

**SUPREME COURT OF CANADA**

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| **Citation:** Kosoian *v.* Société de transport de Montréal, 2019 SCC 59, [2019] 4 S.C.R. 335 | **Appeal Heard:** April 16, 2019  **Judgment Rendered:** November 29, 2019  **Docket:** 38012 |

**Between:**

**Bela Kosoian**

Appellant

and

**Société de transport de Montréal,**

**Ville de Laval and**

**Fabio Camacho**

Respondents

- and -

**Canadian Civil Liberties Association**

Intervener

**Official English Translation**

**Coram:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

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| **Reasons for Judgment:**  (paras. 1 to 141) | Côté J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ. concurring) |

kosoian *v.* société de transport de montréal

Bela Kosoian Appellant

v.

Société de transport de Montréal,

Ville de Laval and

Fabio Camacho Respondents

and

Canadian Civil Liberties Association Intervener

**Indexed as:** Kosoian ***v.*** Société de transport de Montréal

2019 SCC 59

File No.: 38012.

2019: April 16; 2019: November 29.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

on appeal from the court of appeal for quebec

*Police — Civil liability — Fault — Offence non‑existent in law — Police officer arresting and searching citizen after she refused to hold escalator handrail in subway and to identify herself — Citizen bringing civil liability action against police officer, his employer and public transit authority for which he acted as inspector — Whether police officer incurred civil liability and engaged his employer’s civil liability by acting as he did toward citizen — Whether citizen must bear share of liability because of her refusal to cooperate with police officer — Civil Code of Québec, art. 1457.*

*Civil liability — Legal person established in public interest — Immunity — Fault — Public transit authority providing police officers designated as subway inspectors with training indicating that holding escalator handrail was obligation under by‑law — Police officer arresting and searching citizen who did not hold handrail on basis of that training — Citizen bringing civil liability action against police officer, his employer and public transit authority — Whether public transit authority incurred civil liability — If so, whether it can claim public law relative immunity.*

K took the descending escalator in a subway station without holding the handrail. A police officer employed by the city, who had been designated as an inspector by the authority responsible for the subway system (“STM”), ordered her several times to hold the handrail, since the STM taught police officers that holding the handrail was an obligation under a by‑law. K refused to comply and to identify herself. The police officer arrested her and searched her bag. He gave her a statement of offence for disobeying a pictogram indicating that the handrail should be held, which the STM had posted near the escalator pursuant to its By‑law R‑036, and another statement of offence for hindering the police in their duties. After being acquitted in the Municipal Court, K instituted a civil liability action against the police officer, his employer and the STM, arguing that the arrest was unlawful and unreasonable and that it constituted a fault because holding the handrail was not an obligation under a by‑law, but simply a warning. The trial judge dismissed the action, finding that the police officer had not committed any civil fault and that it was K who had behaved in an inconceivable manner by refusing to comply with the officer’s order. A majority of the Court of Appeal affirmed that decision.

*Held*: The appeal should be allowed.

A reasonable police officer in the same circumstances would not have considered failure to hold the handrail to be an offence. The police officer therefore committed a fault when he arrested K. The STMcommitted a fault by teaching police officers that the pictogram in question imposed an obligation to hold the handrail, a fault that explains — at least in part — the officer’s conduct. Finally, as the officer’s principal, the city must be held liable for his fault. As for K, she was entitled to refuse to obey an unlawful order, and she therefore committed no fault that would justify an apportionment of liability.

To carry out their mission of maintaining peace, order and public security, police officers are required to limit citizens’ rights and freedoms using the coercive power of the state. Because the risk of abuse is undeniable, it is important that there always be a legal basis for the actions taken by police officers; in the absence of such justification, their conduct is unlawful and cannot be tolerated. In exercising their powers, police officers are therefore bound by strict rules of conduct that are meant to prevent arbitrariness and unjustified restrictions on rights and freedoms. Police officers who deviate from these rules have no public law immunity. Under Quebec law, a police officer, like any other person, is held civilly liable for the injury caused to another by his or her fault, in accordance with art. 1457 *C.C.Q.*,which imposes on every person “a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another”. A police officer commits a civil fault where he or she acts in a manner that departs from the conduct of a reasonable officer in the same circumstances. Police conduct must be assessed according to the test of the normally prudent, diligent and competent police officer in the same circumstances; this test recognizes the largely discretionary nature of police work.

The standard of conduct that a reasonable police officer is expected to meet corresponds to an obligation of means: it is not enough to show that the officer’s conduct was unlawful. Nevertheless, the mere fact that there is a legal basis for a police officer’s actions does not necessarily exempt the officer from civil liability. Police officers are obliged to have an adequate knowledge and understanding of criminal and penal law, of the offences they are called upon to prevent and repress and of the rights and freedoms protected by the Charters. They must be able to exercise judgment with respect to the applicable law and cannot rely blindly on the training and instructions received, which, although they must be considered in assessing an officer’s conduct, are not conclusive in themselves. Police officers cannot avoid personal civil liability simply by arguing that they were merely carrying out an order that they knew or ought to have known was unlawful. Therefore, they will sometimes commit a civil fault if they act unlawfully, even where their conduct is otherwise consistent with the training and instructions received, with existing policies, directives and procedures and with the usual practices. It is all a matter of context: the question is whether a reasonable police officer would have acted in the same manner. Police officers will generally not be civilly liable for enforcing a provision — presumed to be valid at the time of the events — that is subsequently declared invalid, provided that they do not otherwise commit a fault in exercising their powers. However, it does not follow that the existence in law — or the scope — of an offence must be assumed in a civil liability action on the basis of bare assertions to this effect made by the state, a legal person established in the public interest or one of their representatives.

In the case at bar, the police officer committed a civil fault by ordering K to identify herself and by arresting her and conducting a search based on a non‑existent offence, namely disobeying the pictogram indicating that the handrail should be held. A reasonable police officer in the same circumstances would not have concluded that disobeying the pictogram was an offence under a by‑law. Before depriving K of her liberty, the officer had to ensure that there was valid legal justification for his actions. A reasonable police officer would have concluded that the pictogram simply advises users to be careful, despite the training received. Therefore, the officer’s conduct necessarily constituted a fault insofar as it resulted from an unreasonable belief in the existence of an offence that did not exist in law. As principal, the city is also bound to make reparation for the injury caused, pursuant to arts. 1463 and 1464 *C.C.Q.*, because it is not in dispute that the police officer was acting in the performance of his duties when the fault was committed, even though his conduct was also unlawful.

As for the STM, it has no public law immunity. The general rules of extracontractual civil liability are, in principle, applicable to a legal person established in the public interest, unless that person shows that a specific rule of public law derogates from them. A legal person established in the public interest does not incur civil liability where it makes or passes a regulation or by‑law that is subsequently held to be invalid, unless its decision to do so was made in bad faith or was irrational. It may nonetheless be civilly liable if it makes an error of law in implementing its own regulations or by‑laws. In the instant case, the training provided to police officers by the STM is part of the implementation of By‑law R‑036. In this respect, the STM cannot avoid the rules in art. 1457 *C.C.Q.* It committed a direct fault in the implementation of the by‑law by providing training that suggested to police officers called upon to enforce its by‑laws that holding the handrail was an obligation pursuant to a by‑law. Once the STM undertook to provide police officers with training, it had to ensure that the training would be appropriate and that it would reflect the law. If the police officer was at fault for believing that holding the handrail was an obligation, the STM was equally at fault for misinterpreting the by‑law and providing training accordingly.

The STM is also liable as mandator for the police officer’s fault. The designation of a police officer as a subway inspector creates a legal relationship analogous to that of mandate within the meaning of art. 2130 para. 1 *C.C.Q.*, in which a public transit authority may incur civil liability to a third person. In enforcing the by‑laws of a public transit authority, a police officer *ipso facto* represents that authority in the performance of a juridical act, which must be interpreted broadly. This conclusion in no way compromises the autonomy that a police officer has in exercising his or her powers. If a police officer can be characterized as a subordinate, there is no reason why he or she could not be a mandataryunder the rules of civil liability — a relationship that does not require any relationship of subordination.

K was entitled to refuse to obey an unlawful order and therefore committed no fault that would justify an apportionment of liability under art. 1478 para. 2 *C.C.Q.* Unless a statutory provision or common law rule clearly imposes it, there is no obligation to identify oneself to, or indeed to cooperate with, a police officer. To conclude that K must be apportioned a share of the liability would amount to saying that there is, in all circumstances, a rule of conduct requiring compliance with an unlawful order given by a police officer, even where the order is based on an offence that simply does not exist in law. A well‑informed person whose rights are infringed must be able to respond — within reason — without being held civilly liable. Similarly, K cannot be faulted for not doing anything to mitigate the injury she suffered. A reasonable, prudent and diligent person is not under an obligation to obey an unlawful order. The duty to mitigate must sometimes be displaced where it conflicts with respect for rights and freedoms. In a free and democratic society, no one should accept — or expect to be subjected to — unjustified state intrusions. Interference with freedom of movement, just like invasion of privacy, must not be trivialized.

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APPEAL from a judgment of the Quebec Court of Appeal (Dutil, Vauclair and Schrager JJ.A.), 2017 QCCA 1919, [2017] J.Q. no17168 (QL), 2017 CarswellQue 10898 (WL Can.), affirming a decision of Le Reste J.C.Q., 2015 QCCQ 7948, [2015] J.Q. no 8499 (QL), 2015 CarswellQue 8746 (WL Can.). Appeal allowed.

Aymar Missakila and Ghassan Hamod, for the appellant.

Daniel Maillé, for the respondent Société de transport de Montréal.

Alexandre Thériault‑Marois, *Maryann Carter* and Marie‑Pier Dussault‑Picard, for the respondents Ville de Laval and Fabio Camacho.

Sylvie Rodrigue and *Emma Loignon‑Giroux*, for the intervener the Canadian Civil Liberties Association.

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| **TABLE OF CONTENTS** | |
| Paragraph | |
| I. Overview | 1 |
| II. Background | 8 |
| III. Judicial History | 25 |
| A. *Court of Québec (2015 QCCQ 7948)* | 25 |
| B. *Quebec Court of Appeal (2017 QCCA 1919)* | 27 |
| IV. Issues | 36 |
| V. Analysis | 37 |
| A. *Civil Liability of the Police Under Quebec Law* | 37 |
| (1) Application of the General Rules in Article 1457 *C.C.Q.* | 37 |
| (2) Civil Fault and the Reasonable Police Officer Test | 42 |
| B. *Liability of Constable Camacho and the City* | 53 |
| (1) Obligation of Police Officers to Know and Understand the Law | 55 |
| (2) Presumption of Validity and Non‑existence of an Offence | 67 |
| (3) Application to the Facts | 75 |
| C. *Liability of the STM* | 105 |
| (1) Relative Immunity in the Exercise of a Regulatory Power | 106 |
| (2) Direct Fault of the STM | 111 |
| (3) Liability of the STM as Mandator | 118 |
| D. *Apportionment of Liability* | 128 |
| E. *Injury and the Amount of Damages* | 138 |
| VI. Conclusion | 141 |
| Appendix |  |

