

INTEGRITY, DIGNITY AND THE *ACT RESPECTING INDUSTRIAL ACCIDENTS AND OCCUPATIONAL DISEASES*: CAN THE ACT PROVIDE MORE APPROPRIATE COMPENSATION FOR SEXUAL HARASSMENT VICTIMS?

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Résumé de l'article

La situation des victimes de harcèlement sexuel au travail est devenue une préoccupation de plus en plus importante au cours des dernières années. La victime de harcèlement sexuel au travail qui reçoit une indemnité de la Commission de la santé et de la sécurité du travail (CSST) pour une lésion qui résulte du harcèlement, se trouve sans recours sous la Charte des droits et libertés de la personne pour ses dommages moraux, matériels et exemplaires. Depuis l'arrêt *Béliveau St-Jacques c. Fédération des employées et employés de services publics inc.* [1996] 2 R.C.S. 345, ce principe est fermement ancré dans notre droit.

Pour rendre la situation encore plus compliquée, la *Loi sur les accidents du travail et des maladies professionnelles* n'offre une indemnité que pour les atteintes à l'intégrité de la personne, indemnité qui ne tient aucunement compte de l'atteinte au droit à la dignité que pose le harcèlement sexuel. Dans cette étude, l'auteur explore la possibilité de réforme de la Loi afin de développer une indemnisation plus appropriée pour les victimes de harcèlement sexuel au travail. Étant donné le contexte social et légal d'où la Loi est née, cette exploration incorpore une revue de l'histoire et de l'évolution de la Loi ainsi qu'un examen de quelques décisions récentes émanant du BRP et de la CALP. La place de la personne dans le droit civil au Québec et la définition de deux droits de la personnalité (l'intégrité et la dignité) font aussi partie intégrante de la présente étude.

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by Laverne A. JACOBS*

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*Integrity, Dignity and the Act respecting industrial accidents
and occupational diseases : Can the Act Provide (2000) 30 R.D.U.S.
More Appropriate Compensation for Sexual Harassment Victims?*

The plight of victims of workplace sexual harassment in Quebec has become a matter of great concern in recent years. The worker who receives compensation through the Commission de la santé et de la sécurité du travail (CSST) for an injury resulting from the sexual harassment finds herself with no recourse to the Quebec Charter for moral, material or exemplary damages. This principle has become entrenched in the law since the decision of Béliveau St-Jacques v. Fédération des employées et employés de services publics inc. [1996] 2 S.C.R. 345.

The matter is further complicated by the fact that the Act respecting industrial accidents and occupational diseases compensates only for loss of integrity, providing a completely inappropriate compensation for sexual harassment – an incident through which the person's dignity is first and foremost put under attack. In this paper, the author explores the possibility of reforming the Act in order to provide a more appropriate compensation for victims of workplace sexual harassment, one that addresses the very real affront to dignity that sexual harassment poses. As the Act is grounded in a particular social and legal history, this exploration involves a review of its history and evolution as well as an examination of recent decisions by the CSST's reviewing bodies. Consideration of the place of the person in Quebec Civil Law and the definition of certain personality rights (integrity and dignity) also form an integral part of this paper.

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I- Introduction

Although always a matter of great concern, sexual harassment at the workplace has received a significant increase in attention since the decision of *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc*¹. This Supreme Court decision holds that it is impossible for victims of workplace sexual harassment to obtain moral, material or exemplary damages under the *Charter of Human Rights and Freedoms*² if the victim has been indemnified for an employment injury resulting from the same incident under the *Act respecting industrial accidents and occupational diseases*³ (AIAOD). The Court's judgment has raised concern over access to justice for sexual harassment victims in Quebec, double compensation and the proper interplay between the Quebec Charter and the AIAOD. Most importantly, however, it suggests a need for legislative reform.

The debate on whether the Supreme Court's decision to deny these damages is correct is a lively one⁴. My position is that the decision in *Béliveau*, correct or not, has been made and that it is now a matter of exploring options to provide more appropriate compensation for victims who claim under the AIAOD. This can be done by examining and re-conceptualizing the injury indemnified by the Act.

The AIAOD compensates victims of sexual harassment at the workplace for the injury the harassment has caused to their physical or psychological integrity. Its use as a legal regime providing compensation for sexual harassment claims in the workplace, however, poses serious problems. From a philosophical

1. [1996] 2 S.C.R. 345, S.C.J. No. 70 (QL) [hereinafter *Béliveau* cited to S.C.R.].

2. R.S.Q. c. C-12, s. 49 [hereinafter «Quebec Charter», «Charter»].

3. R.S.Q. c. A-3.001.

4. As well, a surge of legal writing quickly emerged on the scope and repercussions of this decision. For example, see the special edition of *Développements récents en responsabilité civile* dedicated to this judgment : Service de formation permanente Barreau du Québec, *Développements récents en responsabilité civile* (Cowansville, Que : Yvon Blais, 1997); see also K. Lippel and D. Demers, *Access to Justice for Sexual Harassment Victims : The Impact of Béliveau St-Jacques on Female Workers' Rights to Damages* (Ottawa : Status of Women Canada, 1998).

standpoint, one of the most alarming consequences of this use of the Act is that it fosters a misrecognition of the very notion of sexual harassment in both fact and law. Keeping in mind that the law is both a product of and a statement to society⁵, the social message sent by the AIAOD is that sexual harassment is not to be tolerated in the workplace because of the injury it causes to the victim. This view of sexual harassment completely overlooks the most important reason for indemnifying survivors of workplace sexual harassment —its affront to human dignity. I argue that sexual harassment is misplaced in a compensatory regime based on the notion of integrity. If the AIAOD is to offer compensation for this workplace occurrence, it should reflect the very real affront to dignity that sexual harassment presents. However, legislative reform of the AIAOD is a delicate task.

The AIAOD finds its source in a special compensatory, no-fault regime that is based on a particular social and legal history. It represents a compromise between workers and industrial employers that, in its ideal form, allows workers to receive automatic compensation for injury without having to prove the fault of the employer while at the same time relieving employers of costly damage awards⁶. Any reform of the AIAOD should respect the regime's fundamental objectives so that the regime does not become denatured. It is therefore important to understand what the Act's objectives are and how they have evolved over time in order to establish whether the current Act is capable of being modified to address the affront to human dignity that sexual harassment poses. In addition, we need to ask whether we want this regime, whose initial creation contemplated accidents to the physical person stemming from work with industrial machinery, to be extended to workplace incidents that primarily injure intangible, fundamental human rights and only consequentially affect one's integrity. It may well be that factors such as the bar to seeking reparation

5. This is an implicit theme that comes across in the works of many philosophers and legal theorists. For example, Charles Taylor alludes to the need for proper recognition of one's identity by law and politics in order to confirm one's dignity. See «The Politics of Recognition» in C. Taylor, *Multiculturalism and the Politics of Recognition* (Princeton : Princeton University Press, 1992).

6. It has been argued that this ideal form of the regime is being slowly worn away as workers are now required to go through many of the burdens of proof found in civil liability suits in order to receive compensation. See M-C Prémont & M. Tancelin, «L'indemnisation des victimes d'accident du travail : une histoire de contre-courants» (1998) 39 C. de D. 233.

for moral damages that the AIAOD presents as well as the misrecognition of sexual harassment that the regime perpetuates, justify the complete removal of sexual harassment from the scheme of workplace accidents. Consideration of the aims and objectives of the Act, in both its historical and current social context is therefore a necessary part of any project of reform and will form an essential part of my analysis.

As the Act is based on the notion of integrity, I devote the first part of this study to defining the notion of integrity in Quebec Civil law. I discuss the interpretation of integrity under the Quebec Charter and under the Civil Code of Quebec in an attempt to demonstrate that integrity is an inappropriate base notion for compensating victims of sexual harassment. I then move to a similar definitional analysis of the notion of dignity, a personality right which is integrally harmed during experiences of sexual harassment and which has a marked absence from the AIAOD.

In the second part of the paper, I discuss practical problems to obtaining compensation that can be alleviated by allowing interference with dignity to form part of the criteria used to decide a claim for sexual harassment under the Act. In the last part of this article, I present a brief social and legal history of the AIAOD, focusing on why the Act was introduced and the compromise that forms its foundation. Through this analysis, I attempt to discern the extent to which dignity and integrity were contemplated during the Act's evolution to see if its current version can support the introduction of a dignity-based aspect in order to offer more appropriate compensation for sexual harassment victims. I question whether such a modification can be done while guarding intact the essence of the compromise and values represented by the AIAOD.

One final note that I wish to make is on the scope of this paper. Although the *Béliveau* decision has made it clear that receipt of compensation under the Act is a bar to recovery under the Charter, it has left unclear some of the other circumstances in which a victim may be barred from suing under the

Charter⁷. There is thus pending litigation on this issue. This is an issue that I will discuss only as it relates to the problem that this paper addresses. The main issue in this paper is not the right to sue but the fact that sexual harassment victims who are indemnified under the AIAOD and thus barred from recovering under the Charter, receive no compensation for the affront to dignity that the sexual harassment has caused them. It starts from the premise that although there may be other situations in which a sexual harassment victim is precluded from suing under the Charter, it is clear that she cannot do so if she has received compensation under the AIAOD.

