

## WORKPLACE VIOLENCE: EVER-EVOLVING OH&S OBLIGATIONS AND WORKER RIGHTS

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**By: Cheryl A. Edwards**

Workplace violence in Canada is a growing and prominent concern. Based on recently published statistics on Criminal Victimization in the Workplace<sup>1</sup>, over 365,000 violent incidents are reported annually at Canadian workplaces. Almost 1/5 of incidents of violent victimization in Canada occur in the workplace.

Most readers are aware of highly publicized incidents of workplace homicide. In the *Sears Canada* matter in 1996, Theresa Vince, a senior human resources administrator, was killed by her own boss after a prolonged period of harassment and stalking. In the OC Transpo matter, Pierre Lebrun, a long-service bus driver, went on a shooting rampage at his workplace in Ottawa in 1999, killing four employees and two others before committing suicide. Co-workers had taunted him because of a stutter. In 2005, Lori Dupont, a nurse at Hotel Dieu Hospital was stabbed to death by her ex-boyfriend, who worked in the same hospital. The perpetrator subsequently killed himself by taking a drug overdose.

But workplace violence is a multifaceted problem which involves so much more than the fortunately rare and extreme examples above. Day in and day out workers may be threatened, bullied, hurt by their own co-workers, supervisors, clients and customers, or by criminal intruders into the workplace. Violence can result in complex responsibilities for employers, with overlapping legal obligations and potential liabilities. There are numerous legal avenues available to workers who are the targets of objectionable workplace behaviours. Those avenues include: police contact and the commencement of Criminal Code charges; human rights complaints where a protected human rights ground is violated; civil actions, and grievances where collective agreement provisions are violated. A victim of alleged violence in the workplace often has available several possible means of legal action before multiple forums. Internal company processes may be in place to investigate and deal with objectionable behaviour pursuant to violence or harassment policies. But increasingly workers are turning to OH&S work refusals, complaints, requests for government compliance orders, and potentially even requests for prosecution of employers where workplace violence-related OH&S legal obligations are not met.

### **Defining workplace violence**

The answer to the question “What is workplace violence?” depends on the context, as employer duties to prevent workplace violence and harassment span numerous

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<sup>1</sup> Sylvain de Léséleuc, “Criminal Victimization in the Workplace” (2004) *Canadian Centre for Justice Statistics Profile Series* 85F0033MWE, Statistics Canada. Available: <http://www.statcan.ca/english/research/85F0033MIE/85F0033MIE2007013.htm>.

It should be noted that the study was limited to select workplaces and select types of violent victimization including sexual assault, robbery and physical assault. It is thus believed by many that current statistics on workplace violence far exceed these numbers.

statutes and forums. In the OH&S context, increasingly legislation and regulations across Canada include obligations for employers to protect workers from workplace violence. The scope of those obligations is in part determined by how broadly the notion of “violence” is defined in the statute.

Several jurisdictions in Canada have no current definition of workplace violence. This is the case in New Brunswick, Newfoundland and Labrador, Northwest Territories, Nunavut, Yukon, Ontario and Quebec. Where violence is defined, interestingly, there is growing recognition that violence extends beyond physical acts to include psychological violence, such as harassment and bullying.

In the Federal jurisdiction, recently amended CLC Occupational Health and Safety Regulations contain a broad definition of workplace violence which does not restrict violence to “physical injury”. In Manitoba protection of workers against workplace violence includes protection against “any threatening statement or behaviour that gives a person reasonable cause to believe that physical force will be used against a person”. Manitoba legislation also contains specific provisions on the protection of workers against harassment, which is broadly defined as any objectionable conduct, comment or display by a person, directed at a worker in a workplace, based on specific, protected grounds (such as sex, race, religion, etc.) and which creates a risk to the health of the worker.<sup>2</sup>

In Ontario a private member’s bill (Bill 29)<sup>3</sup> introduced in December 2007 would create a definition of violence with significant breadth, to include “the threatened, attempted or actual use of physical force that endangers the physical health or safety of a worker, and includes threatening statements or behaviour a worker reasonably believes may cause physical injury”. Bill 29 also contains specific provisions defining harassment. While this is not a government bill and therefore unlikely to become law, it has been a factor in spurring recent Ontario government action to consult on this issue, including consultation on a potential definition of workplace violence in the Ontario OHSA.

## **Do workers have the right to refuse work because of a risk of violence of violence or harassment?**

Employers must always be mindful of OH&S legislation across Canada which allows workers to refuse work if they have reasonable cause to believe the work is unsafe. Work refusals trigger an obligation for the employer to investigate. A work refusal can

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<sup>2</sup> Quebec and Saskatchewan also have their own specific legal provisions on the protection of workers against harassment. In Quebec labour standards legislation ‘psychological harassment’ is defined 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 he employee”. The Saskatchewan OHSA definition of harassment refers to inappropriate conduct, comment, display or gesture based on one of the protected grounds (such as sex, race, religion, etc.) that adversely affects the worker’s psychological or physical well-being or constitutes a threat to the worker’s health or safety. Saskatchewan requires that ‘harassment’ requires either a repeated conduct or a single incident causing long lasting harmful effect, in order to discourage possible abuse by workers of the protective provisions.

<sup>3</sup> Bill 29, *An Act to amend the Occupational Health and Safety Act to protect workers from harassment and violence in the workplace*, 1st Sess, 39th Parl., Ontario, 2007, (first reading passed 13 December, 2007) Available: [http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillID=1938](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=1938)

force a detailed investigation and a disruption of the workplace pending a decision by the employer, or if the matter cannot be resolved, a government official.

