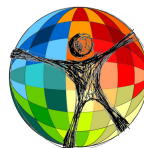


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Workplace Sexual Harassment in the Yukon: An Opportunity to Sustainably Change Workplace Culture

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Human Rights
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ABSTRACT

In the wake of #MeToo, workplace sexual harassment is gaining increased attention as a human rights violation. In light of this issue, the Yukon Human Rights Commission has been granted a five-year federal grant to launch “A Yukon Without Workplace Sexual Harassment”. The grant presents an opportunity for the Yukon to shift socio-cultural norms to increase territorial understanding of workplace sexual harassment and decrease its presence. This paper examines the evolution of socio-cultural understanding of workplace sexual harassment since the height of the #MeToo movement in 2017 and the possibilities that the Yukon can embrace to implement desired shift in norms. The paper analyzes current norms in other Canadian jurisdictions and indicates where successful and promising legal approaches from those provinces have potential for the Yukon. It also looks to where the territory can take opportunities not yet embraced by those jurisdictions, notably with respect to punitive damages and Indigenous traditions.

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Introduction

On December 10, 2019, the Canadian Department of Justice announced that it would support a territory-wide initiative to address workplace sexual harassment in the Yukon. This initiative would constitute \$2.6 million dollars of funding to the Yukon Human Rights Commission over a period of five years.¹ This may be a challenge since there has been very little data regarding this issue, though the Commission has noted regularly receiving complaints about workplace sexual harassment since its founding in 1987.²

As defined in a study in partnership with Statistics Canada, workplace harassment encompasses “objectionable or unwelcome conduct, comments, or actions by an individual, at any event or location related to work, which can reasonably be expected to offend, intimidate, humiliate or degrade.”³ Unfortunately, despite laws designed to prevent it, sexual harassment persists in work environments. Experiencing sexual harassment impacts the work experiences of the survivors in a number of ways including, but not limited to, heightened stress, work withdrawal and a desire to quit.⁴

The #MeToo movement has created a global push to address sexual harassment in public spaces. Originating in 2006, it received major attention in 2017 when accusations of sexual assault and harassment were levied against Harvey Weinstein.⁵

¹ See Department of Justice Canada, News Release, “Government of Canada supports a territory-wide initiative to address workplace sexual harassment in the Yukon” (10 December 2019), online: *Department of Justice Canada* <www.canada.ca/en/departement-justice/news/2019/12/government-of-canada-supports-a-territory-wide-initiative-to-address-workplace-sexual-harassment-in-the-yukon.html> [Government Press Release].

² See Yukon Human Rights Commission, News Release, “Towards a Yukon Without Workplace Sexual Harassment (12 August 2020), online: *Yukon Human Rights Commission* <yukonhumanrights.ca/2020/08/towards-a-yukon-without-workplace-sexual-harassment/> [YHRC Press Release].

³ See Statistics Canada, *Harassment in Canadian Workplaces (Study)* by Darcy Hango & Melissa Moyser, Catalogue No 75-006-X (Ottawa: Statistics Canada, 17 December 2018) at 11 [Statistics Canada Report].

⁴ See Krista Lynn Minnotte & Elizabeth M Legerski, “Sexual harassment in contemporary workplaces: Contextualizing structural vulnerabilities” (2019) 13 *Sociology Compass* 1 at 1-2.

⁵ See Deborah Tuerkheimer, “Beyond #MeToo” (2019) 94:1146 *NYU L Rev* 1146 at 1147, citing Jodi Kantor & Megan Twohey, “Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades”, *New York Times* (5 October

This high-profile case led to media focus on and exposure of sexual misconduct by other powerful men and trickled down to create a demand for changes elsewhere in society. The changes are ongoing, as demonstrated by the Canadian Government's support of workplace culture training in the Yukon.

Now, the Yukon has an opportunity to push for greater reforms in its culture surrounding workplace sexual harassment. Other jurisdictions, notably Ontario, Quebec, and British Columbia, have already moved forward with making significant culture shifts in their respective judicial systems. How can the Yukon take the examples in other Canadian jurisdictions, implement what has worked, and improve on what has not? This paper will look at the shift in norms that has occurred around the #MeToo movement in 2017 before examining other Canadian jurisdictions. It will then focus on the Yukon-specific context to examine how workplace sexual harassment has been evaluated in the judicial system and what shifts have occurred in recent years. Finally, this paper will examine the Yukon's opportunities to shift norms as a means of creating a more effective tool against workplace sexual harassment and conclude with policy recommendations for the territory as it moves forward with its five-year mandate.

An Introduction to Cultural Norms Surrounding Workplace Sexual Harassment

The history behind understanding workplace sexual harassment as a human rights violation is relatively recent. The 1948 Universal Declaration of Human Rights sets out the right to "just and favourable conditions of work", though there is no explicit protection against sexual harassment.⁶ It was only in the 1989 case *Janzen v Platy*, the Supreme Court of Canada clarified that sexual harassment constituted discrimination on the basis of

2017), online: <www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>; Ronan Farrow, "From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell their Stories", *The New Yorker* (23 October 2017), online: <www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 at art 23.

sex.⁷ Currently, the Canada Labour Code defines workplace sexual harassment as “any conduct, comment, gesture or contact of a sexual nature (a) that is likely to cause offence or humiliation to any employee; or (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion.”⁸ A consensual work romance does not constitute workplace sexual harassment, though it can lead to it. Harassment is characterized by an imbalance of power with the harasser wielding their influence to solicit or force sexual favours from an unwilling victim.⁹ Due to its relatively young age in the story of human rights, following society’s broader understanding of the concept is critical to having a grasp on the potential for development in this area of the law.

Pre-#MeToo

Prior to the heightened attention surrounding #MeToo in 2017, sexual harassment was not well understood or addressed in important public institutions, including the workplace and universities. For example, Tuerkheimer notes that underreporting was common on university campuses and victim shaming was a common feature that led to such underreporting. Students would relate the incident to their close friends and family, but due to a belief they would be unsuccessful, they would rarely report an instance of sexual harassment to university officials or the police.¹⁰

The lack of faith in established institutions pervaded beyond universities and into workplace environments and broader society. To protect themselves, women would spread the word about their harassers via informal social networks; a system older than #MeToo itself. Tuerkheimer calls these “whisper networks,” which she divides into “traditional whisper networks” and “double secret whisper networks.”¹¹ Traditional whisper networks consist of unofficial channels where these women’s allegations of known accusers are transmitted, often in a face-to-face exchange or via invitation-only social media networks. Word

⁷ See [1989] 1 SCR 1252, [1989] 4 WWR 39 at paras 55-57 [Janzen].

⁸ *Canada Labour Code*, RSC 1985, c L-2, s 247.1.

⁹ See Lisa Mainiero, “Workplace romance versus sexual harassment: a call to action regarding sexual hubris and exploitation in the #MeToo era” 35:4 *Gender in Management* 329 at 331.

¹⁰ See Tuerkheimer, *supra* note 5 at 1160-61.