II- Sexual Harassment

i) Sexual Harassment — definition and means of recourse

The term «sexual harassment» refers to any unwelcome behaviour that is sexual in nature. In his seminal text on sexual harassment in the workplace, Maurice Drapeau offers the following definition of sexual harassment. This definition is a synthesis of the many legal definitions of sexual harassment produced by doctrine as well as Canadian and American jurisprudence :

In general, sexual harassment in the workplace can be defined as all unwelcome, sexually connotative behaviour, either verbal or physical, which is generally repeated and which, by its nature, has a detrimental effect on the victim's work environment, brings about adverse job-related consequences or interferes with the physical or psychological integrity of her person or with her dignity⁸.

Reference is made to both integrity and dignity in this definition. Depending on the forum in which one institutes a claim for compensation, the

7. See *Beaudet et Commission des droits de la personne et des droits de la jeunesse v. Genest*, [1997] R.J.Q. 1488, J.T.D.P.Q. no. 12 (QL). Discussed in more detail below, this is a successor case to *Béliveau* in which the Quebec Human Rights Tribunal attempts to set out the scenarios in which a workplace sexual harassment victim can sue under the Charter. Currently pending appeal to the Quebec Court of Appeal, dossier # 705-53-000005-960 [hereinafter *Genest* cited to R.J.Q.] .

8. M. Drapeau, *Le Harcèlement sexuel au travail : le régime juridique de protection* (Cowansville, Que : Yvon Blais, 1991) at 86-7 [translated by author].

focus of the decision-making body tends to be on one or the other of these notions.

In Quebec, a claim for sexual harassment can be made under the Charter. Such a claim may be made by complaint to the *Commission des droits de la personne et des droits de la jeunesse* which may lead to a hearing before the Quebec Human Rights Tribunal (QHRT) or by action in regular court. However, if the after-effects of the sexual harassment incident has already been compensated as an employment injury by the *Commission de la santé et de la sécurité du travail* (CSST), section 438 of the AIAOD bars the claimant from also seeking compensation under the Charter. This principle was firmly established in *Béliveau*. The Supreme Court held that the AIAOD's statutory bar against civil liability actions includes a bar against actions made under the Charter. *Beaudet et Commission des droits de la personne et des droits de la jeunesse v. Genest*⁹ went further by attempting to define the different scenarios in which a worker who is a victim of sexual harassment can make a claim under the Charter. In this case, the QHRT found three such situations : i) where the victim has not made a claim to the CSST ii) where the harassment victim has made a claim but the CSST has not recognized that he/she has suffered an employment injury and, iii) where the worker, not having received compensation for the harassment from the CSST, is suing a co-worker. As *Genest* is pending appeal, this analysis of the law is not a strong precedent.

When permitted, a claim under the Charter allows a person to seek recourse for unlawful interference with a right guaranteed under the Charter as well as cessation of the interference¹⁰. The QHRT usually conceives of sexual harassment as a violation of dignity¹¹, though the Tribunal has recognized that

9. *Genest, supra* note 7.

10. By virtue of section 49 of the *Quebec Charter, supra* note 2.

11. Among the numerous cases that refer to dignity in awarding for sexual harassment are : *Commission des droits de la personne du Québec v. Habachi (T.D.P.Q.)* (1992), R.J.Q. 1439, *Commission des droits de la personne du Québec v. Lemay*, [1995] R.J.Q. 1967 and *Lippé et Commission des droits de la personne et des droits de la jeunesse du Québec v. Québec (Procureur général)*, [1998] R.J.Q. 3397 [hereinafter *Lippé*].

other rights, such as the rights to equality¹² and integrity¹³, may be infringed as well.

Alternatively, if permanent interference with one's integrity results from sexual harassment at the workplace, compensation for the resulting injury can be sought under the AIAOD. Under the AIAOD, the injury arising from sexual harassment is treated as any employment injury, that is, as 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»¹⁴. Compensation is provided for the «permanent physical or mental impairment» sustained by the worker who has suffered an employment injury¹⁵. Although the English version of the AIAOD is ambiguous in its use of the word «impairment», the French text makes it clear that compensation will be awarded for interference with the integrity of the person :

Le travailleur, victime d'une lésion professionnelle qui subit une atteinte permanente à son intégrité physique ou psychique a droit, pour chaque accident du travail ou maladie professionnelle pour lequel il réclame à la Commission, à une indemnité pour dommages corporels qui tient compte du déficit anatomo-physiologique et du préjudice esthétique

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12. Sexual harassment in the workplace is also traditionally analyzed as an affront to the right of equality in the workplace. (See C. MacKinnon, *The Sexual Harassment of Working Women* (New Haven : Yale University Press, 1979)) although it has been argued that the courts and tribunals could be more pro-active in analyzing sexual harassment from this perspective (see C. Sheppard, «Systemic Inequality and Workplace Culture : Challenging the Institutionalization of Sexual Harassment» (1995) 3 C.L.E.L.J. 249). Dignity is possibly the most immediate and crucial right violated through sexual harassment whether the sexual harassment occurs at the workplace or elsewhere. The effect on the right to equality is an important and interesting aspect of the effect of sexual harassment but unfortunately is beyond the scope of this paper.
 13. Cases emanating from the QHRT that award damages for interference with the right to integrity include *Genova et Commission des droits de la personne du Québec v. Dhawan*, [1995] J.T.D.P.Q. no. 36 (QL) and *Lippé*, *supra* note 11.
 14. AIAOD, *supra* note 3, s. 2.
 15. See AIAOD, *ibid.*, s. 83, discussed in detail below; see also s. 1 which, in its first paragraph, states «[t]he object of this Act is to provide compensation for employment injuries and the consequences they entail for beneficiaries».

qui résultent de cette atteinte et des douleurs et de la perte de jouissance de la vie qui résultent de ce déficit ou de ce préjudice.¹⁶

As a precondition to awarding compensation, the CSST requires that it be presented with medical proof of the resulting bodily injury¹⁷. Without medical proof of the existence of sequelae, the Commission will not compensate the victim¹⁸. Jurisprudential extension of the category of «employment injury» in the past decade or so to include stress and stress-type injuries (e.g. depression) has resulted in workers being compensated for injury caused to their integrity due to sexual harassment.

A review of the few existing reported decisions of the *Bureau de révision paritaire* (BRP) and the *Commission d'appel en matière de lésions professionnelles* (CALP) dealing with sexual harassment¹⁹ reveals that sexual harassment is usually categorized as an industrial accident rather than as an occupational disease. The definition of industrial accident is broad. It refers to any sudden and unforeseen event that happens to a worker. The event can be

16. AIAOD, *ibid.*, s. 83.

17. AIAOD, *ibid.*, s. 88.

18. AIAOD, *ibid.*, s. 88. See also K. Lippel and D. Demers, *Access to Justice for Sexual Harassment Victims : The Impact of Béliveau St-Jacques on Female Workers' Rights to Damages* (Ottawa : Status of Women Canada, 1998) *supra* note 4 at 19.

19. The method used for finding these cases consisted of searching in the CALP database in SOQUIJ. This search produced less than 20 cases. Only the most relevant ones are discussed in this paper. The CALP database includes all cases from 1986. CSST cases (cases of first instance) are inaccessible to the public and could not be considered. No decisions of the newly established *Commission des lésions professionnelles* were considered.

The decision-making body for the AIAOD is the *Commission de la santé et de la sécurité du travail* (CSST) (except where a special provision gives jurisdiction to another person or agency (s. 349 AIAOD)). Prior to the coming into force of modifications to the Act on April 1, 1998, the first instance of review was done by the *Bureau de révision paritaire* (BRP). The BRP examined the case *de novo*, its decision substituting that of the CSST. Further review by the *Commission d'appel en matière de lésions professionnelles* (CALP) was also available. (See generally, B. Cliche, M. Gravel, L. Ste-Marie, *Les accidents du travail et les maladies professionnelles : indemnisation et financement* (Cowansville, Qué. : Yvon Blais, 1997), Titre V, Chapitre I, «Instances Décisionnelles»). Since April 1, 1998, however, the CSST's decision is first reviewed by members of the CSST (ss. 358.3 and 358.4 AIAOD) and further review is provided by the *Commission des lésions professionnelles* (s. 359 AIAOD).

attributable to any cause but must arise out of or in the course of his work and must cause him an employment injury²⁰. Nevertheless, despite this broad definition, expansive legislative interpretation has been needed so that sexual harassment, which usually takes place in the form of a series of events as opposed to a single event, could be accepted as falling within these parameters. The first important step was an acknowledgment that the term «employment injury» can incorporate injuries of a psychological nature²¹. It was then accepted that the superposition of several incidents of the same type, which, if considered individually, would seem benign, could be said to present the sudden and unforeseen characteristics that constitute an industrial accident²². It was by virtue of this interpretation that compensation was awarded for racial harassment²³. The first reported sexual harassment case in which this rule was applied is *Leduc et Alimentations Claude Dufour inc.*, a case in which a meat packager was awarded compensation after being harassed by her manager²⁴.

