Dalhousie Journal of Legal Studies

Volume 32 Article 2

6-1-2023

Women, The Articling Term, And Sexual Harassment: A Critical Analysis of Protective Legislation, Codes of Conduct, and Regulatory Bodies

Courtney Chrusch

Women, The Articling Term, And Sexual Harassment: A Critical Analysis of Protective Legislation, Codes of Conduct, and Regulatory Bodies

Courtney Chrusch*

ABSTRACT

The following paper argues that legislation and law societies inadequately protect female articling students, and women in law more broadly, from sexual harassment. Previous research from students' personal reports and survey responses outline the barriers, workplace bullying, and misconduct commonly experienced during the articling term. The paper begins with a review of the inadequacies in professional codes of conduct. The analysis considers the *Butterfield (Re)*, 2017 LSBC 2 decision from British Columbia, which describes a female complainant sexually harassed by her principal during her articling term. Feminist Legal Theory, Marxism, and Cultural Law concepts emphasize sexual harassment as a disempowering force that excludes women from meaningful workplace participation. Principles from Cultural Law and meaning-making theories are applied to excerpts from Butterfield and are used to discuss the ignorant attitude towards sexual harassment survivors. The arguments put forth insist that the interactions between inadequate governing structures, gender hierarchies, and cultural norms sustain barriers to equitable work environments for women in law, especially at the inception of their careers.

Citation: (2023) 32 Dal J Leg Stud 35

* Courtney Chrusch obtained her Juris Doctor from the Schulich School of Law at Dalhousie University in May 2022. She is currently an Articling Student in Vancouver, British Columbia, where she practices labour and employment law. Courtney would like to thank the editorial team at the Dalhousie Journal of Legal Studies for their helpful comments and suggestions, and Assistant Professor Sara Ross, whose course on Critical Perspectives on the Law inspired this article.

INTRODUCTION

> If an environment is being poisoned metaphorically by a tree's poisonous fruit, merely harvesting all the fruit from the tree will do little to prevent future poisonous fruit. The elimination of such fruit requires replacing the tree itself with one that does not produce the same fruit.
>
> Brian Rubineau and Nazampal Jaswal [1]

Gender inequality is a malignant force in legal practice.[2] In the 1980s, Catharine MacKinnon critiqued the complex structures that perpetuate sexual harassment for women in law.[3] Nonetheless, sexual harassment has poisoned the legal practice since Clare Brett Martin became the first female Canadian lawyer in 1897.[4] In 2019, the International Bar Association released the "largest-ever global survey on bullying and harassment in the legal profession" finding that one in three female respondents had been sexually harassed at work, yet 75 percent of cases went unreported.[5] Hierarchies

---

[1] Brian Rubineau & Nazampal Jaswal, "Response is Not Prevention: Management Insights for Reducing Campus Sexual Assault" (2017) 27:1 Educ & LJ 19 at 28 [Rubineau].

[2] Simon Lewsen, "Feature: Articling Horrors", *JD Precedent* (28 August 2019), online: <precedentjd.com/news/feature-articling-horror-stories/> [perma.cc/V8YN-2LAU] [Lewsen]; Carolynne Burkholder-James, "Articling System Rife with Harassment and Discrimination", *The Canadian Bar Association National* (28 January 2020), online: <nationalmagazine.ca/en-ca/articles/the-practice/young-lawyers/2020/articling-system-rife-with-harassment-and-discrimi> [perma.cc/5GLA-B6W9] [Burkholder-James]; Carrie Menkel-Meadow, "Mainstreaming Feminist Legal Theory" (1992) 23:4 Pac LJ 1493 at 1506 [Menkel-Meadow (1992)]; Patricia Hughes, "Workplace Speech and Conduct Policies: Reconsidering the Legal Model" (1998) 77:1-2 Can Bar Rev 105 at 111 & 119 [Hughes]; Max Waltman, "Appraising the Impact of Toward a Feminist Theory of the State: Consciousness-Raising, Hierarchy Theory, and Substantive Equality Laws" (2017) 35:2 Law & Ineq 353 at 362 [Waltman].

[3] *Ibid.*

[4] Jennifer Stoddart, "Women and the Law" (5 February 2012), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/women-and-the-law> [perma.cc/8EP2-YM3R]; Lewsen, *supra* note 2.

[5] Sara Forte & Katelynn Denny, "The Walls Are Closing in on Sexual Harassment in the Legal Profession" (2021) 79:2 Advocate 203 at 204 [Forte]; Women Lawyers on Guard, "Still Broken: Sexual Harassment and Misconduct in the Legal Profession a National Study Executive Summary" (2020) at 8–9, online (pdf): *Women Lawyers on Guard* <womenlawyersonguard.org/wp-content/uploads/2020/03/Still-Broken-Full-Report-FINAL-3-14-2020> [perma.cc/KG3H-652Q] [WLOG]; "Us Too? Bullying and Harassment in the Legal Profession" (May 2019) at 12–14, online: *International Bar Association* <www.ibanet.org/MediaHandler?id=B29F6FEA-889F-49CF-8217-F8F7D78C2479> [perma.cc/A2BE-3T2M] [*IBA*].

within a firm setting, not being believed, safety concerns, and risking one's reputation deter women in law from reporting sexual harassment.[6]

Female articling students are particularly vulnerable to sexual harassment in law firms, yet their stories are mostly untold.[7] In every Canadian province, new law school graduates must participate in a period of temporary employment where they are hired as an articling student, supervised under an experienced lawyer, known as a principal.[8] Students are frequently subjected to jobs with "little-to-no" compensation, despite working similar hours as other associates or partners.[9] Only recently have some jurisdictions implemented a policy of mandatory minimum compensation for articling students.[10] In 2022, the Law Society of Ontario confirmed that it will impose a minimum required compensation target of $620 per week for its articling students.[11] This change came into force on May 1, 2023 but it leaves many articling issues unaddressed.

Fierce competition, crushing debt, and power imbalances expose students to bullying, harassment, and mistreatment.[12] Various national surveys describe abuse, discrimination, and sexual harassment throughout a students' articling year.[13]

---

[6] WLOG, *ibid* at 8–9; Deborah L Brake, "Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives That Obscure Gender Bias" (2007) 16:3 Colum J Gender & L 679 at 679 [Brake].

[7] Brake, *ibid* at 680; Forte, *supra* note 5 at 204–205.

[8] "Changing Employment Standards for Articling Students Demonstrate Need to Update HR Practices" (1 April 2021), online: *Spraggs Law* <spraggslaw.ca/changing-employment-standards-for-articling-students-demonstrate-need-to-update-hr-practices-2/> [perma.cc/KSD7-WPG7] [Spraggs Law]; "Details of Articling" (2021), online: *The Law Society of British Columbia* <www.lawsociety.bc.ca/becoming-a-lawyer-in-bc/admission-program/articling-centre/details-of-articling/> [perma.cc/9TR7-MUF8] [LSBC Articling].

[9] Kendelle Pollitt, "Should Employment Standards Act Apply to Articling Students?" (7 December 2020) at 1, online: *The Lawyer's Daily* <www.thelawyersdaily.ca/articles/22967/should-employment-standards-act-apply-to-articling-students-kendelle-pollitt> [perma.cc/BP6J-DQWK] [Pollitt].

[10] "Update: Mandatory Minimum Compensation for Experiential Training for Lawyer Licensing" (30 June 2022), online: *Law Society of Ontario Gazette* <lso.ca/gazette/news/mandatory-minimum-compensation-for-experiential-tr> [perma.cc/N958-H856].

