Access to Workers' Compensation Benefits and Other Legal Protections for Work-related Mental Health Problems: A Canadian Overview

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ABSTRACT

This article reports on a study of the legal and policy framework governing access, in Canada, to workers' compensation benefits for workers who are work disabled because of mental health problems attributed to stressful working conditions and events. It also provides a brief description of legislation regulating psychological harassment in Quebec and Saskatchewan.

Applying classic legal methodology, the article examines the legal situation in Canada, relying on federal and provincial legislation and case law. While many of the jurisdictions studied explicitly restrict compensability to the consequences of traumatic incidents, application of this legislation is very different from one province to the next. In some provinces, legal exclusions are applied emphatically, whereas in others the workers' compensation appeal tribunals interpret the legislative exclusions much more narrowly, allowing for some access to compensation despite the legislative exclusions. Other provinces have no such exclusions and accept claims for both acute and chronic stress, although access to compensation remains more difficult for claimants with mental health problems than for those who are physically injured, regardless of where they live.

The article concludes by offering an analysis of the consequences of the current situation from a public policy and public health perspective, notably underlining the negative consequences, particularly for women, of current workers' compensation policy in most Canadian provinces.

Key words: Workers' compensation; psychosocial risk factors; mental health problems; psychological harassment; legislation

La traduction du résumé se trouve à la fin de l'article.

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Mental health problems are a significant source of disability in Canada,¹⁻³ and many mental health problems are attributable, in whole or in part, to stressful working conditions.¹ Workplace violence, notably in health care facilities,⁴⁻⁶ the hospitality industry and schools,⁷ is a significant cause of disability, both physical and mental.^{8,9} Psychological harassment^{10,11} and organizational factors^{3,10,12} have been linked to an increase in mental health problems but also to physical violence.⁶ Women are disproportionately affected by psychosocial risk factors,^{3,12} including psychological harassment.¹³ Some mental health problems are attributable to acutely traumatic, stressful events, often associated with workplace crime or violent accidents, hereinafter referred to as "acute stress" claims, whereas others develop more insidiously over time, hereinafter referred to as "chronic stress" claims. As we shall see, the nature of the stressful situation has a significant impact on access to economic support in many Canadian jurisdictions.

This paper addresses major policy issues governing protection for people who may be work disabled because of mental health problems arising from stressful work situations or conditions. It relies on classic legal methodology to examine the application of legislation, in Canada, that provides economic support for workers with mental health problems attributable to work-related stressors;¹ it then describes regulatory frameworks recently introduced to provide protection and recourse for workers who are harassed at work.²

Workers' compensation in Canada

Government, society and the business community have long accepted the legitimacy of regulatory interventions to protect work-

ers' health from risks attributable to working conditions. Employers are required to assume the costs of disability attributable to work-related hazards, as they control working conditions and are in the best position to redistribute those costs to the consumers of their products. In Canada,¹⁴ as is the case in other OECD (Organisation for Economic Co-operation and Development) countries, workers' compensation systems are the oldest social security programs, dating back to 1909 in Quebec¹⁵ and 1914 in Ontario.¹⁶ Canadian workers' compensation legislation is said to be the subject of a historic compromise: workers have access to benefits regardless of evidence of fault, and employers are protected from law suits brought by their workers. This legislation thus replaces civil liability rules and was originally designed to remove litigation and blame laying from the workplace.^{15,16}

In Canada, workers' compensation is governed by provincial legislation, with the exception of coverage for workers who are employed by the federal government or federal agencies, whose claims are governed by the *Government Employees Compensation Act*.^a Federal legislation provides for coverage of employees according to

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entitlement rules provided for under the law of the province where the employee is usually employed, but includes a general definition of coverage. Thus 14 different sets of rules govern access to compensation in Canada, and it has been held on several occasions that employees of the federal government will not be subject to the statutory exclusions in provincial legislation, given that the federal Act provides for no such exclusion.^b

