

Highlights of American Tax Reform for Canadians

Presented by: Lorne Saltman
February 7, 2018



Topics to Discuss

1. Introduction: Tax Reform in U.S.A. and Internationally
2. Corporate tax rates
3. Individual tax rates
4. Estate tax
5. Limits on interest deductibility
6. Territorial system of international taxation
7. Capital gains on sales of U.S. partnership interests

Corporate Tax Rates

- Top federal rate of 35% reduced to 21%
- In states with high state taxes, such as New York and California, the combined federal and state tax rate is in the range of 25%-27%, comparable to Canada's combined federal and provincial rates
- Accordingly, the previous cross-border tax rate arbitrage in favour of Canada is gone

Individual Tax Rates

- Top federal rate lowered from 39.6% to 37% but “sunset” in 2025
- In states (and even in some cities, such as New York) with local income taxes, the combined top rate is in the range of 42% to 44%
- Long-term capital gains and qualified dividends still taxed at 20%
- Net investment income tax unchanged at 3.8%

Individual tax rates on pass-through income

- U.S. individuals have used pass-through entities to earn business income and obtain limited liability protection where possible, e.g. partnership, “S” corporation, limited liability company
- Individuals can now deduct up to 20% of their domestic “qualified business income”, and 20% of their aggregate “qualified REIT dividends”
- As a result, the effective top individual tax rate on this pass-through income is 29.6% (using 37% as the top rate)
- 20% deduction expires in 8 years

Estate/Gift/Generation Skipping Taxes

- The exemption for estates of decedents dying, generation-skipping transfers, and gifts made after December 31, 2017 and before January 1, 2026 is doubled
- For 2018, the exemption is approximately USD\$11.2 million (approximately USD\$22.4 million for a married couple) and is indexed for inflation each year

Domestic And International Tax Reform

- Limit on Interest Deductibility
 - Every business (excluding business with gross receipts of USD\$25 million or less and certain real property trades or businesses that elect out) can only deduct business interest equal to sum of business interest income plus 30% of adjusted taxable income (generally taxable income before (a) any of income or expense not properly allocable to trade or business, (b) business interest expense or business interest income, (c) NOL deduction, (d) 20% deduction for certain pass-through income, and (e) for years beginning before January 1, 2022, any deduction for depreciation, amortization or depletion, (i.e, before 2022 calculation is EBITDA, after 2021 it is EBIT).

Domestic and International Tax Reform...cont'd

- Limit on Interest Deductibility
 - Follows BEPS initiative of OECD on the assumption that companies borrow excessively to reduce taxes
 - Implication may be negative for Canada, as U.S. companies shift their borrowings to subsidiaries, such as in Canada where there is no 30% limitation, thus eroding the Canadian tax base

International Tax Reform

- Transition tax
 - Every U.S. shareholder of a “specified foreign corporation” is subject to deemed subpart F inclusion of accumulated foreign income, provided that an individual is only subject to this tax if the SFC is a *controlled foreign corporation* or a foreign corporation with at least one corporate U.S. shareholder
 - Rate of 15.5% on cash and equivalents, and 8% on other foreign assets
 - Limited foreign tax credit availability for corporations but not available for individuals

International Tax Reform...cont'd

- Participation Exemption
 - 100% deduction for U.S. corporation (excluding “S” corporations) in respect of foreign-source dividends paid from 10% owned foreign corporation
 - Major change towards a territorial system
- Global Intangible Low-Taxed Income (“GILTI”)
 - Inclusion in income of U.S. shareholder (including U.S. citizen resident in Canada) equal to excess of net controlled foreign corporation’s “tested income” over deemed tangible income return
 - Excludes high-taxed income of CFC (e.g. Canadian subsidiary with tangible assets)
 - A U.S. corporate shareholder can deduct up to 50% of GILTI inclusion, resulting in an effective tax rate of 10.5%
 - Generally, the break even foreign tax to avoid GILTI is 13.125%



International Tax Reform...cont'd

- Foreign-Derived Intangible Income (“FDII”)
 - Favourable tax rate on income from exports related to U.S.-owned intangibles
 - A U.S. corporation can deduct 37% of FDII (and 21.875% after 2025)
 - FDII is income attributable to (a) sale of property to foreign persons for use outside the U.S.A., (b) provision of services to any person with respect to property located outside the U.S.A.
 - Effective tax rate on FDII is 13.125% (16.406% after 2025)
 - Likely to be challenged at WTO as export subsidy

Capital Gains On Sales Of U.S. Partnership Interests

- For Canadians investing through an LP or LLC in a non-real estate investment in the U.S., the rules have changed
- The disposing partner will be treated as if it sold the underlying business assets and, therefore, becomes subject to tax at ordinary rates (21% for corporations and up to at least 37% for individuals) rather than long-term capital gains rates for individuals (20%)
- Choose to have Canadian corporation invest in a U.S. corporation instead



Questions?



