

**The Criminal Law
re Sexual Assault/Harassment:
A primer for civil lawyers**

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SHARP
WORKPLACES | Sexual Harassment Advice,
Response, and Prevention for
Workplaces

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Please note...

- ▶ This presentation is strictly for training purposes. It is not legal advice and it should not be used in any way as legal advice.

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TOPICS COVERED

1. Role of Crown Counsel
2. Examples of Offences
3. Overview of the Prosecution
4. Timing of Complaints
5. Disclosure
6. Victim Services and Testimonial Accommodations

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1. ROLE OF CROWN COUNSEL

- ▶ The BC Prosecution Service (BCPS) is responsible for the prosecution of Criminal Code offences in B.C.
- ▶ Crown Counsel do not represent a client; instead, we represent the public interest in the prosecution of offences. In particular, Crown Counsel do not represent the complainant/ complainant.
- ▶ Crown Counsel are independent of police other government agencies.
- ▶ Crown have a “quasi-judicial” role.

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Role of Crown Counsel *cont.*

- ▶ We have prosecutorial discretion over:
 - whether a charge will be laid,
 - what the charge will be,
 - whether the charge proceeds to trial,
 - whether to accept a plea to a lesser charge, and/or
 - what sentence to seek (if there is a finding of guilt)
- ▶ Crown policies guide the exercise of prosecutorial discretion

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Role of Crown Counsel *cont.*

The frequently referenced statement from *R. v. Boucher*, [1955] S.C.R. 16, at p. 23–24, summarizes the role of Crown Counsel this way:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

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Role of Crown Counsel: charge assessment

- Under the *Crown Counsel Act*, Crown Counsel in BC are responsible for deciding whether a criminal charge will be laid.
- BCPS' policy Charge Assessment Guidelines (CHA 1) requires Crown Counsel to independently, objectively, and fairly measure all the available evidence against a two-part test:
 - a) Whether there is **a substantial likelihood of conviction**; and
 - b) Whether a prosecution is **required in the public interest**.

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Role of Crown Counsel: charge assessment *cont.*

- In *exceptional* circumstances, Crown Counsel may approve a charge where the relevant public interest factors weigh so heavily in favour of a prosecution that it is necessary to resort to a lower charge assessment standard in order to maintain public confidence in the administration of criminal justice. See CHA 1.
- The applicable charge assessment standard applies throughout the prosecution. Crown Counsel should continue to evaluate all the available evidence to be satisfied that the charge should proceed.

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2. EXAMPLES OF OFFENCES IN THE *CRIMINAL CODE*

There are no charges in the *Criminal Code* directly concerning the workplace. Some for discussion are:

- Assault: s. 266
- Uttering threats: s. 264.1
- Sexual assault: s. 271
- Criminal harassment: s. 264
- Mischief: s. 430

Also, s. 810 recognizances

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Assault, s. 266

- Definition of assault is in s. 265, there are a few ways to perpetrate an assault
- The most common example is the intentional application of “force” without the other person’s consent (s. 265(1)(a))
- “Force” in the case law requires nothing more than touching
- S. 265(3) lists circumstances when no consent is obtained where the complainant submits or does not resist to the touching
- *De minimus* can apply to very minor assaults

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Sexual assault, s. 271

- S. 265 applies to all assaults, including sexual assault. Sexual assault is not further defined in s. 271.
- Case law has defined s. 271 sexual assault as an assault that is sexual in nature, that interferes with the sexual integrity of the complainant.
- Sexual assault is a general intent offence: the Crown does not have to prove that the accused had a sexual purpose/intent under s. 271.

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Uttering threats, s. 264.1

- Definition of this offence is in s. 264.1
- When someone knowingly utters, convey or causes any person to receive a threat to cause death or bodily harm to anyone, or to damage property

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Criminal harassment, s. 264

- ▶ S. 264 defines criminal harassment as conduct that, without lawful authority, and knowing or being reckless as to whether the other person is harassed, causes that other person reasonably to fear for their safety or the safety of anyone known to them by
 - repeated following
 - repeated communication
 - besetting or watching at home, work, etc.
 - engaging in threatening conduct

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Mischief, s. 430

- ▶ Mischief is defined in s. 430. It can be committed a number of ways. The most common example is the wilful damage or destruction of property.
- ▶ Includes interference with the lawful use and enjoyment of property
- ▶ S. 430(1.1) applies to computer data
- ▶ S. 430(4.1) applies when the mischief is motivated by bias, prejudice or hate based on colour, race, religion, etc.

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S. 810 recognizances

- ▶ Commonly referred to as “peace bonds”
- ▶ The Crown can apply for a s. 810 “peace bond” where there are “reasonable grounds” that someone will cause personal injury to another person or that person’s spouse/common law partner or child, or damage that person’s property
- ▶ It can also be applied for if there are reasonable grounds to believe that someone will commit a s. 162.1 offence: publishing intimate images without consent
- ▶ Max duration = one year

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3. OVERVIEW OF A PROSECUTION

1. Submission of RTCC by police
2. Charge assessment
3. Compelling appearance
4. Ban on publication
5. Only the Crown and the accused are parties
6. The complainant's role at trial
7. Preparation for trial

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Overview: submission of RTCC

- ▶ The police conduct the investigation and it is the police's decision whether to submit a report to Crown Counsel ("RTCC").
- ▶ If the police submit a RTCC, the police are to include all the material the Crown needs to assess the proposed charge (absent exceptional circumstances). It can take the police some time to make sure the RTCC is complete.

