

# Workplace Violence and Harassment Enforcement – An Update

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This presentation may contain general comments on legal issues of concern to organizations and individuals. These comments are not intended to be, nor should they be construed as, legal advice. Please consult a legal professional on the particular issues that concern you.



“Out of this nettle, danger,  
we pluck this flower, safety”

William Shakespeare  
Henry IV, Part. 1

# Agenda

- Legislation
- Enforcement in different contexts
- How to comply
- What is next?

# Legislation

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All provinces and NWT have workplace violence and harassment legislation

Canada – New legislation January 2020

Definitions generally include any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee

An objective, not a subjective, standard

# Key Elements of Obligations

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1. Policy which requires updating
2. Prevention/assessment of hazards and implementation
3. Procedures include:
  - complaints process
  - attempted resolution
  - Investigation
  - remedy
4. Training
5. Is what you are doing working?
6. Fix what's broken
7. Start over

# How Are Obligations Enforced?

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1. Labour Relations and Human Right Tribunals
2. Civil suits
3. Health & safety prosecution by applicable ministry
4. Criminal proceedings

# Enforcement Labour Relations

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*Children's Hospital of Eastern Ontario v. Ontario Federation of Health Care Workers*, 2020 CanLII 6444 (ONLA)

- Employee was accused of sending co-worker sexually-harassing Facebook messages. These were in fact not sent by him, but by an unknown third party
- He was fired and grieved the dismissal. He asserted an unfair investigation
- Board held that employee should be reinstated without damages. Employer undertook to pay economic and reputational damage in any event

## Enforcement Labour Relations

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*USW, Local 9042-102 v. Shopping Channel Division of Rogers Broadcasting Limited*, 2020 CanLII 1061

- Male employee of warehouse sexually harassed by female worker whose employment was terminated after investigation. The terminated worker grieved the dismissal and denied the conduct. The Board held that the discharge was justified



# Enforcement Labour Relations

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*The Employee v. The University and another (No. 2), 2020 BCHRT 12*

- University faculty member alleged sexual harassment and discrimination on the basis of sex, resulting from alleged incident on a business trip
- Member complained to Board
- Co-worker and University denied conduct
- Board dismissed complaint

# Enforcement Civil Actions

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*Render v. Thyssenkrupp Elevator (Canada) Limited*, 2019 ONSC 7460

- Plaintiff sued operations manager for termination damages. Company dismissed him because he had touched a co-worker on her buttocks
- Plaintiff said the touch was accidental and not sexual assault
- The Court held the termination was justified: "Whether the act was sexual harassment, sexual assault or simply common assault, the purpose seems to be the same: to assert dominance over V and to demean and embarrass her in front of her colleagues. This type of conduct is unacceptable in today's workplace"

# Enforcement Civil Actions

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*Struthman and Serediak v. Struthman*, 2020 ONSC 759

- Two female applicant shareholders sought relief against their husband/father, relying in part on allegations of verbal abuse and physical violence and misogyny against female workers. Relief was not granted, in part because allegations were largely hearsay

## Enforcement Civil Actions

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*Ottawa Carleton Standard Condominium Corporation 671 v. Friend*, 2019 ONSC 3899

- Condo corporation claimed against one of the unit owners for repeated and continuous workplace harassment of the condo's property manager and physical assault
- The Court held that the owner's conduct was workplace harassment and issued an injunction against the owner, with reference to the OHSA s. 1 definition of workplace harassment

## Enforcement Civil Actions

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*Merrifield v. Canada*, 2019 ONCA 205, leave to appeal to SCC refused September 19, 2019, 2019 CanLII 86486 (SCC)

- Plaintiff claimed against the Canadian government for the conduct of RCMP management, which the plaintiff said engaged in protracted harassment
- The plaintiff won after a 40-day trial, but lost on appeal. The Court of Appeal said that in law, there was no freestanding tort of harassment and that the plaintiff had not proven evidence of intentional infliction of mental suffering

# Enforcement

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Quasi-Criminal – Once prosecution proves the act, the defendant must provide due diligence on a balance of probabilities

Criminal – Prosecution must prove all elements beyond a reasonable doubt

# Enforcement

## Health and Safety Quasi-Criminal Prosecutions

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*Ontario (Ministry of Labour) v. Royal Ottawa Health Care Group*, 2016 ONCJ 456

- In the first prosecution under the then new legislation, the defendant was charged with failing as an employer to develop and maintain measures and procedures for summoning immediate assistance when workplace violence occurs. A patient had become violent, but there was no readily accessible telephone or other communication method to immediately summon assistance. The workers did not have personal alarms. The charge was dismissed

# Enforcement

## Health and Safety Quasi-Criminal Prosecutions

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- In January, the Ontario Ministry of Labour laid nine charges against a health facility, which arose out of a January 2019 assault. A patient suffering from mental health issues attacked and injured a nurse (skull fracture and brain bleed), as well as a security guard (orbital bone fracture)



# Enforcement Criminal Prosecutions

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*R. v. Phillips*, 2019 BCPC 67

- Defendant was a construction workplace supervisor and was charged with criminal assault against P. P was afraid to testify in court. English was not his first language. The Court refused the Crown's application to have P testify behind a screen or by way of closed circuit television. Defendant should be allowed to face his accuser

# Enforcement Takeaways

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1. Highly fact driven – be able to prove diligence
2. Perils of social media
3. Next to zero tolerance
4. Process driven – these things often proceed at a tedious pace

## How to Comply

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1. Have a clear policy of prevention and update as required
2. Have effective programs and procedures and provide effective training
3. Start with the assessment of the risk/hazard and focus on your industry and special risks:  
Health care, hospitality, remote locations and working alone
4. Program must include: safe complaints and investigation steps; attempted resolution; and decision re consequences, if any
5. Document everything
6. Is it working
7. Start over

## What is Next

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- Likely to see more prosecutions
- Ongoing “criminalization” of provincial prosecutions
- On February 3, 2020, Federal Labour Minister announced a nationwide search for workplace harassment and violence prevention investigators



**“It’s not enough that we do our best;  
sometimes we must do what’s required”**

Winston Churchill

# Contact

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