In the late 1980s, no Canadian workers' compensation legislation explicitly addressed compensation for mental health problems, although some provinces, like Saskatchewan, had developed policy applicable to such claims.¹⁷ General rules governing disability arising out of employment were applied to "stress claims", and tribunals – notably in Quebec and Ontario – had accepted compensation claims not only for acute stress but also for situations associated with chronic stress, including harassment and overwork.¹⁷ Then, as now, workers' compensation laws in many US states covered both acute and chronic stress claims, although the rules varied considerably from state to state.¹⁸ All compensation boards in Canada were preoccupied, at that time, by the danger of "opening the floodgates" if the right to compensation for work-related mental health problems were to be recognized.¹⁹

In 2010, while legislation in all provinces acknowledges the right to compensation for workers who have mental health problems attributable to an acutely stressful situation, many provinces have explicitly excluded access to compensation for mental health problems associated with non-acute exposures to stress.

Provinces with Exclusionary Provisions

Between 1992 and 2002, several provinces, starting with Manitoba^c and followed by New Brunswick,^d Newfoundland,^e Nova Scotia,^f Prince Edward Island,^g Ontario^h and British Columbia,ⁱ modified their legislation to exclude protection for workers disabled because

^a R.S.C. 1985, c. G-5, s. 4(2).

^b *Stewart v. New Brunswick Workplace Health, Safety and Compensation Commission* 2008 NBCA 45; *Rees v. Canada*, [2005] N.L.C.A. 15. For a contrary view, see *Appeal Tribunal Decision 20074484*, (2007) New Brunswick Workplace Health, Safety and Compensation Commission.

^c *Workers Compensation Act*, C.C.S.M., c. W200, s. 1.1, "occupational disease ... does not include stress, other than an acute reaction to a traumatic event".

^d *Workers' Compensation Act*, R.S.N.B. 1973, c. W-13, as amended in the early nineties, now reads: "'accident' ... does not include the disablement of mental stress or a disablement caused by mental stress, other than as an acute reaction to a traumatic event".

^e *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990 c. W-11 "does not include stress other than stress that is an acute reaction to a sudden and unexpected traumatic event". The Act also specifically notes that industrial relations decisions cannot be the cause of injuries: 2(2) "Notwithstanding paragraph (1)(o), stress that may be the result of an employer's decision or action relating to the employment of a worker 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 does not constitute an injury".

^f *Workers' Compensation Act*. 1994-95, R.S.N.S., c. 10, s. 1. "accident ... does not include stress other than an acute reaction to a traumatic event".

^g *Workers Compensation Act*, R.S.P.E.I. 1988, c. W-7.1, s. 6 now reads: "The definition "accident" ... does not include stress other than an acute reaction to a traumatic event".

^h *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, s. 13(4) and (5): "a worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However the worker is not entitled to benefits for mental stress caused by his or her employer's decision or actions 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 employment."

of mental health problems attributable to stress that was not acutely traumatic. Policy in most provinces also expanded on potential reasons for exclusion. For instance, New Brunswick compensation board policy explicitly excludes claims arising from "a decision of the worker's employer relating to the management and monitoring of the worker's employment" (section 2.3). It also excludes events that were not "unusual and excessive in comparison to the work-related events or stressors experienced by an average worker in the same or similar occupation". When the latter applies, coverage is denied to those workers who are the most often exposed to stressful situations. These policy-based exclusions have sometimes been upheld by the courts.^j However, the fact that the B.C. statute provides for restrictive access to compensation for people with mental health problems has been challenged on the basis of human rights legislation,^k and a recent judgement of the B.C. Court of Appeal has held that the restrictive policy requirements in the province are a violation of the equality provisions of the *Canadian Charter of Rights and Freedoms*^m and constitute discrimination on the basis of mental disability.ⁿ While the facts of that case did not apply to the section of the Act that excludes chronic stress (the complainant had been exposed to an acutely traumatic event), the reasoning of the Court of Appeal is most relevant to the constitutionality of the exclusion of chronic stress.

Despite very similar legal language used in the legislation of the various provinces that have adopted such exclusions, case law shows a surprising variation in the ways in which these provisions have been interpreted and applied, perhaps because of variations in policy, not sanctioned by the provincial legislature but implemented on the initiative of the compensation board.

