Access to Justice for Sexual Harassment Victims: The Impact of *Béliveau St-Jacques* on Female Workers' Right to Damages

(Translation)

Katherine Lippel
Diane Demers

The research and publication of this study were funded by Status of Women Canada's Policy Research Fund. This document expresses the views and opinions of the authors and does not necessarily represent the official policy or opinion of Status of Women Canada or the Government of Canada.

March 1998

Status of Women Canada is committed to ensuring that all research produced through the Policy Research Fund adheres to high methodological, ethical, and professional standards. The research must also make a unique, value-added contribution to current policy debates, and be useful to policy-makers, researchers, women's organizations, communities, and others interested in the policy process. Each paper is anonymously reviewed by specialists in the field, and comments are solicited on:

- the accuracy, completeness and timeliness of the information presented;
- the extent to which the analysis and recommendations are supported by the methodology used and the data collected;
- the original contribution that the report would make to existing work on this subject, and its usefulness to equality-seeking organizations, advocacy communities, government policy-makers, researchers and other target audiences.

Status of Women Canada thanks those who contributed to this peer review process.

Canadian Cataloguing in Publication Data

Lippel, Katherine

Access to justice for sexual harassment victims: the impact
of *Béliveau St-Jacques* on female workers' right to damages

Text in Englishg and French on inverted pages.
Title on added t.p.: L'accès à la justice pour des victimes
de harcèlement sexuel.
Includes bibliographical references.
Issued also in electronic format through the Internet computer network.
ISBN 0-662-63438-1
Cat. no. SW21-23/1998

1. Sexual harassment of women -- Law and legislation -- Quebec (Province).
2. Sex discrimination in employment -- Law and legislation --
Quebec (Province).
I. Demers, Diane L.
II. Canada. Status of Women Canada.
III. Title.
IV. Title: The impact of *Béliveau St-Jacques* on female workers'
right to damages.

HD6060.5C3L56 1998 344.714'014133 C98-980080-6E

Project Manager: Sarah Bélanger, Status of Women Canada
Publishing Coordinator: Angela McLaughlin, Status of Women Canada
Translation: Société Gamma Inc. and 575 Productions Ltd.

For more information contact:

Research Directorate
Status of Women Canada
360 Albert Street, Suite 700
Ottawa, ON K1A 1C3
telephone: (613) 995-7835
facsimile: (613) 957-3359
TDD: (613) 996-1322
Email: research@swc-cfc.gc.ca

This document is also available for download on the Status of Women Canada Web site at: http://www.swc-cfc.gc.ca/.

PREFACE

Status of Women Canada's Policy Research Fund was instituted in 1996 to support independent, nationally relevant policy research on gender equality issues. In order to determine the structure and priorities of the Policy Research Fund, Status of Women Canada held consultations from March to May 1996 with a range of national, regional and local women's organizations, researchers and research organizations, community, social service and professional groups, other levels of government, and individuals interested in women's equality. Consultation participants indicated their support for the Fund to address both long-term emerging policy issues as well as urgent issues, and recommended that a small, non-governmental external committee would play a key role in identifying priorities, selecting research proposals for funding, and exercising quality control over the final research papers.

As an interim measure during the fiscal year 1996-1997, consulation participants agreed that short-term research projects addressing immediate needs should be undertaken while the external committee was being established to develop longer-term priorities. In this context, policy research on issues surrounding the Canada Health and Social Transfer (CHST) and access to justice were identified as priorities.

On June 21, 1996, a call for research proposals on the impact of the CHST on women was issued. The proposals were assessed by Status of Women Canada and external reviewers. The research projects selected for funding in this area focus on women receiving social assistance, economic security for families with children, women with disabilities, the availability and affordability of child care services, women and health care, and women's human rights.

The call for research proposals on access to justice was issued on July 18, 1996. Also assessed by Status of Women Canada and external reviewers, the selected policy research projects in this area include a study of abused immigrant women, lesbians, women and civil legal aid, family mediation, and the implications for victims of sexual harassment of the Supreme Court ruling in *Béliveau-St. Jacques*.

The objective of Status of Women Canada's Policy Research Fund is to enhance public debate on gender equality issues and contribute to the ability of individuals and organizations to participate more effectively in the policy development process. We believe that good policy is based on good policy research. We thank all the authors for their contribution to this objective.

A complete listing of the research projects funded by Status of Women Canada on issues surrounding the Canada Health and Social Transfer and access to justice is provided at the end of this report.

SUMMARY

This paper examines the significance of the Supreme Court of Canada's decision in *Béliveau St-Jacques* and studies its possible consequences, both legal and political, and the repercussions these consequences may have on working women who are victims of sexual harassment in Quebec, whether subject to Quebec or federal law.

After analyzing the Court's judgment in this case, the paper looks at the law which previously governed efforts by victims of sexual harassment to recover damages and claim other remedies. These included claims before the Commission des droits de la personne [Quebec's human rights commission] and the Tribunal des droits de la personne [Quebec's human rights tribunal] as well as actions filed in superior courts of law. The paper then examines the treatment of working women who have filed claims with the Commission de la santé et de la sécurité du travail (CSST) [Quebec's workers' health and safety board], seeking compensation for physical or psychological injury caused by sexual harassment. Thirdly, the paper examines the exclusion of civil actions in Quebec's *Act respecting industrial accidents and occupational diseases* to determine to what extent victims of sexual harassment in the workplace have lost their right to sue for damages as a result of the *Béliveau St-Jacques* decision.

We conclude that in the aftermath of *Béliveau St-Jacques*, the rights of victims of sexual harassment are highly uncertain and that it is currently impossible to give adequate advice to those victims or their representatives about the rights and the remedies that are available to them and appropriate to their needs. If victims of sexual harassment in the workplace are to avoid becoming victims of the confusion and uncertainty of the current law, an amendment to the Quebec *Charter of Human Rights and Freedoms* is urgently required.

TABLE OF CONTENTS

Access to Justice for Sexual Harassment Victims: the Impact of *Béliveau St-Jacques* on Female Workers' Right to Damages

Katherine Lippel and Diane Demers*

INTRODUCTION

On June 20, 1996, the Supreme Court of Canada handed down a decision in *Béliveau St-Jacques* v. *Fédération des employées et employés de services publics inc. (Béliveau St-Jacques)* that has the potential to significantly undermine the access to justice of working women who are victims of sexual harassment. A majority of the Court held that an employee who suffered sexual harassment in the workplace could not bring an action for compensatory and exemplary damages under section 49 of the *Charter of human rights and freedoms*, R.S.Q., c. C-12 (hereinafter referred to as the Charter) against either her employer or her. Narrowly interpreted, this holding applies only to women who have already received compensation from the Commission de la santé et de la sécurité du travail (CSST). However, a broad interpretation could affect the rights of all victims of sexual harassment in the workplace in Quebec, and perhaps in the other provinces as well.

There were no interventions by women's groups before the Supreme Court of Canada, nor by Quebec's Commission des droits de la personne, the organization responsible for enforcing Quebec's Charter. There is thus good reason to believe that the Court was not made aware of the potential repercussions of its decision, both direct and indirect. The uncertainty created by the decision is liable to have costs for women who are currently before the courts.

This paper is meant to be a tool, designed for the legal community in particular, to help it work with groups that assist women in their struggle against sexual harassment to develop better strategies for intervention and defence. The paper is also meant to explain the need for legislative amendmends that would clarify the rights of sexual harassment victims. This legal summary and update was to be the first stage of an ongoing project. Stage two was to consist of extensive consultation with women's groups, using the paper as a tool, in order to exchange information with the groups and to canvass their views and recommendations concerning the concrete problems created by the *Béliveau St-Jacques* case. In stage three, this material would be synthesized in a final report, available to the general public, which would set out the legal and political problems currently experienced by women and strategic solutions to these problems, along with proposals for legislative amendments. Because of the urgent need for immediate action, however, we are making this initial paper available to the public as quickly as possible.

---

* Professors in the Faculty of Law, UQAM, Box 8888, Centre Ville Branch, Montreal, Quebec H3C 3P8. The authors wish to thank Ginette Valois, Solange Pronovost and Marie-Claire Lefebvre for their assistance in the preparation of this report.

The urgency of the situation is evident from the many questions that remain unanswered in the wake of the *Béliveau St-Jacques* decision. For example, while it is now certain that an action for moral or exemplary damages is not available to women who have received compensation from the CSST for employment injuries caused by sexual harassment, it is not certain whether women who have neither sought nor received compensation from the CSST may claim such damages. Similarly, the limits on the jurisdiction of the Commission des droits de la personne and the Tribunal des droits de la personne over claims relating to sexual harassment in the workplace remain unclear. Of even greater concern is the possibility that it is no longer permissible for a victim of sexual harassment to sue her harasser if the harassment took place at work.

Women whose health has not been affected by the harassment experienced at work are in a nebulous position: they may no longer have any recourse at all, or they may have a right to seek exemplary damages ─ in anomalous contrast to women whose health *has* been affected and who are therefore precluded from seeking exemplary damages, despite their considerable suffering.

There are also the risks attendant on “medicalizing” sexual harassment complaints. This tends to occur when psychiatric evidence is relied on to prove that the health problems for which compensation is sought cannot be attributed to the harassment at work or to prove that the victim has suffered a serious psychological injury. Whether tendered by the complainant or the defendant, this kind of evidence, and the legal-medical issues to which it relates, have the potential to undercut the efforts of sexual harassment victims to achieve an equitable remedy. From a debate about human rights, the focus shifts to medico-legal arguments that totally eclipse the issue of women's right to work in conditions of equality, without being sexually harrassed. When a case is medicalized, attention is effectively deflected from the wrongful behaviour of the harasser to the mental health of the victim.

These are some examples of the very real problems that will soon emerge as a result of the *Béliveau St-Jacques* decision. Taken out of context, the analysis of the case that follows may appear somewhat technical and remote from the concrete concerns of women. But unless such analysis is carried out, women will soon be experiencing some all too real human problems.

Our purpose in this paper is to offer a tool to achieve better understanding of the problems created by the Court's judgment in *Béliveau St-Jacques.* We begin by presenting the judgment and explaining some of the less obvious implications that flow from the case. We then look at the position of women who, having experienced sexual harassment in the workplace, exercise their recourse under Quebec's Charter or the *Canadian Human Rights Act* and those who file a claim with the CSST seeking compensation for an employment injury caused by the harassment. We look at the scope of the exclusionary rule that takes away workers' right to bring an action in civil liability for employment injuries, and we then examine the impact of *Béliveau St-Jacques* on the right of women who have been sexually harassed in the workplace to bring an action in liability against their employer or harasser. We complete our analysis with a survey of the questions that in our view must be addressed on an urgent basis given the rapidly evolving repercussions of this decision.

1. THE JUDGMENT OF THE SUPREME COURT OF CANADA IN *BÉLIVEAU ST-JACQUES*

1.1 The Question Put to the Court

Ms. Béliveau St-Jacques was a worker employed by a trade union. Her psychological health was impaired as a result of sexual harassment in her workplace. She sought and received compensation from the CSST on the ground that her health problems were caused by incidents occurring in the course of her work and constituted an employment injury within the meaning of the *Act respecting industrial accidents and occupational diseases*. Having received the benefits to which she was entitled under this Act, Ms. Béliveau St-Jacques then brought an action in the Superior Court of Quebec seeking both compensatory damages (material and moral) and exemplary damages against her employer and the employee who harrassed her. She claimed to be entitled to these damages because her rights under the Quebec Charter had been violated. She alleged that the incidents that occurred in the course of her work constituted sexual harassment and that she was therefore entitled to the damages sought under sections 10.1 and 49 of the Charter. (The relevant statutory provisions are set out in Appendix A.)

