

Women in workplace should not be deterred by Harvey Weinstein's overturned conviction

By **Stephen Thiele** and **Mryam Sarkis**

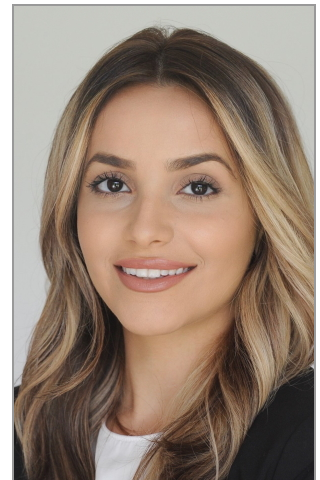
Law360 Canada (May 27, 2024, 11:00 AM EDT) -- Sexual violence in the workplace, or anywhere else, has no place in our society. However, ending the practice where men exploit their positions of power in the workplace to sexually harass or abuse women remains a challenge, as seen in high-profile criminal cases such as the New York case involving Harvey Weinstein, a rich and powerful man in the entertainment industry.

In 2020, Weinstein was convicted of sexual assault of a former production assistant and rape of an aspiring actress in New York and received a 23-year prison sentence.

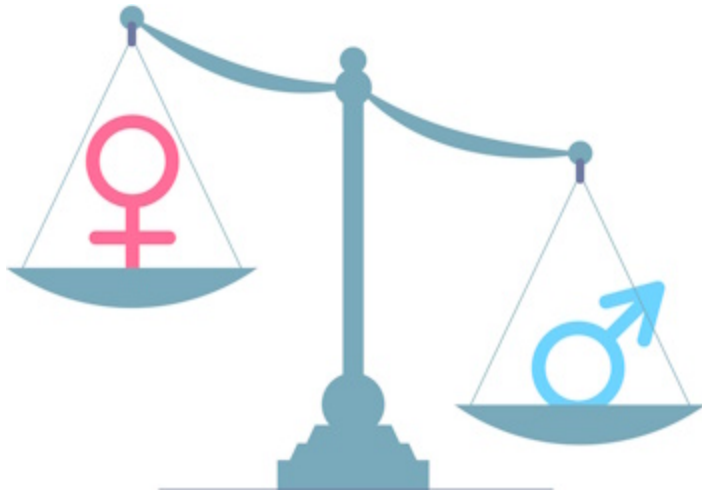
On April 25, 2024, Weinstein's conviction was overturned, leading some to criticize the State of New York Court of Appeals for negatively impacting the #MeToo social movement.



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The separate dissenting opinions of Justice Madeline Singas and Justice Anthony Cannataro highlighted these concerns. Justice Singas explained that the majority of the court's decision overly simplified the facts into a he said/she said narrative regarding the incidents that led to the criminal charges against Weinstein. Justice Singas criticized the majority's judgment for ignoring evidence of Weinstein's manipulation of the complainants and premeditated actions and for failing to recognize that the jury was entitled to consider previous assaults committed by Weinstein against others. Justice Singas stated that as a result of the majority's opinion, "the road to holding defendants accountable for sexual assault has become significantly more difficult."

Similarly, Justice Cannataro stated that the "...majority decision represents an unfortunate step backwards from recent advances in our understanding of how sex crimes are perpetrated and why victims sometimes respond in seemingly counterintuitive ways, endangering decades of progress in

this incredibly complex and nuanced area of law.”

Despite these strongly worded dissents, the majority of the court's rationale for overturning Weinstein's conviction was based on well-established evidentiary principles concerning the admissibility of similar fact evidence under New York law.

During Weinstein's criminal trial, the prosecution was permitted to introduce evidence of his uncharged crimes and other misconduct. This included testimony from non-complainant witnesses about their encounters with Weinstein and details of his bullying and fits of anger towards employees, restaurant workers and business associates. The prosecution was allowed to introduce this evidence to support the argument that Weinstein had abused his position and power in the entertainment industry to coerce the complainants into unwanted sexual encounters, often as part of a *quid pro quo* arrangement. This behaviour was described as a common and well-known secret in the entertainment industry. The prosecution aimed to show that Weinstein not only used force with the complainants but that he was fully aware the complainants did not consent.

The majority of the New York appellate court found that the trial judge erred by allowing the prosecution to introduce the evidence from the non-complainant witnesses because their allegations were not directly related to the charges against Weinstein. According to the majority of the appellate court, the rules of evidence generally prevent the state from introducing evidence of crimes not specifically charged against the accused, to avoid using such information as a basis for additional punishment or as aiding the proof that the accused was guilty of the crime charged. Evidence of uncharged crimes serves to suggest that the accused has a tendency to commit similar offences, thereby improperly creating a presumption of guilt, based on the idea that past criminal behaviour indicates a likelihood of committing the crime charged. Although there are exceptions to this general rule under New York law, the majority of the New York appellate court concluded that no exceptions applied in Weinstein's case, especially given that he had no criminal record at the time he faced the charges in New York.

Viewed through the lens of Canadian laws of evidence, Canadian jurists would likely have overturned Weinstein's conviction as well because Canadian law generally prohibits the use of evidence of an accused's bad character based on having committed similar past crimes to obtain a conviction for a charged crime. Canadian courts have determined that such evidence can lead to impermissible moral or reasoning prejudice. An accused should neither be convicted because they have committed similar wrongful acts in the past nor should similar fact evidence be admitted if it adds a level of complexity that diverts the trier of facts attention away from the specific charges against the accused.

In *R. v. Clermont*, [1986] 2 S.C.R. 131, a case similar to Weinstein's case, the Supreme Court of Canada (SCC) held that evidence of the accused's prior rape conviction from five years earlier was inadmissible in connection with a subsequent charge for rape. The accused had pleaded not guilty and argued that the complainant had consented or, in the alternative, that he was under the mistaken belief that the complainant had consented. The SCC determined that the evidence of the previous conviction was irrelevant to the current charge against the accused and that, at most, the prior conviction only indicated a general disposition of the accused to engage in non-consensual sexual acts. Accordingly, the court decided that the risk of the evidence biasing the jury against the accused outweighed the value of establishing facts pertinent to the charges, making it inadmissible.

Under Canadian law, where similar fact evidence is used to demonstrate that an accused has the propensity to commit a certain crime, its prejudicial effect will outweigh its probative value and will, therefore, be inadmissible.

Despite the political overtures and debates sparked by the decision of the majority of the State of New York Court of Appeals, women should not be deterred from continuing to campaign against sexual abuse and harassment in the workplace. The overturning of Weinstein's New York conviction ought not to hinder the progress of the #MeToo movement because the decision of the majority of the appellate court reflects a judicial commitment to principles that govern the use of similar fact evidence and the court's general reluctance, whether in New York or Canada, to avoid admitting evidence that could lead to wrongful convictions based on past or unrelated conduct.

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