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INVESTIGATING ALLEGATIONS OF HARASSMENT AND WORKPLACE VIOLENCE: PRACTICAL CONSIDERATIONS

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Overview:

A good workplace harassment/violence investigation process is essential.

Not only can it identify potential situations giving rise to a need for accommodation at an early stage, but it can lead to an effective resolution of workplace issues and a more harmonious environment without recourse to lengthy and expensive legal proceedings.

A practical roadmap to the issues and considerations involved in investigating workplace harassment and violence complaints is important to ensure that the process is commenced in a timely manner; is approximately comprehensive in scope; is properly documented; is appropriately communicated to all necessary parties; protects the privacy and confidentiality interests of the parties directly involved and results in suitable remedial action.

A seriously flawed or negligent investigation can be significant and costly to employers; can result in the undermining of employees' confidence and faith in the employer and create a more poisoned work environment than may have existed prior to the investigation.

Workplace investigations relied upon by employers in subsequent civil or human rights proceedings will be subject to intense scrutiny.

Even where an employer does not believe in the merits of the complaint or the credibility of the complainant, the failure to conduct a timely, impartial, appropriately thorough and fair investigation can be critically damaging to the employer's legal position. In numerous cases the court or a tribunal has found for the employee where the employer has failed to take reasonable and appropriate steps to investigate a complaint.

The employer's obligation is summarized in Just Cause: The Law of Summary Dismissal in Canada (Toronto: Canada Law Book, 2011) (Looseleaf) by authors Randy Echlin and Matthew Certosimo as follows:

> "Upon receipt of information suggesting that an employee may have been guilty of significant misconduct sufficient to amount to just cause, it is often incumbent upon the employer to conduct an investigation. In order to satisfy the Court that it had acted reasonably and thoroughly in responding to such concerns, care should be taken by an employer to act in a suitable fashion in determining the validity of such allegations….Upon receipt of the findings of the investigation, it is also advisable for the employer to act in a timely fashion to either dismiss the employee (if the investigation is unfavourable to the employee) or reinstate the employee and withdraw the allegations (if there is not sufficient misconduct to warrant dismissal" (P. 20-5).

In the case of *Disotell v. Kraft Canada Inc.* 2010 ONSC 3793 (S.C.J.) (para. 95), the employer's internal investigation suffered from a number of flaws, including the failure to interview appropriate individuals, the investigator's reliance on questionable testimony, and a very limited scope of investigation.

In the case of *Downham v. County of Lennox and Addington* 2005 CanLII 45197 (Ont. S.C.), the Court concluded that the employer had not conducted even the most basic fact finding during its investigations. In particular, the Court noted that:

(i) the defendant employer made no effort to contact the employee at the outset of the investigation to ascertain his position;

(ii) the investigation was biased, shoddy and substantially undocumented;

(iii) the information allegedly obtained from key witnesses was not recorded, which resulted in false and distorted information being included in the investigation report;

(iv) the investigation report was recklessly prepared and contained numerous statements of fact and conclusions that were unfounded. The statements could have been discovered to be false if key witnesses had been carefully interviewed;

(v) the employee was treated unfairly by not being informed of the allegations against him and by not being given an opportunity to respond;

(vi) although the employee subsequently filed information that disclosed information at odds with the content of the investigation report, none of the defendant's management made any further effort to investigate; and

(vii) the defendant maintained its position at trial even though a number of facts and conclusions in the report were contradicted.

The Complaint:

How is it Framed:

A traditional complaint is initiated by an employee and made pursuant to an employer policy, such as a workplace harassment or violence policy. Such complaints usually name a specific respondent(s) as the source of the behaviour which is of concern.

Increasingly, however, subject matter which brings about the need for an investigation comes to an employer's attention through non-traditional means, such as through a "confidential" complaint, a rumour, or an anonymous complaint. In such cases, information comes to the employer's attention which, if true, suggests that behaviour is occurring in the workplace which is inconsistent with either policy and/or the law, and such information cannot be ignored by the employer. An employer on the receiving end of such information must take some step to "investigate" this information. The real question becomes what type of investigation can meaningfully be conducted when the employer is in receipt of such non-traditional forms of complaint.