[11] *Ibid*; Natasha Burman, "LSO Approves Mandatory Minimum Wage for Articling Students" (5 December 2022), online: *Ultra Vires* <ultravires.ca/2022/12/lso-mandatory-minimum-wage-for-articling/> [perma.cc/NT3S-TX7X].

[12] Forte, *supra* note 5 at 203; Spraggs Law, *supra* note 8; Pollitt supra note 9 at 1.

[13] *Ibid*; Alex Robinson, "Survey Finds 21 Per Cent of Articling Students Face Harassment, Discrimination" (26 January 2018), online: *Canadian Lawyer Magazine* <www.canadianlawyermag.com/resources/legal-education/survey-finds-21-per-cent-of-

Nonetheless, sexual harassment is significantly underreported, and complaint avenues are often internally restricted. Female articling students' lived experiences are hidden from public knowledge, while harassers face little-to-no consequences.[14]

The following paper argues that legislation and law societies inadequately protect female articling students, and women in law more broadly, from sexual harassment.[15] The analysis considers the *Butterfield (Re)*, 2017 LSBC 2 ("*Butterfield*") decision from British Columbia ("BC"), which describes a female complainant sexually harassed by her principal during her articling term.[16] Feminist Legal Theory, Marxism, and Cultural Law concepts emphasize sexual harassment as a disempowering force that excludes women from meaningful workplace participation.[17] The analysis insists that the interactions between inadequate governing structures, gender hierarchies, and cultural norms sustain barriers to equitable work environments for women in law, at the inception of their careers.[18]

---

articling-students-face-harassment-discrimination/274865> [perma.cc/PV92-CDCX]; Priya Bhatia, "Experiential Training Enhancements" (26 November 2021) at 3, online (pdf): *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2021/convocation-november-2021-professional-development-and-competence-report.pdf> [perma.cc/7FXT-LVDT].

[14] Forte, *supra* note 5 at 204–205; Brake, *supra* note 6 at 681. Please note that this paper is written from the perspective of a Caucasian, middle-class woman. For time and space purposes, the analysis defines women in broad, static, and generalized forms. This substantially limits the findings' applicability. Future research is needed to incorporate race, class, and sexual orientation factors that may contribute to sexual harassment in articling students.

[15] *Butterfield (Re)*, 2017 LSBC 2 at para 1 [*Butterfield*]. "Protection" should be interpreted broadly, such as the ability to report sexual harassment, relying on governing bodies to properly consider the report, and depend on the legislation and/or governing bodies to apply proper punishment in light of sexual harassment complaints.

[16] *Ibid*, at paras 1, 5; *Legal Profession Act*, SBC 1998, c 9 at s 38(7) [*LPA*]; The Law Society of British Columbia, "Code of Professional Conduct for British Columbia" (31 December 2012) at Chapter 6, online: *The Law Society of British Columbia* <www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/> [perma.cc/WYJ4-3RSK] [Conduct Code].

[17] Erika Chamberlain, "A Classical Perspective on the Modern Workplace: The Aristotelian Conflict in Sexual Harassment Litigation" (2002) 15:1 Can JL & Jurisprudence 3 at 8, 12 [Chamberlain]; Catharine A MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8:4 U Chicago Press 635 at 641 [MacKinnon (1983)]; Menkel-Meadow (1992), *supra* note 2 at 1516–1517.

[18] MacKinnon (1983) *ibid*; Catharine A MacKinnon, "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) 7:3 U Chicago Press 515 at 516 [MacKinnon (1982)].

This paper is structured as follows. Personal reports and survey responses introduce barriers, workplace bullying, and misconduct commonly experienced in students' articling terms.[19] The methodology to identify the *Butterfield* case is described, including an introduction to the Law Society of British Columbia's ("LSBC") regulatory scheme; a brief case summary of *Butterfield* follows.[20] Feminist Legal Theory is summarized, detailing historical and legislative developments aimed to dismantle workplace discrimination.[21] Next, the inadequacies in professional codes of conduct are examined. Principles from Cultural Law and meaning-making theories are applied to excerpts from *Butterfield* and discuss the ignorance to workplace sexual harassment survivors.[22]

I: THE ARTICLING YEAR: EXHAUSTION, DEBT, AND ABUSE?

Firm culture, lack of available articling positions, and strict licensing requirements place articling students "at the mercy of their firms."[23] Students face excruciating overtime expectations, competition between peers, and little-to-no-say in governing structures that fail to serve their needs.[24] In BC, the period for full-time articles is nine continuous months, with an additional ten week period where the student prepares for the Bar Exams, under the Professional Legal Training Course ("PLTC"), totaling nearly twelve-months.[25] Articling students must successfully complete these requirements and receive approval from their principal to be admitted

---

[19] Lewsen, *supra* note 2; Burkholder-James, *supra* note 2.
[20] *LPA*, *supra* note 16 at, ss 3, 38, 58; The Law Society of British Columbia, *Acts, Rules and Codes* (updated 2021), online: *The Law Society of British Columbia* <www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/> [perma.cc/J57Z-86S4] [BC Acts].
[21] Menkel-Meadow (1992), *supra* note 2 at 1497; Waltman, *supra* note 2 at 362.
[22] Jess Hill, "Patriarchy and Power: How Socialisation Underpins Abusive Behaviour" (7 March 2020), online: *The Guardian* <www.theguardian.com/society/2020/mar/08/patriarchy-and-power-how-gender-inequality-underpins-abusive-behaviour> [perma.cc/5PXM-BVW6] [Hill]; Austin Sarat & Thomas R Kearns, "The Cultural Lives of Law" in Austin Sarat & Thomas R Kearns, eds, *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press, 2000) at 6–7 [Sarat].
[23] Burkholder-James, *supra* note 2; Lewsen, *supra* note 2.
[24] Pollitt, *supra* note 9 at 1; *Spraggs Law*, *supra* note 8. Articling terms last twelve months in BC but differ between provinces.
[25] *Ibid.*

into the practice of law.[26] In British Columbia, articling students are also prohibited from obtaining secondary employment throughout the articling term.[27] In other words, articling students are exclusively reliant on their firm for economic and professional purposes. Lewson states that "workplace mistreatment is most likely to occur in situations where the employee depends on the boss for more than just a job."[28]

Workplace "bullying" is a widespread theme for many students throughout the articling term.[29] In 2017, the Law Society of Ontario published a survey finding that 21 percent of articling students in the past two years "experienced unwelcome conduct or comments while on the job."[30] A 2020 survey from Alberta, Saskatchewan and Manitoba Law Societies reported "almost one-third of articling students [experienced] discrimination and harassment" in their articling term.[31] Articling students are especially vulnerable, due to "no statutory protections under the *Employment Standards Act* or the *Labour Relations Code*." [32]

A growing trend in British Columbia alleges that principals are extorting students to perform "low-paid labour" duties (e.g. paralegal work) for three to four months before offering substantive legal training.[33] Moreover, if a student is terminated from their articling position, they may become blacklisted in their jurisdiction, or Canada more broadly.[34] The legal profession is largely based on reputation and one's ability to abide by hierarchical systems set in place. If an articling student diverts from these expectations, they may gain a reputation as "difficult" or unemployable.[35] In the recent *Ojanen v Acumen Law Corporation*, 2013 HRTO 1034 ("*Ojanen*") case, Ms. Ojanen was bullied by her principal and suffered "prolonged emotional distress;" she was unable to acquire another articling position for three years following the termination of her initial articles in 2016.[36] Throughout this "formative time" in a student's legal

---

[26] "Articling Agreement" (2023) at 2, online (pdf): *The Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/forms/ms-admissions/articling-agmt.pdf> [perma.cc/2ETY-K4ZQ] [Agreement].
[27] *Ibid*; Lewson, *supra* note 2.
[28] *Ibid*; Lewsen, *supra* note 2.
[29] *Spraggs Law*, *supra* note 8.
[30] Lewsen, *supra* note 2.
[31] Burkholder-James, *supra* note 2.
[32] *Ibid*; Lewson, *supra* note 2.
[33] *Ibid*.
[34] *Ojanen v Acumen Law Corporation*, 2021 BCCA 189 at paras 1–6 [*Ojanen*].
[35] *Ibid*.
[36] *Ibid*; Zena Olijnyk, "Award More than Tripled on Appeal for Fired Articling Student at BC Firm Acumen Law" (11 May 2021), online: *Canadian Lawyer Magazine*

career, their vulnerabilities are preyed upon often leading to extreme distress that takes "months or years" to recover from.

