Professional Code: Towards Better Protection For Victims Of Sexual Violence

On December 4, 2024, the National Assembly officially adopted Bill 73, which introduced *An Act to counter non-consensual sharing of intimate images and to improve protection and support in civil matters for persons who are victims of violence* (the "Act"). The Act amends the *Civil Code of Québec* (the "C.C.Q."), the *Labour Code*, the *Professional Code*, the *Public Service Act*, the *Act respecting administrative justice*, and the *Act to establish the Administrative Labour Tribunal*. For comparison purposes, we will focus on section 149.0.1 of the *Professional Code* and article 2858.1 of the C.C.Q.

The purpose of the Act is to provide better support for survivors of sexual or domestic violence before the courts in civil and administrative matters, including matters of professional law for actions covered by section 59.1 of the *Professional Code*. It also establishes the same protections against myths and stereotypes that already exist in criminal law.

When allegations of sexual or domestic violence arise in a civil or administrative contextthe Act creates a presumption of irrelevance with respect to evidence that is based on myths and stereotypes. In criminal law, despite the legal right to a presumption of innocence, courts have for many years considered and taken into account the various myths and stereotypes in question. There is no reason why protections against myths and stereotypes in criminal matters should not also apply in civil matters, especially since the presumption of innocence does not exist in civil matters.

Understanding myths and stereotypes about sexual and domestic violence

To fully understand the new reality created by the Act and its impact on the presentation of evidence in civil and administrative matters, it is essential to examine the myths and stereotypes surrounding sexual and domestic violence. This considered approach is particularly important given that these stereotypes still persist in our courts today. To this end, it is useful to refer to criminal law jurisprudence, since the Act's legislative reforms aim to provide the same protections as those already recognized in criminal law.

In *Kruk*, the Supreme Court of Canada stated that "myths and stereotypes about sexual assault complainants capture widely held ideas and beliefs that are not empirically true." The Court added that these myths tend to convey traditional worldviews that

arbitrarily distinguish between what constitutes “real” sexual violence and what does not, in the eyes of some.

These misconceptions can have far-reaching consequences, undermining the credibility of complainants’ testimony and casting doubt on their reliability.

In *Darrach*, the Supreme Court set out three fundamental reasons for excluding any evidence based on myths and stereotypes regarding sexual violence in criminal proceedings:

1. This type of evidence is, in itself, irrelevant and undermines the search for the truth, the central objective of the legal system;
2. Admitting such evidence may discourage survivors from reporting the violence they have experienced, for fear of being humiliated or discredited in court;
3. Such evidence is inherently discriminatory and compromises the fairness of the trial process as a whole.

For these reasons, courts now consider that taking these subjective social constructs into account significantly impedes their search for the truth.

While these lessons were learned in the context of criminal law, they are equally relevant in civil and administrative matters.

Section 149.0.1 of the *Professional Code*: a paradigm shift in evidence admissibility

First, it is essential to understand the context in which section 149.0.1 applies. This section comes into play at an early stage, before a disciplinary complaint is lodged with the disciplinary council. In fact, it influences the manner in which the syndic should conduct its investigation following a report.

With this in mind, it would be wise for a syndic conducting an investigation to use the six inferences listed in section 149.0.1 of the *Professional Code* as a guide to better distinguish between relevant and irrelevant evidence. Following the investigation, the presence of this evidence can be assessed by the syndic in order to make the final decision on whether or not to lodge a formal complaint with the disciplinary council. This section plays an essential role in helping the disciplinary council identify and select relevant and admissible evidence.

Let us now review the amendments to the *Professional Code* introduced by the Act in order to better understand their impact on professionals. Section 16 of the Act adds section 149.0.1 to the *Professional Code*, which reads as follows:

149.0.1 Where the complaint concerns a derogatory act referred to in section 59.1 or an act of a similar nature set out in the code of ethics of the members of the professional order, the following facts are presumed to be irrelevant:

(1) any fact relating to the reputation of the person who is the alleged victim of the derogatory act;

(2) any fact related to the sexual behaviour of that person, other than a fact pertaining to the proceeding, and that is invoked to attack the person’s credibility;

(3) the fact that the person did not ask that the behaviour cease;

(4) the fact that the person did not file a complaint or exercise a recourse regarding the derogatory act;

(5) any fact in connection with the delay in reporting the alleged derogatory act; and

(6) the fact that the person maintained relations with the alleged perpetrator of the derogatory act.

Any debate relating to the admissibility in evidence of any such fact is an issue of law and is to be held in camera, despite section 23 of the Charter of Human Rights and Freedoms (chapter C-12).

