

WORKPLACE HARASSMENT:  
A CROSS-JURISDICTIONAL COMPARATIVE ANALYSIS OF  
LEGISLATIVE RESPONSES TO THIS WORKPLACE PHENOMENON IN  
CANADA

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## **ABSTRACT**

This thesis investigates different statutory models Canadian legislatures have enacted to address workplace harassment. It adopts a qualitative, comparative case study approach, providing an in-depth comparative analysis of legislation from Québec, Saskatchewan, Ontario, Manitoba and British Columbia. Through this analysis, this thesis outlines the ways in which workplace harassment has been regulated in Canada, why that model was adopted by the jurisdiction and how that model measures against other models for legislating workplace harassment. Through an examination of existing literature relating to workplace harassment stemming from three theoretical paradigms and an analysis of a model legislative framework, this thesis creates a tool for scholars and lawmakers to use for future research and enactments of workplace harassment legislation. Overall, this thesis demonstrates that the varying and complex nature of the enacted legislation in the aforementioned Canadian jurisdictions leaves room for improvement for future enactments and amendments of workplace harassment legislation.

## **DEDICATIONS**

To my parents, Kim and Greg Carr  
and in loving memory of Sheila Carr and Gerard Chisholm,  
without whom my strength, perseverance and success  
would not be possible.

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## CHAPTER 1 - INTRODUCTION

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*Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.<sup>1</sup>*

- Chief Justice Dickson

Employment is a significant part of individual growth, community-building and economic sustainability. The workplace should be one that empowers workers to work at their full potential and the work environment should be one which is free from intimidation, anxiety or fear. It is imperative that the working relationship amongst co-workers and between management and employees is one which fosters mutual respect, cohesiveness and in turn, results in greater productivity. Despite this being an optimistic view of the workplace environment, this should be a goal for all employers and employees to strive to achieve. A work environment that promotes such characteristics is one in which workplace harassment is prohibited.<sup>2</sup> Workplace harassment legislation can be an important tool in combatting this phenomenon and promoting a work environment that prevents and protects workers from workplace harassment.

Research shows that harassment in the workplace causes direct and indirect harm, suffered by the target, the business and others in the workplace.<sup>3</sup> The target of the harassing conduct can experience a range of psychological and/or physical harms which could ultimately result in loss of income, loss of job or loss of life, among other affects.<sup>4</sup> Workplace harassment

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<sup>1</sup> Reference re *Public Service Employee Relations Act (Alta)* (1987), 87 C.L.L.C. 14, at para. 91 as cited in Martin Shain and Carla Nassar, *Stress at Work, Mental Injury and the Law in Canada: A Discussion Paper for the Mental Health Commission of Canada* (Calgary: Mental Health Commission of Canada, 2009) at 34.

<sup>2</sup> Workplace harassment is defined in many ways and will be discussed further in Chapter 2. For the purpose of this thesis, workplace harassment is defined as any comments or conduct by one or more individuals directed to one individual or a group, which negatively affects the target's self-worth, reputation, psychological and/or physical wellbeing and/or creates a hostile, negative work environment. This can include both non-violent and violent conduct. This thesis does not refer to nor examines enumerated grounds of harassment.

<sup>3</sup> Emily Bassman, *Abuse in the Workplace: Management Remedies and Bottom Line Impact* (Westport, CT: Quorum Books, 1992) at 137; Debra Parkes, "Targeting Workplace Harassment in Quebec: On Exporting a New Legislative Agenda" (2004) 8 *Employee Rts. & Emp. Pol'y J.* 423 at 425; Kisha Radliff, "Physical and Verbal Bullying" in Laura M. Crothers and John Lipinski eds, *Bullying in the Workplace: Causes, Symptoms and Remedies* (New York: Routledge, 2014) at 167.

<sup>4</sup> Bassman, *supra* note 3 at 137-150; Radliff, *supra* note 3 at 168

also negatively affects the business, which can include high turnover rates, poor customer service, loss of profits and legal troubles.<sup>5</sup> Although workplace harassment is not a new concept,<sup>6</sup> it has gained increasing attention in recent years,<sup>7</sup> especially among researchers in psychology, sociology, and law.

## 1.1 Purpose

Statutory protections against workplace harassment (outside of human right legislation) have only been introduced in Canada in the last decade.<sup>8</sup> To date, five Canadian provinces (Québec (2002), Saskatchewan (2007), Ontario (2009), Manitoba (2010) and British Columbia (2012)) have passed workplace harassment legislation.<sup>9</sup> This thesis adopts a qualitative, comparative case study approach, providing an in-depth comparative analysis of the Canadian legislation and resulting case law, to provide insight into the issue of, and the need for, regulation of such workplace behaviour.<sup>10</sup> The goal of this thesis is to provide an enriched understanding of the ways in which workplace harassment has been regulated in Canada, why each jurisdiction enacted provision in such a way, and how those provisions measures up against theoretical models for workplace harassment legislation. This thesis does not engage assessing how the legislation operates and whether the enacted provisions effectively prevent, address and/or stop this workplace phenomenon.

This thesis investigates the legal responses to workplace harassment via an examination of the statutory models these five jurisdictions have developed to address this workplace phenomenon. Chapter 2 examines the existing literature on the conceptualization of workplace harassment and the theoretical paradigms of this workplace phenomenon developed by European

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<sup>5</sup> Bassman, *supra* note 3 at 137-150; Carla Gonçalves Gouveia, “From Laissez-Faire to Fair Play: Workplace Violence & Psychological Harassment” (2007) 65 *U. Toronto Fac. L. Rev.* 137, at 143-144; David C. Yamada, “The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection” (2000) 88 *Geo L.J.* 475 at 483-484; Radliff, *supra* note 3 at 168.

<sup>6</sup> These concepts were first developed by Dr. Heinz Leymann, a psychologist, while studying adult behaviours in the workplace in the 1980s. His initial research was produced in Swedish. See Heinz Leymann, “Mobbing and Psychological Terror at Workplaces” (1990) 5 *Violence and Victims* 119 for the first English publication.

<sup>7</sup> Gouveia, *supra* note 5.

<sup>8</sup> Anti-discrimination harassment (harassment based on race, gender, sex, religion etc.) has been regulated in human rights legislation for several decades in Canada. This study is primarily concerned with non-enumerated workplace harassment law, outside of human rights legislation.

<sup>9</sup> This data is as recent as May 2014.

<sup>10</sup> This contrasts with a quantitative approach which would capture the statistics on cases resulting from the respective workplace harassment legislation in the five jurisdictions.

and North American scholars. Chapter 3 outlines the framework for a legislative response to workplace harassment as developed by Carla Gonçalves Gouveia and modifies some of the components and elements of this framework based on the literature reviewed in Chapter 2. This thesis proposes that this model legislative approach to responding to workplace harassment encompasses the provisions that are necessary to responding to workplace harassment. This model framework is used as a tool to assess enacted legislation against a proposed legislative response. Chapter 4 provides a detailed review of the legislative responses of the five aforementioned Canadian jurisdictions. This chapter examines the goals of the legislation, the types of conduct these jurisdictions have chosen to address with legislation, the rights and responsibilities of both the employers and employees in each jurisdiction and the procedures for reporting and investigating complaints. This chapter also briefly explores resulting case law from the five jurisdictions offering insight into the application of the legislation. Chapter 5 categorizes and analyzes three models of workplace harassment legislation that the Canadian jurisdictions have adopted. The first is the “External Enforcement Model,” the second is the “Internal Enforcement Model” and the third is the “Hybrid Enforcement Model.” Chapter 6 assesses the respective provincial legislative responses. It assesses the conceptualization of workplace harassment, how the province has recognized the harmful workplace conduct continuum, how the province has implemented the enforcement model and how it compares to the model legislative framework. Finally, Chapter 7 provides a summary of the findings, the implications of this thesis and suggests future research.

## **1.2 Limitations**

This thesis is restricted to an analysis of the legislative responses for harassment that is psychological or non-enumerated in nature. It excludes an analysis of discrimination legislation in this area of workplace harassment law. This thesis does not aim to discredit or trivialize this form of workplace harassment. The reason for this limitation is due to the significant research conducted on enumerated workplace harassment law, specifically in relation to sexual harassment.

There is a tension between normative and analytical frames in this study. This study is limited to an analytical assessment of workplace harassment legislation in the five provinces. Without empirical data on each of the jurisdictions’ legislation, it is premature to assess the

effectiveness of the provisions. As the legislation in each jurisdiction is relatively new, there is insufficient empirical data available for an empirical study. Furthermore, a thorough understanding and comparison of the legislative provisions provides a foundation for future research.

## **CHAPTER 2 - LITERATURE REVIEW**

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Workplace harassment is a relatively new area of interest that has raised concern amongst scholars, businesses, employees, healthcare professionals and government agencies around the globe. Much of the research conducted on workplace harassment focuses on sexual harassment and discrimination based on enumerated grounds (i.e. race, age, sex, religion, etc.) incorporated in human rights legislation. It has only been in the last thirty years that scholars have focused their research on aspects of workplace harassment that is not based on enumerated grounds. This scholarship has emerged as a result of both the need to develop and implement a legislative response as well as through an analysis of the existing legislative responses of this workplace phenomenon.

Workplace harassment is not strictly a health, economic or legal issue. An examination of such phenomenon through one disciplinary lens cannot combat these problems in the workplace. Most of the scholarship on this phenomenon comes from psychology, sociology, healthcare and business. When trying to create a solution for addressing workplace harassment it is essential that the different aspects of this phenomenon be taken into consideration. As such, most of the literature on workplace harassment has drawn from research from other disciplines, in various jurisdictions, in order to examine the causes of the conduct, the effects of such conduct on the victim, perpetrator, and the workplace, and the solutions for prevention, intervention and remedial action. Legal literature examining this phenomenon is sparse. This is one identifiable gap within the academic literature on workplace harassment. This thesis contributes to the research in this area by analyzing and comparing the legislation Canadian jurisdictions have implemented to address and respond to this workplace phenomenon.

### **2.1 Conceptualizing this Workplace Phenomenon**

Conceptualizing this workplace phenomenon has proven to be a point of contention amongst scholars and legislators and has not led to any consensus. The issues that scholars have addressed, as examined below, include how to label and define this workplace phenomenon, whether or not to recognize this behaviour as a point on the continuum of problematic workplace conduct and whether or not workplace harassment is a form of violence.

## (A) Defining this Workplace Phenomenon

One of the most debated issues, by both scholars and legislators, is how to label and define this workplace phenomenon. Among the labels scholars have applied to this phenomenon are: “bullying,”<sup>11</sup> “moral harassment,”<sup>12</sup> “emotional abuse,”<sup>13</sup> “harassment,”<sup>14</sup> “mobbing,”<sup>15</sup> “status-blind harassment,”<sup>16</sup> “psychological harassment”<sup>17</sup> and “workplace harassment.”<sup>18</sup> These terms concern conduct that could attack an individual’s dignity or integrity, could humiliate the target and/or could have harmful effects on an individual’s psychological or physical state. These terms generally do not refer to enumerated forms of harassment. For the purpose of this thesis, this workplace phenomenon will be referred to as “workplace harassment.”

Several commentators have recognized the competing nature of the various terms and definitions of workplace harassment.<sup>19</sup> These terms have been used both synonymously and distinctly to address particular aspects of this phenomenon. There are both commonalities and variances with many of the definitions. Each definition uses language indicating that the actions or comments are inappropriate, unreasonable or harmful.<sup>20</sup> Many definitions also require that the

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<sup>11</sup> Ståle Einarsen, “The Nature and Causes of Bullying at Work” (1999) 20 *International Journal of Manpower* 16; Katherine Lippel, “The Law of Workplace Bullying: An International Overview” (2010) 32 *Comp. Lab. L. & Pol’y J.* 1; David C. Yamada, *supra* note 5; Gary Namie, “Workplace Bullying: Escalated Incivility” (2003) 68 *Ivey Business Journal* 1; Susan Harthill, “Workplace Bullying as an Occupational Safety and Health Matter: A Comparative Analysis” (2011) 34 *Hastings Int’l & Comp. L. Rev.* 253.

<sup>12</sup> Marie-France Hirigoyen, *Le harcèlement moral: la violence perverse au quotidien* (Paris: La Découverte, 1998); Marius Ezer and Oana Florentina Ezer, “Workplace Harassment, Mobbing Phenomenon” (2012) 1(1) *Perspectives of Business Law Journal* 298; Loïc Lerouge, “Moral Harassment in the Workplace: French Law and European Perspectives” (2011) 32 *Comp. Labor Law & Pol’y Journal* 109.

<sup>13</sup> Loraleigh Keashly, “Emotional Abuse in the Workplace” (2008) 1 *Journal of Emotional Abuse* 85.

<sup>14</sup> Einarsen, *supra* note 11; Parkes, *supra* note 3; Gabrielle S. Friedman and James Q. Whitman, “The European Transformation of Harassment Law: Discrimination versus Dignity” (2003) 9 *Colum. J. Eur. L.* 241.

<sup>15</sup> Leymann, *supra* note 6; Noa Davenport, Ruth Schwartz and Gail Elliott, *Mobbing: Emotional Abuse in the American Workplace* (Civil Society Publishing: 1999) as cited in Yamada, *supra* note 11.

<sup>16</sup> Yamada, *supra* note 11.

<sup>17</sup> Rachel Cox, “Psychological Harassment Legislation in Québec: The First Five Years” (2010) 32:55 *Comp. Labor Law & Pol’y J.* 55; Gouveia, *supra* note 5.

<sup>18</sup> European Agency for Safety and Health at Work, *European Risk Observatory Report: Workplace Violence and Harassment: A European Picture* (Luxembourg: Publications Office of the European Union, 2010), online <<https://osha.europa.eu/en/publications/reports/violence-harassment-TERO09010ENC>>; Friedman and Whitman, *supra* note 14; Gouveia, *supra* note 5.

<sup>19</sup> Sara Branch “You Say Tomatoe and I say Tomato: Can we Differentiate Between Workplace Bullying and Other Counterproductive Behaviours?” (2008) 13 *J. Organ. Behav.* 4 at 4; Laura Crawshaw, “Workplace Bullying? Mobbing? Harassment? Distraction by a Thousand Definitions” (2009) 61 *Consulting Psychology Journal: Practice and Research* 263 at 264; Yamada, *supra* note 11 at 480.

<sup>20</sup> Branch, *supra* note 19 at 5.

behaviour must reoccur,<sup>21</sup> however, some definitions do recognize that a single serious incident can amount to workplace harassment.<sup>22</sup>

Another common element among definitions is the requirement of a power imbalance between the victim and the harasser.<sup>23</sup> Where a power imbalance is required, and where one employee suffers from the conduct of another employee of equal status in the workplace, such that no power imbalance exists, then this will not constitute harassment, and therefore no remedy is available to the victim. Several commentators have addressed and criticized the weakness of this type of definition of harassment.<sup>24</sup>

Another debated element in the various definitions is whether the harasser must possess the intent to harm in order to establish that the conduct amounted to workplace harassment. Generally, the intent to harm is not required to establish workplace harassment (particularly in legal definitions); rather the definitions either expressly state or imply that the perpetrator must possess the intent to act in such a manner, which may, in turn, cause harm to the victim.<sup>25</sup>

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<sup>21</sup> *ibid.* at 5-6; The definition of “bullying” provided by The International Labour Organization (ILO) stipulates that “in order for the label bullying (or mobbing) to be applied to a particular activity, interaction or process it has to occur repeatedly and regularly (e.g. weekly) and over a period of time (e.g. about six months)” as cited in Duncan Chappell and Vittorio Di Martino, *Violence at Work* 3<sup>rd</sup> ed (Geneva: International Labour Organization, 2006), online: International Labour Organization < [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_PUBL\\_9221108406\\_EN/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_PUBL_9221108406_EN/lang--en/index.htm) > at 20; Friedman and Whitman, *supra* note 14 at 249; Radliff, *supra* note 3 at 173.

<sup>22</sup> Rachel Yuen, “Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Quebec” (2005) 38 *Cornell Int’l L.J.* 625 at 635.

<sup>23</sup> Ståle Einarsen, et al. “The concept of bullying at work: The European tradition” in Ståle Einarsen eds, *Bullying and emotional abuse in the workplace: International perspectives in research and practice*, (London: Taylor & Francis, 2003) at 1; Helge Hoel & Cary Cooper, “Origins of bullying: Theoretical frameworks for explaining workplace bullying” in N. Tehrani ed, *Building a culture of respect: Managing bullying at work* (London: Taylor & Francis, 2001) at 3; Loreleigh Keashly & Karen Jagatic, “By any other name: American perspectives on workplace bullying” in Ståle Einarsen, et al. eds, *Bullying and emotional abuse in the workplace: International perspectives in research and practice*, (London: Taylor & Francis, 2003) at 31; Charlotte Rayner et. al. *Workplace Bullying: What we know, who is to blame, and what can we do?* (London: Taylor & Francis, 2002) as cited in Branch *supra* note 19 at 6-7; Radliff, *supra* note 3 at 169

<sup>24</sup> See survey conducted and published in Paula Saunders et al., “Defining Workplace Bullying Behaviour Professional Lay Definitions of Workplace Bullying” (2007) 30 *Int’l J. L. & Psychiatry* 340 at 348 as cited in Katherine Lippel, *supra* note 11 at 3; Centers for Disease Control and Prevention, *NIOSH Update: Most workplace bullying is worker to worker, early findings from NIOSH study suggest*, (Atlanta: National Institute for Occupational Safety and Health, 2004) online: <http://www.cdc.gov/niosh/updates/upd-07-28-04.html> as cited in Duncan Chappell and Vittorio Di Martino, *Violence at Work* 3<sup>rd</sup> ed (Geneva: International Labour Organization, 2006), online: International Labour Organization [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_PUBL\\_9221108406\\_EN/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_PUBL_9221108406_EN/lang--en/index.htm) at 49-50; Friedman and Whitman, *supra* note 14 at 249; Leymann, *supra* note 6 at 119.; Yuen *supra* note 22 at 628

<sup>25</sup> Michael Sheehan, Michelle Barker & Paul McCarthy, “Analysing metaphors Used By Victims of Workplace Bullying” (2004) 5(1) *International Journal of Management and Decision Making* 21 and Clair Mayhew et al., “Measuring the extent of impact from occupational violence and bullying on traumatised workers” (2004) 16(3) *Employee Responsibilities and Rights Journal* 117 as cited in Branch, *supra* note 19 at 7.



However, some psychology scholars support requiring intention to harm as a necessary element of finding workplace harassment.<sup>26</sup> Gouveia criticizes this perspective as being problematic and burdensome on the victim because proving that the perpetrator intended harm can be difficult to establish.<sup>27</sup> Where the definition requires the possession of intent to harm, the perpetrator can claim they did not intend to cause harm by their actions, thus leaving the victim without recourse.<sup>28</sup>

Laura Crawshaw recognizes the confusion arising from the current array of terms and definitions of workplace harassment.<sup>29</sup> She argues that defining workplace harassment “...imped[es] our ability to talk about, much less solve, this destructive workplace phenomenon.” Rather, she proposes that this phenomenon should not be defined at all.<sup>30</sup> While defining such a phenomenon is essential for legislative purposes, it is worth examining Crawshaw’s reasons and recommendations that not defining workplace harassment is a more suitable approach.

Rather than contributing to this confusion with seeking a new definition, Crawshaw contends that descriptive nomenclatures, rather than restricting workplace conduct to a preconceived definition of harassment, is the best approach to address the problematic behaviour.<sup>31</sup> She argues that definitions tend to be restrictive, requiring specific elements to be established in order to find harassment occurred, which could cause victims of harassing conduct to be left without recourse.<sup>32</sup> According to Crawshaw, an attempt to fit a complex workplace phenomenon into a restrictive definition or legislative response is a problem that must be avoided in order to better address this type of workplace behaviour.<sup>33</sup> Crawshaw proposes that harmful workplace conduct can be described so as to address the various types of problematic or harmful

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<sup>26</sup> Christine M. Pearson, Lynne M. Andersson & Christine L. Porath, “Workplace Incivility” in Suzy Fox and Paul E. Spector, eds, *Counterproductive Work Behavior: Investigations of Actors and Targets* (Washington, DC: American Psychological Association, 2005) 177 and C. Rayner, Helge Hoel and Cary Cooper, *supra* note 23 as cited in Branch *supra* note 19 at 7-8; Radliff, *supra* note 3 at 173

<sup>27</sup> Gouveia *supra* note 5 at 146

<sup>28</sup> Rayner et al *supra* note 23 as cited in Branch *supra* note 19 at 8.

<sup>29</sup> Crawshaw *supra* note 19 at 264.

<sup>30</sup> *Ibid.* at 264-265

<sup>31</sup> *Ibid.* at 265.

<sup>32</sup> *Ibid.* at 266

<sup>33</sup> *Ibid.* at 266.

workplace behaviour rather than simply labelling all types of behaviour under the same definition of harassment.<sup>34</sup>

Descriptive nomenclatures for problematic or harmful workplace conduct, according to Crawshaw, should range from broad, inclusive categories to specific, restricted categories, thus capturing and addressing various types of harmful workplace conduct.<sup>35</sup> Crawshaw describes a broad, inclusive nomenclature as “general workplace abuse,” which includes all forms of harmful workplace behaviour such as discrimination, sexual harassment, bullying and violence, amongst other conduct.<sup>36</sup> A specific description of the conduct is more restrictive. According to Crawshaw, a victim can claim they suffered “workplace psychological harassment,” which is a restrictive subcategory of “general workplace abuse.”<sup>37</sup> A descriptive nomenclature for psychological harassment must be broad enough to encompass a range of behaviours. She argues that

in a descriptive nomenclature, workplace psychological harassment can involve one or more perpetrators and targets at various levels of the organization, occur at various degrees of severity and frequency, be intentional or unintentional, and manifest in a wide variety of unacceptable behaviours in response to various precipitants.<sup>38</sup>

Crawshaw argues that this descriptive nomenclature can alleviate the need to fit workplace harassment into the walls of a restrictive definition, which may require a specific duration or frequency, limit to specific conduct, or restrict the conduct to identified workplace actors, which could leave a victim of harassment without recourse. Despite Crawshaw’s contempt for definitions, the aforementioned nomenclature for psychological harassment can still be categorized as a definition, albeit a broad definition.

A formula emerges from Crawshaw’s commentary, which facilitates her proposed description of workplace harassment. This formula is represented in Figure 1. Crawshaw’s formula for a descriptive nomenclature of workplace harassment includes five elements. First, the subtype of behaviour must be determined. Is it general workplace abuse or can the behaviour be specifically described as workplace psychological harassment? Second, the parties involved must be identified. Is it between two individuals, between a group against an individual or

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<sup>34</sup> Ibid. at 264-265

<sup>35</sup> Ibid. at 265

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

another group, or is it between the organization and an individual or group? Third, there must be a description of the type of behaviour that is involved. Is it verbal abuse, the spreading of rumours, ridiculing, assigning degrading tasks, or isolating the individual or group of individuals? Fourth, the duration of the conduct must also be identified. Is it a single incident or has the conduct existed over time? Finally, is the conduct intentional or unintentional? She suggests that by describing the behaviour using these elements, the confusion as to whether it is bullying, harassment, mobbing (which all have similar and conflicting definitions) or some other term is alleviated, and does not restrict the conduct to specific parameters.<sup>39</sup>

**FIGURE 1: Crawshaw’s Formula for Workplace Harassment<sup>40</sup>**

Subtype of behaviour		Parties Involved		Specific Behaviour		Duration		Intentions
Workplace Abuse	+	Individual to individual or group	+	[type of behaviour i.e. verbal abuse, isolation, etc.]	+	Single incident	+	Intentional
or		or				or		
Workplace Psychological Harassment		Group to individual or group				Repeated		Unintentional
		or						
		Organization to individual or group						

Crawshaw uses this formula in a case scenario in which she argues that, rather than calling the workplace conduct merely “bullying”, it should be described in such a way that indicates that the conduct is workplace psychological harassment, between two or more parties, that is manifested in a specific type of behaviour, for an identified duration of time which has been determined to be either intentional or unintentional.<sup>41</sup>

There is yet to be any empirical evidence that Crawshaw’s descriptive approach, which necessitates categorizing the conduct in question, does, indeed, avoid the problems she has identified with employing explicit definitions for workplace harassment. For the purpose of a legislative response, Crawshaw’s approach may leave employers and employees with little

<sup>39</sup> Ibid. at 266.

<sup>40</sup> Ibid. at 265-266

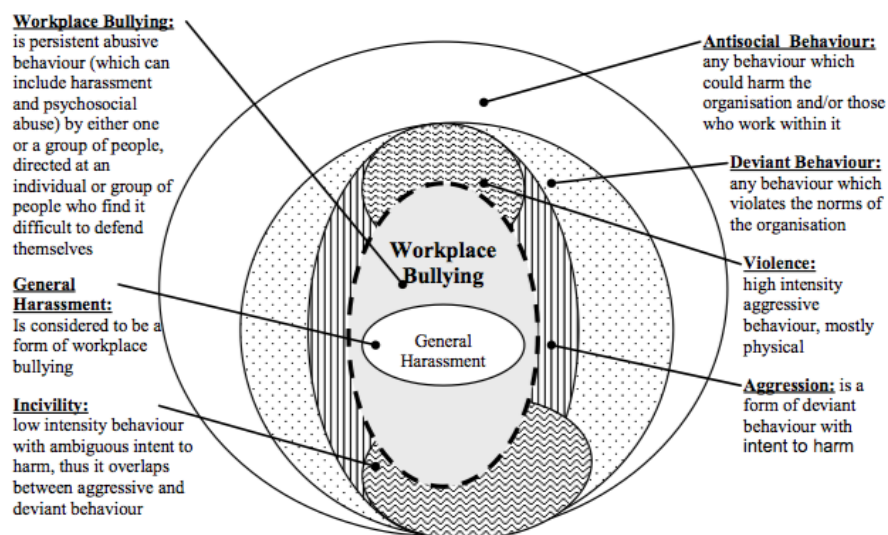
<sup>41</sup> Ibid.

guidance for what constitutes workplace harassment and, therefore, may not be a realistic or desirable approach.

Sara Branch also recognizes the complexity and confusion with the current definitions of workplace harassment.<sup>42</sup> In contrast to Crawshaw, Branch argues, “definitional preciseness is an essential prerequisite for researching, preventing and redressing workplace bullying.”<sup>43</sup> Defining this workplace phenomenon, according to Branch, is necessary for an “accurate diagnosis” of the workplace conduct enabling an appropriate application of a remedial response.<sup>44</sup>

Branch adapts a model of anti-social behaviour in organizations developed by Lynne Andersson and Christine Pearson to include workplace bullying and general harassment.<sup>45</sup> She applies this model to workplace conduct to recognize several subtypes of workplace behaviour.<sup>46</sup> Figure 2 sets out Branch’s model of anti-social workplace behaviours. This diagram illustrates the various forms of anti-social workplace conduct, which can vary in severity, harm and duration.

**FIGURE 2: Branch’s Model of Workplace Bullying in the Context of Antisocial Behaviours<sup>47</sup>**



<sup>42</sup> Branch, *supra* note 19 at 5

<sup>43</sup> *Ibid.* at 13.

<sup>44</sup> *Ibid.* at 14-15.

<sup>45</sup> Lynne Andersson and Christine Pearson, “Tit for Tat? The spiraling effect of incivility in the workplace” (1999) 24(3) *Acad. Manage Rev.* 452 as cited in Branch, *supra* note 19.

<sup>46</sup> Branch, *supra* note 19 at 5.

<sup>47</sup> *Ibid.* at 13. This diagram represents Branch’s adaptation of Andersson and Pearson’s model.

This diagram provides researchers, legislators and human resources personnel with a tool to diagnose problematic workplace conduct more easily and with more accuracy. It illustrates the various forms of what Branch categorizes as anti-social workplace conduct, which includes deviant behaviour, aggression, violence, incivility, workplace bullying and general harassment. She adopts Dieter Zapf's view that not all anti-social workplace behaviour should be labeled as workplace harassment.<sup>48</sup> Workplace anti-social behaviour encompasses all problematic workplace conduct, which "could result in physical, emotional, psychological or economic harm" suffered by the individual or organization.<sup>49</sup> Branch distinguishes this behaviour from workplace bullying based on whether the conduct is repeated.

Workplace bullying, according to Branch, "is persistent abusive behaviour (which can include harassment and psychosocial abuse) by either an individual or a group, directed at an individual or group who find it difficult to defend themselves."<sup>50</sup> Branch's model suggests that there are various anti-social behaviours. These behaviours include "low intensity" workplace incivility to "high intensity" behaviour, aggressiveness or physically violent conduct, which as a single incident, is strictly incivility, aggression or violence, but when repeated, becomes workplace bullying.<sup>51</sup> She also categorizes "general harassment" as a type of workplace bullying. Branch defines this conduct as harassment that concerns an "intrinsic attribute or identifiable characteristic" such as sex, age, race, or religion.<sup>52</sup> Branch distinguishes this from bullying, which is not limited to conduct or comments relating to an individual's characteristics or genetic makeup.<sup>53</sup>

Branch makes several distinctions between workplace bullying and other anti-social behaviours, again based on the persistency of the conduct.<sup>54</sup> Deviant behaviour is distinguished from workplace bullying as it is any conduct against company norms, which may or may not

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<sup>48</sup> Dieter Zapf, "Negative Social Behaviour at Work and Workplace Bullying" (paper delivered at the Fourth International Conference on Bullying and Harassment in the Workplace, Bergen, Norway, June 2004), [unpublished] as cited in Branch, *supra* note 19 at 8.

<sup>49</sup> Karl Aquino and Scott Douglas, "Identity threat and antisocial behaviour in organizations. The moderating effects of individual differences, aggressive modeling, and hierarchical status" (2003) 90, *Organ. Behav. Hum. Dec.* 195 as cited in Laura Crawshaw, *supra* note 19 at 8.

<sup>50</sup> Branch, *supra* note 19 at 13.

<sup>51</sup> *Ibid.* at 12-13.

<sup>52</sup> *Ibid.* at 10.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.* at 13.

include workplace bullying.<sup>55</sup> The following are two examples with the workplace norm of prohibiting the use of vulgar language. In the first scenario, employee A uses vulgar language after noticing a mistake they personally made. This is deviant anti-social behaviour because it goes against the company norm on inappropriate language, however, it is not bullying as it is not directed to any individual or group of individuals in the workplace nor is it persistent. In the second scenario, employee A constantly uses vulgar language toward employee B. This is both deviant and bullying behaviour because it violates the workplace norm and is persistently directed toward another individual.

Aggression and violence may also be aspects of workplace bullying, but again, not all aggressive and violent conduct is bullying.<sup>56</sup> Aggression and violence, according to Branch, requires “intent to harm” and only becomes bullying when the conduct is persistent rather than single incidents.<sup>57</sup> This example is somewhat problematic.

Uncivil workplace conduct is distinct yet can overlap with workplace bullying as well. Branch adopts Andersson and Pearson’s definition of incivility as “‘rude and discourteous’ behaviour that displays ‘a lack of regard for others.’”<sup>58</sup> According to Branch’s model, uncivil behaviour, but not bullying, would be found where a worker is late for a meeting or checks email during the meeting.<sup>59</sup> This behaviour would become bullying where it “increases with intensity” and persistency.<sup>60</sup>

Two issues arise with Branch’s approach. The first issue relates to the requirement of persistency of the conduct in order to establish workplace bullying. It has been noted by some commentators and legislators that a single serious incident can amount to workplace bullying if the incident is serious enough.<sup>61</sup> The second issue relates to Branch’s distinction between workplace bullying and violence. In Branch’s model, violence and harassment overlap yet are distinguished based on persistency. However, several scholars, as well as the International

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<sup>55</sup> Ibid. at 9.

<sup>56</sup> Ibid. at 11.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Tammy L. Hughes and Vanessa A. Durand, “Bullying as Workplace Incivility” in Laura M. Crothers and John Lipinski eds, *Bullying in the Workplace: Causes, Symptoms and Remedies* (New York: Routledge, 2014) at 138.

<sup>60</sup> Branch, *supra* note 19 at 12.

<sup>61</sup> See Hirigoyen’s definition as cited in Yuen, *supra* note 22 at 635; European Foundation for the Improvement of Living and Working Conditions, *Preventing Violence and Harassment in the Workplace*, (Luxembourg: Office for Official Publications of the European Communities, 2003) (Authors: Vittorio Di Martino, Helge Hoel and Cary L. Cooper) at 4.

Labour Organization (“the ILO”) (which will be examined below), regard workplace bullying as a form of violence, whether the conduct is physical or non-physical and as such, are of the view that it should not be considered distinct from workplace harassment.<sup>62</sup>

### **(B) Conduct Continuum of Workplace Harassment**

Another component of a workplace harassment definition is the recognition of a conduct continuum in relation to harmful workplace conduct. Three conceptions of this conduct continuum have developed, the Conflict Escalation Model, the general continuum conception and Namie and Namie’s conception, all of which represent a scale of escalating behaviours.

First, the Conflict Escalation Model is a theory that was developed prior to research on workplace harassment, however, has been applied to workplace harassment research in order to understand the progression of this workplace phenomenon.<sup>63</sup> This theory suggests that workplace conflict begins with “rational conflict” between two parties in the workplace. This initial conflict sparks tension amongst the parties, however, these parties interact and cooperate to an extent.<sup>64</sup> This initial conflict and tension can escalate between the two parties and result in hostility and exclusion.<sup>65</sup> As the behaviour continues to escalate, bullying develops whereby one party “would risk their own welfare, or even existence, in order to damage or destroy the other.”<sup>66</sup> This model stresses prevention and intervention in order to inhibit further escalation.<sup>67</sup>

The general continuum conception model suggests that workplace harassment can begin with an initial minor incident or conflict such as isolation, verbal abuse, practical jokes or ridiculing.<sup>68</sup> According to this model, this minor incident is often ignored and generally does not

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<sup>62</sup> Chappell and Di Martino, *supra* note 24 at 17.

<sup>63</sup> Developed by F. Glasl as cited in Dieter Zapf and Claudia Gross, “Conflict Escalation and Coping with Workplace Bullying: A Replication and Extension” (2014) 10(4) *Eur J. Work Organ Psy* 497 at 501.

<sup>64</sup> *Ibid.* at 502.

<sup>65</sup> *Ibid.*

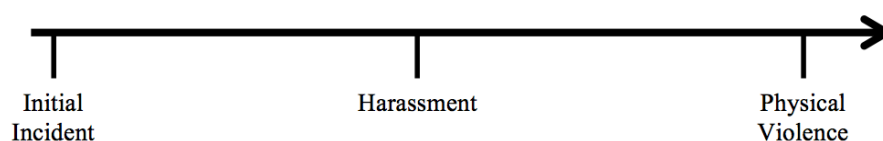
<sup>66</sup> *Ibid.*

<sup>67</sup> Sara Branch, “Workplace Bullying, Mobbing and General Harassment: A Review” (2013) 15 *Int. J. Manag. Rev.* 280 at 282.

<sup>68</sup> European Agency for Safety and Health at Work, *European Risk Observatory Report: Workplace Violence and Harassment: A European Picture* (Luxembourg: Publications Office of the European Union, 2010), online <https://osha.europa.eu/en/publications/reports/violence-harassment-TERO09010ENC> at 22

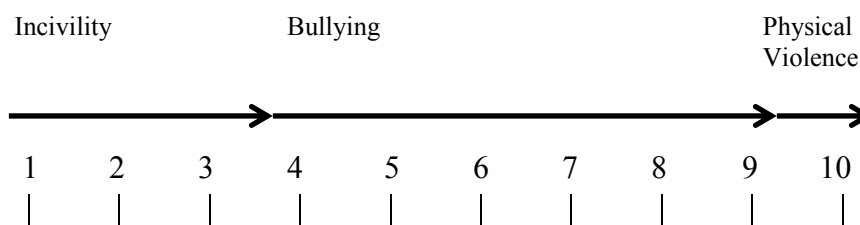
have any major effects or repercussions.<sup>69</sup> This model suggests that it is the accumulation of these “minor” incidents which, when “systematically repeated”<sup>70</sup> can develop into workplace bullying and harassment or even violence.<sup>71</sup> This conception of the harmful workplace conduct continuum is represented in Figure 3.

**FIGURE 3: General Harmful Workplace Conduct Continuum**



Namie and Namie developed a third conception of the continuum. This continuum represents a range of behaviours from incivility to bullying or escalated incivility to violence in the workplace.<sup>72</sup> A 10-point scale represents this continuum in Figure 4. The more harmful the conduct the higher the number is on the scale.

**FIGURE 4: Namie & Namie’s Harmful Workplace Conduct Continuum**



On one end of the continuum, Namie and Namie describe incivility as behaviours that are inconsistent with social norms. This behaviour is represented on the scale from one to three points. Incivility can then escalate into bullying, which includes behaviours such as repeated verbal and physical abuse. This behaviour ranges from mild (four points) to severe (nine points)

<sup>69</sup> European Commission, Advisory Committee on Safety, Hygiene and Health Protection at Work, ‘Opinion on Violence at the Workplace’, Opinion adopted on 29 November 2001, Brussels, 2001 as cited in European Foundation for the Improvement of Living and Working Conditions *supra* note 61 at 4

<sup>70</sup> *European Risk Observatory Report*, *supra* note 68 at 22

<sup>71</sup> *European Risk Observatory Report*, *supra* note 68. Also see, Pamela Lutgen-Sandvik, “The Communicative Cycle of Employee Emotional Abuse: Generation and Regeneration of Workplace Mistreatment” (2003) 16 *Mgmt. Comm. Q.* 471 at 479 and 498; David Yamada, “Crafting a Legislative Response to Workplace Bullying” (2004) 8 *Employee Rts. & Employment Pol’y J.* 475 at 482; Robert A. Baron & Joe; H. Neuman, “Workplace Aggression – The Iceberg Beneath the Tip of Workplace Violence” (1998) 21 *Pub. Admin. Q.* 446; Joseph A. Kinney, *Violence at Work* (Englewood Cliffs, New Jersey: Prentice Hall Trade, 1995)

<sup>72</sup> Gary Namie and Ruth Namie, *The Bully at Work* (Naperville, IL: Sourcebooks, 2000) as cited in Radliff, *supra* note 3 at 165.



depending on the level of “interference with the accomplishment of legitimate business interests” and the level of harm on the target’s wellbeing.<sup>73</sup> At the end of the continuum is physical violence. This behaviour, according to Namie and Namie, includes any conduct, which results in “serious disruption of the victim and the organization and, at its utmost, can result in death.”<sup>74</sup>

Despite the recognition of a harmful workplace conduct continuum, some commentators and legislators have recognized that a single incident can amount to workplace harassment if it is severe enough.<sup>75</sup> However, the threshold for establishing a single incident as workplace bullying and harassment is high.

### (C) The Element of Violence

The relationship between workplace harassment and violence has sparked significant debate amongst commentators and legislators. The issue is whether to categorize workplace harassment as a form of violence or whether to distinguish these two forms of workplace harm. The majority of commentators recognize a causal link between workplace harassment and violence, identifying harassment and violence as adjacent points on a continuum of problematic behaviour (illustrated above on the conduct continuum in Figure 3).

The ILO categorizes workplace harassment, bullying or mobbing as a form of “psychological violence... which [has] the potential to cause significant emotional injury among those victimized.”<sup>76</sup> Gouveia argues that “bullying and intimidation are pervasive forms of violence that threaten the integrity and health of the individual and the workplace structure”<sup>77</sup> suggesting that violence can manifest in physical or psychological forms.<sup>78</sup> The European Union also recognizes this relationship.<sup>79</sup> The European Commission (“EC”) holds that violence is manifested in various forms including “physical aggression to verbal insults, bullying, mobbing...and may be inflicted by persons both outside and inside the working environment.”<sup>80</sup>

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<sup>73</sup> Ibid. at 165.

<sup>74</sup> Ibid.

<sup>75</sup> European Foundation for the Improvement of Living and Working Conditions, *supra* note 61 at 4.

<sup>76</sup> International Labour Organization, *supra* note 21 at 17.

<sup>77</sup> Gouveia, *supra* note 5 at 139.

<sup>78</sup> Ibid. at 144.

<sup>79</sup> *European Risk Observatory Report*, *supra* note 68 at 16.

<sup>80</sup> European Commission, Advisory Committee on Safety, Hygiene and Health Protection at Work, *supra* note 69

Furthermore, the EC notes that this conduct generally takes the form of reoccurring events, “which alone may be relatively minor but which cumulatively can become a very serious form of violence.”<sup>81</sup>

A particular topic of interest amongst Canadian provincial legislators, and to a minimal extent, of commentators, is the relationship between domestic violence and workplace harassment. The ILO highlights the “growing concern” of the “spillover” effect of domestic violence into the workplace<sup>82</sup> noting the concerns of employers over job performance issues, financial strain to the company’s bottom line,<sup>83</sup> as well as the “personal trauma and distress” on workers who witness this conduct.<sup>84</sup> In America, the FBI recognizes the continuum of workplace harassment and violence, and particularly includes domestic violence within this continuum.<sup>85</sup> In Canada, as discussed later in Chapter 4, domestic violence in the workplace was of particular concern in the Ontario Legislature, and to a lesser extent in the Manitoba and British Columbia Legislatures, when drafting workplace harassment legislation. The central question debated in these legislatures was whether domestic violence should be included in workplace harassment legislation or whether employment law should even govern domestic violence at all.

#### **(D) Conclusion**

Workplace harassment is difficult to identify and define clearly. This poses a challenge to legislators seeking a legislative response to this phenomenon. In order to prevent workplace harassment and/or stop it from escalating into physical violence, there needs to be a mutual recognition amongst scholars, legislators, employers and employees that problematic workplace behaviour, if left unaddressed, can escalate and cause severe and sometimes permanent harm to those effected. This challenge is evident in the Canadian legislative responses to this phenomenon, which is discussed in Chapters 5 and 6.

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<sup>81</sup> *ibid.* at 4

<sup>82</sup> International Labour Organization, *supra* note 21 at 133.

<sup>83</sup> M. Hudson, “Domestic Violence isn’t just domestic: sometimes it spills over into the workplace”, *Roanoke Times and World News, Metro Edition* (19 March 1998) C1 as cited in P. Johnson and S. Gardner, “Domestic violence invades the workplace: Strategies for the global business community”, (2000) 15:4 *Women in Management Review* 197 as cited in International Labour Organization, *supra* note 21 at 134.

<sup>84</sup> International Labour Organization, *supra* note 21 at 136.

<sup>85</sup> United States of America, Federal Bureau of Investigation, U.S. Department of Justice, *Workplace Violence: Issues in Response* 13 (Quantico: U.S. Department of Justice, 2004) available at <http://www.fbi.gov/stats-services/publications/workplace-violence> at 40-45 as cited in Harthill, *supra* note 11 at 265.

## 2.2 Theoretical Paradigms

Workplace harassment legislation in Europe and North America reflects three distinct theoretical approaches to addressing this phenomenon. The “European Dignity” paradigm and the “North American Anti-Discrimination” paradigm have become well established over the last two decades.<sup>86</sup> The “Psychological Harassment” paradigm has only recently developed as a result of European legislative and scholarly influences on North American commentators and legislators.

### (A) The European Dignity Paradigm

European workplace harassment law reflects the European Dignity paradigm, emphasizing the effects of conduct on the individual and is primarily concerned with protecting the dignity and wellbeing of individuals.<sup>87</sup> This approach highlights the importance of self-worth, respect for all, and the maintenance of social relationships in the workplace. Under the European Dignity paradigm, workplace harassment, “pose[s] the danger of ‘insulting’ or ‘dishonouring’ or ‘degrading’ treatment,” towards the target which is unacceptable.<sup>88</sup>

Prior to the enactment of any specific law concerning workplace harassment, either by the European Union or individual Member States, leading European psychologists addressed the growing concern for the psychological health and wellbeing of workers.<sup>89</sup> The pioneer of this paradigm is Dr. Heinz Leymann,<sup>90</sup> a German psychologist who, in the late 1980s, adapted Dr. Peter-Paul Heinemann’s research of “mobbing” behaviour amongst school children and applied it to the working world.<sup>91</sup> He uses the terms “mobbing” and “psychological terror” to describe workplace harassment defining it as

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<sup>86</sup> This study will focus primarily on the European dignity paradigm and the recently developed psychological bullying in the workplace paradigm. For the purposes of this study, only a brief analysis of the anti-discrimination paradigm will be produced in order to understand how and why initial workplace harassment legislation took form within the North American region.

<sup>87</sup> Friedman and Whitham, *supra* note 14 at 242.

<sup>88</sup> *Ibid.* at 252.

<sup>89</sup> *Ibid.* at 251

<sup>90</sup> Lippel, *supra* note 11 at 6; Friedman and Whitman, *supra* note 14 at 248.

