

Zero Tolerance

Recent high-profile allegations of sexual harassment have reinforced the importance of strong workplace policies, but changing the corporate culture has to start at the top

Apr 12, 2018 | by [Anthony Davis](#) | Lexpert Magazine January/February 2018 Issue



America's Business, entertainment and political worlds have been shaken as successive waves of sexual harassment allegations break over their stars, hosts, executives and other powerful males. In Canada, meanwhile, corporate leaders and their legal advisors may, as they watch the events unfold in the south, take some comfort in the hope that they're in a somewhat better place when it comes to policies, training and attitudes around workplace violence and harassment.

Canada's most notable case in this area involved Jian Ghomeshi, the once popular CBC radio host. Ghomeshi's reputation was torn asunder in 2014 after allegations that he bullied and sexually harassed at least eight women at the CBC and outside the workplace. Despite his 2016 acquittal on five charges, Ghomeshi's firing and highly publicized courtroom trial, corporate lawyers say, was a kind of alarm bell in the Canadian business world for employers to make their workplaces safer.

Still, misogynist corporate cultures do continue to fester in Canada, and that raises a host of questions for in-house counsel and external lawyers. What should they do to ensure that the requisite shift in attitude occurs at the top echelons? How can they ensure that their founders, C-suite executives and directors lead positive change, while refraining from behaviour that results in allegations of sexual or other harassment?

It was in October that *The New York Times* and *The New Yorker* first published reports by more than a dozen women that Hollywood film executive Harvey Weinstein had sexually harassed or sexually assaulted them. Since then, a shamefully long parade of women in the US have stepped forward detailing similar stories of perverse behaviour by privileged men. The more familiar names include television host Charlie Rose, Senator Al Franken, actor Kevin Spacey and a growing list that includes corporate bigwigs as well. In Canada, Albert Schultz, Founding Artistic Director of the Soulpepper theatre company, is being sued by four women alleging sexual harassment in the workplace. More than 250 members of the theatre community have signed a petition in support of the four complainants, and Schultz has been compelled to resign.

You might think this rising tide of #MeToo Twitter revelations would prompt a high degree of anxious corporate navel-gazing about the need for better harassment policies and remedies in US workplaces. The so-called "Weinstein Effect" — where droves of women have been emboldened to tell their stories of sexual harassment — has certainly prompted a conversation. But the evidence suggests that, so far, conversation hasn't resulted in corporate change.

In Canada, the story is different, because we've been down this bumpy road before, says Jodi Gallagher Healy, a labour and employment lawyer with [Hicks Morley Hamilton Stewart Storie LLP](#) in London, Ontario. "I think the greater impact in Canada has been from the Jian Ghomeshi situation. The CBC was such a well-known employer

and Mr. Ghomeshi such a well-known figure on CBC, I think it really rang through the halls of employers in Canada.”

Also helping to ring Canada’s sexual harassment alarm bell was the Dalhousie University scandal in January 2015. Thirteen male dentistry students were suspended for posting violent sexual comments aimed at female classmates on their Facebook group page. Together the two incidents sparked greater awareness about the need for Canadian corporations and institutions to create or revamp their policies regarding sexual harassment.

HOST CULTURE

The Ghomeshi case was one of those extremely rare instances where an investigation report into workplace sexual harassment was made public. The report was prepared by [Janice Rubin](#) and Parisa Nikfarjam of [Rubin Thomlinson LLP](#), a Toronto-based employment law firm specializing in workplace training and investigations concerning harassment and violence.

Their report made nine recommendations and pointed out CBC management’s numerous missed opportunities to act earlier to mitigate Ghomeshi’s toxic impact on the women he worked with. It has served as a guideline of what to do when rumours or complaints of bullying, harassment, sexual harassment or other destructive behaviours circulate through a workplace. Two things stood out in the report for Gallagher Healy. The first was about capacity — the resources at hand, especially a clear policy and proper training that give an organization ways to prevent or reduce harassment of any kind. Only then can an organization investigate and deal with harassment if it happens. The CBC was found lacking.

“The other idea that came out of the Ghomeshi situation was this idea of “host culture,”” says Gallagher Healy. “This idea that the host was untouchable. What the report ultimately drives home for employers,” continues Gallagher Healy, “is that no one is untouchable. Everyone should be bound by the proper rules of how we treat each other.”