There is a minimal amount of cases, reports, or information addressing sexual harassment faced by female articling students. Most sexual harassment complaints, if reported at all, are handled internally by an equity ombudsperson, their Law Society, or mediation methods.[37] Law firms and principals aim to keep these issues private, with few reaching a tribunal or court proceedings.

These factors, among others, contribute to the scarcity of publicly available cases describing sexual harassment towards female articling students. Cases that do exist primarily pertain to racial discrimination, with sexual harassment complaints largely absent from public knowledge.[38]

II: METHODOLOGY

Searches in CanLII, WestlawNext, and LexisNexis aimed to identify recent sexual harassment or professional misconduct cases involving a principal and articling student. The following search terms were used in each noted platform: "sexual harassment and articling student;" "professional misconduct and articling student;" "law society and sexual harassment" revealing minimal results from all courts and tribunals.[39] Some cases detailed sexual misconduct by lawyers to various staff members, but few involved articling students.[40] *Butterfield* was the most recent case

<www.canadianlawyermag.com/practice-areas/labour-and-employment/award-more-than-tripled-on-appeal-for-fired-articling-student-at-bc-firm-acumen-law/355883> [perma.cc/CH3N-9NPE] [Olijnyk].

[37] Ted Flett, "Lawyers Sexually Harassing Articling Students is a Thing" (20 June 2015), online: *Canadian Lawyer Magazine* <www.canadianlawyermag.com/news/general/lawyers-sexually-harassing-articling-students-is-a-thing/269842> [perma.cc/83H3-75V4]; *Polanski v Law Society of Ontario*, 2020 ONLSTH 115; *Sweeney v Law Society of British Columbia*, 2020 BCHRT 3; *Law Society of Upper Canada v Neinstein*, 2010 ONCA 193; *Ormesher v Schwarz Law LLP*, 2013 HRTO 1034; *Ratneiya v Daniel & Krumeh*, 2009 HRTO 1824; Hill, *supra* note 22; Olijnyk, *supra* note 36; Burkholder-James, *supra* note 2.

[38] *Ibid.* Please note case research was limited to a student subscription. Additional cases and information may be available to those with permission to access these platforms more broadly.

[39] *Ibid.*

[40] *Ibid.*

pertaining to the relevant criteria, narrowing the chosen jurisdiction to British Columbia.[41]

III: THE LAW SOCIETY OF BRITISH COLUMBIA: THE REGULATORY SCHEME

The *Butterfield* case was heard under the disciplinary proceedings at the LSBC Tribunal (the "Tribunal"), a division of the LSBC that performs investigations and hearings for complaints made against lawyers or articling students.[42] The LSBC "upholds and protect public interest,"[43] by "preserving and protecting the rights and freedoms of all persons;"[44] to ensure "independence, integrity, honour, and competence of lawyers;"[45] to apply and establish practice standards;[46] and offer support to "lawyers, articled students."[47]

When the LSBC receives a complaint regarding an ethical concern or a breach of professional standards, a lawyer may be referred to the Discipline Committee where the appropriate recourse is determined. One outcome from the Discipline Committee is a "formal citation" where the Tribunal issues a public document with the allegations against a lawyer. The citation is then used as the subject of a public hearing and ruling, heard by a panel at the Tribunal.[48] A hearing at the Tribunal may result in a lawyer being fined, suspended, or disbarred.[49]

Articled Students: Statutory Requirements and the Articling Agreement

The LSBC has regulations and regulatory structures specific to articling students and principals. The *Articling Guidelines* establishes "The Mutual Obligations of

---

[41] *Butterfield*, *supra* note 15 at paras 1–2.
[42] "The Complaints and Discipline Process" (2021), online: *The Law Society of British Columbia* <www.lawsociety.bc.ca/complaints-lawyer-discipline-and-public-hearings/complaints/about-the-complaints-process/> [perma.cc/XPE7-R4EH] [Complaints].
[43] *LPA*, *supra* note 16, s 3.
[44] *Ibid*, s 3(a).
[45] *Ibid*, s 3(b).
[46] *Ibid*, s 3(c-d).
[47] *Ibid*, s 3(e).
[48] *Complaints*, *supra* note 42.
[49] *Ibid.*

Principals and Students."[50] These guidelines define the responsibility of the principal to instruct students on "various aspects of law and of professional conduct," and a "heavy obligation to the student and to the professional as a whole."[51]

The Appendix to the guidelines notes "a lawyer's duty to adhere to the highest ethical standards, including demonstrating courtesy and good character in all dealings;" responding promptly to ethical problems; and acting "in a respectful, non-discriminatory manner."[52] Benchers establish requirements and "fitness" considerations for lawyers to serve as principals for articled students.[53]

An *Articling Agreement* is signed by the student and principal, listing the responsibilities of both parties during the term.[54] Students are expected to "diligently and loyally provide [their] services for the benefit of the [law firm]."[55] Principals have a duty to provide mentorship, practical training, and direct legal experience to provide the student with "advice and direction on [their] development as a lawyer."[56] Importantly, principals must instruct students to uphold the "appropriate ethical standards and professionalism" that are described in the statutes and regulations for legal professionals.[57]

Act, Rules, and Codes: Professional and Ethical Standards

British Columbia Legal Professionals and articling students must also adhere to the regulations set out in the following legislative sources: the *Code of Professional Conduct for British Columbia* ("*Conduct Code*"); the *Legal Profession Act*, SBC 1998, c.9

[50] "Articling Guidelines" (2021) at 1, online (pdf): *The Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/publications/mm/ArticlingGuidelines_09-07.pdf> [perma.cc/BQ2H-RT7K] [AG].
[51] *Ibid* at 1 ("General").
[52] *Ibid* at Appendix, 1-Ethics.
[53] *LPA*, *supra* note 16, s 20(1).
[54] "Details of Articling" (2021), online: *The Law Society of British Columbia* <www.lawsociety.bc.ca/becoming-a-lawyer-in-bc/admission-program/articling-centre/details-of-articling/> [perma.cc/U4RT-2XW7] [Details].
[55] Agreement, *supra* note 26 at para 2.
[56] *Ibid* at para 3.
[57] *Ibid* at para 7.