<sup>91</sup> Friedman and Whitman, *supra* note 14 at 247-248.

hostile and unethical communication which is directed in a systematic way by one or a number of persons mainly toward an individual... These actions take place often (almost everyday) and over a long period (at least for six months) and, because of this frequency and duration, result in considerable psychic, psychosomatic and social misery... This definition eliminates temporary conflicts...<sup>92</sup>

He developed a model consisting of 45 different behaviours that amount to harassment in the workplace. In his study he found that the behaviours “consisted to a great extent of quite normal interactive behaviours. However, used frequently and over a long period of time in order to harass an individual or group, their content and meaning changed, consequently turning into dangerous, communicative weapons.”<sup>93</sup> He categorizes these behaviours into five subtypes dependent upon the effects they have on the victim.<sup>94</sup> These categories include (1) “effects on the victims’ possibility to communicate adequately,” (2) “effects on the victims’ possibilities to maintain social contacts,” (3) “effects on the victims’ possibilities to maintain their personal reputation,” (4) “effects on the victims’ occupational situation” and (5) “effects on the victims’ physical health.”<sup>95</sup> These subtypes include behaviours such as isolating, spreading rumors, ridiculing, or assigning degrading or meaningless tasks, all of which impinge an individual’s dignity and negatively affect the individual’s sense of self-worth.<sup>96</sup>

Leymann’s definition of mobbing or psychological terror is centrally concerned with the psychological effects of the conduct on the targeted individual, rather than on the nature of the conduct itself.<sup>97</sup> For example, verbal abuse or isolating a worker can, according to Leymann, cause just as much harm on the individual as physical abuse can, thus, for Leymann, the conduct or intent is not as meaningful as are the repercussions of such conduct. This reflects the subjective nature of workplace harassment. Individuals will be affected differently in different circumstances. Therefore, focusing on the conduct could restrict an individual from seeking recourse if those actions lie outside of the parameters of the definition. In contrast, by placing the focus on the harm suffered, individuals can seek recourse, regardless of how the harm occurred.

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<sup>92</sup> Leymann, *supra* note 6 at 120; Heinz Leymann “The content and development of mobbing at work” (1996) 5 *European Journal of Work and Organizational Psychology* 165, at 168.

<sup>93</sup> Leymann, *supra* note 92 at 170.

<sup>94</sup> Friedman and Whitman, *supra* note 14 at 248.

<sup>95</sup> Leymann, *supra* note 92 at 170.

<sup>96</sup> *Ibid.*

<sup>97</sup> Maria Isabel S. Guerrero “The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step Toward EU Legislation” (2004) 27 *Boston College International and Comparative Law Review* 477, at 481.

One significant problem that has been identified with Leymann's conception of this workplace phenomenon is the duration of time needed in order for the conduct to be recognized as problematic behaviour.<sup>98</sup> Leymann specifies that the conduct must occur on a regular basis for at least six months. According to Leymann, six months is the period in which psychiatric or psychological harm begins to develop and, as such, temporary conflicts will be excluded.<sup>99</sup> Six months can potentially be a long time to endure abusive workplace behaviour and significant and potentially irreversible trauma can occur in that timeframe, leaving the victim of workplace harassment without any means through which they can seek help.

Other commentators on the European Dignity paradigm such as Ståle Einarsen, Helge Hoel, Cary L. Cooper, Kaj Björkqvist, Karin Österman and Monika Lagerspetz take a different approach than Leymann. Rather than defining a specific duration of time, these scholars use phrases such as "course of conduct" or "repeated conduct," which requires the need for repetition of the harmful workplace behaviour, but also provides the victim the ability to bring a claim when they feel they have suffered harm to their dignity as a result of the repeated conduct.<sup>100</sup> This is less restrictive and enables victims to address workplace harassment before potential irreversible harm is endured. Leymann's definition is relatively precise and from a legal perspective could result in unsuccessful claims of workplace harassment for reasons such as not meeting the six months duration requirement or not falling within the restricted categories that Leymann developed.

Gabrielle Friedman and James Whitman's adaptation of Leymann's model and categories of workplace harassment are more inclusive, enabling greater potential for successful workplace harassment claims. They establish three categories of behaviours that can amount to what they term "dignity harassment." The first category concerns "abusive communications [and/or] actions."<sup>101</sup> According to Friedman and Whitman, examples of such conduct could include

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<sup>98</sup> Crawshaw, *supra* note 19 at 266.

<sup>99</sup> Leymann, *supra* note 6 at 120.

<sup>100</sup> Ståle Einarsen and Anders Skogstad "Bullying at work: Epidemiological findings in public and private organisations", (1996) 5 *European Journal of Work and Organisational Psychology* 185, at 191 as cited in *supra* note 68 at 21; Helge Hoel and Cary L. Cooper, *Destructive Conflict and Bullying at Work*, Manchester School of Management, University of Manchester Institute of Science and Technology (UMIST), 2000 as cited in *supra* note 68 at 21; Björkqvist, K., Österman, K., and Lagerspetz, K. 'Sex Differences in Covert Aggression among Adults', (1994) 20 *Aggressive Behaviour*, 27 as cited in 68 at 21.

<sup>101</sup> Friedman and Whitman, *supra* note 14 at 249

“screaming, berating... unjustified criticisms... [or] violence.”<sup>102</sup> The second category of behaviours concerns “destruction of the victim’s status at work” which includes behaviours such as “insults, spreading rumors, public humiliation, [or] sabotage ...”<sup>103</sup> The final category concerns “degrading assignments” such as “assigning senseless tasks, no tasks at all or tasks which the target is not qualified” to complete.<sup>104</sup> This approach is not as restrictive as Leymann’s list of 45 harassment behaviours, nor does it provide a specific duration of time to pass before the actions amount to harassment. Like Leymann, their notion of harassing conduct includes an element of dignity as the prescribed categories of behaviour relate to conduct which can negatively affect an individual’s sense of self-worth or could tarnish their reputation at work.

Leymann’s influential study on this workplace phenomenon prompted other scholars to explore this workplace behaviour,<sup>105</sup> and was widely used to develop workplace harassment legislation within Europe.<sup>106</sup> Despite the varying definitions for workplace harassment amongst scholars exploring the European Dignity paradigm, the connection between workplace harassment and the protection of an individual’s dignity is still apparent.

One leading contributor to the European Dignity paradigm, and a strong influencer of France’s “harcèlement moral” (“moral harassment”) legislation is Marie-France Hirigoyen.<sup>107</sup> Her book “Harcèlement Moral” published in 1998 furthers the notion that protection of a worker’s dignity is a fundamental value ingrained in the European mindset.<sup>108</sup> Her definition of moral harassment includes similar features to that of Leymann’s in that it, too, requires abusive conduct, which harms a worker’s dignity and/or their physical or psychological state.<sup>109</sup> It differs from Leymann’s conception slightly with respect to the persistence and duration of the conduct

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<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid. at 249.

<sup>105</sup> Scholarship inspired by Leymann includes: Ståle Einarsen and Anders Skogstad “Bullying at work: Epidemiological findings in public and private organisations” (1996) 5 *Eur. J. Work Organ. Psy.* 185; Helge Hoel and Cary L. Cooper, 2000, *Destructive Conflict and Bullying at Work*, Manchester School of Management, University of Manchester Institute of Science and Technology (UMIST); K. Björkqvist, K. Österman and K. Lagerspetz, “Sex Differences in Covert Aggression among Adults” (1994) 20 *Aggressive Behaviour*, 27; D. Zapf, ‘Organisational, work group-related and personal causes of mobbing /bullying at work’ (1999) 20 *International Journal of Manpower*, 70

<sup>106</sup> Friedman and Whitman, *supra* note 14 at 248.

<sup>107</sup> In France, laws are often passed as the result of political and “journalistic sensation.” Hirigoyen’s book on moral harassment was published and received great recognition during political debates relating to terms and conditions of employment and thus was an influence in the passing of moral harassment legislation in France. See Friedman and Whitman, *supra* note 14 at 260 for further analysis.

<sup>108</sup> Hirigoyen, *supra* note 12 as cited in Lerouge, *supra* note 12 at 109.

<sup>109</sup> Hirigoyen, *supra* note 12 at 109.

that the victim must endure before harassment is established. While Leymann's model requires the conduct to persist for at least six months, Hirigoyen argues that a single serious incident could also amount to moral harassment in the workplace.<sup>110</sup>

On examination of the European Dignity model of workplace harassment, Friedman and Whitman suggest that “[c]ontinental [European] employment law is driven by the idea that European workers ... are now entitled to ‘respect’ which is rooted in Europe’s history of class struggles.<sup>111</sup> These authors say Europeans feel entitled to protection against psychological suffering in their daily lives, including in the workplace, which is evident by the notion of dignity woven throughout both Continental law as well as Member State laws.<sup>112</sup>

Prompted by Leymann's research on workplace mobbing, several European nations implemented laws to protect the worker against this phenomenon.<sup>113</sup> For example, Sweden implemented regulations in 1993 protecting workers from actions such as “‘insults, ‘gross lack of respect,’ ‘degradation,’ ‘respect for people’s right to personal integrity,’ and so on.”<sup>114</sup> In Germany, individuals have a right to the “protection of personality” which includes “the right to be free from insults.”<sup>115</sup> This right is not restricted to the workplace; it is a concept that has been engrained in German culture since post-WWII.<sup>116</sup> France, too, had long ties to the notion of protecting an individual's dignity. In 1994, human dignity became entrenched as a constitutional value, which by 2002, entrenched in the French Labour Code.<sup>117</sup> In France, the law states, “no employee may be subjected to repeated activities which intentionally or unintentionally result in a degradation of the conditions of work tending to injure that employee’s rights or dignity...”<sup>118</sup> These three nations are examples of the prevalence of dignity within the law in European Nations.

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<sup>110</sup> Guerrero, *supra* note 97 as cited in Yuen, *supra* note 22 at 635.

<sup>111</sup> Friedman and Whitman, *supra* note 14 at 267

<sup>112</sup> *ibid.* at 269-70

<sup>113</sup> The nations and respective laws are: Albania, *Code of Labor of the Republic of Albania*, art 32; Belgium, Act of 4 August 1996 on welfare of workers in the performance of their work, (1996) *Moniteur belge*, p. 24309, s. 32; Denmark, *Danish Working Environment Act*; Germany, *Germany Constitution*, art. 1; France, *Labour Code*, art. L1152-1; Netherlands, Occupational Health and Safety; Norway, *Working Environment Act*, s. 4-3; Poland, *Polish Labour Code*, Division IV, art. 94, s. 2; Slovakia; Spain, *Constitution*, art. 15 and *Workers’ Statute*, art. 4.2; Switzerland, *Labour Law*; United Kingdom, *Protection against Harassment Act 1997* as cited in *European Risk Observatory Report*, *supra* note 68.

<sup>114</sup> Friedman and Whitman, *supra* note 14 at 253.

<sup>115</sup> *Ibid.* at 256.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.* at 260-262

<sup>118</sup> Friedman and Whitman, *supra* note 14 at 262

The concept of dignity in the workplace was also entrenched in Article 31 of *The Charter of Fundamental Rights of the European Union*<sup>119</sup> in 2000. It provides that “Every worker has the right to working conditions which respect his or her health, safety and dignity.”<sup>120</sup> The fact that protection of one’s dignity is now a fundamental right in Europe is a distinction from the other two paradigms examined below. For Europeans,

employees shall not be subjected to repeated actions constituting moral harassment, which intentionally or unintentionally deteriorate their working conditions and are likely to violate their rights and dignity, impair their physical or mental health, or jeopardize their professional future.<sup>121</sup>

Although there are differences in the workplace harassment legislation amongst Member States, they share common concern and rationale: to protect an individual’s dignity in the workplace.<sup>122</sup> It is the notion that the law will recognize an injury to an employee where their dignity has been violated, regardless of whether “life, limb, [or] livelihood is any way endangered.”<sup>123</sup>

This paradigm has been criticized by few North American commentators for a misplaced focus on dignity of the individual which, according to them, trivializes discriminatory harassment.<sup>124</sup> Despite this critique, the influence and support of the European Dignity paradigm by North American commentators is significant and will be discussed in more detail below.

## **(B) North American Anti-Discrimination Paradigm**

The North American Anti-Discrimination approach to workplace harassment differs significantly from the European approach. In North America, “harassment” is viewed predominately as acts of discrimination against an individual or a group based on enumerated grounds such as race, age, sex, or religion.<sup>125</sup> Protection from such conduct is rooted in human rights legislation and not workplace legislation. This is in contrast to the European Dignity approach, which defines harassment as harms to one’s dignity or reputation and is rooted in several aspects of law including workplace legislation. The scholarship on this paradigm is

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<sup>119</sup> European Union, *Charter of Fundamental Rights of the European Union*, 2000 O.J. (C 364) 15 (2000), art. 31.

<sup>120</sup> *Ibid.* as cited in Yuen, *supra* note 22 at 632.

<sup>121</sup> Lerouge, *supra* note 12 at 112.

<sup>122</sup> Friedman and Whitman, *supra* note 14 at 252.

<sup>123</sup> *Ibid.* at 264.

<sup>124</sup> Friedman and Whitman, *supra* note 14 as cited in Lippel, *supra* note 11.

<sup>125</sup> *Ibid.* at 241.



predominately from American commentators;<sup>126</sup> there is limited Canadian scholarship on non-discriminatory workplace harassment.<sup>127</sup>

The history of workplace harassment regulation in North America demonstrates that the protection from such conduct developed in the form of anti-discrimination regulation. The work of Charles Epp points out that workplace harassment has centered on anti-discrimination based on sex since the late 1970s.<sup>128</sup> It was the bottom-up pressures from activists, feminists and scholars that sparked the conversation and recognition that workplace sexual harassment was unacceptable. This fostered a self-regulatory enforcement model that employers implemented to protect not only workers from sexual harassment, but also to protect themselves from liability.<sup>129</sup>

Epp provides a conceptual policy framework known as “legalized accountability” to describe the history and development of workplace sexual harassment regulations in America.<sup>130</sup> Despite this thesis not examining sexual harassment, his theory can be applied to the analysis of non-discriminatory workplace harassment legislation below in subsection 2.3(A).

Epp refers to the contributions in the late 1970s and early 1980s of Catherine MacKinnon, an American feminist, and Constance Backhouse and Leah Cohen, two Canadian feminists, who developed theories for responding to workplace sexual harassment. According to Epp, it was the feminists’ campaigns against workplace sexual harassment, throughout this time period, that “profoundly affected sexual harassment policy.”<sup>131</sup>

MacKinnon proposed a legal remedy through Title 7 of the *Civil Rights Act of 1964*.<sup>132</sup> It was proposed that Title 7 can be interpreted to prohibit sexual harassment.<sup>133</sup> Title 7 ultimately became a legal remedy for victims of sexual harassment in the workplace in the United States.<sup>134</sup> Epp critiques MacKinnon’s contribution as lacking any model for employers to implement to

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<sup>126</sup> Harthill, *supra* note 11, Yamada, *supra* note 5, Namie and Namie, *supra* note 72; Friedman & Whitman, *supra* note 14.

<sup>127</sup> Canadian scholars include: Cox, *supra* note 17; Gouveia, *supra* note 5; Lippel *supra* note 11; Parkes, *supra* note 3

<sup>128</sup> Charles Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago: University of Chicago Press, 2009)

<sup>129</sup> *Ibid.* at 187

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.* at 196.

<sup>132</sup> *Civil Rights Act of 1964*, 78 Stat. 241.

<sup>133</sup> *Ibid.* at 170

<sup>134</sup> *Ibid.* at 173.

prevent or stop such conduct.<sup>135</sup> Title 7 merely offers a remedy once a victim has suffered sexual harassment.

Backhouse and Cohen, on the other hand, developed an administrative model to prevent and/or stop workplace sexual harassment and change the workplace culture.<sup>136</sup> Their model became “the dominant organizational model for addressing [sexual harassment].”<sup>137</sup> This model is an early example of Epp’s legalized accountability theory.

Backhouse and Cohen’s model comprises of four elements. First it requires that employers have a clear policy statement prohibiting sexual harassment in the workplace.<sup>138</sup> According to Backhouse and Cohen, such policy should include a clear definition of sexual harassment and state that the behaviour is unacceptable.<sup>139</sup> The second element of this model requires employers to communicate the policy to employees by posting the policy throughout the workplace and through organized training and orientation sessions.<sup>140</sup> The third element of this model proposes an oversight procedure that entails assessing whether and to what extent sexual harassment exists in the workplace.<sup>141</sup> This element requires employers to develop procedures for investigations and discipline in response to complaints of sexual harassment. Finally, Backhouse and Cohen stress that employers must protect complainants from reprisal from either the harasser, other employees and/or management.<sup>142</sup>

This model did not originate through legislative means, as is the case with Title 7. Rather, the Equal Employment Opportunity Commission in the United States, on the backbones of MacKinnon’s legal remedy and Backhouse and Cohen’s administrative model, published Guidelines for American employers to combat sexual harassment in the workplace.<sup>143</sup> These Guidelines stresses prevention as the best tool and stipulates that the employer would be liable for sexual harassment by either supervisors or employees in the workplace under Title 7 “unless [the employer] can show that [they] took immediate and appropriate corrective action.”<sup>144</sup> These

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<sup>135</sup> Ibid.

<sup>136</sup> Ibid. at 170-171

<sup>137</sup> Ibid at 171.

<sup>138</sup> Constance Backhouse and Leah Cohen, *The Secret Oppression: Sexual Harassment of Working Women* (Toronto: Macmillan, 1978) at 185-86 as cited in Epp, *supra* note 128 at 171.

<sup>139</sup> Ibid.

<sup>140</sup> Backhouse and Cohen, *Secret Oppression* at 186 as cited in Epp, *supra* note 128 at 171-172.

<sup>141</sup> Backhouse and Cohen, *Secret Oppression* at 186-188 as cited in Epp, *supra* note 128 at 172.

<sup>142</sup> Backhouse and Cohen, *Secret Oppression* at 186-187 as cited in Epp, *supra* note 128 at 172.

<sup>143</sup> Ibid. at 173.

<sup>144</sup> Epp, *supra* note 128 at 174

published Guidelines, as noted by Epp, only suggest that employers implement a policy against sexual harassment in the workplace. It was a voluntary self-regulation model that employers could adopt to avoid liability from sexual harassment. It did not include Backhouse and Cohen's third and fourth elements of oversight and protections from reprisal.<sup>145</sup>

These shortcomings in the historical development of workplace sexual harassment regulations were eventually added through time.<sup>146</sup> These Guidelines shaped the legal reality of workplace sexual harassment in America as it was referenced and endorsed by the Courts from the 1980s onwards.<sup>147</sup> This brief historical review of the development of harassment law in North America illustrates that protection from harassment was based on enumerated grounds, rather than a more generalized approach of protecting one's dignity, which could encompass both discriminatory and non-discriminatory acts of harassment.

Further developments in the law against workplace harassment continue to show the prevalence of the Anti-Discrimination paradigm. In America, there are federal and state laws reflecting anti-discrimination in the employment context. Federally, the laws include the *Civil Rights Act of 1964*, which prohibits discrimination based on race, colour, religion, sex or national origin, and applies to workplaces with 15 or more employees.<sup>148</sup> It is the *Civil Rights Act* that is used to protect federal workers from discriminatory harassment in the workplace. Other federal laws, which also prohibit discrimination in the workplace, include the *Equal Pay Act*,<sup>149</sup> *Age Discrimination in Employment Act*,<sup>150</sup> *Immigration Reform and Control Act*,<sup>151</sup> and *Americans with Disabilities Act*.<sup>152</sup> Apart from these federal laws, there are 22 states that have specific anti-discrimination laws for groups that are not covered under the federal acts.<sup>153</sup>

In the Canadian context, both federal and provincial jurisdictions have legislated against discriminatory harassment. The *Canadian Human Rights Act*<sup>154</sup> protects individuals, including

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<sup>145</sup> Ibid. at 174-175

<sup>146</sup> Ibid. at 175.

<sup>147</sup> Ibid. at 184 and 195.

<sup>148</sup> *supra* note 132

<sup>149</sup> *Equal Pay Act of 1963*, 77 Stat. 56.

<sup>150</sup> *Age Discrimination in Employment Act of 1967*, 29 USC §§ 621-634

<sup>151</sup> *Immigration Reform and Control Act of 1986*, Pub L No 99-603, 100 Stat. 3445.

<sup>152</sup> *Americans with Disabilities Act of 1990*, 42 USC.

<sup>153</sup> These states include: California, Colorado, Connecticut, Delaware, Washington DC, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, Wisconsin

<sup>154</sup> R.S.C. 1985, c. H-6

employees, under federal jurisdiction, against discrimination. Furthermore, each of the 10 provinces and three territories have Human Rights Codes, which protect individuals from discrimination in the workplace.

Friedman and Whitman suggest the North American Anti-Discrimination paradigm arose as a result of the historical roots of racial and gender equality legislation in the United States.<sup>155</sup> This is evident from Epp's analysis of the historical developments of sexual harassment regulations via the pressures of feminists, activists and scholars to create equality in the workplace. The view in North America is that individuals need protection from discrimination particularly in relation to hiring, termination and advancement.<sup>156</sup> This is in contrast to the European perspective that workers are entitled to stable employment that protects the individual's dignity from all forms of workplace problematic behaviour including discriminatory harassment and harassment based on non-enumerated grounds.<sup>157</sup>

Friedman and Whitman suggest, "Americans have a hard time grasping the legal significance of the kind of dignity at stake in harassment law"<sup>158</sup> and David Yamada notes that this reasoning contributes to why "workplace bullying has yet to be fully recognized and addressed by the American legal system."<sup>159</sup>

Several scholars from North America argue that the conceptualization of workplace harassment as strictly a discrimination issue is problematic.<sup>160</sup> One weakness of such conceptualization is that if the complainant fails to establish that the victim of workplace harassment is a part of a protected class and that the harassment was based on their status in that class, then the victim will be left without means to remedy the harm caused.<sup>161</sup> Kathrine Lippel, the Canada Research Chair in Organizational Health and Safety Law, criticizes North American commentators and legislators, and in particular, Friedman and Whitman, regarding the conceptualization of workplace harassment as only based on discrimination. She notes

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<sup>155</sup> Friedman and Whitman, *supra* note 14 at 265.

<sup>156</sup> *Ibid.* at 244

<sup>157</sup> *Ibid.* at 244-245

<sup>158</sup> *Ibid.* at 264

<sup>159</sup> Yamada, *supra* note 5 at 478

<sup>160</sup> Lippel, *supra* note 11; Gouveia, *supra* note 5; Yamada, *supra* note 5; Namie & Namie, *supra* note 72.

<sup>161</sup> Yamada, *supra* note 5 523-524.

North American authors preoccupied with discriminatory harassment have criticized the European approach, suggesting that by regulating harassment in general, rather than discriminatory harassment, European legislators have trivialized or eclipsed the discriminatory nature of many incidents of harassment. Yet in those jurisdictions where the only recourse is to prove discriminatory harassment, most targets of bullying remain without recourse...<sup>162</sup>

Lippel argues that workplace harassment legislation, from the European perspective, better addresses this workplace phenomenon by protecting workers from *all* forms of harassment, both discriminatory and non-discriminatory, where as in North America victims of non-discriminatory harassment do not have the same protections. In support of this view, Gouveia argues that approaching workplace harassment legislation only through a discriminatory lens fails to protect workers' rights and needs in relation to this workplace phenomenon.<sup>163</sup>

Katherine Lippel identifies an interesting relationship between these two paradigms. She notes that in Europe, dignity harassment legislation pre-existed anti-discrimination legislation, where as in North America, anti-discrimination laws pre-existed any legislation, which identified non-enumerated grounds of workplace harassment.<sup>164</sup> This suggests that the Dignity paradigm has influence North American jurisdictions and the Anti-Discrimination paradigm has influenced the European jurisdictions to address the alternate perspective of workplace harassment.

### **(C) The Emerging Psychological Harassment Paradigm**

Recently, North American scholars, influenced by the European Dignity paradigm, have stressed the need for a legal response to workplace harassment in North American jurisdictions that protects the psychological wellbeing of the individual. This is particularly the case with David Yamada and Drs. Ruth and Gary Namie, American scholars who have adapted the European dignity paradigm and developed and campaigned for a legislative response to workplace harassment in the United States.<sup>165</sup>

Yamada and Namie and Namie have influenced the North American view of workplace harassment. Yamada argues that there is a “need to reframe the intellectual and rhetorical debate

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<sup>162</sup> Lippel, *supra* note 11 at 11.

<sup>163</sup> Gouveia, *supra* note 5 at 148.

<sup>164</sup> Lippel, *supra* note 11 at 11

<sup>165</sup> Drs. Ruth and Gary Namie established the Workplace Bullying Institute which provides research and education to “prevent and correct” this workplace conduct. Further information about this institute and their research can be located at <http://www.workplacebullying.org>; David Yamada and Namie and Namie were the driving force behind the campaign to implement the Health Workplace Bill across American states. Further information about this Bill and the campaign can be located at <http://www.healthyworkplacebill.org/index.php>

over employment law and policy to focus on the dignity and wellbeing of workers.”<sup>166</sup> However, he argues that there is a struggle in North America

with issues of difference and inclusion [which] reinforce[s] the importance of discrimination law in developing a dignitarian legal agenda...[However, policymakers] must avoid the temptation to equate protected class status with the whole of a dignitarian legal agenda, to the neglect of other pressing concerns.<sup>167</sup>

An integration of the European Dignity and North American Anti-Discrimination paradigms, according to Gouveia, can “produce a harassment scheme that serves the individual interests of minorities and recognizes broader based employment rights.”<sup>168</sup> She argues that the dignity model of workplace harassment will fill the gaps of the anti-discrimination model, thus “ensur[ing] that all workers are protected regardless of individual characteristics.”<sup>169</sup>

This developing approach, which this thesis terms the “Psychological Harassment” paradigm, recognizes that workplace harassment legislation must protect workers against both discriminatory and non-discriminatory forms of harassment which can have serious psychological effects on the individual. In a sense, the Psychological Harassment paradigm has adapted European workplace values into a more familial legal framework for North American workplaces. While the scholars in this paradigm have relied upon the commentaries from the European Dignity paradigm, there is a slight difference that is significant to note. Rather than focusing on terminology or ideas that stress the protection of a worker’s sense of self-worth, reputation or dignity, this paradigm seeks to protect workers against “psychological harm.” This includes mental harms such as depression, stress, anxiety, loss of sleep, embarrassment, low self-esteem and, if extreme, Post-Traumatic Stress Disorder (“PTSD”).<sup>170</sup> It also includes physical harms such as high blood pressure and illness.<sup>171</sup> One issue with the emerging literature, which has yet to be resolved, is the difference between the conception of dignity and the conception of psychological torment.

Loraleigh Keashly, a social psychologist, describes workplace harassment under this paradigm as “‘emotional abuse’ characterized by ‘hostile verbal and nonverbal, nonphysical

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<sup>166</sup> David Yamada, “Human Dignity and American Employment Law” (2008) 43 *U. Ric. L. Rev.* 523 at 524

<sup>167</sup> *Ibid.* at 565

<sup>168</sup> Gouveia, *supra* note 5 at 149.

<sup>169</sup> Gouveia, *supra* note 5 at 149.

<sup>170</sup> Yamada, *supra* note 5 at 483.

<sup>171</sup> *Ibid.*

behaviours directed at a person(s) such that the target's sense of him/herself as a competent person and worker is negatively affected."<sup>172</sup> It can include a number of behaviours such as

“aggressive eye contact...; giving the silent treatment; intimidating physical gestures, including finger pointing, and slamming or throwing objects; yelling, screaming, and/or cursing at the target; angry outbursts or temper tantrums; nasty, rude and hostile behaviour toward the target; ... insulting or belittling the target, often in front of other workers; ... [or] spreading false rumors about the target...”<sup>173</sup>

This definition and listed behaviours, like those from the European dignity paradigm, suggest a form of insult to the target's dignity, however, North American scholars and legislators seem to steer clear from the use of that term.

In the last decade, this emerging paradigm has influenced few lawmakers to draft and implement legislation that protects workers from non-enumerated forms of harassment. Five out of 13 Canadian jurisdictions (Québec, Saskatchewan, Ontario, Manitoba and British Columbia) have adopted workplace harassment legislation that is not based on discrimination. These jurisdictions and the models to which they have adopted will be discussed in Chapters 4 to 6.

Apart from, and prior to, Canadian legislatures responding to psychological harassment, government agencies and special interest groups analyzed and developed methods for preventing, addressing and stopping workplace psychological harm, including harm suffered from harassing conduct.

The Canadian Initiative on Workplace Violence, under the direction of Glenn French, provides research, training and education on workplace harassment and violence to employers, governmental agencies and unions.<sup>174</sup>

Martin Shain, for the Mental Health Commission of Canada (“MHCC”) has also influenced the notion of protecting workers from psychological harm in the workplace, including harassment. The MHCC recognizes that harassment and bullying are a risk to the psychological wellbeing of a worker.<sup>175</sup> According to the MHCC,

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<sup>172</sup> Loreleigh Keashly, *supra* note 13 at 87 in Yamada, “The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection” (2000) 88 *Geo L.J.* 475 , at 480.

<sup>173</sup> *Ibid* at 481-482.

<sup>174</sup> Further information on this Initiative can be located at <http://www.workplaceviolence.ca>

<sup>175</sup> Martin Shain, *Weathering the Perfect Storm: A Bird's Eye View* (Calgary: Mental Health Commission of Canada, 2014) at 3

a psychologically safe workplace is one that does not permit harm to employee mental health in careless, negligent, reckless or intentional ways... [and] one in which every practical effort is made to avoid reasonably foreseeable injury to the mental health of employees.<sup>176</sup>

It must be noted, however, that the aforementioned definition is not isolated to the effects of workplace harassment, it also includes conduct that relates to the “management of employees returning to work, management of employees while on disability leave, management of employees with mental disorders and dismissal and how it is done” amongst others forms of conduct which could harm a worker’s psychological wellbeing.<sup>177</sup>

“Careless, negligent, reckless or intentional” infliction of psychological harm can, as recognized by the MHCC, result in feelings of exclusion, rejection, unworthiness, humiliation, shame, anxiety, depression and/or helplessness.<sup>178</sup> Furthermore, the MHCC recognizes that these feelings “are unpleasant and undesirable in themselves and beyond a certain point [...] can turn into mental disorders or even illness that keep people from functioning normally.”<sup>179</sup>

The MHCC’s reports on psychological safety in the workplace influenced and led to the development of a non-legal, voluntary response for psychological health and safety in the workplace. This response will be examined in further detail below.

Meanwhile, in the United States, only one jurisdiction has adopted a form of non-discriminatory workplace harassment legislation. A national campaign began in 2001 by Yamada and Namie and Namie to adopt non-discriminatory workplace harassment legislation.<sup>180</sup> This campaign resulted in 26 states and 2 territories successfully introducing the proposed *Healthy Workplace Bill*.<sup>181</sup> Despite this response, as of May 2014, Tennessee is the only state that has enacted the *Healthy Workplace Act*<sup>182</sup> becoming the first state to introduce workplace harassment legislation on non-enumerated grounds.<sup>183</sup>

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<sup>176</sup> Martin Shain, *Tracking the Perfect Storm: Converging Systems Create Mounting Pressures to Create the Psychologically Safe Workplace* (Calgary: Mental Health Commission of Canada, 2010) at 1 as cited in Shain and Nassar, *supra* note 1

<sup>177</sup> Shain and Nassar, *supra* note 1 at 7.

<sup>178</sup> Martin Shain, Ian Arnold and Kathy GermAnn, *The Road to Psychological Safety* (Calgary: Mental Health Commission of Canada, 2013), 16.

<sup>179</sup> *Ibid.* at 17

<sup>180</sup> Workplace Bullying Institute, “The Healthy Workplace Bill” (2014) online: <http://www.healthyworkplacebill.org/about.php>

<sup>181</sup> *ibid.* online: <http://www.healthyworkplacebill.org/states.php>

<sup>182</sup> *ibid.* online: <http://healthyworkplacebill.org/states/tn/CC0014.pdf>

<sup>183</sup> *ibid.* online: <http://www.healthyworkplacebill.org/states/tn/tennessee.php>



Tennessee's law categorizes workplace harassment as "abusive conduct" which includes verbal abuse such as derogatory remarks or insults, verbal, non-verbal or physical conduct such as making threats, intimidating or humiliating others, or sabotaging or undermining a worker's performance.<sup>184</sup> Provided that the employer implements a workplace policy to prevent such conduct, the employer will be immune for any lawsuits stemming from such conduct.<sup>185</sup> This statutory provision only applies to public-sector employers.<sup>186</sup>

Namie and Namie criticized this statutory response, arguing that Tennessee's approach does not adequately protect workers from workplace harassment as it is restricted to public-sector employers only and does not require employers to enforce their workplace prevention policy; it simply requires employers to have a policy in order to be free from liability.<sup>187</sup> One state out of 50 that has implemented legislation on this workplace phenomenon demonstrates that the North American Anti-Discrimination paradigm is still dominant in the legal sphere in the United States.

### **2.3 Non-legal Policy Frameworks to Workplace Psychological Harassment**

As discussed above, the emerging scholarship on psychological harassment in the workplace has influenced the development of non-legal responses to addressing the harms associated with this phenomenon. Non-legal responses to psychological harassment in the workplace can be a starting point for scholars, lawmakers and employers in preventing, addressing and responding to the harms associated with this workplace phenomenon. It can also be a voluntary tool for employers to implement where there is no legislative requirement to do so. This would be a way for employers to protect workers from harassment in the workplace and could foster better working relationships amongst employees and employers.

Although this thesis concentrates on legal responses to workplace harassment, a brief examination of a non-legal response demonstrates that workplace harassment can be combatted through more than just legal means.

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<sup>184</sup> § 50-1-502(1)

<sup>185</sup> § 50-1-504

<sup>186</sup> § 50-1-502(3)

<sup>187</sup> Adam Rubenfire, "Wall Street Journal: First State Workplace Bullying Law Has Few Fans" *The Wall Street Journal* (20 June 2014) online: <http://www.workplacebullying.org/2014/06/20/wsj-6/> as cited in *supra* note 180 online at <http://www.healthyworkplacebill.org>

### (A) “Legalized Accountability”

As discussed above, Epp contributed to the theory of non-legal responses to workplace harassment through his policy framework known as “legalized accountability.” “Legalized accountability,” as described by Epp, is an administrative model with a purpose to change individual behaviour and the culture of organizations.<sup>188</sup> He notes

[...] for a [...] long time, the nature of interpersonal relationships in the workplace, from jokes to sex, was considered a “private” matter, not subject to public legal regulation. Systems of legalized accountability reversed these presumptions, calling into account many previously hidden discretionary practices and subjecting them to pervasive, comprehensive [...] regulation.<sup>189</sup>

Thus, Epp perceives legalized accountability as having changed the workplace culture in relation to sexual harassment. Although Epp used this model to analyze workplace sexual harassment, the elements of this model can be applied to all forms of workplace harassment.

There are three fundamental elements to the legalized accountability model. The first element requires the development of administrative policies, which outline the organization’s commitment to the particular legal norm.<sup>190</sup> The second element of this model requires the development and execution of training and communication systems, which implements the administrative policies and stresses the commitment to refrain from particular behaviour. It is this element that aims to change the culture of the organization to keep with the legal norms.<sup>191</sup> The final element requires internal oversight. It is through this element that the progress of implementing this policy is assessed to determine if the organizational culture is shifting and/or if there has been any violation of the policies.<sup>192</sup>

According to Epp, the implementation of “formal rules” or administrative policies, is the easiest element to adopt, as it does not require significant changes to the organizational structure.<sup>193</sup> Epp argues that the second and third element, training and communication systems and internal oversight, however, are the most intrusive elements of this theory. It is these two

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<sup>188</sup> Ibid. at 25.

<sup>189</sup> Ibid. at 29.

<sup>190</sup> Ibid. at 25

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid. at 26.

elements that aim to ensure that “organizational policies would be more than window dressings.”<sup>194</sup>

On analysis of the application of this model, in general terms, Epp acknowledges that

[a]lthough in many places officials have used systems of training and oversight to bring organizational practices and internal culture closely into line with the organization’s formal policies, in other places they have made only pro forma efforts at training and oversight, leaving the inner workings of their organization largely unchanged.<sup>195</sup>

This model of legalized accountability is a form of internal enforcement of workplace psychological harassment. It enables the employer to develop and implement the policies based on specific work needs and workplace culture.

As described by Sarah Staszak, Epp makes a “crucial” contribution to the literature on administrative reform and institutional change.<sup>196</sup> However, his theory of legalized accountability has come with sharp criticism. Shep Melnick criticizes this model stating that it “compromise[s] democratic accountability” because it was developed by activists and scholars and “embraced” by the federal court (in the United States) rather than through democratic means and legislatures.<sup>197</sup>

## **(B) Psychological Health and Safety Management System**

A well-developed and thorough non-legal response was published in 2013 by the Canadian Standards Association (“CSA”), through direction from the MHCC.<sup>198</sup> The Psychological Health and Safety Management System (“PHSMS” or “System”), according to the CSA, promotes and maintains a safe and healthy workplace in relation to the psychological wellbeing of workers.<sup>199</sup> This non-legal response is a prevention, promotion and guidance resource for employers to voluntarily implement in their workplaces.<sup>200</sup> The CSA recommends

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<sup>194</sup> Ibid. at 25.

<sup>195</sup> Ibid. at 27.

<sup>196</sup> Sarah Staszak, “Private Power and Public Policy: Rights Enforcement in the Modern Litigation State” (2011) 47 *Tulsa Law Review* 77 at 80.

<sup>197</sup> R. Shep Melnick, “Charles Epp, Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State” 2011 48 *Society* 264 at 267.

<sup>198</sup> CSA Group and Bureau de normalisation du Québec, “Psychological Health and Safety in the Workplace: Prevention, Promotion and Guidance to Staged Implementation” (Mississauga: Canadian Standards Association, 2013)

<sup>199</sup> Ibid. at 2

<sup>200</sup> Ibid. at 5

that employers integrate this response into already established policies and procedures for addressing psychological safety in the workplace, including harassment policies.<sup>201</sup> While this system does not strictly relate to workplace harassment, it is still a tool that can be consulted to address the harms associated with this workplace phenomenon.

The PHSMS has five elements: (1) commitment, leadership and participation, (2) planning, (3) implementation, (4) evaluation and corrective action, and (5) management review.<sup>202</sup> Each of these elements provide extensive policy provisions that can be integrated into workplace policies in order to better prevent, address, and respond to psychological harm. The following will briefly examine these elements.

The first element in the PHSMS comprises of policy provisions relating to three features: commitment, leadership and participation. Under the PHSMS, “all stakeholders share an interest and responsibility to ensure psychological health and safety in the workplace.”<sup>203</sup> This System requires employers to first develop and implement a policy statement that reflects their commitment to manage psychological health and safety in the workplace. This statement should include the commitment to implement the PHSMS to align with workplace values, to implement an evaluation process of the PHSMS, and to designate individuals responsible to implement, maintain and evaluate the progress of the PHSMS.<sup>204</sup> The commitment statement should also reflect “the common interest to promote and enhance a working relationship consistent with the principles of mutual respect, confidentiality and cooperation.”<sup>205</sup> Leadership roles in the workplace should reinforce and support the development and management of the PHSMS.<sup>206</sup> Individuals in these roles should promote a culture that recognizes psychological harm and as such, lead and influence members of the workplace to become involved in the development and maintenance of the System.<sup>207</sup> Furthermore, the CSA establishes that “active, meaningful, and effective participation of stakeholders is a key factor in psychological health.”<sup>208</sup> Such participation, according to the CSA, is a requirement for the success of the PHSMS.<sup>209</sup> In order

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<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid. at 6

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

to facilitate the participation of all stakeholders in the workplace, the System recommends that employers engage all members of the workplace to participate in the drafting, implementing and evaluation of the System.<sup>210</sup>

The second element of the PHSMS concerns planning, which according to the CSA is a necessary component in order for the System to be implemented successfully.<sup>211</sup> This element requires employers to assess the impacts of implementing this System including, how it will effect workers health and what financial costs will incur.<sup>212</sup> During the planning phase of implementing the PHSMS, employers must identify, assess and control risks that could cause psychological harm.<sup>213</sup> Other important features of this element require employers to collect data that relates to the goals of the PHSMS, provide support and information in relation to specific needs of workers, establish objectives for various functions of the workplace, and create measures that will address changes in the workplace that could cause psychological harm.<sup>214</sup>

The third element of the PHSMS provides policy measures for implementing the System. There are several features of this element. First employers must develop and administer infrastructure and resources that provides workplace parties with knowledge and authority to carry out their duties relating to the implementation of the PHSMS.<sup>215</sup> Employers are also required to implement preventative and protective measures that address psychological harms.<sup>216</sup> Education must also be provided on the causes, risks, and harms in the workplace that could affect workers' psychological health and wellness.<sup>217</sup> Employers must communicate and train workers on the policies and procedures relating to workplace psychological harm.<sup>218</sup> Finally the employer must develop and implement procedures for responding to "critical events," reporting incidents and investigating complaints.<sup>219</sup>

The fourth element of the PHSMS requires employers to evaluate and correct the implementation and effectiveness of the System. This requires employers to monitor and record

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<sup>210</sup> Ibid at 6-7.

<sup>211</sup> Ibid. at 7.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid. at 8

<sup>214</sup> Ibid. at 9-10

<sup>215</sup> Ibid. at 10

<sup>216</sup> Ibid. at 10-11.

<sup>217</sup> Ibid. at 11.

<sup>218</sup> Ibid. at 11-12.

<sup>219</sup> Ibid. at 12-13.

any incidents that have occurred, to conduct regular internal audits to determine the effectiveness of the System and implement corrective measures to rectify any failures of the System.<sup>220</sup>

The final element of the PHSMS requires management to review the progress and respond by making improvements if and when there are any deficiencies with the System.<sup>221</sup>

This non-legal response enables employers to implement a system to combat workplace harassment if there is no law or regulation requiring them to do so. It can also provide employers with a resource to consult alongside the required legislation or regulations relating to workplace harassment. Such a policy could be beneficial for employees, as it can protect them from workplace psychological harassment.

However, if this policy is deemed to be a term of the contract, and an employer breaches the policy, then employers increase their liability for voluntarily implementing a non-legal response to workplace harassment.<sup>222</sup> Furthermore, where an employer is required by law to implement a policy on workplace harassment, and then includes further unrequired provisions for harassment, employers risk increasing their liability for breach even further.

### **(C) Conclusion**

Non-legal responses to workplace harassment can be problematic, as employers will implement varying policies and procedures for addressing this workplace phenomenon. Epp's model was founded by activists and scholars and used as a self-regulatory instrument to implement in workplaces by employers. The CSA's System is also a self-regulatory model, which was not developed by lawmakers.

Although non-legal workplace harassment models are options for employers to implement, a legal response to workplace harassment can provide more equality in relation to the protection of workers across all workplaces in jurisdictions across Canada. A legal response sets out clear responsibilities that employers must adhere to when implementing workplace harassment legislation and also provides better equality in relation to provisions of workplace harassment amongst all workplaces in that jurisdiction.

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<sup>220</sup> Ibid. at 13-14.

<sup>221</sup> Ibid. at 15.

<sup>222</sup> P.A. Neena Gupta, *Employment Contracts: The Twelve Most Common Avoidable Drafting Errors*, online: Gowlings Lafleur Henderson LLP: Articles and Resources <<http://www.gowlings.com/KnowledgeCentre/article.asp?pubID=2908>>

Chapter 3 will examine Gouveia's legal response to workplace harassment, which will be used as a model to compare against the existing legislation in Canadian jurisdictions. Epp and the CSA's non-legal models have similar features to that of Gouveia's legal model, however, Gouveia's model is a more detailed legislative framework specifically relating to workplace harassment to guide the drafting of legislation under the Psychological Harassment paradigm.<sup>223</sup> It proposes a model for lawmakers to consult and/or transpose into a legislative response.

## 2.4 Conclusion

The theories behind workplace harassment set the foundation for developing and implementing a legislative response to combat this workplace phenomenon. The key features of this theoretical examination include the conceptualization of this workplace phenomenon, the recognition of the continuum of this behaviour and inclusion of an element of violence, which have all shaped the European Dignity, North American Anti-Discrimination, and Psychological Harassment paradigms. It is these paradigms that have shaped the legislative response in jurisdictions around the world. This foundation will be used in Chapter 6 to compare and contrast the legislative responses of the five Canadian jurisdictions that have adopted workplace harassment legislation.

## 2.5 Gaps and Future Research

The gaps within the literature on workplace harassment are specifically evident within the Canadian legal context. There has been little academic examination of workplace harassment legislation in Canada which exists outside of human rights / anti-discrimination legislation. The existing Canadian literature is predominantly related to Québec's workplace harassment legislation, which was the first in the country.<sup>224</sup> There has yet to be a comparative analysis of the legislative responses across Canadian jurisdictions.

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<sup>223</sup> Gouveia employed elements of Yamada's policy objectives in relation to his development of *The Health Workplace Bill* for the United States, to develop her framework for a legislative response to workplace harassment. See Gouveia, *supra* note 5 at 149.

<sup>224</sup> Gouveia, *supra* note 5; Cox, *supra* note 17; Parkes, *supra* note 3; Yuen, *supra* note 22.

## CHAPTER 3 - FRAMEWORK FOR DEVELOPING A LEGAL RESPONSE TO WORKPLACE HARASSMENT LEGISLATION

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The conceptualization of workplace harassment is complex and has proven, as discussed in Chapter 2, to be inconsistent. This complexity and inconsistency can permeate through legislative responses to this workplace phenomenon.

