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Targeting Workplace Harassment in Quebec: On Exporting a New Legislative Agenda

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I. Introduction

The array of articles in this symposium demonstrates the extent to which the phenomenon of workplace harassment has begun to receive considerable attention around the world from the media, human resources professionals, academics, and increasingly, legislators. From Australia to the United Kingdom to Germany, policy-makers are drafting legislation aimed at ridding workplaces of behavior variously termed "mobbing," "bullying," and "psychological harassment."¹ On June 1, 2004, the Canadian province of Quebec [*424] became the first North American jurisdiction to ban non-discriminatory workplace harassment when amendments to the Labour Standards Act² (LSA) prohibiting the "psychological harassment" of workers came into effect. At the federal level, a Member of Parliament from Quebec recently introduced a private member's bill, the Workplace Psychological Harassment Prevention Act,³ which died on the order paper when the last Parliamentary session ended. If passed, the Act would have applied to all federally-regulated employers in Canada and would have created penalties, including termination of employment, for conduct amounting to psychological harassment of employees. Another private member's bill, this time in Ontario,⁴ recently sought to amend that province's Occupational Health and Safety Act to impose a number of duties on employers to prevent workplace psychological harassment.

For over twenty-five years, Canadian law has prohibited sexual harassment and other forms of discriminatory harassment (meaning harassment that relates to the target's race, disability, sexual orientation, or other similar characteristic). The amendments to the Quebec LSA aim to fill a gap in the law that currently provides a remedy (under human rights legislation) for discriminatory harassment, but not for harassment that is not obviously linked to the target's membership in a protected class such as that based on race, sex, religion, disability or sexual orientation.

This paper takes a preliminary look at this new legislative initiative. It first outlines briefly the minimal legal protections that existed in Quebec and throughout Canada before the psychological harassment law was introduced. It then describes key features of the law before examining some elements of the Quebec social and legal context that shaped the law and that may render the agenda less "exportable" to other Canadian and American jurisdictions. Finally, the paper suggests that it is worth considering the relationship between status-blind harassment and discriminatory harassment, as well as the effect of our attempts to address discriminatory harassment in current economic and political contexts, in an effort to see both the possibilities and potential pitfalls of this new legislative agenda.

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II. Workplace Harassment in Canada: Identifying the Scope of the Problem

It is beyond dispute that bullying and harassment can have a profound effect on the health and safety of workers.⁵⁵ This reality was driven home to Canadians in 1999 when an Ottawa transit bus driver, who reportedly was a victim of repeated bullying, shot and killed four co-workers before killing himself. A coroner's inquest into the tragic events made numerous recommendations aimed at identifying and addressing workplace harassment and violence.⁵⁶

Estimates of the prevalence of workplace harassment or bullying vary significantly in the research, likely due in part to the imprecision and variability of definitions, the relatively recent start to research in this area,⁵⁷ and the different disciplinary and normative lenses through which workplace harassment may be studied. For example, Loreleigh Keashly examined fifteen psychological studies, most of which reported that at least half of workers experienced "emotional abuse," with one study reporting that 98.9 percent of medical students experienced emotional abuse on the job.⁵⁸ At the same time, the Queensland Government Workplace Bullying Taskforce cited a number of international studies reporting "workplace harassment" at levels of 7 percent (Ireland), 25 percent (United Kingdom), and 8.6 percent (Norway).⁵⁹

In Quebec, the province's Commission des Norms du Travail [Labour Standards Commission] apparently estimates that "up to one [*426] in ten" Quebec workers has been the target of bullying or psychological harassment.⁶⁰ Angelo Soares,⁶¹ a sociologist of work and professor in the School of Management at the Universite du Quebec a Montreal (UQAM), recently surveyed public sector workers in Quebec with the support of the federation of Quebec public sector unions, the Centrale des Syndicates du Quebec (CSQ). Soares found that one in three CSQ members had been touched by some form of bullying (either as a target of bullying or as a witness to bullying in the workplace).⁶² Sixty-nine percent of those who reported being bullied indicated that they had endured an incident of bullying nearly every day. As for the consequences of bullying, Soares used a test to detect psychological distress developed by Sante Quebec (Quebec Health) and found that the average psychological distress score of people presently being bullied was 140 percent higher than that of people who have never experienced bullying.⁶³ In addition, 45.5 percent of people being bullied demonstrated symptoms of depression severe enough to warrant medical attention while less than 15 percent of the "never been bullied" category suffered from depression at that level. Workers in Quebec and elsewhere are reporting experiences that fit common definitions of workplace bullying or psychological harassment.⁶⁴

In addition to the Canadian employment law context, which will be outlined briefly below, it is important to consider the broader economic and political context in which workplace harassment is being reported. In particular, it is worth bearing in mind the global trend toward labor market flexibility, the deregulation of labor markets since the 1980s, and the related growth in "vulnerable" or "precarious" work. This phenomenon was described recently by Kerry Rittich:

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Increasing vulnerability at work is a feature of the new economy. By almost any measure, vulnerability for workers is increasing: workers now have less power in the workplace; they are compelled to assume more risk in the labour market; and they enjoy less job and income security as a result. In

addition, there are growing numbers of workers who are especially vulnerable, either because they generate inadequate income; because they are engaged in marginal self-employment and are not legally recognized as employees; because their work is either inadequately regulated and protected or falls outside the regulatory net governing work altogether; because they have conditions or obligations that impinge on their capacity to participate in the labour market; or because they are subject to forms of discrimination and disadvantage at work. ⁿ¹⁵

The growing number of vulnerable workers, including home-workers, tele-workers, piece-workers and others who are characterized as independent contractors rather than employees may be the most vulnerable to a variety of workplace abuses, including workplace harassment, ⁿ¹⁶ yet they fall outside the legislative protections for employees. In his ground-breaking work proposing a legislative response to workplace bullying in the United States, David Yamada ⁿ¹⁷ was careful to note the background factors in the modern American workplace that, in his view, create the conditions for bullying to flourish. Yamada cited (1) growth of the service sector economy, (2) the global profit squeeze, (3) decline in unionization in the U.S., (4) diversification of the workforce, and (5) increased reliance on contingent workers. ⁿ¹⁸ Similar social, political and economic factors are at play in Canadian workplaces, with the exception that the decline in unionization has not been as precipitous in Canada as it has in the U.S. ⁿ¹⁹ It remains to consider the Canadian legal context.

III. The Canadian Status Quo: Limited Protection From Workplace Harassment

Legislative jurisdiction to address workplace harassment is [*428] shared between Canada's federal and provincial governments. Employment law is largely a matter of provincial legislative jurisdiction within the constitutional division of powers, with each province having legislation concerning labor relations, employment standards, occupational health and safety, and human rights in employment. ⁿ²⁰ However, federal law governs the employment of all workers in the federal public service, Crown corporations, and federally-regulated industries such as banking, transportation, and telecommunications. Within this patchwork of federal and provincial legislation, workers are at least formally protected from discriminatory harassment, but have little protection from status-blind harassment. Yamada came to a similar conclusion in relation to U.S. law, albeit after a much more comprehensive examination than will be conducted here in relation to Canadian law. A meaningful attempt to address workplace harassment must take this broader context, as well as the more local political and legal context, into account.

First, it is significant to note that employment is not "at-will" in Canada. Rather, the common law of employment in Canada starts with the presumption that, absent just cause (which is interpreted restrictively in favor of employees), an employment contract can only be terminated upon reasonable notice or pay in lieu of reasonable notice. The length of reasonable notice depends on a variety of factors including the age of the employee, length of employment, and prospects for re-employment. ⁿ²¹ It ranges from a few weeks to two years or occasionally more, with the vast majority of employers opting to pay terminated employees "notice pay" rather than have the departing employee work out the notice period. Quebec is a civil law, rather than common law, jurisdiction. However, like Canadian common law, the Civil Code of Quebec conceives of employment as a contractual relationship and applies a number of similar principles. ⁿ²² Since this paper is primarily concerned with the potential expansion of psychological harassment law outside of Quebec, the brief discussion below of the Canadian legal status quo will focus on [*429] Canadian common law jurisdictions.

