THE NEW STANDARDS FOR PROTECTION AGAINST PSYCHOLOGICAL HARASSMENT IN THE WORKPLACE: A MODERN-DAY APPROACH

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Guy Poirier and Robert L. Rivest
with the collaboration of Hélène Fréchette

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Thereafter, until 1998, he worked as a litigator for the Quebec Justice Department. Finally, he returned to the Labour Standards Commission in 1998. He currently holds the position of Director of Legal Affairs at the Montreal Office of the Labour Standards Commission.

Robert Rivest, Esq. is invited as a lecturer on a regular basis. He has authored numerous articles specializing in the field of labour law and dealing the application of the *Labour Standards Act*.

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Guy Poirier, Esq., was admitted to the Quebec Bar in 1977. He also is a member of the *Ordre des conseillers en relations industrielles du Québec* (Association of Human Resource Professionals in the Province of Quebec). He began his profession as a lawyer with the Quebec Justice Department specializing in the fields of Real Estate Law and Expropriation Law. In 1982, he joined the Labour Standards Commission as a litigator, thereby acquiring expertise in Labour and Civil Law. In 1985, he became Director of Legal Affairs for the Montreal Office of the Commission.

From 1997 to date, he has been Director of Legal Affairs at the Commission. Guy Poirier, Esq., was also appointed Interim Chief Executive Officer of the Commission in July 1997, a position which he held until the beginning of 1998.

Guy Poirier, Esq. was also previously a member of the Management Committee of the Montreal Bar. He has taught at the Quebec Bar Admission School. In 1994, he was appointed by the Government of Quebec to sit for a term of one year as a provisional Director on the Joint Labour/Management Committee for the Flat Glass Industry. Guy Poirier, Esq. is very much in demand as a lecturer. He has authored a great many specialized conferences in the field of labour law dealing with the application of the *Labour Standards Act*.

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Hélène Fréchette, Esq. was admitted to the Quebec Bar in 1983. She was in private practice for a year and, then, in 1984, she joined the *Société des traversiers du Québec* (The Quebec Ferry Company). Her duties mainly encompassed labour relations for this corporation until 1990.

In 1990, she began her career in the Quebec civil service as a litigator for the Legal Affairs Directorate of the General Secretariat of the Treasury Board. The duties assigned to her until June 2002 essentially involved representation before the administrative tribunals of all the departments and agencies of the Public Service in matters of labour relations.

She joined the ranks of the Legal Affairs Directorate of the Labour Standards Commission in June 2002 as a litigator in the Quebec Office, and also works in conjunction with the Implementation Committee on the provisions regarding psychological harassment in the workplace.

FOREWORD

Many publications and articles have dealt with the topic of psychological harassment over the past few years. In connection with the new legislative safeguards provided for in the *Labour Standards Act*, it was our wish to conduct an analysis of the concepts developed in the case law of various judicial venues which often operate under very different and unrelated terms of reference. We will also address governmental perspectives on this topic, no doubt influenced by such concepts, as well as initiatives implemented by certain European countries. Finally, we put forth a potential interpretation of these new provisions in light of the objectives set out by the legislator further to the government's ponderings on the matter.

As a result of the above process, one observation stands out: decision-makers and litigators will already have at their disposal established guidelines enabling them to approach the issue in an objective manner. This book is summary in nature; it merely scratches the surface of the issues, given the breadth of their scope. If, however, it enables one to quickly and easily grasp the complexity of the topic, we will consider that our goal has been achieved.

We have added to the main body of the text the statutory provisions relating to the protection against harassment as well as the interpretation of the Labour Standards Commission for each of them. Finally, we have incorporated two other texts with respect to this topic, namely one dealing with the policies suggested to corporations in order to prevent harassment in the workplace, the other dealing with the investigative tools of the Commission, especially in light of the powers with which it is vested in such matters.

We wish to thank Mrs. Francine Martel-Vaillancourt, Chief Executive Officer of the Labour Standards Commission, who authorized the publication of this study. Her enthusiastic and dynamic

involvement, as in the case of many other matters before the Commission, enabled this project to be brought to fruition. Mrs. Brigitte Pelletier, Vice-President of Communications, Research and Quality, and her team contributed their usual efficiency to the publishing process.

We would also like to extend our appreciation to the entire team of lawyers at the Legal Affairs Directorate of the Labour Standards Commission. Their astute comments and the numerous "informal brainstorming sessions at the office" most certainly played a part in making this book more readily understandable and accessible. In this respect, we were fortunate to be able to count on skilled attorneys who are dedicated to their work and who, incidentally, are among those who devised this new labour law concept based on respect for the worker's right to dignity and integrity.

We are especially thankful to the following persons who imparted to us their invaluable comments: first, Hélène Fréchette, Esq., who incidentally co-authored one of the texts appended as a schedule to this book; secondly, the following attorneys-at-law: Isabelle Dupuis, Johanne Tellier, Claudia Dao and André Goulet, who provided us with their always relevant and constructive comments. Finally, without the precise and organized work of our paralegal, Mrs. Renée Melançon, and of our assistants, Mrs. Sylvie Jobin and Mrs. Lorraine Reid, this book would not have seen the light of day.

Guy Poirier, Esq. and Robert L. Rivest, Esq.

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INTRODUCTION

To say that working conditions in industrialized countries have evolved would be an understatement. Progressively, tasks requiring physical effort are decreasing to be replaced by those that require a high degree of concentration and intellectual analysis which generally involves teamwork. The leisure-oriented society predicted some decades ago has instead evolved towards competitiveness and an increase in working hours for those in regular employment situations and fostered a tendency towards atypical work.

In conjunction therewith, one notes a worrisome deterioration of mental health in the workplace. In the United States, one out of ten workers suffers from depression, anxiety, stress and overwork and is therefore risking hospitalization and unemployment.[1] The social costs and costs incurred by organizations are substantial. Hence, mental health problems have cost between 3 and 4% of their GDP in countries of the European Union. In the United States, public expenses associated with depression amount to between thirty and forty-four billion dollars. The International Labour Office estimates that this phenomenon results in an annual loss for this country of approximately 200 million workdays.[2]

A study conducted by Health Canada in 1998 establishes that, out of a total burden of 14.4 billion dollars, mental health problems represent one of the diseases which is the most expensive to the country. In this same study, the loss of productivity associated with depression and distress on a short-term basis was estimated at six billion dollars. In Quebec, income replacement indemnities paid by

1. P. GABRIEL, M.R. LIIMATAINEN, *Mental Health in the Workplace*, Report of the International Labour Office (I.L.O.) on mental health in the workplace in Germany, the United States, Finland, Poland and the United Kingdom, Geneva, October 2000.
2. Angelo SOARES, CRHA, "La santé mentale au travail: s'attaquer aux sources du problème", *Revue Effectif*, September-October, 2003, Vol. 6, No. 4, p. 24.

the Occupational Health and Safety Board (C.S.S.T.), in connection with depression, anxiety and other mental health problems have spiraled upwards.[3]

In light of such findings, the Labour Standards Commission (L.S.A.) was, as part of a preventive approach, granted new jurisdiction over the protection against harassment. These protection standards and the remedies arising from them were assented to in December 2002. They came into effect on June 1, 2004. For the first time, the Quebec legislator has established a definition of harassment in the workplace, which is described as being "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."[4]

This analysis is intended to be a brief overview of the issue and the impact of such protection standards in the workplace. We will shortly address the involvement of the L.S.C.'s functions and mission as well as the new duty she has been entrusted with. We will then analyze today's actual situation, which takes into consideration the emergence of the problem as well as its legal aspect. We will examine certain European initiatives in order to remedy this phenomenon. We will examine the Quebec solution that has been taken into consideration, which implicates a preventive approach. Finally, we will conclude this analysis with the impacts of such standards in the workplace in general and in particular with the different sentencing courts who deal with the psychological harassment cases.

PART 1

ROLES AND FUNCTIONS OF THE LABOUR STANDARDS COMMISSION IN RELATION TO THE NEW STANDARDS

The primary mission of the L.S.C. is to supervise the implementation and application of the standards provided for in the *Labour*

3. Isabelle BLAIS and Rhéaume PERREAULT, "Les recours judiciaires en matière de harcèlement psychologique", *Revue Effectif*, September-October 2003, Vol. 6, No. 4, p. 36.
4. Sec. 81.18 *Labour Standards Act*, R.S.Q., c. N-1.1 (note, as we will see in greater detail below, that a single serious occurrence may represent psychological harassment within the meaning of the Act).

Standards Act (L.S.A.).[5] Since 1980, these standards have gradually extended their reach, both in their diversity and in respect of the target clientele, in order to represent today a true social and economical net for the population of Quebec. The L.S.A. requires approximately 178,000 employers, which is more than 93% of all corporations in Quebec, to comply with working conditions of a public policy nature.[6] As a result, more than 2.8 million Quebec workers are granted protection, which ranges from basic conditions such as wages and vacation, to very topical concerns such as family leave. These standards have a considerable impact since they represent for more than 1.6 million employees their only true written contract which acts as a framework for their working conditions.[7]

Chapter 1- The Commission's General Terms of Reference

In order to accomplish this mission, the Quebec legislator has entrusted the Commission with five specific responsibilities:

(1) inform the population on matters dealing with labour standards;

(2) inform employees and employers of their rights and obligations under the Act;

(3) transmit its recommendations, where necessary, to the Labour Minister, with respect to the application of the Act;

(4) receive complaints from employees; and

(5) provide employees and employers with a mediation service enabling them to settle their dispute to their satisfaction.[8]

The L.S.C. is not a tribunal, it does not render judicial or quasi-judicial decisions; it is the agency that sees to the application of the standards provided for in the L.S.A.

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5. *An Act respecting labour standards*, R.S.Q., c. N-1.1.
6. COMMISSION DES NORMES DU TRAVAIL, *Rapport annuel de gestion 2002-2003*, gouvernement du Québec, June 2003, p. 8.
7. *Ibid*.

It receives the complaints of the employees. It conducts inquiries upon receipt of complaints [9] in pecuniary matters, and soon in matters of complaints with respect to psychological harassment.[10]

Four separate remedies are provided for in the L.S.A. In matters of claims of a pecuniary nature, the competent forum is the general law courts, namely the Court of Quebec or the Superior Court depending on the disputed amount. In the three other cases (prohibited practices and the recourse against dismissals not made for good and sufficient cause and the recourse against harassment) the case is heard by the *Commission des relations du travail* (Labour Relations Commission).

Following the inquiry in respect of a complaint of a pecuniary nature, if it is of the opinion that an amount of money is due by an employer, the L.S.C. puts the employer in default to pay such amount to the Commission within 20 days. If the employer fails to pay such amount within the prescribed time period, the employer may become subject to legal proceedings instituted by the L.S.C. before the civil courts. In such cases, it acts in its own name and on behalf of the employee.[11] The Commission provides support in terms of representation before the courts.

In the cases regarding prohibited practices[12] and the recourse against dismissals not made for good and sufficient cause,[13] no inquiry is made by the L.S.C. The Commission does, however, provide a mediation service which allows the parties to settle their dispute without having to submit the matter to a trier of fact.[14]

If this mediation does not allow for the settlement of the dispute, the complaint of the employee is then forwarded to the L.R.C., the

8. Sec. 5 L.S.A.
9. Sec. 98 et seq. L.S.A. It may also conduct an inquiry of its own initiative (sec. 104). With respect to the powers of the L.S.C., see Sylvain LEFEBVRE, Isabelle PARADIS and Robert L. RIVEST, "La Commission des normes du travail: ses pouvoirs et compétences en matière de processus d'enquête et d'intervention judiciaire", in Service de la formation permanente du Barreau du Québec, *Développements récents en droit du travail*, Vol. 190, Cowansville, Éditions Yvon Blais, 2003.
10. Sec. 123.8 L.S.A.
11. *Maltais* v. *Corporation du Parc régional du Mont Grand-Fonds inc.*, D.T.E. 2002T-385 (C.A.).
12. Sec. 122 to 123.5 L.S.A.
13. Sec. 124 to 131 L.S.A.
14. Sec. 123.3 and 125 L.S.A.

specialized tribunal of competent jurisdiction which renders decisions both in matters relating to collective work relations (*Labour Code*) and in matters relating to the L.S.A.

The L.S.C. offers in this case a representation service to the employee who proceeds with his or her complaint before this quasi-judicial body.[15] These services are entirely free of charge.

Note that if the complaint is transferred to the L.R.C., the latter also provides, before the hearing, a conciliation service.[16] If this second attempt fails, the L.R.C. will proceed with the hearing and will render a decision on the dispute submitted to it.

The L.S.C. is not a budgetary agency of the government, that is to say that it does not receive from the former its operational budget. It finances all of its activities on the basis of amounts collected by way of assessment on the employer's payroll[17] as well as the lump sum of 20% it claims in the event of a judicial proceedings with respect to a claim of a pecuniary nature.

The L.S.C. fully assumes its duty of informing the public. Annually, it receives more than 500,000 enquiries via telephone. It also provides information via its Internet site and its various regional offices.[18] Furthermore, it leads several information and awareness campaigns in addition to being accessible to the population throughout the territory it serves.

The L.S.C. receives more than 30,000 complaints per year from employees who deem that their rights have been infringed by their employer, of which 25,000 relate to offences of a pecuniary nature and 5,000 to the exercise of a remedy against a prohibited practice or dismissals not made for good and sufficient cause.[19]

Of 25,000 complaints of a pecuniary nature received by the L.S.C., approximately 84% result in a settlement at the inquiry stage and the remaining 16% will be subject to legal proceedings before the civil courts.[20] As for the 5,000 complaints with respect to a prohibited

15. Sec. 123.5 and 126.1 L.S.A.
16. Sec. 121 to 123 *Labour Code*, R.S.Q., c. C-27.
17. Namely 0.08% of the payroll of each business.
18. *Rapport annuel de gestion 2002-2003*, *op. cit.*, note 6, p. 18.
19. *Ibid.*, p. 24.
20. *Ibid.*, p. 27.

practice or dismissals not made for good and sufficient cause, the Labour Standards Commission settles 65% at the mediation stage and 35% will be forwarded to the L.R.C. and will require representation by the attorneys of the L.S.C.[21]

Chapter 2- The New Mission Entrusted to It

Hence, the L.S.C. has been honing for more than twenty years its expertise in labour relations with respect to inquiry, mediation and representation before the specialized courts as well as the common law courts.

In numerous cases relating to constructive dismissals or prohibited practice, as we shall see later on, the L.S.C. is called upon to analyze and handle situations where certain types of harassment in the workplace exist.

In this respect, it was appropriate to entrust the L.S.C. with the application of the new standards in matters of psychological harassment.

PART 2

PSYCHOLOGICAL HARASSMENT IN THE WORKPLACE: AN EMERGING PROBLEM

Chapter 1- Evolution of the Workplace

Since the beginning of the 1980s, the pace of changes in the workplace has accelerated dramatically. One need only call to mind free trade, globalization, the economic restructuring of industrialized nations and that of large economic production blocks. New information technologies and communications that disrupt the rate of acquisition of knowledge add to these far-reaching changes.

These accelerated changes bring into even greater focus the problem of organization of the workplace. Indeed, the current rules governing the workplace have a tendency to impose on the worker increased requirements of flexibility and productivity, which results

21. *Ibid.*, pp. 30 to 32.

in a significant increase of stressful situations. We also note the proliferation of the resort by businesses to temporary employment or atypical jobs[22] over the past twenty years. This increases the vulnerability to the loss of employment while raising the degree of insecurity felt by an increasing number of employees.[23]

The worker, whether unionized or not, is consequently required to commit himself more and more to his work, even to make an outright overcommitment. This means that he then responds to the demands and commitment expectations that are communicated to him by the employer. The danger lies in the fact that, for the individual, the only true sense of worth resides in professional recognition. Hence, work can take on an identity-structuring dimension rather than an instrumental value for the individual.

All of these components contribute to an increase in the frailty of workers and to a rise in the frequency of incidents related to so-called psychological harassment. The consequences are as important to the worker as to the corporation. Indeed, costs related to psychological violence in the workplace can amount to significant sums.[24]

In this respect, it is important to underline that, for Chappel and DiMartino, "[TRANSLATION] the existing nexus between stress and violence in the workplace has already been convincingly demonstrated", violence, in this instance, including psychological as well as physical behaviour. These authors add that minor acts in themselves can, when repeated, represent a serious form of violence, as it is the

22. Full-time salaried employment will be overtaken by atypical work in less than 20 years according to F. Normand relying on the findings of the study conducted on the topic by the Labour Department and made public, in May 1998, in the publication entitled *Le Marché du travail*. Atypical employment is often precarious in nature. It is a multi-faceted notion which bears definition in greater detail: "– uncertainty as to the duration of work or the term of employment; – weak control over, or absence of control over, the organization of work;– poor social protection (or absence thereof) (fringe benefits, collective agreement, minimum labour standards, *Labour Code*); – poor compensation in a specific social context[91]", Nicole MORNEAU, Direction des études et des politiques, *Violence ou harcèlement psychologique au travail? Problématique*, ministère du Travail du Québec, May 21, 1999; see also Jean BERNIER, Guylaine VALLÉE, Carol JOBIN, *Les besoins de protection sociale des personnes en situation de travail non traditionnelle,* ministère du Travail, 2003.
23. D. CHAPPEL, V. DiMARTINO, *Violence at Work*, International Labour Office, Geneva, 1998, p. 40.
24. Nicole MORNEAU, *op. cit.*, note 22, p. 11.

case when it comes to initiations or hazing, group persecutions or sexual harassment.[25]

Since the middle of the 1990s, a growing awareness of this phenomenon has been observed. Research and publications on this topic have become more and more prevalent. One need only consult the different threads dealing with the issue on the Internet to take stock of it.

This concern results from the devastating effects of violence in the workplace. It has repercussions as much on the physical as on the psychological level. It may cause stress, anxiety, depression or a decrease in self-esteem.[26] It creates a sense of incompetence, dissatisfaction with life in general, vulnerability and even guilt. The impact on a person's health can even sometimes have physical manifestations: headaches, sleep disorders, gastrointestinal troubles, nausea, fatigue, etc.[27] Of course, the seriousness of the impact of the violence depends on the nature of the relationship between the victim and the aggressor. Within a context of economical and hierarchical subordination in the workplace, one realizes the importance of establishing protective barriers.

Harassment is not restricted in its effects only to the victim in question. It can potentially have repercussions on other persons in the same work environment. One can then witness a repetition of the deviant behaviour whereby the harasser exhibits similar behaviour towards other employees of the same organization. There can also be contagion, the behaviour of the harasser being imitated by other persons in the work environment, which then becomes tense, corrupted, unpleasant, anomic, irritating and suspicious.[28]

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25. D. CHAPPEL and V. DiMARTINO, *La violence au travail*, International Labour Office, Geneva, 2000, in Nicole MORNEAU, *supra*, note 22, p. 7.
26. *Rapport Comité interministériel sur le harcèlement psychologique au travail*, ministère du Travail, 14 mai 2001, gouvernement du Québec, p. 32. We have already seen that psychological harassment could increase the level of stress and that a work environment characterized by a high degree of stress was more vulnerable to triggering incidents of harassment. The increase in the level of stress entails high financial costs for businesses, especially if one refers to the results of certain studies called to mind by Moyson, namely that "American businesses spend between 25% and 60% of their gross profit in medical expenses intended to cover the harmful effects of stress. This phenomenon has apparently quadrupled over the past five years." (pp. 34, 35 and 58).
27. *Ibid*.
28. *Ibid*.

In addition, the victim may suffer from mental health problems, for instance psychiatric problems or emotional states in varying degrees of intensity and seriousness.[29]

As we are pointing out, the consequences of violence in the workplace are significant in terms of cost and productivity for the corporation: employee turnover, decrease in productivity, absenteeism, loss of motivation in the workplace, reduction in quality of service provided to clients, etc.

Furthermore, the increase in applications for disability due to psychological problems is considerable.[30]

The Occupational Health and Safety Board (C.S.S.T.), as part of its mission to ensure prevention and redress, has recently identified that mental health in the workplace represents an emerging problem.[31] Claims for benefits filed with the C.S.S.T. for psychological injuries have spiraled upwards; the number of such injuries that have led to compensation increased from 530 to 994 between 1990 and 1997. Annual expenses in income replacement indemnities increased from 1.5 to 5.1 million dollars.[32]

No industrialized country has escaped this phenomenon. Already, certain European countries, such as France and Belgium, have proposed legislation to deal with and punish this type of harassment. We will delve in greater detail into the particulars of these statutes when analyzing the provisions existing in foreign legislation.

Chapter 2- Existing Remedies in Quebec

By way of introduction to the more in-depth analysis of the new provisions with respect to psychological harassment in the workplace, in light of already existing legislation, it is essential to point out that the employer's liability is already recognized. The employer has the duty to protect the health, the security, the integrity and the dignity of all of its employees. Indeed, whether by way of application

29. *Ibid*.
30. *Ibid.*, p. 36.
31. *Ibid*., p. 71; see also A. SOARES, *op. cit.*, note 2, p. 24.
32. I. BLAIS and R. PERREAULT, *op. cit.*, note 4, p. 37.

of certain legislative provisions, internal corporate policies or merely as a result of the duties of the parties with regard to contractual matters, the tribunals already had occasion to confirm this responsibility.

The *Civil Code of Québec*, *An Act respecting occupational health and safety*[33] and the Quebec *Charter of Human Rights and Freedoms*[34] specifically require the employer to protect the health, the security, the physical integrity and the dignity of all its employees.[35]

1. The Civil Code of Québec

The *Civil Code of Québec* sets out rules of law applicable to all citizens. Article 7 of the *Civil Code of Québec* specifies:

> **7.** 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.

The holder of a right is required to exercise it reasonably. It is not necessary to establish ill-will in order to be liable.[36] An impulsive, irresponsible, harmful and unreasonable act may be punished by the courts on the basis of such a provision. In a contractual context, this notion has been clearly applied in employment relations. The employer's "malice" need not be proved to determine the existence of abuse of a right.[37]

In the majority of cases pertaining to labour relations, the abusive exercise of a right referred to in this section is interpreted where a breakdown of the employment relationship has occurred. However, many abrupt terminations of employment represent an extension of the abusive, excessive or unreasonable exercise of the employer's authority.[38]

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33. R.S.Q., c. S-2.1.
34. R.S.Q., c. C-12.
35. See in particular Robert DUPONT, *La violence au travail*, speech given as part of a one-day conference on the theme of *Violence in the Workplace. Towards Zero Tolerance*, Insight Information Inc., Insight Press, Toronto, April 16, 1996, pp. 239-261.
36. *Houle* v. *Canadian National Bank*, [1990] 3 S.C.R. 122, 151, 154.
37. *Langlois* v. *Farr Inc.*, [1988] R.J.Q. 2682 (C.A.).
38. Yves PICARD, Charles BROCHU, *Droits et libertés de la personne en milieu de travail*, CCH (looseleaf), para. 33-540.

An employer unilaterally changing the working conditions of its employee[39] or forcing him to accept a lower-level position is abusing his right and defaulting upon its duty to act fairly.[40] Its authority does not extend to uttering unwarranted vexatious comments, to swearing at the employee or to exhibiting a spiteful attitude towards him, which, in the end, forces the latter to resign.[41] In the same vein, an employer taking excessive disciplinary action in light of the wrongdoing is abusing its rights.[42]

In many cases, the circumstances described by the courts show that there is damage to the employee's dignity well before termination of the employment relation. These cases undeniably represent a form of harassment to be frowned on.[43]

Management rights of the employer are not absolute. They must be exercised reasonably, which necessarily implies respect for the employee's dignity.

Incidentally, the *Civil Code of Québec* provides as follows in article 2087 thereof:

> **2087.** 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.* (Emphasis added).

The contract of employment requires the employer to maintain the working conditions laid out at the time of hiring and to provide the appropriate conditions to guarantee their execution. This obligation implies specifically that it must take the necessary measures in order to eliminate factors that trigger tension between employees in the corporation.[44]

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39. *Farber* v. *Royal Trust Co.*, [1997] 1 S.C.R. 846.
40. *Bédard* v. *Capital (Le maître courtier inc.)*, J.E. 94-1198 (C.S.), D.T.E. 94T-814 (C.S.). Out-of-court settlement, C.A., nº 500-09-000810-945, 1998-02-18.
41. *Drolet* v. *Charron,* [2003] R.J.Q. 2947 (C.S.). Appeal filed, C.A., nº 500-09-013888-037, 2003-01-28.
42. *Labarre* v. *Spiro Méga inc*., J.E. 2002-1275 (C.S.), D.T.E. 2001T-640 (C.S.). Appeal filed, C.A., nº 500-09-011223-013, 2001-07-16. Appeal dismissed on 2003-10-02. (Note that, in this case, the employee was also a minority shareholder of the company).
43. Y. PICARD, C. BROCHU, *op. cit.*, note 38, p. 31,006.
44. *Roy* v. *Caisse populaire de Thetford Mines*, [1991] R.J.Q. 2693 (C.S.), p. 2701.

