PREAMBULE

At our last conference held in Yalta (Ukraine), the choice of the Committee for the general topic was:

*Well-being at work: Health and safety at work*

Given the extent of the materials on the concept of health and safety at work, it was agreed to retain only one of its aspects.

Our topic’s choice was:

*Protection against violence, bullying and sexual harassment at the workplace*

It seemed to us that this topic of study would ensure dynamic exchanges in the committee work.

QUESTIONNAIRE 2014

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Preliminary Considerations

Under the Canadian Constitution, the legislative jurisdiction over labour relations is shared between the federal legislature and the provinces. The provinces are generally competent regarding labour relations in their territory. However, the Parliament of Canada has jurisdiction over labour relations for all employees of companies working in matters falling under its power to legislate according to the Constitution (ports, banks, interprovincial transportation, etc.), which represent about 10% of Canadian workers, regardless of the territory of the province in which they perform their job.
Regarding labour standards, the application of the laws from Quebec will depend on the qualification of the company as entity of federal or provincial jurisdiction. The federal companies are thus subjected to the Canadian Labour Code whereas the provincial companies are subjected to the Act Respecting Labour Standards (A.R.L.S.) and to the Labour Code (L.C.).

Since the present exercise would have been very complex if we would have addressed the different legislations in each of the Canadian provinces, the questionnaire was completed considering only the laws of Quebec.

Laws and Regulations

1) What is the definition of violence, bullying and sexual harassment in the legislation in your country applicable to the workplace, if any?

Psychological harassment is defined as any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures. It is a conduct which infringes upon the dignity or the psychological or physical integrity of the employee and causes a harmful work environment for the latter. (s. 81.18 A.R.L.S.) The elements that determine if a situation can be qualified as harassment are, on one hand, the effect the vexatious behaviour had on the victim and, on the other hand, the creation of a harmful work environment. Consequently, the intention of the harasser is not useful to define a situation as psychological harassment. Also, the incidences do not have to be repetitive since a single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment. (s. 81.18(2) A.R.L.S.).

Psychological harassment includes sexual harassment. Therefore, the essential elements for psychological harassment apply to sexual harassment, except that the behaviour is of sexual connotation, whether it is on the physical or psychological aspect.

In the present questionnaire, the term "psychological harassment" includes sexual harassment.

2) Does your country have specific regulations to guarantee the protection of workers against violence, bullying and sexual harassment in the workplace?

The Act Respecting Labour Standards applies specifically to situations of psychological harassment at work. The provisions of sections 81.18 and
following prohibit any act that can constitute psychological harassment. All employees benefit from the same protection, may they be unionised or not, since the provisions of sections 81.18 and 81.19 are deemed to be an integral part of every collective agreement. (s. 81.20 A.R.L.S.). However, the presence of a union entails a difference in the judicial remedy available. For more information, see question 9.

The Civil Code of Quebec also imposes on the employer a general obligation to protect the dignity of the employee (s. 2087 C.C.Q.) and to protect the integrity of the person (s. 3 C.C.Q.).

**Scope of application**

3) **Who has a legal obligation to refrain from all acts of violence and moral or sexual harassment at work? (private and/or public sector - employers, employees, third party?)**

This obligation is imposed upon every worker, whether he/she is an employer, a unionised employee or not, a customer, a supplier, a union representative or a third party and whether he/she is in a group or alone. This obligation is thus universally binding for every person in the public or private sector. Furthermore, harassment can occur outside the workplace and even outside business hours.

**The employer’s obligation**

4) **Is the employer required to put in place a policy to prevent violence, bullying and sexual harassment in the workplace?**

According to section 81.19 A.R.L.S., employers must take reasonable action to prevent psychological harassment. The employer does not explicitly have to put in place a policy. This is because his/her obligation is of means and not of result. The implementation of a policy can help to demonstrate that the employer met his/her obligation, but it does not exonerate him/her automatically from his/her obligation. It is always necessary to make sure that the employer took reasonable actions to prevent harassment.
5) Does the employer have to conduct a risk analysis taking into account the nature of his activities and the size of his business? What are the minimum preventive measures that he has to provide?

As mentioned in the previous question, the employer has the obligation to take reasonable action to prevent psychological harassment. Furthermore, the latter has to put an end to a situation of harassment whenever he/she becomes aware of such behaviour (s. 81.19 A.R.L.S.). Thus, the specific obligation to which the employer is bound depends on the facts of every situation. Of course, the required level of a policy’s efficiency will vary according to the size of the business. However, doctrine seems to notice that four aspects must essentially be present in an effective policy: prevention, information and support for victims, conciliation and redress mechanisms.

6) How are employees informed of the risks, the preventive measures and the procedures applicable to the victims of violence and moral or sexual harassment at work?

The Act Respecting Labour Standards establishes, in its section 4, a commission called “Commission des normes du travail” (hereinafter "CNT"). This administrative body has, amongst other things, the mission to inform the population about labour standards (s. 5 A.R.L.S.), which includes standards regarding psychological harassment at work.

