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## A VICTIM OF SEXUAL HARASSMENT AT WORK HAS NO RIGHT OF ACTION AGAINST HER EMPLOYER FOR DAMAGES

Can an employee who has been subjected to sexual harassment at work and who has received compensation under *An Act Respecting Industrial Accidents and Occupational Diseases* (the "Act"), also bring a claim in civil liability based on the *Charter of Human Rights and Freedoms* (the "Charter")?

### THE FACTS

Ms. Béliveau St-Jacques had been employed by the Confédération des Syndicats Nationaux (the "C.S.N.") since 1978; in 1986, her services were lent to the Fédération des employées et employés de services publics Inc. (the "F.E.E.S.P.") pursuant to an agreement between the two organizations. This agreement provided that the costs related to Ms. Béliveau St-Jacques' employment would be shared equally by the two parties to the agreement.

Some time afterwards, alleging that she had been sexually harassed by her immediate superior and also generally harassed at work, Ms. Béliveau St-Jacques instituted an action in damages in Superior Court against her immediate superior, Mr. Gendron, and her two employers, the C.S.N. and the F.E.E.S.P. She also sued her own union, the Syndicat des travailleurs et travailleuses de la C.S.N. (the "Union").

In addition to the harassment by Mr. Gendron, she also alleged that her employers, the C.S.N. and the F.E.E.S.P., had done nothing to stop her superior's behaviour towards her; finally she alleged that the Union had not ensured the protection of her interests.

She claimed the sum of \$150,000, not only as damages related to loss of health and incapacity to return to work, but also as moral damages for psychological prejudice, and,

### Summary

<b>The facts</b>	<b>1</b>
<b>Superior Court</b>	<b>2</b>
<b>Court of Appeal</b>	<b>2</b>
<b>Supreme Court</b>	<b>2</b>

finally, she claimed \$25,000 as exemplary damages, this latter category of damages being essentially punitive in nature. She based her claim on section 49 of the *Charter*, which provides that the victim of any violation of a right protected by the *Charter*, in the present case, the right not to be sexually harassed, may claim redress of the material or moral prejudice suffered and, where the violation is intentional, may demand that the guilty party be condemned to exemplary damages.

When the action was instituted, both the C.S.N. and the F.E.E.S.P. moved in Superior Court that it be dismissed on the ground that they were both subject to the *Act*, and, that if the facts alleged in the declaration were true, Ms. Béliveau St-Jacques was the victim of an employment injury within the meaning of the *Act*. Indeed, this legislation contains two provisions, sections 438 and 442, which provide that a worker who is the victim of an employment injury may not bring an action based on civil liability in respect of such injury against his or her employer or against a co-worker. Therefore, according to her two employers, Ms. Béliveau St-Jacques was barred from bringing a civil action in the Superior Court.

In effect, Ms. Béliveau St-Jacques had also filed a claim with the Commission de la santé et de la sécurité du travail (the "C.S.S.T.") in conformity with the *Act*, alleging the same facts as were set out in her civil action. The Bureau de révision paritaire of the C.S.S.T. had held that Ms. Béliveau St-Jacques had in fact suffered an employment injury and had therefore upheld her claim.

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### **SUPERIOR COURT**

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The trial judge rejected the motions for dismissal of the action. In his opinion, sections 438 and 442 of the *Act*, generally known as the "immunity clauses", applied only to the damages resulting from the

employment injury *per se*. The *Charter* has priority over all provisions of any law, and the moral and exemplary damages which may be claimed under the *Charter* by a victim of sexual harassment arise from a source which is entirely different from that which gives rise to a claim based on an employment injury.

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### **COURT OF APPEAL**

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The Court of Appeal maintained the judgment at first instance. The Court held that while the *Act* provides compensation for the material loss (e.g. loss of health and incapacity to return to work) resulting from an employment injury, it does not provide for redress of the other heads of damages claimed by the victim, particularly that for exemplary damages. In the Court's view, the *Act* prohibits only those civil actions against an employer which are based on the employment injury alone. As Ms. Béliveau St-Jacques' action did not fall within this category, it could be brought before the regular courts.

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### **SUPREME COURT**

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In a majority judgment, two judges dissenting, the Supreme Court of Canada came to the opposite conclusion. Mr. Justice Gonthier, delivering the judgment of the majority, drew a parallel between the system of indemnity provided under the *Act* and that provided under the *Charter*. He began by analyzing the entire system of indemnification for an employment injury by means of a historical survey of the various laws which have led to the current law, adopted in 1985. He arrived at the conclusion that, in this system of indemnification, the legislator had abandoned any reference to civil fault and to the principles of liability arising from the *droit commun*, and had instead established the notion of professional risk. The *Act* establishes a compromise; it is based on the principle of liability without fault and provides a mechanism for fixed and partial compensation, and is thus a form of final liquidation of remedies.

Mr. Justice Gonthier concluded further that the recourses in damages which are provided under the *Charter*, even those for exemplary damages, are similar to the recourses provided by the civil law of liability, since the civil law establishes the principle that every person is responsible for the redress of the prejudice caused to another by his or her wrongful conduct.

Although the *Charter* establishes norms of behaviour by prohibiting certain specific acts of discrimination, the violation of a right protected by the *Charter* is nonetheless equivalent to a civil fault; as in any other action in liability by which the victim claims damages as compensation for the fault committed, in the case of a violation of a right protected by the *Charter*, the victim must always establish causation between the fault and the prejudice which he or she claims to have suffered. Once this has been established, the victim is entitled to compensation for the entire prejudice suffered. In the opinion of Mr. Justice Gonthier, the violation of a right guaranteed by the *Charter* does not modify the general principles of compensation, nor does it, by itself, create a distinct head of damages. The *Charter* does not create a parallel system of compensation, nor does it authorize duplication in compensation for the same factual situation.

It is therefore necessary to reconcile the system of indemnification provided by the *Charter* and that provided by the *Act*. The prohibition of any recourse against the employer or the co-worker, provided in sections 438 and 442 of the *Act*, covers the type of action taken by Ms. Béliveau St-Jacques in the Superior Court. Allowing the victim of an employment injury to institute proceedings in civil liability based on the *Charter* against her employer or a co-worker would undermine the whole system of liability without fault and the mechanism for fixed-sum compensation provided by the *Act*. In this regard, section 51 of the *Charter* expressly provides

that the *Charter* must not be interpreted so to extend, limit or amend the scope of any provision of any other law.

Mr. Justice Gonthier recognized that barring a victim of an employment injury from instituting a recourse in damages under the *Charter* could create a certain disparity, depending on whether the sexual harassment constituted an employment injury or not. Indeed, where the sexual harassment constitutes an employment injury, the victim is subject to a particular system which allows only for partial compensation in the form of a fixed sum, but however, this system does offer other advantages. Finally, although it was not essential for a decision in the case, he added that the exclusion of the civil recourse would apply equally to a similar claim submitted to a grievance arbitrator.

In rendering this judgment, the Supreme Court has ended a debate which had lasted several years. The Supreme Court's decision clearly establishes that an employee who has received compensation under the *Act* cannot, in respect of the same events, exercise other recourses in damages against his or her employer or co-employee, even by basing such recourses on the *Charter*.

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