

The Peter A. Allard School of Law

Allard Research Commons

Faculty Publications

Allard Faculty Publications

2020

Workplace Sexual Harassment and the "Unwelcome" Requirement: An Analysis of BC Human Rights Tribunal Decisions from 2010 to 2016

Bethany Hastie

Allard School of Law at the University of British Columbia, hastie@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs



Part of the [Human Rights Law Commons](#), and the [Labor and Employment Law Commons](#)

Citation Details

Bethany Hastie, "Workplace Sexual Harassment and the 'Unwelcome' Requirement: An Analysis of BC Human Rights Tribunal Decisions from 2010 to 2016" (2020) 32:1 CJWL 61.

This Article is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

Workplace Sexual Harassment and the “Unwelcome” Requirement: An Analysis of BC Human Rights Tribunal Decisions from 2010 to 2016

Bethany Hastie

Dans la foulée du mouvement #moiaussi et d'un certain nombre de cas très médiatisés au Canada, il était possible de penser que les tribunaux reçoivent de plus en plus de plaintes de harcèlement sexuel au travail. Pourtant, il existe actuellement peu d'analyses des lois relatives au harcèlement sexuel au Canada. L'auteure du présent article offre ici sa contribution en analysant des décisions du Tribunal des droits de la personne de la Colombie-Britannique de 2010 à 2016. Elle y analyse les tendances dans l'évaluation de la crédibilité et de la nature des plaintes de harcèlement sexuel et démontre que le fait que la plaignante doive prouver que la conduite en question était « importune » dirige de façon inappropriée le centre de l'enquête juridique vers son propre comportement. En s'appuyant sur des questions bien documentées concernant les mythes et les stéréotypes genrés dans le contexte de l'agression sexuelle, cet article démontre que l'exigence de prouver que la conduite était « importune » introduit des problèmes semblables dans les plaintes de harcèlement sexuel.

Legal complaints concerning workplace sexual harassment are anticipated to increase, following in the wake of the #MeToo movement and a number of high-profile cases in Canada. Yet little contemporary research has analyzed sexual harassment laws in Canada. This article contributes to further research on sexual harassment laws through a case analysis of BC Human Rights Tribunal decisions from 2010 to 2016. This article analyzes trends in assessing credibility and character in sexual harassment complaints and establishes that the requirement that a complainant prove that the conduct in question was “unwelcome” improperly shifts the focus of the legal inquiry towards her own behaviour. Drawing on well-documented issues concerning gendered myths and stereotypes in the sexual assault context, this article demonstrates that similar problems are introduced in sexual harassment complaints through the “unwelcome” requirement.

I wish to thank Isabel Grant and the anonymous reviewers for the *Canadian Journal of Women and the Law* for their helpful comments and feedback on the draft of this article. I would also like to acknowledge the research assistance of Hayden Cook in preparing this article and the editors of the journal for their helpful guidance throughout the review and publication process.

Introduction

The #MeToo movement has sparked renewed attention to the issue of sexual harassment. In the Canadian legal context, sexual harassment complaints, particularly in the non-unionized workplace, are likely to be pursued through a human rights tribunal.¹ Recent evidence from Ontario suggests that the volume of such claims may be increasing due to the benefits associated with human rights tribunals as a remedial vehicle over civil courts, including relaxed evidentiary and examination standards, a less adversarial atmosphere, and higher compensatory awards.² Yet little research has examined how sexual harassment law is currently understood, interpreted, and applied by human rights tribunals in Canada.³

This article is part of a larger project that takes up an examination of workplace sexual harassment complaints at the BC Human Rights Tribunal (BCHRT) from 2010 to 2016. While an earlier article examined inherent limitations and enduring

-
1. The recognition of sexual harassment as a form of employment discrimination has created a direct pathway for claims under human rights law in Canada. In limited cases, if the conduct is severe enough to constitute criminal harassment or sexual assault under the *Criminal Code*, RSC 1985, c C-46, s 276(1)(a)–(b) [*Criminal Code*], criminal charges may be laid. In addition, complainants could optionally pursue civil claims in tort or employment law where the discrimination or harassment relates to a recognized civil claim.
 2. See Sean Fine, “Ontario Human Rights Tribunal Gains Steam as Alternative Route for Sexual Assault Cases”, *Globe and Mail* (3 April 2018) <<https://www.theglobeandmail.com/canada/article-workplace-sexual-assault-survivors-claim-victory-at-human-rights/>>. Note also that sexual harassment does not constitute an independent civil action and, as such, could only be addressed through civil courts in the employment context when it is ancillary to a recognized claim, such as wrongful dismissal. See also *Human Rights Code*, RSO 1990, c H-19, s 46.1, which grants civil courts the ability to award remedies where the Code has been infringed (s 46.1(1)), but prohibiting an independent action for infringement under the Code through the courts (s 46.1(2)).
 3. For existing scholarship on sexual harassment law in Canada, see e.g. Colleen Sheppard, “Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment” (1995) 3 *Canadian Labour and Employment Law Journal* 249; Arjun P Aggarwal & Madhu M Gupta, *Sexual Harassment in the Workplace*, 3rd ed (Toronto: Butterworths, 2000); Fay Faraday, “Dealing with Sexual Harassment in the Workplace: The Promise and Limitations of Human Rights Discourse” (1994) 32:1 *Osgoode Hall Law Journal* 32; Kathleen Gallivan, “Sexual Harassment after *Janzen v Platy*: The Transformative Possibilities” (1991) 49 *University of Toronto Faculty of Law Review* 27; Sandy Welsh, Myrna Dawson & Elizabeth Griffiths, *Sexual Harassment Complaints to the Canadian Human Rights Commission* (Ottawa: Status of Women Canada, 1999) <<http://publications.gc.ca/collections/Collection/SW21-43-1999E-5.pdf>>; Susan M Hart, “Labour Arbitration of Co-Worker Sexual Harassment Cases in Canada” (2012) 29:2 *Canadian Journal of Administrative Sciences* 268; Sheryl L Johnson, *Sexual Harassment in Canada: A Guide for Understanding and Prevention* (Toronto: Lexis Nexis Canada, 2017).

problems attending the identification of sexually harassing conduct,⁴ this article focuses on problematic trends in assessing credibility, character, and consent in sexual harassment complaints. Given the increasingly documented issues attending victims of sexual offences and gender-based violence in the criminal justice system,⁵ there is good reason for concern that similar issues may plague complainants of sexual harassment within human rights tribunal proceedings.

Victims of sexual offences are known to face substantial barriers pursuing justice in the criminal justice system, especially concerning issues in assessing credibility and character. Problematic myths concerning women's sexual availability, narrow and even false understandings of how women should respond to sexual violence, and underlying tendencies to responsabilize or blame women for the violence perpetrated against them continue to impact negatively credibility and character for victims of sexual offences.⁶

Sexual harassment, like sexual assault, will often occur in private and without corroborating evidence. This means that cases may revolve substantially around the testimony of the complainant and respondent, which makes credibility a significant factor in such cases. The documented impact that stereotypes and myths have in relation to a victim's credibility in sexual assault cases,⁷ coupled with research that posits "people are more likely to rely on stereotypes when making judgements under conditions of uncertainty," means that a lack of material or corroborating evidence may create conditions that enable the introduction and use of stereotypes in sexual harassment

-
4. See Bethany Hastie, "Assessing Sexually Harassing Conduct in the Workplace: An Analysis of BC Human Rights Tribunal Decisions 2010–2016" (2019) 31:2 *Canadian Journal of Women and the Law* 293.
 5. See e.g. Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41:4 *Akron Law Review* 865 [Gotell, "Rethinking Affirmative Consent"]; Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22:2 *Canadian Journal of Women and the Law* 397 [Randall, "Ideal Victims"]; Isabel Grant, "Intimate Partner Harassment through a Lens of Responsibilization" (2015) 52:2 *Osgoode Hall Law Journal* 552; Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal and Kingston: McGill-Queen's University Press, 2018) [Craig, *Putting Trials on Trial*]; Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94:1 *Canadian Bar Review* 45 [Craig, "Section 276 Misconstrued"]; Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43:3 *Alberta Law Review* 743; Susan Ehrlich, "Perpetuating—and Resisting—Rape Myths in Trial Discourse," in Elizabeth Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice, and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 389.
 6. See e.g. Randall, "Ideal Victims", *supra* note 5; Craig, *Putting Trials on Trial*, *supra* note 5; Ehrlich, *supra* note 5; Grant, *supra* note 5.
 7. See e.g. Gotell, "Rethinking Affirmative Consent", *supra* note 5; Randall, "Ideal Victims", *supra* note 5; Craig, *Putting Trials on Trial*, *supra* note 5; Ehrlich, *supra* note 5.

complaints as a way to ‘explain’ complainant behaviour.⁸ This article demonstrates that these problems arise in the context of sexual harassment complaints in the human rights context, particularly in relation to the requirement that a complainant establish that conduct was “unwelcome” in order to substantiate her complaint.