Looking first at human rights legislation, statutes in all provinces and in the federal sector prohibit discrimination in the workplace (as well as in housing, contracts, and the provision of services customarily available to the public) on the basis of enumerated grounds of discrimination.ⁿ²³ All jurisdictions list age, race, national or ethnic origin, disability, religion, sex, and sexual orientation as prohibited grounds of discrimination.ⁿ²⁴ Other grounds that are listed in some, but not all, human rights statutes include family status, marital status, criminal conviction, and political belief. Some provincial human rights laws explicitly prohibit harassment on the basis of the enumerated groundsⁿ²⁵ in addition to prohibiting discrimination. They define harassment as, for example, "a course of abusive and unwelcome conduct or comment undertaken or made on the basis of any characteristic referred to in subsection 9(2) [the prohibited grounds of discrimination]"ⁿ²⁶ or "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome."ⁿ²⁷ However, even in jurisdictions where harassment or sexual harassment are not defined or explicitly prohibited, the general statutory prohibition against discrimination in employment has been held to include discrimination by way of harassment.ⁿ²⁸

More will be said later about the successes and shortcomings of discriminatory harassment laws in Canada. In the meantime, it is important to understand the nature and scope of this protection, at least at a formal level. Employees who are harassed in the workplace on the basis of their sex, race or other recognized group characteristic may bring a complaint to the applicable (federal or provincial) human rights commission which will investigate the complaint, and if it is [*430] found to have merit, will take the complaint to mediation or ultimately, adjudication before a human rights tribunal. It is the human rights commission that has carriage of the complaint, not the complainant. Contrary to American law, there is no civil cause of action for discrimination.ⁿ²⁹ Remedies awarded by human rights tribunals in sexual harassment cases range from reinstatement of employment, damages for lost wages, minimal general damages for loss of dignity, humiliation and mental anguish (usually no more than a few thousand dollars), and more preventative remedies such as ordering an employer to establish policies and procedures to prevent and address sexual harassment.ⁿ³⁰ However, Canadian human rights commissions and tribunals have come under serious challenge due to lengthy delays, an increased focus on "private" resolution of human rights complaints (i.e., mediation), and other pressures caused at least in part by inadequate government resources.ⁿ³¹ For example, only one or two percent of complaints to the Canadian Human Rights Commission are referred to a tribunal for adjudication.ⁿ³²

In addition to human rights legislation that protects workers from discriminatory harassment, Canadian common law recognizes certain limited causes of action that have been used by harassed employees to seek redress in the courts. In recent years, employees have argued successfully that harassment (whether on a discriminatory or "status-blind" basis) by co-workers or supervisors may, in some extreme cases, amount to "constructive dismissal" (a unilateral breach by the employer of an implied term of the employment contract) or the tort of infliction of nervous shock, either intentionally or negligently.

Shah v. Xerox Canadaⁿ³³ and Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.ⁿ³⁴ are examples [*431] of successful constructive dismissal suits brought by victims of bullying in the workplace. Viren Shah, an employee with a fourteen-year positive work record was subjected to a series of unsubstantiated and unreasonable disciplinary actions by his new supervisor. Similarly, Cindy Whiting's employer (a non-profit board of directors) leveled "unjustified criticism as well as vague and unfounded allegations against her" in a manner that created a "hostile and embarrassing work environment."ⁿ³⁵ The key to success in these cases was the courts'

finding that the employer's conduct "demonstrated that it no longer intended to be bound by the employment contract."ⁿ³⁶ These and other successful constructive dismissal cases usually involve harassment or bullying by a supervisor,ⁿ³⁷ rather than by a co-worker.ⁿ³⁸

It is important to note that even if an employee is successful in proving that harassment amounted to constructive dismissal, she or he is not entitled to damages for the harassment itself. As a breach of contract action, the employee is only entitled to pay in lieu of reasonable notice of termination of the employment contract, which means some number of months at the employee's regular rate of pay.ⁿ³⁹ While the Supreme Court of Canada has held that "bad faith in the manner of dismissal" may serve to lengthen the reasonable notice period to which a wrongfully dismissed employee is entitled,ⁿ⁴⁰ the principles of contract law are applied to these damages awards such that, for example, an employee who mitigates her damages by finding another job quickly after being harassed or bullied into quitting will be entitled to little, if any, compensation for the employer's misconduct.ⁿ⁴¹ For this reason, and due to the high cost of litigation compared to the relatively modest compensation available, the common law remedies provide little protection to harassed employees.

[*432] Tort law may also provide a remedy to some harassed employees. Some employees have sued successfully for damages resulting from intentional or negligent infliction of nervous shock, although these torts are notoriously difficult to prove for a variety of reasons. Intentional infliction of nervous shock requires that the plaintiff prove (1) that the defendant's conduct was outrageous, (2) that the defendant intended to produce an effect like the one produced, and (3) that the plaintiff suffered a "visible and provable illness" as a result of the defendant's conduct.ⁿ⁴² Proving outrageousness, intention, and psychiatric or other medical injury are high hurdles for plaintiffs. Nevertheless, in one successful case, *Boothman v. Canada*,ⁿ⁴³ the plaintiff's supervisor was found to have knowingly exploited the plaintiff's fragile mental state by threatening her with bodily harm, yelling profanities at her, and repeatedly insulting her in front of co-workers over a number of years. Boothman suffered a major mental breakdown and was diagnosed with severe depression that persisted to the time of trial some seven years after the fact. The court found that Boothman's supervisor "was looking to hire an employee who would readily submit to his control and plaintiff, because of her apparent fragile state was a fitting candidate" and that he intended to cause her to break down and quit her job.ⁿ⁴⁴ Boothman was awarded \$ 5,000 for pain and suffering, \$ 20,000 for lost earnings, and \$ 10,000 in exemplary damages.

Proving the tort of negligent infliction of nervous shock requires proof that (1) the employer owed the employee a duty of care, (2) the employer breached the standard of care, (3) damage resulted from the breach (again, a "visible provable illness"), and (4) the damage was foreseeable and not too remote. Canadian courts have been quite wary of negligence claims based on psychiatric injury.ⁿ⁴⁵ However, in a particularly egregious case of sexual harassment of a female police officer by her male colleagues, the Federal Court found the co-workers liable for intentional infliction of nervous shock and the employer liable for negligent infliction of nervous shock because **[*433]** the supervisor "deliberately refused to exercise his authority to put an end to the conduct of harassment of which he was well aware and which he in fact participated in on one occasion, thus condoning that behaviour."ⁿ⁴⁶ Many cases will not reach this threshold of psychiatric injury required to prove the tort of nervous shock, whether intentional or negligent. In addition, the amount of recovery available to most employees renders the prospect of litigation unfeasible.

Occupational health and safety laws also may provide some protection against workplace harassment. British Columbia is one jurisdiction where the Occupational Health and Safety Regulation

ⁿ⁴⁷ explicitly addresses abusive and threatening behavior in the workplace. Section 4.25 of the Regulation provides: "A person must not engage in any improper activity or behaviour in a workplace that might create or constitute a hazard to themselves or to another person." "Improper activity or behaviour" is defined in section 4.24 to include "(a)...any threatening statement or behaviour which gives the worker reasonable cause to believe he or she is at risk of injury, and (b) horseplay, practical jokes, unnecessary running or jumping or similar conduct." As with other workplace hazards identified in the Regulation, workers have a right to refuse to work where they have reasonable grounds to believe that the workplace is unsafe. ⁿ⁴⁸ It is difficult to determine the impact of this provision since a search of employment tribunal decisions revealed no cases of workplace harassment decided under it. In Ontario, where harassing or bullying conduct is not specifically addressed in the Occupational Health and Safety Act, ⁿ⁴⁹ the Ontario Labour Relations Board (OLRB) has speculated that harassment may be a workplace health and safety hazard ⁿ⁵⁰ but has yet to decide the matter. In some sexual and racial harassment cases, the OLRB has declined to exercise jurisdiction, referring the matters to the Ontario Human Rights Commission. ⁿ⁵¹ **[*434]** However, in another case, a majority of the OLRB held that a server in a tavern was entitled to refuse to work in the face of an abusive customer that amounted to a "hazard" within the meaning of the Act. ⁿ⁵² All in all, the prospects of occupational health and safety law effectively addressing workplace harassment are not good. These acts were not meant to address the kinds of harms and injuries done by workplace harassment ⁿ⁵³ and are quite ill-suited to address them now in their current form.

In short, Canadian law is not without some legal recourse for workers who are harassed or bullied. However, the protection is limited to protection from discriminatory harassment and harassment that is quite severe. In this context, the recent amendments to Quebec's LSA break new ground.

IV. Prohibiting Psychological Harassment of Quebec Workers: The Law in Brief

Quebec's psychological harassment law is now part of the province's LSA, a statute containing minimum employment standards for all Quebec workers. ⁿ⁵⁴ The amendments, described further below, include a right of workers to be free from psychological harassment and a corresponding duty of employers to prevent and put a stop to it. Yamada helpfully measured existing American legal rules and causes of action against four key priorities related to workplace bullying: (1) prevention, (2) protection of workers who engage in reasonable self-help in response to bullying and prompt resolution of bullying complaints, (3) relief, compensation and restoration for bullying victims, and (4) punishment (with a view to deterrence and prevention). ⁿ⁵⁵ It is useful to keep these criteria in mind when assessing the new Quebec psychological harassment law.

