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*Rape Culture and
Our Realities*

WAVAW Rape Crisis Centre

MOORE EDGAR LYSTER LLP SHARP WORKPLACES WAVAW RAPE CRISIS CENTRE

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*Sexualized Violence
is about
power and control*

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*Reflecting on
#metoo*

- #metoo has impacted all of us in many ways
- What new understandings have we gained through #metoo?
- How have conversations about sexualized violence changed or not changed?

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Poll Question:
Have you worked with a support Person in your Legal Practice?
If yes, how many times?

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*Power is
context-based*

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*What are the implications if we
don't challenge our bias?*

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*Unpacking Our Realities:
WE are all in the soup*

Rape culture shapes and influences our realities

Our realities are always changing as our cultural landscape shifts

The realities of navigating rape culture are complicated and nuanced by our identities and experiences

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WAVAW's values

We BELIEVE Survivors

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WAVAW's values

We BELIEVE survivors have the right to choose their own path to healing and justice

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Justice Interview Quote:

Well definitely the overarching message from almost every professional that I spoke with was like do not expect anything to happen like there will not be a consequence for this. And that started just from having police come to my house to going to the hospital to coming to WAVAW to the counselor that I saw every... to Crown

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Safety should not be considered "scarce"

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Impacts of Sexualized Violence

Systemic Inequality and our experiences of it will greatly impact experiences of Sexual Violence and Harm

- Physical
- Sexual
- Emotional
- Mental & psychological – exacerbated isolation
- Spiritual
- Social & relational (Self & others, inward & outward)
- Economical



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WHAT CAN YOU DO?

- Survivors are the experts of their own experience
- It's never a survivor's fault
- Act with compassion and empathy
- Because sexual assault takes away a person's autonomy over their body and sense of power, ensure they are in charge of making decisions for themselves
- Understand that the more systemic inequality an individual faces in their life, the more likely they are to be confronting multiple barriers.
- Acknowledge difference and privilege. The way you interact with systems may not be the way others do.
- Don't make assumptions, ask if you don't know.

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FEMINIST SUPPORT

- Listen – Do what you are all skilled at doing already, resist problem solving mode
- Believe – Being aware of what biases/myths we may be holding about survivors and sexual assault
- Validate – Validating emotions and responses
- Contain – Don't be overly shocked or horrified, clearly outline your scope
- Avoid blaming - Always assure them it is not their fault, ensure that your questions reflect this
- Be understanding – they might not have put the pieces together yet, or they don't believe they deserve attention for what's happened
- They are not alone – connection is healing, refer

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Thinking critically about consent discourse

- Consent is crucial and its importance extends to almost all aspects of our lives
- The law tells us that consent is required and must be acquired in the absence of pressure, force, or coercion
- But what might we miss if we only focus on consent?
- Does the consent discourse help us address sexualized violence as a systemic issue?
- How we might think about consent as practitioners when we are offering options to survivors of how they can/want/need to be supported

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Integrating a circle of support: Concrete Ways to respond to survivors in your work

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WHAT WORDS COME TO MIND, WHEN YOU THINK ABOUT WORKING WITH SUPPORT PEOPLE?



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Key Questions of Confidentiality and Privilege When Involving Support People in Legal Relationships

- 3-3 Confidentiality
- Confidential information
- 3-3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
 - (a) expressly or impliedly authorized by the client;
 - (b) required by law or a court to do so;
 - (c) required to deliver the information to the Law Society, or
 - (d) otherwise permitted by this rule.

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Recommendations

- Have the client sign a form that authorizes the lawyer to communicate with the support person.
- See Sample Retainer Addendum Handout
- (We will come back to this)

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Privilege

- A rule of evidence.
- It means that communications are seen as special, and purports to foster relationships that society deems important.
- The relationships it deems important, though, are very limited.

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Solicitor Client Privilege

- Attaches to confidential communications between lawyer and client, for the purposes of giving and receiving legal advice.
- the area of privilege that "the law has been most zealous to protect and most reluctant to water down"

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Waiver

- Solicitor client privilege belongs to the client, and the client can waive the privilege in certain circumstances.
- Waiver is ordinarily established where the client:
 - (1) knows of the existence of the privilege; and
 - (2) voluntarily evinces an intention to waive that privilege.
- Waiver can also be implied.

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Agents

- Stranger danger!
- Unless they're an agent: someone who acts as a conduit or channel of communication from the client.
- Should agency be extended further?

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Litigation Privilege

Hamalainen (Committee of) v. Sippola (1991), 62 BCLR (2d) 254 (BCCA)

- a) was litigation in reasonable prospect at the time the document was produced, and
- b) if so, what was the dominant purpose for its production?
- Includes communications with third parties
- Beware: litigation privilege expires.

