

HUMAN RIGHTS TRIBUNAL

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N° : 500-53-000269-074

DATE : May 21, 2008

BY THE HONOURABLE MICHÈLE RIVET

**WITH THE ASSISTANCE OF ASSESSORS : Mtre Taya di Pietro
Ms. Renée Lescop**

**COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA
JEUNESSE**, a public body constituted pursuant to the *Charter of human rights and
freedoms* (R.S.Q., c. C-12), located at 360, Saint-Jacques street West, Montréal
(Québec) H2Y 1P5, acting for **ROGER THIBAUT** and **THEO WOUTERS**

Plaintiff

v.

X

-and-

A, as the father of X

Defendants

-and-

ROGER THIBAUT, domiciled and residing at [...], Pointe-Claire (Québec) [...]

- and-

THEO WOUTERS, domiciled and residing at [...], Pointe-Claire (Québec) [...]

Victims and complainants before the Commission des droits de la personne et
des droits de la jeunesse

-and-

CENTRE FOR RESEARCH-ACTION ON RACE RELATIONS (CRARR), a public body
located at 460 St-Catherine street West, Suite 610, Montréal (Québec) H3B 1A7

Complainant before the Commission des droits de la personne et des droits de la

jeunesse

JUDGEMENT

[1] The Human Rights Tribunal (hereinafter the “Tribunal”) is seized of an application introductive of suit whereby the Commission des droits de la personne et des droits de la jeunesse (hereinafter the “Commission”) alleges that, between April 19 and November 21, 2003, X (hereinafter the “defendant”), engaged in hurtful and discriminatory behaviour with respect to Roger Thibault and Theo Wouters (hereinafter the “victims”), thereby infringing their rights to the safeguard of their dignity and the peaceful enjoyment of their property, without distinction based on sexual orientation, contrary to sections 4, 6 and 10 of the Québec *Charter of Human Rights and Freedoms*.¹

[2] During the same period, the defendant harassed the victims at their place of residence, thereby violating their right to be free of discriminatory harassment, contrary to section 10.1 of the *Charter*.

[3] As a result, the Commission is seeking, jointly and severally from the defendant and his father, payment of the following damages:

- 12 000 \$ in moral damages to each of the victims;
- 5 000 \$ in punitive damages to each of the victims;

[4] THE WHOLE with interest at the legal rate and the additional indemnity pursuant to section 1619 of the *Civil Code of Québec*, as and from the service of the proposed corrective measures on June 18, 2007, and all costs.

Preliminary issue

[5] Because the defendant was a minor at the time of the alleged incidents, the Tribunal has ordered that his name and his father’s name be withheld in order to protect his identity.

1. FACTS AND EVIDENCE

[6] The victims, Roger Thibault, 61, and Theo Wouters, 65, are two gay men who have lived together as a couple at their current residence in Pointe-Claire since 1978.

[7] On July 18, 2002, they became the first gay male couple to formalize their union under Québec’s civil union law.

¹ R.S.Q. c. C-12 [*Charter*].

[8] They are well-known activists in their community in the fight for gay rights and have frequently been the target of acts of vandalism, harassment and intimidation. A letter dated April 6, 2004 signed by Jacquelin St-Pierre, Chief of Police Station 5, produced as Exhibit P-7, refers to several police reports filed by the victims regarding incidents of vandalism – unrelated to the defendant in the present case – occurring as early as November 2001.

[9] For their protection, a surveillance camera was installed on their property by the Direction de l'indemnisation des victimes d'actes criminels (IVAC), a body responsible for assisting victims of crime.

[10] The defendant and his family live in the same community as the victims on the West Island. They are members of The Brethren Church, a conservative Christian religious order whose followers believe that homosexuality is sinful.

[11] The defendant was raised according to the precepts of his religion and was otherwise afforded little contact with the outside world. He attends church daily and was home-schooled by his mother for his elementary as well as high-school education. He does not have access to television or the internet although he does read newspapers.

[12] The defendant began working part-time for his father's business manufacturing steel railings at the age of fifteen. He has been working with him full-time since his graduation at the age of eighteen.

[13] The incidents involving the victims and the defendant occurred between April and November 2003, when the defendant was 16 and 17 years old.

[14] On April 18, 2003, around 9:00 p.m., a dark blue pick-up truck drove past the victims' residence. One of the passengers threw toilet paper from the truck onto their car and lawn.

[15] The couple called the police, filed a report² and gave police a videotape of the incident.

[16] The following day, on April 19, 2003, someone was heard screaming "fucking faggots" from the street. When one of the victims looked outside, he saw the same dark blue pick-up truck speeding away, tires screeching.

