

**Béliveau St-Jacques v. Fédération des employées et employés de services publics inc., [1996] 2 S.C.R. 345**

**Louissette Béliveau St-Jacques**

*Appellant*

v.

**The Fédération des employées et employés de services publics inc. (CSN) and the Confederation of National Trade Unions**

*Respondents*

and

**Pierre Gendron and the Syndicat des travailleuses et travailleurs de la Confédération des syndicats nationaux (CSN)**

*Mis en cause*

and

**The Commission de la santé et de la sécurité du travail**

*Intervener*

**Indexed as: Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.**

**File No.: 22339.**

**1995: November 3; 1996: June 20.**

**Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.**

**on appeal from the court of appeal for quebec**

*Workers' compensation — Harassment — Employee, victim of sexual harassment and harassment in the workplace, receiving compensation under Act respecting industrial accidents and occupational diseases — Whether employee may in addition bring civil liability action based on Charter of Human Rights and Freedoms against her employers — Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001, s. 438 — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 49, 51, 52.*

*Civil rights — Prohibited harassment — Remedy — Compensatory and exemplary damages — Employee, victim of sexual harassment and harassment in the workplace, receiving compensation under Act respecting industrial accidents and occupational diseases — Whether employee may in addition bring civil liability action based on Charter of Human Rights and Freedoms against her employers — Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001, s. 438 — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 49, 51, 52.*

The appellant, who alleged that she had been the victim of harassment in the workplace and sexual harassment by one of her supervisors, instituted a liability action based on the *Charter of Human Rights and Freedoms* against her employers and the alleged harasser in the Superior Court. The appellant subsequently obtained compensation under the *Act respecting industrial accidents and occupational diseases* (“AIAOD”), for having suffered an employment injury as a result of the same events. The employers then filed a motion to dismiss in which they argued that, because the appellant had obtained compensation from the competent industrial accident authorities, the effect of s. 438 AIAOD and art. 1056a C.C.L.C. was to deprive the Superior Court of

jurisdiction in respect of the appellant's civil liability action. They also maintained that the Superior Court lacked jurisdiction *ratione materiae*, which was reserved to the grievance arbitrator under the collective agreement. The Superior Court dismissed the motion and the Court of Appeal, in a majority decision, affirmed this judgment. The employers obtained leave to appeal to this Court but subsequently discontinued their appeal. The appellant then brought a motion to continue the appeal, which was treated as an application for leave to appeal. The motion was granted, which explains her status as appellant. This appeal is to determine whether the victim of an industrial accident who has received compensation under the *AIAOD* may in addition bring a civil liability action based on the *Charter*. The employers argued, by way of cross-appeal, that if such an action was not barred, it had to be decided by the grievance arbitrator. The issue of whether the *AIAOD* applies to sexual harassment and harassment in the workplace is not before this Court.

*Held* (La Forest and L'Heureux-Dubé JJ. dissenting in part): The appeal and the cross-appeal should be dismissed.

*Per* Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.: The object of the *AIAOD* is to provide compensation for employment injuries and the consequences they entail for beneficiaries. It establishes a compensation system that is based on the principles of insurance and no-fault

collective liability, the main purpose of which is compensation and thus a form of final liquidation of remedies. The victim of an employment injury receives partial, fixed-sum compensation, and a civil liability action against the victim's employer (s. 438) or against a co-worker who is alleged to have committed a fault in the performance of his or her duties (s. 442) is prohibited. The civil immunity of employers and co-workers under ss. 438 and 442 is broad in scope and applies to an action under s. 49 of the *Charter* based on the events that gave rise to the employment injury, because this remedy, in so far as it authorizes a claim of compensatory and exemplary damages, is a civil liability remedy.

The violation of a right protected by the *Charter* is equivalent to a civil fault. Before the advent of the *Charter*, art. 1053 C.C.L.C. could provide the basis for a liability action for a violation of fundamental rights. The *Charter* now formalizes standards of conduct that apply to all individuals but the *Charter's* recognition of specific and perhaps still unexplored aspects of the standard of good conduct under the *Civil Code* does not in itself justify a new characterization of the liability resulting from its violation. As is the case with art. 1053, the liability associated with the action for compensatory damages provided for in the first paragraph of s. 49 of the *Charter* is directed to the reparation of harm caused to others by wrongful conduct and must therefore be characterized as civil liability. The violation of a guaranteed right does not

change the general principles of compensation or in itself create independent prejudice. The *Charter* does not create a parallel compensation system and cannot authorize double compensation for a given fact situation. An action for exemplary damages based on the second paragraph of s. 49 of the *Charter* cannot be dissociated from the principles of civil liability. Such an action can only be incidental to a principal action seeking compensation for moral or material prejudice. The wording of the second paragraph of s. 49 clearly shows that, even if it were admitted that an award of exemplary damages is not dependent upon a prior award of compensatory damages, the court must at least have found that there was an unlawful interference with a guaranteed right. This 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.

The appellant therefore may not bring a civil liability action based on the *Charter*. The action she brought in the Superior Court, in so far as it involved the employers, was prohibited by s. 438. The motion to dismiss the action should /have been allowed 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 *AIAOD* and made compensation payable under that Act. This solution is consistent with s. 51 of the *Charter*,

which states that the *Charter* must not, as a general rule, be interpreted so as to extend or amend the scope of a provision of law. Allowing the victim of an employment injury to bring a civil liability action based on the *Charter* against his or her employer or a co-worker would necessarily call into question the compromise formalized by the *AIAOD*. Although s. 52 of the *Charter* affirms the relative preponderance of the *Charter*, this section does not include s. 49 in the group of privileged provisions. Only ss. 1 to 38 of the *Charter* prevail over other statutes, which may not derogate from the *Charter* unless they do so expressly. Read together, ss. 51 and 52 show that the legislature did not intend to impose the same formal requirements for derogations from s. 49. That provision, even when invoked because of a violation of one of the rights guaranteed in ss. 1 to 38, does not have the same relative preponderance that they have. In any event, while the exclusion is not express, the language of s. 438 *AIAOD* hardly leaves any doubt as to the legislature's intention, owing to the characteristics of the remedy provided for in s. 49. Section 438 *AIAOD*, which came into effect after the *Charter*, unambiguously indicates that s. 49 of the *Charter* must give way.

Given the conclusion regarding the availability of a civil liability action, it is not necessary to determine whether a grievance could have been filed under the collective agreement. If that had been the case, however, the arbitrator could not have awarded damages for the

prejudice suffered as a result of the employment injury. The exclusion of a civil liability action also applies to the grievance arbitrator.

*Per La Forest and L'Heureux-Dubé JJ.* (dissenting in part): As regards liability and for the purposes of s. 438 AIAOD, the *Charter* does not create a parallel system. The overlap between the general law system and that of the *Charter*, however, is limited to the elements of liability and the compensatory remedy provided for in the first paragraph of s. 49 of the *Charter*. The conditions for establishing a liability-related right — namely fault, prejudice and a causal connection — and the compensatory remedy derive for both systems from general civil law principles. The two sources of compensation merge, which makes it possible to avoid double compensation for prejudice. However, the second paragraph of s. 49 of the *Charter*, which provides for an exemplary remedy where there has been “unlawful and intentional” interference with the fundamental rights guaranteed therein, differs from the general law in that it establishes a remedy that is autonomous and distinct from compensatory remedies. This exceptional concept in Quebec law, which is related to the law’s role of punishment and deterrence, is unrelated to the overlap of the general law system with that of the *Charter*. In short, although in order to claim exemplary damages under the second paragraph of s. 49, the elements of liability must be established in accordance with the general law rules,

the remedy available for a violation of that law derives from a specific statute, the *Quebec Charter*.

The no-fault employment injury compensation system under the *AIAOD* does not preclude the awarding of exemplary damages under the second paragraph of s. 49 of the *Charter* because of the employers' civil immunity clause in s. 438 *AIAOD*. Section 438 *AIAOD* is limited to civil liability "actions" (art. 1056a *C.C.L.C.*, which recognizes this civil immunity as part of the general law, speaks of "recourse"). Section 438 therefore does not preclude the conditions for liability from being established. Moreover, s. 438 is limited to "civil liability" actions, that is, the power to sue to obtain compensation for prejudice suffered. Thus, s. 438 does not bar court actions to punish or deter certain types of behaviour. Section 438 *AIAOD* therefore applies only to compensatory actions and remedies and does not cover the exemplary remedy available under the second paragraph of s. 49 of the *Charter*.

Above and beyond the semantic arguments, the civil immunity clause under s. 438 *AIAOD* can be reconciled with the specific remedies provided for in the *Charter*. The right not to be harassed in the workplace, which is guaranteed in s. 10.1 of the *Charter*, is included among the rights that are given relative preponderance by s. 52 of the *Charter*. Even though s. 52 expressly mentions only ss. 1 to 38 of the *Charter*, s. 49 has the same relative preponderance because it is incidental to the rights specified in ss. 1 to

38. The precise purpose of the remedies provided for in s. 49 is to enforce those fundamental rights. It is therefore unnecessary for s. 52 to mention s. 49 specifically, since the latter provision simply sets out the possible remedies and does not guarantee a right. The application of s. 52 in this case also excludes the application of s. 51 of the *Charter*. Because s. 49 prevails over statutes that do not derogate expressly therefrom, the two types of remedies provided for in that section must *prima facie* take precedence over the compensation system under the *AIAOD*. However, although the compensation system under the *AIAOD* authorizes only partial, fixed-sum compensation, it has precisely the same objective as the first paragraph of s. 49, namely providing compensation for prejudice. Since the *AIAOD* adequately attains the objective of the first paragraph of s. 49, there is no need to rely on the relative preponderance provided for in s. 52. The general law system and that of the *Charter* do not overlap, however, in respect of the punitive, deterrent remedy under the second paragraph of s. 49. This provision must be interpreted generously since its purpose is to enforce the fundamental rights guaranteed in the *Charter*. As regards harassment in the workplace, which is covered by s. 10.1 of the *Charter*, this exemplary remedy must therefore, in the event of inconsistency, take precedence over the civil immunity clause in s. 438 *AIAOD* because of the relative preponderance that must be given to s. 10.1. Since s. 438 does not mention exemplary damages, it does not explicitly derogate, as required by s. 52, from the

possibility of ordering the payment thereof. The fact that the *AIAOD* came into force after the *Charter* does not show that there was an intention to derogate from the second paragraph of s. 49, since s. 52 expressly states that the *Charter* prevails over all statutory provisions, “even subsequent to the Charter”.

Although a number of forums are available in which victims of harassment in the workplace can obtain compensation, in this case it is the grievance arbitrator who has jurisdiction under the collective agreement to decide the appellant’s claim for exemplary damages from her employers under the second paragraph of s. 49 of the *Charter*. The power of a grievance arbitrator to apply the law extends to human rights legislation and an arbitrator can award remedies based on such legislation provided that he or she has, as in this case, jurisdiction over the parties (worker/employer), the subject matter of the dispute (harassment in the workplace) under the collective agreement, and the order sought. For an arbitrator to be able to deal with a grievance related to harassment in the workplace, there need not be a specific provision in the agreement to this effect. A general provision, such as the one in article 10 of the present collective agreement, authorizing the arbitrator to dispose of disputes about working conditions is sufficient. An arbitrator also has the power to order the payment of exemplary damages under the *Charter* where the employer has acted in an “unlawful and intentional” manner.

Section 100.12(a) of the *Labour Code* provides that an arbitrator may interpret and apply any Act or regulation to the extent necessary to settle a grievance. Where the issue and the remedy sought come within the jurisdiction of grievance arbitrators under a collective agreement or statute, this jurisdiction is exclusive. The jurisdiction of the arbitrator in the present case means that the appellant can bring no action against her employers in the ordinary courts or before other agencies that would otherwise have jurisdiction. However, this does not preclude the appellant's seeking relief under s. 47.2 of the *Labour Code* if, as she alleges, her union refused to take the grievance to arbitration.

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By Gonthier J.

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*St-Cyrille Inc.*, [1989] R.J.Q. 44; *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922.

By L'Heureux-Dubé J. (dissenting in part)

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*de l'Institut Doréa (C.S.N.) v. Conseil des services essentiels*, [1987] R.J.Q. 925; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Halkett v. Ascofigex Inc.*, [1986] R.J.Q. 2697; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374; *Joannette et Pièces d'auto Richard Ltée*, [1993] C.T. 398; *Girard v. Produits de viande Cacher Glatt Ltée*, [1986] T.A. 304; *Clarke et Université Concordia*, D.T.E. 87T-765; *General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537; *Shell Canada Ltd. v. United Oil Workers of Canada*, [1980] 2 S.C.R. 181; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Mills v. The Queen* [1986] 1 S.C.R. 863; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *Schokbéton Québec Inc. et Métallurgistes unis d'Amérique, section locale 15398*, [1984] T.A. 176; *Centre d'accueil du Haut St-Laurent et Fédération des affaires sociales*, [1985] T.A. 432; *Syndicat des employées et employés de la Commission des droits de la personne du Québec et Commission des droits de la personne du Québec*, D.T.E. 94T-1166.

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*Act respecting labour standards*, R.S.Q., c. N-1.1, ss. 124 [am. 1990, c. 73, s. 59], 128, para. 1(3).