Gouveia developed a detailed legislative framework model specifically relating to workplace harassment to guide the drafting of legislation under the Psychological Harassment paradigm.<sup>225</sup> She argues that there are specific components of psychological harassment that must be clearly addressed through a legislative response.<sup>226</sup> According to Gouveia, the four components of a legislative response to workplace harassment include provisions relating to: a classification of harassment, preventative measures, a responsive and collaborative process, and relief and punishment procedures.<sup>227</sup> Within each component, Gouveia lists various elements that the legislative response must address when fulfilling the components. These elements are listed in each of the respective components discussed below.

Her framework offers a design that jurisdictions should consider when developing workplace harassment legislation. Despite the clarity of her framework, this thesis identifies missing elements that should be included in a legislative framework as well as elements that need clarification or modification. These additions and modifications will be discussed in detail below. Table 1 (at the end of this chapter) represents Gouveia's legislative framework, noting the modifications and additions this thesis has included.<sup>228</sup>

### 3.1 Classification of Harassment

The classification of harassment is the first component of Gouveia's legislative framework. Gouveia's framework requires lawmakers to define this workplace phenomenon, thus creating a single definition that all employers must adhere to in a jurisdiction.

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<sup>225</sup> Gouveia employed elements of Yamada's policy objectives in relation to his development of *The Health Workplace Bill* for the United States, to develop her framework for a legislative response to workplace harassment. See Gouveia, *supra* note 5 at 149.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.* at 149-150.

<sup>228</sup> Text that is struck out identifies elements of Gouveia's framework that this thesis has removed. Text that is italicised/underlined indicates modified or added elements from this thesis.



This component has elements that require the legislation to identify the scope of and definition for workplace harassment.<sup>229</sup> The first element requires the legislation to have a clear definition. It must identify and include features of anti-discrimination harassment as well as dignity harassment. It must identify the harms of harassment including harm to one's dignity, mental anguish and psychological harms. It must also address the types of behaviour that could amount to harassment including implicit, explicit, verbal and non-verbal conduct. The definition must identify that the actions be persistent, reoccur, or can include a single serious incident. It must also identify that the intentions of the perpetrator are irrelevant; the victim must only establish that the physical and/or psychological harm suffered affected their wellbeing on the basis of a reasonableness test. Finally the legislative response must identify the actors in the workplace that fall within the scope of the definition, which can include co-workers, supervisors, management, and customers.<sup>230</sup>

There are three issues with Gouveia's first component of classifying harassment in a legislative response that this thesis identifies and modifies. The first concerns the labelling of this workplace phenomenon. Gouveia's framework requires that the legislation label this phenomenon as "psychological harassment." Defining this workplace phenomenon in such a way has the potential of limiting the scope to psychological harm only. It could have the potential of requiring victims to establish a medically recognized psychological disorder in order to find relief from workplace harassment. This would require victims of workplace harassment to endure such harms for a significant amount of time before they can seek relief or require employers to stop the behaviour. It also has the potential of not addressing any physical, discriminatory or dignitary harm that such conduct could have on the victim, which could have more than merely a psychological impact. Branch's conceptualization of workplace harassment, as depicted in Figure 2 (Chapter 2), demonstrates that labeling this workplace phenomenon under a general term encompasses several forms of harmful workplace conduct such as discriminatory harassment, violence and aggression.<sup>231</sup> Labelling this workplace phenomenon as "harassment" encompasses all forms including, enumerated, non-enumerated, psychological, physical and non-

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<sup>229</sup> Gouveia, *supra* note 5 at 149.

<sup>230</sup> *Ibid.* at 150.

<sup>231</sup> Branch, *supra* note 19 at 13.

physical workplace harassment. Therefore, this thesis proposes that it should be labeled as “harassment.”

The second issue with Gouveia’s first component of classifying workplace harassment concerns the recognition of a single serious incident. Gouveia does not identify the threshold used to determine the seriousness of a single incident. This could foster spurious claims of harassment or deter victims of harassment from reporting an incident which they believe might not meet the threshold for seriousness. Branch has noted that incidents of harmful workplace behaviour could include one-off actions or comments, which would not necessarily amount to harassment, but merely anti-social, uncivil or aggressive workplace behaviour.<sup>232</sup> The latter type of conduct may not necessarily cause serious harm and should be addressed by the employer before the conduct develops into workplace harassment. Scholars have suggested that a single incident can only amount to workplace harassment if it is serious enough.<sup>233</sup> This thesis modifies this element in Gouveia’s framework to include the caveat that a single incident must cause serious harm based on a reasonableness test in order for that incident to amount to workplace harassment. This threshold can prevent erroneous claims of harassment by disgruntled employees.

The third issue with Gouveia’s first component of a legislative response is its lack of recognition of the conduct continuum. Gouveia’s framework does not reflect escalating conduct or violence in relation to workplace harassment. As discussed in Chapter 2, there is well developed scholarship which describes the risks of workplace harassment escalating into violence.<sup>234</sup> This thesis modifies the framework by adding an element of violence. This requires lawmakers to include provisions that address violence stemming from workplace harassment such as requiring employers to develop workplace violence policies and procedures, as well as requiring employers to intervene in situations to prevent the escalation of harm.

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<sup>232</sup> Branch, *supra* note 19 at 12-13.

<sup>233</sup> Yuen, *supra* note 22 at 635; European Foundation for the Improvement of Living and Working Conditions, *supra* note 61 at 4.

<sup>234</sup> European Commission, Advisory Committee on Safety, Hygiene and Health Protection at Work, *supra* note 69; European Foundation for the Improvement of Living and Working Conditions, *supra* note 61 at 4; Namie & Namie, *supra* note 72 as cited in Radliff, *supra* note 3 at 165; International Labour Organization *supra* note 68.

### 3.2 Preventative Measures

Gouveia's second component of a legislative response to workplace harassment relates to preventative measures. This requires the legislation to place the responsibility on employers to raise awareness of workplace harassment through education and training.<sup>235</sup> It requires employers to train workers on how to identify harassment and how to conduct oneself in the workplace in order to refrain from harassing behaviour.<sup>236</sup> It also requires employers to prevent such conduct from occurring.<sup>237</sup>

The one addition to the second component of Gouveia's legislative framework relates to the onus for preventing workplace harassment. Gouveia places the onus on employers to prevent or intervene when workplace harassment occurs.<sup>238</sup> Rather than place this onus solely on employers, this thesis modifies this element to require employees to take preventative measures to ensure their own health and safety in the workplace as well. Legislative provisions could require employees to refrain from harassing others and to report harassment as soon as they become aware or ought reasonably to become aware of such conduct.<sup>239</sup>

### 3.3 Responsive and Collaborative Process

The third component of Gouveia's framework focuses on elements relating to the complaints and investigations procedures requiring that a responsive and collaborative process be included within the legislative response for workplace harassment. Gouveia's responsive element lacks measures requiring employers to address any harassing behaviour as soon the employer knows, or ought reasonably to know, that such conduct occurred. This additional requirement could occur prior to an employee filing a complaint and thus facilitating the previous component of prevention. This is the first addition that this thesis makes to Gouveia's third component. The early prevention and/or intervention, as noted in the Conflict Escalation Model discussed in Chapter 2, can prevent further escalation and harm to victims of workplace harassment.<sup>240</sup>

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<sup>235</sup> Gouveia, *supra* note 5 at 149-150.

<sup>236</sup> *Ibid.* at 150.

<sup>237</sup> *Ibid.* at 149-150

<sup>238</sup> Gouveia, *supra* note 5 at 149-150.

<sup>239</sup> European Foundation for the Improvement of Living and Working Conditions, *supra* note 61 at 53.

<sup>240</sup> Branch, *supra* note 67 at 282.

Gouveia's elements of a responsive and collaborative process place the responsibility on the employer to create and implement clear measures for filing and addressing a complaint. It requires that employers consult employees when developing such measures. It also requires employers to create an internal neutral committee to facilitate the processing of complaints. Gouveia suggests that a legislative response to workplace harassment should also include "incentives for employers who respond promptly, fairly, and effectively when informed about [workplace harassment]." <sup>241</sup>

There are further aspects of Gouveia's third component that this thesis modifies. One aspect relates to the incentive for employers who respond to workplace harassment. This is a potentially problematic element and one in which raises several questions including: what kind of incentives will be provided (i.e. financial or other); who will be responsible for providing and administering the incentives (i.e. government or the employer); what will be the threshold for providing these incentives (i.e. every time the employer effectively responds to workplace bullying complaints); and for how long will this incentive program continue (i.e. the first five years of implementation, 10 years or forever)? This provision has the potential for causing strain on government or employer resources. Therefore, this thesis proposes that this provision be removed from the legislative framework until further clarification and parameters are in place to facilitate such a program.

Finally, this thesis modifies the framework as regards to the investigation process. Gouveia's third component does not address the procedures for investigations. This thesis adds an investigations element within the third component, as it is an essential part of the responsive process for workplace harassment. This element requires employers to implement clear investigation procedures and appoint a committee or ombudsmen to conduct investigations. A legislative response must also require that investigations be conducted within a reasonable time of the employer becoming aware of such conduct or when a complaint is filed, which could prevent further escalation or harm as noted above. <sup>242</sup>

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<sup>241</sup> Gouveia, *supra* note 5 at 150.

<sup>242</sup> Branch, *supra* note 67 at 282.

### **3.4 Relief and Punishment**

The final component of Gouveia's framework requires that a legislative response incorporate provisions relating to the relief and punishment for workplace harassment. This includes elements which identify means of relief for victims and punishment for perpetrators. It also requires provisions stipulating that employers be subject to punitive action if they encourage or ignore workplace harassment. This element holds employers accountable for preventing and protecting employees from such conduct. It also provides employees with recourse where the employer has failed to reasonably protect the worker from harm.<sup>243</sup> Gouveia also requires that a legislative response include provisions for victims to seek help from "an external legal process to vindicate their rights" where the employer's process was non-existent or unsatisfactory.<sup>244</sup>

### **3.5 Applying the Legislative Framework to the Analysis of the Provincial Legislative Responses**

In Chapter 6, this thesis assesses the provincial legislative responses of Québec, Saskatchewan, Ontario, Manitoba and British Columbia. In this assessment, the provincial legislative responses will be analyzed and compared against the legislative framework outlined above. Table 12 in Chapter 6 represents the modified legislative framework that is assessed against the provincial legislative responses.

This thesis analyzes the classification of harassment by each of the five Canadian provincial legislative responses in comparison to the classification of harassment in the first component of the legislative framework. This analysis measures the following: Does the provincial legislative response identify and define this workplace phenomenon using elements of dignity, psychological harm, and anti-discrimination? Does the province address enumerated, non-enumerated, physical and/or psychological conduct within the label and definition? Does the legislative response recognize that the behaviour can be found in reoccurring and/or a single serious incident? Are there provisions on workplace violence stemming from harassment? What actors in the workplace has the legislative response identified as perpetrators and victims?

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<sup>243</sup> Gouveia, *supra* note 5 at 150.

<sup>244</sup> *Ibid.* at 149.

The preventative measures in each of the provincial legislative responses are analyzed in comparison to the preventative measures in the second component of Gouveia's legislative framework. This relates to the enforcement model adopted by the provincial legislators. It analyzes the following: Does the province place the onus internally, on employers or a joint health and safety committee, or externally, on a government agency, for preventing and responding to workplace harassment? Does the legislative response place responsibility on both the employer and employee to prevent workplace harassment? Does the legislative response include provisions that require employers to educate and train workers on how to prevent, recognize and respond to workplace harassment?

An analysis of the responsive and collaborative processes of each jurisdiction is compared against such processes in the third component of the legislative framework. It analyzes the following elements: Are there provisions in the legislation that require employers to implement a complaints process? Does the province require employers and employees to work collaboratively to develop and administer the complaints process? Does it require a neutral workplace committee to facilitate the complaint process? Are there investigation procedures? Does the legislation require the employers and employees to develop the investigation procedures collaboratively? Does the legislation require a neutral body to conduct investigations?

Finally, this thesis analyzes the provisions of relief and punishment each of the five jurisdictions implement in comparison to the provisions in the fourth component of the legislative framework. This analysis measures the following: Does the province outline clear remedies for victims of workplace harassment? Are there punitive measures for employers who do not prevent or stop workplace harassment? Does the province provide an external enforcement body to review or administer harassment complaints and investigations?

This analysis and comparison determines whether the tangible provincial legislative responses are a complete or partial representation of the model legislative framework.

**TABLE 1: Modified Framework for a Legislative Response**

COMPONENT	ELEMENTS
<b>CLASSIFICATION OF HARASSMENT</b>	<p><b>Expansive Breadth and Scope</b></p> <ul style="list-style-type: none"> <li>• Include aspects of both American and European paradigms: enumerated ground and dignity component</li> <li>• <del>Clearly name psychological harassment</del></li> <li>• Address issues of dignity in definition</li> <li>• <u>Label the conduct harassment</u></li> </ul> <p><b>Definition</b></p> <ul style="list-style-type: none"> <li>• Dignity component/mental anguish and psychological harm</li> <li>• <u>Violence provisions resulting from harassment</u></li> <li>• Implicit and explicit behaviour/verbal and non-verbal</li> <li>• Recurring and persistent in nature</li> <li>• Focus on victim feelings and perception not aggressor's intention</li> <li>• No requirement for damages-act and mental anguish is enough</li> </ul> <p><b>Scope</b></p> <ul style="list-style-type: none"> <li>• Allows for single action (<u>limited to circumstances that cause serious harm</u>)</li> <li>• Tangible and intangible actions (obvious or overt)</li> <li>• Includes actions from co-workers, supervisors and customers or clients (people outside the initial scope of the workplace hierarchy)</li> </ul>
<b>PREVENTIVE MEASURES</b>	<p><b>Responsibility Placed on Employers <u>and Employees</u> to Alter Workplace Relations or Raise Awareness of Issue</b></p> <ul style="list-style-type: none"> <li>• Encourage preventive measures to reduce the likelihood of bullying</li> <li>• Educational workshops &amp; training for employees</li> </ul>
<b>RESPONSIVE AND COLLABORATIVE PROCESSES</b>	<ul style="list-style-type: none"> <li>• <u>Immediately address harassing behaviour to prevent further injury</u></li> </ul> <p><b>Legal Provisions <del>or Incentives</del> Outlined for Responding to Complaints</b></p> <ul style="list-style-type: none"> <li>• Duty is on employer to implement a process to address concerns</li> <li>• Collaborative provisions to include employee contribution</li> <li>• Process of complaint is clearly outlined</li> <li>• <del>Law also should provide incentives to employers who respond promptly, fairly, and effectively when informed about such behaviour.</del></li> </ul> <p><b>Internal Neutral Committee</b></p> <ul style="list-style-type: none"> <li>• Internal Complaints Committee or Ombudsmen</li> <li>• Available consequences outside the workplace should be made as an alternative</li> </ul> <p><b><u>Investigations</u></b></p> <ul style="list-style-type: none"> <li>• <u>Employer, in consultation with employees, to implement procedures for investigating complaints</u></li> <li>• <u>Investigation process should be clearly outlined</u></li> <li>• <u>Investigations should be conducted by a neutral Committee or Ombudsmen</u></li> </ul>
<b>RELIEF AND PUNISHMENT</b>	<p><b>Remedies, Compensation and Enforcement</b></p> <ul style="list-style-type: none"> <li>• Means of relief to bullying targets</li> <li>• Focus of punishment should be to deter bullying activity</li> <li>• Bullies, and employers who place bullies in a position to abuse their coworkers, should be subject to punitive measures for their actions</li> </ul> <p><b>External Enforcement Body</b></p> <ul style="list-style-type: none"> <li>• Grievance or Commission</li> <li>• Standard of proof depending on nature of allegation</li> <li>• Burden of proof on independent body conducting investigation</li> </ul>

## CHAPTER 4 - CASE STUDIES

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The Canadian jurisdictions that have adopted workplace harassment legislation are Québec, Saskatchewan, Ontario, Manitoba and British Columbia.<sup>245</sup> Most of these provinces have included provisions on workplace harassment and workplace violence, albeit through separate provisions. Significantly, the only jurisdictions that explicitly recognize a domestic violence element within the workplace harassment and violence statutory response are Ontario, Manitoba and British Columbia.

This thesis outlines the workplace harassment legislative response adopted by the five jurisdictions. It first reviews the history of the respective legislative response by examining documents such as legislative debates, ministry reports, and government agency documents and policies. These documents contribute to the understanding of the rationale behind the chosen model of each jurisdiction.

An in-depth examination of the legislative response provides a basis for the analysis and comparison of these responses later in the thesis. It examines and analyzes the definition of this workplace phenomenon from each jurisdiction to determine what comments and behaviours are prohibited.<sup>246</sup> This assesses the rights and responsibilities of the employer and employee as outlined in each legislative response. This definitional analysis, as well as the assessment of rights and responsibilities, is imperative in determining the model and how it contributes to the understanding of the rationale behind the legislative response. It also examines the ways in which to report a claim and the recourse afforded to victims. Finally, this thesis explores the types of punishment each jurisdiction chose to enforce.

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<sup>245</sup> Alberta only recognizes workplace harassment on enumerated grounds found in the *Alberta Human Rights Act*, RSA 2000, c A-25.5. This was further clarified in the case of *Ashraf v. SNC Lavalin ATP Inc.* 2013 ABQB 143; New Brunswick only protects workers from enumerated grounds of workplace harassment found in the *Human Rights Act*, RSNB 2011, c 171; Newfoundland and Labrador only recognizes enumerated grounds of workplace harassment as found in the *Human Rights Act*, 2010, SNL 2010, c H-13.1; Nova Scotia only recognizes enumerated grounds of harassment in the workplace found in the *Human Rights Act*, RSNS 1989, c 214; Prince Edward Island only protects workers from enumerated grounds of harassment as found in the *Human Rights Act*, RSPEI 1988, c H-12; Northwest Territories recognizes workplace harassment on enumerated grounds only as found in the *Human Rights Act*, SNWT 2002, c 18; Nunavut only protects workers from enumerated grounds of harassment found in the *Human Rights Act*, SNU 2003, c 12; Yukon only recognizes enumerated grounds of workplace harassment as found in the *Human Rights Act*, RSY 2002, c 116.

<sup>246</sup> This chapter will referred to this workplace phenomenon as the term used in the respective jurisdiction



The case law analysis provides clarification of the provisions in the legislative response and it demonstrates the application of the respective response. Understanding these elements establishes the framework for comparing the models.

Table 10 (at the end of this chapter) is a cross-sectional comparison of the five jurisdictions' legislative response to workplace harassment and violence.

#### **4.1 Québec**

In 2002, Québec became the first jurisdiction in Canada to introduce legislation on psychological harassment in the workplace. A significant feature of Québec's statutory response to this workplace conduct is the grouping of provisions for workplace harassment relating to both enumerated and non-enumerated grounds. Québec legislators chose to provide one definition, which applies to both forms of harassment. Also, Québec legislators did not include provisions with respect to the element of violence and the recognition of a conduct continuum. This suggests that Québec does not recognize the possibility of harassment developing into workplace violence. No other province enacted legislation in such a way.

This approach aligns itself with the parameters of the European Dignity paradigm, as the definition does not distinguish between enumerated and non-enumerated forms of harassment; instead the focus is on the protection of the individual's dignity.

##### **(A) Legislative History**

In 1999, the Minister of Labour commissioned an Interdepartmental Committee to study psychological harassment at work.<sup>247</sup> The purpose was to examine the problem of psychological harassment and make recommendations to reduce such conduct in the workplace.<sup>248</sup> The Committee recognized that psychological harassment has severe consequences in the workplace including absenteeism, high turnover rates, productivity reductions and financial strain on both the employer and employee.<sup>249</sup> The Committee found that the causes of workplace harassment include “the individual, the environment, work conditions, relations between co-workers,

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<sup>247</sup> Québec, Ministère du Travail, *Interdepartmental Committee Report on Psychological Harassment at Work*, (Québec: Ministère du Travail du Québec, 2001) at 1 [translated by author].

<sup>248</sup> *Ibid.*

<sup>249</sup> *ibid.* at 2.

relations between co-workers and clients as well as relations between management and employees.”<sup>250</sup> Therefore, the Commission determined that “a holistic approach is required to eradicate violence and harassment.”<sup>251</sup> On this analysis, the Commission recommended that educating and training Québec workers was essential and that a prevention policy on psychological harassment must be developed.<sup>252</sup> Based on this report, the Minister of Labour drafted and introduced provisions on psychological harassment.

### **i. Introduction and Debates**

Bill 143, *An Act to amend the Act respecting labour standards and other legislative provisions*,<sup>253</sup> was introduced on November 7, 2002, by the Minister of Labour, under the Parti Québécois (PQ). One purpose of this Bill was to introduce provisions on psychological harassment which provided Québécois with the right to a harassment free workplace.<sup>254</sup> A PQ Member of the National Assembly (“MNA”) highlighted that the level of absenteeism in Québec resulting from workplace psychological harassment was high, causing economic loss for employers and employees and significantly affecting employees’ health.<sup>255</sup> Thus, provisions for psychological harassment were necessary to prevent such harm.

A significant portion of the debates was dedicated to the interpretation of the definition of “psychological harassment.” The original definition of “psychological harassment” upon introduction of Bill 143 was

any behaviour in the form of repeated and unwanted attitudes, verbal comments, actions or gestures that affects an employee’s dignity or psychological or physical integrity and has detrimental consequences for the employee.

A single serious incident of such behaviour that has a lasting harmful effect on an employee also constitutes psychological harassment.<sup>256</sup>

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<sup>250</sup> Ibid. at 4.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid. at 5.

<sup>253</sup> Bill 143, *An Act to amend the Act respecting labour standards and other legislative provisions*, 2<sup>nd</sup> sess, 36<sup>th</sup> leg, Québec, 2002 (assented to 19 December 2002), SQ 2002, c 80.

<sup>254</sup> Québec, Assemblée nationale, *Journal des débuts*, 2<sup>e</sup> sess, 36<sup>e</sup> lég, n<sup>o</sup> 129 (7 novembre 2002) at n(14h 20)n (Jean Rochon) [translated by author].

<sup>255</sup> Québec, Assemblée nationale, *Journal des débuts*, 2<sup>e</sup> sess, 36<sup>e</sup> lég, n<sup>o</sup> 130 (19 novembre 2002) at n(11h 30)n [translated by author].

<sup>256</sup> Bill 143, *supra* note 253, cl. 47.

This conceptualization proved to be problematic for MNAs and several community groups. Concerns were raised that the definition of psychological harassment could lead to abuse of the term or difficulty in actually demonstrating that psychological harassment occurred.<sup>257</sup> Liberal MNA, André Tranchemontagne raised concern with the broadness of the definition of and the effects this broadness would have on the Standards Committee and the newly adopted Commission de relations de travail (the “CRT”).<sup>258</sup> Throughout the duration of the debates he argued that the definition must correspond with the phenomenon that it wishes to prevent,<sup>259</sup> stating, “[y]es, bullying exists, but we are not convinced that the proposal of the minister really addresses this problem.”<sup>260</sup>

There was also major concern over whether a single serious incident should amount to psychological harassment.<sup>261</sup> When questioned on the inclusion of a single serious incident within the definition, the Minister, upon consultation with experts, stated that the seriousness of single incidents can have massive effects on the individual, and although it is rare, it is important that those situations are addressed in the legislation.<sup>262</sup>

As a result of the contention with the proposed definition, the Minister put forth an amended definition to include

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.<sup>263</sup>

This definition still includes single serious incidents as well. The inclusion of terms like “vexatious” and “hostile or unwanted,” according to the Minister, provided more clarity and precision, enabling a more accurate application of the law.<sup>264</sup> He noted that the term “vexatious” applies to conduct which amounts to hurting an individual’s pride or through the abuse of

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<sup>257</sup> 19 novembre Debates, *supra* note 255 n(11h)n (André Tranchemontagne) [translated by author].

<sup>258</sup> Ibid.

<sup>259</sup> Québec, Assemblée nationale, *Journal des débuts*, 2<sup>e</sup> sess, 36<sup>e</sup> lég, n<sup>o</sup> 69 (11 décembre 2002) at n(12h 43)n (André Tranchemontagne) [translated by author].

<sup>260</sup> 19 novembre Debates, *supra* note 255 n(11h)n (André Tranchemontagne) [translated by author].

<sup>261</sup> Québec, Assemblée nationale, *Journal des débuts*, 2<sup>e</sup> sess, 36<sup>e</sup> lég, n<sup>o</sup> 65 (4 novembre 2002) at n(15h 40)n (André Tranchemontagne); Québec, Assemblée nationale, *Journal des débuts*, 2<sup>e</sup> sess, 36<sup>e</sup> lég, n<sup>o</sup> 67 (6 novembre 2002) at n(16h 10)n (André Tranchemontagne) [translated by author].

<sup>262</sup> Québec, Assemblée nationale, *Journal des débuts*, 2<sup>e</sup> sess, 36<sup>e</sup> lég, n<sup>o</sup> 69 (11 décembre 2002) at n(11h 54)n (Jean Rochon) [translated by author].

<sup>263</sup> 11 décembre Debates, *supra* note 259 n(16h 20)n (Jean Rochon).

<sup>264</sup> Ibid. at n(11h 54)n (Jean Rochon).

power.<sup>265</sup> Including the terms “hostile or unwanted” enabled an objective application of both intentional and serious harsh conduct as well as conduct that might not be hostile in nature but is still unwanted by the target.<sup>266</sup> Liberal MNAs argued that the term “unwanted” was problematic. It was put forth that actions can be unwanted, however, those actions do not necessarily amount to harassment and therefore keeping this term could enable abuse of the provision.<sup>267</sup> To demonstrate this point, a Liberal MNA suggested that this definition left room for actions such as an individual bringing another individual a cup of coffee which that individual did not want, thus making that cup of coffee an act of harassment as it was unwanted.<sup>268</sup> This reasoning is somewhat farfetched, yet demonstrates the concern with the broadness and ambiguity of the term “unwanted conduct.” In defence of the term, an MNA of the PQ clarified that the term “unwanted” was used for actions or gestures that amount to sexual harassment that are not necessarily hostile, where as the term “hostile” was used predominately to describe conduct which amounts to bullying.<sup>269</sup>

Another notion of contention was the concept of dignity used within the definition of psychological harassment. It was argued that the difficulty of successfully proving that psychological harassment affected an individual’s dignity could ultimately be an unnecessary burden on employees.<sup>270</sup> Professor Katherine Lippel,<sup>271</sup> during the consultation debates, put forth that harm to one’s dignity should not be a component of establishing a successful claim for psychological harassment.<sup>272</sup> Despite the contention and the suggestion from Lippel, harm to one’s dignity remained an important component in establishing psychological harassment in Québec.

Concerns were also raised over the obligation of employers to prevent and stop workplace harassment from occurring. It was suggested that employers, employees and unions should share in the obligation to maintain a workplace free from harassment.<sup>273</sup> While there were no explicit

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<sup>265</sup> Ibid.

<sup>266</sup> Ibid., at n(11h 54)n to n(12h)n (Jean Rochon).

<sup>267</sup> Ibid., at n(12h 43)n (André Tranchemontagne).

<sup>268</sup> Ibid., at n(12h 43)n (Françoise Gauthier).

<sup>269</sup> Ibid. at n(12h)n (Jocelyne Caron).

<sup>270</sup> See Québec, Assemblée nationale, *Journal des débuts*, 2<sup>e</sup> sess, 36<sup>e</sup> lég, n<sup>o</sup> 64 (3 décembre 2002) at n(15h 10)n (Esther Paquet) and n(20h 10)n (Mme. Barbot) [translated by author].

<sup>271</sup> Professor Lippel is the Canada Research Chair on Occupational Health and Safety.

<sup>272</sup> Québec, Assemblée nationale, *Journal des débuts*, 2<sup>e</sup> sess, 36<sup>e</sup> lég, n<sup>o</sup> 65 (4 décembre 2002) at n(20h 40)n (Katherine Lippel) [translated by author].

<sup>273</sup> 3 décembre Debates, *supra* note 270 n(12h 30)n (M. Taillon).

obligations for employees in relation to workplace harassment, it is understood by the Commission, that employees also have the responsibility to refrain from workplace harassment.<sup>274</sup>

Despite the amendments made during the consultation and committee stages, the Liberals subsequently held that the definition was still too broad arguing that it has the potential for unjustified claims.<sup>275</sup> Although the Liberals were contentious of this Bill, they still supported the passage.<sup>276</sup> Bill 143 was given Royal Assent on December 19, 2002.<sup>277</sup>

### **(B) Provisions on Harassment**

The provisions on psychological harassment came into force on June 1, 2004.<sup>278</sup> Notwithstanding that *An Act Respecting Labour Standards*<sup>279</sup> (“Act”) does not apply to certain sectors of employment,<sup>280</sup> the provisions on psychological harassment within this *Act* applies to all Québec employees.<sup>281</sup>

The Commission des normes du travail (“CNT”) is a body governed by the Ministry of Labour and is responsible for providing assistance with the interpretation of the *Act*, ensuring compliance with the *Act*, investigating complaints and providing representation for employees.<sup>282</sup>

With respect to psychological harassment, the CNT considers

[t]he new provisions of the *Act respecting labour standards* are the reflection of a common desire in Québec to create a work environment free from psychological harassment and to limit the consequences of such harassment. Taking steps and action to correct at the source circumstances that may lead to harassment and intervening effectively will result in benefits for all concerned.<sup>283</sup>

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<sup>274</sup> Commission des normes du travail (CNT), *Awareness promotion guide for employers and employees*, (Québec: Direction des communications, 2004) at 7.

<sup>275</sup> Québec, Assemblée nationale, *Journal des débuts*, 2<sup>e</sup> sess, 36<sup>e</sup> lég, n<sup>o</sup> 145 (17 décembre 2002) at n(12h)n (André Tranchemontagne) [translated by author].

<sup>276</sup> Ibid.

<sup>277</sup> Ibid. at n(11h 10)n

<sup>278</sup> CNT, *supra* note 274 at 2.

<sup>279</sup> CQLR c N-1.1

<sup>280</sup> Ibid., s. 3

<sup>281</sup> CNT, *supra* note 274 at 3.

<sup>282</sup> *Mission and Clientele* online: Commission des normes du travail <<http://www.cnt.gouv.qc.ca/en/about-us/index.html>> .

<sup>283</sup> CNT, *supra* note 274 at 11.

To provide further clarification of the rights and responsibilities of both employers and employees, the CNT published a reference guide<sup>284</sup> on the provisions of psychological harassment in the workplace. Table 2 (on page 59) provides a synopsis of the provisions of Québec’s law on workplace psychological harassment.

### **i. Definition**

Québec’s definition of “psychological harassment” has a component of human dignity. Section 81.18 of the *Act* defines “psychological harassment” as

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 incident of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.<sup>285</sup>

This definition applies to both enumerated grounds of harassment under s. 10 of the *Charter of Human Rights and Freedoms*<sup>286</sup> and non-enumerated grounds of psychological harassment.<sup>287</sup> Despite labelling this workplace phenomenon as “psychological harassment”, the victim does not need to prove they suffered a medically diagnosed mental health affect. Rather, all that is required is proof that the conduct affected the victim’s integrity and caused a harmful work environment.<sup>288</sup>

There are four components to this definition that must be established in order to have a successful claim for psychological harassment. First, there must be vexatious behaviour that is repeated or serious in nature. Second, the behaviour must be hostile or unwanted. Third, it must have an effect on the individual’s dignity or psychological or physical integrity. Finally, it must be harmful to the work environment.<sup>289</sup> The intentions of the perpetrator are not considered relevant in establishing whether the behaviour amounted to workplace psychological

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<sup>284</sup> CNT, *supra* note 274.

<sup>285</sup> Labour Standards Act, *supra* note 279 at s. 81.18

<sup>286</sup> CQLR c C-12

<sup>287</sup> CNT, *supra* note 274 at 2.

<sup>288</sup> Parkes, *supra* note 3 at 6-7; Gouveia, *supra* note 5 at 155.

<sup>289</sup> *Ibid.* at 3.

harassment.<sup>290</sup> Rather, all that must be established is that the conduct has some effect on the individual.<sup>291</sup>

The first component that must be established is the presence of vexatious behaviour that is repeated or is a single serious incident. This includes conduct that is “humiliating, offensive or abusive for the person who is subject to such behaviour that undermines his self-esteem or that causes him torment” and it must exceed what a reasonable person would consider inappropriate.<sup>292</sup> Such behaviours include isolating, threatening, belittling or discrediting a worker.<sup>293</sup> In order to establish psychological harassment for a single serious incident, the conduct must have a continuous harmful effect on the victim.<sup>294</sup>

The second component requires the behaviour to be hostile or unwanted. The conduct does not necessarily need to be hostile for it to be unwanted by the target.<sup>295</sup> Provided that one of the two types of behaviour is present, this component will be established. The CNT also notes that the conduct will be found to be unwanted, regardless if the victim “clearly expressed his refusal or disapproval.”<sup>296</sup>

There must be an effect on the individual’s dignity, or psychological and/or physical integrity. This is the third component that must be established. Feelings of diminishment or degradedness may be signs that the conduct amounts to psychological harassment.<sup>297</sup> While there may also be physical health effects on the victim resulting from the conduct, this is not a necessary component to establish.<sup>298</sup>

The final component to be established is that the conduct created a harmful work environment. The CNT defines a harmful work environment as “detrimental” and “harmful” to a worker, which adversely affects the worker.<sup>299</sup>

To further clarify the definition, the CNT notes that actions taken on the part of the employer in the course of their managerial rights and responsibilities will not be considered

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<sup>290</sup> Ibid.

<sup>291</sup> Ibid.

<sup>292</sup> Ibid.

<sup>293</sup> Ibid. at 5.

<sup>294</sup> Ibid. at 3.

<sup>295</sup> 11 décembre 2002 Debates, *supra* note 259 at n(16h 20)n (Jean Rochon).]

<sup>296</sup> CNT, *supra* note 274 at 3.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid. 3.

<sup>299</sup> Ibid.

vexatious conduct under the *Act*.<sup>300</sup> This includes disciplinary action, dismissal, performance reviews, or assigning tasks.<sup>301</sup> Workplace conflicts between workers will also not amount to psychological harassment if the conflict is adequately managed by the employer.<sup>302</sup>

*Ganley c. 9123-8014 Québec inc.*<sup>303</sup> was one of the first decisions relating to psychological harassment handed down by the CRT. The complainant was a manager at a Subway.<sup>304</sup> The business owner consistently yelled at the complainant, denounced her work, criticized her sexual orientation, refused to speak to her and accused her of not counting the tills.<sup>305</sup> The conduct continued well after the complainant advised the business owner that she would not tolerate that type of conduct.<sup>306</sup> The complainant filed a complaint of psychological harassment with the Commission.<sup>307</sup> The Commissioner held that “[the] words and [the] hostile and repeated acts constitute[d] vexatious conduct that affected her dignity and psychological integrity of the complainant.”<sup>308</sup>

Conduct that amounts to psychological harassment has been illustrated in a number of Québec’s cases. In *Allaire et Research House Inc.*<sup>309</sup> the Commissioner held that vexatious conduct was found where the employer assigned unrealistic performance objectives, which the employee would fail to meet, where the employer made unwarranted threats to terminate his employment based off of the failure to meet the performance objectives and when the employer excluded him from participating in the office dinner party but assigned him to wash the dishes and take out the trash.<sup>310</sup>

To establish a successful psychological harassment complaint, the victim must prove that their dignity was affected. In *Dian c. Pêcheries Norref Québec inc.*<sup>311</sup> the Commissioner held

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<sup>300</sup> Ibid. at 6.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid.

<sup>303</sup> 2006 QCRT 20.

<sup>304</sup> Ibid. at para 6 [translated by author].

<sup>305</sup> Ibid. at para 7 [translated by author].

<sup>306</sup> Ibid. at paras 8-9 [translated by author].

<sup>307</sup> Ibid. at para 9 [translated by author].

<sup>308</sup> Ibid. at para 16 [translated by author].

<sup>309</sup> 2006 QCCRT 0161, [2006] R.J.D.T. 736, conf. 2007 QCCA 1689, 2008 QCCRT 0530

<sup>310</sup> Ibid. cited in Rachel Cox, “Psychological Harassment Legislation in Québec: The First Five Years” (2010) 32:55 *Comp. Labor Law & Pol’y J.* 55 at 66.

<sup>311</sup> 2007 QCCRT 551.



that despite the complainant establishing that the conduct amounted to vexatious behaviour, the complainant's dignity was not affected and subsequently rejected the complaint.<sup>312</sup>

In order to establish psychological harassment for a single serious incident there must be a lasting harmful effect, otherwise the claim will be rejected.<sup>313</sup> Single serious incidents, although rare, have been found in cases where an individual threw a hammer at a worker who was leaving the scene of a confrontational situation,<sup>314</sup> where an individual put an ice cube down a co-workers shirt who had been handcuffed to a chair at an office party,<sup>315</sup> and where a meeting was held to provoke an employee to resign<sup>316</sup> or retire.<sup>317</sup>

## ii. Employer Responsibilities

Québec employers are required under section 81.19 of the *Act* to “take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it.”<sup>318</sup> The CNT notes that employers cannot claim ignorance to a harassment complaint. “Not being aware of a harassment situation does not itself relieve the employer of his responsibility.”<sup>319</sup>

## iii. Employee Rights and Responsibilities

Québec employees have an express right under section 81.19 of the *Act* “to a work environment free from psychological harassment.”<sup>320</sup> This is not a guarantee that such conduct will not occur in the workplace.<sup>321</sup> This provision provides that both employers and employees

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<sup>312</sup> Ibid. cited in Cox, *supra* note 17 at 73.

<sup>313</sup> See *Syndicat de la fonction publique du Québec c. Québec*, [2008] AZ-50510208 (T.A.) and *Lizotte c. Alimentation Coop La Pocatière*, 2008 QCCRT 0240, conf. 2008 QCCRT 0521, cited in *Supra* note 17 [Rachel Cox] at 67, n 54.

<sup>314</sup> *Landesman c. EnCore Automotive*, 2007 QCCRT 0184, conf. 2007 QCCRT 0558 cited in Cox, *supra* note 17 at 67.

<sup>315</sup> *S.H. c. Compagnie A*, 2007 QCCRT 0348.

<sup>316</sup> *Fédération des professionnelles (CSN) c. Corporation du Centre hospitalier Pierre-Janet*, A.A.S. 2007 A-130, [2007] AZ-50449412 (T.A.); *L.B. c. Compagnie A*, [2007] R.J.D.T. 115, 2006 QCCRT 0608, cited in Cox, *supra* note 17 at 66.

<sup>317</sup> *Dumont c. Matériaux Blanchet inc.*, 2007 QCCRT 0087, conf. 2007 OCCS 6554, cited in *Supra* note 17 [Rachel Cox] at 66.

<sup>318</sup> Labour Standards Act, *supra* note 279 at s. 81.19

<sup>319</sup> CNT, *supra* note 274 at 7.

<sup>320</sup> Labour Standards Act, *supra* note 279 at s. 81.19

<sup>321</sup> CNT, *supra* note 274 at 7.

must reasonably maintain a safe and healthy workplace free from psychological harassment. Employees have a responsibility to not harass other workers and to “actively contribute to preserving a workplace that is free from harassment.”<sup>322</sup>

#### iv. Complaints, Investigations and Recourse

The complaint and investigation procedures and the process for recourse are governed by whether a worker is unionized or non-unionized. The procedures are slightly different, however, the recourse for the complainant is the same.

Non-unionized workers who are victims of workplace harassment can file a written complaint to the CNT within 90 days of the last incident.<sup>323</sup> A non-profit organization can also file a claim on the worker’s behalf.<sup>324</sup> Once the CNT receives the complaint, an inquiry into the complaint will be made.<sup>325</sup> The CNT will then determine if action is necessary. If the CNT refuses to take action, the worker can make a written request for referral to the CRT for an administrative review of the CNT decision.<sup>326</sup> If the CNT accepts the case, an investigation will ensue to determine if the complaint is warranted and whether the employer took steps to stop the harassment.<sup>327</sup> At any time during the investigation, the CNT, upon agreement of all parties, can request the appointment of a mediator.<sup>328</sup> The worker also has the right to continue to work, if still bound by an employment contract, during the mediation process.<sup>329</sup> If there is no settlement upon conclusion of the investigation and the CNT believes the complaint should be pursued, the CNT can refer the complaint to the CRT.<sup>330</sup> The employee is entitled to representation either by an external party or by the CNT during the proceedings at the CRT.<sup>331</sup> During these proceedings, the burden of proof is on the employee to establish that he or she was the victim of psychological harassment.<sup>332</sup> Upon establishing that the conduct amounted to psychological harassment, the

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<sup>322</sup> Ibid.

<sup>323</sup> Ibid. at s. 123

<sup>324</sup> Ibid. at s. 123.6

<sup>325</sup> Ibid. at s. 123.8

<sup>326</sup> Ibid. at s. 123.9

<sup>327</sup> CNT, *supra* note 274 at 8.

<sup>328</sup> CNT, *supra* note 279 at s. 123.10

<sup>329</sup> Ibid. at s. 123.11

<sup>330</sup> Ibid. at s. 123.12.

<sup>331</sup> Ibid. s. 123.13

<sup>332</sup> CNT, *supra* note 274 at 9.

burden shifts to the employer to establish that reasonable steps were taken to prevent and/or stop the conduct.<sup>333</sup> If the CRT deems the complaint to be unfounded, all parties will be notified. The victim can make a written request of an administrative review of that decision.<sup>334</sup> Where the CRT determines that psychological harassment occurred and that the employer failed to fulfill the duties as required by section 81.19, the CRT will render a decision ordering the employer

- (a) ... to reinstate of an employee;
- (b) ... to pay the employee an indemnity up to a maximum equivalent to wages lost;
- (c) ... to take reasonable action to put a stop to the harassment;
- (d) ... to pay punitive and moral damages to the employee;
- (e) ... to pay the employee an indemnity for loss of employment;
- (f) ... to pay for psychological support needed by the employee for a reasonable period of time determined by the Commission
- (g) ... the modification of the disciplinary record of the employee.<sup>335</sup>

Furthermore, an employee is protected under section 122 of the *Act* from reprisal from the employer.<sup>336</sup>

For unionized workers, section 81.20 of the *Act* provides that sections 81.18, 81.19, 123.7, 123.15 and 123.16 are “an integral part of every collective agreement.”<sup>337</sup> The employee must follow the procedures within the collective agreement to file a complaint for psychological harassment (i.e. by filing a grievance).<sup>338</sup> The complaint must be filed within 90 days of the last incident.<sup>339</sup> The appointed arbitrator will determine whether the complaint is founded and whether the employer complied with their obligations under section 81.19.<sup>340</sup> At any time, the parties under the collective agreement can request the appointment of a mediator.<sup>341</sup> If the arbitrator concludes that the psychological harassment complaint was founded and that the employer did not comply with their duties, “a fair and reasonable decision” can be handed down.<sup>342</sup> The arbitrator has the same decision powers as the CRT under sections 123.15.<sup>343</sup>

This state administered procedure provides certainty and equality amongst all workers in Québec. On assessment of the first 5 years of this statutory response, Rachel Cox argues that the

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<sup>333</sup> Ibid.

<sup>334</sup> CNT, *supra* note 274 at 9.

<sup>335</sup> Ibid.

<sup>336</sup> CNT, *supra* note 274 at 10.

<sup>337</sup> Labour Standards Act, *Supra* note 279 at s. 81.20.

<sup>338</sup> CNT, *supra* note 274 at 10.

<sup>339</sup> Labour Standards Act, *supra* note 279 at s. 123.7

<sup>340</sup> CNT, *supra* note 274 at 10.

<sup>341</sup> *Supra* note 279 at s. 123.10; CNT, *supra* note 274 at 10.

<sup>342</sup> CNT, *supra* note 274 at 10.

<sup>343</sup> Labour Standards Act, *supra* note 279; CNT, *supra* note 274 at 10.

Québec process is complex and “thus hindered rather than helped the goal of creating timely and effective recourse against psychological harassment in the workplace.”<sup>344</sup>

**(C) Conclusion**

Québec’s approach to legislating against workplace psychological harassment is well defined and addresses the workplace conduct, which it seeks to eliminate or prevent. It provides clearly expressed rights and obligations for employees and employers and clearly defines the complaint process.