[17] The victims called the police and gave the officers the videotape of the incident.³

[18] On November 10, 2003, around 11:30 p.m., the blue pick-up truck drove by again. According to the victims, a flare was thrown from the truck and huge flames and fireballs could be seen on the roof, rolling on the lawn and into the street. Although there was no damage to their property, the victims claim to have been very frightened by the attack.

² Exhibit P-2, Police report # 05030418028.

³ Exhibit P-9, complimentary Police report # 05030418028.

[19] Once again, the incident was recorded on videotape and reported to the police. A photograph⁴ as well as a copy of the videotape⁵ of the incident were adduced at the hearing.

[20] On November 21, 2003, as the victims were driving home, they stopped at a convenience store and noticed the same blue pick-up truck and a group of young people who had stopped to buy some beer. When the victims drove away, they were followed to their driveway and insults such as “fucking faggots” were yelled at them from the truck.

[21] Incensed, the victims decided to get back into their car, follow the truck and finally identify the culprits.

[22] The truck turned onto a street called Broadview and drove into the parking lot of a community church. The victims stopped their car, effectively blocking the truck’s way.

[23] The defendant got out of the truck and approached the victims’ car. When the victims refused to move or open the window, the defendant repeatedly banged on the window, tried to open the car door and threatened to strike one of the victims with his fist.

[24] The victims heard the defendant say that he would rather break his “fucking face” than break his fist on the window. Then they dialled 911 from the car and the defendant ran away.

[25] When the police arrived, the victims filed a report.⁶

[26] The defendant was subsequently identified by the police and admitted his involvement in each of the incidents described above.

[27] The notes from the sergeant detective’s investigation into the matter indicate that the defendant was arrested in front of his father on January 6, 2004, at which time he admitted to harassing the victims for some time and described the circumstances under which he threatened the victims. The officer noted that he seemed sincere and acknowledged his wrongdoing.⁷

[28] Because the defendant was a minor at the time of the incidents, it was determined by police and the Crown attorney that extrajudicial measures would be sufficient to hold him accountable for his actions and he was not formally charged or prosecuted.

[29] Instead, as approved by a Youth Court Judge on February 18, 2004, the defendant wrote a letter of apology to the victims as well as an essay on human rights and sought counselling for anger-management.⁸

[30] The defendant’s apology dated January 11, 2004, reads as follows:

⁴ Exhibit P-4.

⁵ Exhibit P-10.

⁶ Exhibit P-5, Police report # 05031121024.

⁷ Exhibit P-5A, Police report # 05031121024.

⁸ Exhibit P-7.

I would like to take the time and opportunity to write to you and apologize for the unthoughtful and unkind way I have treated you. I want to tell you I am very sorry for the way I have treated you over the past few months. Even though I do not agree with your lifestyle at all that you are living at the moment, I have absolutely no right to treat you the way I have. I want you to know that I feel very bad about all the stupid things I have done to you. I am very sorry that I threatened you the way I did and harassed you by driving by your house. I trust that I have learnt my lesson about treating people so wrongfully. I have been brought up in a christian household and should have known better than this. I am truly sorry and humbled by this whole experience.⁹ (reproduced with errors and/or omissions)

[31] The victims claim to have found the letter to be insincere and insufficient to put their minds at rest.

[32] The victims also dismiss the essay written by the defendant as wholly inadequate to establish any real admission of remorse.

[33] On the contrary, the victims claim to have continued to live in constant fear for their safety. They no longer listen to music, they have trouble sleeping and are constantly afraid of what might happen next. The couple has even cancelled plans to travel together so as not to leave their home unattended.

[34] More particularly, Roger Thibault testified that the events caused him to relive the profound trauma of accepting his homosexuality and that it is still something he is trying to deal with his psychologist.

[35] Theo Wouters added that his once successful artistic career has been destroyed; he is no longer able to paint because of his anxiety.

[36] During his testimony, the defendant explained that he had heard of the victims through the local papers and disapproved of their openly homosexual lifestyle, although he had never met them personally.

[37] His disapproval of homosexuality stems from his religious beliefs as a member of the Brethren Church, a conservative Christian Church that teaches that homosexuality is a sin.

[38] He confirmed that he continues to believe that homosexuality is wrong. However, he recognizes that he had no right to express his disapproval the way he did and he maintains that his apology to the victims was genuinely felt.

[39] Although he essentially acknowledged his involvement in each of the incidents reported by the victims, his testimony differed with their version of events on several points.

[40] The defendant only admitted to calling them “fags” on one occasion, on April 18, 2003, and he categorically denied ever using the word “fucking” as alleged by the victims.

⁹ Exhibit D-1.