English version of the judgment of the Court delivered by

Côté J. —

1. Overview
2. On an evening in May 2009, the appellant, Bela Kosoian, entered a subway station in order to travel to university. She took the descending escalator. Like many subway users, she did not hold the handrail. She leaned forward and rummaged through her bag. A police officer saw her and ordered her several times to hold the handrail. Ms. Kosoian refused to comply and then refused to identify herself once she reached the bottom of the escalator. A few moments later, as she tried to leave, the police officer and a colleague took her by the elbows and led her to a holding room. Given her refusal to provide a piece of identification and her agitated behaviour, the police officers handcuffed her with her arms crossed behind her back and forced her to sit on a chair. After searching her bag, still without her consent, the officers finally gave her a statement of offence for $100 for disobeying a pictogram indicating that the handrail should be held and another statement of offence for $320 for hindering them in their duties. Ms. Kosoian was later acquitted in the Municipal Court.
3. This appeal concerns Ms. Kosoian’s civil liability action against the police officer who arrested her, Constable Fabio Camacho, his employer, Ville de Laval (“City”), and the authority responsible for the subway system, Société de transport de Montréal (“STM”). Ms. Kosoian submits that not only was the arrest unlawful and unreasonable, but it also constituted a fault. She argues that holding the handrail was not an obligation under a by‑law, but simply a warning. Furthermore, a reasonable police officer in the same circumstances would not have acted in such a manner.
4. The courts below rejected Ms. Kosoian’s arguments and found that the respondents, Constable Camacho, the City and the STM, had not incurred any civil liability. In their view, Ms. Kosoian had instead been the author of her own misfortune by refusing to cooperate.
5. I disagree. With respect, the courts below erred in law in presuming the very existence of the alleged offence. The majority of the Quebec Court of Appeal could not rely on the presumption of validity applicable to the STM’s *By‑law on the standards of safety and conduct to be observed by persons in the rolling stock and buildings operated by or for the Société de transport de Montréal* (“By‑law R‑036”) to support the reasonableness of Constable Camacho’s belief in the existence in law of the alleged offence. The basis for the action instituted by Ms. Kosoian is not that the by‑law is invalid, but rather that it does not create the offence alleged against her. In other words, she argues that that offence does not exist in law; yet the presumption that a by‑law is valid does not extend to the very existence or scope of an offence. I would add that the validity of the by‑law is not challenged in this case and is therefore not a matter I need to address.
6. In my view, a reasonable police officer in the same circumstances would not have considered failure to hold the handrail to be an offence. Constable Camacho therefore committed a fault when he took hold of Ms. Kosoian in order to prevent her from leaving and detained her in the holding room*.* The STM, for its part, committed a fault by teaching police officers that the pictogram in question imposed an obligation to hold the handrail, a fault that explains — at least in part — Constable Camacho’s conduct. Finally, as the police officer’s principal, the City must be held liable for his fault. As for Ms. Kosoian, she was entitled to refuse to obey an unlawful order, and she therefore committed no fault that would justify an apportionment of liability.
7. In a free and democratic society, police officers may interfere with the exercise of individual freedoms only to the extent provided for by law. Every person can therefore legitimately expect that police officers who deal with him or her will comply with the law in force, which necessarily requires them to know the statutes, regulations and by‑laws they are called upon to enforce. Police officers are thus obliged to have an adequate knowledge and understanding of the statutes, regulations and by‑laws they have to enforce. Police forces and municipal bodies have a correlative obligation to provide police officers with proper training, including with respect to the law in force. Under Quebec law, a breach of these obligations may, depending on the circumstances, constitute a civil fault.
8. That is the case here. Ms. Kosoian’s appeal must therefore be allowed against the three respondents, with costs throughout.
9. Background
10. On May 13, 2009 at 5:05 p.m., Ms. Kosoian, a 38‑year‑old student and mother, was in the Montmorency subway station in Laval. She planned to take the Montréal subway to travel to the Université du Québec à Montréal to attend a class.
11. Ms. Kosoian went down the station’s long escalator. There was a sign posted at the top of the escalator in plain view of users (see the reproduction in the appendix to these reasons). The sign was titled [translation] “CAUTION” and contained several pictograms, including one showing a figure holding the escalator handrail (except where otherwise indicated, I use the term “pictogram” in my reasons to refer specifically to this figure). The pictogram in question was accompanied by the following warning: [translation] “Hold Handrail”. Ms. Kosoian was aware of the existence of the pictogram. She believed that it simply constituted a warning, not an obligation under a by‑law.
12. As she went down the escalator, Ms. Kosoian rummaged through her backpack looking for money to pay for her ticket. While she did so, she did not hold the handrail.
13. That evening, Constable Camacho, a police officer with the City, was assigned with a colleague to monitor the subway stations in Laval, including the Montmorency station. The STM had designated the two police officers as inspectors and, for that purpose, had given them nearly 20 hours of training on safety in the subway system, the applicable by‑laws and the actions they were to take. Among other things, the STM taught the police officers that holding the handrail was an obligation under a by‑law. In fact, in Constable Camacho’s view, *all* of the pictograms in the subway established prohibitions or obligations, and failure to comply with them was an offence.
14. While patrolling the Montmorency station, Constable Camacho saw that Ms. Kosoian was going down the escalator without holding the handrail. Fearing for her safety, he decided to intervene to [translation] “raise awareness”. He approached her and warned: “Careful, you might fall. It’s dangerous. You should hold the handrail” (C.Q. reasons, 2015 QCCQ 7948, at para. 139 (CanLII)).
15. Ms. Kosoian refused to do so, and a heated exchange ensued. Although the versions of events differ, it is clear that the appellant was upset by the police officers’ actions and that she questioned their authority. For their part, the police officers found her tone to be arrogant and aggressive. In the end, Constable Camacho ordered her to hold the handrail and threatened to give her a statement of offence if she refused to comply. Ms. Kosoian persisted in refusing to do so.
16. Ms. Kosoian and Constable Camacho arrived at the bottom of the escalator. Any potential danger had now passed. Constable Camacho nonetheless stood by his decision to give Ms. Kosoian a statement of offence for disobeying the pictogram. He asked her to follow him to the STM’s holding room so he could draw up the statement there, but she ignored his request and tried to walk toward the subway turnstiles instead.
17. The police officers then intervened physically. Constable Camacho took hold of Ms. Kosoian’s forearm to restrain her. With his colleague’s help, he then led her to the holding room by force, holding her — at least briefly — by the elbows. The room contained a table, chairs and a cell. There was a surveillance camera in the room that filmed the scene.
18. Once inside the room, Constable Camacho asked Ms. Kosoian to give him a piece of identification. She refused to identify herself and asked to be allowed to contact a lawyer. Constable Camacho then told her that he would arrest her for hindering a police officer in his duties if she did not cooperate. Faced with her repeated refusals to cooperate and her agitation, he advised her that she was under arrest and informed her of her constitutional rights.
19. Constable Camacho then tried to search Ms. Kosoian’s backpack to find a piece of identification, but she objected. He [translation] “placed his foot on hers, pressing firmly with his shoe”, and attempted to take the backpack from her (C.Q. reasons, at para. 32).
20. It was then that the police officers decided — following a warning — to handcuff Ms. Kosoian by pulling her arms back, pinning her against the wall and placing the cuffs on her. They then forced her to sit on a chair before they searched her bag, in which they quickly found her wallet and identification cards.
21. While Constable Camacho was drawing up the statements of offence, Ms. Kosoian continued to protest and moved closer to him several times to look at what he was writing. The police officers had to use force to keep her on her chair. Because of her agitated behaviour, Constable Camacho placed his right foot on the left leg of the chair. In the end, the officers told Ms. Kosoian about the presence of the surveillance camera, which apparently had the effect of easing tensions.
22. At 5:29 p.m., the police officers finally gave her two statements: one for $100 for disobeying a directive or pictogram posted by the STM contrary to art. 4(e) of By‑law R‑036, and another for $320 for hindering an inspector in the performance of inspection duties contrary to s. 143 of the *Act respecting public transit authorities*, R.S.Q., c. S‑30.01. The police officers then removed the handcuffs from Ms. Kosoian’s wrists, and she took the statements and left.
23. According to Ms. Kosoian, she experienced significant psychological stress and humiliation as a result of the police action. The following day, she saw a physician, who found that she was suffering from post‑arrest anxiety and had superficial abrasions on her wrists and one of her feet. A few days later, another physician diagnosed her with post‑traumatic stress and a sprained wrist.
24. Meanwhile, Ms. Kosoian’s spouse filed a complaint with the STM the day after the police action. He formally requested that the videotapes be given to him. His request went unheeded. Because Constable Camacho was on vacation when the complaint was filed, it was only once he returned on May 19 that he was able to request that the tapes be kept. It was too late. After five days, the surveillance system had already erased the images of the incident.
25. In accordance with the statements of offence issued on its behalf, the STM, as prosecutor, instituted penal proceedings in the Municipal Court of Ville de Montréal. Ms. Kosoian was ultimately acquitted of the two offences on March 14, 2012. In his decision, Judge Bisson concluded that he was not [translation] “satisfied beyond a reasonable doubt that there is an obligation to obey [the] pictogram” (A.R., vol. II, at para. 48). He also stated that Ms. Kosoian’s testimony was “credible and believed” (*ibid.*). Conversely, he did not accept the prosecution’s evidence “in light of the contradictions between the abridged offence reports and the testimony of the constable [Camacho]” (*ibid.*). He even stated that he had “the impression that adjustments were made to the evidence to justify the failure of this intervention, which basically should have been routine” (*ibid.*).
26. Ms. Kosoian subsequently instituted the civil liability action that is the subject of this appeal. She alleged, among other things, that Constable Camacho had committed a civil fault by making an unlawful and unreasonable arrest on the basis of a pictogram that did not create an offence but simply gave a [translation] “warning of danger”. She added that the physical restraint used against her was unreasonable in the circumstances. She argued that the City was also liable as Constable Camacho’s principal. As for the STM, Ms. Kosoian reproached it for improperly applying By‑law R‑036 by treating failure to comply with the pictogram indicating that the handrail should be held as if it were an offence, and for instituting and pursuing penal proceedings on that basis over a three‑year period. She argued that the STM was also liable, as mandator, for the faults committed by Constable Camacho, since it had designated him to enforce its by‑laws. According to Ms. Kosoian, the faults committed by Constable Camacho and the STM had caused her psychological suffering and minor bodily injuries in addition to impairing her dignity. She claimed a total of $69,000 in compensatory and punitive damages.
27. Judicial History
    1. Court of Québec (2015 QCCQ 7948)
28. The trial judge, the Honourable Denis Le Reste, dismissed the civil liability action. He found that Constable Camacho had not committed any civil fault (para. 270). In his view, the applicable rules and directives were [translation] “clear” and their implementation “beyond reproach” (para. 281), so much so that Constable Camacho’s work had been “exemplary and irreproachable” (para. 266). He also stated that he did not have the “slightest suspicion of unreasonable methods used by the police officers” (para. 279). He found that Ms. Kosoian had at no time been “unlawfully detained” (para. 276) and that the actions taken against her, including the use of handcuffs, had been “entirely justified” in the circumstances (paras. 277‑80). Rather, it was Ms. Kosoian who had behaved in an “inconceivable” manner by “unlawfully and stubbornly” refusing to comply with a police officer’s order and to hold the escalator handrail (paras. 270‑72).