¹¹ See *ibid* at 1168.

could spread quickly within these networks, but the stories and identities were often protected by the private space in which the stories were shared. This meant outsiders remained oblivious.¹² Double secret whisper networks take another step to protect the victims and allow victims to report their allegations anonymously via documents such as a shared Google Doc or an anonymous chat system.¹³ These informal structures are often still used today in the aftershock of the #MeToo era.¹⁴

In the era prior to #MeToo, these informal networks were essential safe havens to those who had been harmed, but wanted to warn others of a dangerous member of the community. The allowance for anonymity allowed targets of workplace sexual harassment to spread the word without fear of ostracism and retaliation; a real fear when the public tide seemed to be against those who spoke out against workplace sexual harassment; as best demonstrated by the aftermath of Anita Hill's accusations against Clarence Thomas in which she lost her funding and was defamed by those who listened to her testify during the Senate Judicial Committee.¹⁵ Women in particular feared there was more to lose by reporting a complaint than there was to be gained, including retaliation such as ostracism in the workplace or damage to their careers or reputations that would make it difficult to be promoted.¹⁶ The silence held even when #MeToo first began.

The Inauguration of the #MeToo Era

While the phrase "Me Too" became a household phrase in 2017, it was started far earlier in 2006 when Tarana Burke, a survivor of sexual assault, created the phrase as a means to help

¹² See *ibid* at 1168-69.

¹³ See *ibid* at 1169-70.

¹⁴ See e.g. "Shitty Media Men" as referenced in Madison Malone Kircher, "Why Is It So Hard for Women to Find Safe Spaces Online?", *Intelligencer* (12 October 2017), online: <nymag.com/intelligencer/2017/10/shitty-men-in-media-assault-list-raises-safe-space-questions.html#_ga=2.227789979.708920519.1607718231-1016961613.1602336472>; Ann Friedman, "The Unexpected Power of Google-Doc Activism", *The Cut* (23 October 2017), online: <www.thecut.com/2017/10/the-unexpected-power-of-google-doc-activism.html>.

¹⁵ See Stephanie EV Brown & Jericka S Battle, "Ostracizing targets of workplace sexual harassment before and after the #MeToo movement" (2019) 39:1 *Equality, Diversity & Inclusion* 53 at 57.

¹⁶ See Tuerkheimer, *supra* note 5 at 1164-65.

survivors of sexual assault. The goal was twofold: show how common the issue of sexual violence is in society and to show survivors that they are not alone. Something that is frequently overlooked or forgotten, however, is that she created the phrase with women of colour in mind in particular.¹⁷ While the scope of this paper will not fully address the intersectionality of workplace sexual harassment and race, it is important to acknowledge that the lens through which the development of harassment norms is viewed has its origins in helping racialized women.

About a decade after Burke created 'Me Too', the accusations against Harvey Weinstein rocked society. The *New York Times* article that broke the news mentioned the pattern in Weinstein's interactions with women, tracking settlements meant to silence these women dating back decades prior to the 2017 story.¹⁸ As time went on, people started seeing society turn increasingly against the accused rather than the women who brought the allegations. As this happened, Alyssa Milano used #MeToo (notably without giving credit to Burke) to inspire women to come forward on social media with their experiences with sexual violence.¹⁹ The utilization of social media in this manner contributed to the normalisation of the discussion around sexual violence and a broader public realization of the vast extent to which this was normal.

In the aftershock of the 2017 Weinstein accusations, studies on the sexual violence started to become more common. In one American study, it was determined that 81% of women and 43% of men reported experiencing a form of sexual harassment and/or assault in their lifetime.²⁰ A Canadian study in partnership with Statistics Canada focused on harassment in Canadian workplaces more specifically and found 19% of women and 13% of men reported experience harassment in the workplace.²¹ As

¹⁷ Abby Ohlheiser, "Meet the woman who coined 'Me Too' 10 years ago – to help women of color", *Chicago Tribune* (19 October 2017), online: <www.chicagotribune.com/lifestyles/ct-me-too-campaign-origins-20171019-story.html>.

¹⁸ See Kantor & Twohey, *supra* note 5.

¹⁹ See Minnotte & Legerski, *supra* note 4 at 2.

²⁰ See Stop Street Harassment, "The Facts Behind the #MeToo Movement: A National Study on Sexual Harassment and Assault" (2018) at 7, online (pdf): *Stop Street Harassment* <www.stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf>.

²¹ See Statistics Canada Report, *supra* note 3 at 1.

these studies were conducted, the next question soon became, how does society better protect its members against sexual violence?

The Canadian Context

In early 2017, prior to the Weinstein story being reported, Employment and Social Development Canada, a Canadian government department, released a report on harassment and sexual violence in the workplace. There was a total of 1,219 participants of which 1,005 identified as female and 5 identified as male.²² Key findings included that 60% of participants reported having experienced harassment, 30% of the participants specifically experienced sexual harassment, twenty-one percent experienced violence, and three percent experienced sexual violence. Half of the survey respondents reported experiencing harassing or violent behaviour from a superior and 44% percent reported experiencing such behaviour from a co-worker. The further breakdown indicated that men were more likely to experience harassment generally while women were more likely to experience violence and, more specifically, sexual harassment. Most participants who had experienced sexual harassment noted that it was a superior who committed the act and those with disabilities or that were visible minorities were more likely to experience harassment than any other group.²³

This government report had some troubling results when asking about how employers responded to incidents of harassment and violence. Though 75% of respondents who experienced harassment or violence took action, nearly half of those that reported the incidents stated there was no attempt made by their employers to resolve the issue and most faced obstacles when attempting to resolve them. This led to low satisfaction with employers' responses.²⁴ The futility of reporting such an incident again emphasizes the significance of Tuerkheimer's "whisper networks". If the employer is unwilling to take action, then private means may seem like the only way to keep a community safe and to get the support these victims need in the aftermath of experiencing such an incident.

²² See Employment and Social Development Canada, *Harassment and Sexual Violence in the Workplace: Public Consultations (Report)* (Ottawa: Employment and Social Development, 2017) at 35.

²³ See *ibid* at 11-12.

²⁴ See *ibid* at 22.

While the federal report is significant for establishing a general sense of workplace sexual harassment norms across the country, it is important to note that workplace sexual harassment would be treated as a civil matter which places it squarely in the jurisdiction of the provinces as opposed to the federal government.²⁵ This is significant because the norms for the Yukon may look different from the norms for Ontario which will look different from the norms for Quebec. Many of these provinces have a Human Rights Tribunal that adjudicates workplace sexual harassment cases. Often, there is also a Human Rights Commission available to complainants and respondents as a resource as a complainant moves forward through the judicial process of filing a complaint.

This paper will specifically look at the Ontario, British Columbia, and Quebec as case studies for norm shifts. These three provinces have been leaders in the development of workplace sexual harassment legislation and norm shifts in recent years. They will serve as the primary case studies against which to compare ways forward for the Yukon. While, ideally, the Northwest Territories and Nunavut would be more direct and similar jurisdictions to use as comparisons, as in the Yukon, there is less data so this paper will place its focus on the aforementioned provinces for a comparative point of reference.

A Deep Dive into Three Canadian Jurisdictions

Ontario

In Ontario, section 32.0 of the *Occupational Health and Safety Act* governs the laws regarding workplace sexual harassment.²⁶ The act was amended in 2009 to explicitly address violence and harassment in the workplace. It mandates that an employer prepare a policy regarding workplace violence and workplace harassment and review such policies as necessary with a minimum of one review per year.²⁷ The policies are to be written and posted clearly in the workplace.²⁸ Such policies are meant to decrease risks and clearly describe the measures available for

²⁵ See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92, reprinted in RSC 1985, Appendix II, No 5.

