



# #MeToo – Lessons Learned

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# Overview

- **Part 1:** Refresher on the #metoo movement
- **Part 2:** Legal effects of the movement
- **Part 3:** Relevant legislation
- **Part 4:** Recent case law
- **Part 5:** Best practices & risk management for employers



# Part 1:

Refresher on the #MeToo movement

- Part 1: The #metoo movement



- 2006/2007 - activist Tarana Burke
- Just Be Inc.
- Phrase “**me too**” to show solidarity and support

- Part 1: The #metoo movement



Tarana Burke created a nonprofit organization to help victims of sexual harassment and assault. via [justbeinc.org](https://justbeinc.org)

# The hashtag that changed the world?

- #metoo fall of 2017 *New York Times* story - Harvey Weinstein
- Survivors (mostly women) used #metoo to indicate that they had experienced sexual assault and/or harassment
- Investigative journalism and workplace investigations
- Allegations sometimes lead to criminal/civil proceedings
  - Jian Ghomeshi;
  - Bill Cosby; and
  - Harvey Weinstein.



Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."



**Alyssa Milano** ✓

@Alyssa\_Milano



If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

12:21 PM - Oct 15, 2017

68,192 24,831 53,554

# From a hashtag back to a movement

- #metoo is cultural shorthand for broader movement, focused on:
  - *sharing personal experiences*
  - *believing survivors*
  - *holding perpetrators to account*
  - *advocating for systemic change*
- And yet the movement confirms that:
  - *many survivors are hesitant / afraid to come forward (they can face more dire consequences than the 'accused'!)*
  - *reprisal is a very real concern*
- So the movement's work continues...





- Part 1: The #metoo movement



*“How much is a little girl worth?”*  
- Rachael Denhollander



*“Indelible in the hippocampus is the laughter.”*  
- Dr. Christine Blasey Ford



## Part 2:

Legal effects of the #MeToo movement

# Legal systems

- Generally, same overarching legal structures pre #metoo in place:
  - Sexual assault - criminal offence; harassment can be criminal, too
  - Sexual battery - civil wrong
  - Sexual harassment - discrimination
  - Sexual misconduct (of many forms) - disciplinary matter in the workplace
    - Mismanaging response to sexual misconduct can expose employers to liability

# Some legal developments

Recent legal developments include:

- Amendments to legislation or enacting new legislation
  - Occupational Health and Safety Act/Canada Labour Code – harassment provisions
- Courts and tribunals mentioning #metoo in decisions:

*[77] Ultimately, while there may not be a policy prohibiting relationships between employees and students outright, I am of the view – **particularly in this #MeToo moment of heightened public awareness and scrutiny of the use of power on campuses and in workplaces** – that UBC has an obligation to safeguard against its employees exploiting or otherwise abusing their positions of trust in their interactions with students. UBC is not only an employer, it is a student services provider and as such it has obligations to all of its various stakeholders. There is, in my mind, no question that UBC is under an obligation to investigate employees who are in positions of trust and suspected of cultivating sexual relationships with students whether by seeking them out expressly or through sheer disregard of their status as students.*

*Conklin v. University of British Columbia, 2018 BCHRT 130*

# Angus Reid survey – February 2018



52%

**The percentage of Canadian women who say they have been subject to sexual harassment in the workplace**

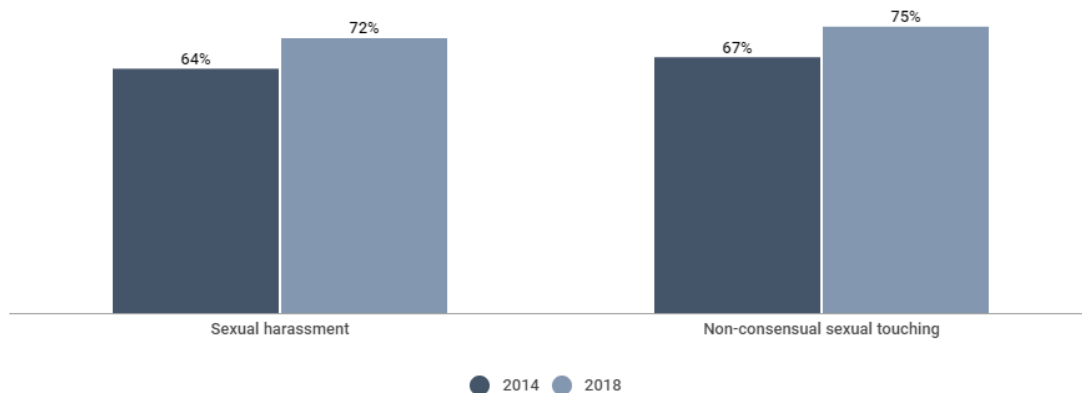


28%

**The percentage of Canadian women who say they have been subject to non-consensual sexual touching in the workplace**

# Angus Reid survey – February 2018

Percentage of women who say their employer would be responsive and conduct a serious investigation if they reported the following:



*“While #metoo doesn’t appear to have had much effect on women’s sense that they would report harassment if they experienced it, **the campaign may be having an effect on expectations about what the employer’s response would be.** Today, roughly three-in-four expect their employer would be responsive and take appropriate action, compared to two-in-three who expected this three years ago.”*

# Cultural shift

- Sexual misconduct in the workplace is a real problem, often rooted in power imbalances
- Solving the problem also requires a cultural shift – not a box-ticking exercise

The question becomes...

***How does a movement about systemic change affect, in practical terms, how employers manage their workplaces?***



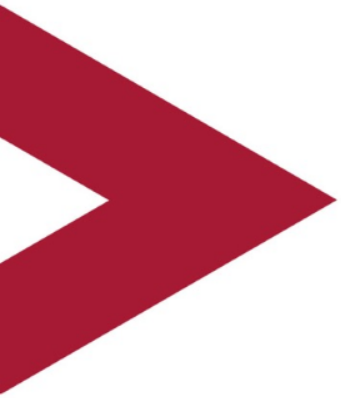
# Opportunity for employers

- The #metoo movement is an opportunity for employers to
  - study their legal obligations
  - review and update their existing policies on sexual misconduct in the workplace
  - ensure they are taking sexual misconduct seriously



# Part 3:

## Relevant Legislation



# Provincial legislation

# New Brunswick *Human Rights Act*

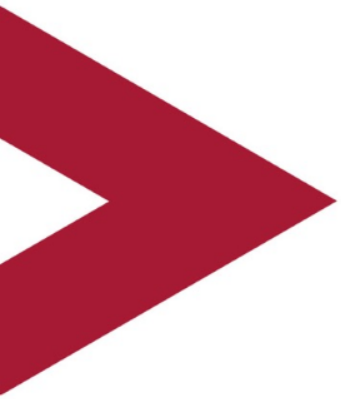
- Applies to employers in NB who are provincially regulated
- Explicitly prohibits sexual harassment in employment:
  - 10(2) No employer, representative of the employer or person employed by the employer **shall sexually harass a person** employed by the employer or a person seeking employment with the employer.*
- Act defines “sexually harass”:
  - “**sexually harass**” means engage in vexatious comment or conduct of a sexual nature that is known or ought reasonably to be known to be unwelcome.*

# New Brunswick *Human Rights Act*

- General overview of process:
  - Complaint to New Brunswick Human Rights Commission
  - Investigation
  - Commission dismissal or referral
  - Labour and Employment Board
  - Order following hearing
- If sexual harassment is proven, the Labour and Employment Board has broad authority to order a party to have violated the Act *“to do or refrain from doing any act or acts so as to effect compliance with the Act, to rectify any harm caused by the violation, to restore a party adversely affected by the violation to the position that party would have been in but for the violation etc....”*

# New Brunswick *Occupational Health and Safety Act*

- Amendments to the General Regulation
  - Came into force April 1, 2019
- Three main requirements:
  1. Harassment Code of Practice
  2. Assessment for Violence
  3. Violence Code of Practice
- Definition of “harassment” includes sexual harassment
- Definition of “violence” includes sexual violence



# Federal legislation

# *Canadian Human Rights Act*

- Applies in federally regulated workplaces
- Characterizes **harassment and sexual harassment** “in matters related to employment” as “discriminatory practices”: section 14



# Canadian Human Rights Act (cont'd)

- According to the Canadian Human Rights Commission on harassment (which may be sexual depending on context):
  - *“It includes any unwanted physical or verbal behaviour that offends or humiliates you. Generally, harassment is a behaviour that persists over time. Serious one-time incidents can also sometimes be considered harassment”*
- Examples of harassment (which may be sexual depending on context):
  - “unwelcome remarks or jokes”
  - threats or intimidation
  - “unwelcome physical contact”