29. In light of these findings, the trial judge did not assess the amount of damages. However, in quoting *Godin v. Montréal (Ville de)*, 2015 QCCQ 5513, he did reproduce an excerpt from *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 9, in which the Court stated that “minor and transient upsets” do not constitute compensable injury in tort law.
    1. Quebec Court of Appeal (2017 QCCA 1919)
30. The majority dismissed Ms. Kosoian’s appeal. The Honourable Julie Dutil, writing for the majority, expressed the view that Constable Camacho did not commit a civil fault by giving the appellant a statement of offence and by arresting her when she refused to identify herself (para. 6 (CanLII)). Dutil J.A. noted that, in matters of civil liability, a police officer is held to the standard of a reasonable police officer in the same circumstances, such that the officer’s conduct must be considered in light of the facts known to him or her at the time of the events (*ibid.*). In this case, she noted that By‑law R‑036 was presumed to be valid at the time of the events and that Constable Camacho had also received training on the subject (paras. 7-8, 11 and 13). For these reasons, he had to assume that failing to hold the handrail was an offence under the by‑law in force (*ibid.*). Dutil J.A. added that it was not Constable Camacho’s role to analyze the law to determine whether the offence existed in law (para. 11). In the end, she concluded that it was [translation] “[t]he appellant [who] was the author of her own misfortune” (para. 18). Ms. Kosoian should have cooperated with the police, even if she contested the statements of offence later. In this context, even on the assumption that a fault had been committed, it would not be appropriate to award damages as a remedy (para. 18).
31. On the issue of the STM’s liability, Dutil J.A. stated that that public body enjoys relative immunity in the exercise of its regulatory power, which includes the implementation of By‑law R‑036 (para. 21). For the STM to be found civilly liable on this basis, Ms. Kosoian had to establish that it had acted in bad faith. In Dutil J.A.’s view, she had not proved this (para. 22).
32. The Honourable Martin Vauclair wrote concurring reasons in which he agreed with Dutil J.A.’s opinion (para. 25) but also stated that the police officers could lawfully search Ms. Kosoian’s bag, incidentally to her arrest, in order to identify her (para. 42). Dutil J.A. found that it was not necessary to decide that question (para. 15).
33. The dissenting judge, the Honourable Mark Schrager, would have allowed the appeal, set aside the trial judgment and ordered the respondents to pay Ms. Kosoian $15,000 in damages. In his opinion, the trial judge had erred in law in finding that there was an obligation under a by‑law to hold the handrail on the STM’s escalators (paras. 58 and 64).
34. First, he expressed the view that art. 4(e) of By‑law R‑036 could not render it an offence to fail to comply with a pictogram (paras. 58‑59 and 64‑65). This would be an unlawful subdelegation of the STM’s regulatory power to the person responsible for making and posting pictograms. The enabling provision, s. 144(1) of the *Act respecting public transit authorities*, CQLR, c. S‑30.01, authorizes the STM to prescribe standards of safety and conduct only through a by‑law approved by the city. However, the pictogram in question did not receive such approval.
35. The dissenting judge then noted, on an alternative basis, that [translation] “the pictogram communicates only a warning to hold the handrail” and therefore does not set out a *directive* (paras. 67‑70 (emphasis added)). He found that a pictogram cannot be the source of an offence under art. 4(e) unless it amounts to a directive (paras. 71‑72). As such, Ms. Kosoian could not be reproached legally for disobeying a message that in fact only advises users to be careful (para. 67). The dissenting judge concluded that By‑law R‑036 does not render it an offence to fail to hold the handrail (para. 73).
36. In the dissenting judge’s view, not only were the arrest and search unlawful, but they also constituted a fault given that the offence that could have justified them did not exist (paras. 90‑91). He stated that police officers must know the general principles of criminal and penal law they have to apply (para. 84) and that ignorance of the law is no defence (para. 82). In the instant case, therefore, it was not sufficient that Constable Camacho sincerely believed that art. 4(e) of By‑law R‑036 created an offence (para. 84). The dissenting judge was also of the view that the reasonable police officer standard can be of no assistance where a court is called upon to decide a question of law rather than to assess a fact situation (para. 85). When an arrest is made for an offence that does not exist in law, the act constitutes a fault even if it also results from improper training (para. 88).
37. The dissenting judge further found that in addition to being liable for its own faults in the drafting and implementation of By‑law R‑036, including the training given to police officers, the STM was liable as mandator for Constable Camacho’s fault (paras. 97‑98). He was of the opinion that, in the circumstances, the STM could not claim the relative immunity enjoyed by public bodies in the exercise of their regulatory power (para. 100). The STM was also at fault for failing to discontinue the proceedings against Ms. Kosoian in the Municipal Court of Montréal (para. 101). Finally, the City too was liable for Constable Camacho’s fault in its capacity as his principal (para. 102).
38. The dissenting judge expressed the view that the events had caused moral injury to Ms. Kosoian. After reviewing the relevant jurisprudence, he set the total amount of compensation at $20,000 (paras. 105‑12). However, he found that 25 percent of the liability should be apportioned to the appellant because her failure to cooperate with the police officers had aggravated the situation. She had thus breached her duty to mitigate the injury (para. 113). Schrager J.A. would therefore have ordered the respondents solidarily to pay the appellant $15,000 while apportioning all of the liability to the STM, among the three respondents, because of its role in drafting the by‑law, training the police officers and prosecuting Ms. Kosoian in the Municipal Court (para. 116).
39. Issues
40. The following issues must be considered in this appeal:
    1. What are the general principles governing the civil liability of the police?
    2. Did Constable Camacho incur civil liability by acting as he did toward Ms. Kosoian because of the fact that she was not holding the escalator handrail?
    3. Did the STM incur civil liability by committing a direct fault? If so, can it claim public law relative immunity? Did it also incur liability as mandator?
    4. On the assumption that Ms. Kosoian is successful, must she bear a share of the liability because of her refusal to cooperate with the police?
41. Analysis
    1. Civil Liability of the Police Under Quebec Law
       1. Application of the General Rules in Article 1457 *C.C.Q.*
42. Under Quebec civil law, s. 48 of the *Police Act*, CQLR, c. P‑13.1, specifically entrusts police officers with the mission of maintaining peace, order and public security and preventing and repressing crime and offences under the law and municipal by‑laws. In doing so, police officers help to ensure the safety of persons and property and to safeguard rights and freedoms (see, e.g., A.‑R. Nadeau, *Droit policier: Loi sur la police annotée et règlements concernant la police* (12th ed. 2008), at p. XIII).
43. In carrying out their mission, police officers are required to limit these same rights and freedoms using the coercive power of the state, including by detaining or arresting individuals and by conducting searches or seizures. The risk of abuse is undeniable. That is why, in a society founded on the rule of law, it is important that there always be a legal basis for the actions taken by police officers (*Dedman v. The Queen*, [1985] 2 S.C.R. 2, at pp. 28‑29; *R. v. Sharma*, [1993] 1 S.C.R. 650, at pp. 672‑73). In the absence of such justification, their conduct is unlawful and cannot be tolerated.
44. In exercising these powers, police officers are therefore bound by strict rules of conduct that are meant to prevent arbitrariness and unjustified restrictions on rights and freedoms (*Hill v. Hamilton‑Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 71; *Jauvin v. Québec (Procureur général)*, [2004] R.R.A. 37 (C.A.), at para. 46). Police officers who deviate from these rules may be civilly liable. They have no public law immunity in this regard (*Jauvin*, at para. 42; *Régie intermunicipale de police des Seigneuries v. Michaelson*, [2005] R.R.A. 7 (Que. C.A.), at para. 22; *Popovic v. Montréal (Ville de)*, 2008 QCCA 2371, [2009] R.R.A. 1, at para. 63).
45. Under Quebec law, a police officer, like any other person, is held civilly liable for the injury caused to another by his or her fault, in accordance with art. 1457 of the *Civil Code of Québec* (“*C.C.Q.*”). The officer’s employer is bound to make reparation for the injury if the fault was committed in the performance of the officer’s duties, pursuant to arts. 1463 and 1464 *C.C.Q.* In short, there are no exceptional rules applicable to the police (M. Lacroix, “Responsabilité civile des forces policières”, in *JurisClasseur Québec — Responsabilité professionnelle*, by A. Bélanger, ed., fasc. 13, at para. 6; J.‑L. Baudouin and C. Fabien, “L’indemnisation des dommages causés par la police” (1989), 23 *R.J.T.* 419, at p. 422).
46. Whether a police officer should be held civilly liable must be determined by referring to the cumulative conditions set out in art. 1457 *C.C.Q.*, namely fault, injury and a causal link between the two. The case at bar specifically requires the Court to consider the concept of a police officer’s civil fault and the test to establish such a fault, that is, the reasonable police officer in the same circumstances. On this point, I agree with the majority of the Court of Appeal: the reasonable police officer test remains relevant where compliance with the law is in issue.
    * 1. Civil Fault and the Reasonable Police Officer Test
47. Under Quebec civil law, art. 1457 *C.C.Q.* imposes on every person “a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another”. An extracontractual civil fault occurs where a person who is endowed with reason fails in this duty by acting in a manner that departs from the conduct of a reasonable, prudent and diligent person in the same circumstances (*St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 21; *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, at para. 24; J.‑L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile* (8th ed. 2014), vol. 1, at Nos. 1‑182 and 1‑195; V. Karim, *Les obligations* (4th ed. 2015), vol. 1, at paras. 2505, 2508 and 2514‑15). In this sense, fault is a [translation] “universal concept” that applies in any lawsuit based on art. 1457 *C.C.Q.* (*St. Lawrence Cement*, at para. 33, citing P.‑G. Jobin, “La violation d’une loi ou d’un règlement entraîne‑t‑elle la responsabilité civile?” (1984), 44 *R. du B.* 222, at p. 223).
48. The standard of conduct that a reasonable person is expected to meet corresponds to an obligation of means (*St. Lawrence Cement*, at paras. 21 and 34; see P.‑A. Crépeau, *L’intensité de l’obligation juridique ou Des obligations de diligence, de résultat et de garantie* (1989), at pp. 7 and 55). The general rules of extracontractual civil liability do not demand [translation] “total infallibility”, nor do they require the “conduct of a person endowed with superior intelligence and exceptional skill who is capable of foreseeing and knowing everything and who acts properly in all circumstances” (Baudouin, Deslauriers and Moore, vol. 1, at No. 1‑195).
49. It goes without saying, moreover, that the reasonable person test takes into account the nature of the activity in issue. The practice of a profession will therefore be assessed by reference to the normally prudent, diligent and competent *professional* in the same circumstances (see Roberge v. Bolduc, [1991] 1 S.C.R. 374, at pp. 393‑95; Baudouin, Deslauriers and Moore, vol. 1, at No. 1‑196; Karim, at paras. 2510‑13). It follows that [translation] “the requisite knowledge and ability must be determined on the basis of the skills that exist within the particular group, that is, the group of persons practising the same profession as the defendant” (H.‑R. Zhou, “Le test de la personne raisonnable en responsabilité civile” (2001), 61 *R. du B.* 451, at p. 488).
50. It is well established that police conduct must be assessed according to the test of the normally prudent, diligent and competent police officer in the same circumstances (*Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474, at pp. 512‑13, per Pratte J., dissenting in part, but not on this point; *Hill*, at para. 72; *Jauvin*, at paras. 44 and 59; *Michaelson*, at para. 22; *Popovic*, at para. 63; *Lacombe v. André*, [2003] R.J.Q. 720 (C.A.), at para. 41; *St‑Martin v. Morin (Succession de)*, 2008 QCCA 2106, [2008] R.J.Q. 2539, at para. 101; Lacroix, “Responsabilité civile des forces policières”, at paras. 14‑15). Professors Baudouin and Fabien provide the following explanation of the approach to be taken by a court ruling on a police officer’s alleged fault:

[translation] A court that has to judge a police officer’s conduct must begin by assessing the facts *in abstracto* against the ideal, abstract standard of a police officer of ordinary prudence, diligence and skill. This standard is not necessarily the result of observing the average conduct of the coworkers of the police officer in question. In determining this standard, the court can consider empirical data. However, it is not bound by such data and can project onto the standard its own idea of what seems socially desirable. The “prudent administrator” of the Civil Code is not a sociological fact, but a normative creation.

The standard of conduct that is applied to determine whether a police officer committed a fault is not one of excellence. It is an average standard, neither the best nor the most mediocre.

Next, it is important to properly place the “yardstick police officer” in the same external circumstances as the police officer whose conduct is being assessed. The circumstances of place (temperature, visibility, urgency, etc.) and time must be considered.

(Baudouin and Fabien, at pp. 423‑24; see also C. Massé, “Chronique — Arrestation illégale et brutalité policière: dans quelles circonstances la responsabilité des policiers peut‑elle être engagée?”, *Repères*, May 2013 (online), at p. 2.)

1. The reasonable police officer test recognizes the largely discretionary nature of police work (*Hill*, at paras. 51‑52 and 73). In this regard, the observations made by the Court in *Hill* concerning the tort of negligent investigation can, for the most part, be transposed to Quebec civil law:

Police exercise their discretion and professional judgment in accordance with professional standards and practices, consistent with the high standards of professionalism that society rightfully demands of police in performing their important and dangerous work.

. . .

The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made — circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results. [Citation omitted; paras. 52 and 73.]

1. The content of the law governing the work of the police determines, to some degree, the scope of “the duty of prudence and diligence that applies in a given context” (see *St. Lawrence Cement*, at para. 36). In a civil liability action, a court will therefore have to assess a police officer’s conduct in light of the limits imposed by, among other things, constitutional and quasi‑constitutional enactments, criminal and penal legislation and the constituting statutes and codes of ethics of police forces (see, e.g., *Hill*, at para. 41; see also M. Vauclair and T. Desjardins, *Traité général de preuve et de procédure pénales* (26th ed. 2019), at paras. 207‑11; Lacroix, “Responsabilité civile des forces policières”, at paras. 6‑11; Baudouin, Deslauriers and Moore, vol. 2, at Nos. 2‑1 to 2‑2).
2. A violation of such statutory or regulatory rules of conduct can often, absent special circumstances, be considered a civil fault (see *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, at para. 96; *Compagnie d’assurance Continental du Canada v. 136500 Canada inc.*, [1998] R.R.A. 707 (Que. C.A.), at p. 712). This will particularly be the case where a provision itself lays down an elementary standard of prudence or diligence (*Morin v. Blais*, [1977] 1 S.C.R. 570, at p. 580; *Harvey v. Trois‑Rivières (Ville de)*, 2013 QCCA 772, [2013] R.J.Q. 650, at paras. 56‑62). Nevertheless, under Quebec law, conduct that is unlawful does not systematically constitute a civil *fault* (*St. Lawrence Cement*, at paras. 21 and 34; *L. (J.) v. Gingues*, 2008 QCCA 2242, 93 C.C.L.T. (3d) 67, at para. 5; see, in this regard, Baudouin, Deslauriers and Moore, vol. 1, at No. 1‑191; Karim, at para. 2519; M. Tancelin, *Des obligations en droit mixte du Québec* (7th ed. 2009), at para. 634; N. Vézina, “Du phénomène de pollution lumineuse appliqué à l’observation des astres jurisprudentiels: responsabilité objective, responsabilité subjective et l’arrêt *Ciment du Saint‑Laurent*”, in G. Bras Miranda and B. Moore, eds., *Mélanges Adrian Popovici: Les couleurs du droit* (2010), 357, at pp. 369‑83; M. Lacroix, *L’illicéité: Essai théorique et comparatif en matière de responsabilité civile extracontractuelle pour le fait personnel* (2013), at p. 160; M. Lacroix, “Le fait générateur de responsabilité civile extracontractuelle personnelle: *continuum* de l’illicéité à la faute simple, au regard de l’article 1457 C.c.Q.” (2012), 46 *R.J.T.* 25, at pp. 37‑38; Jobin, at pp. 224‑29).
3. In other words, while, as stated in art. 1457 para. 1 *C.C.Q.*, a reasonable person must of course comply with the rules of conduct imposed by law, these rules do not create obligations of result under the general rules of civil liability (with regard to this concept, see Crépeau, at pp. 11‑12). In *St. Lawrence Cement*, the Court rejected the proposition that the violation of statutory or regulatory rules constitutes an objective “civil fault” that requires a form of strict liability regardless of the prudence and diligence exercised by the person who caused the injury, having regard to the circumstances:

The standard of civil fault corresponds to an obligation of means. Consequently, what must be determined is whether there was negligence or carelessness having regard to the specific circumstances of each disputed act or each instance of disputed conduct. This rule applies to the assessment of the nature and consequences of a violation of a legislative standard. [Emphasis added; para. 34.]

(See, in this regard, Baudouin, Deslauriers and Moore, vol. 1, at No. 1‑164.)

1. Under Quebec civil law, it is not enough to show that a police officer’s conduct was unlawful. The obligation resting on the officer remains an obligation of means, even where compliance with the law is in issue. To obtain reparation, the plaintiff must first establish the existence of fault within the meaning of art. 1457 *C.C.Q.*, that is, a departure from the conduct of a reasonable police officer in the same circumstances. This is not to say that the general rules of civil liability are lax. As I will explain below, the standard of conduct expected of police officers is justifiably high: a police officer who acts unlawfully cannot easily escape civil liability by relying on his or her ignorance or misunderstanding of the law.
2. In addition, the mere fact that there is a legal basis for a police officer’s actions does not necessarily exempt the officer from civil liability (see *Infineon*, at para. 96; Baudouin, Deslauriers and Moore, vol. 1, at No. 1‑192). In exercising their discretion, police officers must act reasonably and comply with the general obligation of prudence and diligence toward others that is incumbent on them in the circumstances, pursuant to art. 1457 *C.C.Q.* (in the common law, see *Hill*, at para. 41).
3. Before proceeding any further, I will clarify one point. This appeal concerns an action based on art. 1457 *C.C.Q.*, not on s. 49 para. 1 of the *Charter of human rights and freedoms*, CQLR, c. C‑12 (“Quebec *Charter*”). As a result, I do not have to consider the concept of unlawful interference under s. 24 of the Quebec *Charter*, which states that “[n]o one may be deprived of his liberty or of his rights except on grounds provided by law and in accordance with prescribed procedure”. I prefer to leave consideration of the standard applicable to unlawful interference under s. 24 for another day, when the Court has the benefit of full submissions on the matter.
   1. Liability of Constable Camacho and the City
4. In my view, Constable Camacho committed a civil fault by ordering Ms. Kosoian to identify herself and by arresting her and conducting a search based on a non‑existent offence, namely disobeying the pictogram indicating that the handrail should be held.
5. Before examining the facts of this case more closely, I will deal with the following points: (1) police officers’ obligation, under the general rules of civil liability, to have an adequate knowledge and understanding of the law; and (2) the scope of the presumption of validity in this context.
   * 1. Obligation of Police Officers to Know and Understand the Law
6. Police officers are obliged to have an adequate knowledge and understanding of criminal and penal law, of the offences they are called upon to prevent and repress and of the rights and freedoms protected by the Charters. They also have an obligation to know the scope of their powers and the manner in which these powers are to be exercised. A police officer whose application of the law departs from that of a reasonable police officer in the same circumstances commits a civil fault. In this respect, an officer who arrests someone on the basis of a non‑existent offence may be civilly liable.
7. In *Chartier*, Pratte J., dissenting, but not on this point, stated the following in this regard: “The authority of a police officer is not of course unlimited; he must know its limits, and if he disregards or ignores them, he commits a fault: ignorance of what a person is supposed to know is not an excuse . . .” (p. 513 (emphasis added); see also the majority reasons, at p. 498). This Court also discussed this duty in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353: “While police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is” (para. 133 (emphasis added); see also *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 149). The Court also emphasized this point in *R. v. Genest*, [1989] 1 S.C.R. 59, at p. 87: “While it is not to be expected that police officers be versed in the *minutiae* of the law concerning search warrants, they should be aware of those requirements that the courts have held to be essential for the validity of a warrant” (see also *R. v. Kokesch*, [1990] 3 S.C.R. 3,at pp. 32‑33; *Gounis v. Ville de Laval*, 2019 QCCS 479, at para. 112 (CanLII); *Simard v. Amyot*, 2009 QCCS 5509, at para. 41 (CanLII)).
8. Under Quebec civil law, the obligation of police officers to have an adequate knowledge and understanding of the statutes, regulations and by‑laws they are called upon to enforce is also reflected in several provisions of the *Code of ethics of Québec police officers*, CQLR, c. P‑13.1, r. 1, which set out the standard of conduct expected of a reasonable police officer in the context of civil liability (see Baudouin, Deslauriers and Moore, vol. 2, at Nos. 2‑1 to 2‑2; O. Jobin‑Laberge, “Norme, infraction et faute civile”, in Service de la formation permanente — Barreau du Québec, vol. 137, *Développements récents en déontologie, droit professionnel et disciplinaire* (2000), 31, at p. 33). Police officers are subject to stringent requirements in this regard, particularly when it comes to respect for rights and freedoms:

**2.** In order to promote the quality of the police department in its relations with the public, a police officer shall promote, to the extent of his capabilities, the development of his profession through the exchange of knowledge and through participation in upgrading courses and training programs.

**3.** This Code is intended to ensure better protection of the public by developing high standards of public service and professional conscience within police departments and to ensure the respect of human rights and freedoms including those set out in the Charter of human rights and freedoms (chapter C‑12).

. . .

**6.** A police officer must avoid any form of abuse of authority in his relations with the public.

(*Code of ethics of Québec police officers*, ss. 2, 3 and 6 para. 1)