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*Act to amend the Civil Code respecting the right of action in the cases covered by the Workmen’s Compensation Act, 1931*, S.Q. 1935, c. 91.

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APPEAL and CROSS-APPEAL from a judgment of the Quebec Court of Appeal, [1991] R.J.Q. 279, affirming a judgment of the Superior Court dismissing a motion to dismiss. Appeal and cross-appeal dismissed, La Forest and L'Heureux-Dubé JJ. dissenting in part.

*Jacques Blanchette*, for the appellant.

*Pierre Bérubé and Annie Gerbeau, for the respondents.*

*Jean-Claude Paquet, for the intervener.*

*Bernard Bélanger, for the mis en cause Gendron.*

*//L’Heureux-Dubé J.//*

The reasons of La Forest and L’Heureux-Dubé and La Forest JJ. were delivered by

- 1 L’HEUREUX-DUBÉ J. (dissenting in part) — I have had the benefit of the opinion of my colleague Justice Gonthier. Although I agree in part with his reasons, I cannot accept either his interpretation of the two legislative schemes in question, namely the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001 (“AIAOD”), and the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 (“Charter”), or his conclusion that a victim of harassment in the workplace who has obtained a compensatory remedy under the AIAOD cannot obtain the exemplary remedy available under the second paragraph of s. 49 of the *Charter* for unlawful and intentional interference with a fundamental right provided for therein, in this case the right not to be harassed in the workplace, which is guaranteed in s. 10.1 of the *Charter*.
- 2 I need not discuss the facts of the case or the judgments of the courts below, as Gonthier J. has already done so. I will recall, however, that the appellant instituted an action in the Superior Court of Quebec claiming remedies for harassment suffered in the workplace, including the payment of exemplary damages under the second paragraph of s. 49 of the *Charter*. The respondents brought two motions to dismiss: the first alleged that, in view of s. 438 AIAOD, the Superior Court had no jurisdiction to hear an action by a worker against his or her employer in respect of an employment

injury; the second, which was declinatory in nature, alleged that the Court lacked jurisdiction *ratione materiae*, which was reserved to the grievance arbitrator under the collective agreement.

3 These motions were dismissed by the Superior Court and the respondents' appeal from that decision was also dismissed by the Quebec Court of Appeal, in a majority decision: [1991] R.J.Q. 279. The respondents filed an application for leave to appeal to this Court but later discontinued their appeal. The appellant's motion to continue the appeal, which was treated as an application for leave to appeal, was granted.

4 Section 49 of the *Charter*, which is central to this case, reads as follows:

**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.

5 The fundamental right not to be harassed in the workplace, which can serve as a basis for the remedies provided for in s. 49, is protected by ss. 10 and 10.1 of the *Charter*:

**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.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

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

6 Section 52 of the *Charter*, which confers relative preponderance on the *Charter*, reads as follows:

**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.

7 The main issue in this appeal is the relationship between the compensation system under the *AIAOD* and the *Charter* remedies for interference with a fundamental right. More specifically, the issue is whether the no-fault employment injury compensation system precludes the awarding of remedies under s. 49 of the *Charter* because of the civil immunity clause in s. 438 *AIAOD*. The second issue is whether a grievance arbitrator has jurisdiction under the collective agreement to order the payment of exemplary damages under the second paragraph of s. 49 of the *Charter* for harassment in the workplace. Before considering these issues, however, the proceedings should be placed in their legislative and judicial context.

### I. Legislative and Judicial Context

8 The agencies that apply the *AIAOD*, namely the Commission de la santé et de la sécurité du travail (“CSST”), the Bureau de révision paritaire and the Commission d’appel en matière de lésions professionnelles (“CALP”), appear to have jurisdiction over harassment in the workplace. That jurisdiction is relatively recent and results from a broad, and perhaps even expansive, interpretation of the term “employment injury”, which is defined as follows in s. 2 *AIAOD*: “an injury or a disease arising out of or in the course of an industrial accident, or an occupational disease, including a recurrence, relapse or aggravation”.

9 On June 17, 1988, in *Anglade et Communauté urbaine de Montréal*, D.T.E. 88T-730, a case involving a black police officer who had worked for the Montreal Urban Community for more than ten years, the CALP found for the first time that harassment in the workplace was an employment injury covered by the *AIAOD*. Later, in *P. et X. (Ville de)*, [1990] C.A.L.P. 677, the CALP found that a firefighter diagnosed with situational anxiety/depression syndrome caused by nine months of continuous harassment by his co-workers had suffered an employment injury within the meaning of the *AIAOD*. See also the CALP’s decisions in *Gagnon et Commission*

*administrative des régimes de retraite et d'assurances*, [1989] C.A.L.P. 769; *Blagoeva et Commission de contrôle de l'énergie atomique*, [1992] C.A.L.P. 898; *Langevin et Québec (Ministère du Loisir, de la Chasse et de la Pêche)*, [1993] C.A.L.P. 453; and *Lambert et Dominion Textile Inc.*, [1993] C.A.L.P. 1056.

- 10 In the case at bar, the Bureau de révision paritaire decided that the harassment in the workplace and sexual harassment alleged by the appellant constituted an employment injury and therefore granted her claim for compensation under the *AIAOD*. In this Court, the parties did not challenge the validity of the Bureau de révision paritaire's decision that harassment in the workplace is an "employment injury" or the finding that exemplary damages cannot be awarded under the *AIAOD*.
- 11 However, it appears that the central issue in the instant case results precisely from that expansive interpretation of the term "employment injury". When the CALP found that harassment in the workplace was covered by the *AIAOD*, the civil immunity provided for in s. 438 became applicable and, according to my colleague Gonthier J., this meant that victims of harassment in the workplace could no longer obtain any of the remedies provided for in s. 49 of the *Charter*.
- 12 The sole object of the no-fault employment injury compensation system is to provide compensation for injuries suffered (see s. 1 *AIAOD*). Sections 44 *et seq.* *AIAOD* provide that an income replacement indemnity will be paid when a worker becomes unable to carry on his or her employment by reason of an employment injury. Sections 83 *et seq.* provide that a worker who sustains permanent physical or mental impairment is entitled to compensation for bodily injury that takes into account any anatomicophysiological deficit and disfigurement. Finally, ss. 92 *et seq.* provide for compensation in the case of death and ss. 112 *et seq.* provide for other indemnities for damage to clothing, prostheses or orthoses. However, as noted by the Court of Appeal, the *AIAOD* does not seem to authorize the awarding of exemplary damages.

13 Nevertheless, according to my colleague, because of the civil immunity clauses applicable to employers (s. 438 *AIAOD*) and co-workers (s. 442), a person who has obtained compensation under this system could not receive either a compensatory remedy for moral or material prejudice under the first paragraph of s. 49 of the *Charter* or an exemplary remedy under the second paragraph of s. 49. Thus, as he sees it, the combination of these two factors — the CALP’s decisions on harassment in the workplace and s. 438 *AIAOD* — means that no worker covered by this statute can obtain the exemplary remedy provided for in the second paragraph of s. 49 of the *Charter* from his or her employer, whereas any person other than a worker covered by the *AIAOD* can do so. In short, according to this interpretation, the second paragraph of s. 49 is for all practical purposes a dead letter in light of the scope of the no-fault compensation system under the *AIAOD*.

14 Gonthier J. expresses the opinion that the *AIAOD* supplants not only the right of action that arises from the rules of liability in art. 1053 of the *Civil Code of Lower Canada* (in force at the time of the proceedings — now art. 1457 of the *Civil Code of Québec*, S.Q. 1991, c. 64), but also the remedies, both compensatory and exemplary, provided for in s. 49 of the *Charter*. He bases this conclusion mainly on the theory that there is a complete overlap between the general law system and that of the *Charter* as far as the conditions for liability are concerned: see L. Perret, “De l’impact de la Charte des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité au Québec” (1981), 12 *R.G.D.* 121; P.-G. Jobin, “La violation d’une loi ou d’un règlement entraîne-t-elle la responsabilité civile?” (1984), 44 *R. du B.* 222; M. Caron, “Le droit à l’égalité dans le Code civil et dans la Charte québécoise des droits et libertés” (1985), 45 *R. du B.* 345; and K. Delwaide, “Les articles 49 et 52 de la Charte québécoise des droits et libertés: recours et sanctions à l’encontre d’une violation des droits et libertés garantis par la Charte québécoise”, in *Application des Chartes des droits et libertés en matière civile* (1988), p. 95.

- 15 This theory conflicts with the position taken by other authors that the remedies provided for in s. 49 of the *Charter* are in principle autonomous: see G. Otis, “Le spectre d’une marginalisation des voies de recours découlant de la Charte québécoise” (1991), 51 *R. du B.* 561; and M. Drapeau, “La responsabilité pour atteinte illicite aux droits et libertés de la personne” (1994), 28 *R.J.T.* 31.
- 16 I agree with Gonthier J. that, as regards liability and for the purposes of s. 438 *AIAOD*, the *Charter* does not create a parallel system. Unlike him, however, I am of the opinion that the overlap between the two systems is limited to the elements of liability and the compensatory remedy and does not extend to the exemplary remedy provided for in the second paragraph of s. 49 of the *Charter*.

## II. Exemplary Damages and the Overlap Theory

- 17 The concept of exemplary damages has traditionally been, and still is, foreign to the civil law. The system of delictual liability under the *Civil Code of Lower Canada* and now the *Civil Code of Québec* is confined to the compensatory aspect of liability, which means that the remedy is calculated solely on the basis of the loss suffered and the earnings lost. Punishment and deterrence of certain types of conduct are almost exclusively within the domain of criminal liability. In *Chaput v. Romain*, [1955] S.C.R. 834, 1 D.L.R. (2d) 241, Taschereau J. (as he then was) stated this principle as follows (at pp. 246-47 D.L.R.):

[TRANSLATION] Under art. 1053 *C.C.*, the obligation to compensate flows from two essential elements: an injury suffered by the victim, and fault on the part of the author of the delict or quasi-delict. Even if no pecuniary damage is proven, there exists nevertheless, not a right to *punitive or exemplary damages* which the law of Quebec does not recognize, but without doubt a right to *moral damages*. Civil law never punishes the author of a delict or a quasi-delict. It recognizes and provides for compensation to the victim for the injury suffered. Punishment is exclusively within the province of criminal Courts: *French v. Héту* (1908), 17 Que. K.B. 429; *Guibord v. Dallaire* (1931), 53 Que. K.B. 123; [*Goyer v. Duquette* (1937), 61 Que. K.B. 503, at p. 512]; *Duhaime v. Talbot* (1937), 64 Que. K.B. 386 at p. 391. Moral damages, as any other damages awarded by the civil Court, have exclusively a compensatory character. [Emphasis in original.]

See also *Lamb v. Benoit*, [1959] S.C.R. 321, as well as the comments of Professor J.-L. Baudouin (now of the Quebec Court of Appeal) in *La responsabilité civile* (4th ed. 1994), at pp. 148-50; and those of A. Nadeau, *Traité pratique de la responsabilité civile délictuelle* (1971), at pp. 269-70.

18 In France, jurists such as Domat (*Oeuvres complètes de J. Domat* (1828), t. 1, Book II, Title VIII, Section IV) and Pothier (*Oeuvres de Pothier* (2nd ed. 1861), t. 2, Nos. 116 *et seq.*) have, since the 17th century, categorically excluded exemplary damages from the French system of civil liability. Compensation for prejudice is still the only recognized objective of damages, and no other consideration or purpose is permitted (see G. Viney and B. Markesinis, *La réparation du dommage corporel: essai de comparaison des droits anglais et français* (1985), at pp. 54-56).

19 Recently, however, the Quebec legislature has made it possible to obtain exemplary damages under specific statutes: see the *Tree Protection Act*, R.S.Q., c. P-37; the *Consumer Protection Act*, R.S.Q., c. P-40.1; the *Act respecting Access to documents held by public bodies and the Protection of personal information*, R.S.Q., c. A-2.1; the *Act respecting collective agreement decrees*, R.S.Q., c. D-2; the *Act respecting prearranged funeral services and sepultures*, R.S.Q., c. A-23.001; the *Act respecting the Régie du logement*, R.S.Q., c. R-8.1; and, finally, the *Charter*. Some civil law experts have difficulty accepting this implant and have even characterized it as a contamination of the civil law (see D. Gardner, “Les dommages-intérêts: une réforme inachevée” (1988), 29 *C. de D.* 883, at p. 905).

20 In any event, there is no doubt that this new type of damages is part of Quebec civil law. However, as Gonthier J. states, it remains an exceptional remedy and, in my view, it does not originate in the civil law’s fundamental principles of liability. Moreover, when the *Civil Code* was reformed, it was decided not to make the power to award exemplary damages a general principle. Article 1621 *C.C.Q.* clearly restates the rule

that exemplary damages cannot be recovered unless a specific statute provides for them, and adds a number of criteria to regulate such an award (see *Roy v. Patenaude*, [1994] R.J.Q. 2503 (C.A.)).