The context in which the BCHRT operates makes this an appropriate jurisdiction for this pilot study. Based in one of only two jurisdictions in Canada without a Human Rights Commission during the period examined,⁹ the BCHRT has held independent responsibility for educating and informing itself on contemporary issues, such as workplace sexual harassment.¹⁰ The lack of a Human Rights Commission in British Columbia was claimed to have created a “gaping hole in the province’s system of human rights protection,” though existing research has not actually documented the impact this absence has had on the tribunal’s jurisprudence during the time period in question.¹¹ As British Columbia moves ahead with its newly reinstated Human Rights Commission, and given the current attention to, and momentum of, the issue of workplace sexual harassment in public discourse, increased research and information on the current status of the law and its interpretation and application at the BCHRT may be useful in directing the new Human Rights Commission’s work.¹²

8. Craig, *Putting Trials on Trial*, *supra* note 5 at 206.

9. See Kaitlyn Matulewicz, “Law and the Construction of Institutionalized Sexual Harassment in Restaurants” (2015) 30:3 *Canadian Journal of Law and Society* 401 at 408 [Matulewicz, “Institutionalized Sexual Harassment”]. British Columbia reinstated its Human Rights Commission in 2019. Bill 50, *Human Rights Code Amendment Act, 2018*, 3rd Sess, 41st Parl, BC, 2018 (assented to 27 November 2018), SBC 2018, c 48 <<https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/3rd-session/bills/progress-of-bills>>.

10. This might be contrasted with, for example, the Ontario Human Rights Commission (OHRC), which has been particularly active in generating policy reports on workplace sexual harassment. See e.g. OHRC, “Policy on Preventing Sexual and Gender-Based Harassment” <<http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment-0>>; OHRC, “OHRC Policy on Sexualized and Gender-Specific Dress Codes” <<http://www.ohrc.on.ca/en/ohrc-policy-position-sexualized-and-gender-specific-dress-codes>> [OHRC, “Policy on Dress Codes”].

11. Matulewicz, “Institutionalized Sexual Harassment”, *supra* note 9 at 408, citing Gwen Brodsky & Shelagh Day, *Strengthening Human Rights: Why British Columbia Needs a Human Rights Commission* (Vancouver: Poverty and Human Rights Centre and Canadian Centre for Policy Alternatives, December 2014) <<https://www.policyalternatives.ca/publications/reports/strengthening-human-rights>>. Human Rights Commissions in Canada have historically played a significant role in defining and providing guidelines on sexual harassment. Aggarwal & Gupta, *supra* note 3 at 12–13; OHRC, “Policy on Dress Codes”, *supra* note 10.

12. Regarding the reinstatement of the BC Human Rights Commission, see Government of British Columbia, Office of the Premier, News Release, 15138, “B.C. to Fight Inequality and Discrimination with Renewed Human Rights Commission” (4 August 2017) <<https://news.gov.bc.ca/15138>>.

The case selection for this study is comprised of twenty complaints of sexual harassment in the workplace, pursuant to section 13 of British Columbia's *Human Rights Code*, from 2010 to 2016.¹³ These cases provide a contemporary picture of sexual harassment complaints and their adjudication at the BCHRT as well as a sample size suitable for in-depth qualitative analysis.¹⁴

This article proceeds in three parts. The first section outlines and critiques the legal principles governing sexual harassment complaints in the human rights context, focusing on the "unwelcome" requirement. The second section outlines and discusses the challenges facing sexual assault complainants regarding credibility and character assessments in the criminal justice system and the problematic myths and stereotypes commonly documented in that context. The third section engages in a qualitative analysis of identified cases at the BCHRT with a view to unpacking how problems similar to those discussed in relation to criminal law arise and impact cases of sexual harassment in the human rights context. This section analyzes and discusses how assumption-based reasoning and stereotypes unfold in workplace sexual harassment complaints in relation to: (1) a lack of protest as implicit consent or "welcomeness"; (2) "risky" behaviour or participation as undermining the threshold for establishing conduct as "unwelcome"; and (3) challenges in evaluating harassment in intimate partner and other close relationships.

-
13. RSBC 1996, c 210; *LaBelle v Campus Technologies and Another*, 2010 BCHRT 116 [*LaBelle*]; *Ratzlaff v Marpaul Construction and Another*, 2010 BCHRT 13 [*Ratzlaff*]; *Tyler v Robnik and Mobility World (No 2)*, 2010 BCHRT 192 [*Tyler*]; *Soroka v Dave's Custom Metal Works and Others*, 2010 BCHRT 239 [*Soroka*]; *Skorka v Happy Day Inn and Others*, 2010 BCHRT 306 [*Skorka*]; *Wideman v Wiebe and Another (No 2)*, 2010 BCHRT 312 [*Wideman*]; *Heyman v Saunders*, 2010 BCHRT 88 [*Heyman*]; *Kang v Hill and Another (No 2)*, 2011 BCHRT 154 [*Kang*]; *Young and Young on behalf of Young v Petres*, 2011 BCHRT 38 [*Young*]; *McIntosh v Metro Aluminum Products and Another*, 2011 BCHRT 34 [*McIntosh*]; *Woods v Fluid Creations*, 2012 BCHRT 110 [*Woods*]; *Q v Wild Log Homes and Another*, 2012 BCHRT 135 [*Q*]; *MacDonald v Najafi and Another (No 2)*, 2013 BCHRT 13 [*MacDonald*]; *Root v Ray Ray's Beach Club and Others*, 2013 BCHRT 143 [*Root*]; *Paananen v Scheller (No 2)*, 2013 BCHRT 257 [*Paananen*]; *Sleightholm v Metrin and Another (No 3)*, 2013 BCHRT 75 [*Sleightholm*]; *Kuchta v J Lanes Enterprises and Others*, 2013 BCHRT 88 [*Kuchta*]; *Kafer v Sleep Country Canada and Another (No 2)*, 2013 BCHRT 289 [*Kafer*]; *Balikama Obo Others v Khaira Enterprises and Others*, 2014 BCHRT 107 [*Balikama*]; *PN v FR and Another (No 2)*, 2015 BCHRT 60 [*PN*].
 14. A longitudinal study on the evolution of the legal conceptualization of sexual harassment, and the inclusion of cases dismissed in preliminary proceedings, would add further depth to the findings of this article, as would a comparative study of several provincial human rights tribunals. Although beyond the scope of this article, such studies are planned to follow. For a comparison of BC and Ontario case law from 2000 to 2018, see Bethany Hastie, *Workplace Sexual Harassment: Assessing the Effectiveness of Human Rights Law in Canada* (Vancouver: University of British Columbia, 2019) <https://commons.allard.ubc.ca/fac_pubs/500/>.