1. In other words, while police officers are not held to an obligation of result with regard to knowledge of the law, the applicable standard is a high one. Citizens rightly expect them to have an adequate knowledge and understanding of the statutes, regulations and by‑laws they are called upon to enforce and of the limits of their authority (see, e.g., *Bellefleur v. Montréal (Communauté urbaine de)*, [1999] R.R.A. 546 (Que. Sup. Ct.), at p. 550; *R. v. Rouleau*, 2002 CanLII 7572 (C.Q.), at para. 103). Police officers cannot claim to carry out their mission — to maintain peace, order and public security and to prevent and repress crime and offences under the law and by‑laws (*Police Act*, s. 48 para. 1) — without having an adequate knowledge and understanding of the fundamental principles of criminal and penal law, of the rights and freedoms protected by the Charters and of the offences they are called upon to repress, and without knowing the limits of their authority (see P. Patenaude, “De la recevabilité des preuves obtenues au moyen de l’utilisation par la police de techniques modernes d’enquête et de surveillance”, in *Police, techniques modernes d’enquête ou de surveillance et droit de la preuve* (1998), by P. Patenaude, ed., at pp. 1‑2).
2. The training and instructions given to police officers, as well as internal police force policies, directives and procedures, must be considered in assessing an officer’s conduct, although they are not conclusive in themselves. A reasonable police officer must know that they do not have the force of law(see *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at paras. 44‑46). Similarly, the usual practices are at most a relevant factor. As the Court stated in Roberge in the context of a civil liability action arising out of an error of law made by a notary, “[i]t is not sufficient . . . that the common professional practice be followed in order to avoid liability. That practice has to be demonstrably reasonable” (p. 434). The mere fact that an error of law is repeated does not make it excusable.
3. As professionals responsible for law enforcement, police officers must be able to exercise judgment with respect to the applicable law. They cannot rely blindly on the training and instructions given to them, nor can they mechanically follow internal policies, directives and procedures or usual police practices.
4. Similarly, it is well established that police officers cannot avoid personal civil liability simply by arguing that they were merely carrying out an order that they knew or ought to have known was unlawful (Chartier, at p. 498; *Chaput v. Romain*, [1955] S.C.R. 834, at p. 842; *Pelletier v. Cour du Québec*, [2002] R.J.Q. 2215 (C.A.), at para. 37; Lacroix, “Responsabilité civile des forces policières”, at para. 16). Baudouin, Deslauriers and Moore put this point aptly: [translation] “In the civil context, it is disobedience of an unlawful order that must be considered the normal conduct of a prudent and diligent person, and not the reverse” (vol. 1, at No. 1‑206; see also G. Viney and P. Jourdain, Traité de droit civil: Les conditions de la responsabilité (2nd ed. 1998), by J. Ghestin, ed., at p. 502). The same is true of the training and instructions given to police officers and of internal police force policies, directives and procedures.
5. Of course, police officers are not lawyers and are not held to the same standards as lawyers (Hill, at para. 50). For example, they are not themselves expected to carry out thorough research or to engage in extensive reflection concerning the subtleties of conflicting case law (see Grant, at para. 133). Moreover, where a question of law is controversial, a police officer’s conduct should not be found to constitute fault insofar as it is based on an interpretation that is reasonable and consistent with the training and instructions given to the officer (see, by analogy, Roberge, at p. 436).
6. That being said, the expectations that exist for police officersremain high. Where there is uncertainty about the law in force, it is incumbent on them to make the inquiries that are reasonable in the circumstances, for example by suspending their activities in order to consult with a prosecutor or by rereading the relevant provisions and the available documentation. In principle, an error will be judged less severely if it is made during an emergency response, or in a situation where public safety is at stake, rather than in the context of a carefully planned operation or the routine application of a by‑law. In other words, unless the circumstances require immediate intervention, it is not appropriate to act first and make inquiries later. I note that — even in an emergency — the fact that conduct seems dangerous to a police officer does not permit the officer to presume the existence of an offence (see Baudouin and Fabien, at pp. 423‑24).
7. In short, police officers sometimes commit a civil fault if they act unlawfully, even where their conduct is otherwise consistent with the training and instructions they have received, with existing policies, directives and procedures and with the usual practices. It is all a matter of context: the question is whether a reasonable police officer would have acted in the same manner. In assessing a police officer’s conduct, a court musttherefore [translation] “give significant weight to the external circumstances” and “avoid the perfect vision afforded by hindsight” (*Dubé v. Gélinas*, 2013 QCCS 1681, at para. 68 (CanLII); see also *Hill*, at para. 73; *Gounis*, at para. 29; *Boisvenu v. Sherbrooke (Ville de)*, 2009 QCCS 2688, at para. 79 (CanLII)).
8. In this regard, I emphasize that a police officer’s conduct must be assessed in light of the law in force *at the time of the events* (*Hill*, at para. 73; *St‑Martin*, at para. 94; *L. (J.)*, at para. 5; *Communauté urbaine de Montréal v. Cadieux*, [2002] R.J.D.T. 80 (Que. C.A.), at paras. 39‑41). An officer can hardly be faulted for applying a provision that was presumed to be valid, applicable and operative at the relevant time (*Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at para. 14).
9. This brings me to the presumption of validity on which the opinion of the majority of the Court of Appeal is based, at least in part.
   * 1. Presumption of Validity and Non‑existence of an Offence
10. In principle, police officers may presume that the provisions of the statutes, regulations and by‑laws they are called upon to enforce are valid, applicable and operative. For example, it is not up to them to determine whether a regulation or by‑law is consistent with its enabling legislation, the constitutional division of legislative powers or the *Canadian Charter of Rights and Freedoms* (“*Charter*”) (see *R. v. Wiley*, [1993] 3 S.C.R. 263, at p. 279; *Kokesch*, at pp. 33‑34).
11. Indeed, under the presumption of validity, it is presumed that a provision was “*in fact* . . . validly enacted and therefore is to be given legal effect unless and until a court with the jurisdiction to do so declares it to be invalid” (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 523 (emphasis in original)). The presumption of validity thus places the burden on a challenger to demonstrate the invalidity of a provision rather than on the regulatory body that adopted the provision to justify it (*Katz Group Canada Inc. v. Ontario (Health and Long‑Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 25; Sullivan, at p. 523). In the meantime, the requirements of the provision must be satisfied (*Breslaw v. Montreal (City)*, 2009 SCC 44, [2009] 3 S.C.R. 131, at para. 23). Moreover, in the municipal context in Quebec, s. 364 of the *Cities and Towns Act*, CQLR, c. C‑19, and art. 452 of the *Municipal Code of Québec*, CQLR, c. C‑27.1, specifically state that every by‑law remains in force and executory until it has been annulled by a competent authority (see J. Hétu and Y. Duplessis, with the collaboration of L. Vézina, *Droit municipal: Principes généraux et contentieux* (2nd ed. (loose‑leaf)), vol. 1, at p. 8151).
12. However, the presumption that a provision is valid does not extend to the very existence or scope of an offence. In fact, “[i]t says nothing about the interpretation of the legislation [or regulation or by‑law] whose validity is being challenged” (Sullivan, at p. 523).
13. It is therefore important to distinguish the legal existence and scope of an offence from its validity. The existence and scope of a provision creating an offence — like any provision — are related to the *intention* of the legislature or regulatory body concerned. What must essentially be determined is whether that authority, through a statute, regulation or by‑law, expressed the intention to prohibit the conduct in question. By contrast, the validity of a provision rests on its *compliance* with constitutional requirements and, in the case of a regulation or by‑law, with the enabling legislation and the general principles of administrative law (see, e.g., P. Garant, *Droit administratif* (7th ed. 2017), at pp. 287‑345; Hétu and Duplessis, vol. 1, at pp. 8021‑8291; G. Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at pp. 151‑64; Sullivan, at pp. 523‑24).
14. In the civil liability context, the corollary of the presumption of validity is that the mere enforcement of a provision that is subsequently declared invalid will generally not be considered a fault — absent bad faith or conduct that is abusive or otherwise wrongful, of course (see *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at paras. 78‑79; *Guimond*, at paras. 13‑19; *Beauchemin* *v. Blainville (Town)* (2003), 231 D.L.R. (4th) 706 (Que. C.A.), at para. 57). The legitimate action of the state and of legal persons established in the public interest would be unduly hampered if their representatives — including police officers — could not presume that provisions are valid. This is why, as I stated above, their liability should be assessed by reference to the [translation] “law as it existed at the time of the impugned act” (*Cadieux*, at para. 39 (emphasis added)).
15. However, the presumption of validity does not allow the very *existence* of an offence to be assumed. In other words, although an existing offence must be presumed to be *valid*, an offence is not presumed to *exist* simply because the state, a legal person established in the public interest or one of their representatives *believes* that it exists. There can be no justification for giving effect to legislation, regulations or by‑laws that have never in fact been passed or made.
16. It is, I agree, undoubtedly rare for a police officer to think that an offence exists when it is in reality non‑existent. But it may happen that the state, a legal person established in the public interest or one of their representatives mistakenly believes that an act or omission constitutes an offence because of an error regarding the scope of a law. In *Ryan v. Auclair* (1989), 60 D.L.R. (4th) 212, for example, the Quebec Court of Appeal had to determine whether police officers had committed a fault by arresting nuns who had distributed religious tracts door to door. The nuns argued that the municipal by‑law prohibiting the distribution of circulars applied only to commercial leaflets. Although the court ultimately did not find the police officers civilly liable, it did not *presume* that their interpretation was correct. Moreover, in *Procureur général du Québec v. Ouellet*,1998 CanLII 12543, the Court of Appeal upheld a decision awarding damages to the operator of a business that sold products for making wine, cider and beer following a seizure based on an offence that did not actually exist under the *Act respecting the Société des alcools du Québec*, R.S.Q., c. S‑13. In each of those decisions, the presumption of validity played no role in the assessment of civil liability. The reasoning remains the same, regardless of the reason for the police officer’s error. Whether the officer believes that an act or omission constitutes an offence because of an error regarding the scope of a law or an error regarding the existence of a law, the presumption of validity is of no assistance to the officer.
17. In short, it is true that police officers are generally not civilly liable for enforcing a provision — presumed to be valid at the time of the events — that is subsequently declared invalid, provided of course that they do not otherwise commit a fault in exercising their powers. Furthermore, once the courts have recognized the existence of an offence or clarified its scope, police officers can certainly rely on it without fear that their conduct in this regard will be found to constitute a fault. It does not follow, however, that the existence in law — or the scope — of an offence must be assumed in a civil liability action on the basis of bare assertions to this effect made by the state, a legal person established in the public interest or one of their representatives.
    * 1. Application to the Facts
18. In my view, Constable Camacho’s conduct constituted a fault. A reasonable police officer in the same circumstances would not have concluded that disobeying the pictogram indicating that the handrail should be held was an offence under a by‑law. At the least, a reasonable police officer would have had some doubt in this regard and would therefore have refrained from acting as Constable Camacho did, that is, unreasonably by requiring Ms. Kosoian to identify herself and, when she refused, by arresting her by force and searching her personal effects.
19. Before depriving Ms. Kosoian of her liberty, Constable Camacho had to ensure that there was valid legal justification for his actions (*Dedman*, at pp. 28‑29). As a police officer, he could obviously not have been unaware that both s. 9 of the *Charter* and s. 24 of the Quebec *Charter* protect every person from “unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification” (*Grant*, at para. 20).
20. In enforcing the STM’s by‑laws,[[1]](#footnote-1) the City’s police officers exercise, among other things, the powers conferred on them by the *Code of Penal Procedure*, CQLR, c. C‑25.1 (“*C.P.P.*”). Where a police officer wishes to issue a statement of offence, art. 74 *C.P.P.*gives the officer the power to arrest without a warrant a person informed of the offence alleged against him or her who refuses to identify himself or herself, provided, of course, that the offence exists in law:

**72.** A peace officer who has reasonable grounds to believe that a person has committed an offence may require the person to give him his name and address, if he does not know them, so that a statement of offence may be prepared.

. . .

**73.** A person may refuse to give his name and address or further information to confirm their accuracy so long as he is not informed of the offence alleged against him.

**74.** A peace officer may arrest without a warrant a person informed of the offence alleged against him who, despite the peace officer’s demand, fails or refuses to give him his name and address or further information to confirm their accuracy.

(Articles 72 para. 1, 73 and 74 *C.P.P.*)

1. The exercise of these powers presupposes that there are reasonable grounds to believe an offence has been committed. The “reasonable grounds” concept relates to the *facts*, not to the existence in *law* of the offence in question (*Frey v. Fedoruk*, [1950] S.C.R. 517, at p. 531). If the offence that the police officer believes has been committed simply does not exist, neither the *C.P.P.* nor, for that matter, any other statute or common law rule gives the officer the power to require a person to identify himself or herself and to arrest the person if he or she refuses to comply (see *Moore v. The Queen*, [1979] 1 S.C.R. 195, at pp. 205‑6, per Dickson J., dissenting; *R. v. Guthrie* (1982), 21 Alta. L.R. (2d) 1, at p. 8; *R. v. Coles* (2003), 221 Nfld. & P.E.I.R. 98, at para. 14). An officer who makes an arrest on this basis is acting unlawfully, even if he or she believes in good faith that the offence exists (*R. v. Houle* (1985), 41 Alta. L.R. (2d) 295, at pp. 297‑99; *Crépeau v. Yannonie*, [1988] R.R.A. 265 (Que. Sup. Ct.), at p. 269; see also P. Ceyssens, *Legal Aspects of Policing* (loose‑leaf), vol. 1, at p. 2‒3). It was therefore incumbent upon Constable Camacho to verify the existence of the offence alleged against Ms. Kosoian before using the powers conferred on him by the *C.P.P.*
2. In the present case, Constable Camacho believed that he was enforcing art. 4(e) of STM By‑law R‑036, the French version of which reads as follows:[[2]](#footnote-2)

**4.** Dans ou sur un immeuble ou du matériel roulant, il est interdit à toute personne :

. . .

e) de désobéir à une directive ou un pictogramme, affiché par la Société;

1. The unofficial English version[[3]](#footnote-3) of art. 4(e) of STM By‑law R‑036 uses different language:

**4.** No one shall, within or on a building or rolling stock:

. . .