The employer (but not the harasser) responded by filing a motion to dismiss on the ground that section 438 of the *Act respecting industrial accidents and occupational diseases* bars all civil actions for damages against an employer, including actions under the Charter. This motion was dismissed at trial, and the judgment at trial was upheld by a majority of the Quebec Court of Appeal. The Court divided on the question of damages. A majority held that in these circumstances exemplary damages were available under the Charter; the minority taking the position that such damages could not be sought. All three judges agreed that the plaintiff had no right to sue for material damages, and only one of the three considered it possible to award moral damages. Persisting in her efforts, Ms. Béliveau St-Jacques appealed to the Supreme Court of Canada seeking a full dismissal the employer's motion. A majority of the Court dismissed her appeal, holding that in her case an action under the Charter for compensatory, moral and exemplary damages was inadmissible because she had already received compensation under the *Act respecting industrial accidents and occupational diseases*.

1.2 The Majority Opinion

Gonthier J., writing for a majority of five, held that the attempt to recover damages under the Charter was an action in civil liability and as such was barred by section 438 of the *Act respecting industrial accidents and occupational diseases*. For the purpose of the appeal, he accepted that the plaintiff was the victim of an employment injury as established by the competent authority.

The majority judgment is explicit in stating that the monetary remedies provided for in section 49 of the Charter, including the claim for exemplary damages, all depend on civil liability. According to Gonthier J., the awarding of exemplary damages presupposes proof of wrongful conduct and concludes (at p. 409): “The necessary connection with the wrongful conduct that gives rise to civil liability leads one to associate the remedy of exemplary damages with the principles of civil liability.”

Given that section 438 of the *Act respecting industrial accidents and occupational diseases* bars any action in civil liability, recourse to section 49 of the Charter is necessarily excluded. The majority refused to accept the argument that Quebec's Charter has paramountcy over Quebec's workers' compensation legislation. Gonthier J. pointed out that section 49 of the Charter is not one of the sections that are expressly given paramount status by section 52. In any case, even if a different interpretation of section 52 were accepted, it would make no difference, for section 438 of the *Act respecting industrial accidents and occupational diseases* is a sufficiently explicit derogation from section 49 to justify the exclusion of the section 49 remedies.

Gonthier J. concludes (at pp. 410-11): “Since the events relied on by the appellant in support of her action had already been characterized by the competent authorities as an employment injury within the meaning of the *Act respecting industrial accidents and occupational diseases*, the principle of an employer's civil immunity had to be applied.”

1.3 The Minority Opinion

L'Heureux-Dubé J. wrote a dissenting opinion in which LaForest J. concurred. In Madame Justice L'Heureux-Dubé's analysis, the appellant was entitled to bring an action under the Charter, but for exemplary damages only. She took the view that the overlap between the *Act respecting industrial accidents and occupational diseases* and the Charter includes the issue of liability and compensatory damages for liability but does not extend to the matter of exemplary damages (p. 365). Emphasizing the fundamental nature of the Charter, she rejects the majority view that section 49 does not share in the paramountcy of the Charter (p. 374). She affirms that a right to seek exemplary damages under that section subsists, even though an employment injury has been duly recognized and compensated. However, she goes on to conclude that the claim to exemplary damages nonetheless fails because in this case it falls within the exclusive jurisdiction of the arbitrator. If for some reason the union wrongfully refused to submit Ms. Béliveau St-Jacques' grievance to arbitration, her proper remedy would be an action against the union under section 42 of the *Labour Code*.

The majority did not determine whether a grievance could have been filed in this case and did not comment on the question of whether filing a grievance would be an exclusive recourse.

1.4 The Legal and Policy Significance of the Question Put to the Supreme Court

This rather technical summary of the Supreme Court of Canada's judgment does not do justice to the wide ranging legal and policy issues that flow from the case. To understand those issues, we must explore the potential repercussions of the question put to the Court.

In this case, a worker was trying to obtain double compensation for the consequences of a single series of events. Having successfully obtained compensation from the CSST, by describing her injury as the psychological consequence of chronic stress in the workplace, she then sought to recover damages under the Charter, by characterizeing the same series of events as constituting sexual harassment. It is important to realize that whether an employee has suffered a form of harassment prohibited by the Charter in no way affects the employee's right to compensation under the *Act respecting industrial accidents and occupational diseases*. It is thus incorrect to say that as a result of *Béliveau St-Jacques* sexual harassment now comes within the jurisdiction of the CSST or that it now constitutes an industrial accident giving rise to compensation for employment injury. The CSST merely found on the facts of this case that the psychological illness suffered by Ms. Béliveau St-Jacques as a result of stressful events experienced in the workplace amounted to an employement injury In reaching this conclusion, it followed the existing case law of the Commission d'appel en matière de lésions professionnelles (CALP) [Quebec's employment injury appeal board] establishing that a worker who becomes ill and unfit to work as a result of chronic stress is entitled to claim compensation.

What was primarily at risk in this case is the basic compromise on which the statutory workers' compensation regime is founded. The real problem here concerns not so much the question of sexual harassment, which arises in only a small minority of cases,[1] but rather the possibility of claimants pursuing concurrent actions and receiving concurrent remedies for every work-related violation of a Charter-protected right. The Charter prohibits discrimination on the grounds set out in section 10 while section 10.1 prohibits discriminatory harassment. Allowing concurrent actions before the CSST and the ordinary courts in cases of workplace discrimination might be workable. But allowing such actions in the case of violations of other Charter rights would cause enormous problems. Consider, for example, sections 1 and 46 of the Charter. Section 1 guarantees the right to life and to personal security, inviolability and freedom while section 46 guarantees workers fair and reasonable conditions of employment which have proper regard for their health, safety and physical well-being. If the Supreme Court of Canada had permitted Ms. Béliveau St-Jacques to bring a civil action for all possible damages arising out of the sexual harassment, it would have opened the door to fault-based civil liability actions not only on behalf of victims of discrimination and harassment, but also on behalf of every person whose health has been impaired by dangerous conditions at work. There is no doubt that such an outcome would have led to the dismantling of the workers' compensation regime. This regime was designed with great care in 1909 to establish a balance between the rights of workers to no-fault compensation for employment injuries and the protection of employers from fault-based civil liability actions brought by their employees.

We must point out here two important differences in approach, between Quebec on the one hand, and Canada and the other provinces on the other, in respect of the legal treatment of the right to equality, free of harassment. The first difference lies in the relevant statutes. Quebec's Charter is the only legal instrument in Canada, with the exception of the constitutionally entrenched

---

[1] In 1994, cases concerning the psychological consequences of a stressful situation in the workplace represented 0.68% of all the CSST's compensation cases. It appears from our preliminary findings that less than 3% of *that* figure involved cases of sexual or racial harassment.

Canadian Charter of Rights and Freedoms, that simultaneously protects equality rights and the entire range of fundamental rights and freedoms, legal rights, and economic and social rights. This is a key factor in the Supreme Court's decision in *Béliveau St-Jacques*, given the consequences that would flow from recognizing a paramount right to seek exemplary damages for violations of the right to equality. As noted above, this would entail recognizing a paramount right to seek such damages for violations of *all* Charter-protected rights, including those set out in section 46 which guarantees "the right of every person who works to fair and reasonable conditions of employment which have proper regard for his health, safety and well-being." Unfortunately, to avoid the unacceptable consequences that would have occurred in this particular legislative context, the Court adopted an interpretation that may adversely affect equality rights across Canada.

The second important difference concerns the tribunals that have jurisdiction to hear disputes involving equality rights, whether protected by ordinary statute, by codes or by the Charter. The Quebec legislature has not seen fit to confine this jurisdiction to either the ordinary courts or administrative tribunals. The Charter itself clearly indicates that persons whose rights have been violated may choose whatever forum they think best. They may file a complaint with the Commission des droits de la personne which could wind up before the Tribunal des droits de la personne; they may go directly to the Quebec Court or the Superior Court; or, where applicable, they may refer the matter to an arbitrator or other administrative tribunal. This range of choice is explained by the fact that violations of protected rights are considered to be civil wrongs (delicts) under Quebec law and may also be breaches of a collective agreement. In common law jurisdictions, the law is different. Violations of fundamental rights are not considered torts; the protection of such fundamental rights has never been part of the common law tort regime (*Seneca College* v. *Bhadauria*).

It should be noted here that the Supreme Court's reasoning in the case did not dwell on this aspect of Quebec law. It did not point out that the action which enabled Ms. Béliveau St-Jacques to deal with the violation of her fundamental rights in the context of a civil liability action against her employer for the acts of its employee could not have been brought in a common law jurisdiction. The Court instead focused on the issue of compensation for an employment injury resulting from harassment in the workplace and dealt with the case on these terms. And in this respect, Canadian legislation is similar in all jurisdictions, being based on the same fundamental trade-off. Employees who suffer an employment injury are guaranteed monetary compensation without having to prove any fault on the part of their employer. In exchange for this guarantee, they are limited to compensation for loss of income and loss of capacity and they waive their right to claim other types of damage. The regime of compensation is entirely governed by statute which prohibits actions in civil liability or actions in tort.

The last point to notice about the *Béliveau St-Jacques* case is less important perhaps, given that the majority of the Court did not address it. However, it warrants our attention for two reasons: first, in the minority judgment it is given decisive importance and, second, the handling of the issue by the minority is inadequate from both a legal and a social policy perspective. In her minority judgment, L'Heureux-Dubé J. takes the position that the injury complained of by Ms. Béliveau St-Jacques arises out of what is essentially the employee's working conditions; in other

words, “sexual harassment” in the workplace is part of collective labour relations and consequently comes within the exclusive jurisdiction of grievance arbitrators. She answers potential objections to this analysis by pointing out that in the event an employee who has suffered harassment is not defended by her union, she is entitled to her union's decision under section 42 of the *Labour Code*.

Without entering the debate on this question, which affects not only Quebec but the entire country given the similarity of Canadian labour laws, we will simply point out that labour law grievances are universally viewed as a union remedy designed to ensure compliance with collective agreements. While unions are obliged to defend each and every one of their members, they have never been obliged at any time or place in Canada to take every grievance to arbitration. There is no labour legislation in Canada that interferes with the process by which unions decide whether to defend a grievance, negotiate a settlement, accept a compromise or simply discontinue. Only in the case of grievances for dismissal or suspension is a union's decision not to pursue the matter subject to review by the courts. Furthermore, a provision for review is not included in the labour codes in any jurisdictions; and in those where it is (as for example in s. 42 of Quebec's *Labour Code*), the court has discretion to consider and accept the reasons for the union's decision. In cases involving sexual harassment in the workplace, union sources tell us that it is the harassers, dismissed from their employment because of their unacceptable conduct, who rely on these provisions to challenge the union when it refuses to defend them.

As for victims of sexual harassment, they sometimes manage (with uneven success) to raise the issue of harassment in the context of arbitrating the denial of some other right (such as a promotion or transfer, a standard work schedule, and the like). To our knowledge, no employee has ever managed to use arbitration to put an end to a situation of harassment, still less to recover compensatory or exemplary damages. It is important to remember that grievances are always brought against the employer and sometimes, in exceptional circumstances, against the union, but never against an employee, for the simple reason that the parties to a collective agreement are the employer and the union. One must also bear in mind the importance of employer-union representation in arbitration, which puts arbitrators at the heart of a company's labour relations and displaces to a significant degree the principle of independence. The members of arbitration tribunals are appointed and paid by the employer and the union. This dependence makes them sensitive to the consequences of their decisions for employers, unions and the workplace.

In such a context, one must seriously question the value of relying on grievances and arbitration to deal with cases of sexual harassment involving a victim, a harasser and a workplace that is the responsibility of the employer. One must acknowledge that the role of the union is to represent the collective interest of all members, and not the individual interests of each member, particularly in enforcing the collective agreement and negotiating with the employer. Given the union's role and functions, it would appear that any effort to recover compensatory and exemplary damages by way of a grievance against the employer for the benefit of a individual member is problematic at best.