Gallagher Healy got a lot of anxious questions from clients after the Ghomeshi report went public, “particularly around the issue of, when is there sufficient information [before the complaint] for the employer to take action or do an investigation.” Often, especially when harassment involves superiors, victims are reluctant to file official complaints for fear of inaction or retribution. So they suffer silently. It doesn’t help that, in Canada, some companies still fail to provide adequate means for harassment victims to discreetly and reassuringly express their complaints through the right process.

Rubin Thomlinson recently surveyed companies about, among other things, the percentage of employers that had improved their harassment complaint mechanisms with a confidential hotline.

[Janice Rubin](#) was dismayed by the results. The respondents were generally from companies that had more proactive harassment policies, “yet only 50 per cent of them had [created a hotline],” she says.

Clearly, from the cases worming to the surface in the US, there’s been a long-standing and significant sense of untouchability by powerful men across a wide spectrum of business and political arenas. That has ranged all the way up to the presidency of the United States. Bill Clinton allegedly propositioned and exposed himself, without consent, to Paula Jones and, though he paid an \$850,000 out-of-court settlement, he left office with the highest approval rating of any president since the Second World War. More recently, Americans have seen Donald Trump elected to the country’s highest office, despite repeated misogynistic remarks.

Yet the Weinstein case seems to have marked a tipping point in the public discourse, demonstrating that serious allegations may now bring down harassers, especially those with sexual overtones, regardless of status. Days after the reports against him, Harvey Weinstein was fired from Miramax Studios, the company he co-founded. When talk show host Charlie Rose was accused by eight women of groping, walking nude in front of them and making unwanted advances, he was fired by CBS, PBS and Bloomberg TV in less than 24 hours.

But are North America's business leaders actually getting the message about what constitutes harassment, or how their employees — and perhaps even they themselves — need to be restraining themselves and checking their behaviours?

"I think there's a lot of training going on at Canadian companies," says Katherine Pollock, a Toronto partner with [Fasken Martineau DuMoulin LLP](#) who has helped large Canadian financial institutions implement harassment policies, and trains employees in areas such as properly conducting harassment investigations.

Still, Pollock says that, at receptive companies, she has been able to tweak training specifically for senior and executive leadership. For them, Pollock says, there's an added dimension of "setting the tone for the organization; that the culture of the place has to emanate from them. And it was critical that they live the values set out in the policy and not tolerate, or be seen to be tolerating, any offside behaviour."

That's not the norm, though. "I believe that companies could do a better job in ensuring top managers — who, after all, have the ability to control the message and set the standards — are trained and understand that it is part of their role to effect cultural change when necessary," Pollock told *Lexpert* in an email.

In an October *Washington Post* article, leadership columnist Jena McGregor wrote about a recent survey of more than 400 company directors and venture capitalists. It revealed that, despite the current barrage of sexual harassment allegations in the news concerning some icons of Hollywood and corporate America, nearly 80 per cent of those directors (many women) had not discussed those events within their firms. Almost 90 per cent had yet to implement any plan of action to mitigate the risks of harassment in their workplaces.

That inaction at the board and executive levels was cringe-inducing, says Janice Rubin. She did not speak to *Lexpert* specifically about the CBC's handling of the Ghomeshi case. But she says the spate of sexual harassment cases in the US are an important reminder that, when Canadian companies attempt to change their workplace cultures to improve conditions for women, it must be a top-down process.

Rubin says there can be a tendency "to let past bad behavior go," when individuals are the public face of a company or important to revenue generation. But Rubin says that kind of attitude is no longer permissible: "There is not a free pass if you are in the C-suite. ... Having a policy that sets out what the behavioural expectations are for everyone is very helpful. But holding folks at the top accountable to the standards set out in the policy is key."

For those responsible for implementing and overseeing anti-harassment policies at a company — whether in-house counsel or HR personnel — it's also important that top executives visibly participate in training and discussions. "Otherwise other people don't take it seriously," says Shana French. Previously in-house counsel at a telecommunications company, French is now an employment and labour lawyer with Sherrard Kuzz LLP in Toronto. "It really has to have buy-in from the most senior levels of management."

That doesn't always happen, says Gallagher Healy. Often, she notes, employers focus workplace training on front-line people. "They don't as frequently refresh their managers and executives on those policies. Though that is not universal," she adds.

THE LAW LEANS IN

In post-Ghomeshi Canada, suggests French, there has been an escalating sophistication in how Canadian companies deal with harassment. “The Ghomeshi situation was our version of Weinstein,” she says. “The Canadian pattern, particularly in Ontario, was a powerful response to that sort of golden boy, turn a blind eye attitude.” That response came most tangibly in the form of legislation when, on March 6, 2016, less than two years after the Ghomeshi scandal broke, Premier Kathleen Wynne’s Liberal government passed Bill 132, the *Sexual Violence and Harassment Action Plan Act*.