To implement this mission, the Act Respecting Labour Standards gives to CNT the power to prepare and disseminate information documents on labour standards and make the documents available to any interested person or body, in particular employers and employees (s. 39 (13) A.R.L.S.). The CNT may also require an employer to transmit to employees any CNT’s information document concerning labour standards and to post the document in a prominent place easily accessible to all employees or to disseminate the contents of the document (s. 39 (14) A.R.L.S.). The CNT can even indicate to the employer how to give, display or disseminate the information.

7) Is the employer required to appoint persons with specific skills to deal with cases of violence and moral or sexual harassment at work?

No. The employer is not required to appoint persons with specific skills to deal with cases of violence and moral or sexual harassment at work. If he/she does
so, it can help to make the demonstration that he fulfill his/her obligation to take reasonable means to prevent harassment.

8) **What are the sanctions against the employer who doesn’t adopt policies against violence and moral or sexual harassment at work?**

An employer who has not adopted a harassment prevention policy will not automatically be liable. This is because, as mentioned earlier, the employer has an obligation of means and not of result. Also, the essential element remains to know if the employer provided a work environment exempt from psychological harassment (s. 81.19 A.R.L.S.).

When it has been demonstrated that the employer has failed to fulfill his obligation, he/she can be obliged by the CNT to reinstate the employee, take reasonable action to put a stop to the harassment, modify the employee’s disciplinary record, pay for the employee’s salary loss or loss of employment and pay for the psychological support needed by the employee as well as punitive and moral damages. (s. 123.15 A.R.L.S.). The employer can also be condemned to pay the victim’s lawyer fees. This list is not restrictive since section 123.15 A.R.L.S. allows the CNT to render any decision it believes fair and reasonable taking into account all the circumstances of the matter.

**Remedies Available to Victims**

9) **What are the ways of actions available to the victims?**

a. **Internal procedures in the enterprise?**

The possible recourses differ according to the presence of a union.

When there is no union, and the employer adopted a complaint procedure for harassment, the employee can obviously follow this procedure. If there is no such procedure or if the victim doesn’t want to use it, he/she can send his/her complaint to the CNT. This aspect of the question is answered in more details in question b).

When there is a union, if a recourse exists in the collective agreement, the employee has to follow this procedure. In that case, the authority that has jurisdiction is the arbitrator (s. 100 L.C.). Usually, it is the union that undertakes the complaint procedure (s. 69 L.C.), but the collective agreement can foresee a different procedure.
The union being subject to a duty of just representation (s. 47.2 L.C.), if the union refuses to take action with respect to the complaint, the complainant can address directly a commission called “Commission des relations du travail” (an administrative body established to implement the Labour Code (hereinafter “CRT”) to transfer the complaint to arbitration (s. 47.3 L.C.). Let us note that in this situation, the CRT has no power to decide on the complaint, this power belonging to the arbitrator.

b. External procedures?

When there is no collective agreement, a victim of psychological harassment may file a complaint in writing with the CNT (s. 123.6 A.R.L.S.) that will proceed to an inquiry (s. 103 to 110, 123.8 A.R.L.S.). At the end of the enquiry, if no settlement is reached between the parties and the CNT agrees to pursue the complaint, it shall refer the complaint without delay to the CRT (s. 123.12 A.R.L.S.) which is the administrative body having competence to take a binding decision (s. 123.15 A.R.L.S.). The CNT may decide to represent an employee before the CRT (s. 123.13 A.R.L.S.).

However, if the CNT finds that the complaint is groundless, it shall refuse to proceed and give notice of its decision to the complainant (s. 107, 123.9 A.R.L.S.). The latter can apply for a review of the decision or make a written request for the referral of the complaint to the CRT (s. 107 A.R.L.S.). In this last case, the complainant will represent himself/herself (s. 123.9 A.R.L.S.).

c. Legal remedies before the court?

i. Civil?

Section 114(2) L.C. confers upon the CRT an exclusive competence concerning any litigation connected to the Labour Code. The legislator mentions explicitly at the appendix I of the Labour Code that recourses based on psychological harassment, such as the one provided by section 123.12 A.R.L.S., are of the exclusive competence of the CRT.

In a unionised workplace, this exclusive competence belongs to the arbitrator because sections of A.R.L.S. on psychological harassment are embedded into all collective agreements. Also, the arbitrator possesses an exclusive power on any question connected to the collective agreement. In Quebec law, this exclusivity
of competence of the arbitrator has been recognized for a long time by the Supreme Court of Canada\(^1\).

**ii. Penal provisions?**

Sections 139 and 140 A.R.L.S. create penal offences so that any person who violates a provision of this statue is liable to a fine (s. 140(6) A.R.L.S.). Similarly, section 144 L.C. penalizes any violation of an obligation imposed by the Code or by any decision of the CRT. In every case, the proceedings are instituted by the Attorney General or by any person authorized by a judge (s. 9 and 10 C.P.P.)