("*LPA*"); and the *Law Society Rules* ("*Rules*").[58] Legal professionals must follow "all rules made by the Benchers," [59] and any other bylaws made by the LSBC.[60]

The *Conduct Code* is the "governing document concerning professional responsibility for British Columbia lawyers," and is considered to be the most important scheme.[61] Chapter 6 underlines a lawyer's "Relationship to Students, Employees, and Others," referenced in *Butterfield*.[62] It is the "duty of a principal" to provide a student with "meaningful training," knowledge, and "practical" legal skills, asserting "the traditions and ethics of the profession."[63] The *Conduct Code* includes a section dedicated to "Harassment and Discrimination,"[64] where the principles of Human Rights Laws apply.[65]

Specifically, a lawyer must "not sexually harass any person;"[66] "not engage in any other form of harassment of any person;"[67] and "not discriminate against any person" both within and outside legal practice.[68] The *Conduct Code* is intended to "guide the conduct of lawyers, not only in the practice of law," but as esteemed societal representatives.[69]

The *LPA* emphasizes protection to the public and legal professionals,[70] outlining the rules to authorize an "investigation into the conduct of a law firm or competence of a lawyer, or articled student." [71] The terminology in the LSBC's governing statutes establishes its jurisdiction over lawyers, or articling students who have "practiced law incompetently or been guilty of professional misconduct, [or] conduct unbecoming

---

[58] *Ibid*; "Law Society Rules" (1 July 2015) at 1–10, online (pdf): *The Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/publications/mm/LawSocietyRules_2021-07.pdf> [perma.cc/3GU5-V7K6] [Rules].
[59] *Ibid*, s 1(1). Benchers are elected or appointed members of the Law Society of British Columbia.
[60] *Ibid*, ss 58(1–2), 60.
[61] *Butterfield*, *supra* note 15 at para 20.
[62] *Ibid*; Conduct Code, *supra* note 16 at Chapter 6.
[63] Conduct Code, *ibid*, s 6.2(2).
[64] *Ibid*, s 6.3.
[65] *Ibid*, s 6.3(1).
[66] *Ibid*, s 6.3(3).
[67] *Ibid*, s 6.3(4).
[68] *Ibid*, ss 6.3(5), 7.2(1).
[69] *Ibid*; BC Acts, *supra* note 20.
[70] *LPA*, *supra* note 16 at Part 3.
[71] *Ibid*, s 26(2); *Rules*, *supra* note 58 at Rule 4-30(5).

[in] the profession."[72] *Butterfield* decision makers applied various *Rules* and determined the respondent met the test for professional misconduct under paragraph 38(4)(b) in the *LPA*.[73]

IV: RECOURSE FOR ARTICLING STUDENTS: *BUTTERFIELD (RE)*, 2017

Butterfield describes a sole family law practitioner, Michael John Butterfield, who sexually harassed two employees between May 14 and July 4, 2014: a female articling student and a female paralegal, both of whom were newly hired.[74] The articling student's complaint detailed Mr. Butterfield's "inappropriate comments of a sexual nature to her;" touching her lower back; regular remarks on her clothing choices; and Mr. Butterfield's persistent habit of shouting to employees across the office, among others.[75] The student felt "vulnerable, depressed, and timid" in the firm environment, eventually leading to her resignation on August 6, 2014.[76] The student pursued disciplinary action to "protect future employees from having to suffer the same harassment," asking for no compensation or formal apology.[77]

The Tribunal applied the *LPA*, the *Conduct Code*, the *Rules*, and other legal precedents in determining the appropriate punishment for Mr. Butterfield's behaviour.[78] The respondent made a "conditional admission of professional misconduct by sexually harassing two employees," charged with a $10,000 fine, and an additional $2,000 in hearing costs.[79] Mr. Butterfield consented to conditions "pursuant to section 38(7)" in the *LPA* and to complete a "sensitivity training course."[80] *Butterfield* affirmed that unwanted sexual conduct instills a "hostile work environment that adversely affects other employees who are not the direct subject of

[72] *LPA*, *ibid* at s 26(1)(a-b).
[73] *Ibid*, at s 38(4); *Butterfield*, *supra* note 15 at para 34; The decision also applied Rules, *supra* note 58 at Rules 4-48, 4-30(5), 5-11(1).
[74] *Ibid* at paras 1, 9-11. As of 2021, the firm is still operated with Mr. Butterfield as the sole practitioner and lists his wife as the only other employee.
[75] *Ibid* at paras 10, 12, 14.
[76] *Ibid* at para 16.
[77] *Ibid* at para 27.
[78] *LPA*, *supra* note 16, s 3.
[79] *Ibid* at s 38(7); *Butterfield*, *supra* note 15 at paras 1, 5.
[80] *Ibid*.

the unwanted conduct," while simultaneously praising Mr. Butterfield for his cooperation in the disciplinary process.[81]

Sexual Harassment Complaints Processes for Articling Students

The regulatory scheme in place attempts to protect professional misconduct between articling students, principals, and the work environment, providing contract breach initiatives. For instance, Mr. Butterfield breached his contractual obligations to his student in the *Articling Agreement*, which violated the expectations set out for lawyers under the *LPA*, the *Conduct Code*, and the *Rules*.

However, neither the *Articling Agreement* nor the *Articling Guidelines* describe any specific protections or processes for articling students that experience harassment. Students are faced with navigating the complaint process at the LSBC or through court processes.

The LSBC "attempts to resolve complaints at an early stage;" and if that isn't possible a complaint and investigative process ensues, as in *Butterfield*.[82] Articling students may also pursue legal action at the British Columbia Human Rights Tribunal, where sexual harassment can amount to constructive dismissal. [83] Additionally, a complainant can file a civil claim for wrongful dismissal, or tortious claims through provincial court processes.[84] "Criminal forms" of sexual harassment, such as sexual assault or stalking, can be reported to the police and pursued as an action under the *Criminal Code* at the Supreme Court of British Columbia.[85]

Other resources or procedures are available to support sexual harassment complaints. For instance, "Promoting a Respectful Workplace: A Guide For Developing Effective Policies," established in 2013, incorporates anti-bullying requirements set out in *WorkSafe BC's Occupational Health and Safety Policies*.[86] However, small firms often have "limited financial resources or personnel to adopt the same

---

[81] *Butterfield*, *ibid* at para 5.
[82] Complaints, *supra* note 42; *Butterfield*, *supra* note 15 at para 21.
[83] Forte, *supra* note 5 at 206–207.
[84] *Ibid.*
[85] *Ibid.*
[86] *Butterfield*, *supra* note 15 at para 21; "Practice Resources" (2021) at 2, online (pdf): *The Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/Policy-RespectfulWorkplace.pdf>[perma.cc/ZH6W-SM3Y] [Practice Resources].

kind of processes as larger firms," restricting its applicability.[87] Articling students may also file sexual harassment complaints directly to WorkSafeBC, if desired.[88]

Importantly, the LSBC includes an Equity Ombudsperson ("EQ") with a mandate to "stop workplace discrimination and encourage equitable workplace practices."[89] Complaints made to an EQ rely on private mediation procedures between the complainant and respondent.[90] The EQ recognizes sexual harassment as a "predominant issue" stating that "the discipline system does not seem to work well for matters of this kind."[91]

V: THE FEMINIST LEGAL THEORY: A WORKPLACE APPLICATION

Feminist Legal Theory (the "Fem-Crits") offers a critique of workplace sexual harassment interventions, approached differently from early feminist efforts. Throughout history, women have asked for, fought for, and demanded the same opportunities as men to participate in education, employment, and the broader public sphere.[92] Early feminist movements supported the application of women's rights in *formal equality* (or "Aristotelian equality") defined as "sameness," promoted throughout civil activism in 1960s America (e.g. Bloody Sunday and anti-war movements).[93] The pursuit defined women as fundamentally identical to men, deserving "equality, respect and justice."[94] Human rights legislation emphasized equal