[*435] The LSA 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." ⁿ⁵⁶ The definition is broad in a number of respects. First, it does not limit the class of parties from which the actionable conduct, comments, actions or gestures must emanate. For example, it does not state that the harassing conduct must come from a superior or a co-worker. On its website, the Commission states that "psychological harassment may come from a superior, a colleague, a group of colleagues, a customer or a supplier..." [ellipsis in original]. Second, while the definition generally requires that the unwanted conduct, comments, actions or gestures be repeated, it also allows that a single serious incident of such behavior may constitute psychological harassment if it undermines the employee's psychological or physical integrity and results in a harmful

work environment for the employee.ⁿ⁵⁷ Furthermore, the Act does not require that the harassment result in proven effects on the employee's health, but only that it affect an employee's dignity or psychological or physical integrity and result in a harmful work environment. Also notably absent from the definition of psychological harassment, and from the other relevant provisions of the Act, is any mention of the intention of the harasser.ⁿ⁵⁸ The new psychological harassment law, like sexual harassment law in Canadian human rights codes, attempts to put the focus on the impact or effects of the harassment, as well as on the target's perception of the harassment, rather than on the harasser's intention or knowledge. Just as psychological harassment must be "hostile or unwanted," sexual harassment must be "unwelcome."ⁿ⁵⁹

[*436] The law further states that "every employee has a right to a work environment free from psychological harassment"ⁿ⁶⁰ and imposes a corresponding duty on employers to "take reasonable steps to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it."ⁿ⁶¹ Employees file their complaints of psychological harassment with the Commission des normes du travail (Labor Standards Commission). Once a complaint is filed, the Commission will investigate and, if the complaint has merit, will refer it to mediation. If no mediated settlement is reached, the Commission will refer the complaint to the Commission des relations du travail (Labor Relations Board). The Labor Relations Board has broad remedial jurisdiction, including the power to order the employer to reinstate the employee, to compensate the employee for lost wages, to pay punitive damages to the employee, and to pay for the "psychological support" of the employee.ⁿ⁶²

The rights, duties and remedies provided in the Act are deemed to be part of all collective agreements in Quebec,ⁿ⁶³ while also applying to non-unionized workers.ⁿ⁶⁴ Unionized workers are required to pursue psychological harassment complaints through the grievance procedure in their collective agreement rather than bring their claim to the Labor Standards Commission.ⁿ⁶⁵ With the potential barriers faced by non-unionized employees seeking redress for psychological harassment in mind, the legislation permits complaints to be filed by "a non-profit organization dedicated to the defence of employees' rights on behalf of one or more employees who consent thereto in writing."

At time of writing, the amendments to the LSA prohibiting psychological harassment had only been in effect for four months. It is simply too early to know how the legislation will be enforced and what effect it will have on Quebec workplaces. In the first three months of the law's operation, 488 complaints were filed under it. A recent news report indicated that nearly one quarter of those [*437] complaints have already been dismissed because they were resolved, were filed in the wrong forum (notably, unionized workers must grieve psychological harassment, rather than complain to the Labor Standards Commission), or otherwise did not meet the Act's criteria.ⁿ⁶⁶ However, even before the law came into force, Quebec's federation of public sector unions reported in its newsletter that the incidence of psychological harassment among its members had decreased by over four percent from 2001 to 2003, citing studies by Angelo Soares.ⁿ⁶⁷ Soares attributed the lower numbers of workers reporting psychological harassment to the "awareness-raising, information and training work" carried out by the CSQ during that time.ⁿ⁶⁸ Not surprisingly, the Labor Standards Commission also promotes prevention as the best means of combating psychological harassment, particularly in light of the new statutory duty on employers to take reasonable steps to prevent psychological harassment.ⁿ⁶⁹

It appears that the legislative regime in Quebec satisfies Yamada's five key criteria for measuring the usefulness of legal protection against workplace bullying. It aims to be preventative, by im-

posing a duty on employers to prevent psychological harassment, by the range of remedial orders available, and by the apparent approach taken by the Labor Standards Commission. The Act creates a mechanism for protection of harassed employees who take self-help measures to address it ⁿ⁷⁰ and seems to encourage prompt resolution of bullying complaints. ⁿ⁷¹ The requirement of providing relief, compensation and restoration is met by the range of available remedies which includes reinstatement of harassed employees who may have resigned or been terminated, compensation for lost wages, and other limited compensation (in keeping with the public, statutory [*438] nature of the regime). Finally, the Act authorizes punishment with a view to deterrence and prevention by permitting orders for punitive and moral damages to be paid by the employer, ⁿ⁷² as well as orders that the employer take specific steps to stop harassment in the workplace. ⁿ⁷³ In short, the Act aims to fill a gap in the law left by contract, tort and anti-discrimination law, and to provide a range of remedies to address the harms of workplace harassment.

V. Exporting the Quebec Model? The Law in Context

One of the benefits of a federal system is said to be the ability of provincial or state governments to act as "social laboratories" for the development of innovative, and even controversial, public policy measures. ⁿ⁷⁴ An oft-cited Canadian example is the piloting of universal, publicly funded medical coverage by the province of Saskatchewan before it was adopted throughout Canada. A prominent professor of labor law in Quebec recently remarked that the province is acting as a "laboratory" in the area of psychological harassment law. ⁿ⁷⁵ This section takes a preliminary look at some of the factors that may have contributed to the development of the new law in Quebec in an effort to determine whether similar changes in other provinces, and even in the United States, might be possible and desirable.

The law prohibiting psychological harassment in Quebec was the result of significant political will and a sustained campaign by Quebec unions, as well as by a non-profit advocacy and resource group for non-unionized workers, "Au bas l'échelle" (in English, "Rank and File"). Beginning in 1999, then Minister of Labor, Diane Lemieux, established an Interdepartmental Committee on Psychological Harassment at Work which reported in 2001, recommending that the government take legislative steps to prohibit psychological harassment. ⁿ⁷⁶ The LSA amendments concerning psychological [*439] harassment were part of a broad-based package of reforms to the LSA aimed at providing more support and protection to low-income and precarious employees. For example, other amendments gave employees the right to refuse to work a shift of more than twelve to fourteen hours or a week of more than fifty hours ⁿ⁷⁷ and extended the right of employees to be terminated only for just cause to all employees with at least two years of service. ⁿ⁷⁸ Rank and File lobbied hard for these changes and, in fact, wanted the reforms to go further. ⁿ⁷⁹ Meanwhile, employer lobby groups such as the Canadian Federation of Independent Business (CFIB) have lamented the "employee bias" in Quebec's labor laws and have complained recently that the reforms in the LSA "could bring investment to a halt." ⁿ⁸⁰

Employer groups are correct in noting that Quebec's labor and employment laws are, relative to other Canadian provinces and to American jurisdictions, probably the most favorable to workers. ⁿ⁸¹ The LSA reforms mark Quebec as one of the few jurisdictions to go against the global "deregulatory" trend in labor and employment law. ⁿ⁸² In addition, the Quebec Charter of Human Rights contains explicit protection for workers' rights, guaranteeing that "everyone who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being." ⁿ⁸³ In a similar vein, Article 2087 of the Civil Code of

Quebec states that "the employer is bound not only to allow the performance of the work agreed upon and to pay the remuneration fixed, but also to take any measures consistent with the nature of the work to protect the health, safety and dignity of the employee."ⁿ⁸⁴ The emphasis on dignity in employment and labor law is common in civil law systems and has been cited as the [*440] underlying value protected by anti-harassment laws in Continental Europe.ⁿ⁸⁵

The profile and political clout of organized labor in Quebec appears to have played a role in the development of the psychological harassment provisions of the LSA. Union density in Quebec is higher than anywhere else in Canada, sitting at 40.4 percent in 2002 (82 percent in the public sector and 27.4 percent in the private sector).ⁿ⁸⁶ The Quebec rate compares favorably with an overall Canadian rate of 32.2 percent and a low in the province of Alberta of 27.4 percent. Union density throughout Canada declined through the 1980s and 1990s, falling from 41.8 percent in 1984 to 32.2 percent in 2002.ⁿ⁸⁷ Quebec's rate was 49.7 percent in 1984.ⁿ⁸⁸ As is the case currently, Quebec's union density was substantially higher than the rate in any other province and the Canadian average. However, unlike the precipitous drop in the United States, the Canadian decline in union density has not been accompanied by a drop in the absolute number of union members, at least not in recent years. For example, from 1997 to 2000, a time when union density declined by 1.5 percent, the total number of workers covered by a collective agreement rose by more than 350,000 from 3,844,000 to 4,201,000.ⁿ⁸⁹ The strength of unions in Quebec, in relation to other Canadian provinces, and markedly in relation to the United States, has allowed Quebec workers to lobby for greater legislative protections, including the recent prohibition against psychological harassment.ⁿ⁹⁰

Another factor that appears to have contributed to enactment of the psychological harassment law was the influence of the French approach to psychological or "moral" harassment as seen in the writings of French psychiatrist, Marie-France Hirigoyen. Hirigoyen's [*441] popular book, *Le Harcelement Moral: La Violence Perverse au Quotidien*ⁿ⁹¹ was a bestseller in France and Quebec, and has been credited with raising public awareness of workplace harassment in both countries and contributing to the impetus to legislate against it.ⁿ⁹² In a recent article comparing the development of workplace harassment law in the United States and Continental Europe, Gabrielle Friedman and James Whitman argue that Hirigoyen's work, with its use of the French word for harassment, *harcelement*, "contained an implicit polemic against the American notion that the primary form of harassment was the sexual kind" and therefore, "tapped into French resentment of the American idea of sexual harassment, offering its readers a seemingly better and more capacious 'harassment' concept."ⁿ⁹³ Quebec, situated as it is in North America, within the Canadian federal state yet maintaining strong links to France's laws and values, has seemingly developed a unique anti-harassment law that draws on both traditions.ⁿ⁹⁴