To date, neither jurisprudence nor doctrine seems to have examined this provision in any depth. It is therefore useful to refer to article 2858.1 of the C.C.Q., introduced by section 13 of the Act. The wording and underlying principles of article 2858.1 of the C.C.Q. overlap with section 149.0.1 of the *Professional Code*. This comparison helps to clarify the interpretation and scope of the new section of the *Professional Code*.

To better understand the inferences covered by the presumption set out in section 149.0.1 of the *Professional Code*, let us analyze the Superior Court of Québec's interpretation of article 2858.1 of the C.C.Q. in the case of *A.C. c. Rozon*. The Court emphasized that these categories implicitly correspond to harmful myths and stereotypes, particularly in relation to sexual and domestic violence. As such, they cannot be admitted as evidence nor taken into account by the judge without a prior debate *in camera* to establish their admissibility. Let us examine each of the inferences covered by this article, as interpreted by the Court in this decision.

(1) Any fact relating to the reputation of the person who is the alleged victim of the derogatory act

This provision echoes section 277 of the *Criminal Code*, which provides that evidence of sexual reputation or history is not admissible for the purpose of challenging the credibility of the complainant. In other words, no logical connection can be established between a person's sexual reputation and their credibility in legal proceedings. That being said, ultimately it is possible to debate the admissibility of such evidence in camera.

(2) Any fact related to the sexual behaviour of that person, other than a fact pertaining to the proceeding, and that is invoked to attack the person's credibility

The Superior Court noted that this paragraph is somewhat reminiscent of *R. v. Seaboyer*. That decision eventually led to the codification in the *Criminal Code* of the prohibition against relying on certain myths and stereotypes regarding sexual assault survivors. At issue here is not the person's sexual reputation, but rather their sexual behaviour. In short, the aim is to prevent the survivor's sexual behaviour from being considered as a relevant factor in establishing their credibility before the courts. This evidence is therefore presumed irrelevant until an *in camera* debate on its admissibility has taken place.

(3) The fact that the person did not ask that the behaviour cease

The third paragraph acknowledges the various myths surrounding passive behaviour displayed by some survivors of violence. Evidence relating to the survivor's passivity or lack of resistance, whether physical or verbal, cannot be interpreted as consent to participate in sexual activity. Thus, any evidence regarding the survivor's passivity is dismissed as irrelevant until an *in camera* debate on its admissibility has taken place.

(4) The fact that the person did not file a complaint or exercise a recourse regarding the derogatory act

The Superior Court also said it wanted to bust the myth that a "real" survivor of sexual violence would always come forward and report it right away. The Court recognized that the fact that a complaint was not filed, or was filed late, does not in itself undermine the complainant's credibility. Consequently, evidence relating to the "delay" in reporting the offence or whether a complaint was filed is presumed irrelevant to the judge's decision, until the admissibility of such evidence can be debated *in camera*.

(5) Any fact in connection with the delay in reporting the alleged derogatory act

The Superior Court analyzed this paragraph in conjunction with the preceding fourth paragraph, and therefore no further comment is required.

(6) The fact that the person maintained relations with the alleged perpetrator of the derogatory act

Finally, the Superior Court addressed the sixth paragraph, which is intended to counter another myth (also rejected by criminal law jurisprudence) according to which a survivor of violence would not, in principle, continue their relationship with the perpetrator following the violent incident. Facts relating to the continuation of a relationship with the perpetrator of the violence will be presumed irrelevant until an *in camera* debate can be held to determine their admissibility.

Conclusion

With the addition of section 149.0.1 to the *Professional Code*, it is essential to remember the following principle: when a party attempts to prove a inference relating to one of the six myths and stereotypes covered by this section, and an objection is raised by one of the parties or even by the court *ex officio*, the disciplinary council or tribunal cannot consider these facts without an *in camera* debate on their admissibility.

This approach, modelled on principles well established in criminal law, reflects a clear determination to reject harmful stereotypes and better protect survivors' rights during legal proceedings. Just recently, in *Kinamore*, the Supreme Court once again addressed the myths and stereotypes present in our judicial system, stating: "This Court cannot condone any party evoking myths and stereotypes about sexual assault complainants. Permitting a party to do so would further entrench these discriminatory beliefs in our criminal justice system and, by extension, distort the truth-seeking function of trials." This illustrates how important it is for syndics, when conducting their inquiry or acting as prosecutors, to be aware of these issues to (i) avoid drawing inferences based on myths and stereotypes themselves; and (ii) be able to recognize questions, arguments, or evidence based on myths and stereotypes and ensure that such evidence is not admitted into evidence.

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