A decision in favour of Ms. Béliveau St-Jacques would have had a significant impact on cases having nothing to do with sexual harassment. However, the unfavourable decision actually rendered by the Court is also problematic. If it is interpreted as having a broad application, it could prevent all workplace victims of sexual harassment from seeking damages for violation of their Charter rights, even though the legislature clearly indicated a contrary intention by adding a remedy to the Charter that is specifically designed to meet the needs of victims of discriminatory harassment. From the point of view of workers who have suffered employment injuries and equally from the point of view of victims of sexual harassment, the Court was faced with an impossible dilemma. It was asked to choose between two regimes, the workers' compensation regime and the Charter, even though the legislature never intended them to be mutually exclusive. In our view, the Court correctly answered a question which probably should not have been asked. In so doing, by choosing to protect the no-fault compensation regime for industrial accidents, it inadvertantly opened a Pandora's box for women subjected to discriminatory harassment in the workplace.

2. SEXUAL HARASSMENT IN THE WORKPLACE: VIOLATION OF A FUNDAMENTAL RIGHT OR EMPLOYMENT INJURY?

2.1 The Fundamental Right to Protection from Sexual Harassment

2.1.1 The Socio-legal Context of Sexual Harassment

Before addressing the questions raised by the *Béliveau St-Jacques* decision concerning sexual harassment, and in particular its implications for the struggle against this serious social problem, it is important to review the socio-legal context in which the concept of sexual harassment has evolved. Unlike the problem of workplace injuries and the associated regime of workers' compensation, recognition of sexual harassment in the workplace as a social problem is relatively recent. At the beginning of the century, when workers were protesting the gaps in occupational health and safety and demanding adequate protection, the very notions of employment equity, equality of opportunity and equality of effects as we know them today simply did not exist ─ still less the notion that those rights could be violated by harassment.

The provisions that expressly prohibit harassment have all been adopted within the past 20 years, and some have been in force for less than 15 years.

Sexual harassment in the workplace slowly emerged as a specifically identified and named social problem during the 1960s in the United States and the 1970s in Canada. This problem coincided with the increasing presence of women in the workplace and was part of the larger problem of women's right to equal access to the labour market.

In the wake of a number of inquiries conducted by women's groups, the serious consequences of this widespread social phenomenon gradually came to light. These studies revealed the difficulties that are repeatedly encountered by women of all ages, in every social condition and in the most varied workplaces. They showed that the difficulties experienced by women affected not only their active participation in the labour market but also their private, social and family lives, and even their health. Once the problem was identified, organizations took up the struggle against harassment, first in the United States and more recently in Canada. In the United States this struggle was part of the legal battle against discrimination under *Title VII* of the *Civil Rights Act* dealing with sexual discrimination. American courts found that harassment is contrary to equality rights and human dignity and is therefore a discriminatory act.

In Canada, beginning in 1980, the federal and provincial legislatures recognized the need to intervene to put an end to this social problem. In every Canadian jurisdiction, harassment has been condemned as a violation of fundamental rights and in particular the right to equality; it is considered a form of discrimination. It is for this reason that the prohibitions against harassment are found in human rights legislation and are closely related to prohibitions against discrimination. The main purpose of these statutes, codes and charters is clear: to eliminate harassment, on the same basis that discrimination is to be eliminated, so that in their relations with one another, men and women have equal worth and dignity.

As Chairman Shime wrote in the *Bell* decision:

> The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work-place, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman.

This decision was the first in Canada to address the harassment issue and it preceded the amendments by which various legislatures specifically prohibited harassment. In a similar manner in Quebec, amendments to the Charter were adopted only after a decision by Mailhot J. of the Superior Court recognizing that sexual harassment leading to loss of employment is a form of discrimination and as such is prohibited by the Charter. Such conduct violates the right to dignity that is an integral part of the right to equality and freedom from discrimination. The amendments introduced by Canadian legislatures did not seek to modify this analysis or the interpretation of harassment; their purpose was rather to draw attention to the serious nature of the social problem and to confirm the legislature's intention to condemn and prohibit such conduct.

Since the enactment of this legislation, there have been numerous human rights decisions dealing with harassment. There are several reasons why recourse to human rights legislation is an attractive option for women who are struggling against harassment. First of all, in every jurisdiction the legislature has given the authority to hear complaints and handle investigations to bodies expressly created for this purpose and, more importantly still, to bodies that have no direct or indirect involvement with the organization or management of the labour market. In this respect human rights commissions are neutral bodies, operating at arm's length from the workplace — unlike the tribunals that hear grievance arbitrations and the other bodies that play a role in traditional labour law. This feature of human rights commissions is an advantage for employees who are victims of harrassment. The commissions offer a remedy that can be sought by employees whether they are still working or have already left the job.

Another factor to be emphasized is that investigations by human rights commissions focus on the harassment situation, on its causes and consequences. For victims, this means that they are not prejudged on the reactions they may have had in the context of their workplace. It also means that they are no longer alone in facing the difficulties involved in proving embarrassing and perhaps aggressive conduct by their employers or colleagues at work. For employers, it means that in cases where the harassment was the act of an employee, the range of measures taken by the employer to prevent or correct the situation can be relied on as a defence. As for the commissions themselves, their intervention occurs as part of their broader mandate to combat the social problem of sexual harassment.

Finally, the decisions rendered in human rights cases, whether by a human rights tribunal or a superior court, are meant to do more than simply determine the complainant's right to damages, to make up for the particular harm that a particular victim has suffered. These decisions have a broader legal function, which is to define the concept of sexual harassment and to work out its implications in the context of different social situations, focusing in particular on the liability of employers and/or harassers, to ensure recognition of the real problem confronting the victim, to

refurbish her reputation if necessary, and to sensitize respondents to the unacceptable nature of their conduct.

By attacking the social dimensions of sexual harassment, the human rights commissions and the tribunals that hear the complaints help to eliminate it from society at large, which is the purpose of human rights legislation.

2.1.2 The Concept of Sexual Harassment

Initially the decisions handed down by human rights tribunals focused on the problem of determining the meaning and scope of prohibited sexual harassment. In the *Janzen* case, Dickson J. offered the following definition:

> Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.

This open-textured definition is consistent with the Supreme Court's approach in the field of human rights: it recognizes two categories of circumstances that may be considered harassment, but at the same time it is broad enough to encompass the multiplicity of situations in which harassment can occur.

It is well established in current case law that the concept of sexual harassment covers two fairly well-defined situations: (1) sexual blackmail or *quid pro quo* harassment and (2) "hostile workplace" harassment. With respect to the second type, it has been recognized that an atmosphere of sexism in the workplace has a harassing effect, and constitutes harassment within the meaning of the legislation, without it being necessary for victims to prove that they have suffered physical consequences or that the harassment is directly related to the loss or withholding of specific workplace benefits. This approach is consistent with the purpose of the legislation, which is to provide a solution to a social problem. To promote this purpose, judges and arbitrators have appropriately interpreted the legislation to take into account the way in which a pervasively hostile environment can amount to a significant violation of human dignity.

With respect to sexual blackmail, it has been recognized that this type of harassment also takes different forms and can lead to various consequences such as, disability and the need for treatment; loss of workplace rights or benefits; involuntary resignation; and the violation of fundamental rights including the right to dignity, the right to the physical and psychological integrity of the person, the right to privacy, the right to one's good name, and even the right to security of the person. As the case law makes clear, conduct comprising harassment resists easy classification, as do the harmful consequences that flow from such conduct.

The cases also explore the characteristics that distinguish prohibited sexual harassment from behaviour that is socially acceptable. The task of defining these characteristics, of drawing the line between acceptable and unacceptable conduct, is unavoidable given the social nature of the problem that legislatures are attempting to eradicate. In carrying out this task, the courts have focused on two essential factors: the unwelcome nature of the sexual conduct and the negative impact of the harassing conduct.

The courts have thus recognized that the ultimate goal of sexual harrassment is not seduction. As explained by Lamarche, the ultimate goal is to keep women "individually and collectively trapped in a position of economic inferiority." [Translation] She goes on to explain:

> Even a minimal understanding of the socio-economic reality of women in the workplace explains why the victims of sexual harassment are almost exclusively women. It is because sexual harassment essentially expresses a relationship of control and superiority over women by the men who employ them, and not a sexual relationship. [Translation]

It is this understanding of the problem that has allowed the courts to identify the two defining features of sexual harassment mentioned above. In contrast to acceptable social behaviour, a harassing employer or co-worker persists in his comments and gestures and continues to make his advances even though they have been rejected by the victim. In other cases harassers rely on their position of authority to impose a situation or create a climate that bears no relation to the normal obligations of the workplace. Human rights tribunals have recognized that women on the receiving end of this type of behaviour are victims of prohibited harassment, and that this is the sort of conduct the legislation was meant to prohibit. To put an end to such harassment, these women are entitled to a full range of remedies, including compensatory and exemplary damages.

However, taking advantage of these remedies is not that easy for women who often find themselves in an intolerable situation and who have good reason to fear the consequences of taking steps to protect themselves. The case law reveals that in many cases victims feel forced to resign in order to put an end to harassment that affects not only their life at work but also their social or family life. Such victims suffer the hardship of losing their jobs, as well as the additional difficulties that flow from leaving a job "voluntarily." It is hard for women to explain why they have left, and this difficulty is compounded if they are denied the benefit of the references needed to find another job. There is also the damage inflicted on their reputation as a worker and sometimes even as a capable and reliable person.

Often women cannot afford to resign and must find a way to deal with harassment that will minimize the impact on their financial position — a position which is generally weaker than that of the men around them. In such cases, women may resort to taking leaves of absence, whether holidays or medical leaves, in hopes that the situation will change by the time they return.

As amply illustrated by the cases (see the case list at the end of this paper), going to a human rights commission to assert their rights is the last resort of most women. This is because it is generally difficult to prove harassment. Except for obvious cases of hostile working

environment, the conduct comprising harassment is generally surreptitious. A harrasser rarely engages in sexual conduct or makes harassing remarks in front of a large audience. The victim therefore finds it difficult to discharge her burden of proof. In keeping with the spirit and purpose of human rights legislation, the courts have been open to the development of new rules of evidence which, while not limited to sexual harassment cases, are now widely accepted in such cases. They permit victims to tender evidence that might otherwise be inadmissible as a means of proving the facts in question.

One example is the courts' flexible approach to hearsay evidence corroborating the victim's story. If at the time the alleged harassment occurred the victim spoke out about it or shared confidences about it with colleagues or friends, testimony recounting her remarks is admissible as evidence of the truth of her version of events. Such testimony, which is a form of hearsay, is often the key evidence supporting the victim's testimony.

Faced with the inevitably contradictory versions of victim and harasser, the courts have clearly sought to ease the burden of proof that is normally borne by victims since they are the complainants. To this end, the courts have held that complainants benefit from a presumption of fact that arises if they can prove that they have suffered an adverse consequence in the workplace, for example, dismissal or denial of a promotion or transfer, just at the time when, according to their testimony, they have rejected an employer's or manager's sexual advances. Upon proof of these facts, the presumption arises that the complainant has been the victim of sexual harassment. The presumed fact constitutes what is sometimes called *prima facie* proof.

In light of the foregoing, it is apparent that since their beginning in the 1980s, Canadian human rights commissions and tribunals have focused not on the compensatory remedies available to victims of sexual harassment but rather on measures to eliminate harassment as a social problem. To this end, they have defined the concept of harassment broadly, thereby furthering legal recognition of the phenomenon, while at the same time setting out the limits and scope of liability.