The work of Quebec academics who researched psychological harassment also appears to have contributed to the development and enactment of the new law. For example, UQAM sociologist of work, Angelo Soares was an advisor to the Minister's Intergovernmental Committee on Psychological Harassment.ⁿ⁹⁵ Soares conducted research into the extent and impact of psychological harassment among unionized workers with the support of the federation of Quebec public sector unions, the Centrale des syndicats du Quebec (CSQ). In addition to providing evidence of the prevalence and extent of psychological harassment of Quebec's unionized workers, Soares attempted to locate psychological harassment within a wider context of changing work environments and pressures on workers. He offered some preliminary ideas about the reasons for workplace bullying, indicating that the data seemed to indicate that systemic or [*442] structural factors were at work. His study identified key triggers to bullying as (1) organizational changes (45.3 percent), (2) interpersonal

conflicts (14.9 percent), and (3) exercising of a work-related right such as sick leave or maternity leave (13.3 percent).ⁿ⁹⁶ Soares found that in 53 percent of cases, the bullying was perpetrated by colleagues or a group of colleagues and only 22.4 percent of the time by a superior.ⁿ⁹⁷ Soares suggested that "new forms of work organization which are based on individualism and the isolation of individuals in time and space" may have contributed to the tendency for colleagues to bully each other.ⁿ⁹⁸ It is heartening that researchers are attempting to locate some of the structural factors contributing to the prevalence of workplace harassment,ⁿ⁹⁹ but the individual complaints model does not lend itself well to addressing these factors, as will be discussed below.

VI. Proceeding with Caution: Lessons Learned and Pitfalls to Avoid

In addition to any (as yet unavailable) evidence of a reduction in the incidence of bullying, the new Quebec law arguably serves a useful purpose in identifying and naming a new "wrong" and expressing society's denunciation of it. This is not to suggest that workplace harassment is new, but rather that our awareness of it and efforts to address it are relatively new. This point about law and law-making has been made in relation to legal recognition of other wrongs that have been historically minimized. For example, Elizabeth Schneiderⁿ¹⁰⁰ describes some of the effects of feminist law reform efforts directed at violence against women (particularly "domestic" violence by intimate partners). She claims that "assertion of legal claims concerning battering have exposed new harms, expanded public understanding by labeling what was previously private as public, and made important statements concerning women's autonomy."

[*443] Yet the notion of naming and responding to a "new wrong" raises a number of difficult questions that do not have obvious answers. Is psychological harassment the pathological behavior of a few individuals? Is some or all of it more systemic or structural in nature? What is the relationship between psychological harassment and discriminatory harassment? Should we treat all forms of harassment the same or differently? This paper only aims to begin a conversation about some of the possibilities and obstacles facing a new legislative agenda to address workplace harassment in the Canadian context. In doing so, it will discuss briefly some of the challenges that have arisen in relation to efforts to date to combat discriminatory harassment, particularly sexual harassment, through law.

It is worth noting that the move to legislate against status-blind or non-discriminatory workplace harassment comes at a time when feminists and other equality-seekers are suggesting that we have not yet adequately theorized or addressed sexual harassment.ⁿ¹⁰¹ It is argued that the lack of an adequate account or understanding of sexual harassment has led to some unintended consequences and to an inability to address harassment claims that do not fit paradigmatic heterosexual models such as a quid pro quo proposition or a working environment saturated with sexually explicit images or jokes.ⁿ¹⁰²

[*444] Vicki Shultz takes the view that despite the best intentions of its feminist proponents, sexual harassment law has been used to "sanitize" American workplaces, rather than to promote equal, integrated, and discrimination-free workplaces. Shultz suggests that attempts to address and prevent sexual harassment, in seeking to suppress "sex" (as in, sexual conduct or sexuality) on the job, have resonated with widely shared concepts of Taylorist organizational management, in the sense that "sexuality" and other "personal" matters are not good for productivity. Shultz cites case law, corporate policies, and interviews with human resources managers to support her contention

that sexual harassment law has largely lost sight of discrimination, focusing instead on civility and discipline in sanitized workplaces, free of the distractions and dangers of sex. Shultz argues:

Underneath this avalanche of no-dating policies and love contracts, zero-tolerance policies, self-policing, and discipline for conduct with sexual overtones, the most fundamental goal of employment discrimination law has been lost. Title VII should not be used to police sexuality; it was meant to guarantee women and men equal work roles. The drive to eliminate sexuality from the workplace has detracted from this important goal - and may even encourage organizations to act in ways that undermine genuine workplace equality. ⁿ¹⁰³

Returning to a theme developed in her earlier work, Shultz suggests that the organizational context matters. In particular, Shultz is concerned with the persistence of sex-segregated workplaces, arguing that discriminatory sexual harassment (i.e., male workers seeking to "shore up the masculine content or image of their jobs ... [taking] action[] to drive women away or brand them as inferior" ⁿ¹⁰⁴) is more likely to occur in these contexts. There is also some evidence that women who work in sex-integrated workplaces are less likely to report sexual harassment than women who work in occupations that are effectively segregated horizontally (within the same job) or vertically (with mostly men in supervisory positions and mostly [*445] women in more junior positions). ⁿ¹⁰⁵

Katherine Franke identifies a related problem of American sexual harassment law, namely that the law has failed to address same-sex sexual harassment, such as when heterosexual men harass other men who may not conform to dominant norms of masculinity. She argues that sexual harassment is not about sexual desire or purely about power. Rather, it is a technology of sexism, in the sense that "it perpetuates, enforces, and polices a set of gender norms that seek to feminize women and masculinize men." ⁿ¹⁰⁶ Her approach seeks to avoid the problem of conflating sex with sexism and allow the law to address same-sex harassment that is based on the same kind of disciplinary gender harassment that also underlies opposite-sex harassment.

Like its American counterpart, Canadian sexual harassment law finds its roots in a legislative prohibition against discrimination on the basis of sex. In the leading Supreme Court of Canada decision, *Jantzen v. Platy Enterprises*, ⁿ¹⁰⁷ Chief Justice Dickson described sexual harassment as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment." ⁿ¹⁰⁸ As discussed above, sexual harassment, along with other forms of discrimination, is actionable through an individual complaint-based process involving a human rights commission and ultimately, adjudication by an administrative tribunal. Canadian feminists have viewed the location of harassment within a human rights framework as symbolically and practically important. ⁿ¹⁰⁹ Within a human rights regime, systemic remedies, such as the affirmative action order made in *Action Travail des Femmes* ⁿ¹¹⁰ and orders for implementation of anti-harassment [*446] policies ⁿ¹¹¹ are available although under-utilized. ⁿ¹¹²

Nevertheless, sexual harassment law in Canada has been susceptible to some of the same problems identified by Shultz, Franke, and others. The definitional focus on "unwelcome conduct of a sexual nature" puts the emphasis squarely on sexual content, arguably taking it away from gender-based harassment and discrimination that is "non-sexual" but nevertheless harmful to women as well as to men who may not fit gender norms of masculinity. Colleen Shepard contends that despite

its formal commitment to addressing the effects of sexual harassment (particularly on women), "the law continues to develop with reference to the moral blameworthiness of isolated individual perpetrators, to rely solely on existing legal categories even if they fail to resonate with women's lived experience of harassment, and to leave the larger systemic context of sexual harassment unquestioned." ⁿ¹¹³ Sheppard further argues that "systemic inequalities - such as the isolation of individual women in male-dominated jobs and in traditionally female jobs, the sexualization of many jobs where women predominate, the impact of racism, the sexist supervisory structures of most workplaces, and the precariousness of women's job security in the face of economic globalization - create an institutional environment in which women become more readily subjected to sexual harassment." ⁿ¹¹⁴

Sheppard also suggests that the individual complaint-based model lends itself to an analysis of "aberrant individual wrongdoing, rather than an institutionalized problem of inequality." ⁿ¹¹⁵ Remedies in sexual harassment cases tend to focus on (minimal) individual redress rather than on more broad-based, preventative or systemic ones, even though human rights legislation accords broad remedial powers to tribunals. In the Australian context, Margaret Thornton [*447] has argued that the neo-liberal, individualistic basis of anti-discrimination law thwarts the achievement of real equality because the collective interests and experience of disadvantaged groups are no more than a backdrop for individual complaints. ⁿ¹¹⁶ The individual complaint model pulls us away from systemic and structural understandings of, and responses to, discriminatory harassment.

Against this backdrop of arguably inadequate enforcement of anti-discrimination, including anti-harassment, law in the workplace, how should we view a legislative prohibition against status-blind harassment? How might discriminatory and non-discriminatory harassment law relate to one another? Obviously, it is not a zero-sum game in the sense that we must choose only one form of harassment to address. Rather, what can be learned from the problems associated with enforcing anti-discrimination law in the workplace?

