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Workplace Sexual Harassment: Assessing the Effectiveness of Human Rights Law in Canada

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PETER A. ALLARD
SCHOOL OF LAW

Workplace Sexual Harassment

ASSESSING THE EFFECTIVENESS OF
HUMAN RIGHTS LAW IN CANADA

BETHANY
HASTIE

August 2019

University of British Columbia

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Opinions expressed in the report are those of the author and should not be attributed to other parties. The report does not represent the official position of the Peter A. Allard School of Law or the University of British Columbia. This report was prepared based on publicly available information.

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Executive Summary

Sparked by the #MeToo movement, social commentary and media have revived broad-based discussions concerning sexual harassment and misconduct in contemporary workplaces. Investigations into sexual misconduct within Canada's military and RCMP, as well as the failed Jian Gimeshi trial two years ago, reveal the seriousness of the issue and a need for further legal research, reform and advocacy. These events have created heightened awareness and sensitivity to a pervasive issue that is known to affect many Canadians.

Evidence suggests that legal claims concerning sexual harassment and misconduct are increasingly being pursued through human rights tribunals. Human rights tribunals are cited as a better vehicle for pursuing sexual harassment complaints due to relaxed evidentiary and examination standards, a less adversarial atmosphere, and higher compensatory awards. However, there is reason for concern that the increasingly documented issues attending victims of sexual assault and gender-based violence in the criminal justice system may arise in complaints of sexual harassment under human rights law as well.

This report analyzes substantive decisions on the merits concerning workplace sexual harassment at each of the BC and Ontario Human Rights Tribunals from 2000-2018, with a view to identifying how the law of sexual harassment is understood, interpreted and applied by the Tribunals' adjudicators. In particular, this report examines whether, and to what extent, gender-based stereotypes and myths known to occur in criminal justice proceedings arise in the human rights context.

This report examines substantive decisions on the merits for claims of workplace sexual harassment from 2000-2018 in BC and Ontario. The limitation to substantive decisions allows for a greater focus on the core research question of this project, which asks about adjudicators' interpretation and application of the legal principles where they have the benefit of a full hearing. This is not, therefore, reflective of the scope of sexual harassment incidents, many of which will be not reported or pursued through legal means, or which may be settled, dismissed or abandoned prior to a full hearing.

BC and Ontario adopt distinct approaches to the codification of sexual harassment in human rights law. While Ontario sets out explicit statutory provisions concerning sexual harassment in the workplace under the *Human Rights Code*, BC has not codified sexual harassment as a specific provision under its *Human Rights Code*, rather adopting the definition laid down in *Janzen v Platy Enterprises*, [1989] 1 SCR 1252, 59 DLR (4th) 352 to guide its analysis of sexual harassment complaints, which are brought broadly as discrimination complaints on the basis of sex. Despite these distinct approaches, this report identifies doctrinal similarities between the jurisdictions, and similar issues that arise in each jurisdiction.

The legal principles defining sexual harassment under human rights law require a complainant to establish: (1) the impugned conduct that constitutes the harassment; (2) that the impugned conduct was "unwelcome"; and, (3) that the complainant suffered adverse consequences as a result of the conduct. This report concludes that these legal principles create multiple entry points for gender-based myths and stereotypes to influence the analysis of a complaint, and the assessment of remedies for justified complaints. In particular, the case law reveals enduring issues in: privileging physical misconduct and *quid pro quo* sexual harassment (explicit sexual advances, invitations or demands made by a person in a position of authority); the requirement for a complainant to establish that the impugned conduct was "unwelcome"; and, providing remedies that meaningfully address a complainant's individual experience and the broader workplace environment.

Both BC and Ontario give expansive doctrinal interpretations to the kind of conduct that may constitute sexual harassment. Physical misconduct, and *quid pro quo* harassment (explicit sexual advances, invitations or demands from a person in a position of authority) are readily understood as constituting sexually harassing conduct in each jurisdiction, while verbal and visual misconduct produce greater difficulty in individual cases. In addition, the requirement that a complainant establish multiple incidents or a pattern of conduct where non-physical misconduct alone is at issue may implicitly support a privileging of physical misconduct, and creates some space where gender-based myths and stereotypes may influence the analysis. In addition, the assessment of conduct often required an assessment of credibility, given that many cases of sexual harassment rely on the testimony of the parties to the complaint, and sometimes other witnesses. This often makes credibility assessments integral to a determination of the complaint. This creates further space in which gender-based myths and stereotypes may impact the analysis.

The requirement that a complainant established that the impugned conduct was “unwelcome” provides the most direct and expansive space for gender-based myths and stereotypes to influence the analysis and outcome of sexual harassment complaints. This requirement focuses direct attention on a complainant’s own behaviour, and essentially requires them to establish the absence of consent, rather than adopting an affirmative consent standard. While in many cases, adjudicators displayed attentiveness and sensitivity to issues concerning gender-based myths and stereotypes, and actively resisted attempts by respondents to craft arguments that relied on those myths and stereotypes, issues nonetheless arose in a number of cases.

This report identifies issues in the case law with respect to the “hue and cry” stereotype (the myth that a “real victim” will promptly report the harassment to another person, whether a co-worker, manager or person in authority). Although the legal principles have been doctrinally interpreted as not requiring active protest or express objection, the absence of such evidence proved problematic in some cases. This report also discusses cases where evidence of participation in similar or related behaviour worked to undermine a complainant’s case. This mirrors gender-based myths in the criminal justice context that suggest participation in “risky” behaviours or prior sexual encounters make a victim both more likely to consent and less deserving of belief. Finally, this report examines how sexualized work environments may operate to normalize conduct that would otherwise be considered as “unwelcome” and as sexual harassment.

Where a complaint is found justified, the Tribunal may order remedies, including compensatory awards for injury to dignity (non-pecuniary) and pecuniary losses (such as lost wages), and non-compensatory discretionary remedies. The remedial authority and legal principles governing remedies in each jurisdiction is quite similar, though Ontario was found to both award higher compensatory damages and make more frequent use of other remedies. With respect to compensatory awards, cases involving physical misconduct tended to attract higher awards in both jurisdictions. Quantum of awards may also be impacted by the evidence a complainant is able to marshal in order to establish the negative impacts that they have experienced as a result of the harassment. This may inadvertently depress awards for complainants who are unable to lead such evidence, whether due to cost, availability of resources, or other reasons why they may not seek out such resources. Reliance on such evidence may also support assumptions and stereotypes concerning victimhood and signal a privileging for performances of traumatization. As a result, complainants who deviate from expected or privileged behaviour, such as through stoicism or a rejection of formal mental health intervention, may be disadvantaged at the remedy stage.

In addition to injury to dignity awards, human rights tribunals are equipped to make a variety of other remedial orders that may work towards proactively addressing and deterring future sexual harassment in the workplace. Orders of this kind in the identified cases include a variety of training and education requirements, as well as policy development, implementation and revision. These orders can assist in prospectively addressing sexual harassment in the workplace through education and knowledge-building, signaling the importance of the issues, deterring future harassment, and providing a basis for legal complaints if needed in the future.

Based on the analysis undertaken, this report makes eight recommendations:

- Remove the requirement for a complainant to establish that the impugned conduct was “unwelcome”;
- Expand the conduct element of the law to clearly encompass visual communications and sexualized workplace environments as constitutive of sexual harassment;
- Make use of remedial orders beyond compensatory awards;
- Clarify the evidentiary requirements useful in assessing injury to dignity awards;
- Enhance resources for self-represented parties;
- Develop educational resources specifically addressing sexual harassment;
- Develop policy guidelines to address institutional and systemic issues that surround sexual harassment; and,
- Provide specific and regular training to adjudicators, lawyers and other relevant actors on the issues examined in this report

Introduction

Sparked by the #MeToo movement, social commentary and media have revived broad-based discussions concerning sexual harassment and misconduct in contemporary workplaces. Investigations into sexual misconduct within Canada's military and RCMP,¹ as well as the failed Jian Gomeishi trial two years ago, reveal the seriousness of the issue and a need for further legal research, reform and advocacy. These events have created heightened awareness and sensitivity to a pervasive issue that is known to affect many Canadians. A 2014 Angus Reid poll found that 43 percent of women, and 12 percent of men, in Canada reported experiencing sexual harassment in their workplace.²

Evidence suggests that legal claims concerning sexual harassment and misconduct are increasingly being pursued through human rights tribunals.³ Human rights tribunals are cited as a better vehicle for pursuing sexual harassment complaints due to relaxed evidentiary and examination standards, a less adversarial atmosphere, and higher compensatory awards. Yet, little contemporary research on sexual harassment law in Canada exists.⁴ The legal principles governing sexual harassment complaints were first articulated by the Supreme Court of Canada in *Janzen v Platy Enterprises*, [1989] 1 SCR 1252, 59 DLR (4th) 352 [*Janzen*]. Remarkably little doctrinal change has occurred with respect to the legal principles since that time. However, the past thirty years has produced greater awareness of and sensitivities to the range of conduct that may constitute sexual harassment, and a shift in understanding the psychological and emotional dynamics and impacts of sexual harassment, including movement away from historical stereotypes about women. This contemporary social context and more nuanced understanding of sexual harassment may not be fully appreciated in law.

This report analyzes substantive decisions on the merits concerning workplace sexual harassment at each of the BC and Ontario Human Rights Tribunals from 2000-2018, with a view to identifying how the law of sexual harassment is understood, interpreted and applied by the Tribunals' adjudicators.⁵ In particular, this report examines whether, and to what extent, gender-based stereotypes and myths appear in the reasoning and outcomes of these cases. Increasingly documented issues attending victims of sexual assault, sexual misconduct and gender-based violence in the criminal justice system point to barriers in accessing justice due, in part, to issues surrounding credibility assessment.⁶ Problematic myths concerning women and sexuality, narrow understandings of the psychological and emotional dynamics and impacts of sexual misconduct on victims, and underlying tendencies to responsibilize women for assault- and harassment-avoidance, continue to negatively impact adjudicators' assessment of the credibility and character of victims of gender-based violence.⁷ There is reason for concern that similar issues may plague complainants of sexual harassment within human rights tribunal proceedings.

¹ Marie Deschamps, "External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces" (2015), online: *Government of Canada* <<http://www.forces.gc.ca/en/caf-community-support-services/external-review-sexual-mh-2015/summary.page>>; Colin Perkel, "Landmark deal in RCMP sexual-harassment class action wins court approval", *CBC News* (31 May 2017), online: <<http://www.cbc.ca/news/canada/british-columbia/rcmp-sexual-harassment-class-action-1.4140138>>.

² "Three-in-ten Canadians say they've been sexually harassed at work, but very few have reported this to their employers" (5 December 2014), online (pdf): *Angus Reid Institute* <<http://angusreid.org/wp-content/uploads/2014/12/2014.12.05-Sexual-Harassment-at-work.pdf>>.

³ Sean Fine, "Ontario Human Rights Tribunal gains steam as alternative route for sexual assault cases", *The Globe and Mail* (3 April 2018), online: <<https://www.theglobeandmail.com/canada/article-workplace-sexual-assault-survivors-claim-victory-at-human-rights/>>.

⁴ Kathleen Gallivan, "Sexual Harassment After *Janzen v Platy*: The Transformative Possibilities" (1991) 49:1 *UT Fac L Rev* 27; Fay Faraday, "Dealing with Sexual Harassment in the Workplace: The Promise and Limitations of Human Rights Discourse" (1994) 32:1 *Osgoode Hall LJ* 32; Colleen Sheppard, "Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment" (1994-1995) 3 *CLELJ* 249 [Sheppard, "Systemic Inequality"]; Sandy Welsh, Myrna Dawson & Elizabeth Griffiths, "Sexual Harassment Complaints to the Canadian Human Rights Commission" (1999), online (pdf): *Government of Canada* <<http://publications.gc.ca/collections/Collection/SW21-43-1999E-5.pdf>>; Arjun P Aggarwal & Madhu M Gupta, *Sexual Harassment in the Workplace*, 3rd ed (Toronto: Butterworths, 2000); Susan M Hart, "Labour Arbitration of Co-Worker Sexual Harassment Cases in Canada" (2012) 29:3 *Can J Administrative Sciences* 268; Sheryl L Johnson, *Sexual Harassment in Canada: A Guide for Understanding and Prevention* (Toronto: LexisNexis Canada, 2017).

⁵ This paper analyzes reported decisions on the merits, and is thus limited in scope. Complaints of sexual harassment may be settled prior to a full hearing, pursued through other legal means, or not pursued at all. This study is also limited to workplace sexual harassment, though this is not the only site or context in which harassment unfolds.

⁶ Janine Benedet, "Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?" (2013) 18:2 *Rev Const Stud* 161 [Benedet, "Marital Rape"]; Janine Benedet & Isabel Grant, "Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities" (2014) 22:2 *Fem Leg Stud* 131; Isabel Grant, "Intimate Partner Criminal Harassment Through a Lens of Responsibilization" (2015) 52:2 *Osgoode Hall LJ* 551; Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018) [Craig, *Putting Trials on Trial*].

⁷ See Grant, *ibid*; Craig, *Putting Trials on Trial*, *ibid*.

Methodology

As mentioned above, this project analyzes substantive decisions on the merits for workplace sexual harassment at the BC and Ontario Human Rights Tribunals from 2000-2018.

These jurisdictions employ two distinct approaches to defining sexual harassment in human rights law, making them suitable comparators for the project. As discussed in more detail in Chapter 1, the Ontario *Human Rights Code*, RSO 1990, c H-19 sets out specific provisions and statutory language related to sexual harassment, while the BC *Human Rights Code*, RSBC 1996, c 210 subsumes a consideration of such claims under general provisions relating to employment discrimination and gender as a protected ground, drawing on *Janzen* and previous cases to ground the principles and their interpretation. Despite the distinct approaches in each jurisdiction, this report has found that similar issues arise with respect to the interpretation and application of the legal principles, particularly as concerns the requirement that a complainant establish that the conduct in question is “unwelcome”.

This project examines only substantive decisions on the merits for claims of workplace sexual harassment from 2000-2018. The limitation to substantive decisions allows for a greater focus on the core research question of this project, which asks about adjudicators’ interpretation and application of the legal principles where they have the benefit of a full hearing. This is not, therefore, reflective of the scope of sexual harassment incidents, many of which will be not reported or pursued through legal means, or which may be settled, dismissed or abandoned prior to a full hearing. While Chapter 2 outlines trends in the characteristics of the decisions, these are not therefore exhaustive of the contexts or incidents in which sexual harassment unfolds. The time period chosen, 2000-2018, provides a sufficient body of case law to analyze, as set out in Chapter 2, while also allowing for potential shifts in the interpretation of legal principles over time. This time period also encompasses, in Ontario, the shift to a direct-access Tribunal model in 2008.

The body of case law for this report was retrieved through searches on CanLII, WestLaw, LexisNexis, and the Tribunal websites. Searches were limited to the employment context, and keyword combinations were used to identify relevant decisions. A review of the Tribunal websites cataloguing their decisions was used to cross-check the identified and retrieved cases. Cases were then entered into a spreadsheet to map quantitative characteristics, and reviewed for qualitative analysis.

The quantitative analysis of cases, set out in Chapter 2, provides a “snapshot” of salient characteristics and trends attending sexual harassment complaints over the time period and in relation to each of the comparator jurisdictions. Identified characteristics include: representation of the parties at the hearing; the outcome of the hearing; remedies awarded (where applicable); ground(s) of discrimination; the identified sex of the complainant and individual respondent; the employment relationship between the complainant and the individual respondent; the job or occupational role held by the complainant; and, the industry in which the complainant was employed.

The qualitative analysis, set out in Chapters 3-5, examines how adjudicators understand, interpret and apply the legal principles attending sexual harassment. This analysis was derived through a blended approach of doctrinal and directed content analysis. A doctrinal analysis examined how the legal principles governing sexual harassment are articulated and applied in the case law. A directed content analysis discerned deeper meaning from identified texts using preliminary categories and keywords for qualitative analysis. Using identified keywords for directed content coding, I analyzed the case law to determine specific issues and trends that arose in particular contexts. For example, while the doctrinal analysis examined how the “unwelcome” standard is articulated and applied, the directed content analysis contextualized the interpretation and application of that principle as it relates to specific issues concerning a complainant’s character and credibility. Decisions and quotes are used throughout the report to illustrate the broader findings, but are not exhaustively listed in relation to each point of discussion or finding.

Summary of Findings

The central research question guiding this report asks: “do human rights tribunals replicate, or overcome, the problematic narratives about gender and sexuality that create barriers to justice for victims in criminal justice proceedings?” To answer this question, this report engages in a detailed analysis of sexual harassment case law at the BC and Ontario Human Rights Tribunals. This report concludes that the legal principles governing the substantive reasoning and decisions in sexual harassment complaints reveal enduring problems for complainants seeking this pathway for redress. These problems relate to how the legal principles are interpreted and applied in relation to: (1) identifying conduct as sexual harassment; (2) requiring a complainant to establish that such conduct was “unwelcome”; and, (3) the remedies awarded where complaints are justified. In particular, the case law reveals enduring issues in: (1) privileging *quid pro quo* and physical sexual harassment; (2) assessing credibility, character and ‘consent’ in workplace sexual harassment complaints alongside the “unwelcome” requirement; and, (3) providing remedies that meaningfully address the complainant’s individual experience and the broader workplace environment.

First, *quid pro quo* and physical forms of sexual harassment may be privileged over covert and subtle forms of harassment.⁸ This is reflected in several ways in the interpretation and application of the legal principles in the cases. Where *quid pro quo* or physical harassment was established, often very little (to no) explicit analysis was set out in finding that the conduct met the threshold. Furthermore, where covert or subtle harassment was alleged and even established, the complainant’s own behaviour tended to be scrutinized more closely. Finally, awards for injury to dignity tended to be higher for justified complaints related to physical harassment. This privileging relies on narrow understandings of sexual harassment, despite the fact that the legal definition contemplates a wide range of conduct that may constitute sexual harassment. This privileging further reflects a narrow understanding of the emotional and psychological dynamics and impacts of sexual harassment on a complainant.

Second, enduring issues concerning credibility, character and consent plague complainants of sexual harassment, as they do victims of sexual assault and other forms of gender-based violence.⁹ Less-than-ideal complainants may face barriers in establishing their complaint of sexual harassment, and the legal principles governing these claims invite scrutiny of a complainant’s character and behaviour by including the requirement that a complainant establish that the conduct in question is “unwelcome”. The negative impact of stereotypes and character issues for sexual assault complainants are well-documented and problematically shift the burden of responsibility for harassment-avoidance onto complainants.¹⁰ This report documents similar issues for complainants of sexual harassment under human rights law, particularly where a complainant fails to promptly report their harassment, or where they have previously participated in similar behaviour in the workplace.

Third, the remedies awarded by human rights tribunals for justified complaints of sexual harassment are impacted by the above noted issues. Human rights tribunals are specifically noted as a preferential vehicle for addressing workplace sexual harassment due to their ability to make compensatory awards. While the existence of compensatory awards may be a positive attribute, the range of compensation suggests that the awards may reflect the problematic patterns concerning the narrow and privileged understandings of sexual harassment noted above, and may thus fail to fully appreciate and account for the full range of emotional and psychological impacts that a complainant may experience. Beyond compensation, the ability of human rights tribunals to order remedies that prospectively address workplace sexual harassment is broad, and the cases illustrate many positive trends in that regard. These remedies include requiring training and other educational initiatives, and the development and revision of workplace policies to address sexual harassment.

⁸ Gallivan, *supra* note 4; Faraday, *supra* note 4.

⁹ *Ibid.*

¹⁰ Christine Boyle, “Reasonable Doubt in Credibility Contests: Sexual Assault and Sexual Equality” (2009) 13:4 Intl J Evidence & Proof 269; Grant, *supra* note 6; Craig, *Putting Trials on Trial*, *supra* note 6.

Report Outline

This report proceeds as follows. I begin by outlining the legal principles attending sexual harassment complaints in each of BC and Ontario in Chapter 1. I then, in Chapter 2, describe trends in the characteristics of the reported decisions, including: gender of complainant and alleged harasser; power dynamics shaping the employment relationship as between complainant and alleged harasser; jobs and industries in which complaints arise; and, the outcome of cases. Following this, in Chapter 3, I discuss in more detail the issues presented across the body of cases, in relation to identifying and defining what constitutes “sexually harassing conduct”. In Chapter 4, I undertake an analysis of the “unwelcome” requirement, and the various ways in which gender-based myths and stereotypes may improperly influence legal analysis under this element of sexual harassment law. Finally, in Chapter 5, I discuss trends in respect of remedies awarded, including the range of monetary awards for injury to dignity, and the remedial powers of the Tribunals in prospectively addressing workplace sexual harassment. The conclusion of this report offers recommendations and points for further consideration arising from the findings set out in the previous chapters. A set of appendices provides the list of identified decisions used in this report.

1. Sexual Harassment: Legal Principles

The leading definition of sexual harassment is taken from *Janzen v Platy Enterprises*, [1989] 1 SCR 1252, 59 DLR (4th) 352 [*Janzen*]: “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.” Under this definition, there are three primary elements:

- (1) conduct of a “sexual nature”;
- (2) the conduct was “unwelcome”; and,
- (3) the conduct produces adverse consequences for the complainant.

In each of BC and Ontario, these elements and the broader definition in *Janzen* are used to ground legal understandings of sexual harassment in human rights law and discrimination complaints. However, the approach in each of these jurisdictions is somewhat distinct. In BC, there are no specific statutory provisions governing sexual harassment under the *Human Rights Code*; rather, the definition from *Janzen* has been used to identify the particular elements that adhere to sexual harassment as a specific form of sex discrimination under the *Code*. In Ontario, specific statutory provisions exist that define and prohibit sexual harassment in the workplace and other contexts. In each jurisdiction, proving the substantive claim of discrimination leads to an assessment of remedies. As human rights law is primarily focused on compensating an individual for the harm to their dignity, respect and well-being that results from the discrimination and adverse consequences they experience, injury to dignity awards (non-pecuniary compensatory awards) are the primary remedial tool. The legal principles governing remedies, including injury to dignity awards, are discussed fully in Chapter 5 of this report.

This chapter sets out the legal principles in each jurisdiction and the dominant doctrinal interpretation and understanding of the principles. This lays an important foundation for a deeper examination of the law’s interpretation and application in the forthcoming chapters.

British Columbia

The definition of sexual harassment, and its underlying purpose, was most recently affirmed in *Eva obo others v Spruce Hill Resort and another*, 2018 BCHRT 238 at para 75 [*Eva*]:

Sexual harassment is “any sexually-oriented practice that endangers ... continued employment, negatively affects ... work performance, or undermines ... personal dignity”: *Janzen* at para. 49. It may be blatant, such as sexual assault, or it may be more subtle, such as sexual innuendos: *Janzen* at para. 49. Not every case involves explicit sexual demands or invitations for a sexual relationship because sexual harassment is ultimately about an abuse of power: *Al-Musawi v. One Globe Education Services*, 2018 BCHRT 94, para. 33.

Conduct of a sexual nature

The BC Human Rights Tribunal, in *Mahmoodi v University of British Columbia and Dutton*, 1999 BCHRT 56 at paras 135–136 [*Mahmoodi*], confirmed that conduct falling within the definition of 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,¹¹ as noted also in the quote from *Eva*, above. However, as the Tribunal most recently affirmed in *Eva* at para 80, not every negative incident or incident connected to sex constitutes harassment (citing *Hadzic v Pizza Hut Canada (cob Pizza Hut)*, [1999] BCHRTD No 44 at para 33).

While physical conduct such as unwanted touching, is blatant and often readily recognizable as sexual harassment, various kinds of verbal conduct are also recognized as sexual harassment. 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.¹²

¹¹ See, Aggarwal & Gupta, *supra* note 4 at 14–18.

¹² Gallivan, *supra* note 4 at 30.

A pattern of on-going or persistent conduct is not necessarily required to establish sexual harassment, and a single event may, depending on the particular facts and context, be sufficient to constitute discriminatory conduct in this context. Where sexually harassing conduct is physical in nature, a single event may more often be found to meet the threshold. However, where verbal sexual harassment is alleged, persistent conduct or an on-going pattern of conduct may more often be required to meet the threshold.

In assessing whether one incident of verbal conduct is sufficient to meet the threshold for sexual harassment, various factors may be considered (*Eva* at para 80, citing *Pardo v School District no 43*, 2003 BCHRT 71 at para 12 [*Pardo*]):

- the egregiousness or virulence of the comment;
- the nature of the relationship between the involved 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.

Conduct that is “unwelcome”

Tribunals and courts have come to understand the legal test for determining whether conduct was “unwelcome” as (*Mahmoodi* 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 thus asks whether the harasser knew, or *ought to have known*, that the conduct was not welcomed.

Establishing that the conduct in question is unwelcome does not require a complainant to actively protest or expressly object to the conduct in question; acquiescence or toleration of conduct is not considered determinative that the conduct was therefore welcome (see *Mahmoodi* at paras 140–141). However, in the absence of express objection, a complainant may be required to lead some evidence from which a decision-maker can conclude that a reasonable person would understand the conduct in question to be unwelcome.

Despite the potentially broad interpretation of this element, the requirement that a complainant establish that conduct was “unwelcome” in a complaint of sexual harassment is contentious. Some argue that this element places the burden of establishing a lack of consent on the complainant, invites inappropriate scrutiny of the complainant’s own behaviour, and allows for “victim-blaming”.¹³ These issues will be taken up further in Chapter 4.

Adverse consequences

The third part of the definition from *Janzen* requires that the conduct gives rise to adverse job-related consequences for the complainant or detrimentally affects the work environment. This element has not given rise to a need for specific interpretation or elucidation, but rather aligns with general legal principles governing human rights complaints and the need for a complainant to establish adverse treatment or impact, and that the protected characteristic was a factor in the adverse treatment or impact (see *Moore v British Columbia*, 2012 SCC 61). An adverse job-related consequence is not limited only to punitive consequences such as termination or a reduction in hours, but can include the consequences of working in a “hostile” or “poisoned” work environment.

Ontario

In Ontario, the legal definition and elements of sexual harassment are defined under the *Human Rights Code*, RSO 1990, c H-19. Section 5 of the *Code* prohibits discrimination generally with respect to employment, including on the basis of sex, sexual orientation, gender identity, gender expression, marital status, and family status (s 5(1)), and also specifically prohibits harassment in employment (s 5(2)). Section 7 of the *Code* specifically addresses sexual harassment in the workplace:

¹³ See, Aggarwal & Gupta, *supra* note 4 at 120–37; Janine Benedet, Book Review of *Sexual Harassment in the Workplace*, 3rd ed, by Arjun P Aggarwal & Madhu M Gupta, (2001) 39:4 Osgoode Hall LJ 843 at 847; Hart, *supra* note 4. This critique will be taken up in greater detail in Chapter 3 of this report.

Harassment because of sex in workplaces

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

Sexual solicitation by a person in a position to confer benefit, etc.

7(3) Every person has a right to be free from,

- (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
- (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

As can be seen from the above provisions, the *Code* both specifically prohibits what has historically been referred to as *quid pro quo* sexual harassment (s 7(3)), as well as more generally prohibiting harassment on the basis of sex under section 7(2). The *Code* further defines "harassment" as: "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" (s 10).

Section 7(2) has been interpreted broadly in its purpose, and is often used to ground claims concerning a "poisoned work environment". As set out in *Smith v Menzies Chrysler*, 2009 HRTO 1936 [*Menzies Chrysler*], cited in *Harriott v National Money Mart Co*, 2010 HRTO 353 at para 110 [*Harriott*]:

The purpose of section 7(2) of the *Code* is to protect employees from sex harassment and this includes inappropriate sexualization of the workplace. Human rights jurisprudence has long accepted that the "emotional and psychological circumstances in the workplace" which underlie the work atmosphere constitute part of the terms and conditions of employment [...]. It is well-settled law that the prohibition against discrimination in section 5(1) affords employees the right to be free from a poisoned work environment in relation to *Code*-protected grounds. If sexually charged comments and conduct contaminate the work environment, then such circumstances can constitute a discriminatory term or condition of employment contrary to both section 5(1) and 7(2) of the *Code* [...].

The Ontario Human Rights Tribunal has interpreted section 7(2) of the *Code* as requiring an applicant¹⁴ to establish four primary elements in order for an application on the grounds of sexual harassment to be allowed:

- (1) that the individual respondent was her employer, her employer's agent, or another employee;
- (2) that the individual respondent harassed her by engaging in a course of vexatious comment or conduct towards her that was known or ought reasonably to have been known to be unwelcome;
- (3) that the individual respondent harassed her in the workplace; and,
- (4) that the individual respondent harassed her because of her sex.

Sheldon v St-Marys Ford Sales Ltd, 2017 HRTO 497 at para 104, citing *Ghosh v Domglas Inc. (No. 2)* (1992) 17 CHRR D/216 (Ont Bd Inq). See also: *Harriott v National Money Mart Co*, 2010 HRTO 353 at para 99, citing also *Smith v Menzies Chrysler*, 2009 HRTO 1936.

Adjudicating an application on the grounds of sexual harassment under the *Code* in Ontario requires a "multi-faceted assessment that looks at the balance of power between the parties, the nature, severity and frequency of impugned conduct, and the impact of the conduct. The key indicia (and harm) of sexual harassment is the use of sex and sexuality to leverage power to control, intimidate or embarrass the victim" (*Menzies Chrysler*, cited in *Harriott* at para 99).

¹⁴ The Human Rights Tribunal of Ontario has adopted the terminology of "applicant" and "application", in place of "complainant" and "complaint". When an application or complaint has been successful, it is referred to as having been "allowed" by the Ontario Tribunal, and as being "justified" by the BC Tribunal. This report will use "complainant", "complaint" and "justified" when referring to the BC and Ontario contexts together and to BCHRT decisions, and will use "applicant", "application" and "allowed" when discussing HRTO decisions, alone.

The focus of a sexual harassment application will revolve substantially around the second element: that the individual respondent harassed the applicant by engaging in a course of vexatious comment or conduct towards them that was known or ought reasonably to have been known to be unwelcome (*Sheldon v St-Marys Ford Sales Ltd*, 2017 HRTO 497 at para 105). It is this element which captures the substance of the legal definition of sexual harassment, which itself aligns closely with the definition set down in *Janzen*.