In the matter of liability, it should be noted that both the legislatures and the courts have put special emphasis on the liability of employers. First of all, both have recognized that because employers are the only ones with the authority and means to control what goes on in the workplace environment, they are responsible for everything that occurs there. An examination of the case law to date (199 decisions) shows that employers' liability flows directly from the fact that they have the management of the workplace environment as well as the management of victims' complaints.

This principle underlies subsection 65(1) of the *Canadian Human Rights Act* which creates a presumption that employers are liable for the discriminatory or harassing conduct of their employees. However, subsection (2) creates a defence: employers can avoid liability if they prove that the discriminatory or harassing conduct occurred without their consent, they exercised due diligence to prevent the conduct from occurring in the first place, and they exercised due diligence to mitigate or avoid the effects of the conduct after it occurred.

This approach to the problem is in keeping with the primary purpose of human rights legislation, which is to eliminate a social problem. Although specific provisions of this sort are not found in every human rights statute or code, it is clear from the cases that a majority of courts have adopted this approach in dealing with harassment complaints. As La Forest J. points out in the *Robichaud* case:

> ... it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy ─ a healthy work environment.

In keeping with this approach, the courts find employers who fail to exercise their authority to control sexual harassment in their workplace to be jointly and severally liable with the harasser. On the other hand, employers who can prove that all reasonable measures have been taken to control the situation are not liable; in such circumstances the courts find that the harasser is solely liable for his conduct.

It was in *Simms* v. *Ford Motor Co. of Canada* that the courts first enunciated the principle that employers who adopt human rights policies for their workplace might limit or avoid liability. For this defence to work, the policy must be designed to eradicate discrimination or harassment in the workplace and it must be actively applied. In *Simms* the harassment was racial in nature, but the principle applies to all prohibited grounds of discrimination.

The principle stated in *Simms* was approved by La Forest J. in the *Robichaud* case:

> ... an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters go to remedial consequences, not liability.

In *Janzen*, the Supreme Court affirmed that this approach to anti-discrimination or anti-harassment human rights legislation is valid for all provinces since the legislation of all the provinces have a similar purpose and structure. The Court has since confirmed this approach on a number of occasions. The principle put forward is consistent with the goal of the legislation, which is to put an end to a social problem by imposing on employers, by virtue of their right of management, a clear obligation to prevent discrimation and harassment in the workplace. To the extent this obligation is discharged, employers may invoke it as a defence to any complaint of harassment filed against them.

In concluding this section we should bear in mind that in the field of human rights, complaints of harassment are always brought against the harasser himself, whether he is part of management or a co-worker; and if the matter goes to court, judgment is always sought against him. There is no denying that he is the principal agent of the harassment and, except in situations where harassment has occurred as a result of a hostile working climate, he is the only person who can be found to have committed an intentional interference with the victim's rights through his improper conduct. This, at least, is the inference that must be drawn from the Supreme Court's recent interpretation of the provisions relating to exemplary damages in Quebec's Charter. The Court held (in *Gosset* and *St. Ferdinand*) that negligent conduct (which would describe the conduct of an employer who failed to exercise due diligence) does not suffice to constitute intentional unlawful interference and that the person liable (if the employer is indeed liable for the action of the employee) must have wanted to cause the consequences of the improper conduct or must have acted in full knowledge of the immediate and natural, or at least extremely likely, consequences of that conduct. Given these tests, it is unlikely that an employer who is not himself the harasser could be ordered to pay exemplary damages.

We may fairly conclude that compensating victims of harassment for incapacity resulting from the violation of their rights is not the central concern of human rights law and in any case represents only a fraction of human rights violations. To date, the priority of both the human rights commissions and the tribunals that hear complaints has always been to act so as to put an end to sexual harassment. To ignore this objective by focusing only on the compensation of victims as victims of employment injury could well undermine the effectiveness of the law.

It would be even worse to approach every situation of harassment mechanically and from a narrow point of view, asking only a single question — has the victim missed work because her health was impaired? Such an approach would significantly alter the rules of the game. First, it could lead to a medicalization of the legal response to harassment, which is essentially a social problem. Second, it could bring about a radical change in the rules governing complainants' burden of proof and the fora in which they must file their complaints. Third, it could mean the loss of social and legal recognition and monitoring of harassment in the workplace. And finally, given the principles governing compensation for employment injuries, it could make it easier for harassers to avoid responsibility for their actions.

These possibilities will be explored in greater detail below, but first we must take a closer look at the position of women who experience harassment in the workplace in the context of the law of employment injury.

2.2 Employment Injury Resulting from Sexual Harassment

2.2.1 The Issues

To the best of our knowledge, the first claim allowed by the CSST for an injury resulting from sexual harassment dates back to 1984 (*Leduc*, 1984). After reviewing all of the Appeal Commission's reported and unreported cases, all the reported cases of the Bureau de révision paritaire (BRP) [joint review board] and a significant portion of the BRP's unreported cases, we were able to find only eight cases in which a worker recieved compensation following a decision on review or appeal. We do not know how many of such claims may have been allowed by the CSST at first instance, but given the complexity of cases of this kind, it would be surprising if there were many.

Appeals concerning injuries occurring before 19 August 1985 were heard by the Commission des affaires sociales. So far as we know none of the appeals heard by the Commission dealt with sexual harassment. However, this tribunal was the first to accept the principle that victims of workplace harassment who experience psychological injury are entitled to compensation. This interpretation, of the former *Workers' Compensation Act*, has since been accepted ─ it was found not to be patently unreasonable ─ by the Court of Appeal (in *Canada Post Corporation*).

A claimant like Ms. Béliveau St-Jacques is seeking compensation for the physical or psychological consequences of stress in the workplace; the fact that the stressors are violations of human rights is in no way decisive, or even relevant, in determining such a claimant's right to compensation under the *Act respecting industrial accidents and occupational diseases*.

Like the courts and tribunals of most American states and Canadian provinces, Quebec's administrative tribunals interpret industrial accident legislation in a broad and liberal way, taking into account the objectives of the legislation, so as to provide compensation for the consequences of stress in the workplace (Lippel, 1992). A now imposing body of case law recognizes that an injury suffered as a result of a series of stressful events arising “out of or in the course of” work constitutes injury from an “industrial accident.” Each stressor is treated as a microtrauma, and the cumulative effect of the series of microtraumas is considered an employment injury.

The questions that arise in cases of this kind are the following:

> Does the medical report on which the claim is based constitute a diagnosis of an injury or disease or merely a description of symptoms? (Insomnia is not compensable, but depression is.)
>
> Has the injury resulted in a physical or psychological disability? (No compensation is payable in the absence of a temporary or permanent disability, even if a serious fault has been committed.)
>
> Was the injury caused by the events complained of, or could it be due to some other cause? (A worker who is more susceptible to injury than others is still entitled to compensation if the injury complained of was caused by work; however, in cases where

stressful events at work have affected a worker's marriage, the courts are likely to attribute any resulting health problems to the stresses of the marriage, not the workplace, thereby justifying rejection of the claim.)

Are the events complained of uncommon?

Did the events complained of arise out of or in the course of work?

The case law reveals that claims relating to stress in the workplace tend to be particularly litigious (83% of the claims reviewed were contested, Lippel and Demers 1996). Each of the questions listed above may be disputed by the employer, by the CSST and, according to one CALP decision (*Brien*), even by the harasser. This last decision is particularly surprising because it supposes that an alleged harasser is prejudiced by a judgment that recognizes the complainant's employment injury even though the harasser is not subject to an order to pay.

Each of the questions listed above can lead to debates that have little or nothing to do with the reality of working women who are victimized by sexual harassment.

In connection with the first question concerning diagnosis, it should be noted that the *Act respecting industrial accidents and occupational diseases* does not provide for compensation to be given for the wrong suffered by a victim (by awarding moral or exemplary damages). Its purpose, rather, is to provide compensation for the consequences of injury or illness, whether physical or psychological in nature. It follows that women who have suffered sexual harassment at work but who are not ill or disabled as a result of the harassment will see their claim for compensation dismissed by the CSST on the ground that they have suffered no injury. Proof of injury is a necessary condition of receiving compensation.

Even if a woman is injured as a result of sexual harassment, it does not follow that this injury will prevent her from going to work. Without loss of salary or permanent injury, no benefits are payable. A worker in this position is entitled to reimbursement for the costs of any medication or psychological counselling she may have received as necessary treatment for her employment injury. But if medical care of this sort is not required, nothing will be paid. Yet despite all this, depending on how the courts interpret it, section 438 of the *Loi sur accidents du travail et les maladies professionnelles* might be applicable to her, in which case she would lose her right of action before the ordinary courts even though she has received no compensation whatsoever.

Administrative tribunals are often very exacting in the proof they require to establish a sufficient connection between the incidents occurring in the workplace and the illness in question. In a recent study of 175 cases dealing with workplace stress, a category that includes claims resulting from sexual harassment, we observed that female workers had significantly less chance than male workers of having their injury recognized as an employment injury (Lippel and Demers 1996). When a female worker has both personal and work problems, tribunals accept her claim in only 19% of cases, whereas male workers in the same circumstances win 54% of their cases (Lippel and Demers 1996). Given the small number of individuals with personal problems, this difference is not statistically significant. But there are some striking contrasts in the decisions. In

one case, the problem of marital violence was a basis for denying a female worker's claim: CALP concluded that the worker's illness was more attributable to her marital problems at home than to sexual harassment at work (Phuong Dung). In another case, a male worker received compensation for a reactive depression he experienced following an investigation into allegations of harassment made against him. Although this worker was also experiencing family problems, the CALP found that these problems were themselves caused by his difficulties at work (*Y...L... et Compagnie M...*).

To make matters more difficult still, a majority of tribunals also require proof of the unusual character of the circumstances giving rise to the stress. The the notion of “unusual stress” is obviously vulnerable to discriminatory interpretation (Lippel and Demers 1996). For example, there are many decisions in which the courts have agreed to compensate male prison workers on the ground that working in penitentiaries is exceptionally depressing. On the other hand, there are three decisions that deny compensation to female guards subjected to sexual harassment by inmates on the ground that sexual tensions are normal in a penitentiary setting. Despite uncontested evidence of injury caused by sexual harassment, the courts effectively denied the claims of these women on the grounds that women in prison are not in their place (*Mercier, Raymond, Correctional Service*).

Finally, it is necessary that the harassment “arise out of or in the course of” work. This notion is highly ambiguous. In one case, for example, a female worker who was sexually assaulted by her subordinates ─ at her place of work, during working hours ─ was refused compensation on the ground that the actions of her assailants were not undertaken in the interest of the employer and the assault did not, therefore, arise in the course of work (Anonymous).

While there are many difficulties to overcome in making a claim, those women who succeed are entitled to what can amount to significant compensation.

2.2.2 What Rights Are Recognized and What Compensation Is Payable under the Act respecting industrial accidents and occupational diseases?

It can be in the interest of a worker who suffers sexual harassment to characterize the resulting injury as an employment injury. If her health is significantly affected, a claim under the *Act respecting industrial accidents and occupational diseases* entitles her to income replacement and other rights that may be worth more than the compensation payable under the Charter.

For example, a worker who proves that she is the victim of an employment injury is entitled to an income replacement equal to 90% of her net income for the duration of her psychological or physical disability. If she has suffered permanent damage to her health, she is entitled to occupational rehabilitation. The rehabilitation program is designed to enable workers to resume appropriate employment and to this end may include training, an employment subsidy or other measures. In practice, few victims of sexual harassment benefit from these rehabilitation measures; most receive income support while they look for work and nothing more. During the rehabilitation period, which in very exceptional cases may last a number of years, the worker continues to receive 90% of her net income, less income from other employment. When the

rehabilitation period ends, she receives a reduced pension equal to the difference between her income replacement and what she could earn if she were employed in a job considered appropriate given her capacity. The pension is reduced regardless of whether she in fact is employed.