²⁶ *Occupational Health and Safety Act*, RSO 1990, c O.1, s 32.0.1-32.0.3.

²⁷ See *ibid* at s 32.01(1).

²⁸ See *ibid* at s 32.01(2).

someone who has experienced workplace harassment or violence, as well as the procedures that will be triggered once such a complaint is filed.²⁹

Ontario has a Human Rights Commission that assists complainants in bringing complaints of workplace sexual harassment before the Ontario Human Rights Tribunal. The Commission is also a useful source of information for those seeking information on their rights. It provides a set of guidelines as to what constitutes sexual harassment, how to prevent it, and whom to contact if an employee believes they have been sexually harassed.³⁰ While the policy was last updated in 2013, it indicates that Ontario has maintained a commitment to addressing sexual harassment in the workplace prior to #MeToo. Many of the guidelines in Ontario's brochure are the same ones that appeared in similar Human Rights Commission guidelines developed later, often with links on their respective sites to the Ontario Human Rights Commission's website for more references on policy templates and guidelines.³¹

A number of cases regarding workplace sexual harassment have come before the Ontario Human Rights Tribunal in the last decade. When an award is given, it is offered as "compensation for injury to... dignity, feelings and self-respect."³² This award may take into account when the offense has been reprised against the same complainant.³³ The reference to each of these three aspects indicates the extent of the harm that can be done to a person when they are sexually harassed. Beyond having injured feelings due to the physical harm done, dignity and

²⁹ See *ibid* at s 32.02.

³⁰ See Ontario Human Rights Commission, "Policy on Preventing Sexual and Gender-Based Harassment" (May 2013), online: *Ontario Human Rights Commission* <www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment-0>.

³¹ See e.g. Workplace Sexual Harassment Project, "Developing a Workplace Sexual Harassment Policy & Procedures" (2020), online (pdf): *Prince Edward Island Human Rights Commission*: <www.peihumanrights.ca/sites/www.peihumanrights.ca/files/SHIFT%20SHW%20Policy%20and%20Procedure%20booklet.pdf>; Saskatchewan Human Rights Commission, "Sexual Harassment" (22 August 2016), online (pdf): *Saskatchewan Human Rights Commission* <saskatchewanhumanrights.ca/wp-content/uploads/2020/03/SHRC_Sexual-Harassment.pdf>.

³² For an example of the wording, see e.g. *AB v Joe Singer Shoes Limited*, 2018 HRT0 107 at para 181 [Joe Singer].

³³ See e.g. *Marzara v 2565818 Ontario Ltd*, 2019 HRT0 1625 at para 108 [Marzara].

self-respect are often lost. This impacts a victim's ability to work and may lead to depression and substance abuse in certain cases. These conditions are often aggravated when the victim is a minor.³⁴

The other common award given in these cases is compensation for lost wages as a result of the act of sexual harassment.³⁵ Though counsel for the complainant has sometimes tried to make an argument for an award of punitive damages, no cases have resulted in an award of punitive damages in the past decade. It has been explicitly noted that the Tribunal's remedial powers are not meant to be punitive.³⁶ However, the Tribunal has ordered that the respondent attend human rights training at their expense. This is considered a public interest remedy and an avenue to ensure future compliance from the respondent. The most commonly ordered trainings are readily available on the Ontario Human Rights Commission's website.³⁷

Reviewing successful complainants before Ontario's Human Rights Tribunal, on average, there are higher awards in the last five years than there were previously. The considerations for an award in a case of workplace sexual harassment are derived from *Sanford v Koop*.³⁸ The factors listed in *Sanford* include: humiliation; hurt feelings; loss of self-respect, dignity, self-esteem, or confidence; the experience of victimization, vulnerability; and, the seriousness, frequency, and duration of the offensive treatment.³⁹ These factors were affirmed in the 2008 case *Lane v ADGA Group Consultants*.⁴⁰

Awards meeting or exceeding \$100,000 are quite rare. In the last decade, I have noted of 3 cases that meet this: one in 2015, one in 2018, and one in 2020. Most notably, the highest award to date was in the 2018 case *AB v Joe Singer Shoes Limited* in which AB was awarded \$200,000 for injury to dignity,

³⁴ See e.g. *GM v X Tattoo Parlour*, 2018 HRT0 201 at para 54 [GM].

³⁵ See *Marzara*, *supra* note 33 at para 114.

³⁶ See *McCreary v 407994 Ontario*, 2010 HRT0 2369 at para 6.

³⁷ See *Marzara*, *supra* note 33 at 111.

³⁸ 2005 HRT0 53 at paras 34-38. In this case, Koop, the employer, left suggestive images in obvious places throughout the workplace, made sexually suggestive comments and gestures, and pressed his body against the much younger Sanford.

³⁹ See *ibid* at para 35.

⁴⁰ 295 DLR (4th) 425, 91 OR (3d) 649 at para 153.

feelings, and self-respect.⁴¹ AB was repeatedly assaulted and harassed by her employer, Mr. Singer, both at work and in her home. In its reasons, the Tribunal noted the power imbalance between AB and Mr. Singer as well as the particularly serious effects the repeated harassment had on AB.⁴² Since she was an immigrant and a single mother, the Tribunal also noted that she was a particularly vulnerable member of society.⁴³ Perhaps most importantly, AB's counsel presented medical evidence to support the applicant's claims.⁴⁴

The weight of medical evidence before the Ontario Human Rights Tribunal is significant. In the 2020 case *NK v Botuik*, the Tribunal explicitly noted that it was mindful of the lack of medical evidence and the failure to include the applicant's mental health diagnosis.⁴⁵ It is likely this, in addition to the shorter time period of the harassment, attributed to the Tribunal's decision not to award the applicant the same \$200,000 award that was given to AB in the *Joe Singer* case. However, *NK v Botuik* is also an interesting case in that it was also "the rare case where the appropriate compensation award exceeds that which was requested."⁴⁶

The decision in *NK v Botuik* may be an indicative of two trends the Ontario Human Rights Tribunal is taking towards the treatment of workplace sexual harassment cases. On one hand, the Tribunal is standing firm on the importance of medical evidence. This is somewhat troubling due to the difficulty some survivors of sexual harassment have with coming forward. Though #MeToo has brought greater care and attention to the plight of victims, there is still difficulty in ruling a case that comes down primarily to a "he said, she said", in which the reliability of a witness becomes more important. Due to the difficulties that already exist for many survivors in coming forward to an official forum, particularly when gaslighting occurs, societal norms may

⁴¹ See *Joe Singer*, *supra* note 32 at para 181.

⁴² See *ibid* at paras 161 & 165.

⁴³ See *ibid* at para 167.

⁴⁴ See *ibid* at paras 169-70.

⁴⁵ See *NK v Botuik*, 2020 HRT0 345 at paras 280 & 284 [*Botuik*]. The facts in this case are very similar to those in *Joe Singer*. NK worked at a residents' home caring for the residents under Botuik's supervision. He solicited an undesired sexual relationship both at the workplace and outside the workplace.

