



LEGAL BYTES

PSYCHOLOGICAL HARASSMENT IN THE WORKPLACE

Carol V. Kljajo

The relatively new recourse available under the *Quebec Labour Standards Act* (LSA) to employees who believe they are victims of psychological harassment in the workplace has been garnering employers' attention. Employers are asking: i) what constitutes psychological harassment?; ii) how are such claims being dealt with by the Quebec labour commissions?; and iii) what are the consequences an employer may face in the event of a successful claim?

Definition

Psychological harassment in the workplace is defined as "**vexatious behaviour**", meaning humiliating, offensive or abusive behaviour which **injures** the employee's self-esteem, dignity or physical integrity and causes him anguish. It may be repetitive or limited to a single incident. It may come from the employee's superior, co-workers or other people he interacts with in the workplace. The behaviour must also be considered **hostile** or unwanted, even if the victim has not clearly expressed that it is unwanted. It is important to note that the words, gestures or actions of the harasser do not have to be associated with a harmful intent in order for the behaviour to constitute psychological harassment. It is the effect on the person concerned that counts. Finally, the behaviour must make for a **harmful** work environment.

The Complaint

If an employee believes he is a victim of psychological harassment, he has **90 days** from the last incidence of the offending behaviour to lodge a written complaint with the Labour Standards Commission (LSC). If he or she misses this deadline, the complaint will not be accepted. The LSC investigates the complaint and offers an opportunity to both employee and employer to come to a mediation session. If an agreement is not reached at this stage, the LSC must decide, based on the facts investigated, whether the complaint merits being transferred to the Quebec Labour Relations Commission (LRC) for a hearing

The Test Applied by the Commission

Part 1: Does the offending behaviour exceed what a **reasonable person** considers appropriate in the workplace?

Part 2: Has the employer taken reasonable action to **prevent** psychological harassment and, when he became aware of such behaviour, did he take reasonable action to **put a stop to it**?

Some Interesting Statistics

While the recourse has been available since June 1, 2004, decisions only recently began to be

rendered by the LRC. Between June 2004 and July 2008, 8,631 psychological harassment complaints were lodged with the LSC of which over 7,700 (90%) did not reach the hearing stage because they were: i) not accepted by the LSC; ii) considered unfounded at the investigation stage; iii) settled; or iv) dropped by the complainant. Close to 700 complaints were transferred to the LRC, 462 (66%) of which were settled before a hearing took place. It is interesting to note from these statistics that 90% of the cases were settled, 37% of them at the mediation stage.

What the Employer may Face

If the complaint is heard by the LRC and the latter concludes that there is indeed a situation of psychological harassment in the workplace, it may render any decision it believes fair and reasonable, taking into account all circumstances of the matter, including: i) ordering the employer to reinstate the employee; ii) ordering the employer to pay the employee an indemnity up to a maximum equivalent to wages lost; iii) ordering the employer to take reasonable action to put a stop to the harassment; iv) ordering the employer to pay **punitive and moral damages** to the employee (ex: \$2,000 – \$5,000, so far); v) ordering the employer to pay the employee an indemnity for loss of employment; vi) ordering the employer to pay for the psychological support needed by the employee for a reasonable period of time determined by the LRC (ex: therapy sessions); vii) ordering the modification of the disciplinary record of the employee.

Conclusion

While there may not be a large number of decisions rendered by the LRC to date, it is clear that the effect of the psychological harassment recourse is not meant to limit the employer's right to manage his human resources. An employer may certainly take actions in the normal and legitimate exercise of his managerial rights, even if they involve disciplinary measures with unpleasant consequences for the employee. It is the arbitrary, abusive, discriminatory measures, or actions which are beyond normal employment conditions, which this recourse aims to address.

TAX EFFICIENT OPTIONS FOR ACQUIRING REAL ESTATE IN THE UNITED STATES

Gabriel Girouard and Marianne Lo

The acquisition of real estate in the United States ("U.S.") may have a serious impact on the value of the estate of an individual resident in Canada due to the imposition of U.S. estate taxes. Estate tax is assessed on the value of the property at a rate as high as Fifty-Five Percent, subject to certain tax credits.

Differences in Taxation

In Canada, an estate is not taxed on the value of its property. The deceased Canadian taxpayer will only be subject to tax on the increase in value of certain real estate. For instance, if Mr. X, resident in Canada, purchased real estate in Canada for two million dollars in 2000 which would have a fair market value of three million dollars at the time of death in 2008 and which property was not his primary residence, he would only be taxed on the capital gain of one million dollars upon death. However, if the real estate was situated in the U.S., the estate would be subject to estate tax assessed on the fair market value of the property, being three million dollars, rather than the deceased being taxed in his last taxation year the capital gain of one million dollars in accordance with Canadian tax laws.