First, sexual harassment and other forms of discriminatory harassment are generally characterized as a sub-set of psychological harassment, both formally in legislation and informally in popular discussion of the law. The official interpretation guide to Quebec's psychological harassment law makes it clear that psychological harassment includes sexual harassment. ⁿ¹¹⁷ The proposed federal bill, based as it was on the Quebec law, would have taken the same approach. At a popular level, psychological harassment laws are often promoted as a means to "treat workplace bullying the same as sexual or racial harassment" [emphasis added]. ⁿ¹¹⁸ At one level, it is appropriate to understand discriminatory harassment as a particular form of psychological harassment. Rosa Ehrenreich has described the relationship this way:

imagine two concentric circles, one wholly contained by the other. Label the outside circle "actions that cause dignitary harm" and label the inside circle "discriminatory actions." In some sense, all discriminatory actions involve the infliction of dignitary harms, making discrimination a subset of dignitary harm. However, all actions that cause dignitary harm are not discriminatory. ⁿ¹¹⁹

The new Quebec law seems to get this relationship right. Dignitary harm is a fundamental element of the definition of [*448] psychological harassment. In addition, the Charter of Human Rights and Freedoms still provides a remedy for discriminatory harassment in the workplace.

Yet at another level, much of the literature on bullying and psychological harassment contains the implicit or explicit assumption that sexual harassment is no longer a problem or, at least, is much less of a problem than workplace bullying. For example, a recent article on psychological harassment and workplace stress contained in the newsletter of Quebec's federation of public sector unions stated that "sexual harassment has virtually disappeared from workplaces."ⁿ¹²⁰ One American legal commentator has suggested:

Privacy invaders and bullies are the current hobgoblins of the employment world. That is not to say that discriminators, the workplace demons of the last century, have been exorcized. However, a significant segment of society believes that forty years of powerful legal intervention has abated virulent workplace discrimination against African Americans, women, and others. Now, some attention has shifted to status-neutral (color-blind, sex-blind, etc.) initiatives to make the workplace more civil for all workers, a place where the relatively powerful do not bully, invade the privacy of, and otherwise inflict dignitary harm on the relatively powerless.ⁿ¹²¹

It may be accurate that the most "virulent" discriminatory harassment is being addressed by existing laws, but the evidence does not seem to back up a perception that, for example, sexual harassment, is no longer a problem.ⁿ¹²² Research indicates that sexual harassment, like sexual assault, is significantly under-reportedⁿ¹²³ and that there are substantial psychic and practical barriers that prevent targets of sexual harassment and other forms of sex discrimination in the workplace from coming forward.ⁿ¹²⁴

[*449] The assumption that sexual harassment and other forms of discriminatory harassment in the workplace are on the decline may relate to the tendency to view harassment as individual pathological behavior and to understand sexual harassment as about sexual content in the workplace, rather than about sexism. Human rights tribunals and labor arbitrators in sexual harassment cases tend to relegate systemic factors to the background, focusing on the overt sexual or racist conduct in the abstract.ⁿ¹²⁵ Since psychological harassment is explicitly status-blind, it may be even more difficult to locate and address the roots of, and structural support for, such harassment.

If we conceptually subsume discriminatory harassment within the legal regime to address psychological harassment or bullying - whether officially through law or more informally through popular understanding - we may lose sight altogether of the more subtle and insidious ways that harassment is linked to discrimination and structural inequality in workplaces. A recent qualitative studyⁿ¹²⁶ of reported bullying incidents in the British civil service found that judgments about inappropriate gender conduct and pressure to conform to gendered norms of behavior actually figured prominently in the cases. For example, one woman faced harassment from her supervisor because she was not sufficiently feminine and compliant. The study's author concluded that the research "problematized the absence of gender analysis in the current workplace bullying discourse." Some harassment in the workplace may be simple interpersonal hostility, and the ostracism of some workers may be a purely individualistic kind of "ganging up" on a co-worker. We simply do not know and perhaps are not concerned because under a status-blind regime, targets of harassment ought to be entitled to a remedy. However, if the harassment is more subtly gendered or linked to broader systemic features of the workplace, any remedy **[*450]** aimed at prevention will miss the mark.ⁿ¹²⁷ Without the first task of identifying and naming discrimination, we have no hope of working to eradicate it.

Much of the psychological and management literature on workplace bullying tends to view it as the aberrant behavior of individuals. For example, Namie describes workplace bullying as being "driven by perpetrators' need to control another individual, often undermining legitimate business interests in the process."ⁿ¹²⁸ In the debate, literature, and legislative responses to "schoolyard bullying," we see a similar phenomenon. Nan Stein has described a tendency to "psycho-pathologize" behaviors that may have structural or systemic sources or connections.ⁿ¹²⁹ She suggests that the psychological literature on schoolyard bullying would benefit from a more broad-based approach that considers insights from other disciplines such as feminist legal theory, sociology, education, and anthropology.ⁿ¹³⁰

Stein's main contention - and one that is worth examining in the workplace bullying context - is that "'bullying' became a euphemism for all sorts of behaviours that school officials did not want to name, like racism, homophobia, sexism, or hate crimes."ⁿ¹³¹ Bullying is a gender-and race-neutral term that, in Stein's view, tends to shift attention away from larger struggles and that is over-inclusive at both ends of the severity spectrum. Particularly when accompanied by a "zero tolerance" policy, as it often is in the school setting, the "bullying" label may be applied to relatively insignificant behaviors like "making faces,"ⁿ¹³² as well as to serious, already illegal behavior such as discrimination and even sexual or other assaults. In Canada, the Ontario Human Rights Commission has expressed concern about the way that anti-bullying legislation in schools may have a discriminatory effect on racialized students and students with [*451] disabilities.ⁿ¹³³ While the analogy between school bullying and workplace bullying should not be taken too far, it is worth considering the possibility that it may simply be easier for harassed workers to name bullying rather than discrimination.

It also may be easier for employers to ignore the discriminatory context of some harassment when the bullying (or "psychological harassment") label can be applied with fewer implications for systemic inquiry. Shultz' work on sexual harassment law and its "sanitizing" effect on American workplaces raises the possibility that psychological harassment law may be used to further sanitize workplaces.ⁿ¹³⁴ Since the law is essentially about basic decency and human dignity, might it pose an even greater risk of being used to enforce a "civility code"? In the context of proposing a status-blind common law tort, Rosa Ehrenreich has rejected the civility code objection as "overblown," noting that courts are often required to interpret potentially broad language and, in fact, tend to be cautious and conservative rather than generous in their interpretation.ⁿ¹³⁵ However, she concedes that some employers may "have an incentive to simply fire workers who behave in ambiguous or borderline ways,"ⁿ¹³⁶ but concludes that providing a remedy for the many legitimate cases of harmful workplace harassment is worth this risk. Again, it is important to keep the legal context in mind. For example, the concern about overzealous enforcement may have more force in the United States (in light of the employment-at-will doctrine), than it does in Quebec where workers have a right to reinstatement for unjust dismissal and are much more likely to be represented by a union.

There is also a danger that employers who wish to avoid liability for psychological harassment may engage in greater surveillance of workers. Of course, this possibility exists with other forms of employer liability, such as that under human rights law and occupational health and safety law. However, since there is at least a perception that only a fine line separates conduct amounting to psychological harassment and "regular" employer prerogative, [*452] decision-making, and discipline,ⁿ¹³⁷ the concern may have more force in this context. In fact, there is a significant emphasis on corporate security in the popular literature on bullying and aggression in the workplace.ⁿ¹³⁸ Sur-

veillance also has been a key plank in the platform to address schoolyard bullying.ⁿ¹³⁹ For workers without union representation, the possibility of increased surveillance may be more acute.

VII. Conclusion: Some Thoughts on the Way Forward

It is worth remembering that Quebec is a civil law jurisdiction, with a particular social and political history, and a relatively robust labor movement. The form of its response to workplace harassment may not "fit" elsewhere. In both the United States and Canada, it has been argued that a reinvigorated common law of employment may be the way to deal with workplace harassment, as well as other forms of employee abuse in the workplace, such as electronic monitoring and genetic discrimination.ⁿ¹⁴⁰ William Corbett suggests that it is difficult to craft legislation to effectively address these problems and that the common law is more flexible and better-suited to meet these new challenges.ⁿ¹⁴¹ Denise Reaume argues that the common law is preferable as a "bottom-up" rather than "top-down" approach since it relies on a slower process of norm creation to address newly identified harms.ⁿ¹⁴² In addition, the common law does not provide a "concrete target" for opponents of such developments.ⁿ¹⁴³ It is possible that Canadian common law jurisdictions (i.e., those outside Quebec), may see greater use of the common law to combat harassment. However, the prospects for a broad-based common law approach are [*453] muted by the fact that the Supreme Court of Canada has refused recently to recognize a general common law duty of employers to treat employees fairly.ⁿ¹⁴⁴ The reality is that different legal regimes to address workplace harassment may better fit different socio-legal contexts.