Defining Sexual Harassment in Human Rights Law: A Critical Examination of the “Unwelcome” Requirement

Sexual harassment is defined broadly as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victim of the harassment.”¹⁵ Under this definition, a complainant must establish both the harassing conduct and the fact that such conduct was “unwelcome.”¹⁶ The inclusion of the “unwelcome” requirement creates a context that invites scrutiny of the complainant’s own conduct and behaviour, creating space for problematic stereotypes and assumption-based reasoning like that documented in the context of sexual assault to improperly influence adjudication of the complaint.¹⁷

The requirement that a complainant establish that the conduct in question is “unwelcome” is unique and not required in other human rights complaints.¹⁸ Tribunals and courts have come to understand the legal “test” for determining whether conduct is “unwelcome” as: “[T]aking into account all the circumstances, would a reasonable person know that the conduct in question was not welcomed by the complainant?”¹⁹ The test thus asks whether the harasser knew, or ought

-
15. *Janzen v Platy Enterprises*, [1989] 1 SCR 1252 at 1284 [*Janzen*]. The conduct element of the definition was further elaborated upon in *Mahmoodi v UBC and Dutton*, 1999 BCHRT 56 [*Mahmoodi*].
 16. This element may have been introduced to ensure that consensual sexual interactions in the workplace were excluded from the legal concept of sexual harassment. See e.g. Aggarwal & Gupta, *supra* note 3 at 120–37, for an overview of this requirement and its critiques. See also Janine Benedet, “Book Review of *Sexual Harassment in the Workplace* by Aggarwal and Gupta” (2001) 39:4 *Osgoode Hall Law Journal* 843 at 847 [Benedet, “Book Review”] for a critique of their treatment of the issue and especially of how this creates a heightened standard for establishing discrimination.
 17. In addition to analogies with sexual assault literature, one identified article in existing literature examined claims of sexual harassment within labour arbitration proceedings. Hart found that the identified cases in that context were united by an “inadequate understanding of sexual harassment with a subtheme of victim blaming [and the] undermining [of] women’s credibility as witnesses through gendered arguments.” Hart, *supra* note 3 at 273. This further supports the need to examine whether, and to what extent, such stereotypes and myths have a pervasive presence in the human rights tribunal context.
 18. Under the *BC Human Rights Code*, *supra* note 13, the conduct in question does not have to be intentional (s 2). Human rights complaints must generally establish three elements: (1) that the complainant has a protected characteristic; (2) that the complainant has experienced adverse treatment; and (3) that the protected characteristic was a factor in the adverse treatment. *Moore v British Columbia*, 2012 SCC 61. For a commentary on judicial and academic confusion around whether or not express protest is required to establish unwelcomeness, potentially making it more difficult to establish a discrimination claim, see Benedet, “Book Review”, *supra* note 16 at 846–47.
 19. *Mahmoodi*, *supra* note 15 at para 140.

to have known, that the conduct was not welcomed. Providing an objective basis for assessing “unwelcomeness” through the inclusion of “ought to have known” potentially expands the reach of how sexual harassment is defined in human rights law by eliminating a requirement to establish specific or actual intent on the part of the harasser.

Interpretations of the test for establishing “unwelcome” conduct further acknowledge that a complainant is not required to expressly object to the conduct in question and that tolerating conduct does not equate to consent or acceptance.²⁰ This interpretation is significant as it reflects an understanding of sexual harassment as an abuse of power.²¹ Individuals subjected to sexual harassment will face several disincentives towards making a complaint or reporting the harassment. A complainant may tolerate or submit to “unwelcome” conduct due to the power differential between herself and her harasser, who may be, for example, a supervisor or person in a position of authority.²² A fear of job-related consequences may similarly act to delay a complaint, in addition to the social stigma often experienced by victims of sexual violence.²³ A Working Women’s Institute survey found that the “most common reasons given for not reporting the [sexual harassment] incidents were that they believed nothing would be done (52%), that it would be treated lightly or ridiculed (43%), or that they would be blamed or suffer repercussions (30%).”²⁴ A complainant might otherwise attempt to engage in subtle forms of dissuasion, rather than alerting their co-workers or reporting the harassment to a supervisor, particularly in male-dominated workplaces or workplaces where sexualized conduct is normalized.²⁵

Despite the positive potential of doctrinal interpretations of the “unwelcome” requirement, its application in individual cases continues to place an inappropriate burden on complainants and looks disproportionately to their own behaviour and reaction to the respondent’s conduct in assessing complaints. While the “unwelcome”

20. *Ibid* at paras 140–41.

21. *Ibid* at paras 136–37; *Janzen*, *supra* note 15. See also Matulewicz, “Institutionalized Sexual Harassment”, *supra* note 9 at 403; Aggarwal & Gupta, *supra* note 3 at 129.

22. *Mahmoodi*, *supra* note 15 at 141.

23. See Elaine Craig, “The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence” (2011) 36:2 *Queen’s Law Journal* 551 at 557 [Craig, “Relevance of Delayed Disclosure”].

24. Johnson, *supra* note 3 at 195.

25. Hesitance to report or file a complaint may be due to the various job-related consequences a complainant perceived they might face. Hart, *supra* note 3 at 275; Craig, “Relevance of Delayed Disclosure” at 557; Johnson, *supra* note 3 at 195. A complainant’s behaviour may, at first glance, suggest tolerance of the impugned conduct. *Mahmoodi*, *supra* note 15 at para 141, acknowledges that conduct may be tolerated and yet unwelcome. Similarly, Johnson found that “generally, tribunals have great difficulty in accepting the survivor’s claim of harassment where he, she, or they continued to have social or cordial relations with the alleged harasser after the incident(s) of harassment.” Johnson, *supra* note 3 at 198.

requirement appears, on its face, to centralize the alleged harasser's conduct, adjudicators may look to the complainant's behaviour, examining whether, and to what extent, she participated in the conduct or demonstrated similar behaviour in the past, in assessing whether the conduct was "unwelcome."²⁶ In the American context, this has been critiqued as creating "a 'trial of the victim,' analogous to that which occurs in sexual assault cases[.]" leading to calls for the abolition of the "unwelcome" requirement in sexual harassment law.²⁷

Isabel Grant writes of similar problems arising under the legal definition of criminal harassment in Canada. She notes that the text of this offence itself shifts scrutiny to the complainant and that its drafting and interpretation is "influenced by assumptions about how women should respond to male violence and how they are responsible for changing their lives in order to avoid it."²⁸ In particular, the criminal harassment offence requires that the Crown prove that the accused knew that their behaviour was harassing. In order to ascertain this, judges often ask whether the complainant communicated this fact.²⁹

As in the case of criminal harassment, the application of the "unwelcome" requirement in sexual harassment cases has been widely criticized for the reliance it places on assessing the complainant's own conduct or behaviour, as well as the workplace atmosphere, in determining whether the respondent knew, or ought to have known, that the conduct in question would be "unwelcome."³⁰ Thus, despite doctrinal interpretations of the requirement that reject such an approach, in practice, the application of this element of sexual harassment complaints problematically operates to shift the focus of the legal inquiry from the harasser to the complainant herself.³¹ This undermines the purpose of the principles governing sexual harassment claims and human rights complaints more

26. Matulewicz, "Institutionalized Sexual Harassment", *supra* note 9 at 403. See also Aggarwal & Gupta, *supra* note 3 at 123–28 (discussion of various issues that arise with respect to the "unwelcome" standard, the complainant's character and consent).

27. Kathryn Abrams, "The New Jurisprudence of Sexual Harassment" (1998) 83:5 *Cornell Law Review* 1169 at 1170, n 6, 1190. See also Susan Estrich, "Sex at Work" (1991) 43:4 *Stanford Law Review* 813 at 831.

28. Grant, *supra* note 5 at 553, 573.

29. *Ibid* at 576.

30. Matulewicz, "Institutionalized Sexual Harassment", *supra* note 9 at 403, citing Marlene Kadar, "Sexual Harassment: Where We Stand; Research and Policy" (1983) 3 *Windsor Yearbook of Access to Justice* 358; Sandy Goundry, "Sexual Harassment in the Employment Context: The Legal Management of Working Women's Experience" (1985) 43:1 *University of Toronto Faculty of Law Review* 1; Gallivan, *supra* note 3; Judy Fudge, "Rungs on the Labour Law Ladder: Using Gender to Challenge Hierarchy" (1996) 60:2 *Saskatchewan Law Review* 237; Faraday, *supra* note 3; Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2010). See also Aggarwal & Gupta, *supra* note 3 at 131.

31. For similar critiques in the American context, see e.g. Estrich, *supra* note 27 at 830.

generally, which emphasize that a complainant's apparent tolerance of, or acquiescence to, harassing conduct ought not to be understood as welcoming it.³²

The propensity to scrutinize a complainant's own behaviour may further discourage complainants of sexual harassment from pursuing a legal complaint. Sheryl Johnson asserts that many attribute their silence to "practical considerations," and a mere "18% of the women in the Working Women's Institute survey stated that they complained about the harassment."³³ In discussing an arbitral decision that illustrated these very problems, Susan Hart notes that the complainant in that case stated that she regretted filing a complaint and would counsel others to refrain "because the process 'makes it seem like you are the person being investigated.'"³⁴ This statement buttresses Johnson's claim that the "fear of vicious attacks on their reputations during hearings discourages targeted persons from reporting and complaining about sexual harassment incidents."³⁵ For some, "the harassing questioning at the hearing [is] part and parcel of the harassment that humiliates and denigrates the targeted person."³⁶ These disincentives towards launching a legal claim or reporting harassment again mirror some of the reasons why victims of sexual assault and violence are known not to approach police or file a formal complaint. As such, despite notable differences between the two phenomena and their location and treatment in law, many similarities persist, suggesting that further work and education must be done to properly contextualize, understand, and address sexual harassment complaints under human rights law.