21 Furthermore, it is clear that the purpose of awarding exemplary damages is not to compensate, but is related to the law's role of punishment and deterrence: see *Papadatos v. Sutherland*, [1987] R.J.Q. 1020 (C.A.); *West Island Teachers' Association v. Nantel*, [1988] R.J.Q. 1569 (C.A.); *Lemieux v. Polyclinique St-Cyrille Inc.*, [1989] R.J.Q. 44 (C.A.); and *Association des professeurs de Lignery v. Alvetta-Comeau*, [1990] R.J.Q. 130 (C.A.). This is also the conclusion of my colleague Gonthier J.

22 Thus, like the general common law principle, some specific Quebec statutes authorize the awarding of exemplary damages to suppress and deter certain types of behaviour (see C. Dallaire, *Les dommages exemplaires sous le régime des Chartes* (1995), at pp. 17-21). It must now be determined what place this new institution has in, and how it fits into, Quebec civil law, a task that this Court has already undertaken in other areas, including trusts (see *Royal Trust Co. v. Tucker*, [1982] 1 S.C.R. 250, *per* Beetz J.).

23 It is in this context that the second paragraph of s. 49 of the *Charter* provides for an exemplary remedy where there has been "unlawful and intentional" interference with the fundamental rights guaranteed therein. It should be added that the *Charter* mentions not only the possibility of exemplary damages but also, in the first paragraph of s. 49, compensation for moral or material prejudice, that is, the awarding of compensatory damages.

24 Having said this, it must now be determined whether the theory that the general law system overlaps with that of the *Charter* applies to the exemplary remedy provided for

in the *Charter*. In my view, the overlap must be confined to the conditions for establishing a liability-related right, namely fault, prejudice and a causal connection, which derive from general civil law principles. Thus, when authors — including Professor Baudouin, *supra*, at p. 224 — argue that the *Charter* does not create an autonomous, distinct system of liability, their remarks must be interpreted as applying to the necessary elements for establishing liability and not automatically to particular remedies, which may not overlap under the two systems.

25 With regard to these remedies specifically, a distinction must be drawn between compensation for moral and material prejudice (first paragraph of s. 49 of the *Charter*) and exemplary damages (second paragraph of s. 49). Only the first type of remedy, which is compensatory in nature, exists under the general law and, accordingly, it is only in respect of this remedy that there is a complete overlap between the general law system and that of the *Charter*. Thus, the two sources of compensation merge, which also makes it possible to avoid double compensation for prejudice.

26 The exemplary remedy provided for in the second paragraph of s. 49 of the *Charter* is an exception to the general law system in Quebec. Accordingly, these two systems cannot overlap in respect of this remedy. It is in this sense that I understand the following passage from *La responsabilité civile*, *supra*, at p. 224:

[TRANSLATION] In a liability action, however, the Charter may have an impact on what damages are awarded, such as where it requires punitive damages to be awarded in addition to compensatory damages in the case of unlawful and intentional interference.

It can therefore be said that the *Charter* differs from the general law with respect to exemplary damages in that it establishes a remedy that is autonomous and distinct from compensatory remedies: see Perret, *supra*, at pp. 164-65; and Delwaide, *supra*, at p. 98.

27 In practical terms, a claim for exemplary damages must be based on the second paragraph of s. 49 of the *Charter*. In establishing liability, however, the general law rules under art. 1053 *C.C.L.C.* (now art. 1457 *C.C.Q.*) will apply. The procedural rules of the *Code of Civil Procedure*, R.S.Q., c. C-25, will also be applicable. In short, with regard to exemplary damages under the second paragraph of s. 49, the elements of the right (fault, prejudice and causal connection) derive from the general civil law, but the remedy available for a violation of that law derives from a specific statute, the Quebec *Charter*.

28 In sum, it appears that, although it does not create a parallel system of liability or conflict with the civil law tradition, the exemplary remedy under the second paragraph of s. 49 of the *Charter* is an exceptional concept in Quebec law that must, while advancing its underlying objective, fit together with other legislative schemes, including that of the *AIAOD*, which should now be discussed in greater detail.

### III. The System under the *AIAOD* and the Civil Immunity Clause

29 Gonthier J. undertakes a detailed historical review of the legislation dealing with Quebec's employment injury compensation system. I agree completely with that review and will restate only a few points that I consider essential to dispose of the first issue.

30 To begin with, before the first specific statute dealing with industrial accident compensation was passed, victims could obtain compensation only on the basis of the rules of liability established by the general law. In 1909, a no-fault compensation system for injuries suffered in the workplace replaced the general law remedies for the first time. For the parties involved, namely workers and employers, the "bargain" established by that exceptional legislation had a dual effect: workers were guaranteed partial, fixed-sum compensation and employers were given immunity from civil

liability actions. See *Traité de droit civil du Québec*, t. 8, by A. Nadeau, 1949; K. Lippel, *Le droit des accidentés du travail à une indemnité: analyse historique et critique* (1986); and L. Dubé, “L’immunité civile des employeurs en vertu de la Loi sur les accidents du travail et les maladies professionnelles”, in *Développements récents en droit de la santé et sécurité au travail* (1993), p. 81.

31 In *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, in which this Court had to decide whether provincial occupational health and safety legislation was constitutionally applicable to a federal undertaking, Beetz J., speaking for the Court, stated the following about the nature of industrial accident compensation schemes (at p. 851):

In general, workmen’s compensation schemes, whether in British Columbia, Quebec or the schemes in all or most of the provinces, are statutory insurance schemes of no-fault collective liability, which replace the former systems of individual civil liability based on fault. They are generally financed, at least in part, by contributions from employers. They create a complex system of direct statutory remedies and subrogatory remedies which have little to do with the old common law or *droit commun* remedies. Their main purpose is compensation and thus more or less a form of final exhaustion of remedies. [Emphasis added.]

32 It is also necessary to elaborate on the civil immunity provided for in s. 438 *AIAOD*, which, according to my colleague, completely deprives those who suffer employment injuries of their right to bring civil liability actions against their employers. Co-workers would also have such immunity under s. 442, the purport of which is the same as s. 438. First of all, I note that this type of clause, which derogates from the general law by excluding the jurisdiction of the courts, must be interpreted restrictively (see P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 421-24).

33 For the sake of convenience, I will reproduce the English and French versions of s. 438 *AIAOD*:

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

**438.** Le travailleur victime d'une lésion professionnelle ne peut intenter une action en responsabilité civile contre son employeur en raison de sa lésion. [Emphasis added.]

Article 1056a *C.C.L.C.* (in force at the time of these proceedings) recognizes this civil immunity as part of the general law by barring any “recourse” in civil liability.

34 I note first that s. 438 of the *AIAOD* refers to a civil liability “action” (“recourse” under art. 1056a *C.C.L.C.*) and not to liability-related “rights”. In this regard, a parallel can be drawn with the automobile accident compensation system under the *Automobile Insurance Act*, R.S.Q., c. A-25. That Act is *in pari materia* with the issue in the instant case, since it also creates a “statutory insurance schem[e] of no-fault collective liability” as that term was used in *Bell Canada, supra*, at p. 851. The civil immunity clause in that Act provides as follows:

**83.57.** Compensation under this title stands in lieu of all rights and remedies by reason of bodily injury and no action in that respect shall be admitted before any court of justice.

**83.57.** Les indemnités prévues au présent titre tiennent lieu de tous les droits et recours en raison d'un dommage corporel et nulle action à ce sujet n'est reçue devant un tribunal. [Emphasis added.]

35 The term “*droit*” is defined as follows in *Vocabulaire juridique* (1994), a dictionary edited by G. Cornu, at p. 290:

[TRANSLATION] **4** In a technical, precise sense, a right [“*droit* subjectif”]: individual \*prerogative recognized and sanctioned by the law [“*Droit* objectif”, which is capitalized, unlike “*droit* subjectif”], which allows the holder thereof to do, require or prohibit something for his or her own benefit or, sometimes, for someone else’s benefit. [Emphasis added.]

See also P.-A. Crépeau, *Private Law Dictionary and Bilingual Lexicons* (2nd ed. 1991), at p. 381.

36 The term “*action*” (“remedy” has more or less the same meaning) is defined as follows in *Vocabulaire juridique*, at p. 19:

[TRANSLATION] **a** / (usual meaning). Sanction of a \*right; legal means available for obtaining judicial protection of a right or legitimate interest (in this sense, every right carries with it an action), potential guarantee included in the patrimony of an individual (one speaks of an individual’s rights and actions, art. 1166).

**b** / (precise meaning). Right to bring suit; right (available on certain conditions: \*interest, \*capacity, etc.) for a person who makes a \*claim (main, incidental, appeal, appeal to Court of Cassation, etc.) to be heard and judged on the merits of that claim, which cannot be found to be barred, the judge being required to declare whether it is valid or invalid. . . . [Emphasis added.]

The definition of “action” in *Private Law Dictionary and Bilingual Lexicons*, at p. 11, is even more revealing in Quebec’s bilingual legislative context:

**1.** (*Jud. Law*) Right to submit a claim to a judicial authority for the purpose of obtaining the sanction or acknowledgement of a right.

**Occ.** Art. 2188 C.C.

**Obs.** The term is rarely used in this way in Quebec judicial law; the word *action* used alone is employed more in the sense of a judicial demand, whereas an *action* in the sense of the power to submit a claim to the courts is characterized as a *right of action* (art. 2188 C.C.).

**Fr.** action, action en justice. [Emphasis added.]

37 To return to the relevant statutory provisions, s. 438 *AIAOD* uses the term “action” to confer civil immunity on employers, while art. 1056a *C.C.L.C.* uses the term “recourse” and s. 83.57 of the *Automobile Insurance Act* refers to “action”, “remedies” and “rights”. On this basis, it would seem that civil immunity with respect to employment injuries is more limited: it applies only to the power to submit a claim to a judicial authority for the purpose of obtaining the sanction or acknowledgment of a right and does not extend to the right itself, that is, the interest legally protected by law. Moreover, the English version of s. 438 *AIAOD* refers to a “civil liability action” (emphasis added), and not a “right of action”, thus confirming that it is the power to obtain the sanction or acknowledgment of a right that is excluded by that clause.

38 Moreover, the civil immunity clause in s. 438 *AIAOD* bars “civil liability” actions (emphasis added) and not simply “liability” actions. The term “*responsabilité*” (liability) is defined as follows in *Vocabulaire juridique*, at p. 723:

[TRANSLATION] Obligation to answer for damage in court and to bear the civil, penal, disciplinary and other consequences thereof (to the victim, society, etc.). See *accountability, answer. Ant. non-liability*. [Emphasis added.]

See also the definition in *Private Law Dictionary and Bilingual Lexicons*, at p. 254.

39 The term “*responsabilité civile*” (civil liability) is defined as follows in *Vocabulaire juridique*, at p. 724:

[TRANSLATION] **a** / In a generic sense (which encompasses delictual and contractual liability), any obligation to answer civilly for damage one has caused to another, that is, to remedy it in kind or by an equivalent (esp. by paying \*compensation). See *non-cumulativeness* [“non-cumul”].

**b** / Refers more spec. to civil liability in delict, as opposed to penal liability. See *\*civil action*. [Emphasis added.]

To the same effect, see *Private Law Dictionary and Bilingual Lexicons*, at pp. 62-63.

40 Thus, when s. 438 *AIAOD* refers to a “civil liability” action, it means the power to sue to obtain compensation for prejudice; this is more limited than a “liability” action, which may deal not only with compensation for prejudice but with punitive, disciplinary or deterrent remedies. It is therefore apparent that the *AIAOD*’s civil immunity clause is applicable only to actions for compensation and not to the power to submit a claim to a judicial authority to obtain some other remedy, such as an exemplary remedy.

41 Above and beyond these semantic arguments about s. 438 *AIAOD*, it is necessary, in order to resolve the issue under consideration, to determine whether the civil immunity

clause under the *AIAOD* can be reconciled with the specific remedies provided for in the *Charter*. The solution I propose seems to me to be compatible with all the imperatives involved.

#### IV. *Charter of Human Rights and Freedoms*

42 The *Charter* is not an ordinary statute implemented by the Quebec legislature in the same way as any other enactment. Rather, it has a special status: it is a fundamental, quasi-constitutional statute of public order that must be given a large and liberal interpretation in order to achieve the general purposes underlying it as well as the specific objectives of its particular provisions.

43 This Court has already discussed the nature, role and scope of provincial and federal legislation dealing with human rights and freedoms and the manner in which it should be interpreted. Those comments apply *mutatis mutandis* to the Quebec *Charter*. In *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, at p. 158, Lamer J. (as he then was) wrote that British Columbia's *Human Rights Code* could not be interpreted "as another ordinary law of general application. It should be recognized for what it is, a fundamental law". As well, in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, La Forest J. explained the principle that human rights legislation must be interpreted generously to attain the objectives being pursued by it (at p. 89):

As McIntyre J., speaking for this Court, recently explained in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional". . . .

See also *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226; *Canadian National Railway*

*Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; and *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571.