An employee observing a default of his employer in this respect and who, as a result, suffers harm, can sue the latter for damages.[45]

He must, in this respect, be represented by an attorney or act on his own behalf before the common law courts. Since the cost of such representation would be borne by him or her personally, he or she will be called upon to assess and decide if the remedy sought warrants the significant expense connected with the exercise of his or her rights. The new provisions provided for in the L.S.A. therefore allow for enforcement of such right by way of a procedure which bypasses such inhibiting factors.

Through article 2087 of the C.C.Q., it nevertheless remains that the courts have long recognized that the employer is required to provide a healthy environment which implies a work environment free of psychological violence, free of harassment. The employer must treat the employee with respect and take the appropriate measures to protect his dignity.[46]

As pointed out by Madam Justice Rivet,[47] this duty of protection under article 2087 of the C.C.Q. achieves the same end result as that reached through a combination of sections 4, 10 and 16 of the *Charter of Human Rights and Freedoms*[48] (Quebec Charter), which we will examine.

2. The Charter of Human Rights and Freedoms

Among the legislative provisions that provide for a protection with respect to harassment, the Charter is, we believe, undervalued, despite the fact that it represents an awesome weapon to thwart harassment, specifically through the operation of section 52 of this Act. This section reads as follows:

> No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.[49]

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45. *Ibid*.
46. *Lavallière* v. *Tricot Richelieu,* D.T.E. 97T-1596 (C.S.); *C.D.P.D.J.* v. *140998 Canada inc.*, J.E. 2002-1901 (T.D.P.Q.), D.T.E. 2002T-991 (T.D.P.Q.).
47. *Ibid*.
48. *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.
49. *Ibid.*, sec. 52.

This provision therefore gives the Charter precedence over any other rule of law which confers upon it "quasi-constitutional" status.[50]

In addition, it confers broad protection against any injury to the person's integrity and dignity, at any time and not only in the specific cases of discrimination set out in section 10 of the Charter. Finally, the Quebec Charter implements specific avenues of redress for the victim that may be advantageous in certain cases.[51]

Section 1 of the Charter sets out as follows:

> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.

Section 4 provides:

> **4.** Every person has a right to the safeguard of his dignity, honour and reputation.

Case law has clearly established that these general safeguards, which apply in the workplace, are not restricted to the specific situations set out in section 10.1 of this same Charter.[52]

The right of an employee to the safeguard of his or her dignity implies a duty on the part of the corporation to provide a work environment free of any form of harassment. The Court of Appeal has confirmed that the injury to the right to dignity, may, by itself, give rise to the liability of the perpetrators in the workplace.[53]

In the case of *West-Island Teachers' Association,* it confirmed a union incurred liability when it ostracized and harassed certain dissident members.[54] The Court of Appeal has recently confirmed that

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50. *Béliveau St-Jacques* v. *Fédération des employées et employés du service public inc.*, [1996] 2 S.C.R. 345; *Québec (C.D.P.D.J.)* v. *Montréal (City)*, [2000] 1 S.C.R. 665.
51. Christian BRUNELLE, "La protection quasi constitutionnelle contre le harcèlement", in Service de la formation permanente du Barreau du Québec, *Développements récents en droit du travail*, Vol. 134, Cowansville, Éditions Yvon Blais, 2000.
52. Y. PICARD and C. BROCHU, *op. cit.*, note 38, p. 10,953.
53. *West-Island Teachers' Association* v. *Nantel*, [1988] R.J.Q. 1569 (C.A.).
54. *Op. cit.*, note 53, p. 1573; *Dufour* v. *Syndicat des employées et employés du Centre d'accueil Pierre St-Joseph Triest (C.S.N.)*, [1999] R.J.Q. 2674 (C.S.); *Blanchet* v. *Corneau,* [1985] C.S. 299.

common law courts have jurisdiction to hear such a dispute since it is impossible for employees who are victims of harassment to obtain relief by way of grievance.[55] For these reasons, this decision makes sense although it runs counter to the teachings of the Supreme Court in this matter.[56] It will be interesting to follow the judicial ponderings on this topic because, since January 2004, the L.R.C. can take action with respect to any failure to discharge an obligation set out in section 47.2 of the *Labour Code* which includes any form of discrimination.[57] The increased scope of such a section in combination with the new standards provided for in the L.S.A. will, we believe, result in the arbitrator now having full jurisdiction in the matter.

With respect to legal proceedings for damages before the common law courts, several decisions confirm the application of such a protection in employment situations in the event of a wrongful dismissal[58] or the forced retirement of an employee.[59]

An arbitrary and unwarranted suspension may also affect the employee's dignity.[60] In certain cases, a suspension, even where justified in order to protect the corporation's interests, may affect the employee's dignity.[61]

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55. *Shermag Inc*. v. *Beaulieu*, D.T.E. 2003T-249 (C.A.).
56. *Weber* v. *Ontario Hydro*, [1991] 2 S.C.R. 929; *New-Brunswick* v. *O'Leary*, [1995] 2 S.C.R. 967; *Parry Sound (District), Social Services Administration Board* v. *O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157; *Isidore Garon Ltée* v. *Tremblay,* C.A., nº 500-09-003505-010, December 9, 2003; *Syndicat national des employés de garage du Québec inc. (C.S.D.)* v. *Filion et frères (1976) inc.*, C.A., nº 200-09-003550-016, December 9, 2003.
57. Section 47.2 of the *Labour Code,* R.S.Q., c. C-27 provides as follows: "A certified association shall not act in bad faith or in an arbitrary or discriminatory manner or show serious negligence in respect of employees comprised in a bargaining unit represented by it, whether or not they are members." Prior to January 2004, the remedy of the employee, in respect of such duties, was restricted to a dismissal and disciplinary action (s. 47.3). Now, such remedies may be exercised within the same time limits (s. 116, par. 2 *Labour Code*) pursuant to the new powers conferred upon the L.R.C. s. 119 *Labour Code*). See Fernand MORIN, Jean-Yves BRIÈRE, *Le droit de l'emploi au Québec,* 2e édition, Montréal, Wilson & Lafleur, 2003, 1636 pages, p. 1325; Robert P. GAGNON, *Le droit du travail du Québec,* 5e édition, Cowansville, Éditions Yvon Blais, 2003, 809 pages, p. 368.
58. *Wilkinson* v. *Commission scolaire Baldwin-Cartier*, [1994] R.J.Q. 2020 (C.S.); *Ugolee* v. *Hôpital neurologique de Montréal*, J.E. 2001-1276, REJB 2001-25142 (C.Q.).
59. *Lehouillier* v. *Assurathèque Bernier, Garon, Lemay et ass*., [2001] R.J.D.T. 658, J.E. 2001-933, REJB 2001-23887 (C.S.).
60. *Tremblay* v. *Anjou (Ville d')*, [1991] R.J.Q. 1989 (C.S.).
61. *Cabiabman* v. *Industrielle Alliance*, [2000] R.D.J.T. 504 (C.S.), aff'd by REJB 2002-38202 (C.A.); application for leave to appeal granted by the Supreme Court of Canada on 28-08-03, No. 29584.

In addition, due to its underlying objectives, the Charter provides for an outright prohibition of harassment towards a group or a class of protected persons.

Section 10.1 states as follows:

> **10.1** No one may harass a person on the basis of any ground mentioned in section 10.

The protected grounds set out in section 10 are the following:

- race
- colour
- sex
- pregnancy
- sexual orientation
- civil status
- age
- religion
- political convictions
- language
- ethnic or national origin
- social condition
- handicap

In point of fact, this section is the extension of the general prohibition set out in section 4 of the Charter.[62]

The Quebec legislator thus prohibits harassment on the basis of one of the prohibited grounds of discrimination set out in the Charter. The notion of harassment, within the meaning of section 10.1 of the Quebec Charter, when applied in the workplace, essentially amounts to an expression of the right to equality mentioned in section 16 which prohibits the discrimination with respect to employment.

Discrimination will result from a distinction, an exclusion or a preference based on one of the grounds mentioned above. Despite the generality of section 4 and the case law's acknowledgement that such

62. C. BRUNELLE, *op. cit.*, note 51, p. 180.

a protection implies a prohibition of harassment in the workplace, one notes that today the majority of remedies sought for harassment that are being exercised before the *Tribunal des droits de la personne* (Human Rights Tribunal) are restricted to discrimination issues only.

Under section 10.1 of the Charter, the person will necessarily be required to demonstrate that the harassment he or she was subjected to can be related to one of the grounds of discrimination prohibited outright by section 10.

Upon receipt of a complaint,[63] the *Commission des droits de la personne* will conduct an inquiry and, if it concludes that discrimination took place, it will request the appropriate redress.[64] If unable to obtain such redress, it may then refer the matter to the Human Rights Tribunal which will issue the appropriate order, which will become effective upon confirmation of the Superior Court.[65]

Upon reading the published cases involving harassment, one notes that a large number of the disputes heard by the courts deal with an employment situation. For example, a female employee working in an environment that usually employs men, and who was ostracized by her male colleagues, was granted the right to exercise the remedy provided for in section 10.1 of the Charter.[66] A supervisor victimized by false allegations made by his employees to the effect that he was homosexual suffered a type of harassment in the workplace within the meaning of this section.[67] Abusive instructions from an employer forcing waitresses in a restaurant to wear degrading clothes or clothing which serves the purpose of emphasizing their sexual attributes may constitute a form of harassment in the workplace.[68] Employees using language laced with racial connotations

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63. Section 74 of the Charter reads: "Every complaint must be made in writing. A complaint may be filed on behalf of a victim or group of victims by any organization dedicated to the defence of human rights and freedoms or to the welfare of a group of persons. The written consent of the victim or victims is required except in the case of exploitation of aged persons or handicapped persons..."
64. The Charter provides for the possibility of an agreement by way of mediation (sec. 79).
65. Sec. 50 and 130 of the Charter.
66. *Commission des droits de la personne et des droits de la jeunesse* v. *Procureur général du Québec*, [1998] R.J.Q. 3397.
67. *Darke* v. *Moullas*, [1999] R.R.A. 527, J.E. 99-1338, REJB 1999-13436 (C.S.). Appeal filed, C.A., nº 500-09-008011-991, 1999-04-23.
68. *Commission des droits de la personne et des droits de la jeunesse* v. *2632 Québec inc.*, J.E. 97-1517 (T.D.P.). See also within the framework of the L.S.A.: *Kirk-*

with respect to a colleague, thereby isolating him gradually, and avoiding him are guilty of harassment.[69] The supervisor who uses his authority to make advances or who utters embarrassing comments of a sexual nature to a female employee perpetrates a type of harassment. The latter is authorized to exercise this remedy provided for in the Charter.[70]

It is mainly pursuant to the remedy under section 10.1 of the Charter that the Court of Appeal of Quebec has interpreted the notion of harassment in the workplace.[71] Case law is replete with reflections on this issue. Drawing inspiration from the comments of the Supreme Court, the Court of Appeal therefore determined certain objective assessment criteria enabling an establishment of application guidelines, which will be analyzed more in-depth when we shall address the new applicable Quebec standards.

However, the weakness inherent in such a remedy is, according to us, twofold. On the one hand, in light of the current state of the case law and the remedies already being exercised, it implies adducing evidence, in addition to that relating to the existence of harassment, that the employee in question falls within the parameters of grounds protected by section 10 of the Charter. On the other hand, one notes that, in matters of employment, the processing and hearing of cases takes an excessively long time, which implies the exercise of other parallel remedies in many cases. A situation of multiple remedies therefore arises causing the intervention of numerous different forums with a more remedial than preventive approach: the common law court, the Human Rights Tribunal (H.R.T.), the L.R.C. and potentially the C.S.S.T. or the C.L.P. *(Commission des lésions professionnelles).*

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ham and *Bill Edward's Cheers, Cheers Management (Pointe-Claire) Inc.*, [2002] R.J.D.T. 314, D.T.E. 2002T-3030 (C.t.), judicial review partially settled out-of-court, C.S., nº 500-05-070916-026, 2002-12-09.

69. *Québec (Commission des droits de la personne et des droits de la jeunesse)* v. *Provigo Distribution inc., division Maxi,* D.T.E. 2002T-1041 (T.P.D.Q.).

70. *Habachi* v. *Commission des droits de la personne,* [1999] R.J.Q. 2522 (C.A.); *Dhawan* v. *Commission des droits de la personne et des droits de la jeunesse*, D.T.E 2000T-633 (C.A.), aff'd D.T.E. 96T-285 (T.P.D.Q.); *Commission des droits de la personne du Québec* v. *Lemay*, [1995] R.J.Q. 1967 (T.D.P.Q.); *Commission des droits de la personne* v. *Marotte*, [1993] R.J.Q. 203 (T.D.P.Q.); *Halkett* v. *Ascofigex inc.*, [1986] R.J.Q. 2697 (C.S.); *Commission des droits de la personne* v. *Latreille*, QCTDP 1994 (T.D.P.Q.).

71. *Habachi* v. *Commission des droits de la personne*, *supra*, note 70; *Dhawan* v. *Commission des droits de la personne et des droits de la jeunesse*, *supra*, note 70.

Of course, it is impossible to avoid the involvement in all cases of more than one forum in light of the respective jurisdictions and the remedies sought.[72] However, a healthy administration of justice requires the application of a certain element of parsimony in this respect since the evidence in respect of certain facts is, in many cases, applicable to one or more of the jurisdictions. We will see later, that, already, when it comes to arbitration, case law has been considering for quite some time the notion of harassment in the workplace and the appropriate remedies.

3. Collective Agreements

Remedies with respect to harassment pursuant to section 10.1 of the Charter have unquestionably generated a high volume of case law, and the same can be said of arbitration boards. Indeed, arbitrators have for many years now been aware of the causes and consequences of harassment in the workplace.

First, case law has recognized, for many years, that the arbitrator, within the scope of a collective agreement, has jurisdiction to make a determination as to a grievance involving harassment.[73] He will intervene either in the form of a contested disciplinary action in connection with the attitude of an employee which is said to be "harassing"[74], or by way of a grievance filed by an employee claiming to have been subjected to harassment.

Hence, in analyzing grievances alleging either obstruction to "the establishment of harmonious relations between the parties", to "good relations" or to "the well-being of the employees" provided for in the collective agreement, arbitral awards have developed several different definitions of the notion of harassment.[75]

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72. Hence, the relief sought pursuant to *An Act respecting industrial accidents and occupational diseases* is not the same as that arising from a recourse for harassment pursuant to the L.S.A.
73. Francine LAMY, "Définir le harcèlement et la violence psychologique en milieu syndiqué: les hésitations des uns, les difficultés des autres", in Service de la formation permanente du Barreau du Québec, *Développements récents en droit du travail*, Vol. 190, Cowansville, Éditions Yvon Blais, 2003, p. 179-227, p. 188; *Béliveau St-Jacques* v. *F.E.E.S.P.*, [1996] 2 S.C.R. 345; with respect to the scope of jurisdiction of the arbitrator regarding a dispute in a unionized setting, see *Weber* v. *Ontario Hydro*, *supra*, note 56; *New-Brunswick* v. *O'Leary*, *supra*, note 56; *Parry Sound (District), Social Services Administration Board* v. *O.P.S.E.U., Local 324*, *supra*, note 56.
74. By way of illustration, *Association des cadres intermédiaires des affaires sociales* v. *Centre hospitalier de M...*, [1992] T.A. 865.
75. F. LAMY, *op. cit.*, note 73, p. 189.

Long before this notion became fashionable, the arbitration board, in the case of *Syndicat des professeurs de l'Université Laval (S.P.U.L.)* v. *Université Laval*, was called upon to adjudicate a grievance claiming that the complainant was subjected to harassment. The grievance was based on the exclusion of the employee from the faculty's board, the cancellation of some of the conferences he was to give without his consent or giving him notice, the disconnection of his telephone, the censorship of his articles in the paper of the faculty, the prohibition of access to certain secretarial services, etc.

Drawing inspiration from sections 10 and 10.1 of the Charter as well as the provision of the collective agreement which created safeguards against harassment in the workplace, the arbitrator Jean Gauvin gave a broad interpretation of the term "harassment". He specified that, in many cases, such behaviour was exhibited in an insidious manner, without one necessarily being able to establish the existence of an illegal act in itself:

> [TRANSLATION] It is not necessary that action taken in respect of a person be illegal, prohibited or unreasonable for it to amount to an injury to feelings or an attack that could potentially take on the trappings of harassment. Indeed, displaying overzealousness towards a person, being less tolerant or hostile towards such person in deed or through comments or simply ignoring such person totally may very well represent for that person a form of injury to feelings or a subtle attack without, in and of itself, when considered in isolation, amounting to an illegal, prohibited and unreasonable act. Such action is therefore not to be analyzed in isolation, but rather in its entirety, taking into consideration the context in which such action was taken, the time at which it occurred and the common ground which may have prompted such action to be taken.[76]

Arbitration boards do not hesitate to confirm that harassment in and of itself represents a form of violence which is just as objectionable as physical violence.

Based on these same criteria, which ultimately always tie into the respect and dignity of the employee, a supervisor who uses abusive language towards his employee, who offends him with abusive

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76. D.T.E. 89T-490 (T.A.), pp. 44 and 45. Note that the collective agreement specifically provided for protection in cases of harassment (p. 41).

comments, blasphemous words and conducts himself in a vulgar fashion causes his employer to incur liability.[77] The supervisor may also face an order forcing him to cease such behaviour.[78]

Harassment is often insidious in that the deviant acts, attitudes or behaviour are perpetrated over an extended period of time, which explains the hesitation of the victim to promptly report the situation. In the case of *Hippodrome de Montréal* v. *Syndicat des employés des services d'entretien de l'Hippodrome de Montréal*,[79] the arbitrator added in this respect:

> [TRANSLATION] Time is of the essence in matters of harassment: it is misconduct which extends over time. Harassment is the end result of a certain number of actions which are more or less serious and have a repeated and persistent nature. The first actions may appear innocuous or insignificant. It is the accumulation of occurrences, in retrospect, which brings out their true significance. Evidence of harassment does not fit well in the narrow confines of too short a time period. The occurrences amounting to harassment are part and parcel of the same event and it is sufficient, in principle, that material events occur within the agreed-upon time period for evidence of the entire reprehensible behaviour of the harasser to be adduced. However, no great amount of time should have elapsed between each occurrence and the reporting thereof: it must be possible to establish a reasonable nexus with the most recent events which have allowed the portrait of harassment to surface. Each case must be assessed by the court, according to the circumstances. In the case at hand, the words "I could have squashed you" have a sufficient nexus in terms of continuity with the prior threat "I will have your head on a platter" and the subsequent threat to reveal his dishonesty, for the entire body of evidence to be admissible.[80]

Taking a much more global approach, in a grievance opposing a dismissal, the arbitrator defined this notion of violence in the workplace in the case of *Syndicat de la fonction publique du Québec* v. *Gouvernement du Québec (Ministère du Revenu)*[81] as follows:

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77. *Municipalité de S...* v. *Syndicat canadien de la fonction publique,* [1996] T.A. 881.
78. *Ibid*., p. 889.
79. D.T.E. 2003T-133 (T.A.), p. 11.
80. *Ibid*., p. 11.
81. D.T.E. 2003T-366 (T.A.).

> [TRANSLATION] [88] Violence implies notions of brutality, duress, intimidation, use of force with a view to bringing about submission. In fact, it finds its expression in unwanted words and actions and it is intended to subject a person to the will of another against his or her wishes; the result is obvious: there is, in such circumstances, damage to physical or psychological integrity.[82]

In this case, the employee alleged that she had refused to work because of the difficult climate prevailing due to work overload. Relying specifically on article 2087 of the C.C.Q., the Tribunal clarified the notion of institutional harassment as being:

> [TRANSLATION] [...] a question of intent and means chosen to achieve it. Hence, one could no doubt state that a person in a position of authority has perpetrated institutional harassment if such person resorts to insinuation, innuendo, intimidation or threats solely in order to dominate or control. Such would also be the case if such person continually harped upon the weaknesses of a subordinate for the sole purpose of humiliating or demeaning that person.[83]

He ruled in the case at hand that the complainant had not shown the presence of harassment in the workplace. It appears that the work she was requested to perform by her supervisor was in keeping with the duties she was required to perform. The dismissal was confirmed.[84]

The safeguards against harassment do not, however, do away with the management rights of the employer which, among others, involve the application of appropriate disciplinary action.[85] The supervisor's intervention in order to monitor the employee's duties, legitimate criticism leveled by the employer in the event of inadequate performance of duties, following up on, and exercising tight

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82. *Ibid*., p. 17.
83. *Supra*, note 81, p. 11; with respect to the definition of harassment, see also *Syndicat des employées et employés de la Commission des droits de la personne* and *Commission des droits de la personne,* D.T.E. 94T-1166 (T.A.).
84. *Supra*, note 81, p. 25.
85. *Syndicat canadien de la fonction publique, section locale 2929* and *Société immobilière du Québec (SIQ),* [2001] R.J.D.T. 1570 (T.A.). Application for judicial review granted, D.T.E. 2001T-1035 (C.S.), on other grounds; *Syndicat des employées et employés de la Commission des droits de la personne* and *Commission des droits de la personne*, *supra*, note 83.

control over, the work of an employee who displays an unsatisfactory work performance do not, of course, amount to harassment.[86] Furthermore, the employee who falsely accuses his supervisor of psychological harassment is liable to be meted out severe punishment.[87]

Should the employer become aware of deviant behaviour that may amount to harassment, it must intervene quickly,[88] failing which, it will have to bear the liability and the consequences of such behaviour. In the case of *Fédération des infirmières et infirmiers du Québec* et *Hôpital Victoria*,[89] the arbitrator pointed out that it is not sufficient to exercise diligence after the fact, although this may help the employer to mitigate the damages claimed. The employer must also prevent such actions:

> [TRANSLATION] [...] in order to escape liability with respect to the duties incumbent upon it, an employer must have demonstrated all reasonable diligence to prevent the perpetration of such acts. However, the hospital reacted after the fact and had no policy in place to prevent the perpetration of such acts. The employer exhibited the required diligence after the fact in order to minimize or reverse the effect of the act or the omission. *However the other criterion had not been met.* [...][90] (Emphasis added)

Finally, note that, in the case of *Fédération des infirmières et infirmiers du Québec (F.I.I.Q.)* v. *C.H.U.Q./Pavillon Hôtel-Dieu de Québec*,[91] the Tribunal was called to interpret section 938 of *An Act respecting industrial accidents and occupational diseases*.[92] The employer was claiming that the arbitrator did not have jurisdiction to award damages, considering that such damages stemmed from an employment injury within the meaning of said Act.

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86. *Syndicat canadien de la fonction publique, section locale 2929* and *Société immobilière du Québec (S.I.Q.)*, *supra*, note 85, p. 1601.
87. *Syndicat canadien de la fonction publique, section locale 2929* and *Société immobilière du Québec (S.I.Q.)*, *supra*, note 85, p. 1601 (in this case, the Superior Court ultimately upheld the dismissal of the employee which was warranted in particular by these false allegations).
88. *Orica Canada Inc.* v. *Syndicat des travailleurs et travailleuses d'Orica (C.S.N.)*, D.T.E. 2003T-1031 (T.A.); *Provigo Distribution Inc. (Maxi Les Saules)* and *Union internationale des travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 503*, D.T.E. 98T-643 (T.A.).
89. [1993] T.A. 983, D.T.E. 93T-1292 (T.A.). Motion for evocation denied, C.S., nº 500-05-012987, 1993-11-30.
90. *Ibid*., p. 1014.
91. [2003] R.J.D.T. 387 (T.A.), D.T.E. 2003T-64 (T.A.).
92. R.S.Q., c. A-3.001.

The arbitrator stated the following on the basis of *An Act respecting industrial accidents and occupational diseases*:

> [TRANSLATION] [...] in light of the definition which the Act gives to the latter notion, it has been recognized that "the combination of certain events occurring as a result or during the performance of work which, taken in isolation, appear to be innocuous, may, nevertheless, when combined, become significant and thus exhibit the unforeseen and sudden features required by the Act for the event to represent an industrial accident. It has also been decided, based on this statement of principle, that harassment, and even the mere expression of verbal reprimands, would amount to the definition of the expression "sudden and unforeseen event" used in the statute. Consequently, there are grounds for a determination that harassment perpetrated in the workplace may give rise to an employment injury if it appears that it is the result of an injury or a disease, which has led the competent authorities ultimately to specify that this notion of disease requires that its existence be certified by way of diagnosis and that it be established that it truly results from an industrial accident.[93]

He concluded that, for such a section to be applied, the employer would have had to demonstrate the disability by way of a specific diagnosis identifying a disease, failing which, he could only conclude that the employee had not shown any physical or psychological condition.

Overall, one notes that a significant number of arbitral awards, in order to determine whether or not harassment exists, seem to require evidence of intent to perpetrate the harmful conduct[94] despite the fact that the Court of Appeal has long recognized that malicious intent is not necessary to establish abuse of a right.[95]

Francine Lamy, Attorney-at-Law, proposes, as do several authors, an approach which analyzes each case by considering the assessment criteria: the subjective-objective model of the reasonable victim.[96]

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93. *Ibid*., p. 25.
94. F. LAMY, *op. cit.*, note 73, p. 202 to 210.
95. *Houle* v. *Canadian National Bank*, *supra*, note 36.
96. F. LAMY, *op. cit.*, note 73, p. 210.

