WORKPLACE VIOLENCE AND PSYCHOLOGICAL HARASSMENT :

AN OVERVIEW OF THE QUEBEC EXPERIENCE

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BIOGRAPHY

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Since her call to the Quebec Bar in 1993, Ms. Chainey has focused her practice on labour and employment law, first in private practice for a law firm specializing in labour and employment law for employers (unionized and non-unionized) exclusively. As such, she provided legal representation to numerous large and small private companies in different fields of business, as well as organizations from the public and paragovernmental sectors. Also, she worked for the legal department of a large corporation.

Sine 2001, Ms. Chainey joined the team of the "Commission des normes du travail", the body responsible for the implementation and application of the *Labour Standards Act* in the province of Quebec.

Ms. Chainey is a litigator who is regularly called upon to represent employees before administrative bodies as well as before the civil courts, following complaints filed regarding monetary issues with respect to the application of the *Labour Standards Act* and complaints filed by employees with regards to a dismissal made without good and sufficient cause, complaints for prohibited practice and complaints for psychological harassment.

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1. Introduction

As we know, psychological harassment in the workplace did not appear with the recognition in June 2004 in the Quebec *Act respecting labour standards* ("LSA")[1] that a workplace free thereof constituted a labour standard. This notion of harassment has developed gradually in the labour relations field in Quebec and all over the country to ensure some kind of protection for employees faced with workplace violence.

For many years, workplace violence and psychological harassment have become a growing concern because of its repercussions on labour relations, and the ensuing social and human costs.

An abundant jurisprudence, in respect of recourses by employees benefiting from a collective agreement as well as by non-unionized employees, has developed over the years using the legislative tools available.

Although the issue was examined via existing concepts, like constructive dismissal or forced resignation, or by interpreting notions like the right to dignity, to respect and the right to a person's integrity as set forth in the Civil Code of Quebec and the Quebec Charter of Human Rights and Freedoms, the reality was that the recourses available to the employees victimized in the workplace were scattered and fragmentary.

[1] R.S.Q. chapter N-1.1

It is in that context that the province of Quebec decided to include the right to a work environment free from psychological harassment as a labour standard giving rise to a corresponding recourse in the *LSA.*

To fully comprehend the situation leading to the adoption of the protection against psychological harassment as a labour standard, we will begin with an overview of various legislation applicable to situations of workplace violence and harassment.

Following which we will examine more closely the protection against psychological harassment as set forth in the *LSA*, its importance, the definition of what constitutes psychological harassment, the obligations of the employer in that context, the recourse and the remedies.

2. Overview of the applicable legislation in the context of workplace violence and harassment in Quebec

The Quebec legislation recognizes the importance of protecting employees from any form of violence, whether verbal, psychological or physical in the workplace.

a) The Civil Code of Quebec

Section 2087 of Civil Code of Quebec states that:

"The employer is bound not only to allow the performance of the work agreed upon and to pay the remuneration fixed, but also to take any measures consistent with the nature of the work to protect the health, safety and dignity of the employee."

Moreover, the Civil Code of Quebec guaranties in article 7 that "no right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith."

As we can see, these sections of the Civil Code represent general obligations of the employer with regards to the safeguard of the health and safety of their employees.

b) The Occupational health and safety legislation

This obligation of protection imposed on the employer is also present in the *Act respecting occupational health and safety*[2], which states that an Employer must take the necessary measures to protect the health and ensure the safety and physical well-being of the worker (section 51). Consequently, the foregoing Act recognizes in section 9 the right of every worker to working conditions that have proper regard for his health, safety and physical well-being. Section 12 further provides for the right of an employee to refuse to perform work that may be dangerous for his health, safety and physical well-being.

Its counterpart, the *Act respecting industrial accidents and occupational diseases*[3] provides available recourses to a worker for whom the harassment has resulted in a workplace injury as defined in the aforesaid act. Namely, section 2 defines a workplace injury as: "a sudden and unforeseen event, attributable to any cause, which happens to a person, arising out of or in the course of his work and resulting in an employment injury to him."[4]

[2] R.S.Q. chapter S-2.1.
[3] R.S.Q. chapter A-3.001.
[4] *Ibid*.,section 2.

