大成 DENTONS

Employment and labour law

Review of landmark decisions rendered in 2022 | Québec

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In this publication, we provide an overview of landmark decisions rendered by the Court of Appeal and the Superior Court of Québec as well as the Administrative Labour Tribunal in 2022.

The decisions to which we would like to draw your attention relate to various subjects, including the powers of the Administrative Labour Tribunal, the exclusive jurisdiction of the grievance arbitrator over allegations of defamation, the calculation of an indemnity in lieu of notice paid to an employee who was receiving disability insurance benefits at the time of their termination, the power of the civil courts to order the reinstatement of a former employee, the employer's access to the personal accounts of its employees, the interpretation of section 95 of an *Act respecting labour standards*, the limit of rebuttal evidence, electronic monitoring in a telework context and vaccination against COVID-19.

If you have any questions or require further information, please contact one of the authors of the publication (see list of contacts at the end of this publication) or a member of our Employment and Labour group.

1. *Abbadi* v. *Meubles Delta inc.*, 2022 QCCA 903

Power by the ALT to raise ex officio article 359 of the AIAOD

Facts

- On September 17, 2018, the review branch of the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST) rendered a decision dismissing the application for review of a CNESST decision suspending the payment of income replacement indemnities to a worker.
- On June 21, 2019, the worker filed a contestation to this decision with the Administrative Labour Tribunal (ALT). However, an *Act respecting industrial accidents and occupational diseases* (AIAOD) provides that the deadline for filing such a contestation is 45 days following the date on which the worker is notified of the decision.
- At the hearing before the ALT, the administrative judge automatically raised the delay set out in section 359 of the AIAOD. The ALT finds that the worker has not shown reasonable grounds to explain the delay and therefore declares the contestation inadmissible.
- On March 10, 2021, the Québec Superior Court found that the ALT's decision was reasonable and dismissed the worker's appeal for judicial review.
- On appeal, the worker argued that, under article 2878 of the *Civil Code of Québec* (CCQ), the ALT could not automatically raise the time limit set out in section 359 of the AIAOD. Moreover, he alleges that it was unreasonable for the ALT to calculate the time limit for contesting from the date of the decision rather than that of its notification and to assume notification in the absence of proof of the CNESST in this regard.
- The CNESST and the ALT argued that the ALT could raise *ex officio* the time limit for complying with section 359 of the AIAOD.
- The CNESST states that this time limit is *sui generis* and autonomous in nature in relation to the prescription provisions of the CCQ and that it is unnecessary to refer to it in a suppletive manner because of the broad powers vested in the ALT.
- The ALT, for its part, indicates that its authority to raise *ex officio* this preliminary ground is derived from four elements: (1) the public compensation scheme of the AIAOD, (2) its role and powers, (3) its autonomy with respect to the rules of evidence and procedure, and (4) the jurisprudence and practices of the ALT.

Decision

- The Court of Appeal concluded that the administrative judge could reasonably have raised *ex officio* the failure to comply with the time limit set out in section 359 of the AIAOD, since this is a procedural time limit that does not fall under article 2878 of the CCQ.
- This procedural time limit is distinct from the extinctive limitation period found in a litigious context, since it does not concern the time limit for exercising a right, but rather the time limit for challenging a decision ruling on that right.
- As for the starting point for calculating the time limit for challenging the decision, the Court of Appeal acknowledged that the ALT judge erroneously refers in his decision to the date of the CNESST's decision rather than the date on which the decision was notified to the worker. However, this error is neither fatal nor determinative, because even applying a certain notice period due to the long period for challenge and in the

absence of a credible explanation from the worker, it is more likely than not that the time limit for a challenge is exceeded.

- The worker's claim that the time limit does not begin to run until he has seen the decision is incorrect. The Court of Appeal was of the opinion that the term "notification" refers to the receipt of a document rather than the formal knowledge of it.
- With respect to the burden of proving notification given the nine-month time limit for a challenge, imposing this burden on the worker is not unreasonable. Indeed, considering that this is not a situation where the deadline is exceeded by only a few days and that the worker acknowledges having been notified, he is then in the best position to enlighten the court on this subject.