*[Continued on next page]*

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<sup>344</sup> Cox, *supra* note 17 at 87

**TABLE 2: Synopsis of Québec’s Provisions on Workplace Psychological Harassment**

<b>Definition:</b>	<p><b>“psychological harassment”</b> 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.</p> <p>A single serious incident of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.<sup>345</sup></p>
<b>Employer Responsibilities:</b>	<p>Employers must:</p> <ul style="list-style-type: none"> <li>– ensure psychological harassment does not occur in the workplace</li> <li>– when they become aware of psychological harassment they must put a stop to it</li> </ul>
<b>Employee Rights &amp; Responsibilities:</b>	<p>Employee’s Right:</p> <ul style="list-style-type: none"> <li>– to work in an environment free from psychological harassment</li> </ul> <p>Employee’s Responsibility:</p> <ul style="list-style-type: none"> <li>– must not participate in the harassment of others</li> </ul>
<b>Complaints, Investigations &amp; Recourse</b>	<p>Non-Unionized Places of Employment:</p> <ol style="list-style-type: none"> <li>1. Employee can file a complaint to CNT within 90 days of final incident</li> <li>2. CNT will conduct an inquiry into the complaint <ul style="list-style-type: none"> <li>– If the CNT refuses the complaint, the employee has 30 days from date of refusal to request an administrative review from the CRT</li> <li>– If the CNT accepts the complaint, an investigation will be conducted to determine if the complaint is warranted and whether the employer complied with the <i>Act</i></li> </ul> </li> <li>3. The CNT will investigate <ul style="list-style-type: none"> <li>– A mediator can be appointed at any time during the investigation</li> <li>– The employee has the right to remain at work if still bound by an employment contract</li> <li>– Upon conclusion of the investigation, if there is no settlement, the CNT can refer the complaint to the CRT</li> </ul> </li> <li>4. CRT proceedings: <ul style="list-style-type: none"> <li>– The CNT can represent an employee during the CRT proceedings</li> <li>– Burden of Proof: <ul style="list-style-type: none"> <li>↳ Employee must establish they were a victim of psychological harassment</li> <li>↳ Employer must establish they took reasonable steps to prevent and/or stop the conduct</li> </ul> </li> <li>– Conclusion of proceedings: <ul style="list-style-type: none"> <li>↳ Unfounded Complaint: all parties will be notified. The victim can request administrative review of the decision</li> <li>↳ Established Complaint: CRT will render a decision and can order the employer to reinstate employee, pay an indemnity up to lost wages, take reasonable steps to stop the conduct, to pay punitive and moral damages, pay indemnity for loss of employment, to pay for psychological support, to modify the employee’s record</li> </ul> </li> </ul> </li> </ol> <p>[Con’t on next page]</p>

<sup>345</sup> 11 decembre Debates, *supra* note 259 at n(16h 20)n (Jean Rochon).

	<p>Unionized Places of Employment:</p> <ol style="list-style-type: none"><li>1. Employees must follow the procedures contained in their collective agreement for filing a complaint for psychological harassment<ul style="list-style-type: none"><li>– The complaint must be filed within 90 days of the last incident</li></ul></li><li>2. An arbitrator will be appointed<ul style="list-style-type: none"><li>– The arbitrator will determine whether the complaint has merit and whether the employer complied with their obligations under the <i>Act</i></li><li>– If the complaint has merit, the arbitrator will render a decision (same as the decisions handed down by the CRT above)</li></ul></li></ol>
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## 4.2 Saskatchewan

Saskatchewan introduced workplace harassment legislation in May 2007. They are a leading jurisdiction in occupational health and safety law.<sup>346</sup> Workplace violence provisions were included in workplace health and safety legislation since 1993. They were also the first common law jurisdiction in Canada to introduce non-discriminatory workplace harassment legislation.

One significant feature of Saskatchewan's statutory response is the distinction between workplace harassment and violence. This is evident in the separation of harassment and violence provisions on the former *Occupational Health and Safety Act, 1993*<sup>347</sup> ("Saskatchewan OHSA") and *The Occupational Health and Safety Regulations, 1996*<sup>348</sup> ("Regulations") and now in the new *Saskatchewan Employment Act* ("SEA").<sup>349</sup>

The following examines the legislative history of Bill 66, *The Occupational Health and Safety (Harassment Prevention) Amendment Act, 2007*<sup>350</sup> ("Bill 66"). It then examines the provisions of harassment and the provisions on violence in the *SEA* and *Regulations*.

An interesting note is the limited jurisprudence in Saskatchewan relating to the workplace harassment provisions, particularly since this legislation has been in effect for seven years. This could be as a result of the well rounded and detailed legislative approach.

The legislative approach, which Saskatchewan adopted, is an example of the newly emerging Psychological Harassment paradigm. It categorizes workplace harassment as affecting an individual's wellbeing and such that either intimidates or humiliates the target. It does not make explicit reference to an element of dignity.

### (A) Legislative History

The Saskatchewan NDP party recognized the need for legislation for workplace harassment and subsequently introduced provisions. These provisions were included in *OHSA* in 2007. In April 2014, all employment related statutes were consolidated into *SEA*. The only

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<sup>346</sup> Saskatchewan was the first jurisdiction in North America to introduce the current version of occupational health and safety regulations. See Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)* 25<sup>th</sup> Leg, 3<sup>rd</sup> Sess, No. 51A (25 April 2007) at 1395.

<sup>347</sup> SS 1993, c O-1.1.

<sup>348</sup> RRS, c O-1.1, Reg 1

<sup>349</sup> SS 2014, c S-15.1

<sup>350</sup> 3<sup>rd</sup> Sess, 25<sup>th</sup> Leg, Saskatchewan, 2007 (assented to 17 May 2007), SS 2007, c 34.

change to the provisions from the *OHS*A to the *SEA* relates to the special adjudicators for harassment. This change is discussed below.

### **i. Introduction and Debates**

Bill 66 was introduced under the NDP government on April 23, 2007<sup>351</sup> and given Royal Assent on May 17, 2007.<sup>352</sup> The entire debate process was relatively short, taking one month from introduction to being given Royal Assent. Bill 66 was the first and only bill relating to workplace harassment to be introduced and subsequently passed. This is contrary to the process in other jurisdictions (namely Ontario) where multiple attempts were made prior to the passing of their respective legislation on workplace harassment.

The Minister of Labour made significant reference to the statutory response Québec implemented, stating that the Québec experience would be examined in order to effectively address this workplace phenomenon as well as flush out any problems within the Saskatchewan context.<sup>353</sup>

Upon introducing this amendment, the Minister stated, “Saskatchewan workers have the right to work in a healthy and safe workplace, and that means a workplace free of any kind of harassment.”<sup>354</sup> The goal of this legislation was to send a message that harassment was unacceptable workplace behaviour.<sup>355</sup> It was recognized and stressed that there was a need to educate Saskatchewan workers and employers on workplace harassment prior to the enforcement of these new provisions. This would provide workers and employers the opportunity to understand and conduct themselves accordingly in the workplace.<sup>356</sup>

There were two key features of Bill 66 that were the subject of much of the debate process. The first concerned the definition of this phenomenon and the second concerned the introduction of a special adjudicator.

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<sup>351</sup> Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)* 25<sup>th</sup> Leg, 3<sup>rd</sup> Sess, No. 50A (23 April 2007) at 1371.

<sup>352</sup> Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)* 25<sup>th</sup> Leg, 3<sup>rd</sup> Sess, No. 64A (17 May 2007) at 1675.

<sup>353</sup> Saskatchewan, Legislative Assembly, Standing Committee on the economy, “Bill No. 66 – The Occupational Health and Safety (Harassment Prevention) Amendment Act, 2007” in *Hansard Verbatim Report*, No. 46 (14 May 2007) at 845-846

<sup>354</sup> 25 April Debates, *supra* note 346 at 1395.

<sup>355</sup> *Ibid.*

<sup>356</sup> 14 May Debates, *Supra* note 353 at 842.



### a. Definitions

Bill 66 amended the definition of harassment to recognize psychological harassment. The Minister of Labour argued that psychological harassment needs to be a recognized form of harassment as it can negatively affect a worker's emotional and physical wellbeing which in turn could cause strain in the worker's personal relationships, level of productivity and attendance at work.<sup>357</sup> It can also negatively affect the employer's bottom line because of increased turnover, absenteeism due to sick or injured workers, and decreased productivity levels.<sup>358</sup>

The definition of "harassment" was amended to include

inappropriate conduct, comment, display, action or gesture by a person... that... 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...<sup>359</sup>

The Minister of Labour made it a point to state that the definition of "harassment" in Bill 66 provides recourse for targeted victims of *actual* harassment. It does not enable individuals to use the Bill "for their own personal pettiness to settle a score with someone..."<sup>360</sup> An MP from the NDP argued that the amendment to the "harassment" definition was intentionally "specific" and noted that "actions must fit that definition" otherwise it would not amount to harassment.<sup>361</sup> The definition requires that the conduct be hostile or unwanted, that could cause humiliation or intimidation and that affects the wellbeing of the targeted individual.<sup>362</sup> These three elements must be established in order to detract from claims which concern simply offending someone.<sup>363</sup>

The official opposition, the Saskatchewan Party ("the SP"), politicized the entire debate process by constantly referring to the way the Murdoch Carriere harassment case<sup>364</sup> was dealt with rather than concerning itself with the actual provisions of Bill 66. One SP MP argued that Bill 66 was "more smoke and mirrors to divert attention from their appalling record of

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<sup>357</sup> Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)* 25<sup>th</sup> Leg, 3<sup>rd</sup> Sess, No. 52A (26 April 2007) at 1414.

<sup>358</sup> *Ibid.*

<sup>359</sup> SEA, *supra* note 347, s. (2)(1)(l).

<sup>360</sup> 14 May Debates, *supra* note 353 at 841.

<sup>361</sup> 25 April Debates, *supra* note 346 at 1395.

<sup>362</sup> *Ibid.*

<sup>363</sup> 14 May Debates, *supra* note 353 at 839.

<sup>364</sup> This case involved the former director of Fire Management and Forest Protection of the Department of Saskatchewan Environment and Resource Management. He was accused of sexually harassing and physically assaulting six women in the workplace. This paper does not deal with harassment based on enumerated grounds and thus, this paper will not review this case.

enforcement of sexual harassment legislation.”<sup>365</sup> They also criticized the timing of the Bill, suggesting that the NDP government should have acted sooner which would have protected the victims of Carriere.<sup>366</sup> The official opposition was more concerned with highlighting the past faults of the NDP in dealing with the Carriere case rather than focusing on the proposed legislative response to an issue that is increasingly becoming a problem in workplaces. Despite the criticism, the SP believed that the bullying aspect of Bill 66 was “a very positive amendment” and the Party “would be very supportive of that Bill.”<sup>367</sup>

### **b. Special Adjudicator**

The second prominent topic of the debates concerned the introduction of the “special adjudicator” role. This new role was strictly designed to deal with appeals of harassment claims. The NDP noted that this provision provided for a higher level of expertise and also enabled a claim to be dealt within a reasonable time frame.<sup>368</sup> It was also stated that the expertise and knowledge of a special adjudicator would produce quality decisions in these types of cases.<sup>369</sup> There was little contention with introducing this provision by either MPs or community groups.

Bill 66 added a new provision establishing special adjudicators to hear appeals from a decision of an occupational health officer concerning harassment claims.<sup>370</sup> These special adjudicators were to be appointed for a five-year term<sup>371</sup> with the potential for reappointment.<sup>372</sup> This provision was repealed and replaced with section 3-54 of *SEA*, discussed below. The new provisions do not include a “special adjudicator” position dedicated to hear harassment cases.

### **(B) Provisions on Harassment**

Bill 66 amended the Saskatchewan *Occupational Health and Safety Act*<sup>373</sup> (“*OHSA*”) and *Occupational Health and Safety Regulations*<sup>374</sup> (“*Regulations*”). In April 2014, all employment

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<sup>365</sup> 25 April Debates, *supra* note 346 at 1396.

<sup>366</sup> *Ibid.* at 1395-1396.

<sup>367</sup> *Ibid.* at 1397

<sup>368</sup> 26 April Debates, *supra* note 357 at 1414; 14 May Debates, *supra* note 353 at 843.

<sup>369</sup> 14 May Debates, *supra* note 353 at 843.

<sup>370</sup> *OHSA*, *Supra* note 347, s. 56.3

<sup>371</sup> *Ibid.*, s. 48.1(3)

<sup>372</sup> *Ibid.*, s. 48.1(4)

<sup>373</sup> *OHSA*, *supra* note 347

related statutes were consolidated into *The Saskatchewan Employment Act*<sup>375</sup> (“SEA”). No amendments were made to the provisions from the former *OHS Act* upon consolidation. WorkSafe Saskatchewan, a branch of the Ministry of Advanced Education, Employment and Labour, published Guidelines to assist employers with the interpretation of this *Act*.<sup>376</sup>

These amendments made workplace psychological harassment a facet of health and safety in the workplace. Saskatchewan’s legislative response to regulating workplace harassment is to place responsibility in the hands of employers to develop and implement a workplace harassment policy. The *Regulations* provide significant detail relating to the employer’s responsibilities for creating and implementing a policy. This is contrary to other jurisdictions.

While the purpose of this amendment is to “protect workers from workplace harassment that may adversely affect their health and safety,” WorkSafe Saskatchewan notes that this does not entitle workers to compensation even if mental or physical harm was caused to the worker.<sup>377</sup> Table 3 (on page 72) provides a synopsis of Saskatchewan’s law on workplace harassment.

#### **i. Definition**

Section 3-1(1)(l) of the *SEA* defines “harassment” in two ways. The first definition of harassment is based on enumerated grounds.<sup>378</sup> The second definition of harassment concerns

Any inappropriate conduct, comment, display, action or gesture by a person:

- (i) that either:
  - ...
  - (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;<sup>379</sup>

Furthermore, section 3-1(4) requires a harassment claim to meet a certain threshold test in order for the complaint to be warranted. Harassment will be found when

<sup>374</sup> *Regulation*, *supra* note 348

<sup>375</sup> *SEA*, *supra* note 349

<sup>376</sup> Saskatchewan Ministry of Labour Relations and Workplace Safety, *Working Well: Employers’ Guide to Preventing and Stopping Harassment in Saskatchewan Workplaces*, (Regina: WorkSafe Saskatchewan, 2011).

<sup>377</sup> *Ibid.* at 3.

<sup>378</sup> *SEA*, *supra* note 349, s. 3-1(1)(l)(i)(a). This provision will not be covered by this research.

<sup>379</sup> *Ibid.* at s. 3-1(1)(l)

- (a) repeated conduct, comments, displays, actions or gestures must be established; 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 must be established.<sup>380</sup>

WorkSafe Saskatchewan’s Guidelines outline several types of behaviour that could amount to “bullying” such as “verbal or written abuse or threats, insulting, derogatory or degrading comments, jokes or gestures, [or] personal ridicule or malicious gossip...”<sup>381</sup>

In *The City of Saskatoon v. The Canadian Union of Public Employees and Local No. 47*<sup>382</sup> the Arbitrator noted that the definition of harassment should not be interpreted as forcing employees to sincerely like one another.<sup>383</sup> In this case, two employees chose not to interact with each other. The Arbitrator found that because the ignoring was mutual, the relationship could not be seen as “harassment” under the Act.<sup>384</sup> The Arbitrator went on to state that “swearing under one’s breath... when there is no evidence that the swearing was directed at or intended in a demeaning way at a fellow employee” would not amount to harassment.<sup>385</sup>

Section 3-1(5) also stipulates that harassment will not be found where “reasonable action... relating to the management and direction of the employer’s workers or the place of employment” was taken on the part of an employer, manager or supervisor.<sup>386</sup> Reasonable actions include job assessments, distributing work assignments, implementing workplace policies and disciplinary actions.<sup>387</sup>

The definition, accompanying provisions and guidelines clearly outline what conduct does and does not amount to workplace psychological harassment, guiding employers and employees to act accordingly.

## ii. Employer Responsibilities

Employers in Saskatchewan have two main duties with respect to workplace harassment: (1) to develop a written workplace policy to prevent workplace harassment and (2) to reasonably ensure employees are protected from workplace harassment.

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<sup>380</sup> Ibid. at s. 3-1(4)

<sup>381</sup> Guidelines, *supra* note 376 at 2.

<sup>382</sup> 2011 CanLII 51974 (SK LA)

<sup>383</sup> *ibid.* at 57.

<sup>384</sup> *Ibid.*

<sup>385</sup> *ibid.*

<sup>386</sup> *SEA*, *supra* note 349

<sup>387</sup> Guidelines, *supra* note 376 at 3.

Section 3-8 and section 3-9 of the Saskatchewan *SEA* outlines the general duties of the employers and supervisors, respectfully. Section 3-8(d) requires the employer 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 worker’s employment.<sup>388</sup>

Section 3.9(c) requires supervisors to “[e]nsure, insofar as is reasonably practicable, that all workers under the supervisor’s direct oversight and direction are not exposed to harassment at the place of employment.”<sup>389</sup> Employers and supervisors must be vigilant in recognizing the signs of workplace harassment and when they believe harassment is taking place, they must act promptly to stop the harassment.<sup>390</sup>

The *Regulations* detail specific duties for the employer to protect employees from workplace harassment. Section 36 strictly deals with requirements relating to harassment. It requires employers to develop, in consultation with the joint health committee, a written policy to prevent harassment.<sup>391</sup> Every policy must include the following ten features. There must be a definition of workplace harassment<sup>392</sup> and a statement indicating that all workers are entitled to a harassment-free workplace.<sup>393</sup> There must also be commitment statements that the employer will take every precautionary step to protect workers from harassment<sup>394</sup> and should harassment occur, take corrective action to amend and reconcile the conduct.<sup>395</sup> The policy must include procedures for the complaint process<sup>396</sup> and have a confidentiality statement noting that complainants will remain anonymous unless it is necessary to disclose for the investigation or as required by law.<sup>397</sup> It must also inform employees of their right to request assistance from an occupational health officer to resolve a complaint.<sup>398</sup> The policy must provide employees with information regarding discriminatory harassment and how to file a complaint under *The Saskatchewan Human Rights Code*.<sup>399</sup> Procedures for informing the results of the investigation to

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<sup>388</sup> *SEA*, *supra* note 376

<sup>389</sup> *SEA*, *supra* note 349

<sup>390</sup> *SEA*, *supra* note 376 at 5.

<sup>391</sup> *Regulations*, *supra* note 348 s. 36(1)

<sup>392</sup> *Ibid.*, s. 36(1)(a)

<sup>393</sup> *Ibid.*, s. 36(1)(b)

<sup>394</sup> *Ibid.*, s. 36(1)(c)

<sup>395</sup> *Ibid.*, s. 36(1)(d)

<sup>396</sup> *Ibid.*, s. 36(1)(e)

<sup>397</sup> *Ibid.*, s. 36(1)(f)

<sup>398</sup> *Ibid.*, s. 36(1)(g)

<sup>399</sup> *Ibid.*, s. 36(1)(h)

the complainant and accused harasser must be included.<sup>400</sup> Finally, the employer must include a statement that the policy is not intended to discourage or prevent anyone from pursuing his or her legal rights.<sup>401</sup> The policy must be implemented and posted in a common area in the workplace that is easily accessible to workers.<sup>402</sup>

To ensure the confidence of employees in the workplace harassment policy, employers and supervisors must demonstrate a commitment to providing a workplace free from harassment. Employers must have a clear commitment statement outlining that harassment will not be tolerated.<sup>403</sup> With respect to complaints, employers must take every single complaint seriously by explaining the options for dealing with harassment, that the complaint will be kept confidential and that the complainant will be protected from reprisal.<sup>404</sup> There must be a clear set of procedures for handling complaints that is consistent and fair for every party involved.<sup>405</sup> WorkSafe Saskatchewan suggests, “employers should also look beyond what is legally required and take additional action to create a respectful working environment.”<sup>406</sup>

The duties of employers are greatly detailed in the *Regulations*. While Saskatchewan employers are still required to develop their own workplace policy, the long list of requirements provides greater certainty as to what the policy must include. It also creates better consistency amongst all workplace in Saskatchewan.

### iii. Employee Rights and Responsibilities

Significantly, “Saskatchewan people have a right to healthy and safe work environments, free from harassment.”<sup>407</sup> With this right, comes responsibility. Saskatchewan’s *SEA* places a duty on employees specifically in relation to workplace harassment. Section 3-10(b) requires workers to “refrain from causing or participating in the harassment of another worker.”<sup>408</sup> A workplace free from harassment is not simply the employer’s responsibility. It is also every worker’s responsibility. WorkSafe Saskatchewan encourages employers to train or instruct their

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<sup>400</sup> Ibid., s. 36(1)(i)

<sup>401</sup> Ibid., s. 36(1)(j)

<sup>402</sup> Ibid., s. 36(2)

<sup>403</sup> Guidelines, *supra* note 376 at 4.

<sup>404</sup> Ibid. at 5

<sup>405</sup> *ibid.* at 8.

<sup>406</sup> Ibid. at 4.

<sup>407</sup> Ibid. at 1.

<sup>408</sup> *SEA*, *supra* note 349

employees of their rights and responsibilities concerning workplace harassment.<sup>409</sup> This instruction will provide workers with the necessary tools and knowledge on what is and is not appropriate conduct in the workplace.<sup>410</sup>

Expressing a duty to refrain from causing or participating in workplace harassment provides for accountability on the part of the employees. It must be understood that the work environment is not simply governed by the relationship between the employer and the employee. The work environment is strongly influenced by the all employee interaction. The duty to refrain holds employees accountable for their actions in the workplace. This is a significant and essential component of Saskatchewan's harassment model and one which should be recognized in other jurisdictions.

#### **iv. Complaints, Investigation and Recourse**

Bill 66 and the subsequent *Regulations* enable employers to develop and implement their own procedures for filing complaints and conducting investigations. WorkSafe Saskatchewan provides some guidance on how employers should administer the complaints and investigations process.<sup>411</sup> The Guidelines suggest that complaints can take three forms. Complaints could come in the form of seeking further information or advice as to whether the worker should file a complaint.<sup>412</sup> They could also be filed in an informal manner, which requires the employer to indirectly intervene to stop the behaviour.<sup>413</sup> The final recourse for employees would be to file a formal complaint.<sup>414</sup> It is suggested that those individuals who are designated to receive the complaints be trained to take the complaints seriously, to adhere to the harassment policy and to understand their role in the complaint process.<sup>415</sup>

The Guidelines provide suggestions for filing complaints and procedures for investigations. The complaint should be made in writing on a formal complaint form, ensuring that all the necessary information has been noted.<sup>416</sup> Following the complaint, an assessment of

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<sup>409</sup> Guidelines, *supra* note at 6.

<sup>410</sup> Ibid.

<sup>411</sup> Ibid.

<sup>412</sup> Ibid at 9.

<sup>413</sup> Ibid.

<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> Guidelines, *supra* note 376 at 12.

the complaint should be conducted to determine whether the complaint has merit in relation to the workplace policy.<sup>417</sup> If the assessment concludes that the complaint has merit, the employer should determine if immediate action is necessary to protect the worker from further harm.<sup>418</sup> Finally, the employer must conduct a formal and thorough investigation of the complaint.<sup>419</sup>

Where the results of the investigation are inconclusive of harassment, the employer must inform both the alleged harasser and the complainant of the results.<sup>420</sup> The employer is only entitled to take disciplinary action against a complainant if, on persuasive evidence, the complaint was made in bad faith.<sup>421</sup> Where the results of the investigation find the conduct was harassment, the employer has a duty to take corrective action.<sup>422</sup> This should include steps to prevent and stop harassment.<sup>423</sup>

#### **v. Adjudicators**

The *SEA* repealed the provisions for and appointment of “special adjudicators” for appeals of harassment decisions under section 56.3 of the *OHS Act* and replaced it with new provisions for adjudication under section 3-54 of the *SEA*.

Now, any person who is affected by the decision of an occupational health officer relating to harassment can appeal the decision to an adjudicator as stipulated in section 3-54(1) of the *SEA*. The adjudicator is required to

make every effort that the adjudicator considers reasonable to meet with the parties affected by the decision of the occupational health officer that is being appealed with a view to encouraging a settlement of the matter that is subject of the occupational health officer’s decision.<sup>424</sup>

These are the only two specific provisions for appeals to an adjudicator relating to harassment.

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<sup>417</sup> Ibid.

<sup>418</sup> Ibid.

<sup>419</sup> *ibid.*

<sup>420</sup> Ibid. at 15.

<sup>421</sup> Ibid.

<sup>422</sup> Ibid.

<sup>423</sup> Ibid. 15.

<sup>424</sup> *SEA*, *supra* note 349 at s. 4-5(2)(a)



**TABLE 3: Synopsis of Saskatchewan’s Provisions on Workplace Harassment**

<b>Definition:</b>	<p><b>“harassment”</b> Any inappropriate conduct, comment, display, action or gesture by a person: (iii) that either: ... (b) ... 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 (iv) that constitutes a threat to the health or safety of the worker;<sup>425</sup></p> <p><b>“Harassment”</b> can be (a) repeated conduct, comments, displays, actions or gestures must be established; 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 must be established.</p>
<b>Employer Responsibilities:</b>	<p>Employers must:</p> <ul style="list-style-type: none"> <li>– reasonably protect workers from workplace harassment</li> <li>– develop a written policy to prevent workplace harassment that includes: <ul style="list-style-type: none"> <li>↳ definition of harassment</li> <li>↳ statement that all workers are entitled to a workplace free from harassment</li> <li>↳ commitment statement to take precautionary steps to protect workers</li> <li>↳ the corrective action an employer will take if harassment occurs</li> <li>↳ complaint procedures</li> <li>↳ confidentiality statement</li> <li>↳ statement that employees can request an occupational health officer for assistance during the complaint process</li> <li>↳ procedures for informing parties of results of the investigation into the complaint</li> <li>↳ information regarding harassment claims under the <i>Human Rights Code</i></li> <li>↳ statement indicating the policy is not intended to prevent other legal rights</li> </ul> </li> </ul>
<b>Employee Rights &amp; Responsibilities:</b>	<p>Employee’s Right:</p> <ul style="list-style-type: none"> <li>– to work in an harassment free workplace</li> </ul> <p>Employee’s Responsibility:</p> <ul style="list-style-type: none"> <li>– must refrain from participating in or causing workplace harassment</li> </ul>
<b>Complaints, Investigations &amp; Recourse</b>	<p>Employers are required to develop their own procedures for complaints, investigation and recourse</p> <p>It is suggested that employers implement the following:</p> <ul style="list-style-type: none"> <li>– Have 3 types of complaint processes: <ul style="list-style-type: none"> <li>↳ Information Seeking: an employee seeks information regarding concern and whether to make a complaint</li> <li>↳ Informal Complaint: an employee makes a complaint and the employer intervenes indirectly</li> <li>↳ Formal Complaint: an employee makes a formal complaint in writing and the employer assess the complaint, determines if immediate action is necessary, conducts and investigation and takes corrective action to prevent/stop conduct</li> </ul> </li> </ul>
<b>Adjudicator:</b>	<p>Employees can appeal a decision from the occupational health officer to an adjudicator</p>

<sup>425</sup> SEA, *supra* note 349, s. 3-1(1)(l)

## (C) Provisions on Violence

Saskatchewan's workplace violence provisions have been included in Saskatchewan's *OHS*A since 1993 (with only minor language amendments). Saskatchewan separates workplace violence provisions from workplace harassment. Table 4 (on page 76) provides a synopsis of Saskatchewan's law on workplace violence.

### i. Definition

Workplace violence is defined as "...the attempted, threatened or actual conduct of a person that causes or is likely to cause injury, and includes any threatening statement or behaviour that gives a worker reasonable cause to believe that the worker is at risk of injury."<sup>426</sup> This provision, as well as the Guidelines<sup>427</sup> published by WorkSafe, do not identify whether injury suffered must be physical or if it can include non-physical injury such as psychological harm.

Section 37(2) of the *Regulations* limit this provision to prescribed areas of employment including healthcare services, pharmaceutical-dispensing services, education services, police services, corrections services, other law enforcement services, security services, crisis counselling and intervention services, security services, retail sales establishments in operation between 11:00 p.m. and 6:00 a.m., financial services, premises selling alcoholic beverages, taxi services and transit services.<sup>428</sup> This limitation is problematic. While these workplaces are known to have a greater risk of workplace violence, these provisions should be extended to *all* workplaces in Saskatchewan. Every worker should be entitled to a violence-free workplace regardless of the industry or sector they are employed in.

### ii. Employer Responsibilities

Saskatchewan employers that fall under the prescribed sectors are required, under section 3-21(1) of the *SEA*, to develop and implement a workplace violence policy. Prior to the

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<sup>426</sup> *Regulations*, *supra* note 348 s. 37(1)

<sup>427</sup> Saskatchewan Ministry of Labour Relations and Workplace Safety, *Violence: A Guide to Developing a Violence Policy Statement*, (Regina: WorkSafe Saskatchewan, 2010).

<sup>428</sup> *Regulations*, *supra* note 348, s. 37(2)

development and implementation of this workplace policy, the employer must conduct a risk assessment.<sup>429</sup> This assessment must consider the attributes of all workers, the nature of the work environment and any past history of violent incidents in their workplace or in similar workplaces in the province.<sup>430</sup> The results of the assessment must be included in the workplace violence policy. The policy must be developed in consultation with an occupational health committee, an occupational health and safety representative or the workers, if neither of the aforementioned committees exists.<sup>431</sup>

Sections 37 of the *Regulations* stipulate that the policy must be in writing and must include specific. There must be a commitment statement that the employer will minimize or eliminate the risk of violence erupting in the workplace.<sup>432</sup> The employer must identify and list the worksites<sup>433</sup> and staff positions<sup>434</sup> which have been or can be exposed to violent situations. The policy must also include the procedures for informing workers of the risk of violence,<sup>435</sup> the steps the employer will take to minimize the risk,<sup>436</sup> procedures to be followed if workers are exposed to violence,<sup>437</sup> and the employer's investigation procedures.<sup>438</sup> There must also be a statement advising employees to seek medical assistance or counselling if affected by workplace violence.<sup>439</sup> The policy should include a commitment statement that the employer will train the workers on recognizing risks of violence.<sup>440</sup> Finally the policy must include procedures on how employees should seek assistance when violent incidents occur.<sup>441</sup>

Again, the detail within the *Regulations* provides Saskatchewan employers with the essential components of a workplace violence policy. Like the detailed provisions for workplace harassment, these provisions enable consistency amongst the prescribed sectors of employment.

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<sup>429</sup> Guidelines, *supra* note 376, at 12.

<sup>430</sup> Ibid.

<sup>431</sup> SEA, *supra* note 349, s. 3-21(1)

<sup>432</sup> Regulations, *supra* note 348, s. 37(3)(a)

<sup>433</sup> Ibid. s. 37(3)(b)

<sup>434</sup> Ibid. s. 37(3)(c)

<sup>435</sup> Ibid., s. 37(3)(d)

<sup>436</sup> Ibid., s. 37(3)(e)

<sup>437</sup> Ibid. s. 37(3)(f)

<sup>438</sup> Ibid. s. 37(3)(g) and s.37(3)(j)

<sup>439</sup> Ibid. s. 37(3)(h)

<sup>440</sup> Ibid. s. 37(3)(i)

<sup>441</sup> Ibid. s. 37(3)(j)

### **iii. Employee Rights**

There are no specific provisions related to workplace violence for employees, however, section 3-31 of the *SEA* enables a worker to refuse to work where there is reason to believe that the workplace is “dangerous to the worker’s health or safety.” Thus, where an employee believes that violence is imminent they have the right to refuse under this provision.

### **iv. Complaints, Investigations and Recourse**

As Saskatchewan’s method of regulating workplace violence is via an employer policy, the respective workplace procedures on filing a complaint, conducting an investigation and disciplinary action will differ from one employer to the next. However, violent situations should be reported to the police and investigations should ensue immediately following the incident.

### **(D) Conclusion**

Saskatchewan’s legislative response to workplace harassment is clear and recognizes the seriousness of this workplace conduct. The provisions for workplace harassment are comprehensive and address the components to prevent and stop this workplace conduct from continuing. This approach is one which should be used as a reference for other jurisdictions when implementing workplace harassment legislation.

Saskatchewan’s approach to workplace violence legislation is also clear and encompasses the components necessary to prevent, stop and address workplace violence. However, these protections are only available to prescribed sectors of employment. This leads to unequal protections for Saskatchewan workers. Thus, while the provisions of this approach are commendable, there should be reconsideration of applying these provisions to all sectors of employment.

**TABLE 4: Synopsis of Saskatchewan’s Provisions on Workplace Violence**

<b>Definition:</b>	<p>“<b>violence</b>”  “...the attempted, threatened or actual conduct of a person that causes or is likely to cause injury, and includes any threatening statement or behaviour that gives a worker reasonable cause to believe that the worker is at risk of injury.”<sup>442</sup></p> <p>* The provisions on violence are limited to prescribed sectors of employment or where assessment indicates risk of violence</p>
<b>Employer Responsibilities:</b>	<p>Employers must:</p> <ul style="list-style-type: none"> <li>– conduct an assessment to determine risk of violence</li> <li>– develop and implement a written workplace violence policy in consultation with occupational health committee, the representative or the workers. It must include: <ul style="list-style-type: none"> <li>↳ commitment statement that employer will minimize or eliminate the risk of violence</li> <li>↳ list worksites and positions at risk</li> <li>↳ procedures for informing workers of risk</li> <li>↳ procedures to minimize risk of violence</li> <li>↳ procedures for when violence occurs</li> <li>↳ investigating procedures</li> <li>↳ statement advising employees to seek medical attention following an incident of violence</li> <li>↳ statement on training procedures</li> </ul> </li> </ul>
<b>Employee Rights &amp; Responsibilities:</b>	<p>Right:</p> <ul style="list-style-type: none"> <li>– to refuse to work if there is a belief that the workplace is dangerous</li> </ul>
<b>Complaints, Investigations &amp; Recourse</b>	<p>Employers are required to develop their own procedures for complaints, investigations and recourse</p>

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<sup>442</sup> *Regulations, supra* note 348 s. 37(1)

### 4.3 Ontario

Ontario enacted workplace violence and harassment provisions in December 2009. Prior to the enactment of workplace violence and harassment legislation, workers in Ontario were only protected from enumerated grounds of harassment via the *Human Rights Code*.<sup>443</sup> Much of the case law concerning workplace violence and harassment relied on section 25(2)(h) of the *Occupational Health and Safety Act*<sup>444</sup> (the “OHS Act”). This provision required employers to “take every precaution reasonable in the circumstances for the protection of a worker.”<sup>445</sup> Following many Coroner’s Inquests into deaths resulting from workplace violence and harassment, the Ministry of Labour consistently called for the aforementioned provision to be reviewed to determine whether it provided the appropriate protection for workers in relation to violence and harassment.

The legislative response that Ontario adopted does not fit nicely within in any of the three theoretical paradigms. There are no provisions relating to protecting an individual’s dignity or psychological wellbeing. It also does not fit within the anti-discrimination paradigm as Ontario protects against enumerated grounds of harassment within the *Human Rights Code*. Arguably, Ontario’s legislative response is an example of the struggle to understand and accept the notion of protecting a worker’s wellbeing.

#### (A) Legislative History

Three cases ignited the debate and subsequent introduction of several Bills. Many of the Bills that were introduced died on the order paper, thus prolonging the implementation of violence and harassment legislation in Ontario.

In June 1996, Theresa Vince was murdered at her workplace by her supervisor, Russell Davis, whom committed suicide following the murder. A Coroner’s Inquest into their deaths revealed evidence that Ms. Vince had been the target of workplace harassment for more than a year prior to the final violent incident.<sup>446</sup> The jury made several recommendations requesting that

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<sup>443</sup> *Human Rights Code*, R.S.O. 1990, c. H.19.

<sup>444</sup> RSO 1990, c O.1.

<sup>445</sup> *ibid.* s. 25(2)(h)

<sup>446</sup> Chief Coroner for Ontario, *Verdict Explanation: Inquest into the Deaths of Theresa Vince and Russell Davis September 22-December 2, 1997* (Toronto: Office of the Chief Coroner, 1997) at 2-4.

employers implement effective policies and procedures for workplace violence and harassment as well as requesting that the Ministry of Labour include harassment provisions in the *OHSA*.<sup>447</sup> Those recommendations were never acted upon.

Another workplace tragedy in April 1999 increased concern over the viability of current health and safety laws in relation to workplace violence and harassment. Pierre Lebrun shot and killed four co-workers before killing himself at his workplace.<sup>448</sup> Findings of the Inquest revealed escalating bullying by co-workers and complaints made by Mr. Lebrun, which were ignored by his employer. The jury made a number of recommendations. First, the jury proposed that both the federal and provincial governments implement legislation on workplace violence.<sup>449</sup> Second, as was suggested in the Vince Inquest, the jury recommended that employers implement a “zero tolerance” workplace policy for violence and harassment.<sup>450</sup> As a result of these recommendations, the Ministry of Labour responded stating that the duty of employers under section 25(2)(h) of the *OHSA* already met the recommendation for employers to create anti-harassment and violence policies.<sup>451</sup> Responding to these recommendations, the Ministry of Labour concluded that there was no need to enact separate legislation concerning violence and harassment in the workplace.

November 2005 marked a workplace tragedy that ultimately pushed legislators to act. Lori Dupont, a nurse, was murdered by Dr. Marc Daniel, a co-worker, with whom she had a romantic relationship. This was a case of domestic violence that was transposed into the workplace.<sup>452</sup> An inquest into the deaths resulted in similar recommendations as the two previous cases. The jury recommended that employers create a workplace policy on violence and harassment as well as requested the Ministry of Labour to investigate whether protection from domestic violence should be included in the *OHSA*.<sup>453</sup>

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<sup>447</sup> Ibid, at 4-11.

<sup>448</sup> Chief Coroner for Ontario, *Coroner’s Explanation of Jury Verdict: Inquest into the Deaths of Harry Schoenmakers, David Lemay, Brian Guay, Clare Davidson, Pierre Lebrun* (Toronto: Office of the Chief Coroner, 2001) at 2.

<sup>449</sup> Ibid at 5.

<sup>450</sup> Ibid.

<sup>451</sup> Ministry of Labour, *Report of the Ministry of Labour on the Recommendations of the Coroner’s Jury Regarding the Inquest into the Deaths of Harry Schoenmakers, David Lemay, Brian Guay, Clare Davidson, Pierre Lebrun* (Toronto: Ministry of Labour, 2001) at 1.

<sup>452</sup> Chief Coroner of Ontario, *Report on the inquest into the deaths of Lori Dupont and Marc Daniel* (Toronto: Office of the Chief Coroner, 2009) at 15-20.

<sup>453</sup> Ibid. at 6-11.

These three cases sparked an increase concern in the protection of workers against violence and harassment in the workplace. Between 2001 and 2007 eight attempts<sup>454</sup> were made to introduce bills to prevent any further workplace tragedy. The bills all had similar purposes and methods of protecting workers from this workplace phenomenon. All of the bills adopted an employer-based workplace policy model. None of the bills provided workers with an express right to work free from violence or harassment.

Thus, from the very outset of the Ontario legislators' attempt at drafting workplace violence and harassment law, it is clear that the government would rather place the responsibility in the hands of the employer rather than providing Ontarians with the right not to be subjected to workplace violence and harassment. This model is carried through into the introduction and implementation of Bill 168.

### **i. Introduction and Debates**

The Liberal government introduced Bill 168, *An Act to amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace and other matters*,<sup>455</sup> on April 20, 2009 and despite grave contention by the official opposition (the Progressive Conservatives, "PC") and other Members of Parliament ("MPs"), the Bill was given Royal Assent on December 15, 2009. The purpose of Bill 168 was to strengthen the general duty of employers under section 25(2)(h) of the *OHS Act* to keep the workplace safe by introducing violence and harassment provisions, enabling employers and employees to understand "their

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<sup>454</sup> The following is a list of the previous Bills introduced, all of which died on the order paper: Bill 78, *An Act to amend the Occupational Health and Safety Act to protect workers from sexual harassment*, 2<sup>nd</sup> Sess, 37<sup>th</sup> Leg, Ontario, 2001; Bill 51, *An Act to amend the Occupational Health and Safety Act with respect to acts of workplace violence*, 4<sup>th</sup> Sess, 37<sup>th</sup> Leg, Ontario, 2003; Bill 55, *An Act to amend the Occupational Health and Safety Act to protect workers from sexual harassment in the workplace*, 4<sup>th</sup> Sess, 37<sup>th</sup> Leg, Ontario, 2003; Bill 126, *An Act to amend the Occupational Health and Safety Act to protect workers from harassment in the workplace*, 1<sup>st</sup> Sess, 38<sup>th</sup> Leg, Ontario, 2004; Bill 131, *An Act to amend the Occupational Health and Safety Act with respect to acts of workplace violence and workplace harassment*, 1<sup>st</sup> Sess, 38<sup>th</sup> Leg, Ontario, 2004; Bill 35, *An Act to amend the Occupational Health and Safety Act to protect workers from harassment*, 2<sup>nd</sup> Sess, 38<sup>th</sup> Leg, Ontario, 2005; Bill 45, *An Act to amend the Occupational Health and Safety Act to protect workers from harassment in the workplace*, 1<sup>st</sup> Sess, 39<sup>th</sup> Leg, Ontario, 2007; Bill 29, *An Act to amend the Occupational Health and Safety Act to protect workers from harassment and violence in the workplace*, 1<sup>st</sup> Sess, 39<sup>th</sup> Leg, Ontario, 2007

<sup>455</sup> Bill 168, *An Act to amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace and other matters*, 1<sup>st</sup> Sess, 39<sup>th</sup> Parl, Ontario, 2009 (assented to 15 December 2009), SO 2009, c 23.



responsibilities and rights to prevent and respond to workplace violence and harassment.”<sup>456</sup> While there was support from MPs for the implementation of workplace harassment and violence legislation, there was significant contention with the language and provisions of Bill 168.

Strikingly, there was minimal comparison of Bill 168 with similar legislation adopted in Saskatchewan and Québec several years prior. Only one member from the NDP mentioned the legislation in Québec and Saskatchewan in passing, suggesting Bill 168 was faulty, as it did not address the psychological harm suffered by victims of violence and harassment, however the MP did not go into detail as to why Ontario’s legislation was faulty.<sup>457</sup> This is the only reference made to other Canadian jurisdictions that had workplace harassment legislation and no in-depth comparison was discussed during the debate process.

Four prominent features and goals of this Bill were heavily debated by MPs and the community during the parliamentary debate process.

#### **a. Definitions**

Defining workplace harassment and violence was a central feature of much of the debate process. The definition of “workplace harassment” was introduced as “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.”<sup>458</sup> Bill 168 defined “workplace violence” as

- (a) The exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
- (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
- (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.<sup>459</sup>

MPs and community groups raised significant contention over these definitions. One member of the PC party argued that this definition of harassment was “a huge, broad, all-

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<sup>456</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39<sup>th</sup> Parl, 1<sup>st</sup> Sess, No. 136 (20 April 2009) at 6086 (Hon. Peter Fonseca).

<sup>457</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39<sup>th</sup> Parl, 1<sup>st</sup> Sess, No. 170 (5 October 2009) at 7810-7811.

<sup>458</sup> *OHSAs*, *supra* note 444.

<sup>459</sup> *Ibid.*

encompassing and... false concept of what harassment is.”<sup>460</sup> It was further noted that the legal definition of harassment “is prolonged and intolerable conduct by a person to another” not simply “unwelcomed” conduct as described in Bill 168.<sup>461</sup> A common consensus during the Standing Committee on Public Policy Debates was the misplaced emphasis on physical violence and the insufficient recognition of the psychological effects of violence and harassment in the workplace. Community groups suggested that the psychological affects, rather than the physical affects, can be more detrimental, as there tends to be multiple and prolonged incidents which increase in intensity over time, increasing the cost on both the employer’s bottom line and the employee’s financial and psychological wellbeing.<sup>462</sup> The Bullying Education and Awareness Centre of Ontario petitioned for the definitions to be amended to recognize “psychological harassment” and “psychological violence.”<sup>463</sup> It was presented that this Bill failed to adequately address the prevalence of workplace bullying.<sup>464</sup> Without an amendment to the definitions, it was submitted that this Bill “has the potential for employers to be faced with many frivolous complaints.”<sup>465</sup>

During the final meeting of the Standing Committee on Social Policy, 24 proposals were made by the NDP requesting amendments to Bill 168. All of the proposals were defeated.<sup>466</sup> Of interest is NDP’s motion 4, which requested that amendments be made to the “workplace violence” definition to include “the endangerment of the physical or psychological health or safety of a worker.”<sup>467</sup> The Liberal government defeated this motion arguing that Bill 168 already “deals with situations where there is psychological harassment with threats of physical harm.” This suggests that the Liberal government was primarily concerned with physical acts of violence and completely undermined or ignored the psychological, non-physical forms of

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<sup>460</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39<sup>th</sup> Parl, 1<sup>st</sup> Sess, No. 170 (5 October 2009) at 7805.

<sup>461</sup> *Ibid* at 7805

<sup>462</sup> Ontario, Legislative Assembly, Standing Committee on Social Policy, “Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009” in *Official Report of Debates (Hansard)*, No SP-41 (23 November 2009) at SP-960, and SP-979; Ontario, Legislative Assembly, Standing Committee on Social Policy, “Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009” in *Official Report of Debates (Hansard)*, No SP-42 (24 November 2009) at SP-987.

<sup>463</sup> Ontario, Legislative Assembly, Standing Committee on Social Policy, “Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009” in *Official Report of Debates (Hansard)*, No SP-40 (17 November 2009) at SP-947-SP-948.

<sup>464</sup> *Ibid.* at SP-948.

<sup>465</sup> *Ibid.* at SP-947.

<sup>466</sup> *Ibid.* at SP-1005-SP-1018.