Apart from income replacement, a worker who has suffered a permanent injury is entitled to a small lump sum payment. For example, a 40-year-old worker who has suffered a permanent impairment assessed at 15% is entitled to a lump sum of $8,461. A worker who is able to return to work within a year (or within two years in the case of a business with more than 20 employees) has the right to do so and can insist that she be taken back. The legislation also provides legal protection from potential reprisals by the employers.

One final advantage of claims under the *Act respecting industrial accidents and occupational diseases* is that, once an employment injury is recognized, the file is never closed. In Ms. Béliveau St-Jacques' case, not only was she entitled to income replacement for several years, but she was also able to return to the Commission and have her file reopened by showing that the psychological trauma of her civil action before the ordinary courts caused a recurrence of her initial injury (*Béliveau St-Jacques*, CALP). While this case is exceptional, it nonetheless illustrates the advantages to be had under the *Act respecting industrial accidents and occupational diseases*.

Despite these advantages, it is far from certain that access to a statutory regime designed to compensate victims of employment injury is appropriate in all cases of sexual harassment.

In the *Béliveau St-Jacques* case, by resorting to the employment injury compensation regime, the claimant was not obliged to prove that she had suffered sexual harassment. A careful reading of the judgment that recognizes her injury (*Béliveau St-Jacques*, BRP) reveals that the tribunal made no finding of sexual harassment. Having proved that she suffered an injury caused by stressors at work, she did not have to prove that these stressors constituted a breach of her rights under the Charter.

It is easy to imagine other cases, however, in which a worker could prove that her rights were violated even though she has suffered no significant damage to her health. In such cases, the employment injury compensation regime would not work to her advantage. If such a worker is now precluded from pursuing any recourse under the Charter, something clearly has gone wrong. How can this response to the victims of sexual harassment be reconciled with the goals of the legislature — a legislature which sought clearly to prohibit discriminatory harassment when it enacted section 10.1 of the Charter?

3. LEGISLATIVE EXCLUSION OF THE RIGHT OF ACTION OF VICTIMS OF EMPLOYMENT INJURY

3.1 Exclusion Provided in the *Act respecting industrial accidents and occupational diseases*

3.1.1 Historical Context

Under the first workers' compensation legislation, enacted in 1909, workers gave up their right to sue their employer for damages resulting from workplace accidents, but in exchange they were given the right to receive contract-based compensation (at the time, maximum damages amounted to 50% of wages) without having to prove fault. This trade off is the basic compromise on which the workers' compensation regime is built, a compromise retained and developed in subsequent versions of the legislation.

The 1909 legislation allowed workers to seek additional damages in cases where the employer had committed an “unpardonable” fault. In 1928, however, the exclusion of the right to bring civil proceedings against the employer became absolute (Lippel, 1986, note 514). Since 1941 (Lippel, 1986, note 548), this immunity has been extended to co-workers: a co-worker who commits a fault in the course of work that causes bodily harm to another cannot be sued if the harm suffered by the victim is an employment injury within the meaning of the Act. And since 1977, the immunity has been extended to all employers covered by the regime: such employers cannot be sued by their own workers or the workers of other employers within the regime.

At the same time that it was expanding the immunity from civil proceedings, the legislature was also amending the formula for calculating compensation, increasing it from 75% of gross income to 90% of net income. This principle of trade off remains a crucial feature. Any attempt to revisit the rules governing civil liability must inevitably open up the question of workers' benefits under the regime. This trade off principle has been acknowledged and relied on by the Supreme Court of Canada to uphold exclusionary clauses of this sort in the face of constitutional challenges under section 15 of the *Canadian Charter of Rights and Freedoms* (Reference re (1989)).

While the basic compromise on which workers' compensation regimes are founded must be respected, it is important to consider the intended scope of the compromise. Did the legislature really intend to exclude civil proceedings for violations of workers' quasi-constitutional rights? For decades now, workers who have suffered psychological damage as a result of unlawful dismissal or of sexual or racial harassment have successfully sued their employers before the ordinary courts and have obtained compensation under the Civil Code or the Charter without anyone claiming immunity. So long as double compensation was avoided, there was a tacit recognition that the ordinary courts retained jurisdiction over certain categories of action, even though the injury complained of might come within the definition of employment injury, because these categories were clearly subject to the jurisdiction of the ordinary courts (*Dire*). For example, health problems caused by the discriminatory dismissal of a worker or discriminatory harassment in the workplace would be an employment injury but the worker would nonetheless be entitled to sue for damages before the ordinary courts on the ground that the dismissal or harassment was a violation of their civil rights. It is plausible to argue that these categories of action are not part of the trade off on which workers' compensation legislation is built, for they do not concern the sort of injury for which employers would have had to purchase private insurance coverage. Under workers compensation legislation, the general liability insurance previously purchased by employers was replaced by the statutory regime. It is doubtful that damages resulting from sexual harassment or unlawful dismissal would be covered by a policy of general liability insurance.

3.1.2 The Scope of the Exclusion

3.1.2.1 Quebec's Exclusionary Rules

Today, section 438 of the *Act respecting industrial accidents and occupational diseases* reads as follows:

> No worker who has suffered an employment injury may institute a civil liability action against his employer by reason of his employment injury.

Under section 439, if a worker dies as a result of an employment injury, this prohibition applies equally to his or her “beneficiaries.”

Section 441 provides that no employer who is subject to the statutory regime may be sued for damages arising out of an employment injury suffered by a worker employed by another employer. This sweeping immunity is subject to certain exceptions provided for in the Act. For example, if the amount of the loss sustained by a worker exceeds the benefit payable under the Act, the worker may sue a third party employer to recover the balance. A worker may also sue a third party employer if his or her damages have been caused by a fault that constitutes an offence under the *Criminal Code.* But even in these special cases, the employer's immunity from actions instituted by his or her own employees remains absolute.

Section 442 prohibits actions against the workers or mandataries of any employer who is subject to the statutory regime for faults allegedly committed by them in the performance of their duties.

Given the Supreme Court's decision in *Béliveau St-Jacques*, it should be useful to review the historical application of these exclusionary rules in order to get a clearer idea of the rights of action available to victims of sexual harassment against their own employer, third party employers and co-workers who have engaged in harassing conduct. We will then consider how the ordinary courts have responded to civil liability actions brought by workers for injuries which are alleged to be employment injuries.

3.1.2.2 The Role of Ordinary Courts of Law

One of the key questions raised by the *Béliveau St-Jacques* case is whether it is up to the ordinary courts to determine whether an injury for which compensation is sought in a civil liability action constitutes an employment injury. To answer this question, we have reviewed every published decision since the beginning of the century that deals with the exclusion of civil actions on the ground that the subject of the action is an employment injury. There are few such decisions and we found none at all in which the issue was raised *proprio motu* by the court (on its own motion, without a request from either party). On the other hand, we found several cases in which the court proceeded with an action even though the injuries in question could have been employment injuries (*Dire*).

In virtually every case in which the question was raised, and there were few, it was the defendant who raised it by way of a motion to dismiss on the ground that the plaintiff had no right of action. In responding to such motions, the courts take a hands-off approach, concluding that it is for the judge who will hear the case on its merits to determine whether the injury complained of should be considered an employment injury (*Landry*). However, in cases where the plaintiff has already received compensation from the CSST, the courts readily conclude that the injury is an employment injury and dismiss the plaintiff's action, either without hearing any of the evidence (*Béliveau St-Jacques*), or at the end of the case (*Maxwell-Davis*). If the damages sought in such cases result from an industrial accident or an occupational disease, the action will be dismissed even if the type of damage sought is not covered by the *Act respecting industrial accidents and occupational diseases* (*Bergeron, Vincent et al*.).

In at least two cases, however, the court has agreed to hear an action for damages brought against a co-worker even though the plaintiff had already been compensated for employment injury under the *Act respecting industrial accidents and occupational diseases*. In *Monette*, the plaintiff was assaulted by a co-worker while on the job and she succeeded in her claim for compensation before the CSST. The court held that her action in civil liability to recover damages before the ordinary courts was not barred by section 442 of the *Act respecting industrial accidents and occupational diseases* because at the time of the assault the assailant was not acting “in the performance of his duties” within the meaning of section. In the *Ferron* case, a motion to dismiss was filed on the grounds that the plaintiff's claim for compensation under the *Act respecting industrial accidents and occupational diseases* had already been allowed by the CSST. This motion was dismissed as premature, the court taking the view that it was up to the judge who would hear the action on its merits to determine whether the injury, caused by an assault at work, could properly be considered an employment injury.

In the *Toulgoat* case, the only decision that deals with a claim involving sexual harassment, the Superior Court granted a motion to stay and suspended the action before the Court pending the CSST's decision on whether the injury was an employment injury.

The *Alain* case dealt with an action based on sections 1 and 46 of the Charter arising out of the accidental death of the plaintiff's husband and father. Although the Superior Court agreed to assess exemplary damages, its decision predates the judgment of the Supreme Court in *Béliveau St-Jacques* and would no doubt be decided differently today.

Having reviewed the case law, we are left with the following questions. First, how will *Béliveau St-Jacques* affect access to justice by women who are sexually harassed at work? Second, how will *Béliveau St-Jacques* affect the exclusive jurisdiction of specialized tribunals, particularly the CSST and CALP? Third, how will *Béliveau* affect the jurisdiction of the Tribunal des droits de la personne and the role of the Commission des droits de la personne?

On the question of access to justice, it is clear that the two-regime model currently operating creates serious difficulties. Suppose that the court decides to suspend the civil action, as it did in the *Toulgoat* case, pending the CSST's decision on whether the injury complained of by a victim of sexual harassment is an employment injury. This approach forces victims to invest time and energy pursuing their claim before a tribunal that may be ill-suited to their needs, particularly in cases where the victim does not want to medicalize her claim and is primarily seeking moral and exemplary damages. The impact will be even more significant if the victim is forced to exhaust her right of appeal before returning to the ordinary courts. A claimant can expect to wait three or four years from the time her claim is filed to the moment the CALP renders its final decision.

Suppose, on the other hand, that the court decides to go ahead and rule on the question of employment injury itself, without waiting for the CSSTand the CALP. In taking this approach, the court will be acting in violation of section 349 of the *Act respecting industrial accidents and occupational diseases* which clearly expresses the intention of the legislature to entrust the task of interpreting the legislation to its specialized tribunals. This understanding of the section has been confirmed by the superior courts, which repeatedly refuse to interfere with that task in the context of demands for extraordinary recourses (*Domtar*, *Chaput*).

From the standpoint of access to justice, this situation is problematic. Victims of sexual harassment could find themselves locked out by conflicting interpretations. Consider the following scenario. A court refuses to rule on a sexual harassment case because in its view, given the facts, the plaintiff's claim should be made under the *Act respecting industrial accidents and occupational diseases*. This decision, based on the court's own interpretation of the concept of employment injury, in no way binds either the CSST or the CALP (*Boulanger*). They could easily disagree. If the Superior Court or the Tribunal des droits de la personne has declined jurisdiction on the ground that the injury constitutes an employment injury, and the CSST or CALP, not bound by this interpretation and not in the least interested in the sexual nature of the harassment, refuses to classify the injury this way, the victim will be deprived of all compensation. Conversely, if she goes to the CSST first, has her claim dismissed, and the Superior Court then decides that her injury is an employment injury, she will suffer the same

fate. At the end of several years and having had as many as three hearings on the merits of her case, in each of which she will have been confronted by her harasser, she will find herself with no compensation, no remedy at all. This would be the outcome even if it were conceded by everyone involved in the case that she been sexually harassed in her workplace. The mere possibility of such an outcome is sufficient to discourage most women considering proceedings for discriminatory harassment.