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 **Case-by-Case Analysis**

Wigmore criteria

1. The communications must originate in a confidence that they will not be disclosed;
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which, in the opinion of the community, ought to be sedulously fostered.
4. The injury that would enure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

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M(A) v Ryan, [1997] 1 SCR 157

- Even where there is a strong case for confidentiality under the first three criteria, if a document is relevant to the search for truth, and withholding it from judicial scrutiny would result in an injustice, it will fail the fourth step of the Wigmore test.
- Partial privilege strikes the balance.
- We need to think about *Charter* values.
- The law of privilege must evolve as society evolves.

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 **Sample Retainer Addendum**

- Made it a separate document from the actual retainer.
- Signed by both client and support person.
- Emphasizes importance of confidentiality, and the importance of the role of the support person.
- Authorizes verbal communication only.

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**SPEAKING OF
CONFIDENTIALITY → PRIVACY**

Thank you to my colleague, Daniel McBain, who did his best to dump his brain into mine for this part of the presentation.

There are three areas where privacy law has developed:

1. Statutory regulation
2. Civil liability
3. For unionized workplaces, arbitral jurisprudence

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STATUTORY SCHEME

	Provincial (BC)	Federal
Public	Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165 (FIPPA or FOIPPA)	Privacy Act, RSC 1985, c P-21 Access to Information Act, RSC 1985, c A-1
Private	Personal Information Protection Act, SBC 2003, c 63 (PIPA)	Personal Information Protection and Electronic Documents Act, SC 2000, c 5 (PIPEDA) ** watch for bill c-11

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- CONSISTENT CONCEPTS**
- Definition of "personal information"
 - Generally, very broad application
 - Some narrow exceptions
 - Some nuanced differences
 - No need for consent in employment
 - Employers can collect, use and disclose employee personal information without consent where the information is reasonably necessary to establish, manage, or terminate the employment relationship with that individual
 - Notice (again, with some exceptions)
 - Reasonableness (will depend on the circumstances)
 - Access and Accuracy

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CIVIL LIABILITY

- Privacy Act, RSBC 1996, c. 373 creates a relatively restricted right of action for breach of privacy.
 - 1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
- Because of the restrictive nature, the number of exceptions, and the fact that a claim must be pursued in the BC Supreme Court (s. 4), it may not be useful for many employees.
- Consider coupling it with a wrongful dismissal claim.

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CIVIL LIABILITY – PRIVACY ACT, CT'D

Elements:

1. Wilfull
2. Claim of right
3. Violate privacy
4. No need to prove harm

There are exceptions

- Consent
- Lawful right of defence of person or property
- Authorized by law or court process
- Investigations for peace officers or public officers engage in investigations
- Publications:
 - Publication was of public interest or fair common on a matter of public interest;
 - Privilege (either qualified or absolute)

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CIVIL LIABILITY – PERSONAL INFORMATION PROTECTION ACT -S. 57

57 (1) If the commissioner has made an order under this Act against an organization and the order has become final as a result of there being no further right of appeal, an individual affected by the order has a cause of action against the organization for damages for actual harm that the individual has suffered as a result of the breach by the organization of obligations under this Act.

(2) If an organization has been convicted of an offence under this Act and the conviction has become final as a result of there being no further right of appeal, a person affected by the conduct that gave rise to the offence has a cause of action against the organization convicted of the offence for damages for actual harm that the person has suffered as a result of the conduct.

Elements:

1. Final order (no right of appeal)
2. Breach of obligation OR convicted under the Act (broad)
3. Causation
4. Actual harm.

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CIVIL LIABILITY – PIPEDA, COMMON LAW, AND FUTURE LEGISLATION

PIPEDA, s. 14

- Application to federal court for a breach of an organization's PIPEDA obligations.
- Similar to PIPA, after complaining to the privacy commissioner.
- Doesn't require finding of breach

Common Law

Existing torts or contracts depending on the circumstances.

Future torts:

- o Intrusion upon seclusion
- o Public disclosure of private facts
- o False light

Revenge Porn Legislation

Current consultation on BC legislating about this, possibly along the lines of other provinces

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UNIONIZED WORKPLACES

- Generally, no recourse to courts. Must go to arbitration, or privacy commission.
- Arbitrators are old hat at privacy issues, though source of their decisions isn't always clear.
 - o Employee searches
 - o Drug and alcohol testing
 - o Disclosure of medical information
 - o Surveillance
- Will typically take a balancing of interests approach, and ask what is reasonably necessary.
- Have the power to exclude evidence and award damages for breaches

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