# Canadian Human Rights Act (cont'd)

- Process can be complex and exact steps will depend on the situation, but there are 3 main 'stages':
  - **(1) Before a formal complaint is filed**
    - Inquiry and screening – Commission communicates with complainant, who may then file a formal complaint
  - **(2) After a formal complaint is filed**
    - Employer is notified
    - Voluntary and confidential mediation may occur
    - If mediation occurs but is unsuccessful, the complaint proceeds to the investigation process
  - **(3) Commission's decision + potential next steps**
    - Commission may decide to:
      - Dismiss the complaint
      - Send complaint to conciliation (separate process under Act) or
      - Refer complaint to Tribunal for a formal hearing

# *Canadian Human Rights Act (cont'd)*

- If a complaint of sexual harassment is substantiated, the Tribunal may “make an order against the person” who has engaged in the discriminatory practice (which could include an employer), including an order that the person:
  - “cease the discriminatory practice” and take measures of redress
  - make available to the victim “the rights, opportunities or privileges” that were denied to them because of the discriminatory practice
  - compensate the victim for any or all of the following:
    - costs and expenses
    - pain and suffering (up to \$20,000)
    - willfulness or recklessness in discriminatory practice (up to \$20,000)

# *Canada Labour Code*

- Applies to federally-regulated workplaces
- Provides that **employees** have a right to be free from sexual harassment, and **employers** “shall make every reasonable effort” to protect employees from sexual harassment
- Defines “sexual harassment” in section 247.1:  
**247.1** In this Division, **sexual harassment** means any conduct, comment, gesture or contact of a sexual nature  
**(a)** that is likely to cause offence or humiliation to any employee; or  
**(b)** that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.

## *Canada Labour Code* (cont'd)

- Requires employers to issue a **policy statement** on sexual harassment that (inter alia – see section 247.4):
  - defines sexual harassment in line with section 247.1
  - outlines how complaints may be made
  - states that the employer will take appropriate “disciplinary measures” in response to sexual harassment against an employee
  - confirms that complaints will remain confidential unless exceptional circumstances exist
  - informs employees of the relevant *Canadian Human Rights Act* provisions

# Canada Labour Code amendments

## Bill C-65:

- Not yet in force – Federal government has indicated that it intends to bring into force within 2 years
- Is designed to “strengthen the existing framework for the prevention of harassment and violence, including sexual harassment and sexual violence, in the [workplace]”\*

*\*note recognition that harassment and violence can be distinct forms of misconduct*

- Will amend the *Canada Labour Code* in several respects, including by adding the following definition:

***“harassment and violence means 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, including any prescribed action, conduct or comment”***



# Part 4:

Recent Cases

## *Al-Musawi v One Globe Education Services, 2018 BCHRT 94*

- Employer provided services to international students. Felt forced to leave.
- Complainant and owner both members of same tightknit Muslim community.
- Tribunal rejected employer's application for preliminary dismissal of complaint.

*[30] Sexual harassment is primarily about **power imbalance/abuse of power** as opposed to actual sexuality. As a result, not every case of sexual harassment necessarily involves explicit sexual demands or invitations for a sexual relationship with the perpetrator. Actions and comments that are more subtle may be just as demeaning in their attack on the target's dignity and self-respect, both as an employee and as a human being."*

*[33] In my view, the connection between these allegations is apparent as all are related to an **abuse of power** related to sex that is interwoven with [Ms.] Al-Musawi's religious and ethnic background.*



## *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62

- Complainant under BC *Human Rights Code* worked for an engineering firm, and alleged harassment by an employee of the construction contractor on the project
- SCC determined the *Code* was not limited to protecting employees solely from harassment by their workplace superiors
- In light of *Schrenk*, the scope of employers' responsibility for discrimination could extend beyond their immediate workplace
- **Discrimination is prohibited whenever it has a sufficient nexus with employment, including discrimination by coworkers with different employers**

## *Cuconato v Parker Auto Care Ltd*, 2018 ONSC 2803

- P was terminated for allegedly “making a sexually explicit gesture behind a female customer’s back” and denying it
- In court he admitted to making the gesture, but there was no evidence that the customer saw it
- Court found termination was without cause and awarded damages in lieu of notice:

*“Mr. Cuconato’s conduct, while wrongful, appears to have been an isolated and momentary lapse in a long, unblemished career. He has attempted to explain why he initially denied having made the gesture. Without diminishing what Mr. Cuconato did, in my view, Mr. Cuconato’s misconduct cannot be said to be a very serious form of employee dishonesty.”*