[41] He also denied throwing a flare at the victims' property and claimed it was merely a firecracker with a small stick. He explained that there was no fire, only sparks, and all it did was "go bang". He explained that it was late at night and that he was probably just trying to show off in front of his friends.

[42] With respect to the threats he uttered on November 21, 2003, he explained that he merely wanted the victims to move their car so he could leave with his truck and that he would never have stricken either victim.

[43] Regarding his education, he claimed that although his father had told him that homosexuality is legal in Canada, he could not recall whether he had been told that homosexuals have rights or that discrimination and harassment based on sexual orientation are prohibited.

[44] The defendant's father testified that his son attends Church daily and is generally a responsible person.

[45] Although he acknowledged that it is self-evident to his family that homosexuality is a sin, he claimed he also taught his son to obey the law and that homosexuality is legal in Canada. However, he was very evasive when asked to elaborate on his teachings regarding homosexual rights and would not acknowledge that his son's behaviour had harmed the victims' sensibilities.

2. QUESTIONS IN DISPUTE

[46] The Tribunal must rule on the following questions:

- 1- Did the defendant discriminatorily harass the victims, thus interfering with their right to the safeguard of their dignity and their right to the peaceful enjoyment of their property without distinction or exclusion based on their sexual orientation, contrary to sections 4, 6 and 10.1 of the *Charter*?
- 2- If so, is the defendant's father also liable for his son's actions?
- 3- If applicable, what damages are the victims entitled to?

3. APPLICABLE LAW

[47] The relevant sections of the *Charter* read as follows:

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

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

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

49. Any unlawful interference with any right or freedom recognized by this *Charter* entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefore. In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

[48] At the federal level, sexual orientation was first recognized as a ground analogous to those specifically mentioned in section 15 of the *Canadian Charter of Human Rights*¹⁰ by the Supreme Court of Canada in *Egan*¹¹. Justice La Forest, then writing for the majority, held that “whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs”.¹²

[49] A few years later, in *Vriend*¹³, the Supreme Court described the burden suffered by homosexuals when the law fails to protect them against discrimination:

Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada’s society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.¹⁴

[50] In Québec, the right to full and equal recognition and exercise of every person’s human rights and freedoms without distinction, exclusion or preference based on sexual orientation has been explicitly enshrined at section 10 of the *Charter* since 1977.

[51] The courts have since consistently reiterated and refined the prohibition against discrimination based on sexual orientation,¹⁵ yet research continues to show that

¹⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*].

¹¹ *Egan v. Canada*, [1995] 2 S.C.R. 513.

¹² *Ibid.* at 528.

¹³ *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

¹⁴ *Ibid.* at para. 102.

¹⁵ See *Quebec (Commission des droits de la personne) v. 9113-0831 Québec inc. (Bronzage Évasion au soleil du monde)*, 2007 QCTDP 18 at para. 19-33 for a recent summary of both domestic and international instances prohibiting discrimination based on sexual orientation.

homophobia remains prevalent and that a very significant proportion of homosexuals experience homophobic violence, be it verbal, psychological, physical or sexual.¹⁶

[52] Clearly, the impact of homophobic acts cannot be underestimated.

[53] Over the years, the Tribunal has rendered a number of decisions dealing specifically with discrimination or harassment based on sexual orientation.¹⁷ In *Bronzage Évasion*¹⁸, a young homosexual was fired because his employer, the director of the tanning salon, deemed that he was not virile enough. The defendant employer added, referring to prejudices about gay men's flirting habits, that her salon was not a "dépanneur" but a respectable place. The evidence established that the victim lost his job and had been discriminated against because of his sexual orientation.

[54] In another case, the defendant was condemned for harassing a homosexual neighbour who was a tenant in the same building. The defendant repeatedly insulted the victim in connection with his sexual orientation, encouraged fellow tenants to mock and demean the victim and otherwise made the victim's life in the building extremely difficult. In that case, the Tribunal quoted the following definition of homophobia from the Groupe de travail mixte contre l'homophobie:

Toutes les attitudes négatives pouvant amener au rejet et à la discrimination, directe et indirecte, envers les gais, lesbiennes, les personnes bisexuelles, transsexuelles et transgenres, ou à l'égard de toute personne dont l'apparence ou le comportement ne se conforme pas aux stéréotypes de la masculinité ou de la féminité.¹⁹

[55] In 1982, the right to freedom from discriminatory harassment was added to the *Charter*, as explained by the Court of Appeal in *Habachi*²⁰, to eradicate unacceptable behaviour tolerated for too long, primarily towards women and homosexuals.