2. *Pinard* v. *Laplante*, 2022 QCCA 1119

Jurisdiction of the civil courts over a dispute alleging defamation against an unionized employee by an employer representative

Facts	• A unionized employee, Mr. Laplante, was dismissed for a harassment-like situation and for comments described as inappropriate, misogynistic and racist, which the union grieved. • The employee and his spouse concurrently initiated a civil action against the appellant, Ms. Pinard, a human resources manager working for the employer. They alleged that Ms. Pinard committed a fault when she announced Mr. Laplante's suspension for investigation purposes and termination to his colleagues by making defamatory remarks about him. Specifically, she allegedly shared with them some of the comments that justified the investigation and then his dismissal. • At the outset of the proceedings, Ms. Pinard filed an application for declinatory exception, asking the Court of Québec to declare that it had no jurisdiction to hear the dispute, which falls within the exclusive jurisdiction of an arbitrator. More specifically, Ms. Pinard maintained that if she had committed a fault in the manner in which she announced the suspension and dismissal to Mr. Laplante's colleagues, it was as the employer's representative and not in her personal capacity. • The trial judge dismissed this application on the basis that if, in this case, the alleged defamatory statements had in fact been made at employee meetings by an employer manager, they could just as easily have been made outside the employer's walls. These statements would, in the same way, be liable in tort for the author. Moreover, the trial judge concluded that since the statement of claim alleged that some of the comments had been made after the dismissal, the dispute could not fall under the collective agreement.
Decision	• The trial judge erred in finding that the dispute fell within the scope of civil liability and not the interpretation, application, administration or violation of the collective agreement. In this regard, the Court of Appeal noted that a dispute based on allegations of defamation may fall under the collective agreement, depending on the context in which the allegedly defamatory statements are made. In this case, since the disputed comments were made at a meeting to announce the dismissal of an employee while the appellant was acting on behalf of her employer, there was an obvious connection with the collective agreement. • The Court of Appeal also found that the judge erred in stating that the dispute did not arise from the collective agreement because the impugned comments were made after the respondent's dismissal. • Indeed, the fact that the alleged defamatory statements were made after the letter of termination was sent does not affect the jurisdictional issue. What is determinative is that these comments were made during work meetings or during meetings that were intimately related to the investigation and disciplinary process which led to the suspension and then to the dismissal of the respondent. As such, they were formulated within the broader context of dismissal, and any dispute about them falls within the exclusive jurisdiction of the arbitrator.

3. *Caisse populaire Desjardins de Saint-Raymond — Sainte-Catherine* v. *Girard*, 2022 QCCA 1171

impact of disability insurance benefits on the calculation of the indemnity in lieu of notice

Facts	• Ms. Girard is employed by a caisse populaire and has approximately 30 years of seniority with Desjardins Group. She is in a managerial position when her employer meets with her and asks her to leave (without formally dismissing her) because of her authoritarian management style and because he no longer has confidence in her ability to turn things around. • Following these events, Ms. Girard fell into a depression and received disability benefits under her group insurance plan for several months. About a year after the beginning of her disability period, the employer proceeded with her formal dismissal, following which Ms. Girard initiated proceedings against the employer in order to obtain an indemnity in lieu of notice of termination, payment for moral damages, compensation for the loss of certain benefits related to her employment as well as the reimbursement of certain costs related to her reintegration into the labour market. • At trial, the Superior Court ordered the employer to pay Ms. Girard $213,404.17 in severance pay to compensate her for a 24-month notice of termination, non-monetary damages and certain costs and benefits related to her employment. • In her cross-appeal, Ms. Girard argued that the trial judge erred in deducting from the compensation in lieu of notice a portion of the disability benefits paid by the insurer. • For its part, the employer argues that the trial judge erred in ordering it to pay non-pecuniary damages in connection with the meeting notifying Ms. Girard that she had to leave, since this event constitutes an industrial accident within the meaning of an *Act respecting industrial accidents and occupational diseases* (AIAOD).
Decision	• The Court of Appeal pointed out that Ms. Girard cannot claim damages for the physical and moral injury caused when she was sent home by her general manager, to the extent that it could have been compensated by income replacement indemnities paid under the AIAOD. However, the Court of Appeal clarified that Ms. Girard retains her rights and remedies under the general law based on a separate cause of action, such as the termination of her employment contract or any other distinct fault committed by the employer that does not constitute an employment injury. • As for the disability benefits received during the disability period, the Court of Appeal reiterated that, under article 1608 of the *Civil Code of Québec* (CCQ), the trial judge should not have deducted them from the compensation in lieu of notice. The Court confirmed that article 1608 of the CCQ applies when disability benefits are paid by an insurer to an employee, regardless of