- Notably, the employer had provided no training, and had no policies, on harassment and workplace violence

## *Doucet v Oromocto Auto Sales Ltd*, 2016 NBQB 196

- Plaintiff employee alleged wrongful dismissal
- Defendant employer argued plaintiff was terminated for failing to report to work, and for sexually harassing female co-workers
  - He made inappropriate comments and gestures, put a camera down an employee's blouse to take a picture of her breasts, and hugged an employee and attempted to touch her breasts
- Employer discovered harassment after termination, but Court found it was a legitimate after-discovered cause
- The sexual harassment was grounds for immediate dismissal
- P's lawsuit dismissed

*“Leaving aside personal safety issues, sexual harassment is demeaning and the stress that it engenders in its victims has serious consequences for their physical, psychological and emotional well-being”*

## *ATU, Local 113 and TTC, Re. 2018 CarswellOnt 12619*

- TTC terminated female employee who complained about sexual harassment by a supervisor
- Alleged consensual behaviour
- TTC “could not tolerate or condone [her] behaviour specific to this incident and dismissed her for her ‘inappropriate and unprofessional conduct.’”
- Key points in addressing harassment complaint
  - Consensual behaviour
  - “Proper” way to react

## *Doyle v Zochem*, 2017 ONCA 130

- P was terminated as plant supervisor (was only woman at the plant)
- P had complained of sexual harassment by the plant maintenance manager, who (graphically) talked to her about sexual positions, asked about her sexual activity, and made sexual references to employees' body parts
- Trial judge found P was likely terminated because of her "gender and her sexual harassment complaint"
- Dismissal had severe physical and mental impact on P
- D was liable for wrongful dismissal –
  - Court of Appeal upheld **\$60,000** award of moral damages
  - P was also awarded general damages for salary in lieu of notice, and \$25,000 in damages under the *Human Rights Code*

# *Render v ThyssenKrupp Elevator,* 2018 ONSC 3182

- Plaintiff was claiming wrongful dismissal
- Defendant alleged cause – that P slapped the buttocks of a female co-worker “and also ‘placed his face in the area of [her] breasts and pretended to nuzzle into them””
- Co-worker’s complaint led to the investigation which led to the Plaintiff’s termination
- Co-worker was granted **intervener status** in the wrongful dismissal action and permitted to have her own counsel (she was already going to be a witness):

*“This decision to allow Ms. Vieira to intervene in the action is intended to enable her to protect her integrity primarily in the context of her continued employment”*

- From her evidence:

*“I have been the subject of derision and hostility from my co-workers because I refused to stay quiet about the behaviour of the Plaintiff and simply ‘suck it up””*

*“Because there’s a stigma attached to me, that if you joke around with Linda, if you’re inappropriate, you could get fired”*

*“My life has become harder because of something that someone else did to me”*

## *Smith v Vauxhall Co-op Petroleum Ltd*, 2017 ABQB 525

- P claimed wrongful dismissal; D alleged cause, incl. breach of workplace sexual harassment policy, following romantic relationship between P (manager) and AM (employee)
- No just cause on basis of sexual harassment or assault –investigation into allegations problematic

*“To be clear, the Defendant was not required to adjudicate Ms. AM’s allegations based on the standards expected in a judicial process. Most private employers are not equipped with the same investigative tools, authority, or safeguards as those available in the judicial system. This Court, however, cannot rely upon Mr. Longman’s problematic investigation as justification for terminating Mr. Smith. Especially when its conclusions are based on allegations of sexual harassment and sexual assault that have clearly not been made out on the facts.”*
- However, P committed personal harassment against AM after their relationship ended, by threatening to fire her; having angry outbursts against her; failing to follow proper disciplinary procedures; and ordering her to complete a delivery when pregnant and supposed to be on bedrest
- P also engaged in a “long-term pattern of dishonesty aimed at concealing the Relationship from the Defendant, regardless of whether the Relationship was itself contrary to workplace policies”
- Just cause accepted; action dismissed

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

- P (golf course superintendent) alleged wrongful dismissal after terminated for cause – verbal and sexual harassment against female member of grounds crew, who reported directly to him
  - “When Ms. Li made it clear to the Plaintiff that she had no romantic feelings for him and wanted their relationship to be only professional, the Plaintiff began to vacillate between continuing to try to woo her and becoming increasingly aggressive and abusive to her”*
- He also sent drunken text messages:
  - *I mdrunk*
  - *R u sleeping*
  - *Im lost*
  - *Sorry I was tryin 2 walk home*
  - *Oh o*
  - *Drank 2 much but I tried 2 get home trouble love u I think 4 will be ok sorry*
  - *Good morning want 2 go 4 coffee*