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20. AIAOD, *supra* note 3, s. 2. The broad definition of industrial accident contrasts with the much narrower concept of occupational disease which section 2 defines as «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». Only one case has characterized sexual harassment as an industrial disease. The analysis of how CALP reached this conclusion is not very rigorous. CALP merely stated that it was of the opinion that the post-traumatic depression was in relation to the work and was therefore an industrial accident. It seemed to overlook that the harassment incident was not characteristic of the employee's work nor directly related to the risks peculiar to that work. See *Desroches et Gestion Réaction Extra*, C.A.L.P. 81815-60-9608.
 21. *Mme M.*, *Commission des affaires sociales*, division des accidents du travail, decision no. JR000137323, November 23, 1983, bureau de Montréal. This led to recognizing that sexual harassment as a «climat du travail» could cause employment injury. See *Mme Nicole Leduc*, *Bureau de révision de la Commission de la santé et de la sécurité du travail du Québec*, decision no. 2335, October 30, 1984, bureau de Longueuil. See also *Drapeau*, *supra* note 8 at 192-3 for a discussion of these cases.
 22. See *Gagnon et Commission administrative des régimes de retraite et d'assurance*, [1989] C.A.L.P. 769; *P. et (Ville de)X*, [1990] C.A.L.P. 677; *Gravel et Canada (Ministère des Anciens combattants)*, [1990] B.R.P. 249 and *Blagoeva et Commission de contrôle de l'énergie atomique*, [1992] C.A.L.P. 898 which all hold harassment to be an industrial accident by considering that the events taken together constitute a sudden and unforeseen event.
 23. See *Anglade et Montreal (Communauté urbaine de)*, [1985-86] B.R.P. 131. Appealed successfully (D.T.E. 88T-730), C.A.L.P. 00837-60-8609, 1988-06-17.
 24. [1993] B.R.P. 199. Other cases at the CSST level may have awarded compensation for sexual harassment as an industrial accident at an earlier date. Unfortunately, due to the inaccessibility of cases decided by the CSST, it is difficult to know if the same reasoning was

The fact that the entire worker's compensation regime is built on the premise that permanent detrimental effect to one's integrity must be shown before compensation will be given means that sexual harassment victims face particular barriers. Before getting into a discussion of these barriers and in order to fully understand why dignity is a more suitable notion than integrity on which to ground sexual harassment claims, it is useful to outline and compare the two rights as they exist in Quebec Civil law.

ii) **Defining the Notions of Integrity and Dignity in Quebec Civil Law**

Integrity

The notion of integrity is not defined in the AIAOD. Consequently, it is to the *droit commun* that we must look for its definition²⁵. The AIAOD's emergence from and links to Quebec private law suggest that the notion of integrity it protects should find its source in the *droit commun* of Quebec Civil law. As indicated by the Preliminary Provision of the *Civil Code of Quebec* (C.C.Q.) the *droit commun* forms the foundation of all other Quebec laws. On the question of the extent to which the C.C.Q. can be used as the foundation of other legislation, Jean-Maurice Brisson affirms :

C'est une chose de dire qu'à cause de ses éléments intrinsèques, le nouveau Code manifeste une aptitude à servir de fondement aux autres lois; c'en est une autre que de savoir quelles sont précisément les autres lois que l'on pourra faire reposer sur le Code. Or cette dernière question est probablement celle qui est la plus fondamentale pour l'avenir du Code à titre d'expression du droit commun.

À cette question on peut apporter, me semble-t-il, deux réponses : *la première, que le Code civil du Québec doit être considéré comme le fondement de toutes les autres lois, dans la mesure où celles-ci font*

applied. These cases are unreported and access to the decisions is not open to the general public.

25. As opposed to public, Common law principles although it is important to note that, for the purposes of judicial review, public law principles, finding their source in the Common law, apply.

appel, principalement ou accessoirement, à des notions de droit privé;
la deuxième, que le Code civil s'applique à l'État, lorsqu'une règle de
droit public en a décidé ainsi.

– Pourquoi doit-on dire que le Code civil est le fondement de toutes
les autres lois? Pour la raison très simple qu'il est devenu difficile de
dire à quelle catégorie juridique traditionnelle les lois contemporaines
peuvent être rattachées. Rares sont les lois aujourd'hui, s'il en existe
encore, qui peuvent être qualifiées exclusivement de lois de droit
privé. Mais rares sont les lois, aussi, qui ne font aucunement appel, ne
serait-ce que de façon marginale, à des notions de droit privé.²⁶

Although the AIAOD derogates from the civilian principle of fault-based
responsibility, it does not derogate from civilian private law principles
altogether. The primary aim remains compensation for the injured party –
compensation which is still paid by the presumed author of the injury (the
employer) albeit through a collective fund instead of directly²⁷. In defining the
notions of integrity and dignity it should therefore be a valid approach to look
to the *droit commun*.

The C.C.Q.'s Preliminary Provision defines the *droit commun* as the
C.C.Q.'s body of rules working in harmony with the Quebec Charter. Of these
two sources, the Charter value is most significant. This is because section 52 of

26. J-M. Brisson, «Le Code civil, droit commun?» in *Le nouveau code civil :interprétation et application : Journées Maximilien-Caron 1992* (Montreal : Thémis, 1993) 292 à 312 [emphasis added].

27. Compensation for victims under worker's compensation legislation generally comes from a collective fund comprised of employer contributions. In the case of the AIAOD, the *Commission de la santé et de la sécurité du travail* (CSST), an administrative body established by the *Act respecting occupational health and safety*, R.S.Q. c. S-2.1, ss. 137ff, is responsible for collecting the funds required for the administration of the AIAOD. A valuation is made at the end of each year and the sums collected by the CSST are deposited into a bank or a savings and credit union (AIAOD, ss. 285, 287). See generally Chapter IX (ss. 281-331.3) on Financing and Chapter X (ss. 332-348) on the special provisions applicable to employers held personally responsible for the payment of benefits.

the Charter requires that every law conform to its first thirty-eight sections in the absence of express derogation²⁸. The AIAOD contains no such derogation.

Looking, then, to the *droit commun*, we see that the extra-patrimonial right to integrity is found both in the *Civil Code of Quebec* and in the *Charter of Human Rights and Freedoms*. As one of the first rights identified in the Code, it appears to occupy a position of primary importance in Quebec Civil law. It is therefore a bit surprising that the right is not explicitly defined in either enactment and that most related jurisprudence and doctrine focus not on what the right to integrity is, but rather, on reasons why the right exists and how it can be infringed²⁹. As Madam Justice L'Heureux-Dubé observes in *Québec (Curateur Public) v. Syndicat national des employés de l'hôpital St-Ferdinand*, Quebec courts have paid little attention to interpreting the concept of *intégrité*³⁰. Indeed, the decision in *St-Ferdinand* provides the most thorough and current definition of the right to integrity³¹.

In *St-Ferdinand*, the unionized employees of a hospital centre for the mentally disabled held a thirty-three day strike in order to pressure their employer into discarding plans for staff re-organization. As a result of the strike, over seven hundred patients were deprived of certain care and services that they normally received. In its reasons for judgment, the Supreme Court of Canada closely examines both the notions of integrity and dignity and concludes that the temporary discomfort suffered by the patients constituted an interference with their right to dignity but not with their *droit à l'intégrité*. The Court holds that *le droit à l'intégrité* as found in section 1 of the Charter, is a guarantee against

28. This strong requirement is further supported by section 53 of the Quebec Charter which directs that any doubt in the interpretation of a law must be resolved in keeping with the intent of the Charter. Wide interpretation has been given to this direction, the Courts have gone as far as holding that inspiration is to be found in the general philosophy of the Charter when interpreting a law. See *Thibault v. Corporation professionnelle des médecins du Québec*, [1992] R.J.Q. (C.A.) 2029 at 2038-39.

29. See for example A. Mayrand, *L'Inviolabilité de la personne humaine*, (Montreal : Wilson & LaFleur, 1975).

30. [1996] 3 S.C.R. 211 at 251 [hereinafter *St-Ferdinand*].

31. The only decision prior to *St-Ferdinand* which attempts to define the concept is *Viau v. Syndicat canadien de la fonction publique*, [1991] R.R.A. 740.

any interference that leaves a person less complete. This diminished state must be of a more than fleeting nature, evidenced by marks or sequelae, in order for it to be said that the person's integrity has been violated³². Insofar as *St-Ferdinand* maintains that the right to integrity is the right of a person to remain intact, it is difficult not to agree with the Court's definition. This interpretation of the right to integrity also finds support in the *Civil Code of Quebec* (with which the Charter works in harmony to provide the *droit commun*³³) and its related jurisprudence.

There are several instances in the C.C.Q. which indicate that the right to integrity of the person is one which aims to keep the person intact. The chapter on integrity of the person, for example, suggests a desire on the part of the legislature to guard the human being in a state of being whole. Interference in the form of care such as specimen-taking³⁴ and removal of tissue³⁵ require the consent of the person if possible and, if not, that of a substitute. Similarly, consent is required in order to donate body parts removed during medical care to research³⁶ and for the alienation of a body part *inter vivos*³⁷. Finally, those incapable of giving consent can only alienate a body part «that is capable of regeneration»³⁸, which also indicates concern with guarding the human being intact.