A course of vexatious comment or conduct

The conduct element under section 7(2) requires the applicant to establish that the respondent engaged in a “course of vexatious comment or conduct” in order to constitute harassment (as defined by s 10). This element requires further definition and interpretation in relation to (1) a “course” of conduct; and, (2) “vexatious” comments or conduct.

Where the conduct or comment is a single instance, the Ontario Tribunal has adopted the *Pardo* factors from British Columbia, cited above, in deciding whether it constitutes a course of conduct. A single incident may, in limited circumstances, be sufficient to constitute discrimination where it is particularly “virulent or egregious” (see *BC v London Police Services Board*, 2011 HRTO 1644 at paras 47–48, citing *Pardo*; see also *Berisa v Toronto (City)*, 2011 HRTO 912), or where it is “clearly demeaning and attack[s] the dignity and self-respect of the applicant” (*Lee ...*, 2016 HRTO 1440 at paras 102–103, citing also *Romano v 1577118 Ontario Inc*, 2008 HRTO 9 at paras 67–68).

“Vexatious” comments or conduct are understood as those which are “annoying, distressing or agitating to the person complaining” or where the applicant “finds the comments and conduct worrisome, discomforting and demeaning”, as understood in both cases from a subjective point of view (*Harriott* at para 101, citing *Streeter v HR Technologies*, 2009 HRTO 841 at para 33).

The Ontario Human Rights Tribunal has also relied on the decision in *Janzen* to identify the kinds of conduct that are captured by the definition of sexual harassment. This includes conduct that creates a “hostile environment” such as “requiring employees to endure sexual gestures and posturing in the workplace” (*Janzen* at para 54, cited in *Menzies Chrysler* at para 148). As the Court in *Janzen* noted, sexual harassment may include “‘any sexually-oriented practice’ that adversely impacts an employee’s work performance, work conditions or personal well-being [...] including, but not limited to, sexual gestures, sexual posturing and sexually-oriented practices” (*Menzies Chrysler* at para 148).

Conduct that is “unwelcome”

The requirement that conduct be unwelcome has been interpreted and applied in Ontario in the same vein as in BC. It requires an applicant to establish that the respondent knew or *ought to have known* that the conduct would be unwelcome, assessed on an objective basis (see *Harriott* at para 104).

Adverse consequences

The *Code* provisions in Ontario are silent on the requirement of adverse consequences. However, as discussed earlier with respect to the law in BC, the very nature of sexual harassment itself produces adverse consequences in that an applicant is presented with a poisoned or hostile work environment. As noted in respect of this terminology, which was adopted explicitly in Ontario, a “poisoned work environment” is one “where discrimination or harassment on a prohibited ground becomes a part of a person’s workplace” (*Vanderputten v Seydaco Packaging Corp*, 2012 HRTO 1977 at para 63 [*Vanderputten*]). In other words, “the atmosphere in which an employee must work is a condition of his or her employment, and should that atmosphere be oppressive or ‘poisoned’ for a minority group, that circumstance might amount to discrimination on a prohibited basis” (*Vanderputten* at para 63, quoting *Ghosh v Domglas Inc (No 2)* (1992) 17 CHRR D/216 (Ont Bd Inq) at para 76).

As the above quotes describe, sexual harassment, where it is found to exist, adversely affects the environment in which the applicant works and this amounts to “adverse consequences” as required by human rights law.

Conclusion

Comparing both provisions (ss 7(2) and 7(3)) of the Ontario *Code* with the definition in *Janzen* and approach taken in BC, there are significant similarities. The laws in each jurisdiction require three specific elements to meet the definition of sexual harassment: (1) prohibited conduct; (2) that the respondent knows or ought to know is unwelcome; and, (3) adverse consequences for the complainant. In addition, implicit in the definition of sexual harassment in each jurisdiction is the notion that the alleged discriminatory conduct in question relates to sex, gender, sexual orientation or gender identity or expression.¹⁵

While Chapters 3 and 4 of this report will engage in a deeper analysis of how the law is interpreted and applied in specific cases of workplace sexual harassment in each jurisdiction, the next Chapter (2) will first set out the dominant characteristics and trends presented by the body of case law.

¹⁵ Although sexual harassment was historically viewed as a gendered harm "most often perpetrated by a male in a position of authority over a female victim", contemporary understandings of sexual harassment have expanded, with a broad and purposive approach generally being adopted. See: *Smith v Menzies Chrysler Incorporated*, 2009 HRTO 1936 at paras 147-48, 150-52.

2. Workplace Sexual Harassment Complaints at the BC and Ontario Human Rights Tribunals, 2000-2018: Characteristics of the Complaints

This chapter provides an overview of the salient characteristics and outcomes of reported decisions on the merits for workplace sexual harassment complaints. As noted in the Introduction, this research is limited to reported decisions on the merits for workplace sexual harassment complaints at the BCHRT and HRTO from 2000-2018. The focus of this examination is to assess how the legal principles governing sexual harassment complaints are being interpreted and applied in the human rights tribunal setting. However, the scope of this research has inherent limitations. Many complaints may be settled prior to a full hearing on the merits. In addition, many potential complainants may either pursue other legal avenues for redress, or not take legal action at all. Disincentives towards formalizing complaints of sexual harassment and pursuing legal remedies are well-documented.¹⁶ As such, while this chapter sets out the salient characteristics of the reported decisions below, they are not exhaustive of the various characteristics and contexts in which workplace sexual harassment unfolds.

Overview of Decisions and Outcomes

	BC	Ontario
Decisions on the Merits	66	116
Justified	45	74
Justified complaints as a percentage of decisions	68%	64%
Dismissed	21	42
Dismissed complaints as a percentage of decisions	32%	36%

For BC, a total of 72 decisions were retrieved. Of the 72 identified decisions, 6 were dismissed because the complainant did not attend the hearing (*Hansen v Hiebert*, 2002 BCHRT 21; *Lloyd v Mercier*, 2006 BCHRT 380; *McWilliams v Edenvale Restoration and Ali*, 2007 BCHRT 90; *Heyman v Saunders (No 2)*, 2010 BCHRT 88; *LaBelle v Campus Technologies and another*, 2010 BCHRT 116; *Skorka v Happy Day Inn and Others*, 2010 BCHRT 306). Therefore, a total of **66 decisions on the merits** were rendered in BC.¹⁷

In Ontario, a total of 119 decisions were retrieved. Of the 119 decisions, 3 were dismissed because the applicant did not attend the hearing (*Skander v Poly Nova Technologies*, 2010 HRTO 947; *Breziuk v Treco Real Estate*, 2011 HRTO 584; *Gardiner v 1708840 Ontario*, 2010 HRTO 668).¹⁸ Therefore, a total of **116 decisions on the merits** were rendered in Ontario.¹⁹

Of the 66 decisions in BC where a full hearing on the merits was conducted, 45 were found justified, and 21 were dismissed.²⁰ Of the 116 decisions in Ontario where a full hearing on the merits was conducted, 74 were allowed and 42 dismissed.²¹ Most dismissed complaints were the result of credibility issues in assessing the alleged facts, rather than a failure to meet the elements required to establish the complaint where the factual allegations were accepted.

¹⁶ See Hart, *supra* note 4 at 274; Johnson, *supra* note 4 at 195.

¹⁷ See Appendix A for a list of the identified BC cases.

¹⁸ The Human Rights Tribunal of Ontario has adopted the terminology of "applicant" and "application", in place of "complainant" and "complaint". When an application or complaint has been successful, it is referred to as having been "allowed" by the Ontario Tribunal, and as being "justified" by the BC Tribunal. This report will use "complainant", "complaint" and "justified" when referring to the BC and Ontario contexts together and to BCHRT decisions, and will use "applicant", "application" and "allowed" when discussing HRTO decisions, alone.

¹⁹ See Appendix B for a list of identified Ontario decisions.

²⁰ Two decisions are related: *Kwan v Marzara and another*, 2007 BCHRT 387 and *Kwan v Marzara and another (No 3)*, 2009 BCHRT 418. The matter was re-opened on application by the respondent who had failed to attend the original hearing. As the adjudicator in the second decision considers the matter without reference to the previous decision, each decision is treated as independent for the purposes of counting the number of justified versus dismissed complaints. However, in relation to other aspects of the analysis, such as the gender of complainant, ground of discrimination, etc., the two decisions will be treated as one "unique complaint".

²¹ Of the 74 applications that were allowed, in two, the application on the grounds of sex was allowed only in part: In *Frolov v Mosregion Investment Corporation*, 2010 HRTO 1789, the Tribunal could not make findings regarding whether the applicant was sexually harassed or solicited, but found that he had been discriminated against on the grounds of gender, which the Tribunal at that time included as part of the grounds of sex (at para 105). In *Sutton v Jarvis Ryan Associates*, 2010 HRTO 2421, the Tribunal

Of the 65 unique complaints (see note 20) in BC, there were two cases involving multiple complainants in relation to sexual harassment complaints specifically: *Tannis et al v Calvary Publishing and Robbins*, 2000 BCHRT 47 (4 complainants); and, *Young and Young on behalf of Young v Petres*, 2011 BCHRT 38 (2 complainants). This brings the total number of unique complainants to 69. In Ontario, of the 116 unique applications, five involved multiple applicants with respect to the sexual harassment applications: *Ontario Human Rights Commission v Motsewetshe*, 2003 HRTO 21 (5 applicants); *Gibbons v Sports Medicine Inc*, 2003 HRTO 26 (2 applicants); *Colvin v Gillies Hillcrest Variety*, 2004 HRTO 3 (2 applicants); *JD v The Ultimate Cut Unisex*, 2014 HRTO 956 (3 applicants); and *OPT v Presteve Foods Ltd*, 2015 HRTO 675 (2 applicants). This brings the total number of unique applicants for Ontario to 125.

Representation at the Tribunal

With increasing numbers of self-represented litigants in courts being documented generally across Canada, whether and to what extent representation may impact the outcome of a human rights complaint is a common query. Human rights tribunals generally provide extensive resources for parties, as well as adopting a pro-active approach to the complaint process, often involving direct contact with parties early in the process and regularly throughout it.²² This may enhance the preparedness of parties to a human rights complaint and thus the outcomes where a case proceeds to full hearing.

Of the 66²³ complaints in BC, 21 were brought by self-represented complainants (32%), and represented complainants brought 45 (68%). In Ontario, self-represented applicants brought 59 of 112²⁴ applications (53%) and represented applicants brought 53 (47%).

Self-Represented Complaints	BC	Ontario
Number of complaints brought by self-represented complainants	21	59
Number of justified complaints (self-represented complainants)	9	35
Justified complaints as a percentage of total self-represented complaints	43%	59%
Number of dismissed complaints (self-represented complainants)	12	24
Dismissed complaints as a percentage of total self-represented complaints	57%	41%

As a percentage of the complaints brought by self-represented complainants, 43% were found justified in BC (9 of 21), and 59% in Ontario (35 of 59). These fall below the percentage of overall justified complaints in each jurisdiction outlined earlier (68% in BC, and 64% in Ontario). In contrast to self-represented complainants, 80% of complaints brought forward by represented complainants in BC were found justified (36 of 45), and in Ontario, 66% (35 of 53), which each fall above the percentage of overall justified complaints in each jurisdiction. This suggests that representation in a human rights complaint may continue to have some impact on the outcome. However, as this study does not account for complaints dismissed or settled prior to hearing, it is difficult to draw firm conclusions in this regard.

Situations where the complainant was self-represented and the respondent was represented did not appear to have a significant influence on the outcome. As a breakdown of total self-represented complaints, the complaint was justified in 50% of decisions in BC (7 of 14 cases), and allowed in 48% of Ontario decisions (19 of 40 cases). In contrast, cases where

could not find that sexual solicitation or advances occurred, but allowed that the corporate respondent did not respond appropriately to the allegations thereof (at paras 119, 143)

²²BCHRT: "Steps in the Human Rights Complaint Process" (last visited 15 August 2019), online: *BC Human Rights Tribunal* <<http://www.bchrt.bc.ca/complaint-process/steps.htm>>; and HRTO: "Application and Hearing Process" (last modified 2015), online: *Tribunals Ontario Social Justice Division* <<http://www.sjto.gov.on.ca/hrto/application-and-hearing-process/>>.

²³Two decisions are related: *Kwan v Marzara and another*, 2007 BCHRT 387 and *Kwan v Marzara and another (No 3)*, 2009 BCHRT 418. The two decisions are counted separately for the purposes of assessing representation, as the complainant was self-represented in the first hearing (2007), and represented in the reconsideration hearing (2009). See, relatedly, note 20.

²⁴In four Ontario decisions, whether the complainant was or was not represented is not stated. These four decisions have been excluded for the purposes of assessing representation: *Sanford v Koop*, 2005 HRTO 53; *Domingues v Fortino and Varbaro*, 2007 HRTO 19; *Pchelkina v Tomsons*, 2007 HRTO 42; *Hughes v 1308581 Ontario*, 2009 HRTO 341.

a complainant was represented and the respondent was self-represented were far more often decided in favour of the complainant in BC. In BC, 13 decisions involved represented complainants and self-represented respondents. 11 of those decisions found the complaint justified. However, in Ontario, of the 7 decisions involving represented applicants and self-represented respondents, 4 applications were allowed and 3 dismissed, presenting more even outcomes.

In the remaining BC cases involving self-represented complainants (7 of 21), 5 cases involved self-represented parties on both sides (and in none of those cases was the complaint found justified), and in 2 cases the respondent did not attend (and the complaint was found justified in both of those cases). In the remaining Ontario cases involving self-represented applicants (19), 10 involved self-represented parties on both sides (and the application was allowed in 7 of those cases), and in 9 cases the respondent did not attend (and the application was allowed in all of those cases).

Grounds of Discrimination

In most cases, sex / sexual harassment was the sole ground of discrimination put forth in the complaint: 53 of 65 unique complaints (see note 20) in BC, and 78 of 116 applications in Ontario. 12 complaints in BC were brought in relation to multiple grounds of discrimination,²⁵ and 38 in Ontario.²⁶

Ground of discrimination claimed in a complaint	BC	Ontario
Race	3	18
Colour	0	11
Place of origin	4	9
Ethnic origin	0	14
Ancestry	2	10
Citizenship	0	1
Disability	3	6
Sexual orientation	1	2
Gender identity / expression	0	4
Marital status	1	6
Family status	1	8
Religion/ Creed	3	6
Age	3	5
Political belief	1	0
Record of offences	0	1
Association	0	2

As this table sets out, a number of cases pleaded multiple grounds of discrimination. Discrimination based on race, ethnicity, place of origin and related grounds were most frequently claimed alongside sexual harassment. This illustrates the intersectional dimensions of discrimination and inequality, which often involve abuses of power, as with sexual harassment.²⁷ In some cases, the incidents forming the basis of complaints were distinct where multiple grounds of discrimination were claimed, while in others, they were identified as interrelated based on the factual events. Given the small number of cases claiming multiple grounds of discrimination, coupled with the disparate nature of the claims across that small body of cases, a nuanced intersectional analysis was determined to be beyond the scope of this report.

²⁵ *Balikama obo others v Khaira Enterprises and others*, 2014 BCHRT 107 and *Eva obo others v Spruce Hill Resort and another*, 2018 BCHRT 238 also set out multiple grounds of discrimination, however, in these cases the sexual harassment complaints arise from distinct and separate incidents involving one of many complainants.

²⁶ See Appendix C for a full list of cases involving multiple grounds of discrimination.

²⁷ See, e.g.: "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims" (last visited 15 August 2019), online: *Ontario Human Rights Commission* <<http://www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims/introduction-intersectional-approach>>; Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity politics, and Violence against Women of Color" (1991) 43:6 *Stan L Rev* 1241.

The relationship between gender and sex

A number of cases either specifically pleaded discrimination on the basis of sex and gender identity or expression, or discussed gender in the analysis of the decision. As such, given the focus of this report on sexual harassment, the relationship between gender and sex, as presented in the identified cases, is set out here.

A small number of cases in Ontario considered discrimination on the basis of gender identity or expression alongside the claimed ground of sex. In *Gubrenko v TOJ Empire Auto*, 2014 HRTO 1232, the applicant brought an application involving multiple incidents. While the Tribunal found that she had been discriminated against on the basis of sex and family status (see paras 39–42), a separate incident that involved a gendered slur was found not to constitute a breach of the *Code* because, as a single incident, it was not sufficiently egregious (at paras 37–38). Similarly, in *Lalonde v Star Security Inc*, 2015 HRTO 74, the applicant claimed, in part, discrimination on the basis of gender identity and expression in relation to derogatory comments, although the case was dismissed on all grounds (see paras 67, 70, 72–75). Two further cases did not present an analysis of the claims specifically related to gender identity or expression: *Kharb v B&B Alarms*, 2016 HRTO 772; *GM v X Tattoo Parlour*, 2018 HRTO 201.

Two further cases considered the issue of “gender” discrimination before the ground of “gender identity or expression” was introduced in the Ontario *Code*: *Frolov v Mosregion Investment Corporation*, 2010 HRTO 1789, and *Farris v Staubach Ontario Inc*, 2011 HRTO 979 [*Farris*]. These cases, like the ones discussed above, illustrate how the language of “gender” may be adopted to describe incidents or conduct that relate to the social construction of “gender” as a separate issue from sex. For example, in *Farris*, the Tribunal found that the applicant was subjected to a poisoned work environment, tied to her sex and gender (at paras 163, 165), based in part on negative perceptions of the applicant stemming from “gender-stereotypical views of women in a workplace setting” held by the applicant’s managers and co-workers (at paras 55–56).

A number of cases also discuss issues of gender even where this is not specifically pleaded, supporting a possible shift towards a more nuanced understanding of the social construction of gender and its impact in cases of sexual harassment. In *Lee v NCR Leasing Inc o/a Aaron’s Stores*, 2016 HRTO 1440, the adjudicator found that the manager’s suggestion to the applicant of “the shorter the skirt the better and to show cleavage” (at para 100) demeaned the applicant based on “gender”, though the case was determined to constitute “discrimination on the basis of sex in employment” (at para 108). Relatedly, in *Dix v The Twenty Theatre Company*, 2017 HRTO 394, the adjudicator distinguished certain allegations of sexual harassment from other comments which were identified as “gender and age discrimination” but not made out (at paras 5, 17).

Cases in BC have also discussed the relationship between gender and sex in a number of decisions. For example, in *Algor v Alcan and others (No 2)*, 2006 BCHRT 200, the Tribunal noted that “[...] if the conduct at issue in a complaint is gender-related, in that it would not be directed at the other sex, it may fall within the definition of sexual harassment and constitute sex discrimination” (at para 179, citing *Bailey v Anmore (Village)*, [1992] BCCHR No 20). See also: *Davis v Western Star Trucks Inc, et al*, 2001 BCHRT 29; *LeBlanc v Dan’s Hardware et al*, 2001 BCHRT 32; *Mottu v MacLeod and others*, 2004 BCHRT 76; *JJ v School District No 43 (No 5)*, 2008 BCHRT 360.

Gender Dynamics

Of the 69 unique complainants (across 65 cases) in BC, 65 (94%) were identified as female in the decisions (across 61 cases). Of the 125 unique applicants (across 116 cases) in Ontario, 111 (89%) were identified as female in the decisions (across 102 cases).

Identified Sex of Complainant	BC	Ontario
Female	65	111
Male	4	14
Total unique complainants	69	125

In all of the identified cases in BC, the alleged harasser was identified as male. In 95 of the Ontario decisions, the applicant or applicants identified as female and her or their alleged harasser identified as male. This aligns with existing literature that identifies sexual harassment as a highly gendered issue which predominantly and historically targets women in the workplace.²⁸

In six of the Ontario decisions, the applicant and alleged harasser were both identified as female: *Moghimi v Honeywell Limited and Janet Moynes*, 2010 HRTO 2147 (age, colour, ethnic origin, place of origin, race, sex) (dismissed on all grounds); *Eldary v Songbirds Montessori School Inc*, 2011 HRTO 1026 (ancestry, place of origin, ethnic origin, creed, sex, marital status) (dismissed on all grounds); *Shinozaki v 2252419 Ontario Inc cob Hotlomi Spa*, 2013 HRTO 1027 (sex) (allowed on the grounds of sex); *Gubrenko v TOJ Empire Auto*, 2014 HRTO 1232 (sex, gender identity, gender expression, family status, marital status) (allowed on the grounds of sex and family status; dismissed on the grounds of gender identity and expression; the Tribunal did not rule on marital status); *Baker v Twiggs Coffee Roasters*, 2014 HRTO 460 (sex) (dismissed on the grounds of sex); *Fatima v BioPharma Services Inc*, 2018 HRTO 1290 (race, colour, ancestry, place of origin, ethnic origin, creed) (dismissed on all grounds). In one Ontario case, a female applicant brought an application regarding the harassing conduct of an unknown person and the failure of her employer to respond to it: *Ford v Nipissing University*, 2011 HRTO 204 (allowed on the grounds of sex for failure to respond adequately).

Male applicants brought 14 of the applications in Ontario. 10 were brought by male applicants against male respondents: *Smith v Menzies Chrysler*, 2009 HRTO 1936 (sex, sexual orientation) (allowed on all grounds); *Wagner v Bishop*, 2010 HRTO 2546 (sex) (allowed on the grounds of sex); *Latronico v York Region District School Board*, 2011 HRTO 2012 (sex, ancestry, colour, ethnic origin, place of origin, race) (dismissed on all grounds); *Anamguya v Itercon Security Limited*, 2011 HRTO 2186 (sex) (allowed on the grounds of sex); *Xu v Quality Meat Packers Ltd*, 2013 HRTO 533 (race, colour, ancestry, place of origin, citizenship, ethnic origin, sex) (allowed on the grounds of race and sex; the Tribunal did not rule specifically on the related grounds of colour, ancestry, place of origin, citizenship, ethnic origin); *Ibrahim v Hilton Toronto*, 2013 HRTO 673 (race, colour, place of origin, ethnic origin, creed, sex, family status) (allowed on the grounds of sex only); *Kerceli v Massiv Automated Systems*, 2016 HRTO 1324 (race, sexual orientation; the Tribunal added sex (sexual harassment)) (allowed on the grounds of sex; the Tribunal holds that, although harassment on the grounds of sexual orientation could be found, sexual harassment is the more appropriate grounds; dismissed on the grounds of race); *Bassis v Commissionaires Great Lakes*, 2017 HRTO 1667 (sex, disability) (dismissed on all grounds); *Insang v 2249191 o/a Innovative Content Solutions Inc*, 2017 HRTO 208 (sex, creed, race) (allowed on all grounds); *Khan v 1742247 Ontario Inc*, 2017 HRTO 635 (origin, sex) (dismissed on all grounds).

Three applications in Ontario were brought by male applicants against female respondents: *Kaloshi v Pickakchi*, 2016 HRTO 173 (sex) (dismissed on the grounds of sex); *Chopra v Noble Group of Finance*, 2012 HRTO 2289 (race, sex age, ethnic origin) (dismissed on all grounds); *Frolov v Mosregion Investment Corporation*, 2010 HRTO 1789 (sex) (allowed on the grounds of gender, which was at that time considered part of the grounds of sex). In one case, a male applicant brought an application regarding sexually harassing conduct by an unknown person: *Burns v Employer's Choice Staffing of Canada*, 2009 HRTO 1255 (sex, disability) (allowed on the grounds of disability only; dismissed on the grounds of sex).

Of the BC decisions, 4 concerned complaints brought by a male complainant against a male respondent: *Dyke v Circa Industries Ltd*, 2000 BCHRT 14 (sex) (justified on the grounds of sex); *Hashimi v International Crowd Management (No 2)*, 2007 BCHRT 66 (race, place of origin, sex) (justified on all grounds); *Mercier v Dasilva*, 2007 BCHRT 72 (race, place of origin, physical and mental disability, sex, sexual orientation) (justified on the grounds of race, place of origin, and sex; dismissed on the grounds of physical and mental disability and sexual orientation); *Wang v Golden Boy Foods and Navoa (No 2)*, 2008 BCHRT 15 (sex, disability) (dismissed on all grounds).

²⁸ Gallivan, *supra* note 4 at 28; Aggarwal & Gupta, *supra* note 4 at 1; Sheppard, "Systemic Inequality", *supra* note 4 at 250; Bethany Hastie, "Assessing Sexually Harassing Conduct in the Workplace: An Analysis of BC Human Rights Tribunal Decisions 2010-2016" (2019) 31 CJWL (forthcoming) [Hastie, "Sexually Harassing Conduct"].

Workplace Dynamics

Employment Position of Alleged Harasser	BC	Ontario
Supervisor, manager or person of authority	51	86
Co-worker	12	28
Other	2	2
Unknown	0	2
Total	65	118 ²⁹

As this table illustrates, 51 of the BC decisions, and 86 of the Ontario decisions, identified the alleged harasser as the complainant's supervisor, manager or person in a similar position of authority in the workplace. This highlights the role that formal authority can have in shaping workplace dynamics, and in contributing to potential fear of reprisal for individuals who are subjected to sexual harassment in the workplace.³⁰ This further supports the position that sexual harassment is ultimately an abuse of power.³¹

Formal and economic power in the workplace has long been understood as a significant form of power that can be abused through sexually harassing conduct. However, it is not the only form of power that is asserted or misused in the context of workplace sexual harassment.³² Co-workers, with whom an individual labours on a daily basis, can hold various forms of informal power which may similarly allow for sexual harassment to unfold. In 12 of the BC cases, and 28 of the Ontario cases, the alleged harasser was a co-worker.

A small number of decisions in each jurisdiction also related to claims against an employer based on a failure to adequately investigate or respond to alleged harassment where the alleged harasser was not an employee of the employer (whether supervisor or co-worker in relation to the complainant), or where the alleged harasser was unknown.

A number of those cases involved identifiable individuals as the alleged harasser who were not employees or agents of a corporate respondent. In *Laskowska v Marineland of Canada Inc*, 2005 HRTO 30, the applicant's alleged harasser was not an employee of the corporate respondent, but the owner's brother, who was a frequent visitor to the worksite. The application against the corporate respondent was based on whether there was a reasonable response to the internal complaint of sexual harassment (see paras 1, 57). Similarly, in *Wamsley v Ed Green Blueprinting*, 2010 HRTO 1491, the applicant was sexually harassed by a Xerox technician servicing equipment at the worksite (at paras 1, 13). In BC, a complaint was brought by a worker employed under the Live-in Caregiver Program, alleging sexual harassment by her employer's brother (*Milay v Athwal and Bains (No 4)*, 2005 BCHRT 2, at paras 1, 5). The complaint was considered, but dismissed (see paras 54, 64). The complaint against the employer was also dismissed, as the Tribunal found that the employer responded appropriately to the allegations (at para 65).

In other cases, the alleged harasser was not identifiable, and, similar to the above cases, the complaint was brought on the basis of inadequate investigation or response by the employer. In *Burns v Employer's Choice Staffing of Canada*, 2009 HRTO 1255, the applicant alleged that an anonymous note had been left at his office desk, containing "explicit sexual language" (at para 8), and that his manager threatened him when the note was brought to their attention. However, the adjudicator did not find that the alleged harassment or threats occurred and dismissed the application on those grounds (at para 17). Similarly, in *Ford v Nipissing University*, 2011 HRTO 204, the applicant received an offensive and threatening email to her work account (at para 4) from an unidentified person (at para 48). The decision focused on whether the employer

²⁹ Two Ontario cases had multiple individual respondents holding distinct positions: *Farris v Staubach Ontario Inc*, 2011 HRTO 979; *Szabo v Niagara (Regional Municipality)*, 2010 HRTO 1083. For the purposes of assessing the employment positions of alleged harassers, the individual respondents in a supervisory position and the individual respondents who are co-workers of the applicant are counted separately. However, in relation to other aspects of the analysis, such as the gender of applicant, and grounds of discrimination, the decision is counted only once.

³⁰ Gallivan, *supra* note 4 at 35–36.

³¹ *Ibid* at 31–34; *Eva obo others v Spruce Hill Resort and another*, 2018 BCHRT 238 at para 75, citing also *Al-Musawi v One Globe Education Services*, 2018 BCHRT 94 at para 33. Formal authority is not the only way in which power can be or is asserted in cases of sexual harassment. In addition to the economic power an employer or supervisor can wield, other forms of power may be asserted between co-workers or others without a position of formal authority.

³² See, e.g., Bethany Hastie, "Human Rights and Precarious Workplaces: A Comment on *British Columbia Human Rights Tribunal v Schrenk*" (2019) 52:1 UBC L Rev 169 [Hastie, "Precarious Workplaces"].

reasonably responded to the applicant's internal complaint. Ultimately, the Tribunal found that the University's policies and procedures were inadequate (at paras 65, 72–73) and allowed the application.

Finally, in one case, the relationship in question was found not to constitute an employment relationship, placing it beyond the scope of the *Code*. In *Bahadur v Yacht*, 2018 BCHRT 234, the complainant sublet a room from the respondent at a reduced rate, and in exchange for doing various jobs around the house (at paras 3, 12). The Tribunal found that this informal arrangement did not constitute an employment relationship (at para 97), and therefore did not consider the substance of the complaint (see paras 41, 43).

Alongside the position of the alleged harasser, occupational characteristics of complainants mapped onto identified trends in existing literature concerning the workplace contexts and job roles that have been historically highlighted in relation to the prevalence of sexual harassment. Existing literature has historically identified certain job roles and workplace contexts where sexual harassment appeared prevalent. With respect to job roles, these include jobs where women have historically occupied a gendered and subordinated role, such as administrative staff, service-oriented jobs, such as in the restaurant industry, and industries or jobs that were historically male-dominated, such as in trades and construction.³³ The identified decisions map onto these characteristics.

Complainants in 21 cases in BC, and 44 cases in Ontario, were identified as engaging in service-oriented work, including in retail sales, food services, and hospitality. 14 cases in BC, and 30 cases in Ontario, involved complainants who were identified as working in a traditionally gendered or subordinated occupational role, primarily as assistants in various office and professional settings. Finally, in 14 BC cases and 17 Ontario cases, female complainants were identified as occupying historically male-dominated job roles, in construction, manufacturing and resource industries.