Contact Us

Lorne Saltman



T 416.865.6689



E lsaltman@grllp.com



W grllp.com



@grllp



Loosening the Strings: Internal Free Trade in Canada

The Comeau Case

Presented by: Ian A. Blue, Q.C.
February 7, 2018



R. v. Gérard Comeau

Background

In October, 2012 M. Comeau lived in Tracadie, New Brunswick.

He drove across the Restigouche River to Quebec

He stopped at Pointe-A-la-Croix and the Listiguj First Nation Indian Reserve.

All this took about fifteen minutes.

R. v. Gérard Comeau

Background

Once he arrived in Quebec, the RCMP observed him.

He purchased a quantity of beer, wine and liquor.

The RCMP followed him to the border and radioed ahead to Campbellton RCMP who stopped, searched and charged him Mr. Comeau.

R. v. Gérard Comeau

The Charge

- He was charged under s. 134(1)(b) of New Brunswick's Liquor Control Act:
 - *134(1)(b). Except as provided by this Act or the regulations, no person, within the Province, by himself, his clerk, employee, servant or agent shall(b) have or keep liquor not purchased from the Corporation.*

R. v. Gérard Comeau

M. Comeau's argument

- We defended M. Comeau
- We argued that s. 134(b) was unconstitutional because it violated s. 121 of the Constitution Act 1867:

All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

R. v. Gérard Comeau

- No one had ever successfully argued s. 121 before.
- Because 98 years ago, the SCC had said that the only things s. 121 specifically prohibited were custom duties at the provincial border and not any other types of interprovincial trade barriers

Gold Seal Limited v The Attorney General of the Province of Alberta (1921), 62 SCR 424 [Gold Seal Case].

R. v. Gérard Comeau

Comment on Subsequent Cases

- What has changed since 1920 when the Gold Seal case was decided?

R. v. Gérard Comeau

What Changed to cast doubt on Gold seal?

- The SCC 's new decisions on The Charter have provided new rules for interpreting our Constitution.
- In 2003 the Supreme Court said that our Constitution is a living tree and that this is “a fundamental tenet of constitutional interpretation.”
- [R v Blais, [2003] 2 SCR 236 at para 40].

R. v. Gérard Comeau

What Changed (Cont'd)

- The Court has also said that the Constitution must be interpreted “purposefully” and must consider:
 - the wording of the act,
 - the legislative history of the provision,
 - the scheme of the act, and
 - the legislative context of the provision.

[R v Kapp, 2008 SCC 41, [2008] 2 SCR 483 at para 82.]

R. v. Gérard Comeau

Wording

- S. 121 requires that goods “shall be admitted free”.
- We now know that this was a change from earlier rules that had said goods “shall be admitted free from duty”.
- This change had been made in the mid 19th century when the world was changing rapidly and countries started to use non-tariff trade barriers to protect their industries.

R. v. Gérard Comeau

Legislative History

- One of the main reasons people agreed to Confederation was the prospect of interprovincial free trade with no trade barriers of any kind.
- This would replace the end of the 1854-1864 period of reciprocity between BNA and the US.
- s. 121 was therefore an important provision of the BNA, 1867 and for the Confederation.

R. v. Gérard Comeau

Scheme of the Act

- S. 121 was part of the financial deal underlying Confederation.
- It provided provinces with a new revenue source to replace their old tariffs.
- Revenue would come from the increased prosperity that interprovincial-trade profits would provide.

R. v. Gérard Comeau

- In 1920, s. 121 was misinterpreted by the SCC in *Gold Seal*.
- *Gold Seal* was about whether the CTAA had been properly proclaimed in Alberta.
- It was not really about s. 121.

R. v. Gérard Comeau

Gold Seal Concluded

- The Gold Seal interpretation of s. 121 was an expedient decision.
- We are hopeful that the Supreme Court will not follow it when it releases its Comeau decision.

R. v. Gérard Comeau

The Trial before Judge Ronald LeBlanc

- We argued that s. 134(b) of the LCA violated a purposive and progressive interpretation of s. 121
- We called one of Canada's foremost historians of the Constitutional era, Dr. Andrew Smith, as a witness.
- The Crown called a political scientist, Dr. Tom Bateman of St. Thomas University.

R. v. Gérard Comeau

What the Crown Did Not Argue

- The Crown did not suggest that the our interpretation of s. 121 was wrong or overlooked any point of law.
- They did not dispute our analysis of the Gold Seal Case.
- They not cite any contrary decision on point.
- Their arguments were political rather than legal.