Numerous cases in Quebec Civil law jurisprudence award damages for loss of physical integrity — a fact which further suggests that the law acknowledges an interference with one's right to integrity to have occurred when a person is rendered less whole. These include cases well-known to every student of Quebec Civil law such as *Gburek v. Cohen*³⁹, in which a patient was

32. *St-Ferdinand*, *supra* note 30 at 252-53. This is also the minimum requirement for exemplary damages to be awarded for violation of the right under section 49.

33. Preliminary Disposition, C.C.Q. See generally on the relationship between the Code and the Charter, A-F Bisson, «Nouveau code civil et jalons pour l'interprétation : traditions et transitions» (1992) 23 R.D.U.S. 1.

34. Art. 11 C.C.Q.

35. *Ibid.*

36. Art. 22 C.C.Q.

37. Art. 19 C.C.Q.

38. Art. 19, para. 2 C.C.Q.

39. [1988] R.J.Q. 2424 (C.A.).

rendered deaf after being treated for too long on an antibiotic known to cause deafness; *Jim Russell International Racing Drivers School(Canada) v. Hite*⁴⁰, dealing with disfigurement; and *Trans Quebec Helicopters v. Estate of David Lee*⁴¹, awarding compensation for decapitation.

In addition to interference with physical integrity (one's physical person), damages awarded for loss of or interference with moral integrity also abound in Quebec Civil law⁴². Generally speaking, moral integrity comprises the subjective qualities that serve to define a person as an individual such as one's thoughts and sentiments. The Courts tend to place interference with all personality rights of a non-physical nature together under this title (including the rights to honour, reputation, privacy and dignity). Unfortunately, this is usually done with no acknowledgment of the tension that exists between the extent to which the rights overlap and the inherent distinctiveness of each⁴³. Finally, in conceiving of the notion of integrity as a right, I would add that the act of rendering the person less whole must be done without or in spite of the person's consent in order to constitute a violation.

At the same time, the Supreme Court's definition of integrity is a bit problematic. Its difficulty arises from the fact that it does not distinguish between the right to integrity and the right to inviolability. We must keep in mind that the Supreme Court of Canada is defining *le droit à l'intégrité* as it is found in section 1 of the Charter. Because of confusing drafting, the resulting definition of *le droit à l'intégrité* is said to correspond to the «right to

40. [1986] R.J.Q. 1610 (C.A.).

41. [1980] C.A. 596.

42. See for example *Aubry v. Éditions Vice-Versa Inc.*, [1998] 1 S.C.R. 591 regarding infringement of the right to privacy and *Deschamps v. Renault (1972) (1977)*, C. de D. 937 (S.C.) awarding an injunction to prevent unauthorized use of another's image.

43. In this regard, it is important to note that while dignity may have some common attributes with the rights often placed under the rubric of moral integrity (e.g. honour and reputation), dignity is an autonomous right; not a subset of integrity. The distinction between integrity and dignity is discussed in greater detail below. See also É. Deleury & D. Goubau, *Le droit des personnes physiques*, 2nd ed. (Cowansville, Que. : Yvon Blais, 1997) c. III at 153ff.

inviolability»⁴⁴. (The English text of article 1 offers a right to «inviolability» as the equivalent of the «*droit à...l'intégrité*»). *St-Ferdinand* therefore sets out the right to integrity (*intégrité*) and then concludes that this right is the same as the right to inviolability. It does not contemplate the definition of the right to inviolability, a right which is conceptually different and, like all extra-patrimonial rights, has its own finality⁴⁵.

More specifically, it is unclear how to classify a situation in which all of the elements of a violation of the right to integrity are present except for evidence of the person's diminution. Consider a situation in which a person is slapped in the face, no mark or bruising is left on the person's cheek and a psychological assessment reveals that the person has suffered no trauma by the incident. In such a situation, there are therefore no after-effects of either a physical or psychological nature. Based on the *St-Ferdinand* test, the slap would not be considered an interference with the person's physical or moral integrity because the person has in no way been rendered less intact. Yet, there is

44. The wording of articles 3 and 10 of the C.C.Q. infers that integrity is very similar to the notion of inviolability but distinct from it. The Code explicitly provides a right to inviolability and one to integrity of the person, indicating that the two rights are not the same. That article 3 offers two separate rights is most clearly gleaned from reading the French version of the text : «Toute personne est titulaire de droits de la personnalité, tels le droit à la vie, à l'inviolabilité et à l'intégrité de sa personne...». The use of the preposition «à» before each of the rights of inviolability and integrity, indicates that they are distinct rights. Similarly, the wording of art. 10 («Every person is inviolable and entitled to the integrity of his person. Except in cases provided for by law, no one may interfere with his person without his free and enlightened consent») suggests that : a) inviolability and integrity are distinct and independent rights and b) interfering with a person's inviolability is a first step toward interfering with her integrity. Inviolability thus appears to shield integrity. In any case, inviolability and integrity are not seen as one and the same in either article 3 or 10.

45. See preceding note. The school of thought maintaining that each right has its own discernable finality has strongly emerged since the coming into force of the Charter. See F. Allard, «La vie privée : cet obscur objet de la prestation contractuelle» in *Mélanges Paul-André Crépeau*, (Cowansville, Que. : Yvon Blais, 1997)1; F.Allard, «Une délimitation de l'ordre public par une nouvelle représentation du sacré : la dignité de l'humain» (1998) not yet published; H.P. Glenn, «Le droit au respect de la vie privée» (1979) 39 R. du B. 879; P.A. Molinari & P. Trudel, «Le droit au respect de l'honneur de la réputation et de la vie privée : aspects généraux et application» in *Formation permanente du Barreau du Québec, Application des Chartes des droits et libertés en matière civile* (Cowansville, Que. : Yvon Blais, 1988) 197.

something about this conclusion that is annoying to the sensibilities. The slap clearly constitutes an interference with one's physical person; it is also a violation since no consent was given by the person slapped. I suggest that this is the notion of inviolability, an intermediate right between the right to integrity and the right to dignity. Mere non-consensual interference with another in either a physical or emotional manner could be what defines a violation of the right of inviolability. Unfortunately, there is no doctrine or case law on this topic. It is therefore possible to violate one's right to inviolability without harming one's right to integrity. On the other hand, violating one's right to integrity without violating one's right of inviolability does not seem possible.

In summary, a violation of the right to integrity is an interference with one's physical (tangible) or moral (intangible) state of being intact. *St-Ferdinand* has held that this interference must result in the person being perceivably less whole. I remain skeptical as to whether the right to integrity should be read to designate a right to inviolability in all circumstances. The right to integrity distinguishes itself from the right to inviolability in that the right to inviolability is the right to not have interference with one's person. While the right to integrity is violated when one becomes less intact, a person's right to inviolability has a lower threshold of violation.

Dignity

Again, it is *St-Ferdinand* that provides the current state of the law. Madam Justice L'Heureux-Dubé's analysis presents a just appreciation of the right to dignity. Based on an examination of the ordinary meaning of the word and of cases dealing with dignity in both Quebec and Canadian Charter jurisprudence, she concludes that :

s. 4 of the *Charter* addresses interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself.⁴⁶

46. *St-Ferdinand*, *supra*, note 30 at 256.

This definition sets forth some very important general principles. First, it implies that the first step to deciding if the right to dignity has been violated is to determine whether there has been interference with a fundamental attribute of the person. The meaning of a fundamental attribute of the person is not explicit in the decision. With respect to the specific case of mentally disabled persons, Madam Justice L'Heureux-Dubé appears to interpret the need for care as a fundamental attribute, although she does not say so expressly. Because this need for care was disregarded, the respect to which the patient was entitled as a human being was not accorded. As dignity is the violation of respect owed to each person merely because he is a human being, Madam Justice L'Heureux-Dubé was able to draw the conclusion that the dignity of the patients had been violated. The holding in *St-Ferdinand* suggests that fundamental attributes can be appreciated in light of the particular person situated in a specific context (e.g. a mentally disabled person). In this way, fundamental attributes can be interpreted to include not only the more universal characteristics of human beings such as life but also those that are specific to a particular group. It may even extend to specific characteristics of an individual.

A further general principle advanced in *St-Ferdinand* is that dignity incorporates both an internal and an external component. The internal component relates to the respect merited by a human being from others simply because the person is a human being, while the external component denotes one's self-respect including his sense of pride and honour⁴⁷. *St-Ferdinand* suggests that both components are normally to be considered and that in cases where the person is unable to appreciate his worth as an individual, the internal component must be given precedence. In *St-Ferdinand*, this meant that the fact that the patients may not have been able to appreciate that their dignity had been violated was of no consequence in determining that the violation had occurred⁴⁸.

The wording of the Charter and doctrinal writings mirror the principles enounced in *St-Ferdinand*. The preamble of the Charter indicates that respect

47. *St-Ferdinand*, *supra* note 30 at 254.