44 In the context of the Quebec *Charter*, see *Thibault v. Corporation professionnelle des médecins du Québec*, [1992] R.J.Q. 2029 (C.A.), and *Archambault v. Doucet*, [1993] R.J.Q. 2389 (Sup. Ct.). See also authors G. Rémillard, “Les règles d’interprétation relatives à la Charte canadienne des droits et libertés et à la Charte des droits et libertés de la personne du Québec”, in D. Turp and G.-A. Beaudoin, eds., *Perspectives canadiennes et européennes des droits de la personne* (1986), p. 205; J.-Y. Morin, “La constitutionnalisation progressive de la Charte des droits et libertés de la personne” (1987), 21 *R.J.T.* 25; and G.-A. Beaudoin, “De la suprématie de la *Charte canadienne des droits et libertés* et des autres chartes sur le droit canadien, fédéral ou provincial”, in G.-A. Beaudoin, ed., *Vues canadiennes et européennes des droits et libertés* (1989), p. 23.

45 Moreover, not only does the nature of this human rights and freedoms legislation call for a large and liberal interpretation, but s. 53 of the *Charter* also provides that “[i]f any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the Charter”. This provision has been relied upon to ensure that statutes are interpreted in a manner consistent with the rights guaranteed in the *Charter*: see *Thibault v. Corporation professionnelle des médecins du Québec*, *supra*; and *Syndicat national des employés de l’Institut Doréa (C.S.N.) v. Conseil des services essentiels*, [1987] R.J.Q. 925 (Sup. Ct.); see also Côté, *supra*, at p. 311.

46 In my view, these principles apply as much to the remedies provided for in the *Charter* as they do to the fundamental rights protected therein. This brings me to a more specific discussion of s. 49 of the *Charter* and its relationship to the immunity clause in s. 438 *AIAOD*.

V. Section 49 of the Charter in Relation to Section 438 AIAOD

47 The purpose of the first paragraph of s. 49 of the *Charter* is to provide compensation for moral or material prejudice, while the purpose of the second paragraph of the same section is to punish and deter “unlawful and intentional” interference with guaranteed rights. It is true that the *Charter* provides for other remedies aimed at punishment and deterrence, including penal proceedings under ss. 134 and 135 and the possibility of applying to the Human Rights Tribunal for any appropriate measure of redress under ss. 80 and 111 of the *Charter*. In my view, however, these measures are partial and inadequate to meet the objectives of punishment and deterrence that motivate an award of exemplary damages, especially in the labour context, where some employers will not be induced to rectify a climate of harassment except by the threat of monetary retaliation under the second paragraph of s. 49 of the *Charter*. Moreover, making these alternative measures the only possible remedies for harassment in the workplace would deprive this paragraph of an important part of its punitive and deterrent role, and to do so would disregard the large and liberal interpretation principles applicable to the *Charter*.

48 What is more, in the case at bar the fundamental right in respect of which the appellant seeks a remedy under s. 49 is the right not to be harassed in the workplace, which is guaranteed in s. 10.1 of the *Charter*. That section is expressly included among those that are given relative preponderance by s. 52 of the *Charter*, which I will reproduce here for the sake of convenience:

**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.

49 My colleague Gonthier J. expresses the opinion that the *Charter*’s primacy does not extend to the remedies provided for in s. 49 since that section is not expressly mentioned in s. 52. With respect, it would be paradoxical to say the least if the

precedence conferred by the legislature on the rights guaranteed in ss. 1 to 38 of the *Charter* did not extend to s. 49, the precise purpose of which is to order remedies to enforce those fundamental rights. According to my colleague's reasoning, all the remedies provided for in the *Code of Civil Procedure*, for example, would have to be mentioned in the *Civil Code of Québec* to be considered principles of the *jus commune*, as that term is used in the preliminary provision of the *Civil Code of Québec*. Yet it is well known that the *Code of Civil Procedure* establishes the general legal rules respecting sanctions under Quebec civil law (see D. Ferland and B. Emery, *Précis de procédure civile du Québec* (2nd ed. 1994), vol. 1, at pp. 1-2). Likewise, with respect to fundamental freedoms, if the *Charter* is to afford effective protection to the rights under ss. 1 to 38, it must obviously include the corollaries necessary to exercise those rights, namely the remedies provided for in s. 49 of the *Charter*.

50 In my opinion, it is clear that the fundamental rights guaranteed in ss. 1 to 38 of the *Charter*, which may not be derogated from except by an express statutory provision, would be meaningless if the remedies under s. 49 did not also have the same precedence. The general principle that a person has rights only to the extent that a remedy is available for their violation applies with even more force to fundamental freedoms (see *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 229). No one could argue, for example, that the remedies under ss. 24 and 52 of the *Constitution Act, 1982* are not as fundamental as the rights guaranteed in the *Canadian Charter of Rights and Freedoms*. In my view, therefore, it is unnecessary for s. 52 of the *Charter* to mention s. 49 specifically, since the latter provision simply sets out the possible remedies and does not guarantee a right. It is thus correct to recognize that, although s. 49 of the *Charter* is not specifically mentioned in s. 52, it is incidental to the rights specified in ss. 1 to 38, including the right not to be harassed in the workplace, and therefore has the same relative preponderance.

51 I would like to add that the application of s. 52 of the *Charter* also excludes s. 51, which provides that “[t]he 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” (emphasis added). Accordingly, with deference to the opinion of my colleague Gonthier J., I am not of the view that ss. 51 and 52 of the *Charter* must be “read together” in the case at bar.

52 If, as I believe, s. 49 of the *Charter*, as a corollary to ss. 1 to 38, prevails over statutes that do not derogate expressly therefrom, it would seem, *prima facie*, that the two types of remedies provided for in s. 49 must be found to take precedence over the compensation system under the *AIAOD*. However, in the case at bar it is apparent that the preponderance of s. 49 of the *Charter* has an impact only as regards the exemplary remedy under the second paragraph of that section.

53 With respect to the compensatory remedy under the first paragraph of s. 49, the general law system overlaps with that of the *Charter* when it comes to harassment in the workplace. More importantly, that overlap extends to the compensatory objective of the remedies provided for in the *AIAOD*, which also grants indemnities for loss of income and physical impairment (see s. 1 *AIAOD*). In fact, although the no-fault compensation system under the *AIAOD* authorizes only partial, fixed-sum compensation — *inter alia* with respect to moral damages, which it seems cannot be awarded under the *AIAOD* — it has precisely the same objective as the first paragraph of s. 49 of the *Charter*, namely providing compensation for prejudice.

54 Moreover, in overall terms this “statutory insurance schem[e] of no-fault collective liability” (see *Bell Canada, supra*, at p. 851) is undoubtedly more beneficial for all those involved, including workers who sustain an employment injury and wish to be compensated for the prejudice suffered (Lippel, *supra*). In short, the compensatory objective underlying the first paragraph of s. 49 of the *Charter* is adequately attained

under the *AIAOD* system without having to rely on the relative preponderance provided for in s. 52.

55 However, the same cannot be said of the punitive, deterrent remedy under the second paragraph of s. 49. The two systems do not overlap in respect of this remedy, which, it seems, cannot be awarded under the *AIAOD*. Full effect must therefore be given to its punitive, deterrent role in the analysis under the second paragraph of s. 49 of the *Charter*. Moreover, since the immunity clause in s. 438 *AIAOD* does not mention exemplary damages, it does not explicitly derogate, as required by s. 52 of the *Charter*, from the possibility of ordering the payment thereof.

56 Unlike Gonthier J., I do not think the fact that the *AIAOD* came into force after the *Charter* shows that there was an intention to derogate from the second paragraph of s. 49, since s. 52 of the *Charter* expressly states that the *Charter* prevails over all statutory provisions, “even subsequent to the Charter”. Moreover, the origin of the issue before this Court, namely the inclusion of harassment in the workplace in the definition of “employment injury” under the *AIAOD*, results from the CALP’s 1988 and 1989 decisions. This expansive interpretation could not, of course, have been foreseen by the legislature in 1985. I am therefore of the view that the date on which the *AIAOD* came into force is not relevant to these proceedings.

57 It goes without saying that the question of primacy would not arise if the legislature had been explicit about the relationship between exemplary damages under the second paragraph of s. 49 of the *Charter* and the no-fault compensation system under the *AIAOD*. However, as these legislative schemes currently stand, giving precedence to the second paragraph of s. 49 of the *Charter* seems to me the solution that is most compatible with the imperatives involved. Thus, as regards harassment in the workplace, which is covered by s. 10.1 of the *Charter*, the exemplary remedy under the second paragraph of s. 49 must, in the event of inconsistency, take precedence over

the civil immunity clause in s. 438 *AIAOD* precisely because of the relative preponderance that must be given to s. 10.1 of the *Charter*.

58 Finally, victims of harassment in the workplace to whom the *AIAOD* is applicable should, as far as possible, be entitled to the same *Charter* remedies as victims of harassment outside the workplace, as noted by Mailhot J.A. of the majority of the Court of Appeal. Moreover, in terms of logic, the need to reconcile s. 438 *AIAOD* with the second paragraph of s. 49 of the *Charter* should favour a solution that gives effect to the exemplary remedy rather than one that gives it no effect: *interpretatio chartarum benigne facienda est ut res magis valeat quam pereat*. However, in the absence of a statutory amendment, exemplary damages do not seem to be recoverable under the *AIAOD*.

59 In short, the exemplary damages provided for in the second paragraph of s. 49 of the *Charter* are an exceptional remedy in relation to the general law remedies; the general law system does not overlap with that of the *Charter* with respect to such damages. Nevertheless, this exemplary remedy must be interpreted generously since its purpose is to enforce the fundamental rights guaranteed in the *Charter*. Moreover, the existence of two types of remedies (compensatory and exemplary) under s. 49 of the *Charter*, as well as the legislative objectives behind an award of exemplary damages (punishment and deterrence) and the relative preponderance of the remedy under the second paragraph of s. 49 when it comes to harassment in the workplace (ss. 10.1 and 52 of the *Charter*), seem to me to authorize a distinction between compensatory remedies based on the general law or the first paragraph of s. 49 (pursuant to the overlap theory) and the exemplary remedy under the second paragraph of s. 49 of the *Charter*, at least for the purposes of s. 438 *AIAOD*.

60 The civil immunity clause in s. 438 *AIAOD* is limited to civil liability “actions” (art. 1056a *C.C.L.C.* speaks of “recourse”). Section 438 therefore does not preclude

the conditions for liability from being established. As well, and this is the key passage, this immunity clause is limited to “civil liability” actions, that is, the power to sue to obtain compensation for prejudice suffered. Thus, s. 438 also does not bar court actions to punish and deter certain types of behaviour.

61 Accordingly, in light of the two legislative schemes involved and their respective imperatives, I am of the view that the civil immunity clause in s. 438 *AIAOD* applies only to compensatory remedies under the general civil law and does not cover the exemplary remedy available under an exceptional provision in the *Charter*, which must be interpreted in a large and liberal manner and in accordance with its purpose.

62 My colleague is of the opinion that the remedy provided for in the second paragraph of s. 49 of the *Charter* can only be incidental to the compensatory remedy under the first paragraph of s. 49. With respect, I cannot accept that interpretation. I am not convinced by my colleague’s argument that the words “in addition”, in the second paragraph, necessarily make an award of exemplary damages dependent on an award of compensatory damages. In my view, those words simply mean that a court can not only award compensatory damages but can “in addition”, or equally, as well, moreover, also (see the definition of “*en outre*” in *Le Grand Robert de la langue française* (1986), vol. 6), grant a request for exemplary damages. The latter type of damages is therefore not dependent on the former. The only conditions for the second paragraph of s. 49 to apply are the establishment of liability (fault, prejudice and causal connection) and the “unlawful and intentional” nature of the interference with a *Charter* right.

63 In short, a literal, contextual, logical and teleological interpretation of the legislative schemes of the *AIAOD* and the *Charter*, and the interpretation principles applicable to the latter, lead me to conclude that employers have civil immunity under s. 438 *AIAOD* only with respect to “civil liability actions”, that is, the power to submit a

claim to a court to obtain a compensatory remedy based on the general law or the first paragraph of s. 49 of the Charter (pursuant to the overlap theory), and not with respect to the exemplary remedy under the second paragraph of s. 49 of the Charter. The remedy provided for in the second paragraph of s. 49 must remain available to victims of harassment in the workplace notwithstanding s. 438 AIAOD.

64 In practice, to claim exemplary damages under the second paragraph of s. 49 of the *Charter*, a victim of harassment in the workplace must first prove, in the forum of competent jurisdiction, the elements of fault, prejudice and causal connection. Furthermore, as required by the second paragraph of s. 49, he or she must show that the interference with the guaranteed right was “unlawful and intentional” (see *Association des professeurs de Lignery v. Alvetta-Comeau, supra*, and *West Island Teachers’ Association v. Nantel, supra*).

