



# Complainant Protections in the Proposed Rules for Adjudication Hearings under the CSPA

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# Important Investigations



Sexual assault is not like any other crime ....

- **Seaboyer** (1991)

Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society.... **We can and must do better.**

- **Barton** (2019)

Sexual harassment or assault is intolerable. It is one of the most frightening and damaging things that one person can do to another. **The effects of sexual harassment or sexual assault on the victim can be extreme and long-lasting, and incidents of this misconduct can disrupt the workplace.** I am satisfied that sexual harassment falls within the same category of serious misconduct as theft, and that discharge is *prima facie* the appropriate penalty even in the case of a first offence. This does not mean that discharge will necessarily be appropriate in every case ...

# The Problem: in our Community



- Women are 11 times more likely to be the victim of sexual offences.
- Approximately 99% of the perpetrators are male.
- Approximately 85% of victims know the perpetrator.
- Stats Can online public consultation – February 14 to March 9, 2017: 30% female employees experience sexual harassment in the workplace.

# The Problem

CONTRIBUTORS

OPINION

## Policing has a sexual violence problem

Before suggesting sexual violence by police is committed by a few bad apples, we need to recognize it's systemic — it's built into policing cultures.



By **Jeff Shantz** Contributor  
Sat., Feb. 11, 2023 | 3 min. read

Ottawa

**14 women report sexual assault, harassment by male Ottawa police officers in past 3 years**



Police chief considering harsher penalties, changing options to come forward

[Judy Trinh](#) · CBC News · Posted: May 26, 2020 8:54 AM EDT | Last Updated: May 26, 2020

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Sexual harassment in Toronto police forces 'unacceptable': Ontario labour minister

**Women working with RCMP suffered 'shocking' levels of violence, sex assaults, says report**



Settlement covers women who worked in non-policing roles from 1974 to 2019



[Meghan Grant](#) · CBC News · Posted: Jun 17, 2022 7:00 AM EDT | Last Updated: June 17, 2022



# The Problem: in Ottawa



- 2020 Engagement survey: “a significant number of members experienced harassment and discrimination in the workplace.”
- 2021: RT found that female employees who were interviewed experienced sexual harassment and violence, general mistreatment, unequal career opportunities, and hostility regarding pregnancy and parental leave. RT reported that the totality of what was described breaches the OPS's commitment to provide all of its members a respectful workplace that is free from harassment and discrimination.

# Regulations: Ontario Police and Arbitration Committee



- Two committees responsible for:
  - Register of arbitrators for labour-related disputes.
  - A roster of adjudicators for discipline-related hearings.
- Joint Recommendation:
  - Mandatory Trauma-Informed Training, which can be based on:
    - OPS piloted annual training in response to RT recommendations – PSU
    - Condensed module for Hearing Officers Lunch and Learns

# Advocate for Training re: Myths and Stereotypes



Women who have been assaulted might still get a pedicure, or go out for dinner with friends. These things are all irrelevant. Equally irrelevant is the tone and nature of the text messages ... some of which had sexualized overtones. **The suggestion that this is somehow inconsistent with having been sexually assaulted the night before is completely without merit and has no foundation in the reality of women's lives. There simply is no "normal" or "typical".** I have not taken any of this conduct into account in reaching my decision. (para. 192)

*Basic v. Esquimalt Denture Clinic and another*, 2020 BCHRT 138 at paras. 136 and 138

# Advocate for Training re: Myths and Stereotypes



- Most sexual assaults are done by strangers
- Most victims can prevent the assault/harassment from taking place by resisting
- Young, physically attractive women are assaulted because of what they wear/how they look
- Men don't get sexually assaulted
- If you were sexually assault, you not be talking to the perpetrator the next day
- A substantial number of sexual assault/harassment reports are false/vindictive/regret (woman as a shrew)
- The majority of sexual assaults/harassment involve alcohol or drugs



# Advocate for Training re Consent

- **No implied consent:** unless a woman protests or resists, she should be ‘deemed’ to consent”. It is an error of law — not fact — to assume that unless and until a woman says “no”, she has implicitly given her consent to any and all sexual activity.
- **No broad advance consent:** a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact.
- **No propensity to consent:** a belief that the complainant’s prior sexual activities, by reason of their sexual nature, made it more likely that she was consenting to the sexual activity in question is a mistake of law.

# Regulations: Proposed Rules for Adjudication Hearings



- Definitions
- Four types of discipline hearings
  - Challenge
  - Demotion/dismissal
  - Suspension
  - Expungement
- Procedural requirements
  - Pre-hearing conferences
  - Expert witnesses
  - Timelines
- SPPA governs where rules silent

# Advocate for the Protections: Codifying the Common Law



However, underlying principles in criminal proceedings could be applicable to administrative tribunals such as this matter.

...

The Applicant is not charged with sexual assault, he faces allegations of employment misconduct. Therefore, the rules of evidence are different, and I am not bound by section 276 of the Criminal Code, but **I find the general principles assistive.**

...

Section 276 of the criminal code is meant to protect a complainant's dignity, equality, and privacy rights and the rights of the accused while ensuring misleading evidence is not admitted. I am not impacted by the fact that the prior sexual activity in question could possibly be considered "minor" or that there has been reference made to it in other exhibits. The issue is whether K.M. ought to be cross examined on this material.