48. One wonders if an objective appreciation would also be used in a situation where the person is able to appreciate his own worth as an individual but refuses to do so.

for human dignity is the underlying principle that informs all of the Charter rights. It reads :

...Whereas all human beings are equal in worth and dignity,
and are entitled to equal protection of the law;

Whereas respect for the dignity of the human being and
recognition of his rights and freedoms constitute the foundation of
justice and peace;..

This reflects Madam Justice L'Heureux-Dubé's assertion that the respect that every person is owed because he is a human being must be accorded. Similarly, France Allard, speaking of dignity as it is found in Quebec Civil law, states :

Le droit québécois aborde la dignité humaine de deux manières fort différentes. La première, celle que l'on rencontre le plus souvent dans la jurisprudence, est celle de la dignité humaine telle qu'elle est protégée par l'article 4 de la *Charte des droits et libertés de la personne*. Dans l'optique de l'article 4, la dignité humaine se rapproche du sentiment d'honneur, elle protège la personne, à titre de droit, contre un sentiment de déshonneur, d'angoisse et de honte, de dégradation ou d'asservissement. La seconde, qui se rattache à la limite d'ordre public, relève d'un autre ordre, celui-là transcendant, qui n'appartient à personne en particulier, mais à tous. C'est la dignité au sens des préambules de différentes déclarations internationales et de la *Charte des droits et libertés de la personne*. Cette notion de dignité vise la protection de l'idée abstraite de l'humain que chacun représente. Elle cherche en quelque sorte à assurer la survivance de l'humanité en protégeant chacun contre le sentiment de dégradation, d'infériorisation, d'avilissement ou d'exploitation que chacun peut vivre par la négation de l'autre, représentation de soi.⁴⁹

49. Allard, «Délimitation», *supra* note 45 at 21-22.

iii) Sexual Harassment properly conceived as an affront to dignity as opposed to integrity

Once the rights of integrity and dignity are outlined, it becomes clearer why, of the two, interference with dignity is a more appropriate basis for sexual harassment claims. Whereas a violation of the right to integrity involves the person's state of wholeness being attacked and dismantled in some piecemeal fashion, a violation of the right to dignity involves an attack on the person's fundamental core.

Put another way, a loss of integrity can be seen as the chipping away of the person — the loss or harm to a physical body part in the case of physical integrity or the loss or harm done to one of a person's intangible qualities, such as one's reputation, in the case of moral integrity. The injury to one's dignity is to the person's fundamental core or essence as a human being. The chipping away of the person's body represented by the classic, industrial revolution type scenario where a worker's appendage is physically mutilated by a machine or the more modern-day scenario where the constant daily stress of repetitive work causes a nervous breakdown, has little similarity with the incident of sexual harassment. In the former cases, harm is first and foremost done to the person's integrity — it is some aspect of her wholeness such as her physical person or her mental state that is attacked or interfered with. In the latter case of sexual harassment, the person is primarily attacked at her core through mere, if not blatant, disrespect for her as a human being.

Under the AIAOD, sexual harassment is treated as any other workplace industrial accident but it is very unlike other workplace industrial accidents. There may be physical or psychological after-effects of sexual harassment that affect the victim's integrity but even if such after-effects exist, they will always be secondary to the harm done to the victim's dignity. It is in this light that Chief Justice Dickson's definition of sexual harassment in *Janzen v. Platy* emerges as a just and apt appreciation of the problem. He asserts :

Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks

the dignity and self-respect of the victim both as an employee and as a human being.⁵⁰

III- Modifying the AIAOD

i) Practical Problems, Proposed Reform

On a practical level, problems exist which act as barriers to compensation for sexual harassment victims. These problems relate to the use of loss of integrity as the sole determining factor of compensation, coupled with the burdens and methods of proof used by the tribunals in deciding whether to compensate. They could be alleviated if the detrimental effects to the claimant's dignity were considered as well. Allowing compensation for the affront to dignity avoids the *Béliveau* problem : the worker for whom the after-effects of sexual harassment is deemed an employment injury, who receives compensation under the AIAOD and who is thus precluded from suing under the Charter will be able to recover some compensation for the injury to the right to dignity which the harassment has caused her. In holding that the bar to claims in civil liability presented by section 438 of the Act encompasses claims under the Charter, the majority in *Béliveau* may have overlooked that the partial, lump sum payment offered by the AIAOD is not aimed to account for interferences with dignity and that sexual harassment is a unique type of industrial accident in which it is the worker's dignity that is first and foremost affected. If the victim who is compensated by the AIAOD cannot claim for damages under the Charter, she will be precluded from any compensation for the affront to dignity she has suffered. Compensating for dignity therefore also renders the award more true. The damage award will reflect the affront to the person's dignity, the primary harm done in an incident of sexual harassment as opposed to just impairment, the secondary harm done.

It is currently a difficult and arduous process to prove loss to one's integrity after sexual harassment. As the case law stands, only claimants with the clearest of claims can successfully obtain compensation under the AIAOD.

50. *Janzen v. Platy*, [1989] 1 S.C.R. 1252 at 1284.

These claimants, usually women, generally have nothing else occurring in their lives that could have caused the stress⁵¹ or they have very minor troubles in their distant past such as an isolated incident of being molested as a child⁵². If the stress or stress-related injury can be traced to a cause other than the workplace sexual harassment, the worker will not be compensated. The worker is thus required to undergo extensive examinations. In *Supermarché Ste-Julie inc. et Lebouthillier et CSST*⁵³, for example, Ms. Lebouthillier was examined by a total of four doctors for compensation of a 5% anatomophysiological loss in the form of a minor neurosis. The first doctor was the one she chose. He referred her to a psychiatrist. After that, both the employer and the CSST requested that she see a psychiatrist of its respective choice.

Not only are these examinations potentially numerous they are also extremely intrusive. Every aspect of the woman's life is examined by the doctors—her family life, her upbringing and even her cultural adaptation. This information is then examined again by the Commission, often at a hearing, in its determination of whether the injury was a result of the harassment and of the appropriate award to be given. The CALP decision of *Phuong Dung et Granby inc.*⁵⁴ presents an example of how intrusive these examinations can be. In the written judgment, the reported facts include an excerpt from the notes of Ms. Phuong Dung's psychiatrist. In examining the other events occurring in Ms. Phuong Dung's life which may have caused her stress in addition to or instead of the alleged sexual harassment at work, the tribunal accepts the psychiatrist's evidence of conjugal problems and of difficulties in adapting culturally. The psychiatrist had noted :

...Elle [Ms. Phuong Dung] a des fortes aspirations universitaires tandis que le mari est un ouvrier. Il semblerait que selon sa culture, elle devrait renoncer à cet avancement, cette émancipation.

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51. *Desroches et Gestion Réaction Extra*, C.A.L.P. 81815-60-9608; *Corporation Urgence-Santé et Yasvinski*, C.A.L.P. 65354-60-9501.
 52. *Supermarché Ste-Julie inc. et Lebouthillier et CSST*, C.A.L.P. 67355-62-9503, 72694-62-9508.
 53. *Ibid.*
 54. C.A.L.P. 46004-60-9210.

...En effet, Asiatique et Vietnamiennne de naissance elle a grandi, s'est développée à un moment où ce pays d'Asie était balayé par la pensée occidentale et bouleversé par la guerre. Elle semble vouloir plutôt s'identifier à la femme blanche, occidentale, progressiste qu'à la personne dont ethniquement elle est apparentée⁵⁵.

One's cultural adaptation need not enter the analysis to compensate for sexual harassment. Indeed, it is a bit disturbing that a tribunal should be allowed to make its decision to compensate based in part on something as subjective as a worker's perceived cultural adaptation. If dignity were used as a deciding factor this process could be made less intrusive for the worker. An affront to dignity can essentially be decided on the facts of the case. Once it has been determined that the incident constitutes sexual harassment and that the worker was the victim, it is undeniable that her dignity has been harmed. This dignity is her internal dignity, the respect she is owed because she is a human being. No concern for the pre-existing condition of the person would enter the analysis because irrespective of the person's condition before the incident, so long as she is human she has dignity that must be respected.

The way in which dignity should be introduced as a practical matter is a more difficult question. As one option, section 83 of the Act could be modified to offer the worker, in addition to what it already provides, a fixed but indexed amount in cases of sexual harassment. This lump sum would serve to represent the harmful effects to dignity that the worker has experienced. Since it is the internal dignity with which we are concerned, that is, the dignity that every person is owed merely because she is a human being, a fixed lump sum for all sexual harassment victims would be acceptable. This lump sum would not compensate the worker for the full amount of the damage suffered to her dignity; however, compensating for less than the full amount of the injury suffered fully accords with the philosophy of the worker's compensation regime. In the spirit of compromise, the regime aims to provide a type of insurance, it is not meant to compensate the worker in full.

55. *Ibid.* at 14-15.