4. Occupational Health and Safety Legislation

An *Act respecting occupational health and safety*[97] provides in section 9 thereof that the employee has a right to working conditions that have proper regard to his health, safety and physical well-being. As for the employer, he must take the appropriate measures to protect this right.[98]

If the employee has reasonable grounds to believe that the performance of his work will expose him to danger to his mental health, he has the right to refuse to perform that work as provided for in section 12 of *An Act respecting occupational health and safety*. If he has developed psychological health problems that render him incapable of continuing to work due to a psychological harassment situation at work which should be considered as an industrial accident, he can apply to the Occupational Health and Safety Board (C.S.S.T.). to grant him an income replacement indemnity.

The remedy available to the employee who claims that his health, security or physical integrity has been injured is provided for in *An Act respecting industrial accidents and occupational diseases*.[99]

Pursuant to *An Act respecting industrial accidents and occupational diseases*,[100] persons who file such an application must demonstrate a nexus between a psychological injury and the psychological harassment situation found to be an industrial accident. However, psychological harassment in the workplace only represents one of the causes which bring about a psychological injury.

In the vast majority of reported decisions on harassment, the decisions of the C.L.P. and the B.R.P. (*Bureau de révision paritaire*) deal with the abusive exercise of the employer's authority.[101] In these cases, it is alleged that the impugned employer has exercised its

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97. R.S.Q., c. S-2.1.
98. Sec. 51 *An Act respecting occupational health and safety*.
99. *Supra*, note 92.
100. *Supra*, note 92.
101. Solange PRONOVOST, "La violence psychologique au travail à l'aube du régime d'indemnisation des lésions professionnelles", in Service de la formation permanente du Barreau du Québec, *Développements récents en droit de la santé et de la sécurité au travail*, Vol. 123, Cowansville, Éditions Yvon Blais, 2003, p. 123.

management right in an abusive and unreasonable manner, which is demeaning to the victimized worker.[102]

In light of the decisions of the C.L.P., harassment during employment will amount to an employment injury provided three essential conditions are met. First, an employee must show that he is confronted with a combination of events which, when considered in an isolated manner, may appear innocuous or even trivial, but which represent an objectively significant whole, akin to an industrial accident. Further, a health professional must have made a diagnosis of situational stress, anxiety combined with depression or any other similar disease amounting to an injury. Finally, the employee must establish a direct causal link between the events which occurred in the workplace and the injury to his health.

The Act does not define what constitutes harassment in the workplace and an injury associated with such harassment. Decision-makers must demonstrate a certain amount of creativity with respect to the antiquated definitions of the Act.

Section 2 of the Act defines what amounts to an *employment injury* and an *industrial accident:*

> "employment injury"; means an injury or a disease arising out of or in the course of an industrial accident, or an occupational disease, including a recurrence, relapse or aggravation;
>
> "industrial accident"; means 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;

Slowly, case law has begun to interpret an employment injury caused by harassment as the combination of events that may exhibit the "sudden and unforeseen" characteristics required by this section.[103]

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102. See, for instance, *Anglade* and *Communauté urbaine de Montréal*, D.T.E. 88T-730 (C.A.L.P.); *Blagoeva* and *Commission de contrôle de l'énergie atomique*, [1992] C.A.L.P. 898, D.T.E. 92T-875. Motion for evocation denied, C.S., nº 500-05-012138-929, 1993-01-07, D.T.E. 93T-224. Appeal withdrawn, C.A., nº 500-09-000179-937, 1995-04-10.

103. For a more in-depth study of the notion of psychological harassment in cases of workplace health and safety, see Luc CÔTÉ, Robert L. RIVEST, "Harcèlement:

All the questions which decision-makers may have pertaining to this issue are tied to the identification of an industrial accident or an employment injury.[104]

In the case of *Fouché*,[105] the following clarification is given:

> [TRANSLATION] [...] as for the eligibility of a psychological injury, cases of harassment in the workplace, whether or not they are acknowledged to be employment injuries pursuant to case law, are analyzed as industrial accidents and not as occupational diseases. Indeed, case law recognizes that each of the events, taken in isolation and apparently innocuous in nature, may, when combined, and if repeated over a more or less lengthy period of time, become problematic and result in the fact that the combination of these events exhibits the unforeseen and sudden nature required by the Act.[106]

The employee will be required to obtain a diagnosis certifying his injury. The employer will be entitled to have the employee assessed by a physician of his choosing. It will also be entitled to challenge the medical assessment made by the physician of the employee.

Finally, the C.S.S.T. may also ask the employee to undergo a medical examination by a health professional designated by it.

This full range of possible examinations, in several cases, will lead to challenges on both sides and therefore contribute to a significant increase in delays. Several months to several years may elapse before a final decision is rendered once a file is medicalized.

In addition, this remedy has its limits, since it will only be applicable once the employee has been able to demonstrate that he developed a disease as a result of the psychological harassment he was subjected to in the workplace.

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indemnisation des lésions professionnelles et nouveau recours en cas de harcèlement psychologique au travail", in Service de la formation permanente du Barreau du Québec, *Développements récents en droit de la santé et sécurité au travail*, Vol. 201, Cowansville, Éditions Yvon Blais, 2003, pp. 221 to 252.

104. S. PRONOVOST, *op. cit.*, note 101.

105. *Fouché* and *Établissement de détention du Québec*, C.L.P., nº 103573, February 17, 1999, D. Taillon.

106. *Ibid*.

The absence of a clear definition and guidelines make the determination of a psychological harassment case very complex. The same applies to the recognition of an employment injury in psychological harassment cases. This is a delicate balancing act due to the particular necessity to establish a link between the psychological harassment situation and the diagnosis. Currently, the diagnosis of the attending physician may be challenged by the opinion of the physician representing the C.S.S.T. or by the insurance company physician.[107]

Some decisions have also recognized that, in certain cases, harassment amounting to an employment injury may originate from co-workers.[108]

Employment injury in matters of harassment has also been recognized during confrontations with clients.[109] In the latter cases, the nuisance must be outside the parameters of the normal working conditions in the applicable environments.[110]

At the "trial" level, pursuant to surveys that have been conducted, the C.S.S.T., it seems, barely recognizes more than 1% of the cases submitted as an employment injury, and only upon termination of the appeal process (before the C.L.P.) does this percentage climb to more than 30%.[111]

This is certainly not a remedy available to all. On one hand, cases of harassment are not guaranteed protection under *An Act respecting industrial accidents and occupational diseases*. On the other hand, the worker is not entitled to free support in terms of representation[112] and is confronted with a plethora of medical experts that are dissecting his file.

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107. *Rapport du comité interministériel*, *op. cit.*, note 26, p. 65.
108. *Pursey Krauch* and *Canadien Pacifique*, [1996] C.A.L.P. 281; *P....* et *Ville de .....*, [1990] C.A.L.P. 677.
109. *Bouchard et al.* and *C.S.S.T.*, [1982] C.A.L.P. 701; *Lynch* et *Ministère du Solliciteur général du Canada*, [1987] C.A.L.P. 590.
110. *Services correctionnels du Canada* and *L. (B.),* [1993] B.R.P. 369, *op. cit.*, as well as the decision in *Mercier* and *Services correctionnels du Canada*, C.A.L.P., nos 05083-61-8712 and 05653-61-8712 (17-04-91).
111. S. PRONOVOST, *op. cit.*, note 101, p. 123.
112. The Charter in section 10.1 provides for such a possibility; the L.S.A. also provides a representation service for the employee in the event of complaints regarding prohibited practices and complaints for dismissal without just and sufficient cause.

5. The Labour Standards Act

A non-unionized employee credited with 2 years of uninterrupted service with his employer is entitled to exercise the recourse against a dismissal not made for a good and sufficient cause.[113]

In the event of harassment, he can cease to work and file a complaint alleging constructive dismissal. He can also file a complaint while continuing to work by alleging that his working conditions have changed so drastically as to amount to constructive dismissal.[114]

In many cases, the analysis with respect to the existence of harassment is made after termination of the employment. The employee leaves the corporation exhausted, dejected and without any resources and then pleads that the deterioration of his working environment in fact represents a dismissal without just cause. In other words, the abuse of authority, the unpleasant remarks made by the supervisor in the presence of colleagues, his offensive gestures and a practice regarding staff management that injures his dignity amount to unacceptable harassment and a form of constructive dismissal.[115]

In the case of *Brisson* v. *Liquidation choc inc. / La différence*[116] (L.R.C., March 13, 2002), the plaintiff had worked as a manager since November 1999 for a retail store. The Operations Manager criticized her lack of organization and her ability to work. Following several written warnings, the complainant was demoted on January 18, 2001 to the position of cashier, which she refused to accept, and she resigned.

She was required to consult a psychologist and a doctor in order to recover from the events which occurred in her workplace. She claims that the employer never wanted to help her and that he did everything he could to incite her to resign. In this respect, she alleges constructive dismissal, relying on the unilateral and substantial change in her conditions of work. The L.R.C. opined as follows:

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113. Sec. 124 L.S.A.
114. *Joyal* v. *Hôpital Christ-Roi*, [1997] R.J.Q. 38 (C.A.); *Farber* v. *Royal Trust*, *supra*, note 39; Susan HEAP and Pascal LAFOREST, "Le harcèlement d'un salarié non syndiqué – y a-t-il un recours?", in *Les recours en matière de harcèlement et de violence au travail*, Barreau du Québec, December 8, 2000.
115. *Ville* v. *Entreprises Cara du Québec ltée*, Robert Levac, Commissioner, September 15, 2000, CM-9810S103.
116. *Brisson* v. *Liquidation choc inc. / La différence*, D.T.E. 2003T-347 (C.R.T.).

> [TRANSLATION] In the opinion of the Commission, the occasional tools offered to her by management could not enable useful lessons to be drawn. In each instance, the support was in response to a problem situation instead of being planned with a view to curing the flaws of a procurement system which, in all likelihood, was inadequate [...]
>
> All things being considered, the Labour Relations Commission is of the view that the employer never had any real intention of helping the claimant. The behaviour of the Operations Manager was rather more consistent with a desire to dismiss her. He was merely content to systematically remind her of her mistakes and weaknesses without providing adequate training which would have enabled her to develop and strengthen her work habits. [...]
>
> [...] For all the above grounds, the employer has not successfully demonstrated that demotion was warranted. The Commission concludes that the claimant was treated abusively and inequitably and deems that she was unjustly dismissed within the meaning of section 124 of the *Labour Standards Act*. The complaint should therefore be allowed.[117]

Finally, in the recent decision of *Ranger* v. *Clinique chiropratique St-Eustache*,[118] the L.R.C. handed down a decision where the claimant claimed to have been a victim of psychological harassment by her supervisor. The latter, thereafter, allegedly dismissed her without just and sufficient cause. The facts showed that, from the outset, their professional and personal relations had always been harmonious. However, the employer could not stand the spouse of the claimant. Hence, following an argument between the spouse and the employer, the latter expected the claimant to take his side. Upon observing that such was not the case, he started behaving angrily towards her and acting in a vexatious and abusive manner in the workplace and during business hours.

No steps were taken to protect the health and dignity of the claimant in the workplace. In addition, no official reprimand was directed to her. Upon returning from sick leave, the claimant tried in earnest to remedy the situation from a strictly professional point of

117. *Ibid*., p. 17.
118. D.T.E. 2003T-1013 (C.R.T.).

view; however, she observed that the situation had further deteriorated, to such an extent that she would be subjected to a highly humiliating treatment as a result of several degrading actions and words.

In addition, upon returning from sick leave, new instructions were in effect which also tended to demean her: zero tolerance for tardiness, compulsory attendance upon the premises until the closing of the clinic even where no clients were waiting and removal of the key to the clinic. The situation reached such proportions that the complainant decided to leave the clinic. The employer alleged that the claimant had not been subjected to constructive dismissal since her conditions of work had not been changed.

In light of these facts, the L.R.C. held that the claimant had, in fact, been constructively dismissed and had not left voluntarily.

The Commissioner, drawing inspiration from the duties arising under the Charter, pointed out the following:

> [TRANSLATION] [...] the entire evidence shows that the respondent behaved, on several occasions, in an arrogant, abrupt and spiteful manner towards the claimant. He uttered negative and even vulgar words which were directed towards her. He raised his voice and was aggressive. He became nit-picky and inflexible.[119]

> [...] the vexatious, abusive and unreasonable behaviour of the respondent brought about a nefarious work environment which affected her health and dignity. Ignoring his duty to provide conditions of work which are in keeping with the health and dignity of the claimant, the respondent impinged upon the rights of the claimant provided for in the Charter, in particular.[120]

Note, however, that, since it is essentially a remedy alleging an unlawful termination of employment, evidence of harassment once the employee has left the company is not easy to establish. In the case of *Bourgouin* v. *Alza Canada*,[121] the Commissioner stated as follows:

> [TRANSLATION] [53] In the same vein as the attorney for the claimant, I have no hesitation in positing the principle that an

119. *Ibid*., p. 21.
120. *Ibid*., p. 22.
121. D.T.E. 2003T-67 (C.R.T.).

> unacceptable and unjustified behaviour (whether it qualifies as harassment or otherwise) by an employer towards an employee, which behaviour leaves the employee with no other choice but to resign, is liable to give rise to a complaint for constructive dismissal, regardless of whether the material conditions of work have, in and of themselves, not been changed.[122]

However, the Commissioner concluded that the employee had in fact resigned and that this resignation was not tied to a form of harassment alleged by the employee. Note as well that sections 122 and following of the L.S.A. with respect to prohibited practices may also act as an indirect form of protection where the victim finds him or herself in one of the situations protected by the Act. In this respect, in the case of *Gordon* v. *Association de la communauté noire de Lasalle*,[123] it was decided that the various parallel remedies in respect of mediation before the C.S.S.T. and the L.S.C. may involuntarily be prejudicial to future remedies.

In this case, the employee had filed the complaint under section 122.2 for prohibited practices (sick leave) and also a remedy under section 32 of *An Act respecting industrial accidents and occupational diseases* as well as a claim for compensation for an employment injury. It happens not infrequently, in matters of prohibited practices with respect to sick leave, that the employee has also brought a remedy before the C.S.S.T.[124] Commissioner Cloutier, of the L.R.C., stressed that, in order to avail himself of a remedy pursuant to section 122.2 of the L.S.A., the claimant must, in particular, establish "that he was absent by reason of illness or accident" other than an industrial accident or an occupational disease. He added:

> [TRANSLATION] [...] The claimant suffered an injury, namely a sprain, while he was at work. This injury is deemed to be an employment injury in accordance with section 28 of *An Act respecting industrial accidents and occupational diseases*. However, an employment injury is a generic term which refers to either an industrial accident or an occupational disease, in accordance with section 2 of this latter Act. The absence of a

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122. *Ibid*.
123. *Gordon* v. *Association de la communauté noire de Lasalle*, D.T.E. 2002T-959 (C.T.).
124. See, for instance, the case of *Gagnon* v. *Scierie Gallichan inc*., D.T.E. 2000T-1096 (C.T.).

> claim for reimbursement of the benefits received confirms that the C.S.S.T. deemed that he was entitled to such benefits since he had suffered an industrial accident.

The Commissioner observed that the employee had withdrawn his complaint filed pursuant to section 32 of *An Act respecting industrial accidents and occupational diseases*. The employee claimed that it was at the suggestion of the conciliator-mediator of the C.S.S.T. that he had acted in this manner. The representative of the C.S.S.T., for his part, argued that, in light of the fact that he had received payment of the 14 days which had initially followed his leave from work, his file was no longer of any consequence since he could always rely on his remedy under section 122.2 of the *Labour Standards Act*.

The Commissioner reached the following conclusion:

> [TRANSLATION]
>
> [56] It is possible that the claimant may have withdrawn his complaint based on section 32 of *An Act respecting industrial accidents and occupational diseases* by mistake or on other grounds enabling him to cancel his withdrawal. It is not up to the Labour Commissioner to decide.
>
> [57] However, the withdrawal of this complaint, whether by mistake or upon grounds allowing for its cancellation or withdrawal, does not grant jurisdiction to the Labour Commissioner to hear a complaint based on section 122.2 of the *Labour Standards Act*, where the absence of the complainant was due to an industrial accident.[125]

The Commissioner therefore dismissed the employee's complaint.[126] With all due deference, we nevertheless believe that such an analysis should have gone beyond the mere taking into account of an administrative decision confirming a settlement for a very specific period of time. Hence, although compensation for an employment injury had been paid for a specific time period, this did not exclude

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125. *Ibid*., p. 5.
126. See also the case of *Usine Giant inc. v. Meas*, D.T.E. 2002T-259 (T.T.), where the tribunal conducted an interesting analysis of the two remedies under s. 32 of *An Act respecting industrial accidents and occupational diseases* and 122.2 L.S.A. respectively.

any form of compensation for a later period, which would not be necessarily based on the same jurisdiction.

Although the relief under sections 122 and 124 of the L.S.A. may, under certain circumstances, enable sanctions to be taken in matters of harassment, it is to be noted that, in most of the cases, the employment relationship no longer exists. Non-unionized employees rarely have the means to rely on such remedies as a protection during the course of their employment.

6. Observation

As the Labour Minister mentioned in his brief upon tabling Bill 143 which introduced the new provisions with respect to psychological harassment into the *Labour Standards Act*:

> [TRANSLATION] [...] employees currently have no specific remedy when they experience such a situation (*of psychological harassment*). The other remedies do not guarantee the employee an efficient protection against psychological harassment. Indeed, several remedies are often a lengthy and costly process for employees. The remedies exercised pursuant to the *Act respecting industrial accidents and occupational diseases* only allow for an intervention following an employment injury and a right to refuse to work, which is provided for in the *Act respecting occupational health and safety*, may only be exercised where health and safety are jeopardized. Finally, the remedy available pursuant to the Charter of Human Rights and Freedoms enables the Human Rights and Youth Rights Commission or the Human Rights Tribunal to intervene, but only in the event of harassment based on grounds of discrimination found in Section 10 of the Act.[127] (emphasis added)

This overview of the situation in Quebec shows that the protection of workers was scattered, piecemeal and devoid of structure, not allowing for an objective determination of what may fall within the purview of workplace harassment. At the same time, it appeared obvious that, in light of the emergence of this new reality of psychological harassment, it was necessary to act upstream in order to establish the standards requiring a preventive approach.[128] In

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127. Assemblée nationale du Québec, *Journal des débats*, 2e session, 36e législature, 19 novembre 2002, cahier no 130, p. 7599-7614 (M. Jean Rochon).
128. N. MORNEAU, *op. cit.*, note 22, p. 8.

addition, in light of the restricted accessibility of the existing forums, a specific remedy was necessary both by way of prevention and as a remedial necessity.

An overall approach was therefore necessary in order to thwart workplace harassment, which approach required the involvement of all the social stakeholders: unions, employers, governments and state agencies involved in the workplace.

Before undertaking such a legislative intervention, the government agreed to examine whether, elsewhere throughout the country or throughout the world, a similar legislative approach existed.

Chapter 3- Existing Remedies in Foreign Legislation

1. In Canada

Until the end of 2002, the analysis undertaken indicated that in Canada, in the other provinces and territories, no workplace legislation incorporated exhaustive provisions dealing with psychological harassment.

Certain statutes deal with the issue in specific circumstances. By way of illustration, on the federal level, the *Employment Insurance Act* provides that an employee has just cause for voluntarily leaving an employment or taking leave from an employment if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including sexual or other harassment.[129]

2. In Europe

Elsewhere throughout the world, without purporting to have conducted an exhaustive analysis, the legislation of France and Belgium caught our attention. These two countries, in 2002, passed specific legislation with respect to "moral" harassment. It is to be observed, however, that the approach towards such protective measures is clearly criminal in nature which explains why, in certain circumstances, the evidence with respect to the actions which may represent harassment is more stringent.

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129. *Employment Insurance Act,* S.C. 1996, c. 23.

(a) France

In France, the *Loi de modernisation sociale*[130] (Statute Respecting Social Modernization) which came into force on January 17, 2002, contains provisions enabling action to be taken against harassment. Generally speaking, in France as elsewhere in Europe, the expression used is "moral harassment"[131] rather than "psychological harassment". The provisions in respect thereof were incorporated in the *Code du travail* (Labour Code) and in the *Code pénal* (Criminal Code). Moral harassment is provided for in section L.122-49 of the *Labour Code*:

> [TRANSLATION] No employee shall be subjected to repeated acts of moral harassment the purpose or effect of which is to cause a deterioration of the working conditions likely to injure his rights and his dignity, to alter his physical or mental health or to jeopardize his professional future.

This provision only focuses on the repeated nature of harassment. The courts which have been called upon to decide upon, and to apply, this provision, have stated as follows:

> [TRANSLATION] [...] harassment is defined as the relentless subjection to incessant and repeated attacks: the continuous nature is inherent in the pressure exerted and in the very definition of this offense;[132]

The purpose or effect of the repeated actions must be to harm the employee, to injure his rights and his dignity, to alter his physical or mental health or to jeopardize his professional future.

Hence, in a case brought before the Tribunal de Grande Instance de Paris,[133] a corporate executive, in a complaint filed

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130. *Loi de modernisation sociale n° 2002-73 du 17 janvier 2002* (J.O. du 18 janvier 2002, rectificatif 13 février) amended by the *Loi 2003-6 du 3 janvier 2003, portant relance de la négociation collective en matière de licenciements économiques* (J.O. du 4 janvier 2003).
131. The author Marie-France HIRIGOYEN, in her book entitled *Le harcèlement moral – la violence perverse au quotidien*, Paris, Éd. Syrros, 1998, used this expression for the first time, thereby associating a specific term therewith in order to describe and identify a problem experienced by certain persons.
132. *Sophie-Anne Vautier* v. *Philippe Bismuth*, TGI Paris, 31e Chambre correctionnelle, October 25, 2002.
133. *Ibid*.

against the Chairman of the Board of Directors, argued that the following actions represented moral harassment:

– moving her out of her office, without prior notice, from the strategic floor where management was located to the ground floor in unfurnished premises resembling a closet space and geographically located away from the team with which she worked,

– banishment from the management committees and removal from the management organizational flow chart,

– exclusion from a certain number of meetings,

– censorship of numerous items of information with respect to the projects under her responsibility,

– constant increase in her workload and definition of goals becoming impossible to achieve, conflicting orders and requests made on the eve of the day for which they were due, and

– humiliating, vexatious and degrading behaviour on the part of the Chairman.

The Court, analyzing these difficult work conditions in their entirety, reached the conclusion that they did not have the purpose or effect of injuring the employee in particular. Indeed, the relocation of an office is a frequent occurrence, the changes in management staff as well, and the urgency of certain circumstances may be such that meetings may be organized in the absence of the employee. In addition, the Court concluded that the messages which had been alleged to be humiliating were couched in language in common use throughout the corporation.

The court is required to "[TRANSLATION] determine if, in the exercise of a professional activity, the facts which it is called upon to decide are criminally reprehensible or whether they are to be analyzed as the consequences, to which the employee may rightly or wrongly have reacted, of steps taken as a result of managerial necessity inherent in the life of any corporation developing its activity in a competitive field and which, at times, leads to a questioning of established circumstances".

In addition, the Cour d'appel de Douai,[134] in a case involving an adult educator working for an employment association, granted benefits with a view to curing the moral harassment suffered as well as the harm caused by the unlawfulness of the termination of the employment relationship. This employee had been refused access to secretarial services, use of the facsimile and telephone whereas other trainers were entitled to such access. She was required to give her training sessions in the premises used as a kitchen. She was entitled to no administrative support and no information and was excluded from the coffee breaks of the trainers. She was ultimately dismissed by her employer.

The steps taken in this case were personally directed towards this employee and could not fall within the purview of "managerial necessity inherent in the life of any corporation".

Paragraphs (2) and (3) of section L.122-49 of the *Labour Code* grant a certain degree of protection to the victim and to the witness who reported or described the actions of harassment:

> [TRANSLATION] No worker may be punished, dismissed or be subjected to discriminatory action, whether directly or indirectly, specifically with respect to compensation, training, demotion, assignment, qualification, classification, professional promotion, transfer or renewal of his contract as a result of having been subjected to, or having refused to tolerate, the conduct defined in the preceding paragraph or for having witnessed such conduct or having disclosed it.
>
> Any breach of an employment agreement as a result thereof, as well as any provision or action inconsistent therewith, shall be null and void *ab initio*.

The duty to take all action necessary in order to prevent repeated acts of moral harassment befalls the head of the corporation (Sec. L.122-51 *Labour Code*).

In this respect, the employer is justified in taking disciplinary action against the employee guilty of the repeated acts of harassment (Sec. L.122-50 *Labour Code*).

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134. *Anne-Marie Liban* v. *Association RE ACTIFS*, C.A. Douai, Chambre sociale, 31 janvier 2003.

The French legislator has also provided for the possibility, for the alleged victim as well as for the other offending party, to avail themselves of mediation, which, as the case may be, may avoid resort to the judicial process. Section L.122-54 of the *Labour Code* provides as follows:

> [TRANSLATION] A mediation process may be considered by any person within the corporation who deems that he has been a victim of moral harassment. The offending party may also resort to this process. The mediator shall be selected by way of agreement between the parties.
>
> The mediator shall enquire as to the state of relations between the parties, shall attempt conciliation and submit to them proposals in writing with a view to a cessation of the harassment.
>
> Should the conciliation fail, the mediator shall notify the parties of the possible consequences which they face and the procedural guarantee in place to protect the victim.

