward. If you cannot help the client to resolve their issue within the time available, consider making appropriate referrals—for example, to CLAS's Human Rights Clinic, Workers' Advisors Office, Access Pro Bono—at the end of the allotted time.

B. What the Client Needs to Tell You

One way to make best use of the advice hours is to gather as much information as possible from clients before the first meeting. People who have experienced workplace sexual harassment or sexual violence have widely varying abilities to organize and communicate information about the harassment they have experienced. Some clients will be able to independently produce concise, accurate, and relevant summaries and chronological documentation; others will not be able to do this or will feel overwhelmed by the mere prospect of doing so, and pushing them to prepare information in advance of a meeting may discourage them from coming.

While there is no one-size-fits-all answer, a quick initial telephone conversation can be beneficial to both you and the client. You, or your legal assistant, can begin building rapport in the call and attempt to gauge the client's ability to communicate and organize their thoughts. Make it clear that the client only needs to provide the information needed for conflict checks at this early stage, but any additional information that they can produce easily would be helpful—even if you only have their name and

full contact information and the names of potentially adverse parties (employer and harasser), you can still proceed with a first meeting. Review the information provided by the intake coordinator when the case is assigned to determine what further information you may need, or if you are simply connecting to schedule the first meeting and start building your relationship with the client.

C. Ideal Information to Gather Before a First Meeting: Who, What, When, Where, and Why

1. Who

Before you accept any retainer, you need to run a conflict check and open a file. The intake coordinator sends the information you need, including the client's name and identifying information as required by LSBC, the name of the harasser, and the client's employer/former employer (both the registered corporate entity name and any "doing business as" or "operating as" information).

The intake coordinator talks with the client about all the parties that may be involved, provides you with those names, and tries to broadly identify the names of other parties who may have been involved. Perform a conflict check on all the names provided for potentially adverse parties to minimize the risk of subjecting clients to an unexpected conflict as they go through their story with you or once you are into the process.

2. What, When, and Where

It can be useful to get a chronological written statement, including dates, locations, and witnesses, from clients before you meet. However, this is not mandatory, and it can be extremely difficult for some clients to produce a written account. If they already have a written statement that they created for some other purpose, they can use that. Otherwise, take a case-by-case approach to requesting one. When asking for a chronology, it is important to emphasize that it is only for your reference and that it can be very brief and in point form. In many cases, you will have to use the client's verbal account of events when you meet as the basis of your information.

It is also helpful to request in advance any related documents, including emails and texts, and any employment agreement or workplace policies the client has access to. If they would need to request these from their employer/former employer, wait until you have set the first meeting before requesting them. If the client is no longer with their employer, request related documents such as resignation or termination letters and their Record of Employment. Gather details about the client's employment including their start date, total annual compensation (a T4 or December 31 pay stub are ideal), and nature of their position. Also ask about their current employment status and their age so you can assess the notice period under the *Bardal* factors. (See Chapter 21: Civil Actions (Employment Law and Tort).)

If the client provides numerous documents, consider carefully which ones you need to review at the beginning of the process, and which ones can be set aside until you and

the client have agreed on a plan. For example, if the client has provided copies of texts sent by the harasser, you may not need to review the details in the texts if the client is able to initially draft their complaint themselves; or if they have provided all their documentation from their WorkSafe claim and, after a review of their legal options, they decide to pursue a human rights complaint, you may need to review only certain documents included in the WorkSafe documentation.

The "when" is particularly important to identify early as many of the legal frameworks have limitation periods and filing deadlines. (Chapter 29, Table 1. AVAILABLE FORUMS sets out limitation periods for various legal options.)

3. Why

Ask the client why they decided to get legal advice. Ask for a list of their main questions so that you can ensure they are answered. Ask the client what they are hoping for from the meeting; this may help you focus the direction of the interview. This also contributes to the client being heard and ensuring you are able to address their expectations.

D. The Stage of the Client's Complaint

Before the first meeting, ask the client what, if anything, they have done to address their concerns so far. Contacting you may be their first step, but ask if they have:

- started any legal proceedings (e.g., WorkSafeBC, Human Rights, Civil Action),
- reported the incident or incidents to the police,
- pursued an internal complaint with their employer, or
- reported the incident or incidents formally or informally at work.

If the client has taken any of these steps and has any written correspondence, statements, documents, or outcomes relating to these proceedings, request copies of them.

E. Client Interview Guidelines

1. Review the Client's Intake Information Before Your Meeting

Review and assess the information provided by the client before you meet. If you are familiar with the client's case, it can help you build rapport—and subsequently trust—at your first meeting. Key information to review and assess includes:

- the timeline of events, keeping limitation periods in mind,
- employment details, including the *Bardal* factors to assess reasonable notice period (age, length of service, nature of job, and availability of alternative employment) and compare reasonable notice cases, and
- the client's current employment status (i.e., are they still at work, on leave, quit, fired, or in a new job?).

2. Make the Client Comfortable

At the beginning of the first meeting, review the agenda with the client so they know what to expect. For many, this will be their first interaction with a lawyer, or they may have had prior negative experiences with lawyers or the justice system. Find a private location to meet and have a pen, notepad, calculator, and tissues available for the client.

Introduce yourself and your experience, and explain the solicitor-client relationship and confidentiality. Clients who are experiencing sexual harassment at work are often concerned about their privacy and that something may happen just because they are consulting with a lawyer.

Here is an example of how you might introduce yourself and try to put a client at ease:

> How are you feeling about this meeting? Is there anything I can do to make it easier for you?
>
> I run all of my meetings the same way, and I will explain that to you now so you know what to expect.
>
> First, I would like to hear what has happened. As we go through it, I may ask you questions to get more information, and if I think you are getting off track or I don't understand the relevance of information, I may interrupt so we can stay focused.
>
> Next, I will explain the law to you and how it applies to your situation. You can ask questions then or anytime that feels right to you.
>
> Then we will review your options, and the pros and cons of each option, together.
>
> And then we will pick a path and make a strategy together. You will leave here with a plan, or at the very least, a couple of options to consider.
>
> As we have limited hours, we should consider how I can provide the most value to you. We can discuss at the end of the meeting how you want me to spend my time.
>
> Do you have any concerns or worries about the meeting or the plan? [Address them] We can take a break at any time.

After this introduction you may feel able to ask the client what their ideal outcome looks like. What is their goal? Do they want to stay at work with the harassment stopped? Do they want to leave their job with some compensation? Some clients cannot address this at the outset of the meeting, but for many it is a good place to begin and can help to frame the rest of the meeting and strategy. If you do not address this point at the outset, circle back to it later in the meeting.

3. Listen to the Client

If the client has a certain point in their story where they would like to start, let them begin with that. Depending on where they start and the flow of the narrative, you may want to bring them back to the beginning at an appropriate point. The relevant starting point in most cases is when they started their employment. It can be useful to refer to any documents that they provided in advance or brought with them as you discuss the related events.

Some clients need direction and assistance, with reminders of where they left off. If a client is struggling to give a chronological account of events, make a note of your questions, let them finish their thought or story, and then circle back for more detail.

4. Ask About the Client's Story

You will need certain key information to assess a client's case. Ask them about:

- their working relationship or interactions with the harasser;
- the relative positions between them and the harasser in the organization (e.g., power imbalances);
- details of the workplace sexual harassment/sexual violence (what, where, when);
- witnesses or people told contemporaneously about the incident;
- the impact the harassment had on them; specifically, did they:
    - see a doctor or other healthcare provider;
    - take any time off work;
    - suffer symptoms of any kind;
    - find the situation at work or their performance at work was negatively affected;
    - experience discomfort;
    - find themselves treated differently, demoted, or sidelined; or
    - get fired?

If you did not address the client's ideal outcome or goal at the outset, do so now.

5. Explain the Law and Legal Assessment

You have to give the client some legal coaching. This is when the notepad and pen you brought for the client come into use. Most lawyers find a plain language approach to writing and speaking is challenging but it is crucial for legal coaching. Invite questions from the client throughout and check in frequently to confirm they understand what you are saying. Review the three-part test from *Janzen v. Platy* and explain each segment of the test. Confirm that the client understands the test and work with them to apply it to their situation. Review the various legal schemes that can apply to their case, and work through them to assess each one for fit, and the legal tests that apply under each. Use your discretion about schemes that seem obviously not applicable. It may be useful to mention them briefly rather than reviewing them in detail.

The Three-Part Test for Sexual Harassment

Janzen v. Platy [1989] 1 SCR 1252 sets out a three-part test for sexual harassment. In essence, the conduct must:

1. be of a sexual nature,
2. be unwelcome, and
3. result in adverse consequences for the complainant.

A good approach to talking about the law can be to explain the legal concept in abstract terms first and then apply it to your client's situation. The client may find it easier to understand if you contrast their case with a hypothetical one that has a different legal assessment.

Make a practical assessment of what financial and other outcomes there could be under the various legal frameworks, and then review some negotiated settlements and what a reasonable settlement might include (look at both financial and other outcomes). Use your calculator to walk through the calculation of damages with your client.

6. Discuss the Legal Options

Based on the legal assessment, some legal frameworks will apply better than others. It is impossible to create a complete catalogue of options, as every client's situation has both unique facts and unpredictable aspects. Collaborate with the client to compile the most complete list of options that you can come up with and then review them. Seek their ideas and input, and expressly acknowledge that they, not you, are the expert on their situation. Explain that the options are not mutually exclusive and that the client can pursue several either in parallel or in series. As you review each option, discuss the pros and cons in the context of the client's goal or ideal outcome.

The options include:

- Do nothing. This is always an option. Discuss the pros and cons of doing nothing.
- Raise the matter informally internally at work.
- Make a formal internal complaint.
- Send an email written by the client which may be reviewed, or ghost-written by counsel, about the matter, asking that it be addressed internally.
- Send a demand letter about the matter from counsel, asking that it be addressed internally.
- Start legal action(s).
- Send an email written by the client and reviewed, or ghost-written by counsel, about the matter, seeking severance package.
- Send a demand letter about the matter from counsel, demanding severance package.

When a client is weighing their options, remind them about the limited funding for legal services offered under SHARP. Many clients want "a letter from a lawyer." While you

may be able to have the consultation meeting, review the materials, and write a demand within the five-hour limit, it is very unlikely that any negotiation would conclude within those five hours. Even with a five-hour extension, a demand letter and negotiation on your letterhead could easily use all of the 10 hours, leaving no time to help the client through any legal processes. A ghost-written email (or email the client writes and you review) is a better use of time. It should be written in a simplified, plain language form, rather than as a formal demand letter, and should appear as if the client had written it. If you can provide the client with an understanding of the range of reasonable resolution outcomes, they may be able to review the employer's response and respond without further legal advice.

See Chapter 30: Legal Coaching: Guiding Self-represented Litigants to Advance Their Case for an example of a ghost-written demand.

7. Make a Plan and Fix an End Goal of Service

In most client consultations, a clear best option—or perhaps a top two or three—will emerge. Ideally, by the end of the first meeting with the client you will have a step-by-step plan. Discuss with the client how to make best use of the time available, what the client can do themselves, and where they anticipate needing assistance. For example, a client may be able to draft the complaint or demand letter themselves and ask you to review it, assist with calculating claims, or provide relevant case law to support their claim. They may be able to attend mediation with a support person and could benefit from understanding the process and the value of their claim, receiving tips about negotiation, and having assistance in reviewing the release. Depending on the client, you may be able to work with them during the meeting to ensure they have notes on the options, time limits, and overall plan. If they are unable to make notes, send a brief follow-up email summarizing the plan for them and listing links to self-help information online and forms for starting legal actions, information about limitation periods and filing deadlines, and clear statements about what each of you will each be responsible for doing.

Tips for Interviewing Clients

- If your client is unable to stop talking, or speaks very rapidly, they may need to be gently interrupted from time to time and reminded to slow down so you can take notes.
- If your client responds very slowly to questions, or appears to not respond, you may need to pause without commenting to allow them time to gather their thoughts.
- If your client gets stuck on a topic and is unable to move forward from something unrelated to the matter at hand, remind them there is only a certain amount of time available. Let them know you are there to help with the one issue you are there to address, refocus the conversation by asking them to respond to a few specific questions.
- If your client struggles to communicate a detailed narrative, you may need to ask specific questions to prod for more information. It may be helpful to ask them if there is someone who you can call to get more details or to corroborate their information.
- If your client gets agitated, angry or upset, it may help to take a brief break (time and situation permitting).
- See also Chapter 3: Trauma-informed Practice.

CHAPTER 27: INVOLVING SUPPORT PEOPLE IN LEGAL RELATIONSHIPS

By Melissa Van der Houwen

A. Introduction

Many clients find working with a lawyer and legal processes intimidating and disorienting. Some have never had any interaction with the legal system before; others have had traumatic experiences in the legal system. A client may therefore find it helpful to bring a support person to meetings. For survivors of sexual assault, for example, wrap-around supports from local community-based Victim Service Workers (VSWs) can be critical to providing trauma-informed services and adequate support. (See also Chapter 3: Trauma-informed Practice.)

However, including a VSW or other support person in the lawyer-client relationship raises questions about maintaining confidentiality and privilege between a lawyer and their client. This chapter addresses those areas of confidentiality and privilege that are relevant to involving support people in a lawyer-client relationship.

B. Confidentiality

1. The Ethical Requirement

Confidentiality is the cornerstone of the lawyer-client relationship. Both the Law Society of BC and the Federation of Law Societies of Canada maintain that lawyers can only effectively serve their clients when there is full and unreserved communication between them. This unreserved communication depends on the client feeling assured that information disclosed to the lawyer will be held in strict confidence.[1]

Lawyers owe a duty of confidentiality to every client, without exception, whether the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, even if differences have arisen between them.

The Law Society of BC's Code of Professional Conduct requires:

> 3.3 Confidentiality
>
> Confidential information
>
> 3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
>
> a) expressly or impliedly authorized by the client;
> b) required by law or a court to do so;

[1] Law Society of BC, *Code of Professional Conduct*, Rule 3.3-1 and Commentary; Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Rule 3.3-1 and Commentary.

c) required to deliver the information to the Law Society; or
d) otherwise permitted by this rule.

The commentary to Rule 3-3 notes, *inter alia*, that the ethical requirement of "confidentiality" is distinct from the evidentiary rule of privilege. The ethical requirement of confidentiality is wider than privilege and applies regardless of the nature of the information, the source of the information, and the fact that others may share the information.

C. Recommendations for Involving Support People

Rule 3.3-1(a) of the Code of Professional Conduct provides a simple mechanism to involve a support person in the lawyer-client relationship: the express authorization of the client.

If the client signs a form that authorizes the lawyer to communicate with the support person, the lawyer can communicate with the support person without breaching confidentiality.

D. Privilege

1. Background

Privilege is a rule of evidence that protects particular information from disclosure and admission into evidence. It is an exception to the otherwise (mostly) categorical rule that relevant, probative, and trustworthy information that advances the just resolution of a dispute should be disclosed and admitted into evidence. "Privileged" essentially means "exceptional" or "special."

Per *R. v. McClure*, 2001 SCC 14, at para 26, the law recognizes that some types of communications are worthy of confidentiality because they serve a public interest. The concept of privilege purports to foster relationships that society deems important by preventing communications made within them from being admitted into evidence. It balances the harm to the relationship, and society as a whole, against the judicial process for ascertaining the truth.

However, because privilege restricts the judicial eye from seeing information that would otherwise be important to the truth-seeking process, courts apply privilege restrictively.

At one time, privilege was called "class privilege" and only applied to set categories of relationships—for example, solicitor-client privilege. However, since the 1970s, the trend in Canada has been to approach questions of privilege on a case-by-case basis, using the Wigmore test as the analytical framework, rather than to create new classes of privilege.[2] Further, the growing preference in Canadian courts is to opt for orders of "partial privilege," whereby certain documents and information are redacted and the

[2] See *Slavutych v. Baker*, [1976] 1 SCR 254.

most relevant information is disclosed, even in relationships where the argument for confidentiality is very strong.[3]

2. Solicitor-Client Privilege

Solicitor-client privilege is the common law privilege that attaches to confidential communications between lawyer and client for the purposes of giving and receiving legal advice.[4] While it began as a rule of evidence, it is now recognized as a "fundamental civil and legal right"[5], and a principle of fundamental justice. [6]

Solicitor-client privilege is sometimes called legal advice privilege. Be careful in reviewing case law on this topic because in case law, legal advice (solicitor-client) privilege and litigation privilege (see below) are often confused; these are separate concepts.[7] Solicitor-client privilege is a principle of fundamental justice,[8] and is the area of privilege that "the law has been most zealous to protect and most reluctant to water down."[9] The SCC has referred to it as "integral to the workings of the legal system itself."[10]

Solicitor-client privilege applies whenever a client seeks legal advice, regardless of the terms of the retainer agreement, and includes situations where lawyers are advising self-represented litigants. Solicitor-client privilege applies even if the lawyer is not retained or the client is not planning litigation.[11]

In his book *Solicitor-Client Privilege*, Adam Dodek offers criticisms of the approach to solicitor-client privilege, including the law's focus on the lawyer over the client. Dodek says, "I like to say that it is not for nothing that the Solicitor comes first in 'Solicitor-Client Privilege.'"[12] We tend to put the solicitor first despite the client's interests being the *raison d'être* for the privilege, and despite confirmation from the SCC that "the privilege belongs to the client alone."[13]

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[3] *M(A) v. Ryan*, [1997] SCR 157.

[4] *Blank v. Canada*, 2006 SCC 39, at paras 6–7.

[5] *R. v. McClure*, 2001 SCC 14 [*McClure]* at paras 22 – 24; *Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353 [*Geffen*], at p. 383 citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 834.

[6] *McClure* at para 41.

[7] *Blank v. Canada*, 2006 SCC 39, at para 1.

[8] *Maranda v. Richer*, 2003 SCC 67, at para 57.

[9] *Jones v. Smith*, [1999] 1 SCR 455 at 477.

[10] *McClure* at para 31.

[11] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 144, at para 9.

[12] Adam Dodek, *Solicitor-Client Privilege* (LexisNexis, 2015) [*Dodek*], at Introduction.

[13] *Geffen* at p 383.

Waiver

Solicitor-client privilege belongs to the client, and the client can waive that privilege in certain circumstances, deliberately and knowingly, or by implication.[14] It cannot be lost inadvertently.

Waiver may occur without an intention to waive, where fairness and consistency so require.

Waiver may be implied by conduct in certain circumstances. For example, intentional disclosure of part of a privileged communication may suggest an implied waiver of the whole communication. Similarly, if a party advances state of mind or relies on legal advice to justify their conduct, waiver may be inferred.[15]

The risk of waiver is the greatest risk likely to arise from involving a support person in a legal advice relationship, as their involvement could be seen as waiver over communications and documents that are covered by solicitor-client privilege. However, between the pedestal on which solicitor-client privilege sits at law, and the concepts of agency (see below), it could be argued that involving support people in a lawyer-client relationship should not defeat privilege.

Agents

Privilege normally applies to communications between two parties. Generally, the presence of a third party who is considered a "stranger" to the privilege will defeat the requisite confidentiality necessary for the privilege to attach.[16] However, if the third party is an "agent" of the client, seeking advice on the client's behalf, then solicitor-client privilege may attach.[17]

To be considered an agent, the third party's role should be to act as a conduit or channel of communication for the client, and includes people who act as messengers or translators or interpreters. The third party's assistance must be central to the solicitor-client relationship.[18] The BC Court of Appeal has found that third-party communications fall within the protection of solicitor-client privilege where the third party's role is integral to the obtaining of legal advice—that is, they essentially stand in the client's shoes.[19]

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[14] *S & K Processors Ltd, v, Campbell Avenue Herring Producers Ltd*, (1983), 45 BCLR 218 (BCSC), at para 20.

[15] *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219, at para 55.

[16] *Dodek, Solicitor-Client Privilege,* note 11 at §3.29.

[17] Sidney N. Lederman et al., *Sopinka, Lederman & Bryant: The Law of Evidence in Canada,* 6th ed. (Canada: LexisNexis, 2022), at §14.135.

[18] Lederman et al., *Sopinka, Lederman & Bryant: Law of Evidence*, at §14.138.

[19] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, at paras 46 – 50, citing *General Accident Assurance Co. v. Chrusz*, (1999), 45 O.R. (3d) 321, [1999] O.J. No. 1107 (Ont. C.A.).

Dodek argues that the concept of agency should extend further than is often recognized in common law, and that clients who have mental disabilities could benefit from someone they know and trust being with them when they meet with a lawyer, even if they do not necessarily require that extra layer of support. He argues that agency ought to extend to that support, and that involving support people in communications between a lawyer and their client is entirely consistent with promoting the underlying purposes of the privilege: to ensure full and frank disclosure and to facilitate the provision of legal advice.[20]

Similarly, Dodek argues that privilege should still attach to legal advice given in the presence of an advocate or a family member whose assistance may not be necessary, and that this would reflect a more client-centric approach to solicitor-client privilege:

> Courts have no problem with extending the protection of the privilege for the benefit of lawyers to secretaries, clerks and law students, even though their work or participation is not strictly speaking necessary. A lawyer could type his own letter. A student does not have to sit in on a client meeting. However, the privilege allows such participation in order to make it easier for the lawyer to provide legal advice. Similarly, assistance which makes it easier for the client to communicate with the lawyer should generally not be seen to defeat the privilege. The privilege should be client-centric and provide at least as much flexibility to clients as it does as lawyers in terms of recognizing the assistance of others to help facilitate communication.[21]

The law does not clearly state that a support person involved in a legal advice relationship should be considered an agent and covered by solicitor-client privilege. However, in view of the above, it could be argued that the concept of agency should be extended to include support persons whose support is a prerequisite for the client's access to legal advice.

E. Litigation Privilege

Litigation privilege is the privilege that attaches to communications and material produced or brought into existence for the dominant purpose of being used in litigation. In certain circumstances, communications between lawyers and third parties can be covered by litigation privilege.

In BC, litigation privilege is sometimes called solicitor's brief privilege. To make things more confusing, in Ontario, the phrase "litigation privilege" is sometimes used interchangeably with "the without prejudice rule" to refer to settlement privilege.[22] Therefore, when reading case law, examine the content of the privilege that is being discussed, not just the name.

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[20] *Dodek*, *Solicitor-Client Privilege,* note 11, at §5.120.

[21] *Dodek*, *Solicitor-Client Privilege,* note 11, at §3.2.4.