[56] In *Habachi*, Justice Baudouin explained that harassment may consist of repeated words or acts. However, a single act may also be sufficient to constitute harassment under certain circumstances, "à condition cependant qu'il soit particulièrement grave et

¹⁶ As many as 50 % according to one study quoted in *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Périard*, 2007 QCTDP 10 at para. 80.

¹⁷ See notably *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Michaud* (1999), 34 C.H.R.R. D/123 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Poulin* (14 March 2001), Quebec 200-53-000016-001, J.E. 2001-1071 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. 140998 Canada inc.*, 2002 QCTDP 59; *Québec (Commission des droits de la personne) c. Périard*, *ibid.*; *Quebec (Commission des droits de la personne) v. 9113-0831 Québec inc. (Bronzage Évasion au soleil du monde)*, *supra* note 15.

¹⁸ *Quebec (Commission des droits de la personne) v. 9113-0831 Québec inc. (Bronzage Évasion au soleil du monde)*, *ibid.*

¹⁹ Quebec, Commission des droits de la personne et des droits de la jeunesse, Groupe de travail mixte contre l'homophobie, "De l'égalité juridique à l'égalité sociale – Vers une stratégie nationale de lutte contre l'homophobie", Commission des droits de la personne et des droits de la jeunesse, March 2007, at 96, cited in *Québec (Commission des droits de la personne) c. Périard*, *supra* note 16 at para. 40.

²⁰ *Habachi c. Québec (Commission des droits de la personne)*, [1999] R.J.Q. 2522 at 2526 (C.A.).

sérieux”.²¹ Justice Baudouin’s analysis thus confirmed what the Tribunal had stated in other words in the first instance:

La durabilité qu’une conduite vexatoire doit également comporter pour constituer du harcèlement peut donc tantôt être établie par la répétition de certains actes, tantôt par leur gravité dans la mesure où leurs effets ont alors un caractère de continuité.²²

[57] More recently, in a case of racial harassment in the workplace, the Tribunal reviewed the relevant jurisprudence and concluded that the victim had suffered from repeated acts and words attacking his race²³. Coworkers and superiors repeatedly mistreated the victim, shouting racial slurs at him, put up a poster of a monkey meant to refer to him at his workplace, and conspired to lodge unfounded complaints of sexual harassment against him, ultimately leading to his dismissal.

[58] As a result of discriminatory harassment, a victim often suffers violations of his rights to the safeguard of his dignity and to the peaceful enjoyment of his property, rights guaranteed respectively at sections 4 and 6 of the *Charter*.

[59] There is little jurisprudence regarding the interpretation and scope of the right to the peaceful enjoyment of one’s property in relation to discrimination or harassment, although harassment between neighbours has sometimes been considered to amount to a violation of section 6.²⁴ An author has drawn the same conclusion:

Lorsque le bien litigieux est un bien corporel mobilier ou immobilier sur lequel la victime jouit d’un droit réel, le comportement incriminé relève sans discussion de l’article 6 de la *Charte*. Ainsi, pour le propriétaire d’un immeuble, les troubles de voisinage, le harcèlement incessant, les empiètements, les coupes d’arbres non autorisées, les vues illégales et les dépassements de servitude représentent en principe une violation de l’article 6 [...].

[...]

Le traitement de l’article 6 de la *Charte* en droit québécois demeure modeste, particulièrement lorsqu’on le compare à l’interprétation extensive associée à des dispositions de facture similaire (par exemple en droit européen). Si l’on excepte la possibilité d’accorder des dommages-intérêts exemplaires en cas d’atteinte à la propriété, il évoque une peau de chagrin dont les juges n’usent guère (ainsi l’absence quasi totale de contrôle sur les « lois » portant atteinte à la propriété) et dont ils ne se soucient pas non plus, faute d’usage, d’étendre le champ

²¹ *Ibid.* at 2527.

²² *Québec (Commission des droits de la personne) c. Habachi*, [1992] R.J.Q. 1439 at 1452 (T.D.P.).

²³ *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Québec (Procureur général)*, 2008 QCTDP 8.

²⁴ See notably *Lemieux c. Polyclinique St-Cyrille inc.*, [1998] R.J.Q. 44 (C.A.); *Voisard c. Hée*, 2006 QCCS 705; *Légaré c. Flammand* (31 May 2004), Quebec 200-22-023709-033, J.E. 2004-1482 (C.Q.); *Québec (Commission des droits de la personne) c. Allard* (10 April 1995), Laval 540-53-000002-943, J.E. 95-986 (T.D.P.); *Québec (Commission des droits de la personne) c. J.M. Brouillette inc.* (1995), 23 C.H.R.R. D/495 (T.D.P.).

d'application (l'interprétation assez restreinte de la notion de « biens » en fait foi).²⁵

[60] As for the fundamental importance of recognizing and respecting the dignity of all human beings, it is not only enshrined at section 4 of the *Charter*, but also emphasized in the *Charter's* preamble as follows:

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 [...].