In the event of a resort to the courts, the plaintiff is not required to adduce evidence of the abuse, but rather "[TRANSLATION] to establish the facts whereby the existence of harassment may be deemed". The onus then falls upon the defendant "[TRANSLATION] to prove that such action did not amount to harassment and that his decision was warranted by objective criteria not involving harassment" (Sec. L.122-52 *Labour Code*).

It is interesting to note that, in France, the penalty for moral harassment is directed at the perpetrator and is a criminal offence. A specific offence of moral harassment was introduced in the *Criminal Code*, in Section 222-33-2:

> Harassing another by way of repeated acts the purpose or effect of which is to cause a deterioration of the working conditions likely to injure the person's rights and dignity, to alter his physical or mental health or to jeopardize his professional future, is punishable by a term of imprisonment of one year and a fine of 15,000 Euros.

Note as well that the victim still retains his or her right at common law to obtain relief for the damages suffered as result of the harassment of which he or she has been a victim.

(b) Belgium

On June 11, 2002, Belgium passed the *Loi relative à la protection contre la violence et le harcèlement moral ou sexuel au travail*[135] (An Act Respecting Protection Against Violence and Moral or Sexual Harassment in the Workplace). This statute amended the Act entitled *Loi du 4 août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail* (Statute of August 4, 1996 respecting the well-being of workers in the discharge of their duties) (The Well-Being Act) as well as the *Code pénal* (Criminal Code) by incorporating therein all the provisions with respect to violence and harassment.[136]

Subsection 32(3) of the Well-Being Act defines the notions of violence and moral and sexual harassment in the workplace:

> [TRANSLATION]
>
> (1) Violence in the workplace: any factual situation where a worker is persecuted, threatened or psychologically or physically attacked during the performance of his duties;
>
> (2) Moral harassment in the workplace: abusive and repeated conduct of any origin, from within or outside the business or institution, which find their expression, specifically, in behaviour, words, intimidation, actions, conduct and written comments of a unilateral nature, the purpose or effect of which is to injure the person, dignity or physical or psychological integrity of a worker in the performance of his duties, to place his employment in jeopardy or to foster an intimidating, hostile, degrading, humiliating or offensive environment;
>
> (3) Sexual harassment in the workplace: any form of verbal, non-verbal or bodily behaviour of a sexual nature, which the perpetrator thereof knows or ought to know affects the dignity of women and men in the workplace.

Belgium courts have been called upon to interpret and apply this definition of moral harassment. Hence, in a case brought before the Tribunal du Travail de Bruxelles[137] (Brussels Work Tribunal),

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135. Moniteur Belge, June 22, 2002.
136. The Act came into force on July 1, 2002.
137. *Paul Taquet* v. *Marcel Baele et al.*, Tribunal du Travail de Bruxelles, Chambre des référés, July 18, 2003.

the complainant, who worked for the Belgium National Railway Corporation, was the senior assistant stationmaster for the region of Namur, and was temporarily assigned to Brussels, having been asked to monitor compliance with the railway regulations.

He alleged that he had been victim of moral harassment due to the conduct of the persons named in the claim, namely:

– cancellation of the media review;

– denial of promotion;

– reduction of premium quotations;

– denial of travel expenses;

– reinstatement in the position of railway guard;

– incitation to panic;

– discriminatory supervisory action; and

– overwork.

In response to each of these allegations, the persons named in the complaint brought forth the following information:

– The cancellation of the media review resulted from a decision by the employer and applied to all the persons in the plaintiff's class.

– As for the denial of promotion, the line supervisors are required to assess the staff's performance taking into consideration the work system in all its facets, and the performance of the person assessed. It is legitimate not to take into account only seniority.

– The rating of the plaintiff went from 1.2 (very satisfactory) to 1.1 (satisfactory), in light of the quantity and quality of work provided. They acted in accordance with the prescribed procedure.

– Travel expenses are paid in accordance with the Belgium National Railway regulations.

– The reinstatement of the plaintiff in the role of railway guard was intended to place the plaintiff in the same position as the other employees at the same level as him. At the most, one could say that the timing of the decision was perhaps ill-conceived.

– One line supervisor of the plaintiff was attempting to communicate with another line supervisor of the plaintiff in order to enquire as to what measures had been undertaken to plug a water leak which had flooded the tracks and a platform and rendered them inaccessible and it is only by chance that he got the plaintiff on the line. There was, therefore, no incitation to panic.

– The complaint with respect to discriminatory supervisory action resulted from the fact that the plaintiff had been reminded to follow proper hierarchical channels with respect to any matter relating to the management of staff and the organization of work as well as from a reminder to all the members of the plaintiff's workgroup to be discreet with respect to decisions and information regarding a particular project.

– The plaintiff's supervisors observed that he was carrying an extra workload, asked him to cease performing certain tasks and took some steps to remove some of his workload. The plaintiff acknowledged that he was poorly organized in his work and was exceedingly slow when it took him four days to draw up the reports for the three meetings held during the month.

The court noted that "moral harassment" "is much more than stress"; it involves a "flagrant and humiliating denial of communication", "mean-spirited criticism", "hurtful words and attitudes", and "intent to harm", "perverse processes".[138]

By way of conclusion, the Court stated as follows:

> [TRANSLATION] From all the previous elements considered, it appears that, if there was, as the prevention consultants mentioned, a lack of communication between the parties, a problem to which the claimant also partly contributed, the claimant did not, *prima facie*, establish the facts enabling one to deem a situation of moral harassment in the workplace clearly to exist, which harassment is of an extreme seriousness, that is to say

138. *Ibid*.; J. Ph. CORDIER, in J.T.T., p. 383.

> abusive, serious and repeated conduct having the purpose or the effect of injuring his person, his dignity or his physical or psychological integrity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment [...]
>
> There is no doubt that the claimant suffered health problems which he subjectively associated to occupational stress. There is, however, *prima facie* no objective nexus between the claimant's workplace and the medical problems which he suffered.[139]

The plaintiff's claim was therefore rejected. It is quite surprising to note that the Court would posit as a criterion for assessment that of "an intent to harm". Indeed, in civil matters, in Canadian law, it is acknowledged that evidence of the intent of the perpetrator can not be used as an affirmative defense nor represent an element which the victim is required to establish. It is the conduct in and of itself which is analyzed as to its purpose and effect.

Belgian law provides for certain duties. Subsection 32(2) provides that employers, workers and third parties who come into contact with the workers in the performance of their duties are required to refrain from perpetrating any act of moral harassment.

The employer is required to develop within the corporation a policy regarding prevention and the handling of complaints,[140] which, at a very minimum, focuses on the following:

(1) the physical layout of the work premises in order to prevent violence and moral or sexual harassment in the workplace;

(2) the definition of the channels made available to the victims in order to obtain help and the manner in which they are to communicate with the prevention consultant[141] and the facilitator[142];

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139. *Paul Tacquet* v. *Marcel Baele et al.*, *supra*, note 137.
140. *Loi du 4 août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail*, amended by *Loi relative à la protection contre la violence et le harcèlement moral ou sexuel au travail*, June 11, 2002, article 32quater, 1er.
141. The prevention advisor is specialized in the psycho-social aspects of work and is responsible for helping "[TRANSLATION] the employer, the line supervisors and the workers in the application of measures provided for in the statute and in this decree". Article 32sexies, par. 4, *op. cit.*, note 140. He or she may receive complaints.
142. The facilitator is selected within the corporation by the employer with the consent of the representatives of the workers and assists the prevention advisor

(3) a prompt and completely impartial investigation of the facts relating to violence and harassment;

(4) the orientation, help and support provided to victims;

(5) the steps taken to handle the matter and to ensure a return to work;

(6) the duties of line supervisors in the prevention of violence and harassment;

(7) providing information and training to workers, and

(8) notification of the Workplace Prevention and Protection Committee.

Workers are required to actively participate in the prevention policy.

With respect to the handling of any harassment complaint, two channels are available to the worker, namely the internal procedure (Subs. 32(9)) and judicial remedies (Subs. 32(10)).

According to the internal procedure, the worker may communicate with the prevention consultant, the facilitator or the Medical Department and seek conciliation with the perpetrator of the acts of harassment.

If he proceeds by way of judicial redress, the worker may obtain, in addition to damages, an injunction requiring the perpetrator of the harassment to cease such action within a prescribed time limit.[143]

Where facts are established pursuant to which the existence of harassment is deemed, the onus of proof that no harassment has occurred then shifts to the party sued.[144]

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and enables the worker to direct enquiries to him or her, especially if the employee finds it difficult to speak to another person due to his or her hierarchical position within the corporation. Article 32sexies, *op. cit.*, note 140.

143. Art. 32decies, *op. cit.*, note 140.

144. *Ibid*.

Belgian law also provides a certain degree of protection both for the victim and for the witnesses.

Indeed, the employer may not terminate the employment agreement or unilaterally change the conditions thereof, except upon grounds unrelated to the harassment complaint or to the court proceedings.[145] This protection lasts for a period of twelve months following the filing of the complaint or the date of the witnesses' testimony or for a period of three months following the handing down of the decision having the effect of *res judicata*.[146]

Fines and/or a term of imprisonment are provided for where the person held to be in breach does not cease such harassment within the prescribed time limit. Subsection 88(2) of the above statute provides as follows:

> [TRANSLATION] **Subs. 88(2).** Without prejudice to the provisions set out in Sections 269 to 272 of the *Criminal Code*, any person who shall not have ceased the acts of violence or moral or sexual harassment in the workplace within the time limit communicated to them by the competent authority pursuant to Subsection 32(10) shall be liable to a term of imprisonment of eight days to one month and to a fine of 26 to 500 Euros or to one of these penalties only.[147]

Finally, there are also in the *Belgian Criminal Code* provisions prescribing a fine and a term of imprisonment for any person perpetrating harassment in general. The provision reads as follows:

> [TRANSLATION] **Subs. 442(2).** Any person who has harassed another person when he knew or ought to have known that, by this behaviour, he would seriously affect the peace of mind of the person in question, shall be punished by a term of imprisonment of fifteen days to two years and a fine of fifty to three hundred francs, or one of these penalties only.
>
> The offence provided for in this Section may only be established upon complaint by the person alleging harrassment.[148]

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145. *Ibid*.
146. *Ibid*.
147. Sec. 88.
148. Sec. 444 *Code pénal belge*.

(c) The Council of Europe

In all the European countries, the desire to combat the phenomenon of moral harassment is clearly outlined, just as in the case of sexual harassment or violence in the workplace.

This commitment is set out in the European Social Charter revised on May 3, 1996[149] which is a treaty of the Council of Europe safeguarding human rights.

In order to better understand the context in which this commitment is expressed, it is necessary to provide a short introduction to the Council of Europe.

The Council of Europe is the oldest (1949) political organization on the European continent. It has 45 member countries and a head office in Strasbourg.

It was created in order to defend human rights and parliamentary democracy, to ensure the rule of law, to enter into continent-wide agreements in order to streamline the social and legal practices of the member states and to promote awareness of the European identity based on shared values and which transcend cultural differences.

In 1993, the heads of the member states and governments, during the Vienna Summit, decided that the Council of Europe would henceforth be the guardian of democratic security based on human rights, democracy and the rule of law.

The proceedings of the Council of Europe result in the development of European conventions and agreements which form the basis of the amendments and the legislative streamlining within the various member states. Such is the case of the European Social Charter. On October 31, 2003, 33 European countries had ratified the European Social Charter.

The fields of law protected by the European Social Charter are the following: housing, health, education, employment, social protection, movement of persons (mobility rights) and non-discrimination.

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149. *European Social Charter* (revised), May 3, 1996, Secretariat of the European Social Charter, Directorate General II – Human Rights, Council of Europe.

In the field of employment, the following rights are guaranteed:

– the right to earn one's living in an occupation freely entered upon;

– a social and political policy designed to ensure full employment;

– fair working conditions as regards pay and working hours;

– action to combat sexual and psychological harassment;

– the prohibition of forced work;

– the freedom to form trade unions and employers' organizations to defend economic and social interest, as well as the individual freedom to decide whether or not to join them;

– the promotion of joint consultation, collective bargaining, conciliation and voluntary arbitration;

– protection in case of dismissal, and

– the right to strike.

Article 26 of the European Social Charter establishes the right to dignity at work:

> With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations:
>
> 1. to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct;
>
> 2. to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.[150]

150. *Ibid*.

Consequently, the countries which have ratified the European Social Charter are required to proceed to streamline their national legislation in order to comply with this Charter, that is to say that they must attempt to acquire the legislative tools or adapt existing ones in order to thwart the phenomenon of moral or psychological harassment.

It is also interesting to note that the Council of Europe, in its capacity as employer, has adopted an internal policy with respect to the protection of the dignity of the person.[151] The preamble of the policy, signed by the Secretary General of the Council of Europe, reads as follows:

> [TRANSLATION]
>
> Being resolved to eradicate from the workplace and from labour relations within the Council of Europe any behaviour that may undermine the dignity of men and women and to ensure a work environment free from sexual and psychological harassment, [...].

Section 3 of the policy defines psychological harassment in the following manner:

> [TRANSLATION]
>
> "Psychological harassment" means any improper conduct in the workplace or in connection with work that takes place over a period, is repetitive and/or systematic and involves, in particular, physical behaviour, spoken or written language, intimidation, acts, gestures or methods of work organisation that are intentional or unintentional and that may undermine the personality, dignity or physical or psychological integrity of a person, cause a deterioration of the work environment or jeopardize the employment of the person or create an intimidating, degrading, humiliating or offensive environment.[152]

This policy provides an informal procedure for the handling of cases through "facilitators" to whom a person who deems that he has been a victim of conduct amounting to harassment may turn in order

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151. Instruction nº 44 relative à la protection de la dignité de la personne au Conseil de l'Europe, 7 mars 2002.
152. *Ibid*.

to obtain support and to receive information with respect to the procedures available to him as part of the policy.

The policy also provides for a mediation procedure which, at the request of the person alleging that he is a victim, may be enforced.

Where the situation reported has not been settled through the informal procedure or by way of mediation, the alleged victim may forward a written complaint to the human resources manager asking that his complaint be referred to the commission responsible for investigating it.[153] The latter may resort to alternative dispute resolution mechanisms, hear the parties and/or require an official investigation to be undertaken. At the end of the process, it will make a determination on the facts and, as the case may be, send its recommendations to the Secretary General, which recommendations may even lead to disciplinary proceedings. The final decision resides with the Secretary General.

In adopting such a policy, it is clear that the Council of Europe, in its capacity as defender of human rights, was required to lead by example and to subject itself to the duty to abide by a clear policy respecting the protection of the dignity of the persons working for it.

3. A Worrisome Problem in Industrialized Nations

Based on several interventions reported here and elsewhere throughout the world, as well as on the definitions which have been put forth, one notes a strong desire to thwart this new unhealthy phenomenon, which is at times insidious and trivialized, and which attacks the individual with a view to demeaning him in his individuality. The primary effect of harassment, whether it be sexual or moral in nature, and whether it be accompanied by physical or psychological violence, is always to denigrate and humiliate the individual.

It is also a question of survival for corporations since, by allowing such reprehensible behaviour or suffering it to exist, they discredit and diminish the importance of their primary resource without which their very existence would be jeopardized, namely the human resource.

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153. *Ibid*. The Commission is made up of four persons, two of which are appointed by the Secretary General and two by the Staff Committee: sections 8 to 12 of the policy.

PART 3

THE APPROACH OF THE QUEBEC LEGISLATOR

Quebec, as we have seen, has not escaped the trend which has developed. Issues with respect to psychological or moral harassment were initially put forth by various workers' rights groups and by several researchers and specialists whose studies were published. In certain classes of employment, a majority of workers have stated that they have been a victim of some form of workplace harassment.[154]

Chapter 1- Requisite Preliminary Considerations

In the summer of 1999, the Minister of Labour decided to establish an interdepartmental committee made up of representatives of the Labour Department, the Justice Department and the Health and Social Services Department, as well as the *Secrétariat à la condition féminine* (i.e., the Office for Women's Issues) and the Occupational Health and Safety Board (C.S.S.T.) as well as the L.S.C.

1. The Terms of Reference of the Interdepartmental Committee

The terms of reference of this Committee were as follows:

– identify the problem of psychological harassment by assessing the scope of the phenomenon, the environments in which it manifests itself, the forms which it takes on and the repercussions which it has on persons who are victims thereof;

– organize consultations in order to gather the perception of groups and persons interested in this phenomenon;

– identify means of eradicating the problem or, at the very least, lessening its impact; and

– make recommendations with respect to the eradication of psychological harassment in the workplace (prevention) and with respect

154. A survey conducted by the F.I.I.Q. established that more than 75.4% of nurses have been victims of hurtful attitudes or words, 66.2% of threats of aggression, 44.8% of sexual assaults. F.I.I.Q. survey in the report of N. MORNEAU, *op. cit.*, note 22, p. 16.

to lessening its impact on the persons who have been victimized by it (reparations).

2. Identification of the Types of Psychological Harassment in the Workplace

An analysis of the problem enabled the Committee to determine the existence of three principal forms of expression of harassment:

(a) abuse of power, which manifests itself by an inappropriate or abusive exercise of power by the employer or the person to whom such power has been conferred. This may take the form of the exercise of authority and power by means of intimidation, threats, blackmail or coercion in order to harm the person, his or her development and his or her performance.[155] Establishing the existence of some conduct therefore requires the exercise of authority, in an undue manner, which amounts to behaviour which a person knows or ought to have known was vexatious. "In an undue manner" refers to the exercise of authority which is either inappropriate, discriminatory, threatening, intimidating, offensive, unpleasant, abusive, unreasonable, debilitating, malicious, insulting, injurious, inequitable or unacceptable.[156]

The intent to jeopardize the employment of the employee, to harm his or her performance at work, to endanger his or her means of subsistence or to interfere in any manner whatsoever in his or her career should not be a compulsory criterion.[157] As we shall see, the Quebec legislator has opted for a much larger approach, which is more in keeping with the recent opinion of the Court of Appeal of Quebec on the issue[158];

(b) "mobbing" which may be defined as follows: persecution (some even go so far as to speak of psychological terrorism), a war of

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155. *Rapport du comité interministériel sur le harcèlement psychologique au travail*, *op. cit.*, note 26, p. 11.
156. Jean-Maurice CANTIN, *L'abus d'autorité au travail; une forme de harcèlement*, Carswell, 2000, p. 53; see in particular, by way of illustration, the cases of *André Ville* v. *Entreprise Cara du Québec ltée*, *supra*, note 115; *Brisson* v. *Liquidation choc inc./La différence*, *supra*, note 116; *Ranger* v. *Clinique chiropratique St-Eustache*, *supra*, note 118.
157. F. LAMY, *op. cit.*, note 73, p. 198, borrowing from Maurice CANTIN, *L'abus d'autorité au travail; une forme d'harcèlement*, Toronto, Carswell, 2000, p. 15.
158. See F. LAMY, *op. cit.*, note 73, p. 204, referring to the case of *Houle* v. *Canadian National Bank*, *supra*, note 36, p. 164.

nerves or attrition, a negative attitude by one or several persons[159] with respect to another person and designed to prevent that person from expressing him or herself, to isolate, discredit or disparage him or her.[160]

Among others, instances of "mobbing" are unwarranted criticism, ignoring the presence of the person, abstaining from communicating with the person, subjecting him or her to ridicule, starting rumors about him or her, entrusting to him or her duties far below his or her qualifications, or humiliating work and even aggression or perpetration of damages to the workstation or residence;

(c) "bullying" which consists of the following: conduct or attempts which may originate either from the person in authority or from co-workers, tending to discredit a person and manifesting itself by an irreparable loss of confidence in his or her abilities, reliability or honesty by way of false allegations,[161] charges or accusations of incompetence and the perpetration of reprehensible or outright criminal actions.[162]

3. The Recommendations of the Committee

The Committee tabled its report in May 2001. In particular, it contained a definition of the notion of "psychological harassment" as well as recommendations.[163]

The definition proposed by the Interdepartmental Committee was the following:

> Conduct which includes repeated words, actions or gestures which are undesired, and which affect a person's dignity, psychological or physical integrity, or which may compromise one of

159. The most "ferocious" groups of employees which isolate or ostracize an individual in many cases arise from a form of unhealthy union solidarity. See *West-Island Teachers' Association* v. *Nantel*, *supra*, note 53; *Dufour* v. *Syndicat des employées et employés du Centre d'accueil Pierre St-Joseph Triest (C.S.N.), supra*, note 54; *Shermag inc.* v. *Beaulieu, supra*, note 55.
160. N. MORNEAU, *op. cit.*, note 22, p. 6. *Rapport du comité interministériel sur le harcèlement psychologique au travail*, *op. cit.*, note 26, p. 7.
161. By way of illustration; *Darke* v. *Moullas*, *supra*, note 67.
162. *Rapport du comité interministériel sur le harcèlement psychologique au travail*, *op. cit.*, note 26, p. 7.
163. *Ibid*.

> that person's rights, entail unfavorable working conditions, a lay-off, a dismissal or a forced dismissal. One serious act which entails harm may also be defined as being harassment.[164]

The Committee made three recommendations chiefly focusing on the preventive aspect:

– the implementation of a permanent consensus-building structure on the issue of psychological harassment in the workplace;

– the furtherance of awareness and training efforts directed first and foremost at employers and workers; and

– the progressive implementation, drawing upon resources from the health and social services network, of teams specialized in the identification of psychological harassment at work and support to victims.

In addition, the Committee acknowledged that prevention alone, while it is far preferable to reparations, could not in and of itself thwart this phenomenon. For this reason, it recommended the implementation of simple and accessible remedies both for unionized and non-unionized workers.

This latter recommendation confirms the weakness of the current safeguards in existence, which are scattered and more or less accessible. Indeed, the notion of harassment in the workplace is known, and the Courts, as we have seen, do grant some form of protection. However, the exercise, by the worker, of the various remedies raised several problems which diminished the efficiency of this protection.

Chapter 2- The Solution in Quebec

Conscious of the fact that psychological harassment entails significant individual and social costs, the Government of Quebec incorporated in the *Labour Standards Act*, on December 19, 2002, specific provisions with respect to psychological harassment, namely

164. *Ibid.*, p. 13.

Sections 81.18 to 81.20 and Sections 123.6 to 123.16 of the L.S.A.[165] These provisions came into force on June 1, 2004.

This legislation aims to define the notion of psychological harassment, to establish the rights and duties of employees and employers, as well as to provide remedies to punish psychological harassment.

In conjunction with these provisions, it is important to ensure, both for employees and businesses, informational and preventive support mechanisms, and the Labour Standards Commission is already being solicited in this respect.

1. The Definition: A Modern-Day Approach

The definition laid down by the Quebec legislator in Section 81.18 of the L.S.A. is the following:

> [...] 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.
>
> A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.

This definition is in keeping with that propounded by specialists in the matter such as Hirigoyen:

> [TRANSLATION] Any abusive conduct expressed, in particular, in the form of behaviour, words, acts, gestures, writing, which may harm the personality, the dignity or the physical or psychological integrity of a person, and jeopardize the employment of such person or cause deterioration to the work environment.[166]

In fact, the challenge in establishing such standards is to identify whether or not we are in the presence of a deviant attitude, since harassment arises in an innocuous manner and is spread insidiously. It progresses and evolves in a step-by-step process. The attacks are

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165. See Schedule which includes the legislative provisions with respect to the protection afforded and the interpretation of the L.S.C. for each of them.
166. M.-F. HIRIGOYEN, *op. cit.*, note 131.

repeated and the victim finds him or herself in a perpetually hostile climate, without truly understanding what is happening. It is this incessant repetition which renders the process destructive.[167]

This definition includes all the components generally acknowledged as forming part of the phenomenon of psychological harassment. It is broader than that found in some decisions handed down by the various courts.

2. The Various Components of the Definition

(a) The Vexatious Nature

Conduct is of a vexatious nature where it is humiliating or abusive for the person experiencing it. The person will feel diminished, denigrated both on the personal and on the professional level.

The vexatious nature refers to the result of the behaviour. It implies that such conduct injures a person in his or her self-esteem, that it annoys the person or causes him or her torment. The legislator, in this instance, requires us to focus on the victim and on what he or she experienced from a psychological point of view, since, fundamentally, this is the issue for determination.