⁴⁶ *Ibid* at para 285.

still lead to the dismissal of a victim's complaint.⁴⁷ The social impact results in victims being more hesitant to come forward with an allegation of sexual harassment, missing the narrow window when a medical test may be done if that person had been raped or making a judge inclined to believe a mental health condition may have been triggered by something else, regardless of the contributory factor of the experience of being harassed.⁴⁸

On the other hand, the Tribunal gave NK more than what she asked for in its award. This, in conjunction with the overall trend of higher awards in recent years, could be indicative that there is a shift in norms on the Tribunal. It may be taking into account the debilitating effects workplace sexual harassment has on its victims. The unofficial reporting that constituted the use of the hashtag #MeToo may have helped evolve other social institutions to accept that this is a far more widespread issue than had been realized in an official capacity prior.⁴⁹ This, in turn, may give future complainants more confidence that their case will be heard and that the accuser will be held accountable. That may influence employers to be more careful in drafting policies and ensure that training is given to all new employees.

British Columbia

Unlike Ontario, British Columbia does not have a Human Rights Commission. British Columbia's Office of the Human Rights Commissioner is its closest equivalent. Like Ontario, it provides resources for its constituents to understand their rights and responsibilities. However, notably, it does not have guidelines regarding the creation of a workplace sexual harassment policy or guidelines as to what constitutes harassment.

Like Ontario, British Columbia has legislation regarding violence in the workplace.⁵⁰ However, it is worded more vaguely than its Ontario equivalent. It is addressed in a policy item connected to its *Occupational Health and Safety Regulation*

⁴⁷ See Tuerkheimer, *supra* note 5 at 1180.

⁴⁸ Most DNA evidence collected in a medical forensic test must be collected within 72 hours and before a shower, using a restroom, or changing clothing. See RAINN, "What is a Sexual Assault Forensic Exam?", online: <www.rainn.org/articles/rape-kit>.

⁴⁹ See Tuerkheimer, *supra* note 5 at 1184.

⁵⁰ See *Occupational Health and Safety Regulation*, BC Reg 82/2020, Policy Item P2-21-2.

whereby the legislation declares that an employer has a duty to prevent or minimize the likelihood of workplace harassment. WorkSafeBC, which administers the Workers Compensation Act for the British Columbia Ministry of Labour, has provided what it considers to be reasonable steps to minimize incidents of harassment in the workplace, including the development of policy and procedures as to how to address a complaint should one arise. It also provides a Word document template to give employers a basic policy to prevent harassment in their workplaces.⁵¹ Interestingly, there is no explicit mention of sexual harassment in the sample policy or the examples of harassment on the WorkSafeBC website.

Without legislation, the best understanding of the definition of sexual harassment for the British Columbia courts comes from *Janzen v Platy Enterprises* where the Supreme Court broadly defined sexual harassment in the workplace 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”.⁵² This was explicitly confirmed by the British Columbia Human Rights Tribunal in the case of *Mahmoodi v Dutton*.⁵³

Bethany Hastie conducted a study of workplace sexual harassment cases that came before the British Columbia Human Rights Tribunal from 2010 to 2016 and noted the problematic reliance on the term “unwelcome” to give awards to complainants.⁵⁴ Hastie noted that the term “unwelcome” was unique and not required in other human rights complaints which then set a strict test for what constituted harassment. The harasser needed to know or ought to have known that the conduct was unwelcome; a difficult test to which to assign objective standards.⁵⁵ It may be expected that assigning such a difficult test to evaluate sexual harassment complaints could deter potential complainants from engaging with the formal system as they would

⁵¹ See WorkSafeBC, “Developing a Policy Statement Template: Workplace Bullying and Harassment” (September 2013), online: WorkSafeBC <www.worksafebc.com/en/resources/health-safety/books-guides/developing-a-policy-statement-template?lang=en>.

⁵² *Janzen*, *supra* note 7 at para 56.

⁵³ 1999 BCHRT 56 at paras 135-37.

⁵⁴ See Bethany Hastie, “Workplace Sexual Harassment and the ‘Unwelcome’ Requirement: An Analysis of BC Human Rights Tribunal Decisions from 2010 to 2016” 32:1 CJWL 61 at 63-64.

⁵⁵ See *ibid* at 66-67.

need to fight an uphill battle to win any meaningful award. Hastie further noted that if a complainant could not conform to the “ideal victim” then their credibility was likely to be diminished before the Tribunal.⁵⁶

British Columbia has had fewer cases than Ontario over the last decade and no successful cases have come close to resulting in the \$200,000 award that was given in *AB v Joe Singer Shoes Limited*. As in Ontario, the language in giving an award is phrased as “injury to dignity, feelings and self-respect.”⁵⁷ The successful applicant may also be awarded lost wages. There has also been no significantly noticeable trend with respect to an increase in awards in the aftermath of the height of the #MeToo movement. Of the four highest awards in the last decade, three were ordered in the last five years. As a result, it tentatively seems that a trend to giving higher awards may soon be discernable, but more time will be needed to confirm this.

The highest award that has been handed down in the last decade was *PN v FR and another (No 2)* in which the Tribunal awarded \$50,000 for injury to dignity, feelings, and self-respect.⁵⁸ Similar conditions were noted for PN’s case: she was particularly vulnerable as an immigrant and she had a counsellor testify as to the state of her post-traumatic stress disorder.⁵⁹ As with Ontario, it seems that having medical evidence increases the likelihood of receiving an award. However, it should be noted that this case may be exceptional as the Court noted that PN’s case was essentially a story of human trafficking considering the constant threats FR made to have her deported if she did not comply with his demands.⁶⁰

A similar and more recent decision was given by the Tribunal in 2019 in the case of *Araniva v RSY Contracting and another (No 3)* in which the applicant was awarded \$40,000 for injury to dignity, feelings, and self-respect.⁶¹ Similarly, Ms. Araniva brought forward medical evidence in the form of her doctor’s testimony in order to confirm the effects of the harm the

⁵⁶ See *ibid* at 73.

⁵⁷ See *ibid* at para 308.

⁵⁸ See 2015 BCHRT 60 at para 137.

⁵⁹ See *ibid* at paras 133-35.

⁶⁰ See *ibid* at para 136.

⁶¹ 2019 BCHRT 97 at para 146 [*Araniva*].

complainant committed on her long-term wellbeing.⁶² Though this need for medical evidence to assure a higher award may be troubling for the reasons mentioned in the previous sub-section, there is reason to believe that the Tribunal is headed towards handing down more generous awards for future sexual harassment cases.

In *Araniva*, the Tribunal noted that there is an upward trend for damages, citing the Court of Appeal upholding a \$75,000 award in an employment case the British Columbia Human Rights Tribunal had awarded.⁶³ The decision also cited the Ontario Human Rights Tribunal cases of *AB v Joe Singer Shoes Limited* and *GM v Tattoo Parlour* as being influential to this upward trend. The British Columbia Human Rights Tribunal took into account this upward trend when awarding \$40,000 to Ms. *Araniva*.⁶⁴

This may be indicative that there is slowly a reversal from the stereotypes that plagued the Tribunal according to Hastie towards a Tribunal more willing to accept that silence is not the same as consent.⁶⁵ If this is the case, then, overall, it seems that British Columbia is poised to follow the same trends seen in Ontario with respect to workplace sexual harassment decisions before its Human Rights Tribunal. There is less data off of which to base such a claim; however, the verbalization by the Tribunal in the 2019 *Araniva* decision seems to be a sufficiently strong indicator to believe that British Columbia is not far behind Ontario in awarding higher awards for those who bring complaints of workplace sexual harassment.