This already gloomy picture is made even darker by the fact that Quebec's Commission des droits de la personne has, until very recently, refused to claim compensatory damages on behalf of victims of sexual harassment if it appears on the face of the record that the harassment occurred in the workplace and coincided with a period of absence from work by reason of illness. The fact that a complainant has filed no claim with the CSST does nothing to convince the Commission that it has jurisdiction. This reluctance to assume jurisdiction seeems incompatible with the Commission's mandate (see ss. 71-77 of the Charter); it goes beyond anything found in the judgments of the courts to date and even beyond the dictates of the Supreme Court of Canada in the *Béliveau St-Jacques* case. At several points in his judgment, Gonthier J. takes care to emphasize that the his own decision is based on the fact that the plaintiff had already received compensation from the CSST. It is far from clear that the Court was trying to create obstacles for victims of sexual harassment who have not filed a claim with the CSST. Furthermore, in all the cases reviewed, we did not find a single example of a court declining jurisdiction, *proprio motu,* on the ground that the damages sought were the result of an employment injury. On the contrary, even the Quebec Court of Appeal recently awarded damages in a case in which the worker could have filed a claim with the CSST (*Dire*). Since no one raised the issue, the Court apparently felt no obligation to decline jurisdiction in the circumstances. It is to be hoped that the ordinary courts and the specialized commissions and tribunals with jurisdiction to apply the Charter will continue to hear claims for damages caused by sexual harassment.

In a very recent decision, *Commission des droits de la personne et Genest et al*., the Tribunal des droits de la personne suggests that it is willing to assert jurisdiction in sexual harassment claims by workers so long as there is no clear evidence that the harassment has been dealt with as an employment injury by the appropriate specialized tribunal. Since there was no such evidence in *Genest*, the Tribunal awarded compensatory, moral and exemplary damages to the claimant whose health had been damaged as a result of sexual harassment in the workplace.

This innovative approach is attractive in that it protects victims of sexual harassment from the unacceptable consequences to which the other approaches can lead ─ contradictory judgments by the ordinary courts and specialized tribunals concerning the definition of employment injury, and lengthy waiting periods resulting from a stay of the civil action. Hopefully, this new approach will encourage the Commission des droits de la personne to reconsider its unwilliness to allow injured workers a choice of remedy. Hopefully, the Tribunal's approach in *Genest* will be followed.

Unfortunately, however, *Genest* is not a strong precedent. It attempts to resolve a problem arising out of a conflict in the legislation, a problem that was probably overlooked by the legislature when it was was drafted. For this reason we do not think the *Genest* case offers a definitive solution to the problems created by *Béliveau St-Jacques.*

3.2 Legislative Exclusion of the Right of Action of Workers Subject to Federal Jurisdiction

It is probable that *Béliveau St-Jacques* will affect the situation of workers who are subject to federal jurisdiction, at least those working in Quebec. Workers in other provinces will be affected to the extent that sexual harassment causing injury can be considered an industrial accident or occupational disease causing physical or psychological injury.

To understand the effect of the judgment on workers under federal jurisdiction, it is necessary to distinguish (1) employees of entities that are governed by federal law because of the nature of their activities and (2) employees of the federal government.

Under subsection 92(10) of the *Constitution Act, 1867*, jurisdiction over certain entities is withheld from the provinces and given to the federal Parliament. These are entities that in 1867 were thought to carry out functions that are pan-Canadian in scope, such as telecommunications (radio, television, telephone and cable), aeronautics, and interprovincial transportation (interprovincial rail and bus traffic), to mention only a few. The labour rights and relations of employees in these sectors are regulated by federal law. However, despite this arrangement, it was decided early on that provincial legislation governing compensation for employment injuries should apply to these pan-Canadian entities and that the provisions concerning compensation for employment injuries should apply to their employees (*Workmen's Compensation Board*). It follows that sections 438 *et seq.* of the *Act respecting industrial accidents and occupational diseases*, which prohibit employees from bringing an action in civil liability against their employer or co-workers, applies to such federal workers in Quebec (*Air Canada*), and the consequences of *Béliveau St-Jacques*, will be the same for them as for other Quebec workers.

The position of employees working for the federal government or one of its agencies is less clear. With the exception of members of the Armed Forces and the Royal Canadian Mounted Police, these employees are governed by the *Government Employees Compensation Act*. Since 1918, this legislation has provided for the application of provincial compensation regimes to federal employees, but because of the way the provincial law is incorporated, not every provision of the provincial regimes is made applicable.

It is now well established that the concepts of industrial accident and occupational disease, as defined in provincial statutes, apply to workplaces governed by the *Government Employees Compensation Act*. Thus, for cases of harassment occurring in Quebec, if the physical or psychological consequences suffered by the victim would be compensable as employment injuries under Quebec law, it appears that they will be treated the same way under the *Government Employees Compensation Act.* In fact, in a number of cases, employees governed by this legislation have received compensation from the CSST for the consequences of incidents that amounted to harassment (although the Commission made no explicit finding to that effect) (*Blagoeva, Canada Post Corporation*).

There is one Federal Court decision which appears to be inconsistent with this analysis, but in that case the victim was an RCMP officer and the circumstances, which clearly constituted sexual harassment, occurred outside Quebec. Relying on the absence of cases dealing with this issue in provincial law, the Court held that the circumstances complained of did not constitute an industrial accident within the meaning of the *Government Employees Compensation Act* (*Clark*).

Although its definitions apply, it appears that the exclusionary clauses of the *Act respecting industrial accidents and occupational diseases* do not apply to employees in Quebec governed by the *Government Employees Compensation Act*. The federal Act contains its own exclusionary clause, with its own specific provisions prohibiting civil actions. The courts have decided that the provisions in the federal Act are limited in scope and apply to federal employees to the exclusion of comparable provisions in provincial Acts (*Canada* v. *Tremblay*, *R.* v. *Bender*). The exclusion of the right of action provided for in section 12 of the *Government Employees Compensation Act* is limited to actions taken against the federal Crown or its employees; the exclusion does not apply to other employers subject to the Act or to their employees. Thus, a Canadian Broadcasting Corporation/Radio-Canada employee could be sued for damages resulting from a sexual assault even though the victim of the assault had already been compensated under the *Government Employees Compensation Act* (*Canada* v. *Tremblay*).

CONCLUSION

If we consider all aspects of the analysis carried out in this study, we may safely conclude that several important questions remain unanswered. Under current law, the nature and scope of the rights of women who have suffered sexual harassment in the workplace are anything but certain. These rights depend on the circumstances of the victim and vary according to whether she has suffered a physical or psychological injury as a result of the harassment, whether she has claimed compensation from the CSST (with or without success), and whether she is seeking damages or some other remedy to end the harassment. At the moment, everything is subject to interpretation. And it is not at all clear which persons or bodies have the authority to interpret the relevant legislation and case law so as to set out in definitive fashion the exact state of the law.

Given this uncertainty, we think it is important to take time to reflect on a number of questions before proposing possible ways out of the current imbroglio.

1. Is it desirable that the right to seek moral or exemplary damages is denied to women who have been physically or psychologically injured by sexual harassment in the workplace when less seriously injured workers may seek these types of damages?

2. Does it make sense to completely exclude all rights of action against harassers when they happen to be co-workers or superiors?

3. Is it appropriate to grant the CSST *exclusive* jurisdiction over the compensation of sexual harassment in the workplace, given that the discriminatory nature of the harm suffered by a victim is irrelevant in determining her right to compensation for employment injury and given that the tribunals established to deal with employment injuries may not have the training needed to deal fairly with the aspects of a claim that relate to the violation of fundamental rights.

4. Who should decide whether sexual harassment occuring in a workplace does or does not amount to an employment injury?

4.1 Is it desirable to permit two parallel lines of cases interpreting the definition of employment injury, one by specialized human rights tribunals or the ordinary courts, the other by the CSST?

4.2 What will become of women who are denied any remedy as a result of contradictory interpretations?

5. Is it desirable to ignore or obscure the discriminatory (and sexual) nature of sexual harassment in determining the right to compensation?

6. Would there be negative consequences for women if sexual harassment in the workplace were excluded from the jurisdiction of the Commission des droits de la personne, the Tribunal des droits de la personne or, alternatively, the CSST?

7. What are the dangers in the “medicalization” of sexual harassment cases that is sure to follow if the only remedy available to victims is compensation contingent on proving that the victim is unfit to work, as certified by a physician or (worse still) a psychiatrist?

Answering these questions will facilitate a better understanding of the choices that will have to be made by those who want to ensure that effective legislative protection is available to the victims of sexual harassment.

Our research has revealed what the current policy issues are and we can envisage legislative amendments in the short term which we think would permit a fair and equitable resolution of the dilemma.

In our view it is essential to respect the integrity of the trade off on which the workers' compensation regime is based. However, it is not acceptable that, because of this trade off, the victims of prohibited discrimination are prevented from asserting their rights. In the case of traditional industrial accidents, it is reasonable for the legislature to suppose that the health problems caused by such accidents are the number one priority of the victims. The legislature could reasonably think that it is fair to give such workers an adequate indemnity for the losses engendered by their health problems in exchange for renouncing their right to damages for loss of dignity or for the violation of their right to safe working conditions. In many cases, the priorities of sexual harassment victims will be different from those of industrial accident victims. In some cases, however, where the victim's health has been seriously affected, sexual harassment victims will fit the traditional profile. We therefore think it is inappropriate to seek to impose a single model, based on the idea of trade off, on all sexual harassment victims. A single model cannot deal fairly with the full range of harassment claims.

In some circumstances, seeking compensation under the *Act respecting industrial accidents and occupational diseases* will be the most appropriate recourse. In other cases, the Commission des droits de la personne and Tribunal des droits de la personne will be better equipped to understand the situation and meet the resulting needs.

We think it is reasonable to deny victims of harassment a double compensation for the same injury. We also think that a system in which victims could receive supplemental compensation for disability, on top of the benefits paid for disability under the *Act respecting industrial accidents and occupational diseases,* would be inappropriate. On the other hand, we believe that every woman who has suffered sexual harassment in the workplace should be guaranteed an award of damages, even if she not suffered an extended period of disability. Awarding moral and exemplary damages is an important and useful tool in the struggle to provide a safe and productive workplace.

Prohibiting victims from bringing civil proceedings against a harasser who is a colleague or a supervisor is particularly inappropriate, in our view. The economic impact of a successful claim before the CSST is felt solely by the victim's employer (or by employers in the industry as a whole, depending on the size of the enterprise). The employer pays the cost of compensating the victim, and has no legal action to recover this cost from the person who is actually responsible for the damage. The harasser is sheltered from any possibility of a civil action, and the victim can never recover exemplary damages from him, even in cases where the harasser has intentionally violated her rights. In short, under the workers' compensation regime the harasser is never required to pay for the consequences of his actions. For this reason, even in cases where a victim has exercised her rights under the *Act respecting industrial accidents and occupational diseases*, we think that she should also be entitled to bring an action under the Charter, against her harasser, for exemplary damages and perhaps for moral damages as well.

To achieve these goals and put an end to the current uncertainty, legislative amendments are required. We believe that amendments to Quebec's *Charter of Human Rights and Freedoms* should be quickly adopted to:

> (1) Give every victim the option of seeking damages under s. 49 of the Charter, both compensatory (material and moral) and exemplary, against her employer and/or her harasser, should she wish to do so. This option would be open to all persons who have suffered physical or psychological injury arising out of or in the course of work as a result of sexual or racial harassment, or other violations of the rights protected by sections 10 and 10.1 of the Charter. However, victims would not be entitled to both collect benefits from the CSST and recover damages under the Charter.
>
> (2) Despite compensation of the victim by the CSST, permit actions against the harasser for moral and exemplary damages for violations of sections 10 and 10.1 of the Charter.