[61] The Supreme Court of Canada has provided the following definition of human dignity:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits.²⁶

[62] In *Coutu*²⁷, the Court of Appeal described the notion of human dignity as follows:

La dignité humaine est la pierre angulaire de tous les autres droits et libertés de la personne. [...] [L]a charte québécoise des droits énonce, dans le deuxième alinéa de son préambule, que tous les êtres humains sont égaux en valeur et en dignité et ont droit à une égale protection de la loi. Cette place de choix réservée à la dignité humaine s'appuie sur le principe que chaque être humain possède une valeur intrinsèque qui le rend digne de respect.²⁸

[63] This Tribunal has also had the opportunity to elaborate on the concept of human dignity, more precisely regarding its scope and the significance of its inclusion in the *Charter's* preamble and in section 4, in *Villa Plaisance*²⁹, a case involving the sexualization of positions of employment in a centre for the elderly:

La notion de dignité qui est inscrite dans le Préambule de la Charte nous apparaît plus large que celle énoncée à l'article 4. La première n'est pas un droit fondamental en particulier, mais une valeur justifiant la reconnaissance de l'ensemble des droits fondamentaux. [...] La notion de dignité constitue alors un principe interprétatif des droits et libertés de la personne.

[...]

²⁵ Anne-Françoise Debruche, "La protection de la propriété par la *Charte des droits et libertés de la personne* : diable dans la bouteille ou simple peau de chagrin?" (2006) R. du B. 175 at 180-181, 216.

²⁶ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 53.

²⁷ *Québec (Commission des droits de la personne) c. Coutu*, [1995] R.J.Q. 1628 (C.A.).

²⁸ *Ibid.* at 1651.

²⁹ *Québec (Commission des droits de la personne) c. Centre d'accueil Villa Plaisance*, [1996] R.J.Q. 511 (T.D.P.).

[N]ous considérons que la notion de dignité au sens de l'article 4 s'entend de la valeur intrinsèque qu'a tout être humain, qui l'autorise à être traité avec pudeur, avec égards, avec déférence.³⁰

[64] Quoting the Superior Court, the Tribunal then concluded that “[l]a notion de dignité se confond avec celle de la qualité de vie [...]; la dignité, c’est la jouissance véritable de ses droits et libertés”.³¹

[65] Since then, the Tribunal has often reiterated that human dignity is the cornerstone upon which the other rights and freedoms enshrined in the *Charter* are interpreted and may be understood to their full extent.³²

[66] This Tribunal has consistently found that demeaning references to sexual orientation and homophobic statements constitute a serious affront to the dignity of a human being. In a recent decision, the Tribunal clearly stated:

Ultimately, like racist comments, which the jurisprudence has consistently considered as likely to interfere with the dignity of the individual, **hurtful, malicious and insulting comments about a person, dealing with his or her sexual orientation** or any other unlawful ground enumerated in section 10 of the Charter, **are also likely to interfere with the person’s dignity. The right to the safeguard of one’s dignity implies the right to be treated with decency, regard and deference.** Hence, interference with the right to dignity can also be caused by contempt and a lack of respect.³³ (emphasis added)

[67] In the present case, a particular question of civil law must also be considered given that, at the time of the incidents, the defendant was still a minor.

[68] In fact, the defendant’s father may be liable for his son’s actions pursuant to section 1459 of the *Civil Code of Québec*³⁴ which establishes a presumption of fault on the part of a minor’s parents:

1459. A person having parental authority is liable to reparation for injury caused to another by the act or fault of the minor under his authority, unless he proves that he himself did not commit any fault with regard to the custody, supervision or education of the minor.

[...]

[69] However, this does not mean that the minor is discharged from his own liability, as stated at section 164 of the *Civil Code*:

164. [...]

³⁰ *Ibid.* at 521, 523.

³¹ *In re Goyette Centre de services sociaux du Montréal métropolitain*, [1983] C.S. 429 at 436, cited in *Centre d'accueil Villa Plaisance*, *ibid.* at 522.

³² See for example *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Poulin*, *supra* note 17.

³³ *Quebec (Commission des droits de la personne) v. 9113-0831 Québec inc. (Bronzage Évasion au soleil du monde)*, *supra* note 15 at para. 42 [original translation].

³⁴ S.Q. 1991, c. 64.

A minor may not avoid an extracontractual obligation to redress damage caused to another person by his fault.