Where information comes to the employer's attention but either the provider of the information is unwilling to attach their name to the complaint (the "confidential" complaint) or the source of the information is unknown, as in the case of a rumour or an anonymous complaint, it is very difficult for the employer to follow a traditional investigation process. The traditional process usually involves interviewing the complainant to understand the parameters of the complaint, interviewing the respondent and applicable witnesses. When there is no willing complainant or no complainant at all, following this process becomes logistically difficult and results in procedural fairness issues for the respondent.

For the above reasons, we normally recommend that employer clients proceed in an alternate manner when complaints present in any of these forms. Where there is an unwilling or "confidential" complainant, he or she can sometimes be persuaded to "go on the record". This is often preferable because it then allows the organization to employ a traditional investigation procedure and best ensures fairness and thoroughness for the parties.

However, when the employer is faced with merely a rumour or an anonymous complaint, there is no potential complainant to persuade and it is not even clear that there is any substance behind the information. This does not afford the employer the opportunity to ignore the information. If the information could be legally problematic if true, then the employer still has an obligation to act. It will need to be able to show that it did *something* in response to receiving this information. The question becomes what to do?

An employer must be primarily concerned with accusing a potential respondent of questionable behaviour with no credible basis for a complaint. Instead, an employer might seek to substantiate the information provided by the anonymous source through other means. In such cases, we have worked with employers who have conducted "departmental reviews" by interviewing all members of a team in which the respondent works and asking the same generic questions of all. An employer might also seek out information regarding employee concerns through other means such as through use of an employee survey or a 360 degree review of the individual identified in the complaint. In cases involving non-traditional complaints, there is no perfect or correct process – different methods may be more or less appropriate depending upon the circumstances.

In setting out to commence an investigation, the most significant issue which must be established is the investigator's "mandate" or the scope of the investigation. Whether this involves investigating a particular employee's complaint, examining issues of bullying or intimidation in a given department, providing legal advice and/or making recommendations, this should be clear to the investigator and the organization before the investigator sets out to commence the investigation. Where difficult issues arise throughout the investigation, often these are determined with reference to the specific mandate. The mandate is not finite and can certainly be altered or amended throughout the course of the investigation, but any such changes should be done consciously and with proper authorization.

How Long Do You Have to Act:

Generally speaking, employers must act quickly when in receipt of a complaint of harassment/violence. The timing of the commencement of an investigation of a complaint can be critical and may play an important factor in a subsequent determination by a court or tribunal as to whether the employer took adequate steps to investigate. That being said, there is no specific formula to the amount of time within which an employer must commence an investigation into employee misconduct. In moving with haste, employers must primarily keep two things in mind: (1) ensuring that, if the allegations are true, no other employees are subject to the problematic behaviour in the time it takes to conclude the investigation, and (2) neither party is prejudiced because of the length of time is takes to conduct the investigation – in other words, protecting against the loss of relevant evidence.

In a perfect world, investigations would be commenced immediately and conducted in a very short period of time. However, there a multitude of variables which impede an employer's ability to act quickly and complete an investigation in a timely way. Investigators often find themselves having to make judgment calls throughout the course of an investigation as to whether a particular delay is justifiable. The investigator is charged with the obligation of being both fair and thorough and these interests are often competing when it comes to issues of timeliness. The following are a list of possible circumstances which may arise in the course of an investigation, all of which may result in a delay and where such a delay may be justifiable:

- One of the parties commences a medical leave of absence – this does not necessarily mean that the investigation cannot proceed, but the investigator will need to proceed with care and caution;

- One of the parties wishes to retain counsel – this often takes some time, and if the party wishes their counsel to attend their interview and the employer is prepared to allow this, there is often a delay associated with scheduling a meeting between all attending parties;

- Union/counsel raises issues related to process, such as (i) requests for particulars, (ii) requests for production, (iii) requests for the names of and the evidence provided by witnesses, etc.;

- Timing issues, such as coordinating interviews around vacation schedules and other reasons relevant witnesses may not be in the office; and

- Identification of a counter-complaint or new complainants/respondents.

