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## OCCUPATIONAL HEALTH & SAFETY: #METOO AND OTHER EMERGING ISSUES

Thursday, June 20, 2019

**Anthony Purgas**




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### Occupational Health and Safety Act, SA 2017, c O-2.1: a Refresher

- New act in effect since June 1, 2018
- Highlights:
  - For all work sites with 20 or more workers
  - For all work sites with less than 20 workers
  - Additional requirements for reporting incidents
  - Broader powers for OHS inspection and enforcement
- Increased liability for employers and supervisors

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### Harassment from the Courts

Harassment includes words, gestures and actions which tend to annoy, harm, abuse, torment, pester, persecute, bother and embarrass another person, as well as subjecting someone to vexatious attacks, questions, demands or other unpleasantness. A single act, which has a harmful effect, may also constitute harassment.

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## Harassment from the Courts

Also helpful is the analysis of Arbitrator H. Brown in *[ITT Cannon Canada v. C.A.W., Local 1090 (1990), 1990 CarswellOnt 4151 (Ont. Arb.)]*, in which he described harassment as “a course of conduct which is designed to upset and disturb other employees”

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## Harassment: the Tort

*Sunshine Village Corporation v Chevalier*, 2018 ABQB 484

[25] There is some recognition of harassment as a recognized tort under Alberta law. In *Al-Ghamdi v Alberta*, 2017 ABQB 684 (CanLII), Justice Goss at paras 136-7 questioned whether that was the case, but cited a number of Alberta cases, including my decision in *Dechant*, indicating such recognition.

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## Harassment: the Crime

**Criminal harassment**

**264 (1)** No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

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## Harassment: the Statistics

- Government Canada report
- From 1,349 online surveys:
  - 60% reported experiencing non-sexual harassment in the work place;
  - 30% reported experiencing sexual harassment in the work place;
  - 21% reported experiencing violence in the work place;
  - 3% reported experiencing sexual violence in the work place

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## Harassment under OHS

(q) “harassment” means any single incident or repeated incidents of objectionable or unwelcome conduct, comment, bullying or action by a person that the person knows or ought reasonably to know will or would cause offence or humiliation to a worker, or adversely affects the worker’s health and safety, and includes

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## Harassment Under OHS

**Obligations of employers**

**3(1)** Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,

...

(c) that none of the employer’s workers are subjected to or participate in harassment or violence at the work site,

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## Harassment Under OHS

**Obligations of supervisors**

4 Every supervisor shall

- (a) as far as it is reasonably practicable for the supervisor to do so,
- ...
- (v) ensure that none of the workers under the supervisor's supervision are subjected to or participate in harassment or violence at the work site

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## Harassment under OHS

- (i) conduct, comment, bullying or action because of race, religious beliefs, colour, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, gender, gender identity, gender expression and sexual orientation, and
- (ii) a sexual solicitation or advance but excludes any reasonable conduct of an employer or supervisor in respect of the management of workers or a work site;

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## Bullying from the Courts

“Bullying” is merely a label given to offensive, oppressive, and coercive conduct usually directed against an individual. “Bullying” is a conclusory term characterizing the underlying offensive, oppressive, or coercive conduct to which the individual has been subjected. It is another way of expressing “adverse treatment”.

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## Bullying under the *School Act* [later the *Education Act*]

(d) “bullying” means repeated and hostile or demeaning behaviour by an individual in the school community where the behaviour is intended to cause harm, fear or distress to one or more other individuals in the school community, including psychological harm or harm to an individual’s reputation;

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## Bullying: the Tort

*Yen v. Alberta (Advanced Education)*, 2010 ABQB 380

[28] The Plaintiff further alleges that the Defendants’ actions were abusive and against Canadian law, and that they inflicted emotional suffering and serious damages to her career,

continued on next slide

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## Bullying: the Tort

citing *Balasubramanian v. Ceridian Canada*, 2003 MBQB 197 (CanLII). That decision, made in an employment context, held that harassment is not a cause of action in itself, but may be a component of intentional infliction of mental shock.

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## Bullying: the Tort

With respect to the tort of intentional infliction of mental suffering, the complainant must prove these three basic elements:

1. Conduct that is flagrant and outrageous
2. Conduct calculated to produce harm to her
3. That she suffered a visible and provable injury

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## Violence from the Courts

**Supreme Court of Canada**

The primary meaning of the word “violence” according to the Shorter Oxford English Dictionary, 3rd ed. (Oxford: Clarendon Press, 1987) is “[t]he exercise of physical force so as to inflict injury on or damage to persons or property.”