[87] Practice Resources, *ibid* at 2.
[88] Forte, *supra* note 5 at 206–207.
[89] *Butterfield*, *supra* note 15 at para 21.
[90] *Practice Resources*, *supra* note 86 at 2.
[91] "Bencher Meeting" (12 October 2007) at 4, online (pdf): *The Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/about/minutes/07-10-12.pdf> [perma.cc/77YX-T59Y] [Bencher Meeting].
[92] Carrie Menkel-Meadow, "Feminist Legal Theory, Critical Legal Studies, and Legal Education Or the Fem-Crits Go to Law School" (1988) 38:1 J Legal Educ 61 at 63; Brake, *supra* note 6 at 679 [Menkel-Meadow (1998)].
[93] Menkel-Meadow (1992), *supra* note 2 at 1494; Grace Ganz Blumberg, "Fineman's the Illusion of Equality: A Review-Essay" (1992) 2 UCLA Women's LJ 309 at 309 [Menkel-Meadow (1992)]; Waltman, *supra* note 2 at 361; History.com Editors, "Civil Rights Movement" (17 May 2021), online: *The History Channel* <www.history.com/topics/black-history/civil-rights-movement> [perma.cc/EM87-J7PT] [HC].
[94] Menkel-Meadow (1992), *ibid* at 1497.

opportunity in the workplace "as a means for historically disadvantaged groups to achieve financial and professional equality."[95]

Early civil rights movements played an important role in women gaining rights under the law, yet left some women's needs unfulfilled in various ways.[96] However, formal equality deluded the specific gendered abuses that cannot be understood when women are considered "equal" to men under the law.[97] For instance, women were "entitled to equal treatment" only if they could display equivalent needs and performance attributes as men.[98] Thus, women were not afforded any "special treatment" for feminine-specific needs such as pregnancy leave, access to menstrual supplies, or protection against job-specific harms (e.g. women working as prison guards).[99] A closer analysis of 'equality' revealed the "standard women were supposed to equal was a 'male' one."[100] Neutralizing "definitions of men and women ignored the contextual experiences," and inadequately recognizes gender as a "system of social hierarchy."[101]

Conversely, the Fem-Crits formulated substantive equality, to account for women's "experiential point of view" in the workplace.[102] While sexual harassment is often directed to an individual employee, it conveys "the suitability of all women for employment in a particular job or work environment."[103] Fem-Crits argue that sexual harassment is sexual discrimination where, for instance, women are paid lower wages than men for comparable work, subscribe to gender-segregated job positions, are expected to perform more uncompensated workplace tasks than men, or are "asked to give sexual favours for work benefits in ways that men were not."[104]

The Supreme Court of Canada recognized "sexual harassment [as] a prohibited form of discrimination under human rights legislation" in *Janzen v Platy Enterprises Ltd*, 1989 1 SCR 1252.[105] The decision defended women's right to a workplace "free from

---

95 Chamberlain, *supra* note 17 at 8, 12.
96 *Ibid*; Blumberg, *supra* note 93 at 309; *HC*, *supra* note 93; Waltman, *supra* note 2 at 361.
97 Waltman, *ibid* at 356 and 358.
98 Menkel-Meadow (1992), *supra* note 92 at 72.
99 *Ibid* at 72, 73
100 *Ibid*; Waltman, *supra* note 2 at 356 and 358.
101 *Ibid*; Menkel-Meadow (1992), *supra* note 2 at 1506; Hughes, *supra* note 2 at 111 and 119.
102 *Ibid*.
103 Chamberlain, *supra* note 17 at 11.
104 *Ibid* at 4, 11; Menkel-Meadow (1992), *supra* note 2 at 1507; Waltman, *supra* note 2 at 363; Menkel-Meadow (1998), *supra* note 92 at 71, 72; *Janzen v Platy Enterprises Ltd*, 1989 1 SCR 1252 at 2–4 [*Janzen*].
105 *Ibid*.

discriminatory attitudes and behaviour," establishing possible remedies under human rights statutes when violated.[106] Formalized "codes of conduct to dictate ethical behaviour" became prominent in the 1980s responding to unjust treatment towards employees and conflicts of interest in the corporate context.[107] Modern codes of conduct became standardized in legal practice, emulating human rights legislation, and the importance to prevent workplace discriminatory behaviours, such as sexual harassment.[108] Professional codes of conduct have explicitly prohibited sexual harassment in Canada for the last 30 years.[109]

Lawyers and principals are required to uphold professional conduct codes and related legislation to not sexually harass any person.[110] Nonetheless, sexual harassment has been, and continues to be, rampant in the legal profession.[111] For instance, a 2020 survey from Women Lawyers on Guard indicated over 70 percent of respondents "reported that sexual misconduct was a part of the culture of their workplace."[112] Half of respondents recounted that the "harasser faced no consequences even after they reported the incidents," and for some respondents the conduct worsened.[113]

The survey asserted that "misconduct and harassment is sapping individual productivity," contributing to large numbers of women leaving legal practice altogether.[114] Despite the legislation, codes of professional conduct, and the common law serving to "encourage equality of opportunity," modern workplace sexual harassment in legal practice persists. In other words, the intentions of feminist and Fem-Crit efforts have not been upheld.[115] Laws, regulatory bodies, and workplace

---

[106] *Ibid.*
[107] *Ibid*; Jessalynn Strauss, "A (Brief) History of Codes of Ethics" (2021), online: *The Arthur W. Page Center / Public Relations Ethics* <pagecentertraining.psu.edu/public-relations-ethics/professional-codes-of-ethics/lesson-1-some-title-goes-here/a-brief-history-of-codes-of-ethics/> [perma.cc/HB9U-PJUS].
[108] *Ibid.*
[109] Amy Salyzyn, "Reporting Sexual Harassment: A New Professional Duty for Lawyers?" (3 June 2020) online: *Slaw* <www.slaw.ca/2020/06/03/reporting-sexual-harassment-a-new-professional-duty-for-lawyers/#_ftn1> [perma.cc/B2EX-CD46] [Salyzyn].
[110] Forte, *supra* note 5 at 204; Conduct Code, *supra* note 16.
[111] *Ibid.*
[112] *WLOG*, *supra* note 5 at 19.
[113] *Ibid* at 9 and 20.
[114] *Ibid* at 11; Janice Tibbetts, "Why Women Leave" (18 June 2018), online: *The Canadian Bar Association* <nationalmagazine.ca/en-ca/articles/the-practice/workplace/2018/why-women-leave> [perma.cc/UM8F-ZUXY] [Tibbetts].
[115] Waltman, *supra* note 2 at 356 and 358.

norms must be analyzed collaboratively "with a specific, particularized view of how they disempower, or disadvantage women."[116]

VI: PROFESSIONAL CODES OF CONDUCT: DO THEY REALLY SOLVE SEXUAL HARASSMENT?