While the above list is by no means exhaustive, in each of the above cases, the investigator will be called upon to decide whether the delay which may be associated with addressing the issue in question will be justified in the circumstances, taking the need for fairness into account.

Is a Third Party Investigator Required:

When a need for an investigation arises, one of the first issues that must be decided by the employer is whether the investigation will be conducted by an internal investigator (i.e. an employee of the organization – often a human resources staff person or, in some cases, in-house legal counsel) or whether an external third-party investigator will be retained. We have yet to see case-law which has dictated circumstances in which an external investigator is *required*. However, what we do know is that investigators, both internal and external, must be objective.

Based on the foregoing, there are certain circumstances in which is certainly recommended that a third-party external investigator be retained. The following list is not exhaustive, but is intended to provide a guideline for employers attempting to decide whether to make use of an internal vs. an external investigator. Any of the following situations would certainly suggest that consideration be given to retaining an investigator external to the organization:

- Possibility of bias or perception of bias
- Internal investigator is not sufficiently experienced
- Internal investigator is unable to give investigation timely or full attention
- The allegations are very serious
- There are multiple complainants or respondents
- The parties are represented by counsel or a union
- "EEWWW" factor (the allegation involves delicate or difficult subject-matter)
- The parties are highly-placed or high-profile within the organization
- The complaint arises in the department in which the internal investigator(s) works or involves someone who the internal investigator(s) knows well
- There is a high likelihood of legal challenge

Hiring the Investigator:

Whether the employer elects to utilize an external third-party investigator, including external legal counsel, or an internal investigator, including in-house or external legal counsel, there are a number of practical considerations which must first be addressed:

Training and Experience:

The investigation should be undertaken by an individual with legal or human resources/health and safety training appropriate to address the issues at hand.

Terms of Reference:

The investigator should establish terms of reference prior to the commencement of the investigation which:

- confirm the terms of her/his retainer, and in particular the purpose of the investigation and for whose benefit any findings/conclusions/reports shall be prepared
- establishes the requirements of objectivity and impartiality
- addresses privacy and confidentiality issues in respect to oral and documentary evidence and information exchanged during the ongoing investigation
- addresses issues of solicitor-client and/or litigation privilege
- delineates when and to whom conclusions shall be provided
- addresses whether recommendations as to remedial action or legal advice are to be provided by the investigator
- documents and follows the employer's Bill 168 investigation policy
- documents any relevant matters pertaining to the conduct of the investigation

Impartiality and Objectivity:

The investigator undertaking the investigation must be a neutral third party and cannot be influenced by the employer's theories, biases or preferences in her/his determination of the proper conduct and direction of the investigation or the appropriate scope thereof. While this is a particularly difficult issue where the investigator has an existing and ongoing relationship with the employer, such as an internal investigator or in-house legal counsel, objectivity is key to an impartial process.

In the case of *Tong v. The Home Depot of Canada Inc.* 2004 CanLII 18228 (Ont. S.C.), involving a case of termination for just cause due to time fraud, the Court stated that an investigation will be tainted where it is determined that the in-house investigator commenced an investigation "…with the firm belief that the [accused employee] was a wrongdoer" (para. 11).

Also, in *Disotell v. Kraft Canada Inc. supra*, the Court noted that:

> "The H.R. investigation in my opinion demonstrates the inherent difficulty of in-house investigations between employees of longstanding relationships, especially when there are conflicting reports between supervisory and first level employees. Kraft has clearly invested much time and effort in creating and disseminating a zero tolerance harassment policy. That policy is only as effective as the individuals who administer it" (para. 95)…
>
> "Faced with serious and repetitive allegations made by the Plaintiff against four named employees and given the knowledge of one substantiated complaint that two of the named individuals had committed conduct sufficiently serious that a

> supervisor verbally reprimanded them, the conduct and conclusions of H.R. were not "neutral"." (para. 97).