[22] *BC Children's Hospital v. Air Products Canada Ltd*, 2003 BCCA 177, at para 4.

In order for litigation privilege to apply, litigation must be in reasonable contemplation at the time the document or communication was made.[23] The test is:

- was litigation in reasonable prospect at the time the document was produced, and if so,
- what was the dominant purpose for its production?[24]

The test does not require a lawyer to be retained in a representative capacity or even to be involved in the litigation team in any way.

Unlike solicitor-client privilege, litigation privilege ends when the litigation, and all closely related proceedings, is concluded.[25]

It is likely much easier to involve support people in a lawyer-client relationship where there is a reasonable prospect of litigation, provided the support person is a member of the client's litigation team. The downside to this approach is that the privilege has an expiry date, and documents and communications with the support person may be subject to disclosure in later, unrelated proceedings.

F. Case-by-Case, or Wigmore, Privilege

The SCC has made it clear that privilege can arise on a case-by-case basis if the four Wigmore criteria are met. The Wigmore test adopted by the SCC in *M(A) v. Ryan* [1997] 1 SCR 157 requires that:

- the communications must have been conducted in confidence that they will not be disclosed,
- this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties,
- the relation must be one which, in the opinion of the community, ought to be sedulously fostered, and
- the injury that would inure to the relation if the communications were disclosed must be greater than the benefit thereby gained for the correct disposal of the litigation.[26]

M(A) v. Ryan involved a question of whether a psychiatrist's notes and records pertaining to a sexual assault victim were privileged. It remains the leading case on case-by-case privilege, particularly as it pertains to psychologists' records, and is the grounding for the judicial preference for partial privilege. It has been followed by the BC Human Rights Tribunal.[27]

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[23] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, at para 85.

[24] *Hamalainen (Committee of) v. Sippola* (1991), 62 BCLR (2d) 254 (BCCA), confirmed in *Raj v. Khosravi*, 2015 BCCA 49 at paras. 8 and 9.

[25] *Blank v. Canada (Minister of Justice), [2006] 2 SCR 319, at para 34.*

[26] *M(A) v. Ryan,* note 4.

[27] See, for example, *Webber v. Alcan (No 4)*, 2005 BCHRT 283, at para 7.

In this case, the appellant sought counselling from a psychiatrist after being sexually assaulted by the respondent, Dr. Ryan. The question before the court was whether the psychiatrist's notes and records, made in course of treating the appellant, were protected from disclosure.

The SCC found that the documents met the first three, but not the fourth, Wigmore criteria. It ordered the disclosure of all records except the notes the psychiatrist had made for their own reference, on strict terms, and called it "partial privilege."

With respect to the fourth criteria, this factor is a public policy consideration that weighs the benefit inured from privilege against the interest in the correct disposal of litigation. Critically, the court refused to accept that an "occasional injustice" was the price to pay for privilege.

The court ultimately found that:

> 33 It follows that if the court considering a claim for privilege determines that a particular document or class of documents must be produced to get at the truth and prevent and unjust verdict, it must permit production to the extent required to avoid that result. … I would venture to say that an order for partial privilege will more often be appropriate in civil cases where, as here, the privacy interest is compelling. Disclosure of a limited number of documents, editing by the court to remove non-essential material, and the imposition of conditions on who may see and copy the documents are techniques which may be used to ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth.

Two further aspects of the decision in *M(A) v. Ryan* are noteworthy.

First, the court notes that it is important to ensure that the common law of privilege develops in accordance with Charter values. This requires ensuring that the existing rules of privilege be scrutinized to ensure that they reflect the values the *Charter* enshrines. While the basic structure of the common law of privilege must remain intact, particular rules in that structure may be modified and updated to reflect emerging social realities.[28]

Second, J. McLachlin (as she then was) notes at paragraph 21 that the law of privilege must evolve with the realities of the time. This statement is important to bear in mind, particularly as the decision in *Ryan* ages and society's views of certain records and relationships progresses.

Until there is some drastic change in the law, unless a document is otherwise privileged it will need to be disclosed where it is critical to the search for the truth and where withholding it from judicial scrutiny would result in an injustice.

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[28] *M(A) v. Ryan*, note 4, at para 23.

Instead of blanket privilege over documents arising in confidential communications, the judicial preference is now for orders of partial privilege, including orders for disclosure of a limited number of documents, editing by the court or tribunal to remove non-essential material, and the imposition of conditions on who may see and copy the documents. For example, in *Wright v. Becker*, 2018 BCSC 451, the Ministry of Child and Family Services sought an order for the Kamloops Sexual Assault Counselling Centre (KSACC) to provide copies of documents relating to the plaintiff. The plaintiff did not oppose production, but the KSACC did. The Master found that the documents were only of questionable relevance and thus, following *Ryan*, were privileged.

G. The Retainer Addendum

If a support person is going to be involved in a legal advice relationship, consider having the client and support person sign an addendum to the retainer agreement that sets out the terms of the support person's involvement (the "Retainer Addendum"). The sample retainer addendum at the end of this chapter can be customized to suit the circumstances of the client, the identity of the support person, and the organization for which they work or volunteer.

The retainer addendum can serve multiple purposes. First, it serves as the client's written authorization to counsel to disclose confidential information to the support person, as required by the Code of Professional Conduct.

Second, it outlines the importance of confidentiality in the relationship between the client and the support person, and contains a promise by the support person to hold any confidential information in strict confidence. If an opposing party applies for disclosure by the support person, the retainer addendum may form the basis for an argument that disclosure should not include, or should be limited with respect to, communication with the client's lawyer.

The form should note that the support person will also form part of a legal or litigation team. As long as there is a reasonable prospect of litigation, the client can have a litigation team, and communications between the litigation team are privileged.

The form should explicitly prohibit the lawyer from communicating in writing confidential information about the client to the support person. The reason for this is purely practical: an application for disclosure of documents from a support person is far less problematic if no correspondence documents between the lawyer and support person exist.

Explain to the client that:

- involving a support person in the lawyer-client relationship involves some risk, and while conversations between a lawyer and their client are privileged, as soon as a third party becomes involved, there is a risk that the client may be seen as waiving that privilege and that communications involving the support person may be subject to disclosure;

- the purpose of the retainer addendum is to try involve the third-party support person in the lawyer-client relationship and to avoid the risks of being seen to waive privilege, but there is no guarantee that it will accomplish that goal, and there is always a risk that the communications may be subject to disclosure; and
- the retainer addendum does not change the nature of the lawyer-client relationship, and nothing in it means you are agreeing to represent the client. Emphasize that the terms of your relationship with the client are set out in your retainer agreement, and that those terms are not modified by the retainer addendum.

Last updated April 2023

H. Sample Retainer Addendum

In this addendum, **"Confidential Information"** includes personal information about the client, the facts relating to the client's legal issue, and legal advice.

Part One

I, _____ , the client, authorize _____, my lawyer, to verbally relay Confidential Information to _____, my victim service worker at [ORGANIZATION]. My victim service worker at [ORGANIZATION] will form part of my legal and potential litigation team, and may attend meetings with me and my lawyer. The disclosure of Confidential Information to my victim service worker is necessary to ensure that I receive continuity of support and care.

I understand that my victim service worker at [ORGANIZATION] will, in turn, hold any Confidential Information given to them by me or my lawyer in strict confidence. I confirm that confidentiality between me and my victim service worker is critical to ensuring my safety, and to maintaining the integrity of our support relationship.

I **do not** authorize my lawyer to relay Confidential Information to my victim service worker at [ORGANIZATION] in writing.

I understand that this authorization gives my lawyer permission to discuss Confidential Information with my victim service worker at [ORGANIZATION].

_____	_____	_____
Client's Printed Name	Signature	Date

Part Two

I, _____, a victim service worker at [ORGANIZATION], agree to be part

of the legal and potential litigation team of _____, a client of [ORGANIZATION].

As part of the client's legal and potential litigation team, I understand that I may receive Confidential Information from the client or their lawyer.

I agree to hold any Confidential Information I receive from the client or their lawyer in strict confidence. I confirm that confidentiality is essential to the full and satisfactory maintenance of the relationship between myself and the client.

_____	_____	_____
Victim Service Worker Name	Signature	Date

CHAPTER 28: PRIVACY LAW AND SEXUAL HARASSMENT[1]

Adapted by Coral Lyster and Angela Wong

A. Introduction

Legislation governs organizations' privacy obligations on both the provincial and federal levels. Provincially, the Office of the Information and Privacy Commission of British Columbia (OIPC) enforces the *Freedom of Information and Protection of Privacy Act* [RSBC 1996], c. 165 (FIPPA*)* and the *Personal Information Protection Act* [SBC 2003], c. 63 (PIPA). The *Privacy Act* [RSBC 1996], c 373, defines and establishes the tort of violation of privacy, creating civil liability depending on the circumstances. Federally, the Office of the Privacy Commissioner of Canada (OPC) oversees compliance under two federal privacy laws: the *Privacy Act* (RSC 1985, c. P-21) and the *Personal Information Protection and Electronic Documents Act* (SC 2005, c. 5) (PIPEDA).

While there are differences between the various pieces of legislation covering privacy rights, they share certain basic principles:[2]

- An employer should only collect personal information that it needs for a specific purpose, and should collect it by fair and lawful means.
- An employer should say what personal information it collects from employees, why it collects it, and what it does with it.
- Personal information should normally only be collected, used, or disclosed with an employee's knowledge and consent.
- An employer should normally use or disclose personal information only for the purposes that it collected it for, and keep it only as long as it is needed for those purposes, unless it has the employee's consent to do something else with it, or is legally required or permitted to use or disclose it for other purposes.
- Employees' personal information must be accurate, complete, and up to date.
- Employees should be able to access their personal information and to challenge its accuracy and completeness.

B. Overview of Provincial Legislation

FIPPA applies to the public sector. It sets out individuals' access and privacy rights, including their right to access their own personal information and records in control of a public body. Under Schedule 1 of FIPPA, "public body" includes:

- a ministry of the government of British Columbia,

[1] This chapter was adapted from the Ending Violence Association of BC's Creating Safer Workplaces and Communities Project (see https://endingviolence.org)

[2] Office of the Privacy Commissioner of Canada, 2004. Privacy in the Workplace. https://www.priv.gc.ca/en/privacy-topics/privacy-at-work/02_05_d_17/

- an agency, board, commission, corporation, office, or other body defined in Schedule 2, and
- a local public body (i.e., local government body, healthcare body, social services body, educational body, or governing body of a profession or occupation).

Schedules 2 and 3 of FIPPA list all the public bodies and governing bodies of professions or occupations covered by FIPPA.

PIPA applies to any private sector organization (e.g., business, corporation, union, political party, not-for-profit, society, church, doctor's office, etc.) that collects, uses, and discloses the personal information of individuals in BC. Under PIPA, individuals have the right to access and correct their own personal information.

Both FIPPA and PIPA require public bodies and private organizations to take reasonable steps to protect the privacy of the personal information they hold and to secure it against unauthorized use or disclosure. Public bodies and private organizations are required to follow the terms set out in FIPPA and PIPPA as it pertains to the collection, use, and disclosure of individuals' personal information.

C. Overview of Federal Legislation

The *Privacy Act* applies to the federal government's collection, use, disclosure, retention, and disposal of personal information in the course of providing services such as employment insurance, old age security benefits, border security, federal policing and public safety, and tax collection and refunds. The legislation applies to federal government institutions listed in Schedule 3 of the *Privacy Act* as well as Crown corporations.

In contrast, PIPEDA applies to private sector organizations across Canada that collect, use, or disclose personal information in the course of a commercial activity. Typically, PIPEDA applies to federally regulated organizations that conduct business in Canada such as airports, banks, inter-provincial or international transportation companies, telecommunication companies, offshore drilling operations, and radio and television broadcasters.

D. What Is Personal Information?

Personal information is defined differently under the various legislation. It is therefore crucial to identify early on which legislation applies to a client's situation.

Under FIPPA, personal information is defined as "recorded information about an identifiable individual other than contact information." It also defines "personal identity information" as "any personal information of a type that is commonly used, alone or in combination with other information, to identify or purport to identify an individual." However, contact information such as an individual's name, position, business telephone number, business address, or business email or fax number is not considered personal information protected under FIPPA.

Similarly, PIPA defines personal information as "information about an identifiable individual and includes employee personal information but does not include contact information or work product information." It specifically states that contact information (i.e., an individual's name, position title, business telephone number, business address, or business email or fax number) is not considered personal information. An individual's work contact information is different from "employee personal information," which is protected under PIPA, and includes any personal information that was collected, used, or disclosed for the purposes of establishing, managing, or terminating an employment relationship (e.g., performance reviews). It should be distinguished from "work product information," which is information prepared or collected by individuals as part of their responsibilities or activities related to their employment and is not considered personal information.

Under PIPA and FIPPA, therefore, an individual would not normally need to consent to their name and work contact information being disclosed.

In comparison, the federal statutes provide a broader definition of personal information—and arguably greater protection. The *Privacy Act* defines personal information as any recorded information about an identifiable individual including:

- race, national or ethnic origin, colour, religion, age, and marital status;
- education, medical, criminal, employment history, and information about financial transactions;
- any assigned identifying number or symbol;
- address, fingerprints, and blood type;
- personal opinions or views except where they are about another individual or about a proposal for a grant, an award, or a prize to be made to another individual by a government institution;
- private or confidential correspondence sent to a government institution;
- the views or opinions of another individual about the individual;
- the views or opinions of another individual about a proposal for a grant, an award, or a prize to be made to the individual by an institution; and
- the name of the individual where it appears with other related personal information and where the disclosure of the name itself would reveal information about the individual.

Under PIPEDA, personal information includes any factual or subjective information, recorded or not, about an identifiable individual. The information can be in any form and includes:

- age, name, ID numbers, income, ethnic origin, and blood type;
- opinions, evaluations, comments, social status, and disciplinary actions; and
- employee files, credit records, loan records, medical records, existence of a dispute between a consumer and a merchant, and intentions (e.g., to acquire goods or services, or change jobs).

Consent of an individual is generally required for disclosure of their personal information. However, there are exceptions to this under statutes in which an organization may disclose information about an individual without their consent.

E. Limits to Confidentiality

Privacy rights are not absolute. While a workplace can support victims and survivors who bring forward a complaint without requiring a formal report, the legal limits to confidentiality should be clearly articulated within workplace policy and procedures. The employer should review confidentiality and its limitations with a complainant and with the person(s) about whom the complaint was made, and confirm in writing that it has been reviewed. Organizations may be required to take immediate action—for example, contacting the police or child welfare authorities—in relation to a disclosure of gender-based violence, in the following circumstances:

- There are reasonable grounds, based on the information provided, to believe that others in the work community may be at significant risk of harm.
- An individual is at imminent risk of severe or life-threatening self-harm.
- An individual is at imminent risk of harming another person.
- There is a requirement to report to child welfare under s. 14 of the *Child, Family and Community Service Act* where a child (someone under 19 years) is in need of protection.[3]
- There is a requirement to comply with a court order for the release of information.

There are certain other circumstances in which an organization may have to disclose information about an individual without their consent, so carefully check the exceptions listed in the applicable legislation.[4] For example, under PIPA, s. 1(c), in addition to the circumstances listed above, an organization may disclose personal information about an individual without their consent if it is reasonable to expect that the disclosure with their consent would compromise an investigation or proceeding. Similarly, under FIPPA, s. 33.2(i), PIPEDA, s. 3(c.1)(ii), and the *Privacy Act*, s. 2(e), a public body may disclose personal information about an individual without their consent to another public body or law enforcement agency to assist in a specific investigation.

If a client is disclosing or reporting sexual harassment, gender-based violence, harassment, bullying, or sexual assault, their disclosure or report will contain personal information about the alleged perpetrator. Generally, the alleged perpetrator's consent would be required before that information could be disclosed. (Conversely, in the event of the alleged harasser making an FOI request, the victim's consent would be

[3] Note that s. 13(2)(a) of the *Child, Family and Community Service Act* [RSBC 1996] c. 46 provides an exception where the confidential information on which the belief is based is obtained as a result of a solicitor-client relationship. This exception does not extend to all confidential information that a lawyer may have.

[4] PIPEDA, s. 5; FIPPA, ss. 33, 33.1, and 33.2; PIPA, ss. 18-19; and *Privacy Act*, s. 8.

required.) However, as previously noted, consent is not required if disclosure is for the purpose of assisting an investigation or there are reasonable grounds to believe that the health or safety of an individual could be compromised.

Workplace policy and procedures should specify who within the workplace has the authority to release information without consent in the above circumstances. An individual's information should only be released without their consent where legally required. If a decision is made to release information without consent, only information relevant to the health or safety concern in question should be released. The individual should be kept informed of any decision to release personal information.

F. Accessing Personal Information

If an individual makes a request to access their personal information, an organization must provide them with:

- their personal information that is under the control of the organization,
- information about the ways in which the personal information has been used or is being used by the organization, and
- the names of individuals and organizations to whom the personal information has been disclosed by the organization.

Each organization and public body should have their own privacy policy with instructions on how to access personal information, but typically, the request must be in writing and provide enough information to allow the organization to find the information with reasonable effort.

The organization may also have to adhere to certain timelines when fulfilling an access request. For example, under PIPA, s. 29, an organization must respond to an access request within 30 business days, but it may also take an additional 30 days in certain circumstances. For example:

- The applicant did not give enough information to allow the organization to find the requested personal information or document.
- A large amount of personal information was requested or had to be searched and meeting the time limit would unreasonably interfere with the organization's operations.
- The organization has to consult with another organization or public body to decide if access should be given.

Access to personal information is not guaranteed. Under PIPA, s. 23, an organization can refuse access to information in the following circumstances:

- The personal information was collected for an investigation (e.g., bullying, harassment, or sexual harassment) or the proceeding had not concluded.
- The personal information is protected by solicitor-client privilege—for example, a legal opinion from the organization's lawyer containing legal advice about a lawsuit brought by the applicant against the organization.

- The personal information was collected by a mediator or arbitrator while conducting a mediation or arbitration pursuant to a collective agreement or law, or by the court.

Even if the access request comes from the individual themselves, an organization or public body can refuse to disclose personal information under FIPPA ss. 19 and 22 and PIPA s. 23 if it:

- could reasonably be expected to threaten the safety or physical or mental health of another individual,
- could reasonably be expected to cause immediate or serious harm to the safety or physical or mental health of the individual who made the request,
- would reveal personal information about another individual, and
- would reveal the identity of the person who provided the organization with the applicant's personal information, and that person does not consent to their identity being disclosed.

Given that there are defined circumstances in which an organization or public body may refuse access to information, you must review the applicable legislation when you are advising a client on how to access their personal information and the limitations of that request.

If the client has requested access to their personal information and the request was denied, but there are reasons to believe that the reason for refusal is not justified under the legislation, the client can make a complaint to the OIPC (for FIPPA or PIPA-related complaints),[5] or to the OPC (for PIPEDA or *the Privacy Act* related complaints).[6]

G. Freedom of Information Requests

By Clea Parfitt

1. Why Make an FOI Request?

In some cases of workplace sexual harassment, the client may want to consider a freedom of information request. While this option may not provide a complete remedy for the client, the client may be concerned about what information the employer may have kept on record about them. As discussed above, there are limitations to what information would be disclosed through a freedom of information request.

If any sort of formal process is being considered or planned, it is often a good idea to make a formal request for information under the applicable freedom of information legislation (provincially, FIPPA for public entities, PIPA for private companies; federally, PIPEDA for private companies, the *Privacy Act* for the federal government). Employers often have information that will be important in the context of the complaint—for example, information about any internal complaint and the response, about internal

[5] See https://www.oipc.bc.ca/forms/individuals/

[6] See https://www.priv.gc.ca/en/report-a-concern/

communications about the complaint or underlying events, about internal policies and procedures, and about other complaints against the same alleged harasser. When credibility is an issue, an employer may leverage workplace issues concerning the complainant to diminish their credibility. A request for an employee's personnel file may circumvent this possibility. A freedom of information request can be particularly helpful if there have been considerable internal processes around a harassment issue.

Documents provided through a freedom of information request are frequently redacted, but they are still a useful way of ensuring that disclosure in a formal process is complete, and of limiting any temptation for the respondents to add to or subtract from the file. In larger organizations, the person responsible for responding to freedom of information requests is often an information specialist or privacy officer who is not part of human resources or involved in any workplace dispute around harassment. This can mean broader disclosure than might come later in a formal discrimination complaint process.

The other benefit of making a freedom of information request is that the documents received can be used for any purpose and can be made public. Conversely, documents that come through legal disclosure processes can only be used for the direct purposes of the litigation in which they were produced. If there may be public discussion of a complaint, it is helpful to have documents that can be disclosed publicly.

Making a freedom of information request is straightforward, although potentially time-consuming. It should set out as specifically as possible which documents are sought and the date range that should be searched.

To make best use of time, the complainant could make and monitor the request, and you could help with the initial drafting.

2. Why Avoid Making an FOI Request?

The main reason not to make such an application is the work involved in making the request and following up if it is not met. If the complainant has limited resources, and perhaps capacity, this step may be more trouble than it is worth.

Timing can be another issue. If a formal complaint is about to be filed, formal document disclosure may happen before a freedom of information request can be fulfilled. In BC, government entities and organizations, for example, have 30 working days to respond, and can request a further 30 working days if necessary. If the response is lacking, concerns of delay can be raised by complaining to the Commissioner under the statute.

Useful Resources

BC Freedom of Information and Privacy Association, n.d., "Request Personal Information": https://fipa.bc.ca/get-help/rights-to-your-personal-information/.

Government of British Columbia. "What Is Freedom of Information in British Columbia?" (n.d.). https://www2.gov.bc.ca/gov/content/governments/about-the-bc-government/open-government/open-information/freedom-of-information

Office of the Information and Privacy Commissioner for British Columbia: "How Do I Request Records?" (n.d.). https://www.oipc.bc.ca/for-the-public/how-do-i-request-records/

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CHAPTER 29: ADVISING CLIENTS ON THEIR LEGAL OPTIONS: SUMMARY TABLES: STATUTE JURISDICTION, ISSUE FORUMS, REMEDIES, AND TIME LIMITS

By Jadine Lannon

The tables below summarize the various potential legal options for clients with workplace sexual harassment complaints. Use them as a quick reference to ensure you have reviewed all the client's available options and to advise them on the most suitable option(s) for their situation.