<sup>467</sup> *Ibid.* at SP-1006.

violence, which, too, could have a harmful effect on workers' health and safety. The NDP also suggested that rather than having separate definitions for workplace violence and harassment, this workplace phenomenon should be defined in the following way: "workplace violence" means any incident in which a person is threatened, abused or assaulted in circumstances related to their work... and includes all forms of harassment, bullying, intimidation, physical threats, assaults, robbery and other intrusive behaviours.<sup>468</sup> This definition recognizes the continuum of workplace behaviour. The Liberal government, however, defeated these motions citing that workplace violence and workplace harassment are two completely different acts and should be understood and dealt with separately "as there are unique protections for each."<sup>469</sup>

### **b. Domestic Violence**

Resulting particularly from the workplace deaths of Theresa Vince and Lori Dupont, the Liberal government included a domestic violence provision. Section 32.0.4 of the Bill states:

If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker.

This provision was one of the driving forces for Ontario enacting workplace violence and harassment legislation and a major topic of debate. On several occasions, the PC party particularly raised concern with this provision arguing that "the employer cannot be reasonably expected to know the personal relationship of employees, spouses or partners without a complete breach of people's privacy. And... if there are suspicions of potential violence, these personal details must be shared with all employees in that workplace."<sup>470</sup> The Liberals clarified that the employer is simply required to take action upon direct notification of a domestic dispute or if they witness evidence of a domestic dispute. The employer should not request personal information from employees as suggested by the PC members.<sup>471</sup> The PC party proposed that

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<sup>468</sup> Ibid. at SP-1005.

<sup>469</sup> Ibid. at SP-1005 and SP-1012.

<sup>470</sup> 5 October Debates, *supra* note 460 at 7806.

<sup>471</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39<sup>th</sup> Parl, 1<sup>st</sup> Sess, No. 175 (20 October 2009) at 8016.

rather than including a domestic violence provision in this Bill, laws relating to obtaining restraining orders should be amended which would provide a far better protection for victims.<sup>472</sup>

### c. Employer Policy Model

The third feature of Bill 168 that raised concern was the employer-based policy and procedure model. The Liberal government argued that enabling employers to create and implement workplace violence and harassment policies and procedures based on the needs and risks of their particular work environment would provide for better protection and flexibility of implementation.<sup>473</sup> Both the PC and NDP parties challenged this method. PC members argued that the Liberal government was merely passing their responsibility onto employers rather than adequately legislating against workplace violence and harassment.<sup>474</sup>

The complete lack of regulations accompanying this amendment proved problematic for the NDP party and some interests groups.<sup>475</sup> A prominent critique was the insufficient detail regarding the requirements for the violence and harassment policies and procedures that employers should implement. There was also concern over the employer's ability to effectively create and implement such policies and procedures due to the potential lack of knowledge or financial resources.<sup>476</sup>

### d. Costs

The final issue of contention was the costs associated with workplace violence and harassment and the legislative model for regulating such behaviour. This conduct has drastic costs on both the employee and the employer. By preventing injury and lost time, workplace productivity would increase and workplace insurance premiums would be reduced.<sup>477</sup> The Liberals argued that the implementation of this Bill would not “substantially increase” costs to

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<sup>472</sup> Ibid at 8014.

<sup>473</sup> 20 April Debates, *supra* note 456 at 6086; 5 October Debates, *supra* note 460 at 7802.

<sup>474</sup> 5 October Debates, *supra* note 460 at 7805.

<sup>475</sup> Ontario, Legislative Assembly, Standing Committee on Social Policy, “Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009” in *Official Report of Debates (Hansard)*, No SP-40 (17 November 2009) at SP-950.

<sup>476</sup> 20 October Debates, *supra* note 471 at 8019.

<sup>477</sup> 20 April Debates, *supra* note 456 at 6086; 5 October Debates, *supra* note 460 at 7802

Ontario business.<sup>478</sup> Despite this claim, the Canadian Federation of Independent Business raised concern over the costs that drafting, implementing and training would have on small to medium Ontario businesses and requested to have government assistance provided in order to absolve some of that cost.<sup>479</sup> This proposition never materialized.

## **(B) Provisions on Harassment and Violence**

As already discussed, Ontario tackled this workplace phenomenon via an amendment to the Ontario *OHS*A. This amendment provides clarification of the general duty of the employer under section 25(2)(h) of the Ontario *OHS*A in relation to workplace violence and harassment. This employer-based policy places the responsibility of regulating workplace violence and harassment in the hands of the employer, providing only minimal guidelines as to what must be included in the policies and programs. The reasoning for this was to enable employers to develop workplace policies and programs on violence and harassment that is workplace-specific, addressing the needs of that particular work environment.<sup>480</sup>

While Bill 168 deals with both violence and harassment in the workplace, there is a significantly greater emphasis on physical violence. It is also important to note that Ontario is the only jurisdiction in Canada with provisions on domestic violence included within their legislative approach. The Ministry of Labour (“MOL”) published *Health and Safety Guidelines: Workplace Violence and Harassment: Understanding the Law* (“Guidelines”)<sup>481</sup> to provide further information the Ontario employers. A synopsis of the provisions of workplace violence and harassment can be found in Table 5 (on page 95).

### **i. Definitions**

Bill 168 introduced two new definitions into the Ontario *OHS*A. These definitions are broad and encompass a range of behaviours.

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<sup>478</sup> 5 October Debates, *supra* note 460 at 7802.

<sup>479</sup> *Supra* note 475 at SP-939-SP-940.

<sup>480</sup> 20 April Debates, *supra* note 456 at 6086; 5 October Debates, *supra* note at 7802.

<sup>481</sup> Ontario, Ministry of Labour, *Workplace Violence and Harassment: Understanding the Law*, (Toronto: Occupational Health and Safety Branch, 2010).

### a. “Workplace Violence”

The language used in the definition of “workplace violence” is clear and encompasses the actions which could constitute workplace physical violence.

“workplace violence” means,

- (a) The exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
- (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
- (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.<sup>482</sup>

Violent conduct can include “verbally threatening to attack a worker; leaving threatening notes or sending threatening e-mails to a workplace; shaking a fist in a worker’s face; ... or throwing an object at a worker...”<sup>483</sup>

The *Corporation of the City of Kingston v. Canadian Union of Public Employees, Local 109*<sup>484</sup> (“*City of Kingston*”) is a leading case on the interpretation of workplace violence. This case held

workplace violence is the utterance of the words. There need not be evidence of an immediate ability to do physical harm. There need not be evidence of intent to do harm. No employee is required, as the receiver of the words, to live or work in fear of attack. No employee is required to look over their shoulder because they fear that which might follow.<sup>485</sup>

This case suggests that employees have an implied right to work free from violence or the threat of violence.

Further clarification on the interpretation of workplace violence was given in *Rheem Canada Limited v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)*.<sup>486</sup> The Arbitrator concluded that

when one employee confronts another, with voice angrily raise, and where the physicality of the speaker intimidates to such an extent that the recipient is made to feel unsafe, the recipient acts reasonably when he or she interprets that conduct as a threat. It is my view that the misconduct so described constitutes workplace violence within the meaning of the [*OHS*A].<sup>487</sup>

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<sup>482</sup> *OHS*A, *supra* note 444, s. 1(1).

<sup>483</sup> Guidelines, *supra* note 481 at 1-2.

<sup>484</sup> 2011 CanLII 50313 (ON LA).

<sup>485</sup> *Ibid* at 55.

<sup>486</sup> 2012 CanLII 51437 (ON LA).

<sup>487</sup> *Ibid.* at 10.

The definition of violence, while lacking any conception of the psychological harm which a victim could suffer, provides the accurate balance of clarity and ambiguity with respect to physical harm. One immediate downfall with this definition is the complete disregard to psychological harm that could be suffered in the workplace. As noted by scholars<sup>488</sup> and brought up several times by MPs and community groups during the Standing Committee,<sup>489</sup> violence is not merely physical nor does it only cause physical harm. It also can cause psychological harm, emotional distress and could lead to various mental health issues. Other jurisdictions in Canada have recognized the psychological harm associated with workplace violence. The Ontario legislators failed to recognize the gravity of psychological harm resulting from violence. The driving force behind this legislation came as a result of three tragic workplace violence incidents. Notwithstanding the psychological harm these three individuals endured leading up to the physical act resulting in death, the Ontario government seemed to place a higher emphasis on protecting against physical violence (and also domestic violence). Despite the government recognizing that there is a continuum of workplace behaviours which could begin as harassment and over time lead to violence,<sup>490</sup> this is clearly not a concern or a priority as the legislation only deals with physical rather than physical and psychological harms.

#### **b. “Workplace Harassment”**

The language used for the definition of “workplace harassment” is very broad and ambiguous. Bill 168 defines “workplace harassment” as “engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonable to be known to be unwelcome.”<sup>491</sup> Although the definition requires a “course of conduct” to establish harassment, jurisprudence has expanded the definition to also include a single serious incident.<sup>492</sup>

The Guidelines list behaviours which could amount to workplace harassment such as intimidating, isolating or discriminating targeted individuals. Harassment is also “making

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<sup>488</sup> Leymann *supra* note 6 and 92.

<sup>489</sup> *supra* note 475

<sup>490</sup> Guidelines, *supra* note 481 at 4.

<sup>491</sup> OHSA, *supra* note 444, s. 1(1).

<sup>492</sup> *Peterborough Regional Health Centre v. Ontario Nurses’ Assn.* (Withers Grievance), 2012 CanLII 52238 (ON LA) at para. 114.

remarks, jokes or innuendos that demean, ridicule, intimidate or offend; displaying or circulating offensive pictures or materials in print or electronic form [or] bullying...”<sup>493</sup>

The Guidelines also indicate behaviour that is not “workplace harassment” including

reasonable action or conduct by an employer, manager or supervisor that is part of his or her normal function... [such as] changes in work assignment, scheduling, job assessment and evaluations...[or] Differences of opinion or minor disagreements between co-workers...”<sup>494</sup>

This was recognized in *Conforti v. Investia Financial Services Inc. and Industrial Alliance Insurance and Financial Services Inc.*<sup>495</sup> (“Investia”); the leading jurisprudence in Ontario on workplace harassment. In this case, the applicant made a number of complaints that email communications from Investia employees amounted to bullying and harassment. His employment was terminated from Investia due to the derogatory and abusive tone of his responding email communications. The OLRB did not accept that the email communications to the applicant amounted to vexatious and unwelcomed conduct. “Harassment is not the same as an employer (or employees responsible for ensuring that other employees comply with rules and regulations) ensuring that rules are complied with...the employer’s conduct amounted to simply dealing with the applicant’s behaviour.”<sup>496</sup> The OLRB held that the applicant’s responding emails amounted to unacceptable and abusive behaviour<sup>497</sup> and as such, the employer’s response of termination was appropriate.<sup>498</sup>

The Ministry of Labour suggests that an employer should recognize and stop workplace harassment as it can “escalate to threats or acts of physical violence or a targeted worker may react violently to prolonged harassment in the workplace.”<sup>499</sup> This clearly suggests that the Ministry recognizes that there is a continuum of this behaviour. The problem, however, is that the legislation is not fully reflective of this continuum as the emphasis on workplace violence is much greater than workplace harassment. In almost all cases, workplace harassment is much more prevalent and physical violence occurs in only in a few cases. Ontario’s Bill 168 misplaces the emphasis on the conduct continuum.

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<sup>493</sup> Guidelines, *supra* note 481, at 3.

<sup>494</sup> *Ibid.* at 4.

<sup>495</sup> 2011 CanLII 28377.

<sup>496</sup> *Conforti v. Investia Financial Services Inc. and Industrial Alliance Insurance and Financial Services Inc.*, 2011 CanLII 60897 (ON LRB), at para 25

<sup>497</sup> *Conforti v. Investia Financial Services Inc. and Industrial Alliance Insurance and Financial Services Inc.* 2011 CanLII 28377 (ON LRB), at para 18

<sup>498</sup> *supra* note 496 at para. 29

<sup>499</sup> *Supra* note 481 [guideline] at 23



Another significant problem with the definition of workplace harassment in Bill 168 is its ambiguous language. Although the Guidelines indicate behaviours such as bullying or intimidation, the document is not legally binding. The government should have developed a clearer definition, highlighting the psychological aspects of workplace harassment.

## **ii. Employer Responsibilities**

The *OHS Act* requires Ontario employers to take every precaution reasonably necessary to protect their employees.<sup>500</sup> Under Bill 168, regulating workplace violence and harassment is now the responsibility of the employer. The employer has a duty to (1) create violence and harassment policies and programs, (2) to protect workers against domestic violence, (3) to provide information and training in relation to the policies and programs and (4) investigate any complaints of workplace harassment or violence.

### **a. Policies**

Section 32.0.1 requires Ontario employers to prepare a workplace policy on violence and a policy on harassment. These policies must be reviewed at least annually<sup>501</sup> and the policies must be posted at a high traffic area in the workplace.<sup>502</sup> Workplaces with five or fewer employees, unless ordered otherwise by an inspector,<sup>503</sup> do not need to post the policies.<sup>504</sup>

The Guidelines provide general requirements for these policies. It is suggested that the policies should

- show an employer's commitment to protecting workers from workplace violence;
- address [violence/harassment] from all possible sources (customers, clients, employers, supervisors, workers, strangers, and domestic/intimate partners);
- outline the roles and responsibilities of the workplace parties in supporting the policy and program; and
- be dated and signed by the highest level of management at the workplace<sup>505</sup>

This approach is beneficial as the provisions and guidelines enable the employer to adapt policies on workplace violence and harassment that best fit their work environment. The required risk

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<sup>500</sup> *OHS Act*, *supra* note 444, s. 25(2)(h)

<sup>501</sup> *Ibid.* at s. 32.0.1(1)

<sup>502</sup> *Ibid.* at s. 32.0.1(2)

<sup>503</sup> *Ibid.* at s. 55

<sup>504</sup> *Ibid.* at s. 32.0.1(3)

<sup>505</sup> Guidelines, *supra* note 481, at 7.

assessment which employers must conduct will outline the likelihood of violence occurring and thus, workplaces which are more prone to violence have the ability to extensively address these risks versus those workplaces which are less prone.

The trouble with this model is that it lacks consistency amongst workplaces in Ontario. Employers in Ontario could adopt a different approach to policies on workplace violence and harassment, thus creating a potential for unequal protections from workplace violence and harassment for Ontarians.

### **b. Duties for Violence**

The employer has three duties with respect to workplace violence: (1) conduct a workplace risk assessment, (2) create a violence program, and (3) inform and instruct workers.

First, section 32.0.3 requires an employer to conduct an assessment of the workplace, taking into consideration “the workplace, the type of work or the conditions of work” to determine the risk of violence in the workplace.<sup>506</sup> The assessment must also consider “circumstances that would be common to similar workplaces; circumstances specific to the workplace; and any other prescribed elements.”<sup>507</sup> The results of the assessment must be provided to either a health and safety committee or a representative and if neither exists, the results must be reported to the employees.<sup>508</sup> A reassessment must be conducted “as often as necessary” to assure that the violence program accurately recognizes and manages the risk of violence in the workplace.<sup>509</sup> There are no parameters to discern what amounts to “as often as necessary”, thus it assumes that employers are capable of recognizing when and if reassessment is necessary. This provision is both beneficial and disadvantageous. Assessing the specific workplace circumstances and potential risks enables the employer to create a custom-fit program to ensure their employees are protected from workplace violence. On the contrary, this provision assumes that the employer has adequate access to resources to conduct an accurate workplace risk assessment. Several concerns should be flagged with this provision. Does the employer have the knowledge required to recognize risks? If not, does the employer have the ability to gain

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<sup>506</sup> *OHSA*, *supra* note 444, s. 32.0.3(1)

<sup>507</sup> *Ibid.* at s. 32.0.3(2)

<sup>508</sup> *Ibid.* at s. 32.0.3(3)

<sup>509</sup> *Ibid.* at s. 32.0.3(4)

sufficient knowledge to recognize risks? Will the employer spend enough time on the assessment to address the risks?

Second, the employer is required under section 32.0.2 to “develop and maintain a program to implement the policy with respect to workplace violence.”<sup>510</sup> This program must include measures and procedures to control the assessed risks, to summon for immediate assistance if violence occurs, to report incidents and to provide details on how the employer will investigate and rectify the incident.<sup>511</sup> Within the Guidelines, the Ministry provides a sample program with measures and procedures that the employer can consider when developing their program.<sup>512</sup> This duty is partially dependent on the results of the risk assessment. If the employer conducts a substandard risk assessment, the developed program will not fully encapsulate and address the potential risks of violence and thus not provide adequate protection to workers. If the government, however, generated a workplace violence program to be implemented across all Ontario businesses or provide more regulatory guidelines on what needs to be included within the policy and programs, it would more adequately address specific workplace risks.

The final duty of an employer in relation to workplace violence is to provide information and instruction to employees regarding the workplace violence policy and program as required by section 32.0.5. This also includes a duty to provide information to employees regarding a person’s history of violent behaviour if the employees will encounter that individual or if the risk is likely to cause injury to that employee.<sup>513</sup> The Arbitrator in *The City of Kingston*<sup>514</sup> stated that this provision denotes that “workplace safety trumps personal privacy.”<sup>515</sup> This is one particular provision which sparked contention with MPs due to privacy concerns for the individual with a violent past.<sup>516</sup> The Guidelines stipulate that employers will need to consider an individual’s right to privacy as required by the law<sup>517</sup> and should seek legal advice if unsure whether there would be a breach.<sup>518</sup>

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<sup>510</sup> Ibid. at s. 32.0.2(1)

<sup>511</sup> Ibid. at s. 32.0.2(2)

<sup>512</sup> Guidelines, *supra* note 481 at 32.

<sup>513</sup> OHSA, *supra* note 444, s. 32.0.5(3)

<sup>514</sup> *City of Kingston*, *supra* note 484

<sup>515</sup> Ibid at 54.

<sup>516</sup> 5 October Debates, *supra* note 460 at 7806

<sup>517</sup> Canada, *Youth Criminal Justice Act* SC 2002 c.1; Canada, *Personal Information Protection and Electronic Documents Act* SC 2000 c.5; Ontario, *Personal Health Information Protection Act* SO 2004 c. 3

<sup>518</sup> Guidelines, *supra* note 481 at 16.

Training employees on the workplace policies and procedures relating to workplace violence is essential in order for employees to accurately recognize and report incidents.

**c. Duties for Domestic Violence**

As a result of the influencing cases for this Bill, Ontario included a domestic violence provision. Section 32.0.4 states

If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker.<sup>519</sup>

The Guidelines note that employers will become aware of domestic violence where an incident occurs at the workplace or if the employer is informed either by the targeted worker, co-workers, some other individual or through threatening actions such as phone calls, emails or unwanted visits to the workplace.<sup>520</sup> The Guidelines stipulate that domestic violence should be assessed and dealt with on a case-by-case basis. This could include taking action to prevent incidents in the workplace even if the targeted worker does not want steps to be taken.<sup>521</sup>

Domestic violence is a very sensitive issue for victims as well as bystanders. It can be inescapable for victims, as demonstrated in the cases of Theresa Vince and Lori Dupont. Providing protection for workers who may be the victim of a domestic dispute has its benefits. It provides for a sense of security while the victim is at work. However, including this provision within workplace legislation creates a burden on employers to moderate domestic violence.

While this provision was the driving force behind Bill 168, there has been no subsequent jurisprudence in the four years this provision has been in force. This is significant as it demonstrates that domestic violence, while harmful, may not be as prevalent in the workplace as was suggested in the Debates.

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<sup>519</sup> *OHSA*, *supra* note 444, s. 32.0.4.

<sup>520</sup> Guidelines, *supra* note 481 at 18

<sup>521</sup> *Ibid.* at 17-18

#### d. Duties for Harassment

The employer has two duties with respect to workplace harassment: (1) to create and maintain a workplace harassment program; and (2) to provide information and instruction to workers concerning the program. First, section 32.0.6 requires the employer to “develop and maintain a program to implement the policy on workplace harassment.”<sup>522</sup> It must include reporting procedures for incidents of workplace harassment<sup>523</sup> and investigating and rectifying measures, which the employer will undertake when incidents or complaints erupt.<sup>524</sup> With the emphasis of this Bill on workplace violence, a concern arises as to whether the harassment program developed by the employer will focus on psychological harassment behaviours such as bullying or ridiculing. Furthermore, it calls into question whether the employer will develop a harassment policy and program that is as in-depth and effective as their workplace violence policy and program.

The second and final duty of the employer, under section 32.0.7, requires the employer to provide information and instruction to employees regarding the workplace harassment policy and program.<sup>525</sup> Information and instruction on how to recognize and respond to workplace harassment should be provided to all employees with consideration of their position.<sup>526</sup> All employees should receive training on how to conduct oneself in the workplace so as not to harass or bully any fellow co-worker. Managers and supervisors should receive more in depth training on how to prevent, recognize, and intervene when necessary, where as employees should receive training on how to recognize and report such conduct.<sup>527</sup>

The OLRB in *Investia* found that Bill 168 did not create an obligation for employers to keep the workplace free from harassment stating that “the legislature could very easily have said an employer has an obligation to provide a harassment free workplace but it did not.”<sup>528</sup> This decision was affirmed in *Ljuboja v. Aim Group Inc.*<sup>529</sup>

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<sup>522</sup> *OHSA*, *supra* note 444, s. 32.0.6(1)

<sup>523</sup> *Ibid.* at s. 32.0.6(2)(a)

<sup>524</sup> *Ibid.* at s. 32.0.6(2)(b)

<sup>525</sup> *Ibid.* at s. 32.0.7(a)

<sup>526</sup> *Guidelines*, *supra* note 481 at 25

<sup>527</sup> *Ibid.*

<sup>528</sup> *Investia*, *supra* note 496 at para 15.

<sup>529</sup> 2013 76529 (ON LRB) at para 35.

### iii. Employee Rights and Responsibilities

Bill 168 does not prescribe any specified duties for employees to comply with. It does, however, provide in section 32.0.5(1) that "... the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence." Under section 28 of the *OHSA*, Ontario workers have a duty to work in compliance with the provisions of the *OHSA*<sup>530</sup> as well as report to the employer any infringement of the *OHSA*.<sup>531</sup> This amendment only applies to situations involving workplace violence. It does not apply to workplace harassment and therefore employees do not have a duty to report situations involving workplace harassment. Again, this highlights the inadequacies of Bill 168. The emphasis placed on workplace violence over workplace harassment fails to effectively control the continuum of workplace behaviour.

In relation to workers' rights, Bill 168 adds subsection b.1 to section 43(3) of the Ontario *OHSA* allowing workers to refuse to work where the workers believes that "workplace violence is likely to endanger himself or herself."<sup>532</sup> Furthermore, section 43(5) was amended to enable workers the right to remain "in a safe place that is as near as reasonably possible to his or her workstation" until the investigation into the workplace violence incident is completed.<sup>533</sup> These amended provisions do not apply to workplace harassment.

### iv. Complaints, Investigations and Recourse

Bill 168 requires employers to develop and implement reporting and investigating procedures. The employer must conduct an investigation that is procedurally fair for all complaints made by employees.<sup>534</sup> At the discretion of the employer, investigations can either be conducted by an internal investigator or an external investigator.<sup>535</sup> Where situations arise causing immediate danger to employees, the employer must contact the police.<sup>536</sup>

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<sup>530</sup> *OHSA*, *supra* note 444, s. 28(1)(a)

<sup>531</sup> *Ibid.* at s. 28(1)(d)

<sup>532</sup> *Ibid.* at s. 43(3)(b.1)

<sup>533</sup> *Ibid.* at s. 43(5)

<sup>534</sup> Elaine Newman, *Violence and Harassment in the Workplace: A Practical Guide to Ontario's Bill 168 for Employers, Unions and Employees* (Toronto: Lancaster House, 2012), at 82.

<sup>535</sup> *Ibid.* at 92

<sup>536</sup> *Ibid.*

The Arbitrator in *The City of Kingston*<sup>537</sup> noted that Bill 168 changed the way an employer should respond to a threat of violence. The employer must

investigate allegations of workplace violence with a full and fair approach, assessing objectively verifiable fact, and ensuring that decision-making in responding to the incident is informed, reasonable and proportionate. The seriousness of the allegation does not minimize the requirement for thorough and appropriate investigation and decision-making.<sup>538</sup>

With respect to disciplining employees responsible for committing violence in the workplace, *The City of Kingston* case held that each case must turn on its own facts,

guided by the usual criteria referred to in the arbitral jurisprudence, and must be reasonable and proportionate. It would be a mistake for any employer to assume the Bill 168 amendments make termination automatic or necessary if the misconduct amounts to workplace violence.<sup>539</sup>

During the investigation process, the employee has the right to refuse to work in unsafe conditions and to remain in an area that is safe from harm for the duration of the investigation.<sup>540</sup>

### **(C) Conclusion**

Ontario's approach to workplace harassment and violence legislation is a step in the right direction. It is clear that Ontario recognizes the conduct continuum by implementing violence and harassment provisions within the same section. The emphasis on violence over harassment is cause for concern. In comparison to other jurisdictions, there are areas that are in much need of improvement.

*[Continued on next page]*

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<sup>537</sup> *City of Kingston*, *supra* note 484

<sup>538</sup> *ibid.* at 56.

<sup>539</sup> *Ibid.* at 53.

<sup>540</sup> *OHSA*, *supra* note 444, s. 43

**TABLE 5: Synopsis of Ontario’s Provisions on Workplace Violence and Harassment**

<b>Definition:</b>	<p><b>“workplace violence”</b></p> <ul style="list-style-type: none"> <li>(a) The exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,</li> <li>(b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,</li> <li>(c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker. * The provisions on violence are limited to prescribed sectors of employment or where assessment indicates risk of violence</li> </ul> <p><b>“workplace harassment”</b>  “engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonable to be known to be unwelcome.”<sup>541</sup></p>
<b>Employer Responsibilities:</b>	<p>Employers must:</p> <ul style="list-style-type: none"> <li>– create and implement a policy and program for violence and harassment</li> <li>– the policies and programs must be reviewed at least annually</li> <li>– conduct an assessment to determine risk of violence</li> <li>– provide information to workers regarding an individual’s violent past</li> <li>– protect workers against domestic violence</li> <li>– provide information and training on the policies and programs</li> <li>– investigate complaints</li> </ul>
<b>Employee Rights &amp; Responsibilities:</b>	<p>Right:</p> <ul style="list-style-type: none"> <li>– to refuse to work if there is a belief that workplace violence is likely or imminent</li> </ul> <p>Responsibility:</p> <ul style="list-style-type: none"> <li>– employees must report all incidents of violence</li> </ul>
<b>Complaints, Investigations &amp; Recourse</b>	<p>Employers are required to develop their own procedures for complaints, investigation and recourse</p>

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<sup>541</sup> *OHSA, supra* note 444, s. 1(1).



## 4.4 Manitoba

In October 2010, Manitoba enacted workplace harassment legislation. Manitoba's approach to workplace violence and harassment legislation is slightly different than other Canadian jurisdictions. The law on violence and harassment legislation comes in the form of strictly regulatory provisions, rather than specific legislative provisions.

Manitoba's legislative response, like Saskatchewan, aligns with the Psychological Harassment paradigm. It recognizes workplace harassment as harming an individual's psychological wellbeing.

### (A) Legislative History

In 2002, the *Workplace Safety and Health Act*<sup>542</sup> ("Act") was amended by Bill 29, *The Safer Workplaces Act (Workplace Safety and Health Act Amended)*<sup>543</sup> to include a provision enabling the Lieutenant Governor in Council to make regulations "respecting measures that employers shall take to prevent harassment in the workplace."<sup>544</sup> Despite this provision, there were four unsuccessful legislative attempts to amend the *Workplace Safety and Health Act* to include legislative provisions on workplace bullying and harassment within the *Act* itself. Although this approach was unsuccessful, Manitoba included workplace harassment and violence provisions within the *Workplace Safety and Health Regulation* ("Regulation").<sup>545</sup>

The first attempt to include provisions within the *Act* was made by Hon. Jon Gerrard, a Liberal Member of the Legislative Assembly ("MLA") in March 2006. He introduced Bill 210, *The Workplace Safety and Health Amendment Act (Harassment in the Workplace)*.<sup>546</sup> The purpose of the Bill was to provide anti-bullying provisions to improve the working conditions for Manitoba workers.<sup>547</sup> The Bill included a definition of workplace harassment, required employers to prevent and investigate workplace harassment incidents and gave workers the right to refuse to work due to harassment. The Minister of Labour, Hon. Nancy Allen, firmly opposed

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<sup>542</sup> RSM 1987, c. W210.

<sup>543</sup> SM 2002 c. 33.

<sup>544</sup> S. 18(1)(bb)

<sup>545</sup> Man Reg 90/2014

<sup>546</sup> Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)* 38<sup>th</sup> Leg, 4<sup>th</sup> Sess, No 35 (9 March 2006), at 1135.

<sup>547</sup> *Ibid.* at 1135.

this Bill suggesting that the current law and regulations on workplace harassment adequately met the needs of Manitoba workers.<sup>548</sup> This Bill died on the order paper.

The first step Manitoba took to regulate workplace harassment and violence came in October 2006. The *Regulation* was amended to include provisions on workplace harassment and workplace violence. These provisions came into force in February 2007.<sup>549</sup> Part 10 of the *Regulation* confined the definition of workplace harassment to harassment only on enumerated grounds.<sup>550</sup> It did not recognize psychological harassment. Part 11 of the *Regulation* concerned workplace violence provisions. It required employers to assess and identify the risk of workplace violence and develop a workplace violence policy addressing the identified risks.<sup>551</sup>

In December 2006, Bill 210 was reinstated into the Legislative Assembly as Bill 204.<sup>552</sup> Again, this Bill did not successfully make it past the first reading. The Hon. Jon Gerrard made another attempt and reintroduced Bill 210 in October 2007,<sup>553</sup> however, it did not make it past the second reading stage. Objections to Bill 210 came from the Ministry of Labour. It was argued that there was already provisions on workplace harassment (although, restricted to enumerated grounds of harassment) within the *Regulation* as prescribed by s. 18(1)(bb) of the *Act*.<sup>554</sup>

In February 2009, in response to the Advisory Council's recommendations to amend the *Workplace Safety and Health Act*,<sup>555</sup> the Minister of Labour refused to accept the recommendation to amend the harassment definition and to include provisions relating to psychological harassment.<sup>556</sup> The Minister stated that the amendment would be a "fundamental change to the regulation that was just implemented in 2007."<sup>557</sup>

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<sup>548</sup> Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)* 38<sup>th</sup> Leg, 4<sup>th</sup> Sess, No 79A (30 May 2006), at 2751-2752.

<sup>549</sup> *ibid.*, s. 44.2

<sup>550</sup> Safe Work Manitoba, "Guideline for Preventing Harassment and Violence in the Workplace" (Winnipeg: Workplace Safety and Health Division, 2011) at 3.

<sup>551</sup> *Ibid.*

<sup>552</sup> Bill 204, *The Workplace Safety and Health Amendment Act (Harassment in the Workplace)*, 5<sup>th</sup> Sess, 38<sup>th</sup> Leg, Manitoba, 2006; Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)* 38<sup>th</sup> Leg, 5<sup>th</sup> Sess, No 16B (7 December 2006) at 601-602.

<sup>553</sup> Bill 210, *The Workplace Safety and Health Amendment Act (Harassment in the Workplace)*, 1<sup>st</sup> Sess, 39<sup>th</sup> Leg, Manitoba, 2007; Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)* 39<sup>th</sup> Leg, 1<sup>st</sup> Sess, No 17 (10 October 2007) at 1055.

<sup>554</sup> Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)* 39<sup>th</sup> Leg, 1<sup>st</sup> Sess, No 26A (25 October 2007) at 1648.

<sup>555</sup> *Workplace Safety and Health Act*, *supra* note 542

<sup>556</sup> Brian Campbell, "Psychological Harassment and Bullying in Manitoba Workplaces" Manitoba Federation of Labour (2009) at 6.

<sup>557</sup> *Ibid.* at 6.

A final attempt at amending the *Act* came in December 2009. The Hon. Jon Gerrard introduced Bill 219, *The Workplace Safety and Health Amendment Act (Harassment and Violence in the Workplace)*<sup>558</sup> which was influenced by the amendments in Saskatchewan and Ontario.<sup>559</sup> The provisions within this Bill were different from the previous attempts to amend the *Act* through Bill 210. The provisions included definitions on workplace discriminatory harassment, psychological harassment, domestic violence and violence<sup>560</sup> and provided workers with the right to work free from harassment.<sup>561</sup> Hon. Mr. Gerrard argued that these proposed provisions were much more effective than the current regulations that were in place.<sup>562</sup> The Minister of Labour, Ms. Jennifer Howard, argued that the current model of regulating workplace harassment and violence met the goal of placing the responsibility of preventing workplace harassment and violence in the hands of the employer.<sup>563</sup> She further stated that the government was already looking into amendments for the definition to include psychological harassment.<sup>564</sup> Once again, this attempt was unsuccessful and the Bill did not make it past the second reading.

It was not until 2010 that the Manitoba government amended Part 10 of the *Regulation*. The definition for harassment was repealed and replaced with a definition recognizing both enumerated forms of harassment as well as psychological workplace bullying and harassment.<sup>565</sup>

## **(B) Provisions on Harassment**

The provisions on harassment in the *Regulation* came into effect on February 1, 2011. Manitoba has developed and implemented an employer-policy model as the regulatory response to workplace bullying and harassment. Table 6 (on page 102) provides a synopsis of Manitoba's law on workplace harassment.

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<sup>558</sup> Bill 219, *The Workplace Safety and Health Amendment Act (Harassment and Violence in the Workplace)*, 4th Sess, 39<sup>th</sup> Leg, Manitoba, 2009

<sup>559</sup> Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)* 39<sup>th</sup> Leg, 4th Sess, No 8 (9 December 2009) at 209 (Jon Gerrard)

<sup>560</sup> Bill 219, *supra* note 558 at s. 2.

<sup>561</sup> *Ibid.* at 209.

<sup>562</sup> Manitoba, Legislative Assembly, *Debates and Proceedings Official Report (Hansard)* 39<sup>th</sup> Leg, 4th Sess, No 39A (4 May 2010) at 1748 (Jon Gerrard).

<sup>563</sup> *Ibid.* at 1750 (Jennifer Howard)

<sup>564</sup> *Ibid.*

<sup>565</sup> *The Workplace Safety and Health Regulation*, Man Reg 217/2006, as amended by Man Reg 147/2010, s. 2.

### **i. Definitions**

Manitoba’s definition combines both discriminatory harassment and general workplace harassment. General “harassment” is defined under section 1.1 of the *Regulation* as “severe conduct that adversely affects a worker’s psychological or physical well-being.” Conduct which amounts to harassment under section 1.1.1(1)(b) is “severe, if it could reasonably cause a worker to be humiliated and is repeated, or in the case of a single occurrence, has a lasting, harmful effect on a worker.”<sup>566</sup> Harassment will not be found for conduct by the employer or supervisor in the course of their management or direction of workers.<sup>567</sup> Harassing conduct includes “a written or verbal comment, physical act or gesture or a display, or any combination of them.”<sup>568</sup>

### **ii. Employer Responsibilities**

Section 10.1(1) requires Manitoba employers to “(a) developed and implement a written policy to prevent harassment in the workplace; and (b) ensure that workers comply with the harassment prevention policy.” The policy must be developed with the workplace committee or representative, or where neither exist, the workers of the workplace.<sup>569</sup>

There are a number of requirements under section 10.2(1) that employers must comply with when developing their workplace prevention policy for harassment. The employer’s policy must be posted in a conspicuous area in the workplace as required under section 10.3 of the *Regulation*.<sup>570</sup> The policy must include a statement that “every worker is entitled to work free from harassment,”<sup>571</sup> that the employer will ensure that workers will not be subjected to harassment<sup>572</sup> and if workers are subjected to harassment, that the employer will take corrective action to stop and rectify the conduct.<sup>573</sup> Also, the policy must have a confidentiality statement noting that employers will not disclose the complainant’s name unless required for the investigation or by law.<sup>574</sup> A statement must also be included indicating that a worker can file a

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<sup>566</sup> s. 1.1.1(1)(b)

<sup>567</sup> s. 1.1.1(2)

<sup>568</sup> s. 1.1.1(3)

<sup>569</sup> s. 10.1(2)

<sup>570</sup> s. 10.3

<sup>571</sup> s. 10.2(1)(a)

<sup>572</sup> s. 10.2(1)(b)

<sup>573</sup> s. 10.2(1)(c)

<sup>574</sup> s. 10.2(1)(d)

complaint with the Manitoba Human Rights Commission<sup>575</sup> and that the prevention policy is “not intended to discourage or prevent the complainant from exercising any other legal rights...”<sup>576</sup>

The policy must also provide information on how to make a complaint, how the employer will conduct the investigation, and how the employer will inform the accused and complainant of the results of the investigation.<sup>577</sup>

### **iii. Employee Rights**

All Manitoba workers have a right to work free from harassment.<sup>578</sup> With this right comes responsibility. All workers in Manitoba must “act in a reasonable manner in the workplace, tell their supervisor or manager if they feel they have been harassed or if they see it happening to other workers, [and] co-operate if there is an investigation into a harassment complaint.”<sup>579</sup>

### **iv. Complaints, Investigation and Recourse**

As the employer is required to develop workplace procedures for filing and investigating a complaint of harassment, each workplace in Manitoba will have a slightly different model. However, Safe Work Manitoba recommends that every policy should include procedures for making an informal or formal complaint. It also suggests that the policy include the name(s) of the individual(s) that is responsible to take the complaint.<sup>580</sup>

With respect to investigating complaints, Safe Work Manitoba suggests that an individual who is not a party of the harassment complaint should conduct the investigations.<sup>581</sup> The workplace health and safety committee and representative must be notified of the harassment

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<sup>575</sup> s. 10.2(1)(e)

<sup>576</sup> s. 10.2(1)(f)

<sup>577</sup> s. 10.2(2)

<sup>578</sup> SafeWork “Understanding Manitoba’s New Requirements for Preventing Harassment at Work” (Winnipeg: Manitoba Labour and Immigration Workplace Safety and Health Division, 2010) at 2.

<sup>579</sup> Ibid. at 11.

<sup>580</sup> Safe Work Manitoba, *supra* note 550 at 5.

<sup>581</sup> Ibid.

complaint and subsequent investigation.<sup>582</sup> Every investigation must remain confidential except where required by law or for investigative purposes.<sup>583</sup>

The suggested steps as outlined in the Guidelines for investigating a complaint of harassment are as follows. First, the complaint should be made in writing in order to obtain accurate and consistent details relating to the allegation.<sup>584</sup> The investigator must then determine whether the alleged conduct falls within the parameters of the definition of harassment.<sup>585</sup> If the allegation does not have merit the complainant must be advised of the decision.<sup>586</sup> Where the investigator deems the complaint to meet the harassment definition, the investigator must provide, if necessary, immediate protection to the complainant from harassment, reprisal or retaliation throughout the investigation process.<sup>587</sup> Interviews of the complainant, the accused and any witnesses should then be conducted. The information obtained during the interview should either be documented by the interviewee or the investigator. During the interview the investigator should obtain information concerning the incident(s) of harassment including who was involved, who witnessed the incident(s), what was said and done, and whether the complainant ever objected to the conduct.<sup>588</sup> The investigator must prepare and submit a report to the employer on the findings of the investigation, attaching all documents obtained from the investigations.<sup>589</sup> The employer must then provide the findings of the investigation, in a separate meeting, to both the accused and the complainant.<sup>590</sup>

These suggested steps provide Manitoba employers with procedures on how to conduct an investigation.

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<sup>582</sup> Ibid.

<sup>583</sup> Ibid.

<sup>584</sup> Ibid.

<sup>585</sup> Ibid.

<sup>586</sup> Ibid.

<sup>587</sup> Ibid.

<sup>588</sup> Ibid., at 8-9

<sup>589</sup> Ibid., at 9.

<sup>590</sup> Ibid., at 10

**TABLE 6: Synopsis of Manitoba’s Provisions on Workplace Harassment**

<b>Definition:</b>	<p><b>“harassment”</b> severe conduct that adversely affects a worker’s psychological or physical wellbeing.</p> <p>Conduct that amounts to “harassment” is severe, if it could reasonably cause a worker to be humiliated and is repeated, or in the case of a single occurrence, has a lasting, harmful effect on a worker.</p> <p><b>“Harassment”</b> is not Reasonable conduct of an employer or supervisor in respect of the management and direction of workers or the workplace</p>
<b>Employer Responsibilities:</b>	<p>Employers must:</p> <ul style="list-style-type: none"> <li>– develop and implement a written policy on workplace harassment that includes: <ul style="list-style-type: none"> <li>↳ a statement that all workers are entitled to a harassment-free workplace</li> <li>↳ a statement that employers will ensure workers are not harassed</li> <li>↳ a statement that corrective action will be taken if/when harassment occurs</li> <li>↳ a confidentiality statement</li> <li>↳ information relating to harassment complaints under the <i>Human Rights Code</i></li> <li>↳ a statement that the policy is not intended to prevent any other legal action</li> <li>↳ procedures for filing a complaint</li> <li>↳ investigation procedures</li> <li>↳ procedures for informing the parties of the results of the investigation</li> </ul> </li> <li>– ensure that all workers comply with the policy</li> </ul>
<b>Employee Rights &amp; Responsibilities:</b>	<p>Right:</p> <ul style="list-style-type: none"> <li>– All employees have the right to a work environment that is free from harassment</li> </ul> <p>Responsibilities:</p> <ul style="list-style-type: none"> <li>– All employees must act reasonably in the workplace</li> <li>– Employees must inform employer if they have witnessed or been victim to harassment</li> <li>– All employees must co-operate with the investigation into a harassment complaint</li> </ul>
<b>Complaints, Investigations &amp; Recourse</b>	<p>Employers are required to develop their own procedures for complaints, investigation and recourse</p> <p>It is suggested that employers implement the following:</p> <ul style="list-style-type: none"> <li>– Guidelines on how to make informal and formal complaints</li> </ul> <p>Investigations should:</p> <ul style="list-style-type: none"> <li>– be conducted by an individual who is not a party to the complaint</li> <li>– be notified to the health and safety committee or representative</li> <li>– remain confidential</li> </ul> <p>Suggested steps to follow for investigations:</p> <ul style="list-style-type: none"> <li>– The complaint should be made in writing</li> <li>– The investigator will determine whether the complaint has merit <ul style="list-style-type: none"> <li>↳ If the complaint does not have merit, the investigator must inform complainant</li> <li>↳ If the complaint does have merit, the investigator must implement necessary protections for the complainant</li> </ul> </li> <li>– The investigator should conduct interviews of the complainant, accused and witnesses <ul style="list-style-type: none"> <li>↳ The information from the interview should be documented</li> <li>↳ The investigator should obtain information regarding the incident (i.e. who was involved, what was said and done etc.)</li> </ul> </li> <li>– The investigator must prepare and provide a report on the findings of the investigation</li> <li>– The employer must separately inform the victim and accused of the results</li> </ul>

### (C) Provision on Violence

Manitoba’s violence provisions only apply to specific sectors of employment as outlined in section 11.1 of the *Regulation*. The sectors which must comply with the violence provisions include health care services,<sup>591</sup> pharmaceutical-dispensing services, education services, financial services, police, corrections and other law enforcement services, security services, crisis counseling and intervention services, public transportation services, retail stores open between 11:00 p.m. and 6:00 a.m., and premises’ which sell alcohol. Furthermore, any workplace that has conducted an assessment and identified a risk of violence, as required by section 11.2 of the *Regulation*, must also comply with section 11 of the *Regulations*.<sup>592</sup> Safe Work Manitoba published a “Guide for Preventing Violence in the Workplace”<sup>593</sup> to assist employers and employees with understanding the violence provisions. Table 7 (on page 110) provides a synopsis of Manitoba’s law on workplace violence.

#### i. Definition

Section 1.1 of the *Regulation* defines “violence” as “(a) the attempted or actual exercise of physical force against a person; and (b) any threatening statement or behaviour that gives a person reasonable cause to believe that physical force will be used against the person.” This definition clearly identifies that both physical and threats of violence are prohibited.

#### a. Domestic Violence

Despite not having explicit domestic violence provision within the *Regulation* on workplace violence, Safe Work Manitoba identifies that there is a risk of “family violence” entering the workplace affecting not only the victim but other employees.<sup>594</sup> “Family violence” is considered to be any violent conduct inflicted by one family member against another.<sup>595</sup> It is recognized that the most common form of such conduct that enters the workplace is violence

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<sup>591</sup> A list of what constitutes a health care service is found under s. 11.8 of the *Regulation*.

<sup>592</sup> *Regulations*, *supra* note 545 s.11.1

<sup>593</sup> Safe Work, “Guide for Preventing Violence in the Workplace (Winnipeg: Workplace Safety & Health Division, 2011)

<sup>594</sup> *ibid.* at 5

<sup>595</sup> Manitoba Family Services and Labour, *What is Family Violence*, online: Manitoba <[http://www.gov.mb.ca/fs/fvpp\\_toolkit/what.html](http://www.gov.mb.ca/fs/fvpp_toolkit/what.html)>



within an intimate relationship or otherwise known as domestic violence.<sup>596</sup> To help employers recognize and respond to this type of workplace violence, Manitoba developed the *Workplace Initiative to Support Employees (WISE) on Family Violence*.<sup>597</sup>

While employers are not obligated to implement workplace policies and procedures specifically relating to family violence, it is highly suggested that employers take a proactive approach in recognizing and responding to family violence that spills over into the workplace. The effects of such conduct are troubling for both the employer and employee and include reduced productivity, absenteeism and potential liability for harm to employees resulting from family violence erupting in the workplace.<sup>598</sup>

Notwithstanding not having specific obligations to implement a policy, *WISE on Family Violence* advises that employers should incorporate a policy and procedures for family violence within the policy on workplace violence.<sup>599</sup> It is suggested that the policy include a statement that the employer is committed to the prevention of family violence. Employers should also provide employees with information about services offered to victims of family violence.<sup>600</sup> Necessary and relevant safety procedures should be implemented when an employer becomes aware that an employee is a victim of family violence which could affect the work environment. These procedures can include installing emergency contact alarms within the workplace, offering to walk the employee to their vehicle, providing a picture of the perpetrator to security, reception or relevant workplace personnel, or offer to have incoming calls screened.<sup>601</sup>

Taking a proactive approach to preventing or stopping workplace family violence will benefit the victim, the employer and any co-worker or customer that could be affected by this conduct.