In *Greater Toronto Airports Authority v. P.S.A.G. Local 0004*, [2010] C.L.A.D. No. 127, Arbitrator Owen Shime concluded that the GTAA internal investigators had associated the grievor, who had been terminated for dishonesty in reporting post-surgery absences, with her roommate, another employee under surveillance by the company for suspected sick leave abuse. The Court held that the in-house investigators commenced the investigation with a preconceived notion that the grievor was dishonest and that the employer dismissed the grievor based upon her association with the roommate, completely failing to assess the grievor's conduct independently and objectively (paras. 215 and 216).

Fairness:

The investigator should be bound by the principle of fairness. If the parties to the investigation do not perceive the investigation to be such that they have received a fair hearing on the merits and that appropriate action has been taken, they may prove to be resistant or cause disruption in the process, may not be prepared to accept the results and may ultimately be prompted to exercise legal options.

Further, while case law in Ontario and elsewhere in Canada has established that at common law, employers are not legally required to provide employees with access to natural justice (see *Leach v. Canadian Blood Services* [2001] A.J. No. 119 (Alta Q.B) (paras. 143-146), as shown in the cases referred to below, courts and tribunals will be influenced by investigations which do not follow basic principles of natural justice; such as notice of the allegations and an opportunity to be heard. The more serious the allegations the more scrutiny will be given to the consideration of fairness even though the courts may not recognize a legal duty of procedural fairness.

In the case of *Tse v. Trow Consulting Engineers Ltd.* [1995] O.J. No. 2529 (Gen. Div.), where an employee was summarily dismissed for sexual harassment, Justice Cummings found that the employer did not have just cause. In his decision, Cummings J. commented on the employer's inadequate investigation and stated:

> "There are divergent views in the law on the extent of an employer's obligation to an employee in terms of the process to be followed when there is a summary dismissal. An obligation can be asserted to exist on the part of the employer to give the accused employee a chance to state his case. Trow failed to offer Mr. Tse any chance to explain his actions, and terminated him on August 4 without any particulars or explanation of the alleged harassment" (para. 59).

However, the Judge went on to comment that:

> "In any event, even though there may be procedural unfairness by the employer in the case at hand, this does not mean there is an actionable wrong on that account" (para. 73).

In *Quirola v. Xerox Canada Inc.* [1996] O.J. No. 21 (Gen. Div.), an employee had been terminated after a complaint of sexual harassment and a complaint that he had "purchased" illegal drugs from another employee and paid for them by providing the employee with unearned overtime pay.

While holding that "[n]o authority has been brought to my attention in which an employer's right to dismiss an employee for cause has been denied on the basis of an unfair process" (para. 12), Justice Pitt went on to find that the employee had been wrongfully terminated. Justice Pitt noted that:

> "The case is instructive for a rather comprehensive discussion of the importance of the need for a fair process with an opportunity for the employee to respond. It is to be noted in this case that although the defendant had elaborate policy guidelines in most areas, there was none with respect to sexual harassment" (para. 32).

Finally, in the case of *Foerderer v. Nova Scotia Chemicals* 2007 ABQB 349 (Alta. Q.B.), an employee was terminated for cause after an investigation into allegations that he had sexually harassed a female employee through verbal comments and visual images. While the termination was upheld after rejecting the employee's assertion that he was entitled to due process and a fair investigation, Justice Topolniski made reference, with approval, to comments made in Just Cause, The Law of Summary Dismissal in Canada 2000, authored by Randy Echlin and Matthew Certosimo as follows:

> "It may be that while a duty to provide a fair hearing may not arise in the common law employment context the very nature of the allegations of sexual harassment, based for the most part on the accusations of one employee against another, compels the employer to exercise a degree of care in prosecuting the allegations, so as to balance the "rights" of the accused employee with those of the victim. While there are divergent views on this point, it does appear, that at the very least, by providing to the accused employee an opportunity to respond to allegations of harassment the employer enhances its case" (para. 137).