R. v. Gérard Comeau

- On April 29, 2016 Judge LeBlanc dismissed the charge against Gerard Comeau.
- He held that s. 121 permits the free movement of goods among the provinces without barriers, tariff or non-tariff.
- His Judgment was an impressive piece of judicial scholarship of which any provincial court of appeal or the Supreme Court of Canada would be proud.



R. v. Gérard Comeau

Judge LeBlanc's Decision

- Judge LeBlanc held that the Gold Seal case was wrongly decided.
- He said that Interpreting s. 121 of the Constitution Act, 1867 as permitting the free movement of goods among the provinces without barriers, tariff or non-tariff will have a resounding impact.

R. v. Gérard Comeau

Judge LeBlanc's decision

- Interpreting s. 121 of the Constitution Act, 1867 as permitting the free movement of goods among the provinces without barriers, tariff or non-tariff will have a resounding impact.

R. v. Gérard Comeau

The SCC Case.

On January 16, 2017, the Crown sought leave to appeal from the SCC.

The Defence supported this request so that s. 121 could be clarified by the SCC.

On May 4, 2017 all nine judges of the SCC granted leave to the New Brunswick Crown to appeal directly from Judge Le Blanc's decision.

R. v. Gérard Comeau

SCC Case

- All governments except Yukon and Manitoba intervened to attempt to set aside Judge LeBlanc's Decision.
- Twelve non-government interveners also participated, to support the decision .
- The Court heard the case on December 6 and 7, 2017

R. v. Gérard Comeau

The SCC Case

- Trade barriers have resulted in Canadians paying higher prices for Canadian goods than would otherwise be required.
- One study estimates that inter-provincial trade barriers add between 8% and 14% to the cost of all goods and services in Canada.

R. v. Gérard Comeau

SCC Case

- Eliminating those costs would lead to a real GDP gain of between 3% to 7% or between \$50 and \$130 billion annually.
- Another study shows that Canadians pay an implied tariff equivalent of 6.9% on all goods sold in Canada due to provincial trade barriers.
- This contrasts with the United States where there are few comparable inter-jurisdictional trade barriers.

R. v. Gérard Comeau

SCC Case

- We are optimistic that the Court will hold that it is time to allow the Gold Seal Interpretation and all the internal trade barriers that depend on it to creep quietly into history.
- We hope that the Court will provide Canadians with a progressive and purposive interpretation of s. 121 so that it may fulfill its proper and intended constitutional role of benefitting all Canadians, not just special interest groups.

R. v. Gérard Comeau

The SCC Case

- This would release enormous economic potential that would benefit Canadians and Canada for generations to come.
- Stand by!
- Thank you for your attention.



Questions?

Contact Us

Ian A. Blue QC



T 416.865.2962



E ibblue@grllp.com



W grllp.com



[@grllp](https://twitter.com/grllp)



Defamation and Social Media

An Update

Presented by: Gavin Tighe



Outline

Overview

- The Legal Framework of Defamation in Canada

Recent Developments

- Recent Jurisprudence and Amendments to the Legislative Framework

What is Defamation?

- **A statement is defamatory if:**

“the impugned words might tend to expose the plaintiff to hatred, contempt, or ridicule or whether they lower the plaintiff in the estimation of reasonable persons who have common sense and who are reasonably thoughtful and well-informed but who do not have an overly fragile sensibility”

Guergis v. Novak, 2013 ONCA 449 (CanLII)

- Defamation has primarily developed from common law.
- In Ontario, the *Libel and Slander Act* supplements or modifies the existing common law.

Slander vs. Libel

- Slander is the publication of a defamatory statement by means of an oral communication.
- Libel is the publication of a defamatory statement by means of a written communication.



Elements of the Tort of Defamation

The plaintiff must show...

- I. The statement was defamatory
- II. The statement made reference to the plaintiff
- III. The words were published or disseminated

Grant v. Torstar Corp., 2009 SCC 61, para 28 (CanLII)

Elements of the Tort of Defamation

- Virtually a strict liability tort.
- Strict liability is modified by the requirement that the publication itself must have been intended or negligent.
- Publication may be inferred.