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<sup>596</sup> Ibid.

<sup>597</sup> Manitoba Family Services and Labour, *Introduction to the Employer's Toolkit*, online: Manitoba <[http://www.gov.mb.ca/fs/fvpp\\_toolkit/intro.html](http://www.gov.mb.ca/fs/fvpp_toolkit/intro.html)>

<sup>598</sup> Manitoba Family Services and Labour, *Why Employers Should Care About Family Violence*, online: Manitoba <[http://www.gov.mb.ca/fs/fvpp\\_toolkit/why.html](http://www.gov.mb.ca/fs/fvpp_toolkit/why.html)>

<sup>599</sup> Manitoba Family Services and Labour, *What Employers Can Do*, online: Manitoba <[http://www.gov.mb.ca/fs/fvpp\\_toolkit/cando.html](http://www.gov.mb.ca/fs/fvpp_toolkit/cando.html)>

<sup>600</sup> Ibid.

<sup>601</sup> Ibid.

## ii. Employer Responsibilities

All employers must conduct an assessment of the workplace to determine the risk of violence to a worker.<sup>602</sup> Every work assessment will be slightly different depending on the sector of employment, the interactions between workers and the public and the duties performed by the worker.<sup>603</sup> If the assessment identifies a risk of violence, the employer must comply with section 11 of the *Regulation*.<sup>604</sup> Where the assessment does not identify a risk, the employer is not obligated to comply with section 11.

Employers which fall under the noted sectors in section 11.1 of the *Regulation* must develop and implement a prevention policy on workplace violence, train employees on the policy and ensure compliance of the policy by all employees.<sup>605</sup> The workplace committee, representative or if neither of the aforementioned exist, the workers, must be consulted during the development stage of the workplace violence policy.<sup>606</sup>

The employer's violence policy must include the following features as outlined in section 11.4 of the *Regulation*. First, the policy must indicate measures the employer will take to eliminate or control the risk of violence.<sup>607</sup> The policy must identify the worksites where violence has or is likely to occur and indicate any job positions that have a risk of exposure to violence.<sup>608</sup> The employer's policy must indicate the measures that will be taken to eliminate or control the identified risk of workplace violence.<sup>609</sup> The policy must inform workers of the procedures for summoning immediate assistance when violence erupts,<sup>610</sup> procedures for reporting incidents,<sup>611</sup> the investigation procedures<sup>612</sup> and the procedures for how the employer will implement the corrective measures arising out of the investigation.<sup>613</sup> Employers are required to have a statement advising employees involved in an incident of violence to seek

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<sup>602</sup> *Regulations*, *supra* note 545, s. 11.2

<sup>603</sup> Violence Guide, *supra* note 593 at 3.

<sup>604</sup> *Regulations*, *supra* note 545 [Man Reg] s. 11.2

<sup>605</sup> *Ibid.* s. 11.3(1)

<sup>606</sup> *Ibid.* s. 11.3(2)

<sup>607</sup> *Ibid.*, s. 11.4

<sup>608</sup> *Ibid.*, s. 11.4(a)

<sup>609</sup> *Ibid.*, s. 11.4(b)

<sup>610</sup> *Ibid.*, s. 11.4(c)

<sup>611</sup> *Ibid.*, s. 11.4(d)

<sup>612</sup> *Ibid.*, s. 11.4(e)

<sup>613</sup> *Ibid.*, s. 11.4(f)

medical attention following the incident.<sup>614</sup> The employer's policy must also include a confidentiality statement which indicates that a worker's confidentiality will be maintained except where required for investigation purposes, to take corrective action in response to the violent incident or if required by law.<sup>615</sup> The confidential information that might be required to be disclosed should be as minimal as necessary for the purposes of the aforementioned exceptions.<sup>616</sup> Finally the policy should include a statement indicating that the employer's workplace violence policy is "not intended to discourage or prevent a complainant from exercising..." any legal right.<sup>617</sup> The employer is required to post a copy of the violence prevention policy and inform all workers about the policy.<sup>618</sup>

Where an employer knows of an individual, including a worker, customer or other individual on the employer's premises, with a violent history, the employer must inform the workers of the potential risk if they will come into contact with that individual during the course of their work.<sup>619</sup> Any information given to workers about the individual's history of violence should be as minimal as reasonably necessary to protect the workers' safety.<sup>620</sup>

Following a violent incident, the employer is required to investigate and implement any control measures to eliminate or control the risk of violence erupting.<sup>621</sup> Also, if necessary, the employer should notify the police.

Manitoba employers must prepare an annual report detailing any violent incidents in the workplace, the details of investigations, the results of the investigation and any control measures that were implemented.<sup>622</sup> This report must be provided to the workplace committee, the representative or the workers where there is no committee or representative.<sup>623</sup>

The detailed requirements of the mandatory provisions to be included in the employer's policy clarify the responsibilities of employers in relation to violence. It also enables employers to create a comprehensive policy which will positively affect the workplace.

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<sup>614</sup> Ibid., s. 11.4(g)

<sup>615</sup> Ibid., s. 11.4(h)

<sup>616</sup> Ibid., s. 11.4(i)

<sup>617</sup> Ibid., s. 11.4(j)

<sup>618</sup> Ibid., s. 11.5(1)

<sup>619</sup> Ibid., s. 11.5(2)

<sup>620</sup> Ibid., s. 11.5(3)

<sup>621</sup> Ibid., s. 11.6

<sup>622</sup> Ibid., s. 11.7(1)

<sup>623</sup> Ibid., s. 11.7(2)

### iii. Employee Rights

Manitoba workers have a right to work free from violence or the threat of violence. Furthermore, workers must refrain from conducting oneself in a violent or threatening manner.<sup>624</sup>

### iv. Complaints, Investigations and Recourse

The complaint, investigation and recourse measures for workplace violence will vary from employer to employer in Manitoba. This is because the employer is responsible to develop and implement their own policy and procedures for workplace violence. However, there are certain requirements set forth in the *Regulation* and suggestions from Safe Work which Manitoba employers should follow, creating consistency amongst all Manitoba workplaces that fall under the prescribed sectors.

Employees must report any incidents of violence that occurs. The individual responsible for accepting the incident report should be listed within the employer's policy.<sup>625</sup> Where the violent incident resulted in a worker being killed, a worker suffering serious injury, a worker requiring medical treatment, or where the incident could have resulted in any of the aforementioned,<sup>626</sup> the employer, along with either the health and safety co-chairs, a health and safety representative or an employee (where there is no committee or representative), must conduct an investigation into the violent incident.<sup>627</sup> The employer must also report such incidents to the Workplace Safety and Health Division.<sup>628</sup> Where the violent incident does not result in serious injury, death or the possibility of either, the employer must still investigate the incident, however does not have to conduct the investigation with the committee, a representative or a worker, and does not need to report the incident to the Workplace Safety and Health Division.<sup>629</sup>

There are a number of requirements that the employer must follow when conducting an investigation. First, the investigation must take place as soon as possible following the

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<sup>624</sup> Violence Guide, *supra* note 593 at 17.

<sup>625</sup> *Ibid.* at 8.

<sup>626</sup> *Regulations*, *supra* note 545, s. 2.9(1)

<sup>627</sup> *Ibid.*, s. 2. 9(2)

<sup>628</sup> *Ibid.*, s. 2.7(1); Violence Guide, *supra* note 593 at 9.

<sup>629</sup> *Ibid.*

incident.<sup>630</sup> The investigator must gather the name, address, date of birth and status of the victim, the name of the perpetrator of the violence, an overview of the incident, the name of the victim's supervisor and names of any witnesses.<sup>631</sup> The investigator should inspect the area where the incident occurred and interview the victim, the perpetrator and any witnesses.<sup>632</sup> During the interview process, the investigator should obtain written accounts of the incident from each interviewee.<sup>633</sup> Following the investigation, the investigator is required to produce a written report detailing the findings of the investigation and outlining both the immediate and long-term corrective measures to be taken to control the risk of further violent incidents occurring.<sup>634</sup>

Corrective measures taken by the employer must be reasonable in relation to the conduct. In *CG Power Systems Canada Inc. v. United Steel Workers Local 4297 and Henry Saromo*,<sup>635</sup> the Grievor was terminated from employment as a result of an altercation with another co-worker. The Grievor and the co-worker had made loud verbal exchanges concerning work to be done.<sup>636</sup> At one point of the altercation, the Grievor pushed the co-worker.<sup>637</sup> The co-worker reported the incident to the Manager of Human Resources who subsequently investigated the complaint.<sup>638</sup> The investigator reviewed the discipline record of the Grievor and found that he had two previous incidents of shoving co-workers,<sup>639</sup> to which he was given a two day suspension.<sup>640</sup> After conducting interviews of the victim, the Grievor and witnesses and reviewing the discipline record of the Grievor, the investigator determined that termination was the appropriate penalty in this circumstance.<sup>641</sup> In relation to the seriousness of the incident, the Arbitrator held, "clearly such pushing constitutes abusive conduct and goes against the whole thrust of the employer's efforts to create a respectful workplace."<sup>642</sup> Notwithstanding that the Arbitrator found the conduct to be serious, it was held that it was "important... to recognize that the acceptable range of penalty in the circumstances could have involved a lengthy

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<sup>630</sup> Ibid.

<sup>631</sup> Ibid.

<sup>632</sup> Ibid. at 9-10

<sup>633</sup> Ibid. at 10.

<sup>634</sup> Ibid. at 11.

<sup>635</sup> 2012 CanLII 97756 (MB LA)

<sup>636</sup> Ibid at 10-11.

<sup>637</sup> Ibid. at 13.

<sup>638</sup> Ibid. at 18-19.

<sup>639</sup> Ibid. at 20-22.

<sup>640</sup> Ibid. at 22.

<sup>641</sup> Ibid at. 22.

<sup>642</sup> Ibid at 55.

suspension.”<sup>643</sup> Ultimately the Arbitrator held that the Grievor should be re-instated with the condition that he completes an anger management course and he writes an apology letter to the victim.<sup>644</sup>

#### **(D) Conclusion**

Manitoba’s legislative response to workplace harassment and violence enables employers to create a workplace-specific policy addressing the particular risks and implementing specific measures to address those risks. The detailed requirement set forth in the Regulation provides employers with a framework of required policies to protect workers from harassment and violence.

The one problem with this approach concerns the provisions on violence which only apply to the prescribed sectors of employment. All workplaces in Manitoba should be required to implement a violence policy, regardless of sectors. The depth and breadth of the policy would be determined by the identified risks.

*[Continued on next page]*

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<sup>643</sup> Ibid at 56.

<sup>644</sup> Ibid. at 60.

**TABLE 7: Synopsis of Manitoba's Provisions on Workplace Violence**

<b>Definition:</b>	<p><b>“violence”</b></p> <p>(a) the attempted or actual exercise of physical force against a person; and</p> <p>(b) any threatening statement or behaviour that gives a person reasonable cause to believe that physical force will be used against the person</p>
<b>Employer Responsibilities:</b>	<p>All Employers must:</p> <ul style="list-style-type: none"> <li>– conduct an assessment of the risk of violence <ul style="list-style-type: none"> <li>↳ If the assessment identifies a risk of violence, then the employer must comply with the provisions</li> </ul> </li> <li>– develop and implement a prevention policy which includes: <ul style="list-style-type: none"> <li>↳ measures the employer will take to eliminate or control the risk of violence</li> <li>↳ identified workspaces and/or positions which are at risk of violence</li> <li>↳ procedures to summon immediate assistance when violence occurs</li> <li>↳ reporting procedures</li> <li>↳ investigation procedures</li> <li>↳ procedures for informing workers of the result of the investigation</li> <li>↳ a statement to seek medical treatment if necessary</li> <li>↳ confidentiality statement</li> <li>↳ a statement that the policy is not intended to prevent the employee from taking any legal action</li> </ul> </li> <li>– post the policy</li> <li>– train employees on the policy</li> <li>– ensure compliance of the policy</li> <li>– inform workers of an individual’s violent history if that worker will come into contact with that individual</li> <li>– investigate violent incidents</li> <li>– prepare an annual report on violent incidents which is to be provided to the health committee, a representative or the workers.</li> </ul>
<b>Employee Rights &amp; Responsibilities:</b>	<p>Right:</p> <ul style="list-style-type: none"> <li>– Employees have the right to work free from physical violence</li> </ul>
<b>Complaints, Investigations and Recourse</b>	<p>Employers are required to develop their own procedures for complaints, investigation and recourse</p> <p>Employers must report incidents of violence that resulted in actual or possible serious injury, a worker receiving medical treatment or death of a worker to the Workplace Safety and Health Division</p> <p>Investigations must take the following steps:</p> <ol style="list-style-type: none"> <li>1. Take place as soon as possible following the incident</li> <li>2. The investigator must document the information regarding the victim and the incident</li> <li>3. The investigator should inspect the area where the incident occurred</li> <li>4. The investigator must conduct interviews of the victim, perpetrator and witnesses <ul style="list-style-type: none"> <li>↳ The investigator should obtain written documentation detailing the interviewee’s account of the incident</li> </ul> </li> <li>5. The investigator must provide a written report detailing the finding of the investigation</li> <li>6. The employer must implement corrective measures resulting from the findings of the investigation</li> </ol>

## 4.5 British Columbia

British Columbia introduced workplace harassment as a cause for mental distress in the workplace in May 2012. It was not until November 2013, that British Columbia required employers to implement a workplace policy to protect workers from the harms of such conduct. British Columbia's legislative response to workplace harassment falls under the workers compensation regime and the occupational health and safety regime. Flowing from the *Workers Compensation Act*<sup>645</sup> ("Act"), WorkSafe BC has developed Occupational Health and Safety (OHS) Policies on bullying and harassment. Workers will not have recourse under workers compensation until it can be demonstrated that a medically diagnosed mental disorder has developed as a result of the workplace behaviour. This is contrary to Québec's approach which does not require a medical diagnosis to seek recourse for psychological harassment.

British Columbia recognizes that "bullying and harassment in the workplace may involve a spectrum of behaviours."<sup>646</sup> This recognition is significant as it enables regulators and policy makers to develop and implement a well-structured policy on workplace harassment which recognizes the potential risk of escalating harmful behaviour.

This legislative response aligns itself with the Psychological Harassment paradigm. It recognizes the harmful effects of workplace harassment on the worker's psychological wellbeing.

### (A) Legislative History

Bill 14, the *Workers Compensation Amendment Act, 2011*,<sup>647</sup> was introduced under the BC Liberals, by the Hon. Dr. Margaret MacDiarmid, the Minister of Labour, Citizens' Services and Open Government, on November 3, 2011.<sup>648</sup> The purpose of this Bill was "to ensure that the workers compensation system remained responsive to both worker and employer needs..."<sup>649</sup> It

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<sup>645</sup> *Workers Compensation Act*, RSBC 1996, c 492, Part 1

<sup>646</sup> WorkSafe BC "Towards a Respectful Workplace: A Handbook on Preventing and Addressing Workplace Bullying and Harassment" (British Columbia: Workers' Compensation Board of British Columbia, 2013) at iv.

<sup>647</sup> Bill 14, *Workers Compensation Amendment Act, 2011*, 4th Sess, 39th Leg, British Columbia, 2011

<sup>648</sup> British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)* 39th Leg, 4th Sess, No 7 (3 November 2011) at 8653

<sup>649</sup> *Ibid.* at 8654



amended section 5.1 of the *Act* to expand workers compensation coverage to new mental stress categories.<sup>650</sup>

The Bill proposed a number of changes to the *Act*. One of the most significant changes to the *Act* was the expansion of compensation for mental disorders which developed as a result of work conditions.<sup>651</sup> The Minister of Labour recognized the “significant effects” of work-related mental disorders on workers, their families and the cost to employers.<sup>652</sup> Thus, the Minister argued that mental disorders arising out of the workplace needed to be treated the same way as physical disabilities resulting from workplace incidents.<sup>653</sup> Prior to this Bill, British Columbia workers could only seek compensation for work-related mental disorders that resulted from a sudden or traumatic workplace incident, however these amendments would enable workers to seek compensation for mental disorders which arise out of “a significant work-related stressor or a cumulative series of significant work-related stressors, including bullying and harassment.”<sup>654</sup>

The government took the position “[...] that bullying or harassment in the workplace is completely unacceptable, whether it is physical or psychological.”<sup>655</sup> In order to prevent or stop such conduct the government stressed the “[...] need to ensure that our workplace health and safety regulations are strong, clear and specific when it comes to bullying and harassment.”<sup>656</sup>

For a workers compensation claim to be successful, the Minister proposed that the worker must provide a medical diagnosis of the mental disorder by either a psychiatrist or psychologist which demonstrates that it resulted from a significant work-related stressor.<sup>657</sup> The Minister argued that setting this threshold is necessary to ensure that only legitimate claims receive compensation.<sup>658</sup> The NDP argued, however, that setting a threshold requiring workers to seek medical documentation from a psychiatrist or psychologist is too high and does not help workers who are going through such stress.<sup>659</sup> The previous legislation simply required documentation

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<sup>650</sup> 3 November Debates, *supra* note 648 at 8654.

<sup>651</sup> British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)* 39th Leg, 4th Sess, No 6 (3 May 2012) at 11477

<sup>652</sup> *Ibid.*, at 11478

<sup>653</sup> *Ibid.*

<sup>654</sup> *Ibid.*

<sup>655</sup> *Ibid.*

<sup>656</sup> *Ibid.*

<sup>657</sup> *Ibid.*

<sup>658</sup> *Ibid.*

<sup>659</sup> *Ibid.*, at 11480.

from a physician.<sup>660</sup> The Minister argued that changing the condition to require documentation from a psychiatrist or psychologist ensures that the correct medical professional with the necessary medical knowledge and training would accurately diagnosis the mental disorder.<sup>661</sup> An MP of the NDP argued that this threshold causes unnecessary stress on the victim because the victim would have to wait to get an appointment with these specialists, which could take a significant amount of time.<sup>662</sup>

The NDP government argued that the Bill 14 amendments are not favourable, supportive or helpful to British Columbia workers.<sup>663</sup> The Minister was questioned by an NDP MP as to why the language of section 5.1 of the *Act* was amended from “mental stress” to “mental disorder.” The Minister responded stating that the change of language to “mental disorder” was to provide clarity to employers and employees that compensation will only be provided upon a medically diagnosed mental disorders resulting from significant stressors and “not simply for experiencing stress in the workplace”<sup>664</sup> Furthermore, the language “predominately caused by a significant work-related stressor” was called into question.<sup>665</sup> The Minister argued that the use of the term “predominately” “recognizes the unique characteristics and supports the objectives and financial integrity of the workers compensation system by ensuring that a mental disorder was predominately caused by a significant work-related stressor arising out of employment.”<sup>666</sup>

Bill 14 was given royal assent on May 31, 2012<sup>667</sup> and enforced July 2, 2012. The WorkSafe BC Policies in relation to this amendment did not come into effect until November 1, 2013.

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<sup>660</sup> British Columbia, Legislative Assembly, Committee of the Whole House, “Bill 14 – Workers Compensation Amendment Act, 2011” in *Official Report of Debates of the Legislative Assembly (Hansard)* 39th Leg, 4th Sess, No 1 (30 May 2012) at 12532.

<sup>661</sup> *Ibid.*

<sup>662</sup> *Ibid.*

<sup>663</sup> 3 May Debates, *supra* note 651 at 11480.

<sup>664</sup> 30 May Committee, *supra* note 660 at 12531.

<sup>665</sup> *Ibid.*

<sup>666</sup> *Ibid.*, at 12531-12532.

<sup>667</sup> British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)* 39th Leg, 4th Sess, No 3 (31 May 2012) at 12693.

## **(B) Provisions on Bullying and Harassment**

There are two distinct yet coexisting provisions for workplace bullying and harassment in British Columbia. First, the “*Act*” amended in 2012, provides general duties of employers, supervisors and workers. There is no specific duty on workplace bullying and harassment within the *Act*. The amendment to the *Act*, however, now provides recourse for victims who can establish a medically diagnosed mental disorder resulting from workplace bullying and harassment.<sup>668</sup> The second set of provisions relates to specific duties concerning workplace bullying and harassment. The OHS Policies and Regulations adapted by WorkSafe BC provide the necessary guidelines and acceptable conduct for the workplace in relation to bullying and harassment.

The amendments to the *Act* and the additional Policies on workplace harassment have only recently been in effect since November 1, 2013. Table 8 (on page 121) provides a synopsis of British Columbia’s law on workplace harassment.

The following will first examine the WorkSafe BC Policies in relation to bullying and harassment which flow from the general duties of the *Act*. It will proceed to examine the provisions under the *Act* that deal with compensation for mental disorders associated with workplace bullying and harassment.

### **i. Definition**

British Columbia approached defining workplace “bullying and harassment” via the OHS Policies, rather than defining this phenomenon within the *Act*. Workplace “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.<sup>669</sup>

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<sup>668</sup> WorkSafe BC, *Small Business Guide*, online: Bullying and Harassment Prevention Tool Kit < <http://www2.worksafebc.com/Topics/BullyingAndHarassment/Resources.asp?reportID=37260>> at 2; *Workers Compensation Act*, *supra* note 645, s. 5.1

<sup>669</sup> BC Policies Workers Compensation Act, Item D3-115-2

Harassing and bullying behaviour could include aggressive or derogatory speech, humiliation of others, and spreading rumours.<sup>670</sup> The perpetrator of this workplace conduct does not need to have the intention to bully or harass.<sup>671</sup> All that must be established is that a reasonable person acting in a similar manner as the perpetrator would know that his or her actions amount to workplace bullying or harassment.<sup>672</sup> Bullying and harassment does not include differences of opinions, constructive feedback concerning work-related conduct or any reasonable action taken by the employer relating to management of the workplace.<sup>673</sup>

## ii. Employer Responsibilities

The general duties of employers and supervisors are found under sections 115 and 117, respectively, of the *Act*. British Columbia employers have a general duty, under section 115(1)(a) to “ensure the health and safety of (i) all workers working for that employer, and (ii) any other workers present at a workplace at which that employer’s work is being carried out...”<sup>674</sup> They must provide employees with the “information, instruction, training and supervision necessary to ensure the health and safety of those workers...” as required by section 115(2)(e) of the *Act*.<sup>675</sup> Supervisors, too, have general duties under section 117 of the *Act*. Supervisors are required to ensure the health and safety of workers under the supervisor’s direct supervision.

The accompanying OHS Policies to the aforementioned duties of employers and supervisors detail the specific duties in relation to workplace bullying and harassment. Policy D3-115-2 applies to employers and Policy D3-117-2 applies to supervisors.

Section 115-2 of the Policy outlines the reasonable steps employers must take in relation to bullying and harassment in order to fulfill their general duty of ensuring workers health and safety. These duties include developing and implementing a policy statement,<sup>676</sup> taking steps to prevent or minimize any harassing or bullying conduct,<sup>677</sup> developing procedures for reporting<sup>678</sup>

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<sup>670</sup> WorkSafe BC, *Employer Fact Sheet*, online: Bullying and Harassment Prevention Tool Kit < <http://www2.worksafebc.com/Topics/BullyingAndHarassment/Resources.asp?reportID=37260>> at 1.

<sup>671</sup> Handbook, *supra* note 646 at 2.

<sup>672</sup> Ibid.

<sup>673</sup> Ibid., at 1; Employer Fact Sheet, *supra* note 670 at 1.

<sup>674</sup> Policy Item D3-115-2, *supra* note 669, s. 115(1)(a)

<sup>675</sup> Ibid., s. 115(2)(e)

<sup>676</sup> Ibid., s. 115-2(a)

<sup>677</sup> Ibid., s. 115-2(b)

<sup>678</sup> Ibid., s. 115-2(c)

and investigating,<sup>679</sup> informing<sup>680</sup> and training<sup>681</sup> workers of the respective policies and procedures, and reviewing the policies and procedures annually.<sup>682</sup> The employer is also responsible for not engaging in any bullying and harassing behaviour<sup>683</sup> and must comply with their developed policies and procedures.<sup>684</sup>

Employers are required to develop a policy statement asserting that bullying and harassment is unacceptable and will not be tolerated in the workplace.<sup>685</sup> WorkSafe BC provides a number of steps, which employers should take when developing and implementing a workplace policy statement. First, employers must consult and update their existing policies (if they have such policies) that deal with respectful workplace conduct or harassment. Where the employer does not have an existing policy, they must develop and implement a policy on workplace harassment and the policy should be reviewed at least annually.<sup>686</sup> Fourth, the policy should have a clear definition of workplace bullying and harassment to ensure that workers understand how to conduct themselves in the workplace. The policy should also list the workers protected under the policy, such as permanent or temporary workers or any other worker. Finally, the employer must inform all workers of the policy.

Employers must prevent or minimize workplace bullying and harassment as required under section 115-2(b). Providing adequate supervision and necessary training are ways which WorkSafe BC suggests employers can prevent or minimize the risk of bullying and harassment erupting in the workplace.

Under section 115-2(c) employers are required to develop and implement procedures for reporting incidents of workplace bullying and harassment. WorkSafe BC provides a detailed Guide<sup>687</sup> as to how to develop and implement these procedures. There must be procedures outlining how to report a claim, including the form of which complaints can be received (i.e.

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<sup>679</sup> Ibid., s. 115-2(d)

<sup>680</sup> Ibid., s. 115-2(e)

<sup>681</sup> Ibid., s. 115-2(f)

<sup>682</sup> Ibid., s. 115-2(g)

<sup>683</sup> Ibid., s. 115-2(h)

<sup>684</sup> Ibid., s. 115-2(i)

<sup>685</sup> Ibid., Item 115-2(a); WorkSafe BC, *Developing a Policy Statement*, online: Bullying and Harassment Prevention Tool Kit < <http://www2.worksafebc.com/Topics/BullyingAndHarassment/Resources.asp?reportID=37260>> at 1.

<sup>686</sup> WorkSafe BC, *Developing a Policy Statement*, online: Bullying and Harassment Prevention Tool Kit < <http://www2.worksafebc.com/Topics/BullyingAndHarassment/Resources.asp?reportID=37260>> at 1

<sup>687</sup> WorkSafe BC, *Developing a Reporting Procedures*, online: Bullying and Harassment Prevention Tool Kit < <http://www2.worksafebc.com/Topics/BullyingAndHarassment/Resources.asp?reportID=37260>> at 1

written or verbal).<sup>688</sup> Information on when to report a complaint must also be included with an emphasis that complaints should be made as soon as reasonably possible.<sup>689</sup> The procedures must outline the name and contact information for the person responsible for taking the complaints (i.e. union representative, human resources personnel etc.)<sup>690</sup> The employer must also develop alternative reporting procedures for workers who are bullied or harassed by the person who is responsible for taking the bullying and harassment complaints. If the employer cannot offer an alternative person for reporting procedures, then workers can seek assistance through WorkSafe BC to report workplace harassment.<sup>691</sup> When taking the report, employers are advised to obtain as much information as reasonably possible. This includes the names of the parties involved, names of witnesses, the location, date and time of the incident, details about the incident and any additional information relevant to the investigation including email communication, notes, or photographs.<sup>692</sup> The procedures for reporting workplace bullying and harassment must be reviewed annually and must be provided to workers to ensure they understand how to report such conduct.<sup>693</sup>

Under section 115-2(d) employers are required to develop and implement procedures for handling complaints of workplace bullying and harassment. WorkSafe BC outlines the necessary requirements for these procedures including the process of the investigation, what the investigation will entail, what the roles and responsibilities are of the investigator, the employer, the employee, and other individuals, and the follow-up process subsequent to the investigation.<sup>694</sup> All complaints must be addressed immediately and be taken seriously.<sup>695</sup> WorkSafe BC advises employers to maintain confidentiality where possible and to be thorough, fair, impartial and sensitive throughout the investigation.<sup>696</sup>

Employers must inform and train workers on the policies and procedures as required under section 115-2(e) and (f). Posting the policy and procedures in a conspicuous place in the workplace, distributing the aforementioned in emails, and/or training employees upon hiring or

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<sup>688</sup> *ibid.*

<sup>689</sup> *Ibid.*

<sup>690</sup> *Ibid.*

<sup>691</sup> *Ibid.*

<sup>692</sup> *Ibid.* at 2.

<sup>693</sup> *Ibid.* at 2.

<sup>694</sup> Handbook, *supra* note 646 at 11-12

<sup>695</sup> *Ibid.*, at 12.

<sup>696</sup> *Ibid.*

during staff meetings are recommended ways to inform workers.<sup>697</sup> Training should include how to recognize, respond, and report workplace bullying and harassment.<sup>698</sup>

Policy D3-117-2 outlines the supervisor's duties in relation to workplace bullying and harassment flowing from the general supervisor duties in the *Act*. Supervisors are required not to engage in bullying and harassing conduct and must apply and comply with the policies and procedures developed by the employer.<sup>699</sup>

### iii. Employee Responsibilities

British Columbia workers have a general duty, under section 116(1)(a) of the *Act* to “take reasonable care to protect the worker’s health and safety and the health and safety of other persons who may be affected by the worker’s acts or omissions at work...”<sup>700</sup> OHS Policy D3-116-1 requires British Columbia employees to protect their own health and safety as well others by

- (a) not engaging in bullying and harassment of other workers, supervisors, the employer or persons acting on behalf of the employer;
- (b) reporting if bullying and harassment is observed or experienced in the workplace; and
- (c) applying and complying with the employer’s policies and procedures on bullying and harassment.<sup>701</sup>

These provisions stress the notion that employees, too, should be responsible for their actions in the workplace including their actions which could cause themselves or other workers harm.

### iv. Complaints, Investigation and Recourse

As noted, employers are required under section 115-2(c) and (d) to develop and implement procedures for reporting and investigating incidents of workplace bullying and harassment. Therefore, each workplace in British Columbia will have slightly different policies and procedures. Where the employer lacks adequate reporting or investigating procedures, victims of workplace bullying or harassment can submit a complaint to WorkSafe BC.<sup>702</sup>

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<sup>697</sup> Ibid.

<sup>698</sup> Ibid., at 14.

<sup>699</sup> BC Policies Workers Compensation Act, Item D3-117-2, s. 117(1)(a)

<sup>700</sup> *Workers Compensation Act*, *supra* note 645, s. 116(1)(a)

<sup>701</sup> BC Policies Workers Compensation Act, Item D3-116-1

<sup>702</sup> WorkSafe BC, *Bullying and Harassment Complaint Submission* online: Resources  
<<http://www2.worksafebc.com/Topics/BullyingAndHarassment/Resources.asp?reportID=37280>>

WorkSafe BC's role is not to resolve or mediate complaints. Rather, they are to ensure that the employer complies with the required implementation of policies and procedures relating to workplace bullying and harassment.<sup>703</sup> To report a complaint to WorkSafe BC, the individual must complete an online questionnaire.<sup>704</sup> The questionnaire is then reviewed by a WorkSafe BC prevention officer who will determine whether the complaint has merit.<sup>705</sup> If the complaint has merit, WorkSafe BC will contact the complainant to confirm commencement of an investigation.<sup>706</sup> WorkSafe BC advises the complainant that attempts at maintaining confidentiality will be made except where the investigation requires otherwise.<sup>707</sup>

Upon commencement of an investigation, the employer will be questioned on their respective bullying and harassment policy and procedures and what actions were taken to address the alleged conduct.<sup>708</sup> This will result in either the employer amending their policies and procedures to comply with the requirements under the law<sup>709</sup> or the employer will conduct their own investigation into the complaint and address the bullying and harassing conduct.<sup>710</sup> Where the employer does not adequately comply with the required provisions on bullying and harassment or conducts an unsound investigation, WorkSafe BC will continue to inquire into the complaint.<sup>711</sup> WorkSafe BC will order employers to comply with the law and can impose penalties on any employer that does not comply.<sup>712</sup>

#### v. Workers Compensation

Bill 14 amended section 5.1 of the *Act* to include compensation for mental disorders arising out of bullying and harassment in the workplace. Workers are now entitled to compensation for a mental disorder, which is

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<sup>703</sup> Ibid

<sup>704</sup> WorkSafe BC, *Bullying and Harassment Questionnaire* online: Resources <[https://online.worksafebc.com/Anonymous/wcb.BullyingAndHarassment.web/default.aspx?\\_ga=1.141558258.1980267352.1395963720](https://online.worksafebc.com/Anonymous/wcb.BullyingAndHarassment.web/default.aspx?_ga=1.141558258.1980267352.1395963720)>

<sup>705</sup> WorkSafe BC, *Complaint and Inquiry Procedures*, online: Resources <<http://www2.worksafebc.com/Topics/BullyingAndHarassment/Resources.asp?reportID=37280>> at 1.

<sup>706</sup> Ibid., at 1.

<sup>707</sup> Ibid., at 2.

<sup>708</sup> Ibid., at 1.

<sup>709</sup> Ibid., at 2.

<sup>710</sup> Ibid., at 2.

<sup>711</sup> Ibid., at 2.

<sup>712</sup> Ibid., at 2.



- (a) Either
  - (i) Is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or
  - (ii) Is predominately caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's environment
- (b) Is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnosis and Statistical Manual of Mental Disorders at the time of the diagnosis, and
- (c) is not caused by a decision of the worker's employment relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.<sup>713</sup>

Where the individual believes that they have suffered a mental disorder resulting from the bullying and harassment, they must report the illness to WorkSafe BC and initiate a claim. The worker, employer and psychiatrist or psychologist must report the disorder.<sup>714</sup>

Providing workers compensation for a medically diagnosed mental disorder arising from workplace bullying and harassment is a substantial step in recognizing the harmful psychological and physical effects that workplace bullying and harassment can have on victims. Unlike other jurisdictions, British Columbia has offered recourse for victims that address these effects.

*[Continued on next page]*

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<sup>713</sup> 30 May Committee, *supra* note 660 at 12531

<sup>714</sup> WorkSafe BC, *Report an Injury or Illness*, online: Claims  
<[http://worksafebc.com/claims/report\\_injury/default.asp?\\_ga=1.239005248.1980267352.1395963720](http://worksafebc.com/claims/report_injury/default.asp?_ga=1.239005248.1980267352.1395963720)>

**TABLE 8: Synopsis of British Columbia’s Provisions on Workplace Harassment**

<b>Definition:</b>	<p>“<b>bullying and harassment</b>”</p> <ul style="list-style-type: none"> <li>(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</li> <li>(b) excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.</li> </ul>
<b>Employer Responsibilities:</b>	<p>All Employers must:</p> <ul style="list-style-type: none"> <li>– minimize or prevent bullying and harassment</li> <li>– develop and implement a policy statement on workplace bullying and harassment that includes: <ul style="list-style-type: none"> <li>↳ a definition of harassment</li> <li>↳ reporting procedures</li> <li>↳ investigating procedures</li> </ul> </li> <li>– review the policy annually</li> <li>– inform and train employees on policy</li> <li>– not engage in bullying or harassment</li> </ul>
<b>Employee Rights &amp; Responsibilities:</b>	<p>Responsibilities:</p> <ul style="list-style-type: none"> <li>– must not engage in bullying and harassment</li> <li>– must report incidents of bullying and harassment</li> <li>– must comply with employer’s policy and procedure</li> </ul>
<b>Complaints, Investigations &amp; Recourse</b>	<p>Employers are required to develop their own procedures for complaints, investigation and recourse</p> <p>Employees can file a complaint with WorkSafe BC where an employer has inadequate or no reporting procedures.</p> <p>Complaints with WorkSafe:</p> <ul style="list-style-type: none"> <li>– WorkSafe will determine if the complaint has merit <ul style="list-style-type: none"> <li>↳ If the complaint does not have merit, the complainant will be notified</li> </ul> </li> <li>– WorkSafe will investigate the complaint</li> <li>– WorkSafe will question the employer on the policy and procedures for workplace bullying and harassment</li> <li>– WorkSafe will order the employer to comply with implementing a workplace policy on bullying and harassment</li> </ul>

### (C) Provisions on Violence

British Columbia recognizes that there is a spectrum of workplace conduct with is problematic. Notwithstanding the recognition of this spectrum, British Columbia has categorized violence as a separate form of workplace problematic behaviour. Violence and bullying and harassment provisions only intersect where the bullying or harassing conduct becomes violent or if there are threats of violence.<sup>715</sup> There are no specific provisions on “violence” between co-workers.<sup>716</sup> The provisions concerning workplace violence between workers fall under the *Occupational Health and Safety Regulation* (“OHS Regulation”) on workplace conduct.<sup>717</sup> These provisions are relatively limited in comparison to workplace violence provisions from other jurisdictions. Table 9 (on page 126) provides a synopsis of British Columbia’s law on workplace violence.

#### i. Definition

Workplace violence between workers falls under the definition of “improper activity or behaviour.” This behaviour includes

the attempted or actual exercise by a worker towards another worker of any physical force so as to cause injury, and includes any threatening statement or behaviour which gives the worker reasonable cause to believe he or she is at risk of injury...<sup>718</sup>

For the purposes of this definition, worker includes workers, supervisors and employers.<sup>719</sup>

Conduct which amounts to harassment or verbal abuse is not considered violence under this definition, unless it involves a threat or behaviour, which leads an individual to believe they are at risk of injury.<sup>720</sup>

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<sup>715</sup> Handbook, *supra* note 646 at 6.

<sup>716</sup> There are provisions on “violence” in the workplace but only in relation to a non-worker (i.e. customer, client etc.) against a worker. These provisions can be found under the OHS Regulations s. 4.27 to s. 4.31.

<sup>717</sup> BC Reg 297/97

<sup>718</sup> *Regulations*, *supra* note 717, s. 4.24(a)

<sup>719</sup> *Workers Compensation Act* RSBC 1996, c 492, Part 3, Division 1, s. 106.

<sup>720</sup> BC Policies Workers Compensation Act, Item R4.27-1

## ii. Employer Responsibilities

Under section 4.28 of the *OHS Regulation*, employers must conduct an assessment of the risk of violence arising out of their employment.<sup>721</sup> The assessment must take into consideration previous incidents of violence in the workplace, incidents in similar workplaces or sectors and the location and conditions of the workplace.<sup>722</sup> Reassessments should be conducted periodically to re-evaluate the risks and the measures implemented to minimize or eliminate the risk.<sup>723</sup> Where the assessment identifies a risk of violence, section 4.29 requires employers to create and implement policies and procedures to eliminate or minimize the risk of violence. When developing the policies and procedures, the employer should consult the joint health and safety committee or representative, or the workers where neither of the aforementioned exist.<sup>724</sup>

The employer is responsible for providing information to workers regarding the risk of workplace violence and the likelihood of exposure.<sup>725</sup> This includes informing workers of any individual who has a history of violent behaviour to which they will come into contact with through the course of their work.<sup>726</sup> Employers are also required to provide training to employees on how to identify the risk of violence, the policies and procedures to minimize or eliminate the risk of violence, the procedures for summoning assistance if violence erupts in the workplace and the procedures for reporting and investigating violent incidents.<sup>727</sup>

Employers must notify the Workers Compensation Board (“the Board”) if a violent incident occurs that results in serious injury or death of a worker.<sup>728</sup> The employer must conduct an investigation of an incident where it resulted in serious injury or death, the worker required medical attention, or where the incident did not result in injury but had the potential of causing serious injury.<sup>729</sup> Employers must ensure that the worker reporting an injury as a result of a violent incident consult a physician following the incident.<sup>730</sup>

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<sup>721</sup> *Regulations, supra* note 717, s. 4.28(1)

<sup>722</sup> *Ibid.*, s. 4.28(2)

<sup>723</sup> BC Policies Workers Compensation Act, Item R4.29-2(b)

<sup>724</sup> BC Policies Workers Compensation Act, Item R4.29-1

<sup>725</sup> *Regulations, supra* note 717, s. 4.30(1)

<sup>726</sup> *Ibid.* at s. 4.30(2)

<sup>727</sup> *Ibid.* at s. 4.30(3)

<sup>728</sup> *Workers Compensation Act, supra* note 645, Part 3, Division 10, s. 172(1)(a)

<sup>729</sup> *Ibid.* at s. 173(1)

<sup>730</sup> *Regulations, supra* note 717, s. 4.31(3)

### iii. Employee Rights and Responsibilities

British Columbia workers have the right to work in an environment that is free from violence. This right entails two responsibilities. First, all workers, including employers, employees and supervisors, are prohibited from engaging in “improper activity or behaviour” that “might create or constitute a hazard to themselves or to any other person.”<sup>731</sup> Second, where an incident of violence occurs, employees are required to report the incident.<sup>732</sup> These responsibilities ensure the protection of the employees’ right not to be exposed to violence.

### iv. Complaints, Investigation and Recourse

Employers in British Columbia are required to develop and implement their own procedures for complaints and investigations. As a result, each workplace will have slightly different processes. Despite the variances, employers are required to follow a certain protocol with respect to investigations. The law requires the investigation to be conducted by a person knowledgeable and trained in the area of investigating violent incidents.<sup>733</sup> The investigation must

- (a) determine the cause or causes of the incident,
- (b) identify any unsafe conditions, acts or procedures that contributed in any manner to the incident and
- (c) if unsafe conditions, acts or procedures are identified, recommend corrective action to prevent similar incidents.<sup>734</sup>

The employer must make all employees or witnesses party to the incident available for the investigator to interview and must provide the investigator with the contact information of those individuals being interviewed.<sup>735</sup> The employer is responsible for ensuring the investigation report complies with the regulations and is provided to the joint health and safety committee or representative and the Board.<sup>736</sup>

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<sup>731</sup> Ibid. at s. 4.25

<sup>732</sup> Ibid. at s. 4.26

<sup>733</sup> *Regulations*, *supra* note 717, Part 3, Division 10, s. 174(1)

<sup>734</sup> Ibid. at s. 174(2)

<sup>735</sup> Ibid. at s. 174(3) and (4)

<sup>736</sup> Ibid. at s. 175

Resulting from the investigation report, the employer must implement any corrective action necessary in order to prevent further incidents of violence.<sup>737</sup> These implemented corrective measures must be detailed in a report which is to be provided to the joint health and safety committee or representative, or where neither exists, the workers.<sup>738</sup> Furthermore, employers must not prevent an employee from reporting any incident of violence to the Board.<sup>739</sup>

#### **(D) Conclusion**

British Columbia's legislative response to workplace harassment and violence enables employers to create a policy addressing the specific needs and risks of the workplace. The Policies and Guidelines offered by the Ministry enables employers to create a standard workplace policy that will address the minimum requirements that must be met across all workplaces within the province. Furthermore, the implementation of workers compensation for a medically diagnosed mental disorder resulting from bullying and harassment is commendable. This regime should be considered in other jurisdictions in order to address the harmful effects of workplace harassment and violence.