This qualification of the conduct represents a lighter onus of proof as compared with that which is usually required in arbitration matters. The qualifiers necessary to the establishment of harassment refer to conduct that is inappropriate, spiteful, offensive, degrading, humiliating or demeaning. These qualifiers are not synonymous: they express significant varying degrees of intensity and purpose with respect to the nature of that which is prohibited. They are to be taken into account in the selection of precedents to be used in the interpretation or application of the *Labour Standards Act*. However, evidence of vexatious conduct is, indeed, a test which is more difficult to pass than that of inappropriate conduct. It is, however, a less stringent test than that which is required in certain arbitration awards.[168]

The vexatious nature, as we shall see, does not necessarily imply establishing that the act is "unwanted". It is sufficient that the

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167. S. PRONOVOST, *op. cit.*, note 101, p. 123.
168. F. LAMY, *op. cit.*, note 73, p. 215.

conduct be "hostile" or "unwanted". In certain instances, the conduct, in and of itself, is so unacceptable that evidence of disapproval thereof is not necessary.[169]

On the other hand, in order, in particular, to distinguish a case of sexual harassment in the workplace from mere flirting, the examination of the vexatious nature of the conduct impugned will focus on the nature, intensity and recurrence of the unwanted actions as well as their impact upon the victim.[170] In such a case, even if the vexatious acts or attitudes are not perpetrated on a daily basis, they become "harassing" to the extent that they have given rise to an explicit or implicit refusal, to threats or aggressive behaviour, thereby creating lasting effects which alter the work environment and degrade the working conditions.[171]

(b) The Repeated Nature

In addition to the vexatious nature, it is the notion of the repeated nature of the conduct which is most often present in the reality of harassment, although, according to current case law, it is no longer an essential component in the determination of conduct which represents psychological harassment in the workplace.[172]

As we shall see below, one single act may be liable to entail a reasonable fear of deterioration of the work conditions. Hence, where one single act is laced with direct or implied threats, it is not truly isolated since its deleterious effects continue to be felt and to be repeated over time.[173]

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169. Hence, it is obvious that a person who claims to be victimized by hurtful and humiliating words with respect to his or her race need not establish that such comments were "unwanted". *Québec (Commission des droits de la personne et des droits de la jeunesse)* v. *Provigo Distribution inc., Maxi*, *supra*, note 69; see Hélène TESSIER, "Le harcèlement en éducation: responsabilité légale et problèmes éducatifs", in Service de la formation permanente du Barreau du Québec, *Développements récents en droit de l'éducation*, Vol. 117, Cowansville, Éditions Yvon Blais, 1999, pp. 297-324, p. 305.
170. *Commission des droits de la personne* v. *Dhawan*, *supra*, note 70.
171. *Ibid*.
172. *Dhawan* v. *Commission des droits de la personne et des droits de la jeunesse*, *supra*, note 70; *Québec (Commission des droits de la personne et des droits de la jeunesse)* v. *Provigo Distribution inc., division Maxi, supra*, note 69.
173. *Habachi* v. *Commission des droits de la personne*, *supra*, note 70, p. 2528. H. TESSIER, *op. cit.*, note 169, p. 304.

It is the conduct, the verbal comments, the actions or the gestures, on the whole, or the combination of two or more thereof, which will enable one to conclude that a situation of harassment exists. Each of them, taken in isolation, may be innocuous in and of itself, but the accumulation or combination becomes indicative of a situation of harassment. The repetitive nature does not preclude any of the events from being serious.

(c) The Hostile or Unwanted Nature

The original bill provided that the conduct was required to be "hostile and unwanted". It was amended in order to provide the two qualifiers alternatively since, especially in instances of insidious sexual harassment, a conduct is not necessarily hostile but is indubitably unwanted.[174]

In certain instances, harassment may arise from actions which are quite "non-aggressive" in nature, such as the progressive reduction in duties and responsibilities of the victim. Hence, an attitude may be harassing in nature but not necessarily "hostile" at least from outward appearances, yet definitely be "unauthorized" by the victim.[175] In cases such as these, the alleged victims may be able to establish, subject to certain circumstances, the implicit or express refusal made known to the alleged harasser. In this respect, the impugned facts must be able to be objectively viewed as unwanted.[176] However, the Court will be sensitive to the subordination or economic dependence of the victim, which explains that, in many cases, the refusal is not expressed verbally. In this respect, body language is a means of communication of such refusal. The Court will then analyze the unwillingness of the victim, his or her attempts at bypassing the problem, retreating, etc.[177]

Consequently, the "unwanted" nature does not require establishing an apparent or outright refusal on the part of the victim. Indeed, it frequently occurs that the victim only expresses his or her

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174. *Journal des débats*, Les travaux parlementaires, 36e législature, 2e session, Commission parlementaire de l'économie du travail, Étude du projet de loi no 143, p. 3.
175. *Ibid*., p. I.
176. *Habachi* v. *Commission des droits de la personne, supra*, note 70, p. 2540, comments of the Honourable Justice Deschamps.
177. *Commission des droits de la personne* v. *Dhawan, supra*, note 70, d'Amours J., aff'd by D.T.E. 2000T-633 (C.A.).

refusal in a very timid manner, out of fear of reprisals. As underscored by the attorney Brunelle, tolerating conduct should not be confused with accepting it.[178] Within the purview of such a protection tied to the economic dependence of the employee vis-à-vis his or her employer, one cannot require the former to clearly express their harassment in order to avail oneself of such provisions.[179]

As for the notion of "hostile", note that there is no requirement to establish evidence of a hostile work environment. The plaintiff must rather show that the unlawful conduct, *in his or her respect*, has been hostile, and that it is harmful to his or her dignity and entails, for him or her, a harmful work environment. It is a much broader application than the notion of harassment that is usually determined by arbitration boards.[180]

(d) Damage to the Dignity, Psychological or Physical Integrity

In matters of harassment in the workplace, we have seen that both the common law courts and those which are specialized tribunals draw their inspiration from recognized notions in respect of dignity and integrity of the person. The principle of safeguarding the dignity of the person is one of the fundamental building blocks of our laws. It is a principle which lies at the very foundation of the rights and freedoms of the person and of the various Charters, whether it be the Canadian Charter, the Quebec Charter or foreign charters.

Indeed, the *Canadian Charter of Rights and Freedoms*[181] provides in Section 7 thereof that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

The Quebec Charter of Human Rights and Freedoms, for its part, states in Section 1 thereof as follows:

> Every human being has the right to life, and to personal security, inviolability and freedom.

178. C. BRUNELLE, *op. cit.*, note 51, p. 201.
179. F. LAMY, *op. cit.*, note 73, p. 218.
180. *Ibid*., p. 216.
181. *Canadian Charter of Rights and Freedoms*, R.S.C. (1985), Sch. II, No. 44.

Finally, the *Civil Code of Québec*, in its preamble, provides as follows:

> The *Civil Code of Québec* in harmony with the *Charter of Human Rights and Freedoms* and the general principles of law, governs persons, relations between persons, and property.

It also recognizes, in Section 10, which concerns the integrity of the person, that:

> Every person is inviolable and is entitled to the integrity of his person. Except in cases provided for by law, no one may interfere with his person without his free and enlightened consent.[182]

The legislator thereby incorporates the many criteria developed on the issue in case law.

(e) A Harmful Work Environment

By "harmful", one means an environment which is noxious, damaging, poor or unhealthy. The atmosphere created may, for instance, cause the isolation of the victim in an environment where, usually, collaboration and cooperation are the foundation of the work. This isolation of the person will cause him or her to be perceived as a "spoilsport" in the group dynamics! The employment contract requires the corporation to maintain conditions of work enabling the performance of the work in an appropriate manner. This duty implies that the employer must take any necessary steps to eradicate sources of tension between employees.[183]

(f) One Single Occurrence of Serious Conduct

In addition, the Quebec legislator has also included in this definition the isolated act, as opposed to the repeated act, as a basis for psychological harassment. The wording refers to a single serious "incidence", namely a single manifestation of conduct, verbal comment, action or gesture, of such a serious nature that it need not be repeated.

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182. Preamble, C.C.Q.
183. *Roy* v. *Caisse populaire de Thetford Mines*, *supra*, note 44.

Such could be the case of sexual harassment which does not require a repeated pattern in order to represent an injury to the dignity or the psychological or physical integrity of the person and to cause a continuous deleterious effect for such person. Other isolated instances of conduct, such as violence or aggression, could also represent harassment depending on the level of seriousness involved.

The Honourable Justice Baudouin, writing for the Court of Appeal, in the case of *Habachi*,[184] pointed out:

> [TRANSLATION] [...] that in law at least, contrary to linguistics, a single act, so long as it is serious and causes lasting effects in the future, may in fact represent harassment. Therefore, in this respect, I endorse the broad notions put forth by certain authors, namely Maurice Drapeau, Catherine MacKinnon and A. Aggarwal.
>
> However, unless one wishes to completely render the notion of harassment devoid of meaning, to trivialize it and to mitigate the impact which the legislator wished to import into this act, for a single act to be so qualified, it must exhibit a certain objective degree of seriousness. The above-mentioned authors refer to rape or attempted rape, and, therefore, to sexual assault. One could probably add thereto a persistent solicitation of sexual favours under threat, for instance, of dismissal of the employee. In such a case, in its effect, the act does not remain truly isolated since its impact (the threat of dismissal) lingers over time.[185]

More recently, in the case of *Dhawan*,[186] the Court of Appeal specified that the need to establish the duration of the harassment arises in a degree which is inversely proportional between the repetition of the acts and the impact of their consequences. Hence, rejection of the conduct which led to a dismissal may be qualified as harassment in light of the seriousness of the circumstances, despite the fact that the impugned behaviour may not be repeated.[187]

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184. *Habachi* v. *Commission des droits de la personne, supra*, note 70.
185. *Ibid*.
186. *Dhawan* v. *Commission des droits de la personne et des droits de la jeunesse*, *supra*, note 70.
187. *Ibid*.

3. A New Standard for Protection in the Workplace Providing for Rights and Duties

(a) Rights

The legislator has consequently established as a first principle that the employee is entitled to a work environment free from psychological harassment. Any person who signs a contract of employment with an employer is entitled to a healthy work environment in which he or she may adequately discharge his or her duty to perform the work requested using the tools and the resources necessary to achieving this goal.

In addition, the work environment extends not only to the physical premises where the employee works, but also to any premises where the latter may be called upon to work by a reason of his or her employment.

The work environment is unquestionably made up of the physical universe surrounding the employee, but also, and especially, of the representatives of the person of the employer in a relation of authority, the co-workers and other workers in the company and, ultimately, third parties or clients with whom the company and the worker transact in the course of his or her employment. This latter situation is often overlooked even if it is prevalent throughout all companies. One need only bear in mind, among others and by way of illustration, the entire service industry.

The employer is also entitled to demand that his or her employee exhibit behaviour free of harassment towards his or her colleagues, bosses and third parties.

(b) Duties

The duty to provide this work environment free of psychological harassment befalls the employer.[188] It must take reasonable steps not only to prevent psychological harassment in its business, but also to put an end to such conduct if made aware thereof.[189]

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188. Sec. 81.19 L.S.A.
189. Jean-Maurice CANTIN, *op. cit.*, note 156, p. 21.

The employer is primarily responsible for the work conditions of its employees, which must be just, reasonable and respectful of the health, security and physical integrity of the employees. The employer must ensure, within the business, a work environment which is suitable for its employees. As the chief manager of the work distribution, only the employer may exercise the necessary authority to ensure a healthy work environment free of harassment.[190]

The legislator now provides in Section 81.19 as follows:

> Every employee has a right to a work environment free from psychological harassment. Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it.

Contrary to the approach adopted by European authorities, these new Quebec standards for protection in the workplace do not necessarily aim for a criminal resolution of the matter by establishing fault and thereafter punishing the deed. These standards are, first and foremost, of a preventive nature and, failing that, of a remedial nature. They are aimed at detecting deviant behaviour and eradicating it. To this end, the involvement of the employer is the only appropriate remedy in order to thwart the undesirable effects of harassment in the workplace.

This obligation incumbent upon the employer is one of means and not of result. It is not required to guarantee that no situation of harassment will occur, but to guarantee that it will take reasonable measures to ensure that no harassment will occur or, if such an event should occur, that it will intervene immediately to put an end to it.

Failing that, the liability of the employer is also incurred as a result of the wrongdoing of its employees in the discharge of their duties.[191] Employees exhibiting a harassing conduct in the exercise of their duties towards one or several other employees of the business incur the liability of the latter.[192] The employer is required to cure the harm caused by the fault of its employees in the exercise of their

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190. *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, 1292.
191. *Robichaud* v. *Canada (Treasury Board),* [1987] 2 S.C.R. 84; *Janzen* v. *Platy Enterprises Ltd., supra*, note 190, p. 1292; *Béliveau St-Jacques* v. *Fédération des employées et employés des services publics inc.*, [1996] 2 S.C.R. 395.
192. *Janzen v. Platy Enterprises Ltd., supra*, note 190, p. 1292.

duties.[193] The acts referred to were committed while the harasser was exercising his or her duties or was at work.[194] Case law in Quebec has on several occasions confirmed the existence of this liability.[195]

The employee guilty of harassment, who would breach these new standards or the policies of the corporation prohibiting any form of harassment, would not only likely incur personal liability,[196] but also risk disciplinary action on the part of the employer to bring an end to this deviant behaviour.

As for third parties, it may at times be difficult to prevent such situations of harassment, but the employer will be required to intervene promptly upon becoming aware of such occurrences, failing which, its liability would be incurred.[197]

(c) The Measures and Policies of the Corporation

There are many diverse means at the disposal of the employer to fulfill its duties and, as the case may be, to attempt to avoid liability.

By way of illustration, the employer may adopt a clear policy of zero tolerance for any form of harassment or violence in the workplace, ensure the communication of the policy to all employees and see to it that such policy is understood and complied with. The policy must take into account the reality of each business, whether it is a large, a medium-sized or a small corporation. Training must be provided to executives, line supervisors and specialized employees who may be called upon to apply it.[198] Should such steps not be taken, the corporation may nevertheless be held liable for harassing conduct.[199]

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193. Art. 1463 C.c.Q.
194. *Janzen* v. *Platy Enterprises Ltd.*, *supra*, note 190, p. 1293.
195. Hélène TESSIER, *op. cit.*, note 169, p. 316.
196. This liability may arise pursuant to litigation under the Charter; *Québec (Commission des droits de la personne et des droits de la jeunesse)* v. *Provigo Distribution inc., division Maxi, supra*, note 69, under the *Civil Code of Québec* or even those arising from the collective agreement.
197. See by way of illustration the case of *Commission des droits de la personne du Québec (William Kafé) v. Commission scolaire Deux-Montagnes,* [1993] R.J.Q. 1297 (T.D.P.Q.).
198. Jean-Maurice CANTIN, *op. cit.*, note 156, p. 24.
199. *Commission des droits de la personne et des droits de la jeunesse* v. *Procureur général du Québec*, *supra*, note 66.

In addition to a policy, the employer should implement an in-house procedure for handling complaints and ensure that such complaints are quickly handled. The procedure in question is one of investigation, mediation and conciliation, which will generally be entrusted to a person exhibiting qualities of integrity, objectivity and neutrality. Such person shall, upon being entrusted with such duties, see to it that the allegations made are analyzed and placed in proper sequence, by meeting all the parties involved. To avoid a deterioration of the work environment, it is crucial that such an investigation be prompt, serious and exhaustive.[200]

Finally, after objective analysis, the employer shall be required to promptly take all necessary action and impose all appropriate penalties, as the case may be.

Note that the latter may not escape liability by merely alleging ignorance of the existence of a situation of harassment. The employer must have implemented procedures, such as those referred to above, in order to enable the employee to become aware of them.

Creating such a procedure, although relevant in the analysis of an inquiry regarding harassment, does not represent a defense for the employer which is legally accountable for the impingement upon a right by its employees. In accordance with Article 1463 C.C.Q., the employer remains liable for the "injury caused by the fault of his agents and servants in the performance of their duties".[201]

This principle of liability is equally applicable whether the perpetrator of the situation of harassment is a representative of the delegated authority, an employee, a third party or a client of the business.[202]

4. A Standard of Protection Requiring the Use of Objective Criteria

(a) A Difficult Matter to Identify

It is not easy to identify situations of harassment. The nature of this type of violence is often complex and characterized by numerous

200. Jean-Maurice CANTIN, *op. cit.*, note 156, p. 38.
201. C. BRUNELLE, *op. cit.*, note 51, p. 207.
202. *Robichaud* v. *Canada (Treasury Board), supra*, note 191.

possible steps. The authors Aurousseau and Landry have identified 12 types of behaviour, from the most insidious to the most flagrant:

- the use of vocabulary as a disguise;
- the refusal to communicate with the person except on an as-required basis;
- biased dialogue;
- the denial of any form of professional development;
- the denial of any professional support;
- the questioning of abilities: invalidation, punishment, denigration;
- lack of respect or contempt;
- administrative harassment;
- excessive control;
- threats;
- intimidation;
- ostracism.[203]

In light of the rules of subordination which underlie the employer-employee relation, the objectification of psychological harassment in the workplace is crucial. The degree of analysis at times presents certain challenges. The difficulties in this respect originate from three principal sources: the varying psychological tolerance from one person to the next when faced with a problem of a psycho-social nature relating to attitudes, mores, etc.; the relative invisibility of this problem in the workplace since one generally assumes that mental health concerns are perceived as an individual responsibility; the great diversity both of the behaviour as well as of the effects arising from the phenomenon. Finally, note that "[TRANSLATION] the psychological nature of the harassment explains that it is often difficult for the person to break his or her silence and to speak openly about a situation of harassment".[204]

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203. Chantal AUROUSSEAU, Simone LANDRY, *Les professionnelles et professionnels aux prises avec la violence organisationnelle,* Protocole UQAM – C.S.N.-F.T.Q., document nº 64, Services aux collectivités de l'UQAM, Fédération des professionnel(le)s salarié(e)s et des cadres du Québec (F.P.P.S.C.Q.), 1996.
204. *Rapport du comité interministériel sur le harcèlement psychologique au travail*, *op. cit.*, note 26, p. 54.

(b) Criteria in Case Law That Are Already Well-known and Established

The identification of harassment is rendered all the more difficult that it is often a matter of perception. The same behaviour may be perceived as "harassing" by one person whereas another will react with indifference.[205]

By way of illustration, the ordinary exercise of the management rights of an employer does not represent conduct which may be qualified as harassment. One must be able to recognize a situation of harassment and distinguish between abuse of authority as basis for harassment and the legitimate exercise of such authority. Even superimposing various inconvenient or unpleasant events in and of themselves which represent normal working conditions within a business may not qualify as harassment. However, the result may be quite different if such an exercise of power exceeds the normal bounds of employment.

The courts have therefore attempted to objectify the identification process. We are of the view, just as the author Brunelle, that the appropriate criterion is that of the "reasonable victim", namely a "reasonable person" placed "in the same circumstances".[206] This approach draws inspiration from that followed by the Supreme Court of Canada in the case of *Law* v. *Canada* (*Department of Employment and Immigration*)[207] which was called upon to construe what constitutes a violation or demeaning of dignity.[208] The highest court in the land has, indeed, stated on several occasions that the purpose of such a provision is to ensure protection "against the evil of discrimination by the state whatever form it takes" and the "promotion of human dignity".[209]

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205. C. BRUNELLE, *op. cit.*, note 51, p. 194.
206. *Ibid*., p. 199.
207. [1999] 1 S.C.R. 497, 533-534.
208. The notion of dignity has been interpreted as part of the test for application of the notion of discrimination within the meaning of Subsection 15(1) of the *Canadian Charter of Rights and Freedoms, op. cit.*, note 181.
209. *Law* v. *Canada (Minister of Employment and Immigration)*, *supra*, note 207; *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229.

Injury to human dignity is also an injury to the physical or psychological integrity of the person.[210] In light of such notions that vary according to the individual, one understands that the Supreme Court attempted to establish objective criteria for analysis.

The Court, speaking through Justice Iacobucci, stated that the "relevant point of view is that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant".[211]

The Court insisted on the significance of putting oneself in the position of the person allegedly victimized in order to determine if there was damage to his or her dignity. A Court must be persuaded that the allegation of the victim with respect to such injury is supported by an objective assessment of the situation. All the traits, history and circumstances of this person must be taken into consideration in their entirety when assessing whether a reasonable person placed in a similar situation to that of the plaintiff would deem that there had been an injury to the physical or psychological integrity of the person.[212]

In the same vein, one conducting an analysis as to whether a case of harassment has been identified, the relevant point of view, as pointed out by Justice Deschamps in the case of *Habachi*,[213] is that of the reasonable and objective person well-informed of the circumstances and placed in a situation similar to that reported by the employee alleging harassment.

Recently, the Court of Appeal in the case of *Dhawan,* citing with approval the words of Justice Deschamps, confirmed that it does intend to apply such a test in matters of harassment.[214] The examination of the event of harassment "[TRANSLATION] must be made on the

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210. *Law* v. *Canada (Minister of Employment and Immigration)*, *supra*, note 207, para. 53.
211. *Law* v. *Canada (Minister of Employment and Immigration)*, *supra*, note 207, para. 60. Justice Iacobucci was quoting Justice L'Heureux-Dubé in the case of *Egan v. Canada*, [1995] 2 S.C.R. 513.
212. *Law* v. *Canada (Minister of Employment and Immigration)*, *supra*, note 207, p. 19, para. 60.
213. *Habachi* v. *Commission des droits de la personne*, *supra*, note 70, p. 2441 (dissenting with respect to part of the findings in the ruling, but whose legal analysis on this point were accepted by her colleagues).
214. *Dhawan* v. *Commission des droits de la personne et des droits de la jeunesse*, *supra*, note 70.

basis of a reasonable person placed in the same circumstances as the victim or according to the circumstances of the perpetrator of the impugned behaviour"[215]:

> [TRANSLATION] Only those attitudes and actions which may be perceived as unwanted by a reasonable person, according to a neutral and abstract model, should be punished.

Finally, such a test, as confirmed by the definition laid down by the Quebec legislator, is obviously less stringent than that applicable in matters of criminal law. It is not necessary to adduce evidence of the intent of the harasser. The Supreme Court of Canada had already clearly dispelled such a duty in civil matters in the case of *Robichaud* v. *Treasury Board of Canada*.[216]

5. The Remedy Provided for in the Labour Standards Act

We have previously seen that there are various remedies more or less adapted and available to victims of harassment in the workplace.

The legislator, further to the examination of the issue by the Labour Department, added another in the *Labour Standards Act* which we will now examine in greater detail.

(a) Scope of Protection

It is important to note, from the outset, that the general remedy provided for in the *Labour Standards Act* requires no other precondition than that of being an employee. The victim is not required to allege any form of discrimination, an occupational disease or any other requirement.

The remedy is open to all employees, regardless of their hierarchical level within the corporation. The employee at the bottom of the ladder all the way up to the senior executive is afforded this protection.

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215. *Ibid*.
216. *Supra*, note 181; cited with approval in the case of *Dhawan*, *supra*, note 70, para. 16.

Two special situations, however, merit consideration: unionized workers and state employees.

In the case of unionized workers, they are afforded the same protection but with the following proviso: the relief to be sought will be the grievance provided for in the collective bargaining agreement and the forum which will make the determination shall be the grievance arbitrator.

State employees that are unionized will resort to the same relief as referred to in the previous paragraph. If they are non-unionized, regardless of their hierarchical level, from the highest position (including members and officers of state corporations) to the lowest level, the forum called upon to decide the matter will be the Public Service Commission, an administrative tribunal exercising jurisdiction in labour matters for certain state employees.

For all other employees, the remedy provided for in the L.S.A. will apply, namely that which is provided for in Sections 123.8 and following of the Act.

(b) The Complaint

This remedy may be initiated by the employee himself or herself or by a non-profit employee rights' organization which has obtained the written consent of the employee to act on his or her behalf[217] by way of a complaint made to the Labour Standards Commission. Although the latter has forms for this purpose, no particular form is required by the Act or the Regulations.

In the light of the specific nature of harassment and the significant impact it may have on the life of the employee, the legislator deemed it equitable to allow for a longer time frame than that of 45 days provided for other remedies before the L.S.C. in order to enable the employee to exercise his or her rights knowingly.[218] The time limit has been set at 90 days.[219]

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217. S. 123.6 L.S.A. With respect to defence groups, the legislator seems to have drawn inspiration from the process provided for before the *Commission des droits de la personne et des droits de la jeunesse* (s. 74 *Charter of Human Rights and Freedoms, op. cit.*, note 48).
218. The recourse against prohibited practices (sec. 122 L.S.A.) and the recourse against dismissal without just and sufficient cause (sec. 124 L.S.A.).
219. Sec. 123.7 L.S.A.

(c) The Inquiry

Contrary to other administrative remedies,[220] after receiving this complaint, the Labour Standards Commission is required to conduct an inquiry in order to determine if the plaintiff has been subjected to psychological harassment in the workplace.

In order to take into account the very nature of the complaint, the usual inquiry process followed by the Labour Standards Commission must be adapted to this reality. Indeed, by way of illustration, an investigation of a business in order to verify if overtime has been paid in accordance with the provisions of the statute is quite different from an inquiry into whether a person who has made a complaint has been a victim of psychological harassment.

In this latter case, the investigator is required to assess whether there exists some form of psychological harassment within the meaning of the L.S.A. The inquiry, based on the criterion referred to above, will enable a determination, in particular, of whether a policy for protection against harassment conceived by the business in this respect exists and to gather the facts enabling an assessment of the merits of the complaint. The adoption of a policy may not, in and of itself, enable the employer to escape liability. It may, however, represent a significant element amidst all the protective steps taken in order to avoid cases of harassment in the workplace.