Under this proposed modification, the additional lump sum would be awarded in sexual harassment cases that are successful under section 83 as it currently exists. In cases where the claimant fails to show loss of or interference with integrity under section 83 but where it is clear that sexual harassment has taken place, dignity could also be used as a basis for awarding the lump sum or other types of compensation like time away from work. Though this solution may not serve to prevent the examinations from being numerous or overly intrusive, it would ensure that workplace sexual harassment victims are not precluded from all compensation due to other events happening in their lives. A further positive aspect of this modification is that it does not greatly modify the purpose of the Act. The Act still serves to compensate injury caused by workplace incidents but at the same time reconceives the notion of injury so that it encompasses the affront to dignity that exists in incidents of workplace sexual harassment.

A disadvantage of the proposed modification is that it may entail giving the worker a monetary sum while she remains at a workplace where no obligation has been imposed on the harasser or employer to end the sexual harassment problem. This raises difficult moral and philosophical issues and makes us wonder if the CSST should be dealing with sexual harassment claims at all. If it becomes common for workers to receive compensation for sexual harassment without any obligation on the part of the harasser or employer to solve the problem, the message sent to society is that sexual harassment in the workplace is acceptable so long as money is paid to the victim. The situation may encourage the normalization of the incidence of sexual harassment at the workplace. The QHRC's mandate, by contrast, involves introducing measures in the workplace to ensure that the interference with the right is stopped. I note that while the Supreme Court in *Béliveau* dealt with compensatory and exemplary damages, it did not address the right to have the violation stopped which is also granted under section 49 of the Charter. Possibly, this means that a request to have the harassment stopped could still be brought to the QHRC and that the threat of normalization is not a strong one.

A significant advantage to claiming through the CSST is that the worker can receive time away from work. For the worker, this may mean time away from her harasser. As well, the monetary compensation she will receive while off work will come much more quickly than a judgment award through the

QHRT or the regular courts. Moreover, many victims do not wish to deal with the stigma and difficulties that are often associated with suing an employer or co-worker for sexual harassment. Women who sue can attract the reputation of a troublesome employee and experience difficulty finding future employment because of this reputation. Sexual harassment can also be difficult to prove. Factors such as these could be very important to the claimant and should be respected. In fact, so long as the claimant is told of the advantages and disadvantages of claiming through each of these systems and makes an informed choice, this choice should be respected. The CSST should therefore be obliged to advise all workplace sexual harassment victims of their option to seek action through the QHRC or the courts (whether or not the worker has suffered impairment). It should also be required to inform them of the fact that obtaining compensation through the worker's compensation regime means renouncing the option of suing the employer later for full compensation for the injury caused to their extrapatrimonial rights. To help ensure that an obligation will be imposed on the employer or harasser to stop the harassment, the CSST and QHRC could perhaps work in collaboration. Overall, the advantages outweigh the disadvantages. From a practical and philosophical viewpoint, it is worth offering compensation for dignity through the AIAOD.

The next question we need to address is whether the Act can support this proposed modification. An examination of the ways in which the objectives and attributes of the Act have grown since its creation in 1909, indicates that the Act is capable of supporting this change. At the same time, in light of the recent movement towards becoming a social security Act (that is, one that only indemnifies for injury only to the extent that it allows the worker to maintain lost revenue), importing compensation for loss of or interference with dignity will present a change in orientation to the Act's evolution – a change in orientation which nevertheless provides a link to the Act's traditional roots.

ii) History and Evolution of the Worker's Compensation Regime in Quebec — the Act's capacity to support the modifications proposed

As it currently stands, the AIAOD does not provide compensation for the harm to dignity suffered by sexual harassment victims in the workplace. One way to determine whether the Act can support a modification through which the

dignity of the victim can be considered is to examine the major changes made to the objectives and defining aspects of the Act since its inception to see if similar or analogous modifications to the one proposed have been made. In this section, I first set out the circumstances leading to the Act's creation in 1909. I then examine the evolution of the Act's aims and objectives in three phases⁵⁶. The three phases centre around the years when the most major modifications were made to the Act — 1909, 1931 and 1985. I conclude that, except for the period from 1985 to present, the changes made in each phase reflect a definite movement toward considering the employee as a human being instead of merely a worker. This trend seems to be an indication that considering the dignity of the employee is not completely outside of the Act's realm. The 1985 modifications show a step backward. The minimal amounts awarded and the length of time for which they are awarded, make the employee seem less valued as a human being than as a tool of production.

The First Act Respecting Workplace Accidents in 1909 and the Situation Prior to it

Much work has been done on the legal recourses available to workers prior to the first Act respecting workplace accidents in Quebec⁵⁷. These texts focus on the problems caused by the doctrine of civil responsibility for both the workers and the employers. In our case, it may be beneficial to shift the focus : instead of concentrating on the shortcomings of the civil law system, let us attempt to examine how the worker was perceived at that time. Why was he protected? Was his protection seen merely as a means of keeping the industry running? To what degree did the Act aim to protect his human rights generally, and his rights to dignity and integrity specifically? We must ask these questions, however, while still remaining within the context of the compromise that was established. In other words, while focusing on the worker, we must not lose sight

56. See K. Lippel, *Le droit des accidentés du travail à une indemnité : analyse historique et critique* (Montreal : Thémis, 1986) for an in-depth study of the modifications to the law that occurred during these three phases.

57. For example, Lippel, *ibid.*, E. Lafontaine, «Le régime légal des accidents du travail devrait-il être modifié?» (1895) R.L.N.S. 67, E. Lafontaine, «Comment modifier notre régime légal des accidents du travail?» (1895) R.L.N.S. 409, J. C. Lamothe, *Responsabilité du patron dans les accidents du travail* (Montreal : Carswell, 1905).

of the fact that the regime was established to benefit both the employee and the employer.

Prior to the first Workmen's Compensation Act, workers who were injured at the workplace could only sue their employer using the general system of civil liability. This caused them significant hindrances. These obstacles stemmed from the fact that it was necessary to prove the employer's fault in order to succeed, whereas, in the majority of cases, the immediate cause of the accident was impossible to determine⁵⁸. If the accident could indeed be proven, another difficulty arose in convincing co-workers to testify as witnesses against the employer. Co-workers were often understandably hesitant to speak out against the employer. Many times, the accidents suffered by workers were devastating and forced them to leave the workforce. As the worker was usually the husband and supporter of the family, if the legal suit was unsuccessful, his family was left to suffer⁵⁹.

These suits in civil responsibility also had potentially disastrous effects on the employer. The slightest degree of fault led to a finding of liability by the courts. Employers were found to be at fault for not providing the proper safeguards to prevent the accident⁶⁰, such safeguards included the safest equipment no matter how expensive or unusual⁶¹. They were also held responsible for not doing all within their power to protect the worker against the accident, including safeguarding him against his own carelessness⁶² and the carelessness of his co-workers⁶³. As a consequence, employers found

58. See Lippel, *ibid.*, Lamothe, *ibid.*, and Lafontaine, *ibid.*

59. See Globensky, *Report of the Commission on Labour Accidents* (Montreal : 1908).

60. *Brown v. Leclerc* (1893), [1894] 22 S.C.R. 53. See generally on the fault of the employer K. Lippel, *supra* note 56 at 17-23 and Globensky, *ibid.* at para 50.

61. *Durant v. Asbestos & Asbestic Co.* 19 R.J.Q. 39 (S.C.). See Lippel, *ibid.* and Globensky, *ibid.*

62. *Ibbotson v. Treveithick* (1893) 4 C.S. 318 at 320. See also *St-Arnaud v. Gibson* (1898) 13 C.S. 22.

63. See *R. v. Filion* (1894), [1895] 24 S.C.R. 482, *R. v. Grenier* (1899), [1900] 30 S.C.R. 42 and Lamothe, *supra* note 57 at paras. 110-119.

themselves faced with excessive damage awards as well as innumerable court costs⁶⁴.

In 1907, the Globensky Commission, comprised of a group of three commissioners, was appointed by the Quebec government. The Commission's mandate was to canvass the opinions of employers and employees in Quebec, to study the laws and jurisprudence of other countries concerning workplace accidents, and ultimately, to make recommendations to the Quebec Government as to a more equitable system for indemnifying workplace accidents. The Commissioners' report formed a fundamental source of the workmen's compensation law eventually adopted. In reaching the conclusion that a law should be enacted that would entitle accident victims to compensation at the expense of the employer, the Commissioners contemplated not only the economic aspects of the problem but the humanitarian ones as well. In the report, they assert that «[h]uman life is so valuable that it cannot be placed on the scales with a question of costs, however considerable these may be, when the question is to prevent an accident»⁶⁵. Expanding on this theme, they note the humanitarian, Christian and social principles that incited the worker's compensation laws in Germany and England :

Outside of the economical point of view, such a law could be justified by the humanitarian principles which have induced Germany and England to adopt compensation measures. It would also find its justification in the application of the principle that it behooves the State to insure the welfare of the working classes by protecting them against accidents and by granting them some resources when they are victims of those accidents.⁶⁶

In Germany, it was believed that the state had a duty toward its poorer classes. This duty was imposed by humanitarian and Christian principles and also by a policy by which, the government felt, it was necessary to impress upon the greater masses that the state was a beneficent one.