It is important that employees' options to sue under the Charter be limited to cases in which section 10 or 10.1 of the Charter has been violated. Any broader option, embracing other sections of the Charter, would open up the basic trade off on which the compensation regime is based.

In the case of workers governed by federal law, it is too soon to be thinking of legislative amendment. We must see what happens in the case law before concluding that the reasoning in the *Béliveau St-Jacques* case is fully applicable in the federal context. it is crucial that developments in the case law are closely monitored, not only in Quebec and at the federal level, but in all Canadian jurisdictions, for the indirect effects of this judgment may be felt by women across Canada.

APPENDIX A: RELEVANT LEGISLATION

Quebec Legislation
Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001

s. 2 ... "industrial accident" means a sudden and unforeseen event, attributable to any cause, which happens to a person, arising out of or in the course of his work and resulting in an employment injury to him;

"employment injury" means an injury arising out of or in the course of an industrial accident, or an occupational disease, including a recurrence, relapse or aggravation;

"occupational disease" means a disease contracted out of or in the course of work and characteristic of that work or directly related to the risks peculiar to that work;

s. 349 The Commission has exclusive jurisdiction to decide any matter or question contemplated in this Act unless a special provision gives the jurisdiction to another person or agency.

s. 438 No worker who has suffered an employment injury may institute a civil liability action against his employer by reason of his employment injury.

s. 442 No beneficiary may bring a civil liability action, by reason of an employment injury, against a worker or a mandatary of an employer governed by this Act for a fault committed in the performance of his duties, except in the case of a health professional responsible for an employment injury contemplated in section 31.

Where the employer is a legal person, the administrator of the corporation is deemed to be a mandatary of the employer.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12

s. 1 Every human being has a right to life, and to personal security, inviolability and freedom.
He also possesses judicial personality.

s. 10 Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

s. 10.1 No one may harass a person on the basis of any ground mentioned in section 10.

s. 46 Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being.

s. 49 Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to exemplary damages.

s. 51 The Charter shall not be so interpreted as to extend, limit or amend the scope of a provision of law except to the extent provided in section 52.

s. 52 No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

Labour Code, R.S.Q. c. C-27

s. 47.2A certified association shall not act in bad faith or in an arbitrary or discriminatory manner or show serious negligence in respect of employees comprised in a bargaining unit represented by it, whether or not they are members.

s. 47.3 If an employee who has been the subject of dismissal or of a disciplinary sanction believes that the certified association is, in that respect, violating section 47.2, he must within six months, if he wishes to avail himself of this section, either

(1) submit a written complaint to the Minister; or
(2) submit to the Court or mail to the address of the Court a written application for an order directing that his claim be referred to arbitration.

Federal Legislation

Government Employees Compensation Act, R.S.C., c. G-5

s. 12 Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.

Canadian Human Rights Act, R.S.C. 1985., c. H-6.

s. 14 (1) It is a discriminatory practice, ...

(*c*) in matters related to employment, to harass an individual on a prohibited ground of discrimination.

(2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

s. 65 (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

(2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act of omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

U.S. Legislation

The Civil Rights Act, 1964, Title VII, section 703, 42 U.S.C.

APPENDIX B: GLOSSARY[2]

Arbitration: a method of resolving disputes in which the dispute is submitted to one or more individuals (called arbitrators) who are chosen by the parties.

BRP: Bureau de révision paritaire [the joint review board], a tribunal that reviews the decisions of the CSST.

CALP: Commission d'appel en matière de lésions professionelles [Quebec's employment injury appeal board], a tribunal that hears appeals from decisions of the BRP.

Case law: the body of law created by courts in rendering judgment in particular cases.

Civil immunity: legal protection from an action in damages that could otherwise be brought under the law of civil liability.

Civil liability: a legally imposed obligation to provide compensation for injury caused to another.

Common law: the legal system of British origin that governs civil law matters in the provinces other than Quebec.

Compensatory damages: an amount of money paid to repair or compensate for damage that has actually been suffered.

CSST: Commission de la santé et de la sécurité du travail [the workers' health and safety board], Quebec's equivalent to the Workers' Compensation Board.

Defendant: the person against whom an action is brought.

Dissenting opinion: the opinion of a judge or judges who disagree with the majority decision in a case.

Exclusive jurisdiction: the authority conferred on a court or other body to hear and decide a matter to the exclusion of all other bodies.

Exemplary damages: an amount of money paid to a victim as a form of private punishment, independent of any damage that has actually been suffered.

---

[2] Several of the definitions in the French text were taken from or modelled after CRÉPEAU, P.A. *et al*., *Dictionnaire de droit privé* [dictionary of private law], Centre de recherche en droit privé et comparé du Québec, Montreal, 1985.

Extraordinary recourse: a petition to a superior court asking it to quash a decision of an administrative tribunal such as the CALP on the grounds that the tribunal has exceeded its authority (evocation, mandamus, etc.).

Hearsay evidence: a form of evidence, generally inadmissible under traditional rules, in which a witness purports to repeat the words of a person who is not present.

Judgment at first instance: the judgment rendered by the first court to hear a dispute, as opposed to a judgment rendered by an appellate court.

Material damages: damage consisting of a patrimonial loss, which is a loss that can be calculated in dollars and cents and repaired through a payment of money.

Moral damages: damage consisting of extra-patrimonial injury, such as pain or inconvenience, which cannot be measured in money but for which money may be paid by way of compensation.

Motion to dismiss: a motion asking the court to dismiss an action on the ground that the plaintiff has no right of action (or there is some other legal impediment that warrants immediate dismissal of the action).

Ordinary courts: a court with jurisdiction to hear actions that are not not expressly assigned to another court.

Plaintiff: the person who brings an action.

Presumption of fact: an unknown fact established by the court by inference from a set of known facts that is serious, precise and concordant (sections 2846ff C.C.Q.).

Tort law: the law governing civil liability in Canadian provinces and with common law jurisdictions, and other common law jurisdictions.

BIBLIOGRAPHY
CASES CITED IN THE TEXT

Right of Action under Civil Law

Federal Employees

Bell Canada v. *CSST*, [1988] 1 S.C.R. 749

Canada v. *Tremblay*, [1989] 61 D.L.R. (4th) 649 (F.C.)

Clark v. *Canada*, [1994] 3 F.C. 323 (sexual harassment)

Malfair v. *Wile*, [1987] 20 B.C.L.R. 2d 155

R. v. *Bender*, [1947] S.C.R. 172

Rainville-Tellier v. *Lecorre*, [1967] C.S. 704

Workmen's Compensation Board v. *Canadian Pacific Railway*, [1920] A.C. 184

Provincial Employees

Alain v. *Revêtements Nor-Lag Ltée*, 92T-379, January 21, 1992, C.S.Q. 500-05-017220-912
Béliveau St-Jacques v. *Fédération des employées et employés de services publics inc. (C.S.N.) et al.*, [1996] 2 S.C.R. 345

Ferron v. *St. Louis*, J.E. 87-1037, August 3, 1987, C.S.Q. 500-05-005976-1037
Landry v. *Commission scolaire la neigette et Villa de l'Essor inc*., JE- 95-2260, November 9, 1995, C.A.Q. 200-09-000558-905

Maxwell-Davis v. *Cooke*, [1978] C.S. 975

Monette v. *Savoie*, J.E.94-1174, June 14, 1994, C.Q. 500-32-004868-933
Toulgoat v. *Centre local de services communautaires des Maskoutains*, 92T-1312, October 1, 1992, leave to appeal to Quebec Court of Appeal denied in 500-09-0001882-927, November 9, 1992

Act respecting industrial accidents and occupational diseases: Claims allowed for harassment-related injuries
Sexual harassment causing an employment injury

Béliveau St-Jacques et Conseil Central de Sherbrooke, BRP 60183128, February 9, 1989

Béliveau et C.S.N., [1993] CALP 1571 (relapse as a result of stress caused by civil action)
Brien et Bouchard et Centre de thérapie industriel Montérégie, CSST 1010 19438, appeal to CALP, 44597-60-9209, appeal by harasser

Leduc et Les aliments Claude Dufour Inc., [1993] BRP 199

Leduc et Les Centres d'accueil du Haut St-Laurent, B.R. CSST 8518466, October 30, 1984

Pursey-Krausch et Canadian Pacific, [1996] CALP 281

Supermarché Ste-Julie Inc. et Lebouthillier et CSST, CALP 67355-62-9503, May 10, 1996

Taillefer et Autobus Val-Nord, CALP 49640-60-9302, September 16, 1994

Charge of sexual harassment causing employment injury

Y...L... et Compagnie M..., [1993] CALP 986

Racial harassment causing employment injury

Anglade et Communauté Urbaine Montréal, CALP 60-00247-8609, D.T.E. 88T-730
Klein et Travail Canada Service Indemnisation, BRP 61102192, August 4, 1993 (sexual and racial harassment)

Harassment of an individual causing employment injury

Boivin et Municipalité Paroisse Ferme-Neuve, BRP 61067395, June 1, 1993
Lafleur et Syndicat des employés de la commission scolaire régionale Tilly, BRP 8643222, October 3, 1985 (age)

Lambert et Dominion Textile Inc., [1993] CALP 1056 (confirmed C.S.Q. [1993] CALP 1071)

Langevin et Ministère du loisir chasse et pêche, CALP 18032-62-9003, March 3, 1993

Rioux et GUS Canada Inc., CALP 34034-08-9111, April 22, 1993

Employees compensated by CSST under *Government Employees Compensation Act* as a result of harassment in the workplace

Klein et Travail Canada Service Indemnisation, BRP 61102192, August 4, 1993 (sexual harassment)

Procureur général du Canada v. *Blagoeva et CALP*, [1993] CALP 60, (C.S.Q., final decision)
Sauveteurs et victimes d'actes criminels-69, [1988] C.A.S. 694 (AT-59927), evocation denied by the Quebec Court of Appeal in *Société canadienne des postes* v. *C.A.S. et al*., 500-09-001481-894

Compensation for injuries attributable to harassment under the *Act respecting industrial accidents and occupational diseases*: claims denied

Anonymous, BRP 6129 5509, 23/09/93

Mercier et Service correctionnel du Canada, CALP 05083-8712, April 17, 1991

Phuong Dung et Granby Inc., CALP 46004-40-9210, June 1, 1994

Raymond et Service correctionnel du Canada, CALP 15225-60-8911, January 16, 1992

Service correctionnel du Canada et BL, [1993] BRP 369

Harassment prohibited by charters, acts and codes of human rights

U.S. cases cited

Meritor Savings Bank F.S.B. v. *Vinson*, 54 L.W. 4703

Canadian cases cited

Bell v. *Ladas*, (1980) 1 C.H.R.R. D/155 (Ont., Shime)

Foisy v. *Bell Canada*, [1984] C.S. 1164

Janzen v. *Platy Enterprises Ltd*., [1989] 1 S.C.R. 1252

Robichaud v. *Canada (Treasury Board)*, [1987] 2 S.C.R. 94
Simms v. *Ford Motor Co. of Canada*, (Ont. 1979, Krever) unreported decision, see summary in AGGARWAL, A.

Singh v. *F. W. Woolworth Co.*, (1982) 3 C.H.R.R. D/1743 (Ont., Cumming)

Cases cited on exemplary damages
Québec (Curateur public) v. *Syndicat national des employés de l'Hôpital St-Ferdinand*, [1996] 3 S.C.R. 211

Augustus v. *Gosset*, [1996] 3 S.C.R. 268

Other judgments cited in the text
Centre hospitalier de St. Mary's v. *Dire*, D.T.E. 92T-826, Quebec Court of Appeal, July 3, 1992

Chaput et Montréal (Société de transport de la Communauté urbaine de), (1992) CALP 1253 (C.A.Q.)