Quebec

Quebec provides an interesting case study for comparison because it is the sole civilian jurisdiction in Canada. Though the Yukon is a common law jurisdiction, like the rest of Canada, there are valuable insights into the treatment of workplace sexual harassment from the Quebec perspective. Most notably, this

⁶² See *ibid* at para 141.

⁶³ See *University of British Columbia v Kelly*, 2016 BCCA 271, upholding *Kelly v University of British Columbia*, 2011 BCHRT 183 (To date, this is the largest award the British Columbia Human Rights Tribunal has awarded, but it is not being used as a primary case study because it was not a harassment case).

⁶⁴ See *Araniva*, *supra* note 61 at para 145.

⁶⁵ See *Hastie*, *supra* note 54 at 83-84.

comes in the increased likelihood of punitive awards being handed down compared to the very rare occurrence in common law jurisdiction.

Similarly to Ontario, Quebec has a Human Rights Commission: La Commission des droits de la personne et des droits de la jeunesse. The name of the Commission indicates a broader conception of human rights in Quebec as it explicitly includes youth rights in its name. As with Ontario, the Quebec Commission provides guidelines for employers and potential complainants regarding what constitutes sexual harassment and tools for addressing it should it arise. It should be noted that some resources are only available in French meaning the population in Quebec that only comprehends English may have more difficulty finding resources. That being said, French is the primary language of the province and, in other provinces, resources are given only in English.

There are two documents provided in English: an infographic on an employer's role in handling a sexual harassment complaint and a guideline for creating a policy addressing harassment for businesses to use. It may be these documents were deemed to be of particular importance, explaining why they are found in both languages. One of the most interesting points in the Quebec infographic is its emphasis on the importance of protecting the victim with support mechanisms.⁶⁶ This is significant for its implication regarding the work community's shared responsibility for ensuring there is more than a cold procedural form of justice. Some researchers have indicated the significance that a peacebuilding approach can have to ensure that victims feel "valued, safe and empowered... to contribute to healing and restoration for all."⁶⁷ This can contribute to complainants being willing to come forward with complaints because the dialogue can build trust not just between the employer and the harmed member, but also amongst community members as a whole.⁶⁸

⁶⁶ See Commission des droits de la personne et des droits de la jeunesse, "Dealing with sexual harassment : your role as an employer", online (PDF): *Commission des droits de la personne et des droits de la jeunesse* <www.cdpcj.qc.ca/storage/app/media/publications/infographie_harcelement-sexuel_En.pdf>.

⁶⁷ Nancy Ross & Sue Bookchin, "Perils of conversation: #MeToo and opportunities for peacebuilding" (2020) 35:4 *Gender in Management* 391 at 397.

⁶⁸ See *ibid* at 400.

In its guidelines regarding harassment in the workplace, the Commission introduces the subject matter by explicitly stating “[a] healthy, harmonious working atmosphere cannot be established without the creation of a management policy to combat discriminatory harassment in the workplace.”⁶⁹ Unlike similar brochures in other jurisdictions, it provides the text of the related legislation insisting upon the prohibition of harassment in the Quebec Charter.⁷⁰ It also takes a deeper dive into the jurisprudence, explaining the development of the definition of sexual harassment before the Courts starting with *Janzen*.⁷¹ The guidelines also include the importance of intersectionality in Court analysis.⁷² Intersectionality is not explicitly addressed in Ontario’s equivalent guidelines.

The guidelines also, interestingly, point to prior use in the Quebec Superior Court of article 1457 CCQ in addressing employer responsibilities.⁷³ This may explain, in part, the more ready use of punitive damages before the Tribunal. Article 1457 CCQ governs extracontractual liability, noting that “where is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.”⁷⁴ The emphasis on allowing for “bodily” and “moral” in particular give strength to a complainant’s argument for reparations. While “bodily” is self-explanatory in the context of sexual harassment, using the term “moral” in a legal argument before the Tribunal may help the Courts and the employer understand that sexual harassment has emotional impacts on the victims and that it is equally something that should give rise to compensation.

The awarding of punitive damages is also explicitly permitted as per article 1621 CCQ. Punitive damages are to be assessed in light “of all the appropriate circumstances, in

⁶⁹ Commission des droits de la personne et des droits de la jeunesse, “Discriminatory Harassment in the Workplace : A policy against discriminatory harassment in the workplace” (2004) at 5, online (pdf): *Commission des droits de la personne et des droits de la jeunesse* <www.cdpdj.qc.ca/storage/app/media/publications/discriminatory_harassment_workplace.pdf> [Quebec Commission Harassment Guidelines].

⁷⁰ See *ibid*.

⁷¹ See *ibid* at 8.

⁷² See *ibid* at 9.

⁷³ See *ibid*.

⁷⁴ Art 1457 CCQ.

particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the reparatory damages is wholly or partly assumed by a third person."⁷⁵ The damages are meant to be exceptional in that the damages must be solely what is sufficient to fulfil the need to prevent the liable party from repeating the behaviour in the future.⁷⁶

Beyond using the *Quebec Charter* to establish an argument that workplace sexual harassment has occurred. Quebec has also recently passed legislation explicitly prohibiting harassment.⁷⁷ Similar to its equivalent in Ontario, it insists upon employers creating and making available policies to prevent harassment. The legislation also explicitly insists upon there being a section of the policy addressing "behaviour that manifest itself in the form of verbal comments, actions or gestures of a sexual nature."⁷⁸ This provision sets the legislation apart from its common law counterparts by making it as clear as possible that sexual harassment in the workplace is not just a subset of harassment, but is an area that deserves its own category within the harassment policies and laws.

However, even with all the legislation and guidelines in place, there have not been many cases regarding workplace sexual harassment in Quebec in recent years. The two most notable cases in recent Quebec history are *Lippé* and *Habachi*. *Lippé* established that a "hostile workplace" as an element of determining when to workplace sexual harassment has occurred, mandating reparations.⁷⁹ When the *Habachi* case came before the Quebec Court of Appeal, the Court ruled that, despite a linguistic tendency to think of harassment as requiring the act occurring multiple times, a grave and serious single act could constitute harassment.⁸⁰ These decisions have laid the groundwork

⁷⁵ Art 1621 CCQ.

⁷⁶ See *ibid*.

⁷⁷ See *Act Respecting Labour Standards*, CQLR, c N-1.1, s 81.19 [Quebec Labour Act].

⁷⁸ *Ibid*.

⁷⁹ See *Quebec (Commission des droits de la personne et de la jeunesse) c Quebec (Procureur général)*, [1998] RJQ 3397, 1988 CarswellQue 5010 at paras 5-7.

⁸⁰ See *Quebec (Commission des droits de la personne) c Habachi*, [1999] RJQ 2522, 1999 CarwellQue 30716 at paras 13-14.

should a case of workplace sexual harassment come before the Tribunal.