On the whole, the powers of investigation are the same as those applied in a civil remedy.[221] The L.S.C. is required to investigate with due dispatch.[222] The L.S.C. or a person designated by it may, at any reasonable hour, enter upon the premises of any work establishment of an employer.[223] The Commission may require any information or documents relevant to its inquiry.[224] The L.S.C. or a person designated by it for the purposes of an inquiry is vested with the powers and the immunity of commissioners appointed pursuant to the *Act respecting public inquiry commissions*.[225]

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220. With respect to prohibited practices, s. 122 L.S.A. and with respect to dismissals without just and sufficient cause, s. 124 L.S.A.
221. Sec. 123.8 L.S.A. referring to ss. 103 to 110 of the L.S.A.
222. Sec. 104 L.S.A.
223. Sec. 109 L.S.A.
224. *Ibid*.
225. R.S.Q., c. C-37.

Note that the findings of the inquiry represent an administrative decision, meaning that the L.S.C. does not exercise judicial or quasi-judicial powers. This decision only makes a determination as to the merits or lack of merits of a complaint for the purposes of proceedings before the L.R.C., which is the only tribunal empowered to exercise quasi-judicial jurisdiction over the matter. Hence, in the event of conflicting versions, only the latter tribunal will be called upon to decide the dispute. One cannot, under such circumstances, blame the L.S.C. for having decided to submit the issue so that a decision may be rendered.[226]

In addition, a right of review is granted to the plaintiff in those instances where the L.S.C. refuses to go forward with an inquiry on the grounds that the complaint is groundless or frivolous.[227]

(d) Mediation

At any time during the inquiry process, should the parties (employer and employee) agree thereto, mediation with the assistance of a mediator appointed by the Labour Minister may be undertaken in order to attempt to settle the dispute to the satisfaction of the parties.[228]

The mediator is required to be a person unattached to the L.S.C. This is understandable since such mediator must exhibit characteristics of neutrality and impartiality vis-à-vis the parties. Since the Labour Standards Commission is conducting a formal inquiry in these cases, it would not exhibit this requirement of appearance of neutrality and impartiality at the mediation stage.

One must also take into account any aspect of confidentiality which is involved in a mediation process.

(e) Referral to the Courts

This is a process in which the plaintiff may submit to the Head of Legal Affairs of the Labour Standards Commission all items which

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226. By way of analogy in pecuniary matters: *C.N.T.* v. *Cercueils André (1992) inc.*, D.T.E. 96T-538 (C.Q.); see S. LEFEBVRE, I. PARADIS and R.L. RIVEST, *op. cit.*, note 10, p. 344.
227. Sec. 107.1 L.S.A.
228. Sec. 123.10 L.S.A.

he or she deems to be important and showing that the outcome of the inquiry could have been different.

If the inquiry concludes that psychological harassment did occur and no agreement was reached by way of mediation, the L.S.C. will then transfer the file to the L.R.C., namely the administrative tribunal responsible for hearing the parties and the evidence submitted.

This Tribunal will be required to decide if evidence has been adduced as to the existence of psychological harassment and, should such be the case, to decide the appropriate means of redress. In this respect, the L.R.C. is vested with the powers usually conferred upon administrative tribunals in matters of labour relations.[229]

Where the inquiry conducted by the L.S.C. does not establish the existence of psychological harassment, the plaintiff is notified thereof and may avail himself or herself of a review process in respect of this decision.[230]

The decision of the L.S.C. with respect to the merits or lack of merits of the complaint is an administrative decision which does not bind the employee in question. The latter may ask to be heard by the L.R.C. even following the administrative decision of the Labour Standards Commission deeming the complaint to be groundless. In such a case, the employee must make a written request to the L.S.C. in order to have the file transferred to the L.R.C.[231]

Once the complaint has been referred to the L.R.C., the latter summons the parties to a hearing before it to hear the parties and rule on the claim. The *Labour Code* also provides for pre-decision conciliation meetings between the parties in order to reach a settlement.[232]

6. Powers of the L.R.C. Following a Complaint of Psychological Harassment

In light of this evidence, if the L.R.C. reaches the conclusion that the claimant was a victim of psychological harassment and that the

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229. Sec. 123.14 L.S.A.; *Labour Code*, *op. cit.*, note 16.
230. Sec. 107.1 L.S.A.
231. Sec. 123.9 L.S.A.
232. Sec. 121 to 123 *Labour Code.*

employer failed to comply with its duties, it may hand down any fair and reasonable decision taking into account all the circumstances of the matter and, *inter alia*:

- order the reinstatement of the employee;
- order the employer to pay to the employee compensation equal to the wages lost, as the case may be;
- order the employer to take reasonable action in order to put an end to the harassment;
- order the employer to pay to the employee punitive and "moral" damages;
- order the employer to pay to the employee compensation for loss of employment;
- order the employer to fund the psychological support necessary for the employee, for a reasonable duration, which it shall determine; and
- order the alteration of the disciplinary file of the employee.

All the powers listed in Section 123.15 of the L.S.A. are the same as those already conferred upon the L.R.C. with respect to a complaint for dismissal without just and sufficient cause.[233] Paragraphs 1 to 7 of Section 123.15 are descriptive in nature. These powers are not restrictive, and the L.R.C. "may render any decision it believes fair and reasonable, taking into account all the circumstances of the matter".[234]

A decision handed down by the L.R.C. and filed with the Superior Court becomes binding, to the same extent as a final judgment of that Court.[235]

It is possible that an employee may have exercised another remedy in order to determine if the psychological harassment to which he or she was subjected may represent an employment injury. In this respect, in accordance with the ruling of the Supreme Court of

233. Sec. 128 L.S.A.
234. Sec. 123.15, first paragraph L.S.A.
235. Sec. 129 *Labour Code*.

Canada in the case of *Béliveau St-Jacques*,[236] the legislator has preserved the notion of no-fault compensation in connection with an industrial accident. Hence, in such a case, if the L.R.C. deems it likely that a decision handed down by a body having jurisdiction will establish that there was indeed such an employment injury, it must reserve its decision with respect to any orders which it may make pursuant to paragraphs 2, 4 and 6 of Section 123.15. These orders relate to compensation with respect to wages lost, punitive and "moral" damages and the funding of the psychological support necessary over time for the employee.

One should, however, note that the opinion of the L.R.C. as to the probability of the existence of an employment injury does not bind the C.S.S.T., or the Employment Injury Commission (C.L.P.) which have exclusive jurisdiction in this matter.[237]

CONCLUSION

The legislative safeguards provided for in the L.S.A. against harassment in the workplace confront this problem by way of a modern-day approach to the issue. Aware of the significant cost, both economical and social, which this exploding phenomenon entails, the legislator is indeed concentrating on information, prevention, streamlining of the notion, and, finally, upon the implementation of an effective remedy available to the victims of psychological harassment.

Knowledge and understanding of the phenomenon are two essential conditions in order to cure the problem. Psychological harassment, as we have seen, takes on various forms; it is often insidious and not necessarily initially motivated by a mean-spirited or malicious intent on the part of the harasser, or, at least, on the part of

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236. *Béliveau St-Jacques* v. *Fédération des employées et employés du service public inc., supra*, note 50.

237. Sections 349 and 369 of *An Act respecting industrial accidents and occupational diseases* (R.S.Q., c. A-3.001) respectively deal with the exclusive powers of C.S.S.T. and the C.L.P. **349.** "The Commission has exclusive jurisdiction to examine and decide any question contemplated in this Act unless a special provision gives the jurisdiction to another person or agency." **369.** "The board shall, to the exclusion of any other tribunal, make determinations on 1) proceedings brought under section 359, 359.1, 450 or 451; 2) proceedings brought under section 37.3 or 193 of the Act respecting occupational health and safety (chapter S-2.1)."

the employer which has a duty to provide healthy work conditions to its employees.

The legislative intervention therefore incites the parties in question to take stock of the problem and to act in a preventive manner. Will we, in the near term, see a reduction of the number of employment injury cases in this matter? This is certainly the goal sought to be achieved by the legislator.

The right to respect, dignity and integrity of the person has been recognized for all employees by the courts for several years. The legislator has enshrined this principle by adopting public policy rules applicable in the workplace. Section 81.19 therefore states that "every employee has a right to a work environment free from psychological harassment". It consequently requires the employer to "take reasonable action" to prevent psychological harassment and, where it becomes aware of vexatious behaviour, to intervene "to put a stop to it".

These rights and duties apply to all parties involved in the workplace.

Of course, chief among them, is the employer, since the Act imposes duties of a dual nature upon it. The first duty, which is preventive in nature, involves taking measures, passing guidelines or adopting policies with a view to eradicating any form of psychological harassment in the workplace. The second duty, which is interventionist in nature, requires the employer to act immediately upon becoming aware of harassing conduct, in order to put an end to it. This specific duty is the legislative enshrinement of the duty of the employer to maintain healthy work conditions and of its liability with respect to employees guilty of wrongdoing.

Naturally, the preventive steps taken will vary according to the size of the business. All employers are not faced with the same realities and do not possess the same capacities for organization. One business made up of some ten employees, the owner of which is the person assuming all the management duties, cannot be compared to another corporation managing more than a hundred employees. In a small business, the relations and coexistence are closer, more individualized, than in a medium-sized or large corporation. These different realities must be taken into consideration in the establishment of preventive measures.

In addition, labour organizations ought to foster awareness among their members as to the issue. We have noted that many cases of psychological harassment in the workplace originated from an unhealthy climate of union solidarity which expressed itself in ostracism exercised against certain dissident members. Due to the broadening powers of the L.R.C. with respect to equitable and non-discriminatory union representation,[238] labour organizations will have to be more vigilant in light of the phenomenon of harassment in the workplace and intervene with all due dispatch when such situations arise.

All in all, the legislative protection against psychological harassment focuses chiefly on the employee himself or herself, as a person worthy of respect. Although the L.S.A. enshrines the liability of the employer with respect to the wrongdoing of its representatives,[239] it does not do away with the individual liability of the harasser, who may be required to pay compensation to the victim in some form, in light of the various remedies which exist, among others, those pursuant to the Quebec Charter, the Civil Code or even following the filing of a grievance.

However, the legislator requires that a distinction be made between harassing behaviour and the altogether legitimate management of the employer, which may involve taking disciplinary action. The employee must, therefore, be in a position to assess the seriousness of such an allegation of harassment in the workplace. The filing of a frivolous complaint in this respect and the harm suffered by the person unjustly accused could warrant serious punishment.

The new legislative provisions also have the advantage of streamlining the notion of harassment in the workplace according to a modern-day approach adapted in light of legal ponderings and socio-economic analysis on the topic. The definition put forth pursuant to Section 81.18 combines the various criteria developed by the common law courts as well as those tribunals specialized in such matters. It incorporates the notion of respect, dignity and integrity of the employee which have been analyzed and have enabled the development of an objective test for an equitable application of the principle.

In this respect, the criterion of the "reasonable person placed in the same circumstances" represents an objective standard for

238. Sec. 47.2 and 47.3 *Labour Code*.
239. Sec. 1463 C.C.Q.

identification. The conflict situation must be considered in light of the standard of conduct which is accepted or tolerated by society in order to ask oneself how this reasonable person would have reacted in the same harassment context.

In other words, the relevant point of view is that of the reasonable and objective person, who is apprised of all the circumstances and is placed in a situation which is similar to that reported by the employee.

The definition of harassment provided for in Section 81.18 L.S.A. is the first of its kind to have been crafted by the legislator. Since it is incorporated in a public policy statute, it is a strong bet that it will inspire a good many litigators and decision-makers both before specialized tribunals and before the common law courts.

This definition will certainly have a significant impact on the courts called upon to intervene in this matter, such as the L.R.C., the Public Service Commission and arbitration boards. We believe that it will also have a similar impact on the common law courts in actions for damages and even before the Employment Injury Commission when it is called upon to determine, initially, if the events alleged as a basis for compensation amount to psychological harassment in the workplace.

Finally, even if it is far preferable to reparations, the prevention of harassment may not, in and of itself, thwart all the occurrences thereof. It was therefore necessary to provide a simple remedy, which is accessible and efficient for victims, whether or not they are unionized.

In this respect, Section 81.20 L.S.A. usefully preserves the exclusive jurisdiction of the various specialized tribunals in matters of labour relations, in keeping with the rulings of the Supreme Court of Canada. Hence, with respect to non-unionized employees, the L.R.C. will be called upon to hand down a decision on a complaint for harassment. Owing to its broadly-recognized expertise with respect to complaints for prohibited practices and for dismissals without just and sufficient cause, the parties involved will, therefore, be heard more promptly by a tribunal of competent jurisdiction. The grievance arbitrators, who have developed certain definitions in the case law on

the matter, will hear the cases of unionized employees. As for the Public Service Commission, it will retain jurisdiction with respect to non-unionized employees appointed pursuant to the *Public Service Act*.

In addition, let us recall that the legislator has preserved the notion of no-fault compensation in matters of employment injuries. The L.S.A. also guarantees the specificity and the jurisdiction of the courts which have been called upon to interpret cases of employment injury. This new protection and the remedies arising thereunder do not do away with the other legal vehicles already available to the employee. It is to be expected that parallel remedies will be initiated where the worker will, for instance, allege that he or she has suffered consequences as a result of harassment in the workplace.

In these latter cases, the challenge will be to ensure a common and concerted intervention by the agencies involved, such as the C.S.S.T., the Employment Injury Commission, the L.S.C., the L.R.C. and the *Commission des droits de la personne et des droits de la jeunesse*, in order to ensure that the various conciliation and adjudication procedures are efficient. Otherwise, the parties involved, both the employer and the employee, risk becoming bogged down in intertwined remedies.

From now on, decision-makers have a single source which specifies what amounts to psychological harassment in the workplace: the definition provided for in the *Labour Standards Act*. In this respect, the L.R.C., the other specialized tribunals and, as the case may be, the superior courts will have a crucial role to play in the direction and application to give to the legislative commitment.

SCHEDULE

Labour Standards Commission

INTERPRETATION OF THE PROVISIONS RELATING
TO PSYCHOLOGICAL HARASSMENT

February 2, 2004

DIVISION V.2

PSYCHOLOGICAL HARASSMENT

The notion of harassment has progressively evolved in labour relations. Abundant case law, especially with respect to the issue of constructive dismissal and resignation, has recognized a degree of protection in this matter, both for persons governed by a collective bargaining agreement and for those which are non-unionized.

Several forums have set out the rights and duties of the parties on this issue. For an employee not governed by a collective bargaining agreement, the common law courts and the commissioners of the Labour Relations Commission have been called upon to delve into the question, in particular when interpreting the notion of the right to dignity granted by the *Civil Code of Québec*.

As for unionized employees, grievance arbitrators have long ago developed various criteria enabling the identification of what is meant by the notion of harassment in the workplace.

However, the remedies are currently scattered and piecemeal, the various processes and procedures being more or less adapted to the circumstances of each case.

The purpose of this legislation is, first and foremost, to promote awareness among employers and employees with respect to psychological harassment in the workplace and, thereby, to enable action to be taken upstream in order to avoid a deterioration of the work environment for the employee.

It is under these circumstances that the new standards with respect to psychological harassment incorporated in the *Labour Standards Act* (ss. 81.18 to 81.20) were adopted. These standards give rise to a specific remedy (ss. 123.6 to 123.16). They came into force on June 1, 2004.

These safeguards apply to any employee, including the senior executive (s. 3.1). The duties underlying this protection are incumbent upon any employer.

These standards set out duties incumbent on the employer which already exist pursuant to provisions of the *Civil Code of Québec* and the *Charter of Human Rights and Freedoms*. These provisions enshrine the right to dignity, to respect and to integrity of the person and guarantee unto such person equitable and sufficient work conditions as well as a healthy work environment.

The application of these labour standards should enable a streamlining of the various definitions developed in case law by specialized tribunals and common law courts.

> **81.18.** 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.
>
> A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.

INTERPRETATION

This section defines what amounts to psychological harassment. The definition must be examined in the particular circumstances of the employer-employee relationship. In other words, that which would not have represented harassment under other circumstances may amount to such conduct due to the relation of legal subordination existing between the parties.

The vexatious conduct must be expressed in the form of behaviour, verbal comments, actions or gestures, which must exhibit, as far

as the first subsection is concerned, a repeated nature, i.e. continuity over time.

The vexatious nature is generally examined in light of the person experiencing the situation which he or she has reported, regardless of the intent of the harasser. In the majority of cases, the assessment will focus on the nature, intensity and recurrence of the unwanted acts, as well as their impact upon the victim. The vexatious conduct may involve a continuous nature which is evidenced by the effect of the physical or psychological harm connecting each of the acts together.[1]

This behaviour, these verbal comments, actions or gestures, must be hostile or unwanted. They must entail damage to the dignity or the psychological or physical integrity of the person to whom they are directed and foster, for such person, a harmful work environment. By "harmful", one means a noxious, damaging, poor or unhealthy environment.

Hostile action taken towards the employee need not necessarily be flagrant. Indeed, the aggressiveness of such action is not crucial to its qualification as hostile. For instance, an employee may be subjected to verbal comments, acts or gestures, which, taken in isolation, may appear to be benign or innocuous, unless combined, in which case the accumulation or combination thereof may amount to a situation of harassment. In such a case, if the employee works alone most of the time, the hostile action will not necessarily be visible from the outset.

The qualification of the term "unwanted" refers to the deviant behaviour in its entirety. Indeed, the victim is not required to verbalize his or her refusal when confronted with such behaviour, however the crucial aspect leading to a finding of harassment is that the behaviour in and of itself must be unwanted.[2]

The notion of human dignity means that a person feels respected and self-respect. It ties into physical or psychological integrity. Human dignity in no way relates to the status or position of a

1. *Dhawan* v. *Commission des droits de la personne et des droits de la jeunesse*, C.A. Montréal, 2000-06-26, D.T.E. 2000T-633 (C.A.), aff'd *Commission des droits de la personne du Québec* v. *Dhawan*, D.T.E. 96T-285.
2. *Habachi* v. *Commission des droits de la personne*, D.T.E. 92T-634 (C.A.).

person in his or her work environment, but rather to how it is reasonable that a person would feel in light of a particular fact situation. Human dignity is undermined where a person is marginalized, ostracized and demeaned.[3]

Note, as well, that one single serious occurrence may also amount to psychological harassment. The harmful effect of this seriousness must have repercussions over time for the person subjected to it. The damage to the dignity or the psychological or physical integrity of the employee and the harmful effect of the behaviour are inextricably linked, both in the case of an isolated incident and in those instances of a repeated nature.

In this definition, the legislator is not targeting specific situations nor persons in particular.

Conduct amounting to sexual harassment, whether it be expressed in a physical or verbal manner, could be deemed to be psychological harassment.

Let us recall that the *Charter of Human Rights and Freedoms* and the *Civil Code of Québec* provide specific provisions to this effect.

Section 46 of the Charter states as follows: "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."

As for Article 2087 of the *Civil Code of Québec*, it reads as follows: "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."

The Criteria for Identification

The identification of the existence of harassment must be determined according to an objective analytical process.

In this respect, the criterion of the "reasonable person" placed in the circumstances reported in a complaint of harassment represents

3. *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

an objective identification standard. The reference point for this "reasonable person" must be a standard of conduct which is accepted or tolerated in society. Reference is made to a person of average intelligence and judgment, in order to determine how this person would have reacted in the specific circumstances.

The relevant point of view is, therefore, that of the reasonable and objective person who is apprised of all the circumstances and is placed in a situation similar to that reported by the employee. Would such person conclude that a situation of harassment exists?

The application of the standards must not have the effect of denying the ordinary exercise by the employer of the management of its human resources. One must distinguish the actions of the employer in the normal and legitimate exercise of its management rights, even where they involve various inconvenient or unpleasant events, from those actions taken in an arbitrary, abusive, discriminatory fashion or in a manner not in keeping with normal work conditions.

> **81.19.** Every employee has a right to a work environment free from psychological harassment.
>
> Employers must take reasonable actions to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it.

INTERPRETATION

The work environment includes not only the physical premises where the employee performs his or her duties, but also any place where he or she may be called upon to work according to the requirements of his or her employment.

The reality of this work environment cannot ignore the persons with whom the employee interacts in the discharge of his or her duties. Consequently, the legislator is targeting not only the employer, its representatives or the co-workers, but also clients or third parties.

The *Labour Standards Act* imposes upon the employer an obligation of means. Such an obligation requires the person subject to it to act cautiously, diligently and to take reasonable steps in

attempting to obtain the results sought, without, however, requiring that such result be attained with absolute certainty. The example which is most often cited is that of the doctor who, while using all means at his disposal in order to cure his patient, cannot guarantee to the latter, however, that he will be successful.

By way of illustration, an employer having an obligation of means may incur liability, among others, in the event of:

– wrongdoing perpetrated by the employer or one of its representatives in the discharge of his duties;

– breach of its duty to ensure the existence, in its business, of an appropriate climate and appropriate work conditions.

Conversely, the obligation of result, as its designation indicates, requires the person subject to it to obtain a specific and precise result. An example of this obligation is that of the vendor who undertakes to deliver specific property on a specific date.

This liability is incumbent upon the employer itself and not upon the alleged perpetrator of the psychological harassment. The liability lies with the employer to provide its employees with equitable and reasonable work conditions and to respect their health, security, dignity and psychological and physical integrity.

Consequently, as soon as it becomes aware of a situation of harassment, the employer is required to take the appropriate steps and the necessary action to put an end to it. This implies the existence and implementation of a procedure which is known, efficient and adapted to the reality of each business in order to enable the disclosure of cases of harassment and the rapid and objective handling thereof.

In its capacity as primary organizer of the work, only the employer may exercise the requisite authority in order to guarantee a healthy work environment free of harassment.

Lack of knowledge of a situation of harassment on the part of the employer will not allow it to escape liability, all the more so in the event of the negligence or wilful blindness of the latter when confronted with a situation of harassment, in which case, the employer incurs liability.

> **81.20.** The provisions of sections 81.18, 81.19, 123.7, 123.15 and 123.16 with the necessary modifications, are deemed to be an integral part of every collective agreement. An employee covered by such an agreement must exercise the recourses provided for in the agreement, insofar as any such recourse is available to employees under the agreement.
>
> At any time before the case is taken under advisement, a joint application may be made by the parties to such an agreement to the Minister for the appointment of a person to act as a mediator.
>
> The provisions referred to in the first paragraph are deemed to form part of the conditions of employment of every employee appointed under the *Public Service Act* (chapter F-3.1) who is not governed by a collective agreement. Such an employee must exercise the applicable recourse before the Commission de la fonction publique according to the rules of procedure established pursuant to that Act. The Commission de la fonction publique exercises for that purpose the powers provided for in sections 123.15 and 123.16 of this Act.
>
> The third paragraph also applies to the members and officers of bodies.

INTERPRETATION

The employee having a right to grieve pursuant to his or her collective agreement is required to proceed in accordance with the latter. The provisions with respect to the definition of psychological harassment, as well as those provisions with respect to the right to an environment free from psychological harassment and the duties of the employer to maintain such an environment, form an integral part of any collective agreement. As well, the provisions with respect to the curative powers of the Labour Relations Commission provided for in Sections 123.15 and 123.16 of the Act are included.

The application for the services of a mediator designated by the Minister must be a joint application.

In the case of an employee who is a public servant and non-unionized, the same provisions as those set out above are deemed to be an integral part of his or her work conditions and the Public Service Commission, in that case, exercises the powers provided for in Sections 123.15 and 123.16 of the Act. The same goes for the members and officers of governmental bodies.

DIVISION II.1

RECOURSE AGAINST PSYCHOLOGICAL HARASSMENT

> **123.6.** An employee who believes he has been victim of psychological harassment may file a complaint in writing with the Commission. Such a complaint may also be filed by a non-profit organization dedicated to the defence of employees' rights on behalf of one or more employees who consent thereto in writing.

INTERPRETATION

The complaint of the employee must be made *in writing*. The same goes for the complaint which may be filed by an organization dedicated to the defence of employee's rights, but the latter must, in addition, also include a written authorization of each of the employees to which this complaint applies.

> **123.7.** Any complaint concerning psychological harassment must be filed within 90 days of the last incidence of the offending behaviour.

INTERPRETATION

This is a condition precedent to the exercise of this remedy. The computation of the 90-day time limit runs from the last occurrence of the behaviour amounting to psychological harassment. Consequently, the last occurrence of such behaviour need not be prior to the 90-day time limit, which is of the essence.

> **123.8.** On receipt of a complaint, the Commission shall make an inquiry with due dispatch.
>
> Sections 103 to 110 shall apply to the inquiry, with the necessary modifications.

INTERPRETATION

Upon receiving a complaint, the Commission in keeping with the rules with respect to the inquiry provided for in the Act, shall appoint an investigator who shall discharge his or her duties in accordance with the powers conferred upon him or her by Sections 108 to 110 of the Act. See, in this respect, the interpretation with respect to Sections 108 to 110 of the Act.

On the whole, the powers of investigation are the same as those applied in civil matters. The Commission or a person designated by it for the purposes of an inquiry is vested with the powers and the immunity granted to commissioners appointed pursuant to the *Act respecting public inquiry commissions* (chapter C-37).

In addition, a right of review is granted to the plaintiff where the Commission refuses to proceed with an inquiry on the grounds that the complaint is groundless or frivolous. See also the interpretation with respect to Sections 106 to 107.1 of the Act.