- Table 1 lists the forums, outlines jurisdiction and issues dealt with, remedies, and time limits.
- Table 2 outlines the pros and cons of each option, including indicating parallel forums, level of control a client may have, whether the decision-making body is proactive in resolving cases, and general time frames for achieving a resolution through the forum.
- Table 3 summarizes the pros and cons of each forum.

Table 1. AVAILABLE FORUMS

	Forum	Relevant statute(s) (non-exhaustive)	Jurisdiction (applies to)	Issues	Available remedies (non-exhaustive)	Time limits
PROVINCIAL FORUMS	**BC Human Rights Tribunal**	*Human Rights Code,* RSBC 1996, c. 210	Provincially regulated employers, workers, and services, both unionized and non-unionized	-Human rights violations -Protection against retaliation for participating in human rights process	-Damages for injury to dignity -Compensation for wage loss and expenses -Ameliorative orders (e.g., reinstatement) -Systemic remedies (workplace training, creation of workplace policies, etc.)	1 year from the date of the last discriminatory act
	***WorkSafe BC**	-*Workers Compensation Act,* RSBC 2019, c. 1 ("*WCA*") -*Occupational Health and Safety Regulation*, B.C. Reg. 296/97	Workers in provincially and federally regulated workplaces, both unionized and non-unionized	-Workplace harassment and bullying -Injuries related to employment, including mental health injuries if there is a *DSM* diagnosis -Prohibited (retaliatory) action	<u>Workplace harassment/bullying:</u> -investigation into whether employer has sufficient workplace bullying and harassment policies/procedures <u>Injury:</u> -Compensation for income lost as a result of injury -Healthcare services (treatment, rehabilitation, etc.) -Vocational retraining Prohibited action: -Stop the prohibited action -Reinstatement to employment and to union membership -Clear employment record of discipline	Workplace harassment/bullying: no clear deadline Injury: 1 year from the date of: -injury -last injury in a series of injuries -disability -when a psychological change was experienced as a result of a traumatic event or significant stressor <u>Prohibited action:</u>

					-Reimbursement for expenses -Wage loss	-1 year from the date of the prohibited action; or -60 days from failure to pay wages pursuant to Part III of the *WCA*
	Internal workplace processes	N/A	Workplaces where the employer has an internal process for dealing with harassment, bullying, etc. Note: WorkSafeBC requires employers to have internal processes to deal with bullying/harassment complaints. If they do not, can make a workplace bullying and harassment complaint (called a "Bullying and Harassment Questionnaire") to WorkSafeBC)	Depends on workplace policies, guidelines, etc.	Depends on workplace policies, guidelines, etc.	Depends on workplace policies, guidelines, etc.
	BC Employment Standards Branch	*Employment Standards Act* ("*ESA*"), RSBC 1996, c. 113	Non-unionized workers in provincially regulated workplaces	Violations of employment standards	-Compensation for things that should have been paid pursuant to the *ESA,* but were not (e.g.: overtime, vacation pay, payment in lieu of notice on termination, etc.) -Enforcement of minimum standards provided for in the *ESA*	6 months from the date of contravention or termination

	Union grievances and labour arbitrations	-*Labour Relations Code,* RSBC 1996, c .244 -*Human Rights Code,* RSBC 1996, c. 210 -*Employment Standards Act,* RSBC 1996, c .113	Unionized workers in provincially regulated workplaces Note: pursuant to the decision *Weber v Ontario Hydro*, [1995] 2 SCR 929, and subsequent jurisprudence, unionized employees are barred from filing civil suits against their employer for disputes where the "essential character of the dispute arises from the interpretation, application, administration or violation of the collective agreement")	Any issue where the essential character of the dispute arises from the interpretation, application, administration or violation of the collective agreement, including, but not limited to: -Violations of collective agreements -Human rights violations -Violations of employment standards -Privacy violations	-Wage loss -instatement or reinstatement of collective agreement entitlements, like benefits, seniority, etc -Reinstatement, or damages in lieu of reinstatement -Human rights damages (e.g., damages for injury to dignity) -Privacy damages -Compensation for breaches and enforcement of the *ESA*	Depends on the collective agreement (look at timelines in grievance procedure)
	***Civil suit: Civil Resolution Tribunal**	-*Civil Resolution Tribunal Act,* SBC 2012, c. 25 -*Small Claims Act,* RSBC 1996, c. 430 -*Privacy Act,* RSBC 1996, c. 373	For non-unionized workers with employment and tort law claims of $5,000 or less, except claims involving libel, slander or malicious prosecution; or employment claims that fall within the exclusive jurisdiction of the Employment Standards Branch	-Wrongful and constructive dismissal -Personal injury	Employment law remedies: -Contractual damages (compensation for things that should have been paid pursuant to the employment contract, but were not) -Payment in lieu of reasonable notice -Aggravated damages for manner of dismissal	2 years from the date the claim is discovered, except for claims relating to sexual assault (see s. 3(1)(j) of the *Limitations Act,* SB 2012, c. 13)

			Note: if personal injury arose out of and in the course of employment, the worker may be barred pursuant to s. 10 of the *WCA* from pursuing civil suit for personal injury and can only pursue a WorkSafeBC claim. However, pursuant to s.128, of the WCA, the worker may be permitted to sue a third party (ie not an employer or worker) who caused or contributed to the injury		-punitive damages Personal injury remedies: -Compensation for loss or injury caused by tortious conduct -Aggravated and punitive damages	
	***Civil suit: Provincial Court – Small Claims**	-*Small Claims Act,* RSBC 1996, c. 430 -*Provincial Court Act,* RSBC 1996, c 379 -*Privacy Act,* RSBC 1996, c. 373	For non-unionized workers with employment and tort law claims of between $5,001 and $35,000 (see note above re: WorkSafeBC potentially a bar to personal injury suits)	-Wrongful and constructive dismissal -Personal injury	Same as above	Same as above
	***Civil suit: BC Supreme Court**	-*Supreme Court Act,* RSBC 1996, c. 443 -*Privacy Act,* RSBC 1996, c. 373	For non-unionized workers with employment and tort law claims of more than $35,000, except claims involving libel and slander	-Wrongful and constructive dismissal -Personal injury	Same as above	Same as above

			(see note above re: WorkSafeBC potentially a bar to personal injury suits)			
	Office of the Information and Privacy Commissioner of BC	-*Personal Information Protection Act,* SBC 2003, c. 63 -*Freedom of Information and Protection of Privacy Act,* RSBC 1996, c. 165	Applies to BC public bodies (governmental ministries, agencies, boards, etc.), and private organizations that are either located in BC or that collect, use, and disclose the personal information of individuals in BC	-Violations of privacy (excluding the tort of invasion of privacy) -Review of access to information requests -correction of inaccurate personal information	-Investigations into privacy violations -Declarations of privacy violations -Release of information via access to information requests	Under both *PIPA and FIPPA,* complainants are expected to bring their privacy complaint, access to information request, or correction request to attention of the public body or organization and to give them 30 days (*PIPA)* or 30 business days (*FIPPA*)** to respond before initiating a proceeding with the OIPC. After that: -Privacy complaints: no time limits, but arguably subject to the 2-year limitation period provided for in the *Limitation Act,* SBC 2012, c. 13 -Reviews of access to information and correction requests: 30 days from the day

						the complainant learns of the public body's or organization's response to their access or correction request *(**public bodies and organizations may grant themselves an additional 30 days/business days to respond to an access request pursuant to s. 31 of PIPA and s.10 of FIPPA)*
	Professional regulatory bodies (e.g., law societies, colleges, professional associations, etc.)	Depends on regulatory body	-Depends on regulatory body, but likely includes colleagues, clients, customers, and patients. -Many regulatory bodies also allow for complaints from the general public	Violations of professional standards and requirements	Depends on regulatory body, but could include investigations, public sanctions, removal of required certifications, restrictions/limits on practice, educational requirements on professional, and fines	Depends on regulatory body
FEDERAL FORUMS	**Canadian Human Rights Commission/Canadian Human Rights Tribunal**	*Canadian Human Rights Act,* RSC 1985, c. H-6	Federally regulated employers, workers, and services, both unionized and non-unionized, except certain workers excluded under the *Federal Public Sector Labour Relations Act,* SC 2003, c. 22, s. 2	-Human rights violations -protection against retaliation for filing or being involved in a complaint	-Damages for pain and suffering, capped at $20,000 -Special damages for intentional discrimination, capped at $20,000 -Compensation for wage loss and expenses -Ameliorative remedies	1 year from the date of the last discriminatory act

					-Systemic remedies	
	Employment and Social Development Canada (Labour Program)	*Canada Labour Code,* RSC 1985, c. L-2, Part III	Non-unionized workers in federally regulated workplaces	Violations of employment standards	-Compensation for breaches of the *Canada Labour Code,* Part III -enforcement of minimum standards set out in *Canada Labour Code,* Part III	-6 months from the date of contravention for most complaints -90 days for certain complaints (unjust dismissal, genetic testing, reprisal complaints)
	Internal workplace processes	N/A	Workplaces where the employer has an internal process for dealing with harassment, bullying, etc. Note: WorkSafeBC requires employers to have internal processes to deal with bullying/harassment complaints. If they do not, can make a workplace bullying and harassment complaint (called a "Bullying and Harassment Questionnaire") to WorkSafeBC)	Depends on workplace policies, guidelines, etc.	Depends on workplace policies, guidelines, etc.	Depends on workplace policies, guidelines, etc.
	Union grievances and labour arbitration	*Canada Labour Code,* RSC 1985, c. L-2, Part I	Unionized workers in federally regulated workplaces	Any issue where the essential character of the dispute arises from the interpretation,	-Wage loss -Reinstatement, or damages in lieu of	Depends on the collective agreement (look at timelines in grievance procedure)

				application, administration, or violation of the collective agreement, including, but not limited to: -Violations of collective agreements -Human rights violations -Violations of employment standards -Privacy violations	-instatement or reinstatement of collective agreement entitlements like benefits, seniority, etc -Human rights damages (e.g., damages for pain and suffering and special damages) -Privacy damages -Compensation for breaches and enforcement of *Canada Labour Code,* Part III	
	***Criminal prosecution**	*Criminal Code of Canada,* RSC 1985, c. C-46	All people in Canada	Criminal acts, including assault, sexual assault, uttering threats, mischief, and criminal harassment	-Pre-conviction restrictions on abuser (no contact orders, limitations on where they can go, detention, etc.) -Post-conviction penalties on abuser (fines, house arrest, jail, etc.) -Victim compensation -Publication bans -Testimonial accommodations (testifying behind a screen, via closed circuit TV, etc.)	None, though singular minor incidents may not be charged if incident occurred more than 12 months in the past

	Office of the Information and Privacy Commissioner of Canada	-*Privacy Act,* RSC 1985, c. P-21 -*Personal Information Protection and Electronic Documents Act,* SC 2000, c. 5	Applies to the Government of Canada, and to private sector organizations (excluding those covered by BC's *PIPA*)	-Violations of privacy -Access to information requests -correction of inaccurate personal information	-Investigations into privacy violations -Declarations of privacy violations -Release of personal information via access to information requests Note: Requests for information that is not personal information must be made pursuant to the *Access to Information Act,* RSC 1985, c A-1	*Privacy Act:* No time limits *PIPEDA:* For complaints about access to information requests and correction of personal information requests, 6 months from refusal to disclose or expiry of time limit to disclose. No time limits for all other privacy complaints
	Professional regulatory bodies (e.g., law societies, colleges, professional associations, etc.)	Depends on regulatory body	-Depends on regulatory body, but likely includes colleagues, clients, customers, and patients. -Many regulatory bodies also allow for complaints from the general public	Violations of professional standards and requirements	Depends on regulatory body, but could include investigations, public sanctions, removal of required certifications, educational requirements for professional, restrictions/limits on practice, and fines	Depends on regulatory body

*These forums may be available to workers from both provincially and federally regulated workplaces.

Table 2. PROS AND CONS OF AVAILABLE FORUMS

	Forum	Availability	Parallel forums	Remedies	Time limits	Level of control over process	Proactivity of forum	Public nature of forum	Time range for resolution
Human Rights Complaint	**BC Human Rights Tribunal**	-Workers in provincially regulated workplaces -Unionized and non-unionized	Grievances, WorkSafeBC proceedings, and internal workplace complaint processes may impact ability to proceed with Human Rights complaint	-Damages for injury to dignity (highest award $176,000 in *Francis v BC Ministry of Justice (No 5)*, 2021 BCHRT 16) -Compensation for wage loss and expenses -Ameliorative orders (e.g., reinstatement) -Systemic remedies -Remedies for retaliatory actions	1 year	High: complainant exercises almost complete control over direction of proceeding	Low: proceeding is dictated almost entirely by parties	-Public: most decisions and hearings are open to public, but privacy protections are available (anonymization, etc.) -Complaints are not public until the matter is placed on a hearing list 90 days before the hearing; settlements are private	1–3 years
	Canadian Human Rights Commission/Canadian Human Rights Tribunal	-Workers in federally regulated workplaces -Unionized and non-unionized		-Damages for pain and suffering (capped at $20,000) -Special damages for intentional discrimination (capped at $20,000) -Ameliorative orders (e.g., reinstatement) -Systemic remedies -Remedies for retaliatory actions			Medium to low: Commission relatively proactive during screening, and can become a party once complaint is referred to Tribunal		3+ years
WCB	**WorkSafeBC**	-Workers in both provincially and federally	-Civil actions for personal injury may be available in cases involving	-Ameliorating impact of prohibited (retaliatory) action (reinstatement, removal of discipline,	-1 year for injuries and prohibited	Medium to low: worker exercises some control over	High: WorkSafeBC takes a proactive role in advancing claims and can	Private: files and proceedings are not open to the public, and	2 months–1+ years

		regulated workplaces -Unionized and non-unionized	personal injuries caused by a third party (not a worker/employer, or a worker/employer engaging in "personal" conduct unrelated to work) -Grievance arbitrations and human rights complaints may impact on WorkSafeBC processes (for example, info established in one proceeding may be used in another proceeding)	compensation for wage loss and expenses) -Compensation for income lost as a result of workplace injury -Healthcare services (treatment, rehabilitation) -Vocational retraining -Workplace investigations/inspections	action complaints -60 days for prohibited action complaint involving failure to pay wages pursuant to Part III of the *WCA*	direction of proceeding	initiate its own workplace investigations and take enforcement actions against employers	workers' identities are anonymized in written decisions	
Employment Standards Complaint	**BC Employment Standards Branch**	-Non-unionized workers in provincially regulated workplaces	-Civil suits may be able to deal with breaches of the *ESA,* if they are a matter of contract -Grievances can deal with breaches of the *ESA*	-Compensation for breaches of the *ESA* -Enforcement of minimum standards set out in *ESA*	6 months	Medium: workers exercise fair degree of control over proceeding	High: ESB takes a proactive role in advancing claims and can initiate its own workplace investigations and take enforcement actions against employers	Private at the first level (initial determination by a director), but appeals tribunal (BCEST) decisions are publicly available; privacy protections may be available (anonymization, etc.)	3 months–1 year

	Employment and Social Development Canada (Labour Program)	-Non-unionized workers in federally regulated workplaces	Grievances can deal with breaches of the *Canada Labour Code,* Part III	-Compensation for breaches of the *Canada Labour Code,* Part III -Enforcement of minimum standards set out in *Canada Labour Code,* Part III	6 months or 90 days, depending on claim type	Medium: workers exercise fair degree of control over proceeding	High: ESDC likely takes a proactive role in advancing claims and can initiate its own workplace investigations and take enforcement actions against employers	Private at first level (decision by inspector), but decisions of appeals referee are publicly available; privacy protections may be available (anonymization, etc.)	3 months–1+ years
Workplace Complaint	**Internal workplace processes**	-Workers in workplaces where internal processes exist -Unionized or non-unionized	Depends on internal process, but grievances, human rights complaints, or civil claims may be initiated before, during, or after internal workplace processes are initiated or completed	Depends on internal process	Depends on internal process	Usually low, but depends on internal process	Usually low, but depends on internal process	Private: proceedings and resolution usually not accessible to the public	Depends on internal process
Grievance	**Union grievances and labour arbitrations**	-Unionized workers	Human rights complaints and privacy complaints may impact ability to proceed with grievance on the same issue(s)	-Wage loss -Reinstatement, or damages in lieu of -instatement or reinstatement of collective agreement entitlements like benefits, seniority, etc -Human rights damages (e.g., damages for injury to dignity/pain and suffering) -Privacy damages	Depends on collective agreement	Low: union has carriage of grievance and controls direction of proceeding	Medium to high: unions will frequently attempt to enforce workers' rights without much pressure from workers	Depends on stage of proceeding: informal resolutions before arbitration are usually private, but arbitration awards are usually publicly available; privacy protections may be available (anonymization, etc.)	3 months–2+ years

				-Compensation for breaches and enforcement of employment standards legislation					
Civil Suit	**Civil Resolution Tribunal**	-Non-unionized workers	-Availability of grievances for unionized workers prevents employment law claims and likely most tort claims -Availability of WorkSafeBC claims bars most personal injury claims where injury related to work/workplace -Participation in civil proceedings while criminal proceedings ongoing could harm credibility of complainant in criminal proceeding (different standard of proof and evidentiary findings in one forum could negatively impact claim in other forum)	Employment law remedies (contractual damages, notice, etc.) and tort law remedies (damages) up to $5,000	2 years, except for claims relating to sexual assault (see s. 3(1)(j) of the *Limitations Act,* SB 2012, c. 13)	High: parties exercise high degree of control over direction of proceeding	Low: proceeding is dictated entirely by parties	Relatively public: decisions publicly available; privacy protections may be available (anonymization, etc.)	3 months–1 year
	Provincial Court – Small Claims			Employment and tort law remedies from $5,001 to $35,000				Public: hearings and decisions publicly accessible; privacy protections may be available (anonymization, etc.)	6 months–2 years
	BC Supreme Court			Employment and tort law remedies above $35,000					1–4 years

Privacy Complaint and/or Access to Information Requests	**Office of the Information and Privacy Commissioner of BC**	-Can be brought by any worker, whether unionized or non-unionized -Whether federal or provincial depends on organization against which complaint/ access request is brought	Grievances alleging privacy violations may impact ability to proceed with privacy complaints	-Investigations into privacy violations -Declarations of privacy violations -Release of information via access to information requests Note: federally, requests for information that is not personal information must be made pursuant to the *Access to Information Act,* RSC 1985, c. A-1	Privacy Complaints: None Review of access to information requests and correction requests: 30 days	Medium: complainant exercises fair control over direction of privacy complaints and access to information requests	Medium to high: OIPC can initiate its own privacy complaints, but has limited enforcement mechanisms	Private: some decisions publicly available but claimants are anonymized	3 months–1 year
	Office of the Information and Privacy Commissioner of Canada			-Investigations into privacy violations -Declarations of privacy violations -Release of personal information via access to information requests Note: requests for information that is not personal information must be made pursuant to the *Access to Information Act,* RSC 1985, c. A-1	Complaints under *Privacy Act:* None Access to information requests and correction of personal information requests under *PIPEDA:* 6 months.				6 months – 1+ years

Criminal Charges	**Criminal prosecution**	Can be reported by anyone, whether unionized or non-unionized	N/A, but complainant's participation in civil proceedings while criminal prosecution ongoing could harm credibility of complainant in the criminal process and impact parallel Criminal proceeding	-Pre- and post-conviction penalties and restrictions on abuser (detention, movement restrictions, no contact orders, fines, etc.) -Victim compensation -Publication ban -Testimonial aids (testifying behind a screen, via closed circuit television, etc.)	None, but singular minor incidents may not be charged if incident occurred more than 6 months ago	Low: complainant exercises very little to no control over process	High: once criminal charges are initiated, Crown directs and controls prosecution	Public: hearings and decisions are publicly accessible; privacy protections may be available (anonymization, etc.)	2–5+ years
Complaint to Regulatory Body	**Professional regulatory bodies (e.g., law societies, colleges, professional associations, etc.)**	-Depends on regulatory body, but likely includes colleagues, clients, customers, and patients. -Many regulatory bodies also allow for complaints from the general public	Depends on regulatory body, but usually there are no parallel forums. In theory, criminal charges could be proceeding against professional alongside regulatory process	Depends on regulatory body, but could include investigations, public sanctions, removal of required certifications, education for professional, restrictions/limits on practice, and fines	Depends on regulatory body	Low: complainants likely exercise little control over process	Probably high: regulatory body likely to be proactive in advancing and investigating complaints	Probably mostly private: published decisions may be available to public, but complainants likely anonymized	Depends on regulatory body

	Table 3: SUMMARY OF PROS & CONS		
	Forum	**PROS**	**CONS**
Human Rights Complaint	**BC Human Rights Tribunal**	-Complainant exercises a high degree of control over process -Monetary awards can be large, and there is a trend towards higher I2D damages -Timeline for resolution in the mid-range (1-3 years) -Privacy protections may be available for public hearings/awards	-1-year time limit -Forum relatively public -Tribunal is not proactive and its processes are complex/lengthy, meaning complaints are often difficult to navigate without a lawyer -Trend towards increased timelines for resolutions -Complaints may be barred or impacted by grievances and WorkSafeBC proceedings
	Canadian Human Rights Commission/Canadian Human Rights Tribunal	-Complainant exercises high degree of control over process -Commission is relatively active during screening process, making the process relatively accessible to unrepresented litigants -Once complaint is referred to Tribunal, Commission can take a proactive role as party (usually to pursue systemic remedies) -Privacy protections may be available for public hearings/awards	-1-year time limit -Forum relatively public -Time line for resolution is very long (2+ years) -Human rights damages capped at $40,000 in total ($20K for pain and suffering, $20K for special damages) -Complaints may be barred or impacted by grievances and WorkSafeBC proceedings
WCB	**WorkSafeBC**	-WorkSafeBC takes a proactive role in advancing complaints, meaning process is accessible to unrepresented litigants -Time line for resolution relatively quick (potentially a few months) -Many supportive services available, such as treatment, rehabilitation, and vocational retraining	-1-year time limit for claims and most prohibited action complaints -60-day time limit for prohibited action complaints involving failure to pay wages required under Part III of the *WCA* -Workplace investigations for bullying and harassment not focused on investigating bullying/harassment but on making