The effects of U.S. estate tax can be more severe if Mr. X is a Quebec resident since Quebec is not a party to the tax treaty between Canada and the U.S., which treaty avoids double taxation. If Mr. X was a Quebec resident, he would be taxed at his death by Revenue Quebec on the capital gain of one million dollars and in addition, his estate would be taxed by the Internal Revenue Service on the fair market value of the property of three million dollars, all without the benefit of any tax credits.

Non-Recourse Mortgage

Fortunately, there are ways to diminish the impact of U.S. estate taxes. The best way is to finance the purchase of real estate in the U.S. with a "non-recourse mortgage". U.S. law permits the deduction of the amount of the loan when calculating the value of the taxpayer's estate for U.S. estate tax purposes. This deduction results in the reduction or elimination of the estate tax for the deceased in respect of the subject property. In order for the deduction to be permitted the loan must satisfy certain

conditions. The principal condition is that the lender's sole recourse in the event of default of payment by the borrower will be against the property. Traditionally, financial institutions granting a non-recourse mortgage will only accept to finance an amount not exceeding fifty percent of the value of the property. Subject to certain conditions, the loan can also be granted by a person related to the owner of the property.

Acquisition Through a Revocable Living Trust

In addition to the non-recourse mortgage, a Canadian taxpayer acquiring real estate in the U.S. can use alternate vehicles through which he will own the property. These vehicles result in different advantages. For instance, if the property is purchased by a "revocable living trust", the property will still be subject to U.S. estate tax but the probate (homologation) fees could be eliminated. These fees vary depending on the state where the property is situated. In the State of Florida, the most common state for Canadians to acquire property in the U.S., probate fees range between Three to Four Percent of the value of the property. As suggested by its name, this trust is revocable, which means that the taxpayer who donated the property to the trust can demand that the property be returned whenever he wishes.

If the owner is ready to forfeit his rights in the property, he can transfer the property to an irrevocable trust of which he is neither the sole trustee nor a beneficiary. Such a trust would be considered by the Internal Revenue Service as an entity distinct from the taxpayer and the trust's property would not be subject to U.S. estate taxes upon death.



WHAT'S IN A NAME, NOM, NOMBRE, NOME, ONOMA, ИМЯ?

Angeliki Papadimitropoulos

In 1961, Ray Croc purchased a California-based restaurant franchising enterprise for a price of Two Million Seven Hundred Thousand dollars. Although this may seem to be a benign part of corporate American history, the interest lies in the fact that the

subject restaurant franchising enterprise was purchased from two (2) brothers named Dick and Mac McDonald and bore the name "McDonald's". Needless to say, since 1961, the value of this name, and its recognition across seven (7) continents, has grown exponentially, with no apparent end in sight.

It is without question that the name associated with a business, service or product often possesses an inherent and significant value. However, as many realize all too late, such name must be safeguarded from those that would seek to unjustly benefit from its notoriety.

The Trade-Mark

In Canada, the mere use of an original name or term in connection with the wares and / or services of an enterprise gives rise to the creation of a trade-mark. The Canada *Trade-Marks Act* (hereafter, the "Act") offers a means in which to protect the proprietary interest in a trade-mark. The process for obtaining the registration of a trade-mark in accordance with the provisions of the Act is relatively simple. The first step is of course choosing an original word, term or design specifically destined to represent the product and / or service of an enterprise.

Originality

The requirement for originality is necessary in order to prevent a situation where an average consumer would confuse the product of one enterprise with that of another. For example, in keeping with the anecdotal reference above, a person would not be able to request or obtain the registration of the trade-mark "MacDonald's" in association with the operation of a fast food restaurant. Such a trade-mark would simply be deemed to be too similar and confusing with the "McDonald's" trade-mark above. The originality criterion also prevents a person from attempting to register purely descriptive or deceptively misdescriptive terms. For example, a person would not be allowed register the term "cookbook" as a trade-mark for cookbooks. Similarly, a person would not be able to register the term "New York cookbook" in association with cookbooks that are not, in any manner, related to New York.

The Process

Once the original word, term or design has been se-

lected, a search must be conducted of the Trade-Marks Register and the various business registers across Canada. Such searches are necessary in order to ensure that the desired word, term or design is in fact original and has not previously been registered or used by another person or entity in Canada.