Just as identifying patterns in the employment relations between complainants and harassers underpins a contextualized understanding of sexual harassment as an abuse of power, so too does identifying relevant workplace types and job roles. The prevalence of sexual harassment of women in traditionally subordinated, administrative job roles exists, in part, because these job roles have historically entrenched gender inequality and positions of power in the workplace,³⁴ simultaneously entrenching and enhancing the power which a (historically male) supervisor could use to sexually harass a (historically female) subordinate worker. These types of job roles were historically identified as "women's work", given their subordinated, and often supportive, status in offices, and have long been the subject of commentary and research in connection with sexual harassment.³⁵

Relatedly, service work, particularly in the restaurant industry, is argued to normalize and institutionalize sexual harassment as part of the workplace environment, particularly as it relates to third-party contact, notably with clients or customers.³⁶ This creates an environment in which sexual harassment can unfold with relative ease, and one in which experiencing sexual harassment may be seen as an expected or inevitable part of an individual's job or work.³⁷ As with administrative job roles, service jobs present women at work in a supportive, servile and subordinated capacity, and sometimes, as sexualized objects.³⁸

³³ See Faraday, *supra* note 4; Judy Fudge, "Rungs on the Labour Law Ladder: Using Gender to Challenge Hierarchy" (1996) 60:2 Sask L Rev 237; Sheppard, "Systemic Inequality", *supra* note 4 at 267–72; Aggarwal & Gupta, *supra* note 4 at 1, noting that sexual harassment is "not confined to any one level, class, or profession" but that, for example, "the Ontario Human Rights Commission complaints show that 65 percent of all sexual harassment cases involve waitresses, clerks, secretaries, receptionists, and other low-ranking service jobs."

³⁴ See Sheppard, "Systemic Inequality", *supra* note 4 at 267–72. See, relatedly, Vicki Schultz, "Reconceptualizing Sexual Harassment" (1998) 107:6 Yale LJ 1683.

³⁵ Constance Backhouse, "Sexual Harassment: A Feminist Phrase That Transformed the Workplace" (2012) 24:2 CJWL 275; Aggarwal & Gupta, *supra* note 4 at 1; Sheppard, "Systemic Inequality", *supra* note 4 at 274; Jackie Krasas Rogers & Kevin D Henson, "'Hey, why don't you wear a shorter skirt?' Structural Vulnerability and the Organization of Sexual Harassment in Temporary Clerical Employment" (1997) 11:2 Gender & Society 215, cited in Kaitlyn Matulewicz, "Law and the Construction of Institutionalized Sexual Harassment in Restaurants" (2015) 30:3 Can JL & Soc 401 at 405 [Matulewicz, "Institutionalized Sexual Harassment"]. See also, Hastie, "Sexually Harassing Conduct", *supra* note 28.

³⁶ Matulewicz, "Institutionalized Sexual Harassment", *supra* note 35, citing also Eleanor LaPointe, "Relationships with Waitresses: Gendered Social Distance in Restaurant Hierarchies" (1992) 15:4 Qualitative Sociology 377; Anthony D LaMontagne et al, "Unwanted Sexual Advances at Work: Variations by Employment Arrangement in a Sample of Working Australians" (2009) 3:2 Australian & New Zealand J Public Health 173; Anne C McGinley, "Harassing Girls at the Hard Rock: Masculinities in Sexualized Environments" (2007) 27:4 U of Illinois L Rev 1229. See also Sheppard, "Systemic Inequality", *supra* note 4 at 275; Hastie, "Precarious Workplaces", *supra* note 32.

³⁷ See Matulewicz, "Institutionalized Sexual Harassment", *supra* note 35.

³⁸ *Ibid.*, discussing this issue in the restaurant industry. See also, Hastie, "Sexually Harassing Conduct", *supra* note 28.

Finally, in contrast to administrative and service work, women who have entered historically male-dominated job roles and workplaces have more often been subject to hostile and violent forms of sexual harassment, as a strategy to “push” them out of the workplace.³⁹ Women entering jobs traditionally held by men, especially in trades and resource industries, historically experienced sexual harassment as a form of hostility in entering these “non-traditional” workplaces.⁴⁰ Further, their isolation in these workplaces may work to create “a structural source of vulnerability to sexual harassment.”⁴¹

Although these types of jobs (administrative support; service work; work in male-dominated industries) are not the only occupational roles or sites in which individuals may experience sexual harassment at work, as discussed above and illustrated through the cases, they do represent sites and roles where sexual harassment remains an enduring issue. They further illustrate how social constructions of gender, vis-à-vis others’ positions of power or authority, can impact women in the workplace in relation to the potential for sexual harassment to unfold.

Conclusion

This chapter has outlined dominant characteristics and trends in the identified cases of workplace sexual harassment at the BC and Ontario Human Rights Tribunals from 2000-2018. This chapter has discussed both the legal claims and outcomes for the identified decisions, as well as the empirical characteristics that impact the incidence of sexual harassment in the workplace.

Looking at the legal claims and outcomes, a majority of complaints that proceeded to a full hearing in both BC and Ontario were found justified. Rates of success for self-represented complainants, however, were lower than overall rates in each jurisdiction. A minority of cases claimed multiple grounds of discrimination, despite literature that increasingly acknowledges and discusses the intersectional nature of inequality and discrimination. Further, in many cases where multiple grounds of discrimination were claimed, the complainant was not successful on all grounds. In cases where grounds were interrelated in terms of the complained-of incidents, adjudicators sometimes decided the complaint on one ground and did not go on to analyze other grounds. This could present a missed opportunity for richer and more nuanced analysis of discrimination as an intersectional issue.

Characteristics of the complaints, in terms of gender of the complainant and alleged harasser, the employment relationship between the complainant and alleged harasser, and the occupational role or industry in which the complainant worked, all mapped onto known trends concerning workplace sexual harassment from existing literature. Both historically and contemporarily, workplace sexual harassment is identified as predominantly affecting women, and as most often perpetrated by men. The identified cases strongly aligned with this documented trend in both BC and Ontario. In addition, as the cases in each jurisdiction illustrate, as an abuse of power, sexual harassment is often perpetrated by a person in a position of authority, such as a manager or supervisor. This illustrates how economic power plays a significant role, though it is not the only form of power an individual may wield in engaging in sexually harassing conduct. Finally, as noted above, the occupational roles that many complainants were situated within map onto historical trends that illustrate how subordinated power positions in the workplace enhance vulnerability (administrative support and service work), and reactions to women’s entry into historically male-dominated industries can produce a hostile work environment.

Having outlined the characteristics of the complaints in each of BC and Ontario, the next chapters will examine in greater depth the substance of the sexual harassment complaints, focusing on the assessment of sexually harassing conduct in Chapter 3, and the requirement that a complainant establish that conduct as “unwelcome” in Chapter 4.

³⁹ See, i.e., Carrie N Baker, *The Women’s Movement against Sexual Harassment* (New York: Cambridge University Press, 2008) at 4–5; Backhouse, *supra* note 35 at 295; Gallivan, *supra* note 4 at 28.

⁴⁰ See Baker, *supra* note 39 at 4. See also, Hastie, “Sexually Harassing Conduct”, *supra* note 28.

⁴¹ Sheppard, “Systemic Inequality”, *supra* note 4 at 271.

3. Workplace Sexual Harassment Complaints at the BC and Ontario Human Rights Tribunals, 2000-2018: Assessing Conduct

As set out in Chapter 1, the legal principles governing sexual harassment complaints at the BC and Ontario Human Rights Tribunals describe the pertinent conduct in distinct ways. While BC has adopted broadly the concept of “conduct of a sexual nature”, Ontario has described this element as “a course of vexatious conduct or comment”. There are, however, significant overlaps in the actual conduct that commonly forms the basis of a workplace sexual harassment complaint in each jurisdiction, as well as in the interpretation of the elements despite their distinct wording. This chapter discusses the conduct at issue in the identified case law, and analyzes how this element of sexual harassment law is interpreted and applied in each jurisdiction, and in respect of different kinds of conduct.

Overview

As noted in Chapter 1 of this report, the conduct that may meet the threshold for sexual harassment in both BC and Ontario is varied. While BC’s interpretation of the law has focused on identifying “conduct of a sexual nature”, Ontario’s *Human Rights Code* adopts language concerning a “course of vexatious comment or conduct”. In both jurisdictions, the element includes a “range of practices [that] can create a hostile environment[,]”⁴² including verbal, visual, and physical harassment.

The ambit of conduct captured by sexual harassment law reflects a movement away from a narrow understanding of sexual harassment as *quid pro quo* sexual advances towards a broader conceptualization of the ways in which women experience adverse working conditions and treatment due to their sex.⁴³ Conduct falling within the definition of sexual harassment may be physical or psychological, overt or subtle, and may include verbal innuendoes, taunts, derogatory comments, affectionate gestures, repeated social invitations, and unwelcome flirting, in addition to more blatant conduct such as leering, grabbing, or sexual assault.⁴⁴

This chapter analyses the case law at the BC and Ontario Human Rights Tribunals to identify the types of conduct commonly comprising workplace sexual harassment complaints, and to evaluate how adjudicators understand, interpret and apply the legal principles to these factual contexts. Conduct that formed the basis of identified complaints can be broadly broken down into: physical conduct or contact; verbal conduct involving sexual advances or solicitation; other forms of verbal conduct (such as flirtatious behaviour, derogatory comments, and other); visual communications; and/or, some combination of the above (typically verbal advances that escalate to physical conduct). As such, the analysis in this chapter is divided into four sections: physical conduct; verbal sexual advances; other verbal sexual communications; and, visual communications.

⁴² Gallivan, *supra* note 4 at 30.

⁴³ See, Backhouse, *supra* note 35 at 295; Gallivan, *supra* note 4 at 30, citing also Catharine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979); Schultz, *supra* note 34.

⁴⁴ *Mahmoodi v University of British Columbia and Dutton*, 1999 BCHRT 56 at paras 135–6, citing also *Janzen v Platy Enterprises*, [1989] 1 SCR 1252, 59 DLR (4th) 352, and Arjun P Aggarwal, *Sexual Harassment in the Workplace* (Toronto: Butterworths, 1987). For a detailed list of the various behaviours that may constitute sexual harassment, see Aggarwal & Gupta, *supra* note 4 at 14–18. For a critical perspective of the definition of sexual harassment, see Gallivan, *supra* note 4.

Physical Conduct

Physical misconduct, such as slapping or pinching buttocks, poking or touching breasts, massaging or caressing another's body, kissing someone, or grabbing, holding or hugging someone, has historically been understood to constitute sexually harassing conduct. This may partly be based on implicit conceptual links to other legal claims related to interference with a person's body, such as in tort law and criminal law. This is also a very blatant form of sexual conduct, and where it is unwelcome, the very type of misconduct that the development of sexual harassment law was designed to prohibit. In some cases, physical misconduct can also constitute sexual assault.

Many of the identified cases involved blatant physical conduct, such as poking breasts, massaging and touching arms, backs and shoulders, slapping or pinching buttocks, and more serious conduct. An important theme cutting across cases involving physical conduct is the sexual nature of the conduct itself; rather than only being targeted at the complainant's sex, the conduct in question in most of the justified cases was itself sexualized. For example, in *Q v Wild Log Homes and another*, 2012 BCHRT 135 [*Wild Log Homes*], the complainant endured several instances of unwanted physical touching from her boss, including poking her breasts and grabbing her buttocks, as well as verbal harassment in the form of inquiring about her love life and professing feelings for her in emails and in conversations (see paras 62–112, 138). In *Arias v Desai*, 2003 HRTO 1, the adjudicator found the respondent's conduct to constitute sexual assault when he called the applicant into a dark office, forced her to remain in an embrace, nibbled her ear, and made blatantly sexualized comments to her.

In cases where the physical contact was blatantly sexual in nature, such as grabbing buttocks or breasts, placing a hand on the complainant's thigh, back or other body parts, or kissing or attempting to kiss the complainant, the conduct was often readily understood to constitute conduct of a sexual nature. Relatedly, in many cases, physical conduct, such as slapping the complainant's buttocks, massaging, caressing or touching their body, was accompanied by verbal sexual advances (see the next section below), lending further weight to the interpretation of such conduct as sexual in nature. Finally, in many cases, physical conduct was linked to a sexual advance, but this is not always the case and sexual harassment claims on the basis of physical conduct are not limited to conduct made for the purposes of a sexual invitation.⁴⁵ See, e.g.: *Paananen v Scheller (No 2)*, 2013 BCHRT 257; *Harriott v National Money Mart*, 2010 HRTO 353; *Qiu v 2076831 Ontario Ltd*, 2017 HRTO 1432.

The overt and sexual nature of the conduct at issue in many of the identified cases precluded the need for a detailed analysis on the conduct question. In *Perry v The Centre for Advanced Medicine*, 2017 HRTO 191, the adjudicator, having determined that the respondent did "massage or touch the applicant's neck and shoulder, put his arm around her, rubbed against her as they passed [...]" (at para 262) concluded that "such conduct when unwelcome amounts to sexual harassment [...]" (at para 263). Similarly, in *Dacosta v 2383924 Ontario Inc*, 2015 HRTO 1002, having found as a fact that the respondent slapped the applicant's buttocks twice (at para 51), the adjudicator concluded that she had been harassed (at para 64). In *CK v HS*, 2014 HRTO 1652, a case involving serious physical misconduct, the adjudicator stated that "[t]here is no question that the respondent's sexual assault of the applicant [...] amounts to sexual harassment under section 7(2) of the Code" (at para 32). In *Wild Log Homes*, the adjudicator characterized the respondent's conduct, which included physical touching as well as verbal sexual advances, as "demonstrative of the very type of situation that the Code's prohibition on sexual harassment is designed to prevent" (at para 147). See also, e.g.: *Root v Ray Ray's Beach Club and others*, 2013 BCHRT 143 at para 38; *Ratzlaff v Marpaul Construction and another*, 2010 BCHRT 13 at para 26.

In multiple cases involving physical misconduct, the decisions mentioned parallel criminal proceedings arising from the events, often identifying the charges as either for sexual assault or criminal harassment: *MK v 1217993 Ontario Inc o/a Wimpy's Diner*, 2001 HRTO 705; *Clarke v Frenchies Montreal Smoked Meats and Blais (No 2)*, 2007 BCHRT 153; *Hughes v 1308581 Ontario*, 2009 HRTO 341; *GG v [...] Ontario Limited*, 2012 HRTO 1197; *Wild Log Homes and another*, 2012 BCHRT 135; *Birchall v Andres*, 2013 HRTO 1469; *CU v Blencowe*, 2013 HRTO 1667; *CK v HS*, 2014 HRTO 1652; *OPT v Presteve Foods Ltd*, 2015 HRTO 675; *PT v Rahman Consulting Services*, 2018 HRTO 1566; *GM v X Tattoo Parlour*, 2018 HRTO 201.

⁴⁵ Indeed, neither intent nor motive is required to establish a discrimination claim. See *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at para 88.

Overall, in cases involving blatant physical sexual conduct, adjudicators engaged in very little or no explicit analysis of the conduct in relation to the legal principles, and had little difficulty understanding or interpreting such conduct as sexual harassment. Thus, it appears that blatant physical sexual conduct is readily understood to meet the legal definition of sexual harassment.⁴⁶

Verbal Sexual Advances or Solicitations

The assessment of non-physical sexual conduct has given rise to particular interpretations of the legal principles governing sexual harassment claims in both BC and Ontario. Specifically, as set out in Chapter 1 of this report, verbal conduct has generally been understood to require an element of persistent or continuous conduct. In other words, one instance or event of verbal conduct may generally not be sufficient to constitute sexual harassment.⁴⁷

In assessing verbal sexual harassment, and particularly in assessing whether a single comment may constitute harassment, various factors are considered (*Eva obo others v Spruce Hill Resort and another*, 2018 BCHRT 238 at para 80 [*Eva*], citing *Pardo v School District no. 43*, 2003 BCHRT 71 at para 12 [*Pardo*]):

- the egregiousness or virulence of the comment;
- the nature of the relationship between the involved 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.

These factors have also been adopted in Ontario. See: *BC v London Police Services Board*, 2011 HRTO 1644; *Berisa v Toronto (City)*, 2011 HRTO 912.

While a broader array of verbal conduct will be dealt with below, this section deals specifically with verbal sexual advances or solicitations. Given that this form of verbal conduct has been historically recognized as sexual harassment (*quid pro quo* harassment), and may be characterized as a blatant or obvious form of sexually harassing conduct, it posed fewer problems for the Tribunals' analyses in the identified decisions (absent credibility issues).

Where persistent verbal conduct, without accompanying physical conduct, involved clear sexual invitations, the conduct element was often met in the identified decisions. For example, in *Baeza v Blenz Coffee and Gardner*, 2000 BCHRT 29, at para 35, in finding verbal conduct to constitute sexual harassment, the adjudicator described the respondent's verbal conduct as "repeated sexual advances".⁴⁸ Similarly, in *Soroko v Dave's Custom Metal Works and others*, 2010 BCHRT 239, the complainant was subject to repeated sexual invitations by her supervisor (at paras 73-74). See also: *Simon v Paul Simpson and Med Grill Ltd*, 2001 BCHRT 24; *Fougere v Rallis and Kalamata Greek Taverna*, 2003 BCHRT 23; *Pchelkina v Tomsons*, 2007 HRTO 42; *Bahen v Catering 101*, 2009 HRTO 2271; *McIntosh v Metro Aluminum Products and another*, 2011 BCHRT 34; *Payette v Alarm Guard Security Service*, 2011 HRTO 109; *SS v Taylor*, 2012 HRTO 1839; *Smith v The Rover's Rest*, 2013 HRTO 700; *Anderson v Law Help Ltd*, 2016 HRTO 1683.

In *Eva*, a single sexual advance was found sufficient to constitute sexual harassment. In that case, the complainant's supervisor booked a single hotel room for the two of them to share while on a business trip (see paras 74-88). The Tribunal found that he did so for sexual purposes (at para 81). The complainant rebuked his sexual advance and stated that she did not experience further advances or incidents on the trip. In finding that the single incident amounted to sexual harassment, the Tribunal emphasized the power dynamic in the relationship, given that the respondent was the male supervisor of the female complainant, and the fact that the complainant was, at the time, in a foreign country where she did not speak the language and could not easily escape the situation (see paras 85-86).⁴⁹

⁴⁶ Instances of physical touching have historically been identified as more widely accepted as meeting the threshold for sexually harassing conduct, whereas non-physical conduct is often subject to greater scrutiny; Gallivan, *supra* note 4 at 40-43; relatedly, see Faraday, *supra* note 4 at 43.

⁴⁷ This comports with the historical privileging of physical versus verbal harassment as noted above: see Gallivan, *supra* note 4 at 40-43, Faraday, *supra* note 4 at 43.

⁴⁸ Note that the respondent did not appear in this matter, and the adjudicator based their decision on the complainant's own evidence and testimony.

⁴⁹ Similar emphasis on a complainant's vulnerability vis-à-vis the physical location of the events was made in *Simon v Paul Simpson and Med Grill Ltd*, 2001 BCHRT 24, where the incident took place while the complainant was on an overnight work retreat.

In some cases, respondents attempted to minimize verbal conduct, or re-characterize it as something other than an explicit or serious sexual advance or solicitation. For example, in *SS v Taylor*, 2012 HRTO 1839, the respondent attempted to rationalize his conduct by alleging that similar sexual messages as that which was sent to the applicant were also sent to other employees, such that the applicant was not treated differently from other female staff (at para 28). Relatedly, in *Tyler v Robnik and Mobility World (No 2)*, 2010 BCHRT 192, the respondent claimed that his offering the complainant his hotel room key was a “joke”. The adjudicator concluded that “[i]t is difficult to imagine how Mr. Robnik, Mobility’s district manager, offering his hotel room key to a subordinate female employee could be viewed as simply a joke” (at para 49). In addition to the adjudicator’s rejection of the respondent’s characterization of his conduct as a “joke”, this quote illustrates the significance that the workplace dynamics and employment relationship between the parties can have in analyzing the conduct in a complaint of sexual harassment.

Many cases involved a combination of verbal sexual advances and physical harassment. In some cases, the pattern of conduct demonstrated escalating behaviour that moved from verbal sexual advances or solicitations to physical harassment or assault. In other cases, the verbal and physical conduct unfolded simultaneously as multiple and varying types of sexual advances made by the respondent. See, e.g.: *Smith v Zenith Security*, 2002 BCHRT 25; *Newman v Gujral*, 2003 BCHRT 16; *Gill v Grammy’s Place Restaurant and Bakery*, 2003 BCHRT 88; *Arias v Desai*, 2003 HRTO 1; *Baylis-Flannery v DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28; *Kwan v Mazara and another*, 2007 BCHRT 387; *Behm v 6-4-1 Holdings and others*, 2008 BCHRT 287; *Harrison v Nixon Safety Consulting and others (No 3)*, 2008 BCHRT 462; *Ratzlaff v Marpaul Construction and another*, 2010 BCHRT 13; *Tyler v Robnik and Mobility World (No 2)*, 2010 BCHRT 192; *MK v 1217993 Ontario Inc o/a Wimpy’s Diner*, 2011 HRTO 705; *Q v Wild Log Homes and another*, 2012 BCHRT 135; *Garofalo v Cavalier Hair Stylists Shop Inc*, 2013 HRTO 170; *Vipond v Ben Wicks Pub and Bistro*, 2013 HRTO 695; *JD v The Ultimate Cut Unisex*, 2014 HRTO 956; *Dacosta v 2383924 Ontario Inc*, 2015 HRTO 1002; *Panucci v Seller’s Choice Stockdale Realty Ltd.*, 2015 HRTO 1579; *Crete v Aqua-Drain Sewer Services Inc*, 2017 HRTO 354; *PT v Rahman Consulting Services*, 2018 HRTO 1566.

Generally, absent credibility issues, explicit sexual advances or solicitations are readily understood to constitute sexual harassment under human rights law. In many cases, repeated comments or conduct establishing a pattern or course of behaviour will be necessary to establish a complaint on the basis of sexual advances, as a form of verbal conduct. A pattern of behaviour can include both repeated incidents of verbal comments, or a combination of physical and verbal conduct.

Other Verbal Communications

Verbal conduct outside of explicit and direct sexual advances has also been found to constitute conduct of a sexual nature. In addition to *quid pro quo* verbal harassment and sexual invitations, verbal sexual harassment can include sexual innuendo, jokes, taunts, and comments about a person’s appearance or sexual habits.⁵⁰ In Ontario, this type of verbal conduct is described as “a course of vexatious comment” under the *Code* (see Chapter 1 of this report).

Many different kinds of verbal communications have been found to constitute “vexatious comments” or otherwise come within the parameters of the definition of sexual harassment, including sexualized comments about the applicant’s body, as in *Metcalfe v Papa Joe’s Pizza & Chicken Inc*, 2005 HRTO 46, where the respondent commented on the applicant’s body, asked if he could see and touch her body, and asked about her sexual history (see also, e.g.: *Forgues v Gary Stinka and Moxie’s Restaurant*, 2001 BCHRT 7; *de los Santos Sands v Moneta Marketing Solutions Inc.*, 2016 HRTO 271; *ET v Dress Code Express Inc*, 2017 HRTO 595).

Vexatious comments also include more general comments about the applicant’s sex or gender. For example, in *deSousa v Gauthier*, 2002 CanLII 46506 (Ont), the respondent made comments about the size of the applicant’s breasts, her menstrual cycle, and how she styled her hair and dressed (see also, e.g.: *Ryane v Krieger and Microzip Data*, 2000 BCHRT 41; *Fiebelkorn v Poly-Con Industries and Cowderoy*, 2000 BCHRT 54; *Kerceli v Massiv Automated Systems*, 2016 HRTO 1324 at para 186). Relatedly, vexatious comments may include vulgar or sexual jokes or comments (see, e.g., *Ryane v Krieger and Microzip Data*, 2000 BCHRT 41; *Koblensky v Westwood and Schwab (No. 2)*, 2006 BCHRT 281; *Law v Noonan*, 2013 HRTO 437; *Qiu v 2076831 Ontario Ltd*, 2017 HRTO 1432), or a combination of verbal sexual advances and other comments (see, e.g., *Iu v Markham Marble*, 2012 HRTO 65; *Bento v Manito’s Rotisserie & Sandwich*, 2018 HRTO 203).

Derogatory or hostile comments about the complainant’s gender or sex, whether directly targeted at the complainant or general in nature, have been found to constitute verbal harassment in multiple cases: *Algor v Alcan and others (No 2)*, 2006

⁵⁰ Gallivan, *supra* note 4 at 30.

BCHRT 200; *Clarke v Frenchies Montreal Smoked Meats and Blais (No 2)*, 2007 BCHRT 153; *JJ v School District No 43 (No 5)*, 2008 BCHRT 360; *Harriott v National Money Mart*, 2010 HRTO 353; *Farris v Staubach Ontario Inc*, 2011 HRTO 979; *MacDonald v Najafi and another (No 2)*, 2013 BCHRT 13; *Shinozaki v 2252419 Ontario Inc cob Hotlomi Spa*, 2013 HRTO 1027; *Xu v Quality Meat Packers Ltd*, 2013 HRTO 533; *Ibrahim v Hilton Toronto*, 2013 HRTO 673; *Balikama obo others v Khaira Enterprises and others*, 2014 BCHRT 107 (at paras 272–295, 607–612); *Costigane v Nyood Restaurant & Bar*, 2015 HRTO 420; *Qiu v 2076831 Ontario Ltd*, 2017 HRTO 1432; *Valle v Faema Corporation 2000 Ltd*, 2017 HRTO 588. Relatedly, in *Hashimi v International Crowd Management (No 2)*, 2007 BCHRT 66, intimidating and threatening comments made by an employee to the complainant, which had sexual content, were found to constitute sexual harassment. These cases illustrate that sexually harassing conduct is not limited only to sexual advances or *quid pro quo* harassment, or to explicitly sexual topics or conversations, but can also include hostile, derogatory and threatening verbal and physical conduct.

Verbal conduct constituting sexual harassment has also been found where topics of a generalized sexual nature, not necessarily targeted directly at the complainant, are at issue. For example, in *Wollstonecroft v Crellin et al*, 2000 BCHRT 37, at para 71, the adjudicator found that the respondent's comments about his sexual needs, prior sexual encounters, and a pornographic movie – which, together, the adjudicator described as “discussions of sexual topics” – constituted sexual conduct within the meaning of the Code. Similar “topics” arose in *Leblanc v Dan's Hardware et al*, 2001 BCHRT 32. Although that case also involved incidents of physical touching, the adjudicator found that the content of certain conversations, including a discussion of sexual partners and sexual activity, constituted verbal sexual harassment (see paras 138–149). See also *Gill v Grammy's Place Restaurant and Bakery*, 2003 BCHRT 88. This is significant as it may enable complainants who are not direct targets of harassing conduct, but are made to work in a hostile or poisoned environment, to bring complaints on that basis. It is also significant as including this kind of conduct within the ambit of sexual harassment can do some work to counter attempted justifications for respondents' behaviour that would rely on a normalized sexualized work environment.

As with attempts to minimize conduct constituting sexual advances or solicitations, respondents in some cases concerning other types of verbal comments attempted to normalize such conduct within the context of the workplace. For example, in *Chard v Newton*, 2007 HRTO 36, the respondent acknowledged making sexual jokes in the office, but described the workplace atmosphere as one in which sexual topics of conversation or discussion were frequent (see paras 15–16). However, the adjudicator found that this is not a justification for sexual harassment (at para 63). Relatedly, in *Smith v Menzies Chrysler*, 2009 HRTO 1936 [*Menzies Chrysler*], the adjudicator rejected the respondents' characterization of lewd behaviour as a “locker room” atmosphere of a male-dominated workplace, noting that “[t]here is no basis in law for excluding sexually vexatious behaviour from Code protection simply because it occurs in a same-sex work setting or because some of the participants accept and/or even appear to enjoy it” (at para 155). See also, *Mercier v Dasilva*, 2007 BCHRT 72, where the Tribunal rejected the notion that comments made for the purpose of “motivating” employees in a “tough industry” (construction) meant that such comments were not discriminatory in nature (see paras 74–75, 96–100).

A “course” of vexatious comment generally requires more than a single incident, and similar principles regarding a pattern of behaviour for verbal conduct have been adopted in BC. The *Pardo* factors cited above determine whether or when a single verbal comment may constitute harassment. In *Costigane v Nyood Restaurant & Bar*, 2015 HRTO 420, the adjudicator found that calling a female employee particular derogatory terms that, “on their face, are gendered and demeaning” was sufficiently serious to constitute sexual harassment, considered as a single comment or event (at para 21). Multiple comments made in the course of a single event, such as an argument, may together be interpreted as a “course” of vexatious comment. For example, in *Gubrenko v TOJ Empire Auto*, 2014 HRTO 1232, the adjudicator found that threats related to the applicant's family status and vulgar comments about the applicant's genitalia, all made during the course of a single argument, constituted a course of vexatious comment (at para 42). Sometimes, a single comment may also be considered sufficiently serious to constitute sexual harassment.

Overall, where verbal communications revolved around blatant or overt sexual topics – whether they be sexual invitations, general flirtatious behaviour, sexual topics of conversation, or demeaning or derogatory comments – adjudicators often found these to constitute sexually harassing conduct, where the factual allegations were accepted, and where the credibility of the complainant was not in question. Like with physical conduct, these types of verbal conduct easily fit within the parameters of the definition of sexual harassment. Importantly, the scope of verbal conduct appears to extend beyond comments directly targeted at the complainant themselves, and can include both comments of a general sexual nature and comments that are demeaning or derogatory made generally about gender or sex. This is significant as it does some work to advance and address hostile or poisoned work environments, and moves beyond a highly individualized understanding of sexually harassing conduct.