		-Proceedings and outcomes private/anonymized (NB: WorkSafeBC has a parallel office, the Workers' Advisers Office, which provides free assistance and representation to workers for WorkSafeBC matters. Workers can apply for assistance from the Office. Efficacy of assistance depends on the advisor assigned)	sure employer has sufficient policies and procedures in place to deal with bullying/harassment -Worker's level of control over process is not high: WorkSafeBC largely dictates how claims will proceed and what supportive services will be made available to workers -Findings in WorkSafeBC matters may impact human rights complaints and grievances -Mental health injuries require *DSM* diagnosis -WorkSafeBC regime bars most personal injury suits, even if compensatory benefits not available
Employment Standards Complaint	**BC Employment Standards Branch**	-Workers exercise a relatively high degree of control over process -ESB takes a relatively proactive role in advancing complaints, meaning process is accessible to unrepresented litigants -Time line for resolution relatively fast (potentially a few months) -Initial proceedings and decision are private; privacy protections available for appeal decisions	-6-month time limit -Remedies limited to resolving breaches of employment standards minimums: common law employment remedies must be pursued through civil claims -Unionized workers have to pursue breaches of *ESA* through the grievance process
	Employment and Social Development Canada (Labour Program)	-Workers likely exercise a relatively high degree of control over process -ESDC likely takes a relatively proactive role in advancing complaints, meaning process is likely accessible to unrepresented litigants -Time line for resolution relatively short (potentially a few months)	-6-month time limit for most claims -90-day time limit for some claims -Remedies limited to resolving breaches of employment standards minimums: common law employment remedies must be pursued through civil claims

		-Initial proceedings and decisions are private	-Unionized workers have to pursue breaches of *CLC* through the grievance process -Unclear if privacy protections available for appeals decisions
Workplace Complaint	**Internal workplace processes**	-Can be effective at resolving workplace issues, so can be a good option for individuals who want to continue working for the employer -Time line for resolution is usually short -Proceedings and resolution are private	-Efficacy depends heavily on employer's internal processes and attitudes -Workers tend to exercise a low degree of control over process -Employers do not usually investigate their own liability -Employees could face discipline if they fail to participate in a workplace investigation -Workplace investigations regarding human rights matters could be a bar to human rights complaint if human rights issues are adequately resolved through workplace process, and employers are likely to make this argument in human rights process
Grievance	**Union grievances and labour arbitrations**	-Union has carriage of grievance, meaning need for grievor intervention is low: Union advances grievance on behalf of worker, so worker is typically not required to expend a lot of effort to initiate and advance the process -Unions often take proactive role in resolving issues even where no grievance is filed -Legal expenses covered by the union -Can deal with a number of different violations (human rights violations, breaches of employment standards, privacy breaches)	-Decision to advance grievance rests entirely with union, so worker exercises little to no control over grievance process -Union is statutory bargaining agent for employee, so individual employee (and their counsel) cannot negotiate directly with employer for resolution of employment issue, unless union and employer expressly consent to this -Working in a unionized context limits availability of other remedial avenues, such as civil claims and employment standards claims -Outcomes in grievance procedures can impact on availability to pursue human rights claims

		-Time line for resolution can be short (potentially a few months) -Pre-arbitration processes and outcomes usually private -Privacy protections may be available for published awards	-Arbitration awards publicly available
Civil Suit	**Civil Resolution Tribunal**	-Time line for resolution can be short (3 months–1 year) -Accessible to unrepresented litigants (use of lawyers is discouraged or not allowed) -Time limit relatively long (2 years), with potentially no time limit for claims relating to sexual assault -No cost implications if suit is unsuccessful -Privacy protections may be available for published decisions	-Damages limited to $5,000 -Decisions are publicly available
	Provincial Court – Small Claims	-Plaintiff exercises high degree of control over direction of proceeding -Time line for resolution in the mid-range (6 months–2 years) -Relatively accessible to unrepresented litigants -Time limit relatively long (2 years), with potentially no time limit for claims relating to sexual assault -No cost implications if suit is unsuccessful -Privacy protections may be available for public hearings/decisions	-Damages limited to $35,000 -If represented by counsel, legal fees can be expensive -Hearings and decisions open to public
	BC Supreme Court	-No limit on damages -Plaintiff exercises high degree of control over direction of proceeding	-Usually not accessible for unrepresented litigants, meaning legal cost of advancing a suit can be significant -Time line for resolution is long (1–4 years)

		-Time limit relatively long (2 years), with potentially no time limit for claims relating to sexual assault - Privacy protections may be available for public hearings/decisions	-Cost implications if a civil suit is unsuccessful -Hearings and decisions open to public
Privacy Complaint & Access to Information Requests	**Office of the Information and Privacy Commissioner of BC**	-Time line for resolution relatively short (potentially a few months) -No time limits for privacy complaints or access to information requests -Accessible to unrepresented litigants -Proceedings and outcomes are usually private, and published awards are usually anonymized	-Very short time limits for access to information and info correction requests (30 days) -Cannot deal with tort of invasion of privacy: that needs to be pursued through grievance or civil suit -Privacy complaints have limited remedies: OIPC cannot award damages, and its enforcement mechanisms are relatively toothless -Grievances can impact ability to proceed with a privacy complaint -If requesting personal information about someone other than requester, public institutions may charge a fee if the search and preparation of requests takes more than 3 hours[1]
	Office of the Information and Privacy Commissioner of Canada	-Time line for resolution relatively short (potentially a few months) -No time limits for privacy complaints -No time limits for access to information and correction requests under the *Privacy Act* access to information requests -Accessible to unrepresented litigants	-Short time limits for access to information and correction requests under *PIPEDA* (6 months) -Privacy complaints have limited remedies: OIPC cannot award damages, and its enforcement mechanisms are relatively toothless -Cannot request personal information about others without their written consent

[1] See fee schedule at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/155_2012#section13

		-Proceedings and outcomes are private	-Access to information requests made to private sector organizations under *PIPEDA* can charge fees for the requests[2]
Criminal Charges	**Criminal prosecution**	-Proceeding is advanced by the Crown so typically no cost to complainant -Abuser can be made subject to pre-conviction restrictions that prevent further abuse (no contact orders, limitations on movement or behaviour, etc.) -If prosecution is successful, abuser can face significant penalties such as imprisonment or house arrest, and be subject to a number of restrictions that prevent further abuse -Victim compensation may be available -Publication ban may be available to protect identity of complainant -Testimonial aids may be available	-Complainants exercise no control over a criminal proceeding or whether charge will be laid -Time line for resolution can be very long (2–5 years) -Proceedings/decisions open to public
Complaints to Regulatory Body	**Professional regulatory bodies (e.g., law societies, colleges, professional associations, etc.)**	-Regulatory bodies usually are quite proactive, so are accessible to unrepresented litigants -Time line for resolution may be short (several months) -Anonymization may be available -Proceedings and outcomes usually private/anonymized	-Complainants usually exercise a low level of control over regulatory proceedings -Usually, no personal remedies available from professional regulatory proceedings - Timeline for resolution may be long (more than a year)

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[2] See further details on fees at https://laws-lois.justice.gc.ca/eng/Regulations/SOR-83-507/page-1.html#h-878462.

CHAPTER 30: LEGAL COACHING: GUIDING SELF-REPRESENTED LITIGANTS TO ADVANCE THEIR CASE

By Sara Forte

A. Making Best Use of Time

The client has access to five hours' legal advice. If they have not already pursued or initiated any legal processes, -the allotted time will go very quickly. For a complex case, or if a client is traumatized, a review of the materials and an initial meeting can use up two or three hours. To make best use of the remaining time, consider helping the client to self-represent. This is known as offering "unbundled services" or a limited-scope retainer and can be extremely effective in increasing access to justice.

A key area of risk for both lawyers and clients with limited-scope retainers is potential confusion about who is responsible for various tasks, so it is very important to have clear, written communication about this. The retainer letter will indicate the limited scope of the lawyer's involvement, but moving forward, using emails to record who is responsible for each task as the case progresses will help to avoid confusion or misunderstanding.[1] In addition, lawyers who offer unbundled legal services need to be comfortable with potentially not knowing all the details of a case and having less control than they have when they offer full representation. Collaborate with the client to determine what they can do themselves and where you can add the most value. Empowering the client to take responsibility to move their case forward themselves may give back a client a sense of control and can be rewarding for both the client and the lawyer.

The client's goals should be a key consideration. If a quick settlement is their goal, reviewing an email drafted by the client or ghost-writing an email proposing settlement terms can be a very effective use of the available legal time. An email can often be written in 30 minutes, which leaves some time to support the client through the negotiation or direct them to self-help resources and complaint forms if a resolution is not possible. The client retains responsibility for receiving and reviewing the response. If they are well armed with information about resolution options, they may be able to continue negotiating without further legal advice.

If the client wants to pursue litigation, the time left after the initial meeting could be spent drafting or reviewing a complaint or pleading (one to two hours), connecting them with other advocates or representation, or supporting them through the process on an as-needed basis.

[1] The Law Society has a very detailed and helpful information resource on limited-scope retainers, including a webinar. See https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/practice-resources/ and https://www.lif.ca/risk-management/practice-management-wellness-risks-and-tips/limited-scope-retainers-unbundling/

To make the most of the limited hours available:

- Provide an initial consultation and legal assessment, including choosing a legal forum for a complaint and outlining reasonable expectations for timelines, award, and resolution.
- Ghost-write communication to the employer, including a demand (see end of this chapter for a sample email).
- Provide links to online self-help materials, other advocacy services, and complaint forms. (SHARP Workplaces staff be able to help with this.)
- Review and provide feedback on a complaint or pleading drafted by the client before it is filed. (Sometimes it is faster to draft a simplified pleading for the client to file.)
- Advise on an as-needed basis throughout a legal process on process and strategy. That could include providing leading cases, reviewing the opposing side's materials, and helping draft communications.
- Coach the client ahead of a mediation in process, strategy, and reasonable settlement terms.
- Review the proposed settlement agreements.
- Advise and provide support on presenting a case.

It will be challenging for a client to self-represent at a hearing, so consider their options for free legal representation (e.g., CLAS or LSLAP) if they choose to pursue an action or processes that take an investigation rather than hearing approach (for example, WorkSafeBC). SHARP Workplaces can help provide a client with contacts for referrals and, in the case of other CLAS programs, facilitate the connection.

Useful Resources

CLAS operates the BC Human Rights Clinic which provides free legal representation to people with an accepted BCHRT complaint who qualify for services: https://bchrc.net/

LSLAP is the Law Students' Legal Advice Program at the University of British Columbia. It can provide legal advice for people in the Lower Mainland who may not be able to afford a lawyer: https://www.lslap.bc.ca/

B. SHARP Workplaces and Stand Informed Legal Services' Supports

By Angela Leung

SHARP Workplaces and Stand Informed Legal Advice Services Programs (the "Programs") are committed to taking a holistic approach to assisting clients and recognizes that they are often dealing with myriad issues intertwined with their legal issue. Be aware of signs of background or other issues and ask the client about other

areas of support they may find helpful—for example, counselling, employment, financial support, assistance drafting human rights complaints, or help with other legal issues. Lawyers are not expected to know all the services that are available. SHARP Workplaces or Stand Informed staff can help in identifying services and providing referrals to clients as requested by the client or the lawyer.

If clients need assistance with sending documents, access to video-conferencing, or support in managing the process, the Programs may be able to connect them with advocates or organizations that can help. To this end, SHARP Workplaces has partnered with Rise Women's Virtual Legal Clinic to connect with Rise's network of community partners located across the province. SHARP Workplaces Legal Clinic is also developing our wider referral network.

Additionally, in some circumstances and depending on capacity, SHARP Workplaces or Stand Informed staff may be able to help clients with typing up their complaints or organizing their documents.

Lawyers can contact the staff directly by emailing standinformed@clasbc.net to request assistance for a client.

C. Sample Ghost-Written Demand Where Harasser Was Manager/Owner

Subject: legal claims

[employer contact name],

I have been to see a lawyer about what happened to me when I was working for you. You kissing and hugging me at work, and your text messages calling me beautiful, and telling me you love me are sexual harassment. I told you several times to stop this, and I have text messages to prove that it happened and that I asked you to stop, but you continued. After I objected to your inappropriate behaviour, you humiliated me in front of other staff, threatened to fire me, and demoted me. I have been advised that I can file a complaint against you and the company with the Human Rights Tribunal about this, and I can request wage loss damages and compensation for injury to my dignity.

Since you have made it impossible for me to keep working, you also owe me severance pay for constructive dismissal. Based on my age, length of service and the nature of my job as [title], severance pay would be around XX months' pay.

I do not want to get lawyers involved or start legal claims, and so I am making a without prejudice offer for a private settlement. I believe that $XXX, paid as damages for injury to dignity, would be a reasonable amount to deal with all of this. You have one week to accept this offer, or I will be filing legal claims.

[client name]

CHAPTER 31: ADVISING THE CLIENT IN SETTING OUT THE COMPLAINT

By Clea Parfitt

A. Introduction

If a client is concerned about harassment but is not ready to make a formal complaint, strongly encourage them to **keep notes** about any events they are concerned about—including what happened, when, where, and whether anyone else was present—and any documentary evidence about them. Detailed allegations have the greatest chance of being believed and of convincing others that the harassment has happened, or is happening, and needs to be dealt with.

In BC it is legal to make a **recording** if one of the parties to a conversation knows about it. Such recordings can be entered as evidence at the Tribunal, but making recordings without telling the other party is generally considered to be underhanded, can damage relationships, can affect the credibility of the person making the recording, and can suggest an effort to entrap the other party. Conversely, a recording can be extremely damaging evidence and can conclusively settle factual issues, including where the complainant's credibility may have otherwise been damaged.[1]

Reviewing and producing transcripts of recorded information is exceptionally time-consuming but likely necessary if they are going to be used in any formal proceeding. Discourage clients from making recordings unless they are likely to be very fruitful or the complainant potentially faces a serious credibility issue. Note that if the matter proceeds as a complaint, all recordings that are relevant will need to be disclosed, whether or not you plan to use them at hearing.

B. First Steps

Ideally, the first step in assisting someone with a complaint, or preparing a complaint, is to conduct a detailed interview. This can, however, be problematic in cases of sexual harassment, especially if there is a long narrative involved. Hearing the whole story orally can take a number of hours. When services are limited to only a few hours, this may not be a realistic option.

Second, many complainants find going through what happened over and over very difficult. In particular, complainants who have been subjected to a lengthy course of sexual harassment often cope by dealing with each incident as it comes, and telling themselves it will not happen again. It is therefore often very difficult for them to set out and look at the full sweep of what they have been subjected to. They will need time to do this work, including perhaps a number of sessions. (See Chapter 3: Trauma-informed Practice, for more information on this.) Furthermore, many sexual

[1] See, for example, *Mahmoodi v. University of British Columbia and Dutton,* 1999 BCHRT 56. See also *Brar and others v. British Columbia Veterinary Medical Association and Osborne*, 2015 BCHRT 151.

harassment complaints are essentially a matter of who is believed, and truth-telling is often judged by consistency. The more often a person provides their account of an incident, the more likely it is that changes will creep in, which can negatively affect the complainant's credibility.

Complainants should not tell their story in detail until they are ready. They should then put the complaint in writing. While support through this process can be really helpful, it may be that someone else can provide this support if time is limited. Complainants should also be encouraged to access emotional support, including counselling, as they set out the complaint.

Internal workplace investigations and complaints to the police often include an oral interview with complainant. Consider the additional records that these processes create when deciding whether to engage with them.

From the outset, gather as many relevant documents as possible, preferably in hard copy. Texts, emails, and other electronic communications can provide important evidence in sexual harassment cases, but they can be somewhat ephemeral and difficult to print. Tackle any technological issues early, as over time devices can be lost or damaged, software can change, and access settings can be altered, making access to electronic information more difficult. Any recordings or photographs should also be gathered early.

Ideally, harassment complaints should be set out chronologically, with each date and what happened on that date specified in the narrative. If this is not possible because too much time has elapsed or details have been lost, it can also be effective to describe the behaviours that occurred, together with some sense of how often those behaviours took place (every day, sometimes, rarely, only once, etc.) Many complainants make the common mistake of describing behaviour that happened once as though it happened repeatedly over time. This can lead to confusion and damage their credibility later in the process. An advocate can work with the complainant to confirm that behaviour described as ongoing actually was ongoing.

If the complaint is not set out chronologically, it may be important to establish the date(s) of the most recent events if time limits are likely to be an issue (see below for more discussion of time limits).

Where possible, describe the behaviour rather than naming it. For example, instead of writing "He was abusive," write "He raised his voice and said I was stupid." Encourage the complainant to be more factual and detailed in their account. For example, ask them, "Can you tell me a bit more about that?" or "What did the person say exactly?"

Complaints are usually most effective when they are written in a matter-of-fact tone without too many adjectives or too much emotional language. Calm equates with credible. The narrative should not contain any argument or speculation about why

someone did what they did, although a formal complaint should explain why behaviour that is not obviously adverse should be considered harassment. Complaints do not need to prove intent or the why of what happened; such assertions almost always make the complainant seem less credible and more "fanciful." The complainant should limit themselves as much as possible to describing things they observed and experienced directly.

It can be risky to assert that others had the same experiences or witnessed what happened unless those others are willing to confirm this claim. Bystanders and others subjected to discriminatory behaviour often will not support a complainant's account for many reasons, not least of which is fear about their own safety and security in their workplace. (See also Chapter 34: Advising a Bystander to Sexual Harassment in the Workplace.)

Stereotypes persist about how complainants "should" react to sexual harassment. In practice, of course, reactions differ widely. Some complainants may opt to not challenge behaviour in order to preserve their positions and peace in the workplace or may respond passively for other reasons, potentially because of a prior history of abuse or trauma. Other complainants may be very angry and outspoken about what has happened. Generally, being upset "plays" better than being angry in any sort of formal or informal process. Anger expressed by a complainant can be used against them to suggest that they are vengeful and therefore unreliable. This is another reason to favour neutral language in a complaint.

C. Making a Complaint to the BC Human Rights Tribunal

1. Identifying the Complaint

The Tribunal's complaint form (Form 1[2]) is unhelpful in that it promotes a very convoluted and repetitive telling of what happened. It is better to leave the form sections about what happened blank and to attach to the form "complaint details" setting out what happened in a single narrative. At the end of this narrative, the complaint can detail how the conduct described is harassment. Where there are multiple respondents, this latter section can set out the discrimination by respondent.

Because complaints must be filed within a year, it is crucial to establish with a client that this requirement has been met, even if all the relevant dates in a complaint are not known.

The complaint should also set out in general terms how the discriminatory conduct harmed the complainant. This harm could be external—for example, a toxic work environment or adverse job consequences or demands or personal—for example, the complainant suffers distress, upset, loss of self-esteem, etc. The Tribunal may not fully recognize the latter.[3]

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[2] Available at http://www.bchrt.bc.ca/law-library/forms/index.htm

[3] See *The Employee v. The University and another (No. 2)*, 2020 BCHRT 12.

Taking a complainant's sense that they have been treated unfairly and developing a description of what happened that fits within a workable human rights analysis is not always an obvious process. It is extremely important to get the full story and to think carefully about which grounds of the *Human Rights Code* are engaged. The harassment may also be related to a complainant's age, place of origin, sexual orientation, gender identity or expression, racialization, or any other reason that may identify them as "different" or vulnerable. These intersecting grounds should be named on the complaint form. (See also PART II: SERVING CLIENTS WITH INTERSECTIONAL IDENTITIES.)

Consider not only adverse treatment that occurs because of who someone is or is perceived to be, but also how the impact of treatment may be particularly adverse because of someone's personal characteristics. In the context of gender-based harassment, for example, conduct that may be common in the workplace may have a particularly adverse impact on people who identify as women, even when it is not specifically directed at them, or may be discrimination because it is directed at a person who identifies as a woman but may not have been if it were directed at a person who identifies as a man. This is because certain kinds of derogatory comments fall within recognized patterns of negative treatment that people can be subjected to because of gender.

2. Identifying Respondents

The respondents to a sexual harassment complaint are the individuals whose behaviour is alleged to have been harassing or assaultive to the complainant, the employer, and perhaps a union if union representation has been very poor.

Employers are named because the Tribunal is focused on naming, remediating, and ameliorating conditions of discrimination, and the party in a position to actually do this is the employer.[4]

In sexual harassment complaints, it may also be important to argue that the employer's response to an internal complaint has been deficient or even non-existent. The failure to have measures in place to effectively respond to gender-based harassment is a form of gender discrimination because it has a particularly adverse effect on people who need to make complaints about gender-based harassment discrimination. The BC Human Rights Tribunal has recognized this although it is not an area that it has developed significantly.[5]

Sometimes, the employer's response may lead to other individuals being named in the complaint, since senior managers may respond so poorly that their conduct should also be under scrutiny. In such a case, their specific problematic personal conduct should be identified.

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[4] *Robichaud v. Canada (Treasury Board),* [1987] 2 SCR 84.

[5] In *The Employee v. The University and another (No. 2)*, 2020 BCHRT 12, the Tribunal accepted that the failure to investigate can be a form of discrimination, although it was not proven on the facts.

A union may be named if its conduct has exacerbated the situation in a concrete way or it has not assisted with the complaint and the complainant has had to go outside the collective agreement for help. Either of these circumstances can be a form of discrimination on the basis of sex and other personal characteristics.

The respondents' addresses should be provided to the Tribunal as it will serve them with the complaint. Usually respondents respond to complaints, making it clear they were served. If they do not respond, ensure that their addresses were legally correct for whatever type of entity they are. Otherwise, issues about whether effective service of respondents has taken place may arise later.

3. Time Limits

Certain time limits apply to complaints to the Human Rights Tribunal. In general, complainants should file within one year of the conduct they are complaining about. If the conduct has been going on for some time, they can file within one year of the last incident. On the complaint form, they need to describe why the complaint is a "continuing contravention." A continuing contravention is repeated instances of related conduct where at least one of the events occurred within the time limit. Complainants often have a lot to say about how events are related.

Another circumstance that can give rise to a claim of continuing contravention is a continuing state of affairs—for example, a continuing discriminatory policy or a continuing physical circumstance—although the law is not as clear as it should be on this point. In these instances, it can be helpful to identify occasions on which the continuing state of affairs particularly impacted the complainant and/or to create a current issue by requesting that the employer change the policy or circumstances, or by making a direct complaint before filing a formal complaint to the Tribunal. This way it is possible to see the policy or state of affairs being applied to the complainant directly within the recent past.