*[Continued on next page]*

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<sup>737</sup> Ibid. at s. 176 (1)

<sup>738</sup> Ibid. at s. 176(s)

<sup>739</sup> Ibid. at s. 177

**TABLE 9: Synopsis of British Columbia’s Provisions on Workplace Violence**

<b>Definition:</b>	<p><b>“improper activity”</b> the attempted or actual exercise by a worker towards another worker of any physical force so as to cause injury, and includes any threatening statement or behaviour which gives the worker reasonable cause to believe he or she is at risk of injury</p>
<b>Employer Responsibilities:</b>	<p>All Employers must:</p> <ul style="list-style-type: none"> <li>– Conduct an assessment of the risk of violence in the workplace taking into consideration previous incidents, experiences in similar workplaces and the location and circumstances of the work being done.</li> <li>– Create and implement policy and procedures for identified risks of workplace violence</li> <li>– Inform workers of the risk of violence including the name(s) of an individual with a history of violent behaviour</li> <li>– Train employees on identifying the risks of violence</li> <li>– Inform workers of the procedures for summoning immediate assistance, reporting incidents and the investigation process</li> <li>– Investigate workplace violence incidents</li> <li>– Ensure workers who are exposed to violence seek medical attention</li> </ul>
<b>Employee Rights &amp; Responsibilities:</b>	<p>Right:</p> <ul style="list-style-type: none"> <li>– Work in an environment free from violence</li> </ul> <p>Responsibilities:</p> <ul style="list-style-type: none"> <li>– Must not engage in violent conduct in the workplace</li> <li>– Employees must report all incidents of violence</li> </ul>
<b>Complaints, Investigations &amp; Recourse</b>	<p>Employers are required to develop their own procedures for complaints, investigation and recourse</p> <p>Investigations:</p> <ol style="list-style-type: none"> <li>1. Investigations must be conducted by a person who is knowledgeable on investigating violent incidents</li> <li>2. Investigator must determine the cause and any contributing factors to the incident</li> <li>3. The investigator must recommend corrective action to prevent similar incidents</li> <li>4. The employer must make available all employees and/or witnesses to the incident for the investigator to interview</li> <li>5. The investigation report must be given to the joint health and safety committee or representative and the Workers Compensation Board</li> </ol> <p>Recourse:</p> <ul style="list-style-type: none"> <li>– The Employer must implement any corrective measures necessary to prevent violent incidents</li> <li>– All corrective measures must be documented in a report which must be provided to the joint health and safety committee, a representative or the workers</li> </ul>

**TABLE 10: Cross-Sectional Comparison of Workplace Harassment and Violence Provisions in Québec, Saskatchewan, Ontario, Manitoba and British Columbia**

	Québec	Saskatchewan	Ontario	Manitoba	British Columbia
Statute or Regulation	<i>An Act Respecting Labour Standards</i> , CQLR c N-1.1	<i>Occupational Health and Safety Act, 1993</i> , SS 1993 c O-1.1, as repealed by <i>The Saskatchewan Employment Act</i> , SS 2014, c S-15.1  <i>Occupational Health and Safety Regulations, 1996</i> , RRS c O-1.1 Reg 1	Occupational Health and Safety Act	Workplace Safety and Health Regulation, C.C.S.M. c. W210	Workers Compensation Act, RSBC, 1996, ss. 115-117, 150.  Occupational Health and Safety Policies  Occupational Health and Safety Regulation, (YEAR) ss. 4.24-4.31
Year	Royal Assent: December 19, 2002  Enforced: June 1, 2004	Royal Assent: May 17, 2007  Enforced: October 1, 2007	Royal Assent: December 15, 2009  Enforced: June 15, 2010	Registered: October 15, 2010  Enforced: February 1, 2011	Royal Assent: May 31, 2012  Enforced: July 2, 2012 (Policies effective November 1 2013)
Type	Labour Standards Regime - Statute  Strictly harassment	Occupational Health and Safety Regime – Statute and Regulations  Separate provisions on harassment and violence	Occupational Health and Safety Regime - Statute  Combined provisions on harassment and violence	Occupational Health and Safety Regime - Regulation  Separate provisions on harassment and violence	Workers Compensation Regime and Occupational Health and Safety Regime – Statute and Policies  Separate provisions on harassment and violence
Purpose	To provide workers with the right to a harassment free workplace	To protect workers against workplace harassment	To strengthen the general duty of employers to keep the workplace safe  To require employers to create and implement policies and procedures concerning workplace violence and harassment	To improve the work environment by reducing the problems associated with workplace bullying.	To ensure the workers compensation regime responds to the worker and employer needs in relation to bullying and harassment.



	Québec	Saskatchewan	Ontario	Manitoba	British Columbia
<b>Definition of Harassment</b>	<p><b>“psychological harassment”</b></p> <p>“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.”</p> <p>“A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.”</p>	<p><b>“harassment”</b></p> <p>“is any inappropriate conduct, comment, display, actions or gesture by a person [...] that [...] 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 [...] that constitutes a threat to the health and safety of the worker</p> <p>“To constitute harassment [...], repeated conduct, comments, displays, actions or gestures must be established or [...] a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker must be established.”</p> <p>“[...] harassment does not include any reasonable action that is taken by an employer [...] relating to the management and direction of the employer’s workers or the place of employment.”</p>	<p><b>“workplace harassment”</b></p> <p>“means 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”</p>	<p><b>“harassment”</b></p> <p>“[...] objectionable conduct that creates a risk to the health of a worker; or [...] severe conduct that adversely affects a worker’s psychological or physical well-being”</p> <p>“harassment” conduct is “[...] 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.”</p> <p>“reasonable conduct of an employer or supervisor in respect of the management and direction of workers or the workplace is not harassment.”</p> <p>“[...]”harassment” [...] conduct includes a written or verbal comment, a physical act or gesture or a display, or any combination of them”</p>	<p><b>“bullying and harassment”</b></p> <p>“[...] 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 [...] excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.”</p>

	Québec	Saskatchewan	Ontario	Manitoba	British Columbia
<b>Definition of Violence</b>	None	<p><b>“violence”</b></p> <p>“the attempted, threatened or actual conduct of a person that cause or is likely to cause injury, and includes any threatening statement or behaviour that gives a worker reasonable cause to believe that the worker is at risk of injury”</p> <p>[LIMITED to prescribed sectors. See section 37(2) <i>Regulations</i>]</p>	<p><b>“workplace violence”</b></p> <p>“[...] the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker, [...] an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker, [...] a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.</p>	<p><b>“violence”</b></p> <p>“[...]the attempted or actual exercise of physical force against a person; and [...] any threatening statement or behaviour that gives a person reasonable cause to be that physical force will be used against the person”</p> <p>[LIMITED to prescribed sectors. See section 11.8]</p>	<p><b>“improper activity or behaviour”</b> [violence]</p> <p>“[...] the attempted or actual exercise by a worker towards another worker of any physical force so as to cause injury, and includes any threatening statement or behaviour which gives the worker reasonable cause to believe he or she is at risk of injury [...]”</p>
<b>Employer Obligations</b>	<p><u>Harassment</u></p> <p>Employers are required to take reasonable action to prevent or stop workplace harassment.</p> <p><u>Violence</u></p> <p>None.</p>	<p><u>Harassment</u></p> <p>Employers must:</p> <ul style="list-style-type: none"> <li>– reasonably ensure that workers are not exposed to harassment</li> <li>– create a policy on workplace harassment</li> </ul> <p><u>Violence</u></p> <p>Prescribed sector employers must:</p> <ul style="list-style-type: none"> <li>– conduct risk assessment</li> <li>– develop and implement a policy</li> <li>– investigate incidents</li> </ul>	<p><u>Harassment</u></p> <p>Employers must:</p> <ul style="list-style-type: none"> <li>– develop and implement a policy and program</li> </ul> <p><u>Violence</u></p> <p>Employers must:</p> <ul style="list-style-type: none"> <li>– identify risks</li> <li>– develop and implement a policy and program</li> <li>– protect against domestic violence</li> <li>– investigate incidents</li> </ul>	<p><u>Harassment</u></p> <p>Employers must:</p> <ul style="list-style-type: none"> <li>– develop and implement a policy</li> <li>– ensure compliance with policy</li> </ul> <p><u>Violence</u></p> <p>Prescribed sector employers must:</p> <ul style="list-style-type: none"> <li>– conduct risk assessment</li> <li>– develop and implement a policy</li> <li>– ensure compliance</li> <li>– investigate incidents</li> </ul>	<p><u>Harassment</u></p> <p>Employers must:</p> <ul style="list-style-type: none"> <li>– minimize or prevent bullying and harassment</li> <li>– develop and implement a policy</li> </ul> <p><u>Violence</u></p> <p>Employers must:</p> <ul style="list-style-type: none"> <li>– conduct risk assessment</li> <li>– develop and implement a policy</li> <li>– ensure compliance</li> <li>– investigate</li> </ul>

	Québec	Saskatchewan	Ontario	Manitoba	British Columbia
<b>Employee Rights &amp; Obligations</b>	<p>Every employee has the right to work free from harassment.</p> <p>Employees have a responsibility to not harass other workers</p>	<p>Employees have a right to a healthy and safe work environment free from harassment</p> <p>Every employee is obligated to refrain from harassing behaviour.</p>	<p>Employees are entitled to refuse to work where there is reason to believe violence is imminent</p>	<p>Employees are entitled to a work environment that is free from harassment</p>	<p>Employees are obligated to protect their own health and safety as well as others by not engaging in bullying and harassment.</p>
<b>Complaints, Investigating &amp; Recourse</b>	<p><u>Non-Unionized</u></p> <ul style="list-style-type: none"> <li>- Employee files complaint with CNT within 90 days</li> <li>- CNT will conduct an inquiry</li> <li>- CNT determines no merit: Employee can request administrative review from the CRT within 30 days</li> <li>- CNT determines merit: an investigation will be conducted to determine what action (if any) the employer took</li> <li>- The CNT can appoint a mediator and represent the employee during the investigation</li> <li>- No settlement: the complaint can be referred to the CRT</li> </ul>	<p>Employers must develop their own procedures for complaints, investigations and recourse</p> <p>The Ministry provides Guidelines and suggestions on provisions to include in the policies and procedures</p> <p>Employees can appeal a decision from the occupational health officer to a special adjudicator</p>	<p>Employers must develop their own procedures for complaints, investigations and recourse</p>	<p>Employers must develop their own procedures for complaints, investigations and recourse</p> <p>The Ministry provides Guidelines and suggestions on provisions to include in the policies and procedures</p> <p><u>Specific requirements for Violence</u></p> <ul style="list-style-type: none"> <li>- Employer must investigate incident immediately</li> <li>- Investigator must provide a written report of the investigation</li> <li>- Employer must implement corrective measures to prevent violence</li> </ul>	<p>Employers must develop their own procedures for complaints, investigations and recourse</p> <p>Employees can file a complaint with WorkSafe BC if their employer’s reporting procedures are inadequate or non-existent</p> <p><u>Complaints via WorkSafe BC</u></p> <ul style="list-style-type: none"> <li>- Employee files complaint with WorkSafe BC</li> <li>- WorkSafe BC will determine if complaint has merit</li> <li>- If the complaint has merit, WorkSafe BC will investigate</li> <li>- WorkSafe BC will order employer to implement or amend their policy on bullying and harassment</li> </ul>
[con’t on next page]					

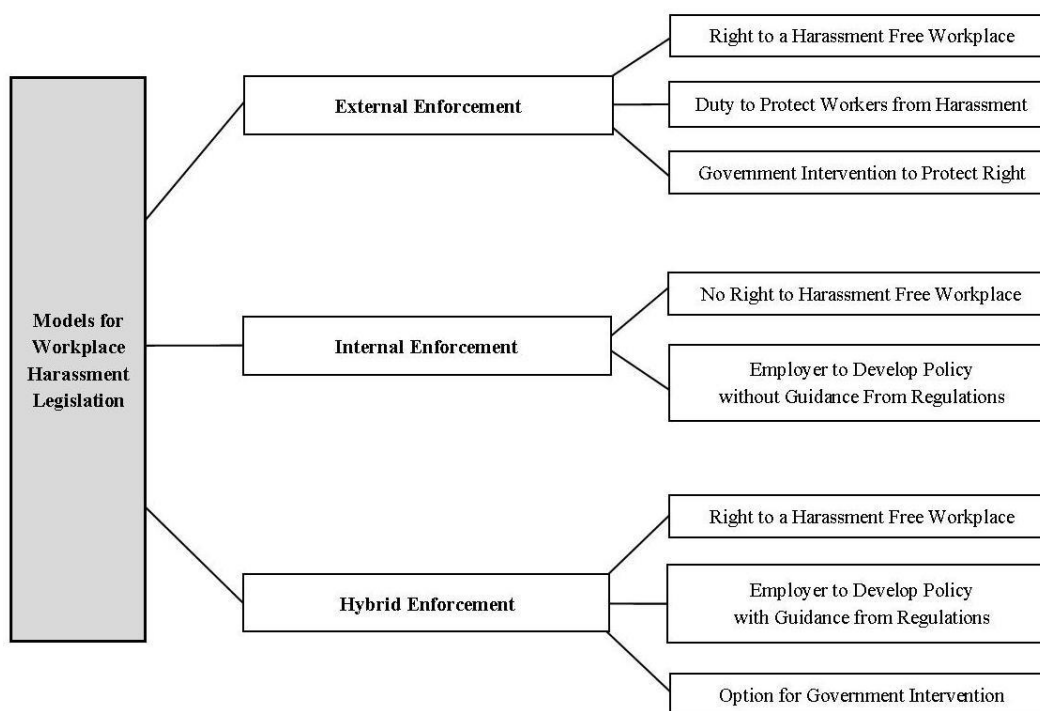
	Québec	Saskatchewan	Ontario	Manitoba	British Columbia
<b>Complaints, Investigating and Recourse</b>	<ul style="list-style-type: none"> <li>- The CRT proceedings requires the employee to establish they were a victim of harassment and the employer must establish they took reasonable steps to prevent / stop the conduct</li> <li>- The CRT can render a decision and order the employer to take correct action</li> </ul> <p><u>Unionized</u></p> <ul style="list-style-type: none"> <li>- Employees must comply with the procedures contained in their collective agreement</li> <li>- Arbitrator will determine if the complaint has merit and render a decision ordering the employer to take corrective action</li> </ul>				<p>Employees can seek workers compensation for a medically diagnosed illness resulting from bullying and harassment</p> <p><u>Specific requirements for Violence</u></p> <ul style="list-style-type: none"> <li>- Employer must investigate incident immediately</li> <li>- Investigator must provide a written report of the investigation and recommendations for corrective action to the health and safety committee and the Workers Compensation Board</li> </ul>

## CHAPTER 5 - LEGISLATIVE ENFORCEMENT MODELS OF WORKPLACE HARASSMENT

Existing Canadian legislation reflects three distinct models for addressing workplace harassment. The first model is the “External Enforcement” model, which recognizes prevention and an outright protection against workplace harassment. The second model is the “Internal Enforcement” model, which requires employers to develop, implement and enforce workplace policies and procedures for harassment. The third model is the “Hybrid Enforcement” model, which recognizes elements from the External and Internal Enforcement models.

Nonetheless, within each model there exist differences in content and form among individual jurisdictions, which will be analyzed in Chapter 6. The criteria used to categorize these models include an assessment of the type of legislative approach (i.e. is it an employer policy or government policy approach), the components of the definition of workplace harassment, the rights and responsibilities of employers and employees and the process for complaints, investigations and subsequent punishment for violations of the legislative response. Figure 5 illustrates these models and their respect elements.

**FIGURE 5: Enforcement Models of Workplace Harassment Legislation in Canada**



## **5.1 External Enforcement Model**

The External Enforcement model adopts a top down approach to ensuring protection of workers against harassment. In this model, the statutory response to this workplace phenomenon provides workers with a right to a workplace free from harassment. It places the responsibility on employers to prevent and/or stop workplace harassment in order to uphold the workers' right. If and when harassment occurs, and the employer fails to comply with their duty to stop such conduct, the government will intervene to enforce the worker's right.

There are three important elements to this model. First, this model provides workers with an express right to a workplace free from harassment. This significant feature of this model places a burden on employers, workers and the state to uphold this right. Despite this burden, this feature demonstrates that protection from harassment is of paramount importance. The creation of such an express right signifies that workplace harassment will not be tolerated.

Second, this model offers assurance to all workers that workplace harassment will be prevented. This is not a guarantee that workers will not be exposed to such conduct. It is, however, assurance that if or when harassment occurs, the employer and/or the government will intervene to stop the conduct from continuing.

The third and most notable element of this model is the significant role the government plays in protecting, upholding and enforcing the right to a workplace free from harassment. This model establishes external procedures for reporting, investigating and enforcing compliance, which is administered by the governmental agency established for such purposes. When harassment occurs, the worker files a complaint with the governmental body, rather than the employer, who subsequently investigates the complaint and orders employers to comply with any decisions resulting from the investigation. This provides all workers, regardless of the workplace, equal access to the complaints and investigation processes. It also provides greater uniformity with respect to the application of the law to all cases of harassment, rather than having various employers implementing varying remedies for victims of this workplace phenomenon.

This model is evident in Québec's statutory response to workplace harassment, which will be discussed in Chapter 6.

## **5.2 Internal Enforcement Model**

The Internal Enforcement model adopts a bottom-up approach to protecting workers from harassment in the workplace. In this model, the government passes the responsibility onto the employers and, to a lesser extent, the employees with respect to preventing and/or stopping this workplace conduct. Employers are required to develop and implement their own workplace policies and procedures for harassment based on the needs of their particular workplace.

This model severs all responsibility of the government to protect workers from workplace harassment and does not give workers the right to a harassment free workplace. In this model, all the responsibility is placed on the employer to protect workers from harassment, to prevent such conduct from occurring and to stop harassment when it occurs. It requires employers to develop and implement policies and procedures on workplace harassment, however, the legislators provide very few or no regulations for employers to follow when developing and implementing their workplace harassment policies and procedures.

This model has only one element. It requires employers to implement workplace policies and procedures relating to workplace harassment. Generally, the government will publish guidelines and/or sample policies for employers to refer to, however, the employer is not obligated to consult such publications. It is left to the discretion of the employer as to what should or should not be included in the policy. Provided that the employer implements policies and procedures, they will not be held liable if workplace harassment erupts. Where an employee becomes a victim of such conduct, they must seek legal action if and when they receive insufficient protection or remedies from their employer. This is a significant departure from the other models. The government will not intervene where the employer's policies are inadequate. This passing of responsibility implies that the government in the jurisdiction implementing this model does not want to intervene in the protection of workers' safety from harassment.

The Internal Enforcement model creates unequal protection from harassment for employees across the jurisdiction. It also can create a division between employers with resources and knowledge to implement extensive or detailed harassment policies verses smaller, less equipped employers. A positive feature of this model is that employers can implement policies and procedures that meet the specific needs of their workplace. That is not to say that the other models do not enable the very same, as those models can include provisions which address their specific workplace needs as well.

This model is evident in the approach adopted by the province of Ontario, which is discussed in Chapter 6.

### **5.3 Hybrid Enforcement Model**

The Hybrid Enforcement model combines elements of both the External Enforcement model and the Internal Enforcement model. Despite the government passing the responsibility of implementing workplace harassment policies to employers, the government takes a proactive approach by providing guidance to employers with respect to required policy provisions in order to prevent workplace harassment. Through this proactive approach the government provides workers the right to a workplace free from harassment. The government also provides detailed regulations for employers to comply with when developing and implementing their respective workplace policies and procedures for harassment. Furthermore, this model includes an option for victims of workplace harassment to seek assistance from the government.

There are three important elements to this model. First, this model provides workers with a right to a workplace free from harassment. Like the External Enforcement model, this feature implies that the government still recognizes the harmful effects of workplace harassment despite placing the responsibility on employers to protect against and prevent this workplace conduct. Furthermore, rather than placing the entire responsibility on the employer to prevent workplace harassment by upholding the right to a workplace free from such conduct, the government also places an obligation on employees to refrain from instigating or participating in harassing conduct. This obligation emphasizes the importance of a workplace free from harassment and holds workers accountable for their own actions in the workplace.

The most significant element of this approach requires employers to develop and implement workplace policies and procedures in relation to harassment. It also requires employers to conduct an assessment of the work environment to determine any risks of workplace harassment that must be addressed within their respective policy. This is similar to the Internal Enforcement model. However, in this Hybrid model, the government provides detailed regulations outlining the required provisions for harassment policies and procedures. Generally, the Ministry of Labour or governmental agency responsible for labour and workplace safety, also publish guidelines and/or sample policies for the employer to refer to when developing their own policies and procedures. The common provisions the regulations require to be included in



workplace harassment policies are the procedures for reporting, investigating and correcting workplace harassment that the employer can take into consideration when addressing such conduct. This takes the initial onus of upholding the right to a harassment free workplace away from the government and passes it to every employer within the legislating jurisdiction.

The final element is the role the government plays in upholding the right to a harassment free workplace. The government establishes procedures for victims of harassment to seek assistance or to file complaints if and when their employer's policies and procedures do not include the required provisions or are non-existent. While the initial responsibility is on the employer to protect workers from harassment and develop workplace harassment policies, the victim of harassment can seek government assistance if the initial internal enforcement model fails to address their situation. This model offers employees an added protection from workplace harassment by offering services to make up for any lack of protection or recourse they are receiving (or not receiving) from their employer.

This model is evident in the statutory responses of Saskatchewan, Manitoba and British Columbia as discussed in Chapter 6.

## **CHAPTER 6 - ASSESSMENT OF THE PROVINCIAL LEGISLATIVE RESPONSES**

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There is no uniformity across Canadian jurisdictions with respect to legislative responses for workplace harassment. The workplace harassment legislation that Québec, Saskatchewan, Ontario, Manitoba and British Columbia have adopted varies, demonstrating different ways of addressing and responding to this workplace phenomenon. These provinces are analyzed based on the date the legislation was brought into force.

This chapter analyzes and categorizes each of the legislative responses by examining (1) how the legislation in each province conceptualizes workplace harassment, (2) if and how the province recognizes the harmful workplace conduct continuum, (3) which enforcement model (External, Internal or Hybrid Enforcement Model) was adopted and (4) compares the provincial legislative response against the model legislative framework developed in Chapter 3.

### **6.1 Conceptualization of Harassment**

As discussed in Chapter 2, workplace harassment can be conceptualized in a variety of ways reflecting different identified behaviours, duration and harmful effects that are included in each of the definitions. This analysis provides the foundation for determining whether the jurisdiction falls within the Dignity, Psychological Harassment or Anti-Discrimination Paradigm or a combination of the paradigms. Table 11 (on page 167) provides a cross-sectional comparison of the conceptualization of harassment by each of the provinces.

#### **(A) Québec**

Québec adopted workplace harassment provisions in *An Act Respecting Labour Standards* (“Quebec Act”).<sup>740</sup> This province’s conceptualization of workplace harassment is slightly different than those of the other jurisdictions. The definition of “psychological harassment” identifies the problematic behaviours that could cause harassment as vexatious behaviour, comments, actions or gestures that are either hostile or unwanted.<sup>741</sup> Québec’s response identifies that such behaviour can either be repeated or a single serious incident, if such

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<sup>740</sup> CQLR c N-1.1

<sup>741</sup> *Labour Standards Act*, *supra* note 279 at s. 81.18.

incident causes a lasting harmful effect on the employee.<sup>742</sup> The harmful effects that are recognized in Québec’s conceptualization include effects on an employee’s dignity or psychological or physical integrity.<sup>743</sup> It also identifies that such conduct must result in creating a harmful work environment.<sup>744</sup> Furthermore, Québec’s conceptualization and definition for “psychological harassment” applies to both enumerated and non-enumerated grounds of harassment.<sup>745</sup>

Québec’s conceptualization of workplace harassment combines elements of all three theoretical paradigms. Providing workers with a right to a harassment free workplace and protecting workers against harassment that affects their dignity suggests that Québec is an example of the European Dignity paradigm in a North American jurisdiction.<sup>746</sup> As noted, the definition applies to both discriminatory and general forms of harassment. This maintains the theory that North American jurisdictions relate the protection against workplace harassment as the protection against discrimination in the workplace. Finally, this legislative response labels this workplace phenomenon as “psychological harassment” and also expressly protects workers from harassment that affects their psychological or physical integrity.<sup>747</sup> The importance of a worker’s psychological wellbeing is a demonstration of the application of the emerging Psychological Harassment paradigm. This is the only jurisdiction that recognizes elements from all three theoretical paradigms.

## **(B) Saskatchewan**

Saskatchewan adopted workplace harassment provisions in the *Saskatchewan Employment Act*<sup>748</sup> (“Saskatchewan SEA”) and *The Occupational Health and Safety Regulations, 1996*<sup>749</sup> (“Saskatchewan Regulations”). This jurisdiction’s conceptualization of “harassment” identifies inappropriate conduct, comment, display, action or gesture, as being problematic

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<sup>742</sup> *ibid.*

<sup>743</sup> *ibid.*

<sup>744</sup> *ibid.*

<sup>745</sup> CNT, *supra* note 274 at 2

<sup>746</sup> *Charter of Human Rights and Freedoms*, *supra* note 286 at s. 81.19

<sup>747</sup> *ibid.* at s. 81.19

<sup>748</sup> SS 2014, c S-15.1

<sup>749</sup> RRS, c O-1.1, Reg 1

behaviours that could cause harassment.<sup>750</sup> These behaviours are identified as either being repeated or a single occurrence, if such occurrence has a lasting harmful effect on the employee.<sup>751</sup> The harmful effects that Saskatchewan identifies include adverse effects on the worker's psychological or physical wellbeing, or causes humiliation or intimidation and that constitutes a threat to the health and safety of the worker.<sup>752</sup> Saskatchewan's conceptualization includes provisions for discriminatory and general forms of harassment.<sup>753</sup>

This jurisdiction's conceptualization of workplace harassment implements elements of the Psychological Harassment paradigm and the North American Anti-Discrimination paradigm. Saskatchewan is an example of the application of the Psychological Harassment paradigm as it identifies and protects workers from harassment, which affects their psychological or physical wellbeing. Furthermore, the definition of harassment applies to both discriminatory and general forms of harassment, thus upholding the long-standing North American Anti-Discrimination approach to workplace harassment.

### (C) Ontario

The conceptualization of harassment in Ontario's *Occupational Health and Safety Act*<sup>754</sup> ("Ontario *OHS*A") is very different from the other provinces. The definition of "workplace harassment" identifies vexatious comment or conduct as being problematic behaviours that could cause harassment.<sup>755</sup> The statutory definition identifies that the behaviour must be repeated (through a course of conduct),<sup>756</sup> however jurisprudence has extended the definition to recognize a single serious incident.<sup>757</sup> The only adverse effect Ontario identifies is that the conduct must be unwanted by the worker.<sup>758</sup> These provisions only apply to general forms of harassment.

Ontario does not fit any of the theoretical paradigms. This jurisdiction's conceptualization of harassment does not address the dignity or psychological wellbeing of a

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<sup>750</sup> *SEA*, *supra* note 349 at s. 3-1(4)

<sup>751</sup> *ibid.*

<sup>752</sup> *ibid.* at s. 3-1(1)(l)

<sup>753</sup> *Ibid.*

<sup>754</sup> RSO 1990, c O.1.

<sup>755</sup> *OHS*A *supra* note 444 s. 1(1)

<sup>756</sup> *ibid.*

<sup>757</sup> *Peterborough Regional Health Centre*, *supra* note 492

<sup>758</sup> *OHS*A, *supra* note 444 at s. s(1)

worker, and there are no provisions relating to protecting workers from discrimination in the *OHSA*.

**(D) Manitoba**

Manitoba implemented workplace harassment provisions in the *Workplace Safety and Health Act*<sup>759</sup> (“*Manitoba Act*”) and the *Workplace Safety and Health Regulation*<sup>760</sup> (“*Manitoba Regulation*”). Manitoba’s conceptualization of harassment is similar to that of Saskatchewan and British Columbia. The definition of “harassment” identifies severe conduct such as written or verbal comments, physical acts or gestures or displays, which are not related to actions of management or direction of workers, as being problematic behaviours that could cause harassment.<sup>761</sup> Manitoba identifies these behaviours as either being repeated or a single occurrence that has a lasting harmful effect on the employee.<sup>762</sup> The harmful effects identified by Manitoba’s conceptualization of harassment include adverse effects on the worker’s psychological and/or physical wellbeing or causes humiliation and/or intimidation and that constitutes a threat to the health and safety of the worker.<sup>763</sup> Manitoba includes provisions for both discriminatory and general forms of harassment within the definition.<sup>764</sup>

A combination of the elements from the Psychological Harassment and Anti-Discrimination paradigms is represented in Manitoba’s conceptualization of harassment. Manitoba directly identifies that workers can suffer psychological and physical harm from workplace harassment. The Anti-Discrimination paradigm is also represented in Manitoba’s legislative response as the definition of harassment includes provisions for enumerated and general forms of harassment.

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<sup>759</sup> RSM 1987, c. W210.

<sup>760</sup> *Amended Regulations*, *supra* note 558

<sup>761</sup> *Regulations*, *supra* note 545 at s. 1.1.1

<sup>762</sup> *ibid.* at s. 1.1.1(1)(b)

<sup>763</sup> *ibid.* at s. 1.1 and s. 1.1.1

<sup>764</sup> *ibid.* at s. 1.1

**(E) British Columbia**

British Columbia implemented workplace harassment provisions in the *Workers Compensation Act*<sup>765</sup> (“British Columbia Act”) and Occupational Health and Safety Policies (British Columbia Policies).<sup>766</sup> British Columbia’s conceptualization of harassment is similar to Saskatchewan and Manitoba. British Columbia identifies inappropriate conduct or comment such as aggressive or derogatory speech as being problematic behaviours that could cause “bullying and harassment.”<sup>767</sup> Conduct relating to management and direction of workers and other conduct such as differences of opinions or constructive feedback is conduct that is identified as not problematic behaviour that could lead to harassment.<sup>768</sup> Furthermore, British Columbia does not expressly identify whether these behaviours must be repeated or whether a single occurrence that has a lasting harmful effect on the employee could constitute harassment. The harmful effects identified by this jurisdiction that victims could suffer as a result of harassment include humiliation or intimidation.<sup>769</sup> British Columbia does not identify enumerated grounds of harassment within the definition of “bullying and harassment.”

This jurisdiction’s legislative response applies elements from the Psychological Harassment paradigm. While British Columbia’s conceptualization of workplace harassment does not expressly refer to protecting workers from psychological harms, as Saskatchewan and Manitoba does, it does, however, protect workers against humiliation and intimidation which have been recognized by this theoretical paradigm as symptoms of psychological harm.<sup>770</sup> Furthermore, British Columbia’s implementation of a workers compensation scheme for mental disorders arising out harassment provides a further indication that this jurisdiction conceptualizes workplace harassment as potentially having adverse psychological effects on workers.<sup>771</sup>

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<sup>765</sup> *Workers Compensation Act*, RSBC 1996, c 492, Part 1

<sup>766</sup> BC Policies Workers Compensation Act, Item D3-115-2, D3-116-1 and D3-117-2.

<sup>767</sup> Policy Item D3-115-2, *supra* note 669 at (a)

<sup>768</sup> *ibid.* at (b)

<sup>769</sup> *ibid.* at (a)

<sup>770</sup> Yamada, “Need for Status-Blind Harassment” *supra* note 5 at 483

<sup>771</sup> *Workers Compensation Act*, *supra* note 645

## **(F) Overview**

Each province approaches the conceptualization and implementation of the theoretical paradigms differently. On analysis of the theoretical paradigms to workplace harassment legislation, most of the provinces with such legislation have taken a combined approach. Québec, Saskatchewan and Manitoba have combined both non-enumerated grounds of harassment (either in the form of the Dignity Paradigm or Psychological Harassment Paradigm) and enumerated grounds of harassment (in the form of the Anti-Discrimination Paradigm) in their respective conceptualizations of this workplace phenomenon. British Columbia is the sole legislating jurisdiction that has strictly adopted the Psychological Harassment paradigm. Unlike the other four jurisdictions, it appears that Ontario does not adopt any of the theoretical paradigms.

An overview of the legislative responses adopted by Québec, Saskatchewan, Ontario, Manitoba and British Columbia demonstrates the various methods for conceptualizing workplace harassment. This variation across the legislating provinces reiterates the commentary that there is no consistency with respect to terms, definitions and approaches for conceptualizing this workplace phenomenon.

### **6.2 Recognition of the Harmful Workplace Conduct Continuum and the Element of Violence**

The five provincial legislative responses are analyzed to determine if and how the province recognizes the harmful workplace conduct continuum and the element of violence. The following examines whether violence provisions are included alongside harassment provisions, whether violence and harassment provisions are separated and/or enacted at different times, or whether the legislation has violence provisions at all.

The provinces are categorized in the following manner: (1) complete, direct recognition (the province has recognized the conduct continuum by combining provisions relating to harassment and violence); (2) complete, indirect recognition (the province has recognized the conduct continuum, however, has separate provisions for harassment and violence); (3) partial, direct recognition (the province has recognized the conduct continuum by combining provisions relating to harassment and violence, however, has limited the application of the provisions to specific sectors of employment); (4) partial, indirect recognition (the province has recognized the

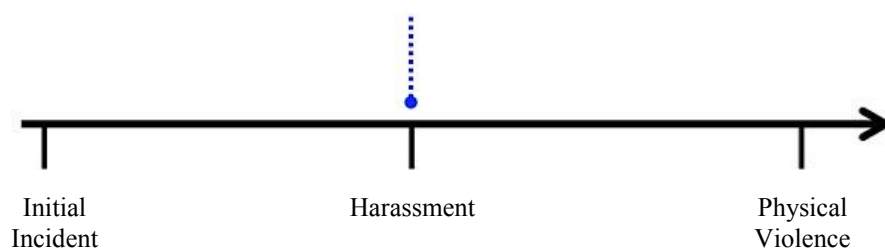
conduct continuum, however, has separate provisions for harassment and violence and has limited the application of the provisions to specific sectors of employment); and (5) no recognition (the province does not recognize the conduct continuum because provisions on violence are non-existent).

Figure 11 (on page 147) depicts an overview of the five provinces' placement on the harmful workplace conduct continuum. Table 12 provides a cross-sectional comparison of the recognition of the conduct continuum by each of the provinces.

### (A) Québec

Québec's *Act* addresses only part of the conduct continuum through the recognition of single serious incidents and harassment. This is a partial, direct recognition of the conduct continuum. As there are no provisions on workplace violence within Québec's *Act*, this province does not reflect the conduct continuum in relation to escalating behaviour that could lead to violence in the workplace. This is a significant departure from the other four provinces. Québec's position on this continuum falls directly on harassment as depicted in Figure 6. This placement is due to Québec only having provisions relating to workplace harassment.

**FIGURE 6: Québec's Position on the Harmful Workplace Conduct Continuum**



This approach has the potential of making it more difficult to address violence stemming from workplace harassment compared to the more comprehensive legislation seen in jurisdictions like Saskatchewan, Ontario, Manitoba and British Columbia.

### (B) Saskatchewan

Saskatchewan's *SEA* and the *Regulations* represent a partial, indirect recognition of the conduct continuum. There are separate provisions on workplace harassment and workplace

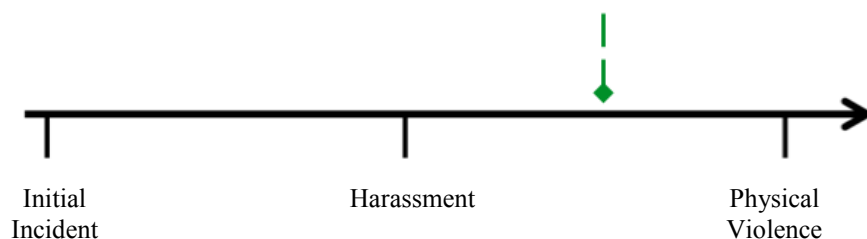


violence. This separation denotes that Saskatchewan indirectly recognizes this continuum. Saskatchewan's legislative response places a responsibility on employers to prevent and/or stop workplace harassment, which could prevent physical violence erupting in the workplace resulting from the harassing behaviour escalating.

Furthermore, as noted in Chapter 4.2(C), the violence provisions are restricted to the prescribed sectors of employment listed in section 37.2 of the Saskatchewan *Regulations*. The sectors that are not listed do not have the same protections against workplace violence as those sectors that are listed. Therefore, it suggests that Saskatchewan partially recognizes the workplace conduct continuum in relation to the applicable employment sectors only.

Figure 7 represents Saskatchewan's placement on the harmful workplace conduct continuum. It is directly between harassment and physical violence as there are detailed provisions for both types of conduct.

**FIGURE 7: Saskatchewan's Position on the Harmful Workplace Conduct Continuum**

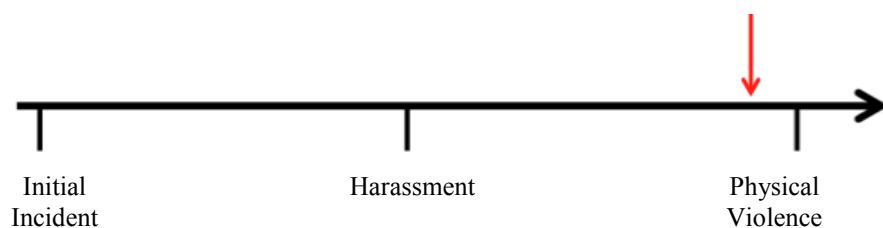


The separation of harassment and violence provisions, apart from its partial application to limited employment sectors across the jurisdiction, indicates that Saskatchewan does not directly recognize that workplace harassment can escalate into physical violence in the workplace. Despite the separation of provisions, Saskatchewan does provide detailed regulations for both workplace harassment and workplace violence. Due to the detailed provisions for workplace harassment and the duty of employers to prevent and stop workplace harassment immediately, the fact that Saskatchewan has separate provisions for violence does not seem to be problematic, as employers are responsible to intervene in such circumstances to stop such conduct from continuing or escalating.

### (C) Ontario

Ontario's legislative response represents a complete, direct recognition of the conduct continuum. This jurisdiction combines workplace violence and harassment provisions into one section of the Ontario *OHSA*. The emphasis placed on workplace violence is much greater than that of workplace harassment. The position on the spectrum signifies this emphasis and is represented in Figure 8.

**FIGURE 8: Ontario's Position on the Harmful Workplace Conduct Continuum**



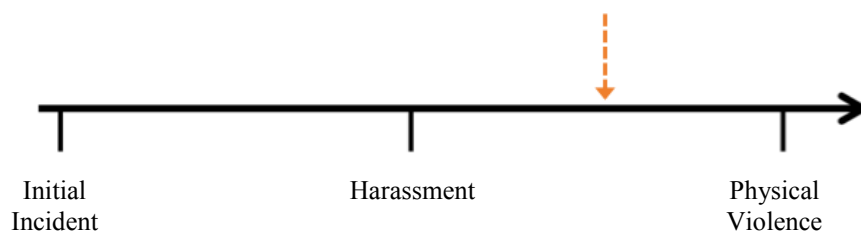
This has the potential of being extremely problematic as the focus is on the behaviour at the end of the spectrum on not on the behaviour that contributes to the escalation. Violent behaviour could be prevented, if workplace harassment is recognized, prevented and/or stopped before an escalation occurs.

### (D) Manitoba

Like Saskatchewan, Manitoba's legislative response represents a partial, indirect recognition of the conduct continuum. Manitoba's *Act* and *Regulation* have separate provisions on workplace harassment and workplace violence. This separation indicates that Manitoba indirectly recognizes the continuum that harassment could lead to violence. Despite this, the responsibility of employers to prevent and/or stop workplace harassment could prevent the escalation of workplace harassment into physical violence. Like Saskatchewan, the violence provisions are restricted to the prescribed sectors of employment listed in section 11.8 of the Manitoba *Regulation*, as noted in Chapter 4.4(C). Any sector not listed in the *Regulation* does not have the same protections against workplace violence as those sectors that are listed. This limitation denotes that Manitoba only partially recognizes this continuum in relation to the listed sectors of employment.

Manitoba's placement on the conduct continuum is represented in Figure 9. Similar to Saskatchewan, Manitoba's placement is directly between harassment and physical violence as there are detailed provisions for both types of conduct.

**FIGURE 9: Manitoba's Position on the Harmful Workplace Conduct Continuum**



The partial application of the violence provisions to limited sectors of employment across the jurisdiction and the separation of harassment and violence provisions indicates that Manitoba does not directly recognize that workplace harassment can escalate into physical violence in the workplace. Apart from this, Manitoba does provide detailed regulations for both workplace harassment and workplace violence. The provisions for workplace harassment and the duty of employers to prevent and stop such conduct, suggests that Manitoba's separate provisions do not seem to be problematic.

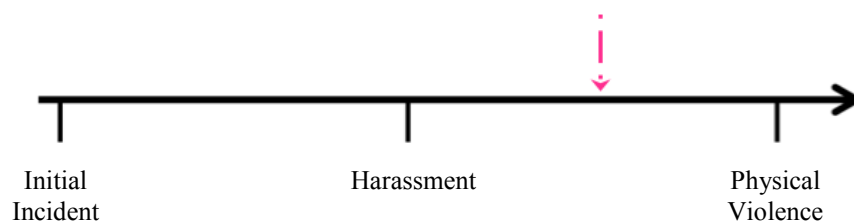
#### **(E) British Columbia**

British Columbia's legislative response is a representation of a complete, indirect recognition of the conduct continuum. There are separate provisions on workplace harassment and workplace violence, as found in the British Columbia Policies and *Regulation*. The separation of harassment and violence provisions indicates that British Columbia does not directly recognize that workplace harassment can escalate into physical violence in the workplace. Unlike Saskatchewan and Manitoba, British Columbia's provisions on workplace violence are applicable to *all* sectors of employment in the jurisdiction, rather than limiting protections to certain workers. This amounts to a complete recognition of the continuum as all employees are protected from harassment and violence.

Figure 10 represents British Columbia's placement on the harmful workplace conduct continuum. It is directly between harassment and physical violence as there are detailed provisions for both types of conduct. This jurisdiction places a responsibility on employers to

prevent and/or stop workplace harassment, which could prevent the conduct escalating to physical violence.

**FIGURE 10: British Columbia’s Position on the Harmful Workplace Conduct Continuum**



Despite the separation of harassment and violence provisions, British Columbia provides detailed regulations and policies for workplace harassment and workplace violence. Similar to Saskatchewan and Manitoba, British Columbia has separate provisions which do not seem to be problematic due to the detailed provisions for workplace harassment and the duty of employers to prevent and stop workplace harassment from continuing.

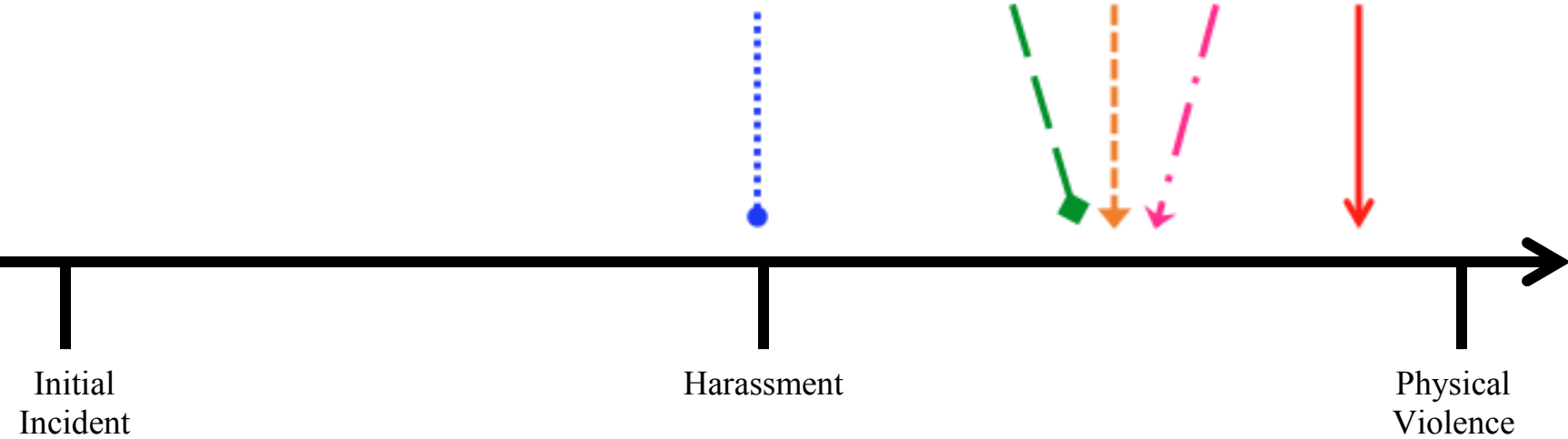
#### **(F) Overview**

The harmful workplace conduct continuum is adopted in some form in the legislation of all five provinces. Québec is the only jurisdiction that does not recognize any element of workplace violence, thus only recognizing the initial stages of this continuum. On the opposite side of the spectrum, Ontario completely recognizes the conduct continuum. This jurisdiction places a greater emphasis on violence rather than balancing the emphasis between harassment and violent behaviour within the legislative response to workplace harassment, as represented in Figure 11. Saskatchewan and Manitoba only partially and indirectly recognize this continuum as the provisions are limited to specific sectors of employment and are separate from harassment provisions. British Columbia completely, yet indirectly, recognizes the conduct continuum. This jurisdiction’s workplace violence provisions apply to every worker in the province, however, the provisions are separate from the workplace harassment provisions.

The variation in recognition of the conduct continuum and element of violence amongst the legislating jurisdiction again demonstrates the complexity and inconsistency in the conceptualization of this workplace phenomenon.

**FIGURE 11: Provincial Recognition of the Continuum of Workplace Conduct**

Québec	
Saskatchewan	
Ontario	
Manitoba	
British Columbia	



### **6.3 Enforcement Model**

The workplace harassment provisions of Québec, Saskatchewan, Ontario, Manitoba and British Columbia are analyzed to determine whether the province's legislative response implements the External Enforcement model (government-based enforcement), the Internal Enforcement model (employer-based enforcement) or the Hybrid Enforcement model (employer/government enforcement). Table 11 (at the end of this chapter) provides an overview of the categorization of the provinces' adopted model.

This analysis compares the elements of the provincial legislative response against the elements of the Enforcement models. As discussed in Chapter 5, each Enforcement model has various elements. There are three elements to the External Enforcement model: (1) it provides workers with a right to a workplace free from harassment, (2) it requires employers to prevent workplace harassment, and (3) it requires the government to establish procedures for reporting complaints, investigating such complaints and enforcing the right to a workplace free from harassment. The Internal Enforcement model has one element, which requires employers to develop, implement and enforce workplace harassment policies and procedures. The Hybrid Enforcement model has three elements: (1) it provides workers with a right to a workplace free from harassment, (2) it requires employers to develop and enforce workplace policies and procedures for harassment based on detailed regulatory provisions and (3) it requires the government to establish procedures for administering complaints and investigations into workplace harassment where the employer's procedures are non-existent or unsatisfactory.