Psychological harassment laws, like the one recently passed in Quebec, fill a significant gap in the law and provide a much-needed remedy for some harassed workers who have had no legal option but to suffer in silence. However, we should not be naive about the prospects of an individual complaints model (whether based in a statute or the common law) eradicating workplace harassment, particularly when it is located in a context that includes, for example, persistent occupational sex segregation, trends toward deregulation of labor markets, and an increase in precarious work. Sheppard says of the individual complaints process in sexual harassment that while "it is a necessary and important source of legal redress, it does not provide a forum that encourages challenges to, debate about, or ultimately the transformation of institutionalized sources of domination... it is important to develop proactive strategies that go beyond the individual complaints approach."ⁿ¹⁴⁵

The range of conduct included within most definitions of bullying or workplace harassment is so broad that it is simply unrealistic to expect that there is one way to deal with the problem. We need, as Rosa Ehrenreich has urged, a truly pluralistic understanding of workplace harassment that avoids the problem of workers attempting to "shoehorn" all harassment claims into the discrimination paradigm,ⁿ¹⁴⁶ while also preserving a place in the law for a rigorous analysis of structural inequality and the forms of harassment that are linked to that inequality. The call for legislative or common law remedies for status-blind harassment presents an opportunity to consider the strengths and shortcomings of existing discriminatory harassment law and to look beyond the formal bounds of the law to the structure of our workplaces and economies, as well as the social actors who will act upon and influence legal rules aimed at addressing the harassment of workers.

FOOTNOTES:

n1. Throughout this paper, "psychological harassment," "bullying," and "workplace harassment" will be used interchangeably to describe the identified phenomenon of harassment in the workplace that may include discriminatory harassment such as sexual or racial harassment, as well as "status-blind" harassment that may not be based on prohibited grounds of discrimination.

n2. R.S.Q. ch. N-1.1 (1977).

n3. Bill C-451, 37th Parl., 2d Sess. (2003) (Bourgeois, MP).

n4. Bill 70, An Act to Amend the Occupational Health and Safety Act with Respect to Acts of Workplace Violence, 2d Sess., 37th Leg., 50 Eliz. II (Ontario 2001) (Bartolucci, MPP). Bill 70 died on the order paper when the 37th Legislature ended.

n5. David Yamada, The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection, 88 Geo. L.J. 475, 483-484 (2000) (citing studies that have linked bullying to stress, depression, mood swings, loss of sleep, high blood pressure, and a variety of other health effects).

n6. Canada Safety Council, Targeting Workplace Bullies (2004), available at <<http://www.safety-council.org/info/OSH/bully-law.html>> (last viewed Feb. 6, 2005).

n7. Loreleigh Keashly, a leading psychologist in the field of workplace harassment, said in a 1998 article:

It is clear from the literature available that emotional abuse is a "real" workplace phenomenon that can have profound effects on both individuals and organizations. The research is however in the preliminary stages and is limited by virtue of its lack of a coherent definition and operationalization of the construct itself, the reliance on non-validated measures of effects and responses, a limited range of methodologies, and self-selected samples.

Loraleigh Keashly, Emotional Abuse in the Workplace: Conceptual and Empirical Issues, 1 J. Emotional Abuse 85, 114 (1998).

n8. Id. at 90-94.

n9. Government of Queensland Department of Industrial Relations, Report of the Queensland Government Workplace Bullying Taskforce 19-20 (2002), available at <<http://www.whs.qld.gov.au/taskforces/bullying/bullyingreport.pdf>> (last viewed Feb. 6, 2005).

n10. Canada Safety Council, *supra* note 6.

n11. Angelo Soares, Quand le travail devient indecent: le harcèlement psychologique au travail 3 Performances 1 (2002) (English version: Angelo Soares, Bullying: When Work Becomes Indecent (2002), available at <<http://www.er.uqam.ca/nobel/r13566/document/bullying%20report%20soares.pdf>> (last viewed Feb. 6, 2005)).

n12. Id. at 10-11. Soares used Heinz Leymann's Inventory of Psychological Terror (LIPT) which lists a number of "bullying" behaviors such as "disapproving stare or gestures," "disparaging your work" and "shouting at you," and asks participants to indicate whether they had experienced some or all of these behaviors in the workplace.

n13. Id. at 17.

n14. The definition of "psychological harassment" found in section 81.18 of the Quebec LSA, R.S.Q. ch. N-1.1, is "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."

n15. Kerry Rittich, Law Commission of Canada, Vulnerability at Work: Legal and Policy Issues in the New Economy (2004), available at <<http://www.lcc.gc.ca/en/themes/er/tvw/rittich/rittich.pdf>> (last viewed Feb. 6, 2005).

n16. Government of Queensland Department of Industrial Relations, *supra* note 9, at 16-17.

n17. Yamada, *supra* note 5.

n18. *Id.* at 486-91.

n19. See *infra* text accompanying notes 86-90.

n20. The jurisdiction to legislate in the field of employment has been found to exist in the broad provincial power to enact laws concerning "property and civil rights in the province": Constitution Act, 1867 (U.K), 30 & 31 Vict., c. 3, 92(13), reprinted in R.S.C. 1985, App. II, No. 5, interpreted in *Toronto Elec. Comm'rs v. Snider*, [1925] A.C. 396 (P.C.).

n21. The foundational case is *Bardal v. The Globe and Mail* [1960], 24 D.L.R. 2d 140 (Ont. H.C.).

n22. See, e.g., *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 (on the similarities of constructive dismissal law under the Civil Code and at common law).

n23. See, e.g., Human Rights Code, C.C.S.M. 2004, ch. H175 (Manitoba); Canadian Human Rights Act, R.S.C. 1985, ch. H-6 (federal).

n24. Barry Kuretzky & Jennifer MacKenzie, *Human Resources Guide to Managing Workplace Harassment* 30 (2003).

n25. See, e.g., Human Rights Code, C.C.S.M. 2004, ch. H175, 19(1) (Manitoba); Human Rights Code, R.S.O. 1990, ch. H.19, 5(2) (Ontario); Charter of Rights and Freedoms, R.S.Q. C-12, 10.1 (Quebec).

- n26. Human Rights Code, C.C.S.M. 2004, ch. H175, 19(2)(a) (Manitoba). Subsections (b)-(d) go on to include in the definition conduct that amounts to sexual harassment such as "a series of objectionable and unwelcome sexual solicitations or advances" Id. 19(2)(b).
- n27. Human Rights Code, R.S.O. 1990, ch. H.19, 10 (Ontario). This section, in combination with section 5(2) prohibits harassment on the basis of race, ancestry, place of origin, color, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability.
- n28. Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1252 (sexual harassment is sex discrimination).
- n29. Seneca Coll. of Applied Arts & Tech. Bd. of Governors v. Bhaduria, [1981] 2 S.C.R. 181.
- n30. See, e.g., Kotyk v. Canada (Emp. & Imm. Comm'n) [1983], 4 C.H.R.R. D/1416. For a detailed discussion of remedies available in human rights proceedings, see Arjun P. Aggarwal & Madhu M. Gupta, *Sexual Harassment in the Workplace* ch. 7 (3d ed. 2000).
- n31. Brian Etherington, *Promises, Promises: Notes on Diversity and Access to Justice*, 26 *Queen's L.J.* 43 (2000).
- n32. Joanna Birenbaum & Bruce Porter, *Screening Rights: The Denial of the Right to Adjudication Under the Canadian Human Rights Act and How to Remedy It: Report to the Canadian Human Rights Act Review Panel* (2000), available at <<http://canada.justice.gc.ca/chra/en/screen2.html>> (last viewed Feb. 9, 2005).
- n33. [2000] 49 C.C.E.L.2d 166 (Ont. Ct. App.).
- n34. [1998] 159 D.L.R.4th 18 (Man. Ct. App.).
- n35. Id. P 17 (citing the trial judge's findings of fact).

n36. Shah, 49 C.C.E.L.2d 166, at P 9.

n37. See also Lloyd v. Imperial Parking Ltd., [1996] A.J. No. 1087 (Alta. Q.B.); Vandooyeweert v. Jensten Foods Ltd., [2002] B.C.J. No. 2346 (B.C. Prov. Ct.).

n38. But see Morgan v. Chukal Enterprises Ltd., [2000] B.C.J. No. 1563 (Sup. Ct.) (where an employee successfully sued for constructive dismissal when she resigned her employment as a restaurant server and beverage room manager after her employer refused to address the hostile and abusive conduct of another employee).

n39. Whiting, 159 D.L.R.4th 18.

n40. Wallace v. United Grain Growers Ltd., [1997] 3 R.C.S. 701.

n41. For a critique of this phenomenon, see Lee Stuesser, Playing Hardball: Wallace v. United Grain Growers, 25 Man. L.J. 547 (1998).

n42. Rhemtulla v. Vanfed Credit Union, [1984] 3 W.W.R. 296 (Sup. Ct.).

n43. [1993] 3 F.C. 381 (T.D.).

n44. Id. P 3.

n45. See generally, Philip Osborne, The Law of Torts ch. 2(E)(3)(c) (2d ed. 2003):

The courts have used the concept of duty of care to keep liability for psychiatric injury on a tight rein. The judicial approach to psychiatric injury is cautious and conservative and reflects a pro-defendant bias that seems out of step with the expansionary trends of modern negligence law.

n46. Clark v. Canada [1994], 3 C.C.E.L. 2d 172 (Fed. T.D.); see also Prinzo v. Baycrest Centre for Geriatric Care (2002), 60 O.R.3d 474 (Ont. Ct. App.) (upholding an award of \$ 15,000 where the trial judge had found that an employees co-workers had harassed her with "almost sadistic resolve").

n47. B.C. Reg. 296/97 under the Workers' Compensation Act, R.S.B.C. 1996, ch. 492.

n48. Id. 3.12.