The Tribunal has discretion to relieve against time limits. The test is whether it would be in the public interest to do so and whether there would be prejudice to any person in doing so. The Tribunal's jurisprudence on what makes an extension in the public interest is often limited to asking why the complaint was late, which has almost nothing to do with any public interest in the complaint. There is public interest in complaints because the *Human Rights Code* enshrines some of Canada's most fundamental social principles, and everyone benefits from having those principles explained, upheld, and developed. In that sense, all complaints that have a basic level of merit are in the public interest and should be accepted unless there is a very strong reason in terms of prejudice to some party not to accept them. This would be consistent with a large and liberal interpretation of the Code.

However, the Tribunal does not tend to approach extensions to time limits from that perspective. The Tribunal will consider novelty and the particular vulnerability of the complainant, or membership in a group that is particularly apt to be discriminated against. Because sexual misconduct complaints are so common, it is difficult to argue

that they merit special consideration when filed after a deadline, even though their very ubiquity makes them a serious problem that has a profound impact on diverse people in the workplace.

4. Remedies

The Tribunal complaint form also requires complainants to identify the remedies they are seeking. Note that it does not treat this list as definitive for the whole life of the complaint, and it will accept claims for other remedies later in the process. It is most useful to see this section as advice to respondents about what issues any settlement discussions in the immediate future may need to address.

Statements of remedies sought do not need to be quantified when the complaint is in the drafting stage, but should try to set out the main areas in which damages and remedies will be sought.

Section 37(2) of the *Human Rights Code* addresses the remedies the Tribunal can order:

> (2) If the member or panel determines that the complaint is justified, the member or panel
>
> (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,
>
> (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Code,
>
> (c) may order the person that contravened this Code to do one or both of the following:
>
> (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
>
> (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code, and
>
> (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:
>
> (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this Code;
>
> (ii) compensate the person discriminated against for all, or a

part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;

(iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self-respect or to any of them.

Generally, remedies can include:

- An order that the respondents cease discriminating in the same or a similar manner.
- Losses that can be calculated—for example, lost past and future wages, and other forms of compensation such as bonuses, pensions, and extended medical, dental, and disability benefits. Lost earnings will usually be claimed until the person finds other reasonable replacement work, or until the date of the hearing, whichever happens first.
- Expenses relating to find replacement work that can be calculated—for example, job search expenses, moving expenses, and training expenses. These expenses can be past and future.
- Expenses that can be calculated for treatment or medications required because of the discrimination. These expenses can be past and future.
- Damages for injury to dignity, feelings, and self-esteem. This amount is treated as an aggregate that addresses losses that cannot be calculated but may be quite or very serious, including the development of serious mental health diagnoses. The Tribunal has identified factors called the Torres factors for assessing the seriousness of harms under this heading.6 The Torres factors address the seriousness and persistence of the conduct, the vulnerability of the complainant, and the degree of harm caused.
- Reinstatement if the claimant lost their workplace position or replacement of other workplace advantages that were lost.
- Other ameliorative remedies, such as the development of or changes to policies and procedures in relation to the subject matter of a complaint.

The Tribunal will not order a party to apologize, but bear in mind that if respondents recognize the harm they have caused, it can be extremely helpful to complainants. This is therefore something that may be explored through negotiation, including at mediation. The Tribunal will not order an employer to terminate someone, although this might have to happen in order for the employer to cease discriminating in the same or a similar manner.

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[6] *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 at D/873 (Ont. Trib.), at para. 7758: "Consider the nature of the harassment: i.e. is it physical as well as verbal; the degree of aggressiveness and physical contact in the harassment; the ongoing nature, or time period of the harassment; the frequency of the harassment; the age of the victim; the vulnerability of the victim; and the psychological impact of harassment upon the victim." See also *Tannis v. Calvary Publishing Corp. 2000*, BCHRT 47.

D. Helping Clients Draft a Complaint

Helping clients draft a complaint can be a very effective use of the time available. A few points to bear in mind are:

- Helping the client to develop a comprehensive complaint that is as tightly focused and free of unnecessary confusion and rhetoric as possible can be time-consuming but will bring a significant return on investment. Conducting a comprehensive initial interview with a client is important but potentially also time-consuming. If their narrative is long, ask the client if they can produce a written chronological statement to use as a starting point and speed up the process.
- If the complaint requires the client to include an analysis of their human rights, they will need more help to understand and express any violation of those rights, especially in less obvious cases.
- If the client is preparing a formal complaint to the Tribunal, make sure they have fully and properly addressed any time limits and remedy issues.

CHAPTER 32: INTERNAL WORKPLACE PROCESSES

By Clea Parfitt

A. Introduction

Internal processes available to complainants to address their concerns range from very informal steps with the harasser directly, to a formal investigation conducted by the employer using an external investigator. Before engaging in any workplace process, a complainant should have been able to tell what happened to them, and received advice about the full range of legal options available to them. They should also have ongoing support.

B. Resolution with the Harasser

Sometimes a complainant may be able to resolve matters directly with a harasser. Take care when suggesting this option, though, as most complainants feel extremely uncomfortable dealing with someone they feel is harassing or has harassed them. Furthermore, many complainants do not want to have continuing contact with their harasser in the workplace, which is difficult to accomplish without involving the employer. A complainant may also be willing to work things out with a harasser directly with the help of a facilitator or mediator. This would require the involvement of the employer in arranging a suitable person to help.

C. Resolution with the Employer

A complaint of sexual harassment to an employer should result in an investigation, as described below. Once an employer is aware of a harassment allegation, they are obliged to investigate it, whether or not the complainant wants that. The complainant will need to decide whether or not to participate in any investigation undertaken by the employer.

Whether or not the complainant decides to participate in the employer's investigation, they can attempt to engage the employer in resolution discussions. The theory of such discussions is that the employer is liable for harassment that occurs in their workplace. The first step is usually to write to the employer setting out the harassment allegations and to attempt to enter into settlement discussions with the employer directly. This is often best done through counsel. In general, employers are far less likely to resolve harassment matters before some sort of process has been commenced than they are to deal with allegations of wrongful dismissal.

D. The Employer's Legal Duty to Investigate

In BC, WorkSafeBC takes the position that employees are required to report workplace bullying and harassment, and employers are required to have policy statements and complaint procedures in place to respond to bullying and harassment complaints.

Employees' obligations not to participate in harassment and to report it if it occurs are laid out in ss. 22(1)(a) and (2)(e)(i) of the *Workers Compensation Act*.

Employers' obligations to have policies and to investigate complaints are part of an employer's responsibilities to ensure the health and safety of its workers—according to WorkSafeBC, this includes preventing or minimizing bullying and harassment. Under s. 21 of the *Workers Compensation Act* an employer is required to take all reasonable steps to prevent, where possible, or otherwise minimize, bullying and harassment.

Section 21 provides:

> (1) Every employer must
>
> (a) ensure the health and safety of
>
> (i) all workers working for that employer, and
>
> (ii) any other workers present at a workplace at which that employer's work is being carried out, and
>
> (b) comply with the OHS provisions, the regulations and any applicable orders.
>
> (2) Without limiting subsection (1), an employer must
>
> (a) remedy any workplace conditions that are hazardous to the health or safety of the employer's workers,
>
> (b) ensure that the employer's workers
>
> (i) are made aware of all known or reasonably foreseeable health or safety hazards to which they are likely to be exposed by their work,
>
> (ii) comply with the OHS provisions, the regulations and any applicable orders, and
>
> (iii) are made aware of their rights and duties under the OHS provisions and the regulations,
>
> (c) establish occupational health and safety policies and programs in accordance with the regulations,
>
> (d) provide and maintain in good condition protective equipment, devices and clothing as required by regulation and ensure that these are used by the employer's workers,
>
> (e) provide to the employer's workers the information, instruction, training and supervision necessary to ensure the health and safety of those workers in carrying out their work and to ensure the health and safety of other workers at the workplace,
>
> (f) make a copy of this Act and the regulations readily available for review by the employer's workers and, at each workplace where

workers of the employer are regularly employed, post and keep posted a notice advising where the copy is available for review,

(g) consult and cooperate with the joint committees and worker health and safety representatives for workplaces of the employer, and

(h) cooperate with the Board, officers of the Board and any other person carrying out a duty under the OHS provisions or the regulations.

Through policy P2-21-2, which is based on s. 21(1)(a) and (e) of the *Workers Compensation Act*, WorkSafeBC sets out in detail its expectations in respect of preventing workplace bullying and harassment.[1]

Policy P2-21-2 says that "bullying and harassment":

(a) 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, but

(b) excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.

Note that "bullying and harassment" as defined here is broader than harassment under the *Human Rights Code* in which harassment is only covered if it is related to one or more of the protected grounds, including sex (s. 13).

WorkSafeBC notes that "person" means any individual, whether or not they are a workplace party. This means that a "person" could be a workplace party such as an employer, supervisor, or co-worker, or a non-workplace party such as a member of the public, a client, or anyone with whom a worker comes into contact at the workplace. This is similar to who can act discriminatorily in relation to employment under the *Human Rights Code: Shrenk v. British Columbia Human Rights Tribunal*, 2017 SCC 62, [2017] 2 SCR 795.

Policy P2-21-2 says that reasonable steps by an employer to prevent where possible, or otherwise minimize, workplace bullying and harassment include the following:

(a) developing a policy statement with respect to workplace bullying and harassment not being acceptable or tolerated;

(b) taking steps to prevent where possible, or otherwise minimize, workplace bullying and harassment;

(c) developing and implementing procedures for workers to *report* incidents or complaints of workplace bullying and harassment including how,

[1] See: https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-policies/policies-for-the-workers-compensation-act#SectionNumber:P2-21-2

when and to whom a worker should report incidents or complaints. Included must be procedures for a worker to report if the employer, supervisor or person acting on behalf of the employer, is the alleged bully and harasser;

(d) developing and implementing procedures for how the employer will deal with incidents or complaints of workplace bullying and harassment including:

i. how and when investigations will be conducted;

ii. what will be included in the investigation;

iii. roles and responsibilities of employers, supervisors, workers and others;

iv. follow-up to the investigation (description of corrective actions, timeframe, dealing with adverse symptoms, etc.); and

v. record keeping requirements;

(e) informing workers of the policy statement in (a) and the steps taken in (b);

(f) training supervisors and workers on:

i. recognizing the potential for bullying and harassment;

ii. responding to bullying and harassment; and

iii. procedures for reporting, and how the employer will deal with incidents or complaints of bullying and harassment in (c) and (d) respectively;

(g) annually reviewing (a), (b), (c), and (d);

(h) not engaging in bullying and harassment of workers and supervisors; and

(i) applying and complying with the employer's policies and procedures on bullying and harassment.

This is the formal source of the employer's obligation under the *Workers Compensation Act* to have a policy and to investigate complaints about harassment. Note that WorkSafeBC policies are not enactments like the *Workers Compensation Act* or the *Occupational Health and Safety Regulation* 296/97.

WorkSafeBC does not specify what employers' policies should say. Therefore, the first step in relation to workplace investigations is to get a copy of the workplace policy and complaint procedures. The complaint procedures should indicate to whom complaints should be made. Workplace policies should be available from the employer's human resources department, or any union in place. The WorkSafeBC Prevention Information Line may also be able to suggest ways to obtain an employer's policies and procedures.

Useful Resources

The **WorkSafeBC Prevention Line** provides information and guidance on occupational health and safety regulations. Workers can also call in to report or discuss workplace-related health and safety concerns. Call:

- 604-276-3100 in the Lower Mainland, or
- 1-888-621-7233 toll-free from elsewhere in BC.

E. The Nature of Internal Investigations

Responses to sexual harassment can be roughly divided into two groups: those driven by a body charged with maintaining order in a space, and those that provide complainants with an opportunity to have their concern heard and adjudicated by a neutral adjudicator.

In the first camp are criminal charges, where the state, through the Crown, endeavours to prove a breach of laws the state has enacted to maintain good order, and if a breach is proven, to have that breach punished. In a criminal matter, the complainant is a witness and not a party and does not receive a direct remedy.

In the second camp are adjudicative processes including grievances and human rights complaints where a forum and process are created for hearing a complaint and adjudicating it. In these processes, the complainant is a party and may receive a direct remedy, including damages.

Internal investigations often look like adjudicative processes but they are not. Usually, they are undertaken by employers to determine whether their rules for good order have been broken, and to punish that breach if it is found. This process is more like the approach of a criminal proceeding, although without all of the procedural protections of a criminal proceeding. In such internal investigations, complainants are usually only treated as witnesses, and will generally not receive a direct remedy.

The usual approach of employers to investigations is not fully consistent with the health and safety approach that WorkSafeBC requires. A health and safety approach does not focus on whether a complaint is proven. A proper health and safety investigation is searching for the scope of the problem and effective remedies. In such an investigation, the complaint is only an alert that a problem is present, the full scope of which may not be set out in the complaint, or known to the complainant.

Clients must be made fully aware of this fundamental difference between an internal investigation and an adjudicative process for the benefit of the Complainant.

A second key aspect of an internal investigation in relation to sexual harassment is that even though such an investigation considers whether the *Human Rights Code* was breached, it considers this only in relation to the actions of the person against whom the complaint was made. The Human Rights Tribunal is clear that breaches of the *Human Rights Code* are primarily, or even wholly, the employer's responsibility.

However, employer investigations into sexual harassment never address the liability of the employer. Instead, they are wholly concerned with the actions of the individual alleged to have committed the harassment. These investigations are a prelude to the employer taking action against the alleged harasser.

At least two things arise from this. First, when the employer is looking at the potential wrongdoing of the alleged harasser, it is actually investigating a matter that it could itself be liable for under human rights law. This creates a significant conflict of interest—and a substantial temptation to find that while some wrongdoing may have occurred, it was not sexual harassment.

Second, remedies that might result if employer responsibility were being considered and acknowledged in an investigation will most likely not be on the table. This can include policy changes, training, and even compensation for the complainant.

F. Disclosing vs. Reporting

Some sexual harassment policies distinguish between disclosing sexual harassment and reporting it. In such policies, disclosure alone may not lead to the employer investigating the allegation or taking any other action. These policies require a formal written complaint by anyone reporting sexual harassment.

In view of the employer's obligation to investigate, it is unclear whether an employer can opt to not investigate once it is aware of the details of a complaint of sexual harassment. If a person truly does not want an investigation, they might have to limit the information they include in a disclosure, including omitting the name of their alleged harasser.

G. Key Questions to Ask about Internal Investigations

Before proceeding with making a sexual harassment complaint to an employer, consider what outcome the client seeks and the process that will be available to deal with any complaint that is made.

As part of the initial discussions with a client, consider the following:

- Why is the complainant making the complaint? What do they hope to achieve or prevent?
- What risk does the complainant facing in making a complaint? Does the employer's policy say that complainants will not be penalized for making complaints or will not be penalized for making complaints in good faith, or does it provide no protection for someone making a complaint?
- What protection does the policy offer to prevent retaliation against the complainant?
- What will happen while the complaint is being investigated? Will the complainant receive any form of support? Will steps be taken to ensure there is no ongoing contact between the complainant and the respondent? If someone is inconvenienced by these steps, will it be the complainant or the respondent?

- Is the complainant entitled to have a support person or advocate through the whole process?
- What rules of confidentiality apply to the investigation? Will the complainant retain the right to speak about their harassment experience as they may need or want to do? Are there constraints on sharing the complaint with others? Are there constraints on sharing information obtained through the investigation process with others?
- Will supports and protections remain in place for the complainant regardless of the outcome of the investigation, only if the investigation finds sexual harassment, or not in either case?
- Do any confidentiality rules change once an investigation is complete?
- How long is the investigation likely to take?
- Who will investigate? Will the investigator be an internal or external person? How neutral are they?
- Will the complainant have a chance and get proper support to set out the complaint in detail in writing?
- Will the respondent be given the complaint and an opportunity to respond in writing? If so, will the complainant receive a copy of the response?
- If there are multiple complainants, how will they be handled? Will the complainants see the other complainants' complaints, or will only the respondent see everything?
- Will relevant documents be identified on all sides and made part of the investigation? If so, will both parties get to see them, or only the respondent?
- Will the investigator conduct interviews? If so, what records will be kept of them? Who will see these records? In particular, will the complainant be provided with a summary of the respondent's replies to the complaint? Will the complainant see summaries of the comments made by witnesses or other persons interviewed?
- If the investigator is going to write a report, will the complainant and respondent see that report before it is finalized in order to correct any errors?
- Once the report is complete, will both parties see it or only the respondent?
- Once the report is complete, who will see it within the organization?
- Who will be the decision-maker with respect to any consequences arising from the report?
- What range of outcomes will the employer consider? Will they include steps to prevent future occurrences of sexual harassment in the workplace?
- Who will be advised of any outcomes—only the respondent or both the respondent and the complainant?
- Is there any further mechanism for either party if they object to the investigation report or the outcomes?
- What will happen to the complaint file after the investigation?

The answers to these questions can help a complainant decide whether or not to wait for, participate in, or place faith in an employer investigation.

The most significant issues seem to arise around disclosure of documents to the complainant, disclosure of replies to the complainant, disclosure of the report to the complainant, and disclosure of the investigation's outcome to the complainant. Complainants often receive poor or no updates on their complaint because they are really witnesses and not true parties in investigations, and investigations are not adjudications but really a way for the employers to figure out if and how they want to respond to sexual harassment complaints.

In relation to disclosure of the report and outcomes, the protection of privacy legislation restricting the sharing of employment information can be a challenge, despite the exceptions permitting the sharing of information necessary for the health and safety of other employees (FOIPPA, s.22(4)(a) and PIPA, s. 18(1)(k)). Arguably, the health and safety of complainants depends on knowing the outcome of their sexual harassment complaints. If reports and outcomes are to be shared with the complainant, the policy should clearly spell this out. Investigations done for health and safety reasons should be provided to WorkSafeBC. They cannot, therefore, be done on a fully confidential or privileged basis. Materials going to WorkSafeBC may well be shared with the complainant through WorkSafeBC. Generally, an employer suggesting that they will not share the results of an investigation with the complainant should be challenged on this statement.

H. Helping Clients in Investigations

To make best use of the available time, consider the following ways to help clients:

- Ensure the complaint is complete and accurate.
- Identify remedies or objectives for the complaint and investigation.
- Review, evaluate, and clarify the procedures established by the policy, and advocate for improvements in the process, if possible. Determine if the investigation is a suitable, safe process.
- Identify and advocate for interim measures during the investigation.
- Identify what disclosure to seek.
- Review the response with the complainant, as this is usually a particularly painful part of the process.
- Support the complainant during an investigative interview, including by attending the interview.
- Review draft or final reports with the complainant and review responses if permitted.
- Identify and advocate for appropriate outcomes for the respondent and for the complainant after the investigation is complete.

Help the complainant to give very careful thought to participating in an investigation that is not safe, carries risk for the complainant, or will not provide proper disclosure throughout, including of the investigation report and outcomes. If an internal

investigation process is not well structured for the complainant, an external process like a grievance or human rights complaint may be a better option. (See Chapter 29: Advising Clients on Their Legal Options: Summary Tables: Statute Jurisdiction, Issue Forums, Remedies, and Time Limits.)

Useful Resources

SHARP Workplaces and Stand Informed Training Webinars

Foreman, Jessica. Navigating Workplace Investigations: Legal coaching and Practice Tips for SHARP Workplaces Clients (November 2023)

Parfitt, Clea. Workplace Investigations related to Sexual Harassment Claims (April 2021)

Resources last updated Janauary 2024

CHAPTER 33: NEGOTIATIONS

By Clea Parfitt

A. Introduction

Negotiation is any conversation or exchange undertaken to try to resolve an issue. The objective may be to work out a process, deal with an interim matter, or bring a complaint to an end that everyone can live with.

The key point about negotiations is that participation in them is mostly voluntary. This means that any solution must be acceptable to both sides and that what the parties decide to include is up to them and is not limited by the remedies that a legal process can provide.

In particular, negotiations can result in an apology, which can be extremely meaningful to a client and will likely not be ordered by any decision-maker, since an apology made on order is not meaningful. The *Apology Act*[1] in BC provides that if an apology is made, it will not amount to an admission of liability. If an apology would be very helpful to a client, tell respondents about this Act, as it is not well known.

B. Exploring the Client's Objectives

In addition to developing an understanding of what the client says happened, work with them to understand what they are looking for both immediately and as a final resolution. This information will be key in developing a strategy to help them.

Use the following points to establish some general objectives:

- Establish what is happening with the harasser/assaulter. Are there immediate issues that need to be addressed?
- Establish if there are processes underway, and if so, what stage they are at and what results they might yield.
- Find out if the client is still at work, and if so, if they want to remain there or leave. Employees who are still at work are often engaged in a very difficult balancing act between trying to preserve their employment relationships, including with their employer, while saying that something very wrong has happened, or is happening, in their workplace. In reality, many employees will ultimately not be able to remain with an employer if they have had a serious experience of harassment or assault in the workplace.
- Determine if there is a union in the workplace and if there is a written employment agreement. This will be a collective agreement if the workplace is unionized. (See Chapter 23: Grievance and Arbitration (Unions)).

[1] *Apology Act* [SBC 2006] c. 19. https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_06019_01

- Consider the time frame of the allegations and if there are time limit issues. This is especially important if the events are approaching, or are more than, a year old. (See Chapter 29: Advising Clients on Their Legal Options: Summary Tables: Statute Jurisdiction, Issue Forums, Remedies, and Time Limits)

To determine more detailed objectives, ask the client what the harms, both monetary and non-monetary, have been to date. For example:

- Have the client's work and career, including current and future opportunities, been affected?
- Has the client lost earnings to date? If so, is the loss ongoing?
- What does the client's compensation package include? For example:
    - Extended health and medical benefits
    - Pension contributions, by the employer or by both the employer and the employee
    - Periodic payments or bonuses
    - Vacation pay
    - Allowances such as car allowances, expense allowances, or home office allowances
    - Employer contributions for EI and CPP?
- How long has the conduct complained of been going on?
- What has been the emotional impact of what has happened? (Ask how particular events made the client feel, as often people will not articulate that for themselves.)
- Has the client required health care or medical treatment or been prescribed medication?
- Do they have a medical diagnosis as a result of the sexual harassment/assault? Did they have prior mental health issues? (This can make establishing causation harder, but can also increase their vulnerability, increasing the harm to them.)
- Do they have other circumstances that make them particularly vulnerable? (This can make the harms greater as well.)
- If they are leaving their position, will they need further training or a letter of reference?

This can be a difficult conversation. Often clients have not really thought about all the losses they have suffered at one time, and it can be distressing to do so. Having this conversation will sometimes lead clients to look for more tangible financial remedies than they might have otherwise been inclined to seek. (See Chapter 26, Client Interview Guidelines and Chapter 3: Trauma-informed Practice, for tips on working with clients who have experienced trauma.)