Among other things, Bill 132 amends Ontario’s *Occupational Health and Safety Act* (OHS Act) to expand the definition of “workplace harassment” to specifically include the term “workplace sexual harassment.” Human-rights policies in Canadian jurisdictions and workplace policies at companies throughout Canada often include recommendations on discouraging various forms of harassment, bullying and workplace violence. But Ontario’s legislation under Bill 132, with its particularly sharp focus on sexual harassment, says Shana French, “takes this past cultural commentary to a legal obligation.”

The legislation requires all businesses in the province to develop and maintain a written workplace harassment policy. Such policies must include measures for reporting harassment to someone other than an employer or supervisor if either of those is the alleged harasser. It must also include procedures for competently investigating complaints, keeping thorough records, and protecting the identity of victims, unless required for the purpose of the investigation or corrective action.

Importantly, at least in Ontario, in-house counsel must keep in mind that companies must now conduct investigations not only when complaints are made, but as Rubin explains, “when the employer just becomes aware of an incident of workplace harassment. That moves the dial a little bit. It means that [even if you don’t have an official complaint], if you have awareness that there is a likelihood of workplace harassment, you need to act.” Ontario’s legislation also permits the Ministry of Labour to order an external investigation at a company’s expense if a victim complains that a company has failed to investigate properly.

At Sherrard Kuzz, Shana French says that Ontario is Canada’s “pathfinder” in terms of developing proactive sexual harassment legislation. “If you don’t have a workplace policy on sexual harassment and provide training on it, and hold your managers accountable for it, there is significant liability. Not just from a brand perspective, but from a legal perspective.”

Companies that fail to implement appropriate policies and training to protect employees from sexual harassment face growing financial and reputational liabilities. Since January 1, 2018, amendments to Ontario’s *Workplace Safety and Insurance Act* mean that employers could be required to pay benefits to employees diagnosed with work-related chronic mental distress disorder. “I have dealt with situations where chronic mental stress arises from workplace harassment,” says Gallagher Healy. “That’s another way there will be focus on addressing and preventing workplace stress and harassment. And it could be a costly one for employers.”

The federal government and other provinces are also in the process of introducing tougher legislation around gender-based and other forms of harassment. That amplifies the attention that in-house counsel or a company’s external advisors must give to any complaints. And what to do if a higher-up is actually the problem?

“Thought needs to be given to how you would frame that in a policy,” says Brian Smeenk, in the labour, employment and human-rights group at Baker & McKenzie, when a complaint happens against an employee in the lower ranks, typically a human-resources person can deal with it,” says Smeenk. “But if a complaint were against the

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CEO, for example, or one of the top two or three people in the company, it is often advisable to have an outside third party investigate.”

For one thing, “privilege” can be an unclear matter when in-house counsel conduct harassment investigations. Privilege can be lost — and any notes by an in-house lawyer can be discoverable — should advice to company executives or a board during the course of a harassment investigation stray from legal matters to business matters. Then, of course, there’s the potential for bias. “When a complaint is against somebody at the very most senior levels of the company,” warns Smeenk, “it’s much more difficult to find an internal person who can objectively investigate that.”

But even when the company engages external advisors to act on a harassment complaint, continues Smeenk, “the question is, who will determine the results of the investigation? Careful thought needs to be given to that as well. Sometimes it would be a committee of the board. Sometimes, if it is not the CEO, it might be the vice-president of human resources.”

Changing a corporate culture around harassment issues can be challenging for external counsel. When dealing with the prospects of workplace harassment, in-house advisors must have the gumption to do more if they want to both improve working conditions for all and insulate their companies against the possible brand, financial and other liabilities arising from harassment complaints. They need to press their boards and senior executives to pay more than lip service to the policies and training given everyone else.

“If creating an inclusive respectful workplace, free from harassment and discrimination, is important to an organization, the leaders of the organization should be modelling that behaviour,” says Rubin. “If you as a senior leader don’t go to the training — or you go to the training and play with your phone for an hour — what type of message is that communicating? It’s communicating that it’s not important.”

Lawyer(s):

[Janice P. Rubin](#), [Brian P. Smeenk](#)

Firm(s):

[Hicks Morley Hamilton Stewart Storie LLP](#), [Rubin Thomlinson LLP](#), [Fasken Martineau DuMoulin LLP](#)

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