The investigator is required to assess if there exists a form of psychological harassment within the meaning of the Act. The inquiry will, in particular, involve the gathering of the factual basis enabling an assessment of the merits of the complaint. In this respect, it will enable the establishment of the existence or lack of existence of a clear and patent desire on the part of the employer to guarantee a work environment free from psychological harassment. In addition, this inquiry will enable a determination of whether the employer has implemented appropriate means or a policy in order to ensure the prevention of psychological harassment in its business.

Note that the adoption of a policy may not, in and of itself, represent a measure which will enable the employer to escape liability. It may however, represent a significant factor in all the protective steps taken in order to avoid cases of harassment in the workplace. See the interpretation of Section 81.19 to this effect.

> **123.9.** If the Commission refuses to take action following a complaint, the employee or, if applicable, the organization with the employee's written consent, may within 30 days of the Commission's decision under Section 107 or 107.1, make a written request to the Commission for the referral of the complaint to the Commission des relations du travail.

INTERPRETATION

The decision of the Labour Standards Commission with respect to the merits or lack of merits of the complaint is an administrative decision which does not bind the employee in question. The latter may ask to be heard by the Labour Relations Commission, even following the administrative decision of the Labour Standards Commission deeming the complaint to be groundless. In such an event, the employee must make the request for referral *in writing*.

The time limit to make such request is 30 days following the decision of the Labour Standards Commission not to go forward with the inquiry, or, where there has been an administrative review of this decision, from the date of rejection of the review.

Where such a request is made by a non-profit organization dedicated to the defence of employees' rights, the written consent of the employee is necessary and constitutes a condition precedent to this request.

The consequence of the refusal by the Labour Standards Commission to take action following the complaint of the employee, because it believes this complaint to be groundless, is that it will not be able to represent the employee before the Labour Relations Commission. The employee must, therefore, provide for his or her own representation, either in person or through a representative of his or her choosing.

> **123.10.** The Commission may, at any time, during the inquiry and with the agreement of the parties, request the Minister to appoint a person to act as a mediator. The Commission may, at the request of the employee, assist and advise the employee during mediation.

INTERPRETATION

Throughout the entire inquiry process, mediation is always possible, without being compulsory. It is an additional means of settlement available to the parties agreeing thereto.

This mediation is conducted by a person designated by the Labour Minister, at the request of the Labour Standards Commission which has obtained the consent of the parties in this respect. Since

the Labour Standards Commission is responsible for the inquiry process, the neutrality of the mediator is therefore guaranteed.

Contrary to complaints for prohibited practices or dismissals without just and sufficient cause, the complaint for psychological harassment may give rise to an inquiry by the Labour Standards Commission. See the interpretation of Section 123.8 of the Act.

> **123.11.** If the employee is still bound to the employer by a contract of employment, the employee is deemed to be at work during mediation sessions.

INTERPRETATION

In such a case, the employee is deemed to be at work and the employer is required to pay him or her the agreed-upon wages, corresponding to the work hours of the employee.

See also the interpretation with respect to Section 57 of the Act.

> **123.12.** At the end of the inquiry, if no settlement is reached between the parties and the Commission agrees to pursue the complaint, it shall refer the complaint without delay to the Commission des relations du travail.

INTERPRETATION

In such a case, the employee is not required to apply to the Labour Standards Commission, either orally or in writing, for a referral of his or her complaint to the Labour Relations Commission.

The referral is effected automatically, without any other formality on the part of the employee, if the Commission had deemed the complaint to be well-grounded and if no complete settlement has been reached between the parties.

The decision by the Labour Standards Commission with respect to the merits of a complaint is an administrative decision; it must not usurp the role incumbent upon the tribunal, which is to decide the dispute.

> **123.13.** The Commission des normes du travail may represent an employee in a proceeding under this division before the Commission des relations du travail.

INTERPRETATION

This power of representation by the Labour Standards Commission is similar to that provided for in Sections 123.5 and 126.1 of the Act. See the interpretation with respect to Sections 123.5, 126.1 and 81.20 of the Act.

> **123.14.** The provisions of the *Labour Code* (chapter C-27) relating to the Commission des relations du travail, its commissioners, their decisions and the exercise of their jurisdiction, except Sections 15 to 19, as well as Section 100.12 of that Code apply with the necessary modifications.

INTERPRETATION

The powers of a grievance arbitrator are conferred upon the labour commissioner required to hear the complaint for psychological harassment. For instance, the commissioner must proceed with all due dispatch to the hearing of the complaint and hand down his or her decision based on the facts gathered in the course of the inquiry. He or she may, therefore, ask of the parties and witnesses any questions which he or she deems useful.

In addition, note that the Labour Relations Commission is vested with broad powers to issue various types of orders, such as an order for interim execution, which it deems necessary to safeguarding the rights of the parties (see Sections 112 and following of the *Labour Code* (R.S.Q., c. C-27) with respect to the powers of the Labour Relations Commission).

> **123.15.** If the Commission des relations du travail considers that the employee has been the victim of psychological harassment and the employer has failed to fulfill the obligations imposed on employers under Sections 81.19 it 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 a 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.

INTERPRETATION

All the powers listed in this section are the same as those already conferred upon the Labour Relations Commission with respect to a complaint for dismissal without just and sufficient cause. Paragraphs 1 to 7 of Section 123.15 are of a descriptive nature. Its powers are not restrictive, the Labour Relations Commission being entitled to "render any decision it believes fair and reasonable, taking into account all the circumstances of the matter".

A decision of the Labour Relations Commission filed with the Superior Court becomes binding, to the same extent as a final judgment of that Court.[4]

4. Section 129 of the *Labour Code* provides as follows: "**129.** The Commission may, within six months after the date of the decision, on application by an interested party, authorize the filing of the decision at the office of the clerk of the Superior Court of the district of the domicile of one of the parties to whom the decision applies. The decision of the Commission becomes enforceable as if it were a final judgment of the Superior Court and has all the effects of such a judgment. If the decision contains an order to do or not to do something, any person named or designated in the decision who transgresses the order or refuses to comply therewith, and any person not designated who knowingly contravenes the order, is guilty of contempt of court and may be condemned by the court having jurisdiction, in accordance with the procedure provided for in articles 53 to 54 of the Code of Civil Procedure (chapter C-25), to a fine not exceeding $50,000 with or without imprisonment for not over one year. These penalties may be imposed again until the offender complies with the decision."

123.16. Paragraphs 2, 4 and 6 of Section 123.15 do not apply to a period during which the employee is suffering from an employment injury within the meaning of the *Act respecting industrial accidents and occupational diseases* (chapter A-3.001), that results from psychological harassment.

Where the Commission des relations du travail considers it probable that, pursuant to Section 123.15, the psychological harassment entailed an employment injury for the employee, it shall reserve its decision with regard to paragraphs 2, 4 and 6.

INTERPRETATION

The Labour Relations Commission to which a complaint has been referred must make a decision as to the existence or lack of existence of harassment in the workplace. When it finds that the employer has failed to comply with its duties, it must hand down a decision with reasons to that effect, according to the remedies provided for in Section 123.15 of the Act.

It is possible that an employee may have filed a claim pursuant to the *Act respecting industrial accidents and occupational diseases* (chapter A-3.001) in order to determine if the psychological harassment to which he or she has been subjected may amount to an employment injury. This statute aims at preserving the compensation scheme based on no-fault principles of insurance and group liability, regardless of the negligence of the employee suffering from an employment injury.

In this event, if the Labour Relations Commission deems it probable that a decision handed down by the body having jurisdiction will establish that there exists such an employment injury, it will reserve its decision only with respect to the orders provided for in paragraphs 2, 4 and 6 of Section 123.15. These orders relate to the indemnity with respect to lost wages, to punitive and moral damages and to the funding of the psychological support necessary for the employee.

Consequently, the Labour Relations Commission shall be required to issue an order based, in particular, on paragraphs 1, 3, 5 and 7 of Section 123.15, as well as any other decision which it deems

equitable and reasonable in light of the circumstances of the matter. In so doing, the legislator intended that the employee should not be deprived of the compensation to which he or she would otherwise be entitled pursuant to the *Labour Standards Act*.

One must, however, note that the opinion of the Labour Relations Commission, with respect to the probability of the existence of an employment injury, cannot bind the *Commission de la santé et de la sécurité du travail*, or the *Commission des lésions professionnelles*, which have the exclusive authority[5] to make a determination as to the existence of an employment injury pursuant to their enabling legislative provisions.

In addition, if the employment injury has been recognized by a body enabled to make such a determination as aforementioned, the Labour Relations Commission may not issue an order with respect to the subject-matter listed in paragraphs 2, 4 and 6 of Section 123.15 of the Act.

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5. Sections 349 and 369 of *An Act respecting industrial accidents and occupational diseases* (R.S.Q., c. A-3.001) respectively deal with the exclusive powers of Commission de la santé et de la sécurité du travail and the Commission des lésions professionnelles. **349.** "The Commission has exclusive jurisdiction to examine and decide any question contemplated in this Act unless a special provision gives the jurisdiction to another person or agency." **369.** "The board shall, to the exclusion of any other tribunal, make determinations on 1) proceedings brought under section 359, 359.1, 450 or 451; 2) proceedings brought under section 37.3 or 193 of the Act respecting occupational health and safety (chapter S-2.1)."

Psychological Harassment – A Question of Accountability

Guy Poirier

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INTRODUCTION

When speaking of accountability, it would be inappropriate to view matters in simple terms of duties incumbent upon an employer.

Indeed, the issue must be cast in a broader light. Accountability chiefly concerns the employer, but also all the employees and the various stakeholders transacting business with the corporation.

Accountability is the application, through deeds, actions, response or behaviour, of principles which act as day-to-day guidelines.

Hence, accountability stems from the basic principle that every person is entitled to a healthy workplace and to the preservation thereof. This principle requires compliance and involvement by all parties. It represents the grouping of all the human resources of the corporation with a view to the achievement of its goal and the attainment of the common good.

Compliance with the principle of preservation of a healthy workplace underscores one of the main objectives designed to eradicate any form of harassment at work, namely that of prevention which:

> [TRANSLATION] [...] is achieved by sound management which thereby promotes the satisfaction and well-being of the employees as well as an environment which advocates mutual respect while remaining conducive to productivity and efficiency.[1]

The first step in achieving true accountability and the stepping stone of a preventive approach within a corporation is the acknowledgement and adoption of values which are specific to that

1. Isabelle CANTIN and Jean-Maurice CANTIN, *Politiques contre le harcèlement au travail et réflexions sur le harcèlement psychologique*, Cowansville, Éditions Yvon Blais, 2004, p. 37.

corporation and necessary to its harmonious operation. These values must be shared by all and implemented.

The following are illustrations of certain values which may be relevant.[2]

– ethics;

– decent work;

– health;

– security;

– respect;

– tolerance;

– equal opportunity;

– cooperation;

– quality of service;

– etc.

The second step involves the awareness and acknowledgement of the existence of situations of psychological harassment, sexual harassment and violence in the workplace.

One must be able to distinguish a situation of psychological harassment from a situation which does not meet those criteria, such as a mere conflict between persons.

Psychological harassment usually manifests itself in three different manners:

– "mobbing", that is to say the isolation or ostracism of a person from a group resulting from a war of nerves designed to prevent that person from expressing himself;

– "bullying" which represents an attempt to discredit a person by false accusations or allegations bearing on that person's abilities, behaviour, actions, etc., and

2. *Code of practice on workplace violence in services sectors and measures to combat this phenomenon*, Meeting of Experts to Develop a Code of Practice on Violence and Stress at Work in Services: A Threat to Productivity and Decent Work, International Labour Office, International Labour Office, Sectoral Activities Programme, Geneva, 8-15 October 2003, MEVSWS/2003/11.

– abusive power which manifests itself by the inappropriate or abusive exercise of authority by the employer or the person to whom such power has been delegated. It may involve the use of authority and power through intimidation, threats, blackmail or coercion in order to harm the person, to impede his development and his performance.[3]

Harassment is often insidious in that the deeds, attitudes or deviant behaviour take place over an extended period of time and, in the beginning, may appear more or less innocuous. They are spread out over time, becoming gradually more serious, more intense and more frequent, which explains why the victim may be hesitant to report the situation quickly.

In this respect, the author Marie-France Hirigoyen[4] states the following:

> [TRANSLATION] Within a group dynamic, it is normal that conflict should arise. A hurtful remark made in a moment of agitation or of moodiness is not significant, all the more so if it is followed by an apology. The destructive phenomenon results from the repetitive nature of the vexatious behaviour, of the humiliations, without any effort being made to temper them.

When the values of a corporation are well entrenched, it is all the more difficult to see such instances of harassment develop. According to Ms. Hirigoyen,[5] "[TRANSLATION] harassment is made possible because it is preceded by a denigration of the person, which is accepted, and then approved of, by the group [...]. This disparagement provides justification after the fact for the cruelty perpetrated against the person (*the victim*) and leads to the belief that the person fully deserved what has happened to him" (the italics are ours).

Not only is it thought that the person richly deserved what he has been subjected to, but, in addition, it happens not infrequently that the person ends up becoming that which one seeks to make him out to be. One forgets who he used to be.

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3. *Interdepartmental Committee Report on Psychological Harassment at Work*, Labour Department, May 14, 2001, Government of Quebec, p. 11.
4. Marie-France HIRIGOYEN, *Le harcèlement moral – la violence perverse au quotidien*, Syros, 1998, p. 56.
5. *Op. cit.*, note 4, p. 58.

The stress caused to the victim of harassment necessarily brings about a significant reduction of his potential:

> [TRANSLATION] The person is inattentive, inefficient and opens himself up to criticism with respect to the quality of his work. It is then easy to get rid of him, arguing incompetence or professional negligence.[6]

In addition, one must beware not to fall into the trap set by these persons to whom Marie-France Hirigoyen[7] refers as small-time paranoiacs who pass themselves off as victims and are therefore able to disguise the existence of the true victims of harassment. The former are tyrannical and inflexible persons who easily find themselves in conflict with others in their environment, who suffer no criticism whatsoever and are prone to feeling rejected. Far from being victims, they are potential aggressors, easily identifiable by their behavioural inflexibility and their absence of guilt.

The awareness and acknowledgement of the phenomenon of harassment is a condition precedent to the implementation of various measures within the corporation in order to ensure a workplace free of harassment and to remedy such occurrences when they arise.

These measures are the following:[8]

– the adoption by the employer of a clear policy or of specific rules advocating zero tolerance in matters of harassment or violence in the workplace;

– an analysis of the prevailing risks and identification of hazards;

– prevention and the control of the work environment;

– the management of the occurrences and conflicts in order to mitigate the impact thereof;

– rapid intervention in the processing of complaints through an efficient internal procedure (investigation, mediation, conciliation carried out by a person exhibiting qualities of integrity, objectivity

6. *Op. cit.*, note 4, p. 59.
7. *Ibid.*
8. *Op. cit.*, note 2.

and neutrality). The Supreme Court, in the case of *Robichaud*[9] opined as follows:

> For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability.

– help and assistance provided to victims;

– appropriate and necessary response with respect to the perpetrator;

– monitoring and assessment of the process.

What a Policy Must Contain

– It must first define what represents psychological harassment, sexual harassment and violence in the workplace. *An Act respecting labour standards* (R.S.Q. c. N-1.1), in Section 81.18 thereof, contains the definition of psychological harassment. It is a broad definition which encompasses the various forms of harassment and violence in the workplace. In addition, it is not always easy to properly identify situations of harassment or violence. One must acknowledge that the dynamics of this behaviour are often complex.

The authors Aurousseau and Landry[10] have identified twelve types of behaviour, from the most insidious to the most flagrant:

1- the use of vocabulary as a disguise;

2- the refusal to communicate with the person except on an as-required basis;

3- biased dialogue;

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9. *Robichaud* v. *Canada*, [1987] 2 S.C.R. 84.
10. Chantal AUROUSSEAU and Simone LANDRY, *Les professionnelles et professionnels aux prises avec la violence organisationnelle*, Protocole UQAM-CSN-FTQ, document nº 64, Services aux collectivités de l'UQAM, Fédération des professionnel(le)s et des cadres du Québec (FPSCQ), 1996.

4- the denial of any form of professional development;

5- the denial of any professional support;

6- the questioning of abilities: invalidation, punishment, denigration;

7- lack of respect or contempt;

8- administrative harassment;

9- excessive control;

10- threats;

11- intimidation;

12- ostracism.

– A willingness at the highest level of authority, which is clearly established and communicated to all hierarchical levels, to promote zero tolerance. This willingness must be accompanied by a clear and unequivocal undertaking to protect the right to the preservation of a healthy workplace.

– An assignment of responsibilities, including those incumbent upon all the employees, to support the measures implemented.

– A complete procedure for intervention which is objective, equitable and efficient.

– A series of measures designed to prevent, control and eradicate any form of harassment or violence.

– A series of measures governing the response to, and management of, incidents of harassment or violence.

– A guarantee of confidentiality and non-retaliation.

Such a policy must be communicated to all the employees and properly understood by the latter. It must be designed to preserve a healthy workplace and to ensure the just and equitable treatment of all.

Duties of the Employer[11]

– To establish or promote the implementation of training, education, information or other programs for management staff and the employees.

– To implement preventative measures following the assessment of risks conducted and taking into consideration the possible indicators of the existence of a problem.

– To conduct the appropriate investigation.

– To provide the necessary support to the victim (E.A.P., remedies, etc.).

– To take necessary action against the perpetrator of the wrongdoing.

– To take necessary action with respect to the organization of work.

– To keep a register of incidents which have occurred.

– Etc.

Duties of the Employee

– To abstain from any form of harassment or violence.

– To cooperate with his employer in the application of the policy.

– Not to suffer acts of harassment or violence to be committed.

– To participate in preventative measures.

– To participate in the training sessions offered.

Let us now examine in closer detail two of the aspects described in the duties above, namely: training and risk analysis.

11. *Op. cit.*, note 2.

Training[12]

The first aspect relates to training. Such training is intended to inform all the workers with respect to: the nature and potential causes of harassment or violence; the scope, places or times which are the most sensitive; prevention by recommending good practices; promotion of awareness as to cultural diversity, male-female relationships, discrimination, etc.; applicable legislation and the help and support services available.

The training sessions are intended for all and are to be adapted according to the needs of the various groups. Hence, the needs of all the employees may differ from those of the managerial staff.

In respect of the employees, training will:

– enable them to acquire a common understanding;

– improve their ability to identify potential situations;

– improve their ability to assess situations, to confront them and to solve problems;

– improve their sense of human relations and communications;

– reinforce attitudes contributing to a good work environment;

– develop defense mechanisms against risks.

In respect of the managerial staff, training will:

– explain the policy of the corporation in order to ensure that it is properly understood and applied;

– enable an assessment of the workplace and an identification of the work processes or conditions to be changed or improved;

– hone advisory skills as well as abilities to assist and help and during interaction with employees in the handling of cases, all of which should be conducted in absolute confidence;

12. *Ibid.*

– acquire the management practices which promote a workplace based on mutual respect.

Risk Analysis[13]

This second aspect is just as essential for any employer and manager who wishes to maintain control and to avoid problem situations.

A risk assessment must take into consideration certain factors and also possible indicators of the existence of a problem.

Non-exhaustive list of factors to take in consideration:

– any aggression;

– any verbal violence (swearing, insults, arrogant attitudes, etc.);

– any aggressive hand movements designed to intimidate or to show contempt or disdain;

– any form of hazing or initiation rituals;

– any racist or discriminatory behaviour;

– any behaviour indicating an intent to harm;

– any threatening behaviour;

– any verbal or written threat;

– any indicator of the existence of a problem:

1. results of investigations conducted in similar sectors or with respect to classes of workers;

2. absenteeism;

3. sick leave;

4. the rate of accidents;

13. *Ibid.*

5. staff turnover;

6. opinions expressed by managerial staff and employees.

– etc.

CONCLUSION

Accountability in matters of psychological harassment involves acquiring the awareness necessary to implementing preventive measures and effectively handling cases.

It enables the employer to place full emphasis on its main resource, namely its human resources, by seeking to provide for the latter a healthy workplace which allows the employees to work efficiently and harmoniously together with a view to attaining the goals of the corporation.

It is crucial to acknowledge the significant role played by prevention and to afford it the place which it deserves; indeed, it factors into the success of prevention-minded businesses.

In the same vein as the authors Cantin and Cantin,[14] we may safely state that preventive measures and efforts undertaken by various sectors, each being different from the other, as well as the many proactive steps which may be put forth, remain the best cure of all.

14. *Op. cit.*, note 1, p. 137.

Investigative Tools at the Labour Standards Commission

Robert L. Rivest and Hélène Fréchette

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INTRODUCTION

The Labour Standards Commission has been in existence for more than 20 years. Over the course of those years, it has played a major part in informing the public and fostering its awareness, as well as in monitoring the application of labour standards with a view to protecting workers' rights.

The legislator has progressively entrusted the Commission over the past few years with new duties: representation of employees with respect to prohibited practices and dismissals not made for good and sufficient cause, new provisions facilitating debt collection from directors of insolvent corporations, the *Regulation respecting minimum labour standards in certain sectors of the clothing industry,* monitoring with respect to differences in treatment, and finally the application of new provisions regarding psychological harassment in the workplace that came into force on June 1.

The part played by the Commission is crucial when it comes to devising regulations governing industrial relations in Quebec. Close to 2,817,000 employees are estimated to be subject to the *Labour Standards Act*, which represents 93.4% of the Quebec workforce. For 1,643,000, or 58.3%, of these employees, this statute is the only legal framework governing their work conditions.[1]

A major part of the ressources of the Commission is devoted to the collection of information. Indeed, it receives annually close to 28,000 complaints, of which three quarters lead to an inquiry.[2] Soon, psychological harassment complaints will add to this number.

We will attempt herein to explain to you the investigative tools available to the Labour Standards Commission, further to the various complaints filed by employees. In this respect, factors considered in case law under the powers of inquiry in pecuniary matters will

1. *Rapport annuel de la Commission des normes du travail*, Fiscal 2001-2002, p. 24.
2. *Ibid*., p. 8.

apply substantively to instances of psychological harassment since Section 123.8 of the Act refers to the same legislative provisions.

Part 1- Inquiry Following a Complaint of a Pecuniary Nature

Subsection 39(8) and Section 98 provide that the Commission may institute proceedings in its own name and on behalf of an employee to recover amounts due by the employer under the Act or a regulation.

The exercise of this remedy, which is known as a complaint of a pecuniary nature, is however subject to an inquiry in order to determine the merits of the complaint and is subject to due compliance with certain essential formalities.

The inquiry is usually carried out following a written complaint by an employee (Sec. 102 L.S.A.), but the Commission may also conduct an inquiry of its own initiative (Sec. 105 L.S.A.).

1. The Business Approach

The so-called "business" approach is an auditing strategy followed by the Commission, which involves intervening within a corporation on behalf of all the employees, not only with respect to the application of the standards to which a specific complaint relates, but also with respect to all the standards provided for in the Act, be they pecuniary or administrative in nature. For instance, as part of an audit following a complaint for non-payment of statutory holidays, the investigator will not only assess the validity of the complaint, but will also proceed to conduct a complete audit of the applicable standards within the corporation in order to ensure full compliance with the Act, in accordance with Sections 5 and 39 thereof.

There is, to a certain extent, an examination of the overall status of the corporation and of all its establishments as regards compliance with the Act. This approach propounds a preventive application of the Act by informing the corporation of various duties incumbent upon it pursuant to the legislation.

2. Who can File a Complaint?

Section 102 of the Act provides that an employee who believes that one of his rights under the Act or a regulation has been violated

may file a complaint in writing with the Commission. Such a complaint may also be filed on behalf of an employee who consents thereto in writing by a non-profit organization dedicated to the defence of employees' rights.

3. How to File a Complaint

An employee may file a complaint by mail, by telephone or in person with the Regional Directorate. In the latter two instances, the employee is required to fill out a complaint form.

In accordance with Section 103 of the Act, the Commission shall not, during the inquiry, disclose the identity of an employee, unless the latter consents to it. Such employee is notified that, should proceedings be commenced against the employer, his identity may be kept confidential by being included with that of the other employees in respect of which statutory breaches have been detected. However, his identity is required to be disclosed if he is called to give evidence. The correspondence forwarded to the employer is designed to preserve the secrecy of the identity of the employee.

4. The Investigative Process

The investigator to whom the complaint is assigned is first required to establish that the complaint meets the criteria for eligibility, namely:

– Corporation falling within the ambit of the legislation;

– Employee status pursuant to the Act;

– Identification of the standard in breach of the Act;

– Prescription or limitation date;

– Existence of a collective bargaining agreement or a decree;

– Complaint which is not frivolous or made in bad faith.

Should the investigator determine that the complaint is groundless for any of the above reasons, Section 107 of the Act provides that he shall give notice to the complainant in writing, and inform him of his right to apply for a review of that decision. Pursuant to Section

107.1 of the Act, the complainant may, within 30 days of receiving the decision by the Commission, apply in writing for a review thereof to the Commission who shall either accept or reject this application within thirty days. The employee is also notified of his right to institute legal proceedings directly against his employer, if the Commission rejects his complaint.