This exercise might also reveal that the person has suffered sufficient losses to justify looking for representation. It is easier to find representation if the complaint has a sound financial basis, because there may be money in the resolution to pay for legal fees.

As well as considering actual losses, which will be used to work out the legal position, think about what the client actually needs to move forward in their lives. The first is their *position*. The latter is their *interests.* While it can be confusing to think about both, it can be helpful in thinking about settlement offers to consider offers against the client's articulated needs at the present time as this helps to give money real meaning in people's lives.

Think too about broader or systemic remedies that a client may want to work for—for example, training for managers and staff, changes to employer policies, installation of safety equipment like security cameras, and creation of and training on safety protocols.

Finally, think about the client's interest in making what happened public. Foreclosing the threat of publicity can be a useful bargaining chip in a negotiation. To preserve this, no part of the complaint can be publicized. Conversely, if the complainant feels strongly that the incident should be publicized, creating negative publicity may make for a speedy settlement to limit the damage. However, publicity is highly unpredictable and this approach should be treated cautiously as it cannot be undone. Negative public comment of any kind is likely to make respondents very wary and mistrustful of the complainant and may make it difficult to negotiate release terms.

Sometimes it is useful to approach objectives in a step-wise fashion. At the outset, the client's objective may be to understand their circumstances and their options in terms of responses. Once this has happened, it may be easier to identify further objectives to guide them in choosing how to move forward.

The client's objectives will often drive the next steps in terms of process, timing, and the form of the negotiation. This conversation will also give a sense of what the client will be able to manage on their own, and what is therefore a realistic strategy if the client does not have representation.

C. Interim Negotiations

Before tackling the larger question of how to finally resolve a matter, it may be necessary, or advantageous, to enter into negotiations about interim matters—for example, interim work arrangements to separate the client from the person harassing/assaulting them, and details about any internal process that may be underway or planned.

It may be possible to negotiate improvements to an internal process where what is proposed, either in a policy or in a process designed for the client's particular complaint, will not meet the client's needs in some way. As noted in Chapter 32: Internal Workplace Processes, internal investigations may not meet the needs of, or protect the interests of, the client in numerous ways. If you understand what is proposed in terms of an internal investigative process, you may be able to request changes to the investigation so it better meets the needs of the client.

Before any communication with the employer occurs, discuss with the client who will do the communicating. Counsel might have more clout, but the client may not want it to be clear that they are getting legal advice and may prefer to use the available time in a different way.

D. Quantifying the Remedies Sought

Whatever format a negotiation over a final resolution takes, think of it in terms of the remedies the client might get if a formal complaint were pursued. Usually, the negotiation for a final resolution begins with some variant of:

- what has happened was wrong and illegal;
- it breached the client's legal rights in the following ways;
- if you do not settle, the client will take further steps to enforce their legal rights, at which time they will make the following claims; and
- at this point the client would accept the following monetary and non-monetary resolution.

Think about the downsides or risks both the client and the respondent face. For example:

- The time and expense required for a formal proceeding.
- The adverse publicity and loss of reputation for the respondent, both the individual and the company.
- The unwanted public commentary, potential embarrassment, and likely online trolling for the complainant.
- The risk of loss in a formal process for both sides.

The three main types of law that can provide compensation for sexual harassment or sexual assault are a human rights complaint, a grievance, and a lawsuit related to breach of contract, or perhaps tort. (See also Chapter 29: Advising Clients on Their Legal Options: Summary Tables: Statute Jurisdiction, Issue Forums, Remedies, and Time Limits.)

Each law provides slightly different compensation.

1. Lost Earnings

In regard to lost earnings, both grievances and human rights complaints will provide actual lost earnings up to the time of a hearing, including all forms of earnings. Similar damages would be available for a tort claim.

By contrast, a lawsuit for breach of contract, which usually takes the form of a wrongful dismissal action, only provides earnings during a "reasonable notice period." This is a judge-determined length of time during which earnings will continue to be provided. The amount of notice payable depends on the *Bardal* factors[2] (see Chapter 21: Civil

[2] *Bardal v. Globe & Mail Ltd.* (1960), 24 DLR (2d) 140 (Ont. HC).

Actions (Employment Law and Tort)). A rough rule of thumb is about one month per year at trial, and something less than that at settlement, except for short-term employees who often get three to six months' notice in any event in court.

Calculating monetary remedies for earning losses involves estimating what a person would have earned had the misconduct not occurred, and comparing that to what they will earn (excluding any EI or disability benefits that must be repaid). The difference is the loss. This can sometimes include future losses if, for example, a person takes a lower-paying job.

2. Mitigation

In human rights complaints and breach of contract suits where earnings might be recovered, an employee who faces lost earnings must take reasonable steps to find other employment to mitigate, or reduce, their losses. The employee bears the burden of proving that they have mitigated adequately. If a client is losing earnings, advise them to look for work and to document every step they take to do so by printing resumés, application letters, and online application forms, and keeping a log of their daily efforts to find work, including any interviews.

Union members who file grievances do not have an obligation to mitigate. Grievance arbitrators will provide full wage loss without evidence of mitigation.

3. EI and CPP

An amount should be added for the employer and employer contributions to EI and CPP at their current rates.[3] Asking for only the employer portion can leave an employee with a payable they were not expecting to have to cover.

4. Expenses

Sexual assault and harassment can create unexpected expenses—for example, paying for treatment, or expenses arising because of lost benefits, security changes, or relocating. These expenses are claimable at hearing and can be sought in a negotiation. Generally, any expense being claimed must be supported by receipts of some kind.

5. Injury to Dignity

A significant different between human rights complaints and either grievances or suits for breach of contract is the availability of damages for non-monetary harm, also called general damages. While grievance arbitrators considering grievances about human rights violations can impose human rights damages, they usually do not.

The BC *Human Rights Code* authorizes the Tribunal to award damages for injury to dignity, feelings, and self-esteem (s. 37(2)(d)(iii)). This is interpreted broadly to cover any non-monetary harm arising from discriminatory treatment. The amount that can

[3] See https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/payroll-deductions-contributions/canada-pension-plan-cpp/cpp-contribution-rates-maximums-exemptions.html

be awarded is not capped. Recently the Tribunal awarded $176,000 (*Francis v. BC Ministry of Justice* (No. 5), 2021 BCHRT 16) in injury to dignity damages, but its usual damages are roughly in the $10,000 to $25,000 range for sexual harassment cases, although they can be less.

The *Canadian Human Rights Act* authorizes the Canadian Human Rights Tribunal to compensate a complainant for pain and suffering to a maximum of $20,000 (s. 53(2)). The CHRT can also award special compensation up to an additional $20,000 if it finds that the respondent engaged in the discriminatory practice willfully or recklessly (s. 53(3)). In many instances of sexual assault or sexual harassment it would be reasonable to claim s. 53(3) damages from the harasser, but likely not from the employer unless conditions at the workplace were very poor, or the employer had notice of the conduct and did not act to prevent it effectively.

In *Behm v. 6-4-1 Holdings and others*, 2008 BCHRT 286, para. 66, the BC Human Rights Tribunal adopted a non-exhaustive list of factors from an Ontario case called *Torres v. Royalty Kitchenware Ltd.*, (1982), 3 CHRR D/858 (Ont. Bd. Inq.) as potentially relevant to assessing damages for injury to dignity in sexual harassment cases. These are generally referred to as the Torres factors:

- The nature of the harassment—that is, was it simply verbal or was it physical as well?
- The degree of aggressiveness and physical contact in the harassment.
- The ongoing nature—that is, the time period of the harassment.
- The frequency of the harassment.
- The age of the victim.
- The vulnerability of the victim.
- The psychological impact of the harassment on the victim.

In considering the application of these factors, remember that the Human Rights Tribunal includes sexual assault in its definition of sexual harassment.

It can be useful to characterize settlements as a lump-sum injury to dignity award, because they are non-taxable. If the respondents are resistant to this, characterizing funds paid as general damages, which injury to dignity is, will have the same effect, and may be more palatable.

6. Costs

Costs are an amount payable by a winning party to a losing party in a lawsuit. In court, they are assessed on the basis of a tariff where units accumulate based on the steps in the lawsuit and its complexity.

Costs of this nature are not payable in human rights complaint proceedings—except in rare circumstances with improper conduct by a party—or in relation to grievances but they are payable in breach of contact cases.

Even if costs are not strictly payable, it can be useful to include an amount for costs in a negotiated settlement if the client has legal costs, as this amount will not be taxable like income if it is offset by actual legal expenses. It can benefit both parties to make tax-advantageous arrangements in negotiating a settlement, including in this way.

7. Civil Suits

Clients claiming human rights violations are generally constrained from filing in court. The courts have said that human rights violations must be addressed by the statutory body created to hear human rights violations, which in BC is the BC Human Rights Tribunal or the Canadian Human Rights Commission. There is no civil action for discrimination under the *Code*.

An exception might arise if it can be argued that the sexual harassment or sexual assault breached fundamental terms of an employment contract, in which case a breach of contract case might be filed.

Another significant bar is the *Workers Compensation Act*, which provides that people who are injured at work cannot launch civil actions against any party for the harm.

If this constraint does not apply for some reason, a sexual assault can be the subject of a civil suit. If the *Workers Compensation Act* is not a bar, it might be necessary to consider the damages available for a civil suit, which might include aggravated and punitive damages as well as general damages. Civil suits are more difficult, expensive, and technical to pursue; carry a risk of costs against the client and the prospect of costs for the client; have stricter evidentiary rules; and require proof of lack of consent rather than proof of unwelcomeness, which in practice can be a more difficult standard to meet.

8. Claims Against Unions

A union's obligation is usually to provide proper representation. A claim against a union in a sexual assault or sexual harassment matter is usually that its representation has been so deficient that it amounts to its own form of discrimination. In such cases, the losses are usually the cost of being represented in a different proceeding (usually a Human Rights Tribunal proceeding), but they could also be other losses being claimed against the employer, if it can be argued that were it not for the poor representation, things would have gone better, and losses would have been less.

9. Non-Monetary Remedies

Explore to what extent the client may want to pursue non-monetary remedies like an apology, access to a position or opportunity they have lost, or a reference letter.

Many clients bring their complaint to ensure that no one else has the experience they had. They may therefore be interested in achieving systemic changes in a workplace—for example, employer-funded training for managers or staff, policy changes, or physical changes in the workplace. Remember that efforts to achieve these changes

may reduce the monetary benefits available to the client and agreements for these items can be difficult to monitor and enforce.

One non-monetary remedy that is theoretically available, but is rarely if ever provided, is an admission of liability or wrong-doing. While such an admission could be explored, it is unlikely to be provided, even though validation of their experience is one of the main things that the client wants.

E. Form and Timing of a Negotiation

1. Introduction

Negotiation involves contact with the other side, which will usually include one or more of the client's employer, the person involved in the harassment or assault, and perhaps the client's union.

The contact can take place directly—in person, on the telephone, or in writing—or can be part of an alternative dispute resolution process, usually a mediation. Mediations are usually done in person, but can also be done via the telephone.

Many clients do not want to deal directly with a harasser or assaulter under any circumstances. It is therefore often appropriate to deal with the employer, leaving the employer to deal with the harasser/assaulter.

Negotiations can begin with efforts to address some pressing interim or practical issue, or may be oriented towards a final resolution from the outset.

2. Demand Letters

It can be useful to begin by sending a demand letter setting out the main issues, the harms to the client, and perhaps a proposed resolution. This allows both the lawyer and client to establish for the respondents the details of the claim events, the legal wrongs, and the harms suffered in a form that the responding parties can review, and perhaps share with their lawyer, if they hire one. In terms of the tone of the letter, sometimes a more conciliatory approach can help to keep the negotiation more open.

If the negotiation is about a final resolution, consider including in the demand letter what the client would currently settle for, and what they are offering to provide to obtain that settlement. You must make the original offer against what would be claimed at hearing, otherwise the respondents are unlikely to recognize and give the client credit for any compromise proposed in their first offer.

Generally, respondents are bargaining for an end to the problem. This means they will want a release that brings all possible legal claims to a close. The client should generally indicate that they will sign a release "on reasonable terms" or provide a form of release that they are prepared to sign.

Sometimes a demand letter will result in a response, sometimes from the other party's lawyer. Once the other party has identified who is speaking for them, it can be useful to have a telephone conversation to see if immediate issues can be resolved, and to

begin exploring a final resolution. Often the response from the other side will include a request for further information, including about the client's mitigation efforts, and will suggest that the employer is investigating the claims.

In determining whether to proceed by a demand letter, consider who will write it. Generally, a letter on lawyer's letterhead is taken more seriously, but time constraints may not allow for this option. Consider too whether you and the client want the other side to reply to the client or their legal representative and who will conduct the rest of the back and forth should a negotiation get under way. Some of this back and forth is likely to take place by telephone.

If an initial contact like a demand letter is ignored, it may be necessary to initiate a formal proceeding to convince the other side that the client is not bluffing and the matter is not going to go away.

3. Without Prejudice Communications

Communications in the context of settlement of a civil suit, including a breach of contract claim, or a human rights matter are generally considered to be without prejudice, meaning they are off the record, and comments in such letters cannot be relied upon by either side. While this is likely to be enforced if correspondence is made in furtherance of a settlement, such letters or emails should be clearly marked "without prejudice" at the top of them. It can also be useful to say that a specific offer is being made on a without prejudice basis.

The Human Rights Tribunal and courts are very strict about settlement discussions being off the record and may well prevent both the writer and the recipient of a letter from relying on any part of the contents of a negotiation letter outside of the negotiation. If something in a demand letter may need to be relied upon later, send it separately in correspondence that does not deal with negotiating a resolution. Even though it is possible to redact actual settlement communications from a letter, this is not always acceptable to the extent that the rest of the letter can be relied upon.

Negotiations in the course of a grievance process, which usually involves several formal steps, may also be off the record, although practice in this respect seems to vary. Usually the parties to a collective agreement have a practice in this respect. It may be useful to inquire about this with the union.

Because of the requirement that settlement negotiations be off the record, they must be kept confidential. Talking about offers breaches the without prejudice rule and will severely damage the other side's trust. Warn the client about this before the negotiations begin.

F. Mediations

The purpose of a mediation is to create a meeting framework in order for all parties to explore the issues and consider whether they can find a resolution they can all live with. Most mediations are optional and require all the parties' ongoing consent to

continue, but some court mediations are compulsory, and the Canadian Human Rights Commission also holds compulsory mediations, albeit at later stages of the process.

The BC Human Rights Tribunal strongly encourages parties to settle and will make multiple offers to them to set up a mediation. Mediation may be a single session or multiple sessions. The Tribunal does not require parties to mediate and will not penalize parties who do not agree to mediate. Tribunal mediators say that their mediation notes are not kept on the complaint file or shared with other parts of the Tribunal.

The question of when to mediate is a significant one, especially at the Tribunal. Mediating early, in an early settlement meeting, usually involves a delay of four or five months for scheduling and means that each side knows little about the other's position. It can be tempting to wait until a response has been provided so that the respondents' positions are clearer, especially since later requests for mediation may be scheduled more quickly. However, preparing a response can solidify a respondent's opposition to the complaint and use up resources that may otherwise have been available for a settlement. Once the respondents reply, the complainant must disclose their documents, which can be a significant undertaking. After that it can be tempting to wait for the respondent's documents, but that creates a significant risk that the respondent will also make an application to dismiss. If that happens, it is very difficult to talk about settlements, because usually respondents believe at that point that their case is strong and their application will win.

Generally, any decision to mediate early depends on how time-sensitive the complaint is for the complainant, and how willing the complainant is to take further steps before settling.

At a mediation, both parties must listen respectfully to the other; they are encouraged to explain their own interests and explore the other party's interests. It is usually helpful to frame comments in terms of how each side felt or viewed things, rather than taking a more accusatory approach.

Generally, a mediation begins with the mediator doing a quick check-in with each side on their own to introduce themselves and find out if there are any major concerns, including about having a joint session. Complainants who go to mediations alone may want to flag any concerns they have about being aggressively questioned by the other side during the mediation. This will help the mediator to be proactive about this possibility.

After that, generally there is a joint session in which the complainant, or their counsel, lays out what happened and why it was bad for the complainant. The idea is that the complainant has information about what happened to them that the respondents do not have.

This part of a mediation is extremely important. The complainant's first-person account of what happened to them, and how they perceived what happened, can be critical in convincing the other side that the client's concerns are genuine, and that the

complainant will be a compelling witness if the process goes ahead. Many respondents come into mediation with the cynical view that the complaint is overblown, the concerns are not real, and the complainant is engaged in some sort of shakedown of the employer. These challenges can be dispelled when the respondent hears the complainant's side of the story and may motivate the respondents to rectify the situation by settling.

If you attend mediation with a client, prepare a series of questions about the complainant's experiences, focusing on the main events and on how those events made the complainant feel, to lay out the history of the allegations. This creates a solid basis from which to discuss the legal analysis and legal claims that subsequently flow.

Sometimes, respondents have questions for the complainant. While it can be helpful for claimants to answer questions, it can also devolve into a form of cross-examination, which is not appropriate for a mediation. Sometimes this chance to question the complainant is the only reason the respondent is there. This is one of the chief risks of a complainant going to a mediation alone. You should make the complainant aware of this if they may go to a mediation unrepresented.

Complainants on their own may tell the mediator that they are concerned about being aggressively questioned; the mediator may then be prepared to be more proactive in preventing it from happening.

Generally, the respondents, or their counsel, respond with their version of events. If the respondent's counsel is present, they will generally do the talking at this point, explaining what they see as the weaknesses of the complaint. You must warn complainants that this will happen, and that while they do not need to agree with what the respondents are saying, it is useful to listen carefully to evaluate any risks associated with the respondent's position.

At this point the mediator generally separates the parties and meets with the complainant to find out what they are looking for to settle. (This may also happen in the general session.)

After this, the mediator shuttles between the parties, conveying to each side what the other is saying, and hearing each side's responses. This part of the mediation can involve a lot of waiting to hear from the other side. It may also include a meeting between only the legal representatives if counsel for both sides is present. This allows the mediator to discuss not only technical legal issues that may not be easy to explain to clients, but also discuss impediments to settlement more frankly than might be possible or practical with clients present. These meetings can be particularly useful if the information is very complex information or there is some concern about what the mediator may, or may not, be conveying to the other side. These meetings create some risk for the lawyer in that the client may lose some trust in them, as they may be seen as siding with the other side.

If the complainant feels they cannot be in the room with the other side, alert the mediator in advance, or at least address the issue in the check-in meeting before the

joint session. If the complainant prefers not to have a joint meeting, they tell their story to the mediator and set out what they are looking for, and the mediator decides what to convey to the other side.

Even if no legal representatives are going to be present at a mediation, they might be able to help with talking to the mediator in advance to lay out the complaint, any likely issues with the response, and any constraints on the complainant, including a desire not to be in the same room as some or all of the respondents. Ideally, a complainant who is very fearful of some or all of the respondents should not go to a mediation without knowing they will not have to meet face-to-face with any of those people.

However, refusing to meet with the other side carries risk. First, it can be empowering for complainants to lay out exactly what has happened to them directly to the respondents in a forum where the respondents must listen to them. This opportunity is lost if they do not meet with the other side. Second, refusing to meet face-to-face can signal to the respondents that the complainant may not be prepared to go to hearing, and therefore may settle for much less than they may achieve at hearing. Finally, not meeting face-to-face deprives the complainant of the opportunity to tell their story to the respondents and perhaps to convince them of their sincerity and the harm to them of their experiences.

The mediation may conclude with both sides agreeing on terms they can live with. The parties may write up the agreement on the spot, or one party may agree to write up the agreement later and have the other side approve it. If a party is unrepresented, they must have an opportunity to get legal advice on the actual language of a settlement. If a client is attending a mediation alone, tell them beforehand to bring any settlement language back to you for further advice, and to say at the mediation that they cannot give their final agreement until the agreement has been legally reviewed.

The settlement will certainly include some form of release. As this document protects, or mostly protects, the respondent, usually they draft or supply it. A complainant can also propose language for the release, and could bring release language to a mediation, or even supply it to the other party before the mediation.

The mediation may conclude with the parties finding that they cannot agree, in which case the file is returned to processing by the adjudicative body. Or it may conclude with one party going away to find out more information, find supporting documents, or get instructions from a lawyer, in which case, the processing of the case will pause and the mediation may resume later.

Generally, a formal mediation brief is not required at the Tribunal but may be required in some other forums.

G. Making an Offer

Consider all the elements that should be included in the offer. Perhaps make a checklist so none are lost or overlooked later in the process.

Ask the client what they want to end up with and leave room to compromise before that amount is reached; ask how much they are prepared to come down from what appears to be a reasonable outcome at hearing. This often means discussing pressing financial obligations with the client—for example, debt, future training costs, or moving costs. Looking at these issues, which are the client's interests rather than their position, can help in deciding if an offer is "enough."

Consider amounts that will be lost to tax on income and earnings, and any employment insurance (EI) or disability insurance repayments that may be required. Ensure that the gross amount of an offer will provide the net recovery the client is expecting after such payments.

A situation that can be tricky in employment law—negotiating for employees who are still working but want to leave their employment—is less tricky if there has been sexual assault or sexual harassment. If such claims are believed, they are sufficient reason to leave a workplace, and so the risk that lost wages will not be compensable if an employee leaves is much less than for other employment issues that can arise, where leaving—that is, quitting—can mean that no compensation is payable.

Lump sums from settlements will require tax withholdings at lump sum rates, which can be significant. Depending on the client's income status, some of that tax withholding may be refunded. It may be possible to split a settlement over two tax years to lessen tax payable, or confine the settlement to a tax year in which income is low. In respect of EI, the federal government will apply earnings in a settlement as though they were earned at the client's usual wage rate. Weeks in which there are thus "earnings" will trigger repayment of EI monies received. Because of this, income loss calculations should ignore EI received, as this money will be repayable by the client.

Amounts provided as general damages are not taxable as income. Consider this when deciding how to balance offers between income and general damages. It can be helpful to make a fairly high offer for general damages to leave this number high, as the overall settlement amount is lowered through compromise offers. Often employers feel uncomfortable about general damage numbers that are too high—$20,000–$25,000 tends to be about the acceptable limit—in case an audit from the CRA finds that the settlement was an unrealistic estimate of likely recovery for general damages, and therefore that more should be attributed to income and more tax should be paid. This is a very rare but not unheard-of issue.