In New Brunswick, involvement in a car accident was considered to be a traumatic event, even though the worker did not suffer physical injury, and the fact that the worker had previously suffered from personal problems was not an obstacle to compensation.^o Yet a claim by a sheriff's officer who was traumatized when he tried to prevent a suicidal individual from jumping from the 12th floor of a building was denied because he was "specifically trained to deal with crisis of this type".^p In Nova Scotia, a worker vulnerable to anxiety developed post-traumatic stress disorder after being reprimanded by his supervisor. His claim was accepted in appeal because it was "something other than the commonplace workplace experiences of the particular worker",^q and similar con-

ⁱ *Workers Compensation Amendment Act, 2002*, amending the *Workers Compensation Act* R.S.B.C. 1996, c. 492. S. 5.1 was enacted in 2002 to restrict access to compensation to "an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment [that] is not caused by a decision of the worker's employer 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."

^j *D. W. v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2005] N.B.C.A. 70.

^k *CUPE, Local 873 v. B.C. (Minister of Labour and Citizens' Services) and WCB*, 2007 BCHRT 73.

^m *Canada Act*, 1982 (1982, c. 11(U.K.)) in R.S.C., 1985 App. II, no 44.

ⁿ *Plesner v. British Columbia (Hydro and Power Authority)*, [2009] B.C.J. No. 856.

^o *Appeal Tribunal Decision 20074606*, (2007) New Brunswick Workplace Health, Safety and Compensation Commission.

^p *Appeal Tribunal Decision 20074781*, (2007) New Brunswick Workplace Health, Safety and Compensation Commission.

^q *Children's Aid Society of Cape Breton-Victoria v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, [2005] N.S.J. No. 75.

clusions have been drawn under the Ontario legislation,^r although trauma associated with a threat of dismissal was not compensable under the Act.^s Mental health problems attributable to circumstances that could meet the definition of psychological harassment have been accepted as compensable in Newfoundland and Ontario^t but refused in New Brunswick^u and British Columbia. Case law in Ontario has restricted access to compensation to those cases in which the harassment was "significant".^v In B.C., case law is so restrictive that the depression and severe anxiety of a school teacher who was subject to a series of stressors and harassing behaviours culminating in death threats were held not to be compensable illnesses, as "Mental stress that arises cumulatively from a series of events is not what the statute and the policy intended to compensate for".^w A nurse who developed mental health problems after being the subject of abuse and threats of assault, sufficiently serious to warrant police intervention, by a patient's family was not compensated because there was insufficient evidence that "the event between the worker and the patient's relative [was] consistent with the examples cited in policy".^x

Smaller provinces have generated little case law, but a significant body of case law has developed in Ontario and British Columbia, including several successful claims rendered before the legislative changes. Since the restrictive definitions were introduced, few publications have addressed this issue in the legal or policy literature.²⁰ An Ontarian overview has suggested that statutory provisions excluding access to compensation for chronic stress claimants may be discriminatory and unconstitutional,²¹ a finding that certainly seems supported by the reasoning applied in a recent decision of the B.C. Court of Appeal.^y

Provinces without Exclusionary Provisions

Quebec,^z Saskatchewan,^{aa} Alberta,^{bb} the North West Territories,^{cc} Nunavut^{dd} and the Yukon^{ee} made no such exclusion, and in 2010 claims for both acute and chronic stress may be filed in these jurisdictions. Workers who have suffered from mental health problems related to chronically stressful situations such as psychological

harassment have been compensated in the Yukon,^{ff} Saskatchewan^{gg} and Quebec,^{17,22-25} although in all jurisdictions evidence of disability and work-relatedness is essential, and cases involving labour relations issues are treated under more stringent criteria.^{23hh} Protection from grievances, human rights complaints and other lawsuits brought by workers claiming to be psychologically harassed has been granted to employers both in Saskatchewanⁱⁱ and Quebec.^{jj} Quebec has been compensating for chronic stress claims for years and has accepted claims under the definition of both occupational disease and industrial accident, although the vast majority of accepted claims, even for chronic stress, are accepted under the provision governing industrial accidents.^{17,23}

Where legislation allows for chronic stress claims, case law and sometimes policy have consistently insisted on evidence that the workplace stressors be unusual, although it is not always clear what the point of comparison should be. While case law in some provinces has looked to the average workplace in a specific industry as a point of comparison,^{kk} in Quebec circumstances must go beyond what would be expected in the average workplace.²³ This interpretation is preferable if protection is to be provided to those in the most hazardous work sectors.