Professional codes of conduct (or "codes"), policies, and training exist to offer protections and preventative measure to workplace sexual harassment victims. However, codes often include very broad statements or brief notes indicating the existence of a "Developed Sexualized Violence Policy" without mentioning its details.[117]

Workplace sexual harassment policies or codes arguably focus on, "protecting the organization from liability;" thus, training is less about the harassment itself, but more to devise a reactive plan if liability should ensue.[118] Policies, described by Hughes, are often "focused on the procedure, rather than its intended *systemic* impact," rarely defining long-term repercussions for survivors.[119] Eliminating problematic behaviours or individuals occurs primarily in "severe" cases of sexual harassment (e.g. sexual assault or other violence), giving little weight to more implicit forms that poison workplace environments.[120] Critics have gone so far to state that codes or policies contribute to, rather than prevent, sexual harassment, exacerbated by the regulatory bodies that make and enforce regulations.[121]

In 2018, the Global Judicial Integrity Network ("GJIN") held a conference dedicated to sexual harassment and other "gender-related integrity issues" in law.[122] Speaker Dame Laura Cox, previous Justice of the High Court (England and Wales),

---

[116] Chamberlain, *supra* note 17 at 8 and 12; Menkel (1992), *supra* note 2 at 1516-1517.
[117] Dalhousie University, *Diversity Inclusiveness* (2020), online (pdf): *Dalhousie University* <https://cdn.dal.ca/content/dam/dalhousie/pdf/cultureofrespect/5.2-Diversity-Inclusiveness-Pillar-Posters.pdf> [perma.cc/2M6Y-ZFQH] [Diversity].
[118] Rubineau, *supra* note 1 at 22.
[119] *Ibid* at 20; Hughes, *supra* note 2 at 109.
[120] Rubineau, *ibid* at 27.
[121] *Ibid* at 20.
[122] International Bar Association, "Us Too? Bullying, Sexual Harassment and Other Gender-Related Integrity Issues in the Judiciary" (25-27 February 2020) at 1, online (pdf): *United Nations Office on Drugs and Crime: Global Judicial Integrity Network* <www.unodc.org/res/ji/resdb/data/2019/us_too_bullying_and_sexual_harassment_in_the_legal_profession_html/iba_us_too.pdf.> [perma.cc/AUH7-L4A7] [GJIN].

stated that codes should "provide clear and specific guidance" to strengthen offender accountability with "ongoing monitoring and fair and transparent disciplinary mechanisms."[123] Conference speakers claimed "commentary on harassment is vague and does not cover the full spectrum of behaviours," and that "there is the need to modernise language [that does] not reflect endemic stereotypes [and] reinforces unconscious bias."[124] For instance, *Butterfield* noted that workplace sexual harassment is not defined in the *Conduct Code*, instead deferring to definitions in *Janzen*.[125] More specifically, the *Conduct Code* only states that "a lawyer must not sexually harass any person"[126] and that "a lawyer must not engage in any other form of harassment of any person."[127] Cox recommended that "barriers to reporting misconduct should be reduced or removed," and "complaint mechanisms and processes must be easy and accessible."[128]

Other presenters argued to amend "every law and policy that protects patriarchy,"[129] highlighting sexual harassment in the legal profession as a "serious and increasing problem that must be addressed with leadership from the top."[130] Attention must be geared toward both the codes themselves, and its enforcers.

Butterfield provides an example of many of the issues identified at the GJIN conference.[131] For instance, *Butterfield* gave undue attention to disciplinary measures aimed at preserving "public interest and maintaining public confidence in the legal profession."[132] The focus on the public perceptions of legal professionals suggests a general limitation in addressing sexual harassment through a disciplinary framework that persists beyond the confines of the *Butterfield* decision. Similarly, the risk to the complainant's professional opportunities or personal repercussions are virtually invisible throughout the decision.[133] Notably, *Butterfield* defines the conduct as "particularly serious," yet reducing Mr. Butterfield's behaviours as "for the most part,

---

123 *Ibid* at 2.
124 *Ibid* at 4.
125 *Butterfield*, *supra* note 15 at para 24.
126 Conduct Code, *supra* note 16 at 6.3-3
127 *Ibid* at 6.3-4.
128 GJIN, *supra* note 122 at 2. Remarks were largely dedicated to the judiciary but are applicable to legal practice more broadly.
129 *Ibid* at 3.
130 *Ibid* at 4.
131 *Butterfield*, *supra* note 15 at para 24.
132 *Ibid* at paras 34, 40, 24.
133 *Ibid.*

in the nature of inappropriate remarks."[134] The decision notes that "sexual harassment involves 'unwanted' conduct of a sexual nature. Once the Respondent understood it was "unwanted," he ceased the conduct."[135] *Butterfield* reflects an unwillingness to defend women's right to a workplace "free from discriminatory attitudes and behaviour," simultaneously excusing Mr. Butterfields' behaviour as on the "less serious" end of the sexual harassment spectrum.[136] The decision reflects inadequate "leadership from the top" and "reinforces unconscious bias" giving more consideration to the harasser rather than the harassed.[137]

There have been attempts to improve codes in the legal profession. The *Model Code of Professional Conduct* ("*Model Code*") aims to "harmonize the rules of conduct across Canada" for all law societies.[138] The LSBC adopts the language of the *Model Code* into its *Conduct Code*, on occasion and at its discretion.[139] In October 2022, the Federation of Law Societies of Canada published amendments to the *Model Code* at Rule 6.3-3 to better describe forms of sexual harassment.[140] Language such as "behaviour that constitutes sexual harassment;" "gender-based insults;"[141] "comments about a person's sex life;"[142] "jokes that cause humiliation;"[143] among others, were incorporated.[144] While the *Conduct Code* may benefit from adopting the language in the *Model Code*, both fall short in giving meaningful suggestions on preventing or responding to sexual harassment.

Rubien notes that "actual behaviours may be 'decoupled' from formal policies" and policies act as a "façade of formal practices designed to eliminate such

---

134 *Ibid* at para 42.
135 *Ibid.*
136 *Ibid* at para 24; see *Janzen*, *supra* note 104; Chamberlain, *supra* note 17 at 4.
137 Rubineau, *supra* note 1 at 29; Conduct Code, *supra* note 16 at 4.
138 Federation of Law Societies of Canada, "What We Do" (2023), online: *FLSC* <flsc.ca/what-we-do/model-code-of-professional-conduct/> [perma.cc/B562-XUMR] [*FLSC*].
139 "Highlights of Amendments to the BC Code" (September 2022) online: *The Law Society of British Columbia* <www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/highlights-of-amendments-to-the-bc-code/> [perma.cc/33ZU-AGGP] [*Highlights*].
140 Federation of Law Societies of Canada, "Model Code of Professional Conduct" (October 2022) at Rule 6.3-3, online: FLSC <flsc.ca/what-we-do/model-code-of-professional-conduct/> [*Model Code*].
141 *Ibid* at Rule 6.3-3[2](e).
142 *Ibid* at (g).
143 *Ibid* at (c).
144 *Ibid* at (a–k).

misconduct."[145] *Butterfield* alleged that aside from training requirements and fines, "more severe discipline will not enhance specific deterrence of the Respondent."[146] Excusing "minor" sexual harassment behaviours builds a workplace culture that welcomes women objectification, inferring that workplace policies are "only as good" as those who enforce them .[147]

Power Structures and the Appearance of Neutrality

A legal regime is influenced more by its enforcers' persuasive capacity to uphold a singular "attainable world."[148] Feminists and Marxists describe "social arrangements of patterned disparity" where groups' interests are "not obscured" nor ignored, but support a system where "many work and few gain."[149] Modes of thought "shap[e] consciousness, by making law's concepts and commands seem perfectly natural and benign."[150] Therefore, "we come to see ourselves as law sees us," internalizing the ways we, as women, are defined by law.[151]

The alleged conduct in *Butterfield* display laws' patriarchal origins, reflected by the Fem-Crits.[152] For instance, after returning from taking the claimant to lunch, Mr. Butterfield said that he would "not make her use the back door" explaining this was "historically the entrance for prostitutes."[153] In a one-on-one meeting with the claimant, Mr. Butterfield "commented in a joking manner that he was disappointed the claimant had not shown more cleavage that week."[154] Another instance details Mr. Butterfield saying that it was in the claimant's "employment contract" which required her to "turn him on."[155]

Gender is a "learned quality, an acquired characteristic" that is socially constructed both by law and culture.[156] Feminists identify "sexuality as the primary social sphere of male power" where women are objectified, judged, and manipulated