65 The “unlawful and intentional” interference must be attributable to the person who engaged in the harassment in the workplace or, in the case of an action under art. 1054 C.C.L.C. (now art. 1463 C.C.Q.), to the employer who, for example, did nothing to create a harassment-free work environment (see *Robichaud v. Canada (Treasury Board), supra*, and *Halkett v. Ascofigex Inc.*, [1986] R.J.Q. 2697 (Sup. Ct.)). I agree with Mailhot J.A. of the majority of the Court of Appeal that, in the latter situation, the employer’s liability under the second paragraph of s. 49 of the *Charter* will depend on the evidence and the assessment thereof. Professor Perret, *supra*, dealt with this aspect of employers’ liability to pay exemplary damages (at p. 140, note 48):

[TRANSLATION] Punitive damages are payable by the person who committed the intentional fault. However, what happens where another person, who has the person who committed the fault under his or her care, control or supervision, is normally liable for the latter under art. 1054 of the *Civil Code*? For example, are employers, who are normally liable for the compensatory damages payable as a result of the fault of their employees in the performance of their duties, also liable for the exemplary damages their employees are ordered to pay for having, in the course of their work, intentionally caused the damage complained of by the victim? . . . It seems highly doubtful that a person can be *punished* for the intentional fault of another under any circumstances. Does not punishment presuppose that the person being punished had wrongful intent? That

is why I feel that employers cannot be held jointly and severally liable for the exemplary damages payable as a result of the intentional fault of their employees, except where there was some complicity between them (e.g. orders given, knowledge and failure to order the wrongdoing stopped) or where the employee in question is in fact one of the managers of the company. [Italics in original; underlining added.]

See also Dallaire, *supra*, at pp. 59-60. Since an exhaustive analysis of this concept would go beyond the scope of the case at bar, this question remains open for discussion.

66 As a final note, I should add that an interpretation that authorizes the awarding of an exemplary remedy under the second paragraph of s. 49 of the *Charter* to a person who has obtained a compensatory remedy under the *AIAOD* is consistent with the doctrine of *res judicata*. The presumption of *res judicata* is stated in art. 1241 *C.C.L.C.* (now art. 2848 *C.C.Q.*), which provides as follows:

**1241.** The authority of a final judgment (*res judicata*) is a presumption *juris et de jure*; it applies only to that which has been the object of the judgment, and when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon.

*Roberge v. Bolduc*, [1991] 1 S.C.R. 374, discussed the nature and conditions of *res judicata*. These conditions are twofold: those pertaining to the judgment itself and those pertaining to the action. First, the court must have jurisdiction and the judgment must be definitive and must have been rendered in a contentious matter. Second, the triple identity mentioned in art. 1241 *C.C.L.C.*, namely the identity of parties, object and cause, must be present.

67 In the case at bar, it is the conditions pertaining to identity that are relevant. Although the parties involved (the worker and the employer) and the cause of action (the facts giving rise to rights) are identical, the object of the proceedings is different. In *Roberge v. Bolduc*, *supra*, at p. 414, I noted that the nature of both the right sought and

the remedy or purpose for which it is sought must be the same. In the instant case, the remedy authorized by the *AIAOD* is compensatory in nature, whereas the remedy provided for in the second paragraph of s. 49 of the *Charter* is an exemplary one that seeks to punish and deter “unlawful and intentional” interference with the rights guaranteed therein. Since these remedies have different purposes, the presumption of *res judicata* does not apply.

68 In conclusion, I am of the view that s. 438 *AIAOD*, the effect of which is to preclude a person who receives compensation for an employment injury under the *AIAOD*, including a victim of harassment in the workplace, from obtaining a compensatory remedy based on the general law or the first paragraph of s. 49 of the *Charter*, is not applicable to the exemplary remedy under the second paragraph of s. 49 of the *Charter*. The only issue that remains to be determined is that of the appropriate forum for a worker claiming exemplary damages from his or her employer under the second paragraph of s. 49 of the *Charter* when there is a collective agreement between them.

## VI. Forum

69 Where there are no specific restrictions, any person may apply to the ordinary courts to enforce his or her rights. In the case of harassment in the workplace, however, a number of other forums are available in which victims can obtain relief and compensation for the harm caused (see D. Monet, “Qui a la compétence sur le harcèlement au travail?”, in *Développements récents en droit du travail (1995)*, p. 1). They are as follows: (1) agencies that apply the *AIAOD*, namely the CSST, the Bureau de révision paritaire and the CALP; (2) the labour commissioner who has jurisdiction to hear complaints under s. 124 of the *Act respecting labour standards*, R.S.Q., c. N-1.1; (3) the Human Rights Tribunal established by s. 100 of the *Charter*, which has non-exclusive jurisdiction under ss. 80 and 111 in respect of interference with the rights protected therein; and finally, (4) grievance arbitrators under s. 100 of the

*Labour Code*, R.S.Q., c. C-27, in accordance with their jurisdiction under collective agreements.

70 The issue to be determined is that of the appropriate forum when the person to whom the exemplary remedy under the second paragraph of s. 49 of the *Charter* is available is a worker governed by a collective agreement who is taking action against his or her employer for harassment in the workplace. The majority of the Court of Appeal found that the ordinary courts have jurisdiction in this regard, even in a context of labour relations governed by a collective agreement, and accordingly dismissed the respondents' motion for declinatory exception. With respect, I cannot agree with that conclusion for the following reasons. To better explain my reasoning, I will review the powers of the various agencies I have mentioned to determine the appropriate forum in the instant case.

71 As the Court of Appeal concluded, the agencies that apply the *AIAOD* seem to have only the power to award compensation. Section 349 *AIAOD* describes the jurisdiction of the CSST (and the CALP) as follows:

**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. [Emphasis added.]

Since the *AIAOD* provides only for compensation for injuries suffered in the workplace (see s. 1 *AIAOD*), the agencies applying that statute would not have jurisdiction to order the payment of exemplary damages.

72 The labour commissioner has jurisdiction over harassment in the workplace when a worker with at least three years of uninterrupted service in the same enterprise leaves his or her employment or is dismissed. The worker can then file a complaint under s. 124 of the *Act respecting labour standards* and the commissioner can, under s. 128, para. 1(3) of that Act, render “any other decision he believes fair and reasonable”. This

power has been interpreted as authorizing an award of exemplary damages under the second paragraph of s. 49 of the *Charter* (see *Joannette et Pièces d'auto Richard Ltée*, [1993] C.T. 398).

73 I note that, according to s. 124 of the *Act respecting labour standards*, the commissioner's powers are subsidiary in that he has jurisdiction "except where a remedial procedure, other than a recourse in damages, is provided elsewhere in this Act, in another Act or in an agreement". Recourse to the grievance procedure under a collective agreement will thus preclude the labour commissioner from exercising his or her powers (see *Girard v. Produits de viande Cacher Glatt Ltée*, [1986] T.A. 304, and *Clarke et Université Concordia*, D.T.E. 87T-765 (Arb. Trib.)). As well, it appears that the commissioner loses jurisdiction where a complaint is made to the Commission des droits de la personne of Quebec ("CDPQ") and then submitted to the Human Rights Tribunal.

74 The Human Rights Tribunal has jurisdiction under ss. 80 and 111 of the *Charter* over any application submitted to it by the CDPQ for ratification of the remedies initially recommended to the parties by the CDPQ under s. 79, which authorizes the CDPQ to propose to the parties "any measure of redress, such as the admission of the violation of a right, the cessation of the act complained of, the performance of any act or the payment of compensation or exemplary damages" (emphasis added). Thus, when the CDPQ proposes an award of exemplary damages under the second paragraph of s. 49 of the *Charter* and applies to the Human Rights Tribunal for ratification of its recommendation, the latter can order the payment of such damages.

75 I note in passing that the Human Rights Tribunal's jurisdiction to hear and dispose of complaints concerning the violation of *Charter* rights does not mean that the courts have no jurisdiction in this regard. There is no express provision in the *Charter* excluding the jurisdiction of the ordinary courts. Although this type of express

provision is found in human rights statutes in a number of common law provinces, in Quebec s. 76(3) of the *Charter*, which concerns the prescription of civil actions, and s. 77, para. 1(2), which authorizes the CDPQ to refuse or cease to act, implicitly provide that individuals may bring an action in the ordinary courts for interference with one of their *Charter* rights. These provisions refer to situations in which “the victim or the complainant has, on the basis of the same facts, personally pursued one of the remedies provided for in sections 49 and 80”.

76 This being said, where harassment in the workplace is concerned the jurisdiction of the labour commissioner and the Human Rights Tribunal to order an employer to pay exemplary damages under the second paragraph of s. 49 of the *Charter* is significantly limited by the powers of grievance arbitrators.

77 In the instant case, the jurisdiction of arbitrators to award exemplary damages for harassment in the workplace was the subject of a cross-appeal by the respondents, who relied on essentially the same arguments they had made on the motion for declinatory exception at trial. This Court must therefore determine whether the grievance arbitrator has jurisdiction in the case at bar. As a preliminary matter, the legislative and judicial context of the jurisdiction of arbitrators in general should be briefly examined.

78 Section 100 of the *Labour Code* provides that “[e]very grievance shall be submitted to arbitration”; the term “grievance” is defined in s. 1(f) as “any disagreement respecting the interpretation or application of a collective agreement”. First of all, since grievance arbitrators derive their jurisdiction from a collective agreement, that is, an agreement between an employer and a union, their orders are enforceable only against the employer, which is a party to the agreement. Thus, even if arbitrators have the power to award exemplary damages for harassment in the workplace, they can order only the employer — personally or under art. 1054 *C.C.L.C.* (now art. 1463

*C.C.Q.*) — to pay such damages, and not a co-worker who engaged in the harassment. Other adjudicators, as mentioned above, have jurisdiction over the latter.

79 Moreover, the courts have consistently held that grievance arbitrators have exclusive jurisdiction where the issue and the remedy sought come within their jurisdiction under a collective agreement or statute: see *General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537; *Shell Canada Ltd. v. United Oil Workers of Canada*, [1980] 2 S.C.R. 181; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; and *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298.

80 Finally, it is also established that the power of an administrative body such as a grievance arbitrator to apply the law extends to charters and that an arbitrator can also award charter remedies provided that he or she has jurisdiction over the parties, the subject matter of the dispute and the order sought. In *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, McLachlin J., speaking for the majority of the Court, recently summarized this principle as follows (at p. 963):

I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to Charter remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal. [Emphasis added.]

See also *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967; and *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75.

81 In the case at bar, there is no doubt that the grievance arbitrator has jurisdiction over the appellant Béliveau St-Jacques (the worker) and the respondents the Confederation of National Trade Unions and, to the extent the collective agreement is binding on it, the Fédération des employées et employés de services publics inc. (her employers) under the collective agreement. It remains to be determined, first, whether the arbitrator has jurisdiction over the subject matter of the dispute, that is, whether the collective agreement deals with questions of workplace harassment, and second, whether the arbitrator has the power to order the remedy claimed, namely exemplary damages under the second paragraph of s. 49 of the *Charter*. If so, the grievance arbitrator's jurisdiction will prevent the ordinary courts and other agencies that would otherwise have jurisdiction from exercising their powers.

82 The main question that arises with respect to the grievance arbitrator's jurisdiction by reason of the subject matter is whether there must be a specific provision in the agreement authorizing the arbitrator to deal with a grievance related to harassment in the workplace or whether a general provision authorizing the arbitrator to dispose of disputes about working conditions is sufficient. It is clear that if the collective agreement specifically authorizes the arbitrator to deal with a harassment grievance or incorporates ss. 10 and 10.1 of the *Charter*, there is no need to even ask whether the arbitrator has jurisdiction: the terms of the agreement would leave no room for doubt. However, according to R. P. Gagnon, L. LeBel and P. Verge in *Droit du travail* (2nd ed. 1991), in cases where the wording is less specific, the content of a collective agreement must be interpreted in a large and liberal fashion (at p. 525):

[TRANSLATION] In short, the working condition concept must reflect the collective and individual nature of the rights arising from the collective agreement and the bargaining system established by the labour law in force in Quebec. This expansive concept corresponds to that found in the most recent cases. The agreement, which encompasses the most varied aspects of relations between the employer, the union and workers, has truly become a "workplace charter". There are hardly any limits to this diversity and flexibility other than public order and the mandatory provisions of certain statutes. [Emphasis added.]

83 In *Schokbéton Québec Inc. et Métallurgistes unis d'Amérique, section locale 15398*, [1984] T.A. 176, the arbitrator found that he had jurisdiction even though the agreement contained no specific provisions dealing with harassment (at p. 177):

[TRANSLATION] If the tribunal declares that it does not have jurisdiction to rule on such a grievance, that would mean employees' rights under the collective agreement could be violated with impunity using indirect methods. Such a conclusion would be unacceptable. The purpose of arbitration is to resolve disputes that arise from the parties' relations under the collective agreement so as to allow those relations to continue without the parties having to deal with incessant conflicts or disputes.

For these reasons, the tribunal therefore concludes that in the absence of specific provisions on this matter in a collective agreement, it has jurisdiction to decide the grievance of an employee who claims to have been harassed, because such a question goes to the very heart of the rights of employees that the collective agreement was designed to protect. [Emphasis added.]

Arbitrators thereafter relied on the introductory or general clauses of collective agreements to find that they had jurisdiction over harassment in the workplace: see *Centre d'accueil du Haut St-Laurent et Fédération des affaires sociales*, [1985] T.A. 432, and *Syndicat des employées et employés de la Commission des droits de la personne du Québec et Commission des droits de la personne du Québec*, D.T.E. 94T-1166 (Arb. Trib.).

84 I agree with this reasoning and will apply it to the collective agreement in question here. Article 10 of the collective agreement between the employer and the appellant's union provides as follows:

[TRANSLATION] In the case of grievances, conflicts or disagreements concerning the employees' working conditions, other than disciplinary measures, the employer and the union agree to comply with the following procedure. [Emphasis added.]