If the originality criterion is satisfied, an application is filed with the Trade-Marks Branch of the Canadian Intellectual Property Office. The registration process normally takes approximately Eighteen (18) to Twenty-Four (24) months to complete. During this process, the Trade-Marks Office may raise an objection to the requested trade-mark based on lack of originality, lack of distinctiveness or possibility of confusion with another trade-mark.

If the objection is successfully overcome, the trade-mark is then published in the Trade-Marks Journal. The publication of the trade-mark is destined to advertise the trade-mark across Canada and to inform interested third parties of its imminent registration.

During the period of Sixty (60) days immediately following the publication of the desired trade-mark in the Trade-Marks Journal, any interested third party can object to the registration of the said trade-mark by way of an Opposition proceeding. Opposition proceedings normally raise issues relating to the lack of originality, lack of distinctiveness or possibility of confusion with another trade-mark. Such proceedings can take up to Four-Eight (48) months to resolve, either by way of an amicable settlement agreement, a decision of the Opposition Board or any other Court of competent jurisdiction. In the interim, the trade-mark application is held in abeyance pending the outcome of the Opposition proceedings.

In the event the Opposition proceedings prove to be unsuccessful or in the event Opposition proceedings are not instituted, the trade-mark is registered by the Trade-Marks Office.

The Resulting Rights

Once a trade-mark is registered in Canada, the registrant is presumed to be the owner thereof and has the right to the exclusive use of the trade-mark throughout Canada. It is of the utmost importance that the trade-mark is used as registered and that it is used in connection with the wares and / or services described in the trade-mark registration. For example, an entity that obtains the registration of the

word “red” in association with the distribution of wares consisting of jeans will not be deemed to be using its “red” trade-mark if such trade-mark is being used in association with coffee mugs. The failure to use a registered trade-mark as indicated in the Trade-Marks Register may ultimately lead to the trade-mark being expunged.

For those persons who obtain the registration of a trade-mark and who use the trade-mark accordingly, the Act provides a number of extraordinary recourses. For example, the Act specifically stipulates the right of a trade-mark owner to request and obtain the cessation of the unauthorized use of the trade-mark by a third party. The caselaw developed under the Act also recognizes the right of a trade-mark owner to obtain payment of a significant portion of the profits generated by a third party as a result of the said third party’s unauthorized use of a trade-mark.

What’s in a name? As demonstrated above, exclusive rights, recognition and inherent value – all necessary components of a successful business enterprise.

OFFER TO LEASE OR LEASE - WHICH IS MORE IMPORTANT?

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The most important part of the process of leasing commercial and industrial space is the execution of the Offer to Lease, sometimes called the « Agreement to Lease ». It is this document that sets out the business terms of the agreement together with other important provisions relating to the leasing transaction. The actual Lease to be entered into at a later date is generally a lengthy standard form document which reflects what was agreed to in the Offer together with other standard provisions which generally are not negotiable.

Key Items to be Negotiated

The key items to be dealt with in negotiating the Offer to Lease are the location of the premises, the rent payable, whether the format of the Lease is net net or gross or a variation thereof, relocation, tenant’s allowance, fixturing period, free rent, options to renew, both landlord’s and tenant’s exclusivities, early termination rights, exterior and interior sign-

age, tenant's right to cure landlord's defaults, exclusions from common area charges and caps on those charges.

At minimum, all of these issues should be addressed in the Offer. As an example, should a tenant not provide in the Offer to Lease for its exclusive rights to sell pizza in a shopping center, rarely will a landlord agree to grant these rights when negotiating the Lease. Should the tenant not obtain, in the Offer to Lease, the landlord's acceptance that the premises will not be relocated during the term, the Lease will almost surely permit the landlord to relocate the tenant's premises at the landlord's discretion.

Other issues that should be dealt with when negotiating an Offer to Lease on the part of both landlord and tenant would include work (if any) to be performed by the landlord on the tenant's behalf, to the premises and/or common areas, hours of access to the premises, insurance requirements, the right to

lease adjoining space and the use of common facilities (if any), such as parking areas, and the ever increasingly popular debate over liability for environmental issues.

Conclusion

A thoroughly negotiated Offer to Lease will permit landlord and tenant to discuss and resolve key issues and therefore enable them to finalize the Lease in the quickest and most efficient manner. A tenant wishing to lease commercial or industrial premises should invest the time and effort necessary in negotiating the Offer to Lease so as to avoid putting himself in a vulnerable bargaining position when concluding the Lease.



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