Consider how aggressive or conciliatory to appear at the outset of a negotiation. Sometimes it can be useful to make a high offer to assure the client that money was not left on the table. On the other hand, a too high offer risks a punitively low reply, or no reply at all. Some compromise is always necessary in settlement discussions to account for the certainty a settlement represents, over the risk (and expense in time, money and effort) of a legal matter proceeding.

The objective in a negotiation is to appear co-operative but also resolute about proceeding with a complaint if a reasonable settlement cannot be reached. Sometimes

this requires putting the negotiation on hold and returning to it later in a complaint process.

H. Evaluating Settlement Offers and Responding

Evaluate any settlement offer not only against what might be claimed, and achieved, at hearing but also against what the client needs to move on with their life.

Settlements always represent a compromise, often a significant one. In evaluating a settlement response, you must recognize and factor in the cost, risk, and effort to get to hearing, and the all-or-nothing outcome of hearings. In the face of the cost, risk, and uncertainty, a settlement represents certainty and closure.

It is very difficult for unrepresented clients to win at hearing. The process of most legal proceedings is so technical and time-consuming that most clients do not feel they can represent themselves adequately at hearing. If it looks likely that they will have to pay for legal representation at any point, it is nearly always more advantageous financially to settle than to go to hearing.

Often, the other side's first offer will be the biggest change in their position; later changes are usually smaller. If the complainant's first offer was very high, the response may be very low. This does not necessarily signal the end of a negotiation, or even serve as an indicator of how much they are willing to pay, but may simply be a rebuke for the original high offer.

Consider counter-offers against all parts of an original offer. It can be easy in a settlement negotiation to lose track of one or more elements if the settlement has many components. Often, as a negotiation proceeds, the demands become simpler, often one for wages and other taxable items, and one for general damages or injury to dignity.

Some employers do not like to make offers for injury to dignity because they feel it is tantamount to admitting discrimination. Calling the damages "general damages" may solve this problem.

A counter-offer should be low enough to keep the settlement discussions going, but not so low that the client appears desperate to settle, as that can seriously damage their bargaining position. It is relatively rare for the other party to walk away from a negotiation over an offer that is too high, but if they do, it creates a serious problem since the temptation then is to make a second offer without receiving a counter-offer. Generally, a reasonable counter-offer should be the price of a further discount. Making a second offer without receiving an offer back signals a significant desire to settle, which is likely to work against the complainant in the negotiations.

In negotiating it is also generally important not to backtrack on compromises already made. While backtracking can be tempting, especially for negotiations that take place over a long period, it may anger the other side and damage trust. Both parties need to feel that they are making progress to want to continue with settlement discussions. Do not be tempted to push employers, who generally have the deeper pockets, into

wanting to make an example of an employee or otherwise take a harsh approach with them. Better that the case remains only a business risk for the employer.

I. Releases

1. Introduction

Negotiating the language of a release can be problematic. Respondents often delay providing the release they want until after the monetary and other terms of a settlement have been agreed upon. Releases put forward by respondents often contain objectionable language and benefits for the respondents that the other party neither anticipated nor bargained for when money was on the table. At this point, the complainant has little bargaining power, and often little appetite to delay the settlement over language that appears abstruse and remote. While it is likely that the release will never be relied upon, the client should not assume this will not happen.

To avoid this scenario, the client could provide the release they will sign up front or stop the negotiation until the other side provides the release. Neither option is ideal. Contracts like releases are interpreted against the drafter. There is therefore some risk in providing the release. Also, it is difficult to take on the specific burdens of a release without being asked to do so, or to stop the negotiation, as the complainant is often as interested as the respondent in concluding the negotiation.

If the other party did not provide the release for discussion during a negotiation, watch for language in respondent communications that may hint at disadvantageous release terms, such as a "strong confidentiality provision."

2. Identification of Parties and Consideration

The principle purpose of a release is to provide assurance to the respondents that all the legal issues relating to the complaint have been fully concluded. Generally, releases are only signed by the complainant and only protect the respondents, but if there is any reason to believe that any of the respondents may start an action against the complainant, a mutual release may be the better option. Because only the complainant usually signs the release, it should not be the only document comprising a settlement. There should also be an agreement that fully sets out the settlement terms, or clear offer and acceptance correspondence.

The first paragraph of the release usually identifies all the entities that make up the releasor (the complainant and any person that could stand in the complainant's stead), and all the parties that make up the releasee (the respondents and all parties that could stand in their stead, usually including corporate entities and employees of those entities), and provides that there will be no further claims by the releasor against the releasees arising out of the employment relationship in any forum. The release should be limited to claims arising from the employment relationship, but this restriction is sometimes missing. While such an omission is not ideal and should be addressed; assess any possible risks with the client to determine if revised wording is necessary.

The first paragraph also sets out the "consideration" that is being provided for the release—that is, the value the complainant is getting from the settlement.

3. No Third-Party Claims

The release usually contains a paragraph in which the releasor promises not to make claims against third parties who may claim against the releasees. Sometimes this is expressed as a promise to indemnify the releasees against all costs or claims if such an action is started. This means that if the releasor claims against someone in future who then claims against any of the releasees, the releasor will have to pay the releasees' legal costs and any orders made against the releasees. This clause is intended to prevent such third-party actions.

4. No Admission of Liability

There is generally a paragraph that specifies that the release is part of a compromise settlement and that nothing in the release amounts to an admission of liability by the releasees. This is a standard term. It is extremely rare for a settlement to contain any admission of liability by the releasees. Such admissions could be made, and might even be helpful, but they are very rarely made.

5. Confidentiality of Settlement Terms

Releases generally provide that the terms of the settlement, and even the fact of the settlement, are confidential. However, complainants must be able to say that the dispute with their employer has been resolved, since they have usually talked about it to various people before it gets settled. Confirm this point if the language suggests that they cannot say it has been settled. The confidentiality provision should contain an exception for immediate family members and financial, legal, and medical professionals, since clients often need to share the details of the settlement with members of these groups.

6. Confidentiality of Alleged Sexual Misconduct

It is not uncommon in matters involving sexual assault or sexual harassment for the respondents to want a confidentiality clause covering what is alleged to have happened. This is a *very* significant request to make of the complainant, and the complainant should give it very careful consideration before agreeing. These clauses are exceptional, and should be treated as such.

Most people who have had a traumatic experience like sexual assault or sexual harassment will find that issues arising from that experience will come up unexpectedly from time to time as they move forward with their lives. Putting a complainant in a position where speaking about what happened to them breaches, or may breach, their settlement agreement impedes this important part of living with and working through what happened. Complainants can experience restrictions on their ability to talk about past trauma as a further trauma or abuse.

There is also a growing view that all the enforced and self-imposed secrecy around sexual misconduct is part of what makes the experience of sexual misconduct so humiliating and harmful for complainants, and a large part of what makes it possible for perpetrators to continue their behaviour. Thus, requiring the complainant to keep the events secret reinforces the larger social problem of silencing, and so further harming, complainants.

Some approaches to any discussion of this type of confidentiality requirement include, for example:

- refusing to provide this kind of confidentiality on the basis that it is harmful to the complainant or otherwise a wrongful practice in its own right;
- refusing to provide this kind of confidentiality on the basis that it is unnecessary given that under defamation law any public comment by the complainant creates a risk of a defamation claim where they will have to prove the truth of their comments about disputed events, which can be difficult to do;
- agreeing to this kind of confidentiality provided express additional settlement funds are paid to compensate for providing it;
- limiting the confidentiality to no broad public discussion, which allows for private discussion of the experience, usually with a promise that anyone told about the experience must agree to keep the information confidential as well; and
- permitting discussion about what happened so long as the respondents are not named.

The success of any of these approaches depends on the interests in play. Respondents are often most concerned about being the focus of some form of shaming campaign on social media. It is difficult for a complainant to satisfactorily promise this will not happen.

In considering confidentiality clauses, bear in mind that in defamation, which is the underlying law, “publication” is any communication to a third party, with very few and limited exceptions. That communication does not need to reach a wider part of the public.

Before agreeing to this type of confidentiality, complainants must think about whom they have already told or who may already know about the events in question—that is, how realistic is secrecy at this point—whether any of those people might want to make it look like the complainant has breached their agreement, and how strong their desire to talk about what happened, in more or less veiled terms, is likely be in the future. As people increasingly decide that secrecy has been a significant contributor to sexual misconduct and expect to be able to share their lives online, being required not to speak about an experience will become a more serious burden on complainants.

7. Indemnification

Some releases contain indemnification language of some sort, usually in relation to government taxes. The idea behind these clauses is that if any liability over issues of taxation arises in the future, that liability will be borne entirely by the complainant, including any additional charges or penalties.

Usually, the justification for these clauses is that the agreement has been structured in a tax-advantageous way from which the complainant benefits, and that the complainant should therefore take any risk associated with this. This is generally untrue. *Both* parties benefit from finding a number that both can live with; the employer pays less and the employee keeps more. Moreover, these clauses usually cover more than any advantageous tax planning.

While it is reasonable that the complainant pay tax owing by them on any settlement, it is not reasonable that large, well-resourced companies should avoid the risk of charges or penalties associated with miscalculating such taxes owing, usually including both income tax and CPP and EI contributions. Employers should take responsibility for their own calculations and risk-taking. Sometimes this language will be so broad that it includes errors made in the past by the employer's payroll department. Be firm about any parts of these requests that are unreasonable.

8. Penalties or Fixed Damages

Some releases contain a clause whose purpose is to attach a fixed consequence to complainants for breaching the release in any way—for example, a requirement that the settlement funds be repaid, or some other pre-estimate of damages. These clauses are also exceptional, and should be treated as such.

Releases are contracts. Breach of contract is covered by contract law. Obtaining damages for a breach depends on proving the breach occurred, and then proving the loss claimed. It is impossible to determine in advance the consequences to the respondents of any particular breach. A breach could be inadvertent and negligible in its effect. If possible, do not accept these clauses, which treat every breach the same, as they are simply a burden and a risk for the complainant. The complainant is having to sign a release in the first place because of a wrong done to them. They should not have to do so under dire threats if the release is somehow imperfectly observed in future.

J. Settlement Implementation

Implementation of the settlement requires co-ordination of each side's actions. Complainants must take particular care over withdrawing from any processes underway since this action often cannot be undone.

Generally, counsel will get the complainant to sign the settlement agreement (if there is an agreement separate from the offer and acceptance correspondence), release, and any formal withdrawal forms or consent dismissal orders. These documents can then

be held by counsel on their undertaking to provide/file them once the settlement proceeds have been advanced and have cleared counsel's trust account and other elements of the settlement have been completed. Alternatively, these documents can be provided to the other side on their undertaking not to file or rely upon them until advised that the settlement funds have cleared counsel's trust account, or a fixed time period has passed (usually 10 days).

Pay careful attention when negotiating a settlement implementation if payments will be made in installments, or other parts of the settlement need to be implemented over time. Both parties need to fully understand when the release and withdrawals will be provided/filed.

The principal problems that can occur with a settlement implementation are that the respondents are unable or unwilling to pay, or the complainant decides they are not satisfied with the settlement.

If the respondents decide to renege on the settlement payment or other terms, the complainant has to decide between treating the decision as a breach of contract and enforcing the settlement in court and arguing that the legal action the settlement was meant to end is underway again. The viability of the latter may depend on whether the complaint or other legal action has been formally ended. It is often appealing because what the complainant was compromising to obtain—that is, certainty—has been lost and therefore they have not received value for whatever compromises they made.

The *Human Rights Code* contains limitations to which components of a human rights settlement can be enforced in court. Section 30 limits the enforcement of settlement terms to terms the Tribunal could have ordered. Certain terms will then not be enforceable, including apologies.

If the complainant decides the settlement is inadequate, counsel may have to withdraw as there is likely then a conflict between what the complainant understands or is saying happened in the negotiation and what counsel understands happened, and has likely communicated to the other side if counsel was handling that task. This can be a very tricky and contentious situation—ideally, consult a bencher—and can happen if the complainant is not ready to give up a battle or dispute that they may have been engaged in for a long time.

Useful Resources

SHARP Workplaces and Stand Informed Training Webinars

Reid, Daniel and Veerapen, Roshni. The Increasing Risk of Defamation Claims and Privacy Concerns (April 2023)

Parfitt, Clea. Strategies, Considerations, and Pitfalls to Avoid in Negotiations and Settlements of Sexual Harassment Claims (October 2022)

Resources last updated Janauary 2024

CHAPTER 34: ADVISING A BYSTANDER TO SEXUAL HARASSMENT IN THE WORKPLACE

By Sara Forte

Rights, obligations, roles, and risks for bystanders or witnesses to sexual harassment or sexual violence in the workplace are a matter of some controversy. While lawyers are not expected to advise on moral responsibility, be prepared to discuss these matters with bystanders or witnesses.

A key question is whether the person who experiences workplace sexual harassment or sexual violence should have an absolute right to privacy and autonomy in deciding whether to raise or address the issue. If a bystander reports an incident, the victim could be drawn into an investigation or legal action that they did not want. If the company determines that harassment or violence did not occur, how does that affect the victim? These matters can be intensely personal, and some victims want to maintain privacy, even if that means not addressing the harassment.

However, bystander silence is recognized to be harmful and could mean that a predator remains in the workplace, industry, or profession. Current research and best practices[1] suggest that bystanders' voices are critical to addressing workplace harassment and bullying. Victims may not in the best position to bring a complaint forward.

Establish whether the bystander or witness is under a legal obligation to report the incident, and if so, what are the consequences to the bystander of not reporting it? Legal obligations could arise from:

- employer policies that specify a duty to report, with possible employment-related consequences (e.g., termination) for not reporting;
- professional regulations that specify a duty to report, for example, the LSBC Code of Conduct Rules 6.3 Harassment and Discrimination and 7.1-3 Duty to Report; or
- occupational health and safety requirements under workers compensation legislation and policy addressing bullying and harassment as required by WorkSafeBC.[2]

[1] Paula McDonald, Sara Charlesworth & Tina Graham "Action or inaction: bystander intervention in workplace sexual harassment," *The International Journal of Human Resource Management*, 27:5 (2016), 548-566, DOI: 10.1080/09585192.2015.1023331 Lee, So Yun, Matthew David Hanson, and Ho Kwan Cheung. "Incorporating Bystander Intervention into Sexual Harassment Training." *Industrial and Organizational Psychology* 12, no. 1 (2019): 52–57. doi: https://doi.org/10.1017/iop.2019.8.

[2] See https://www.worksafebc.com/en/health-safety/hazards-exposures/bullying-harassment/responding-bullying-harassment

A bystander or witness has several options:

- Do nothing. The bystander should be encouraged to take action of some kind, and they should be acknowledged for having taken the step of seeking advice.
- Intervene in the moment, either directly—for example, tell the harasser to stop—or indirectly—for example, make a joke to defuse the situation or distract the harasser.
- Talk to the victim and express support. Could the bystander support them in making a report? If not, is the victim open to the bystander making a report? Refer the victim to SHARP Workplaces.
- Talk to the harasser. Tell them to stop. Let them know they have been seen and what they are doing is not okay.
- Document what they have seen with dated notes and keep any additional evidence.
- Make a report:
    - internally, informally, to a manager, owner, or human resources,
    - internally via a formal complaint (get a copy of the employer policy first),
    - to WorkSafeBC, or
    - to a professional regulatory body (see Chapter 24: Self-Regulated Professions and Other Independent Bodies).

Useful Resources

EVA BC's Be More than a Bystander project has several useful resources:
https://endingviolence.org/prevention-programs/be-more-than-a-bystander/

https://www.canada.ca/en/department-national-defence/services/benefits-military/conflict-misconduct/operation-honour/orders-policies-directives/operation-honour-manual/prevention.html

APPENDIX I: COMMON REFERRAL RESOURCES FOR CLIENTS

Common Referral Resources

Organization	Summary of Organization
Access Pro Bono 604-878-7400 https://accessprobono.ca/	Operates a number of free summary advice clinics around BC. Call or visit website to locate local clinic. Also operates a number of more specialized clinics and programs including employment, housing, and mental health.
Amici Curiae (AC) Friends of Court 778-522-2839 https://www.legalformsbc.ca/#/	AC Friends of court offers free services to help clients complete their legal forms (including human rights complaints) and prepare for virtual appearances.
BC211/VictimLink Dial or call 211/ 1-800-563-0808 Email help@bc211.ca or VictimLinkBC@BC211.ca https://bc211.ca/	A toll-free, confidential, and multilingual service 24 hours a day, 7 days a week across the province. provides information and referral services to all victims of crime and immediate crisis support to victims of family and sexual violence, including victims of human trafficking exploited for labour or sexual services.
BC Human Rights Clinic 604-622-1100/1-855-685-6222 Email: IntakeBCHRC@clasbc.net https://bchrc.net/	Provides free legal advice from human rights lawyers or legal advocates regarding the BC Human Rights Tribunal. May also provide legal representation for accepted BCHRT complaints.
BC Human Rights Tribunal 604-775-2000/1-888-440-8844 Email: BCHumanRightsTribunal@gov.bc.ca http://www.bchrt.bc.ca/	Administrative body that deals with human rights complaints in BC.
BC Transition Houses 1-800-563-0808 (VictimLink) Text: 604.863.6381 TTY: 604.875.0885 https://bcsth.ca	Transition Houses and Transition House support workers
Canadian Human Rights Commission 1-888-214-1090 Email: Info.com@chrc-ccdp.gc.ca	Investigates and tries to settle human rights complaints that arise under the Canadian Human Rights Act (federally regulated

https://www.chrc-ccdp.gc.ca/en	organizations). Will refer cases to the Canadian Human Rights Tribunal.
Canadian Human Rights Tribunal https://www.chrt-tcdp.gc.ca/index-en.html	The administrative body that decides whether a person/organization has engaged in discriminatory practice under the Canadian Human Rights Act. Only reviews cases referred to it by the CHRC.
Clicklaw https://www.clicklaw.bc.ca/	Website with self-help resources for a wide range of legal issues, including family, immigration, employment, human rights, welfare, and pension.
Crisis Lines in BC https://crisiscentre.bc.ca/get-help/ Anywhere in BC 1-800-SUICIDE/1-800-784-2433 Mental Health Support: 310-6789 KUU-US Aboriginal Crisis Line: 800-588-8717 Vancouver Coastal Region: 604-872-3311 Sunshine Coast/Sea to Sky: 1-866-661-3311 Seniors Distress Line: 604-872-1234	Crisis lines for anyone in BC who is in distress. The main crisis line is open 24 hours a day, 7 days a week. Both 310-6789 and 1-800-SUICIDE are available in over 140 languages.
Dial-A-Law https://dialalaw.peopleslawschool.ca/	Website with self-help resources for a wide range of legal issues, including family, immigration, crime, employment, human rights, wills, welfare, and pension.
Employment Insurance Benefits and Leave https://www.canada.ca/en/services/benefits/ei.html	Website for applying for Employment Insurance. Includes links to regular benefits, sickness benefits, and access to finding a job.
Employment Standards BC 1-800-663-3316 https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards	Administers the Employment Standards Act and Regulation which sets minimum standards for wages and working conditions. Investigates complaints about employment standards in BC.
Federal Labour Program https://www.canada.ca/en/services/jobs/workplace/federal-labour-standards/filing-complaint.html	The federal Labour Program accepts labour standards complaints on employment conditions for hours of work, payment of wages, leaves, vacation, holidays, and unjust dismissals. These standards apply to employees working in federally regulated industries and workplaces.
Hope for Wellness Helpline	Service across Canada offering immediate mental health counselling and crisis intervention to all

24/7 helpline 1-855-242-3310 https://www.hopeforwellness.ca/ Include online chat counselling	Indigenous peoples across Canada. The counsellors can also work with client to find other wellness supports available near the client.
Law Student Legal Clinics LSLAP University of BC 604-822-5791 https://www.lslap.bc.ca/ The Law Centre - University of Victoria 250-385-1221 https://www.uvic.ca/law/about/centre/index.php The Thompson Rivers University Community Legal Clinic 778-471-8490 https://www.tru.ca/law/students/outreach/legal-clinic.html	Student law clinics provide free legal services and representation to low-income clients. Each clinic provides services in various areas. See clinic websites for details.
Legal Services Society Publications 604-408-2172 Toll Fee: 1-866-577-2525 https://lss.bc.ca/publications/available	Free legal education booklets in different legal topics. Booklets are available in different languages.
Native Courtworker and Counselling Association of BC 604-985-5355, Toll Free: 1-877-811-1190 https://nccabc.ca/	If you're Aboriginal, this association may be able to help you get legal information.
People's Law School https://www.peopleslawschool.ca/	A non-profit society in BC making the law accessible to everyone. They provide free education and information to help people effectively deal with the legal problems
PovNet https://www.povnet.org/	Website helps find advocates for anti-poverty issues in BC. Includes housing, employment benefits, and family.
Stand Informed https://clasbc.net/get-legal-help/stand-informed-legal-advice-services/	Online hub for resources relating to sexual assault. Includes training and information for support services
Tenant Resources and Advisory Centre (TRAC) 604-255-0546/ 1-800-665-1185 https://tenants.bc.ca/	Promotes the legal protection of residential tenants across BC by providing information, education, support, and advocacy on residential tenancy matters.
Trans Care BC 604-675-3647/1-888-999-1514	Supports the delivery of equitable and accessible care, surgical planning, resources, and peer/community support for trans people across BC.

transcareteam@phsa.ca http://www.phsa.ca/transcarebc/	
Trans Lifeline 1-877-330-6366 https://translifeline.org/hotline/	Is a peer support phone service run by trans people for trans and questioning peers. The client **does not** need to be in crisis to call the number
WorkBC https://www.workbc.ca/	Provide information regarding employment service, job posting, and training/education. There are also resources for specific demographics of potential workers. WorkBC Centres available throughout the province.
Workers' Advisers Office 604-335-5931 / 1-800-663-4261 https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/personal-injury-and-workplace-safety	Provides free advice and assistance to workers and dependents on disagreements they have with WorkSafeBC decisions.
WorkSafe BC 1-888-967-5377 for Claims https://www.worksafebc.com/en	Statutory agency working as BC's workers' compensation insurer. Administers claims relating to injuries or diseases sustained at work. Works to promote good employment practices in BC and can advise on general health & safety concerns.
WorkSafeBC Prevention Line 604-276-3100 in the Lower Mainland, or 1-888-621-7233 toll-free from elsewhere in BC. https://www.worksafebc.com/en	WorkSafe provides information and guidance on occupational health and safety regulations. Workers can also call in to report or discuss workplace-related health and safety concerns.