64. Globensky, *supra* note 59.

65. Globensky, *ibid.* at para 51.

66. Globensky, *ibid.* at para 61.

Similarly, British politicians had declared England's worker's compensation law to be «founded on a great human principle and on public interest»⁶⁷. The English law aimed to «save from ruin and misery thousands of workmen when victims of accidents» and was based on the dual principles that a worker had a right to reasonable compensation when injured in the performance of his duties and that such compensation was a charge on industry, similar to the repair of a piece of machinery⁶⁸.

This discussion about founding the new law partly on humanitarian principles seems to indicate that there was a genuine concern for the employee's fundamental rights to life, dignity and integrity in addition to his economic and social rights to work and to have his family supported when he was injured and therefore unable to work. Yet, at the same time, this humanitarian desire presents a paradox. It is not clear if the worker is being saved out of respect for the dignity that every human being is entitled or because he is viewed as a means of keeping the industry running — a machine. This paradoxical metaphor of humanitarian desire to save the man as a machine is repeated more than a few times in the various analyses of the problem published during this time period. The English law to which the Commissioners refer (cited above) equates the human worker to a piece of machinery in order to justify the cost of compensation being paid by the employer. Another example is found in the theory of contractual liability, which was one of the three ways that an employee could sue his employer in civil responsibility prior to the creation of the workmen's compensation regime⁶⁹. It too aimed to protect the worker and justified this protection by reifying him. The theory underlying a claim based in contract was that the employment contract between the employer and the worker imposed an implicit obligation on the employer to protect its employees from accidents. The scope of this obligation was exhaustive : the employer's duty was nothing less than one to guarantee the absolute safety of the worker. J.

67. Globensky, *ibid.* at para 63.

68. Globensky, *ibid.*

69. An injured worker could take suit against his employer in contract, in delict (subjective liability) or in delict based on objective fault. See generally, J. C. Lamothe, *supra* note 57 and F. Lord, *Le risque professionnel : Ouvrage théorique et pratique* (1919).

Cléophas Lamothe, in describing the theory as it was developed by its Belgian founder, Saintelette, asserts :

D'après M. Saintelette, la responsabilité du patron, résultant du contrat de louage, consiste à garantir la parfaite sécurité de son ouvrier. *Il est tenu aux termes du contrat de le rendre à lui-même en aussi bon état qu'il l'a reçu, comme le locataire doit remettre la chose louée dans le même état qu'il l'a reçue, et comme l'entrepreneur de transport qui doit livrer intacte la chose qu'on lui a confiée.*⁷⁰

If the employee was seen as more than merely a worker in the early 1900s, and if the worker's compensation regime was created out of any concern at all for him as human being, it is not altogether clear that this humanitarian concern completely represents a concern for his human dignity. The principal research report leading to the creation of the law and the theory of contractual liability used at that time suggest that dignity, understood as the respect of the human being simply because he is a human being, may not have been contemplated during the Act's creation. It may merely have been the fact that he kept industry running that the worker was protected.

Interestingly, the concern for the worker as a human being as seen in both the Globensky report and the theory of contractual liability, whether or not it embodied a right to internal dignity as we understand it today, seems to have taken a secondary role once the Act was adopted. Three months following the Globensky report, Taschereau, in the debates of the National Assembly, described the soon to be enacted Workman's Compensation Act in the following manner :

La loi que nous nous proposons de présenter est calquée sur les lois anglaise, française et belge, ne donnant pas tout ce que les ouvriers demandent, mais accordant plus que ce que les patrons voudraient donner....

Il espère qu'avec le temps on pourra aller plus loin et créer l'assurance d'État pour les ouvriers. En Allemagne cette assurance donne des résultats merveilleux.

70. Lamothe, *ibid.* at 18 [emphasis added].

*Pour le moment la loi va surtout s'appliquer à éviter les
procès entre ouvriers et patrons et à régler les réclamations à
l'amiable.*

*À l'heure actuelle, le gouvernement ne peut pas forcer les
patrons à assurer leurs employés, mais l'on désire s'assurer que dans
les cas d'accidents graves ou fatals, il y ait une rémunération
suffisante pour la survie des femmes et enfants d'ouvriers⁷¹*

The primary aim was therefore to solve disputes without animosity and to provide financial support for the injured worker's family.

The first decade of judgments following the law's adoption developed the aims and objectives of the law. However, it was not altogether clear how the rights of integrity and dignity fit into the regime. The object of the law was not expansively set out in the 1909 Act. Indeed, the only indication of the Act's purpose was found in its title which stated that it was an «[a]ct respecting the responsibility for accidents suffered by workmen in the course of their work, and the compensation for injuries resulting therefrom». Section 2 of the Act tells us that a rent based on the worker's wages would be paid in cases of incapacity but it is through judicial interpretation that this was established to mean that an injured worker would receive compensation for injury resulting only if it resulted in a diminished capacity to work. For example, in *Cater v. Grand Trunk Railway*⁷², decided two years after the law's adoption, it was stated as a general principle that the compensation provided under section 2 of the Act was only for those whose capacity to work was reduced as a result of the injury. In addition to showing reduced capacity, the worker had to demonstrate that his incapacity to work would result in reduced revenue⁷³. Similarly, in *Giguère v. Frechette*, decided the same year, the Superior Court held that the fact that the plaintiff's hand had been mutilated to the point of being unrecognizable had nothing to do with determining the appropriate compensation to be awarded⁷⁴. One last example deals with a young worker who lost the tips of his index and

71. Quebec, Legislative Assembly, *Débats de l'Assemblée législative* (4 March 1909) at 49 (L.A. Taschereau) [emphasis added].

72. (1912) 18 R de J. 27.

73. *Ibid.*, at 31.

74. (1911) 40 C.S. 37 at 42.

middle fingers while working on a defective machine. He tried to claim special damages because the injury had hindered his career as a flutist—he was an amateur flutist in an orchestra. The Court held that «the only earnings of the plaintiff that could ... be taken into consideration in estimating the amount of compensation due to him under the ... Act are [sic] the actual remuneration ... from his employment... no account can be taken of what he may have earned in his leisure time»⁷⁵. As Professor Lippel notes, this ruled out compensation for loss to enjoyment of life as well⁷⁶.

Read together, these examples seem to suggest that it was not for the fact that the worker suffered injury nor for the total amount of the injury he suffered that he received compensation⁷⁷. Rather, compensation was received merely for the reduction of his capacity to work. Relating this to the notion of integrity, it would appear that although the Act provided compensation for the loss of wholeness that the worker suffered, it was only because this loss of integrity represented revenue lost. As illustrated by the case of the flutist, the loss of integrity would only be compensated for the degree to which it caused a loss of revenue. Moreover, only loss of physical integrity would be considered by the courts.

It would thus seem that concern for the worker merely because he was a human being was not the principal focus of attention once the regime was put in place. But other aspects of the worker's compensation regime tell us that this perception is not entirely true. Under the Act, the beneficiary was entitled to a lifetime rent⁷⁸. The generosity of the legislation at the time, especially compared to its most current version, demonstrates a concern for the worker that goes beyond merely bringing him back to work. Although the amount paid represented only a portion of the injury suffered, the fact of offering a lifetime rent shows concern that the worker have money to somehow ease the suffering resulting from the accident and to maintain his family. This concern becomes

75. *Dufour v. Metal Shingle Siding Company* (1920) 58 C.S. 268 at 269-70.

76. Lippel, *supra* note 56 at 82.

77. To the degree that loss of integrity can be indemnified by the monetary compensation awarded through the *droit commun*.

78. *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.

even more evident when we consider the fact that the worker did not have to prove economic hardship in order to receive this compensation.

In summary, the first decade following the Act's creation was a period during which the Act's objectives were established by the Courts. Although it may not appear at first glance that the worker's integrity was being protected for any reason other than to save him from losing revenue, if we keep in mind that the indemnity was a lifetime rent and the fact that the employee did not have to prove that he was under financial hardship in order to receive this indemnity, it becomes clear that consideration of the worker as a human being must have played some role in the legislature's reasons for indemnifying the worker.

Modifications between 1926 and 1985

This time period shows a clearer movement towards greater recognition of the employee as a person whose dignity was respected as opposed to merely a worker. Three major modifications that occurred during this time period are : a) the Act allowed compensation for industrial diseases in addition to industrial accidents⁷⁹, b) the Act provided rehabilitation for an injured worker not only to bring him back into the workforce but also to facilitate his return to normal life and his reintegration into society⁸⁰ and c) the law's field of application became progressively wider, providing for more industries and workers⁸¹.

These modifications were made after the government received the results of a commissioned inquiry into the functioning of the Act. Repeating history, the Quebec government once again took an active approach to inquiring into the ways in which the current version of the Workmen's Compensation law could be improved. In 1923, it appointed five commissioners to look into the working conditions in Quebec as they relate to the compensation regime and to

79. *Workmen's Compensation Act 1931*, S.Q. 1931, c. 100, s. 2(l) and schedule 3.

80. *An Act to amend the Workmen's Compensation Act and other legislation*, S.Q. 1978, c. 57, s. 31.