Elements of the Tort of Defamation

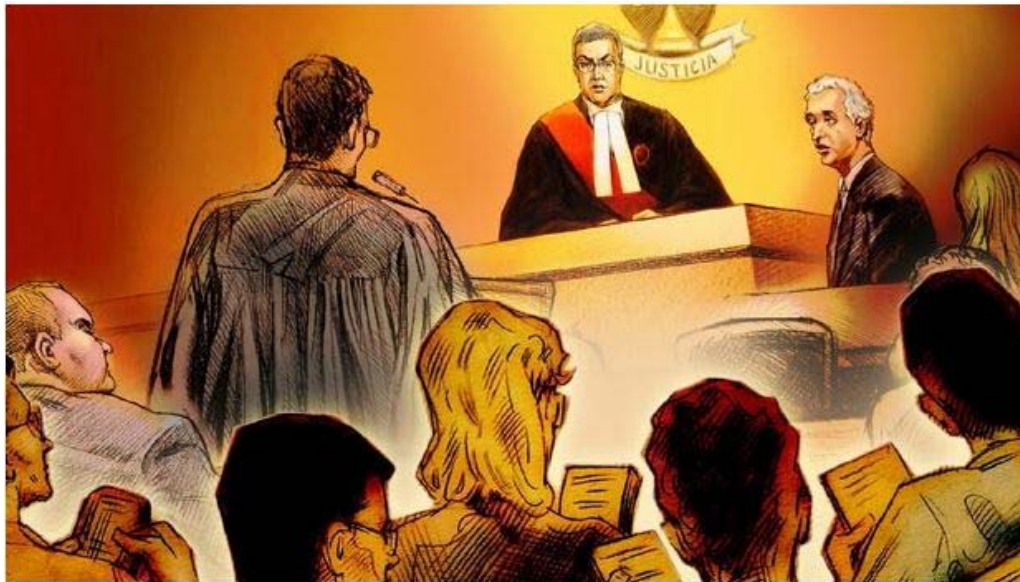
- **Statement must be defamatory**
 - General test is whether the defamatory statement would tend to lower the plaintiff in the estimation of right-thinking members of society generally.
 - Unless there is some innuendo implied by the words in question, the words must be considered in their ordinary meaning and in the full context of how they were published.
 - Liability for defamatory comments is *not* limited to originator of the comment.

Elements of the Tort of Defamation

- **Statement must make reference to the plaintiff**
 - Plaintiff is required to prove that the statement referred to him or her, but the plaintiff does not need to be specifically named.
 - Plaintiff must prove that ordinary and sensible persons familiar with the plaintiff would understand that the words referred to him or her.

Elements of the Tort of Defamation

Man suing Rob Ford for \$6M brought to tears at trial



<http://www.cbc.ca/news/canada/toronto/man-suing-rob-ford-for-6m-brought-to-tears-at-trial-1.1159446>

Elements of the Tort of Defamation

- **Statement must have been published or disseminated**
 - Defamatory statement must be published to a third party.
 - Publication is the final criteria that a plaintiff must prove in order to make a successful claim in defamation.
 - The *Libel and Slander Act* does not encompass internet publication

Elements of the Tort of Defamation

Defences

- Truth
- Absolute privilege
- Qualified privilege
- Fair comment
- Responsible communication on matters of public interest
- Consent

Elements of the Tort of Defamation

Damages

- General damages are *presumed* from the publication of a libel
- Assessed with the following considerations:
 - Nature and seriousness of the libel
 - Mode and extent of publication
 - Reputation and conduct of the plaintiff
 - Conduct of the defendant
 - Apologies and retractions
 - Other recovery of the plaintiff

Elements of the Tort of Defamation

Damages

- **Aggravated, Punitive and Special Damages**
 - Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency
 - Retraction and publication of an apology to mitigate damages
 - Special damages for pecuniary loss resulting from the libel must be specifically pleaded and proven in Court

Social Media

Practical Considerations – Everyone is a Publisher



Breadth of The Distribution of The Publication

The Medium is the Message

Defamation takes on new scales in the day and age of the Internet. Once published, one can never be assured that these allegations will ever be totally removed from the Internet. The breadth and the distribution of the defamation was nationwide and repeated on numerous occasions, even repeated after the plaintiff asked the defendant to stop the allegations.

Gagnon v. Firth, 2017 YKSC 26 (CanLII)

Social Media

Protecting Your Business

- **Has the business been defamed?**
 - Act Fast
 - Time is of the essence - potentially short notice and limitation periods
 - Libel: Notice required in six weeks and action in three months
 - Contact counsel immediately
 - Jurisdictional considerations
 - Determine the parties

Social Media

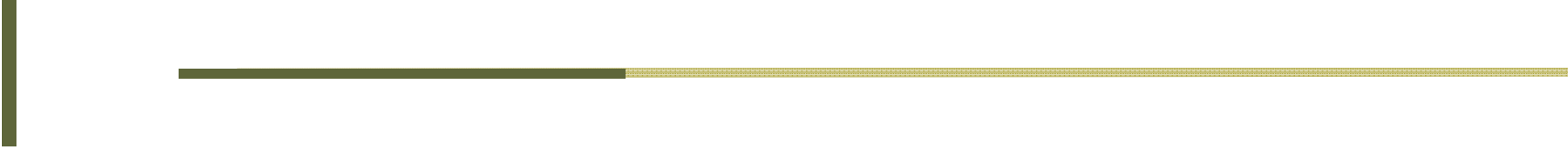
Protecting Your Business

- **Has the business been defamed?**
 - Considerations
 - Ignore it?
 - Refute it?
 - Bury it?
 - Cease and Desist Notice
 - Legal action

Social Media

Protecting Your Business

- **Has the business defamed others?**
 - Contact counsel immediately
 - Jurisdictional considerations
 - Retractions and/or apologies
 - Remove defamatory statements
 - Preserve evidence



Thank You





Questions?