As well as pronouncements from various courts which suggest that the failure to provide an employee accused of serious misconduct with notice of the allegations and a right to be heard during an investigation process may hamper an employer's ability to discharge the burden of establishing just cause, a number of courts have focused on the remedial consequences also. In particular, in both *Fleming v. Ricoh Canada Inc.* [2003] O.J. No. 5557 (S.C.J.) (at para. 18) and *Van Woerkens v. Marriott Hotels of Canada Ltd.* 2009 BCSC 73 (B.C.S.C.) (at para. 152), the judges held, respectively, that if just cause is not established and the lack of procedural fairness is particularly egregious, the employee may have a basis for an extension of the notice period as in *Wallace v. United Grain Growers* [1997] 3 S.C.R. 701 (S.C.C.) or the employee may have a claim for damages as in *Honda Canada Inc. v. Keays* [2008] S.C.C. 39 (S.C.C.). *Van Woerkens* however was decided pre *Honda*. It would seem that the available remedy post *Honda* would be a claim for damages for breach of the obligation of good faith and fair dealing in the manner of the termination of the employment contract.

In the more recent case of *Elgert v. Home Hardware Stores Limited* 2011 ABCA 112, the Alberta Court of Appeal upheld a civil jury award of two years' pay in lieu of notice for wrongful termination as well as punitive damages (albeit in a reduced amount) by virtue of an investigation for sexual harassment which the Court of Appeal agreed was "inept and unfair" and conducted in a malicious, vindictive and outrageous manner. Further, while the aggravated damage award was set aside, it was only because the Plaintiff had not provided any evidence of mental distress at trial.

Timing:

As the need for an investigator may arise on short notice, it is prudent for the employer to keep a list of experienced investigators who can be accessed as required. Ordinarily, the employer will want to communicate to the parties involved the fact of the investigation; the identity of the investigator and the investigator's credentials; that their co-operation and statements shall be required; and the expected timing of the commencement of the investigation process and its conclusion.

Privilege:

This issue is often fraught with potential mine fields. The concept of privilege as it applies to workplace investigations findings and reports still lacks some clarity in the jurisprudence. As well, determinations as to when privilege will attach largely depend on the facts of each case and the retainer arrangements put in place between the investigator and the employer prior to the commencement of the investigation.

If an external or internal non-legal investigator is being utilized it is questionable as to whether the findings and report of the investigator will be found to be protected under the rubric of privilege even where at the outset of the retainer it is clearly documented that the investigator is being retained by external legal counsel and that the report is being prepared for, and is to be provided directly to, legal counsel. The Courts have generally held that a third party who gathers information for use by counsel is not essential to the operation of the solicitor and client relationship and that therefore the report is not subject to solicitor and client privilege; though may be protected by litigation privilege where the dominant purpose is for the furtherance or in contemplation of litigation. Where no privilege attaches, the work product of such investigators, including any interview statements obtained from the parties directly involved or from witnesses, will be seen to be undertaken in the normal course of business and producible in any subsequent legal proceedings (*Liquor Control Board of Ontario v. Lifford Wines Agencies Ltd.* (2005) 76 O.R. (3d) 401 (C.A.) (at paras. 69-76); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* 2002 B.C.C.A. 655 (paras. 29-51).

The line becomes somewhat clearer in the case law when the investigation is being undertaken by external legal counsel, in circumstances where the clear purpose is to provide the employer with legal advice. In these cases the terms of the lawyer's retainer agreement and the express claim of solicitor and client privilege in respect of the findings, conclusions, recommendations and advice and any report, may be critical.