[70] It is important to specify that section 1459 does not provide for presumption of responsibility on the part of the parents, but merely a presumption of fault which may be rebutted. As explained by authors Baudouin and Deslauriers,

[!]a loi présume que le dommage causé par le mineur ne se serait pas produit si les parents avaient bien surveillé leur enfant, lui avaient donné une bonne éducation ou avaient exercé une garde adéquate. C'est donc, en premier lieu, sur la base d'une faute présumée de leur part que leur responsabilité est retenue.³⁵

[71] For the presumption to apply, the victim must establish the fault committed by the child, the latter's minority and the parental relationship between the child and the defendant adult³⁶. The parent may then rebut the presumption by proving that "rien dans leur conduite immédiate, ni dans leur conduite éloignée, n'a favorisé ou entraîné la survenance du préjudice"³⁷.

[72] Factors taken into consideration by the courts include the child's age, his personality, the family's affluence, negative examples set for the child or bad advice provided to the child by the parents, whether they have permitted the child to use dangerous objects and whether the child's acts were foreseeable.³⁸ Moreover, the Court of Appeal has emphasized that parents cannot be expected to keep their children under constant surveillance: "[d]ans un contexte moderne, on ne peut exiger des parents une surveillance de tous les instants".³⁹

[73] In a case of phone harassment, 11 year-old children made insulting collect phone calls to the victim from a public telephone near their school during their lunch break⁴⁰. When they were discovered, they were adequately punished both by their school and their parents and, with their parents' encouragement, they offered sincere apologies to the victim. It was noted that the children obtained good marks in school and generally behaved appropriately and that their parents had really done their best to raise them well. Consequently, they were not held liable. Furthermore, the Court noted that the parents most often succeed in rebutting the presumption at section 1459.

4. ANALYSIS

[74] In the case at bar, the facts are essentially undisputed and the defendant has admitted and apologized for his wrongdoing.

³⁵ Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile*, 7th ed. (Cowansville, Qc: Yvon Blais, 2007) at 667.

³⁶ *Ibid.* at 668.

³⁷ *Ibid.* at 671.

³⁸ *Ibid.* at 670-682.

³⁹ *Gaudet c. Lagacé*, [1998] R.J.Q. 1035 at 1041 (C.A.).

⁴⁰ *Leduc c. Bruneau* (7 February 2003), Joliette 730-32-003599-029 (C.Q.).

[75] Contradictory evidence was given with respect to the exact words used to insult the victims and regarding the object thrown at their property.

[76] Although the defendant denies that the insults he used were quoted exactly by the victims, it is immaterial insofar as the terms used were clearly demeaning and based on the victims' sexual orientation.

[77] With respect to the object thrown at the victims' property – the victims maintain it was a flare, the defendant, a firecracker – the Tribunal clearly saw a brilliant light on the video adduced as exhibit P-10 without, however, being able to determine its exact nature.

[78] In any event, although there was no material damage to the property, the admittedly loud noise and sparks were sufficiently serious to alarm the victims, to cause them to fear for their safety and to legitimately question how far the attacks would go.

[79] In addition, the defendant admitted to throwing toilet paper on the victims' lawn, to driving by their property screeching his tires, and to using threatening language, all because of his disapproval of the victims' openly homosexual lifestyle.

[80] As a result, the victims were repeatedly humiliated and gravely disturbed in the peaceful enjoyment of their property. They were not treated with respect because of their sexual orientation and their right to the safeguard of their dignity was undoubtedly violated.

[81] In so doing, the defendant clearly violated the victims' rights, contrary to sections 4, 6 and 10 of the *Charter*.

[82] Moreover, the repetitive nature of the defendant's acts as well as the escalating violence of the attacks are sufficient to constitute discriminatory harassment within the meaning of section 10.1 of the *Charter*.

[83] Consequently, the defendant must be held responsible for the damages caused to the victims.

[84] Insofar as the minor defendant injured the victims by his fault, his father is presumed liable to reparation unless he can establish that he did not commit any fault in the education of his son.

[85] The defendant's father readily admitted to believing and to having taught his son that homosexuality is a sin, as dictated by his religious beliefs. His right to do so and the defendant's right to hold those same beliefs is undisputed. However, the defendant's right to hold and express his religious beliefs, whatever they may be, does not imply any right to belittle, torment, intimidate or harass any individual on the basis of sexual orientation.

[86] Despite the age of the defendant when the incidents happened – he was almost 18 – and his generally good behaviour, his father did not rebut the presumption against him. The Tribunal finds that the defendant's father's mere assertion that he taught his son to respect the law and that he told him that homosexuality is legal is insufficient to establish that he did not fail in his duty to educate his son. In fact, when asked to

provide details about the information and values imparted to his son, the defendant's father was extremely evasive and was unable to recall whether he had taught his son that homosexuals have a right to dignity and equality, or that discrimination on the basis of sexual orientation is prohibited.