In Quebec, the province with the largest number of claims for mental health problems, it is impossible to access data that distinguish clearly between acute stress and chronic stress, as there is no reason for the Commission de la santé et de la sécurité du travail (CSST, the Occupational Health and Safety Commission [our translation]) to make that distinction, given that the legal framework itself does not distinguish between acute and chronic stress. Two sources, however, allow us to consider claims data in a way that is useful to understanding adjudication practices relating to mental stress claims. Figure 1 provides a portrait of CSST claims data, classified by diagnosis, covering the period 2004 to 2007. The categories available for analysis are "Nervous shock (post-traumatic stress disorder)", "Anxiety, stress, neurotic disorders", "Burnout", "Depressive states", "Adaptation disorders" and a few other diagnoses that each include between zero and five claims, depending on the year: "Psychological decompensation", "Mental syndrome disorder", "Organic mental disorder", and "Mental disorder attributable to a toxic substance". Because the last four categories altogether included between three and seven claims during the four years analyzed, we have not excluded them from the category "Other diagnoses" that appears in Figure 1. While not a perfect fit, it is reasonable to assume that the diagnosis of "Nervous shock-PTSD" is usually reflective of exposure to an acutely traumatic event, so it may serve as a proxy for acute stress claims. However, it is likely that this underestimates the number of acute stress claims, as it is quite probable that diagnoses associated with acutely stressful incidents could also be found in the "Other" category (including depression, anxiety disorders). It is far less likely that cases of chronic stress are included in the diagnostic category "Ner-

^r Decision No. 1527/05, Ontario Workplace Safety and Insurance Appeals Tribunal 2006.

^s Decision No. 392/02, Ontario Workplace Safety and Insurance Appeals Tribunal 2002.

^t Newfoundland (Workplace Health, Safety and Compensation Commission) v. Smith, [2000] N.J. 273. For Ontario, see for example, Decision No. 2056/03, [2004] O.W.S.I.A.T.D. No. 481; Decision No. 2391/06, [2006] O.W.S.I.A.T.D. No. 2880; Decision No. 2270/06, [2007] O.W.S.I.A.T.D. No. 881; Sharif v. McDonald's Restaurants of Canada Ltd, [2007] O.W.S.I.A.T.D. No. 835.

^u Appeal Tribunal Decision 20064353, (2006) New Brunswick Workplace Health, Safety and Compensation Commission; Appeal Tribunal Decision 20074484, (2007) New Brunswick Workplace Health, Safety and Compensation Commission.

^v Decision No. 1394/07, [2007] O.W.S.I.A.T.D. No. 1878.

^w Decision No. WCAT-2008-01573; see also Review Reference #: R0072167, B.C. Workers Compensation Board, 2007; Review Reference #: 7164, B.C. Workers Compensation Board, 2003.

^x Review Reference #: R0060415, B.C. Workers Compensation Board 2006.

^y Plesner v. British Columbia (Hydro and Power Authority), [2009] B.C.J. No. 856.

^z Act Respecting Industrial Accidents and Occupational Diseases, R.S.Q. c. A-3.001, s. 2.

^{aa} Workers' Compensation Act, 1979, S.S. 1979, c. W-17.1.

^{bb} Workers' Compensation Act, R.S.A. 2000, c. W-15, s.1(a).

^{cc} Workers' Compensation Act (Nunavut), R.S.N.W.T. 1988, c.W-6.

^{dd} Workers' Compensation Act (Nunavut), R.S.N.W.T. 1988, c.W-6.

^{ee} Workers' Compensation Act, R.S.Y. 2002, c. 231, the Act specifically includes post-traumatic stress disorder but does not exclude other mental health problems explicitly.

^{ff} Decision # 61. Yukon Workers' Compensation Appeal Tribunal 2003; Decision #115. Yukon Workers' Compensation Appeal Tribunal 2006.