The case of *Gower v. Tolko Manitoba Inc.* [2001] M.J. No. 39 (Man C.A.) involved an investigation of sexual harassment within the workplace. The employer had retained external legal counsel to conduct the investigation on behalf of the employer for the purpose of drafting a fact finding report and providing legal advice. Following the receipt of the findings and report, the employer terminated the employee for cause. In the subsequent civil action which followed, the employee sought production of the whole of the lawyer's report, including but not limited to, the witness statements; the lawyer's conclusions as to credibility; the lawyer's findings of fact; legal analysis and legal advice. The master ordered production of all of the report other than the legal analysis and legal advice. On appeal to the Court of Queen's Bench, the Court overturned the decision and held that the entire report was subject to solicitor and client privilege. It was heavily influenced by the retainer agreement. That finding was upheld by the Manitoba Court of Appeal. The Court of Appeal commented that the entire report was created with the purpose of

providing legal advice to the employer and as such "…the fact gathering was inextricably linked to the second part of the tasks, the provision of legal advice" (para. 38).

The Gower decision was followed in the case of *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority* [2011] B.C.J. No. 104 (B.C.S.C.), where the Court held that:

> "…privilege extends to more than the individual document that actually communicates or proffers legal advice. The reality is that in order for a lawyer to provide advice, he or she will often require history and background from a client. …He or she may repeatedly contact the client asking for clarification of some issue that is salient to the retainer and to the advice being sought. …It is this chain of exchanges or communications and not just the culmination of the lawyer's product or opinion that is privileged" (para. 40).

Where the legal retainer is unclear however as to the purpose of the retainer being to provide legal advice, privilege will not attach to the investigation report.

In the case of *Wilson v. Favelle* [1994] B.C.J. No. 1257 (B.C.S.C.), the Ministry of Health hired a lawyer to conduct an investigation into allegations of sexual harassment and the complainant sought the production of the investigation report. Irrespective that the lawyer swore an affidavit that she was retained to provide legal advice, the Court made a finding to the contrary based upon an interpretation of the lawyer's retainer agreement and concluded that the lawyer had been hired as an investigator to investigate and report, and not as a solicitor. Privilege was found not to apply (pp. 4-5).

Thus, in order to attempt to cloak the investigation reports and related materials with privilege, steps which should be taken are:

- a retainer agreement should be prepared at the earliest possible time detailing the terms of reference of the investigation

- if solicitor and client privilege is to be sought, the investigation should be undertaken by external legal counsel and the retainer agreement should expressly state that the lawyer is being retained by the employer to investigate the incident, provide findings and make legal recommendations and that the lawyer's role is as solicitor and that the investigation/fact-finding functions are for the purpose of providing legal advice

- if a non-lawyer investigator is being utilized, the retainer agreement should expressly state that the investigator is being retained by legal counsel to investigate the incident and provide findings and that the dominant purpose for such investigation is in contemplation of or in anticipation of litigation

- any investigation report by the non-legal third party investigator should be commissioned by legal counsel and a specific claim to confidentiality, solicitor-client and litigation privilege should be made in the retainer agreement

- any documentation provided by the non-legal investigator should be marked confidential and solicitor-client privileged

- any statements or interviews taken should be preceded by a signed acknowledgement by the witnesses that their statements are confidential and will be subject to solicitor-client privilege

- any material which is not subject to privilege should be segregated from the privileged statements/reports and should be produced when required

- any steps which are not subject to privilege should be undertaken separately from activities which purposes relate to solicitor-client or litigation privilege and should be disclosed when required

- when the findings/conclusions are disclosed to the parties involved for decision making or disciplinary purposes, the limited purpose of the disclosure should be expressly stated and it should be maintained that no waiver of solicitor-client or litigation privilege is being made

- if privileged materials (such as copies of statements) must be provided to parties, the purpose of the disclosure should be expressly stated and it should be stated that the material is confidential and subject to solicitor and client privilege and must be returned

- the employer should ensure that it waits until the advice/recommendation of legal counsel is received prior to determining remedial action

Conducting the Investigation:

Privacy and Confidentiality:

In the current legal climate, it can certainly be said that the parties in an investigation have a right to privacy and confidentiality. The more sensitive the subject matter of the investigation, the more care that an employer would be wise to take in protecting these rights. That being said, there are limits to these rights, as certain information must, by necessity, be shared in the investigation process in order to be fair and thorough.