[87] Consequently, the defendant's father is liable for his son's actions.

5. REMEDIES

5.1 Moral damages

[88] The Court of Appeal has cautioned that although moral damages may be difficult to quantify, the harm suffered is no less real. As Justice Rayle has written:

Que le préjudice moral soit plus difficile à cerner ne diminue en rien la blessure qu'il constitue. J'irais même jusqu'à dire que parce qu'il est non-apparent, le préjudice moral est d'autant plus pernicieux. Il affecte l'être humain dans son for intérieur, dans les ramifications de sa nature intime et détruit la sérénité à laquelle il aspire, il s'attaque à sa dignité et laisse l'individu ébranlé, seul à combattre les effets d'un mal qu'il porte en lui plutôt que sur sa personne ou sur ses biens.⁴¹

[89] In numerous cases of sexual harassment⁴² or racial harassment⁴³, the Tribunal has awarded at least 5 000 \$ for moral damages, often even implicitly noting that the

⁴¹ *Malhab c. Métromédia CMR Montréal inc.*, [2003] R.J.Q. 1011 at 1020 (C.A.).

⁴² *Québec (Commission des droits de la personne) c. Larouche* (1993), 20 C.H.R.R. 1 (T.D.P.); *Québec (Commission des droits de la personne) c. Johnson* (18 April 1995), Joliette 705-53-000004-948 (T.D.P.); *Québec (Commission des droits de la personne) c. Dhawan* (1995), 28 C.H.R.R. D/311 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Genest*, [1997] R.J.Q. 1488 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Lavoie* (20 October 1997), Rimouski 100-53-000002-979 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Syed* (13 July 1998), Longueuil 505-53-000001-989 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Québec (Procureur général)*, [1998] R.J.Q. 3397 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Birkett* (12 April 2000), Montreal 500-53-000125-995 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Produits forestiers Domtar* (11 May 2000), Abitibi 615-53-000004-998 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Cormier* (12 October 2000), Sherbrooke 450-53-000001-004 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Café Java Haus inc.* (9 November 2000), Montreal 500-53-000127-001, J.E. 2001-9 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Sfiridis*, 2002 QCTDP 42; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Pigeon*, 2002 QCTDP 64; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Tremblay* (28 March 2003), Montreal 500-53-000162-014 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Caisse populaire Desjardins d'Amqui*, [2004] R.J.Q. 355 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Épicerie Boucherie Saint-Antonin* (26 May 2005), Kamouraska 250-53-000003-046, J.E. 2005-1109 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. D.L.*, 2007 QCTDP 23.

⁴³ *Québec (Commission des droits de la personne) c. Commission scolaire Deux-Montagnes*, [1993] R.J.Q. 1297 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c.*

sum would have been larger had the Commission asked for it. The same comment appears in three Tribunal decisions about discrimination and harassment based on sexual orientation, where the moral damages were granted as claimed.⁴⁴

[90] It is clear from the victims' testimony that they have been wounded, aggravated and frightened by the defendant's actions.

[91] They have undoubtedly suffered as a result of the defendant's actions given their particular history, circumstances and sensibilities. However, given the defendant's apprehension by police and his prompt confession and apology, as well as the ongoing harassment the victims have experienced since 2001, long before the first incident involving the defendant, the feelings of stress, anxiety and fear they have expressed cannot reasonably be wholly attributed to the defendant's actions, reprehensible as they may be.

[92] In light of the foregoing, as well as the applicable case law, the Tribunal finds that an amount of 5 000 \$ to each of the victims is appropriate reparation for the moral damages suffered.

5.2 Punitive damages

[93] It is well-established that the purpose of punitive damages is to punish and to act as a deterrent, that is to prevent the individual from repeating his actions and to dissuade members of society in general from engaging in similar behaviour.⁴⁵

[94] In *Hôpital St-Ferdinand*⁴⁶, the Supreme Court of Canada wrote on the wording of section 49 of the *Charter*:

The issue here is what the expression "unlawful and intentional interference" with a protected right, as it is used in the second paragraph of s. 49 of the *Charter*, means for the purposes of the exemplary damages contemplated in that section.

Having regard to the case law and the doctrine in Quebec and in the common law on this question and, even more importantly, in accordance with the principles of large and liberal interpretation of legislation concerning human rights and freedoms together with the objective of exemplary remedies (i.e., punishment and deterrence), I believe that a relatively permissive approach should be encouraged

Provigo Distribution inc., 2002 QCTDP 60; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Centre maraîcher Eugène Guinois Jr Inc.*, [2005] R.J.Q. 1315 (T.D.P.); *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Québec (Procureur général)*, *supra* note 23.