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## Violence under OHS

(yy) “violence”, whether at a work site or work-related, means the threatened, attempted or actual conduct of a person that causes or is likely to cause physical or psychological injury or harm, and includes domestic or sexual violence

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## Psychological Injury: the Tort

As the Supreme Court of Canada pointed out in ***Mustapha v Culligan of Canada Ltd***, 2008 SCC 27 (CanLII), at paragraphs 8 and 9:  
Generally, a plaintiff who suffers personal injury will be found to have suffered damage. Damage for purposes of this inquiry includes psychological injury.

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## Psychological Injury: the Tort

Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.

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## What Does it all Mean?

Employers and supervisors need to reasonably ensure that employees do not experience at the work site:

- Objectionable or unwelcome conduct that reasonably causes:
  - Offence;
  - Humiliation; or
  - Adverse effects to health and safety.

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## What Does it all Mean?

- Hostile or demeaning behavior intended to cause:
  - Harm;
  - Fear; or
  - Distress.
- Discriminatory conduct, comments, or actions

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## What Does it all Mean?

- Sexual solicitations or advances
- Actual, attempted, or threatened:
  - Physical violence;
  - Psychological injury;
  - Domestic violence; or
  - Sexual violence.

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## What Do You Need in a Policy?

OCCUPATIONAL HEALTH AND SAFETY CODE,  
Alberta Regulation 87/2009 (as of January 1, 2019)

- Violence and harassment are workplace hazards
- Employers must develop and implement a violence prevention plan that includes a violence prevention policy and violence prevention procedures
  - In consultation with JWSHSC or Health and Safety Representative or affected workers

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## What Do You Need in a Policy?

- Employers must develop and implement a harassment prevention plan that includes a harassment prevention policy and harassment prevention procedures
  - In consultation with JWSHSC or Health and Safety Representative or affected workers

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## Violence and Prevention Policy

Must have the following statements:

- The Employer is committed to eliminating or, if that is not reasonably practicable, controlling the hazard of violence;
- The Employer will investigate any incidents of violence and take corrective action to address the incidents;

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## Violence and Prevention Policy

- The Employer will not disclose the circumstances related to an incident of violence or the names of the complainant, the person alleged to have committed the violence, and any witnesses, except
  - i) where necessary to investigate the incident or to take corrective action, or to inform the parties involved in the incident of the results of the investigation and any corrective action to be taken to address the incident

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## Violence and Prevention Policy

- ii) where necessary to inform workers of a specific or general threat of violence or potential violence, or
- iii) as required by law;
- The Employer will disclose only the minimum amount of personal information above that is necessary to inform workers of a specific or general threat of violence or potential violence;

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## Violence and Prevention Policy

- The Violence Prevention Policy is not intended to discourage a worker from exercising the worker's rights pursuant to any other law.

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## Violence Prevention Procedures

An employer must ensure that the violence prevention procedure includes the following:

- (a) the measures the employer will take to eliminate or, if that is not reasonably practicable, control the hazard of violence to workers;
- (b) information about the nature and extent of the hazard of violence, including information related to specific or general threats of violence or potential violence;

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## Violence Prevention Procedures

(c) the procedure to be followed by the employer when disclosing the information in clause (b), which must be in compliance with section 390.1(c) and (d);

(d) the procedure to be followed by a worker to obtain immediate assistance when an incident of violence occurs;

(e) the procedure to be followed by a worker when reporting violence;

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## Violence Prevention Procedures

(f) the procedure to be followed by the employer when

(i) documenting and investigating an incident of violence, and

(ii) implementing any measures to eliminate or control the hazard of violence that have been identified as a result of the investigation;

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## Violence Prevention Procedures

(g) the procedure to be followed by the employer when informing the parties involved in an incident of violence of

(i) the results of an investigation of the incident, and

(ii) any corrective action to be taken to address the incident.

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## Domestic Violence

- When an employer is aware that a worker is or is likely to be exposed to domestic violence at a work site, the employer must take reasonable precautions to protect the worker and any other persons at the work site likely to be affected.

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## Harassment Prevention Policy

Must have the following statements:

- The Employer is committed to eliminating or, if that is not reasonably practicable, controlling the hazard of harassment;
- The Employer will investigate any incidents of harassment and take corrective action to address the incidents;

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## Harassment Prevention Policy

- The employer will not disclose the circumstances related to an incident of harassment or the names of the complainant, the person alleged to have committed the harassment, and any witnesses, except
  - (i) where necessary to investigate the incident or to take corrective action, or to inform the parties involved in the incident of the results of the investigation and any corrective action to be taken to address the incident, or
  - (ii) as required by law;

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## Harassment Prevention Policy

- The harassment prevention policy is not intended to discourage a worker from exercising rights pursuant to any other law, including the Alberta *Human Rights Act*

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## Harassment Prevention Procedures

An employer must ensure that the harassment prevention procedures include the following:

- (a) the procedure to be followed by a worker when reporting harassment;
- (b) the procedure to be followed by the employer when documenting, investigating and preventing harassment;

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## Harassment Prevention Procedures

- (c) the procedure to be followed by the employer when informing the parties involved in an incident of harassment of
  - (i) the results of an investigation of the incident, and
  - (ii) any corrective action to be taken to address the incident.

