

Notes on OH&S and WCB coverage of bullying and psychological injury across Canadian jurisdictions

By Larry Haiven

❖ Current OH&S law in Nova Scotia

- Nova Scotia OH&S law currently EXEMPTS bullying, harassment and psychological violence as causes of workplace harm
- NOVA SCOTIA APPEARS TO BE THE ONLY JURISDICTION IN CANADA THAT HAS NEITHER INTRODUCED NOR PUBLICLY ANNOUNCED THE INTENTION OF INTRODUCING SUCH LEGISLATION
- Current references to violence in the Workplace Regulations
 - Definitions
 - s. 2 In these regulations
 - ... (f) “violence” means any of the following:
 - (i) threats, including a threatening statement or threatening behaviour that gives an employee reasonable cause to believe that the employee is at risk of physical injury,
 - (ii) conduct or attempted conduct of a person that endangers the physical health or physical safety of an employee.

❖ Decision of Labour Board in Harpell case

- On Oct 31, 2018, Annette MacDonald Harpell, of Antigonish, launched complaint to OH&S branch based on psychological injury after bullying at her employer Lawton’s; refused by OH&S branch; Harpell appealed to Nova Scotia Labour Board; Labour Board ruled Harpell v Lawton’s Drug Store, 2019 NSLB 56 (CanLII) (<https://www.canlii.org/en/ns/nslb/doc/2019/2019nslb56/2019nslb56.html>) on 19 June, 2019, denying appeal, saying that psychological violence is expressly excluded from the Act
- “It is acknowledged that the Violence in the Workplace Regulations apply only to physical violence and threats. The wording could not be more clear. The definition of “violence”, in both section 2 (f) (i) and (ii) indicates that it relates only to risk of physical injury, and conduct that “endangers the physical health or physical safety of an employee”. Where the regulations recognize “violence” as an “occupational health and safety hazard”, they clearly do not encompass other than physical threats, behaviours or conduct. This is significant in that it indicates that, where the regulators wished a particular type of conduct to be subject to regulation, they said so clearly.”
- “ We accept that conduct such as harassment and bullying may lead to harmful consequences that have health and safety consequences, and that other provinces may have protections that do not exist in Nova Scotia. However, the decision to broaden the scope of protection to include psychological violence under occupational health and safety legislation is ultimately a legislative policy judgement, which is beyond the role of a statutory tribunal such as the Labour Board.”

❖ International Labour Organization convention on violence C190 “Violence and Harassment Convention, 2019

- Ground-breaking convention adopted June 21, 2019 by the International Labour Organization (ILO)
- (<https://care.ca/2019/06/a-win-for-women-worldwide-historic-global-treaty-to-end-violence-and-harassment-at-work-agreed-today/>)
 - “The International Labour Organization (ILO) is the only tripartite UN agency with government, employer, and worker representatives.”
 - “Ahead of the negotiations, a growing number of companies made their support public, including...L'Oreal, BNP Paribas, BBDO France, Sodexo, Kering, Diageo, Avon, Unilever, and Marks & Spencer.”
- Canadian Labour Congress’ Secretary-Treasurer Marie Clarke Walker served as Worker Vice-Chair for the negotiations.
- Canada was at the table when this was negotiated; while federal gov’t endorsed the convention, it would not have done so without assurances from the provinces and territories that they would support ratification

- For about 90% of Canadian workers, the provincial or territorial government has jurisdiction over employment relations (the Federal government has jurisdiction for the remaining c. 10%)
- The ILO reported Canada's role in advancing this convention: "Governments from many regions played a leading role in advocating for stronger protections, including Uganda and Namibia, which led the African Group of states, the European Union group led by France, as well as **Canada**, New Zealand, Philippines, and many Latin American and Caribbean states." (<https://www.hrw.org/news/2019/06/21/ilo-new-treaty-protect-workers-violence-harassment>)
- The convention, now adopted, needs to be ratified by member countries, and contains the following provisions:
- Preamble
 - "...Acknowledging that violence and harassment in the world of work affects a person's **psychological, physical and sexual health, dignity, and family and social environment**, and
 - ...Recognizing that violence and harassment also affects the quality of public and private services, and may prevent persons, particularly women, from accessing, and remaining and advancing in the labour market,"
- 1. For the purpose of this Convention:
 - (a) the term "violence and harassment" in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in **physical, psychological, sexual or economic harm**, and includes gender-based violence and harassment;
 - (b) the term "gender-based violence and harassment" means violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment.
- 3. This Convention applies to violence and harassment in the world of work **occurring in the course of, linked with or arising out of work**:
 - (a) in the workplace, including public and private spaces where they are a place of work;
 - (b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities;
 - (c) during work-related trips, travel, training, events or social activities;
 - (d) through work-related communications, including those enabled by information and communication technologies;
 - (e) in employer-provided accommodation; and
 - (f) when commuting to and from work.
- 9. Each Member shall adopt laws and regulations requiring employers to take appropriate steps commensurate with their degree of control to prevent violence and harassment in the world of work, including genderbased violence and harassment, and in particular, so far as is reasonably practicable, to:
 - (a) adopt and implement, in consultation with workers and their representatives, a workplace policy on violence and harassment;
 - (b) take into account violence and **harassment and associated psychosocial risks** in the management of occupational safety and health;