Therefore, the protection offered to an employee under these statutes has to fall within the definitions provided by the Acts. Without the recognition of a work related injury, this legislation is of no help to an employee faced with a problem of violence or harassment in his workplace.

c) The Quebec Charter of Human Rights and Freedoms

It is worthwhile recalling that the Quebec *Charter of Human Rights and Freedoms*[5], in addition to the basic protections regarding fundamental rights and freedoms, such as the right to integrity (section 1) and the right to dignity (section 4), has specific provisions on this subject.

The *Charter* specifically prohibits discrimination based on the characteristics found in section 10, namely:

> **"10.** Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.
>
> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.
>
> **10.1.** No one may harass a person on the basis of any ground mentioned in section 10."[6]

[5] R.S.Q. chapter C-12.
[6] *Ibid*, sections 10 and 10.1.

Also, section 46 of the Charter stipulates that: "Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being." [7]

d) The limits of the foregoing legislation

None of the aforementioned legislation provides the employees with a specific recourse on psychological harassment when faced with such a situation.

Indeed any available civil recourses are illusory for most employees, given the associated prohibitive costs and delays. Moreover, recourses based on OHS legislation are limited to situations where the harassment causes an employment injury, as defined by that *Act*.

Finally, the protection regarding harassment in the *Charter* is a function of the conditions set forth in section 10 namely: race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap. Therefore, the Human Rights Commission cannot intervene if the harassment does not fall within those specifications.

3. Specificity of the Quebec legislation: the recourse for psychological harassment in the *Act respecting labour standards*

In that context, it became clear to the Quebec legislator that the employees, including those occupying positions of senior management, needed better

[7] *Ibid*, section 46.

protection in light of the growing problems of workplace harassment and violence. It was within this context that the new standards pertaining to psychological harassment adopted in June 1, 2004 were integrated in the *LSA* (section 81.18 to 81.20). These standards are accompanied by a specific recourse for which remedies are provided, as set forth in sections 123.15 and 123.16.

With these provisions, the objective of the legislator is first and foremost to make employers and employees aware of psychological harassment in the workplace and to permit actions upstream in order to avoid a deterioration of the work environment for the employee.

In this section, we will take a closer look at the standards pertaining to psychological harassment, the definition of what constitutes psychological harassment, the obligations of employers, the recourse available and the possible remedies and exclusions.

But first :

a) A few interesting statistics

In Quebec, there exists an administrative body known as the "Commission des normes du travail".

Pursuant to section 5 of the *Act,* the Commission's role is to supervise the implementation and application of the *LSA.*

In its 2008-2009 annual report, the Commission stated that further to data made available by Statistics Canada for the year 2008, the province of Quebec accounted for 3 344 200 employees and of that number, 3 084 637 employees (92%) fell within the scope of the *LSA.* Further, 1 739 852

employees (56%) only have the *Act* as a protection for their working conditions.[8]

Also, the report stated, further to data made available by Revenue Quebec for the year 2008, that the province accounted for 252 058 employers, of which 248 412 (99%) fell within the scope of the *LSA.*[9]

Consequently, given the scope and widespread application of the *LSA* to Quebec's labour relations, there are undeniable benefits to including protection against psychological harassment in the workplace. Five years after the inclusion of provisions for the protection against psychological harassment in the *LSA* in June 2004, the Commission examined the number of complaints received and the outcome of the complaints:

- For the five year period (until June 2009), the Commission received 10 095 complaints;
- 95% of the complaints related to psychological harassment in the form of repeated conduct;
- 73% of the complaints implicated a person in position of authority;
- 63% of the complaints were filed by women;
- 35% of the complaints were settled through mediation at the Commission;
- 911 complaints were transferred to the "Commission des relations du travail" , the adjudicative body for complaints filed pursuant to the *LSA*, but 723 were the object of an out of court settlement;[10]

[8] Commission des normes du travail, *Rapport annuel de gestion 2008-2009*, gouvernement du Québec, juin 2009, p.10.
[9] *Ibid.*
[10] Service de Formation Continue du Barreau du Québec, *Le point sur la jurisprudence (2004-2010) en matière de harcèlement psychologique en milieu de travail*, Marie-France Chabot, 18 avril 2010, p.3.