Issues with the "unwelcome" requirement have also been specifically raised in relation to sexualized work environments, such as the restaurant industry. The normalization of sexualized or related behaviour in the workplace can problematically be taken as a neutral background for a sexual harassment claim, thus raising the threshold for complainants to establish that conduct in this context is "unwelcome." This may operate to effectively require a complainant to actively protest, particularly if verbal harassment rather than physical touching, is involved. As Kaitlyn Matulewicz notes, "[w]hen a complaint of sexual harassment from a sexualised workplace is raised in a legal forum a complainant may be obligated to clearly object to the sexual remarks, jokes, banter, etc.—which may be the 'norm'—to show the conduct in question was unwelcomed."³⁷ In other words, if a work environment normalizes

32. This may have adverse consequences for a complainant's legal case, similar to widely established critiques concerning victim behaviour and consent in sexual assault cases in the criminal justice system. See Christine Boyle, "Reasonable Doubt in Credibility Contests: Sexual Assault and Sexual Equality" (2009) 13:4 *International Journal of Evidence and Proof* 269.

33. Johnson, *supra* note 3 at 194.

34. Hart, *supra* note 3 at 274.

35. Johnson, *supra* note 3 at 195.

36. *Ibid.*

37. Kaitlyn Matulewicz, "Law's Gendered Subtext: The Gender Order of Restaurant Work and Making Sexual Harassment Normal" (2016) 24:2 *Feminist Legal Studies* 127 at 128 [Matulewicz, "Law's Gendered Subtext"].

sexual banter or related conduct, more may be required of complainants in establishing their claim, and active protest to such conduct may become an implicit requirement or proxy for establishing unwelcomeness in these contexts.

The legal “test” governing sexual harassment complaints and the “unwelcome” requirement facilitate an improper focus on the complainant’s own behaviour and character, opening the door for problematic myths and stereotypes to influence credibility assessments in this context. The next section will set out similar myths and stereotypes that negatively impact sexual assault cases in the criminal law context, before taking up a specific examination of whether, and to what extent, these myths and stereotypes have appeared in the BCHRT cases in the third section.

Credibility, Character, and Consent: Problematic Trends in Sexual Assault Trials

Issues concerning the enduring presence and negative impact of stereotypes and myths in assessing victim credibility in sexual assault cases are widely documented. The volume of research in this area provides an important foundation for considering whether, and to what extent, similar issues arise in the context of sexual harassment complaints under human rights tribunals. The overarching myth that persistently plagues victims in sexual assault cases is that of the “ideal victim” (although this is, itself, an accumulation of many gendered assumptions about victimhood). The “ideal victim” is, in short, a “responsible, security conscious, crime-preventing subject who acts to minimize her own sexual risk.”³⁸ In other words, the “ideal victim” “diligently self-polic[es] [her] behaviour to avoid sexual dangers” and takes immediate action in the aftermath of assault.³⁹

The “ideal victim” myth presents specific iterations that cut across the literature on sexual assault cases and victim credibility issues. Some of the specific stereotypes that fall within its ambit are the “hue and cry” stereotype (“real victims” will fight back or immediately cry for help), the “real rape” stereotype (sexual assaults are committed by a stranger on an unsuspecting victim), and the “party girl” stereotype (“bad girls” are more likely to consent).⁴⁰ Evidence of a complainant’s sexual history was also historically associated with the “twin myths” that a “promiscuous” complainant was more likely to consent and less worthy of belief.⁴¹

38. Gotell, “Rethinking Affirmative Consent”, *supra* note 5 at 879. See also Randall, “Ideal Victims”, *supra* note 5 at 407.

39. Gotell, “Rethinking Affirmative Consent”, *supra* note 5 at 897.

40. For a discussion of the “hue and cry” and “party girl” myths, see Craig, *Putting Trials on Trial*, *supra* note 5 at 34, 37. For a discussion of the “real rape” stereotype, see Ehrlich, *supra* note 5 at 391, citing Susan Estrich, *Real Rape* (Cambridge, MA: Harvard University Press, 1987).

41. Using sexual history evidence in service of either of these myths is expressly prohibited by the *Criminal Code*, *supra* note 1. See also Craig, “Section 276 Misconstrued”, *supra* note 5 at 51.

These stereotypes and myths result in the exclusion of less-than-ideal victims and complainants from understandings of “victimhood” in sexual assault trials and cast suspicion on their credibility. Although changes to the law have barred the use and reliance on such myths and stereotypes in criminal sexual assault trials,⁴² scholars continue to uncover and critique the ways in which these myths and stereotypes influence the trial process and judicial reasoning.⁴³ These myths continue to negatively impact credibility and affect the way in which adjudicators understand consent.

Despite the change to an affirmative consent standard under law,⁴⁴ scholarship has documented numerous problems concerning the application of this standard and the fact that adjudicators continue to rely on the above myths and improperly responsabilize women for assault avoidance. For example, Rakhi Ruparelia notes that, in many cases, judges focus on evidence that there was no “no,” or, in other words, a lack of active protest, in assessing consent, despite the fact that affirmative consent precludes such considerations.⁴⁵ Elaine Craig also documents serious issues with the application of affirmative consent, finding that problematic assumption-based reasoning “that acquits a man of sexual assault because a woman failed to sufficiently fight back amounts to an institutionalized, state-supported shaming of the

-
42. See e.g. *R v Mills*, [1999] 3 SCR 668, which explicitly mentions that an accused’s Constitutional right to make full answer and defence does not allow for the use of harmful stereotypes which, in turn, may violate a complainant’s Constitutional equality rights (at para 90); *Criminal Code*, *supra* note 1, s 276(1)(a)–(b), s 273.1(1). Both of these amendments, which respectively created the modern rape shield provisions and the definition of consent at Canadian law, were made in 1992 as part of *An Act to Amend the Criminal Code (Sexual Assault)*, SC 1992, c 38, s 275 (the abrogation of the recent complaint doctrine, enacted in 1983 as part of the *Criminal Law Amendments Act*, SC 1980-81-82-83, c 125, s 19). See also Craig, “Relevance of Delayed Disclosure”, *supra* note 23.
43. See e.g. Craig, “Relevance of Delayed Disclosure”, *supra* note 23 at 553; Randall, “Ideal Victims”, *supra* note 5; Craig, *Putting Trials on Trial*, *supra* note 5; Lucinda Vandervort, “Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson*, *Kindrat*, and *Brown*” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice, and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 111.
44. The *Act to Amend the Criminal Code (Sexual Assault)*, SC 1992, c 38, is the source of the modern definition of consent. *R v Ewanchuk*, [1999] 1 SCR 330 clarified that no defence of “implied consent” exists at Canadian law, further entrenching the notion that consent must be affirmatively expressed. There also exist critiques concerning the affirmative consent standard, particularly that it is not appropriate for all complainants. See e.g. Isabel Grant & Janine Benedet, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007) 52:2 McGill Law Journal 243; Isabel Grant & Janine Benedet, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues” (2007) 52:3 McGill Law Journal 515.
45. See Rakhi Ruparelia, “Does No ‘No’ Mean Reasonable Doubt? Assessing the Impact of *Ewanchuk* on Determinations of Consent” (2006) 25:1–2 Canadian Woman Studies 167.

complainant.”⁴⁶ Embedded in the reasoning and assessment of credibility in criminal cases that question a victim’s lack of resistance is the myth that “real rape” will be met with violent resistance by all “real victims.”

In the context of criminal harassment, Grant has similarly documented how deviations from “ideal” or “real victim” behaviour can create problematic assumptions in judicial reasoning. For example, where a complainant does not alter their behaviour to avoid their alleged harasser or engages in conduct that is not consistent with demonstrating a fear for their own safety, the court may determine that the requisite elements of the offence are not established since those elements include establishing that the complainant has a subjective fear for her safety.⁴⁷ Past sexual history and “risky” behaviour continue to play a role in credibility assessment in sexual assault cases. As Lucinda Vandervort notes in discussing a case where the victim was intoxicated, the judge “repeatedly allowed questions and answers that put evidence before the jury that directly or indirectly invited speculation and made insinuations or offered conclusions about the significance of the personal and sexual history of the complainant for the matters in issue.”⁴⁸ This kind of questioning implicitly places the victim on trial and invites scrutiny of her character based on the problematic “ideal victim” stereotypes noted earlier.