---

145 *Ibid.*
146 *Butterfield*, *supra* note 15 at para 43; MacKinnon (1983), *supra* note 17 at 641.
147 MacKinnon (1982), *supra* note 18 at 529; Forte, *supra* note 5 at 208; Rubineau, *supra* note 1 at 29.
148 Sarat, *supra* note 22 at 6–7.
149 MacKinnon (1982), *supra* note 18 at 516–517.
150 Sarat, *supra* note 22 at 7.
151 *Ibid.*
152 *Butterfield*, *supra* note 15 at para 26.
153 *Ibid* at 5.
154 *Ibid* at 6.
155 *Ibid* at 10.
156 MacKinnon (1982), *supra* note 18 at 529–530.

based on physical appearances.[157] For instance, in 2020, a study reported that women in law are often "rated on attractiveness" by their male colleagues.[158] Women's sexuality is a "social determination, daily construction, birth to death expression, [that] ultimately male[s] control" exemplified not only in the workplace, but in access to birth control, abortion, and intimate partner relationships.[159] Therefore, "the molding, direction, and expression of sexuality organizes society into two sexes: men and women."[160] Where Marxists describe the expropriation of work as benefiting those in a specified class, feminists argue that the expropriation of sexuality *defines* gender.[161] Thus, "men *create* the world from their own point of view, which then *becomes* the truth to be described."[162]

Sexual harassment is a legal symbol defining female articling students as sexualized, powerless objects.[163] Because law has "meaning-making power," social practices are inseparable from the legal norms they produce.[164] Law is limited in its ability to "constitute, regulate, or contain the imagination, invention, creativity, and improvisation that are culture itself."[165] Historical "concepts of law and culture as well as their complicity" preserve gender hierarchies in legal practice, and broader feminine existence.[166] MacKinnon argues that "sexuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away."[167]

VII: THE CULTURE OF LAW: THE FIRM, ITS HARASSERS, AND NORMS

Legal rules interact with culture to shape the authority, flow, and production of meanings; law is, therefore, not a singular hegemonic force.[168] In fact, regulatory

---

[157] *Ibid* at 529.
[158] Forte, *supra* note 5 at 204.
[159] MacKinnon (1982), *supra* note 18 at 529.
[160] *Ibid* at 516; Please note that an exploration of non-binary gender differences and experiences are understood to be impacted by the cultural structure within the legal profession, but are beyond the scope of this article.
[161] *Ibid.*
[162] *Ibid* at 537.
[163] Sarat, *supra* note 22 at 10.
[164] *Ibid.*
[165] *Ibid.*
[166] *Ibid* at 11.
[167] MacKinnon (1982), *supra* note 18 at 515.
[168] Sarat, *supra* note 22 at 12.

regimes intensify "legal orders" that sustain cultural boundaries.[169] For instance, the nuances in *Butterfield* suggest sympathy and direct attention to Mr. Butterfield's successes before his "tough fall from grace."[170] Decision-makers mentioned his participation in a "weekly radio program;"[171] praising the adoption of a new "Workplace Bullying and Harassment Policy;"[172] and commending the changes Mr. Butterfield made "to the air conditioning system to reduce background office noise."[173] Further, the respondent was described as going "beyond words" in the "policy and physical changes in his office and completed sensitivity training and other self-education about his responsibilities as an employer."[174]

Culture is not autonomous, nor external, but rather a "site of social differences and struggles," representing "historical forms of consciousness" that determine the meaning we subscribe to ourselves and others.[175] As an experienced lawyer, recognized for his achievements, decision makers in *Butterfield* presumably protect patriarchal entitlements, or perhaps, achievements more generally.[176] The ongoing "system of control," patterns, and norms that are historically passed down to many powerful men give rise to these behaviours, thus promoting conduct that one feels "licensed to express."[177] A culture that enables sexual harassment or sexual assault, similarly supports a "broad range of milder behaviours" directed at gender discrimination, broadly poisoning the legal profession.[178] *Butterfield* notes "we find the proposed disciplinary action to be balanced, proportionate and consistent with the principles applied," inferring the type of behaviour that may be tolerated in the legal profession, despite the impact on the articling student.[179]

---

[169] *Ibid* at 11.
[170] *Butterfield*, *supra* note 15 at para 31.
[171] *Ibid* at para 8.
[172] *Ibid* at para 17.
[173] *Ibid.*
[174] *Ibid* at para 43.
[175] Sarat, *supra* note 22 at 3, 5.
[176] Hill, *supra* note 22; Tibbetts, *supra* note 114. The interpretations set out in the analysis are a personalized interpretation, grounded in Feminist Legal Theory, Marxism, and Cultural Law concepts. They should not be considered as objective but viewed through a particularized lens. Thus, it is recognized that differing points of view exist, and are likely valid.
[177] Rubineau, *supra* note 1 at 30–31.
[178] *Ibid.*
[179] *Ibid* at 45.

However, scholars warn about oversimplifying the belief that gender hierarchies "create" sexual harassment or harm in a workplace or system.[180] MacKinnon argues that because social hierarchies are actively maintained by masculine dominance, equality is possible when gender-based systems are dissolved.[181] However, her perspectives grossly assumes that perpetrators must be males.[182] MacKinnon ignores the complexities of same-sex hierarchies, in addition to the ways female bystanders contribute to, and benefit from, the systems in place. In other words, gender is not the only indicator of social hierarchy that fosters the prevalence of sexual harassment towards women in the workplace.[183] There are greater forces at play that maintain inequitable social structures.

Attempts to Disrupt the Status-Quo

Legal culture is a distinct barrier to reporting or seeking action against sexual harassment.[184] The legal profession is "strife with cut-throat competition," and sparse job opportunities, exacerbated by pervasive "boys clubs" encouraging professionals to defend one another from women who accuse their "buddies" of inappropriate behaviour.[185] For instance, a practicing lawyer stated, "as a partner, you aren't a team player if you report a fellow partner."[186] Forte and Denny note that "survivors still get the message that harassment is normal in the legal profession and that speaking out can damage a career."[187]

At various points in the *Butterfield* decision, the respondent's contributions to the "broader community"[188] and "public shame, family anguish, financial costs and professional discipline" are given undue attention, with little-to-no mention of the repercussion faced by the complainant.[189] Instead, the complaint is inferred to violate Mr. Butterfields' achievements, where his career has more value than that of the

---

[180] Meagan Malone, *A Critique of Catharine MacKinnon's Sex-Based Theory of Rape* (Masters of Arts Thesis, Georgia State University, 2017) at 6 [Malone]; Aletta Brenner, "Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape" (2013) 36:2 *Harv J Law and G* 503 at 505.
[181] Malone, *ibid* at 12–13.
[182] *Ibid* at 16.
[183] *Ibid* at 28.
[184] Forte, *supra* note 5 at 208.
[185] *Ibid* at 204, 208; Tibbetts, *supra* note 114.
[186] Forte, *supra* note 5 at 204.
[187] *Ibid* at 208.
[188] *Butterfield*, *supra* note 15 at para 8.
[189] *Ibid* at para 7.

complainant.[190] Importantly, "one of the problems in our profession is that we all read case law," unique to other professions, such as accountants who are less likely to read sexual harassment cases about their colleagues.[191] Despite the expectation that "the perpetrators should be doubly afraid of these allegations coming to light when they happen to be lawyers," victims, especially articling students or new associates fear the repercussions, or inaction, of coming forward.[192]