4.1 Intervention Strategies

The investigator decides upon the intervention strategy, namely the whole range of action he intends to undertake during his intervention, depending on the nature of the complaint, the results of the intervention, the results of his determination as to the eligibility of the complaint, the profile of the corporation and the complexity of the file.

The investigator may be called upon to change his strategy during the intervention. Generally speaking, the investigator resorts to the investigative tools in a progressive manner, that is, he attempts to obtain a settlement as quickly as possible by minimizing administrative procedure. However, should it be impossible to obtain the employer's cooperation, the investigator will then expand his inquiry in order to establish the complaint, validate it, as the case may be, with the attorney acting on behalf of the regional team, forward it to the employer, draft the demand letter, and, if need be, forward the file to the Legal Affairs Directorate in order to institute legal proceedings.

4.2 Powers of the Investigator

The investigator is vested with the powers and the immunity granted to commissioners appointed pursuant to *An Act respecting public inquiry commissions*.[3] This allows him to subpœna "any person whose testimony can be linked to the matter surrounding the inquiry and force any person to lay before him the books and documents he deems necessary".[4] These are powers usually conferred upon similar bodies required to conduct an administrative inquiry.[5]

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3. Chapter C-37.
4. S. 9.
5. See, in particular, with respect to the *Commission des droits de la personne et des droits de la jeunesse* (C.D.P.D.J.), Section 68 of the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12; with respect to the *Commission de la santé et de la*

The failure to comply with such a subpœna may result in the issue of injunctive relief[6] and may even lead to a motion for contempt of court before the Superior Court.[7] Section 109 of the Act provides that an investigator may enter at any reasonable time any place of work and make an inspection thereof, which includes the examination of registers, books, accounts, vouchers and other documents. He may also require any information regarding the application of the Act or a regulation and the production of any document related thereto.

The employer's failure to grant access to the workplace or to allow the examination of documents, payroll records for instance, may also lead to penal proceedings for hindering the inspection, pursuant to Section 140 of the Act.

4.3 Means of Intervention

Various means are at the investigator's disposal in order to carry out his duties: telephone calls, individual or joint meetings with the parties, and an on-site inquiry.

Depending on the nature of the inquiry, the telephone is the preferred means of communication by the Commission with the employer and the employees. If he deems it advisable, the investigator may meet separately with the employee or the employer, or with both. As for joint meetings, they allow for a clarification of the facts, namely enabling new facts to be brought to the fore and a common perception of the situation to be sought, thereby promoting a resolution of the dispute.

An on-site inquiry is the preferred means where it was impossible to conduct or complete the inquiry by telephone or during meetings. It is the best means of obtaining results should the employer refuse to cooperate, or to provide documents, or where meetings with several witnesses are to be held.

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sécurité du travail (C.S.S.T.), Section 378 of *An Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001; with respect to the *Régie de l'assurance-maladie du Québec* (R.A.M.Q.), Section 20 of *An Act respecting the Régie de l'assurance-maladie du Québec*, R.S.Q., c. R-5; with respect to the *Société de l'assurance-automobile du Québec* (S.A.A.Q.), Section 83.41 of the *Automobile Insurance Act*, R.S.Q., c. A-25.

6. *Commission de la construction du Québec* v. *Habitations Louisbourg ltée*, D.T.E. 91T-215 (C.S.).
7. *Commission des valeurs mobilières du Québec* v. *Gaboury*, [2002] R.J.Q. 1932 (C.S.). Appeal filed, C.A. Montreal, nº 500-09-012460-028, July 4, 2002.

4.4 Assembling Evidence

The investigator contacts the employer or his representative to inform him of the following:

– the nature of the complaint filed;

– the role of the investigator;

– the procedure for the processing of the complaint.

He also provides the employer with all information he deems relevant so that the employer is made aware of its rights and duties. The investigator also advises the employer that the former's intervention involves the application of the Act in its entirety, including administrative offences.

The investigator gathers the employer's version of the facts as alleged by the employee. He makes sure that the facts gleaned are clear and supported by documentary evidence or by witnesses. If faced with conflicting versions, he must crosscheck the information gathered.

4.5 Summary Computation of Claim

The investigator summarily computes the claim on the basis of the employee's version. This is a first manual computation of the amount claimed by the employee that allows the investigator to inform the employer of the amount claimed by the employee.

If the facts alleged by the employee are not contradicted by the employer, the investigator will inform the employer of the amount claimed by the employee and the terms of payment: cheque payable to the employee directly, cheque made to the order of the employee and forwarded to the Commission, or cheque made to the order of the Commission.

If the employer adduces new facts or proposes a version of the facts which conflicts with the facts alleged by the employee, the investigator will pursue his inquiry. The Commission's function is to conduct an administrative inquiry and not a quasi-judicial one. It ought not to substitute its judgment for that of the tribunal which, for its

part, will be required to render a decision as a result of adversarial proceedings.[8] If the investigator concludes that the complaint of the employee is baseless with respect to certain standards, he will notify him in writing and inform him of his right to apply for a review of the decision within thirty days, pursuant to Section 107 of the Act.

4.6 Finalization of Claim

Section 98 of the Act provides that the Commission may, on behalf of an employee, claim amounts due by the employer. If the inquiry establishes that the complaint is well-grounded and if the parties have not entered into a settlement, the investigator will finalize the claim, in what is known as the "Particulars of the Claim". This is the claim made by the Commission on behalf of the employee.

The investigator forwards the claim in writing to the employer, along with the particulars of the claim, and grants the latter a time limit of ten days to effect payment. A notice of inquiry and suspension of the prescription or limitation period is also attached to the claim.

4.7 Payment of Claim

If the employer pays the amounts claimed, the settlement can be confirmed in a written agreement and the investigator terminates his inquiry.

5. Putting in Default

Following the forwarding of the complaint, if the Commission has not received payment upon expiry of the ten-day time limit, the investigator will put the employer in default by certified mail. The employer has twenty days following the mailing of this letter to pay to the Commission the amounts claimed.

The investigator is required concurrently to send a notice to the employee indicating the amount claimed on his behalf pursuant to Section 111 of the Act. Where more than one employee is involved, each must be so notified.

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8. *Commission des normes du travail* v. *A. Amyot et fils ltée*, C.Q. Hull, nº 550-22-004627-012, 2002-07-12, Dagenais J.

If the employer pays the amounts claimed in full, the investigator terminates his intervention, notifies the employee and sends him the cheque, as the case may be. If the employer refuses to pay,[9] the investigator forwards the file to the Legal Affairs Directorate so that proceedings may be instituted.

Part 2- Inquiry Following a Complaint of Psychological Harassment

1. Who can File a Complaint?

Section 123.6 provides that an employee who believes he has been the victim of psychological harassment may file a complaint in writing with the Commission.

Such a complaint may also be filed by a non-profit organization dedicated to the defence of employees' rights on behalf of one or more employees who consent thereto in writing.[10]

2. How to File a Complaint

The complaint must be filed in writing (Sec. 123.6) which may take on one of the following forms:

– a letter from the employee or his representative explaining that he believes he has been the victim of psychological harassment;

– a form entitled "Complaint for Psychological Harassment", provided by the Commission, filled out by the employee, with the help of a staff member of the Commission, if necessary.

The complaint shall include:

– the identification of the employee and employer;

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9. Section 101 of the L.S.A. provides as follows: Any settlement of a claim between an employer and an employee which involves a reduction of the amount claimed is absolutely null; *C.N.T.* v. *Cie. minière I.O.C.*, [1987] R.J.Q. 1359 (C.S.), rev'd on other grounds D.T.E. 95T-397 (C.A.).
10. The legislator appears to have drawn inspiration from the statutory wording with respect to a complaint filed before the C.D.P.D.J.; see Section 74, paragraphs 1, 2 and 3, *Charter of Human Rights and Freedoms*, *op. cit.*, note 5.

– the date of the last occurrence of psychological harassment;

– a statement by the employee to the effect that he has been a victim of psychological harassment.

The complaint must be signed by the employee himself or by his representative. It may be filed directly at the offices of the Commission or mailed to its address. It may also be transmitted via facsimile to the Commission's offices; however, the original must be supplied at a later date. Transmission via E-mail is not accepted.

The employee who contacts the Commission by telephone must also forward his complaint in writing in the manner provided for above.

3. Purpose of the Inquiry

– To determine if the allegations of the complainant are substantiated within the meaning of the *Labour Standards Act*;

In addition to this general consideration, there are those which arise specifically from the new duties with which the Commission has been entrusted in instances of psychological harassment:

– To collect the factual basis that will enable an assessment on the merits of the complaint, namely a finding as to the existence or lack of steps taken by the employer to put an end to the psychological harassment;

– By following an objective analytical process, to submit a recommendation as to the further prosecution of the file with a view to the commencement of legal proceedings, as the case may be.

4. The Investigative Process

Upon receipt of a complaint, the investigator must inquire with due dispatch (Sec.123.8). As part of his inquiry, he must:

– assess whether the complaint meets the eligibility criteria;

– assess the merits of the complaint;

– gather the version of the facts propounded by the employee, the offending party, the employer and any person that may be able to provide any information with respect to the situation;

– verify if the employer has taken reasonable steps to prevent psychological harassment in the workplace or to put an end to it upon being made aware of its existence;

– inform the parties about the provisions of the Act and the progress of the complaint during its processing;

– ensure the follow-up and the monitoring of the intervention.

The investigator must intervene with due dispatch, with impartiality and efficiency, without prejudice to the parties. He must act with due regard to discretion, and be respectful of any person he questions. It is with these qualifications in mind that the Labour Standards Commission has drawn up a particular job description requiring a certain degree of expertise in order to discharge the duties of a psychological harassment investigator.

Upon receipt of the duly dated and signed form, the investigator must ensure that the complaint meets the eligibility criteria, namely as to:

– jurisdiction, liability and scope;

– time frame within which to file the complaint;

– grievance rights of an employee covered by a collective agreement;

– resort to the Civil Service Commission for an employee appointed under the *Civil Service Act,* and not governed by a collective agreement;

– compliance of the employee's allegations with the definition of psychological harassment.

The employer must fall under provincial jurisdiction and should not be subject to the *Canada Labour Code*. The employee must qualify as an employee pursuant to the *Labour Standards Act.* The complaint must be filed within 90 days following the last occurrence of the

conduct that is alleged to represent psychological harassment.[11] This time-period, which is twice that of 45 days provided for the filing of a complaint with respect to a prohibited practice or for a dismissal not made for good and sufficient cause pursuant to Sections 122 and 124 of the Act, has been set, taking into account the specific features of psychological harassment.

A unionized employee who has a grievance right pursuant to the collective agreement under which he is covered may not file a complaint with the Commission, whether or not he has exercised this right. He must exercise the recourses provided for in his collective agreement (Sec. 81.20 L.S.A.).

Although the collective agreement may provide a time-period for the filing of a grievance which is shorter than that of 90 days provided for in the Act to file a complaint, we believe that the latter takes precedence. Indeed, Section 81.20 of the Act provides that the provisions regarding psychological harassment provided for in the *Labour Standards Act*, with the necessary modifications, are deemed to be an integral part of every collective agreement.[12] Furthermore, Section 93 of the Act establishes that it is a public policy statute and that any provision of an agreement or a decree that contravenes a labour standard or that is inferior thereto is absolutely null.[13]

The same applies to an employee appointed pursuant to the *Civil Service Act*[14] who is not governed by a collective agreement. Such an employee must exercise the applicable recourse before the Civil Service Commission according to the rules of procedure established pursuant to that Act (Section 81.20 L.S.A.). In our opinion, the same comments apply with respect to the time-period in which to file this recourse.

The stage at which compliance with the eligibility criteria is assessed becomes crucial because it represents the basis for the subsequent conduct of the inquiry. The investigator analyzes the items on file and collects additional information from the complainant in

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11. See, in this respect, Section 77 of the *Charter of Human Rights and Freedoms*, *op. cit.*, note 5. A complainant has at least two years in which to file a complaint.
12. A recourse exercised pursuant to the L.S.A. represents a standard; see *Produits Pétro-Canada Inc.* v. *Moalli*, [1987] R.J.Q. 261 (C.A.).
13. See, in this respect, the decision handed down in *Parry Sound (District)*, *Social Services Administration Board* v. *O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157.
14. R.S.Q., c. F-3.3.3.

order to decide if the occurrence upon which the complaint is based meets the definition of psychological harassment provided for in the Act. He documents any item in respect of which the issue of eligibility could not be resolved by the Regional Directorate. If he must communicate with the employer, he must inform the latter of all upcoming stages in the complaint process.

He will verify if the alleged acts or circumstances amount to psychological harassment in the workplace. Such acts or circumstances may be vexatious and repetitive words, actions or gestures which are harmful to the dignity, respect or integrity of an employee, for example:

- Humiliating comments, abusive words;
- Generally negative criticism with respect to all the complainant is or does;
- Disparaging remarks;
- Off-colour "jokes", caricatures, graffiti;
- Snubs, hurtful acts of omission or hazing or initiation rituals;
- Incidents engineered within the framework of standards designed specifically for the complainant that are not applied in the same manner to other members of the staff; demotions, horizontal transfers, denial of promotions, reprimands, etc.;
- Damage or vandalism caused to the property of the complainant (his car, clothes, tools, etc.) or to the facilities made available to him (locker, office, etc.);
- As regards the complainant, non-compliance with, or tolerance of a lax application of, security protocols designed to protect the entire staff;
- Assault or other more serious aggressions.

The investigator will conduct his analysis in accordance with the guidelines developed pursuant to case law.[15] He will approach the

15. See, in particular, the cases of *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Habachi* v. *Commission des droits de la personne*, [1999] R.J.Q. 2522 (C.A.); *Dhawan* v. *Commission des droits de la personne et des droits de la jeunesse*, D.T.E. 2000T-633 (C.A.).

issue and analyze the facts on the basis of a reasonable, objective and knowledgeable person's perception and understanding of all the circumstances when placed in a position similar to the one described by the employee in question. In light of the information gathered, may the latter conclude that he is being subjected to psychological harassment at work?

The investigator must collect this information within the specific framework of the workplace, which means that management rights and the implied acceptance of the working conditions prevailing at the workplace in question must be recognized.

If the investigator reaches the conclusion that the complaint does not meet the criteria for eligibility, or that it is baseless, he shall notify the employee thereof by providing him with the grounds for his decision and advise him in writing that the Commission is terminating the inquiry. He shall also inform him of his right to apply for a review of his decision.

Section 107.1, which applies to the inquiry following a complaint for psychological harassment pursuant to Section 123.8 of the Act, provides that the employee, or the organization representing him, as the case may be, may, within 30 days of receiving the decision of the Commission refusing to proceed with the inquiry, apply in writing to the Commission for a review thereof (Sec. 107.1). The investigator must also notify the employee that he may, within 30 days of the Commission's decision not to take action following his complaint, make a written request to the Commission for the referral of the complaint to the Labour Relations Commission (Sec. 123.9).

If, however, the conditions for eligibility are established, the investigator shall notify the employer in writing that a complaint for harassment has been filed and that the actual inquiry may commence. Such inquiry will be conducted in two stages: the first will deal with the allegations of the employee claiming to have been subjected to psychological harassment; and the second will deal with the steps undertaken by the employer to prevent this situation or to rectify it.

5. Powers of the Investigator

In matters of psychological harassment, the legislator imports the general powers with which the investigator is vested with regard

to the processing of claims of a pecuniary nature. Hence, the same considerations laid out earlier apply hereto. The investigator is vested with the powers and the immunity granted to commissioners appointed pursuant to *An Act respecting public inquiry commissions*[16] except the power to impose imprisonment. These are the powers generally conferred to conduct an administrative inquiry, such as those of the investigators of the *Commission des droits de la personne et des droits de la jeunesse*, the *Commission de la santé et de la sécurité du travail* and the *Commission de la fonction publique*.

Sections 108 and 109 of the Act provide that an investigator may enter at any reasonable time any place of work and make an inspection thereof, which includes the examination of registers, books, accounts, vouchers and other documents, as well as require any information regarding the application of the *Labour Standards Act* as well as the production of any document related thereto.

6. Preparing an Action Plan for the Inquiry

The investigator analyzes the file to pinpoint the items to be documented as well as the most relevant strategies. He may proceed by way of telephone communication, correspondence, interviews or attendance upon the premises of the corporation, individual or group meetings. The investigator must always act with due regard to efficiency, equity and impartiality in all the choices he may make with respect to any intervention.

7. Assembling Evidence

Collection of evidence involves obtaining testimony and documents regarding the facts relating to the case.

During his contacts with the complainant, the witnesses, the offending party and the employer, the investigator informs them of the duties incumbent upon him and the procedure relating to the inquiry. He must make it clear to them that his inquiry is purely administrative in nature and that any action undertaken by him is only intended to verify if the alleged complaint may call for proceedings before a tribunal. As we have previously pointed out, the Labour Standards Commission has no judicial or quasi-judicial authority

16. *Op. cit.*, note 3.

and only hands down decisions resulting in administrative proceedings.[17]

The investigator shall also inform the persons with whom he is to meet that they may be accompanied, during the meetings, by a support person or a facilitator, including an attorney. These persons may not, however, take part in the inquiry nor may they be potential witnesses. Furthermore, they may not act as a substitute for witnesses and the investigator shall ensure that they maintain a supporting or advisory role.

7.1 Assessment of Allegations of Pychological Harassment

The investigator shall ask the complainant what relief he is seeking and shall make note of the harm which the complainant associates with the harassment situation, for instance:

- the impact which the situation has had on the life, health and security of the complainant;
- the impact of the situation on his working conditions;
- the consequences of the situation on his self-esteem, his reputation (both personal and professional);
- physical losses, such as wages, the need to draw on the sick leave time bank, expenses incurred.

The investigator places special emphasis on situations where grounds of discrimination lie at the core of the psychological harassment. The existence of such grounds (race, religion or sex), if corroborated by testimony or by facts, may support the harassment allegation and may result in the application of provisions set out in the *Charter of Human Rights and Freedoms.*[18]

If the investigator has reason to believe that the life, health or security of the complainant is at risk, he shall inform the latter of the

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17. In this respect, faced with wholly contradictory versions and the inability to establish which represents the "true" one, one cannot blame it for deciding to refer the question to the court. The L.S.C. ought not to usurp the function of the court which may be called upon to decide the dispute; *C.N.T.* v. *2420-9611 Québec inc.*, D.T.E. 2002T-187.
18. *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, ss. 10 and 10.1.

action he may take in this respect: exercise a right to refuse to work before the C.S.S.T., file a complaint with the police or with the *Commission des droits de la personne et des droits de la jeunesse*. If he deems it appropriate, he will recommend that the complainant consult a physician to obtain a medical certificate.

The investigator shall enquire as to the steps taken by the complainant to put an end to the situation and to notify the employer thereof. He makes note of the outcome of the steps taken or, if no action was taken, the reasons therefor.

At this stage of the inquiry, the investigator questions any person who may be able to shed light on his investigation of the facts. The specific framework of the workplace is important. The investigator will be required to specifically check the following:

Work Conditions:

- Written contract;
- Express or implied conditions, job descriptions, term of employment, etc.
- Rules applicable to others performing the same tasks.

Make-up of Staff

- Framework regarding the exercise of authority (written procedure, freedom to set own rules, etc.);
- Operating procedure of one or more work groups;
- Positions held by the various parties in question.

Organization of Work:

- Teamwork or individual work;
- Performance assessment process.

History and Corporate Culture:

- Harassment Protection Policy;

- Application and knowledge by, and communication to, the employees of such policy;
- Person responsible for the application of such policy;
- Channels for redress.

7.2 Assessment of the Employer's Duties

This stage of the inquiry deals with the means put in place by the employer to prevent harassment situations, those devised to become aware of such situations as well as the measures implemented to put an end to them. One seeks to find out what the position adopted by the employer is regarding the phenomenon of harassment in the workplace as well as the message conveyed to employees regarding this problem.

The investigator will first have to analyze the preventive means implemented:

- Identifying the line supervisor(s);
- Verifying if the complainant has made his line supervisors aware of the situation (When? How? Steps taken?);
- Verifying compliance of the corporation's intervention with the one proposed in the policy;
- Identifying the steps taken by the employer to maintain a healthy work environment.

The investigator enquires as to the internal policies of the employer regarding the problem of psychological harassment. He verifies what steps were taken by the employer to communicate them to the employees; to ensure understanding of, and compliance with, the established rules. He takes note of the action taken by the employer to detect risk situations and to rectify them. The investigator enquires as to the channels put in place by the corporation to deal quickly and efficiently with complaints. He checks whether the persons responsible for applying such policy have adequate training.

As to the remedial aspect, the investigator takes note of the reaction of the employer to the alleged harassment situation (its

inaction, its bias towards the offending party or the support provided to the complainant, the steps taken to settle the dispute).

8. Mediation Service Offered by the Labour Department

At any time during the inquiry, with the agreement of the parties, a request for appointment of a mediator may be made to the Labour Minister. In such an event, the Commission may, at the request of the employee, assist and advise the latter (Section 123.10 L.S.A.).

The investigator shall inform the complainant and the employer of the possibility of resolving the dispute in this manner. He shall ensure that they understand the goals as well as the legal implications of a decision to resort to mediation. He shall indicate to them that such mediation will preserve the confidentiality of the information which may be submitted to the mediator because such mediation will take place outside the framework of the inquiry, without the involvement of the Investigation Division of the Labour Standards Commission.

9. Assessment of Facts

The investigator examines the items gathered to determine if the evidence confirms or negates the complainant's allegations. In certain particular cases, similar fact evidence or evidence of a spontaneous confession may support the employee's version.[19] He must place himself in the position of a reasonable, objective person who is knowledgeable of the circumstances surrounding the situation, in order to decide as to the merits of the complaint.

The investigator is also required to analyze the steps taken by the employer to eradicate the problem of psychological harassment in light of the ressources at the corporation's disposal and he must take into consideration its organizational structure. Furthermore, he must express his opinion as to the steps taken to bring about an end to the psychological harassment situation. It is under these circumstances that he will recommend whether or not referral of the complaint should be made to the tribunal called upon to decide the matter, namely the Quebec Labour Relations Commission.

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19. *Commission des droits de la personne et des droits de la jeunesse (Rioux)* c. *Caisse populaire Desjardins d'Amqui*, REJB 2003-1587 (T.D.P.Q.).

10. Investigation Report

In the event of discontinuance of the inquiry or of a settlement, the investigator drafts a short report indicating the nature of the complaint, the steps taken leading up to the discontinuance or the settlement, and his observations as to the steps taken by the employer to prevent the harassment.

Should the investigator conclude that the matter is indeed one of psychological harassment, he will draft a report which shall include a statement of material facts and the documented observations. The statement of facts shall include:

– the nature of the complaint;

– the complainant's version of the facts;

– the offending party's version of the facts;

– the employer's version of the facts;

– the relevant facts enabling an assessment of the degree of harm suffered;

– any recommandations.

11. Disclosure of the Recommendations Made Pursuant to the Inquiry

The investigator shall inform the complainant of his recommendations, as well as the employer, and, as the case may be, the offending party, preferably during one-on-one meetings. He shall confirm everything to them in writing.

12. Access to the Report

If the report concludes that the complaint is well-founded, it will be kept on file and the matter will be forwarded to the Legal Affairs Directorate of the Commission for the purposes of representation of the employee. In light of the best evidence rule, this report will not be considered to be testimonial evidence and will not be filed with the Labour Relations Commission. Evidence will therefore be established first by the witnesses directly involved.

13. Decision of the Commission

If the Commission agrees to proceed with the complaint, it shall refer the complaint without delay to the Labour Relations Commission (Section 123.12 L.S.A.) and shall appoint an attorney to represent the employee before this tribunal.

Where the Labour Standards Commission refuses to proceed with an inquiry because the complaint is groundless, it shall give notice of its decision to the employee by registered or certified mail, providing the reasons therefor and informing him of his right to apply for a review of the decision. (ss. 123.8 and 107 L.S.A.).

The employee may, within 30 days following the Commission's decision upon review, or within 30 days following the first decision handed down to the effect that the complaint is groundless, make a written request to the Labour Standards Commission for the referral of the complaint to the Labour Relations Commission. (Section 123.9. L.S.A.).

CONCLUSION

The Labour Standards Commission has been processing inquiry cases for more than 20 years. With the coming into force of new provisions relating to psychological harassment, the Commission has initiated a new approach which takes into consideration the particulars of psychological harassment cases.

These specific factors are, in fact, already known as a result of the criteria established through case law over the years. These criteria take into consideration, of course, the work environment, all the while developing an objective analysis of the factual findings.

In this respect, the courts have developed the criterion of the tolerance level of a "reasonable person" placed in the position described by the person claiming to be subjected to harassment in the workplace. The intent is to develop an objective identification standard. The frame of reference for this "reasonable person" must be a standard of conduct accepted or tolerated in our society.

The investigator is therefore required to assess the facts as would a reasonable and objective person knowledgeable of all the

circumstances and placed in a position similar to that described by the employee in question. His findings, of course, are restricted to whether or not to recommend the institution of proceedings, taking into consideration the fact that it is incumbent upon the specialized tribunal, namely the Labour Relations Commission, to adjudicate the matter conclusively.

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