Lapointe v. *Domtar Inc. et CALP*, [1993] CALP 613

Reference re Workers' Compensation Act, 1983, (Newfoundland), [1989] 1 S.C.R. 922

Seneca College v. *Bhadauria*, [1981] 2 S.C.R. 181

Select bibliography (harassment prohibited by charters, acts and codes of human rights)

Quebec cases on harassment prohibited by the Charter
Association des cadres intermédiaires des affaires sociales et Centre hospitalier de M., [1992] T.A. 865

Assurance-vie Desjardins c. *Commission des droits de la personne du Québec*, [1990] R.J.Q. 827

Bertrand c. *Hôpital général juif*, [1994] R.J.Q. 2087
Commission des droits de la personne du Québec v. *Cie Bombardier M.L.W. Ltée*, [1983] 4 C.H.R.R. D/1447

Commission des droits de la personne du Québec v. *Lanardakis*, [1990] 4 R.J.Q. 1169 (C.Q.)

Commission des droits de la personne du Québec v. *Marotte*, [1993] R.J.Q. 203

Commission des droits de la personne du Québec v. *Habachi*, [1992] R.J.Q. 1439
Commission des droits de la personne du Québec v. *Imprimerie l'Équipe professionnelle inc*., (1993) R.D.L.P. D/30-1

Commission des droits de la personne du Québec v. *Commission scolaire Deux-Montagnes*, [1993] R.J.Q. 1297

Commission des droits de la personne du Québec v. *G.S.*, [1994] 21 CHRR D/46

Commission des droits de la personne du Québec v. *Latreille*, (1994) R.D.L.P. D/60-1

Commission des droits de la personne du Québec v. *Ville de Montréal*, D.T.E. 95T-241

Commission des droits de la personne du Québec v. *Allard*, J.E. 95-986

Commission des droits de la personne du Québec v. *Johnson*, D.T.E. 95T-1107

Commission des droits de la personne du Québec v. *Dhawan*, D.T.E. 96T-285
Commission des droits de la personne du Québec v. *Daunais*, T.D.P.Q., No. 705-53-0000002-959, March 11, 1996, Brossard J.

Commission des droits de la personne du Québec v. *Trudel*, T.D.P.Q. Terrebonne, No. 700-53-0000001-960, September 27, 1996, Brossard J.

Commission des droits de la personne du Québec v. *Genest*, T.D.P.Q., Joliette, 705-53-0000005-960, March 3, 1997, Rivet J.

Décision C.D.P. – 22, [1987] D.L.Q. 274

Décision C.D.P. – 49, [1987] D.L.Q. 462
Fédération des employées et employés de services publics inc. (C.S.N.) v. *Béliveau St-Jacques* [1991] R.J.Q. 279; [1996] 2 S.C.R. 345

Felix v. *CÉGEP de Saint-Laurent*, (1994) R.D.L.P. D/84-1

Gervais v. *Vaillancourt*, (1994) 20 CHRR D/7

Halkett v. *Ascofigex*, [1986] R.J.Q. 2697 (C.S.)

Hôpital St-Joseph de la Tuque et Centrale des syndicats démocratiques, A.A.S. 92A-139

M. (M.) v. *P. (Y.)*, [1992] RRA 333; DTE 92T-520

Mailhot v. *Bolduc*, J.E. 96-1050
Syndicat des travailleurs et travailleuses du Centre Frederik-Georges Heriot et Centre Frederick-Georges Heriot, A.A.S. 96A-206

Un homme v. *Une femme*, C.Q., Montreal, No 500-02-24389-853, July 27, 1989, Cuddihy J.
Union internationale des travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 500 et Supermarché Ste-Julie inc., [1994] T.A. 390

Université de Montréal et Syndicat général des professeurs de l'Université de Montréal, [1993] T.A. 545

Canadian cases on harassment prohibited by the Canadian Human Rights Act
Brennan v. *Robichaud*, (1982) 3 C.H.R.R. D/977; (1983) 4 C.H.R.R. D/1272; (1984) 2 F.C. 799

Canada (Treasury Board) v. *Robichaud*, [1987] 2 S.C.R. 84
Kotyk et al. v. *Canadian Employment and Immigration Commission (Chuba)*, (1983) 4 C.H.R.R. D/1416

Lewis v. *Treasury Board*, (1983) 4 C.H.R.R. D/1249

Romman v. *Sea-West Holdings Ltd.*, (1984) 5 C.H.R.R. D/2312

Potapczyk v. *MacBain*, (1984) 5 C.H.R.R. D/2285

Gervais v. *Agriculture Canada*, (1986) 7 C.H.R.R. D/3624; (1988) 9 C.H.R.R. D/5002

Bouvier v. *Metro Express*, (1993) 17 C.H.R.R. D/313

Cluff v. *Canada (Department of Agriculture*), [1994] 2 F.C. 176

Stadnyk v. *Canada (Canada Employment and Immigration Commission)*, (1995) 22 C.H.R.R. D/173; (1995) 22 C.H.R.R. D/196

Books, reports and articles

AGGARWAL, A.P. *Sexual Harassment in the Workplace*. Toronto: Butterworths, 1987.

BACKHOUSE, C. and L. Cohen. *The Secret Oppression: Sexual Harassment of Working Women*. Toronto: MacMillan Canada, 1978.

BACKHOUSE C. “Bell v. The Flaming Star Steak House Tavern: Canada's First Sexual Harassment Decision.” *J.W.O.L. Rev.*,19 (1981): 141.

CANADIAN HUMAN RIGHTS COMMISSION. *Unwanted Sexual Attention and Sexual Harassment: Results of a Survey of Canadians.* Ottawa: Department of Supply and Services Canada, 1983.

COMMISSION DES DROITS DE LA PERSONNE DU QUÉBEC. “Orientation de la Commission des droits de la personne du Québec face au harcèlement en milieu de travail.” *D.L.Q.* (1987): 491.

CLICHE, Bernard, Serge Lafontaine and Richard Mailhot. *Traité de droit de la santé et de la sécurité au travail*. Cowansville, Quebec: Éditions Yvon Blais Inc., 1993.

DRAPEAU, M. *Le harcèlement au travail*. Cowansville, Quebec: Éditions Yvon Blais Inc., 1991.

DRAPEAU, Maurice. “La responsabilité pour atteinte illicite aux droits et libertés de la personne.” *R.J.T.*, 28 (1994): 31.

DUBÉ, L. “L'immunité civile des employeurs en vertu de la Loi sur les accidents du travail et les maladies professionnelles.” *Développements récents en droit de la santé et de la sécurité du travail*. Cowansville, Quebec: Éditions Yvon Blais Inc., 1993, 81-98.

DWYER, D. “Sexual Harassment in the Workplace: Nothing to Flirt With!,” *Rights and Freedoms*, No. 55, March 1985.

FARLEY, L. *Sexual Shakedown: Sexual Harassment on the Job*. New York: Warner Books, 1978.

HICKLING, M.A. “Employer's Liability for Sexual Harassment.” *Man. L. J.*, 17 (1988): 124.

JAIN, H.C., and P. ANDIAPPAN. “Sexual Harassment in Employment in Canada.” *R.I.*, 41 (1986): 758.

LAMARCHE, L. “Définition du harcèlement sexuel prohibé sur les lieux de travail en droit canadien.” *R.J.F.D.*, 2, (1986): 113.

LIPPEL, K. *Droit des accidentés du travail à une indemnité: Analyse historique et critique*. Montreal: Éditions Thémis, 1986.

LIPPEL, K. *Le Stress au travail: L'indemnisation des atteintes à la santé en droit québécois, canadien et américain*. Cowansville, Quebec: Éditions Yvon Blais Inc., 1992.

LIPPEL, K., and Diane Demers. “L'Invisibilité: facteur d'exclusion: les femmes victimes de lésions professionnelles.” *Revue Canadienne de droit et société,* 11, (1996): 87-134.

MACKINNON, C.A. *Sexual Harassment of Working Women*. New Haven: Yale University Press, 1979.

MOISAN, L. “Les dessous du 9 à 5: suite et fin?” *La Vie en rose* (September - October 1982): 17.

OTIS, G. “Le spectre d'une marginalisation des voies de recours découlant de la Charte québécoise.” *R. du B,* 51 (1991): 561-584.

SAVOIE, D., and V. LAROUCHE. “Le harcèlement sexuel au travail: Définition et mesure du phénomène.” *R.I.*, 43 (1988): 509.

TOUPIN, S. “Le harcèlement sexuel en milieu de travail.” *R.I.*, 43 (1988): 531.

RESEARCH REPORTS FUNDED BY STATUS OF WOMEN CANADA ON THE CANADA HEALTH AND SOCIAL TRANSFER (CHST) AND ITS IMPACT ON WOMEN

Benefiting Canada's Children: Perspectives on Gender and Social Responsibility
(Des prestations pour les enfants du Canada : perspectives sur l'égalité des sexes et la responsabilité sociale)
Christa Freiler and Judy Cerny
Child Poverty Action Group

Qui donnera les soins? Les incidences du virage ambulatoire et des mesures d'économie sociale sur les femmes du Québec
(Who Will Be Responsible for Providing Care? The Impact of the Shift to Ambulatory Care and of Social Economy Policies on Quebec Women)
Association féminine d'éducation et d'action sociale (AFÉAS), Denyse Côté, Éric Gagnon, Claude Gilbert, Nancy Guberman, Francine Saillant, Nicole Thivierge and Marielle Tremblay

Women and the CHST: A Profile of Women Receiving Social Assistance, 1994
(Les femmes et le TCSPS : profil des femmes à l'assistance sociale en 1994)
Katherine Scott
Centre for International Statistics, Canadian Council on Social Development

Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs
(Les femmes et le déficit en matière d'égalité : l'incidence de la restructuration des programmes sociaux du Canada)
Shelagh Day and Gwen Brodsky
Day, Brodsky and Associates

The Impact of Block Funding on Women with Disabilities
(L'incidence du financement global sur les femmes ayant un handicap)
Shirley Masuda
DAWN Canada

Women's Support, Women's Work: Child Care in an Era of Deficit Reduction, Devolution, Downsizing and Deregulation
(Le soutien aux femmes, le travail des femmes et la garde d'enfants à l'ère de la réduction du déficit, du transfert des responsabilités, de la réduction de la taille de l'État et de la déréglementation)
Gillian Doherty, Martha Friendly and Mab Oloman
Doherty Inc.

RESEARCH REPORTS FUNDED BY STATUS OF WOMEN CANADA ON WOMEN'S ACCESS TO JUSTICE

A Complex Web: Access to Justice for Abused Immigrant Women in New Brunswick
(Une toile complexe : l'accès au système de justice pour les femmes immigrantes victimes de violence au Nouveau-Brunswick)
Baukje Miedema and Sandra Wachholz

Lesbian Struggles for Human Rights in Canada (not published)
(La lutte des lesbiennes pour la reconnaissance de leurs droits fondamentaux au Canada) (non publié)
Ann Robinson and Sandra Kirby

L'accès à la justice pour des victimes de harcèlement sexuel : l'impact de la décision *Béliveau-St-Jacques* sur les droits des travailleuses à l'indemnisation pour les dommages
(Access to Justice for Sexual Harassment Victims: The Impact of *Béliveau St-Jacques* on Female Workers' Right to Damages)
Katherine Lippel and Diane Demers

Getting a Foot in the Door: Women, Civil Legal Aid and Access to Justice
(Un pied dans la porte : les femmes, l'aide juridique en matière civile et l'accès à la justice)
Lisa Adario
National Association of Women and the Law

Family Mediation in Canada: Implications for Women's Equality
(La médiation familiale au Canada : ses implications pour l'égalité des femmes)
Sandra A. Goundry, Yvonne Peters and Rosalind Currie
Equality Matters! Consulting