❖ **Approaches to harassment in other Canadian jurisdictions**

- In the past several years, all but one of the 13 Canadian jurisdiction have moved to enact or have announced intention to enact changes to OH&S to include bullying and psychological harassment (see below)
- Thus Nova Scotia is the ONLY jurisdiction without such regulation or announced intent
- Clearly Nova Scotia is now an outlier and needs to be dragged (kicking and screaming?) into the 21st century
- Several of these pieces of legislation expressly exclude reasonable employer conduct in the normal management of the work site
 - This shows that mere presence of such regulation will not invite abuse

- These changes were spurred on by decisions by Ontario Workplace Safety and Insurance Appeals Tribunal. The Ontario Workplace Safety and Insurance Board's had a practice of denying compensation except for "acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment" for most job mental stress claims. The Appeals Tribunal found that this practice violated the equality provisions of S. 15 of the Charter (by discriminating on the basis of disability) and hence unconstitutional.
 - Ontario responded to the challenge by changing its policy to cover job-related stress
- All provinces that include protection against harassment, except Quebec (where it appears in Labour Standards legislation) have used OH&S legislation for this purpose
- Here is a rundown of the approach by different Canadian jurisdictions to psychological harm (thanks in part to Prof. Katherine Lippel, University of Ottawa):
 - AB
 - Occupational Health & Safety Code now defines workplace harassment and violence in all forms, including domestic and sexual violence, requires employers to investigate incidents of violence and harassment and take corrective action, requires employers to develop separate violence and harassment prevention plans, requires review of plans at least one every 3 years, requires employers to advise workers of treatment options if harmed by violence or harassment; workers are entitled to wages and benefits while attending treatment programs
 - Workplace harassment is defined as a single or repeated incident of objectionable or unwelcome conduct, comment, bullying or action intended to intimidate, offend, degrade or humiliate a particular person or group. It's a serious issue and creates an unhealthy work environment resulting in psychological harm to workers.
 - It does not include any reasonable conduct of an employer or supervisor related to the normal management of workers or a work site. Differences of opinion or minor disagreements between coworkers are also not generally considered to be workplace harassment if steps are taken to resolve the conflict.
 - BC
 - http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96492_00,
 - See link: The Worker's Compensation Act, RSBC 1996, c. 492, s. 115 (link: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96492_00)
 - See link: Policies: (1)<https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-policies/policies-for-the-workers-compensation-act#SectionNumber:D3-115-2>
 - "While the law and the regulation do not explicitly address the prevention of psychological harassment WorkSafe BC has adopted a policy governing prevention. Policy Item D3-115-2 governs ""Employer Duties-Workplace Bullying and Harassment. It is based on the general duty clause and states that ""employers must take all reasonable steps to prevent where possible, or otherwise minimize, workplace bullying and harassment"". WorkSafe BC Officers are mandated under the policy to review whether it has been developed, implemented and periodically reviewed by workplace. It is of note that the policy applies to bullying and harassment by either workers and other workplace parties or others such as clients and the public. See also the policy on Worker Duties-Workplace Bullying and Harassment, Policy Item D3-116-1 and Policy Item D3-117-2: Supervisor Duties-Workplace Bullying and Harassment. In the policies, bullying and harassment are defined :
 - "bullying and harassment"
 - ◆ (a) includes any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated, but