There have been two recent cases that were successful in arguing the existence of workplace sexual harassment in Quebec. In 2015, prior to the height of the #MeToo era, the applicant in *Commission des droits de la personne et des droits de la jeunesse c Gomez* was awarded \$5,000 in moral damages, but no punitive damages.⁸¹ However, in a more recent 2019 case, *Commission des droits de la personne et des droits de la jeunesse c Desormeaux*, the Tribunal awarded \$20,000 for moral damages as well as \$6,000 in punitive damages.⁸² Proportionally, that is a significant amount of punitive damages for a small Quebec business to pay. The punitive damages were equivalent to thirty percent of the moral damages, indicating the seriousness with which the Tribunal is taking these matters.

Similar to British Columbia, there are simply not enough cases to speak of a definitive trend in the Quebec jurisprudence. However, the incorporation of proportionally high punitive damages in workplace sexual harassment awards could be indicative that Quebec finds utility in the awarding of supplementary damages as a preventative measure. The award in *Desormeaux* also indicates an increase in the amount of damages the Tribunal was willing to give. However, the facts of that case were similar to the 2018 Ontario case *GM v X Tattoo Parlour* in which the complainant received an award of \$75,000.⁸³ This indicates that, though Quebec may be doing more to try to prevent reoccurrence of workplace sexual harassment in its use of punitive damages, it is also not as generous as either Ontario or British Columbia in compensatory awards for its complainants. It must be emphasized again that there is less recent jurisprudence in Quebec to draw upon than in either Ontario or British Columbia. However, based upon the landmark cases and recent application in workplace sexual harassment cases before the Quebec Human Rights Tribunal, these are trends to watch in the coming years as different jurisdictions move forward in the post-#MeToo era.

⁸¹ See 2015 QCTDP 14 at paras 230-36.

⁸² See 2019 QCTDP 13 at para 105 [*Desormeaux*].

⁸³ See *GM*, *supra* note 43 at para 59.

Summary of Case Study Conclusions

Overall, across all three jurisdictions examined, there is a trend of higher awards since #MeToo reached its height in 2017. Ontario is the leading jurisdiction in common law Canada, likely in part due to its larger population, but also as indicated by the use of Ontario jurisprudence in decisions before the British Columbia Human Rights Tribunal.⁸⁴ Ontario also has given the highest awards to date in Canada for workplace sexual harassment.⁸⁵ However, despite its high compensatory awards, Ontario has yet to award punitive awards as a preventative measure to future occurrences of workplace sexual harassment.

Quebec, the civil law jurisdiction of Canada, has awarded the lowest compensatory awards of the three examined jurisdictions. However, it has awarded proportionately significant punitive awards unlike its common law sisters.⁸⁶ It also has legislation that more explicitly prohibits sexual harassment and guidelines from its respective Commission that more clearly outline the definition and jurisprudential development of workplace sexual harassment, indicating a strong cultural norm in Quebec to prevent its occurrence in society.⁸⁷

These studies provide interesting insights into how the Yukon can proceed with its mandate to shift the cultural norms surrounding workplace sexual harassment and means by which it can do so utilizing the law and via its Human Rights Commission which has been gifted the money from the Canadian government to create these new norms. It is significant to note that looking to Quebec may provide some guidelines, but it is a civil law jurisdiction and, therefore, the basis of Quebec laws in the *Civil Code of Quebec* may not translate perfectly or particularly well to the common law standards of the Yukon. However, its use of punitive damages in particular are a question that common law jurisdictions have increasingly been starting to contemplate in this complex and the Yukon, as briefly mentioned earlier, may be an ideal testing ground for a common law jurisdiction to adopt some of these traditionally civilian tendencies.

⁸⁴ See *Araniva*, *supra* note 61 at para 145.

⁸⁵ See e.g. *Joe Singer*, *supra* note 32 at para 181; *Botuik*, *supra* note 45 at para 285.

⁸⁶ See e.g. *Desormeaux*, *supra* note 82 at para 103.

⁸⁷ See Quebec Commission Harassment Guidelines, *supra* note 69; Quebec Labour Act, *supra* note 77 at s 81.19.

The Yukon Context

The Yukon is in a prime moment to shift cultural norms surrounding workplace sexual harassment in the territory. The Yukon Human Rights Commission is almost one year into its five-year mandate from the Canadian government.⁸⁸ Already, it is clear that the Commission is serious regarding its role in shifting norms as indicative by its weekly Facebook posts disseminating information on workplace sexual harassment.⁸⁹ The use of social media helps create a sustainable change in behavioural norms.

Dynamic norms are socio-cultural norms that are currently shifting in their role and understanding in society. In a study on dynamic norms, two factors were noted in the use of dynamic norms to create a sustainable change in behaviour. First, when a behaviour becomes more frequent, people anticipate ongoing change and a future world in which that behaviour is normal. This results in people conforming to the emerging norm as if it is the current reality. Second, observing others shifting their behaviour to conform to an emerging norm leads others to reconsider barriers they once believed would be insurmountable with respect to creating change.⁹⁰ Increased Facebook posts regarding workplace sexual harassment helps perpetuate information. People following the Yukon Human Rights Commission will see the posts and absorb the information. The frequency of the posts normalizes the concept of training, making it easier to implement in the future. It may also normalize the concept of sexual harassment in Yukon society because the frequency of posts on a popular social media platform will create a conception that it is normal to discuss the existence of workplace sexual harassment and the need to address it. This was exactly how the #MeToo movement gained power. The power of social media may be particularly pertinent in these COVID-19 pandemic times as more people are isolated and increasingly using social media platforms

⁸⁸ See Government Press Release, *supra* note 1.

⁸⁹ See e.g. Yukon Human Rights Commission, "Workplace sexual harassment is a form of discrimination prohibited under the Yukon Human Rights Act" (27 November 2020), posted on Yukon Human Rights Commission, online: Facebook <www.facebook.com/yukonhumanrights> [YHRC Facebook Post].

⁹⁰ See Gregg Sparkman & Gregory M Walton, "Dynamic Norms Promote Sustainable Behavior, Even if it is Counternormative" (2017) 28:11 Psychological Science 1163 at 1164.

to stay in touch with others, making the likelihood of seeing such a post higher than they would be in non-pandemic times.

The use of engaging in dynamic norms via means such as social media will be a critical path forward to creating a change in the culture of the Yukon. The territory will be reliant on data from other jurisdictions and using methods that have proven effective in recent years to move forward because of the relative lack of data in the Yukon on workplace sexual harassment statistics.⁹¹ A 2018 Statistics Canada report indicated that nineteen percent of women and thirteen percent of men reported experiencing harassment in the workplace.⁹² However, it must be noted that this study only included the provinces. There was no data included for any of the territories, including the Yukon.⁹³ This indicates a particular challenge for the Yukon. Often these surveys include factors such as income, race, and gender to help identify areas of particular importance in helping change social norms; especially since sexual harassment almost always requires an intersectional lens when addressing a victim's specific situation.