I find that the Applicant is not permitted to cross examine K.M. on the issue of prior sexual activity involving the Applicant.

*OPS v Benloss*, February 28, 2022, Decision on Motion for Directions, pgs. 14-19.

# Advocate for the Protections



- Update Definitions
- No other sexual activity:
  - Less worthy of belief
  - More likely to have consented to contact in question
- Record in possession of officer wherein the complainant has a REP in
  - Likely relevant to a material issue at trial or
  - Competence of a witness to testify
  - Production of record is necessary in the interests of justice
- Third party record production – tribunal to consider
  - Whether the matter before the tribunal involves allegations of sexual misconduct;
  - REP in the record;
  - Request based on discriminatory belief;
  - Privacy rights of the person to whom record relates
- Witness protections and right to representation

# Advocate for the Protections



60. Where a police officer is facing allegations of sexual misconduct either party must bring a motion to rely on the following:

- a. Other instances of the complainant's sexual activity, sexual harassment or assault. This evidence is not admissible to support an inference:
  - i. That the complainant is less worthy of belief; or
  - ii. That the complainant is more likely to have consented to the misconduct in question.
- b. Records in the possession of the officer wherein the complainant has a reasonable expectation of privacy.
  - i. Is not admissible if it violates section 60(a); or
  - ii. Is admissible if the following factors are met:
    - 1. it is relevant to an issue at the hearing;
    - 2. it has significant probative value that is not substantially outweighed by the danger of prejudice to the administration of justice.
- c. A motion under this section will be held in camera and subject to a publication ban.



# Advocate for the Protections



## *Production of Documents from Third Parties*

69. The Adjudicator may order production of a document that is in the custody or control of a person who is not a party to the proceeding and that is not privileged, where the Adjudicator is satisfied that,
- a. The document is relevant to an issue at trial or to the competence of a witness to testify in the proceeding;
  - b. Whether disclosure is necessary in the interests of fairness to the party requesting production . In determining necessity, the adjudicator may consider:
    - a. The extent to which the record is necessary for procedural fairness;
    - b. Whether the matter before the tribunal involves allegations of sexual misconduct;
    - c. The reasonable expectation of privacy in the record;
    - d. Whether the request is based on a discriminatory belief or bias;
    - e. The right to privacy of any person to whom the record relates; and
    - f. The effect on the integrity of the administrative process
  - c. A motion under this section will be held in camera and subject to a publication ban.

# Advocate for the Protections



## Witness Supports

1. An adjudicator shall order testimonial supports for any witness testifying in a hearing involving allegations of sexual misconduct, where requested.
2. An adjudicator may order testimonial supports for any witness testifying in a hearing if the witness satisfies that those supports are necessary to provide full, fair and frank evidence.

## Right to Representation

1. For a motion under 60 or 69, a complainant may have a right to representation. In making a decision on this point the adjudicator must make a decision that considers fairness to the police officer, the complainant and the public interest in having an efficient decision on the merits of the case.

# The Pervasive Problem: in Court

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## Robin Camp, Federal Court judge, faces inquiry after berating sexual assault complainant

Inquiry into 2014 comments by then Alberta court judge comes after request from province's attorney general

By Alison Crawford, John Paul Tasker, CBC News Posted: Jan 07, 2016 12:19 PM ET | Last Updated: Jan 07, 2016 5:34 PM ET



The Canadian Judicial Council says it plans an inquiry into the actions of Justice Robin Camp after questionable remarks the judge made to a sexual assault complainant surfaced late last year. (Andrew Balfour/Federal Court)

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Alberta Attorney General Kathleen Ganley has forced an inquiry into the conduct of Federal Court Justice Robin Camp after his controversial remarks during a sexual assault trial surfaced late last year.

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# The Pervasive Problem: in Tribunals

Furthermore, **Jane Doe.** had just spent nearly three hours with **Constable Smith** and **Mr. H,** and by all accounts, was having a good time. **Why, suddenly, would she be afraid to get into a car with them and accept a ride?** Particularly, in consideration of the fact **Jane Doe and Constable Smith spent several hours inside her own home just a few weeks earlier;** there was no evidence to suggest that something occurred at that time that caused her to question her safety when being alone with him again. On the contrary actually, **the text messages following that visit were at minimum, friendly in nature.**

pg. 106

I have difficulty accepting that Jane Doe, a person who was allegedly very reluctant to enter Constable Smith's car and had to be coaxed and yelled at to do so, now chose to sit at the end of his bed to play guitar because it was the "safest place to be." **Jane Doe could have refused to enter his room or refused to go upstairs, there was no suggestion that force or intimidation was used.**

...



# The Pervasive Problem: in Tribunals

I am uncertain as to **why Jane Doe did not leave the bedroom after he leaned in to kiss her or after being berated**. Jane Doe said she was upset that he was coming on to her, she was **alert enough to go to the bathroom, but chose to not leave the room**.

...

I also find it noteworthy that when it appeared Jane Doe might not have a ride to the Crazy Horse bar, she indicated in a text message to Constable Smith that she was getting “worried.” To me, **that suggests that Jane Doe was looking forward to attending the bar to spend time with Constable Smith, further evidenced by the fact that once there, she spent the entire evening at a table with him and another person whom she did not know and could not recall. It gives the appearance that Jane Doe was solely focused on associating with Constable Smith.**

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