- ◆ (b) excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.
- MB
 - "The Workplace Safety and Health Act defines ""harassment"" "harassment"
 - 1.1.1(1)
 - ◆ For the purpose of the definition "harassment" in section 1.1, conduct is
 - (a) objectionable, if it is based on race, creed, religion, colour, sex, sexual orientation, gender-determined characteristics, marital status, family status, source of income, political belief, political association, political activity, disability, physical size or weight, age, nationality, ancestry or place of origin; or
 - (b) severe, if it could reasonably cause a worker to be humiliated or intimidated and is repeated, or in the case of a single occurrence, has a lasting, harmful effect on a worker.
 - ◆ s. 1.1.1(2) Reasonable conduct of an employer or supervisor in respect of the management and direction of workers or the workplace is not harassment.
 - ◆ s. 1.1.1.(3) In this section and in the definition "harassment" in section 1.1, conduct includes a written or verbal comment, a physical act or gesture or a display, or any combination of them. Also, part 10 requires a risk assessment for harassment in part 10. "
- NB
 - As of April 1, 2019, the regulations mandate that employers must establish a written code of practice with respect to workplace harassment
 - Harassment is defined broadly and includes bullying, comments or displays that may threaten the health or safety of an employee, and any objectionable conduct that ought reasonably be known to be unwelcome.
 - The harassment policy must include:
 - ◆ a statement that every employee is entitled to work free of harassment;
 - ◆ the identity of the person responsible for implementing the harassment policy;
 - ◆ a statement that employees must immediately report an incident of harassment to the employer;
 - ◆ the investigation procedure;
 - ◆ information concerning how affected employees will be informed of the results of an investigation;
 - ◆ the procedure to implement any corrective measures that follow as a result of the investigation;
 - ◆ the follow-up measures to be used with affected employees; and
 - ◆ the identification of training needs.
 - An employer must review the harassment policy on an annual basis in consultation with the joint health and safety committee, or with employees if there is no established committee.
 - Employers are required to provide training to all employees regarding the harassment policy. Training records must be kept and made available to a WorkSafeNB officer, upon request.
- NL
 - Effective January 1, 2020, employers are mandated to develop, implement and maintain a written harassment prevention plan to address "workplace harassment", defined as:
 - ◆ inappropriate vexatious conduct or comment by a person to a worker that the person knew or ought to have known would cause the worker to be humiliated, offended or intimidated.
 - An employer's harassment prevention plan must set out the following procedures, among other things:
 - ◆ procedures for employees to report instances of harassment;
 - ◆ procedures to be followed after a complaint of workplace harassment is received and the manner in which a complaint is investigated; and

- ◆ procedures regarding notification of results of investigations and any actions to be taken as a result of an investigation.
- Employers are mandated to investigate complaints of workplace harassment; an occupational health and safety officer can order that an impartial third party investigate such workplace complaints, at the sole expense of an employer.
- Employers must also participate in training related to harassment prevention and provide training to employees on the issue and the employer's harassment prevention plan.
- NT
 - "34.(1) In this section, ""harassment"" means, subject to subsections (2) and (3), a course of vexatious comment or conduct at a work site that
 - ◆ (a) is known or ought reasonably to be known to be unwelcome; and
 - ◆ (b) constitutes a threat at the work site to the health or safety of a worker. (2) To constitute harassment for the purposes of subsection (1), any one of the following must have occurred:
 - (a) repeated conduct, comments, displays, actions or gestures; or
 - (b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker's health or safety.
 - (3) For the purpose of subsection (1), harassment does not include reasonable action taken by an employer or supervisor relating to the management and direction of the workers or of the work site. Policy is required, and includes a statement that each worker is entitled to work free of harassment (34(4)b) and internal complaints proceedings. "
- ON
 - See link for OHSA: <https://www.ontario.ca/laws/statute/90o01>
 - See link for Ontario Human Rights Code: <https://www.ontario.ca/laws/statute/90h19>
 - "workplace harassment is defined under s. 1 of the OHSA as: "workplace harassment" means,
 - ◆ (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or workplace sexual harassment. Employer obligations relating to workplace harassment are in: s. 32.0.1., 32.0.6., 32.0.7., 32.0.8 of the OHSA. "
- PE
 - According to the Charlottetown Guardian July 31, 2019 (<https://www.theguardian.pe.ca/news/local/pei-employers-may-soon-be-required-to-develop-workplace-harassment-policy-229870/>):
 - ◆ "The Occupational Health and Safety (OHS) Act is in the process of being updated to include a definition of workplace harassment, which will result in employers eventually being required to develop a workplace harassment policy.
 - ◆ The update would include a statement that workers are entitled to work in a harassment-free environment, said an official with the Workers Compensation Board.
 - ◆ The Act will be named after Eric Donovan, an Island resident who died in 2013 after experiencing workplace harassment (<https://www.cbc.ca/news/canada/prince-edward-island/pei-workplace-bullying-harassment-workers-compensation-board-lisa-eric-donovan-1.3959704>)
- QC
 - See link to legislation: <http://legisquebec.gouv.qc.ca/en/showdoc/cs/N-1.1>
 - Quebec Charter (link: <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-12>)
 - "Under s. 81.18 of the Quebec Labour Standards Act, psychological harassment in the workplace is defined as such: "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." s. 81.19 addresses employer duties under psychological harassment. s. 81.20 requires that all employment contracts in Quebec include psychological harassment in their collective agreements. . Under s. 123.15 and 123.16 of the Quebec Labour Standards Act, remedies for individuals who are targets of psychological harassment. See also s.1 and s.4 and s. 46 of the Quebec Charter"