The number of resources available may vary based on the issue and geographic location. Lawyers may contact Stand Informed (standinformed@clasbc.net) for additional, specific referrals for clients.

APPENDIX II: BIOGRAPHIES

Dante Abbey is a lawyer in the Mental Health Law Program at CLAS, representing people with a mental disorder before the BC Review Board and the Mental Health Review Board. Dante completed his articles with CLAS in May 2013 and worked as a summer student at CLAS while completing his law degree at the University of British Columbia. Before articling, Dante worked as a tenancy and poverty advocate at different organizations in the Vancouver area and was actively involved with the Law Students' Legal Advice Program.

After articling, Dante operated a private civil law practice focused on offering low-cost or legal aid–funded help in the areas of family, refugee, and administrative law. He has represented clients at the BC Supreme Court, BC Provincial Court, and a range of tribunals. He returned to CLAS in 2015.

Kristen Barnes is currently a policy lawyer with the BC First Nations Justice Counsel. Kirsten previously joined Callison & Hanna as an associate in 2018. Kirsten's law practice focused on Indigenous self-determination including governance and jurisdiction. Kirsten graduated from the Allard School of Law at UBC with a focus on social justice and a specialization in Aboriginal Law. Prior to attending law school, Kirsten obtained a Bachelor of Arts and a Bachelor of Education from UNBC. Kirsten taught high school for several years in her home community of Hazelton and was the first BC recipient of the Indspire Guiding the Journey Educator Award in 2013. She has served multiple terms on the First Nations Schools Association Board and Executive Committee. Kirsten is a member of the Gitxsan Nation in northern BC.

Elba Bendo (she/her) is a human rights lawyer specializing in equality and non-discrimination law. For seven years, she has worked alongside front-line organizations and people with lived experience of marginalization to bring an equality lens to human rights violations. Elba has worked in international advocacy for the European Human Rights Advocacy Centre, as director of Law Reform for West Coast LEAF, alongside Indigenous land defenders in Myanmar, and as a labour, human rights, and employment lawyer representing workers in precarious employment. She holds an LLM from SOAS, University of London, in Human Rights Conflict and Justice.

Jonathan Chapnick (he/him) is a practising lawyer, workplace investigator, adjudicator, and chartered HR professional (CPHR), and the principal at Portage Legal Services, a workplace law practice in Vancouver. Before starting his law practice in 2019, Jonathan worked for unions and employers in BC and Ontario for 15 years, including as legal counsel for the Hospital Employees' Union and Director of Human Resources and Labour Relations at RainCity Housing and Support Society. Jonathan is a trained mediator and is on the roster of investigators established by the Canadian government to investigate occurrences of harassment and violence in federally regulated

workplaces. Outside of Portage, he has taught about workplace law at Douglas College and the University of British Columbia.

Juliana Dalley is a staff lawyer at the Immigration and Refugee Legal Clinic, where she provides legal representation in immigration and refugee matters to low-income individuals. Prior to joining the IRLC, Juliana worked as an immigration and refugee lawyer in private practice and at the Migrant Workers Centre, where she helped migrant workers with immigration and employment issues. Prior to that, she worked with Community Legal Assistance Society as a staff lawyer in the Community Law Program. She has represented several migrant workers in human rights complaints and other proceedings to uphold their employment rights and has testified and provided briefs to House of Commons standing committees regarding the Temporary Foreign Worker Program. She has appeared before the Immigration and Refugee Board, the BC Supreme Court and BC Court of Appeal, and the Federal Court, and has acted for an intervenor at the Supreme Court of Canada. Juliana clerked for Madam Justice Hansen at the Federal Court of Canada after receiving her law degree in 2013.

Megan Ellis, KC, was called to the bar in 1988. Her legal practice has concentrated primarily on civil suits for survivors of sexual abuse and assault, and family law. Drawing on her background working in rape crisis centres, including founding WAVAW/Rape Crisis Centre, Ms. Ellis was counsel in a number of groundbreaking cases which challenged evidentiary, procedural and substantive impediments to survivors of abuse and assault obtaining redress for their injuries. She was a member of the Project Committee on Damages for Sexual Assault for the B.C. Law Institute (2001) and of the Institutional Abuse Study Panel for the Law Commission of Canada (2000). She has appeared at all levels of court, including the Supreme Court of Canada. She was the recipient of the TLABC. Bar Award in 2004, was appointed (then) Queen's Counsel in 2008 and received an alumni award of distinction from UBC law school in 2012.

Lisa Fong, KC, is a partner at Ng Ariss Fong, and her practice focuses on administrative law, aboriginal and Indigenous law. In the area of professional regulatory law, she advises both professional regulatory bodies and professionals. Her work with professional regulatory bodies includes advising on governance, registration, quality assurance, inquiry and disciplinary matters, and judicial reviews. Her aboriginal and Indigenous law practice includes advice to Indigenous governments about their governance structures including the design and operations of tribunals. Lisa speaks regularly at conferences and provides educational offerings in her practice areas. Lisa was a board member for ten years for the Community Legal Assistance Society. Ng Ariss Fong publishes an administrative and professional regulatory law blog and an aboriginal law blog.

Sara Forte is an employment lawyer and founder of Forte Law, based in Surrey, BC. Sara and her team advise employees, employers, and unions on legal problems at work, from hiring to firing, and everything in between. Sara has a passion for educating and empowering her clients and the public to improve workplaces, and she is a frequent speaker and writer on work-related legal issues. Workplace sexual harassment forms a significant portion of Sara's work, and she has both advised victims, accused harassers, companies, and unions on these matters and also acted as an independent workplace investigator. #metoo has drawn public attention to the pervasiveness of workplace sexual harassment. Sara's goal for 2021 is to create public dialogue about solutions to workplace sexual harassment. It is time for change, and we can all make a difference.

Menachem Freedman practises human rights, employment, privacy, and union-side labour law at HHBG Lawyers. Menachem provides advice on matters that arise throughout the course of the employment relationship: contract negotiation, workplace investigations, bullying and harassment, accommodations, regulatory complaints and dismissal. He has experience at all levels of court in BC and has represented clients at Human Rights Tribunals, in labour arbitrations, and before labour boards. Menachem articled at the Information and Privacy Commission of Ontario and advises clients on issues relating to privacy, surveillance technology, and access to information requests.

Chaslynn Gillanders is senior counsel at Callison & Hanna Barristers and Solicitors. Her law practice is focused on comprehensive land claims, employment law, and finance law. Chaslynn is a member of Nisga'a Nation in northern British Columbia. She is a member of the Law Society of British Columbia and the Law Society of the Northwest Territories.

Darwin Hanna is a partner at Callison & Hanna. He has worked for Indigenous Nations throughout British Columbia and the Northwest Territories on a wide array of legal matters with a focus on specific claims, community governance and development, and employment law. He is a member of the Nlaka'pmux Nation from the community of Lytton, BC.

Sara Hanson is a senior associate with Moore Edgar Lyster LLP where she practises in all areas of labour, employment, professional regulatory and human rights law. Sara primarily acts for unions in wide array of grievance arbitrations. She has also represented numerous survivors of workplace sexual harassment and assault in complaints before the BC Human Rights Tribunal. She also acts for unions in grievance arbitrations involving a wide array of workplace disputes, as well as for individuals and

regulatory colleges in matters relating to professional discipline. Sara previously served as a SHARP roster lawyer and has twice presented on legal issues relating to sexual harassment complaints at the CLE's Human Rights Law Conference.

Heather Hoiness (she/her) is a staff lawyer at BC's Office of the Human Rights Commissioner (BCOHRC). Prior to joining BCOHRC, Heather was an associate at Moore Edgar Lyster LLP. Heather received her law degree from the University of Saskatchewan College of Law in 2013 and clerked at the BC Court of Appeal in 2013–14. Before becoming a lawyer, Heather worked for 13 years as an advocate, organizer, and social worker in community organizations in Vancouver and Montreal.

Rose Keith, KC is associate counsel with Harper Grey and brings more than 30 years of experience to her broad civil litigation practice. The focus of her practice is workplace law, assisting both employers and employees in a full range of issues including wrongful and constructive dismissals, human rights matters, workplace investigations, and policy and procedure development. She also works in the area of personal injury, representing individuals injured through the fault of another and also victims of sexual abuse. As a Roster member of Mediate BC, she uses her deep workplace law experience in mediating workplace disputes. Her broader subject matter expertise is used to help resolve disputes through mediation in other areas including wills and estates, personal injury, and breach of contract. Bestowed the honorary title of (then) Queen's Counsel in 2019, Rose is known across the province for her legal acumen and sound judgment. In addition to maintaining a busy practice, Rose makes time for the causes she is passionate about. She is engaged with numerous initiatives in the community and is especially involved with women in sport.

Jennifer Khor (she/her) is supervising lawyer and project manager for CLAS's SHARP Workplaces and Stand Informed. She established the SHARP Workplaces legal clinic and Stand Informed Legal Advice Services in 2020 and 2023, respectively. Jennifer provides legal advice and delivers education and training on workplace sexual harassment, sexual assault and Non-disclosure Agreements. She graduated from Mount Allison University with a Bachelor of Science and obtained her law degree from Dalhousie University. She was admitted to the Law Society of BC in 1997 and has practised primarily human rights, employment, and labour law. Jennifer has dedicated her career to addressing access to justice, human rights, and gender issues. Prior to joining CLAS, Jennifer worked for Legal Aid BC, opening legal aid offices across the province. She has worked internationally, leading projects to improve access to justice and human rights in Africa and Asia. Jennifer is a member of CBABC's Policy and Equality and Diversity Committees. She is a past Board member for West Coast LEAF, West Coast Domestic Workers Association (now Migrant Workers Centre), and a legal aid clinic in Ontario.

Anna King is counsel with the Public Prosecution Service of Canada. Previously, she was a sole practitioner in Vancouver, BC, practicing primarily in the area of criminal defence. She also worked as a legal reviewer of *Gladue* Reports for Legal Aid BC and for the National Inquiry into Missing and Murdered Indigenous Women and Girls.

Jadine Lannon (they/them) is an associate at Forte Workplace Law where they practise human rights, labour, employment, and administrative law. Jadine is committed to using law as a tool of social justice, and has a particular focus on advancing the rights of 2SLGBTQ+ and BIPOC folks.

Angela Leung joined SHARP Workplaces as the project coordinator in November 2019. Prior to this, she worked for other non-profit organizations, such as Legal Aid BC and World Wildlife Fund Canada. Angela received a Bachelor of Arts from Simon Fraser University, with a double major in Criminology and Archaeology. In her spare time, she enjoys travelling, cooking, eating, and gardening.

Kevin Love is a lawyer in CLAS's Community Law Program, working primarily in the areas of mental health and workers' rights. Kevin has represented clients at all levels of court, both federally and provincially, including the Supreme Court of Canada. Prior to joining the Community Law Program, Kevin worked in CLAS's Mental Health Law Program representing clients who were detained in psychiatric facilities under the *Criminal Code*. Kevin represents CLAS on a number of committees, including WorkSafeBC's Policy and Practice Consultative Committee. Kevin chairs the Workers' Compensation Advocacy Group, which is an independent network of worker advocates throughout British Columbia. Kevin acts as the supervising lawyer for the First United Church's legal advocacy program in Vancouver's Downtown Eastside.

Coral Lyster is a Cree lawyer from Northern Saskatchewan and obtained her Bachelor of Arts (Honours) in International Studies Cooperation and Conflict with minors in History and Political Studies from the University of Saskatchewan. Coral went on to graduate from UBC Law and was called to the Bar by the Law Society of Ontario. She also has Master of Arts in Socio-Legal studies from the University of the Basque Country. Coral Lyster joined Community Legal Assistance Society in January 2018 as a legal advocate in the Mental Health Law Program. Coral is currently a lawyer in the SHARP Workplaces Program at CLAS.

Sarah Marsden earned her L.L.B. degree from UVic in 2003 and was called to the Bar of BC in 2006. She worked for several years as a supervising lawyer for the Law Students' Legal Advice program as well as in private practice in union-side labour and immigration and refugee law. She holds an LL.M and a PhD in law, both focused on the

law as it affects marginalized communities. She has also worked as a law professor, with a research and teaching focus on labour, immigration, and community law.

Karen Martin has worked with Disability Alliance BC (DABC) since 2004 in the capacity of project development and coordination, research, and curriculum development and training on access and inclusion for people with disabilities. From 2012- until 2015, DABC partnered with the DisAbled Women's Network (DAWN) Canada on projects addressing violence against people with disabilities. Karen has continued to coordinate anti-violence projects for DABC, creating resources for service organizations and people with disabilities who are victims of crime. Since 2013, Karen has developed and delivered workshops, webinars, and presentations on people and women with disabilities to anti-violence and victim-serving organizations and at provincial and national symposiums and forums. She has been a disability and violence subject matter expert for research and publications for EVA BC and the Provincial Office of Domestic Violence. In 2019, Karen coordinated DABC's Sexual Assault Reporting Options: Increasing Access for Women with Disabilities project, which produced videos, information pages, and a checklist for service providers. Karen has been a member of the Community Coordination for Women's Safety Working Group since 2014.

Myrna McCallum is a former prosecutor and Indian Residential School adjudicator who encourages other lawyers to become Indigenous intergenerational trauma-informed as their personal act of reconciliation. She educates leaders, lawyers, law schools, legal advocates and judges on trauma-informed advocacy, cultural humility, vicarious trauma and resilience, and Indigenous inter-generational trauma through keynotes, training sessions, and lunch and learn lectures. She practises in the area of human rights law and conducts workplace investigations into sexual misconduct, human rights, and bullying and harassment complaints while also serving as an advisor to organizational leaders on how to address gender-based violence in the workplace through trauma-informed policies and procedures. She is also the host of *The Trauma-Informed Lawyer* podcast. Myrna is a former residential school student (Lebret IRS), mother, and kokom (grandmother) to three sweet babies. She is from the historical Metis village of Green Lake and Waterhen Lake First Nation in Treaty Six territory.

Suzette Narbonne was called to the Manitoba Bar in 1989 and began her career in The Pas with Legal Aid Manitoba. As counsel she travelled to isolated First Nations communities, conducting free legal advice clinics and litigating for her clients in criminal and family law cases, often in makeshift courts convened in band offices, recreation centres, and hydro halls.

Since 1995, she has practised law in BC. Suzette joined the Child and Youth Legal Centre at its inception in 2017 and is currently the managing lawyer there. She has helped to shape the vision of child representation in BC. She has mentored many

lawyers through the CBA and has served as a governor for the Law Foundation of BC, a bencher of the Law Society of BC, and chair of the Legal Services Society. Currently, she serves as an elected member of the Provincial Council of the CBA. In her spare time, she enjoys running. She has completed numerous marathons, finishing six times at Boston.

Clea Parfitt is a sole practitioner working primarily in the areas of human rights and employment law and in disciplinary complaints against professionals, particularly veterinarians. She has represented complainants before the BC Human Rights Tribunal on a wide variety of complaints and has appeared on judicial reviews of human rights matters before the BC Supreme Court and Court of Appeal. Clea has also appeared before courts at all levels as well as a number of other administrative tribunals on a range of issues, often employment related. She has a particular interest in processes and procedures for responding to complaints of sexual harassment.

Clea was active for more than a decade as a Board member with the West Coast Domestic Workers' Association, a non-profit organization providing legal advice and advocacy for domestic workers in BC. She has also been a Board member of PACE Society, and is currently a Board member of both West Coast LEAF and Rise Women's Legal Centre. Clea has twice represented WC LEAF as an intervenor on equality cases at the Supreme Court of Canada.

Kerry Porth is a former sex worker and IV drug user and has personal experience of marginalization and social exclusion. She has provided expert advice to Pivot's sex work law reform campaign, responded to media requests, and testified to the Justice and Senate committees on behalf of Pivot during deliberations on the *Protection of Communities and Exploited Persons Act*. Kerry is currently contracted by Pivot to examine the feasibility of launching a constitutional challenge to Canada's prostitution laws. In addition to her work at Pivot, Kerry also works as a community developer with Living in Community, an innovative project that seeks to balance perspectives on Vancouver's sex industry.

Kerry also works as a research collaborator, is a co-author of several peer-reviewed articles, and lectures at local colleges and universities on the issue of sex work and the law. She has a Bachelor of Arts degree from Simon Fraser University.

Sarah Rush has a Master's degree in Social Work from the University of British Columbia and a Bachelor of Arts in Anthropology from the University of Victoria. She has a background in supporting children and families in variety of settings—including early years centres, transition homes, and elementary and high schools—and has worked as an advocate, family facilitator, and program coordinator.

Since 2018, Sarah has been working in the field of addiction and mental health at Women's Hospital and St. Paul's Hospital. She is also employed on a part-time basis at the Child and Youth Legal Centre, where she supports the work with the clients and designs and delivers outreach programs to vulnerable communities. Sarah has training in dialectical behavioural therapy (DBT) and trauma-informed practice. In her spare time, she loves to create puppet shows and plan her next kayak adventure.

Sonya Sabet-Rasekh is a staff representative with the BC Government and Service Employees' Union (BCGEU). Prior to working with the BCGEU, she practised in a private law firm representing unions and practised in the areas of labour law, employment law, human rights, and civil litigation. She currently teaches Canadian Labour Law at Simon Fraser University's Labour Studies Program and serves on the Board of Directors of the Vancouver Association for Survivors of Torture (VAST), a non-profit organization that supports mental health and trauma counselling for refugees and survivors of torture. Sonya holds a law degree from the University of British Columbia and was called to the BC Bar in January 2012.

Adrienne Smith is a transgender human rights activist and social justice lawyer. They recently settled a BC Supreme Court case that guaranteed access to opiate replacement therapy for prisoners in BC jails. Adrienne appeared at the BC Court of Appeal and the Supreme Court of Canada where they argued about the deleterious effects of mandatory minimum sentences for women, Indigenous people, and drug users. As a trade union activist, they advocate for transgender inclusion in unions and workplaces. Adrienne volunteers at the Catherine White Holman Wellness Clinic where they give free legal advice, take on human rights cases, and notarize name change documents for trans people.

Karen Snowshoe, KC, is a lawyer, arbitrator, mediator and workplace investigator. She is a member of both the BC and Yukon Law Societies and provides adjudication and mediation services across Canada. Karen is a member of the Teetl'it Gwich'in Tribal Council and a passionate advocate for Indigenous issues, the environment and human rights. She was senior counsel for the National Inquiry into Missing and Murdered Indigenous Women and Girls, for which she built, trained and led a national team of statement-gatherers who conducted trauma-informed interviews across Canada. She was previously a member of the Northwest Territories Bar, and lived and worked in Whitehorse, Inuvik, and Yellowknife for 14 years. In 2018, Karen was the first Indigenous woman elected as a bencher with the Law Society of BC, where she served two terms. She worked on redrafting the Universal Declaration of Indigenous Rights and also on the Universal Declaration of Human Rights to include Indigenous people. In February 2020, Karen was appointed as a part-time member of the BC Human Rights Tribunal. In June 2023, Karen was bestowed the honorary title of King's Counsel. Karen

has also fostered more than 20 children on an emergency basis while living in the northern territories.

Karen's home community is Fort McPherson, located on the Peel River in Canada's Western Arctic. As a child, Karen spent summers in Fort McPherson, where her grandmother and extended family taught her traditional harvesting skills, a respect for the land, and a respect for the knowledge and wisdom of her Elders.

Laura Track is a human rights lawyer and the director CLAS's Human Rights Clinic, and leads the education program of the Clinic. She advocates on behalf of people who have experienced discrimination and assists complainants in navigating BC's human rights process. Laura also has a strong interest in making legal knowledge accessible. She delivers workshops and presentations to a wide variety of audiences to help people understand their human rights and comply with their legal obligations. Laura earned her law degree from the University of British Columbia in 2006, and holds a Master's degree in International Human Rights Law from Oxford University.

Melissa VanderHouwen practises in all areas of labour, employment, human rights, and administrative law. She provides practical advice and cost-effective advocacy to unions on a wide variety of labour matters, including discipline and discharge, collective agreement interpretation, policy grievances, organizing efforts, and unfair labour practice disputes.

Melissa also provides advice and representation to non-unionized employees on many workplace issues—including wrongful dismissal, contract interpretation, and accommodation disputes—and advice and advocacy for unions and individuals on a variety of human rights issues. Melissa has appeared before the BC Supreme Court and Court of Appeal, the BC Human Rights Tribunal, the Canadian Human Rights Commission, the BC Labour Relations Board, and in federal and provincial grievance arbitrations. She takes a pragmatic approach to client service and values building relationships with her clients to better understand their short- and long-term goals so that she can obtain the best results possible.

Wendy van Tongeren (AKA Harvey) BA, LLB, LLM, is a lawyer in BC (with calls in 1978 Ontario and 1979 BC). She is a retired senior Crown Counsel, having prosecuted from 1980 until 2013, specializing in the prosecution of crimes against children and vulnerable adults, and sexual crimes. Since that time, she has been active in her field in the development of improved forensic interviewing and intervention processes with her writings, committee and policy work, legislation implementation, training, university teaching, lecturing, prosecution trial work, and more recently, inquiry work. She worked as a trial attorney for the Special Court of Sierra Leone and as a

Commission Counsel and Researcher for the National Inquiry into Missing and Murdered Indigenous Women and Girls. She has published several works and provided training and lectures, throughout Canada and internationally, related to the prosecution of crimes against vulnerable persons and sexual crimes.

In 2019, Ms. van Tongeren provided assistance to the Restorative Justice Association of BC as a Board director and to Community Justice Initiatives in Langley as a volunteer.

Angela Wong is the Acting General Counsel at the Hospital Employees' Union (HEU), where she practices in the areas of labour, human rights, employment, and privacy law. Prior to joining HEU, Angela worked as an employment lawyer and workplace investigator for a boutique workplace law firm in Vancouver, and as a lawyer for the Chinese and Southeast Asian Legal Clinic in Toronto. She has experience in designing and delivering legal workshops including on the topic of applying a trauma-informed approach in workplace investigations and unionized environments. Angela holds a J.D. from the University of Alberta, and a M.A. in Asia Pacific Policy Studies and B.A. (Hons.) in History from the University of British Columbia. Angela was called to the Bar in Ontario (2015) and British Columbia (2018).