Myths concerning women’s sexual availability and consent create particular challenges in the context of intimate partner relationships.⁴⁹ Challenges in the intimate partner context have historically been associated with the myth that women in such relationships are in a perpetual state of consent. This also bears links to the “real rape” stereotype that sexual offences are only committed by strangers on unsuspecting victims, usually with a weapon involved.⁵⁰ In the context of sexual assault, Craig discusses a 2005 case in which the judge erroneously admitted sexual history evidence on the basis that it established a “pattern of consenting.”⁵¹ This supports the stereotype that past consent permits an adverse inference of consent in the context of the alleged incident before the court. Similar issues in the context of intimate partner relationships are noted by Melanie Randall⁵² and by Grant in the criminal harassment context.⁵³

46. Craig, *Putting Trials on Trial*, *supra* note 5 at 205.

47. Grant, *supra* note 5 at 576, 580, citing *R v Moyses*, 2010 MBPC 21; *R v W(J)*, 2010 ONCJ 194.

48. Vandervort, *supra* note 43 at 116.

49. See Melanie Randall, “Sexual Assault in Spousal Relationships, ‘Continuous Consent’, and the Law: Honest But Mistaken Judicial Beliefs” (2008) 32:2 *Manitoba Law Journal* 144 at 144 [Randall, “Sexual Assault in Spousal Relationships”].

50. Ehrlich, *supra* note 5 at 391, citing Susan Estrich, *Real Rape* (Cambridge, MA: Harvard University Press, 1987).

51. Craig, “Section 276 Misconstrued”, *supra* note 5 at 62, discussing *R v Latreille*, 2005 CanLII 41547. Craig also discusses other cases involving improper admission of pattern of consent evidence (at 73).

52. Randall, “Sexual Assault in Spousal Relationships”, *supra* note 49.

53. Grant, *supra* note 5.

Overall, patterns of assumption-based reasoning and reliance on negative stereotypes and myths in sexual assault cases continue to have an adverse impact on judicial reasoning and outcomes in criminal trials. Failure to conform to the standard of the “ideal victim” may diminish a complainant’s credibility and open their actions and behaviour to greater scrutiny. The next section examines whether and to what extent similar patterns exist in the reasoning and outcomes of complaints of sexual harassment under human rights law.

Assessing Credibility and Character in Sexual Harassment Complaints at the BCHRT from 2010 to 2016

As mentioned in the introduction, this article draws on a case analysis of sexual harassment complaints under section 13 (employment discrimination) of the BC *Human Rights Code* from 2010 to 2016.⁵⁴ Eighteen substantive decisions on the merits were identified, with fifteen producing substantive reasons in the adjudication of the complaint.⁵⁵ Eleven of those fifteen complaints were found justified, while four were dismissed.⁵⁶ Two further cases were dismissed preliminarily for substantive reasons.⁵⁷

Certain trends were evident in the cases. For example, in all but one case, the complainants were female and the individual respondents were male.⁵⁸ In thirteen of the fifteen decisions where information on the employment relationship between the complainant and respondent was available, the individual respondent held a position of authority over the female complainant in the workplace.⁵⁹ The occupations held by

54. *Human Rights Code*, *supra* note 13.

55. Three cases were dismissed because the complainant did not attend the hearing. *Heyman*, *supra* note 13; *LaBelle*, *supra* note 13; *Skorka*, *supra* note 13.

56. *Kang*, *supra* note 13; *Sleightholm*, *supra* note 13; *Wideman*, *supra* note 13; *Kuchta*, *supra* note 13. Regardless of the outcome of the complaint, it is valuable to analyze the ways in which assumption-based reasoning and stereotypes nonetheless arise in the recitation of facts and analysis of the complaint. Ruparelia discusses this issue in the sexual assault context: “Even when courts have correctly applied *Ewanchuk* and rendered convictions, stereotypical assumptions continue to inform the discussion for many judges.” Ruparelia, *supra* note 45 at 170.

57. *Kafer*, *supra* note 13; *Woods*, *supra* note 13.

58. *Heyman*, *supra* note 13, involved a complaint by a male employee but was dismissed as the employee did not attend the hearing. Identity characteristics that would facilitate an intersectional analysis of complaints (such as race, ethnicity, age, and others) were not consistently reported in the decisions. Thus, although discrimination is often intersectional in nature, the analysis of the complaints forming the basis of this article is limited to the consistently identified ground of discrimination as being the sex of the complainant.

59. *Soroka*, *supra* note 13, and *Ratzlaff*, *supra* note 13, were complaints brought against co-workers. The other cases involved complaints brought against employers or supervisors.

the complainants tended to reflect historical patterns of sex inequality in the labour market, such as occupying subordinate or assistant-type roles in office settings or roles in historically male-dominated workplaces, such as construction.⁶⁰ Finally, the conduct at issue ranged from verbal innuendo to physical touching. Seven of the eleven justified complaints involved physical touching, such as slapping or pinching a complainant's bottom, grabbing a complainant, kissing, hugging, and touching a complainant's breasts.⁶¹ In five of the identified complaints, sexual invitations or propositions were made by the respondent.⁶² Verbal conduct also included sexual innuendo and jokes as well as demeaning and denigrating comments related to the complainant's sex.⁶³

In many of the identified cases, the complainant, and her version of events, was believed. Tribunal members in such cases often did not discuss the "unwelcome" requirement at length, simply stating after a summary of the relevant facts that the conduct in question constituted sexual harassment.⁶⁴ However, these cases also tended to involve blatant forms of sexual harassment, such as unwanted physical touching.⁶⁵ A number of cases illustrate the attentiveness and sensitivity that tribunal members have towards the question of consent and the "unwelcome" requirement in assessing complaints of sexual harassment involving more covert or subtle conduct. However, this is far from uniform, and several complaints, both dismissed and justified, illustrate the pervasive problems attending credibility assessments, character, and consent in establishing sexual harassment complaints. These cases relate directly to the continued presence of stereotypes and myths discussed earlier: (1) the implicit requirement of protest by the complainant (the "hue and cry" stereotype) in establishing a harasser's conduct as "unwelcome"; (2) problems arising from apparent "participation" of complainants in similar or "risky" behaviour or interactions in the workplace; and (3) the difficulty tribunals have in assessing credibility and consent in intimate partner and other close relationships.

60. See *Hastie*, *supra* note 4, for a more detailed discussion of the occupations and industries present in the case set.

61. *Ratzlaff*, *supra* note 13; *Tyler*, *supra* note 13; *Q*, *supra* note 13; *Root*, *supra* note 13; *Paananen*, *supra* note 13; *Young*, *supra* note 13; *PN*, *supra* note 13.

62. *Ratzlaff*, *supra* note 13; *Tyler*, *supra* note 13; *Soroka*, *supra* note 13; *McIntosh*, *supra* note 13; *Q*, *supra* note 13.

63. Regarding demeaning comments, see especially *MacDonald*, *supra* note 13, and *Balikama*, *supra* note 13. For a more detailed analysis of the conduct at issue in the cases, see *Hastie*, *supra* note 4.

64. See e.g. *Ratzlaff*, *supra* note 13; *Soroka*, *supra* note 13; *Young*, *supra* note 13; *Root*, *supra* note 13; *Paananen*, *supra* note 13; *PN*, *supra* note 13.

65. *Ibid.* Note that *Soroka* involved sexual invitations and propositions ("*quid pro quo*" harassment).

*Protest as a Performance of Unwelcome-ness
in Sexual Harassment Complaints*

As discussed earlier, the “hue and cry” stereotype associates “real victimhood” with individuals that actively protest and report sexual violence or harassment in a timely manner. This stereotype is problematic because it neglects the broader social stigma and complex reasons that may lead a complainant to delay reporting such conduct or to tolerate or acquiesce to it. Yet the “unwelcome” requirement can function to privilege active protest as a proxy for establishing that element of the complaint. This, in turn, may result in many complaints being dismissed on the basis that the harasser did not know the conduct was “unwelcome” given the lack of protest on the part of the complainant.⁶⁶ While adjudicators in many cases properly understood that a lack of protest does not mean that the complainant welcomed the behaviour, and did not rely on evidence of clear and active protest in their reasons, the cases involving subtle or less blatant conduct appear to create particular issues in this regard.