Contact Us



T 416.865.6664



E gjtighe@grllp.com



W grllp.com



@GavinTighe

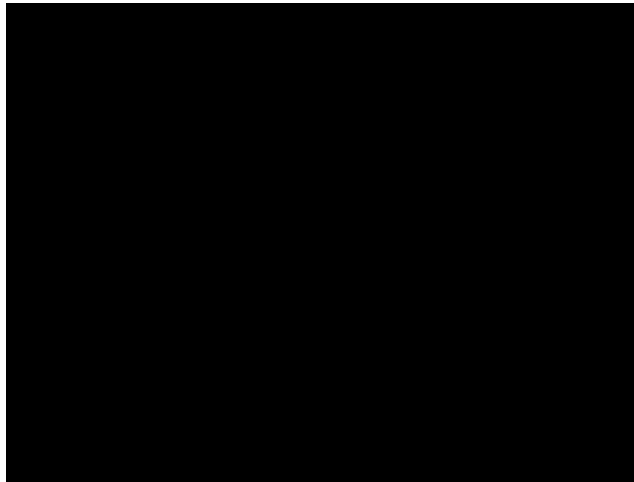


#METOO Movement, Guillotine Justice and the Law of Sexual Harassment

Presented by: Soma Ray-Ellis, Chair Employment Law Group
Prepared with the assistance of Madelena Viksne
February 6, 2018



CP24 with Nathan Downer



We Were Weinsteined...



Not just a man,
**he has become a
movement...**



Since Weinstein...

120 men (and counting) have been accused including...

Accused	Position	# of Accusations	Consequence
Harvey Weinstein	Movie Producer	57	Fired
James Toback	Screenwriter and producer	300+	None
Ben Affleck	Actor and director	1	None
Chris Savino	Nickelodeon animator	12+	Fired
Roy Price	CEO Amazon	1	Quit after leave
Matt Zimmerman	NBC News booker	Multiple	Fired
Josh Besh	Celebrity chef	25+	Resigned
Mark Halperin	Journalist	12	Fired
Gilbert Rozon	Just For Laughs	9	Resigned

Since Weinstein...

Accused	Position	# of Accusations	Consequence
Jeremy Piven	Actor	3	None
Dustin Hoffman	Actor	1	None
Kevin Spacey	Actor	24	Fired, show & movie dropped, police
Brett Ratner	Director	6	None
Hamilton Fish	President, The New Republic	Multiple	Resigned
Nick Carter	Backstreet Boys	1	None
Richard Dreyfus	Actor	1	None
Tom Sizemore	Actor	1	None

Since Weinstein...

Accused	Position	# of Accusations	Consequence
Louis C.K.	Comedian	5	Netflix special & movie cancelled
Larry Nassar	National Team Doctor US Gymnastics	3+	Pleaded guilty, faces 25 years in prison _ additional criminal charges, 125 civil lawsuits
Oliver Stone	Director	2	None
Danny Masterson	Actor	3	None
Andrew Kreisberg	Showrunner "Arrow" and "Supergirl"	19	Suspended
Charlie Rose	PBS and CBS host	Multiple	None
Matt Lauer	The Today Show	Multiple	Fired
James Franco	Actor	5+	None

Dirty Politics...

Accused	Position	# of Accusations	Consequence
Patrick Brown	Ex-head of the Conservative Party	2	Resigned
George W. Bush Sr.	41 st POTUS	7	None
Roy Moore	U.S. Senate Candidate, endorsed by Trump	2 teenage women sexual assault and 6+ other women	Pressure to step aside, state GOP standing by him, lost election
Stephen Bittel	Florida Dem. Party Chairman	Multiple	Resigned
Jack Latvala	Senator	Multiple	Senate Ethics Investigation
Dan Schoen	Minnesota State Democratic Sen.	Multiple	Resigned
Tony Cornish	Minnesota State Republican Rep.	Multiple	Resigned
Al Franken	U.S. Sen. (D-Mich)	At least 4	Senate ethics investigation, resigned
Michael Fallon	British Defence Secretary	2	Resigned