Visual Communications

Visual communications, such as pornography and sexualized pictures in the workplace, have been discussed in existing literature but arise in few legal cases. This may be due to the predominantly individualized account of sexual harassment and anti-discrimination law, which relies on a “sole bad actor” responsible for the misconduct and may similarly focus on situations where a complainant was a direct target of such conduct.⁵¹ In this way, institutional cultures or workplace environments which allow or normalize sexualized conduct, including through visual communications like the presence of pornography, may be seen as outside the scope of anti-discrimination claims under human rights law.⁵² This reflects a wider problem of normalized sexual harassment, especially against women, and the inadequacy of legal tools to address it.⁵³

Visual communications, such as pornography, “pin up” photos, and other pictures in the workplace, arose in a small number of identified decisions. These types of communications or conduct were treated quite differently among the few identified cases and appeared heavily reliant on the surrounding context as well as other comments or conduct that formed the basis of the complaint.

In *Farias v Chuang*, 2005 HRTO 22, the respondent showed the applicant naked pictures of women and men (at para 46). In that case, the adjudicator characterized this as sexually harassing conduct, finding that showing the applicant these pictures was a “metaphor” for the respondent’s expression of his feelings (at para 47). This illustrates one way in which visual communications may constitute sexually harassing conduct, where they act as a proxy for verbal comments or conduct. Similarly, in *Varga v Bentley’s Sandwich Heaven*, 2001 BCHRT 8, the respondent showed the complainant nude photos in connection with verbal sexual advances and physical touching. Together, the allegations in the complaint were found to constitute sexual harassment.

Menzies Chrysler most directly addresses the issue of pornography and visual communications in the workplace. In that case, the adjudicator found that the applicant experienced discrimination and worked in a “poisoned work environment” on the basis of allegations including: an employee showing a video of self-recorded sexual activity; an employee exposing his genitals; and, multiple employees watching pornography on a computer (at para 120). In the analysis of the application, the adjudicator noted that the purpose of the prohibition on sexual harassment under the Ontario Code is “to protect employees from sex harassment and **this includes inappropriate sexualization of the workplace**” (at para 151, emphasis added). This is significant as it establishes that a hostile or poisoned work environment can result from generalized sexualized behaviour, including the presence of pornography in the workplace, and affirms that pornography in the workplace is, in principle, a form of sexual harassment.⁵⁴ Relatedly, in *Harrison v Nixon Safety Consulting and others (No 3)*, 2008 BCHRT 462, the adjudicator found that viewing pornography regularly in the workplace, and inviting the complainant to look at the material on at least one occasion, contributed to a sexualized work environment (at para 321).

Conversely, in *Kuchta v J Lanes Enterprises*, 2013 BCHRT 88, the alleged presence of pornography on a work computer was found insufficient as a basis for a sexual harassment complaint. While at work, Ms. Kuchta found inappropriate pictures of naked women and children on a shared workplace computer, in a file folder called “Dan” (at para 6). The Tribunal found that the owner of the bowling alley, Mr. (Dan) Smith, downloaded the pictures (at para 8). In the analysis, the Tribunal found that this did not constitute sexual harassment. First, the Tribunal found that there was no evidence that Mr. Smith had exerted any power over the complainant in relation to this incident (at para 16). Further, the Tribunal found that the delay in deleting the pictures from the shared computer did not result in a worsening of the workplace environment (at para 17). Although not explicitly stated, it also appeared to be significant that these photos were not publicly viewed, as in *Menzies Chrysler*, but that the complainant rather discovered the photos accidentally when she “opened a file that she was not required to open as part of her job responsibilities” (at para 16). This appears to be a marked distinction between the *Menzies Chrysler* case, where the applicant was exposed to the visual materials by simply being physically present in the

⁵¹ Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen’s University Press, 2010) [Sheppard, *Inclusive Equality*]; Sheppard, “Systemic Inequality”, *supra* note 4 at 256–59.

⁵² Sheppard, *Inclusive Equality*, *supra* note 51; Sheppard, “Systemic Inequality”, *supra* note 4 at 258–59, 267–80. See also Gallivan, *supra* note 4 at 38–39; Faraday, *supra* note 4 at 53–54. Similarities concerning the limitations of understanding sexual harassment and hostile work environments have been raised in the US: see Schultz, *supra* note 34.

⁵³ See Grant, *supra* note 6; Benedet, “Marital Rape”, *supra* note 6; Benedet & Grant, *supra* note 6; Catharine A MacKinnon, “A Sex Equality Approach to Sexual Assault” (2003) 989:1 *Annals New York Academy Sciences* 265.

⁵⁴ See Janine Benedet, “Pornography as Sexual Harassment” in Catharine MacKinnon, ed, *Directions in Sexual Harassment Law* (New Haven: Yale University Press, 2004) 417 at 417–24. Benedet also notes that the Canadian Human Rights Commission explicitly includes pornography as a type of sexual harassment in its Guidelines: at 421.

workplace, and this case, where the complainant was required to take active steps to view the photos. Similarly, in *Lawhead v Southern Insurance Services and Jensen*, 2008 BCHRT 287, the complaint related partly to a sexual cartoon that the complainant saw when she picked up some papers from the respondent's desk. In finding that this did not constitute discrimination, the adjudicator noted that individuals are entitled to some privacy when such items are not in public view (at para 44).

Few cases have considered the presence of visual communications as a form of sexual harassment in the workplace. Where cases have analyzed this issue, the particular type of visual communication and surrounding context of the allegations and incidents were significant in the Tribunals' reasoning and in the outcome of each case. Where visual communications are directly presented to a complainant, or publicly viewed in the workplace such that the complainant may have difficulty escaping the environment, this is more likely to provide firm grounding for a sexual harassment complaint. However, the mere presence of visual materials, particularly where a complainant may be able to easily avoid viewing them, or where active steps are required to view them, may not be found sufficient, alone, to constitute sexual harassment. Whether or not the presence of pornography, alone, is sufficient to form the basis of a justified complaint of workplace sexual harassment is uncertain.⁵⁵ However, the *Menzies Chrysler* case may provide useful and persuasive precedent for expanding sexual harassment law to more firmly encompass pornography and similar visual communications within its parameters.

Conclusion

Overall, the identified decisions from the BC and Ontario Human Rights Tribunals establish the myriad forms of conduct that can constitute sexual harassment in the workplace. Physical misconduct and inappropriate touching appear to be the most widely and well-accepted form of sexually harassing conduct in the workplace, and cases involving this type of conduct often presented little or no substantive analysis; rather, adjudicators concluded on the facts that such conduct constitutes sexual harassment. This is unsurprising given the historical acceptance and privileging of physical misconduct as sexual harassment.⁵⁶ Explicit verbal sexual advances, solicitations or invitations – what has been historically referred to as *quid pro quo* harassment – also appear to be widely understood as constituting sexual harassment. Where a complaint is based on verbal sexual advances, a complainant will likely be required to show a pattern or course of behaviour or conduct, and may be required to establish (in Ontario) that the alleged harasser was in a position of authority (see s 7(3) of the *Code*, set out in Chapter 1). The *Eva* case demonstrates the kind of context in which a single sexual advance may be sufficient to constitute harassment, and it emphasizes a need to focus on the broader power dynamic between the parties, as well as environmental factors that may enhance the vulnerability of the complainant in the situation.

Beyond sexual advances and physical misconduct, which have been historically understood as the core or focus of sexual harassment,⁵⁷ a broader range of verbal comments have been found to constitute sexually harassing conduct, including sexualized comments about the complainant, topics of a general sexual nature, vulgar jokes, and derogatory or demeaning comments. Complainants in these types of cases will also be likely required to establish a pattern or course of behaviour or conduct. Importantly, some adjudicators are alive to the ways in which respondents may attempt to normalize such behaviour as part of the particular workplace environment, and have provided strong precedents to reject such arguments. Finally, in some cases, visual communications or materials provided grounding for a sexual harassment complaint. Decisions in these cases were highly contextual and specific to the facts, particularly as regards access to the visual materials.

Having canvassed the various kinds of conduct which may constitute sexual harassment, the next chapter will go on to examine how Tribunals assess whether that conduct was “unwelcome”, and the many issues that can arise with that analysis, particularly where subtle and covert forms of conduct are claimed.

⁵⁵ *Ibid* at 432.

⁵⁶ See Gallivan, *supra* note 4 at 40–43; relatedly, see Faraday, *supra* note 4 at 43.

⁵⁷ *Ibid*.

4. Workplace Sexual Harassment Complaints at the BC and Ontario Human Rights Tribunals, 2000-2018: Assessing the “Unwelcome” Requirement

As set out in Chapter 1 of this report, sexual harassment law requires a complainant to establish that the conduct in question was “unwelcome”. This has been interpreted as whether the respondent “knew or ought to have known that the conduct would be unwelcome” (*Mahmoodi v University of British Columbia and Dutton*, 1999 BCHRT 56 at paras 140, 232). This element, and its interpretation, has been adopted similarly in BC and Ontario and, as this chapter will analyze, has given rise to similar problems in its application to individual complaints. This chapter discusses trends in the interpretation and application of the “unwelcome” requirement, in light of gender-based myths and stereotypes that have been identified and analyzed in other arenas, notably the criminal justice system.

Overview

As noted in Chapter 1, sexual harassment is defined as *unwelcome* conduct of a sexual nature. This requirement, that the complainant establish that the alleged harasser knew or ought to have known that the conduct was unwelcome, has been widely criticized for the inappropriate burden it places on complainants, predominantly women, to avoid harassment and protest harassing conduct.⁵⁸ This element of sexual harassment law has further provided an entry point for gender-based myths and stereotypes to influence the legal analysis, giving rise to recurrent problems related to credibility assessments, not unlike similar problems that have been widely documented in the context of sexual offences and gender-based violence in the criminal justice system.⁵⁹ Problematic myths concerning women’s sexual availability, narrow and even false understandings of how women should respond to sexual violence, and underlying tendencies to responsibilize or blame women for the violence perpetrated against them, continue to negatively impact assessments of the credibility and character of victims of sexual offences.⁶⁰ Specific stereotypes documented in this context include the “hue and cry” stereotype (the notion that “real victims” will fight back or immediately cry for help), the “real rape” stereotype (sexual assaults are committed by a stranger on an unsuspecting victim), and the “party girl” stereotype (that “bad girls” are more likely to consent).⁶¹ Evidence of a complainant’s sexual history was also historically associated with the “twin myths” that a “promiscuous” complainant was either more likely to consent or less worthy of belief.⁶²

There is reason to be concerned that similar myths and stereotypes are influencing sexual harassment complaints, both in assessing the complainant’s credibility, and in relation to how the “unwelcome” requirement is understood and applied in individual cases. In particular, the inclusion of the “unwelcome” requirement invites scrutiny of the complainant’s own conduct and behavior, creating a space for problematic stereotypes and assumption-based reasoning like that documented in the context of sexual assault to improperly influence adjudication of the complaint.⁶³

⁵⁸ See, e.g., Matulewicz, “Institutionalized Sexual Harassment”, *supra* note 35 at 403, citing also Marlene Kadar, “Sexual Harassment: Where We Stand; Research and Policy” (1983) 3 Windsor YB Access Just 358; Aggarwal & Gupta, *supra* note 4 at 123–8; Sandy Goundry, “Sexual Harassment in the Employment Context: The Legal Management of Working Women’s Experience” (1985) 43 UT Fac L Rev 1; Gallivan, *supra* note 4; Fudge, *supra* note 33; Faraday, *supra* note 4; Sheppard, *Inclusive Equality*, *supra* note 51; Kaitlyn Matulewicz, “Law’s Gendered Subtext: The Gender Order of Restaurant Work and Making Sexual Harassment Normal” (2016) 24:2 Fem Leg Stud 127 [Matulewicz, “Law’s Gendered Subtext”]. For similar critiques in the American context, see also: Kathryn Abrams, “The New Jurisprudence of Sexual Harassment” (1998) 83:5 Cornell L Rev 1169; Susan Estrich, “Sex at Work” (1991) 43:4 Stan L Rev 813 at 831.

⁵⁹ See, e.g., Lise Gotell, “Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women” (2008) 41:4 Akron L Rev 865 [Gotell, “Rethinking Affirmative Consent”]; Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22:2 CJWL 397; Grant, *supra* note 6; Craig, *Putting Trials on Trial*, *supra* note 6; Elaine Craig, “Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada’s Rape Shield Provisions” (2016) 94:1 Can Bar Rev 45 [Craig, “Section 276 Misconstrued”]; Lise Gotell, “When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records” (2006) 43:3 Alta L Rev 743; Susan Ehrlich, “Perpetuating- and Resisting- Rape Myths in Trial Discourse” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice, and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 389.

⁶⁰ See, e.g., Randall, *supra* note 59; Craig, *Putting Trials on Trial*, *supra* note 6; Ehrlich, *supra* note 59; Grant, *supra* note 6.

⁶¹ For discussion of the “hue and cry” and “party girl” myths, see Craig, *Putting Trials on Trial*, *supra* note 6 at 34, 37; for discussion of the “real rape” stereotype, see Ehrlich, *supra* note 59 at 391, citing Susan Estrich, *Real Rape* (Cambridge, MA: Harvard University Press, 1987) [Estrich, *Real Rape*].

⁶² Using sexual history evidence in service of either of these myths is expressly prohibited by *Criminal Code*, RSC 1985, c C-46, s 276(1)(a)-(b); see also Craig, “Section 276 Misconstrued,” *supra* note 59 at 51.

⁶³ In the context of labour arbitration, Hart similarly found that identified cases in that context were united by an “inadequate understanding of sexual harassment with a subtheme of victim blaming [and the] undermining [of] women’s credibility as witnesses through gendered arguments” (Hart, *supra* note 4 at 273).

As this chapter will examine, stereotypes such as the “hue and cry” myth influence analysis and assessment of the “unwelcome” requirement, negatively impacting a complainant who is unable to marshal clear evidence of active protest in the face of harassing conduct. Similarly, complainants who may have participated in similar behaviour in the past may find that “party girl”-like stereotypes influence the “unwelcome” analysis by suggesting that such past behaviour would mean that the respondent, or a reasonable person, might understand the conduct at issue to be welcomed. Relatedly, workplace environments which normalize sexual behaviour may be taken as neutral background for assessing sexual harassment complaints, which, not unlike the “party girl” stereotype, can operate to diminish a complainant’s credibility or assertions that they did not welcome such conduct. In these contexts, and others as will be examined below, express objection or active protest may be necessary to sufficiently establish a complaint of sexual harassment.⁶⁴

Establishing “Unwelcome” Conduct: the Significance of Indicia of Active Protest

As noted in Chapter 1, establishing that the respondent knew or ought to have known that the conduct was unwelcome does not, on its face, require a complainant to establish that they actively protested the conduct, such as through verbal communication. This principle has been affirmed in several cases, including most recently in Ontario in *Bento v Manito’s Rotisserie & Sandwich*, 2018 HRTO 203, in which the adjudicator states at paragraph 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” (citing also *SS v Taylor*, 2012 HRTO 1839 [*SS v Taylor*]).

In many cases in the identified sets of decisions, active protest or express objection was found to have been made by a complainant, thus minimizing potential issues in establishing this element of a complaint. This section discusses dominant approaches to applying the “unwelcome” requirement in the context of overtly sexually harassing conduct – physical misconduct and explicit sexual invitations or advances. As will be examined below, where physical misconduct, or explicit sexual advances, were involved, a lack of active protest appeared less significant in finding that such conduct would reasonably be understood as unwelcome. Further, in many of these cases, whether or not evidence of protest was led, the analysis of the law was fairly circumspect, suggesting a clear understanding that these forms of sexually harassing conduct are, absent explicit consent, to be understood as unwelcome in contemporary workplaces.

Where physical sexual conduct was at issue in a case, the unwelcome requirement appeared easily met in many cases, whether or not evidence concerning active protest was led. This supports the notion that physical conduct, such as grabbing or slapping a woman’s buttocks, is readily understood to constitute sexual harassment today. In such cases, a lack of express objection or protest may pose less of a hurdle for complainants. For example, in *Q v Wild Log Homes*, 2012 BCHRT 135 [*Wild Log Homes*], in discussing the complainant’s silence following an initial incident of physical touching, the adjudicator stated:

I find that Mr. Walker physically touched Q in an inappropriate manner. I accept Q’s evidence that she was shocked and wondered if the incident had actually occurred. She didn’t know how to react initially. **Such a reaction is consistent with the unexpected nature of the contact and its marked incongruence with appropriate workplace conduct. I do not consider her lack of comment at the time of the incident to change the nature of this interaction.** Any reasonable person would have known that such conduct was unwelcome, and there was no evidence that Q indicated that such conduct was welcome. (at para 144, emphasis added)

Sexual invitations or advances were also often found to readily constitute “unwelcome” conduct absent credibility issues. This was particularly so where the alleged harasser was the complainant’s supervisor or a person in a position of authority in the workplace, affirming the importance placed on the notion that sexual harassment is ultimately an abuse of power. See, e.g.: *Domingues v Fortino and Varbaro*, 2007 HRTO 19; *Kwan v Marzara and another*, 2007 BCHRT 2007 BCHRT 387; *Tyler v Robnik and Mobility World (No 2)*, 2010 BCHRT 192; *Harriott v National Money Mart*, 2010 HRTO 353; *SS v Taylor*, 2012 HRTO 1839; *Horner v Peelle Company Ltd.*, 2014 HRTO 1211.

⁶⁴ This chapter uses cases from the identified sets of decisions in each province to illustrate issues concerning the legal principles and their application in situations where gender-based myths or stereotypes may appear. The cases used in this chapter are not an exhaustive accounting of relevant cases from the identified sets of decisions. It is also important to bear in mind that use of cases for illustrative purposes on specific points raised in this chapter does not equate to an opinion that such cases were wrongly decided. Complaints often turned significantly on credibility, and most decisions evidenced a thoughtful and robust assessment of credibility based on multiple factors and facts as presented in the course of the hearing.

In cases involving these blatant forms of sexually harassing conduct (physical touching, and sexual invitations), the Tribunal often did not engage in a detailed analysis of the legal principles or their application to factual findings, simply concluding that the conduct was unwelcome, as the quote from *Wild Log Homes* above illustrates. See, e.g.: *Sanford v Koop*, 2005 HRTO 53; *Kwan v Marzara and another*, 2007 BCHRT 387; *Domingues v Fortino and Varbaro*, 2007 HRTO 19; *Chard v Newton*, 2007 HRTO 36; *Behm v 6-4-1 Holdings and others*, 2008 BCHRT 287; *Ratzlaff v Marpaul Construction and another*, 2010 BCHRT 13; *Tyler v Robnik and Mobility World (No 2)*, 2010 BCHRT 192; *Soroka v Dave's Custom Metal Works and others*, 2010 BCHRT 192; *Harriott v National Money Mart*, 2010 HRTO 353; *Q v Wild Log Homes and another*, 2012 BCHRT 135; *Smith v The Rover's Rest*, 2013 HRTO 700; *Horner v Peelle Company Ltd.*, 2014 HRTO 1211; *JD v The Ultimate Cut Unisex*, 2014 HRTO 956.

In some cases, the Tribunal relied on non-verbal communication by the complainant to find that the respondent ought to have known the conduct was unwelcome. Evidence of non-verbal communications of "unwelcomeness" in reported decisions include:

- stiff body language or "freezing up" (*Varga v Bentley's Sandwich Heaven*, 2001 BCHRT 8; *Forgues v Gary Stinka and Moxie's Restaurant*, 2001 BCHRT 7; *Hayward v Gary Stinka and Moxie's Restaurant*, 2001 BCHRT 9; *Smith v The Rover's Rest*, 2013 HRTO 700);
- facial expression (*Varga v Bentley's Sandwich Heaven*, 2001 BCHRT 8);
- refusing to make eye contact (*Smith v The Rover's Rest*, 2013 HRTO 700);
- avoidance of the harasser in the workplace (*Smith v The Rover's Rest*, 2013 HRTO 700); and,
- physical movement such as pushing the respondent away or crossing one's arms (*Tannis et al v Calvary Publishing and Robbins*, 2000 BCHRT 47; *Kayle v T & V Enterprises et al*, 2000 BCHRT 57; *Willis v Blencoe*, 2001 BCHRT 12; *Hayward v Gary Stinka and Moxie's Restaurant*, 2001 BCHRT 9; *Newman v Gujral*, 2003 BCHRT 16; *Morgan v University of Waterloo*, 2013 HRTO 1644; *Iu v Markham Marble*, 2012 HRTO 65).

While this may suggest a more nuanced understanding of the various modes of objection or protest a complainant may use, it continues to place reliance on some evidence of protest or objection to the conduct, despite legal principles that suggest this is not required. For example, in *Willis v Blencoe*, 2001 BCHRT 12, the adjudicator explained that "[i]t was sufficient that she used body language to indicate her discomfort" in response to the suggestion that the complainant was "required to leave the office to prove that she found the conduct unwelcome" (at para 61). This suggests that reliance on some indicia of protest or objection was useful, if not necessary, to establish that the respondent therefore knew, or ought to have known, that the conduct in question was unwelcome. As will be discussed below, a continued reliance on some indicia of protest or objection may further operate to ignore or misunderstand the multiple kinds of strategies that individuals may deploy when confronted with sexual harassment in the workplace.

Sexual Harassment and a Lack of Protest: Indicia of "Hue and Cry" Stereotypes

The departure from reliance on active protest or express objection in the legal principles governing sexual harassment is an important development because it signals a shift away from responsabilizing women for harassment avoidance.⁶⁵ Despite this principle on paper, in practice, a lack of some indicia of protest has proven problematic in certain contexts.

The disjunct between legal principles governing consent and their operation in practice has been documented in the context of criminal sexual offences. Despite a shift to an affirmative consent standard, which therefore does not require a victim of sexual assault to prove that they did not consent, numerous scholars have documented a continued reliance on such evidence. For example, Ruparelia notes that in many cases, judges focus on evidence that there was a lack of active protest or express objection to the conduct at issue, despite the fact that affirmative consent precludes such considerations.⁶⁶ Embedded in such reasoning, which questions a victim's lack of resistance, is the myth that "real rape" will be met with active resistance by all "real victims".⁶⁷

Although the legal principles governing sexual harassment complaints do not require active protest or express objection in order to meet the "unwelcome" requirement, the inclusion of that requirement may invite scrutiny where a complainant

⁶⁵ See Grant, *supra* note 6 at 576, 580. Grant cites *R v Moyse*, 2010 MBPC 21 and *R v W(J)*, 2010 ONCJ 194; Rakhi Ruparelia, "Does No 'No' Mean Reasonable Doubt? Assessing the Impact of *Ewanchuk* on Determinations of Consent" (2006) 25:1/2 *Can Woman Studies* 167; Craig, *Putting Trials on Trial*, *supra* note 6 at 205.

⁶⁶ *Supra* note 65. See also, Craig, *Putting Trials on Trial*, *supra* note 6 at 205.

⁶⁷ Ehrlich, *supra* note 59 at 391, citing Estrich, *Real Rape*, *supra* note 61; Craig, *Putting Trials on Trial*, *supra* note 6 at 205; Gotell, "Rethinking Affirmative Consent," *supra* note 59 at 879, citing a concept outlined in Rachel Hall, "'It Can Happen to You': Rape Prevention in the Age of Risk Management" (2004) 19:3 *Hypatia* 1 at 6.

fails to protest the conduct in some way. This is because a respondent may rely on a lack of protest to ground an argument that it was, therefore, not reasonable to know that the conduct was unwelcome. In cases involving non-physical conduct, a lack of active protest was, at times, used to undermine the credibility of the complainant or to suggest that this meant it was not reasonable for the respondent to know that the conduct was unwelcome. This gives rise to concerns about the potential influence of both “real rape” and “hue and cry”-like stereotypes, which posit that “real victims” fight back and report their assault immediately.

The ability for such arguments to play a role in sexual harassment complaints is troubling given the many documented reasons why complainants may not protest or immediately report an incident. A Working Women’s Institute survey found that only 18% of women had stated that they complained about harassment they experienced.⁶⁸ Women may choose not to report sexual harassment due to a variety of considerations, including fear of negative job-related consequences, not being believed, attacks on their reputation, or disincentives due to the often-difficult nature of investigations and related processes.⁶⁹ In discussing a case in the labour arbitration context, a complainant stated that she regretted filing a complaint for sexual harassment “because the process ‘makes it seem like you are the person being investigated’”.⁷⁰

Individuals may also deploy various strategies to resist sexual advances or harassment that may not obviously appear to constitute active protest or objection on their face. As noted in *Cugliari v Telefficiency Corporation*, 2006 HRTO 7, “[...] while many cases involving sexual harassment involve clear expressions of disinterest by a person being pursued [...] displeasure and disagreement can be voiced in other ways. Furthermore, because of the nature of the relationships it is not enough to rely on acquiescence as a foundation for acceptance” (at para 227). Relatedly, in *Mercier v DaSilva*, 2007 BCHRT 72 [*Mercier*], the adjudicator noted at para 99,

Some employees, when faced with racist remarks or sexual innuendos, may go along with what is being said, treating it like it was a joke. They may actually view these remarks as being funny. However, other employees may go along with the remarks and not complain, because they do not want to be singled out for further teasing and harassment, or because they must endure it in the interests of job security.

The previous section noted various physical communications that may be used to resist harassing conduct, particularly where that conduct is, itself, physical in nature. In addition, many cases illustrated various verbal strategies complainants may use when confronted with harassing conduct. For example, in *GM v X Tattoo Parlour*, 2018 HRTO 201, the applicant testified in related criminal proceedings that she had attempted to resist the sexual activity by appealing to their family connections; she told him “that he had a wife who was close to her mother” (at para 15). In *McIntosh v Metro Aluminum Products and another*, 2011 BCHRT 34 [*McIntosh*], the complainant similarly deployed several tactics in an attempt to dissuade her harasser from continued verbal engagement and text messages, including by “being mean”, trying to play “a head game”, and through express objection (see paras 43–63). In *Iu v Markham Marble*, 2012 HRTO 65, the applicant attempted to ignore the harassment, and tell the harasser’s wife of his sexual advances (at para 26). Where such strategies were deployed, they were often understood as methods of resistance (absent credibility issues); however, as will be discussed below, in some cases adjudicators suggested that those strategies constituted participation in, and therefore consent to, the conduct at issue.

Despite the plethora of reasons why a complainant may not report an incident, or actively protest conduct in the moment, a lack of protest or reporting was, in some cases, presented as a way to undermine the complainant’s credibility and call into doubt their version of events. Cases that raised concerns about a lack of active protest by a complainant often turned on credibility assessments. There are myriad factors that go into such assessments, and the use of cases in this chapter does not suggest that the decisions reached were ultimately wrong. However, apparent reliance on a lack of protest in assessing credibility does raise concern for the reasons discussed in this report.

Most directly, a lack of protest or objection may be considered as a factor in assessing whether it was reasonable for the conduct to be understood as unwelcome. In *Gibbons v Sports Medicine Inc*, 2003 HRTO 26 [*Gibbons*], while finding that certain physical conduct constituted sexual harassment (at para 32), the Tribunal denied other aspects of the application. In particular, in assessing this conduct, the adjudicator found that “[i]n the absence of any protest by Ms. Gibbons, they did not in my view constitute sexual harassment [...]” (at para 33). Here, lack of express objection or active protest to conduct appeared instrumental in finding that such conduct was not sexual harassment. Similarly, in *Wollstonecroft v Crellin et al*,

⁶⁸ Johnson, *supra* note 4 at 195.

⁶⁹ *Ibid.*

⁷⁰ Hart, *supra* note 4 at 274.

2000 BCHRT 37 [*Wollstonecroft*], the fact that the complainant did not object to the respondent's discussion of sexual topics with her, and did not bring allegations until months later, was noted by the adjudicator (at para 84), although they found the complaint justified.

In *Fatima v BioPharma Services Inc*, 2018 HRTO 1290 [*Fatima*], the applicant's credibility was doubted and her application dismissed. In setting out their analysis of the applicant's credibility, the adjudicator noted that she had not raised concerns about discrimination or harassment before her termination (at para 15). In relation to the specific allegation of sexual harassment, while the adjudicator found that the alleged event did not occur, they also stated that even if it had, it would not constitute sexual harassment because there was only one incident, it was not sexual in nature, and the applicant had not "indicated in any way to the respondent that it was unwelcome" (at para 32). Although there were many factors that impacted the credibility assessment of the applicant and the substantive outcome in this case, the references to the unwelcome requirement made by the adjudicator suggest a narrow understanding that relies on active protest or express objection in order to establish sexual harassment.

In *Anderson v Law Help Ltd*, 2016 HRTO 1683 [*Anderson*], the adjudicator appeared to rely on active protest as the pivotal point at which the respondent knew, or ought to have known, that his conduct was unwelcome. That case revolved substantially around a series of text messages. The applicant had not been "completely blunt in rejecting his sexual advances" in the beginning of the text exchanges (at para 77). However, when she did later attempt to end their exchange and "clearly explained why she was not interested in having a relationship with him", the adjudicator found that, at that point, a reasonable person would have known that further sexual advances would be unwelcome (at para 77).

These cases, *Fatima*, *Gibbons*, and *Anderson*, illustrate how a lack of active protest or objection may negatively influence the assessment of whether the conduct in question was understood to be unwelcome, despite legal principles that suggest that active protest or objection is not required to meet this element of a complaint.

A lack of protest or objection may also cast doubt on a complainant's credibility or influence the understanding of whether the conduct was unwelcome where a work environment is sexualized or particular conduct within it is normalized. In *Dix v The Twenty Theatre Company*, 2017 HRTO 394 [*Dix*], the application included numerous incidents of alleged harassment. The Tribunal dismissed part of the application, which dealt with allegations of hugging and kissing in the workplace. The applicant alleged that two board members solicited hugs and kisses on the cheek from her (at para 26). The adjudicator found that, in the context of this workplace, such behaviour was not uncommon, and as such, it was not reasonable for the respondents to know that such conduct was unwelcome absent express objection or active protest (see paras 32-36). In this analysis, the adjudicator acknowledges that there are "many work environments in the corporate world where hugging and cheek kissing are not the norm" (at para 33), and so takes the particular work environment here as a neutral backdrop which thus suggested that the applicant would have to actively protest this conduct in order for it to be understood as unwelcome. In that case, the applicant also raised an argument that an affirmative consent standard ought to be applied, which was rejected (at para 35).