For some time, healthy debate has transpired regarding whether work refusal provisions in OH&S legislation too readily permit work refusals. Should the right to refuse be restricted to conditions of imminent danger? To physical hazards only? Should OH&S work refusal rights be expanded to allow employees to refuse work in situations of threatened violence, bullying or harassment? In jurisdictions where violence is clearly defined as including more than risk of a physical hazard (Manitoba, Saskatchewan, the federal CLC) the answer to this question would be yes!

But the answer in many jurisdictions is not as clear. Current Ontario OHS work refusal provisions do not specifically extend to allowing workers to refuse to work as a result of a threat of violence in the workplace. However, this might change in the near future. Bill 29 proposes extending work refusal rights specifically to workers who have reason to believe that the existence of workplace-related harassment or violence is likely to endanger their safety. Furthermore, until the final resolution of the investigation, workers would have the right to remain away from work with pay. If OHS statutes such as Ontario's are amended to permit work refusals where there is a threat of violence, or even where there is non-physical harassment in the workplace, this will mark a significant change for employers. Historically, in jurisdictions where no definition of workplace violence exists, or definitions do not include non-physical violence, tribunals have ruled that OHS statutes are not sufficiently elastic to encompass non-physical violence or harassment.<sup>4</sup>

## **Duties to Protect Workers From Violence**

Many provinces have moved to introduce specific OH&S obligations for employers to protect workers against violence. Currently the federal CLC and the OH&S legislation of Alberta, British Columbia, Manitoba, Nova Scotia and Saskatchewan have express detailed OH&S legal obligations respecting workplace violence prevention. Key obligations include requirements to develop policies on workplace violence; undertake workplace violence risk assessments; investigate events of workplace violence; provide training in policies and procedures as a means to prevent workplace violence. Even in the absence of specific statutory obligations to protect workers from violence or physical force, the provisions of most Canadian OH&S statutes impose a general duty on employers to take reasonable precautions to protect each worker.

## **Emerging initiatives**

The rising number of violent incidents in the workplace have led to resounding pressure on governments across Canada to amend OH&S legislation to impose broader responsibilities for employers to protect workers from workplace violence. Just a few recent initiatives and consultations are outlined below. It is fair to assume that numerous jurisdictions, including Ontario, will follow the provinces that already

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<sup>4</sup> See, for example, *Meridian Magnesium Products* [1996] OLRD No. 4392

have specific provisions to protect workers from physical and potentially non-physical violence and harassment.

- ***Amendments to the Canada Labour Code***

As indicated above, the federal CLC has recently added Occupational Health and Safety Regulations. The new Regulations contain specific provisions on the protection of workers against workplace violence. Interestingly, the revised federal legislation contains a broad definition of workplace violence, including “*any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee*”.

- ***Role of inquest juries***

Incidents of homicide in the workplace have been highly publicized. In each of the above mentioned Ontario cases involving *Sears Canada* (1996), *OC Transpo* (1999) or *the Hôtel Dieu Grace Hospital* (2005), a coroner’s inquest was held, and in each inquest, the jury made specific recommendations to the government to adopt or amend OHS legislation to create measures for workplace violence prevention. The families of the workers involved in these tragic matters and others continue to lobby for more significant protection in the workplace, specifically protection in the Ontario OHSA.

- ***Ontario MOL targets high-risk workplaces in violence prevention initiative***

The problem of increasing workplace violence has not gone unnoticed by a number of government regulators. For example, in Ontario there are no OHSA provisions which specifically protect workers from violence, yet in 2007, in a joint effort involving the Workplace Safety and Insurance Board (WSIB) and the Ontario Ministry of Labour (MOL), a province-wide workplace violence prevention initiative was commenced. This initiative, which arose out of inspector training on revised Operating Procedures for dealing with workplace violence last fall, authorizes MOL health and safety Inspectors to make orders and issue directives to employers in ‘high risk industries’, either because there is no workplace violence prevention program in place, or because the program is ineffective in some respect.

Employers in Ontario have experienced compliance orders where a complaint or violent incident has arisen. Inquiries and orders, including orders to create violence prevention programs, conduct workplace violence training, conduct workplace violence hazard assessments, have also been made while MOL inspectors are conducting routine inspections.

High profile inquest recommendations and these enforcement initiatives of the Ontario MOL have paved the way to the introduction of Bill 29, discussed above, making the reform of OH&S legislation on workplace violence a particularly hot topic in Ontario. Bill 29 envisages sweeping new responsibilities for employers in Ontario to prevent workplace violence - - by creating policies and procedures, requiring violence risk assessments, requiring ongoing workplace training. The Ontario government has due to the pressure created by Bill 29, released a Consultation Paper on workplace violence. In a public consultation commencing September 17, 2008, the Ontario government requested input on whether reform of OH&S legislation

in Ontario is required in order to effectively prevent workplace violence. The Ontario government has sought input on such matters as whether employers should be required to implement a workplace violence prevention program, whether obligations relating to the prevention of workplace violence should be sector specific, and whether specific requirements regarding domestic violence in the workplace should be introduced. It is only a matter of time before the Ontario OHSA is amended so that Ontario joins the many other jurisdictions with workplace violence-related provisions.

***Cheryl A. Edwards is a former Ontario Ministry of Labour OH&S Prosecutor and is Lead in Heenan Blaikie's national OHS and WSIB Practice Group. Cheryl has more than 20 years of experience providing strategic, focused, practical advice and in-house training for public and private sector organizations. She also has extensive experience representing clients at trials, complaints, inquests and appeals. For more information on any of the issues discussed in this article, please, contact Cheryl at: Email: [cedwards@heenan.ca](mailto:cedwards@heenan.ca); Direct Line: 416 360.2897; Cell: 416.452.4958***