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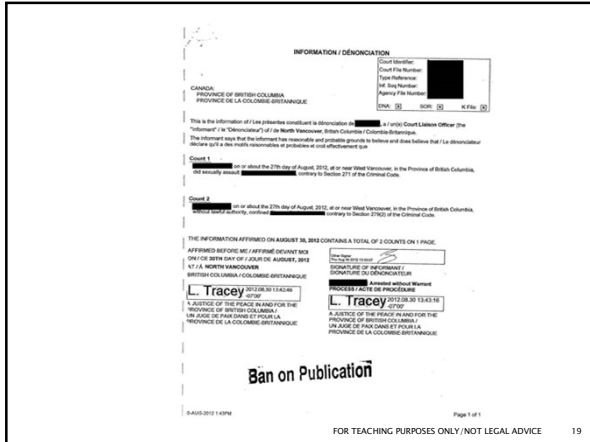
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Overview: charge assessment

- ▶ As already discussed, Crown Counsel in B.C. assess whether a charge will be laid according to BCPS policy CHA 1.
- ▶ A BCPS policy SEX 1 provides guidance for Crown charge assessment in cases of sexual assault. Where the evidentiary standard is met (which is typically that there is a "substantial likelihood of conviction"), it will generally be in the public interest to prosecute sexual offences.

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Overview: compelling attendance

There are several different ways to compel an accused to attend court and what is used will depend on the circumstances of each case:

- ▶ Summons (no terms and conditions)
- ▶ Police issued PTA with or without and undertaking to an officer in charge
- ▶ A warrant for the accused's arrest and a bail hearing either before a judicial justice or before a provincial court judge

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Overview: bans on publication

There is authority in the Criminal Code to apply for bans of publication, some are mandatory and some discretionary, but must be applied for by the Crown or the complainant/ witness. There is also inherent jurisdiction if the proceeding is in the Supreme Court.

In many cases, there is no ban of publication, although one can be applied for depending on the circumstances

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Overview: who are the parties?

- ▶ Only the Crown and the accused(s) are the parties to the prosecution. The complainant and the witnesses are not parties and do not have legal standing to make submissions. See for example, *R. v. Bremner*, 2000 BCCA 345.
- ▶ Only these exceptions exist: witnesses and complainants can make applications for bans on publication and testimonial accommodations; and they can respond to applications by the defence for their private records, or to an application to adduce their sexual history as part of the trial evidence.

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Overview: the role of the complainant

- ▶ The complainant will typically be called as a witness at trial.
- ▶ The complainant will usually be served with a subpoena to attend the trial.
- ▶ A subpoena is a court order (s. 699) issued by a JP (or a judge in the case of an out of province witness).
- ▶ If a witness does not appear as required, a warrant *can* issue for the witness' arrest.

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Overview: preparation of the complainant for trial

- ▶ Preparation by a witness' own lawyer or non-Crown approved agency might be problematic. If done improperly, it could appear to taint the witness' evidence.
- ▶ Please leave evidentiary preparation to the Crown to ensure that:
 - the Crown can properly prepare its case, and
 - the Crown can meet its disclosure obligations to the defence (a topic beyond the scope of this short session).

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4. TIMING OF COMPLAINTS

- ▶ The common law rule regarding “recent complaint” regarding sexual offences has been abrogated (s. 275), and the SCC has recognized that complainants often delay disclosure of the abuse for valid reasons.
- ▶ For practical reasons, it is preferable that the matter is reported to the police as soon as the complainant is able and willing to do so. Witnesses’ memories typically fade with time, physical evidence (if it existed) disappears, etc.

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Timing of complaints, cont.

- ▶ There is no legal impediment to the complainant initially choosing the civil route and later deciding to report the incident(s) to the police.
- ▶ However, the criminal process cannot be used to enforce civil claims. In order to avoid the appearance that this is the motivation behind the criminal process, (and to avoid any concerns the evidence would be tainted by civil discoveries, etc.), the litigation of civil claims usually waits until the conclusion of the criminal proceedings.

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Timing of complaints, cont.

- ▶ Limitation periods do not exist except for some minor types of charges. There are no limitation periods on any offences of interpersonal violence.
- ▶ Less serious matters, such as a minor single incident assault or minor mischief, will likely not be charged if the incident occurred more than 6 months before, unless other considerations apply. (The reason for this is beyond the scope of this session).

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5. VICTIM SERVICES AND TESTIMONIAL ACCOMMODATIONS

In many cases, a complainant will qualify for assistance from victim services. There are two types of victim services agencies: police based and community based. Some of the community based specialize in assisting complainants of sexual and/or domestic violence offences.

The *Criminal Code* sets out testimonial accommodations that can be available to facilitate the participation of witnesses.

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Testimonial Accommodations

Some accommodations are presumptively available for certain witnesses and offences – they will be granted unless the accused can demonstrate would “interfere with the proper administration of justice”.

Other accommodations are only available on a discretionary basis and the Crown or witness is required to establish its appropriateness.

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What Testimonial Accommodations May be Available?

The most commonly used accommodations are:

- o Testifying behind a screen or other device, s. 486.2
 - o Testifying via closed circuit television or video link, s. 486.2
 - o If an accused is self-represented, appointing counsel to cross-examine a witness, s. 486.3
- There are others...

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Video re: Testimonial Accommodations

- 2016 Video on BC Government Website provides some information about testimonial accommodations and other assistive courtroom equipment:

<http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/how-works/court-hearings/court-support>

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BCPS Internet Page

<http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service>

Materials Available Include:

- Information Sheets on variety of topics including:
 - What Witnesses Can Expect
 - Bail
 - Sentencing
 - Domestic Violence Prosecutions
 - Role of Crown Counsel
- VIS & SOR Forms & Guide (available in 10 languages)
- BCPS Policies

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Questions

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