(e) ignore a guideline or pictogram posted by the Société;

The unofficial English version of By‑law R‑036 therefore uses the word “ignore” to render the French word “*désobéir*” (disobey). However, the English word “ignore” does not have the same meaning as the French word “*désobéir*”. The words “*désobéir*” and “*désobéissance*” (disobedience) refer to the act of refusing to comply with a law or an order. They connote insubordination, intractability or resistance (see, e.g., the definitions of these words in the dictionaries *Le Petit Larousse illustré* (2020), at p. 371,and *Le Petit Robert* (new ed. 2020), at p. 707). On the other hand, the word “ignore” means “not to know, to be ignorant of” or, alternatively, “[t]o refuse to take notice of; not to recognize; to disregard intentionally, leave out of account or consideration, shut ‘one’s eyes to’” (see “ignore” in the *Oxford English Dictionary* (2nd ed. 1989), at p. 641).

1. According to *Robert & Collins: Dictionnaire français‑anglais, anglais‑français* (10th ed. 2016), at p. 1548, the English word “ignore” is the equivalent of the French word “*ignorer*”, which means not to know, not to want to know or not to make use of something or, alternatively, to refuse to recognize the existence of or to take notice of something (see also “*ignorer*” in the dictionaries *Le Petit Larousse illustré*, at p. 598, and *Le Petit Robert*, at p. 1276).
2. That being said, the English version of By‑law R‑036 is unofficial and therefore has no legal effect: it is merely a reference document.
3. In addition, s. 8 of the *Charter of the French language*, CQLR, c. C‑11, provides as follows:

**8.**Where an English version exists of a regulation or other similar act to which section 133 of the Constitution Act, 1867 does not apply, the French text shall prevail in case of discrepancy.

1. According to *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312, at p. 329, only regulations that are “enactments of the Government” are subject to s. 133 of the *Constitution Act, 1867*. By‑law R‑036 is not an enactment of the government. It is a corporate by‑law adopted by the STM. As a result, s. 133 of the *Constitution Act, 1867* does not apply to By‑law R‑036, which is therefore covered by s. 8 of the *Charter of the French language*. Since there is a discrepancy between the unofficial English version and the French version, the French text prevails, and my analysis will deal solely with that text.
2. The offence thus involves disobeying a directive or pictogram. By definition, to “disobey” is to refuse to comply with an obligation or order, or to break the law (see, e.g., “*désobéir*” (disobey) and “*désobéissance*” (disobedience) in the dictionaries *Le Petit Larousse illustré*, at p. 371,and *Le Petit Robert*, at p. 707). Therefore, a subway user does not “disobey” a pictogram unless it creates an obligation or prohibition. It follows that a pictogram that only warns, advises or informs cannot serve as the basis for this offence. After all, one does not “disobey” a warning. At most, one refuses to take notice of it. This interpretation — which flows from the ordinary meaning of the words — is the one that must be adopted by a reasonable police officer called upon to enforce By‑law R‑036.
3. However, By‑law R‑036 provides no information about the pictograms to which it refers and no explanation of the obligations and prohibitions allegedly expressed by those graphical representations. Police officers — like subway users, in fact — have no choice but to examine the elements of the various pictograms posted by the STM to understand what is or is not an offence for the purposes of art. 4(e).
4. In the instant case, the question is therefore whether the pictogram concerned imposes an obligation to hold the handrail. In Constable Camacho’s view, the answer is simple: *all* of the pictograms posted in the subway describe prohibitions or obligations, and contravening them is an offence (C.Q. reasons, at para. 198). In his opinion, Ms. Kosoian *disobeyed* the pictogram posted by the STM indicating that the handrail should be held and thereby contravened art. 4(e) of By‑law R‑036. The appellant, on the other hand, maintains that the pictogram simply communicates a message to be careful, not an obligation, that she therefore could not “disobey” it and that, as a result, it does not create any offence.
5. With respect, the majority of the Quebec Court of Appeal erred in law in relying on the presumption of validity applicable to the by‑law to support the reasonableness of Constable Camacho’s belief in the *existence* in law of the alleged offence (paras. 7‑8, 10‑11 and 13). The trial judge erred as well in assuming that Ms. Kosoian had acted [translation] “unlawfully” by not holding the handrail (para. 270), without questioning the very existence of the offence. As I explained above, the presumption that a by‑law is valid does not extend to the very existence or scope of an offence. In the instant case, these errors vitiated the analysis of civil liability undertaken by the courts below, which justifies this Court making its own assessment of Constable Camacho’s conduct.
6. I also reiterate that, contrary to what the respondents argue, the action brought by Ms. Kosoian is not based on a challenge to the validity of art. 4(e) of By‑law R‑036. For this reason, the Court does not have to determine whether this provision validly authorizes the STM to prohibit users from disobeying the directives or pictograms it posts, even if they are not directly incorporated into the by‑law. As the dissenting Court of Appeal judge stated (paras. 59 and 65), an unlawful subdelegation issue might possibly arise, but that is not the issue before the Court. Similarly, Ms. Kosoian is not seeking to invalidate art. 4(e) based on the *vagueness* of the pictograms to which that provision refers. On the contrary, she argues in her factum that the pictogram in question [translation] “clearly and unequivocally communicates a message that encourages something, not an obligation” (para. 39 (emphasis added)).
7. In my opinion, the appellant is correct. A reasonable police officer looking at the STM’s sign would have concluded that the pictogram simply advises users to be careful and does not impose an obligation. In this sense, there is no issue of *vagueness*.
8. In any event, in the case at bar, a cursory analysis is sufficient to show that a reasonable person in the same circumstances — and a fortiori a reasonable police officer — would not regard the pictogram as imposing an obligation the breach of which constitutes an offence under a by‑law:
   1. The pictogram and the message accompanying it — [translation] “Hold Handrail” — have the title “CAUTION”, which aims to communicate advice to be careful.
   2. The other two messages that appear on the same sign — [translation] “Attend Children” and “Avoid Sides” — also seem to provide the same advice.
   3. The pictogram appears on a yellow background. It is well known that this colour generally corresponds to a warning, not to an obligation the breach of which will be penalized.
   4. Certain other pictograms on the same sign communicate a prohibition through explicit visual elements. For example, one pictogram has a small red circle and a diagonal red bar. Another appears with a drawing showing a gavel, and the amount of the fine is specifically indicated on it.
   5. In contrast, there is *no* symbol suggesting that holding the handrail is *obligatory*.
9. Simply put, when the STM intends to impose an obligation or prohibition through a pictogram, it does so using well‑known symbols, which indicate the binding nature of the pictogram. Conversely, when the STM chooses not to use such symbols, as in the case of the pictogram indicating that the handrail should be held, it must be inferred that its intention is instead simply to advise users to be careful.[[4]](#footnote-4) At least, this is the conclusion that must be reached from looking at the sign in question.
10. Unlike the majority of the Court of Appeal, it is my view that the circumstances of this case, including the training Constable Camacho received, cannot render his conduct reasonable. It is true that, as stated in the trial judge’s decision, the STM taught police officers that it was an offence to disobey the pictogram indicating that the handrail should be held (paras. 210‑11 and 270). As I explained above, such training must be taken into account in assessing a police officer’s conduct. However, the fact that police officers have received training does not authorize them to lay aside their own judgment. Here, despite the training received, the very sight of the pictogram should at least have raised a doubt in the mind of a reasonable police officer as to whether it created an offence.
11. In the circumstances, and in light of Ms. Kosoian’s protests, Constable Camacho could not reasonably be certain that he was acting within his powers. He should have refrained from giving her a statement of offence and then made further inquiries as to the meaning of the pictogram and the scope of the by‑law. Moreover, when Ms. Kosoian was at the bottom of the escalator, there was no longer any risk to her or others. His intervention — which was initially supposed to be an effort to [translation] “raise awareness” — should have ended at that moment.
12. In short, a reasonable police officer in the same circumstances would necessarily have doubted the existence in law of the offence and, as a result, would not have required Ms. Kosoian to identify herself so that she could be given a statement of offence. Such an officer would certainly not have arrested her if she refused, but would instead have allowed her to continue on her way.
13. I therefore conclude that Constable Camacho departed from the conduct expected of a reasonable police officer by grabbing Ms. Kosoian in order to prevent her from leaving and by taking her to the holding room. By acting in that manner, he made an arrest which was unlawful (see *R. v. Latimer*, [1997] 1 S.C.R. 217, at para. 24; *R. v. Asante‑Mensah*, 2003 SCC 38, [2003] 2 S.C.R. 3, at paras. 42‑46) and which, having regard to the context, constituted a civil fault.
14. Any exercise of discretion by a police officer must have a valid legal justification (*Dedman*, at pp. 28‑29). Since the offence alleged in this case did not exist, and since Constable Camacho’s belief in the existence of such an offence was unreasonable, any exercise of his discretion grounded on that non‑existent offence was not only unlawful but also necessarily unreasonable.
15. As a result, I do not have to determine whether, in the instant case, going so far as to grab hold of Ms. Kosoian and keep her handcuffed on a chair was an inherently unreasonable exercise of discretion by Constable Camacho. I will simply note that police officers must exercise good judgment before issuing a statement of offence and must also act with prudence and restraint in exercising their powers of arrest.
16. That being said, I have some serious reservations about the trial judge’s conclusions that Constable Camacho’s conduct was [translation] “exemplary and irreproachable” and that the force used was reasonable in the circumstances (paras. 266, 269 and 277‑79).
17. First, in view of the non‑existence in law of the offence initially alleged, the force used was inevitably unwarranted. Article 82 C.P.P., which authorizes a police officer to use the force necessary to make an arrest, applies only where the officer acts lawfully (see *Figueiras v. Toronto Police Services Board*, 2015 ONCA 208, 124 O.R. (3d) 641, at para. 147). Moreover, the search incidental to the arrest was unreasonable given that Ms. Kosoian was not lawfully arrested (*R. v. Saeed*, 2016 SCC 24, [2016] 1 S.C.R. 518, at paras. 36‑37). On this last point, I would add that I prefer not to comment on the issue discussed by Vauclair J.A. in his concurring opinion, namely whether there is a power to conduct an incidental search for identification purposes.
18. Second, the trial judge’s conclusions are inconsistent with those in the penal judgment of the Municipal Court that acquitted Ms. Kosoian. The conclusions reached in that judgment are in fact not innocuous, since the judge stated, among other things, that he was under [translation] “the impression that adjustments were made to the [prosecution’s] evidence to justify the failure of this intervention, which basically should have been routine” (A.R., vol. II, at p. 82 (emphasis added)). I would also note that the only reason we have no physical evidence of the events at issue is that the respondents did not take the necessary steps to keep the videotapes from the surveillance camera, despite the fact that Ms. Kosoian’s spouse requested this the very next day (A.R., vol. II, at p. 75).
19. The trial judge completely disregarded the reasons for the penal judgment. Although civil judges are not bound by such judgments, they also cannot ignore them (see *Solomon v. Québec (Procureur général)*, 2008 QCCA 1832, [2008] R.J.Q. 2127, at paras. 50‑58; *Pierre‑Louis v. Québec (Ville de)*, 2014 QCCA 1554, at paras. 48‑57 (CanLII)). It would have been preferable for the judge in the civil proceedings to explain why he did not share the view of his colleague on the Municipal Court.
20. I would add that there is an extricable error of law in the trial judge’s decision with regard to the timing of Ms. Kosoian’s arrest (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 31‑37). Contrary to what the trial judge suggested (paras. 152, 273 and 276), an arrest occurred as soon as the police officers touched Ms. Kosoian at the bottom of the escalator with a view to her detention (see *Asante‑Mensah*, at para. 42). At that point, they had to inform her promptly of her constitutional and quasi‑constitutional rights, including her right to retain and instruct counsel (s. 10(*b*) of the *Charter*; s. 29 of the Quebec *Charter*), but they did not do so until later, while she was being detained in the holding room (para. 163). This additional error further undermines the trial judge’s conclusions concerning the so‑called [translation] “exemplary and irreproachable” work done by Constable Camacho.
21. I will conclude by saying that Constable Camacho’s conduct necessarily constituted a fault insofar as it resulted from an unreasonable belief in the existence of an offence that did not exist in law. As principal, the City is also bound to make reparation for the injury caused, because it is not in dispute that Constable Camacho was acting in the performance of his duties, even though his conduct was also unlawful (arts. 1463 and 1464 *C.C.Q.*; see Lacroix, “Responsabilité civile des forces policières”, at para. 37).
    1. *Liability of the STM*
22. In my view, the STM has no public law immunity. It is liable for Constable Camacho’s fault as his mandator, and it committed a direct fault by providing training that indicated to police officers that holding the handrail was an obligation under a by‑law.
    * 1. Relative Immunity in the Exercise of a Regulatory Power
23. The general rules of extracontractual civil liability are, in principle, applicable to a legal person established in the public interest, unless that person shows that a specific rule of public law derogates from them (art. 1376 *C.C.Q.*; *Prud’homme v. Prud’homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 31; *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304, at para. 18; Hétu and Duplessis, vol. 2, at pp. 11006‑7).
24. In the present case, the STM argues that it enjoys the public law relative immunity that attaches to the exercise of a regulatory power (see *Entreprises Sibeca*, at para. 27; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957, at pp. 966 and 968‑70). A legal person established in the public interest generally incurs no civil liability where it makes or passes a regulation or by‑law that is subsequently held to be invalid, unless its decision to do so was made in bad faith or was irrational (*Entreprises Sibeca*, at paras. 23‑27; *Papachronis v. Ste‑Anne‑de‑Bellevue (Ville)*, 2007 QCCA 770, 38 M.P.L.R. (4th) 161, at para. 25; Hétu and Duplessis, vol. 2, at pp. 11152‑57; see also, outside the municipal context, *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 90; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at para. 23). The purpose of this immunity is to preserve the latitude that a legal person established in the public interest must have in order to make policy decisions in the interests of the community (*Entreprises Sibeca*, at para. 24; *Welbridge*, at p. 968; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at pp. 722 and 725).
25. In the case at bar, however, this relative immunity is of no assistance to the STM. As I explained above, Ms. Kosoian’s civil liability action is based not on the invalidity of By‑law R‑036, but rather on its *improper* application both by the STM, which developed training that was legally incorrect, and by one of its inspectors, Constable Camacho, who applied the inaccurate information he obtained during that training. The application of a by‑law falls within the “operational sphere”, that is, the practical execution of policy decisions, and is not protected by any form of immunity (see *Laurentide Motels*, at p. 722; *Papachronis*, at para. 23). Baudouin, Deslauriers and Moore provide some relevant examples of operational decisions to which the rules in art. 1457 *C.C.Q.* apply in full:

[translation] Examples include the carrying out of public works, the provision of information, acts of the police and fire departments, the administrative implementation of statutes, regulations and by‑laws, the giving of notice, the conduct of inspections, the enforcement of court decisions, etc. The government has no immunity for such acts and is liable on the private law standard for the commission of a simple fault. [Emphasis added; footnotes omitted; No. 1‑148.]

1. A legal person established in the public interest that makes an error of law in implementing its own regulations or by‑laws may therefore be civilly liable. In *Maska Auto Spring Ltée v. Ste‑Rosalie (Village)*, [1991] 2 S.C.R. 3, the Court adopted the following comments on this point made by Chouinard J.A., dissenting in the Court of Appeal:

[translation] Where its officers or subordinates perform acts in the implementation of a statute, regulation or by‑law, the public corporation is liable for acts performed through an error of fact or of law, in good or in bad faith, even through simple negligence. Its legal obligation is that of a prudent administrator or reasonable person, having regard to the circumstances of each case. [Emphasis added; p. 1585.]

(*Maska Auto Spring Ltée v. Ste‑Rosalie (Corp. municipale du village de)*, [1988] R.J.Q. 1576 (C.A.); see also *Pincourt (Ville de) v. Construction Cogerex ltée*, 2013 QCCA 1773, at para. 47 (CanLII); *Chelsea (Municipalité de) v. Laurin*, 2010 QCCA 1723, at para. 71 (CanLII); *Foley v. Shamess*, 2008 ONCA 588, 297 D.L.R. (4th) 287, at para. 26.)

1. In the instant case, the training provided by the STM to the City’s police officers is part of the implementation of By‑law R‑036. In this respect, the STM cannot avoid the rules in art. 1457 *C.C.Q.*
   * 1. Direct Fault of the STM
2. As noted above, the STM is not only liable for Constable Camacho’s fault as his mandator, but it also committed a direct fault by providing training that suggested to police officers called upon to enforce its by‑laws that holding the handrail was an obligation pursuant to a by‑law. Once the STM undertook to provide police officers with training on [translation] “the safety requirements, the legislation, the types of intervention appropriate for the location and the applicable by‑laws” (C.Q. reasons, at para. 123), it had to ensure that the training would be appropriate and that it would reflect the law.
3. This is, in fact, the corollary of the obligation of police officers to acquire knowledge of the law and to keep that knowledge up to date. This is, moreover, recognized by the *Police Act*, since its first several provisions deal with the training provided to police officers and expressly set out, among other things, the objective of “updat[ing] the knowledge and skills of police officers in the type of police work to which they are assigned” (s. 4(1); see also ss. 1 to 6).
4. The evidence in this case does not confirm the exact content of the training provided by the STM. However, the trial judge’s decision indicates that the STM believed that the pictogram required subway users to hold the handrail, and that Constable Camacho and his colleague — who were acting as inspectors on behalf of the STM at the time — also believed, based on the training they had received, that the pictogram created a legal obligation:

[translation] Each of these two escalators has pictograms and directives posted by the STM. The STM is of the opinion that the graphic described above requires every person to hold the escalator handrail.

. . .

In summary, the defendants — Camacho, Ville de Laval and the STM — argue that Kosoian had to comply with the directives on the pictograms that required her, for example, to hold the escalator handrail.

(C.Q. reasons, at paras. 121 and 211)

1. The STM did not challenge that testimony and in fact never repudiated the interpretation adopted by the two constables during the subsequent court proceedings. Moreover, the STM later allowed its inspectors to hand out similar statements of offence.
2. If Constable Camacho was at fault for believing that holding the handrail was an obligation, the fact that the public authority misinterpreted the by‑law he had to enforce and provided training accordingly made it equally at fault. I therefore conclude that the STM committed a civil fault in the context of the training provided to police officers, including Constable Camacho.
3. Finally, with regard to the decision to institute penal proceedings against the appellant in the Municipal Court, I am of the view that the STM’s conduct in this regard is protected by the relative immunity enjoyed by prosecutors (*Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9, at paras. 7, 9 and 35, citing *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at pp. 193‑94 and 196‑97). For the immunity to be lifted, the appellant had to establish, in particular, that the penal proceedings were not based on any reasonable and probable cause and were motivated by an “improper purpose”. In my opinion, the non‑existence in law of the alleged offence clearly shows that there was no reasonable and probable cause. But this cannot in itself give rise to an inference that the prosecutor acted for an improper purpose. On this last point, Ms. Kosoian has not discharged her burden of proof.
4. In short, I am of the view that the STM’s fault lies in the implementation of the by‑law, and specifically in the training provided to police officers. In addition, I reject the STM’s argument based on extinctive prescription. While it is true that the STM was added as a defendant on August 21, 2012, more than three years after the events of May 13, 2009, the initial action against Constable Camacho and the City was filed within the time limit. The filing of the judicial application led to a civil interruption of prescription with regard to all solidary debtors, including the STM (arts. 2892 and 2900 *C.C.Q.*). Liability is solidary here under art. 1526 *C.C.Q.*, which states that “[t]he obligation to make reparation for injury caused to another through the fault of two or more persons is solidary where the obligation is extra‑contractual”. This provision imposes solidarity on persons who committed a common fault or contributory faults resulting in a single injury (*Montréal (Ville) v. Lonardi*, 2018 SCC 29, [2018] 2 S.C.R. 103, at para. 57). In the instant case, the STM and Constable Camacho both committed faults that contributed to the injury suffered by the appellant. It must therefore be concluded that prescription was interrupted with regard to all of the respondents.
   * 1. Liability of the STM as Mandator
5. In my opinion, the STM is also liable as mandator for Constable Camacho’s fault. This results from the designation of the City’s police officers as inspectors under s. 140 of the *Act respecting public transit authorities*:

**140.** A city adopting a transit authority’s budget shall authorize generally or specially any person designated by the transit authority to act as an inspector for the purpose of carrying out the by‑laws made under section 144. . . .

A transit authority may designate one of its employees or an employee from another enterprise under contract with it for the purposes of Chapters VI and VII. A peace officer under the authority of the city approving the budget of a transit authority is by that sole fact an inspector of that transit authority.

1. This provision must be read in harmony with the *C.C.Q.*, which, as its preliminary provision indicates, lays down the *jus commune* of Quebec (see *Prud’homme*, at paras. 28‑29). As such, it complements the special Acts that draw incidentally on the civil law (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at paras. 15‑16). In particular, art. 300 *C.C.Q.* states that legal persons established in the public interest — such as the STM — are primarily “governed by the special Acts by which they are constituted and by those which are applicable to them”, but are also governed by the *C.C.Q.* “where the provisions of such Acts require to be complemented, particularly with regard to their status as legal persons, their property or their relations with other persons” (see *Verdun (City)*, at paras. 17‑20). As the Court explained in *Verdun (City)* in the context of municipal litigation, “art. 300 *C.C.Q.* opens the door to a greater integration of private law rules into the law applicable to municipalities” (para. 19). This provision is also supplemented by art. 1376 *C.C.Q.*, which states that the rules on obligations — including those concerning mandate — apply, with some exceptions, to legal persons established in the public interest.
2. In my view, the designation of a police officer as an inspector creates a legal relationship analogous to that of mandate within the meaning of art. 2130 para. 1 *C.C.Q.*:

**2130.** Mandate is a contract by which a person, the mandator, confers upon another person, the mandatary, the power to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power.

1. In enforcing the by‑laws of a public transit authority, a police officer *ipso facto* represents that authority in “the performance of a juridical act”, namely the giving of a statement of offence to a third person. The concept of juridical act must be interpreted broadly here:

[translation] The word “act” here must be defined very broadly and indeed in a classic sense: any manifestation of will that is intended to create juridical effects. . . . The act may have no contractual effect and be performed for the purposes of court proceedings, such as a court appearance or the filing of a defence.

(C. Fabien, “Les règles du mandat”, in *Extraits du Répertoire de droit* (1989), at p. 72; see also C. Fabien, “Mandate”, in *Reform of the Civil Code*, vol. 2‑C, *Obligations VII, VIII* (1993), 2, at p. 4.)

1. Accordingly, I am of the view that the rule in art. 2164 *C.C.Q.* should be applied to the liability of public transit authorities for faults committed by their inspectors against third persons:

**2164.** A mandator is liable for any injury caused by the fault of the mandatary in the performance of his mandate unless he proves, where the mandatary was not his subordinate, that he could not have prevented the injury.