Similarly to *Dix*, the complaint in *Sleightholm v Metrin and another (No 3)*, 2013 BCHRT 75 [*Sleightholm*] revolved around a workplace in which certain conduct was considered as normalized. In that case, part of the complaint related to the sharing of a dream in which the complainant was in a bath. While the adjudicator acknowledges that "[...] the sharing of the 'bath dream' might easily be construed as amounting to sexual harassment" in another context, the fact that "dreams and the interpretation of them were frequently the subject of conversation" in this workplace and that the complainant was "the instigator of many of these conversations" changed things (see para 56). In addition, the complainant described behaviour that included hugging and blowing kisses. However, the adjudicator found that this did not constitute a breach of the *Code*, and that such behaviour "was normal for the office they were in and was not protested by her or any other employee" (at para 73). While the adjudicator took issue with the complainant's credibility for numerous other reasons, these passages suggest some reliance on indicia of protest or objection in assessing whether the conduct in question ought to have reasonably been understood as unwelcome.

Both *Dix* and *Sleightholm* suggest that, where a respondent is able to lead evidence to suggest that the conduct complained of is "normal" in the particular work environment, particularly where that conduct is more subtle or covert in nature, this may influence the assessment of the "unwelcome" requirement and create greater reliance on indicia of protest or objection in order to ground a finding that the conduct was understood to be unwelcome.

Finally, in cases where a lack of protest or objection is raised, a complainant's case may be strengthened if they are able to provide a narrative that includes a compelling reason why that is so. In *Garofalo v Cavalier Hair Stylists Shop Inc*, 2013 HRTO 170 [*Garofalo*], the adjudicator accepted the applicant's reasons for not telling anyone that she was being sexually harassment (see paras 219, 233), but also noted that "[e]very case has to be viewed on its own merits" (at para 219). The proffering of and reliance on a narrative that "fits" with assumptions about why individuals may or may not speak out may pose its own issues for complainants who do not easily fit within such narratives and the wider gender-based stereotypes to which they may attach. For example, in *Han v Gwak and Nammi Immigration*, 2009 BCHRT 17 [*Han*], while the adjudicator found that the individual respondent made comments of a sexual nature, they also determined that the complainant, was "a person with strong opinions, who is entirely capable of making her thoughts and feelings known", and therefore that it was "unlikely that she would not have spoken to Mr. Gwak had his comments made her uncomfortable" (at para 35) and that it was therefore unlikely that she found the comments to be unwelcome (at para 79). In this case, the complainant's character may have influenced how her lack of protest or objection was interpreted and understood.

As *Garofalo* and *Han* illustrate, the search for and reliance on explanations for a lack of protest or objection that fit within existing gender-based stereotypes about personal character may provide another entry point for the use of gender-based myths or stereotypes to influence the adjudication of the "unwelcome" requirement.

Contexts Requiring Active Protest or Express Objection

In a select number of cases involving very particular conduct or contexts, adjudicators have suggested that active protest or express objection will be required to establish that the respondent knew or ought to have known that the conduct in question was unwelcome.

First, where the conduct in question may be described as "normal social interaction", be very subtle in nature, and/or is heavily reliant on the complainant's individual interpretation or perception of the conduct and its meaning, express objection or communication that the conduct in question is unwelcome may be necessary to establish the complaint (*De Leon v Tridim 2 Millwork*, 2006 BCHRT 6 [*De Leon*]). In *De Leon*, the complainant alleged that she was sexually harassed on the basis of a remark that the complainant was a "pretty girl", that the alleged harasser asked the employer for the complainant's phone number, and that he leered at the complainant which she described as "stripping me with his eyes" (at para 17). When questioned about the last allegation in cross-examination, she described this as "he would talk to her and look her straight in the eye, smile and laugh" (at para 18). The adjudicator found that this was a "description of perfectly normal and unexceptionable behaviour" (at para 18). Because the complainant's allegation was based on her unique interpretation of this behaviour, which would otherwise appear to be a normal social interaction (at para 20), the alleged harasser could not reasonably know this conduct to be unwelcome absent some indication from the complainant (at para 20).

In contrast to *De Leon*, in *Fougere v Rallis and Kalamata Greek Taverna*, 2003 BCHRT 23 [*Fougere*], the respondent similarly attempted to characterize his conduct as "normal social interaction". In that case, the respondent gave the complainant a letter asking her on a date, calling her "sweetie", and saying he had a crush on her (at paras 91-94). The Tribunal disagreed with the respondent's characterization of the letter as a mere "social invitation" given its contents, and found that the respondent ought to have known that his advances "for social interaction outside the workplace" would be unwelcome, particularly in light of the age differential and power imbalance between the parties (at para 86). This may assist in establishing the threshold for what kinds of "normal social interactions" require express objection or active protest to establish that the conduct was "unwelcome".

While the conduct in *De Leon* was highly dependent on the complainant's particular interpretation of what would otherwise simply be considered friendly behaviour, or normal social cues or responses in conversation, the conduct at issue in *Fougere* was romantic in nature and was an active solicitation, even if that solicitation was characterized as "social" in nature. As such, exchanges that would require active protest or express objection to establish unwelcome-ness may be limited to those which would otherwise seem innocuous even to an individual who was well-informed about and sensitive to issues of sexual harassment and gender inequality.

Second, where the complainant and alleged harasser have engaged in a consensual romantic relationship, this may create additional difficulties in analyzing the "unwelcome" element of a complaint. As noted in *Rushford v Sheppard*, 2014 HRTO 1607, "[d]etermining whether a person has violated [the Code] when pursuing a personal relationship in the workplace is potentially difficult particularly in cases such as this one where the two persons in question were previously in a consensual

long-term relationship. Perhaps it is even more difficult where the persons have previously separated and reunited on a number of cases [...]” (at para 42).

In order to establish that the respondent knew or ought to have known that their conduct was unwelcome in this context, a complainant may be required to actively protest or expressly object to the conduct. In *McIntosh*, the complainant, who had had a prior consensual romantic relationship with the respondent, received ongoing sexually harassing text messages from the respondent for a period of three months (see paras 1-3). The decision turned primarily on the issue of whether the conduct was reasonably known to be unwelcome, given the blatantly sexual content of the messages. In the analysis, the Tribunal considered the impact of the parties’ prior relationship, and found that this created an obligation on the complainant to “clearly and expressly advise [the respondent] that the relationship was over and that she no longer wishes to engage in sexual communications” (at para 116). In other words, the Tribunal found that, in the context of a prior consensual relationship, the complainant was required to actively protest or expressly object to future conduct in order to establish that the conduct was unwelcome.

While the complainant in *McIntosh* was able to provide evidence of active protest (see paras 117-128), the potential for this case to create more stringent requirements where parties have a prior consensual relationship is concerning. This may allow for the introduction of gender-based stereotypes based on a “pattern of consent” or prior participation in related behaviour to be used to undermine the complainant’s credibility or to excuse a respondent’s behaviour on the basis that it was not reasonable for them to know that their conduct would be unwelcome in such circumstances, even where the relationship had clearly ended prior to the harassment.

Participation in Similar Behaviour: an Obstacle to Establishing “Unwelcome” Conduct

Evidence that a complainant participated in similar or related workplace behaviour as that which forms the basis of the complaint may also be used to undermine their credibility or to suggest that such participation made it not reasonable for the respondent to understand their conduct as unwelcome. This kind of argument relates to similar gender-based myths in the criminal justice context that women who engage in “risky” behaviour are both more likely to consent and less deserving of belief.⁷¹

In the human rights context, allegations concerning participation in inappropriate behaviour do not disentitle a complainant to the protection of the *Code*. See: *Fiebelkorn v Poly-Con Industries and Cowderoy*, 2000 BCHRT 54 at para 59; *Twohey v Bartman et al (No. 2)*, 2003 BCHRT 55 at para 225. As such, arguments concerning participation in similar or related behaviour ought not to be determinative of a sexual harassment complaint. However, in some cases, application of this principle appeared to pose challenges given, as mentioned above, the inferences that may be drawn from past behaviour in assessing whether sexually harassing conduct is “unwelcome”.

Relatedly, in Ontario, where a sexual harassment application is based on a poisoned work environment, the Tribunal must consider allegations that the applicant also participated in the misconduct (*Smith v Menzies Chrysler*, 2009 HRTO 1936 at para 159, citing also *Smith v Ontario (Human Rights Commission)*, 2005 CanLII 2811 (ON SCDC) and *Naraine v Ford Motor Company* [1996] OHRBID No 23). This may pose heightened issues in sexual harassment applications, as it expressly invites scrutiny of an applicant’s own behaviour in assessing their claim.

Evidence of a complainant’s participation in similar behaviour, or directly in the conduct at issue, was, in some identified cases, put forth directly to suggest that they welcomed the conduct, that the respondent would not reasonably have known that the conduct in question was unwelcome, or to undermine the complainant’s credibility. As the cases below illustrate, the closer that the alleged participatory conduct of the complainant is to the conduct that forms the basis of the complaint, the more difficulty there is with the “unwelcome” requirement and the greater the potential for reliance on gender-based stereotypes.

In a number of cases, respondents led evidence that the complainant participated in inappropriate behaviour in the workplace as a way to suggest that their participation made the alleged conduct at issue reasonably understood as

⁷¹ Lucinda Vandervort, “Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson, Kindrat, and Brown*” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice, and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 111 at 116; Craig, “Section 276 Misconstrued,” *supra* note 59 at 51. These kinds of stereotypes and myths were similarly found by Hart. See, e.g., Hart, *supra* note 4 at 276 discussing *Saskatchewan and SGEU (Lessard) (Re)*, [2001] SLAA No 4, 99 LAC (4th) 412.

welcomed (or, at minimum, not reasonably understood as unwelcomed). For example, in *Mercier*, the respondent led evidence of the complainant's participation in conversations of a sexual nature in the workplace (at para 97). However, the Tribunal found that this was not relevant to the assessment of the supervisor's conduct, which constituted sexual harassment (see paras 98-99).

In *Harrison v Nixon Safety Consulting and others (No 3)*, 2008 BCHRT 462, the respondents noted that the complainant "regularly wore short skirts to work" and "danced around in the office 'like a stripper'" (at para 267). The adjudicator characterized the respondent's inclusion of these points as an attempt to "portray Ms. Harrison as someone who deliberately dressed and acted in a sexually provocative manner, and [to make] the implicit suggestion that she sexualized the workplace herself" (at para 267). In other words, the respondents attempted to suggest that the complainant's own behaviour demonstrated that she welcomed the conduct at issue, which included physical contact. The adjudicator agreed with the complainant's submission that the issues raised by the respondent were not relevant, and found their submissions on those points without merit (see paras 267, 316).

In assessing allegations of the applicant's use of coarse language in *Smith v Menzies Chrysler*, 2009 HRTO 1936 [*Menzies Chrysler*], the Tribunal found that "[w]hile the complainant may be culpable for his own use of inappropriate language, this does not excuse or nullify [the respondent's] discriminatory misconduct [...]. Further, regardless of whether anyone objects to, or everyone participates in, sexually charged behaviour, the employer has a duty to take steps to ensure the workplace is free from vexatious comments or conduct" (at para 159). The Tribunal's comments here illustrate well the principle that an applicant's own behaviour does not disentitle them from protection under the *Code*.

Similarly, the Tribunal in *Mercier* noted, "[t]here is no expectation that workplaces must be pristine or that obscenities are never to be heard" (at para 98). Rather, as the Tribunal set out,

"[...] [w]hen the comments are related to a protected ground under the *Code*, are unwelcome, occur on more than an occasional basis, or emanate from a supervisor, then these comments have gone too far. [...] It is up to the employer, through its supervisors, to set the tone in the workplace and to be very clear about the kinds of behaviours that are unacceptable." (at para 98)

These cases illustrate that participation in inappropriate behaviour, where it does not appear to be connected to the impugned conduct, does not disentitle a complainant to protection from discrimination under human rights law. This means that not all 'inappropriate' or 'sexualized' behaviour on the part of a complainant can be used to undermine their credibility or suggest that they therefore welcomed sexually harassing conduct. However, where the complainant participated in similar or related behaviour as that which forms the basis of the complaint itself, this may provide a means through which the "unwelcome" requirement of the complaint may be undermined.

In *SS v Taylor*, the applicant admitted to engaging in sexual banter, flirting, and telling dirty jokes, which she described as "typical" of the restaurant/bar she worked at, and of other establishments she had previously worked at (at para 17). The respondent claimed that the applicant condoned or invited sexual comments that he made (at para 57). Despite this apparent participation in related behaviour, the respondent's comments were determined to be unwelcome, and to have "crossed the line" (at para 64). Specifically, the Tribunal found that "[w]hile the applicant welcomed and participated in discussions, jokes and games about sex in the workplace, I find that she did not welcome or encourage the specific and explicit advances the respondent directed at her" (at para 70). As such, integral to the Tribunal's outcome here was the distinction drawn between the kind of conduct the applicant had participated in, and the kind of conduct that formed the basis of the application.

In *Huhn v Joey's Only Seafood Restaurant*, 2002 BCHRT 18 [*Huhn*], the complainant alleged she was sexually harassed on the basis of verbal communications of a sexual nature. The workplace at the restaurant was described as one in which sexual banter, joking and horseplay were common (at para 52), and the respondent alleged that the complainant was an active participant in such conversations, making it unreasonable for him to know that his conduct would be unwelcome (at paras 40, 45). In assessing credibility and the differing accounts of events described by the complainant and respondent, the adjudicator found that the complainant had never indicated an objection, either verbally or non-verbally, to the respondent and that she was, rather, a "full and willing participant" in the sexual banter and related behaviour in the workplace (at paras 54-55). It was only after the complainant and another employee complained, and rules regarding behaviour in the workplace were posted, that the adjudicator finds that the respondent knew or ought to have known that his conduct was unwelcome (at para 59). In contrast to *SS v Taylor*, in *Huhn*, the conduct which formed the basis for the complaint appeared to be very similar to the kind of conduct the complainant had participated in. Further, in *Huhn*, the Tribunal doubted the

complainant's credibility for a number of reasons and not only because of prior participation in related behaviour in the workplace.

These cases illustrate how Tribunals may seek to draw a distinction between the conduct at issue, and the alleged behaviour of the complainant. Where there is a less-than-clear distinction between the two, as in *Huhn*, it appears that this may pose greater difficulty in assessing whether the respondent's conduct could be reasonably understood to be unwelcome. This is problematic because it may facilitate a reliance on problematic gender-based stereotypes in order to interpret whether sexually harassing conduct would reasonably be understood as unwelcome. In other words, it allows the introduction of arguments that suggest that a complainant's behaviour in other contexts or incidents establishes a "pattern of consent", rather than focusing the analysis on the respondent's own conduct. However, where, as in *SS v Taylor*, there is some difference between the complainant's past behaviour and the respondent's impugned conduct, or where a complainant can lead convincing evidence that the respondent's behaviour "crossed a line" from accepted to unacceptable conduct, they may be able to establish that the impugned conduct was unwelcome.

Cases where a complainant appeared to participate directly in the conduct or exchange that forms the basis of the complaint also presented challenges in assessing the "unwelcome" requirement. For example, in *Ghinis v Crown Packaging*, 2003 BCHRT 12, the Tribunal found that the complainant had not established her claim of sexual harassment, based partly on her own participation in the kinds of comments and language which formed the basis of her complaint. The Tribunal found that, "[...] rather than objecting to the poisoned environment, Ms. Ghinis contributed to it" (at para 166).

As mentioned earlier, individuals may deploy a variety of strategies to resist sexual harassment, some of which may appear as engagement with the conduct itself (see, e.g., *McIntosh*). As of now, such an emphasis may be used to undermine the credibility of complainants or to determine that the participation made it unreasonable for the respondent to understand that their conduct was unwelcome. Where emphasis is placed on a complainant's participation in the conduct which forms the basis of the complaint, this deserves deeper scrutiny and attention to the motivations behind such participation and the ways in which apparent participation may, in fact, be a strategy of resistance to sexual harassment.

Cases where a complainant appeared to participate directly in conduct which related to sexual solicitations or advances may similarly be problematic, as such conduct may be interpreted to have been "encouraging" or "welcoming" of the respondent's impugned conduct. In *Kang v Hill and another (No 2)*, 2011 BCHRT 154, the complainant alleged that she was sexually harassed by her employer who made romantic overtures and invitations to her. Her complaint was dismissed in part due to the fact that she had engaged the respondent in conversations about his feelings for her rather than expressly objecting to them (see paras 50-51).⁷² Conversely, in *Twohey v Bartman et al (No. 2)*, 2003 BCHRT 55 [*Twohey*], the complainant's participation in an exchange of post-it notes, in which the respondent had made a "declaration of love" (at para 225), was found not to mean that she was a "willing participant" in his advances (at para 225). Notably, in *Twohey*, the complaint included several incidents of impugned conduct beyond the post-it note exchange, and the Tribunal found that the complainant had made it clear that she did not reciprocate the respondent's feelings (at para 243).

Establishing "Unwelcome" Conduct in a Sexualized Work Environment

As already noted in many cases in this and the previous chapter, specific issues arise where a workplace environment is sexualized, or where sexual behaviour is normalized in a workplace. When it has been normalized, sexualized behaviour in the workplace has in some cases been understood as a neutral background for assessing sexual harassment claims. Where this is so, more may be required for a complainant to establish that the impugned conduct was unwelcome in that context, such as express objection or active protest.⁷³

Attempts by respondents to normalize a sexualized work environment as a way to position the conduct as commonplace and not obviously unwelcome arose in several cases. These arguments often arose where a complainant had not expressly objected to the conduct in question, and where the conduct in question involved more covert or subtle verbal harassment, such as sexual banter and conversations that are not blatant sexual invitations or advances (see, e.g., *Chard v Newton*, 2007 HRTO 36; *Wollstonecroft v Crellin et al*, 2000 BCHRT 37).

⁷² For a more detailed analysis of this case, see Bethany Hastie, "Workplace Sexual Harassment and the 'Unwelcome' Requirement: An Analysis of BC Human Rights Tribunal Decisions 2010-2016" (2020) 31 CJWL (forthcoming).

⁷³ Matulewicz, "Law's Gendered Subtext", *supra* note 58.

The respondent's own position in the workplace may impact whether a sexualized work environment will be accepted in assessing the complaint. For example, in *Wollstonecroft*, the respondent characterized his behaviour in discussing explicitly sexual topics with the complainant as normal conversations in the contemporary workplace, as no longer taboo, and as acceptable conversation between friends. However, the adjudicator, while acknowledging that some topics are no longer taboo and friends may have open conversations, noted that the respondent was the complainant's supervisor, not a friend, and that "employees differ in the extent to which they are comfortable discussing personal matters with their supervisors. The more personal or intimate the conversation, the more likely they will be uncomfortable" (at para 76). Thus, as this case illustrates, analysis of a complaint must continue to account for the power dynamics that attend employment relationships, even where the respondent alleges that the conduct in question is "normal" in the workplace. In other words, even if an adjudicator finds that certain sexual conduct is accepted in the specific workplace, the acceptability of that behaviour may not extend to supervisors or other persons in authority.

Some of the identified cases appeared to accept characterizations of the workplace that normalized sexualized conduct in assessing whether the conduct was, or ought to have been known to be, unwelcome. For example, in *Sleightholm*, at para 56, the adjudicator accepted that certain topics of conversation were "normal" in the complainant's workplace, which led to a determination that a specific conversation at issue in the case, while it may have constituted sexual harassment in another context, did not in these circumstances. Relatedly, in *Dix*, the Tribunal found that part of the application relating to hugging and kissing was not evidently unwelcome or uncommon in the context of the particular workplace in question (see paras 32-36). Further, as was seen earlier in the analyses of *SS v Taylor*, and *Huhn*, sexualized workplaces, particularly in the restaurant industry, may be understood as inevitably sexualized in nature, creating a higher bar for the complainant to establish either that they actively protested the impugned conduct, or that the respondent's conduct "crossed a line".

In other cases, adjudicators have clearly rejected attempted to normalize sexualized behaviour in the workplace. For example, in *Menzies Chrysler*, discussed earlier, the adjudicator addressed the respondents' attempts to normalize their behaviour at para 155:

[...] the respondents suggest the impugned behaviour was not vexatious because the jocularity in the trailer, including of the sexualized variety, took place amongst an all-male group and was part of the "locker room" milieu of used car sales. [...] I reject the foregoing argument. There is no basis in law for excluding sexually vexatious behaviour from Code protection simply because it occurs in a same-sex work setting or because some of the participants accept and/or even appear to enjoy it.

Similarly, in *Mercier*, the Tribunal rejected the respondent's argument that the verbal conduct which formed the basis of the complaint was typical in the workplace and thus not evidently unwelcome (at para 99). The adjudicator shed light on why complainants in such circumstances may not object to such remarks, or may even go along with the tenure of the conversation, due to fear of further harassment or job consequences (at para 99) and that this does not alter the nature of the conduct. Thus, rather than take the workplace environment as neutral backdrop for assessing the complaint, the Tribunal examines the impugned conduct independently.

Both *Menzies Chrysler* and *Mercier* involved lewd and inappropriate verbal comments, and both involved male complainants. In each case, the respondent suggested a type of "locker room" atmosphere to the workplace (to borrow from the *Menzies Chrysler* decision) to justify the conduct at issue. It is positive that the adjudicator in each case did not accept such arguments, and did not find that these altered the nature of the conduct in assessing it as unwelcome.

Cases involving female complainants, and where in many cases the conduct at issue might be considered more subtle in character (whether physical or verbal in nature) may, however, continue to pose issues where a respondent is able to characterize the workplace as one which normalizes such conduct. A contextual analysis of the surrounding workplace dynamics, such as the relative positions of power between the parties, gender, and other factors, may assist in highlighting potential problems in taking a workplace environment as neutral backdrop for assessing whether the impugned conduct ought to be understood as unwelcome.

Conclusion

This chapter has examined the many ways in which the requirement that a complainant establish that the alleged harassing conduct was, or ought reasonably to have been, known to the respondent to be unwelcome, creates entry points for problematic gender-based myths and stereotypes to influence the analysis and outcome of a case. This element of sexual harassment law invites scrutiny of a complainant's own behaviour, including whether they actively protested the conduct in question, whether they participated in related or similar behaviour in the workplace in the past, and whether they had a prior consensual relationship with the respondent.

Through each of these entry points, gender-based stereotypes about how women, and how victims of sexual harassment or assault, "should" behave, can be introduced. The "hue and cry" stereotype, which posits that "real" victims actively fight back and report their assault immediately, can operate to diminish the credibility of complainants who, for a variety of reasons, may not protest the impugned conduct and may not report their harassment to a co-worker, employer, friends, family or others. The stereotype that women who engage in "risky" behaviour are both more likely to consent and less deserving of belief may arise in contexts where a complainant's past participation or behaviour in inappropriate conduct in the workplace is used to suggest that they therefore "welcomed" the conduct, or that it was therefore unreasonable for the respondent to know that their conduct would be unwelcome. Relatedly, where a complainant has had a prior consensual relationship with the respondent, a "pattern of consent" myth may operate to suggest that they are required to expressly object to future sexual conduct, rather than requiring the respondent to seek affirmative consent for future conduct.

In many of the identified decisions, where a respondent attempted to introduce such stereotypes through their evidence, adjudicators were alive and sensitive to these issues, determining such evidence to be irrelevant to the decision. However, in some cases, adjudicators were confronted with evidence that would be difficult to dismiss in light of the fact that the law governing sexual harassment continues to be formulated to require the complainant to establish that the conduct was unwelcome, rather than adopt an affirmative consent interpretation. Even where a complainant was able to provide credible evidence to overcome such hurdles, they clearly posed difficulties in the analysis that may not otherwise exist in kind or degree.

Finally, despite the fact that the "unwelcome" element has been interpreted as not requiring a complainant to actively protest or expressly object to the impugned conduct, the body of identified decisions illustrate well that the absence of some indicia of active protest or objection created additional difficulties in the analysis, particularly where the conduct at issue was not blatant (i.e., physical touching or overt sexual invitations or advances). This means that, while the conduct that constitutes sexual harassment has expanded beyond narrow understandings linked only to physical conduct and overt sexual invitations (as discussed in Chapter 3), the unwelcome requirement under the law may be operating in a way that continues to privilege those historical modes of sexual harassment, and to limit the success of complaints based on other conduct.

5. Workplace Sexual Harassment Complaints at the BC and Ontario Human Rights Tribunals, 2000-2018: Remedies

Where a human rights complaint is found justified, the Tribunal may order a variety of remedies to the complainant. Some remedies will be based on calculable, pecuniary losses, such as lost wages. Others may include a declaration of contravention of the *Code*, an order to cease and desist the impugned conduct, awards for injury to dignity (non-pecuniary), and other remedies as appropriate. This chapter sets out trends in the remedies awarded by the BC and Ontario Human Rights Tribunals, with a focus on the quantum of injury to dignity awards in each province, and the use of novel prospective remedies to address sexual harassment in the workplace.

Overview

The remedial authority for human rights tribunals is set down in their governing statutes. Where a complaint is found justified, several remedies may be available. Remedies aim to primarily compensate a complainant for discrimination they experienced, though the broad remedial discretion given to human rights tribunals also creates space for prospective remedies in the workplace that may have a future impact in preventing and deterring further discrimination.

In BC, the remedial authority given to the Tribunal is set out under section 37. Under that section, the Tribunal must order the person to cease and refrain from the contravention (s 37(2)(a)), and has several optional remedial powers, including:

- making a declaratory order (s 37(2)(b)),
- ordering compensation for lost wages and other pecuniary losses (s 37(2)(d)(ii)),
- ordering compensation for injury to dignity (s 37(2)(d)(iii)), and
- awarding costs (s 37(4)).

In addition, an adjudicator may make orders that “make available to the person discriminated against the right, opportunity or privilege” that was denied through the discrimination (s 37(2)(d)(i)), and may order the person who contravened the *Code* to take steps to ameliorate the effects of the discrimination, and/or to adopt and implement an employment equity or other program to ameliorate the conditions of disadvantaged individuals or groups (s 37(c)).

The latter ability of the Tribunal to make orders for the person who contravened the *Code* to take steps to ameliorate the discrimination, and/or to implement policies to that effect, provides the Tribunal with broad remedial discretion that can be used to order prospective and novel remedies to address sexual harassment in the workplace moving forward from the complaint. This is significant as it complements the traditional and individualized focus on compensatory damages as a remedy for the past harm, creating space for Tribunals to proactively address systemic behaviour in the workplace.

Ontario’s Human Rights Tribunal possesses similar authority under its provincial legislation. The current provision on remedies under the Ontario *Human Rights Code* permits the Tribunal to order:

- compensation for losses arising from the infringement of their rights, including compensation for injury to dignity,
- restitution other than monetary compensation, and
- an order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with the *Code*

(s 45.2(1)) (2006, c 30, s 5).

As with BC, the Ontario Tribunal may thus order compensatory awards for both pecuniary losses and injury to dignity awards. In addition, as will be examined below, the Ontario Tribunal has also awarded non-pecuniary compensation for reprisal claims. Beyond compensatory awards, the remedial authority granted to the Tribunal is similarly broad, and enables novel remedies that proactively and prospectively address sexual harassment in the workplace. The Ontario Human Rights Tribunal underwent significant changes in 2008; prior to this time, initial applications involved the Commission and were heard before a Board of Inquiry. Under that model, compensatory damages were allocated under different headings, specifically as general damages and damages for mental anguish (1981, c 53, s 40 (1)). Despite distinct headings, these damages were assessed on similar criteria to the current awards for injury to dignity, and will be more fully discussed below.

This chapter discusses, first, the compensatory awards in each of Ontario and British Columbia, explaining the factors the Tribunals use to assess the awards, and analyzing the quantum of awards. Following this, a third section will discuss other and novel remedies awarded by the Tribunals, and comment on their value in proactively and systemically addressing sexual harassment in the workplace.

Non-Pecuniary Compensatory Awards in Ontario

Pre-2008: "General Damages" and "Damages for Mental Anguish"

Similar to BC, general damages (as previously labeled) in Ontario had the primary purpose of "compensat[ing] for the intrinsic value of the infringement of the Complainant's rights" (*Pchelkina v Tomsons*, 2007 HRTO 42 at para 17 [*Pchelkina*]). In assessing a quantum of general damages, the Board of Inquiry and Tribunal drew on several factors, including:

- Humiliation experienced by the complainant;
- Hurt feelings experienced by the complainant;
- A complainant's loss of self-respect;
- A complainant's loss of dignity;
- A complainant's loss of self-esteem;
- A complainant's loss of confidence;
- The experience of victimization;
- Vulnerability of the complainant; and,
- The seriousness, frequency and duration of the offensive treatment

Sanford v Koop, 2005 HRTO 53 at para 35 (synthesizing criteria enunciated in previous cases, including *Colvin v Gillies Hillcrest Variety*, 2004 HRTO 3 at para 246; *Farias v Chuang*, 2005 HRTO 22 at para 236; *Baylis-Flannery v DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28 at para 170; and, *Arias v Desai*, 2003 HRTO 1).

Between 2000 and when the amended version of the Code came into effect on June 30, 2008, "general damages" in the cases identified for this study ranged from \$1000 in *Romano v 1577118 Ontario Inc*, 2008 HRTO 9, to \$27,000 in *Farias v Chuang*, 2005 HRTO 22 [*Farias*] (in which general damages were awarded for both the sexual harassment and related reprisals).

Prior to the change in 2008, in addition to general damages, for which there was no statutorily prescribed cap, an adjudicator could award specific damages for mental anguish, up to \$10,000. For the Tribunal to award damages for mental anguish, it was required to find that the harasser engaged in the infringing conduct "wilfully or recklessly" (Ontario *Human Rights Code*, s 41(1)(b)). While there was some disagreement historically about whether such damages were punitive or aggravated in character,⁷⁴ these damages were considered exceptional and not awarded in all cases.

In order for damages for mental anguish to be awarded, the conduct must be "willful" or "reckless" as noted above. Willfulness has been interpreted as conduct that was "intentional and the infringement was the purpose of the conduct" (*Arias v Desai*, 2003 HRTO 1). Recklessness has been interpreted to mean "disregard or indifference to the consequences or impact on the complainant" (*Fuller v Daoud* (2001), 40 CHRR D/306 (Ont Bd Inq) at paras 94-95 [*Fuller*], quoted in *Farias* at para 249).