The #METOO Movement: A Reckoning

- In its first week, #metoo was used on Twitter > **1 Million** times
- #metoo was used on Facebook by more than **4.7 million people** in **12 million posts** during the first 24 hours
- On Facebook, **more than 45% of people in the US** are friends with someone who posted a message using #metoo
- **Over 5 billion people** saw a #metoo tweet
- **30.1% of people** using the hashtag in the first week were men
- Canadians came behind only the US and UK for most #metoo tweets
- The tweet had global variations, all with the same purpose
 - French #balancetonporc
 - Spanish #YoTambien
 - Arab countries, **وانا_ايضا#** and **وانا_كمان#**



Protests and Momentum

- The Women's March 2018
 - 2nd anniversary of the Women's March on Washington, to protest Trump's presidency, sexual assault & feminist issues
 - Museum curators are collecting protest signs as "signs of our time"
- #metoo Movement
 - No longer just an online presence
- Time Magazines Person of the Year: The Silence Breakers
- #TimesUp Black Dress Protest
 - against Sexual Misconduct and Gender Inequity in the Workplace
 - Hollywood takes a stand at the Golden Globes
 - Time's Up Legal Defense Fund

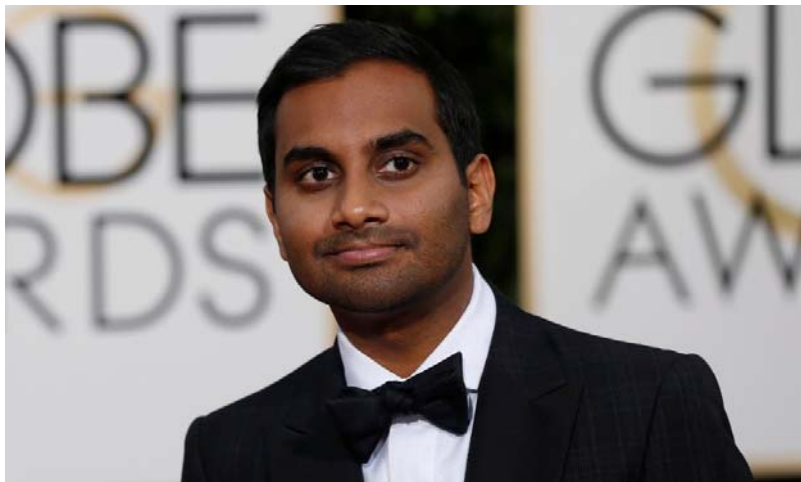


Not Everyone Understands



The Importance of Language

- In the *Criminal Code of Canada*, all sexual offences are called Sexual Assault:
 - The lines were clearer when we differentiated between sexual assault and rape
 - In the media, it appears this is confusing the conversation
- Sexual Assault is not ONLY referring to Rape
- Sexual Misconduct ≠ Sexual Assault





Alexis Novak ✓

@AlexisGirlNovak

Follow



dudes who are saying "it's scary to hook up with women now, it's like I don't know what's ok and what isn't"

uhh.. why don't you ask her? She's literally right there

3:00 PM - 14 Jan 2018

25,894 Retweets 99,687 Likes



402

26K

100K



Have We Gone Too Far?

- The Aziz Ansari accusation has brought this question to the forefront.
- The #metoo movement was not necessarily intended to capture sexual misconduct like his.
- Raises important questions about the way women and men interact with one another and the world differently.
- Should spark conversations about how we deal with intimate relationships and one another, and how we are taught to do so.
- The movement hasn't gone too far, **BUT** the reporting of accusations must be even-handed and informed, and needs to contribute to the conversations around **respect, power and consent in sexual relationships**.



The Court of Public Opinion: Patrick Brown

Guilty before proven guilty?

- Patrick Brown resigned within 24 hours of accusations coming out
- No chance to refute his accusers before public opinion and the lack of support from his party forced him to do so
- Conflict of interest ≠ sexual assault
- Media has a responsibility to be careful and cognizant in their reporting when
 - When they are not, it undermines the purpose of the movement
- “Accused” should be able to face their accusers



A Question of Power...

“I am a 28 year old woman trying to make a living and a career. Harvey Weinstein is a 64 year old, world famous man and this is his company. **The balance of power is me: 0, Harvey Weinstein: 10**”.

- Lauren O'Connor,
Former employee of The Weinstein Company



...and of Consent

- Consent must be given freely and continuously
- Non-verbal signs are difficult to read, so **ASK**
- Consent can be withdrawn at any time
- Consent is an impossibility in relationships where there is a **power imbalance** such as between **boss and employee, doctor and patient, coach/teacher and student, adult and minor, or articling students and partners.**
- In the workplace context, if a person has the ability to control or make decisions which would affect the other's career, **there can be no consent.**

Where is the Line?

We know that 40% of people have, at some point in time, been involved in a workplace relationship or workplace romance. This begs the question....where is the line?

Human Rights Legislation

Prohibition Against Sexual Harassment and Reprisal

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

Where is the Line?