Finally, between June 1, 2004 and March 31, 2010, the "Commission des relation du travail" rendered 108 decisions following complaints of psychological harassment. Of those 36 decisions (33,3%) concluded that the employee was the object of psychological harassment (35 complaints were granted because the employer failed in his obligations and 1 complaint was denied because the employer had fulfilled his obligations) . Correspondingly, 72 decisions (66,6%) concluded that the employee was not the object of psychological harassment in his workplace.[11]

b) What constitutes psychological harassment

Section 81.18 of the *LSA* defines psychological harassment in the workplace as:

> **"Interpretation**
>
> For the purposes of this Act, "psychological harassment" means any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee.
>
> **Vexatious behaviour**
>
> A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment."[12]

[11] *Ibid*, p.4.
[12] See note 1.

This definition must be examined within the specific context of the employer-employee relationship. In other words, what would otherwise not constitute harassment in some circumstances, may be considered harassment owing to the legal subordination relationship between the parties.

An employee may be the object of harassment by a colleague or peer, an individual in a position of authority, even an individual from outside the enterprise such as clients, suppliers or a third party.

An employee claiming to be the victim of psychological harassment has the burden of proving his allegations. In order for an employee to succeed before the Commission des relations du travail, he will have to prove the following elements:

- A vexatious behaviour
- Repetitive by nature
- Hostile and unwanted
- Adverse effect on his or her dignity or integrity (physical or psychological)
- A resulting harmful workplace
- A single incident with a lasting harmful effect may also constitute harassment

Vexatious behaviour must take the form of conduct, comments, actions or gestures which are repetitive in nature. Therefore, continuity of the conduct over time must be present to reach a conclusion of psychological harassment.

The assessment will deal with the nature, intensity and recurrence of the objectionable gestures, as well as their impact on the victim,

notwithstanding the intentions of the harasser. The vexatious behaviour may be continuous in nature, demonstrable by the effect of the physical or psychological prejudices that link each of the gestures together.

These incidences of behaviour, comments, actions or gestures must be hostile or unwanted. Their consequence is to affect the dignity or psychological or physical integrity of the person against whom they are directed, and to create a harmful work environment for him. "Harmful" refers to an environment that is detrimental, bad or unhealthy.

The notion of hostility includes comments, actions or gestures that may seem, when taken on their own, to be harmless or insignificant, but their accumulation or combination may be considered a harassment situation.

Of course, a series of offenses of a more serious nature committed over a period of time will constitute harassment as well.

The term "unwanted" refers to any objectionable conduct. Indeed, the victim does not have to give verbal expression to his rejection of such behaviour; the essential element leading to the ascertainment of harassment is that the behaviour itself is unwanted.

The Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*[13] defined the concept of human dignity as follows:

> "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs,

[13] [1999] S.C.R., 497.

> capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law."

The Supreme Court of Canada in *Quebec (Public curator) v. Syndicat national des employés de l'Hôpital Saint*-Ferdinand[14] in defining the notion of integrity stated:

> The *Petit Robert 1* (1989) defines the word "*intégrité*" as follows, at p. 1016: [TRANSLATION] "**1** (1530). Condition of a thing that has remained intact. **See Intégralité, plénitude, totalité.** *The integrity of a whole, of an entire thing. Integrity of a work. "The integrity of the organism is essential to the manifestations of consciousness*" (CARREL). *The integrity of the territory.* REM. *Integrity* is more qualitative than *integrality*, which is generally reserved for that which is measurable". Having regard to this definition, the Superior Court made the following comments in *Viau v. Syndicat canadien de la fonction publique*, [1991] R.R.A. 740, at p. 745:

[14] [1996] 3 S.C.R. 211.

> [TRANSLATION] When applying this concept to persons, we find that it is a threshold of moral damages below which there is no interference with personal inviolability. This threshold will be exceeded when the interference has left the victim less complete or less intact than he or she previously was. This diminished condition must also be of some lasting, if not permanent nature. [Emphasis added.]
>
> This approach to the interpretation of the concept of inviolability set out in s. 1 of the *Charter* appears to me to be appropriate. The common meaning of the word "inviolability" suggests that the interference with that right must leave some marks, some sequelae which, while not necessarily physical or permanent, exceed a certain threshold. The interference must affect the victim's physical, psychological or emotional equilibrium in something more than a fleeting manner.

The *LSA* also provides that a single serious incidence of such behaviour may constitute psychological harassment. The harmful effect of this serious incidence must be felt over time by the employee. The effect on the dignity or psychological or physical integrity of the employee and the harmful effect cannot be dissociated, whether related to an isolated incidence or repeated incidences.

The finding of harassment must result from an objective analysis.