For example, fairness would seem to dictate that the respondent to an investigation has a right to know the identity of his/her accused. In addition, both courts and human rights tribunals have repeatedly held that the respondent is entitled to be provided with the particulars of the complaint in order to be able to provide a meaningful response.

Where employers seem to run the most risk of disclosing confidential information in the course of an investigation is before the investigation interviews even begin. In communicating with individuals within the organization regarding the fact that an investigation will be taking place, many employers are quick to share far more information than is required to far more people than need to know. Information about the fact of the investigation, and more particularly the individuals involved and the subject matter should be shared with only those individuals within the organization who need to know – examples might include a departmental manager where employees are expected to be interviewed or a director of information technology where a review of e-mail history will need to be conducted. Employers could certainly be faulted, and potentially legally liable, for sharing more information about the investigation than is necessary.

As an example, when interviews with witnesses are being scheduled, it is usually sufficient to tell a potential witness that he or she is being asked to meet with an investigator because a complaint has been made within the organization. The witness should be told that the complaint has nothing to do with them directly, but rather their name has been provided as someone who may have information relevant to the issue being investigated. This should be sufficient in order to summon a witness to a meeting, and in this manner no information about the parties or the subject matter of the complaint need be shared.

Similarly, in interviewing witnesses, questions should be carefully planned in advance so as to ensure that every effort is made to ascertain the information that the witness has regarding the matters in question without providing the witness with more information about the complaint than he or she had before the interview. Reckless questioning in the course of witness interviews runs the risk of allowing otherwise confidential information about the nature of the investigation to disseminate within the organization to the detriment of the parties.

How to Address the Concerns of the Parties During the Process:

There are a host of concerns which may be raised by the parties throughout the investigation. These may include:

- Requests for particulars
- Requests for disclosure of documents
- Requests for identity of witnesses and content of witness interviews
- Requests for attendance of counsel/representative at interviews
- Questions about length of time the investigation is taking
- Questions about the form of reporting that the parties will receive
- Questions about the consequences of the investigation

There is no one answer to any of the above questions/requests. Generally, investigators will be guided by the principles discussed elsewhere in this document: fairness, thoroughness, confidentiality, objectivity and timeliness. Bearing all of these interests in mind (many of which are often competing at any given time), the investigator will need to make a judgment call as to how to respond to the party's request.

What is clear is that parties' requests/questions should be answered and responses should be given in a timely fashion, even if the response is not what the party would like. Also, non-lawyer internal investigators may be wise to bring requests to the attention of legal counsel (either internal or external) so as to avoid potential legal consequences during or after the investigation. When concerns are raised in the course of an investigation, this is often a signal that the party (or his or her representative) has identified an issue which may have potential legal consequences. This may or may not be clear to an investigator without legal training (whether

internal or external), and so discussion with legal counsel may help bring potential legal issues to light *before* decisions are made which may compromise the organization's legal position.

Information Exchange: Who Must Know What and When?

The respondent is entitled to know that a complaint has been received in which he or she has been named and this information should be shared as soon as possible, along with the identity of the complainant. The respondent also has a right to know the particulars of the complaint, but this information is not always known at the outset of the investigation. Where this information is not provided in detail when the complaint is initiated, where it is incomplete or where it is provided in a form which is not suitable for provision to the respondent, he or she can be told that particulars will be provided as soon as they are available, and this may follow the interview with the complainant.

In being provided with "particulars", the respondent has a right to be provided with sufficient detail in order to allow him or her to provide a meaningful response to the complaint. For example, simply telling a respondent that he or she has been accused of sexual harassment is insufficient. It is not necessary to provide the respondent with a full accounting of the complainant's evidence in order for he or she to prepare to provide a response, but there must be sufficient detail provided to allow the respondent to know what matters will be discussed in their interview.

Although it is not necessary to share with a respondent the details of the complainant's evidence in advance of the respondent's interview, it may be necessary to share details of the evidence in the interview itself. For example, if the respondent provides a different version of events in his or her interview then, in fairness, the details of the complainant's version should be provided to the respondent so that he or she can be provided with an opportunity to fully respond. This is not necessary if the respondent simply denies that the events occurred altogether.