That being said, the Yukon Human Rights Commission is in a unique position to understand the various aspects of sexual harassment and how to address it in the context of the Yukon. The Commission was established in the *Yukon Human Rights Act* with five primary goals in mind: (1) to promote that every individual is free and equal; (2) to promote cultural diversity as a fundamental human value and basic human right; (3) to promote education and research to eradicate discrimination; (4) to promote in settling complaints; and, (5) cause complaints that cannot be settled to be adjudicated.⁹⁴ The explicit role the legislation gives it to promote principles of equality necessarily make it an important institution in the fight against workplace sexual harassment in the Yukon. It is also mandated to improve education and research, making it the ideal recipient of the federal funding it received. It also has particular insight into the adjudication of workplace sexual harassment disputes as it is often in the role of assisting both the complainant and the respondent at the outset, making it uniquely situated to understand what constituents of the Yukon seek when attempting to resolve such disputes.

⁹¹ See YHRC Press Release, *supra* note 2.

⁹² See Statistics Canada Report, *supra* note 3 at 2.

⁹³ See *ibid* at 12.

⁹⁴ See *Human Rights Act*, RSY 2002, c 116, s 16(1).

The Yukon Human Rights Commission currently provides a number of resources for complainants and respondents to utilize. It explicitly sets out different guides for each party and includes materials in both French and English. In this sense, it has more comprehensible access to resources for its population than the aforementioned jurisdictions. It also has specific guidelines on how to recognize harassment and sexual harassment. Importantly, its guidelines on sexual harassment emphasize that “[h]arassing actions need not be intentional in order to be considered harassment.”⁹⁵ It also provides a detailed chart on how a complaint moves through the judicial system and the actions that can be taken depending on how a hearing goes.⁹⁶

If a complaint cannot be adjudicated, it is brought before the Yukon Human Rights Board of Adjudication. Keeping in mind the much smaller population size of the Yukon comparative to the jurisdictions examined earlier, there are very few cases publicly available to review in the Yukon. The two notable cases from the last decade are *Hureau v Yukon (Human Rights Board of Adjudication)* and *Budge v Talbot Arm Motel Ltd.*

Hureau was appealed from the Yukon Human Rights Board of Adjudication which had found that Mr. Hureau had harassed the complainant, Ms. Hansen, in 2010. Hansen cross-appealed because she had not been awarded damages connected to the harassment.⁹⁷ The test used was that in *Janzen*, centered on the term “unwelcome conduct.”⁹⁸ The Yukon Supreme Court determined that the Board had erred in not awarding compensatory damages, noting that “[t]here is a danger in trivializing the awards for injury to dignity, feelings and self-respect for sexual harassment. Psychological injuries are just as serious as physical injuries and are often more difficult to remedy and make the subject whole again.”⁹⁹ It allowed the cross-appeal

⁹⁵ See Yukon Human Rights Commission, “Harassment – Recognizing It!” (2011) at 2, online (pdf): *Yukon Human Rights Commission* <yukonhumanrights.ca/documents/Harassment%20-%20recognizing%20-%20rev%20Sept%2011_0.pdf>.

⁹⁶ See Yukon Human Rights Commission, “Life Cycle of a Complaint”, online (pdf): *Yukon Human Rights Commission* <yukonhumanrights.ca/documents/Life%20Cycle%20of%20a%20Complaint.pdf>.

⁹⁷ See *Hureau v Yukon (Human Rights Board of Adjudication)*, 2014 YKSC 21 at paras 1 & 3 [*Hureau*].

⁹⁸ See *Janzen*, *supra* note 7 at para 56.

⁹⁹ *Hureau*, *supra* note 97 at para 69.

and ordered Hureau to pay \$5,000 in compensatory damages to Ms. Hansen.¹⁰⁰

The decision in *Hureau* is significant because of its establishment of the significance of compensatory damages and its acknowledgment as to the difficulty victims of sexual harassment face in healing. Though \$5,000 is lower than the \$15,000 Ms. Hansen requested, it is still significant that the Supreme Court ordered it considering the Board had believed a finding of sexual harassment was sufficient.¹⁰¹

The 2018 decision in *Budge* gives an identical compensatory award to the complainant after she experienced sexual harassment in the workplace.¹⁰² The notable difference between this case and any of the cases previously discussed in this paper is that the complainant was male, a reminder that, though women disproportionately experience sexual harassment in the workplace, men are vulnerable as well. The Board noted four elements required to establish the existence of sexual harassment in the workplace: (1) vexatious conduct; (2) connection with employment; (3) conduct that one knows or ought to know is unwelcome; and, (4) conduct that treats an individual unfavourably on the prohibited ground of sex. The onus is on the complainant to prove that, on a balance of probabilities, there was sufficient evidence to prove a case of workplace sexual harassment.¹⁰³ Overall, while the Board found on a balance of probabilities that there was workplace sexual harassment, it refused to award punitive damages because it did not consider the behaviour to have been malicious.¹⁰⁴

These cases demonstrate that there is room for growth in the treatment of workplace sexual harassment before the Yukon's judicial system. With fewer cases due to a smaller population size, it will inherently take longer to adjust the judicial mindset without the implementation of legislation giving more specific outlines as to how a case should be treated. However, the citations that *Hureau* and *Budge* both make to Ontario cases indicate that there

¹⁰⁰ See *ibid* at para 71.

¹⁰¹ See *ibid* at para 70.

¹⁰² See *Budge v Talbot Arm Motel*, 2018 CarswellYukon 113, 90 CHRR D/231 at para 232.

¹⁰³ See *ibid* at paras 197-98.

¹⁰⁴ See *ibid* at para 229.

is reason to believe that Ontario may be a jurisdiction from which the Yukon can most readily look to for precedent.

Possibilities for the Yukon

Taking into account the current context of the Yukon with its relatively small jurisprudence and fewer statistics, there are a number of avenues that the Yukon Human Rights Commission may be interested in looking into the shift the cultural norms of the territory to eradicate workplace sexual harassment in the territory. In particular, improved awareness of what constitutes sexual harassment, the encouragement of higher awards, and alternative dispute resolution may provide interesting avenues for the Yukon to explore during the remainder of its five-year mandate.

Improve General Social Awareness

As mentioned, the Yukon Human Rights Commission has increased its social media profile on Facebook and posted weekly Facebook posts with factoids regarding workplace sexual harassment. The posts all have the same design of hexagons on a dark blue background. The quick factoid posting is visually appealing and draws the eye towards the fact by placing the fact on the brightest coloured hexagon in the image. Each post includes the contact information for the Yukon Human Rights Commission and the logos of both the Commission and the slogan “A Yukon **without** workplace sexual harassment”.¹⁰⁵ The repetitive nature of the design is to the advantage of the casual scroller. It plays into the dynamism of norms.

Due to the widespread use of Facebook, this avenue can help normalize the discussion of workplace sexual harassment and, when appearing frequently enough, may get people to take the Commission up on its offer on the post to reach out for more information. The apparent normalization may result in real normalization if it is noticeable that complainants are not relying solely on whisper networks to disseminate information regarding an instance of sexual harassment, but are more actively engaging in the judicial process. It will take time to observe how deeply such a phenomenon could pervade society, particularly due to the lack of prior statistics to serve as a point of comparison, but an increase

¹⁰⁵ See e.g. YHRC Facebook Post, *supra* note 89.

in social media chatter, such as sharing of the Commission's posts, may indicate that the culture is shifting.

Higher Awards

Of course, while increased social normalization of sexual harassment is a goal to help end workplace sexual harassment, there will likely be more cases that will reach the Yukon Human Rights Board of Adjudication. There are two aspects to examine in the context of the Yukon: compensatory awards and punitive awards.