85 Interpreting this provision in a manner that seems to me to reflect the parties' intention to make the arbitrator responsible for resolving all disputes that might arise between the employer and the workers during the term of the collective agreement, I consider that the above term "working conditions" is sufficiently broad to encompass

harassment in the workplace. In view of this provision, I am of the opinion that the arbitrator has jurisdiction to hear and dispose of disputes in this regard. My opinion therefore differs from that of the majority of the Court of Appeal on this point, and I conclude that the grievance arbitrator has jurisdiction to hear complaints concerning harassment in the workplace under the general provision in the collective agreement in question here that authorizes the arbitrator to dispose of disputes about working conditions.

86 I would add that the fact that a union refuses to take a grievance to arbitration, as alleged by the appellant in the instant case, has no impact on the arbitrator's jurisdiction by reason of the subject matter. If a worker is wronged by his or her union in terms of being fairly represented, the appropriate procedure, which is set out in ss. 47.2 *et seq.* of the *Labour Code*, does not allow proceedings to be brought in the ordinary courts except, of course, by way of extraordinary remedies, where appropriate.

87 The second question that remains to be determined is whether the arbitrator has the power to order the payment of exemplary damages under the *Charter* where the employer has acted in an "unlawful and intentional" manner. In my view, this exemplary remedy is within a grievance arbitrator's jurisdiction (see L. Chamberland, "Qui de l'arbitre de griefs ou des tribunaux civils est compétent en matière de réclamations monétaires?" (1992), 52 *R. du B.* 167, at p. 173).

88 Section 100.12(a) of the *Labour Code* provides that the arbitrator may "interpret and apply any Act or regulation to the extent necessary to settle a grievance" (emphasis added). Since the Quebec *Charter* is undeniably an "Act" within the meaning of that section, the *Charter's* provisions, including the exemplary remedy in question here, may be interpreted and applied by a grievance arbitrator (see *Douglas/Kwantlen Faculty Assn. v. Douglas College, supra*).

89 Thus, in the case at bar the grievance arbitrator not only has jurisdiction over the parties (worker/employer) and the object of the dispute (harassment in the workplace) under the collective agreement, but also, according to earlier judgments and in this case the *Labour Code*, has the power to order the remedy claimed (see *Weber v. Ontario Hydro, supra*). Moreover, this jurisdiction, which is exclusive, means that no action in the ordinary courts is possible in the instant case.

## VII. Conclusion

90 The appellant in the case at bar instituted an action in the Superior Court seeking both compensatory and exemplary remedies for harassment that she claimed to have suffered in the workplace. The respondents' first motion to dismiss, which alleged that the Superior Court lacked jurisdiction because of the civil immunity clause in the *AIAOD*, is justified only in part. This is because, while s. 438 *AIAOD* precludes any compensatory remedy under either the general law or the first paragraph of s. 49 of the *Charter*, it does not apply to the exemplary remedy under the second paragraph of s. 49 of the *Charter*. In addition, the motion for declinatory exception alleging the Superior Court's lack of jurisdiction *ratione materiae*, on the ground that only the grievance arbitrator has such jurisdiction under the collective agreement, is also justified. It should therefore be granted.

91 For these reasons, I would dismiss the main appeal, allow the cross-appeal, reverse the Court of Appeal's judgment and dismiss the appellant's action in the Superior Court, while preserving her remedies before the grievance arbitrator or any other remedies that might be available to her for the harassment she claims to have suffered in the workplace, the whole without costs.

*//Gonthier J.//*

English version of the judgment of Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ. delivered by

92 GONTHIER J. — This case involves two important legislative schemes, the main thrusts of which come into conflict here. This Court must determine whether the victim of an industrial accident who has received compensation under the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001 ("AIAOD"), may in addition bring a civil liability action based on the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

### I — Facts

93 The appellant, who began working for the Confederation of National Trade Unions in 1978, became a part-time secretary for that organization in 1982. In 1986, pursuant to an agreement between her employer and the Fédération des employées et employés de services publics inc. ("FEESP"), the appellant began working jointly for the two labour organizations on a full-time basis. On August 19, 1988 the appellant instituted an action in the Superior Court alleging that she had been the victim of harassment in the workplace and sexual harassment by Pierre Gendron, one of her supervisors, who was employed by the FEESP. Her civil liability action was brought against both the alleged harasser and her employer, the Confederation of National Trade Unions, which she alleged had done nothing to create a harassment-free work environment. Her action was also brought against the FEESP: she alleged that as Pierre Gendron's employer it had failed to prevent the injurious conduct and that it had, without good reason, terminated its agreement with the Confederation of National Trade Unions respecting the appellant's employment. Finally, the appellant sued her union, the Syndicat des travailleuses et travailleurs de la Confédération des syndicats nationaux (CSN), which she alleged had not protected her interests and had even done everything it could to discredit her in her dispute with Pierre Gendron. Accordingly, the appellant asked that

the respondents and the *mis en cause* be ordered jointly and severally to pay the sum of \$175,000 to compensate her for prejudice that she itemized as follows:

- |  |          |
|--|----------|
| (1) Moral damage resulting from sexual harassment:           | \$25,000 |
| (2) Moral damage resulting from harassment in the workplace: | \$25,000 |
| (3) Loss of health and psychological prejudice:              | \$50,000 |
| (4) Inability to return to work:                             | \$50,000 |
| (5) Exemplary damages:                                       | \$25,000 |

94 On March 17, 1989, the Confederation of National Trade Unions and the FEESP brought a motion alleging lack of jurisdiction and lack of a remedy, relying, *inter alia*, on the fact that the appellant had obtained compensation from the competent industrial accident authorities. The appellant had in fact filed a claim with the Commission de la santé et de la sécurité du travail ("CSST") in January 1988, alleging that she had suffered an employment injury within the meaning of s. 2 *AIAOD* as a result of the same events. The claim for compensation was dismissed on February 10, 1988, but on February 9, 1989, the Bureau de révision paritaire allowed the appellant's appeal and granted the claim. It was in these circumstances that the respondents brought their motion to dismiss, waiving their right to appeal the Bureau de révision paritaire's decision and arguing that the effect of s. 438 *AIAOD* and art. 1056a *C.C.L.C.* was to deprive the Superior Court of jurisdiction in respect of the appellant's civil liability action. The respondents also maintained that the Superior Court lacked jurisdiction *ratione materiae*, which was reserved to the arbitration tribunal under the collective agreement. Savoie J. dismissed the motion on April 17, 1989, but his decision was appealed.

95 The financial compensation to which the appellant was entitled was subsequently established in detail by the CSST. The appellant was awarded an income replacement indemnity for the periods from February 9, 1987, to March 13, 1989, and from July 23, 1990, to July 22, 1991. She also received compensation for bodily injury of \$7,268.94, an amount established on the basis of a permanent impairment percentage of 18 percent. The CSST found that she had sustained an anatomicophysiological deficit of 15 percent and suffering and loss of enjoyment of life resulting from that deficit of 3 percent. Finally, the appellant was also found to be entitled to rehabilitation.

96 On January 10, 1991, the Court of Appeal, in a majority decision, dismissed the appeal from Savoie J.'s decision. On March 8, 1991, the respondents filed an application for leave to appeal to this Court, which was granted on June 20, 1991, [1991] 1 S.C.R. viii. The respondents discontinued their appeal in June 1992, however, which prompted the appellant to file a motion to continue the appeal on July 15, 1992. On June 2, 1994, this Court granted the motion, treating it as an application for leave to appeal, which explains why Louise Béliveau St-Jacques is an appellant in this Court.

## II — Statutory Provisions

97 The relevant statutory provisions are as follows:

Sections 2, 83, 438 and 442 *AIAOD*:

2. . . .

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

. . .

"**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;

**"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;

**83.** A worker who suffers an employment injury and who sustains permanent physical or mental impairment is entitled, in respect of each industrial accident or occupational disease for which he files a claim with the Commission, to compensation for bodily injury which takes into account the anatomicophysiological deficit and disfigurement resulting from the impairment and the suffering or loss of enjoyment of life resulting from the deficit or disfigurement.

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

**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.

Article 1056a of the *Civil Code of Lower Canada*:

**1056a.** No recourse provided for under this chapter shall lie, in the case of an employment injury within the meaning of the Act respecting industrial accidents and occupational diseases (R.S.Q., c. A-3.001), except to the extent permitted by such Act.

Sections 49, 51 and 52 of the *Charter of Human Rights and freedoms*:

**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.

**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.

**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.

*Superior Court*

98 Savoie J. dealt first with the motion by way of declinatory exception, based on the exclusive jurisdiction allegedly conferred on the arbitrator by the collective agreement between the parties. He stated that such a motion must be made *in limine litis* and dismissed it since the respondents had first conducted lengthy examinations for discovery and had not raised this exception until eight months after service of the action. According to Savoie J., this amounted to a waiver of the ability to raise the declinatory exception.

99 With respect to the limits imposed by the immunity clauses in the *C.C.L.C.* and the *AIAOD*, Savoie J. was of the view that they related solely to the damages resulting from the employment injury as such. The action based on the *Charter*, which prevails over specific statutes, could thus not be ruled out at once. In Savoie J.'s view, the remedy based on the *Charter* differed from the one provided by the *AIAOD*, even though the moral and exemplary damages available under it would in fact derive from the events that resulted in the employment injury. Savoie J. therefore felt that the motion to dismiss was premature and left it to the trial judge to decide the matter again, if necessary, in light of the evidence.

*Court of Appeal*, [1991] R.J.Q. 279

Mailhot J.A.

100 Mailhot J.A. began by considering the moral prejudice that the appellant claimed to have suffered. She noted that under the *AIAOD* no compensation can be provided for such prejudice since the function of that Act is to compensate for permanent physical or mental impairment. Accordingly, in Mailhot J.A.'s view s. 438 *AIAOD* limits the jurisdiction of the ordinary courts only with respect to prejudice that is within the

CSST's statutory jurisdiction, namely material prejudice. Only civil actions against an employer based on an employment injury, as defined in the *AIAOD*, would be barred. In the case at bar, Mailhot J.A. was of the view that the claim based on moral prejudice fell outside this category. Giving a broader scope to s. 438 *AIAOD* would amount to creating an unfair distinction between, for example, a victim of harassment in the workplace who suffers an employment injury within the meaning of the *AIAOD* and one who is subject to harassment elsewhere.

101 Thus, according to Mailhot J.A., moral prejudice may be compensated either through the remedies provided for in the collective agreement, if there is one and if it provides therefor, or through an action in the ordinary courts. In her view, grievance arbitrators may award moral damages to the extent that this is within their jurisdiction. In the case at bar, however, Mailhot J.A. stated on the basis of extracts from the collective agreement that harassment in the workplace and sexual harassment did not seem to have been placed within the arbitrator's exclusive jurisdiction. She therefore left it to the trial judge to determine the precise scope of the collective agreement.

102 As regards exemplary damages, Mailhot J.A. noted that they cannot be awarded under the *AIAOD*. Moreover, she was of the view that even if the collective agreement had provided for remedial measures for harassment, the wording of the second paragraph of s. 49 of the *Charter* would not have excluded the ordinary courts even in a context of labour relations governed by a collective agreement.

Chevalier J. (*ad hoc*)

103 Chevalier J. distinguished four items in the appellant's claim. The first two, namely loss of health and psychological prejudice, and inability to return to work, cannot be within the Superior Court's jurisdiction owing to s. 438 *AIAOD* and art. 1056a *C.C.L.C.* and the employment injury suffered by the appellant. In Chevalier J.'s view,

the same was true of the claim based on moral prejudice. Noting that the Court of Appeal had already established the principle that grievance arbitrators have jurisdiction to award compensation for moral prejudice, he stated that the admissibility of such a claim under the *AIAOD* had thus been recognized.

104 Chevalier J. was of the view, however, that the fourth item in the appellant's claim, dealing with exemplary damages, warranted dismissing the declinatory exception. In his opinion, s. 51 of the *Charter* does not bar the victim of an employment injury from suing for exemplary damages. The second paragraph of s. 49 of the *Charter* neither extends nor limits the scope of the *AIAOD*. Chevalier J. was thus of the view that in enacting s. 438 *AIAOD* the legislature simply wished to avoid making the person who caused the prejudice answer more than once for the victim's physical or mental impairment. In his view, an action for exemplary damages is altogether different. Finally, as regards the jurisdiction of grievance arbitrators to award exemplary damages, Chevalier J. was in agreement with Mailhot J.A.'s reasons.

McCarthy J.A. (dissenting)

105 McCarthy J.A. noted that the *AIAOD*, by barring workers from bringing liability actions against their employers, derogates from s. 49 of the *Charter* without expressly stating that it is doing so. He observed, however, that the *AIAOD* was passed after the *Charter* and that s. 52 of the *Charter* mentions only ss. 1 to 38. In his view, it follows that the rule set out in s. 51 of the *Charter*, and not the exception stated in s. 52, must apply. He added that, in any event, s. 49 of the *Charter* provides only that the person guilty of unlawful interference may be condemned to exemplary damages, which would exclude that person's employer or the victim's employer. Thus, assuming that there had indeed been an employment injury in this case, McCarthy J.A. was of the view that Savoie J. should have allowed the motion to dismiss the action on the basis

of s. 438 *AIAOD*. This conclusion meant that McCarthy J.A. did not have to rule on the impact of the arbitration provided for in the collective agreement.