Several cases found the respondent’s conduct “unwelcome” in the absence of explicit protest. In *Q v Wild Log Homes*, the complainant worked as a bookkeeper and administrator for the personal respondent and his company. She brought a complaint of sexual harassment against the respondent on the basis of several instances of unwanted physical touching as well as instances of verbal harassment, including sexual innuendo, comments, and romantic invitations.⁶⁷ In her analysis, the tribunal member noted that the complainant’s lack of protest to the first instance of physical touching was “consistent with the unexpected nature of the contact and its marked incongruence with appropriate workplace conduct.”⁶⁸ Despite Q.’s silence at the time of the initial incident, this did not “change the nature of this interaction.”⁶⁹ This affirms the statement in *Mahmoodi v UBC and Dutton* that the “unwelcome” requirement does not impose an obligation on a complainant to actively or verbally protest.⁷⁰ While the tribunal member goes on to find that Q. did begin to protest the respondent’s conduct, she also noted in her analysis that “any reasonable person would have known that such conduct in the work environment, *absent explicit consent*, would be unwelcome.”⁷¹ The harassment in this case did relate to unwanted physical touching, a particularly blatant recognized form of sexual harassment.

66. Faraday, *supra* note 3 at 45. For a critique of the “unwelcome” requirement and how it invites scrutiny based on whether a complainant expressly protested or objected to conduct, see Benedet, “Book Review”, *supra* note 16 at 847.

67. *Q*, *supra* note 13 at paras 62–112 (summary of evidence), 138 (summary of the complainant’s specific allegations of sexual harassment).

68. *Ibid* at para 144.

69. *Ibid*.

70. *Mahmoodi*, *supra* note 15.

71. *Ibid* at para 145 [emphasis added].

Several cases involving verbal sexual harassment interpreted and applied the “unwelcome” requirement in a manner that did not punish the complainant for a lack of active protest. In *Tyler v Robnik and Mobility World (No 2)*, the respondent made several offers for the complainant to come to his hotel room, in addition to at least one instance of unwanted touching and several other instances of verbal innuendo.⁷² In assessing conflicting versions of events from the complainant and respondent on the matter of the hotel room key offers, the tribunal member stated: “It is difficult to imagine how Mr. Robnik, Mobility’s district manager, offering his hotel room key to a subordinate female employee could be viewed simply as a joke.”⁷³ Although not explicitly connected to the “unwelcome” requirement, this statement evidences an understanding that, on an objective basis, a reasonable person would know that such conduct would be unwelcome in a work environment and between a superior and subordinate employee. It is, in other words, contrary to contemporary norms and expectations governing workplace conduct.

In *Balikama Obo Others v Khaira Enterprises and Others*, when assessing whether a manager’s misogynist language and leering were “unwelcome,” the tribunal member noted: “[T]hese activities were such that, in today’s environment, it should not be necessary to articulate that such conduct is unwelcome.”⁷⁴ In other words, the kind of language and conduct engaged in by the respondent in this case was clearly understood by the tribunal member to constitute, on an objective basis, “unwelcome” sexual harassment. Another example can be seen in *MacDonald v Najafi* where the tribunal member found that, “in spite of [the complainant’s] silence, or her attempt to deflect the behaviour with humour, a reasonable person in Mr. Najafi’s position should have known that his conduct was unwelcome.”⁷⁵ The conduct here was exclusively verbal and not always overtly sexual.

These examples help establish that contemporary norms and expectations concerning sexual conduct in the workplace can be understood and properly captured by the existing legal principles. Particularly, where physical touching is involved, it may be readily understood that such conduct is not welcome in the workplace and that the expectation is that individuals will not touch their co-workers or employees (rather than the expectation being on the woman to communicate her desire not to be touched).⁷⁶ However, for cases involving subtle and non-physical forms of sexual harassment, establishing that conduct was “unwelcome” may require a complainant to demonstrate protest or disapproval, thus shifting the obligation of ensuring appropriate workplace interactions to women. In these cases, a lack of active protest or objection to conduct impacted the determination of whether the conduct was “unwelcome.”

72. *Tyler*, *supra* note 13 at paras 9–17.

73. *Ibid* at para 49.

74. *Balikama*, *supra* note 13 at para 611.

75. *MacDonald*, *supra* note 13 at para 66.

76. See e.g. Gallivan, *supra* note 3 at 40.

In *Sleightholm v Metrin*, the tribunal member found that conduct such as hugging, blowing kisses, and discussing dreams were normal in this workplace because they were “not protested by [the complainant] or any other employee.”⁷⁷ Although not framed in relation to the “unwelcome” requirement, a lack of protest is used to normalize workplace conduct that might otherwise be considered “unwelcome” and harassing. The complaint in *Sleightholm* revolved particularly around the individual respondent sharing a dream he had about the complainant in the bath.⁷⁸ Taking the workplace culture and environment as an apparently neutral background, the tribunal member found that this was not sexual harassment in this workplace, despite the fact that it might have been considered so in another workplace.⁷⁹ While the sharing of dreams, generally, may be normal conduct in this workplace, this ought not be used to suggest that any type or subject matter of dreams may be shared.

Stereotypes about “ideal victims” and how they should react to unwanted sexualized conduct can even be found in cases involving unwanted physical touching. In *Woods v Fluid Creations*, the tribunal member did not find the complainant’s testimony to be credible, based partly on her response and reaction following the alleged conduct: “[T]he Complainant’s assertion that she did not protest because she was a probationary employee does not explain why she said nothing to any co-worker. This alleged meekness seems inconsistent with the statement in her affidavit that she ‘spun around to face [Mr. McPhee] about to freak out on him and tell him off.’”⁸⁰ The statements made in the above quote illustrate concerns about an underlying reliance on the “hue and cry” stereotype as well as gendered ideas of victimhood. The reasoning evidences certain beliefs about how a victim would react and betrays a misunderstanding of victim psychology, economic anxieties, and workplace dynamics commonly documented in similar scenarios.⁸¹ An “ideal victim” is a “(re)action hero” and would have immediately made her discomfort clear; since the complainant did not do this, her conduct is scrutinized and her lack of protest, or performance, as such, negatively impacts the reasoning and outcome in this case.⁸²

Overall, these cases illustrate the ways in which underlying beliefs and stereotypes about the performance of victimhood can negatively impact the credibility of a complainant, the assessment of “unwelcome” conduct, and, in some cases, the outcome of the complaint itself, despite the fact that the legal principles explicitly acknowledge that active protest is not a requirement of establishing “unwelcome” conduct.

77. *Sleightholm*, *supra* note 13 at para 73.

78. *Ibid* at para 20.

79. *Ibid* at para 56.

80. *Woods*, *supra* note 13 at para 50.

81. Matulewicz, “Law’s Gendered Subtext”, *supra* note 37 at 128; Abrams, *supra* note 27 at 1222; Faraday, *supra* note 3 at 45.

82. Gotell, “Rethinking Affirmative Consent”, *supra* note 5 at 879, citing a concept outlined in Rachel Hall, “‘It Can Happen to You’: Rape Prevention in the Age of Risk Management” (2004) 19:3 *Hypatia* 1 at 6.

While some complainants may be able to establish the kind of assertive and explicit objection or protest sought by adjudicators, economic disincentives, gendered hierarchies in the workplace, and other motivations may dissuade many more complainants from actively protesting or reporting sexually harassing conduct.⁸³ However, to borrow from Ruparelia, it seems that “no ‘no’” may risk an interpretation that the conduct was not “unwelcome” in sexual harassment complaints, especially where the harassment is verbal in nature and the workplace normalizes such conduct.⁸⁴

*“Risky” Behaviour as Participation and Performativity
of Welcome-ness: Less-than-Ideal Complainants in Sexual
Harassment Complaints*

Several cases problematically conflated workplace dynamics and particular behaviours of a complainant with welcoming conduct that might otherwise be characterized as harassment. This illustrates the wider problems that character evidence can have in associating individuals who engage in “risky” behaviour as therefore likely to consent to other interactions or behaviours. These cases also, in some instances, communicate problematic beliefs about women’s sexual prowess and frame the complainant as a seductress.⁸⁵ For example, in *Kafer v Sleep Country Canada and Another (No 2)*, the tribunal member dismissed the case on the basis that there was no reasonable prospect of the complainant proving the conduct in question was “unwelcome” because, on occasion, she had previously participated in sexual banter in the workplace.⁸⁶ The tribunal member noted that in most cases the conduct at issue would be deemed “unwelcome” but that the complainant’s prior participation made it unclear whether the conduct would be “unwelcome” in this situation.⁸⁷ This problematically shifts the burden of responsibility to the complainant and works to excuse harassing conduct on the basis of her own “risky” behaviour.⁸⁸ By having previously participated in sexual banter in the workplace, she places herself outside the bounds of “ideal victimhood” and disentitles herself to legal protection, regardless of whether the gravity of the conduct in issue exceeds that of the conduct in which she participated. This could be taken to suggest that an employee waives their right to complain if they have participated in conduct of a similar nature, if not degree, at some time before the alleged incident. In this way, this less-than-ideal complainant

83. See e.g. Abrams, *supra* note 27 at 1222.

84. Ruparelia, *supra* note 45 at 171.

85. These kinds of stereotypes and myths were similarly found by Hart, *supra* note 3. Hart discusses *Saskatchewan and SGEU (Lessard) (Re) (2001)*, 99 LAC (4th) 412 (at 276).