81. See *Workmen's Compensation Act 1931*, S.Q. 1931, c. 100, ss. 70, 77, *An Act to amend the Workmen's Compensation Act and other legislation*, S.Q. 1978, c. 57, s. 2 and *Act respecting industrial accidents and occupational diseases*, S.Q. 1985, c. 6, ss. 7, 8.

specifically examine the how compensation is determined and how this determination could be improved⁸². This Commission, commonly known as the «Roy Commission» was composed of the President, Ernest Roy, who represented the government, two commissioners who represented the interests of employers and two representing the interests of Quebec workers affected by the regime. The Commissioners set about their task by first sending questionnaires to organizations of workers, employers and other interested groups such as insurance companies⁸³. Forty-nine hundred questionnaires were sent out and a large number of them were answered by letters providing detailed recommendations and/or a *projet de loi*. It then held public consultations in six cities across the province.

The Roy report is absolutely fascinating. A significant number of the written responses sent by the worker and employer organizations are reproduced in full. We are thus able to examine the concerns of the workers and to see how the law was adapted to accommodate them. The principal humanitarian concerns raised by the workers can be divided into three major themes that demonstrate a desire to protect human dignity. First, the workers sought to be indemnified not only for workplace accidents but also for industrial diseases. Second, most sought greater monetary compensation for the injured worker. The amount of compensation given at the time was not enough to bring the worker back to full health or to keep his family out of poverty. Third, the workers sought means of encouraging the employer to prevent the accidents that occurred in the workplace. Interestingly, in the modifications to the Act that took place between 1926 and 1931, provision was made for all of these humanitarian concerns except for means of preventing accidents in the workplace. A lifetime rent was also extended to invalid widowers and widows with certain exceptions⁸⁴. The compensation offered thus became more concordant with the injury suffered. In summary, this second phase was an era

82. *Report of the Investigation Commission on the Compensation in Labor Accidents* (Quebec : 1925) at 3 [hereinafter «Roy Report»].

83. At that point in time, the employer was responsible for paying the indemnity costs personally. There was no collective fund as there is today. Often employers contracted with an insurance company which paid the indemnity in their place. This was acceptable under the law. See Roy Report *ibid.*, at 4.

84. See *Workmen's Compensation Act 1931*, S.Q. 1931, c. 100, s. 34.

during which the changes made to the Act, by their very nature, seem to indicate greater respect for the human side of the worker.

1985 to present

During this phase, the Act generally moved from one that compensated for injury suffered to one where the indemnity provided aimed primarily at bringing the employee back to work. Unlike all of its predecessors, the current legislation awards no lifetime compensation. Instead, the worker is merely awarded the difference between what she earned before the accident and what she would be earning if working at a job for which she is suited. The worker who returns to work loses all compensation, even if she continues to suffer from after-effects of the injury⁸⁵. The progressive concern for the dignity of the worker, established in the legislation over the years has thus taken a considerable step backward. As Katherine Lippel notes, the most recent version of the AIAOD has strong characteristics of a social security Act as opposed to one truly aimed at compensation⁸⁶. Inserting a dignity criterion for sexual harassment cases may, to a certain degree, run counter to the current evolution of the Act. However, the lump sum amount awarded would not aim to fully compensate the victim for the dignity lost. Similar to the amounts currently awarded for loss of integrity, the lump sum for dignity would also be symbolic. Furthermore, providing a dignity award would establish a link between the traditional aims of the regime (partial compensation for injury suffered) and the new goals of the Act (maintenance of revenue).

In summary, many of the major reforms since 1926 suggest a move toward greater recognition of the moral rights and dignity of the worker. In light of this trend, I think that Act could support a modification allowing partial lump sum compensation for the affront to dignity caused by sexual harassment.

As an additional note, looking outside of the Act to the Civil law of Quebec more generally, a definite movement involving placing the person and

85. See Lippel, *supra* note 56 at xvii-xviii.

86. *Ibid.*, at xviii.

personality rights at the centre of the law has taken place. This legal shift in emphasis has occurred over the past three decades. It is most predominately evidenced by the adoption of the Quebec Charter in 1975 and the reform of the Civil Code of Quebec. In 1994, the Code became one where the Book of Persons became much more detailed and which announces in its preliminary disposition the primacy of the Quebec Charter⁸⁷. This new ideology promoting respect for the person has manifested itself in smaller ways as well. We have witnessed the proliferation of laws created to protect those with less than full legal capacity including the *Mental Patients Protection Act*⁸⁸, and the *Youth Protection Act*⁸⁹. Similarly, the year 1971 saw the codification of respect of the person's inviolability⁹⁰. Reforming the AIAOD so that it respects the dignity of the individual can not only be supported by the Act's historical evolution, it is also change that is much in keeping with the modern ideology of the Quebec Civil law.

IV- Conclusions

The jurisprudence is now clear that a worker cannot claim for moral damages under the Charter further to an incident sexual harassment if the same incident has given rise to an employment injury that has been indemnified under the AIAOD. In light of this fact, and given that there are definite advantages to making a claim under the AIAOD, it becomes necessary to examine possible ways of providing victims who choose to claim under the AIAOD with compensation that acknowledges the moral injury suffered. One such way is to introduce changes to the Act that recognize the affront to dignity that sexual harassment poses.

87. For interesting discussion of this topic see : J. Pineau, «La philosophie générale du nouveau code civil du Québec» (1992) 71 Can. Bar Rev. 423; Deleury & Goubau, *supra* note 43 at xxxi-xxxii and É. Deleury, «Une perspective nouvelle : le sujet reconnu comme objet du droit» (1972) 12 C. de D. 529.

88. R.S.Q. c. P-41. Replaced by the *Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, R.S.Q. c. P-38.001.

89. R.S.Q. c. P-34.1.

90. *An Act to again amend the Civil Code and to amend the Act to abolish civil death*, S.Q. 1971, c. 84.

As a first step, the CSST should be obliged to tell all workers who are victims of sexual harassment at the workplace of their option to take action under the *droit commun* through the QHRC or in the regular court system and the advantages of doing so. The CSST should give this advice before the claim for sexual harassment is accepted so that the worker is aware that bringing a claim to the CSST precludes her from receiving full compensation, including compensation for moral injury under the Charter later on⁹¹.

If the worker then chooses to pursue her claim at the CSST (which she may do, given that she will likely receive compensation sooner and time away from the troubling work environment), a monetary award should be given for the affront to dignity that the incident of sexual harassment has caused her. In keeping with the aim of the worker's compensation regime to provide a type of insurance instead of full compensation for the injury suffered, this lump sum would represent less than the full amount of the injury suffered. It could be given in successful claims under section 83. Moreover, in cases where loss of or interference with integrity cannot be successfully demonstrated under section 83 but sexual harassment has clearly occurred, dignity could be used as the basis for awarding the proposed lump sum or other types of compensation like time away from work. Currently, the AIAOD provides compensation only for the loss of integrity that the worker suffers as a result of sexual harassment. For sexual harassment victims, this loss of integrity usually manifests itself in the form of stress or a stress-related injury like depression. As the causal link between the harassment and the injury must be strong for the worker to successfully bring a claim, workers who have suffered other stressful events in their lives may find it difficult to recover. The extensive and intrusive examinations of the Commission have led to workers being refused compensation because of its determination that the injury was caused by other events in the worker's life, not the harassment. Providing a fixed, indexed amount for dignity will ensure that victims of sexual harassment are not being precluded from all recovery, especially those victims with traumatic personal histories. The question of whether to award the lump sum will turn on the factual question of whether

91. Once the appeal in *Genest* has been decided and the additional situations in which a victim of sexual harassment will be precluded from Charter damages have been established, it will be easier to determine the stage at which and to whom this advice should be given.

sexual harassment did indeed occur. Furthermore, an award for dignity addresses the fact that it is an affront to dignity, not integrity, that is the first and foremost result of any incident of sexual harassment.

A review of the history of the AIAOD, specifically, the degree to which dignity was contemplated during its creation and the growing place it has come to occupy throughout the Act's legislative growth over seventy-five years, suggests that the Act can support this modification. Such a modification is also very much in keeping with the development of Quebec Civil law which, over the past three decades, has increasingly placed central emphasis on the person and personality rights. However, given that the Act has become one of social security which primarily aims to maintain the worker's revenue, inserting a symbolic lump sum for loss of or interference with dignity would alter the course of the Act's evolution.

Nevertheless, in light of the practical advantages that encourage victims to seek compensation at the CSST, such as time away from the harasser and the possibility that the situation will remedy itself so that the stigma and difficulties related to suing can be avoided, I think the factors that may push a worker to choose to make a claim under the CSST should be respected. As well, since sexual harassment is a unique industrial accident in that it affects primarily the dignity of the worker instead of her integrity and given the bar to recovering moral damages under the Charter, the Act should acknowledge and compensate the affront to dignity suffered.

Overall, introducing compensation for the affront to dignity that sexual harassment causes into the AIAOD is an option that would be advantageous to workers, both from a philosophical and practical standpoint. It is also a modification that could be made to fit into the current and constant evolutions of the Act and the Quebec Civil law.