▪ SK

- See Links : Saskatchewan Employment Act, c. S-15.1
<http://www.publications.gov.sk.ca/freelaw/documents/English/Statutes/Statutes/S15-1.pdf>
- "The Saskatchewan Employment Act, c. S-15.1 includes the "promotion and maintenance of a working environment that is free of harassment" in the definition of occupational health and safety at section 3-1(o) of the Act. It defines harassment at s. 3(1)l) 'harassment' means any inappropriate conduct, comment, display, action or gesture by a person:
 - ◆ (i) that either:
 - (A) is based on race, creed, religion, colour, sex, sexual orientation, marital status, disability, physical size or weight, age, nationality, ancestry or place of origin; or
 - (B) subject to subsections (4) and (5), adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and (ii) that constitutes a threat to the health or safety of the worker.
- S.3(4) adds To constitute harassment for the purposes of paragraph (1)(l)(i)(B) either of the following must be established:
 - ◆ (a) repeated conduct, comments, displays, actions or gestures
 - ◆ (b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker.
- (5) For the purposes of paragraph (1)(l)(i)(B), harassment does not include any reasonable action that is taken by an employer, or a manager or supervisor employed or engaged by an employer, relating to the management and direction of the employer's workers or the place of employment". S. 3-8(d) specifies that the employer has a duty to "ensure insofar as is reasonably practicable that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment. S. 3-9c includes prevention of harassment in the supervisors' duties and s. 3-10b provides that workers shall refrain from causing or participating in the harassment of another worker. A special adjudication system for harassment complaints is set out in the legislation. The Occupational Health and Safety Regulations, 1996, Chapter O-1.1 Reg 1 require at s. 36(1) that the employer, in consultation with the committee, shall develop a policy on harassment with detailed specifications."

▪ NU

- s. 34 of the Occupational Health and Safety Regulations of Nunavut, Nu Reg 003-2016, refers to harassment, defined: 34(1) In this section 'harassment' means, subject to subsections (2) and (3) a course of vexatious comment or conduct at a work site that (a) is known or ought reasonably to be known to be unwelcome; and (b) constitutes a threat at the work site to the health or safety of a worker. (2) To constitute harassment for the purpose of subsection (1) any one of the following must have occurred: (a) repeated conduct, comments, displays, actions or gestures; or (b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture that has a lasting, harmful effect on the worker's health or safety. (3) (...) harassment does not include reasonable action taken by an employer or supervisor relating to the management and direction of the workers or of the

work site. Paragraph 4 requires and describes written policy to be developed and implemented by the employer in consultation with the committee.

- YU
 - The Yukon government is preparing regulation concerning harassment; its website (June 6, 2019) announces (<https://engageyukon.ca/en/2019/regulations-prevent-workplace-violence-and-harassment>):
 - ◆ “The Government of Yukon is preparing a new regulation to prevent workplace violence and harassment. As well, the Occupational Health and Safety Regulations will see a related amendment designed to improve workplace hazard assessments.
 - ◆ “Violence and harassment are serious health and safety hazards to which no Yukon worker should be exposed. The Government of Yukon is taking action to support Yukon employers and workers to foster workplaces that are free from violence and harassment.”
- Fed
 - Bill C-65, amending the Canada Labour Code recently received royal assent.
 - Strengthens provisions regarding violence and harassment, requires employers to:
 - ◆ prevent incidents of harassment and violence;]
 - ◆ respond effectively to these incidents if and when they do occur; and
 - ◆ support affected employees
 - Defines harassment and violence as any action, conduct or comment, including of a sexual nature, which can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.

❖ **Will anti-harassment legislation “open the floodgates?”**

- What about employer claims that changes to accept workplace stress will open the floodgates to a “tsunami” of baseless complaints by every disaffected employee who disagrees with their supervisor(s)
- This is a similar argument to that employers have often used against the opening of any avenue of complaint against workplace discrimination, in human rights, labour standards, OH&S
 - It is basically fear-mongering
- Experience shows that tribunals charged with adjudicating harassment complaints are well able to deal with cases and are actually conservative in these matters
- Several of these new pieces of legislation expressly exclude reasonable employer conduct in the normal management of the work site

❖ **Workers Compensation**

- OH&S and Workers Compensation are different pieces of regulation but are obviously linked
- Argument is that if a certain type of workplace harm is prohibited under OH&S, then time off work as a result of such harm should be covered under Workers Compensation
- Thus “stress leave” as a result of workplace trauma is not subject to compensation except by those employees with a private (either their own or the employer’s) insurance plan
- Also, psychological (and other non-hospital) services are not covered under Canadian Medicare
- But could be covered under a Workers Compensation regime that recognized workplace-based psychological trauma
- It should be noted that Workers Compensation protects not only employees, but also employers. Without WC, employer can be sued and, if the suit is successful, end up paying a large amount of \$. With WC, lawsuits by employees are not allowed.