86. *Kafer*, *supra* note 13 at paras 34, 37.

87. *Ibid* at para 39.

88. Craig, *Putting Trials on Trial*, *supra* note 5 at 37.

has her complaint judged not on the harasser's conduct but, rather, on her own past behaviour or character. Participation in related past conduct thus similarly raises the bar of what is required to establish "unwelcomeness," as discussed earlier. A complainant in such contexts may be expected to actively and clearly protest further conduct in order to establish that it is "unwelcome," requiring vulnerable workers to "draw the line" in determining whether or not something is sexual harassment.⁸⁹

Kang v Hill and Another (No 2) provides another example of the problems for complainants who appear to participate in or encourage the conduct in question. The complainant, Ms. Kang, alleged sexual harassment by her employer, Mr. Hill, related to several instances where he communicated romantic feelings to her. The tribunal member found that her claim was not justified due in part to the fact that she "engaged" the respondent in conversations about these feelings rather than outright rejecting them.⁹⁰ Further, the tribunal member in this case found that Ms. Kang in fact wielded power over her employer, by virtue of his admitted feelings for her.⁹¹ This commentary bears implicit connection to the myth of women's power of seductress and neglects the power dynamics attending the workplace and the role of Mr. Hill as the employer in this situation. Although the tribunal member does formally acknowledge Mr. Hill's position of authority over Ms. Kang, Ms. Kang's participation in dialogue regarding Mr. Hill's feelings is used to undermine the notion that this power imbalance was a meaningful factor and to dismiss the claim that Ms. Kang feared job-related consequences.⁹² The tribunal member's analysis in this case further supports heteronormative assumptions about gender dynamics and relations, where "the legal system affirms that it is 'natural' for men to make sexual advances to women, and that the onus is on women to indicate, after the fact, that this sexual attention is unwanted."⁹³ Despite acknowledging that Mr. Hill's advances were "sudden" and "irrational," they also appeared to be, at least to a degree, excused by the tribunal member.⁹⁴

The parallels to sexual assault and criminal harassment are clear: because a narrow conception of victimhood is privileged, responses to harassment that deviate from that conception are treated with suspicion by adjudicators rather than being

89. Matulewicz, "Law's Gendered Subtext", *supra* note 37 at 132. See also Gallivan, *supra* note 3 at 47, discussing the problematic consequences of past participation as equivocal to full and future consent in *Daigle v Hunter* (1988), 10 CHRR D/5670 (NBHRC).

90. *Kang*, *supra* note 13 at paras 50–51.

91. *Ibid* at para 53. Mr. Hill's communication of his feelings to Ms. Kang was described as "an acknowledgment of his weakness" by the Tribunal member, further supporting a problematic interpretation that this "to some degree placed him under her power, rather than the other way around." *Ibid* at para 52.

92. *Ibid* at paras 50–53.

93. Faraday, *supra* note 3 at 44. Similar assumptions and problematic reasoning exist in relation to sexual assault trials in criminal law. See e.g. Craig, *Putting Trials on Trial*, *supra* note 5 at 201.

94. *Kang*, *supra* note 13 at para 51.

considered as avoidance or coping strategies.⁹⁵ In *Kang*, the tribunal member side-steps the complainant's sense of financial jeopardy, saying that the respondent had "said or done nothing to suggest objectively that her job was at risk."⁹⁶ This, coupled with Ms. Kang's own behaviour, led the tribunal member to conclude that Ms. Kang did not have a fear for her continued employment or of job-related consequences.⁹⁷ This reflects a narrow understanding of complainant behaviour that "assume[s] that there is one standard response to fear, and that departures from that standard are fatal to successful prosecution."⁹⁸ This perspective further influenced the conclusion that Mr. Hill had not asserted economic or sexual power over Ms. Kang and a suggestion that, if anything, she had asserted power over him.⁹⁹

Complicating the "Unwelcome" Requirement and Its Application in the Context of Intimate Partner and Close Relationships

Cases involving current or former intimate partners appear to pose particular problems for adjudicators in assessing credibility and consent. In addition, where there are relationships that are "familial"-like relationships of intimacy or closeness, adjudicators may have difficulty understanding the nature and impact of the conduct at issue. These issues are illustrated most clearly in two cases: *McIntosh v Metro Aluminum Products and Another* (concerning intimate partners) and *Wideman v Wiebe* (concerning "analogous" relationships).

In *McIntosh*, the complainant alleged that she was subject to ongoing sexual harassment by the individual respondent, Mr. Augustynowicz, in the form of persistent text messages for a period of three months, which ultimately caused her to leave her position.¹⁰⁰ Ms. McIntosh and Mr. Augustynowicz had engaged in a consensual sexual relationship prior to the time period during which she was sexually harassed.¹⁰¹ Mr. Augustynowicz claimed that Ms. McIntosh had "consented to, and participated in, all such communications, and that she sent similar

95. For a discussion of alternate ways of interpreting the "unwelcome" requirement that would "reflect the constraints under which many sexual harassment victims operate" by acknowledging the multiple coping mechanisms and strategies that might be deployed in an effort to resist or demonstrate unwelcomeness short of express verbal objection, such as "changing the subject in conversation and attempting to avoid the perpetrator[.]" see Abrams, *supra* note 27 at 1222. In the context of sexual assault, see also Randall, "Ideal Victims", *supra* note 5 at 421.

96. *Kang*, *supra* note 13 at para 51.

97. *Ibid* at para 51.

98. Grant, *supra* note 5 at 579.

99. *Kang*, *supra* note 13 at paras 52–53.

100. *McIntosh*, *supra* note 13 at para 1.

101. *Ibid* at para 3.

text messages” to him.¹⁰² The respondent’s argument thus primarily rested on establishing that the complainant was a “willing participant.” Ms. McIntosh testified to multiple strategies she attempted to use to stop the harassing conduct, including telling Mr. Augustynowicz to stop sending text messages, ignoring him, “being mean back to him,” and pretending she had another boyfriend.¹⁰³ In cross-examination, Ms. McIntosh’s engagement with the text messages was further questioned by the respondent in an apparent attempt to establish that, if the conduct was “unwelcome,” she simply could have deleted the text messages without reading them.¹⁰⁴

In her analysis, the tribunal member framed the issue as centrally concerned with whether the conduct in question was “unwelcome,” given the blatant sexual content of the text messages.¹⁰⁵ In addition to individual testimony, the tribunal member had a forensic report including some of the text messages admitted as evidence to consider, which may have positively impacted her findings of fact and analysis.¹⁰⁶ In addressing the respondent’s argument that the complainant was a willing participant, the tribunal member found that Ms. McIntosh had clearly communicated that she wished him to stop the conduct, both verbally and through text messages.¹⁰⁷ Thus, the complainant performed the characteristics of “cautious femininity” and risk aversion by being clear about her desire not to be harassed, which conform to certain expectations about victim behaviour.¹⁰⁸

In responding to the specific argument made by the respondent that Ms. McIntosh should have simply deleted the texts without opening them, the tribunal member noted: “It was not up to Ms. McIntosh to refuse to open her texts and risk retaliation from her employer. It was Mr. Augustynowicz’s responsibility not to sexually harass his employee.”¹⁰⁹ Through this statement, the tribunal member clearly acknowledged the power dynamic of the parties’ relationship, the impact this would have on their interactions and conduct, and the fact that the expectations and obligations to avoid harassment lay with the employer. The tribunal member further understood Ms. McIntosh’s apparent engagement with the text messages as strategies deployed in an attempt to stop the harassing conduct.¹¹⁰

However, in considering the parties’ prior relationship, the tribunal member found that this had created an obligation on Ms. McIntosh to “clearly and expressly advise [the respondent] that the relationship was over and that she no longer wishes

102. *Ibid* at para 2.