In addition to establishing willful or reckless conduct, damages for mental anguish also look to the effects on the applicant, which must be "a relatively high degree of mental pain and distress" (*Fuller* at para 66, quoted in *Pchelkina* at para 20). The Tribunal in *Sanford v Koop*, 2005 HRTO 53 [*Sanford*] consolidated the various factors that it may look to in assessing a damage award for mental anguish. These include (at para 38):

- The immediate impact of the discrimination and/or harassment on the complainant's emotional and/or physical health;
- The ongoing impact of the discrimination and/or harassment on the complainant's emotional and/or physical health;
- Vulnerability of the complainant;
- Objections to the offensive conduct;
- Knowledge on the part of the respondent that the conduct was not only unwelcome but viewed as harassment or discrimination;
- Anxiety caused by the conduct;
- Frequency and intensity of the conduct.

⁷⁴ See, e.g.: *Farias v Chuang*, 2005 HRTO 22 at para 251; *Ketola v Value Propane Inc*, [2002] OHRBID No 14, 2002 CanLII 46511 (ONHRT); *Turnbull v Famous Players Inc*, [2001] OHRBID No 20, 2001 CanLII 26228 (ONHRT); *Smith v Menzies Chrysler Incorporated*, 2008 HRTO 37 at para 38; Michael Hall, "Racial Harassment in Employment: An Assessment of the Analytical Approaches" (2006) 13:2 CLEJ 229 at 240.

In the identified decisions during the period from 2000 until the change in 2008, 17 awards for damages to mental anguish were made. In three cases, the applicant received the highest award (\$10,000) (*Baylis-Flannery v DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28); *Colvin v Gillies Hillcrest Variety*, 2004 HRTO 3; *Sanford v Koop*, 2005 HRTO 53). The lowest award for damages for mental anguish was \$1000 (*Ontario Human Rights Commission v Motsewetshe*, 2003 HRTO 21 [*Motsewetshe*]).

Post-2008: Injury to Dignity awards

Following changes to the *Code* and human rights institutions in the province in 2008, the Ontario Human Rights Tribunal began awarding non-pecuniary damages under the single banner of injury to dignity awards.

The purpose of “injury to dignity” compensation is to provide “an award of monetary compensation for injury to dignity, feelings and self-respect, [which] includes recognition of the inherent value of the right to be free from discrimination and the experience of victimization” (*PT v Rahman Consulting Services*, 2018 HRTO 1566 at para 73 [*PT*]). In assessing injury to dignity awards, a two-step approach is commonly employed, which looks at: “the objective seriousness of the conduct at issue and the effect on the particular applicant who experienced discrimination” (*Arunachalam v Best Buy Canada*, 2010 HRTO 1880 at paras 52-54 [*Arunachalam*]).⁷⁵

In assessing the seriousness of the conduct, the Tribunal has found that circumstances involving few incidents, less serious incidents, and/or incidents that do not include physical touching will attract lower monetary awards, while multiple incidents, serious incidents, physical assault, and/or reprisal or loss of employment will attract high monetary awards (*Valle v Faema Corporation 2000 Ltd*, 2017 HRTO 588 at para 154; *Bento v Manito’s Rotisserie & Sandwich*, 2018 HRTO 203, at para 131). This reflects the approach taken in Ontario that connects the seriousness of the conduct with the assumed effects on the applicant: “[t]he more prolonged, hurtful and serious harassing comments are, the greater the injury to dignity, feelings and self-respect” (*Arunachalam* at para 53).

In assessing the impact on the applicant, the factors expressed in *Sanford* have been adopted, providing continuity between the previously labelled “general damage” awards and the current “injury to dignity” awards (*ADGA Group Consultants Inc v Lane*, [2008] 91 OR (3d) 649 at paras 153-154). Concerns about this assessment, and its subjective focus, have been raised in relation to the privileging of particular impacts looked to in the assessment, as well as in relation to the kinds of evidence needed to establish those impacts. For example, in *MK v 1217993 Ontario Inc o/a Wimpy’s Diner*, 2011 HRTO 705, the adjudicator noted the limitations that the subjective impact analysis has in its individualized and internalized focus: “The concepts of ‘dignity’ and ‘self-respect’, while certainly including factors that are subjective in nature, import considerations that are broader than the individual’s reaction to how he or she was treated. Dignity and self-respect can be diminished by how one is perceived and treated by others, as well as how one feels about that treatment” (at para 43). The subjective impact analysis has been critiqued as privileging particular responses to harassment and discrimination, thus potentially excluding or minimizing the experiences of individuals whose behaviour does not readily conform to the assumed responses.⁷⁶

Awards for sexual harassment at the Ontario Human Rights Tribunal were cited in a recent decision as generally ranging from \$12,000 to \$200,000 since 2010 (*PT* at para 80). The identified cases in this study documented injury to dignity awards ranging from \$1,000 (*Costigane v Nyood Restaurant & Bar*, 2015 HRTO 420) to \$200,000 (*AB v Joe Singer Shoes Limited*, 2018 HRTO 107 [*AB*]).

Trends in non-pecuniary awards, 2000-2018

Given the similarities between the legal principles and criteria for assessing “injury to dignity” awards and the previous category of general damage awards, this section analyzes trends in these awards together. This also facilitates a more direct comparison with the British Columbia cases.

⁷⁵ See also Honor M Lay, “Assessing the Damage: Money Awards by the OHRT in Sexual Harassment Cases” (2019) 9:2 *Western J Leg Studies* 1 at 3, which describes this as an objective assessment into the seriousness of the conduct, and a subjective assessment of the impact on the applicant.

⁷⁶ See, e.g., Lay, *supra* note 75.

Overall, there were 80 non-pecuniary damage awards made in the identified cases from Ontario (accounting for cases with multiple applicants: *Colvin v Gillies Hillcrest Variety*, 2004 HRTO 3 (2 applicants); *OPT v Presteve Foods Ltd*, 2015 HRTO 675 (2 applicants); *Ontario Human Rights Commission v Motsewetshe*, 2003 HRTO 21 (5 applicants); *Gibbons v Sports Medicine Inc*, 2003 HRTO 26 (2 applicants); *JD v The Ultimate Cut Unisex*, 2014 HRTO 956 (3 applicants)).

In addition, there were 2 cases where an application was allowed but compensatory awards were not ordered. In *Earhart v Nutritional Management et al*, 2007 HRTO 31, the Tribunal found that the applicant had not made out the allegations of sexual harassment. However, it did find that the employer's "failure to make any inquiry at all was inconsistent with NMS' own policy and potentially undermined its ability to maintain a harassment-free workplace" (at para 60). As such, while the Tribunal declined to award compensatory damages, it did make an order for the employer to distribute and post its policy (at para 61). Similarly, in *Sutton v Jarvis Ryan Associates*, 2010 HRTO 2421, the Tribunal also found that the applicant had not made out the specific allegations of sexual harassment, but nonetheless found that the corporate respondent should have taken some steps to investigate the internal complaint (at para 143). As a result, while not ordering compensatory damages, the Tribunal did make other remedial orders concerning training and policy development.

Awards ranged from \$1,000 to \$200,000 (unadjusted).⁷⁷ In the identified decisions, total awards for non-pecuniary damages can be broken down as follows:

- 9 awards under \$5000
- 10 awards between \$5000-\$9000
- 16 awards between \$10,000-\$18,000
- 24 awards between \$20,000-\$28,000
- 16 awards between \$30,000-\$45,000
- 5 awards between \$50,000-\$200,000

Awards in Ontario have historically been higher than in BC. In several cases, the Tribunal notes that the quantum of an award should not be too low, as doing so "would trivialize the social importance of the Code by effectively creating a 'license fee' to discriminate" (*Sanford* at para 34, citing also *Shelter Corp v Ontario (Human Rights Commission)* (2001), 39 CHRRD/111 at paras 43-44 (Div Ct), *Gohm v Domtar Inc.* (No 4) (1990), 12 CHRR D/161 at paras 126-127 (Ont Bd Inq), *Gibbons and Ladouceur v Sports Medic Inc* (2003), 48 CHRR D/98 at paras 49-50, *Baylis-Flannery v Walter De Wilde* (No 2) (2003), 48 CHRR D/197 at para 173 (Ont Bd Inq)). This principle, coupled with the historical distinction between general damages and damages for mental anguish, may offer one hypothesis for the higher trends in awards at the HRTO compared to the BCHRT.

Awards at the higher end of the spectrum reflected situations involving physical misconduct, often over a prolonged period of time, and against individuals often in a position of heightened vulnerability, such as due to immigration status (*OPT v Presteve Foods Ltd*, 2015 HRTO 675 [OPT]) or age (*GM v X Tattoo Parlour*, 2018 HRTO 201). For example, in *JD v The Ultimate Cut Unisex*, 2014 HRTO 956, two of the three applicants were awarded \$40,000 for injury to dignity, due to the severity of the harassment, which included solicitations, advances, and physical misconduct, and to reflect the seriousness of the impact on the applicants (see paras 99-101). In *OPT*, findings of serious physical misconduct, coupled with the applicant's unique vulnerability as a temporary migrant worker and the significant impact of the misconduct on her well-being, led to an award of \$150,000. In that case, the Tribunal found that the respondent had abused his position of authority in a manner that was "unprecedented" in comparison to what the Tribunal had seen in previous cases (see paras 215-218). In *AB*, ongoing discrimination, including sexual harassment, over a period of years, coupled with the ongoing negative impact on the applicant's well-being and her vulnerability as both an employee and tenant of the respondent, led to the Tribunal's highest award to date, \$200,000 (see paras 166-173).

⁷⁷ Awards discussed here include global awards made where multiple grounds of discrimination, and/or reprisal, were claimed. As such, in some cases, the quantum of award reflects circumstances beyond those of the sexual harassment, solely. The quantum of awards described in this section also combines general damage awards and damages for mental anguish for pre-2008 decisions.

Injury to Dignity Awards in British Columbia

Injury to dignity awards are a discretionary and compensatory remedy. As succinctly described recently in *Eva obo others v Spruce Hill Resort and another*, 2018 BCHRT 238 at para 240:

Compensation for injury to dignity, feelings, and self-respect is also discretionary and assessed on a case-by-case basis. This award is compensatory, not punitive. The Tribunal has considerable discretion to award an amount it deems necessary to compensate a person who has been discriminated against: *University of British Columbia v. Kelly*, 2016 BCCA 271 (CanLII), paras. 59-64. The Tribunal considers a number of factors, including the nature of the discrimination, the time period and frequency of the discrimination, the impact of the discrimination on the complainant, and the vulnerability of the complainant.

In assessing injury to dignity awards in the context of sexual harassment, the Tribunal may have regard to several factors, including:

- 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; and
- the psychological impact of the harassment upon the victim

Torres v Royalty Kitchenware Ltd. (1982), 3 CCHR D/858 (Ont Bd Inq), cited with approval in, e.g., *Fougere v Rallis and Kalamata Greek Taverna (No 1)*, 2003 BCHRT 23, *Gill v Grammy's Place Restaurant and Bakery*, 2003 BCHRT 88, *Ratzlaff v Marpaul Construction and another*, 2010 BCHRT 13, and *McIntosh v Metro Aluminum Products and another*, 2011 BCHRT 34.

In the justified complaints for workplace sexual harassment identified, a total of 49 injury to dignity awards were made (accounting for the two cases involving multiple complainants: *Tannis et al v Calvary Publishing and Robbins*, 2000 BCHRT 47 (4 complainants); and, *Young and Young on behalf of Young v Petres*, 2011 BCHRT 38 (2 complainants)). These awards ranged from \$800 to \$50,000 (unadjusted),⁷⁸ and can be broken down as follows:

- 14 awards from \$800-\$3700
- 22 awards from \$4000-\$5000
- 6 awards from \$6000-\$7500
- 7 awards from \$10,000-\$50,000

Awards at the upper end of the range tended to reflect serious misconduct, prolonged harassment, severe psychological impact to the complainant, multiple grounds of discrimination, or a combination of these and other factors. For example, in *Gill v Grammy's Place Restaurant and Bakery*, 2003 BCHRT 88, the Tribunal awarded the complainant \$10,000 (the highest award to date at the time: at para 153), based on the duration of the harassment, as well as the severity of the impact on the complainant's psychological well-being (see paras 145-155). The conduct at issue in that case involved multiple instances of both verbal and physical harassment. See, relatedly, *Harrison v Nixon Safety Consulting and others (No 3)*, 2008 BCHRT 462.

Similarly, in *McIntosh v Metro Aluminum Products and another*, 2011 BCHRT 34 [*McIntosh*], the adjudicator found the respondent's repeated and persistent sexual invitations and comments to be of a "serious nature", aggressive in tone, provocative and demeaning (at para 153). This conduct took place over approximately three months. The adjudicator also found that the complainant had particular vulnerabilities: the power imbalance between her and the respondent; a medical condition exacerbated by the stress caused by the harassment; and, reliance on her employment (at para 156), in addition to accepting the complainant's evidence of the emotional and psychological impact the prolonged harassment had on her (at para 157). These factors led to an award of \$12,500.

⁷⁸ Awards discussed here include global awards made where multiple grounds of discrimination, and/or retaliation, were claimed. As such, in some cases, the quantum of award reflects circumstances beyond those of the sexual harassment, solely.

Decisions where physical misconduct amounting to sexual assault was found have attracted the highest injury to dignity awards. In *Ratzlaff v Marpaul Construction and another*, 2010 BCHRT 13 [*Ratzlaff*] (\$25,000), multiple incidents of physical touching and escalating behaviour were involved (at para 36), culminating in a serious incident of sexual assault. In addition to the significant negative impact the harassment had on the complainant and her family, she was also particularly vulnerable given that her work required her to travel, which also limited her ability to avoid the respondent (at para 40), and because the respondent held a position of authority over her (at para 41). In *PN v FR*, 2015 BCHRT 60, the complainant experienced sexual assault and exploitation over a period of six weeks of employment as a live-in caregiver (see paras 132–137). She also experienced heightened vulnerability due to her immigration status (at para 135). The psychological impact was severe and long-lasting (at para 134). Like in *Ratzlaff*, the complainant was described as being isolated and intimidated by her harasser, who was also her employer, and in whose home she lived (at para 137). As a result, the Tribunal awarded \$50,000 for injury to dignity (at para 137).

Overall, the quantum of awards in BC is lower than Ontario (see below), but similarly privileges particular kinds of evidence and misconduct in evaluating awards. Injury to dignity awards focus substantially on the impact to the complainant, as intended by human rights law. However, this focus, described in the factors used to assess such awards, can create further space for assumptions and stereotypes about victimhood to enter the analysis.⁷⁹ While a subjective analysis of the impact of the harassment on the individual complainant is necessary and important, given the objectives of human rights law, this can allow for assumptions and stereotypes about victim behaviour to influence the analysis. First, such an approach may unintentionally punish stoic complainants. Second, this approach may unintentionally link the type of misconduct to expected impacts, privileging physical sexual misconduct over other forms of harassment.

Physical harassment, often seen as more serious misconduct, tends to attract higher awards, although *McIntosh* illustrates the kind of situation in which verbal harassment may attract a higher injury to dignity award. The apparent trend in privileging physical harassment over verbal harassment, as was discussed in Chapter 3, can be problematic where it leads to assumptions regarding the impact on a complainant. It can also support notions that sexual harassment exists on a “spectrum”, and that physical harassment will be assumed, absent evidence to the contrary, to be more severe than verbal harassment. This deflects attention away from the highly contextual nature of harassment and discrimination, and from a focus on the impact to the individual complainant, which human rights law has as its central aim.

Further, complainants who are able to lead certain kinds of evidence, such as medical documentation, may be better positioned to establish the impact of the harassment on their well-being, with the result that complainants unable to tender such evidence may receive lower injury to dignity awards. The reliance on a complainant to tender evidence to establish their “traumatization” has been cited as creating access to justice barriers for individuals unable to tender medical documentation.⁸⁰

Finally, the lower awards in BC, while reflective of a focus on the impact of the discrimination on the complainant, may be missing an opportunity to create a broader deterrent effect. Although human rights law is not focused on the conduct or intent of the perpetrator, Ontario’s approach does acknowledge the misconduct of the respondent and the need to deter others from discriminating in its remedial analyses (see, e.g., *Sanford* at para 34). This may, in part, account for its higher awards. In contrast, in BC, lower compensatory awards may not provide a meaningful incentive to deter discrimination, and may not communicate the seriousness of discrimination.

Prospective Remedies to Address Sexual Harassment in the Workplace

A number of cases included remedies that aimed to prospectively address sexual harassment in the workplace, and provide novel and unique opportunities for human rights tribunals to make broader impacts, beyond those on the individual complaint. This is a power that should be highlighted and sought out with greater frequency in future cases. While the Ontario Human Rights Tribunal made frequent use of such remedies, the BC Human Rights Tribunal did so in only a few cases. This section provides an overview of the various novel remedies that have been sought and/or awarded in the identified decisions.

In addition to compensatory remedies, the Ontario Human Rights Tribunal has broad remedial authority to direct a party “to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with the *Code*”. Such orders

⁷⁹ See, e.g., *Lay*, *supra* note 75.

⁸⁰ *Lay*, *supra* note 75 at 8–9, 14–17.

should be “reflective of the facts in the case, should be remedial, not punitive and should focus on ensuring that the key objects of the *Code*, to eradicate discrimination and to ensure future compliance, are achieved in the particular circumstances” (*Frolov v Mosregion Investment Corporation*, 2010 HRTO 1789 at para 109, citing *Giguere v Popeye Restaurant*, 2008 HRTO 2 at para 91). As set out below, this remedial discretion has resulted in extensive and frequent use of prospective remedies to address discrimination in a systemic and future-oriented manner in the workplace.

In its publication, *Human Rights at Work*,⁸¹ the Ontario Human Rights Commission describes various remedies beyond compensatory awards that the Tribunal may order in order to achieve the broader goals of protecting the public interest and preventing further or future discrimination. These remedies include:

- Chang[ing] policies that have been found to be discriminatory or have a discriminatory impact;
- Put[ting] in place training initiatives (this may include requirements to hire a consultant, involve the claimant in designing such training and/or make such sessions mandatory for employees);
- Set[ting] up a process for resolving internal human rights complaints [(t)his could include a requirement to have complaints of workplace harassment and discrimination investigated or mediated by an external third party];
- Develop[ing] and introduc[ing] effective anti-discrimination and harassment policies [...] [(t)his may include a requirement] to hire a consultant [...] [and/or the requirement] to include compliance with such policies as an element of the [formal] performance appraisals [...] []];
- Monitor[ing] of compliance with the terms of an order or settlement (for example, reporting to the Tribunal or a third party designated by the Tribunal) on an ongoing basis;
- Mak[ing] available the Tribunal’s decision, or a summary of it, in the workplace and bring[ing] it to the attention of employees.⁸²

Many of these remedies were identified in Ontario decisions, and a few in the BC decisions. These remedies provide a strong roadmap for the ways in which a Tribunal can have broader and prospective impact on sexual harassment in the workplace. This section divides a discussion of these various remedies into the broad categories of “training and education”, and “workplace anti-harassment policies”.

Training and education

Remedies concerning training and education may be requested or ordered to guard against further or future harassment. For example, in *Leblanc v Dan’s Hardware et al*, 2001 BCHRT 32, participation in a harassment awareness and sensitivity training program was ordered as a remedy (at para 167) (see also, in the Ontario context: *deSousa v Gauthier*, 2002 CanLii 46506).

Ontario decisions have frequently made use of remedies ordering the development and implementation of training and education materials and programs in relation to workplace policies, sexual harassment, and human rights law in the province. Training has also been ordered for both individual respondents and broader populations of workers, including employees and managers: *Dix v The Twenty Theatre Company*, 2017 HRTO 394; *Xu v Quality Meat Packers Ltd*, 2013 HRTO 533; *Frolov v Mosregion Investment Corporation*, 2010 HRTO 1789; *Pchelkina v Tomsons*, 2007 HRTO 42; *Vipond v Ben Wicks Pub and Bistro*, 2013 HRTO 695; *de los Santos Sands v Moneta Marketing Solutions Inc*, 2016 HRTO 271; *Granes v 2389193 Ontario Inc*, 2016 HRTO 821; *Bento v Manito’s Rotisserie & Sandwich*, 2018 HRTO 203; *Chualvo v Toronto Police Services Board*, 2010 HRTO 2037; *Kerceli v Massiv Automated Systems*, 2016 HRTO 1324; *Perry v The Centre for Advanced Medicine*, 2017 HRTO 191; *Arias v Desai*, 2003 HRTO 1; *Harriott v National Money Mart*, 2010 HRTO 353; *Qiu v 2076831 Ontario Ltd*, 2017 HRTO 1432; *Smith v The Rover’s Rest*, 2013 HRTO 700; *SH v M[...] Painting*, 2009 HRTO 595; *Baylis-Flannery v DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28; *Smith v Menzies Chrysler*, 2009 HRTO 1936; *Colvin v Gillies Hillcrest Variety*, 2004 HRTO 3; *Ontario Human Rights Commission v Motsewesho*, 2003 HRTO 21.

The Ontario Human Rights Tribunal has also drawn on Commission resources in ordering specific remedies related to training and education. The Ontario Human Rights Commission provides e-learning modules through its website,⁸³ which have been ordered as part of training and education-based remedies: *Frolov v Mosregion Investment Corporation*, 2010 HRTO

⁸¹ *Human Rights at Work*, 3rd ed (Ontario: Ontario Human Rights Commission, 2008), online: <<http://www.ohrc.on.ca/en/iv-human-rights-issues-all-stages-employment/12-resolving-human-rights-issues-workplace>>.

⁸² *Ibid.*

⁸³ “E-learning: Human Rights 101” (last visited 15 August 2019), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/learning/human-rights-101>>.

1789; *Shinozaki v 2252419 Ontario Inc cob Hotlomi Spa*, 2013 HRTO 1027; *Sutton v Jarvis Ryan Associates*, 2010 HRTO 2421. In addition, two Ontario decisions ordered the employer to post “Code cards” which provide a statement on compliance with the *Human Rights Code* as well as contact information for relevant bodies (*Pchelkina v Tomsons*, 2007 HRTO 42; *Shinozaki v 2252419 Ontario Inc cob Hotlomi Spa*, 2013 HRTO 1027).⁸⁴

In BC, one identified case also ordered the distribution of the written decision, which may provide an effective method to notify and educate other workers about the existence of sexual harassment in their workplace. In *Soroka v Dave’s Custom Metal Works and others*, 2010 BCHRT 239, the respondent was ordered to distribute a copy of the decision to all of its employees as a means to ensure that “other employees are aware of what she experienced” (at para 81) (in the Ontario context, see also: *Motsewesho*). This can have both an educational and deterrent effect against future harassment in the workplace.

The above data concerning training and education remedies evidences Ontario’s proactive use of its broad remedial discretion to order prospective remedies aimed at preventing further and future harassment in the workplace. As noted above, remedies to require training and related education have been ordered both for specific respondents as well as for broader populations of workers in the enterprise, such as for all managers, or all employees. This is significant as it works towards addressing sexual harassment as a systemic and institutional issue,⁸⁵ not only as an individualized matter.

The remedial authority given to the BC Human Rights Tribunal under section 38(c), to “order the person who contravened the *Code* to take steps to ameliorate the effects of the discrimination, and/or to adopt and implement an employment equity or other program to ameliorate the conditions of disadvantaged individuals or groups”, may provide legal grounding for ordering remedies concerning training and education with greater frequency in individual complaints. Further, the reinstatement of a human rights commission in the province may provide needed support to develop educational and training materials that could be drawn on in this regard.

Workplace anti-harassment policies

Complainants may also be able to request the implementation of a workplace sexual harassment policy. Although workplaces are now required to have general anti-harassment policies under occupational health and safety legislation,⁸⁶ policies to specifically address sexual harassment can be beneficial, both as a signal of the importance of this issue in the workplace, and as an educational tool for employees. In *McIntosh*, the complainant requested an order for the employer to implement a workplace policy regarding sexual harassment (at para 149). This order was declined given that no evidence had been led regarding any human rights policies that might be in effect at the place of employment (at para 149), although the adjudicator did strongly encourage the employer to implement such a policy if it did not, in fact, already exist (at para 149). This suggests that if a complainant can lead evidence to establish that such a policy does not exist (or, perhaps, lead evidence to establish the inadequacy of an existing policy), the BC Tribunal may be able and willing to order such a remedy.

In Ontario, the Tribunal’s remedial authority appears to allow it to order policy development and implementation whether or not a party requests this or leads specific evidence on the matter. In *Panucci v Seller’s Choice Stockdale Realty Ltd*, 2015 HRTO 1579, the Tribunal ordered implementation of a policy “aimed at preventing and addressing sexual harassment in the workplace” which contained information for all employees about their rights and obligations under the *Code* with respect to sexual harassment (at para 99). It is unclear from the decision whether this remedy had been requested, and whether the applicant led any particular evidence about the absence of a policy. For additional decisions ordering policy development and implementation in Ontario, see: *GG v [...] Ontario Limited*, 2012 HRTO 1197; *Vipond v Ben Wicks Pub and Bistro*, 2013 HRTO 695; *Granes v 2389193 Ontario Inc*, 2016 HRTO 821; *Crete v Aqua-Drain Sewer Services Inc*, 2017 HRTO 354; *Perry v The Centre for Advanced Medicine*, 2017 HRTO 191; *Arias v Desai*, 2003 HRTO 1; *MK v 1217993 Ontario Inc o/a Wimpy’s Diner*, 2011 HRTO 705; *Smith v Menzies Chrysler*, 2009 HRTO 1936; *Ontario Human Rights Commission v Motsewesho*, 2003 HRTO 21; *Sutton v Jarvis Ryan Associates*, 2010 HRTO 2421.

⁸⁴ “Human Rights Code Cards” (last visited 15 August 2019), online: Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/human-rights-code-cards>>.

⁸⁵ See Sheppard, “Systemic Inequality”, *supra* note 4.

⁸⁶ See: In BC, see the BC Reg 296/97 Guidelines (G-D3-115(1)-3 Bullying and Harassment), online: Work Safe BC <https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-guidelines/guidelines-for-workers-compensation-act#SectionNumber:G-D3-115_1-3>; and in Ontario, the Occupational Health and Safety Act, RSO 1990, c. O.1, 32.0.6.

In some Ontario decisions, adjudicators also ordered employers to review existing harassment policies (*Ibrahim v Hilton Toronto*, 2013 HRTO 673; *Ford v Nipissing University*, 2011 HRTO 204; *Harriott v National Money Mart*, 2010 HRTO 353), and to distribute copies of its policies to all employees and/or post copies of its policies in the workplace (*Earhart v Nutritional Management et al*, 2007 HRTO 31; *Ratneiya v Daniel Krumeh*, 2009 HRTO 1824; *Harriott v National Money Mart*, 2010 HRTO 353).

As with training and education-related remedies, the Ontario Human Rights Tribunal appears to be active in its use of remedies concerning workplace anti-harassment policies. In addition to ordering policy development and implementation, it has also used its remedial authority to order review and distribution of existing policies. Again, like with training and education, these remedies can work towards a systemic and institutional response to sexual harassment in the workplace.

In BC, while the Tribunal in *McIntosh* appeared hesitant to order the development of a sexual harassment policy absent evidence supporting the request, its remedial authority under section 37(c) of the *Human Rights Code* may provide legal grounding for ordering such remedies, as well as remedies related to the review and/or distribution of existing policies, as has been done in Ontario. Clarifying the Tribunal's authority to grant such remedies, and under what conditions, may enable greater access to prospective remedies.

Conclusion

This chapter has outlined the remedies available where a complaint of sexual harassment is found justified by a human rights tribunal. Both BC and Ontario provide compensatory damages in the form of injury to dignity awards. BC and Ontario employ similar factors in their assessment of these damages awards. While Ontario awards were higher on average, both BC and Ontario followed a similar pattern in the scale of awards, with awards at the higher end of the scale reflecting cases involving serious physical misconduct, often over a prolonged period of time and against a vulnerable individual. As discussed above, the determination of injury to dignity awards may inadvertently privilege particular conceptions of victimhood or unintentionally rely on gender stereotypes in assessing the impact on the complainant, and in the evidence required for a complainant to establish this impact.

In addition to monetary awards, each of the Tribunals has authority to award remedies that may prospectively address and deter sexual harassment in the workplace. Ontario has been particularly active with this remedial authority. Remedies under this umbrella included: mandatory training and education on sexual harassment, discrimination more generally, and human rights law; and, development and revision of workplace policies concerning sexual harassment and discrimination. These kinds of remedies aim to deter and prevent further and future sexual harassment in the workplace, both by the individual respondent and other employees and managers. As such, these kinds of prospective remedies may have lasting impact and do some work towards addressing workplace sexual harassment as an institutional and systemic issue, not only an individual one.

Conclusion and Recommendations

This report set out to examine how sexual harassment law is interpreted and applied at the BC and Ontario Human Rights Tribunals. Specifically, through an analysis of substantive decisions on the merits from 2000-2018, this report aimed to identify and discuss whether, and to what extent, gender-based myths and stereotypes might influence the interpretation and application of sexual harassment law. As this report has demonstrated, the legal principles governing sexual harassment complaints under human rights law provide space in which gender-based myths and stereotypes may impact the analysis and outcome of cases, especially in relation to the requirement that the complainant establish that the conduct complained of was “unwelcome”. This chapter summarizes the main findings from the previous chapters and, based on these findings, sets out a number of recommendations for policy-makers, adjudicators, lawyers and others.

Summary of Findings

Chapter 2 set out the dominant trends and characteristics of the identified case set, which included only substantive decisions on the merits concerning workplace sexual harassment complaints at the BC and Ontario Human Rights Tribunals from 2000-2018. As discussed in that chapter, cases which proceeded to a full hearing tended to more often be resolved in favour of the complainant (68% in BC and 64% in Ontario). Cases brought by self-represented complainants deviated from the overall success rate, with 43% of cases in BC, and 59% in Ontario, being resolved in favour of a self-represented complainant. Characteristics of the complaints largely mapped onto those noted in existing literature. The majority of complainants in each jurisdiction identified as female (65 of 69 complainants in BC, and 111 of 125 applicants in Ontario), which aligns with existing literature that documents the historical and contemporary understandings of workplace sexual harassment as a dominantly gendered issue. The alleged harasser was often a person in a position of authority in the workplace (51 cases in BC, and 86 cases in Ontario), such as a supervisor or manager, which aligns with existing literature that discusses multiple ways in which sexual harassment is ultimately an assertion of power (though this is not limited to economic or formal hierarchical power in the workplace). Finally, the industries and occupational roles of the complainant in each jurisdiction mirrored identified trends that note heightened vulnerability to sexual harassment in subordinated positions, particularly administrative work in office settings, in service-oriented work, such as in the restaurant industry, and in historically male-dominated industries, such as construction, trades and resources.