#### IV — Analysis

106 This appeal requires an examination of the relationship between the remedies provided for in the *Charter* and those under the *AIAOD*. The general nature of the legislative schemes, as well as the wording of s. 49 of the *Charter* and s. 438 *AIAOD*, must be viewed in context in this regard.

107 Before proceeding further, however, it must be noted that this Court does not have to decide the issue of whether the *AIAOD* applies to sexual harassment and harassment in the workplace. The Bureau de révision paritaire decided on February 9, 1989 that the facts relied on by the appellant constituted an employment injury. On appeal, only McCarthy J.A. briefly considered this issue, stating that the facts alleged by the appellant, if true, would indeed establish the existence of an employment injury. In this Court, the parties have not questioned the validity of the Bureau de révision paritaire's decision. I will therefore assume that sexual harassment and harassment in the workplace may be the basis for a claim to the CSST under the *AIAOD*.

##### (A) *Employment Injury Compensation System*

108 In the nineteenth century, victims of work accidents in Quebec could obtain compensation only on the basis of the general law. With industrialization, the risks increased and accidents occurred more frequently, which brought to light the shortcomings of the available remedies. Workers had to endure judicial delays and the difficulty of establishing the employer's fault or a causal connection with the prejudice suffered. Although the courts had relaxed the rules of evidence somewhat, on the whole the general law responded only imperfectly to the problems presented by the use

of new means of production (on this point, see K. Lippel, *Le droit des accidentés du travail à une indemnité: analyse historique et critique* (1986), at pp. 15-59).

109 In 1909, to remedy these shortcomings, the Quebec legislature passed the *Act respecting the responsibility for accidents suffered by workmen in the course of their work, and the compensation for injuries resulting therefrom*, S.Q. 1909, c. 66, which was based, *inter alia*, on European developments in this area. This statute removed work accidents from the purview of civil liability. Victims no longer had to endure the uncertainties of civil proceedings or to establish the employer's fault, and in return they were granted partial, fixed-sum compensation that did not necessarily correspond to the prejudice they had suffered. From the beginning, the system was thus based on an abandonment of the concept of fault, for which there was substituted that of occupational risk. The costs associated with work accidents were divided between workers and employers. The former had to waive the possibility of obtaining full compensation by way of a civil action, while the latter had to provide partial compensation in the event of an accident.

110 Although the ordinary courts retained jurisdiction under the 1909 Act, the system as a whole was based on an exclusion of the rules of civil liability against employers. In this regard, ss. 14 and 15 of this Act read as follows:

**14.** The person injured or his representatives, shall continue to have, in addition to the recourse given by this act, the right to claim compensation under the common law from the persons responsible for the accident other than the employer, his servants or agents.

The compensation so awarded to them shall, to the extent thereof, discharge the employer from his liability; and the action against third persons responsible for the accident, may be taken by the employer at his own risk, in place of the person injured or his representatives, if he or they refuse to take such action after having been put in default so to do.

**15.** The employer shall be liable to the person injured or to his representatives mentioned in article 3 of this act, for injuries resulting from accidents caused by or in the course of the work of such person, in the cases to which this act applies, only for the compensation prescribed by this act.

The courts thus did not hesitate to find that actions based on the general law could not be brought by victims of work accidents (by way of illustration, see *Mongeau v. Fournier* (1924), 37 Que. K.B. 52).

111 The 1909 Act was subsequently amended a number of times, although its basic principles were not changed. In 1928 the system was removed from the courts when the Workmen's Compensation Commission was created (*Act respecting the Workmen's Compensation Commission*, S.Q. 1928, c. 80). That authority thereby became the only one with jurisdiction to dispose of claims for compensation related to industrial accidents. In 1931, as part of a legislative revision, an accident fund was established; sustained by employers' contributions, it became the source of most of the compensation payable to injured workers (*Workmen's Compensation Act, 1931*, S.Q. 1931, c. 100, ss. 73 *et seq.*). The powers of the Workmen's Compensation Commission were also spelled out in greater detail (ss. 59 *et seq.*). The legislature subsequently took care to formalize the principle of employers' civil immunity by adding art. 1056a to the *Civil Code of Lower Canada*. First enacted in 1933 (*Act respecting the right of action in the cases covered by the Workmen's Compensation Act, 1931*, S.Q. 1933, c. 106), this provision was amended in 1935 (*Act to amend the Civil Code respecting the right of action in the cases covered by the Workmen's Compensation Act, 1931*, S.Q. 1935, c. 91) and 1941 (*Act to amend the Civil Code*, S.Q. 1941, c. 67, s. 1). It took its final form at that time, with only a few minor corrections being made to it thereafter:

**1056a.** No recourse provided for under the provisions of this chapter shall lie, in the case of an accident contemplated by the Workmen's Compensation Act, 1931, except to the extent permitted by such act.

112 The principle of employers' civil immunity was no longer in any doubt, and it applied both to prejudice for which the system provided compensation and to that for which the special legislation offered no compensation. As noted by Létourneau C.J. in *Vincent & Co. v. Gallo*, [1944] Que. K.B. 202, at p. 206:

[TRANSLATION] In other words, workers who benefit from this inclusive industrial accidents legislation thereby waive any claim other than that provided for in the statute in respect of their bodily injuries or losses. If they are injured in a fall, they will receive the full benefits provided by the statute in question in such a case but will have no remedy against their employer or employers for what has not been provided for in the statute; thus, they will obtain nothing from their employer for having also broken or lost their glasses, watch, etc.

113 In 1985, a major reform of the compensation system was carried out by the passage of the current *Act respecting industrial accidents and occupational diseases*. The first section of this Act clearly sets out its purpose:

1. The object of this Act is to provide compensation for employment injuries and the consequences they entail for beneficiaries.

The process of compensation for employment injuries includes provision of the necessary care for the consolidation of an injury, the physical, social and vocational rehabilitation of a worker who has suffered an injury, the payment of income replacement indemnities, compensation for bodily injury and, as the case may be, death benefits.

This Act, within the limits laid down in Chapter VII, also entitles a worker who has suffered an employment injury to return to work.

The principles that have guided legislative activity in this area from the very beginning still exist in the new legislative scheme. Thus, the *AIAOD* is based on the discarding of any reference to civil fault (s. 25) and the adoption of the concept of occupational risk. Moreover, compensation remains partial and fixed-sum. Except in cases of death, workers who suffer employment injuries are entitled only to an income replacement indemnity and to compensation for bodily injury. A pension equal to 90 percent of their net income is generally paid to them for as long as they are unable to carry on employment, in order to compensate them for lost wages (ss. 44 *et seq.*). Moreover, workers who suffer permanent physical or mental impairment are entitled to compensation for bodily injury corresponding to the seriousness of the impairment. As set out in s. 83, the anatomicophysiological deficit and disfigurement resulting from the physical or mental impairment, as well as the suffering or loss of enjoyment of life resulting from the deficit or disfigurement, are taken into account in determining the compensation. Aside from the reimbursement of certain expenses, medical costs and

rehabilitation costs, injured workers are not entitled to any other compensation. Finally, jurisdiction to decide any matter contemplated in the *AIAOD* is conferred exclusively on the CSST (s. 349). This explains, *inter alia*, the prohibition against instituting a civil liability action against the victim's employer (s. 438) or against a co-worker who is alleged to have committed a fault in the performance of his or her duties (s. 442).

- 114 The evolution and characteristics of this normative scheme show that it is largely independent from the general law. It expresses a well thought-out social compromise between various contradictory forces. As B. Cliche, S. Lafontaine and R. Mailhot state in *Traité de droit de la santé et de la sécurité au travail* (1993), at pp. 35-36:

[TRANSLATION] This scheme is a major component of an income security policy for victims of industrial accidents or occupational diseases.

The historical evolution of the legislation relating to prevention of and compensation for industrial accidents and occupational diseases shows that it has acquired the status of autonomous law, free of the principles of liability deriving from the general law. . . .

The *AIAOD* has the characteristics that Beetz J. attributed to statutes of this type in *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 851. It establishes a compensation system that is based on the principles of insurance and no-fault collective liability, the main purpose of which is compensation and thus a form of final liquidation of remedies.

- 115 It is therefore with this coherent set of distinct and, according to the respondents and the intervener, exclusive rules that we must compare the equally important rules deriving from the *Charter of Human rights and Freedoms*.

(B) *The Charter of Human Rights and Freedoms*

116 Like the statutes that are its counterparts in the other provinces, the *Charter*, which was enacted in 1975, has a special quasi-constitutional status. Certain of its provisions thus have relative primacy, resulting from s. 52. By its very nature, such a statute calls for a large and liberal interpretation that allows its objectives to be achieved as far as possible. In this sense, not only the provisions at issue but the entire statute must be examined (see in this regard *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 547). In Quebec, s. 53 indeed provides that if any doubt as to interpretation arises, it must be resolved in keeping with the intent of the *Charter*.

117 As well as affirming human rights and freedoms, the *Charter* provides in s. 49 for a special remedy, which performs several functions at once. To ensure an effective response to unlawful interference with protected rights, the first paragraph of s. 49 allows the victim of that interference to obtain the cessation thereof, as well as compensation for the moral or material prejudice resulting therefrom. In addition, the second paragraph of s. 49 authorizes the court hearing the case to order the author of unlawful and intentional interference to pay exemplary damages. This multifaceted remedy is part of a distinct legislative scheme and cannot be completely dissociated from it. It also adds to remedies under the general law, however, which means that it is necessary to determine its originality in comparison with the existing rules. Expressly leaving aside the question of the interaction between the right to obtain the cessation of an unlawful interference with a right protected by the *Charter* and the injunction available under the *Code of Civil Procedure*, R.S.Q., c. C-25, we must, to dispose of this appeal, characterize the remedy provided for in s. 49. It must be determined whether this provision, in so far as it allows compensatory (first paragraph) and exemplary (second paragraph) damages to be obtained, creates a civil liability remedy. It is thus necessary to consider not so much the formal autonomy resulting from the legislative source, which is distinct from the *Civil Code*, as the originality of the principles underlying s. 49 of the *Charter* compared with those that generally

govern civil liability, which has been defined as "juridical responsibility entailing the obligation to repair harm caused to others" (*Private Law Dictionary and Bilingual Lexicons* (2nd ed. 1991), at p. 62).

(a) The Remedy of Compensatory Damages Provided for in the First Paragraph of Section 49

118 In order to characterize this first aspect of the remedy provided for in s. 49, it is necessary to begin by noting that, before the advent of the *Charter*, art. 1053 *C.C.L.C.* could provide the basis for liability for a violation of fundamental rights that are now protected. This Court has applied art. 1053 on a number of occasions, for example with respect to freedom of conscience and religion (*Chaput v. Romain*, [1955] S.C.R. 834). In this sense, art. 1053 has even been described as a veritable charter of rights (M. Caron, "Le Code civil québécois, instrument de protection des droits et libertés de la personne?" (1978), 56 *Can. Bar Rev.* 197, at p. 199; see also L. Perret, "De l'impact de la Charte des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité au Québec" (1981), 12 *R.G.D.* 121). The flexibility inherent in the principle of civil fault was of course able to allow for judicial adaptation to changes in standards of conduct and, correspondingly, in the content of human rights. As F. R. Scott noted in "The Bill of Rights and Quebec Law" (1959), 37 *Can. Bar Rev.* 135, at p. 136:

The civil law has evolved a general principle of liability for wrongs, applicable to all situations that present themselves. It is a law of delict and not of delicts; new sets of facts may arise in society to which the rule has never been applied before, yet which it is adequate to cover. Quebec judges do not legislate when so applying the all-embracing principle, they merely subsume new facts under the ancient rule.

119 All the same, the *Charter* has made a great contribution to clarifying the scope of the fundamental freedoms recognized in Quebec law. In view of this undeniable contribution, does the remedy of compensatory damages under the first paragraph of s. 49 have an autonomy in principle that makes it distinguishable from civil liability? I do not think so, although certain commentators have put forward arguments to that

effect (see G. Otis, "Le spectre d'une marginalisation des voies de recours découlant de la Charte québécoise" (1991), 51 *R. du B.* 561; M. Drapeau, "La responsabilité pour atteinte illicite aux droits et libertés de la personne" (1994), 28 *R.J.T.* 31). In my view, the first paragraph of s. 49 and art. 1053 *C.C.L.C.* are based on the same legal principle of liability associated with wrongful conduct, which is what I suggested in *obiter* when examining the concept of cause as regards *lis pendens* (*Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440, at p. 457).