n49. R.S.O. 1990, ch. O.1.

n50. Au v. Lyndhurst Hospital, [1996] O.L.R.B. Rep. May/June 456, in obiter.

n51. See, e.g., Meridian Magnesium Products Ltd., [1996] O.L.R.B. Rep. Nov./Dec. 964 (sexual harassment); Pieters v. Toronto (City) Bd. of Educ., [2000] O.J. No. 4314 (Div. Ct.) (racial harassment).

n52. Moore v. Barmaid's Arms, [1995] O.L.R.B. Rep. Mar. 229.

n53. See Laverne A. Jacobs, Integrity, Dignity and the Act Respecting Workplace Accidents and Occupational Diseases: Can the Act Provide More Appropriate Compensation for Sexual Harassment Victims? 30 Revue de Droit, Universite de Sherbrooke (R.D.U.S.) 279 (2000) for a discussion of the roots of Quebec's occupational health and safety act and its focus on compensating losses of "integrity" (generally, physical wholeness) rather than "dignity," which she argues is the real loss suffered by targets of sexual harassment.

n54. The provisions of the LSA are particularly important for Quebec's 1.5 million non-unionized workers. See Kristian Gravenor, Wage Slaves Win One, The Montreal Mirror, Oct. 10-16, 2002, describing the work of "Au bas l'echelle" (in English, "Rank and File"), a non-profit group that provides information to non-unionized workers about their rights under

the LSA. Collective agreements negotiated by labor unions may provide greater protection for Quebec workers than the provisions of the LSA.

n55. Yamada, *supra* note 5, at 492-93.

n56. R.S.Q. ch. N-1.1, 81.18(1). The failed federal law (Bill C-451) used the same language for its definition of psychological harassment, but also included within the definition, "abuse of authority, including intimidation, threats, blackmail or coercion, that occurs when a person improperly uses the power or authority inherent in the person's job, undermine the employee's job performance, threaten the economic livelihood of the employee or interfere in any other way with the career of the employee." Bill C-451, *supra* note 3, 2.

n57. LSA, R.S.Q. ch. N-1.1, 18.18.

n58. This is different from the American model proposed by David Yamada which would require that the infliction of a "hostile work environment" be intentional. See Yamada, *supra* note 5, at 524.

n59. Some commentators have argued that despite this language, the "perpetrator perspective" of the alleged harassment has infiltrated decision-making in sexual harassment cases. See Colleen Sheppard, *Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment*, 3 *Can. Lab. & Emp. L.J.* 249, 259-262 (1995).

n60. LSA, R.S.Q. ch. N-1.1, 81.19(1).

n61. *Id.* 81.19(2).

n62. *Id.* 123.15.

n63. *Id.* 81.20.

n64. However, in accordance with the federal-provincial division of powers, the law does not apply to any workers in the federal public service or in federally-regulated industries. It was for this reason that Quebec Member of Parliament, Diane Bourgeois, proposed the failed private member's bill, Bill C-451, supra note 3, which would have applied a psychological harassment regime similar to the new Quebec one to the federal sector.

n65. LSA, R.S.Q. ch. N-1.1, 81.20.

n66. Ross Marowits, Quebec Workplace Bullying Law May Spawn New Canadian Norms, *The Toronto Sun*, Sept. 29, 2004, at C5.

n67. Luc Allaire, What Does It Take to Be Happy at Work? *CSC News*, May-June 2004, at 4, 5.

n68. *Id.* at 5.

n69. The Commission's website promotes prevention efforts. See <http://www.cnt.gouv.qc.ca/en/site_hp/index.asp> (last viewed Feb. 9, 2005). For a critical view of the potential for sexual harassment training programs to change workplace cultures, see Susan Bisom-Rapp, Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession, 24 *U. Ark. Little Rock L. Rev.* 147 (2001).

n70. The Act permits the Labor Relations Board to order "modification of the disciplinary record of the employee." LSA, R.S.Q. ch. N-1.1, 123.15(7).

n71. For example, the Act requires complaints to be filed within 90 days (*id.* 123.7), permits mediation, with the parties' consent (*id.* 123.10), and requires the Labor Standards Commission to refer unresolved complaints to the Labor Relations Board for adjudication "without delay" (*id.* 123.12).

n72. *Id.* 123.15(4).

n73. Id. 123.15(3).

n74. Articulation of this idea is often attributed to former U.S. Supreme Court Justice Louis Brandeis. In *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), Justice Brandeis famously said, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

n75. Michel Grant, quoted in Marowits, *supra* note 66.

n76. The Interdepartment Committee Report on Psychological Harrassment at Work, available at http://www.travail.gouv.qc.ca/actualite/harcelement_psychologique/commmmittee_phw.pdf (last viewed Feb. 9, 2005).

n77. LSA, R.S.Q. ch. N-1.1, 59.0.1.

n78. LSA, R.S.Q. ch. N-1.1, 124.

n79. Gravenor, *supra* note 54.

n80. Andre Lavoie, senior policy analyst with the CFIB, quoted in Julie Demers, *New Labour Standards: Quebec Government Reforms Miss the Target for SMEs*, CMA Management Magazine, June/July 2003, available at http://www.managementmag.com/index.cfm/ci_id/1465/la_id/1.htm (last viewed Feb. 9, 2005).

n81. As evidence of this fact, the United Food and Commercial Workers (UFCW) has focused its North American efforts to organize Wal-Mart workers in Quebec (and a handful of other perceived labor-friendly Canadian provinces such as Manitoba and Saskatchewan). See, e.g., *Third Quebec Wal-Mart Targeted by Union Drive*, Canadian Press NewsWire, Oct. 5, 2004.

n82. Rittich, *supra* note 15, at 5.

n83. Quebec Charter of Human Rights and Freedoms, R.S.Q. ch. C-12, 46.

n84. Civil Code of Quebec, art. 2087.

n85. Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Dignity Versus Discrimination*, 9 *Colum. J. Eur. L.* 241, 243 (2003). Friedman and Whitman argue that "there are now two paradigms for harassment law in the western world: an American anti-discrimination paradigm and a Continental dignity paradigm."

n86. Andrew Jackson & Sylvain Schetagne, *Solidarity Forever? - An Analysis of Changes in Union Density*, 4 *Just Labour* 53, 76 (2004).

n87. *Id.* at 62.

n88. *Id.* at 63.

n89. *Id.* at 59.

n90. However, the scene may have changed recently with the election in 2003 of a more "business-friendly" Liberal government in Quebec. The new government has raised the ire of Quebec unions - and sparked numerous street protests by unionized workers - by amending the Quebec Labour Code to make it easier for employers to sub-contract work in unionized sectors. See *Quebec Unions Demonstrate against Proposed Labour Code Changes* Canadian Broadcasting Company, Nov. 26, 2003, available at <<http://www.cbc.ca/stories/print/2003/11/26/charest031126>> (last viewed Feb. 9, 2005).

n91. [Moral Harassment: Vicious Daily Violence] (1998).

n92. Luc Allaire, *One CSQ Member in Five a Victim of Psychological Harassment*, *CSC News*, Jan-Feb 2002, at 1-2.

n93. Friedman & Whitman, *supra* note 85, at 260-61.

n94. Anti-discrimination law in Quebec is substantially similar to that in other Canadian provinces. See generally *Discrimination and the Law* (Walter S. Tarnopolsky et al. eds., loose-leaf ed. 2004). In *Janzen v. Platy Enterprises*, [1989] 1 S.C.R. 1252, the Supreme Court of Canada affirmed that the approach to anti-discrimination and anti-harassment in all Canadian jurisdictions is similar because the laws have a similar purpose and structure.

n95. The other academic on the advisory committee was law professor Katherine Lippel of the Faculty of Political Science and Law, UQAM. Among other areas, Lippel's research focuses on the health and safety of women workers, sexual harassment, and the relationship between precarious employment and workers' health.

n96. Soares, *supra* note 12, at 13. These three triggers are different from Leymann's three sources of bullying: (1) work organization, (2) perception of tasks (to escape boredom/ repetition), and (3) management style, although organizational structure (or change) is cited in both accounts.

n97. *Id.* at 14.

n98. *Id.*

n99. See also Government of Queensland Department of Industrial Relations, *supra* note 9, at 13-17 (reviewing studies that cite factors such as corporate restructuring, precarious employment, and a lack of employment rights or job security).

n100. Elizabeth Schneider, *Battered Women and Feminist Lawmaking* 228 (2000).

n101. See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *Yale L.J.* 1683 (1998) [hereinafter *Schultz, Reconceptualizing*] (arguing that a focus on "sexual" conduct has left unaddressed discrimination and harassment that is gender-based but not about sexual conduct); Vicki Schultz, *The Sanitized Workplace*, 112 *Yale L.J.* 2061 (2003) [hereinafter

Schultz, Sanitized] (further arguing that sexual harassment law has been used to discipline and control workers in an attempt to drive sexuality and intimacy out of American workplaces without attention to the equality-based reasons for sexual harassment law); see also Janine Benedet, *Same-Sex Sexual Harassment in Employment*, 26 *Queen's L.J.* 101 (2000) (in the Canadian context advocating a substantive equality approach to sexual harassment law that, in her view, would address same-sex sexual harassment, as well); Katherine Franke, *What's Wrong with Sexual Harassment?* 49 *Stan L. Rev.* 691 (1997) (taking the view that sexual harassment is a technology of sexism and the enforcement of gender norms, rather than being "about sex" in the sense of sexual desire or sexual practices).