As discussed in Chapter 1, BC and Ontario adopt distinct approaches to the codification of sexual harassment in human rights law. While Ontario sets out explicit statutory provisions concerning sexual harassment in the workplace under the Ontario *Human Rights Code*, BC has not codified sexual harassment as a specific provision under its *Human Rights Code*. Rather, BC adopts the definition laid down in *Janzen v Platy Enterprises*, [1989] 1 SCR 1252, 59 DLR (4th) 352 to guide its analysis of sexual harassment complaints, which are brought broadly as discrimination complaints on the basis of sex. Despite these distinct approaches, this report discussed the doctrinal similarities between the jurisdictions in Chapter 1. The laws in each jurisdiction require three specific elements to meet the definition of sexual harassment: (1) prohibited conduct; (2) that the respondent knows or ought to know is unwelcome; and, (3) adverse consequences for the complainant. Similarities concerning the influence of gender-based myths and stereotypes were further identified in each jurisdiction, as discussed in Chapters 3, 4 and 5.

As examined in Chapter 3, both BC and Ontario give expansive doctrinal interpretations to the kind of conduct that may constitute sexual harassment. While physical misconduct, and *quid pro quo* harassment (explicit sexual advances, invitations or demands from a person in a position of authority) were readily understood as constituting sexually harassing conduct in each jurisdiction, verbal and visual misconduct produced greater difficulties and complexities. Given that both jurisdictions have, in most circumstances, attached a “persistence” requirement to establishing harassment on the basis of verbal conduct alone, verbal communications that were explicitly sexual or derogatory in nature were often understood as constituting sexual harassment where there were multiple incidents or instances of such conduct. While BC has adopted this requirement through case law, Ontario’s *Human Rights Code* has codified the “persistence” requirement by requiring a “course” of vexatious comment or conduct. Verbal conduct that was more subtle or covert in nature, or not specifically or directly targeted at the complainant, required deeper analysis to determine whether, in the case at hand, it constituted sexual harassment. Finally, visual communications were treated disparately depending on the particular factual allegations and surrounding context, and were considered in only a few cases.

While the array of conduct that might be considered as sexual harassment is broad, as demonstrated in the existing cases and affirmed by the interpretation of the legal principles in each jurisdiction, the analysis of conduct reveals some issues.

First, the persistence requirement for verbal conduct may pose a challenge in determining whether and when a single comment is “sufficiently egregious” to constitute harassment. This provides a potential entry point for gender-based myths and stereotypes about victimhood to enter an analysis, and may also deflect focus away from the subjective nature of anti-discrimination law, which centres its analysis on the impact on the complainant, not the conduct of the perpetrator. The language used to identify when a single comment will be “sufficiently egregious” to constitute harassment may shift analyses towards an evaluation of the severity of a respondent’s behaviour rather than focusing on the impact of said comment on the complainant. Furthermore, where the analysis does focus its attention on the impact on the complainant, assumptions about victim behaviour, gender, and the “reasonable person” may influence the analysis and determination of whether a comment is “sufficiently egregious”, and colour the way in which a complainant’s subjective experience is interpreted or understood. This also illustrates one way in which an assessment of conduct is implicitly linked to an assessment of the “unwelcome” requirement and credibility determinations.

In addition to the above-noted issue, the assessment of conduct often required an assessment of credibility, given that many cases of sexual harassment relied on the testimony of witnesses alone. Whether or not events occurred, or occurred in the manner that the complainant perceived, were thus often determined based on the perceived credibility of the parties. This creates space in which gender-based myths and stereotypes may impact the analysis as they may influence the assessment of credibility, particularly as concerns assumptions about victim behaviour, as was dealt with directly in Chapter 4.

As discussed in Chapter 4, the requirement that a complainant establish that the impugned conduct was “unwelcome” provides the most direct and expansive space for gender-based myths and stereotypes to influence the analysis and outcome of sexual harassment complaints. This requirement focuses direct attention on a complainant’s own behaviour, and essentially requires them to establish the absence or negation of consent, rather than adopting an affirmative consent standard. Although the legal principles have been doctrinally interpreted as not requiring active protest or express objection, the absence of evidence of such protests or objections proved problematic in some cases.

As with issues in assessing a complainant’s subjective experience of conduct, the “unwelcome” requirement created space in which behaviour or response that deviated from assumptions and stereotypes concerning victimhood could be scrutinized and critiqued as evidence that the conduct in question was not “unwelcome”. For example, where a complainant did not promptly report the harassing conduct to a co-worker, manager or another person, this could be used to suggest that the conduct must not have been unwelcome. While respondents in many cases attempted to use such arguments, some decisions explicitly rejected these lines of inquiry and explained the fallacies of such an approach. In other cases, a lack of reporting (the “hue and cry” stereotype), coupled often with other factors signaling credibility issues, was mentioned in a credibility assessment where a complainant had their credibility doubted.

Where complainants had previously participated in related or similar behaviour in the workplace, this was also often noted in assessing whether the impugned conduct was reasonably known to be “unwelcome”. In other words, where a complainant had displayed related or similar behaviour, such as engaging in sexual banter or jokes, this was used as evidence to suggest that it would not be reasonable for the respondent to know that the impugned conduct (even if distinct in nature, degree or time) would be “unwelcome”. This allows for the introduction of gender-based stereotypes that suggest a “pattern of consenting” or that suggest that participation in related behaviour makes a complainant both more likely to consent and less worthy of belief. Together, those myths may have a powerful impact on the assessment of the complainant’s credibility and the analysis of the “unwelcome” requirement. Problematically, this may work to excuse conduct that would otherwise be considered sexual harassment.

Finally, respondents in some cases attempted to normalize a sexualized work environment in order to excuse their conduct and argue that, in that environment, it would not be reasonably understood as “unwelcome”. Although this does not create as direct an entry point for gender-based myths as the previous issues discussed above, it nonetheless creates problems where the workplace is taken as neutral backdrop for assessing the complaint, as it may require a complainant to actively protest the conduct (contributing to the potential for reliance on a “hue and cry” stereotype), or may inadvertently responsabilize a complainant who “chose” to work in such an environment (which, indirectly, further supports possible use of a “hue and cry” stereotype, by implying that the onus would be on the complainant to voice their objection to the conduct or general workplace environment).

While in many cases, adjudicators displayed attentiveness and sensitivity to these issues, and actively resisted attempts by respondents to craft arguments that relied on the above gender-based myths and stereotypes, there remain enduring

issues in this regard. Respondents are able to continue putting forth such arguments because of the specific language adopted in respect of sexual harassment complaints in human rights law. That language, which requires a complainant to establish that the conduct was “unwelcome”, absent active protest or express objection, directly creates space in which a respondent can argue that they did not understand, nor would a reasonable person understand, the conduct to be unwelcome because of the complainant’s own behaviour (or lack thereof). This creates active space in which to scrutinize a complainant’s own behaviour and thus to introduce gender-based myths and stereotypes into the analysis.

While existing doctrinal approaches might provide adjudicators with a firm foundation for rejecting such arguments in the context of a supervisory relationship, which attracts higher expectations in terms of conduct vis-à-vis subordinate employees, where the alleged harasser is a co-worker, these arguments may create greater difficulty. Where the alleged harasser is in a position of authority, an adjudicator may be able to rely on that role as evidence of what a “reasonable person” would know to be unwelcome, given general expectations that continue to attach to employment relationships with a power imbalance. However, adjudicators cannot rely on job role or workplace authority in analyzing the “unwelcome” requirement for co-worker harassment, which may create difficulties where a complainant does not clearly protest or object to the conduct in question, does not promptly report it, or where they may appear to engage with it to some degree, even if this is a strategy of resistance. In these contexts, especially, the legal principles place an undue burden on complainants to explain and defend their behaviour in response to the sexually harassing conduct, rather than focusing attention on the alleged harasser.

Each of the above-noted issues concerning the “unwelcome” requirement and gender-based myths and stereotypes, examined in Chapter 4, ultimately create the potential for these problematic myths and stereotypes to influence credibility assessment. As discussed earlier, this, in turn, can colour the analysis of the impugned conduct, as well. As such, the element of sexual harassment law that requires the complainant to establish that the conduct in question was, or ought reasonably to have been known to be, “unwelcome” is, as Chapter 4 concluded, the most influential aspect of the law, both doctrinally and in practice, as relates to the possible introduction of and reliance on gender-based myths and stereotypes in evaluating sexual harassment complaints under human rights law.

Finally, Chapter 5 examined the remedies awarded in justified complaints of workplace sexual harassment across the identified case set. The remedial authority and legal principles governing remedies in each jurisdiction was quite similar, though Ontario was found to both award higher compensatory damages and make more frequent use of prospective remedies. In addition to pecuniary losses, such as lost wages, remedies for justified discrimination complaints, including sexual harassment complaints, primarily focus on injury to dignity awards, which aim to compensate a complainant for the non-pecuniary loss they experience as a result of the discrimination.

The quantum of injury to dignity awards is substantially higher in Ontario than BC, though the distribution of awards followed a similar pattern in each jurisdiction. Physical misconduct amounting to sexual assault attracted the highest awards. These cases also often involved factors such as: heightened vulnerability of the complainant due to age, status, or location; multiple occurrences of the misconduct over a period of time; and/or, severe and lasting psychological impact on the complainant. Explicit sexual advances or invitations, particularly where made by a person in a position of authority, where there was an on-going pattern of conduct, and/or where the complainant had particular characteristics of vulnerability, often attracted awards beyond the minimal range. Awards at the low end of the range tended to reflect “minor” incidents, often limited in time and duration, verbal in nature, not perpetrated by a person in a position of authority, and where the complainant did not establish lasting negative impacts to their well-being. Quantum of awards may also be impacted by evidence a complainant is able to marshal that establishes the negative impacts that they have experienced as a result of the harassment. This may inadvertently depress awards for complainants who are unable to lead such evidence, whether due to cost, availability of resources, or other reasons why they may not seek out such resources. Reliance on such evidence may also support assumptions and stereotypes concerning victimhood and signal a privileging for performances of traumatization. As a result, complainants who deviate from expected or privileged behaviour, such as through stoicism or a rejection of formal mental health intervention, may be disadvantaged at the remedy stage.

In addition to injury to dignity awards, human rights tribunals are equipped to make a variety of other remedial orders that may work towards proactively addressing and deterring future sexual harassment in the workplace. Ontario’s Human Rights Tribunal was particularly active in this regard, making such remedial orders in 39 of 74 allowed applications. These orders included a variety of training and education requirements, as well as policy development, implementation and revision. Training or education was ordered both for specific parties (often respondents) and broader groups of workers at the business (such as managers), in relation to both sexual harassment, specifically, and discrimination and human rights law

more generally. These orders can assist in prospectively addressing sexual harassment in the workplace through education and knowledge-building, and by signaling the importance of the issues by requiring employees to undergo training about it. Policy development, implementation and/or revision was also sometimes ordered, specifically in relation to sexual harassment. As discussed in Chapter 5, this is a remedy that can have significance for both prospectively deterring future harassment, and for grounding legal complaints in the future. BC ordered similar remedies in a small number of cases, but did not make as frequent use of such orders, and suggested in at least one case that a complainant may be required to lead specific evidence supporting requested remedies of this kind.

Based on these findings, the next section discusses a variety of recommendations that may work to improve the adjudication of sexual harassment complaints at human rights tribunals, as well as recommendations for law reform and related activities.

Recommendations

In line with the above summary of findings, this section sets out recommendations aimed at responding to noted gaps or issues with the legal principles, their interpretation and application, as well as broader recommendations to improve the effectiveness of responses to and prevention of sexual harassment in the workplace as related to the findings of this report.

Recommendation 1: Remove the requirement for a complainant to establish that the impugned conduct was “unwelcome”

As noted above, the current formulation of the law, which requires a complainant to establish that the impugned conduct was “unwelcome”, creates the most potential for gender-based myths and stereotypes to influence the arguments, analysis and outcome of cases. As such, this report recommends removing this requirement.

Rather than requiring a complainant to establish that the conduct in question was “unwelcome”, the law could move towards adopting an affirmative consent standard, as has been done in the criminal law context. This would allow the introduction of arguments and evidence that establish consent to the conduct in question, while also limiting the space in which gender-based myths and stereotypes can play an active role in the legal arguments and analysis. This further aligns with existing anti-discrimination law, which does not require a complainant to generally establish a lack of consent, but allows a respondent to justify their conduct where it would otherwise constitute discrimination (see, e.g., *Moore v British Columbia*, 2012 SCC 61, [2012] 3 SCR 360; *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3; *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 SCR 561).

Where, as in Ontario, explicit statutory language prohibiting sexual harassment exists, this recommendation could be implemented through legislative intervention. While this report found that there were not significant differences in the interpretation and application of sexual harassment law between the Ontario and BC Tribunals, Ontario’s approach of adopting specific statutory language does allow for amendments through the legislative process.

In addition to legislative intervention, BC could work towards such a change by establishing guidelines through the forthcoming Human Rights Commission, or through the use of common law reasoning and precedent by adjudicators. While one Ontario decision did explicitly reject the notion that an affirmative consent standard exists in sexual harassment claims, in BC, a foundation for moving towards this standard may exist in the way that the “unwelcome” standard has been interpreted in, for example, *Q v Wild Log Homes and another*, 2012 BCHRT 135, which found that the impugned conduct was, absent explicit consent, clearly unwelcome in the modern workplace (see para 144).

In the absence of altering the legal principles concerning the “unwelcome” requirement, further consideration should be given as to how a complainant may effectively establish this requirement in the absence of evidence of express objection or active protest. Further consideration should also be given as to how to avoid the potential introduction of and reliance on gender-based myths and stereotypes in this analysis.

Recommendation 2: Expand the conduct element of the law to clearly encompass visual communications and sexualized workplace environments as constitutive of sexual harassment

Although the requirement to establish the impugned conduct (in BC, conduct of a sexual nature, and in Ontario, a course of vexatious comment or conduct) presented few issues outside of those linked to credibility and the “unwelcome”

requirement, as discussed earlier, this report did find that alleged misconduct which was not highly individualized or directly targeted towards the particular complainant presented some issues in applying the law. Specifically, where visual communications such as pornography generally displayed in the workplace were at issue, this was, on its own, not clearly encompassed by the legal definition of sexual harassment. Relatedly, institutionalized sexualization of the workplace was not clearly identified as harassment in all contexts and was sometimes taken as neutral backdrop for assessing individual conduct.

Anti-discrimination law has primarily adopted an individualized framework for assessing complaints, relying on a “sole bad actor”⁸⁷ and on misconduct targeted at a specific complainant. However, evolving understandings of discrimination, equality and human rights have expanded to include systemic and institutional dimensions as significant sites of discrimination and inequality, and as integral components of effective responses. As such, this report recommends expanding the interpretation of sexually harassing conduct to encompass these factual contexts.

Where an individual displays visual communications, such as pornography, in the workplace, whether or not this is targeted towards another specific individual, that conduct may produce or contribute to a hostile or poisoned work environment. This should not, on its face, be excluded from legal understandings of sexual harassment, and it should be factored into legal analyses in complaints of sexual harassment. Similarly, workplace environments that normalize or institutionalize sexual behaviour should not be taken as neutral backdrop, and should, where an employer fails to properly address this, be sufficient to form the basis of a human rights complaint. Expanding the legal definition of sexual harassment to include this kind of environment may be particularly useful in BC, where group complaints can be brought under the *Human Rights Code*.

Existing legal principles, such as the *Pardo* factors used to determine when a single incident constitutes harassment (see *Pardo v School District no 43*, 2003 BCHRT 71 at para 12), and the related persistence requirement for non-physical misconduct, provide boundaries that could work similarly for visual communications and related environmental concerns. Though these existing principles may be applied in ways that raise other issues, and therefore require careful attention, as discussed in this report, their existence plays an important role, and one which could extend to these types of misconduct, thereby allaying concerns about over-extending the legal definition of sexual harassment.

Recommendation 3: Make use of remedial orders beyond compensatory awards

As noted in Chapter 5, human rights tribunals have broad remedial authority and discretion. Ontario has made regular use of this to order remedies that prospectively address sexual harassment in the workplace, such as through training and education requirements, and policy development and review. All tribunals should make use of their remedial authority and discretion to regularly order similar remedies that assist in proactively addressing and deterring future sexual harassment in the workplace, and work towards a cultural shift concerning behaviour expectations and gender norms in the workplace.

Specifically, the Tribunals should, for each justified complaint, consider ordering the following remedies: completion of training or educational programming specific to sexual harassment and sex discrimination by the respondents and other employees and managers in the workplace; the requirement to display cards with information on human rights in the province in the workplace; the requirement to post and distribute a copy of the decision in the workplace for all employees; the requirement to develop and implement a workplace policy specific to sexual harassment, which outlines behaviour expectations, prohibited conduct, and a clear process for internal complaints and investigations; and, review and revision of existing workplace policies where they exist.

Ontario’s Human Rights Commission has developed numerous resources that were drawn on in respect of these remedies in decisions, including online educational programs, written information, cards to be displayed in a workplace, and other resources. The development of similar resources in BC and other jurisdictions would aid tribunals to order prospective remedies by ensuring ready-access to such resources for parties. The forthcoming BC Human Rights Commission could look to the existing resources in Ontario, particularly the online educational modules and text-based resources, as examples to draw on in developing similar resources.

In BC, parties may be required to specifically request these kinds of remedies and lead evidence to support their request. It would be helpful for the Tribunal to clarify this, advising both what kinds of remedies parties may request and what kinds of evidence would be necessary to support such a request. The BC Tribunal may also consider and consult with relevant

⁸⁷ See Sheppard, *Inclusive Equality*, *supra* note 51; Sheppard, “Systemic Inequality”, *supra* note 4 at 256–57.

parties regarding whether, and to what extent, their remedial authority and discretion allows them to make use proactively of these kinds of remedial orders, as appears to be done by the Ontario Tribunal.

Recommendation 4: Clarify the evidentiary requirements useful in assessing injury to dignity awards

In addition to the above recommendation, which included clarifying the evidentiary requirements for parties wishing to request prospective remedies, this report noted in Chapter 5 how the assessment of injury to dignity awards can create an entry point for assumptions about victimhood to enter the analysis, and how the assessment of such awards may inadvertently privilege particular kinds of evidence and injuries.

This report recommends that tribunals provide clarity through guidelines and other resources that set out what evidence is useful in assessing injury to dignity awards, and that highlight the various kinds of injuries or impacts a complainant may identify and provide testimony and other evidence on in relation to their claim. In doing so, tribunals, commissions and other relevant actors might consider some of the existing critiques identified in this report and Lay's article.⁸⁸

Further, this report recommends explicit movement away from reliance on medical evidence and diagnostic tools in assessing the impact of sexual harassment on a complainant and in determining the injury to dignity award. As discussed in Chapter 5, reliance on such evidence may inadvertently depress awards for complainants who do not, for a variety of reasons, provide such evidence. Further support can also be found in tort law, where courts have moved away from a reliance on such evidence in assessing psychiatric harm.⁸⁹

Recommendation 5: Enhance resources for self-represented parties

As noted in Chapter 2, self-represented complainants experienced a lower rate of justified complaints than the overall average noted for decisions on the merits over the identified time period in both BC and Ontario. Sexual harassment complaints may pose unique or additional difficulty for parties to a human rights complaint, due to the additional and detailed legal principles governing these claims (as compared to general legal principles for discrimination complaints), and the particular issues that arise when gender-based myths and stereotypes influence the arguments and analysis of the complaint, as this report has documented. These factors, coupled with the general increase of self-represented litigants across the justice system, provide justification for enhancing the available resources for self-represented parties at the Tribunals.

Both BC and Ontario provide a number of helpful resources and tips online for parties considering filing a complaint, or otherwise party to a complaint, at the Human Rights Tribunal. This report recommends supplementing existing resources by providing additional detailed resources for complaints of sexual harassment. These resources would include: an explanation of the law of sexual harassment and requisite elements that a complainant must prove to establish their complaint; examples of what kinds of conduct constitute sexual harassment; examples of how a complainant may establish the "unwelcome" requirement; resources explaining the types of evidence, injuries and remedies a complainant may claim as part of their complaint (as noted in the above Recommendations 3 and 4); and, an explanation of gender-based myths and stereotypes and why they are harmful and inappropriate to argue in the context of a discrimination complaint. Leading cases on sexual harassment could also be identified, along with explanations about the legal principles they define.

Recommendation 6: Develop educational resources specifically addressing sexual harassment

In addition to supporting complainants and enhancing the effectiveness of the law, relevant bodies, particularly Human Rights Commissions, may adopt a proactive role in addressing sexual harassment by developing specific educational resources that can be used for both general training and education, and to support the Tribunals' remedial authority (as discussed in Recommendation 3).

As noted earlier, Ontario's Human Rights Commission has developed e-learning modules about human rights, the *Human Rights Code*, and the human rights system in Ontario. These online tools have also been used in remedial orders by the Ontario Tribunal. Human rights tribunals across the country, including in BC and Ontario, could adopt this approach to develop specific e-learning modules on sexual harassment. These e-learning modules would provide a valuable resource

⁸⁸ *Supra* note 75.

⁸⁹ See, e.g., *Rahemtulla v Vanfed Credit Union*, [1984] BCJ No 2790, 3 WWR 296; *Saadati v Moorhead*, 2017 SCC 28.

for general education, as well as tools for tribunals to use in ordering prospective remedies, as discussed under Recommendation 3.

Commissions could also develop text-based resources for public distribution that educate and inform the public, employers and workers about sexual harassment, including with respect to: the legal principles defining sexual harassment under human rights law; examples of prohibited conduct; requirements and obligations of an employer to have an anti-harassment policy and to investigate complaints of sexual harassment; what legal options a person who has experienced sexual harassment possesses; and, how the Commission and the Tribunal can assist a potential complainant. Related to this, the Commissions could develop a sample workplace policy on sexual harassment, as well as a checklist or other tool to assist employers to develop and implement specific policies on sexual harassment in the workplace, as discussed under Recommendation 3.

Recommendation 7: Develop policy guidelines to address institutional and systemic issues that surround sexual harassment

Related to Recommendation 2, where certain issues are known to impact the occurrence and normalization of sexual harassment, but fall outside of the legal principles governing anti-discrimination law and human rights complaints, policy guidelines may be developed to address these issues. Ontario's Human Rights Commission has been active on this front, developing policy guidelines related to sexual harassment, and sexualized dress codes.⁹⁰ Human rights bodies in other provinces may consider adopting similar policy statements and guidelines.

As identified in Ontario, sexualized dress codes are a notorious issue, particularly in the restaurant industry, and work towards normalizing and institutionalizing sexual harassment in the workplace. As such, while some provinces, such as BC, have adopted occupational health and safety regulations and other legal instruments regulating dress codes in particular ways, a broader and more holistic policy position on sexualized dress codes from provincial human rights bodies may send both a stronger and clearer message, and one which properly labels the issue at hand.

In addition to sexualized dress codes, normalized or institutionalized sexual harassment in the workplace may manifest through various practices, as discussed in Chapters 3 and 4. Thus, a broader policy statement and guidelines on sexual harassment and sex discrimination in the workplace may similarly function to signal the importance of this issue, and provide guidance on effective mechanisms to prevent and deter harassment, as the Tribunal engages with such issues only after harassment has occurred. As such, policy guidelines on the prevention and deterrence of sexual harassment in the workplace may support proactive protection of human rights in the workplace, supplementing the work of the Tribunal.

Recommendation 8: Provide specific and regular training to adjudicators, lawyers and other relevant actors on the issues examined in this report

Finally, this report recommends ensuring that regular and updated training specific to issues of sexual harassment, sex discrimination and gender-based stereotypes and myths, are provided to all relevant actors, including adjudicators, lawyers, and others. This is an area of research and expertise that is currently evolving, as social norms and expectations also evolve. As such, it is an area where regular and updated training is beneficial for relevant actors. In addition, the issues detailed in this report are often the product of unconscious or implicit bias, and as such, regular and updated training provides opportunity to reflect on and remain conscious of the potential for such bias to enter into legal arguments and decision-making. Finally, given the variety of backgrounds that relevant actors may have, providing regular and updated training ensures a common foundation of knowledge in this area, which, as this report has examined, is distinct from general anti-discrimination law. Regular and updated training should then work to enhance consistency across decision-makers and allow for more effective advocacy by lawyers and other actors.

⁹⁰ "Policy on Preventing Sexual and Gender-based Harassment" (last modified May 2013), online: *Ontario Human Rights Commission* <<http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment-0>>; "OHRC Policy Position on Sexualized and Gender-specific Dress Codes" (last visited 15 August 2019), online: *Ontario Human Rights Commission* <<http://www.ohrc.on.ca/en/ohrc-policy-position-sexualized-and-gender-specific-dress-codes>>.

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Appendix A: List of Identified BC Human Rights Tribunal Decisions, 2000-2018

Case Name	Citation	Outcome*	Injury to Dignity Award	Grounds of Discrimination	Sex (Complainant)	Sex (Alleged Harasser)	Employment Position of Alleged Harasser
Dyke v. Circa Industries Ltd.	2000 BCHRT 14	Justified	800	Sex	Male	Male	Supervisor
Baeza v. Blenz Coffee and Gardner	2000 BCHRT 29	Justified	3700	Sex	Female	Male	Supervisor
Wollstonecroft v. Crellin et al.	2000 BCHRT 37	Justified	2000	Sex	Female	Male	Supervisor
Kharoud v. Valle-Reyes et al.	2000 BCHRT 40	Justified	1800	Sex	Female	Male	Supervisor
Ryane v. Krieger and Microzip Data	2000 BCHRT 41	Justified	4000	Sex	Female	Male	Supervisor
Tannis et al. v. Calvary Publishing and Robbins	2000 BCHRT 47	Justified	4500 (C1, C2, C3); 5000 (C4)	Sex	Female	Male	Supervisor
Fiebelkorn v. Poly-Con Industries and Cowderoy	2000 BCHRT 54	Justified	1800	Sex	Female	Male	Supervisor
Kayle v. T & V Enterprises et al.	2000 BCHRT 57	Justified	1800	Sex	Female	Male	Supervisor
Larsen v. Michel Country Inn	2000 BCHRT 6	Justified	1500	Sex	Female	Male	Supervisor
Willis v. Blencoe	2001 BCHRT 12	Justified	5000	Sex	Female	Male	Supervisor
Simon v. Paul Simpson and Med Grill Ltd.	2001 BCHRT 24	Justified	5000	Sex	Female	Male	Supervisor
Davis v. Western star Trucks Inc., et al	2001 BCHRT 29	Dismissed		Sex	Female	Male	Supervisor
Leblanc v. Dan's Hardware et al.	2001 BCHRT 32	Justified	3500	Sex	Female	Male	Supervisor
Forgues v. Gary Stinka and Moxie's Restaurant	2001 BCHRT 7	Justified	4500	Sex	Female	Male	Supervisor
Varga v. Bentley's Sandwich Heaven	2001 BCHRT 8	Justified	4500	Sex	Female	Male	Supervisor
Hayward v. Gary Stinka and Moxie's Restaurant	2001 BCHRT 9	Justified	5000	Sex	Female	Male	Supervisor
Huhn v. Joey's Only Seafood Restaurant	2002 BCHRT 18	Justified	900	Sex	Female	Male	Co-worker
Smith v. Zenith Security	2002 BCHRT 25	Justified	3000	Sex	Female	Male	Co-worker
Jacob v. Reed and Mingles Holdings Ltd.	2002 BCHRT 37	Justified	4000	Sex	Female	Male	Supervisor
Ghinis v. Crown Packaging	2003 BCHRT 12	Dismissed		Sex	Female	Male	Co-worker
Newman v. Gujral	2003 BCHRT 16	Justified	3500	Sex	Female	Male	Supervisor
Fougere v. Rallis and Kalamata Greek Taverna	2003 BCHRT 23	Justified	1200	Sex	Female	Male	Supervisor
Twohey v. Bartman et al.**	2003 BCHRT 55	Justified	4000	Sex	Female	Male	Supervisor
Gill v. Grammy's Place Restaurant and Bakery	2003 BCHRT 88	Justified	10000	Sex	Female	Male	Supervisor
Mottu v. MacLeod and others	2004 BCHRT 76	Justified	3000	Sex	Female	Male	Supervisor
Milay v. Athwal and Bains (No. 4)	2005 BCHRT 2	Dismissed		Sex	Female	Male	Other
Bouillet v. Dorsey	2005 BCHRT 357	Dismissed		Sex	Female	Male	Supervisor
Madge v. Trca and Strategic Defence	2005 BCHRT 392	Dismissed		Sex, age	Female	Male	Supervisor
Jansson v. Miller's Landing Pub and others	2005 BCHRT 470	Dismissed		Sex	Female	Male	Supervisor
Algor v. Alcan and others (No. 2)	2006 BCHRT 200	Justified	5000	Sex	Female	Male	Co-worker