First, the compensatory awards that have been awarded for workplace sexual harassment have been around \$5,000. Though neither of the sets of facts in the aforementioned Yukon cases have the same gravity of the high awards given in Ontario and British Columbia, this is still a relatively low award to be given when considering the psychological impact that sexual harassment may have on its victim. Perhaps it is due to lack of opportunity that the Courts have yet to award a higher amount, but the trends in Ontario and British Columbia cannot be ignored, particularly when a British Columbia court explicitly noted in *Araniva* that compensatory awards are showing an upward trend.¹⁰⁶ When bringing cases before the Board, the Yukon Human Rights Commission may be inclined to present the Court's comments in *Araniva* as evidence that an award should be higher than what has perhaps been given historically. It would also be a signal of the seriousness of the judicial system in eliminating sexual harassment in the workplace.

However, the best preventative measure may be punitive damages. Punitive damages have, notably, only been awarded in the civil law jurisdiction of Quebec. They are not an alien concept to common law jurisdictions in Canada, but there is a clear reluctance demonstrated in Ontario, British Columbia, and the Yukon with respect to imposing punitive damages on a party. Sexual harassment, however, may be considered an extreme subset of harassment in of itself. If it is taken in that light, then comparing awards for workplace sexual harassment to other non-sexual harassment awards may not be the best means to determine if the awards are sufficient. It has been acknowledged in the Yukon that there is grievous psychological harm done to a

¹⁰⁶ See *Araniva*, *supra* note 61 at para 145.

victim of sexual harassment from which it is difficult to recover.¹⁰⁷ Pushing for punitive damages as a way to exemplify this unique and terrible harm could be a way for the Yukon to implement it into its jurisprudence and serve as a test case for other jurisdictions to see how effective punitive damages are in the common law context with respect to deterrence.

A final factor to consider in achieving a higher award is the necessity of medical testimony or evidence. A victim of sexual harassment may not acknowledge that they have been harassed for several days, after which a physical examination may be useless. The frequency with which workplace sexual harassment is tied up in power dynamics may make a victim hesitant to approach any kind of official authority for fear that they will lose the little control they feel they have over their experience. While medical evidence will always be ideal in affirming the reliability of a witness, allowing it to factor into the amount a complainant receives the way it has in Ontario may deter complainants from coming forward. In the interest of access to justice, it seems that it would be best if the Commission and other legal organizations in the Yukon emphasize that medical testimony, while ideal, should solely assist in being a deciding factor to determining if there was sexual harassment. It should not be the sole determinant in confirming that there was sexual harassment in a case and it should not be a factor in the award that is ultimately given to a successful complainant.

Alternative Dispute Resolution: An Indigenous Perspective?

As of June 30th, 2020, the population of the Yukon was estimated to be approximately 20.3% Indigenous.¹⁰⁸ With such a significant population, it is worthwhile considering form of justice that are more common to certain Indigenous populations as the adversarial nature of the Yukon's formal court system may not be the most productive form of justice for an indigenous complainant.

One Indigenous community, the Teslin Tlingit, have their home in the Yukon. Two approaches they have traditionally used to correcting harmful behaviour are sentencing circles and sharing

¹⁰⁷ See Hureau, *supra* note 97 at para 69.

¹⁰⁸ Yukon Bureau of Statistics, *Population Report Second Quarter 2020* (Whitehorse: Yukon Bureau of Statistics, 2020 at 5).

traditional stories.¹⁰⁹ Sentencing circles may be used in instances when an offender has admitted to guilt, thereby accepting responsibility for their actions. The community determines who may partake in the circle and a victim may choose to attend, though they are not obliged to do so. The goal is to address how the offender's actions should be addressed. Factors that contributed to the deviant behaviour may be addressed.¹¹⁰

A sentencing circle may be useful because of the engagement with broader society. It establishes a community norm that makes it abundantly clear that a certain behaviour will not be tolerated while also attempting to repair relationships between the offender and the harmed party. The offender is made to come before members of the community to discuss the harm they created and how the offender reached the point of being able to create this harm. It also gives a chance to the victim to vocalize directly to the offender, while supported by their community, precisely what effect the offender's actions had. The creation of a broader responsibility to the community may also aid in acting as a preventative measure due to the element of shame. As seen in the era prior to #MeToo when shame was a deterrent to victims bringing sexual harassment claims to official figures, a probable offender may think twice before harming another member of the community due to the public nature of facing a sentencing circle in which many members of the community may be involved. While this is derived from traditional Teslin Tlingit methods of conflict resolution, this may be a form of mediation that could be used beyond the indigenous community if the parties were willing. Its utility in repairing relationships could assist a victim in feeling assured that the offender will not harm them or anyone else again and give the victim a means by which to feel secure in their chosen field of employment once again.

The second method of connecting victims to stories as a means of healing may help resolve the issue the Courts have addressed of the difficulty in supporting a victim through the psychological harm they face after experiencing workplace sexual harassment. This may be an avenue particularly pertinent to an indigenous complainant by reinforcing their cultural values, traditions, and means of support.¹¹¹ It may provide community

¹⁰⁹ See Renée Gendron & Charlotte Hille, "Conflict Resolution Practices of Arctic Aboriginal Peoples" (2013) 30:3 Conflict Resolution Q 347 at 353.

¹¹⁰ See *ibid*.

¹¹¹ See *ibid* at 354.

support needed to help an indigenous complainant heal because of the strength of the storytelling tradition in communities such as that of the Teslin Tlingit. This method may not be as useful for a non-indigenous member, but the high percentage of Indigenous peoples living in the Yukon and the inherent vulnerability attributed to being a member of the Indigenous community make this an important consideration when attempting to create norms that encompass the entire Yukon community.

Conclusion

In the post-#MeToo era, there is much work that still needs to be done to improve cultural norms surrounding workplace sexual harassment. The opportunity presented to the Yukon right now makes it an ideal testing ground to take the most successful aspects of norm changes in other Canadian jurisdictions while eschewing those that continue to serve as barriers to a complainant's access to justice. This time also serves as an opportunity to push for previously under-utilized tools such as punitive awards or indigenous forms of mediation. The approach the Yukon takes in the next few years may have a profound impact on how workplace sexual harassment is addressed not just within the territory, but in other jurisdictions as well.

However, while this paper addresses some avenues of exploration the Yukon Human Rights Commission could research in the next few years, it was necessarily limited in scope. While one indigenous group's practices were examined as an opportunity for alternative forms of justice, the Teslin Tlingit are not the only indigenous group present in the Yukon and reviewing the methods other indigenous groups address deviant behaviour could provide more interesting means to be as inclusive as possible in the shift in cultural norms. Additionally, alternative dispute resolution is a growing field and exploring an increased use of arbitration or mediation in the adversarial common law system may be worth addressing in another paper. It may also be interesting to explore methods used formally and informally in the other Canadian territories of Nunavut and the Northwest Territories which may be the most similar jurisdictions to the Yukon.

Regardless of this paper's limitations, this is an exciting moment for the Yukon and it will be fascinating, not just for the territory, but for the other Canadian jurisdictions to see what

successes the Yukon has in continuing this essential battle to eradicate workplace sexual harassment.

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