1. I cannot accept the STM’s arguments to the effect that the autonomy of police officers in the performance of their duties is incompatible with the concept of mandate. It is true that police officers occupy a public office and that their discretion derives directly from statute (*R. v. Campbell*, [1999] 1 S.C.R. 565, at paras. 27 and 32; *McCleave v. City of Moncton* (1902), 32 S.C.R. 106, at pp. 108‑9; Ceyssens, at pp. 1‑17 and 1‑43). They have a certain independence in this regard.
2. However, their relationship with civil authorities is defined and governed by statute, including with regard to civil liability. Thus, under Quebec law, a police officer remains a subordinate when acting as a peace officer — for example, when conducting a criminal investigation (ss. 48 para. 2 and 49 of the *Police Act*; arts. 1463 and 1464 *C.C.Q.*; see Lacroix, “Responsabilité civile des forces policières”, at para. 38; Baudouin, Deslauriers and Moore, vol. 1, at No. 1‑886). In other words, the latitude that police officers have in carrying out their mission does not preclude the existence of the relationship of subordination required to establish a principal‑subordinate relationship (on this point, see, e.g., Baudouin, Deslauriers and Moore, vol. 1, at Nos. 1‑842 to 1‑844; Karim, at para. 3046). Like any other principal, a police officer’s employer is liable where the officer commits a fault, as the City is in the instant case.
3. Similarly, the designation of a police officer as an inspector under s. 140 of the *Act respecting public transit authorities* creates a relationship analogous to that of mandate, a relationship in which a public transit authority may incur civil liability to a third person. This conclusion in no way compromises the autonomy that a police officer has in exercising his or her powers. If a police officer can be characterized as a *subordinate*, I fail to see why he or she could not be a *mandatary* under the rules of civil liability. The mandate relationship can frequently coexist with other relationships (Fabien, “Les règles du mandat”, at p. 83). This is especially true given that, unlike the relationship of principal and subordinate, that of mandator and mandatary does not require any relationship of subordination (see *Code civil du Québec: Annotations — Commentaires 2018‑2019* (3rd ed. 2018), by B. Moore, ed., et al., at pp. 1272‑73 and 1733‑34; see also *Commission des droits de la personne et des droits de la jeunesse v. Poulin*, 2004 CanLII 29094 (H.R.T.)).
4. In the case at bar, the STM, by resolution, designated the City’s police officers — and thus Constable Camacho — as inspectors responsible for enforcing By‑law R‑036 (Resolution CA‑2007‑100 dated May 2, 2007, A.R., vol. II, at p. 89). That resolution was itself based on a resolution passed by the city of Montréal in 2002 authorizing any person designated by the STM to act as an inspector in the subway (Resolution CM02 0388, clause 50.002).
5. In short, Constable Camacho was not a subordinate of the STM, since he remained a subordinate of the City at all times (ss. 48 para. 2 and 49 of the *Police Act*; arts. 1463 and 1464 *C.C.Q.*; see Lacroix, “Responsabilité civile des forces policières”, at para. 38). However, his designation as an inspector made him a mandatary of the STM. Given the fact that Constable Camacho committed the fault in question in carrying out his mandate and that the STM has not proved that it was impossible for it to prevent the injury, I conclude that the STM is liable not only for its direct fault, but also in its capacity as mandator.
   1. Apportionment of Liability
6. In my view, the STM must bear a large share of the liability. Under art. 1478 para. 1 *C.C.Q.*, liability is shared in proportion to the seriousness of the fault. Here, it was first and foremost the responsibility of the STM — as a regulatory body — to ensure that its inspectors acquired an adequate knowledge and understanding of By‑law R‑036 and of the pictograms posted in its facilities. However, Constable Camacho also had to exercise his professional judgment, regardless of the training he had received; as a result, he cannot avoid liability by arguing that he acted in accordance with that training. I would therefore apportion half of the liability to the STM and the other half to Constable Camacho.
7. As for Ms. Kosoian, no liability can be imposed on her. Under art. 1478 para. 2 *C.C.Q.*, the apportionment of a share of the liability to the victim implies that the victim is himself or herself at fault. This is not the case here. The appellant may not have acted in an exemplary fashion, but the fact remains that she had no legal obligation to hold the handrail. In this context, her lack of cooperation does not in itself constitute a civil fault. It was Constable Camacho who caused the situation to escalate by ordering her to hold the handrail, requiring her to identify herself and insisting on giving her a statement of offence. All of those actions were unlawful.
8. At that moment, given that the offence alleged did not exist in law, the appellant was perfectly entitled to refuse to identify herself and then simply to walk away (*Grant*, at para. 21). Unless a statutory provision or common law rule clearly imposes it, there is no obligation to identify oneself to, or indeed to cooperate with, a police officer (*R. v. Gagné*, [1987] R.J.Q. 1008 (C.A.), aff’d [1989] 1 S.C.R. 1584; *Moore*, at pp. 205‑6, per Dickson J., dissenting; *Guthrie*, at p. 8; *Grant*, at para. 37; Vauclair and Desjardins, at paras. 1134 and 1419). In the instant case, Constable Camacho should simply have allowed Ms. Kosoian to leave.
9. To conclude that Ms. Kosoian must be apportioned a share of the liability would amount to saying that there is, in all circumstances, a rule of conduct requiring compliance with an *unlawful* order given by a police officer, even where the order is based on an offence that simply does not exist in law. It is a short step from this to concluding that there must be blind obedience to any demand made by a police officer, no matter how unreasonable, arbitrary or capricious it may appear.
10. Average citizens will, of course, often prefer to be cautious and to comply with an order given by a police officer even where they have doubts about its lawfulness (*Grant*, at para. 170). They will identify themselves and graciously accept a statement of offence, subject to contesting it later. In fact, they run serious risks if they refuse to comply because they believe that the offence alleged against them is non‑existent or invalid. If they are mistaken, they could, for example, be convicted of a criminal offence: wilfully obstructing a peace officer (s. 129 of the *Criminal Code*, R.S.C. 1985, c. C‑46; see, e.g., *Vigneault v. La Reine*, 2002 CanLII 63720 (Que. C.A.), aff’g 2001 CanLII 25420 (Que. Sup. Ct.)).
11. Nevertheless, a well‑informed person does not commit a civil fault merely by refusing to comply with an order that proves to be unlawful. A person whose rights are infringed must be able to respond — within reason, of course — without being held civilly liable.
12. In addition, I have to discard the trial judge’s conclusion that Ms. Kosoian behaved in a manner that was [translation] “inconceivable, irresponsible and contrary to the basic rules of good citizenship” (para. 271). It is clear that the error of law made by the judge — presuming that it was an offence to disobey the pictogram in question — tainted his assessment of the facts. This is obvious from his reasons, particularly the passages where he emphasized that the appellant had “unlawfully and stubbornly refused to comply” (para. 270) and that she “thought she knew everything about the law applicable to such matters, which was not the case” (para. 275). Since the trial judge did not find that the offence was non‑existent, his analysis of Ms. Kosoian’s behaviour was heavily influenced by this and must, in my view, be rejected.
13. That error was repeated in the Court of Appeal as well. The majority of that court also failed to consider whether the offence was non‑existent and relied on the trial judge’s analysis of Ms. Kosoian’s behaviour in concluding that she was [translation] “the author of her own misfortune” (paras. 18 and 26). That conclusion, which was tainted by a fatal error of law, must therefore also be rejected.
14. Moreover, even without calling into question the trial judge’s findings of fact, it remains that Ms. Kosoian legitimately felt that her rights had been infringed (see *Mongeau v. Montréal (Communauté urbaine)*, [2000] J.Q. No. 5823 (QL) (C.Q.), at paras. 25‑26). She may have raised her voice and been rather arrogant (C.Q. reasons, at para. 195), but more is needed to justify an apportionment of liability in the context of an unlawful or unreasonable arrest.
15. I also cannot fault Ms. Kosoian for not doing anything to mitigate the injury she suffered (art. 1479 *C.C.Q.*). To do so, she would have had no choice but to obey an unlawful order. This is not what is required of a reasonable, prudent and diligent person. The duty to mitigate must sometimes be displaced where it conflicts with respect for rights and freedoms (see Baudouin, Deslauriers and Moore, vol. 1, at No. 1‑624). Therefore, while I agree with the quantification of damages of the dissenting Court of Appeal judge, I do not accept his conclusion that a share of the liability should be imposed on Ms. Kosoian. Since he found that the offence alleged against her was non‑existent, he should not have focused on her behaviour.
    1. Injury and the Amount of Damages
16. According to undisputed evidence, Ms. Kosoian suffered minor bodily injuries, but also above all, moral injury as a result of her unlawful arrest, the force used against her and the unreasonable search of her personal effects. As the dissenting judge clearly explained in his reasons (paras. 105 and 107), compensation for suffering, anguish and humiliation must be awarded in this case (see Baudouin, Deslauriers and Moore, vol. 1, at No. 1‑595).
17. I insist on one point: an unlawful arrest — even for a short time — cannot be considered one of the “ordinary annoyances, anxieties and fears that people living in society routinely . . . accept” and that, as a result, do not constitute compensable injury in the sense discussed by this Court in *Mustapha*, at para. 9. In a free and democratic society, no one should accept — or expect to be subjected to — unjustified state intrusions. Interference with freedom of movement, just like invasion of privacy, must not be trivialized. When she took the escalator in the Montmorency subway station that evening, Ms. Kosoian certainly did not expect to end up sitting on a chair in a room containing a cell with her hands cuffed behind her back, nor did she expect to have her personal effects searched by police officers. I have no difficulty believing that such an experience caused her significant psychological stress.
18. Turning now to the amount of damages, I would set the total at $20,000, the amount identified by the dissenting Court of Appeal judge, because that amount was not challenged in this Court.
19. Conclusion
20. For the reasons stated above, I would allow the appeal with costs throughout, set aside the judgment rendered by the Quebec Court of Appeal on December 5, 2017 and the judgment rendered by the Court of Québec on August 11, 2015, and order the respondents, Société de transport de Montréal, Ville de Laval and Fabio Camacho, solidarily to pay $20,000 with interest at the legal rate and the additional indemnity provided for in art. 1619 *C.C.Q.* from the date of service at trial. Among the respondents, the Société de transport de Montréal will be liable for 50 percent of the damages and Constable Fabio Camacho for 50 percent.

**APPENDIX**



*Appeal* *allowed with costs.*

Solicitors for the appellant: Aymar Missakila, Montréal; Barnes, Sammon, Ottawa.

Solicitors for the respondent Société de transport de Montréal: Joly, Chkikar & Maillé, Montréal.

Solicitor for the respondents Ville de Laval and Fabio Camacho: Services des affaires juridiques de la Ville de Laval, Laval.

Solicitors for the intervener the Canadian Civil Liberties Association: Torys, Montréal.

1. Sections 48 and 69 of the *Police Act* make municipal police officers responsible for the enforcement of municipal by‑laws in the territory of a municipality. In addition, STM resolution CA‑2007‑100 specifically designates the City’s police officers to act as STM inspectors pursuant to s. 140 of the *Act respecting public transit authorities*. That resolution provides that the City’s police officers will enforce By‑law R‑036. [↑](#footnote-ref-1)
2. Article 17 (now art. 26) of By‑law R‑036 provided that anyone who contravenes art. 4(e) commits an offence and is liable to a fine of $75 to $500. [↑](#footnote-ref-2)
3. The preamble to the English version of By‑law R‑036 states the following: “This administrative consolidation . . . is a reference document and should not be considered an official version of the By‑law. Please refer to the official French text of the By‑law and its amendment as the official documents.” [↑](#footnote-ref-3)
4. As the dissenting Court of Appeal judge noted (para. 69), another element that tends to confirm this interpretation is the actual source of the pictogram, which is a reproduction of figure 6.1.6.9.1 in the *Safety Code for Elevators*, CAN/CSA B44‑00. That code — which is referred to in the *Construction Code*, CQLR, c. B‑1.1, r. 2, and the *Safety Code*, CQLR, c. B‑1.1, r. 3 — describes the picture suggesting that the handrail be held as a “caution sign”. I recognize, however, that the source of the pictogram is not determinative in assessing Constable Camacho’s conduct. [↑](#footnote-ref-4)