Case Name	Citation	Outcome*	Injury to Dignity Award	Grounds of Discrimination	Sex (Complainant)	Sex (Alleged Harasser)	Employment Position of Alleged Harasser
Koblensky v. Westwood and Schwab (No. 2)	2006 BCHRT 281	Justified	4000	Sex	Female	Male	Co-worker
De Leon v. Tridim 2 Millwork	2006 BCHRT 6	Dismissed		Sex	Female	Male	Co-worker
Clarke v. Frenchies Montreal Smoked Meats and Blais (No. 2)	2007 BCHRT 153	Justified	7500	Sex	Female	Male	Supervisor
Anderson v. Halliday Enterprises (No. 2)	2007 BCHRT 265	Dismissed		Sex	Female	Male	Co-worker
Kwan v. Marzara and another	2007 BCHRT 387	Justified	5000	Sex	Female	Male	Supervisor
Hashimi v. International Crowd Management (No. 2)	2007 BCHRT 66	Justified	7000***	Sex, race, place of origin	Male	Male	Co-worker
Mercier v. Dasilva	2007 BCHRT 72	Justified	4000	Sex, sexual orientation, race, place of origin, disability	Male	Male	Supervisor
Andrews v. Chill House Thai Bistro and Chen (No. 2)	2007 BCHRT 88	Dismissed		Sex	Female	Male	Supervisor
Wang v. Golden Boy Foods and Navoa (No. 2)	2008 BCHRT 151	Dismissed		Sex, disability	Male	Male	Supervisors
Rostas v. Llanes and other (No. 4)	2008 BCHRT 164	Dismissed		Sex	Female	Male	Supervisor
Ly v. Dixon and Cook's Upholstery (No. 2)	2008 BCHRT 284	Dismissed		Sex	Female	Male	Co-worker
Behm v. 6-4-1 Holdings and others	2008 BCHRT 286	Justified	5000	Sex	Female	Male	Supervisor
Lawhead v. Southern Insurance Services and Jensen	2008 BCHRT 287	Dismissed		Sex, age	Female	Male	Co-worker
JJ v. School District No. 43 (No. 5)	2008 BCHRT 360	Justified	4000	Sex	Female	Male	Co-worker
Chan v. Pryer	2008 BCHRT 441	Dismissed		Sex	Female	Male	Supervisor
Harrison v. Nixon Safety Consulting and others (No. 3)	2008 BCHRT 462	Justified	15000	Sex	Female	Male	Supervisor
Han v. Gwak and Nammi Immigration	2009 BCHRT 17	Dismissed		Sex, ancestry, place of origin	Female	Male	Supervisor
Kwan v. Marzara and another (No. 3)	2009 BCHRT 418	Justified	6000	Sex	Female	Male	Supervisor
Moyeni v. Vission 2000 and another (No 2)	2010 BCHRT 111	Dismissed		Sex, religion	Female	Male	Supervisor
Ratzlaff v. Marpaul Construction and another	2010 BCHRT 13	Justified	25000	Sex	Female	Male	Co-worker
Tyler v. Robnik and Mobility World (No 2)	2010 BCHRT 192	Justified	6500	Sex	Female	Male	Supervisor
Soroka v. Dave's Custom Metal Works and others	2010 BCHRT 239	Justified	5000	Sex	Female	Male	Supervisor
Wideman v. Wiebe and another (No 2)	2010 BCHRT 312	Dismissed		Sex, religion, political belief	Female	Male	Supervisor
Kang v. Hill and another (No 2)	2011 BCHRT 154	Dismissed		Sex	Female	Male	Supervisor
McIntosh v. Metro Aluminum Products and another	2011 BCHRT 34	Justified	12500	Sex	Female	Male	Supervisor
Young and Young on behalf of Young v. Petres	2011 BCHRT 38	Justified	4000 (C1); 6000 (C2)	Sex, religion	Female	Male	Supervisor
Q v. Wild Log Homes and another	2012 BCHRT 135	Justified	7500	Sex	Female	Male	Supervisor
MacDonald v. Najafi and another (No 2)	2013 BCHRT 13	Justified	4000	Sex, marital status	Female	Male	Supervisor
Root v. Ray Ray's Beach Club and others	2013 BCHRT 143	Justified	5000	Sex	Female	Male	Supervisor
Paananen v. Scheller (No 2)	2013 BCHRT 257	Justified	3000	Sex, disability	Female	Male	Supervisor

Case Name	Citation	Outcome*	Injury to Dignity Award	Grounds of Discrimination	Sex (Complainant)	Sex (Alleged Harasser)	Employment Position of Alleged Harasser
Sleightholm v Metrin and another (No 3)	2013 BCHRT 75	Dismissed		Sex	Female	Male	Supervisor
Kuchta v J Lanes Enterprises and others	2013 BCHRT 88	Dismissed		Sex	Female	Male	Supervisor
Balikama obo others v Khaira Enterprises and others	2014 BCHRT 107	Justified	10000	Sex, race, colour, ancestry and place of origin****	Female	Male	Supervisor
PN v FR and another (No 2)	2015 BCHRT 60	Justified	50000	Sex, family status, age, race, ancestry colour and place of origin	Female	Male	Supervisor
Bahadur v Yacht	2018 BCHRT 234	Dismissed		Sex	Female	Male	Other
Eva obo others v Spruce Hill Resort and another	2018 BCHRT 238	Justified	18000	Sex, race, colour, ancestry, place of origin****	Female	Male	Supervisor

*The outcome is listed based on the claim for sexual harassment. Some cases involving multiple grounds of discrimination were justified on some bases, and

** The decision on remedies was made separately: see 2003 BCHRT 83. The decision of the BCHRT concerning the substantive complaint was affirmed on judicial review: see 2004 BCSC 1211.

*** The injury to dignity award in this case included \$7000 for sexual harassment, and \$3000 for discrimination on the basis of race.

**** One complainant in this case made a claim of discrimination on the basis of sex (sexual harassment) as part of a larger group complaint concerning separate

Appendix B: List of Identified Ontario Human Rights Tribunal Decisions, 2000-2018

Case Name	Citation	Outcome*	Injury to Dignity Award **	Grounds of Discrimination	Sex (Complainant)	Sex (Alleged Harasser)	Employment Position of Alleged Harasser
Eldridge v. Imperial Buffet Inc. et al.	2000 BOI 00-004	Justified	10000	Sex	Female	Male	Co-worker
deSousa v Gauthier	2002 CanLii 46506	Justified	25000	Sex	Female	Male	Supervisor
Aris v Desai	2003 HRTO 1	Justified	30000	Sex	Female	Male	Supervisor
Ontario Human Rights Commission v Motsewetshe	2003 HRTO 21	Justified	6000 (C1); 9000 (C2); 11000 (C3); 17000 (C4); 18000 (C5)	Sex	Female	Male	Supervisor
Gibbons v Sports Medicine Inc	2003 HRTO 26	Justified	3000 (C1); 25000 (C2)	Sex	Female	Male	Supervisor
Baylis-Flannery v DeWilde (Tri Community Physiotherapy)	2003 HRTO 28	Justified	45000	Sex, race	Female	Male	Supervisor
Colvin v Gillies Hillcrest Variety	2004 HRTO 3	Justified	14000 (C1); 25000 (C2)	Sex	Female	Male	Supervisor
Howard v deRuiter	2004 HRTO 8	Dismissed		Sex, family status, marital status	Female	Male	Supervisor
Farias v Chuang	2005 HRTO 22	Justified	32000	Sex	Female	Male	Supervisor
Laskowska v Marineland of Canada Inc	2005 HRTO 30	Dismissed		Sex	Female	Male	Other
Metcalfe v Papa Joe's Pizza & Chicken Inc	2005 HRTO 46	Justified	20000	Sex	Female	Male	Supervisor
Sanford v Koop	2005 HRTO 53	Justified	35000	Sex	Female	Male	Supervisor
Murchie v JB's Mongolian Grill	2006 HRTO 33	Justified	16000	Sex	Female	Male	Supervisor
Cugliari v Teleefficiency Corporation	2006 HRTO 7	Justified	17500	Sex	Female	Male	Supervisor
Tweedle v Orlick Industries	2007 HRTO 1	Dismissed		Sex	Female	Male	Supervisor
Domingues v Fortino and Varbaro	2007 HRTO 19	Justified	20000	Sex	Female	Male	Supervisor
Earhart v Nutritional	2007 HRTO 31	Justified		Sex	Female	Male	Supervisor
Management et al Chard v Newton	2007 HRTO 36	Justified	16000	Sex	Female	Male	Supervisor
Pchelkina v Tomsons	2007 HRTO 42	Justified	10000	Sex	Female	Male	Supervisor
Boldt-Macpherson v The Hoita Kokoro	2008 HRTO 35	Justified	5000	Sex	Female	Male	Supervisor
Romano v 1577118 Ontario Inc	2008 HRTO 9	Justified	1000	Sex	Female	Male	Supervisor
Burns v Employer's Choice Staffing of Canada	2009 HRTO 1255	Dismissed		Sex, disability	Male	Unknown	Unknown
Ratneiyya v Daniel Krumeh	2009 HRTO 1824	Justified	25000	Sex	Female	Male	Supervisor
Houshang v Ontario Power Generation	2009 HRTO 1828	Dismissed		Sex	Female	Male	Supervisor
Smith v Menzies Chrysler	2009 HRTO 1936	Justified	50000	Sex, sexual orientation	Male	Male	Co-worker
Bahen v Catering 101	2009 HRTO 2271	Justified	2000	Sex	Female	Male	Supervisor
Hughes v 1308581 Ontario	2009 HRTO 341	Justified	25000	Sex	Female	Male	Supervisor
SH v M[...] Painting	2009 HRTO 595	Justified	40000	Sex, family status, race, ancestry	Female	Male	Supervisor

Case Name	Citation	Outcome*	Injury to Dignity Award **	Grounds of Discrimination	Sex (Complainant)	Sex (Alleged Harasser)	Employment Position of Alleged Harasser
Staniforth v CJ Liquid Waste Haulage	2009 HRTO 717	Dismissed		Sex	Female	Male	Supervisor
Ornelas v Casamici Restaurant	2010 HRTO 1078	Dismissed		Sex	Female	Male	Supervisor
Szabo v Niagara (Regional Municipality)	2010 HRTO 1083	Dismissed		Sex, family status, marital status	Female	Male	Co-worker and supervisor
Palmer v Bridgepoint Hospital	2010 HRTO 1134	Dismissed		Sex	Female	Male	Supervisor
Mitchell v 1042735 Ontario	2010 HRTO 1386	Justified	10000	Sex	Female	Male	Supervisor
Wamsley v Ed Green Blueprinting	2010 HRTO 1491	Justified	5000	Sex	Female	Male	Other
Baisa v Skills for Change	2010 HRTO 1621	Justified	1500***	Sex, ethnic origin, family status, marital status	Female	Male	Supervisor
Nyaamine v United Steelworkers Local	2010 HRTO 1699	Dismissed		Sex	Female	Male	Supervisor
Frolov v Mosregion Investment Corporation	2010 HRTO 1789	Justified	7500	Sex	Male	Female	Co-worker
Dunn v Edgewater Manor Resort	2010 HRTO 1795	Dismissed		Sex, creed	Female	Male	Co-worker
Chualo v. Toronto Police Services Board	2010 HRTO 2037	Justified	20000	Sex, colour, ancestry, place of origin and ethnic origin	Female	Male	Supervisor
Mauer v Metroland Media Group	2010 HRTO 2056	Dismissed		Sex	Female	Male	Co-worker
Moghimi v Honeywell Limited and Janet Moynes	2010 HRTO 2147	Dismissed		Sex, age, colour, ethnic origin, place of origin, race	Female	Male and Female	Co-worker
Caldeira v 2068006 Ontario	2010 HRTO 2305	Dismissed		Sex	Female	Male	Co-worker
Sutton v Jarvis Ryan Associates	2010 HRTO 2421	Justified		Sex	Female	Male	Supervisor
Wagner v Bishop	2010 HRTO 2546	Justified	2000	Sex	Male	Male	Supervisor
Harriott v National Money Mart	2010 HRTO 353	Justified	30000	Sex	Female	Male	Supervisor
Peters v Zhang	2010 HRTO 782	Dismissed		Sex, family status, race	Female	Male	Co-worker
Eldary v Songbirds Montessori School Inc	2011 HRTO 1026	Dismissed		Sex, ancestry, place of origin, ethnic origin, creed, marital status	Female	Female	Supervisor
Payette v Alarm Guard Security	2011 HRTO 109	Justified	23000	Sex	Female	Male	Supervisor
Ren v Leon's Furniture	2011 HRTO 1676	Dismissed		Sex, race and colour	Female	Male	Co-workers
Latronico v York Region District School Board	2011 HRTO 2012	Dismissed		Sex, ancestry, colour, ethnic origin, place of origin, race	Male	Male	Co-worker
Ford v Nipissing University	2011 HRTO 204	Justified	8000	Sex	Female	Male	Unknown
Baber v York Region District School Board	2011 HRTO 213	Dismissed		Sex, disability	Female	Male	Supervisor
Anamguya v Itercon Security Limited	2011 HRTO 2186	Justified	3000	Sex	Male	Male	Supervisor
MK v 1217993 Ontario Inc o/a Wimpy's Diner	2011 HRTO 705	Justified	40000	Sex	Female	Male	Supervisor

Case Name	Citation	Outcome*	Injury to Dignity Award **	Grounds of Discrimination	Sex (Complainant)	Sex (Alleged Harasser)	Employment Position of Alleged Harasser
Pinkney v Datex Billing Services	2011 HRTO 835	Dismissed		Sex	Female	Male	Supervisor
Farris v Staubach Ontario Inc ****	2011 HRTO 979	Justified	30000	Sex	Female	Male	Supervisor, co-worker
GG v [...] Ontario Limited	2012 HRTO 1197	Justified	18000	Sex	Female	Male	Supervisor
Lavoie v Calabogie Peaks	2012 HRTO 1237	Dismissed		Sex	Female	Male	Co-worker
SS v Taylor	2012 HRTO 1839	Justified	15000	Sex	Female	Male	Supervisor
Chopra v Noble Group of Finance	2012 HRTO 2289	Dismissed		Sex, race, age, ethnic origin	Male	Female	Supervisor
Iu v Markham Marble	2012 HRTO 65	Justified	20000	Sex	Female	Male	Supervisor
Shinozaki v 2252419 Ontario Inc cob Hotlomi Spa	2013 HRTO 1027	Justified	20000	Sex	Female	Female	Supervisors
JC v McSound Investments Inc	2013 HRTO 1101	Dismissed		Sex	Female	Male	Co-worker
Birchall v Andres	2013 HRTO 1469	Justified	30000	Sex	Female	Male	Supervisor
Morgan v University of Waterloo	2013 HRTO 1644	Justified	7500	Sex	Female	Male	Co-worker
CU v Blencowe	2013 HRTO 1667	Justified	30000	Sex	Female	Male	Supervisor
Garofalo v Cavalier Hair Stylists Shop Inc	2013 HRTO 170	Justified	27000	Sex, disability	Female	Male	Supervisor
Law v Noonan	2013 HRTO 437	Justified	3000	Sex	Female	Male	Supervisor
Xu v Quality Meat Packers Ltd	2013 HRTO 533	Justified	9000	Sex, race, colour, ancestry, place of origin, citizenship, ethnic origin	Male	Male	Co-worker
Ibrahim v Hilton Toronto	2013 HRTO 673	Justified	5000	Sex, race, colour, place of origin, ethnic origin, creed, family status	Male	Male	Supervisor
Vipond v Ben Wicks Pub and Bistro	2013 HRTO 695	Justified	18000	Sex	Female	Male	Supervisor
Smith v The Rover's Rest	2013 HRTO 700	Justified	35000	Sex	Female	Male	Supervisor
Romero v Mennonite Brethren Senior Citizens Home o/a Tabor Manor	2013 HRTO 788	Dismissed		Sex, ethnic origin	Female	Male	Co-worker
Mehjazi v Sanpaul Investments Ltd o/a Walking on a Cloud	2014 HRTO 1156	Dismissed		Sex, race	Female	Male	Co-worker
Horner v Peelle Company Ltd.	2014 HRTO 1211	Justified	28000	Sex	Female	Male	Supervisor
Gubrenko v TOJ Empire Auto	2014 HRTO 1232	Justified	2000	Sex, gender identity, gender expression, family status, marital status	Female	Female	Supervisor
Rushford v Sheppard	2014 HRTO 1607	Dismissed		Sex	Female	Male	Supervisor
CK v HS	2014 HRTO 1652	Justified	45000	Sex	Female	Male	Co-worker
Liaqat v Chaudary	2014 HRTO 1715	Dismissed		Sex	Female	Male	Supervisor
Armstrong v Royal Host Limited Partnership	2014 HRTO 1839	Dismissed		Sex	Female	Male	Co-worker

Case Name	Citation	Outcome*	Injury to Dignity Award **	Grounds of Discrimination	Sex (Complainant)	Sex (Alleged Harasser)	Employment Position of Alleged Harasser
Prado Pereda v Trustworthy Services Inc	2014 HRTO 383	Dismissed		Sex	Female	Male	Supervisor
Baker v Twiggs Coffee Roasters	2014 HRTO 460	Dismissed		Sex, pregnancy	Female	Female	Supervisor
JD v The Ultimate Cut Unisex	2014 HRTO 956	Justified	25,000 (C1); 40000 (C2); 40000 (C3)	Sex	Female	Male	Supervisor
Dacosta v 2383924 Ontario Inc	2015 HRTO 1002	Justified	17000	Sex	Female	Male	Supervisor
Arora v A-1 Bas & Supplies Inc	2015 HRTO 1557	Dismissed		Sex	Female	Male	Co-worker
Panucci v Seller's Choice Stockdale Realty	2015 HRTO 1579	Justified	15000	Sex	Female	Male	Supervisor
Gauthier v Dr Brian Smith Dentistry Professional	2015 HRTO 34	Dismissed		Sex	Female	Male	Supervisor
Costigane v Nyood Restaurant & Bar	2015 HRTO 420	Justified	1000	Sex, race, colour, ancestry, ethnic origin	Female	Male	Supervisor
OPT v Presteve Foods Ltd	2015 HRTO 675	Justified	50000 (C1); 150000 (C2)	Sex	Female	Male	Supervisor
Lalonde v Star Security Inc	2015 HRTO 74	Dismissed		Sex, gender identity, gender expression, record of offences	Female	Male	Supervisor
Brown v Southwest Chrysler Dodge Inc	2016 HRTO 1162	Dismissed		Sex	Female	Male	Co-worker
Borja v Bazos	2016 HRTO 1275	Dismissed		Sex, age	Female	Male	Supervisor
Kerceli v Massiv Automated Systems	2016 HRTO 1324	Justified	25000	Race, sexual orientation*****	Male	Male	Co-worker
Lee v NCR Leasing Inc. o/a Aaron's Stores	2016 HRTO 1440	Justified	3000	Sex	Female	Male	Supervisor
Anderson v Law Help Ltd	2016 HRTO 1683	Justified	22000	Sex	Female	Male	Supervisor
Kaloshi v Pickakchi	2016 HRTO 173	Dismissed		Sex	Male	Female	Co-worker
de los Santos Sands v Moneta Marketing Solutions	2016 HRTO 271	Justified	20000	Sex	Female	Male	Supervisor
Takhar v CSM Driver Services Inc	2016 HRTO 407	Dismissed		Sex, pregnancy	Female	Male	Supervisor
Kharb v B&B Alarms	2016 HRTO 772	Dismissed		Sex, gender identity	Female	Male	Supervisor
Granes v 2389193 Ontario Inc	2016 HRTO 821	Justified	20000	Sex	Female	Male	Supervisor
Qiu v 2076831 Ontario Ltd	2017 HRTO 1432	Justified	30000	Sex, race, ancestry, colour	Female	Male	Supervisor
Thomas v Marccone	2017 HRTO 1607	Dismissed		Sex	Female	Male	Co-worker
Bassis v Commissionaires Great Lakes	2017 HRTO 1667	Dismissed		Sex, disability	Male	Male	Co-worker
Perry The Centre for Advanced Medicine	2017 HRTO 191	Justified	25000	Sex	Female	Male	Supervisor
Insang v 2249191 o/a Innovative Content Solutions Inc	2017 HRTO 208	Justified	20000	Sex, creed, race	Male	Male	Supervisor
Crete v Aqua-Drain Sewer Services Inc	2017 HRTO 354	Justified	20000	Sex	Female	Male	Supervisor
Dix v The Twenty Theatre Company	2017 HRTO 394	Justified	6500	Sex, age, disability	Female	Male	Supervisor
Sheldon v St Marys Ford Sales Ltd	2017 HRTO 497	Justified	20000	Sex	Female	Male	Co-worker

Case Name	Citation	Outcome*	Injury to Dignity Award **	Grounds of Discrimination	Sex (Complainant)	Sex (Alleged Harasser)	Employment Position of Alleged Harasser
Valle v Faema Corporation 2000 Ltd	2017 HRTO 588	Justified	25000	Sex, creed	Female	Male	Supervisor
ET v Dress Code Express Inc	2017 HRTO 595	Justified	15000	Sex, race, ancestry, ethnic origin, and association	Female	Male	Supervisor
Khan v 1742247 Ontario Inc	2017 HRTO 635	Dismissed		Sex, place of origin	Male	Male	Supervisor
PT v Rahman Consulting Services	2018 HRTO 1566	Justified	200000	Sex	Female	Male	Supervisor
Fatima v BioPharma Services Inc	2018 HRTO 1290	Dismissed		Sex, race, colour, ancestry, place of origin, ethnic origin, creed	Female	Female	Co-worker
GM v X Tattoo Parlour	2018 HRTO 201	Justified	45000	Sex, gender identity, age	Female	Male	Supervisor
Bento v Manito's Rotisserie & Sandwich	2018 HRTO 203	Justified	75000	Sex, race, colour, ancestry, ethnic origin, and association with a person identified by a ground	Female	Male	Supervisor
A.B. v. Joe Singer Shoes Limited	2018 HRTO 107	Justified	20000	Sex, race, colour, place of origin, ethnic origin, disability, family and marital status	Female	Male	Supervisor

*The outcome is listed based on the claim for sexual harassment. Some cases involving multiple grounds of discrimination were justified on some bases, and dismissed on others. See Appendix C.

** As discussed in Chapter 5 of the report, Ontario moved towards a classification of non-pecuniary damages as "injury to dignity awards" in 2008. For pre-2008 cases listed here, the quantum of award includes both general damages and, where applicable, damages for mental suffering.

*** The remedy was determined in a separate decision: 2010 HRTO 2161.

**** This case was remitted for reconsideration on the issue of joint and several liability on judicial review: 2012 ONSC 3876. On reconsideration of this issue, the Tribunal found the individual respondents jointly and severally liable with the corporate respondent for \$22,500, and the corporate respondent liable

***** This case was pleaded on the ground of sexual orientation, but the adjudicator determined that it was more appropriate to consider under the sexual harassment provisions of the Code. See para 185.

Appendix C: Decisions Involving Multiple Grounds of Discrimination

BC:

- *Madge v Trca and Strategic Defence*, 2005 BCHRT 392 (age, sex) (dismissed on all grounds);
- *Hashimi v International Crowd Management (No 2)*, 2007 BCHRT (race, place of origin, sex) (justified on all grounds);
- *Mercier v Dasilva*, 2007 BCHRT 72 (race, place of origin, disability, sex, sexual orientation) (justified on the grounds of race, place of origin, and sex; dismissed on the grounds of physical and mental disability and sexual orientation);
- *Wang v Golden Boy Foods and Navoa (No 2)*, 2008 BCHRT 151 (sex, disability) (dismissed on all grounds);
- *Lawhead v Southern Insurance Services and Jensen*, 2008 BCHRT 287 (sex, age) (dismissed on all grounds);
- *Han v Gwak and Nammi Immigration*, 2009 BCHRT 17 (sex, ancestry, place of origin) (dismissed on all grounds);
- *Moyeni v Vission 2000 and another (No 2)*, 2010 BCHRT 111 (sex, religion) (dismissed on all grounds);
- *Wideman v Wiebe and another (No 2)*, 2010 BCHRT 312 (sex, religion, political belief) (dismissed on all grounds);
- *Young and Young on behalf of Young v Petres*, 2011 BCHRT 38 (sex, religion) (justified on the grounds of sex only);
- *MacDonald v Najafi and another (No 2)*, 2013 BCHRT 13 (sex, marital status) (justified on the grounds of sex; the Tribunal holds it unnecessary to consider marital status separately);
- *Paananen v Scheller (No 2)*, 2013 BCHRT 257 (sex, disability) (justified on the grounds of sex only);
- *PN v FR and another (No 2)*, 2015 BCHRT 60 (sex, family status, age, race, ancestry, place of origin) (justified on all grounds).

Ontario:

- *Baylis-Flannery v DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28 (Sex, race) (allowed on all grounds);
- *Howard v deRuiter*, 2004 HRTO 8 (sex, family status, marital status) (dismissed on all grounds);
- *Burns v Employer's Choice Staffing of Canada*, 2009 HRTO 1255 (sex, disability) (allowed on the grounds of disability only; dismissed on the grounds of sex);
- *Smith v Menzies Chrysler*, 2009 HRTO 1936 (sex, sexual orientation) (allowed on all grounds);
- *SH v M[...] Painting*, 2009 HRTO 595 (sex, family status, race, ancestry) (allowed on all grounds);
- *Szabo v Niagara (Regional Municipality)*, 2010 HRTO 1083 (sex, family status, marital status) (dismissed on all grounds);

- *Baisa v Skills for Change*, 2010 HRTO 1621 (sex, ethnic origin, family status, marital status) (allowed on the grounds of sex, family status, and marital status; dismissed on the grounds of ethnic origin);
- *Dunn v Edgewater Manor Resort*, 2010 HRTO 1795 (sex, creed) (dismissed on all grounds);
- *Chovalo v. Toronto Police Services Board*, 2010 HRTO 2037 (sex, colour, ancestry, place of origin and ethnic origin) (allowed on all grounds);
- *Moghimi v Honeywell Limited and Janet Moynes*, 2010 HRTO 2147 (age, colour, ethnic origin, place of origin, race, sex) (dismissed on all grounds);
- *Peters v Zhang*, 2010 HRTO 782 (sex, family status, race) (dismissed on all grounds);
- *Eldary v Songbirds Montessori School Inc*, 2011 HRTO 1026 (ancestry, place of origin, ethnic origin, creed, sex, marital status) (dismissed on all grounds);
- *Ren v Leon's Furniture*, 2011 HRTO 1676 (sex, race and colour) (dismissed on all grounds);
- *Latronico v York Region District School Board*, 2011 HRTO 2012 (sex, ancestry, colour, ethnic origin, place of origin, race) (dismissed on all grounds);
- *Baber v York Region District School Board*, 2011 HRTO 213 (disability, sex) (dismissed on all grounds);
- *Farris v Staubach Ontario Inc*, 2011 HRTO 979 (sex, gender) (allowed on all grounds);
- *Chopra v Noble Group of Finance*, 2012 HRTO 2289 (race, sex age, ethnic origin) (dismissed on all grounds);
- *Garofalo v Cavalier Hair Stylists Shop Inc*, 2013 HRTO 170 (sex, disability) (allowed on the grounds of sex; dismissed on the grounds of disability);
- *Xu v Quality Meat Packers Ltd*, 2013 HRTO 533 (race, colour, ancestry, place of origin, citizenship, ethnic origin, sex) (allowed on the grounds of race and sex; the Tribunal did not rule specifically on the related grounds of colour, ancestry, place of origin, citizenship, ethnic origin);
- *Ibrahim v Hilton Toronto*, 2013 HRTO 673 (race, colour, place of origin, ethnic origin, creed, sex, family status) (allowed on the grounds of sex only);
- *Romero v Mennonite Brethren Senior Citizens Home o/a Tabor Manor*, 2013 HRTO 788 (ethnic origin, sex) (dismissed on all grounds);
- *Mehjazi v Sanpaul Investments Ltd o/a Walking on a Cloud*, 2014 HRTO 1156 (sex, race) (dismissed on all grounds);
- *Gubrenko v TOJ Empire Auto*, 2014 HRTO 1232 (sex, gender identity, gender expression, family status, marital status) (allowed on the grounds of sex and family status; dismissed on the grounds of gender identity and expression; the Tribunal did not rule on marital status);
- *Costigane v Nyood Restaurant & Bar*, 2015 HRTO 420 (race, colour, ancestry, ethnic origin, sex) (allowed on grounds of sex only; dismissed on grounds of race, colour, ancestry and ethnic origin);
- *Lalonde v Star Security Inc*, 2015 HRTO 74 (sex, gender identity, gender expression, record of offences) (dismissed on all grounds);
- *Borja v Bazos*, 2016 HRTO 1275 (sex, age) (dismissed on all grounds);
- *Kerceli v Massiv Automated Systems*, 2016 HRTO 1324 (race, sexual orientation) (allowed on the basis of sexual harassment (see para 185); dismissed on the grounds of race);

- *Kharb v B&B Alarms*, 2016 HRTO 722 (sex, gender identity) (dismissed on all grounds);
- *Qiu v 2076831 Ontario Ltd*, 2017 HRTO 1432 (race, ancestry, colour, sex) (allowed on the grounds of sex only);
- *Bassis v Commissionaires Great Lakes*, 2017 HRTO 1667 (sex, disability) (dismissed on all grounds);
- *Insang v 2249191 o/a Innovative Content Solutions Inc*, 2017 HRTO 208 (sex, creed, race) (allowed on all grounds);
- *Dix v The Twenty Theatre Company*, 2017 HRTO 394 (sex, age, disability) (allowed on the grounds of sex only);
- *Valle v Faema Corporation 2000 Ltd*, 2017 HRTO 588 (sex, creed) (allowed on all grounds);
- *ET v Dress Code Express Inc*, 2017 HRTO 595 (race, ancestry, ethnic origin, sex, association) (allowed on all grounds);
- *Khan v 1742247 Ontario Inc*, 2017 HRTO 635 (origin, sex) (dismissed on all grounds);
- *Fatima v BioPharma Services Inc*, 2018 HRTO 1290 (race, colour, ancestry, place of origin, ethnic origin, creed) (dismissed on all grounds);
- *GM v X Tattoo Parlour*, 2018 HRTO 201 (sex, gender identity, age) (allowed on the grounds of sex; the Tribunal did not address the other grounds separately);
- *Bento v Manito's Rotisserie & Sandwich*, 2018 HRTO 203 (race, colour, ancestry, ethnic origin, sex, association) (allowed on the grounds of race, colour, ancestry, ethnic origin, and sex; dismissed on the grounds of association)
- *AB v Joe Singer Shoes Limited*, 2018 HRTO 107 (race, colour, place of origin, ethnic origin, disability, sex, family and marital status) (allowed on all grounds).