^{gg} Canada Post Corp. v. Saskatchewan (Workers' Compensation Board), [1998] S.J. No. 839 (accepted claim overturned on procedural grounds).

^{hh} Decision #115. Yukon Workers' Compensation Appeal Tribunal 2006.

ⁱⁱ University of Saskatchewan v. Workers' Compensation Board of Saskatchewan, 2009 SKCA 17.

^{jj} Béliveau St. Jacques v. Fédération des employés et employés de services publics inc. (C.S.N.) et al, [1996] 2 S.C.R. 345.

^{kk} Bishop v. Nova Scotia (WCAT), [2008] N.S.C.A. 29.

vous shock, post-traumatic stress disorder" given the restrictive DSM-IV criteria for post-traumatic stress disorder.

During the period between 2004 and 2007, acceptance rates for claims for "nervous shock" averaged 79%, varying between a high of 80% in 2004 and a low of 78.2% in 2006, and acceptance rates for all other mental health diagnoses averaged 23%, varying between 26.1% in 2004 and 20.6% in 2007.

A second source of information about compensation for mental health problems is available through analysis of the CSST annual reports on compensation for violence, a category that includes physical violence, sexual harassment and psychological harassment. As explained in the introduction to the most recent report dated 2009,⁹ the CSST revised its methods for keeping statistics on these issues, and the report warns that statistics before June 2004 are unreliable, as data concerning refused claims were incomplete. This would lead the reader to expect larger numbers of claims after the systematic inclusion of the refused claims, yet the revised tables drastically reduce the number of claims for psychological injury attributable to violence, and the numbers of claims for physical violence remain the same in the two reports. Thus, in Table 10 of the 2008 report⁸ an average of 2,467 claims for violence causing psychological injury are identified for 2004-2006. In Table 10 of the 2009 report⁹ an average of 1,246 claims for the same category and the same years are identified, about half the number identified in the previous report. Although the more recent report does not explain this discrepancy, it is plausible that the definition of violence has been reshaped between the two reports, leading to the exclusion of cases included in the previous report. This gives rise to some intriguing comparisons. In both the CSST violence reports, it is clear that claims for physical injury are accepted at a higher rate than claims for psychological injuries. Here, we only examine the years 2004-2006, as data for these years are treated in both reports. In the 2008 report (Table 17), the success rates for claims related to physical disability arising from violent incidents ranged between 94% and 96% during these years, whereas acceptance rates for claims for psychological injury attributable to violent incidents ranged between 31% and 35% (Table 10).⁸ In the 2009 report (Table 17), although claims for physical injury attributable to workplace violence (2004-2006) were accepted at the same rate as in the previous report, claims for psychological injury (Table 10) are reported to have been accepted at a much higher rate than previously, varying between 53% (2006) and 61% (2004).

In the 2009 report (Table 10), between 2004 and 2007 an average of 682 claims were accepted for mental health problems attributable to violence, and an average of 1,095 claims for physical injury attributable to violence were accepted (Table 17). An average of 70 claims for psychological harassment and 14 claims for sexual harassment were accepted annually during that period (Table 3), but no information is available in either this or the 2008 report with regard to the number of such claims that were denied, and one wonders if the "missing cases" might simply have been removed from the category "psychological harassment" if they were denied, thus disappearing from the purview of the report on violence. The number of accepted claims in these categories seems remarkably low, given that thousands of claims for psychological harassment are filed annually at the Employment Standards Commission, and that many of those claimants are absent from work for health reasons at the time of filing.²⁶

It should be noted that, for previous periods, success rates for claims for chronic stress are far higher before the appeal tribunal than in the first instance.^{22,24}

Workers' compensation for psychological disability is difficult to access, even in those provinces that have no explicit legislative restrictions. Aside from mental health problems associated with acutely violent incidents, it appears necessary to address the appeal tribunal when seeking access to compensation, even in Quebec, which has historically been more open to this type of claim. Quebec data show that access to compensation for mental health problems has not "opened floodgates" in that province. Analysis of the data in Figure 1 in light of the 2007 annual report of the CSST shows that the claims for mental health diagnoses associated with workplace stress (primary claims) represented 3.2% of total claims and 1.1% of compensated claims²⁷ in that year.