# Part 5:

Best practices & risk management for employers

# Policies & procedures – general

- **Consider:**

- Sexual harassment might be a one-time incident; it's not always a pattern
- Consensual relationships can constitute sexual harassment where there is a significant power imbalance between the parties, even when the subordinate employee purports to consent
- Sexual harassment can involve people of any gender – It is not always man→woman
- Sexual harassment and other sexual misconduct can cause victims to suffer genuine physical and psychological trauma, including PTSD
- Conduct can be contrary to workplace policy even if it's not “illegal” in the eyes of the criminal law or civil law

# Bottom line

- Employers need a **sexual harassment policy** and must back up the policy with **education** and **enforcement**

*“For workplace policies to be considered enforceable, and thus constitute an express or implied term of the employment contract, they must be “reasonable, unambiguous, well published, consistently enforced, and [the employee must know] or ought to have known of [the policies’ contents], including the consequences of breach”*

*(Smith case, supra at para 29)*

- Failure to properly respond to a complaint could itself constitute **discrimination** against the complainant (see e.g. *Beharrell v EVL Nursery*, 2018 BCHRT 62)

# Topics to include in policy

- **Definitions**

- Prohibited behaviours
  - *Sexual harassment and other misconduct*
  - *Retaliation*
- Other key concepts (e.g. consent)

- **Extent of policy**

- Workplace social functions?
- Electronic communications?
- Social media?

# Policy topics (cont'd)

- **Complaints procedure**

- To whom does complainant report, and how?
  - *Consider power imbalances, and potential for bias / conflicts of interest*
- Obligation to report? By whom?
- Confidentiality? (confirm whether applicable legislation deals w/this)
- Time limit for reporting? (how to deal with 'historic' allegations?)
  - *But many complainants do not complain right away, if at all*
- Supporting documentation / evidence?

# Policy topics (cont'd)

- **Investigation procedure (ensure compliance w/applicable legislation!)**
  - Criteria for employer to investigate even if no formal complaint?
  - Who conducts – Internal? External?
    - *If **external** – Consider issues related to privilege, and consider how internal department(s) will liaise w/external investigator – Employer is ultimately responsible*
  - Notification to other party(ies) + right of response?
  - Protection against retaliation?
  - Timelines? (need to be diligent but thorough)
  - Informal vs formal resolution mechanisms?
  - Support for complainant?

# Policy topics (cont'd)

- **Decision-making & discipline**

- Who decides?
- Decision-makers trained to avoid myths and stereotypes about complainants?
- Does complainant get to provide input on remedial action?
- Timeline?
- Standard of proof?
- What are the consequences if complaint is made out? (discipline, etc.)
- How is decision communicated? Is there a report?
- Are the results, and any resulting report and related communications, confidential?  
(**note**: legal developments make confidentiality, including non-disclosure agreements, less likely to be enforceable – ensure compliance with applicable legislation!)
- Support for complainant?

# Education & training

- Employees need to know about these policies and procedures!
- Education campaigns and training sessions are must-dos, and should cover topics like **prevention** and **bystander intervention**
- **Education and training** should respect generational, culture, and other differences in the workforce



# Mitigating & managing risk – general

- Having policies in place, with proper education and enforcement, will:
  - help protect employers from civil lawsuits, liability under workplace statutes, human rights complaints, and negative (social) media coverage, and
  - enable employers to be proactive about their organizational culture

# Mitigating & managing risk – specific points to consider

- Is the policy regularly **reviewed / updated**?
- Is the organization minimizing the provision and consumption of **intoxicating substances** at workplace events?
- Has the organization considered and addressed the potential for **decreased mentorship / sponsorship opportunities** in light of #metoo?
- Does the organization have **insurance coverage** for sexual harassment claims?
- Does the organization have a **PR plan** for reputation management in case of a crisis?



# Questions?



Thank you!



These materials are intended to provide brief informational summaries of legal developments and topics of general interest.

The materials should not be relied upon as a substrate for consultation with a lawyer with respect to the reader's specific circumstances. Each legal or regulatory situation is different and requires review of the relevant facts and applicable law.

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