120 It is thus clear that the violation of a right protected by the *Charter* is equivalent to a civil fault. The *Charter* formalizes standards of conduct that apply to all individuals. The legislative recognition of these standards of conduct has to some extent exempted the courts from clarifying their content. This recognition does not, however, make it possible to distinguish in principle the standards of conduct in question from that under art. 1053 *C.C.L.C.*, which the courts apply to the circumstances of each case. The violation of one of the guaranteed rights is therefore wrongful behaviour, which, as the Court of Appeal has recognized, breaches the general duty of good conduct (see *Association des professeurs de Lignery v. Alvetta-Comeau*, [1990] R.J.Q. 130). The fact that an interpreter of the *Charter* first has to clarify the scope of a protected right in light of a specific provision does not make this exercise any different from the one that involves deducing a specific application from the principle recognized in art. 1053 *C.C.L.C.* Moreover, the first paragraph of art. 1457 of the *Civil Code of Québec*, S.Q. 1991, c. 64, now takes care to specify that rules of conduct the violation of which results in civil liability may derive from the law:

**1457.** Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

121 The nature of the damages that may be obtained under the first paragraph of s. 49 reinforces the parallel with civil liability. It is understood that the moral and material damages awarded by a court following a *Charter* violation are strictly compensatory

in nature. The wording of the provision leaves no doubt in this regard, since it entitles the victim of an unlawful interference with a protected right to obtain "compensation for the moral or material prejudice resulting therefrom". Compensation so awarded will thus comply with the fundamental principle of *restitutio in integrum*. This means that for a given fact situation, the *Charter* cannot authorize double compensation or be a basis for awarding damages separate from those that could have been obtained under the general law. The violation of a guaranteed right does not change the general principles of compensation or in itself create independent prejudice. The *Charter* does not create a parallel compensation system.

122 Finally, nothing in the *Charter* relieves the victim of an unlawful interference with a guaranteed right of the burden of proving a causal connection between that interference and the moral or material prejudice he or she allegedly suffered. In this respect, the *Charter* neither breaks new ground nor adds to the general law. All of these factors therefore justify the characterization of the remedy provided for in the first paragraph of s. 49. As J.-L. Baudouin states in *La responsabilité civile* (4th ed. 1994), at p. 224:

[TRANSLATION] Specific statutory provisions in the Quebec *Charter of human rights and freedoms* and the Civil Code now protect what used to come under the general protection of the ordinary law. These provisions set out a series of fundamental rights and freedoms that relate to the protection of the very personality of individuals and the violation of which may cause, although not exclusively, prejudice that is mainly moral in nature. Moreover, section 49 of the Charter establishes the right to compensation for this type of prejudice by placing it on the same footing as material damage. Despite certain opinions to the contrary, the Charter therefore does not create a distinct, autonomous system of civil liability. It merely sets out a group of fundamental human rights, now in statutory form, the sanctioning of which is, however, ensured by the general principle in article 1457 C.C. A violation of a right protected by the Charter or recognized by another enactment or the courts is, in fact, a breach of the legal duty to abide by the rules of conduct that lie upon individuals under article 1457 C.C. In this sense, therefore, there is no dual civil liability system or remedy, one under the Civil Code and the other under the Charter.

123 For these reasons, the analogy that the appellant attempted to draw with *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, simply does not stand up to scrutiny.

In that case, this Court had to decide, *inter alia*, whether an employer could be held liable for discriminatory acts by an employee in violation of the *Canadian Human Rights Act*. In answering in the affirmative, La Forest J., for the Court, characterized the employer's liability as follows (at p. 95):

It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions.

Relying on this passage, the appellant argued that the *Charter*, like the *Canadian Human Rights Act*, has a formal autonomy that makes it distinguishable from the general law of liability and that this is a sufficient reason for characterizing the remedy provided for in the first paragraph of s. 49 as an original one.

124 In *Robichaud*, La Forest J. first had to interpret a particular statutory enactment, in which he found a specific source of liability distinct from the general law. While in that case there was indeed a new remedy, it does not necessarily follow that the remedy provided for in the *Charter*, in light of its specific characteristics considered above, differs from the general principles of civil liability simply because of its formal autonomy. Moreover, the relationship between instruments that protect fundamental rights and the general law is not entirely the same in the common law provinces as in Quebec. Thus, this Court decided in an Ontario case that, because of the prohibition against discrimination in the province's human rights legislation, there could be no parallel development of a discrimination-based tort (*Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181). In light of the characteristics of the Ontario legislative scheme, it was decided that bringing an action in the ordinary courts was not possible. Conversely, it must be recognized that the jurisdiction of the Commission des droits de la personne in Quebec is not exclusive and in no way precludes suing in the ordinary courts (s. 77 of the *Charter*). Moreover, the very nature of the standard of good conduct under the *Civil Code* goes against the acceptance of

an argument that would deny its evolutionary character and its capacity to encompass situations never before contemplated. The *Charter's* recognition of specific and perhaps still unexplored aspects of this standard of conduct does not in itself justify a new characterization of the liability resulting from its violation. I am therefore of the view that the liability under the first paragraph of s. 49 is directed to the reparation of harm caused to others by wrongful conduct and that it must therefore be characterized as civil liability.

(b) Remedy of Exemplary Damages under the Second Paragraph of Section 49 of the *Charter*

125 In keeping with the civil law tradition, Quebec liability law did not traditionally provide for exemplary damages. Since its only purpose was to compensate, civil liability could not seek to punish, as that role was reserved to penal law (*Chaput, supra*, at pp. 841 and 867). The principle of *restitutio in integrum* left no room for awarding compensation that exceeded the loss suffered and the earnings lost. However, the legislature authorized the courts to award exemplary damages in certain cases under a number of socially oriented statutes. For example, the *Tree Protection Act*, R.S.Q., c. P-37, s. 1, and the *Consumer Protection Act*, R.S.Q., c. P-40.1, s. 272, allow judges to do this. The same is true of the second paragraph of s. 49 of the *Charter*.

126 It is now settled that exemplary damages awarded under the *Charter* are not compensatory but rather seek to achieve the dual objective of punishment and deterrence (*Papadatos v. Sutherland*, [1987] R.J.Q. 1020 (C.A.), at p. 1022; *Lemieux v. Polyclinique St-Cyrille Inc.*, [1989] R.J.Q. 44 (C.A.); and *Association des professeurs de Lignery, supra*, at p. 137). Although the *Charter* is broad in scope, the ability to award exemplary damages remains exceptional in Quebec law, as it has not been raised to the status of a principle. This is evident from art. 1621 of the *Civil Code*

of *Québec*, which clearly establishes that a judicial decision in this regard must be based on a specific provision:

**1621.** Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

127 Despite these various special features, an action for exemplary damages based on the second paragraph of s. 49 of the *Charter* cannot be dissociated from the principles of civil liability. Such an action can only be incidental to a principal action seeking compensation for moral or material prejudice. The second paragraph of s. 49 clearly states that in case of unlawful and intentional interference with a protected right, "the tribunal may, in addition, condemn the person guilty of it to exemplary damages" (emphasis added). This wording clearly shows that, even if it were admitted that an award of exemplary damages is not dependent upon a prior award of compensatory damages, the court must at least have found that there was an unlawful interference with a guaranteed right. Some wrongful conduct that gives rise to civil liability will therefore be identified and further consideration given to the intention of the person responsible. It is the combination of unlawfulness and intentionality that underlies the decision to award exemplary damages. 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.

128 I am therefore of the view that the remedy provided for in s. 49 of the *Charter*, in so far as it authorizes a claim of compensatory and exemplary damages, is a civil liability remedy.

129 Two important legislative schemes come into play, and are clearly in conflict, in the case at bar. While the nature of the *Charter* favours maintaining autonomous actions for damages, the purpose of the compromise achieved by the *AIAOD* militates against it. To sort this out, the language used in the relevant statutory provisions must first be considered.

130 Sections 438 and 442 *AIAOD* must necessarily be the starting point for the analysis. The civil immunity of employers and co-workers under these sections is broad in scope and applies to an action for damages under the *Charter* based on the events that gave rise to the employment injury. There is accordingly no doubt that the action brought by the appellant in the Superior Court fell within the exclusion in s. 438 in so far as it involved the respondents. The appellant was unquestionably seeking, as shown above, to bring a civil liability action. She was suing the Confederation of National Trade Unions, for which she had worked since 1978. She was also claiming compensation from the FEESP, for which she had worked since 1986 pursuant to an agreement with the Confederation of National Trade Unions. This agreement provided, *inter alia*, that the Confederation of National Trade Unions and the FEESP would share the expenses related to the appellant's employment equally and placed the appellant under the joint responsibility of the two organizations' servicing representatives. In this Court, the parties did not question the fact that the FEESP, like the Confederation of National Trade Unions, employed the appellant. The Superior Court therefore had before it a civil liability action in which the appellant was seeking damages from her employers for the sexual harassment and harassment in the workplace she alleged she had suffered. 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 *AIAOD*, the principle of an employer's civil immunity had to be applied.

131 This is also the solution indicated by s. 51 of the *Charter*, which makes a point of stating that the *Charter* must not, as a general rule, be interpreted so as to extend or amend the scope of a provision of law. Allowing the victim of an employment injury to bring a civil liability action based on the *Charter* against his or her employer or a co-worker would necessarily call into question the compromise formalized by the *AIAOD*. That Act is based on the principle of no-fault liability and provides for a mechanism of fixed-sum, but partial, compensation. If section 49 allowed the victim of an employment injury to obtain additional damages, the scope of the *AIAOD* would thereby be changed.

132 The appellant countered this reasoning by relying on the special nature of the *Charter* and its relative primacy over other enactments. It must be noted, however, that s. 52 of the *Charter*, which affirms its preponderance, does not include s. 49 in the group of privileged provisions. Only ss. 1 to 38 of the *Charter* prevail over other statutes, which may not derogate from the *Charter* unless they do so expressly. Read together, ss. 51 and 52 therefore show that the legislature did not intend to impose the same formal requirements for derogations from s. 49. That provision, even when invoked because of a violation of one of the rights guaranteed in ss. 1 to 38, does not have the same relative preponderance that they have. In any event, while the exclusion is not express, the language of s. 438 *AIAOD* hardly leaves any doubt as to the legislature's intention, owing to the characteristics of the remedy provided for in s. 49. Section 438 *AIAOD*, which came into effect after the *Charter*, unambiguously indicates that s. 49 of the *Charter* must give way. Contrary to what the appellant argues, the comparison between the explicit exclusion of general law remedies contained in art. 1056a *C.C.L.C.* and the more general one in s. 438 *AIAOD* cannot be conclusive. Article 1056a merely restates a principle already established by the industrial accidents legislation and, moreover, has not been included in the *Civil Code of Québec*. No one would argue that, as a result, the principle of an employer's immunity established by the *AIAOD* no longer applies to a civil liability action under the general law.

133 I am therefore of the view that s. 438 has the effect of validly barring the victim of an employment injury from bringing an action for damages under the *Charter*. By making this exclusion, the *AIAOD* clearly does not violate any of the rights guaranteed in ss. 1 to 38 of the *Charter*. Moreover, victims of employment injuries are not denied all forms of monetary compensation. Rather, they are subjected to a special scheme, which offers a number of advantages but which allows them to obtain only partial, fixed-sum compensation. In this sense, and although the point is not determinative, it is worth noting that this Court has already held that a similar ban on civil liability actions by victims of work accidents did not violate s. 15 of the *Canadian Charter of Rights and Freedoms* (*Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922).

134 In short, I am of the view that the Court of Appeal should have given full effect to the principle of employers' civil immunity and declared that the action brought against the respondents should be dismissed. The purpose of the *AIAOD*, the wording of s. 438 thereof and the nature of the remedy provided for in s. 49 all support this conclusion.

135 It is true, as noted by Mailhot J.A., that there is accordingly a disparity between victims' remedies depending on whether they suffer sexual harassment resulting in an employment injury in the course of their work or outside that context, since it is only in the latter case that they can bring a civil liability action for exemplary damages. This is true, however, for all aspects of employers' civil liability to their employees in the work context. Although victims cannot bring civil liability actions to punish such fault on their employers' part by means of exemplary damages, the other *Charter* remedies are available to them. Such an action for exemplary damages is an exceptional one and must be provided for by the legislature.

(D) *The Role of Grievance Arbitrators*

136 In view of the conclusion I have reached regarding the availability of a civil liability action in the present case, it is not necessary for me to consider the scope of the grievance arbitrator's jurisdiction in any depth. By way of cross-appeal, the respondents argued that if the action based on the *Charter* was not barred, it had to be decided by the grievance arbitrator. To dispose of this appeal and of the cross-appeal, it is sufficient to note that the ordinary courts could not decide the civil liability action based on the events that made compensation payable under the *AIAOD*. I shall therefore refrain from determining whether a grievance could have been filed in the instant case. If that had been the case, however, it is understood that the arbitrator could not have awarded damages for the prejudice suffered as a result of the employment injury. The exclusion of a civil liability action also applies to the grievance arbitrator. This being said, it is not inconceivable that an arbitrator dealing with such a grievance in these circumstances could have ordered other remedial measures, such as reinstatement or reassignment, if the collective agreement so allowed.

#### V — Conclusion

137 For these reasons, I would set aside the judgments of the Court of Appeal and the Superior Court, grant the respondents' motion to dismiss and, therefore, dismiss both the appeal of the appellant and the cross-appeal. In the particular circumstances of this case, I would not grant costs.

*Appeal and cross-appeal dismissed, LA FOREST and L'HEUREUX-DUBÉ JJ. dissenting in part.*

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