In most Canadian jurisdictions, workers' compensation systems provide leverage for prevention incentives because experience-rating systems increase costs to employers as the frequency and costs of compensated claims increase. If mental health problems are invisible to those systems, as they are, in particular, in those provinces that have excluded chronic stress from the purview of their legislation, legal incentives for prevention are minimal.²⁸ In the next section we will examine legislation designed to promote prevention of psychological harassment in the workplace.

Recent legislative developments relating to psychological harassment

As we have shown, Quebec and Saskatchewan were the first jurisdictions to acknowledge compensability of mental health problems related to chronic stress, so it is perhaps not surprising that they were also the first jurisdictions to enact legislation on psychological harassment.

Increased concern about psychological violence, including harassment and bullying, has sparked a broad range of legislative prevention strategies around the world. The first legislation specifically addressing mobbing was adopted in Sweden in 1993, and since then several countries, including France (2002), Belgium (2002), Finland (2002) and South Australia (2005), to name only a few, have introduced legal frameworks targeting prevention of harassment, bullying and mobbing. In Canada, Quebec, whose legislation has been in force since 2004,^{mm} was the first province to regulate prevention of psychological harassment, followed in 2007 by Saskatchewan.ⁿⁿ While not specifically addressing psychological harassment, federal regulations now require risk assessments to prevent violence in the workplace and explicitly acknowledge psychological harassment to be a cause of workplace violence.^{oo} In December 2009, Ontario introduced provisions on violence and harassment to the *Occupational Health and Safety Act*, which will come into force in June 2010.^{pp}

Quebec legislation defines psychological harassment in the following terms: "Any vexatious behaviour in the form of repeated

^{mm} *Labour Standards Act*, RSQ c. N-1.1, s. 81.18-81.20 and 123.6-123.16, as provided for in *An Act to amend the Act respecting Labour Standards*, 2002 S.Q. c. 80.

ⁿⁿ *The Occupational Health and Safety (Harassment Prevention) Amendment Act*, 2007, 2007 S.S. c. 34.

^{oo} *Regulations Amending the Canada Occupational Health and Safety Regulations*, Canada Gazette, vol. 141, No. 50, December 15, 2007.

^{pp} *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009 S.O. c. 23.

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." It provides for the right to a workplace free from harassment, defines employer obligations and prescribes remedies against the employer who fails to prevent harassment in the workplace. Access to recourse exists for all employees. The legal provisions are deemed to be part of all collective agreements, and unionized workers must go through their union and use the grievance procedure. Thus, labour arbitration is the primary recourse for unionized workers. For the non-unionized, complaints can be filed with the Commission des normes du travail (Employment Standards Commission [our translation]), which will represent the worker before the Commission des relations de travail (Labour Relations Commission [our translation]) if the claim is deemed to be well founded. Remedies include orders providing for reinstatement of the harassed worker, requiring reasonable action to put a stop to harassment, and providing for modification of disciplinary orders and indemnities for loss of employment. If the worker has not fallen ill because of the harassment, monetary damages can be granted for lost wages, punitive and moral damages, and payment for psychological support. If the worker has become ill, the sole recourse for damages related to work disability is under workers' compensation legislation.²⁹

More than 2,000 complaints for psychological harassment have been filed annually at the Commission des normes du travail by non-unionized workers since the coming into force of the legislation;²⁶ figures for unionized workers are unavailable.

In October 2007, amendments to Saskatchewan legislation that explicitly require prevention of psychological harassment came into force. Building on previous provisions regarding discriminatory harassment, sections 2(1) and 2(3) of the *Occupational Health and Safety Act* now provide that "harassment means any 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; and that constitutes a threat to the health of the worker.... 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." The legislation provides for mechanisms for intervention by occupational health officers and intervention in appeal to special adjudicators, who will meet with the parties, attempt mediation and conciliation and, if all else fails, render a decision.