n102. Scholars have also argued that American and Canadian anti-discrimination law has failed to address harassment on the basis of race as a systemic or structural problem. For example, Tanya K. Hernandez argues that Title VII racial harassment claims tend to be successful only when they relate to overt "Jim Crow" type racism such as use of the word "nigger," rather than on more subtle forms of exclusion and harassment of African American workers. See Tanya K. Hernandez, in Vicki Schultz et al., *Global Perspectives on Workplace Harassment Law: Proceedings of the 2004 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 8 *Employee Rts. & Emp. Pol'y J.* 151, 169, 170 (2004). On the subject of anti-discrimination law more broadly, Tristin Green has suggested that a shift must be made to examine the way that structural workplace dynamics such as the flattening of hierarchies, blurring of job boundaries, and flexible individualistic methods of evaluation may influence or even encourage the existence of racial biases. Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 *Harv. C.R.-C.L. L. Rev.* 91 (2003). In the Canadian context, see Ian R. MacKenzie, *Racial Harassment in the Workplace: Evolving Approaches*, 3 *Can. Lab. & Empl. L.J.* 285 (1995) (arguing that race discrimination complaints often have been treated in an unduly restrictive manner by Canadian human rights tribunals, but noting that a broader, remedial approach has been taken in some recent racial harassment cases). The failure of anti-discrimination law to address systemic or structural racism is not necessarily a problem of the law per se, but arguably with its enforcement and with the way that racial biases are often normalized to the point of becoming invisible to many people in the dominant racial group.

n103. Schultz, Sanitized, *supra* note 101, at 2131.

n104. *Id.* at 2140.

n105. *Id.* at 2144-2145 (citing Barbara Gutek, *Sex and the Workplace: The Impact of Sexual Behavior and Harassment on Women, Men and Organizations* 141-143 (1985); Robin J. Ely, *The Power of Demography: Women's Social Constructions of Gender Identity at Work*, 38 *Acad. Mgmt J.* 589, 617-618 (1995)).

n106. Franke, *supra* note 101, at 696.

n107. [1989] 1 S.C.R. 1252.

n108. *Id.* P 56.

n109. Katherine Lippel & Diane Demers, *Access to Justice for Sexual Harassment Victims: The Impact of Beliveau St-Jacques on Female Workers' Right to Damages* (translation) (1998), available at <http://www.swc-cfc.gc.ca/pubs/0662634381/19980301_0662634381_e.pdf> (last viewed Feb. 11, 2005).

n110. [1987] 1 S.C.R. 1114. The Supreme Court of Canada upheld the Canadian Human Rights Tribunal's order that the Canadian National Railway increase its percentage of women in "non-traditional" (i.e., blue collar) positions from 0.7 percent to 13 percent (the latter being the national average for women in "non-traditional" jobs). The Tribunal had also ordered that, for example, CN "hire at least one woman for every four non-traditional positions filled in the future" until the 13 percent target was achieved. Another rare example is *Gauthier v. Canada (Armed Forces)*, [1989] C.H.R.D. No. 3 T.D.3/89, where the Tribunal ordered that "full integration [of combat positions and other positions restricted to men] take place with all due speed for both active and reserve forces."

n111. See, e.g., *Curling v. Torimiro* [2000], 4 C.C.E.L.3d 202 (Ont. Bd. of Inquiry).

n112. For example, the Ontario Board of Inquiry refused to order a systemic remedy in the racial harassment case of *Karumanchiri v. Ontario (Liquor Control Board)* [1987], 8 C.H.R.R. D/4076, *aff'd* [1988], 9 C.H.R.R. D/4868 (Ont. Div. Ct.).

n113. Sheppard, *supra* note 59, at 259.

n114. *Id.* at 250.

n115. *Id.* at 250-51; see also Margaret Thornton, *Sexual Harassment: Losing Sight of Sex Discrimination*, 26 *Melbourne U. L. Rev.* 422,424 (2002) (for a similar argument in the Australian context).

n116. Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* 253 (1990).

n117. < <http://www.cnt.gouv.qc.ca/en/normes/harcelement.asp>> (last viewed Feb. 11, 2005).

n118. Gary Namie, *Workplace Bullying: Escalating Incivility*, *Ivey Business J.*, Nov/Dec 2003, at 1 (emphasis added).

n119. Rosa Ehrenreich, *Dignity and Discrimination: Toward and Pluralistic Understanding of Workplace Harassment*, 88 *Geo. L.J.* 1, 63 (1999).

n120. Luc Allaire, *What Does it Take to be Happy at Work?* *CSQ News*, May-June 2004, at 5.

n121. William Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 *Brooklyn L. Rev.* 91, 100 (2003).

n122. A 1990 study in Quebec found that approximately 30 to 60 percent of women workers were likely to be sexually harassed at work. See Danielle Savoie & Viateur Larouche, *Le harcèlement sexuel au travail: resultats de deux études quebécoises* 45 *Rel. Indus.* 38 (1990). A 1993 survey by Statistics Canada found that 87 percent of women reported experiences of sexual harassment. Statistics Canada, *Violence Against Women Survey* (1993).

n123. See, e.g., Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 *Law & Soc'y Rev.* 67, 68 (1999) (citing surveys of U.S. federal employees which report that while 42-44 percent of working women experience behaviors that would be legally actionable, only 7 percent actually file formal charges).

n124. Margaret Thornton describes some of these barriers:

In addition, there is always a psychic difficulty faced by the targeted person in complaining about having been harassed by either a boss or co-workers. To complain formally means that one has to step into the shoes of "the victim," which can be just as humiliating and disempowering as enduring the harassment itself, sometimes more so, particularly for senior women: "To conform to the image of the proper victim, women must comport themselves as sexually pure, even passive, beings who have been violated by their coworkers' sexual predation."

Thornton, *supra* note 115, at 441 (citing Schultz, *Reconceptualizing*, *supra* note 101, at 1732); see also Morgan, *supra* note 123 (based on interviews with thirty-one women who initially reported sexual harassment, finding that relationship ties and family commitments often influenced the decision about whether to file suit. Only four of the women did so).

n125. Sheppard, *supra* note 59, at 263.

n126. Deborah Lee, *Gendered Workplace Bullying in the Restructured UK Civil Service*, 31 *Personnel Rev.* 205 (2002).

n127. Yamada has suggested that discriminatory harassment could be treated as a form of "aggravated" harassment within the proposed "intentional infliction of a hostile work environment" cause of action. Yamada, *supra* note 5, at 530. While this proposal is worth considering, it does not resolve the concern that the systemic factors that contribute to workplace harassment will go unaddressed.

n128. Namie, *supra* note 118, at 1-2 (emphasis added).

n129. Nan Stein, *What a Difference a Discipline Makes* 2 *J. Emotional Abuse* 1, 3 (2001). Stein is a Senior Research Scientist in the Center for Research on Women at Wellesley College.

n130. *Id.* at 3.

n131. Nan Stein, *Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 *Ariz. L. Rev.* 783 (2003).

n132. Stein, *supra* note 129, at 2.

n133. See <<http://www.ohrc.on.ca/english/consultations/safe-schools-submission.shtml>> (last viewed Feb. 11, 2005). Much of the opposition to school anti-bullying laws is due to the "zero tolerance" approach taken by them. It is worth noting that Quebec's psychological harassment law does not take a zero-tolerance approach.

n134. In fact, Schultz has raised this concern. See Vicki Schultz et al., *supra* note 102, at 192.

n135. Ehrenreich, *supra* note 119, at 57.

n136. *Id.* at 59.

n137. A leading Canadian employment lawyer, Norman Grosman, was quoted recently as saying "Where's the boundary between a crummy manager and psychological harassment? It's not against the law to have a bad manager, but maybe it is, if it fits under this bill." Grosman was referring to the failed federal bill that would have adopted a definition similar to the one in Quebec. See Stacy O'Brien, *Invisible Attacker*, Capital News Online, Oct. 17, 2003.

n138. See, e.g., Derrick Hynes, The Conference Board of Canada, *Preventing Workplace Violence: Towards an Aggression-Free Workplace* (2001), available at <<http://www.conferenceboard.ca/documents/previo01.pdf>> (last viewed Feb. 11, 2005) (citing studies of a U.S.-based security firm and recommending that corporate security be considered a stakeholder in addressing workplace aggression and violence).

n139. Stein, *supra* note 131, at 790.

n140. See Corbett, *supra* note 121; see also Ehrenreich, *supra* note 119.

n141. Corbett, *supra* note 121, at 95-97.

n142. Denise Reaume, *Of Pigeonholes and Principles: A Reconsideration of Discrimination Law*, 40 *Osgoode Hall L.J.* 113, 114 (2002).

n143. Corbett, *supra* note 121, at 97.

n144. *Wallace v. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701.

n145. Sheppard, *supra* note 59, at 286.

n146. Ehrenreich, *supra* note 119, at 63.