There is also, as mentioned previously, a recourse for criminal harassment. The victim then has to file a complaint to the police which will be transferred to the Attorney General of Quebec. The latter will then consider the opportunity to institute legal proceedings.

**10) Who can take an action (the worker and / or the employer, colleague workers of the victim, others persons in contact with the victim, the union representative or the agent of an organization of employers, etc.)?**

Recourses against psychological harassment are open to any person being a victim, unionised or not, employee, senior managerial personnel or employer (s. 3(6) and 3.1 A.R.L.S.). The only possibility for a third party to exercise the recourse is mentioned in section 123.6 A.R.L.S. It allows a non-profit organization dedicated to the defence of employee’s rights to file the complaint on behalf of the victim.

Naturally, in the case of a unionized worker, the union can file the complaint on behalf of the worker, subject to the precision raised in question 9.

**11) Who bears the burden of proof of the violent acts and moral or sexual harassment at work?**

The one who adduces being a victim of psychological harassment has the burden to prove five elements: (1) the existence of a vexatious conduct, (2) its serious or repeated character, (3) the violation of his/her integrity and dignity,

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(4) the creation of a harmful work environment and (5) the unwanted character of this conduct.

Once these elements are proven, the CRT concludes that there is psychological harassment. Then the burden overturns on the shoulders of the employer who has to prove that he fulfilled his obligations in section 81.19 A.R.L.S. and that he took reasonable action to put an end to the vexatious conduct when he was informed of it.

12) In order to avoid reprisals at work, is there special protection provided for the victim and the witnesses?

Specify the nature and duration of the special protection.

The Labour Code (s. 15) and the Act Respecting Labour Standards (s. 122) protect employees against any measure of reprisal. Therefore, an employee can file a complaint before the CNT (s. 123 A.R.L.S.) or directly before the CRT (s. 16 L.C.). It should be noted that section 122(2) A.R.L.S. specifically protects any employee who or has given information to the CNT has given evidence in a proceeding. So, witnesses and victims benefit from the same protection against measures of reprisal.

If the complaint is filed before the CNT, the procedure will be the same as it would be for a complaint for psychological harassment. Before the CRT, the plaintiff will have to prove three elements: (1) he/she is an employee under the Labour Code, (2) he/she was subjected to a measure mentioned in section 122 A.R.L.S., such as reprisals, and (3) he/she was in a situation mentioned in this section, which is to have exercised a statutory right, such as a complaint of harassment. Then, there is presumption in favour of the complainant that he/she was a victim of a forbidden practice. The burden will be transferred on the shoulders of the employer who will have to justify the measure he/she imposed to the employee by the existence of another just and sufficient reason.

What about any improper use of the procedures?

13) What would be the consequences for a worker who has abused the procedure put in place to combat violence and moral or sexual harassment at work?

If the CRT considers the complaint to be improper or dilatory, it can summarily reject the complaint (s. 118(1) L.C.). Furthermore, the employer is justified to foresee in the harassment prevention policy that when a complaint is malicious
or made in bad faith with the intent of injuring another, the complainant is liable to disciplinary measures.

**Supervision and sanctions**

14) **Who is responsible for monitoring the measures put in place to combat violence and moral or sexual harassment at work?**

The CNT has the mission to inform the population about labour standards at work, but also has the mission to watch the application of A.R.L.S. and thus the provisions on psychological harassment.

Furthermore, because of his responsibility of prevention, an employer is also held to a diligent and rigorous application of his policy.

15) **What are the sanctions applicable to perpetrators of violence and moral or sexual harassment at work?**

There exists no provision in A.R.L.S or L.C. as for a specific penalty to which exposes himself/herself the perpetrator of the harassment. These statutes impose only on the employer the obligation to prevent and to act upon a complaint of psychological harassment. Thus, the perpetrator only exposes himself/herself to disciplinary or administrative measures from his/her employer.

The possibility for the perpetrator to be prosecuted before a civil jurisdiction is largely restricted because of a particularity of Quebec’s law. Indeed, when specific statutes apply, the recourses foreseen in the latter are the only ones opened to the victim. The only possibility for a victim to prosecute the perpetrator before civil courts is when none of these statutes finds application.

On one hand, as mentioned in question 9, the CRT has an exclusive competence for litigations on psychological harassment. On the other hand, Quebec has a regime of compensation for victims of industrial accidents or occupational diseases established by A.R.I.A.O.D. which prohibits any recourses of a worker against the person responsible for its injury. When a situation of harassment causes the victim a professional injury under the A.R.I.A.O.D., the victim does not have any recourse other than those foreseen by this statute.
However, when the harassment constitutes a discrimination based on the *Charter of Human Rights and Freedoms*, it is then possible for the victim to sue directly the perpetrator. The latter may then have to pay compensatory or punitive damages.

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Bibliography


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