The Ontario legislation is designed to promote risk assessments and prevention measures but does not provide recourse for the individual worker who is the victim of violence or harassment. It covers physical violence and workplace harassment, and also introduces obligations for employers with regard to domestic violence that is likely to expose a worker to physical violence in the workplace. The definition of "workplace harassment" is broader than that of other provinces, as it "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".

However, most provisions address workplace violence without addressing workplace harassment, which is not included in the definition of violence. The legislation specifies that the right to refuse to work may apply when there is danger of physical violence but, contrary to the case in Quebec,⁹⁹ does not allow for the right to refuse in cases of harassment.

CONCLUSION

Access to workers' compensation benefits provides a first step in making visible to the business community and policy makers the extent to which mental health problems are associated with working conditions. Statistical portraits have been linking psychosocial risk factors at work to mental health problems for years, yet little progress in prevention seems to have been made.¹² In those provinces like Quebec, where chronic stress is acknowledged as a potential source of compensable disability, research priorities and prevention strategies have also been more specifically targeted at working conditions and work organization.³⁰

Even when workers' compensation legislation excludes coverage for chronic stress, litigation regarding psychological harassment and other chronic stressors nevertheless continues, before arbitration tribunals, the courts and even before the workers' compensation appeal tribunals. In late 2008, the Superior Court of Ontario¹¹ ordered an employer and a supervisor to pay a harassed worker and her partner over \$500,000 in damages (compensatory, moral and punitive) for intentional infliction of emotional distress. The court found the employer owed a duty to the worker to provide her with a harassment-free environment and that the employer had failed to do so; the worker had been on sick leave as a result of the harassment, and the employer and the harasser were ordered to pay not only damages but the costs of the litigation, amounting to an additional \$225,000.³⁵

Exclusion from workers' compensation coverage for this type of disability has significant consequences for the health of workers: withdrawal from work is often delayed, delaying access to care for those needing to be followed by a psychologist and exacerbating the health consequences associated with continued exposure to chronic stressors. Rehabilitation programs provided by workers' compensation legislation are not available, thus prolonging exclusion from the workplace and potentially increasing work disability. Economic incentives, embedded in the workers' compensation system to promote prevention and support to ensure successful return to work, do not apply, and workers with mental health problems are left to their own devices without the support that is provided to their colleagues suffering from physical health problems related to work. Even in provinces where coverage is available, there is evidence that access to compensation is more difficult for those with mental health problems and that it is often necessary to litigate in order to access support. In all cases in which workers need to struggle to access income support while they are disabled by work-related mental health problems, perceptions of unfairness can exacerbate those health problems.³¹

Exclusion of mental health problems attributable to workplace exposures from the workers' compensation systems also has con-

⁹⁹ Chagnon et Marché Bél-Air, [2000] C.L.P. 388.

¹¹ Piresferreira and Scott v. Ayotte and Bell Mobility, [2008] O.J. No. 5187, December 3, 2008.

³⁵ Piresferreira and Scott v. Ayotte and Bell Mobility, [2009] O.J. No. 2437, June 9, 2009.

sequences for taxpayers and the public social security system, transferring to the public safety net the costs of health care³² and income security in cases of disability.³³ When available, salary insurance designed to support workers with personal health problems picks up some of the cost of temporary disability in many cases in which the disability is attributable to work.³⁴

Given that women are more often exposed to psychosocial risk factors and more often disabled because of work-related mental health problems, biased policy with regard to compensation for mental health problems affects them disproportionately, and this may well justify a constitutional challenge as a violation of equality rights under sections 15 and 28 of the *Canadian Charter of Rights and Freedoms*;³⁵ it is also clear that the equality provisions could be invoked because of discrimination based on type of disability.³⁶ This has been done successfully with regard to the policy of the British Columbia Workers' Compensation Board,³⁷ and the same reasoning could be applied to the exclusion of chronic stress claims in all jurisdictions that apply differential access to compensation on the basis of the type of health problem (physical or mental) caused to the worker by workplace events or conditions. From a legal perspective, the status quo seems untenable. Exclusionary clauses do not make the problem go away, they simply transfer the venue to civil courts, increasing costs to both workers and employers, as can be seen by the recent Ontario decision discussed above.³⁸