Despite the efforts put forth, power structures create a powerful story-telling tool for women entering the legal profession.[193] Inaction towards harassers institute "fear, extreme discomfort, sidelining [which has] a significant negative impact on the morale."[194] Notably, reasons for not reporting have "remained stubbornly consistent over the last 30 years," including "doubts about whether reports will be believed."[195] Complainants describe that sometimes "managers gave the harassers written or verbal warnings," but only rarely.[196] More often than not "harassers were promoted or given additional managerial responsibilities" with few disciplinary consequences.[197] Survivor stories define women as unwelcome, or even problematic, to the legal profession, which is established at the inception of their legal career.[198] Thus, "law is inseparable from the interests, goals, and understandings that deeply shape or comprise social life," where "things *are*, so *must* they be."[199]

There have been suggestions put forth regarding mandatory reporting of sexual harassment within the legal profession.[200] Scholars have argued that if lawyers are obligated to report conduct such as misappropriation of trust funds, then sexual harassment should be reasonably added to this list. However, mandatory reporting can also place "undue burdens on vulnerable bystanders," especially on new lawyers and articling students. [201] As noted by Woolley's personal experiences of sexual harassment in the legal profession, reporting comes at a cost. [202] For instance, litigation

---

[190] Rubineau, *supra* note 1 at 30; Sarat, *supra* note 22 at 18.
[191] Forte, *supra* note 5 at 204–205.
[192] *Ibid.*
[193] Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 MLJ 725 at 737 [Napoleon].
[194] WLOG, *supra* note 5 at 8.
[195] *Ibid* at 9.
[196] *Ibid.*
[197] *Ibid.*
[198] Napoleon, *supra* note 193 at 737.
[199] Sarat, *supra* note 22 at 6.
[200] Salyzyn, *supra* note 109.
[201] *Ibid.*
[202] *Ibid.*

or complaint processes may "exacerbate or perpetuate symptoms developed as a result of the original harassment" and that "engaging with the law society about an experience of sexual harassment could be re-traumatizing." [203]

Professors Elaine Craig and Joycelyn Downie, at the Schulich School of Law at Dalhousie University, believe that a victim-exemption from mandatory reporting obligations could resolve these concerns.[204] However, witnesses may be vulnerable to repercussions of mandatory reporting obligations such as discipline, a destroyed reputation, or becoming the subject of abuse from the person they are reporting. Salyzyn argues that while many survivors may achieve positive outcomes with a mandatory reporting scheme in place, reporting should be viewed as a personal, informed choice.[205] This raises the question, what can be done?

VIII: MAKING MEANING: WHERE DO I BELONG IN THE SYSTEM?

Active listening to stories is argued to reveal what these stories really *mean* to women in law.[206] Stories "are a part of a serious public intellectual and interactive dialogue involving listeners and learners."[207]

Nonetheless, women continue to be the only listeners and learners. Law societies rest on a false belief that policies, codes, and legislation have "dealt with the problem," ignoring their own contributing positions.[208] The broader system fails to actively consider the narratives surrounding sexual harassment to move towards a "deeper level of respect" and humility for survivors.[209]

Meaning determines how we make sense of what we, and others, do "practically, morally, expressively, [and] juridically."[210] In 2020, a national survey from Women Lawyers on Guard asserted the broader implications of sexual harassment, alluding

---

[203] *Ibid.*
[204] Elaine Craig & Jocelyn Downie, "Everyone Turns to Lawyers for #MeToo Advice, but the Legal Community Needs its Own Reckoning" (24 December 2019), online: *The Globe and Mail* <www.theglobeandmail.com/opinion/article-everyone-turns-to-lawyers-for-metoo-advice-but-the-legal-community/> [perma.cc/FXX3-4KKM].
[205] Salyzyn, *supra* note 109.
[206] Napoleon, *supra* note 193 at 738.
[207] *Ibid.*
[208] WLOG, *supra* note 5 at 16.
[209] *Ibid.*
[210] Sarat, *supra* note 22 at 6.

to sentiments depicted in the *Butterfield* decision.[211] Respondents claimed that "no one realized the damage that [sexual harassment] was doing to women, or the repression it caused in their careers."[212] Mr. Butterfield was unaware that "he was impacting his staff and creating a hostile work environment."[213] Nonetheless, the LSBC gave Mr. Butterfield the benefit-of-the-doubt, almost excusing his ignorance.[214] *Butterfield* diminishes the profound impacts of sexual harassment, perpetuating the belief that reporting this, or worse, behaviour will likely lead to no substantive change.[215]

Sexual harassment sustains "lasting consequences" where women's careers and "personal sense of well-being had been negatively impacted."[216] Survivors report "anxiety about their careers and well-being; feared retaliation; and lost productivity," similar to the complainant in *Butterfield*.[217]

Despite harassers not "remembering" or recognizing their conduct as problematic, it "lives on in the memory" of survivors, "long after the behavior stops or the person harassed has changed jobs or employment settings."[218] Even with the space given to women in law after decades of legislative and regulatory reform, women in law are limited, isolated, and their experiences oversimplified.[219] Changes to the language in codes and mandatory reporting obligations may indicate that attention is being brought to the enduring problem of sexual harassment in the legal profession. However, everyday justice is much broader, and deeper, than what the law depicts, where "dominant interests 'masquerade informally as a background, default condition.'"[220]

---

[211] WLOG, *supra* note 5 at 4.
[212] *Ibid* at 10.
[213] *Butterfield*, *supra* note 15 at para 42.
[214] *Ibid.*
[215] WLOG, *supra* note 5 at 11.
[216] *Ibid.*
[217] *Ibid* at 11, 16; *Butterfield*, *supra* note 15 at paras 6, 8, 10, 26.
[218] *Ibid.*
[219] Napoleon, *supra* note 193 at 739.
[220] Sarat, *supra* note 22 at 18.

IX: CONCLUSION

Seeking recourse for sexual harassment as a new female articling student is, more or less, impossible but continues to be a significant issue.[221] Power structures, systemic sexism, and inadequate governing regimes are coupled with the precariousness of an articling contract.[222] Sexual harassment claims reported by articling students are kept hidden behind internal processes, where supportive precedents are virtually nonexistent.[223] *Butterfield* confirms long-held fears that prevent women in law from reporting sexual harassment, as complaints provide little-to-no fundamental changes.[224] The LSBC applies vague codes intended to eliminate discrimination, proving ineffective against patriarchal origins. Decision makers tolerate nuanced gendered behaviours, thwarting any hopes towards fundamental cultural changes.

Sexual harassment "pervades the workplace" and social sphere, "destructive not only to its direct victims," but to the entire female population.[225] Over thirty years after the Fem-Crits argued the importance of "contextual experiences" for women in legal practice, "systems of social hierarchies" in the workplace, and beyond, inescapably exist and disempower women in law.[226] Despite efforts to remove poisonous fruit in the legal profession, the tree itself, continues to be watered by the farmers that benefit most from its fruits.[227]

---

[221] Tim Wilbur, "How to Fight Sexual Harassment in the Legal Profession" (28 May 2021), online: *Canadian Lawyer Magazine* <www.canadianlawyermag.com/resources/professional-regulation/how-to-fight-sexual-harassment-in-the-legal-profession/356616> [perma.cc/7VWV-7Q8Y].
[222] *Ibid.*
[223] *Ibid*; Napoleon, *supra* note 193 at 738; Forte, *supra* note 5 at 208.
[224] WLOG, *supra* note 5 at 9.
[225] Chamberlain, *supra* note 17 at 3.
[226] Menkel-Meadow (1992), *supra* note 2 at 1506; Hughes, *supra* note 2 at 111, 119; Waltman, *supra* note 2 at 362.
[227] Rubineau, *supra* note 1 at 27.