103. *Ibid* at paras 32–33, 43–45, 51.

104. *Ibid* at para 59.

105. *Ibid* at para 104.

106. *Ibid* at paras 36–42.

107. *Ibid* at para 113.

108. Gotell, “Rethinking Affirmative Consent”, *supra* note 5 at 878.

109. *McIntosh*, *supra* note 13 at para 127.

110. *Ibid* at para 117, 124–28.

to engage in sexual communications.”¹¹¹ While, in this case, Ms. McIntosh could establish that she had done so, this statement has the effect of creating a higher bar for complainants who have a history of sexual or romantic relations with their harasser. The tribunal member makes it clear that former partners must meet a more stringent test (by expressly protesting).¹¹² In other words, where intimate partners are concerned, active protest and communication that the conduct is unwelcome appears to be required. This directly contradicts the reasoning and principles stated in *Mahmoodi* and creates a heightened burden for complainants to both communicate disapproval or protest and establish as much in a legal proceeding.¹¹³ This creates a default position for prior intimate partner relationships that sexual conduct is welcome unless a woman communicates otherwise and enables the importation of problematic concepts related to “patterns of consent” critiqued in the sexual assault context.¹¹⁴

In a more subtle fashion, similar problems can arise where a complainant and respondent have a closer relationship than typical in the workplace; adjudicators can similarly misconstrue a relationship of imbalanced power and harassment as one of intimacy or closeness. This is illustrated in the decision in *Wideman v Wiebe*. In *Wideman*, allegations concerning sexual harassment arose in the context of the complainant’s former employment at Community Builders. Early in her analysis, the tribunal member characterizes Community Builders as an “unusual workplace” where “the relational approach to tenant support required very close contact and communication between staff, management and tenants.”¹¹⁵ Within this context, the relationship between the complainant, Ms. Wideman, and the respondent, Mr. Wiebe, is repeatedly cast as being a familial one.¹¹⁶

The reasoning in *Wideman* evidences a reliance on notions of “the family” to colour the character of the conduct, as has been done in the context of intimate partner sexual assault. For example, the tribunal member states that she does not “think it ‘in harmony with the preponderance of probabilities’ that Mr. Wiebe would have become sexually fixated on and jealous of Ms. Wideman while at the same time encouraging her ongoing involvement with his immediate and extended family.”¹¹⁷ It appears that an inference with regard to whether the conduct was in fact harassment is being drawn on the basis of an assumption that harassment would not be carried out in a “familial”-like context; this bears links to the “real rape” stereotype, discussed earlier, that assumes sexual assault is only committed by strangers, not by individuals with whom a victim would have an ongoing relationship.¹¹⁸

111. *Ibid* at para 116.

112. Indeed, in *McIntosh*, the tribunal member later discusses the complainant’s fear of retaliation and power imbalance between her and the respondent (at paras 132–36).

113. *Mahmoodi*, *supra* note 15 at 140.

114. Craig, “Section 276 Misconstrued”, *supra* note 5.

115. *Wideman*, *supra* note 13 at para 10.

116. *Ibid* at para 32.

117. *Wideman*, *supra* note 13 at para 62.

118. Ehrlich, *supra* note 5 at 391.

Although other evidence places Ms. Wideman's credibility in doubt, the way in which sexual harassment is discussed, in relation to credibility, character, and consent, reveals important issues for consideration. Coupled with the ways in which the "familial"-like context of the workplace and of Ms. Wideman's relationship to Mr. Wiebe is discussed so as to potentially minimize the conduct in question, her intimate relationship with an individual not employed by Community Builders is used to undermine her credibility. In assessing her credibility, the tribunal member states that, "for reasons known only to her, *but which appear to be connected to her relationship with the Tenant*, she had historically revised her recollection of her working and other relationships with Mr. Wiebe and his family."¹¹⁹ The individual with whom Ms. Wideman was in a relationship was further noted as having addiction issues and being occasionally violent.¹²⁰ The "risky" lifestyle or behaviour of her partner thus appeared to play some role in assessing Ms. Wideman's own judgment and credibility. The explicit connection of the complainant's lack of credibility to her relationship with "the Tenant" could be seen as improperly shifting the focus of inquiry in her complaint towards the propriety or prudence of her lifestyle or behaviour outside of the workplace. At other times, the relationship between Ms. Wideman and "the Tenant" is used to suggest ulterior motives, casting a wider suspicion over her credibility.¹²¹

Overall, these cases illustrate similar difficulties to those documented in relation to intimate partner violence in the criminal justice system. This is particularly troubling given that, in the workplace, many relationships may bear analogous characteristics to "intimate" relationships, such as ongoing communication, social interactions, and others. The nature and structure of the workplace may be mistakenly taken as neutral ground,¹²² rather than interrogating whether and to what extent institutional culture may play a role in the creation or facilitation of sexual harassment in the workplace.

Conclusion

Despite successful outcomes in a majority of identified complaints of workplace sexual harassment at the BCHRT, a qualitative analysis of the reasoning in these cases illustrates that stereotypes and myths known to plague sexual assault cases in the criminal law context are also present in cases of sexual harassment in the human rights law context. These stereotypes enter the inquiry through, primarily, the requirement that a complainant establish that harassing conduct was "unwelcome." The "unwelcome" requirement has the potential to create numerous obstacles for complainants and may serve to improperly shift the focus of the inquiry towards

119. *Wideman*, *supra* note 13 at para 59 [emphasis added]. Note that "the Tenant" and Ms. Wideman were involved in a romantic relationship during the time of the hearing.

120. *Ibid* at paras 43, 70.

121. *Wideman*, *supra* note 13 at para 59.

122. As could potentially be argued in relation to both *Wideman*, *supra* note 13, and *Sleightholm*, *supra* note 13, discussed earlier in this article.

their own behaviour, including participation or a lack of clear objection to harassing conduct. This shift presents an opportunity to argue that harassing conduct was not “unwelcome” because of the complainant’s background, reaction, or conduct and inappropriately shifts the burden of responsibility to women to avoid harassment, operating to further entrench sex inequality in the workplace.

The legal principles governing workplace sexual harassment complaints were laid down initially in *Janzen v Platy Enterprises* in 1989. While those principles have been subject to interpretation, the “unwelcome” requirement continues to present serious problems in application. Further amendment, whether through legal interpretation or formal law reform, is needed. In particular, legislators and legal decision-makers could look to the amendments made with respect to sexual assault law, as documented in this article. As has been previously suggested, a reverse onus of proof, explicitly requiring a respondent to establish affirmative consent, may be a welcome addition to sexual harassment law.¹²³ Relatedly, provincial Human Rights Commissions could publish policy and guidance documents summarizing and outlining factors that should be considered in establishing the “unwelcome” requirement, as have been laid down in existing decisions and documented in this article.¹²⁴ These would include, for example, the fact that silence on the part of a complainant should not be understood as consent. As both social and legal culture continue to work against the entrenchment of gender myths and stereotypes, it is important that the laws attending sexual harassment, in and outside of the workplace, keep pace.

About the Contributor / Quelques mots sur notre collaboratrice

Bethany Hastie is an assistant professor at the Peter A. Allard School of Law at the University of British Columbia (UBC). She completed her JD at UBC and LLM and DCL at McGill University. Her research examines the relationship between law, precarious work, and labour inequalities. She was awarded a Canadian Bar Association Law for the Future Fund grant in 2018–19 to conduct comparative research on the interpretation and application of sexual harassment law at the BC and Ontario Human Rights Tribunals. Bethany is a member of the Centre for Feminist Legal Studies at UBC.

123. See Janine Benedet, “Hostile Environment Sexual Harassment Claims and the Unwelcome Influence of Rape Law” (1996) 3:1 *Michigan Journal of Gender and Law* 125.

124. For further suggestions on the work that provincial human rights commissions can play in addressing sexual harassment, see Bethany Hastie, “Human Rights Commission Has Opportunity to Change Workplace Culture around Sexual Harassment” (25 January 2019), *Policy Note* <<https://www.policynote.ca/human-rights-commission-has-opportunity-to-change-workplace-culture-around-sexual-harassment/>>.