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## Review of Plans

- An employer must review the violence prevention plans and harassment prevention plans and revise the plans if necessary.

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## Training

An employer must ensure that workers are trained in

- (a) the recognition of violence and harassment,
- (b) the policies, procedures and workplace arrangements that the employer has developed and implemented to eliminate or control the hazards of violence and harassment,

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## Training

- (c) the appropriate response to violence and harassment, including procedures for obtaining assistance, and
- (d) the procedures for reporting, investigating and documenting incidents of violence and harassment.

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## Investigation and Reporting of Incidents

Investigation and reporting of incidents 391.1  
Sections 40(5)(b) to (d), (7) and (8) and 53 of the Act apply to incidents of violence or harassment  
If violence or harassment results in 1) death or 2) the worker being admitted to a hospital or 3) has the potential of causing serious injury to a person, then

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## Investigation and Reporting of Incidents

**40(1)** When an injury or incident described in subsection (2) occurs at a work site, the prime contractor or, if there is no prime contractor, the employer shall report the time, place and nature of the injury or incident to a Director of Inspection as soon as possible.  
**(2)** The injuries and incidents to be reported under subsection (1) are

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## Investigation and Reporting of Incidents

(a) an injury or incident that results in the death of a worker,  
(b) an injury or incident that results in a worker being admitted to a hospital, and for the purposes of this clause, "admitted to a hospital" means when a physician writes admitting orders to cause a worker to be an inpatient of a hospital, but excludes a worker being assessed in an emergency room or urgent care centre without being admitted,

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## Treatment or Referral

- An employer must ensure that a worker reporting an injury or adverse symptom resulting from an incident of violence or harassment is advised to consult a health professional of the worker's choice for treatment or referral.

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## Why Do You Need These?

- Legally required
  - OHS are now conducting pro-active spot checks
  - Employers may be subject to penalties even if there are no incidents

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## Why Do You Need These?

- Prevent injuries
  - Harassment and violence do exist in the workplace
  - They undermine productivity

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## Why Do You Need These?

- Avoid litigation
  - Employer could be vicariously liable for other employees
  - Victimized employees could sue for constructive dismissal

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## Investigation Process – What Do You Do?

- Have a policy
- Follow the policy

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## Investigation Process – What Else Should You Do?

- **Investigate:** if you receive a complaint or are aware of a possible incident, then do an investigation
- **Confidentiality:** do not disclose the circumstances related to the incident or names of the people involved except when necessary to do so

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### Investigation Process – What Else Should You Do?

- **Document:** document the investigation from start to finish
- **Listen:** hear both sides of the story and any witnesses before making decision
- **Retribution:** zero tolerance for any retribution towards complainant

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### Investigation Process – What Else Should You Do?

- **Discipline:** if complaint has merit then use appropriate and proportionate discipline
- **Action:** if investigation reveals potential ongoing issue then take action to correct for future
- **Fairness:** be impartial and fair to complainant and respondent throughout

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### Investigation Process – Basic Steps

- Receive complaint
- Appoint an investigator (internal or external)
- Contact parties
- Interim steps (e.g. LOA with pay)
- Provide complaint to respondent

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## Investigation Process – Basic Steps

- Interview complainant
- Interview respondent
- Interview witnesses
- Re-interview parties if necessary
- Mark findings and issue written report

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## Investigation Process – Options for Investigators

Type	Pro	Con
Internal	Less Expensive	Untrained, unexperienced
External	Experienced in investigation	Expensive
Lawyer	Legally trained	More Expensive

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## Investigation Process – What Should You Not Do?

*Elgert v. Home Hardware Stores Limited*, 2011 ABCA 112

[1] A jury concluded that the appellant, Home Hardware Stores Limited (Home Hardware), wrongfully dismissed the respondent, Daniel John Elgert (Elgert), from employment. The jury awarded Elgert two years' pay in lieu of notice, \$200,000 aggravated damages, \$300,000 punitive damages, interest, and costs. It concluded that the individual appellants, Christa Bernier (Bernier) and Diane Stengle (Stengle), defamed Elgert, qualified privilege did not apply and awarded damages against them of \$50,000 and \$10,000, respectively.

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### Investigation Process – What Should You Not Do?