Where a respondent provides information in his or her interview that can be characterized as a "counter-complaint", and where the investigator is then charged with a mandate to also investigate such a counter-complaint, the complainant becomes a respondent by counter-complaint and is afforded all of the same rights as outlined above, including the right to be provided with the particulars of the counter-complaint in advance of meeting to respond to these allegations.

A difficult issue which comes up in many investigations is whether the parties are entitled to be made aware of the identity of the witnesses to an investigation and the contents of their evidence. On this issue, the law is unclear. In a traditional legal proceeding, the parties would have this right, and further the right to "test" the witness' evidence through cross-examination. Although a workplace investigation is not a legal proceeding, increasingly courts and tribunals are requiring parallel rules of procedural fairness from these processes. If an investigator wishes to adhere as closely as possible to best practice, it would seem most fair to provide this information to the parties. However, because these processes are internal, there are often compelling reasons not to share this information in the interests of maintaining workplace harmony, allowing for workplace restoration and minimizing the likelihood of reprisal.

Also as indicated above, witnesses have no rights in an investigation process. They are often curious (or worse, prone to gossip) and may ask questions about the people and the subject matter involved. They have no right to this information and an investigator should feel comfortable in responding to any such inquiry in a manner which reveals no confidential information.

Despite the foregoing, sometimes certain information relating to the investigation must be shared with witnesses in order to determine whether they have information relevant to the investigation. An investigator should be able to justify sharing such information in the interests of determining whether the witness has relevant information to share. Such justification may be found in information already provided to the investigator by the parties or other witnesses. For example, if Karen was believed to have witnessed a threat of violence on the workplace, she could be questioned generally about her recollection of events which occurred on a particular day. However, if this line of questioning revealed no relevant information, the details of the incident may need to be put to Karen in order to refresh her memory. Although this would result in information regarding the investigation being shared with Karen, this may be justified in the interests of fairness and in order to obtain her complete response.

Assessing the Results and Determining Next Steps:

Communication of Findings/Conclusions:

Subject to the terms of the investigator's retainer and terms of reference, it is prudent to communicate, even in a general fashion, the results of the investigation to the parties directly involved at the earliest opportunity and what remedial action is to be taken.

The employer should also determine whether the nature of the issue is such that a wider communication, to the department or the workplace as a whole, is required (for instance to address a poisoned workplace allegation or systemic workplace issues).

Remedial Action:

In determining what remedial action is required, the case law has clearly established that the employer must carefully assess the findings and take a contextual approach to disciplinary action; termination cannot be an automatic response to a finding of harassment or workplace violence (see *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 (S.C.C.) and *Kingston (City) v Canadian Union of Public Employees, Local 109*, 2011 CanLII 50313 (Arbitrator Newman)).

The employer must consider all relevant factors including:

- the investigation findings and the recommendations of the investigator
- whether personal safety concerns are at issue – was there a threat of violence and/or actual attack and the severity
- whether the conduct was an unplanned incident or a premeditated act
- whether the incident was a single episode or a series of incidents
- whether there was provocation

- the accused's disciplinary history
- the accused's position and length of service
- if the conduct was proven, was there an apology or an indication of remorse or acceptance of responsibility
- whether the accused's conduct/actions give rise to the need for accommodation or can be appropriately addressed through training or accommodation (psychological counseling; anger management training)
- whether the complainant can be appropriately remediated and protected through accommodation measures (reassignment of the accused)
- whether a severance package or other damages should be provided to the complainant
- whether Bill 168 or other policies adequately educate employees/management as to their obligations and whether amendments to the policy or further employee training is necessary

Timing of Remedial Action:

The implementation of the remedial action to be undertaken should be timely. Exposing the complainant to unnecessary delay in the resolution of the process could lead to an exacerbation of stress or mental anguish or a perception that the employer is not willing to "put its money where its mouth is". Furthermore, delay in the implementation of the remedial action to be taken may create an environment for the repetition of the harassing/violent conduct.