The aforementioned legislative initiatives on psychological harassment are the first in North America, and it is encouraging to see provincial legislators taking on difficult issues that affect mental health in the workplace. It must nevertheless be noted that the definitions retained are highly technical and restrictive, and many instances of verbal violence, incivility and hyper-conflict do not meet the legal definition of harassment,¹³ although they clearly can lead to work-related mental health problems. Other jurisdictions are less exacting in their legislation. Finland, for instance, allows for intervention by authorities if there is evidence of "violence, harassment and other inappropriate treatment". Nonetheless, the legislative acknowledgement of the existence of the phenomenon of psychological harassment can in itself initiate change by forcing workplace parties to acknowledge the phenomenon and take action for its prevention. The importance of improving legal mechanisms for the prevention of mental health problems in the workplace has been underlined again in a recent legal treatise on the issue.²⁵

As an example of ways in which this type of legislation drives prevention, the introduction of the Quebec legislation has led to an increase in the development of company policies on psychological harassment; training activities for both employers, managers and union members;³⁵ and the inclusion of psychological harassment in government health surveys.³⁶ Case law shows also that health and safety inspectors from the CSST have occasionally intervened since the enactment of the legislation to ensure that employers have policies for the prevention of harassment.³⁷

From a public health perspective, reduction of obstacles associated with the compensation process would promote a more speedy access to services and benefits delivered in a timely manner. It would also provide a clear incentive to reduce workplace psychosocial risk factors. The Quebec example shows that floodgates would not open were those provinces with exclusionary provisions in their legislation and policy to eliminate those obstacles. The health of Quebec workers could also be favourably affected by reducing the necessity for litigation associated with appeals, litigation frequently required to ensure that there is access to workers' compensation benefits for mental health problems.

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³² *Canada Act*, 1982 (1982, c. 11(U.K.)) in R.S.C., 1985 App. II, no 44.

³³ *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, [2003] 2 S.C.R. 504.

³⁴ *Plesner v. British Columbia (Hydro and Power Authority)*, [2009] B.C.J. No. 856.

³⁵ *Piresferreira and Scott v. Ayotte and Bell Mobility*, [2008] O.J. No. 5187, December 3rd, 2008.

³⁶ Étude québécoise des conditions de travail, d'emploi et de SST, (EQCOTESST), www.irsst.qc.ca/fr/_projet_3565.html (Accessed March 28, 2010).

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RÉSUMÉ

Nous faisons le compte rendu d'une étude du cadre juridique et politique qui régit l'accès, au Canada, aux indemnités pour lésions professionnelles versées aux travailleurs qui doivent s'absenter pour des problèmes de santé mentale imputés à des incidents ou des conditions de travail stressants. Nous donnons aussi une brève description des lois sur le harcèlement psychologique en vigueur au Québec et en Saskatchewan.

Selon une méthodologie juridique classique, nous examinons la situation juridique au Canada d'après les lois et les décisions des tribunaux administratifs des administrations fédérale et provinciales. Bon nombre des administrations à l'étude limitent expressément le versement d'indemnités aux victimes d'incidents traumatisants, mais l'application des lois diffère beaucoup d'une province à l'autre. Dans certaines provinces, les exclusions législatives sont appliquées de façon péremptoire, tandis qu'ailleurs, les tribunaux d'appel des accidents du travail interprètent ces exclusions beaucoup plus étroitement, en ouvrant l'accès à l'indemnisation. D'autres provinces n'ont aucune exclusion de la sorte et acceptent les demandes d'indemnisation en cas de stress aigu et de stress chronique. Malgré tout, l'accès aux indemnités demeure plus difficile pour les travailleurs atteints de problèmes de santé mentale que pour ceux qui ont subi des lésions physiques, peu importe l'endroit où ils vivent.

Nous concluons par une analyse des conséquences de la situation actuelle du point de vue des politiques publiques et de la santé publique, en soulignant notamment les conséquences négatives, surtout pour les femmes, des politiques d'indemnisation des accidents du travail en vigueur dans la plupart des provinces canadiennes.

Mots clés : indemnisation des lésions professionnelles; facteurs de risque psychosociaux; santé mentale; harcèlement psychologique; législation