[2] The appeal is allowed in part. The award for aggravated damages is set aside and the award for punitive damages is reduced to \$75,000.

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### Elgert v Home Hardware Stores Limited: The Background

- Elgert was 17-year employee and supervisor at Home Hardware
- Christa Bernier worked under Elgert
- Norris Bernier was her father and manager of the store
- Christa had bad performance and kept following around another male co-worker whom she had a romantic interest in

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### Elgert v Home Hardware Stores Limited: The “Belly Bump”

[10] Shortly after Bernier’s transfer, she told her father about an incident she alleged happened in November or December of the previous year – approximately 4 months earlier. She said that Elgert had followed her up some stairs into a storage room and belly bumped her against a table, ending with his legs between hers. She said she yelled and after another employee, Kim Fontaine (Fontaine), came into the room, she left.

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**Elgert v Home Hardware Stores Limited: The “Investigation”**

a. Norris Bernier, Christa Bernier’s father, had some involvement in the early stages of this matter. Bernier told her father about the incident on April 1 or 2.

b. Norris Bernier called a meeting of supervisors within days (maybe April 3) and advised that there was a serious allegation of sexual harassment against a supervisor and there was an investigation. Pamphlets relating to sexual harassment policies were circulated.

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**Elgert v Home Hardware Stores Limited: The “Investigation”**

c. Although, Norris Bernier denied discussing this matter with his friends Gingrich or Kirck, Gingrich confirmed that Norris Bernier discussed it with him on April 15, before head office had received any complaint.

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**Elgert v Home Hardware Stores Limited: The “Investigation”**

d. Bernier did not file the originating complaint. Rather, her friend Bowen talked to Borodawka then sent a letter outlining the Stengle and Bernier incidents and other incidents involving others. Borodawka sent an email to Kirck on April 15 advising of Bowen’s complaint, then sent her letter on April 23. There was a notation in Gingrich’s interview with Borodowka “trying to keep Christa’s [Bernier’s] name out.”

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### Elgert v Home Hardware Stores Limited: The “Investigation”

- e. In a conference call on April 24 among Norris Bernier, Gingrich, Borodawka, and Kirck, Kirck advised he would commence the investigation.
- f. Notwithstanding what was described as the most serious allegation of sexual harassment ever at Home Hardware, Kirck (who had no training or experience in investigations) was sent to investigate.

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### Elgert v Home Hardware Stores Limited: The “Investigation”

There was no effort during the investigation to examine the relationship between Bernier and Elgert or interview people, other than Fontaine, who worked directly with them.

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### Elgert v Home Hardware Stores Limited: The “Investigation”

Home Hardware never considered motive or fabrication. Both experts indicated that this is an essential aspect of a proper investigation. Both emphasized that an investigator’s role is to be impartial, neutral, and objective. Although they had the evidence of Fontaine, there is at least some evidence that Home Hardware largely accepted what Bernier said at face value.

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### Elgert v Home Hardware Stores Limited: The “Investigation”

Gingrich requested a meeting with Elgert but refused to meet with his lawyer. He acknowledged that it was his hope to get a confession from Elgert. While an employer has a right to speak to an employee directly, this behaviour can be taken into account here, especially since particulars were not provided to Elgert when he asked for them.

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### Elgert v Home Hardware Stores Limited: The “Investigation”

In fact, Bernier continued to work under Elgert’s supervision for almost five months after the alleged incident. Neither she nor Kirck recalled discussing the issue of safety concerns or the suspension itself. Even without expert evidence, it would be possible to conclude that there were insufficient grounds to suspend Elgert.

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### Elgert v Home Hardware Stores Limited: The Conclusion

[87] Although the above list is not exhaustive, it demonstrates there was sufficient evidence to permit a jury to conclude that the manner of dismissal was unfair, in bad faith, misleading, or unduly insensitive.

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## Elgert v Home Hardware Stores Limited: The Conclusion

Its failure to conduct an appropriately broad investigation that took account of Bernier's possible motives against Elgert.

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## Elgert v Home Hardware Stores Limited: The Conclusion

[89] Nevertheless, how the employer reacts is subject to judicial scrutiny. Its responsibilities do not give it licence to conduct an inept or unfair investigation or behave in malicious, vindictive, or outrageous ways. Here there was sufficient evidence about how Home Hardware handled Elgert's case to leave punitive damages with the jury. *continued on next slide*

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## Elgert v Home Hardware Stores Limited: The Conclusion

Much of the same evidence could support leaving aggravated damages with the jury, subject to the question of whether there was sufficient evidence of Elgert's actual damages arising from the manner of his termination to sustain an award of aggravated damages.

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<b>Thank You For Your Attention</b> <b>Questions Are Welcome</b>		
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