In that respect, the criterion of a "reasonable person" placed in the circumstances described in a harassment complaint is to be applied. The point of comparison for this "reasonable person" must be a standard of conduct that is accepted or tolerated by society. As a reference, a person

with ordinary intelligence and judgment is chosen to see how this person would have reacted in a given context. Would this person conclude that this was a harassment situation?

It is essential to reiterate that the application of such standards must not result in the obstruction of an employer's normal exercise of management of his human resources. It is important to distinguish the actions taken by the employer as part of the normal and legitimate exercise of his management right, even if they involve unpleasant consequences or events, from those taken in a manner that is arbitrary, abusive, discriminatory or outside the normal conditions of employment.

c) The Employer's obligations

Once an employee has convinced the Commission des relations du travail that he has been subjected to psychological harassment in his workplace, the Commissioner will examine if the Employer has met his duty to protect the employee by taking reasonable action to prevent harassment and to put a stop to it when he has been made aware of such behaviour.

These obligations are set forth in section 81.19 of the *LSA:*

> **"Right of the employee**
>
> Every employee has a right to a work environment free from psychological harassment.

Duty of employers

> Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it."

The *LSA* imposes an obligation of means on the employer. Under this obligation, the person is required to act carefully, diligently and by taking all reasonable steps in the search for the expected result, without providing the certainty of achieving this result.

This responsibility falls on the employer and not on the person presumed responsible for the psychological harassment. It is the employer who has the responsibility of providing his employees with fair and reasonable conditions of employment and of respecting their health, safety, dignity and psychological and physical integrity.

Consequently, as soon as a harassment situation is brought to his knowledge, the employer is under the obligation to take the appropriate steps and impose the necessary sanctions to put a stop to such behaviour.

The fact that the employer is unaware of a harassment situation cannot relieve him of his responsibility. On the contrary, the employer's negligence or decision to turn a blind eye to a harassment situation engages his responsibility.

The legislator imposed a dual obligation on the employer, one of prevention and another of intervention. In first place, the employer should establish an internal policy addressing and banning any form of workplace violence and

harassment (zero tolerance) and publicize it so that employees, management, clients and third parties are well aware of its existence.

In second place, the Employer should implement a complaint mechanism for employees faced with a situation they feel constitute psychological harassment so that they may denounce such behaviour without fear of reprisals. The employer should also provide an inquiry process and adopt measures designed to cause the behaviour to cease, when it presents itself.

As an example, the Commission des relations du travail rendered a decision in *Gougeon v. Cheminées Sécurité International Ltée*[15] in which after concluding that there was psychological harassment according to section 81.18 of the *Act*, rejected the employee's complaint because the employer had fulfilled its obligation pursuant to section 81.19:

> [103] Puisque la preuve révèle que le plaignant a été victime de harcèlement psychologique de la part des employés sous sa supervision les 13 juin, 31 juillet, 19 septembre, 1er et 24 octobre 2007, la Commission doit maintenant déterminer si l'intimée a respecté les obligations que lui impose l'article 81.19 de la *Loi*.
>
> [104] La *Loi* impose à tout employeur des obligations en amont et en aval d'une situation de harcèlement psychologique. Celui-ci doit d'abord prendre les moyens raisonnables pour prévenir le harcèlement psychologique. Puis, lorsqu'une conduite constituant du harcèlement psychologique est portée à sa connaissance, il doit prendre les moyens raisonnables pour la faire cesser.

[15] 2010 QCCRT 0120, March 4, 2010.

[105] En matière de prévention, l'intimée a adopté, après consultation auprès du Syndicat, l'année précédant les événements reprochés, une politique pour contrer le harcèlement psychologique en milieu de travail. Elle a également donné une formation concernant cette politique à ses employés et l'a affichée dans les locaux de l'entreprise, à des endroits très visibles.

[106] Puis, toutes les fois que le plaignant a dénoncé une situation de harcèlement, l'intimée est intervenue afin de faire cesser le comportement fautif. En effet, monsieur Deschamps a agi rapidement en imposant des mesures disciplinaires aux employés fautifs. Il a mené des enquêtes exhaustives et a décidé des sanctions, en tenant compte de l'ensemble des circonstances, notamment l'ancienneté des salariés, leur dossier disciplinaire et leur comportement à la suite des gestes fautifs, ainsi que le respect de la gradation des sanctions et des règles prévues à la convention collective.