These elements are used as the basis for determining whether the provincial legislative response adopts the External Enforcement model, the Internal Enforcement model or the Hybrid Enforcement model.

#### **(A) Québec**

The workplace harassment legislative response in Québec represents the External Enforcement Model. This jurisdiction possesses all three elements of this model. It provides workers with a right to a harassment free workplace and requires employers to prevent and/or

stop workplace harassment from occurring.<sup>772</sup> If and when harassment occurs, Québec's legislative response places the responsibility on the government, under section 123 of the *Act respecting labour standards* to enforce the workers' right to a harassment free workplace by administering the complaints, investigations and decision-making processes.<sup>773</sup>

Québec's legislative response demonstrates the application of the External Enforcement model. Rachel Cox measured the effectiveness of this model by conducting an assessment of the first five years of Québec's legislative response (2004-2009).<sup>774</sup> Cox's assessment provides statistics demonstrating the functionality of this legislative enforcement model. Her study analyzed the 134 cases resulting from the new provisions on psychological harassment.<sup>775</sup> Despite the amount of cases, only 32% of those were established complaints of psychological harassment.<sup>776</sup> The study noted however, that a majority of the complaints of harassment were settled prior to hearings at the CRT.<sup>777</sup>

Cox uncovered two significant issues with Quebec's legislative response. First, there was an influx of complaints following the enforcement of the legislation. 8,641 complaints were filed at the CNT between June 1, 2004 and March 31, 2008, of which 38% settled through the CNT's mediation services.<sup>778</sup> 462 cases were referred to the CRT of which 83% were settled outside of court.<sup>779</sup> The second issue with Quebec's enforcement model relates to the processing time for complaints. Although there was a high rate of settling through mediation or outside of the CRT, the initial backlog of complaints caused a wait time of two years or more before a complaint or grievance was heard or decided.<sup>780</sup> Two years is a significant time lag for victims of workplace harassment to wait for recourse.

Cox argued that Québec's legislative response was complex as a result of the processes to which an alleged victim of harassment must undergo,<sup>781</sup> stating, "the complexity of the

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<sup>772</sup> *Labour Standards Act*, *supra* note 279 at s. 81.19

<sup>773</sup> *ibid.* at s. 123.

<sup>774</sup> Cox, *supra* note 17

<sup>775</sup> *Ibid.* at 59.

<sup>776</sup> *Ibid.*

<sup>777</sup> Of the 8,631 complaints, 38% of them were settled during the mediation process. See *Ibid.* at 61-62.

<sup>778</sup> *Ibid.* at 61-62

<sup>779</sup> *Ibid.* at 62.

<sup>780</sup> *Ibid.* at 81-82.

<sup>781</sup> *Ibid.* at 81-87.

applicable legal framework has hindered rather than helped the goal of creating timely and effective recourse against psychological harassment in the workplace.”<sup>782</sup>

As Québec’s legislative response is now in its tenth year of enforcement, there has yet to be an updated study on the processing times for complaints, investigations and decisions to determine if the two year backlog was as a result of the initial insurgence of complaints or whether the delays are still significant today.

## **(B) Saskatchewan**

Saskatchewan’s legislative response is a representation of the Hybrid Enforcement model. All three elements of this model are executed in Saskatchewan’s response.

First, workers are provided a right to a workplace that is free from harassment.<sup>783</sup> The onus of upholding and enforcing this right is placed internally on both the employer and employee. Employers are to prevent harassment from occurring by implementing workplace policies and procedures and must take corrective action if and when harassment occurs.<sup>784</sup> Employees are also obligated to refrain from causing or participating in such conduct.<sup>785</sup>

Saskatchewan implements an internal enforcement procedure to prevent and respond to workplace harassment by requiring employers to develop and implement policies and procedures for such conduct. The detailed regulations provide direction to employers with respect to implementing workplace harassment. This is the second element of the Hybrid Enforcement model. As noted in Chapter 4.2(B), these regulations direct employers to develop and implement a policy that includes a definition of harassment, a statement that workers are entitled to a workplace free from harassment, a commitment statement that the employer will take precautionary steps to protect workers, an outline of the corrective action the employer will take when harassment occurs, the procedures for filing a complaint, a confidentiality statement, a statement that employees can request assistance from an occupational health officer during the complaint process, procedures for informing the parties involved in the incident of the results from the investigation, information regarding how to bring a claim under the *Human Rights*

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<sup>782</sup> Ibid. at 87.

<sup>783</sup> Guidelines, *supra* note 376 at 1.

<sup>784</sup> SEA, *supra* note 349 at s. 3-8 and s. 3-9

<sup>785</sup> SEA, *supra* note 349 at s. 3-10(b)



*Code*, and finally a statement that the workplace policy is not intended to prevent employees from pursuing any other legal rights.<sup>786</sup> In comparison to jurisdictions like Ontario, and to a much lesser extent, British Columbia, Saskatchewan provides extensive direction to employers for workplace harassment policies. Along with providing these regulations, WorkSafe Saskatchewan published guidelines relating to workplace harassment policies, which provides further direction to employers on the provisions that should be included within their policy.<sup>787</sup>

When and if a worker is exposed to workplace harassment the responsibility of addressing and responding to such conduct is on the employer. The employer is required to implement internal enforcement procedures for complaints, investigations and recourse.<sup>788</sup> WorkSafe Saskatchewan directs employers to implement informal and formal complaint processes and investigation processes.<sup>789</sup>

The final element of the Hybrid Enforcement model relates to government intervention. While the initial onus is on the employer to enforce the right to a harassment free workplace and to investigate and address incidents of workplace harassment, the Saskatchewan government has implemented an external process to assist victims that have been provide with insufficient protection and/or recourse. If and when harassment occurs and the victim feels that the investigation or recourse was insufficient, they can file an appeal with an adjudicator.<sup>790</sup> This provides an external review of the internal decision of a harassment complaint.

The detail within the *Regulations* enables employers across the province to meet a standard threshold of protecting workers against harassment in the workplace. It also allows employers to add specific provisions within their policies to address and meet the needs of any identified risks.

There are two features of Saskatchewan's legislative response that have demonstrated both positive and negative effects of the efficiency of the Hybrid Enforcement model. First, employers are initially responsible for the complaint, investigation and remedying of any harassment incidents. This feature has the potential of addressing workplace harassment complaints quickly and could have less of a burden on government resources. One downside to

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<sup>786</sup> *Regulations, supra* note 348 at s. 36.

<sup>787</sup> *Guidelines, supra* note 376

<sup>788</sup> *Regulations, supra* note 348 at s. 36.

<sup>789</sup> *Guidelines, supra* note 376 at 9

<sup>790</sup> *SEA, supra* note 349 at s. 3-54

this approach is the possibility that employees could be discouraged from filing harassment complaints with their employer for fear of reprisal. This is especially the case if the employer is the harasser. This issue raises concern with the capacity of this legislative model to protect workers from harassment.

Furthermore, the minimal case law relating to workplace harassment in Saskatchewan can suggest that this model is effective in addressing workplace complaints internally without the need of external intervention. It also can suggest, however, that employees are discouraged from filing a workplace harassment complaint. There is yet to be empirical evidence to support either conclusion.

The second feature relates to the decision of the occupational health officer. If the decision of the occupational health officer at the place of employment is unsatisfactory, the employee has recourse via an adjudicator appointed by the government. This feature provides employees with an additional aid in seeking to enforce their right to a harassment free workplace. However, this feature can cause an additional burden on the victim by creating a longer process for seeking recourse against workplace harassment, as the employee must first file a complaint with the employer, wait for the results from the investigation, then file an appeal and wait for the subsequent decision of the Adjudicator.

### **(C) Ontario**

Ontario's legislative response to workplace harassment represents the Internal Enforcement Model. There is only one element to this model, which is represented in Ontario's legislative response.

Similar to this model, Ontario does not provide workers with the right to a harassment free workplace. Ontario places the entire responsibility on employers to address and respond to workplace harassment. This jurisdiction takes a passive approach and requires employers to develop and implement policies and programs on workplace harassment with little to no regulations for policy provisions.<sup>791</sup> The government does offer suggestions for provisions, in the

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<sup>791</sup> *OHSA, supra* note 444 s. 32.0.6

published guidelines for employer policies, however the employer is not required to implement any such provisions.<sup>792</sup>

This model can be advantageous, as employers have greater liberty to implement custom-fit policies addressing the specific needs of their workplace. There is also the possibility that this model could better protect workers that work in high-risk sectors. However, this model could also be problematic. Employers may not have the resources or knowledge to implement a policy on workplace harassment, leading to the implementation of subpar policies and procedures. This model can also create inconsistencies with respect to policies and procedures for addressing and responding to workplace harassment amongst Ontario workplaces.

#### **(D) Manitoba**

Manitoba's legislative response exemplifies some of the features of the Hybrid Enforcement model. Two of the three elements of this model are implemented in Manitoba's response.

First, Manitoba workers are provided a right to a workplace that is free from harassment.<sup>793</sup> Like Saskatchewan, the responsibility of upholding this right is placed internally on both the employer and employee. Employers are responsible for preventing harassment by implementing workplace policies and procedures and taking corrective action if and when harassment occurs.<sup>794</sup> Employees are also responsible for upholding this right by acting reasonably in the workplace, informing supervisors of workplace harassment and cooperating with the investigation process.<sup>795</sup>

The second element of this model relates to the enforcement of the right to a workplace free from harassment. The onus of enforcing this right is on the employer whom is responsible for addressing and responding to workplace harassment incidents.<sup>796</sup> Every employer is required to develop a workplace policy to prevent and stop workplace harassment.<sup>797</sup> The government of Manitoba implemented regulations (as noted in Chapter 4.4(B)) directing employers on the

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<sup>792</sup> Guidelines, *supra* note 481

<sup>793</sup> SafeWork, *supra* note 578

<sup>794</sup> Regulations, *supra* note 545 at 10.1(1)

<sup>795</sup> SafeWork, *supra* note 578 at 11.

<sup>796</sup> Regulations, *supra* note 545 at 10.1(1)

<sup>797</sup> Ibid. at 10.1(1)

required provisions for a workplace harassment policy. These regulations require employers to include the following provisions: a statement that workers have the right to a harassment free workplace, a statement that employers will ensure workers are not harassed; an outline of the corrective action the employer will take when harassment occurs; a confidentiality statement; a reference to the *Human Rights Code* for discriminatory harassment; the procedures for filing a complaint, investigating the complaint and informing the parties involved of the results of the investigation; and a statement that the policy is not intend to infringe any other legal right.<sup>798</sup> This direction to employers provides a threshold for workplace harassment policies, which all workplaces in Manitoba must meet. Furthermore, like Saskatchewan, the Ministry of Labour published further guidelines for employers to reference when developing and implementing the policies and procedures for workplace harassment.<sup>799</sup>

Unlike Saskatchewan, Manitoba's execution of the Hybrid Enforcement model does not include government intervention to uphold the right to a harassment free workplace. Victims of workplace harassment have neither external aid for administering the complaint, investigation and remedying process for harassment claims nor any means by which an employee can seek review of a decision.

Similar to the issues raised with the application of the Hybrid model adopted by Saskatchewan, Manitoba's execution of the Hybrid Enforcement model reveals advantageous but also unfavourable features. First, this model promotes employers and employees to resolve incidents of harassment internally. This can equate to quick results for the victim. It also does not consume government resources. A problem with resolving workplace harassment incidents internally is that it could cause further friction in the workplace, especially if the employer is the harasser. Workers could be discouraged from filing a workplace harassment complaint for fear of reprisal. Another potential issue of internal enforcement is that employers can insufficiently remedy and rectify the incidents of workplace harassment. There is also the potential of inconsistent remedies for victims across the jurisdiction.

As Manitoba does not provide an external enforcement process, victims of workplace harassment are left to seek recourse by other legal means. The absences of an external

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<sup>798</sup> Ibid. at 10.2

<sup>799</sup> Safe Work Manitoba, *supra* note 550

enforcement process, which victims could rely on, does not enable employers to be held accountable for enforcing (or not enforcing) the right to a harassment free workplace.

The jurisprudence on workplace harassment in Manitoba is limited. Like Saskatchewan, this could suggest that addressing workplace harassment incidents internally is effective or that employees are discouraged from filing a workplace harassment complaint, hence the lack of case law. Again, there is no empirical evidence to support either conclusion.

### **(E) British Columbia**

British Columbia is a third representation of a Canadian jurisdiction implementing the Hybrid Enforcement model. All three elements of this model are implemented in British Columbia's response.

British Columbia has adopted a different approach from that of Saskatchewan and Manitoba in relation to the right to a harassment free workplace. This jurisdiction places an obligation on employees to protect their own health and safety in the workplace by obligating employees to not engage in harassing conduct, report workplace harassment incidents and comply with the employer's policies and procedures for workplace harassment.<sup>800</sup> Employers are also responsible for preventing and stopping workplace harassment from occurring by not engaging in harassing conduct, developing harassment policies and procedures and training employees on the prevention of workplace harassment.<sup>801</sup> This model holds both the employee accountable for his or her own actions, as well as holds the employer accountable for protecting workers from harassment.

The onus is on the employer to address and respond to workplace harassment incidents by implementing procedures for complaints, investigations and recourse.<sup>802</sup> This is the second element of the Hybrid Enforcement model. British Columbia's legislative response to workplace harassment provides employers with regulations and policies to direct the development and implementation of workplace harassment policies and procedures. Unlike Saskatchewan and Manitoba, the requirements for the workplace policies are not as detailed in the regulations or policies handed down by the government. The only regulations that employers must comply with

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<sup>800</sup> Policy Item D3-116-1, *supra* note 701

<sup>801</sup> Policy Item D3-115-2, *supra* note 669

<sup>802</sup> *ibid.*

when developing workplace harassment policies are to include a definition of harassment, reporting procedures and investigating procedures.<sup>803</sup>

This minimal direction can have both advantageous and disadvantageous effects. Having minimal requirements for provision for workplace harassment policies can enable employers to implement provisions, which directly relate to the specific work environment. However, it also has the potential of employers implementing subpar policies which could result in insufficient protection and remedies for victims of workplace harassment. British Columbia's legislative response is less than a year old, thus it has yet to be determined whether less regulatory direction is effective for employers developing and implementing policies for workplace harassment.

Under British Columbia's legislative response, the employer administers the entire complaints, investigation and recourse processes internally.<sup>804</sup> As was raised in the assessment of Saskatchewan and Manitoba's execution of this model, this feature could provide workers with a quick response to workplace harassment and does not weigh on the resources of the government. However, as noted above, it could discourage victims from filing a complaint. It also has the capacity for inconsistent responses to workplace harassment across British Columbia.

Like Saskatchewan, British Columbia has implemented an external enforcement process for victims who have not received recourse for the harm suffered as a result of workplace harassment. Through this external process, the government provides services to administer the filing of complaints where an employer has insufficient workplace harassment policies.<sup>805</sup> This provides victims with recourse if the employer's policy is ineffective in addressing their complaint. The victim can file a complaint with WorkSafe BC if the employer has not complied with implementing workplace harassment policies.<sup>806</sup> WorkSafe BC will not determine relief for the victim; it will simply order the employer to comply with implementing workplace harassment policies.<sup>807</sup> This feature of British Columbia's legislative response can provide workers with added assistance for filing a complaint and seeking recourse and can ensure that complaints are being dealt with in a sufficient manner. One downfall to this approach is that if

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<sup>803</sup> *ibid.*

<sup>804</sup> *ibid.*

<sup>805</sup> Complaint Submission, *supra* note 702

<sup>806</sup> *ibid.*

<sup>807</sup> *ibid.*

employers do not implement a remedy for harassment, the employee cannot seek review of the decision.

A departure from the Enforcement models and from other jurisdictions is the implementation of workers compensation for medically diagnosed mental disorders arising from workplace harassment.<sup>808</sup> This is an external enforcement process that workers can seek recourse from, if and when the harm causes such a disorder. As this provision has only been in effect for less than a year, there is no jurisprudence or empirical evidence to measure the effects of implementing such an external enforcement process.

#### **(F) Overview**

There is a variation amongst the legislating provinces in relation to the implementation of the External Enforcement, Internal Enforcement or Hybrid Enforcement models for workplace harassment legislation. Québec is the only jurisdiction that has implemented the External Enforcement model. With respect to the Internal Enforcement Model, Ontario is the only jurisdiction to adopt this model, while Saskatchewan, Manitoba and British Columbia adopted the Hybrid Enforcement model.

This, once again, exhibits the variation in conceptualization of this workplace phenomenon and the implementation of workplace harassment legislation.

#### **6.4 Comparison of the Provinces' Legislation against the Model Legislative Framework**

The model legislative framework, as discussed in Chapter 3, highlights the components for a legislative response to workplace harassment. The subsequent discussion compares each of the provincial legislative responses to the legislative framework model by measuring the four components of the model legislative framework against the provincial legislative responses. These components include (1) the classification of harassment, (2) preventative measures, (3) responsive and collaborative processes and (4) relief and punishment.

This thesis analyzes the classification of harassment by each of the five Canadian provincial legislative responses in comparison to the classification of harassment in the first

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<sup>808</sup> *Workers Compensation Act*, *supra* note 645

component of the model legislative framework. This analysis measures the following: Does the provincial legislative response identify and define this workplace phenomenon using elements of dignity, psychological harm, and anti-discrimination? Does the province address discriminatory, non-discriminatory, physical and/or psychological conduct within the label and definition? Does the legislative response recognize that the behaviour can be found in reoccurring and/or a single serious incident? Are there provisions on workplace violence stemming from harassment? What actors in the workplace has the legislative response identified as perpetrators and victims?

The preventative measures in each of the provincial legislative responses are analyzed in comparison to the preventative measures in the second component of the model legislative framework. This relates to the enforcement model adopted by the provincial legislators. It analyzes the following: Does the province place the onus internally, on employers or a joint health and safety committee, or externally, on a government agency, for preventing and responding to workplace harassment? Does the legislative response place responsibility on both the employer and employee to prevent workplace harassment? Does the legislative response include provisions that require employers to educate and train workers on how to prevent, recognize and respond to workplace harassment?

An analysis of the responsive and collaborative processes of each jurisdiction is compared against such processes in the third component of the model legislative framework. It analyzes the following elements: Are there provisions in the legislation that require employers to implement a complaints process? Does the province require employers and employees to work collaboratively to develop and administer the complaints process? Does it require a neutral workplace committee to facilitate the complaint process? Are there investigation procedures? Does the legislation require the employers and employees to develop the investigation procedures collaboratively? Does the legislation require a neutral body to conduct investigations?

Finally, this thesis analyzes the provisions of relief and punishment each of the five jurisdictions implement in comparison to the provisions in the fourth component of the model legislative response. This analysis measures the following: Does the province outline clear remedies for victims of workplace harassment? Are there punitive measures for employers who do not prevent or stop workplace harassment? Does the province provide an external enforcement body to review or administer harassment complaints and investigations?



Table 12 outlines the components and elements, as discussed in Chapter 3, that will be used to measure whether and to what extent the provincial legislative response compares to the model legislative framework. This analysis and comparison determines whether the tangible provincial legislative responses are completely or partially comparable to the model legislative framework, which is reflected in Table 13 (on page 169).

**(A) Québec**

Québec's *Act* is partially comparable to the model legislative framework for workplace harassment as it includes only some of the components from the model framework.

The first component of the model legislative framework concerns the classification of harassment. All of the elements of this component are reflected in Québec's classification. First, Québec labels this workplace phenomenon as "psychological harassment." As noted in Chapter 3.4, labeling this phenomenon in such a way could be problematic with identifying the range of behaviours addressed by the definition. In this instance, Québec's label has the potential of only identifying psychological harassment, when the definition encompasses both psychological harassment and discriminatory harassment.<sup>809</sup> Second, Québec's classification of harassment includes aspects of both enumerated and non-enumerated forms and addresses the issue of protecting a worker's dignity and psychological integrity. The definition also identifies the problematic behaviours as including conduct, verbal comments, actions or gestures,<sup>810</sup> which represent the model requirement that implicit, explicit, verbal and non-verbal behaviours are identified. Québec's classification of harassment includes reoccurring incidents and single serious incidents with the qualification that the single incident must have a lasting harmful effect on the victim.<sup>811</sup> This classification also places an emphasis on the victim's feelings rather than the intentions or actions of the perpetrator. With respect to the element of identifying the workplace actors, Québec has no specific provision in relation to harassment that directly identifies the actors to which the provisions apply. However, the provisions refer to employers and employees whom the *Act* itself defines in section 1(7) and 1(10) respectively.

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<sup>809</sup> Commission, *supra* note 274 at 2

<sup>810</sup> *Labour Standards Act*, *supra* note 279 at s. 81.18.

<sup>811</sup> *ibid.*

The second component of a legislative response to workplace harassment includes provisions for preventative measures. Québec's *Act* only addresses two of the three elements. First, employers are required to prevent workplace harassment from occurring and stop the conduct if it does occur.<sup>812</sup> Second, employees are required to not engage in harassing behaviours.<sup>813</sup> The legislative response, however, does not stipulate that employers must educate and train employees on recognizing and responding to workplace harassment.

Québec's *Act* does not include any provisions from the third component of the model legislative response, which includes responsive and collaborative processes. The employer is not obligated to implement procedures for addressing complaints or investigating incidents of workplace harassment. The onus is on the state to respond to and address workplace harassment and enforce the right to a harassment free workplace.

Finally, Québec's *Act* includes all of the provisions of the fourth component of the model framework, which concerns relief and punishment. All complaints and subsequent investigations of workplace harassment are processed externally by the government, rather than by the employer.<sup>814</sup> Québec's legislative response outlines clear remedies for victims of workplace harassment and punitive measures for employers who did not prevent or stop the conduct from occurring under section 81.19.

## **(B) Saskatchewan**

Saskatchewan's *SEA* is partially comparable to the model framework for a legislative response to workplace harassment as it only includes some of the provisions of the model.

The first component concerns the classification of harassment and all of elements of this component are included within Saskatchewan's classification. This jurisdiction's classification of harassment includes elements of discriminatory and non-discriminatory forms of harassment and protects workers from psychological harm.<sup>815</sup> The problematic behaviours identified as causing and contributing to harassment includes inappropriate conduct, comment, display, actions or

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<sup>812</sup> *Labour Standards Act*, *supra* note 279 at s. 81.19.

<sup>813</sup> Commission, *supra* note 274 at 7.

<sup>814</sup> *Labour Standards Act*, *supra* note 279 at s. 123.

<sup>815</sup> *SEA*, *supra* note 349 at s. 3-1(1)(l)

gestures.<sup>816</sup> These listed behaviours reflect implicit, explicit, verbal and non-verbal behaviours, which are elements of the classification of harassment in the model legislative framework. This jurisdiction identifies that such behaviours will constitute harassment if they are repeated or a single serious incident that has lasting harmful effects,<sup>817</sup> which represents the element of the model framework. This jurisdiction also identifies that harassment will be established based on the harm suffered by the target and not the intentions of the perpetrator, which is expressed in the definition of harassment.<sup>818</sup> The measurement for establishing this component of the definition is the reasonable persons test; would a reasonable person know or ought to know that such actions would cause harassment. Saskatchewan has no specific provision in relation to harassment that directly identifies the actors to which the provisions apply. However, the provisions refer to employees and employers whom the *Act* itself defines in section 2.1(f) and 2.1(g) respectively.

The second component of the model framework concerns preventative measures. Saskatchewan's *SEA* reflects some but not all of the elements of this component. The legislative response does place a responsibility on both the employers and employees to prevent workplace harassment.<sup>819</sup> It does not, however, expressly state that employers are required to address workplace harassment immediately, and it does not place a responsibility on employees to report incidents of harassment. Furthermore, there is no express requirement that employers are to educate and train employees on recognizing and responding to workplace harassment. While this element is suggested within WorkSafe's published guidelines, employers are not bound to comply.

Responsive and collaborative processes are the third component to the legislative framework and one in which Saskatchewan's *SEA* fully implements. First, employers are required to develop and implement workplace harassment policies and procedures in consultation with the joint health committee in the workplace.<sup>820</sup> As such, each policy will be different from the next. Despite this, Saskatchewan requires that all employers set out clear procedures for complaints and investigations and provides detailed regulations for employers to

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<sup>816</sup> *SEA*, *supra* note 349 at s. 3-1(4)

<sup>817</sup> *ibid.*

<sup>818</sup> *SEA*, *supra* note 349 at s. 3-1(1)(b)

<sup>819</sup> *SEA*, *supra* note 349 at s. 3-8, 3-9, 3-10(b)

<sup>820</sup> *Regulations*, *supra* note 348, s. 36(1)

comply with.<sup>821</sup> Thus, while the procedures for complaints and investigations might differ slightly, all employers are required to meet a specific threshold.

The final component relating to relief and punishment is only partially implemented in Saskatchewan's legislative response. There are no provisions relating to specific relief measures or punishment, however the government of Saskatchewan provides services to appeal decisions of workplace harassment to an adjudicator,<sup>822</sup> which represents one of the elements of this component in the model framework.

### (C) Ontario

Ontario's *OHS*A is partially comparable to the model framework. It reflects some, but not all of the elements of the four components of the model framework.

With respect to the classification of harassment, Ontario's legislative response only implements some of the provisions within this component. Ontario labels this workplace phenomenon as "workplace harassment" which has the potential of encompassing all forms of harassment, yet the definition does not recognize any notion of dignity, psychological harm or discrimination. Thus, this label is ambiguous as to what type of harassment is and is not covered under this definition. The legislation stipulates that there must be a course of conduct for actions to amount to harassment, thus, only partially implementing this element.<sup>823</sup> However, it should be noted that recent jurisprudence has recognized that a single serious incident can also amount to harassment.<sup>824</sup> With respect to the element of identifying the workplace actors, Ontario does not directly identify the actors to which the provisions of workplace harassment apply. However, the provisions refer to employers, supervisors and employees whom the *OHS*A defines in section 1(1).

Ontario has some of the provisions from the second component of the model legislative framework, which relates to preventative measures. Ontario's legislative response does not include provisions requiring employers or employees to prevent workplace harassment. The only

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<sup>821</sup> *Regulation*, *supra* note 348 at s. 36.

<sup>822</sup> *SEA*, *supra* note 349 at s. 3-54

<sup>823</sup> *OHS*A, *supra* note 444 s. 1(1)

<sup>824</sup> *Peterborough Regional Health Centre*, *supra* note 492

element represented in Ontario's legislative response is the provision requiring employers to give information and provide training on the policy and program of workplace harassment.<sup>825</sup>

Third, the legislative framework requires responsive and collaborative provisions. Ontario's *OHS*A reflects only some of these provisions. Ontario's legislative response and adaptation of the Internal Enforcement Model requires employers to develop and implement procedures for reporting, investigating and rectifying complaints of harassment.<sup>826</sup> This represents the responsive element of the model framework. The element of collaboration between employers and employees with respect to developing the workplace policies and procedures for harassment is non-existent in Ontario's legislative response.

The final component of the model legislative framework concerns provisions relating to relief and punishment. Ontario's legislation does not reflect any of the provisions within the model framework. This jurisdiction does not have provisions outlining remedies for victims, punishment for perpetrators or punitive measures for employers who do not prevent workplace harassment. This could be as a result of the legislative model that Ontario has adopted. As the employer is responsible for developing and implementing their own workplace policies and procedures for harassment, the respective employer will determine any remedies and punishment. There is also no external enforcement procedure that victims of harassment could rely on in situations where the employer does not remedy workplace harassment.

#### **(D) Manitoba**

Most of Manitoba's provisions on workplace harassment included in the *Act* and *Regulation* reflect the provisions of the model framework.

Manitoba's legislation includes provisions, which reflect all of the elements of the first component of the framework concerning classification of harassment. This workplace phenomenon is labelled "harassment" and incorporates protection against both psychological, dignity and discriminatory harms.<sup>827</sup> This jurisdiction clearly identifies problematic behaviour in the legislation as any severe conduct, which affects the worker's psychological and physical

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<sup>825</sup> *OHS*A, *supra* note 444 s. 32.0.7(a)

<sup>826</sup> *Ibid* at s. 32.0.6

<sup>827</sup> *Regulations*, *supra* note 545 at s. 1.1.1

wellbeing.<sup>828</sup> This jurisdiction also identifies that workplace harassment can be established in repeated acts or a single incident, if the single incident has a lasting harmful effect.<sup>829</sup> This provision is a representation of the model framework element requiring the identification of the threshold of seriousness. Manitoba does not have a provision directly identifying the actors to which the harassment provisions apply. However, the provisions on harassment refer to employers, supervisors and employees whom the *Act* defines in section 1.

Manitoba's legislation includes only some of the provisions of the second component of the model framework, which requires provisions relating to preventative measures. Employers and employees are responsible for preventing workplace harassment in Manitoba. Employers must prevent and stop harassment when it occurs,<sup>830</sup> however, there is no provision requiring employers to stop such conduct as soon as they become aware of the conduct. Employees must also prevent workplace harassment by informing the employer of incidents of harassment.<sup>831</sup> This jurisdiction only partially fulfills the second component, as there is no provision requiring employers to educate and train employees on recognizing and addressing harassment.

Manitoba's legislation completely reflects the provisions of the third component, which requires provisions of a responsive and collaborative nature. Manitoba employers are required to develop and implement procedures for complaints and investigations, which must be done in consultation with the workplace health and safety committee, a representative or the workers.<sup>832</sup>

The final component of a legislative response includes provisions relating to the relief and punishment for workplace harassment. Manitoba does not fulfill this component, as each employer is responsible for developing and implementing their own policies and procedures for relief and punishment. There are no provisions identifying remedies, compensation or punishment for harassment. There are also no punitive measures identified for employers who do not uphold the workers right to a harassment free workplace. Furthermore, Manitoba does not have an external enforcement body to uphold this right if and when employers are negligent or noncompliant.

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<sup>828</sup> *ibid.*

<sup>829</sup> *ibid.*

<sup>830</sup> *Regulations, supra* note 545 at 10.1(1)

<sup>831</sup> *SafeWork, supra* note 578 at 11.

<sup>832</sup> *Regulations, supra* note 545 at 10.1(2)

### (E) British Columbia

Similar to the other jurisdictions, British Columbia's legislation and Policies are a partial reflection of the model legislative framework.

Only some of the provisions relating to the classification of harassment in the model framework are included in British Columbia's Policies. British Columbia's legislative response includes a label and definition of harassment that identifies psychological harm,<sup>833</sup> however, the definition does not address whether the actions need to be reoccurring or whether a single serious incident can suffice. Furthermore, the definition does not expressly identify the actors to which the provisions apply, however, the direction and obligations given to workers, supervisors and employers indirectly identifies them as such.

The preventative measures component of the model legislative framework is partially reflected in British Columbia's legislative response. Employers are required to not engage in harassment, prevent harassment from occurring and develop policies and procedures for prevention.<sup>834</sup> They are also required to inform and train workers on the prevention of workplace harassment.<sup>835</sup> The only element of the framework that is not addressed in this legislative response is the element that intervention by the employer must be taken as soon as the employer becomes aware of the harassing situation.

British Columbia's legislative response includes only some of the provisions of the third component that relates to responsive and collaborative processes. It requires employers to develop and implement workplace procedures for reporting and investigating,<sup>836</sup> however, it does not require that such procedures be developed in consultation with workers.

British Columbia's legislation only includes some of the provisions from the model framework relating to relief and punishment. The legislative response identifies the compensation element through the implementation of workers compensation for medically diagnosed mental disorders resulting from workplace harassment.<sup>837</sup> A part from this compensation, the legislation does not indicate any punitive measures for employers who do not prevent or address workplace harassment.

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<sup>833</sup> Policy Item D3-115-2, *supra* note 669 at (a)

<sup>834</sup> Policy Item D3-115-2, *supra* note 669

<sup>835</sup> *ibid.*

<sup>836</sup> *ibid.*

<sup>837</sup> *Workers Compensation Act*, *supra* note 645

British Columbia does implement an external enforcement body. This body investigates complaints of workplace harassment and orders employers to comply with implementing policies and procedures for workplace harassment.<sup>838</sup>

#### **(F) Overview**

Each of the five legislating jurisdictions respond to workplace harassment differently and reflects different components of the model legislative framework. The four components of the model framework relate to (1) classification of harassment, (2) preventative measures, (3) a responsive and collaborative process, and (4) relief and punishment. Québec, Saskatchewan and Manitoba are a complete representation of the first component. These three jurisdictions fulfill all of the elements of classifying workplace harassment. This is in contrast to Ontario and British Columbia who only meet some of the elements of classifying workplace harassment. In relation to the second component of a workplace harassment legislative response, all of the five legislating jurisdictions partially fulfill the elements of this component. The representation of the third component of provisions relating to a responsive and collaborative process also varies. Québec does not fulfill any elements under this component whereas Saskatchewan and Manitoba completely fulfill all of the elements. Ontario and British Columbia, however, only partially fulfill this component by implementing some but not all of the elements within their respective legislative responses. The final component of relief and punishment is not reflected in Ontario or Manitoba's legislative response to workplace harassment. Québec's legislative response is a complete representation of this component, while Saskatchewan and British Columbia are only partial representations.

An overall comparison between the provincial legislations and the model framework demonstrates the varying and complex nature of workplace harassment legislation. As none of the provincial legislative responses are a complete representation of the model legislative framework, it calls into question whether the model legislative framework is too optimistic? Without empirical evidence to demonstrate that the model legislative framework is viable as a whole, it is still a useful tool that lawmakers could consult when drafting or amending workplace harassment legislation.

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<sup>838</sup> *Complaint Submission, supra* note 702



**TABLE 11: Assessment of the Legislative Responses of Québec, Saskatchewan, Ontario, Manitoba, and British Columbia**

	Québec	Saskatchewan	Ontario	Manitoba	British Columbia
<p><b>Which theoretical paradigm does the province adopt?</b></p> <ul style="list-style-type: none"> <li>• Dignity</li> <li>• Anti-Discrimination</li> <li>• Psychological Harassment</li> <li>• Combination</li> </ul>	Combination: Dignity, Psychological Harassment and Anti-Discrimination	Combination: Psychological Harassment and Anti-Discrimination	None	Combination: Psychological Harassment and Anti-Discrimination	Psychological Harassment
<p><b>How does the legislation recognize violence?</b></p> <ul style="list-style-type: none"> <li>• Associates violence with harassment</li> <li>• Separates violence and harassment</li> <li>• No recognition of violence</li> </ul>	<p>Partial, direct recognition</p> <p>No recognition of violence</p>	<p>Partial, indirect recognition</p> <p>Separates violence and harassment</p>	<p>Complete, direct recognition</p> <p>Associates violence with harassment</p>	<p>Partial, indirect recognition</p> <p>Separates violence and harassment</p>	<p>Complete, indirect recognition</p> <p>Separates violence and harassment</p>
<p><b>Which enforcement model does the legislation implement?</b></p> <ul style="list-style-type: none"> <li>• External Enforcement</li> <li>• Internal Enforcement <ul style="list-style-type: none"> <li>- Directed Policy</li> <li>- Undirected Policy</li> </ul> </li> </ul>	External Enforcement Model	Hybrid Enforcement Model	Internal Enforcement Model	Hybrid Enforcement Model	Hybrid Enforcement Model

**TABLE 12: Framework for Developing Workplace Harassment Legislation<sup>839</sup>**

COMPONENT	ELEMENTS
<b>CLASSIFICATION OF HARASSMENT</b>	<p><b>Expansive Breadth and Scope</b></p> <ul style="list-style-type: none"> <li>• Include aspects of both American and European paradigms: enumerated ground and dignity component</li> <li>• Address issues of dignity in definition</li> <li>• Label the conduct harassment</li> </ul> <p><b>Definition</b></p> <ul style="list-style-type: none"> <li>• Dignity component/mental anguish and psychological harm</li> <li>• Violence provisions resulting from harassment</li> <li>• Implicit and explicit behaviour/verbal and non-verbal</li> <li>• Recurring and persistent in nature</li> <li>• Focus on victim feelings and perception not aggressor's intention</li> <li>• No requirement for damages-act and mental anguish is enough</li> </ul> <p><b>Scope</b></p> <ul style="list-style-type: none"> <li>• Allows for single action (limited to circumstances that cause serious harm)</li> <li>• Tangible and intangible actions (obvious or overt)</li> <li>• Includes actions from co-workers, supervisors and customers or clients (people outside the initial scope of the workplace hierarchy)</li> </ul>
<b>PREVENTIVE MEASURES</b>	<p><b>Responsibility Placed on Employers and Employees to Alter Workplace Relations or Raise Awareness of Issue</b></p> <ul style="list-style-type: none"> <li>• Encourage preventive measures to reduce the likelihood of bullying</li> <li>• Educational workshops &amp; training for employees</li> </ul>
<b>RESPONSIVE AND COLLABORATIVE PROCESSES</b>	<ul style="list-style-type: none"> <li>• Immediately address harassing behaviour to prevent further injury</li> </ul> <p><b>Legal Provisions for Responding to Complaints</b></p> <ul style="list-style-type: none"> <li>• Duty is on employer to implement a process to address concerns</li> <li>• Collaborative provisions to include employee contribution</li> <li>• Process of complaint is clearly outlined</li> </ul> <p><b>Internal Neutral Committee</b></p> <ul style="list-style-type: none"> <li>• Internal Complaints Committee or Ombudsmen</li> <li>• Available consequences outside the workplace should be made as an alternative</li> </ul> <p><b>Investigations</b></p> <ul style="list-style-type: none"> <li>• Employer, in consultation with employees, to implement procedures for investigating complaints</li> <li>• Investigation process should be clearly outlined</li> <li>• Investigations should be conducted by a neutral Committee or Ombudsmen</li> </ul>
<b>RELIEF AND PUNISHMENT</b>	<p><b>Remedies, Compensation and Enforcement</b></p> <ul style="list-style-type: none"> <li>• Means of relief to bullying targets</li> <li>• Focus of punishment should be to deter bullying activity</li> <li>• Bullies, and employers who place bullies in a position to abuse their coworkers, should be subject to punitive measures for their actions</li> </ul> <p><b>External Enforcement Body</b></p> <ul style="list-style-type: none"> <li>• Grievance or Commission</li> <li>• Standard of proof depending on nature of allegation</li> <li>• Burden of proof on independent body conducting investigation</li> </ul>

<sup>839</sup> This framework is the adaptation of Gouveia's legislative framework as discussed in Chapter 3 of this thesis.

**TABLE 13: Assessment of the Legislative Responses of Québec, Saskatchewan, Ontario, Manitoba, and British Columbia in relation to the Model Legislative Framework**

	Québec	Saskatchewan	Ontario	Manitoba	British Columbia
<b>CLASSIFICATION OF HARASSMENT</b>	Complete Reflection	Complete Reflection	Partial Reflection	Complete Reflection	Partial Reflection
<b>PREVENTATIVE MEASURES</b>	Partial Reflection	Partial Reflection	Partial Reflection	Partial Reflection	Partial Reflection
<b>RESPONSIVE AND COLLABORATIVE PROCESS</b>	No Reflection	Complete Reflection	Partial Reflection	Complete Reflection	Partial Reflection
<b>RELIEF AND PUNISHMENT</b>	Complete Reflection	Partial Reflection	No Reflection	No Reflection	Partial Reflection

*\*This chart denotes the extent to which the provincial legislative response reflects the components of the model legislative framework. There are three labels that denote the extent of the reflection: (1) “complete reflection” indicates that the province has included all of the elements within that component; (2) “partial reflection” indicates that some but not all of the elements in the component have been included; and (3) “no reflection” indicates that the component and elements of that component are not included.*

## **CHAPTER 7 - CONCLUSIONS & RECOMMENDATIONS**

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Workplace harassment is not a new phenomenon. It has been distinguished from discrimination harassment for over 30 years. Despite this, only five Canadian jurisdictions (Québec, Saskatchewan, Ontario, Manitoba and British Columbia) have addressed workplace harassment legislation through a non-discrimination legislative regime. Québec first introduced this type of workplace harassment legislation in Canada over a decade ago. This jurisdiction's legislative response increased the awareness of the growing concern of workplace harassment in North America.

### **7.1 Summary of Findings**

This thesis addresses various methods of workplace harassment legislation in Canada through a cross-jurisdictional analysis. The varying nature of the legislative responses is based on how the jurisdiction interprets workplace harassment, whether the harmful workplace conduct continuum is recognized and how it enforces the provisions of the workplace harassment legislation.

In Chapter 2, this thesis reviews the literature on workplace harassment. This literature reveals that conceptualizing workplace harassment in legislation is complex and varies from jurisdiction to jurisdiction. It reviews the European Dignity Paradigm, North American Anti-Discrimination Paradigm and the Psychological Harassment Paradigm revealing the various ways workplace harassment has been conceptualized. While scholarship in this area describes North American jurisdictions conceptualizing harassment as discriminatory, this thesis suggests that jurisdictions in North America are shifting to incorporate other forms of harassment within employment and labour law. This shift is evident in Québec, Saskatchewan, Ontario, Manitoba and British Columbia, which have addressed workplace harassment as conduct that includes discriminatory harassment either through workplace harassment legislation or contained in the Human Rights Codes and general forms of harassment.

Chapter 3 reviews the framework for developing workplace harassment legislation as developed by Gouveia. This thesis identifies missing elements from Gouveia's framework resulting from the analysis of the existing literature on workplace harassment and modifies her framework to include these missing elements.

The case study analysis in Chapter 4 provides a review of the existing workplace harassment legislation in Canada. It demonstrates the variation in conceptualizing and regulating this workplace phenomenon. Through this analysis, this thesis exposed three models, the External Enforcement model, Internal Enforcement model and the Hybrid Enforcement model for legislating workplace harassment. Through an analysis of these models, in Chapter 5, this thesis reveals potential disadvantages to the respective models. The External Enforcement Model can be disadvantageous, as it requires government agencies to administer the complaint and investigation processes, which could have a financial hindrance. The analysis of the Internal Enforcement model reveals that it can be problematic as little direction is given to employers to assist with the development and implementation of workplace harassment policies and procedures and also does not provide employees with external assistance, should their employer's investigation processes be insufficient to address their complaint. The Hybrid Enforcement model appears to be the most advantageous method of legislating workplace harassment, as it requires the employer to conduct the initial complaint and investigation process but also enables employees to seek further assistance through government agencies.

Chapter 6 analyzes the existing workplace harassment legislation in Québec, Saskatchewan, Ontario, Manitoba and British Columbia and reveals that these jurisdictions conceptualize and regulate workplace harassment differently, fall at different points on the conduct continuum and implement different enforcement models. This thesis reveals that Québec, Saskatchewan and Manitoba combine features of the theoretical paradigms in conceptualizing workplace harassment, while British Columbia conceptualization aligns with features from the Psychological Harassment paradigm. Ontario's conceptualization of workplace harassment, on the other hand, does not fit with any of the paradigms.

Furthermore, this thesis demonstrates that the harmful workplace conduct continuum and the recognition of escalating behaviours resulting in workplace violence is partially recognized in the legislating jurisdictions in Canada, with the exception of Ontario, which fully recognizes the continuum.

On analysis of the implementation of the Enforcement Models in the Canadian legislating jurisdictions, this thesis reveals that the Hybrid Enforcement model is more prevalent in Canadian jurisdictions than the External Enforcement model or the Internal Enforcement model. Saskatchewan, Manitoba and British Columbia all adopt a form of the Hybrid Enforcement

model, whereby employees have a right to a harassment free workplace, employers are responsible for enforcing the legislative provisions relating to workplace harassment, and with the exception of Manitoba, employees can seek further assistance through government agencies. Ontario is the sole legislating jurisdiction that adopts the Internal Enforcement model while Québec is the sole legislating jurisdiction that implements the External Enforcement model.

Finally, this thesis reviews the legislation of the five jurisdictions in Canada against the model legislative framework. This comparison provides insight into the various ways of legislating this workplace phenomenon and also highlights the shortcomings of each of the jurisdiction's legislative responses.

## **7.2 Implications**

This thesis contributes to Canadian legal literature on legislative responses to workplace harassment. It provides the first cross-jurisdictional comparison of workplace harassment legislation in Canada. In the 10 years since the first workplace harassment legislation has come into force in Canadian jurisdictions, only five provinces have implemented a response. This thesis provides a framework for future researchers and lawmakers to consult when developing and implementing workplace harassment legislation.

## **7.3 Future Research**

This thesis analyzes the legislative provisions of workplace harassment in five Canadian jurisdictions. It raises the questions as to why the other Canadian jurisdictions have not provided workers with protection against workplace harassment.

This thesis did not assess the effectiveness of these provisions. It is suggested that future research be conducted on an empirical basis to determine the effectiveness of the legislative responses and measure how well the provisions operate. Also, research on the effectiveness of the External Enforcement, Internal Enforcement and the Hybrid Enforcement models is necessary to determine which approach better facilitates protection against workplace harassment. Without such empirical evidence, legislation will continue to be enacted without regard to whether it effectively prevents and responds to the harms of workplace harassment.

#### **7.4 Conclusion**

In conclusion, this thesis demonstrates the various methods for legislating workplace harassment and provides insight into the current models of workplace harassment legislation in Canada. Workplace harassment must be addressed in order to prevent and stop this phenomenon from harming workers. Thus, the remaining jurisdictions in Canada should consider developing and enacting workplace harassment legislation to protect workers from harm.

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