⁴⁴ See *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Michaud*, *supra* note 17; *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Périard*, *supra* note 16; *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bronzage Évasion au soleil du monde*, *supra* note 15.

⁴⁵ See *Québec (Commission des droits de la personne) c. Bizouarn* (21 November 1995), Terrebonne 700-53-000001-952, J.E. 96-144 at 7 (T.D.P.).

⁴⁶ *Québec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211.

in Quebec civil law when effect is to be given to the expression "unlawful and intentional interference" for the purposes of the exemplary damages contemplated in the *Charter*. Consequently, there will be unlawful and intentional interference within the meaning of the second paragraph of s. 49 of the Charter **when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause.** This test is not as strict as specific intent, but it does go beyond simple negligence. Thus, an individual's recklessness, however wild and foolhardy, as to the consequences of his or her wrongful acts will not in itself satisfy this test.⁴⁷ (emphasis added)

[95] There is no doubt, given the facts established, that the damages caused by the defendant's actions were unlawful and intentional within the meaning of section 49 of the *Charter*. On several occasions, he deliberately humiliated, intimidated and harassed the victims.

[96] At the beginning of the twenty-first century, homophobic acts of repression, intimidation or harassment cannot be tolerated in our society.

[97] In assessing punitive damages, several factors must be taken into account, notably "the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person".⁴⁸ The Court of Appeal also underlined that "il ne s'agit pas d'indemniser le demandeur mais de punir le défendeur comme il le mérite, de le décourager, lui et d'autres, d'agir ainsi à l'avenir et d'exprimer la réprobation de tous à l'égard de tels événements".⁴⁹

[98] Given the gravity of the acts committed and the importance of dissuading others from engaging in similar behaviour, yet also considering the defendant's apology and expression of remorse, the Tribunal finds that an amount of 2 500 \$ to each victim is appropriate.

[99] Can the defendant's father also be held liable for punitive damages?

[100] In *Béliveau St-Jacques*⁵⁰, in examining an employer's liability to pay punitive damages further to the intentional fault of its employees, the Supreme Court approvingly quoted Professor Perret as follows:

[TRANSLATION] Punitive damages are payable by the person who committed the intentional fault. However, what happens where another person, who has the person who committed the fault under his or her care, control or supervision, is normally liable for the latter under art. 1054 of the Civil Code? For example, are employers, who are normally liable for the compensatory damages payable as a

⁴⁷ *Ibid.* at 260.

⁴⁸ See *Civil Code of Québec*, *supra* note 34, s. 1621.

⁴⁹ *Métromédia C.M.R. Montréal inc. c. Johnson*, 2006 QCCA 132 au para. 108.

⁵⁰ *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345.

result of the fault of their employees in the performance of their duties, also liable for the exemplary damages their employees are ordered to pay for having, in the course of their work, intentionally caused the damage complained of by the victim? It seems highly doubtful that a person can be punished for the intentional fault of another under any circumstances. Does not punishment presuppose that the person being punished had wrongful intent? That is why I feel that employers cannot be held jointly and severally liable for the exemplary damages payable as a result of the intentional fault of their employees, except where there was some complicity between them (e.g. orders given, knowledge and failure to order the wrongdoing stopped) or where the employee in question is in fact one of the managers of the company.⁵¹

[101] Moreover, section 1459 of the *Civil Code* clearly specifies that a parent is “liable to reparation for injury” caused by his child’s fault, which corresponds to compensatory damages, should they be material or moral damages. Nevertheless, the function of punitive damages, as stated previously, is not one of “reparation for injury” but rather of repression and future prevention. Consequently, condemnation to punitive damages does not falls inside the limits of the parents’ responsibility as worded in section 1459.

[102] Consequently, he cannot be held liable for punitive damages.

THEREFORE, THE TRIBUNAL:

ALLOWS the present application;

ORDERS the defendants X and A to solidarily pay 5 000 \$ in moral damages to each of the victims, Roger Thibault and Theo Wouters;

ORDERS the defendant X to pay 2 500 \$ in punitive damages to each of the victims, Roger Thibault and Theo Wouters;

THE WHOLE with interest at the legal rate and the additional indemnity pursuant to section 1619 of the *Civil Code of Québec*, as and from the service of the proposed corrective measures of June 18, 2007, and all costs.

**Michèle Rivet,
President, Human Rights Tribunal**

⁵¹ Louis Perret, “De l’impact de la *Charte des droits et libertés de la personne* sur le droit civil des contrats et de la responsabilité au Québec” (1981) 12 R.G.D. 121 at 140, cited in *Béliveau St-Jacques*, *ibid.* at para. 65.

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