[107] Il n'appartient pas à la Commission de se prononcer sur le bien-fondé des mesures disciplinaires. Son rôle consiste, comme le prévoit le dernier alinéa de l'article 81.19 de la *Loi*, à s'assurer que les moyens pris par l'employeur pour faire cesser le harcèlement sont « *raisonnables* ». Or, la Commission est d'avis que les moyens pris par l'intimée sont raisonnables, compte tenu de l'ensemble des circonstances.

> [108] L'intimée ayant rempli ses obligations, la plainte est rejetée.[16]

The foregoing decision confirms that if an employer does everything he can to fulfill the obligations as set forth in the *LSA* , he can be exonerated of any responsibility even if a situation of psychological harassment was present in the first place.

Therefore, it is of the utmost importance that the employers develop "zero tolerance" policies on workplace harassment and violence of any shape or form and establish a mechanism for dealing with complaints rapidly and effectively to the benefit of all parties involved.

d) The recourse in the face of psychological harassment, exclusions and remedies

In the event that an employee feels that his employer does not provide him with a workplace free from psychological harassment, the employee may file a complaint, in writing, to the Commission (section 123.6) within 90 days of the last incidence of the offending behaviour (section 123.7).

On receipt of a complaint, the Commission shall make an inquiry (section 123.8) to verify the presence of a form of psychological harassment within the meaning of the *LSA*. The inquiry will seek to gather the factual elements to verify the validity of the complaint and show the existence or absence of a clear and patent desire on the part of the employer to ensure a work environment that is free from psychological harassment. Moreover, the inquiry will help determine if the employer has taken appropriate steps and

[16] *Ibid*, pages 18-19.

adopted an adequate policy to prevent psychological harassment in his enterprise. During that process mediation is always possible to try to resolve the complaint (section 123.10).

A significant factor supporting the recourse for psychological harassment under the *Act* is the fact that the Commission may represent the employee, free of charge, during the proceedings before the Commission des relations du travail (section 123.13).

If the complaint of the employee is granted and the employer has failed to fulfill his obligations, the Commission des relations du travail, based on section 123.15, may render any decision it believes fair and reasonable, taking into account all the circumstances of the matter, including:

1. ordering the employer to reinstate the employee;
2. ordering the employer to pay the employee an indemnity up to a maximum equivalent to wages lost;
3. ordering the employer to take reasonable action to put a stop to the harassment;
4. ordering the employer to pay punitive and moral damages to the employee;
5. ordering the employer to pay the employee an indemnity for loss of employment;
6. ordering the employer to pay for the psychological support needed by the employee for a reasonable period of time determined by the Commission;
7. ordering the modification of the disciplinary record of the employee.

On the other hand, it is possible that an employee has submitted a claim pursuant the *Act respecting industrial accidents and occupational diseases*[17] to determine if the psychological harassment of which he is a victim is an employment injury concurrently with the complaint lodged with the Commission.

In this case, if the Commission des relations du travail deems it likely that a decision rendered by the competent body will establish that the case involves such an employment injury, it will have to reserve its decision regarding the remedies available pursuant to paragraphs 2), 4) and 6) of section 123.15, namely the indemnity related to lost wages, punitive and moral damages, and the funding of the psychological support required for the employee (section 123.16).

Consequently, the Commission des relations du travail will have to issue an order that will deal, in particular, with paragraphs 1), 3), 5) and 7) as well as any other decision that it believes is fair and reasonable, taking into account all the circumstances of the matter to ensure that the employee is not deprived of the compensation to which he would otherwise be entitled under the *LSA*.

Moreover, if the employment injury is recognized by the competent body, the Commission des relations du travail will not be able to issue an order on the subject matter listed at paragraphs 2), 4) and 6) of section 123.15.

[17] See note 2.

4. Conclusion

In conclusion, we submit that the provisions regarding psychological harassment in the *LSA* have not only brought the reality of workplace violence and harassment in Quebec to the forefront, but legitimized the complaint process in holding the employer accountable.

The Quebec legislation on psychological harassment was designed to emphasize on the importance of prevention. That explains why the obligations set forth in the *LSA* fall on the employer's shoulders instead of on the harasser himself, the ultimate objective being to provide a work environment free of psychological harassment.

Moreover, the recourses now available, although far from ideal as the employee continues to bear the burden of proving the occurrence of psychological harassment within the confines of the legal definition set forth in the *LSA,* will serve to address not only the personal costs associated with workplace violence and harassment but the larger social costs as well.