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

Occupational Health and Safety Act

Section 32.0.1

- Employers with more than 5 employees must prepare **policies on workplace violence and harassment**
- Policies must be:
 - In writing
 - Reviewed at least annually
 - Posted visibly in the workplace

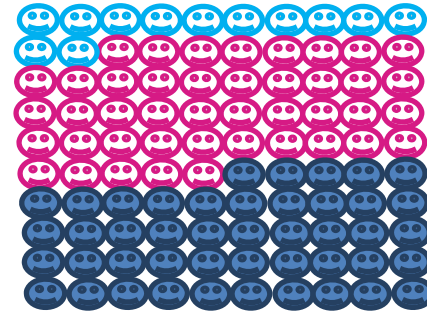
Occupational Health and Safety Act

Section 32.0.6

- Employers must develop a reviewable program for implementing the workplace harassment policy
- Program must include procedures for:
 - Reporting to the employer or supervisor
 - Reporting to someone else if the employer or supervisor is the harasser
 - Investigating complaints
 - Protecting complainant information where possible
 - Corrective action

The Canadian Context

- **43%** of Canadian women and **12%** of Canadian men say they have experienced sexual harassment at work
- **87%** of people believe the next generation will experience the same amount of sexual harassment as the current generation
- **4/5** people believe the next generation will experience the same amount sexual assault as the current generation



The Canadian Context

The Government of Canada conducted a self-selecting public consultation survey online in February-March 2017:

***all percentages are the percent of total respondents**

- **Respondents who reported workplace harassment or sexual harassment** in the past 2 years reported that they experienced these behaviours more than once
- 60% experienced general harassment, 30% sexual harassment, 21% violence, 3% sexual violence
- 94% who experienced sexual harassment were women
- 44% experienced harassing behaviour from a co-worker

The Canadian Context

- Men were more likely to experience non-sexual harassment than women
- People with disabilities or members of visible minorities were more likely to experience harassment than other groups

An Institutional Issue

- In many cases where powerful or influential individuals are accused, the **employer protects the harasser**
- Ex. Weinstein's employment contract:

“You will pay the company liquidated damages of **\$250,000 for the first** such instance, **\$500,000 for the second** such instance, **\$750,000 for the third** such instance, and **\$1,000,000 for each additional** instance.”
- As long as he paid, he could keep his job.
- Since the scandal:
 - box office flops
 - pulled 5 movies from its release schedule
 - reportedly, its employees, assets and old projects may be acquired by a new company under a new banner and with a board led by women



Resolutions: The “Apology”

“I came of age in the 60’s and 70’s, when all the rules about behaviour and workplaces were different. That was the culture then...”

“...I want a second chance in the community but I know I’ve got work to do to earn it... I have been trying to do this for 10 years and this is a wake-up call...”

Excuse: I am an older man.

The “Older Men” Exception

Silvera v. Olympia Jewellery Corp. 2015

Michelle’s Story:

•Michelle Silvera

- Administrative assistant at a jewellery store
- Salary: \$28,000/year

•Michelle’s boss would :

- Ask her to model pieces of jewellery and asking her to unbutton her shirt “so he could see the pendant clearly”
- Insist on driving her home
- Show her pictures of naked women on his computer
- Give her uninvited massages
- Touch her breasts and buttocks without her consent



The “Older Men” Exception

Silvera v. Olympia Jewellery Corp. 2015

- After taking time off for surgery, Michelle was fired
 - The business claimed she was terminated for cause due to her “prolonged absence from work”
- Michelle brought an action for wrongful dismissal, sexual assault and battery, racial and sexual harassment

The “Older Men” Exception

Silvera v. Olympia Jewellery Corp. 2015

The Ontario Superior Court awarded Ms. Silvera (who was a 1 ½ year employee earning \$28,000 a year) **\$312,056.56**.

\$ 90,000.00 -	general and aggravated damages
\$ 30,000.00 -	human rights general damages
\$ 33,924.75 -	loss of future income
\$ 10,000.00 -	punitive damages
\$ 42,570.00 -	costs of future therapy and care
\$ 90,344.63 -	wrongful dismissal
\$ 15,000.00 -	Michelle’s daughter under Family Law Act
\$ 37.18 -	subrogated OHIP claim

The “Kevin Spacey” Exception: Minors

E.T. v. Dress Code Express Inc. 2017

- E.T. was 14 years old.
- She worked at a retail store called Dress Code Express as a general helper.
- She worked 3-4 days a week for just under two months.
- E.T. was sexually harassed by her employer.
- Her employer (the owner) made comments about her body and her virginity

The “Kevin Spacey” Exception: Minors

E.T. v. Dress Code Express Inc. 2017

- E.T. was forced to give her employer massages.
- He would make comments of a sexual nature about customers and compare her to customers at the store.
- E.T.’s employer warned her not to engage in sexual activity with black people.
- Her employer would routinely enter her physical space, often brushing past her so that his crotch would touch her.

The “Kevin Spacey” Exception: Minors

E.T. v. Dress Code Express Inc. 2017

- The HRT found that E.T.’s employer had created a “poisoned work environment” in which she felt forced to give him a massage or lose her job and that E.T. experienced sexual and racial harassment.
- The HRT awarded E.T. **\$15,000** for the harm caused by the discrimination.
 - For loss of dignity, injury to her feelings and self-respect
- The employer and the business were made jointly and severally liable
- The age of the applicant was an **aggravating factor**
 - She was 14 and her employer was 65



What is One Day Worth?

De Anna Granes v. 2389193 Ontario Inc. and Rajnessh Dutta 2016

De Anna's Story:

- De Anna was a server at a restaurant called Houston Avenue Bar and Grill in Barrie.
- In September 2013, the restaurant got a new part-owner, Mr. Dutta.



What is One Day Worth?

De Anna Granes v. 2389193 Ontario Inc. and Rajnessh Dutta 2016

- On his first day, De Anna's new boss sat at the bar while she worked, and said things like
 - "I want to take you home"
 - "We are going to have our own party"
 - "You know I love you right?"
- Throughout her shift, De Anna's boss:
 - Grabbed her breast
 - Came up behind her and touched her
 - Caressed her arms, thighs and stomach
 - Grabbed her and backed her into a wall even though she said no to all of his advances.

What is One Day Worth?

De Anna Granes v. 2389193 Ontario Inc. and Rajnesh Dutta 2016

- The day after the incident, De Anna came into work and had a panic attack.
- She brought a complaint to the police but there was not enough evidence.
- De Anna told the General Manager, who attempted to help but was told by the owners “to make the issue go away” and was fired when he did not.
- The owners met with De Anna and told her:
 - “put on that pretty little smile of yours and do your job”
 - “take the hurt out of your heart and throw it away”

What is One Day Worth?

De Anna Granes v. 2389193 Ontario Inc. and Rajnessh Dutta 2016

- De Anna requested, as accommodation, that Mr. Dutta not be present when she worked for a while, but the owners refused.
- She was forced to resign as she was anxious and distraught, and the restaurant refused to accommodate her.
- De Anna made under minimum wage
 - Server wage - \$8.90/hour in 2014.
- All of the harassment happened on February 1, 2014.
- The restaurant failed to act, when the complaint was brought to it two days later.



What is One Day Worth?

De Anna Granes v. 2389193 Ontario Inc. and Rajnessh Dutta 2016

- De Anna was awarded damages **\$29,440.52**
 - \$20,000 for injury to dignity, feelings and self-respect
 - **Exacerbated by the failure of the employer to act**
 - \$9,440.52 for wage loss
- Company faced consequences:
 - **Joint and severally liable** for the financial damages
 - Mr. Dutta was ordered to **complete Human Rights101 training**
 - The restaurant was required to adopt a **written policy for dealing with complaints and discrimination** within 3 months
 - The restaurant had to implement **mandatory training** within 6 months



Criminal Consequences

Criminal Charges *R. v. J.P.* 2017

- A Halifax woman in her mid-20's came forward recently, alleging her supervisor sexually abused her for months
 - Repeatedly groping her
 - Making sexual comments under the guise of “fooling around”
 - Pulling her onto his lap
 - Putting his hand under her skirt
 - Touching her breasts
 - Opening her blouse
 - Repeatedly telling her he wants to have sex with her

Criminal Consequences

Criminal Charges *R. v. J.P.* 2017

- One incident was caught on video
- Complaints were brought to other managers, who were unsupportive of her complaint and did nothing
- She filed criminal charges
- The supervisor was **sentenced to 8 months of house arrest and a year of probation for sexual assault**
- He is a permanent resident in Canada and **may face deportation.**

What to Do: Due Diligence

Next Steps

- Recognize that HR issues are about the heart and soul of an organization
- Good corporate governance necessitates strong HR policies
- Annual review of complaints and Annual review of code of conduct
- Annual training
 - Training should be specific to every section of the protected ground but highlight gender, race and disability and harassment and bullying
- Revise sexual harassment policies



What to Do: Due Diligence

Next Steps

- Identify leaders, those who people feel comfortable with to address those issues
- Formal complaint process
- Informal complaint process
- Ensure employees know their complaints are held in confidence, though may not be confidential if action is required
- **The message should be clear: the Company does not tolerate harassment, assault or abuse of power from any of its employees.**





Questions?

Contact Us

Soma Ray-Ellis



T 416.865.6709



E srayellis@grllp.com



W grllp.com



@grllp