whether the cost of insurance premiums is paid in whole or in part by the employer. Since the employer's contribution is part of Ms. Girard's working conditions, it must not be confused with the disability benefits paid by the insurer. Consequently, the employer's obligation to pay damages is not mitigated or modified by the fact that the employee received benefits from a third-party insurer during the notice period.

- However, the Court of Appeal specified that it would be different if the employer did not pay the insurance premiums, but paid the wages or part of the wages in the event of disability, since in such a situation, the employee would not receive a benefit from a third party within the meaning of article 1608 of the CCQ.

TO WATCH IN 2023

Obligations under the *Charter of the French Language*

Employers with employees in Québec have until June 1, 2023 to have the application forms, documents relating to conditions of employment and training documents that existed before June 1, 2022, translated into French if they were not already available in French.

4. *Commission des droits de la personne et des droits de la jeunesse (T.J.R.)* v. *Procureur général du Québec (Sûreté du Québec)*, 2022 QCCA 1577

Pre-employment questionnaires and potentially discriminatory questions

Facts

- After making a promise to hire him, but before the start of his employment, the employer, the Sûreté du Québec (SQ), learned that the complainant had Tourette syndrome (TS), for which he had mild symptoms. Noting that the complainant did not declare this condition in response to the pre-employment and medical questionnaires or during the medical examinations administered as part of the hiring process, the employer suspended his hiring in order to conduct an investigation on the situation.
- As part of this investigation, the SQ's physician determined that the complainant remained fit to perform the police job, despite his TS. However, the employer decided to withdraw its promise to hire on the grounds that the bond of trust had been broken and that the complainant no longer met the requirements of good morals and ethics.
- When asked to rule on a complaint alleging a discriminatory refusal to hire and a violation of the complainant's fundamental rights, the Human Rights Tribunal (HRT) found that certain parts of the pre-employment medical process violated section 18.1 of the *Charter of Human Rights and Freedoms* (the *Charter*). However, several other information requested was "directly related to the aptitudes or qualifications required" for the job being sought, which is particularly the case for mental health issues. Thus, the complainant should have declared his TS.
- The HRT finds that the denial of employment is not discriminatory, as it is based on the employer's assessment that the complainant no longer met the requirements of good morals and integrity, and not on the fact that he is a TS carrier. However, the HRT awards damages to the complainant in compensation for the moral damage he suffered in answering certain discriminatory questions and undergoing certain medical examinations that infringed his right to integrity.

Decision

- The onus is on the employer to demonstrate that the health-related questions it asks in the hiring process relate to information that is required for a purpose rationally connected to the performance of the work in question and that is reasonably necessary to achieve that purpose. However, the employer met that burden by demonstrating that, given the major safety issues associated with being a police officer, it is necessary to ensure the good mental health of applicants for that job. The fact that some questions on the form are discriminatory does not completely invalidate it.
- Although the questions asked in a pre-employment medical questionnaire must be sufficiently precise, it would not be reasonable to require an employer to list every condition or symptom that a candidate may have. Moreover, the fact that a person believes they are personally cured of a relevant condition, or the fact that they experience few symptoms related to it, does not exempt them from declaring it.
- In the context where the evidence shows that the complainant made false statements and lacked transparency during the pre-employment questionnaire, the employer was justified in concluding that the bond of trust required for any employment relationship no longer existed and thus refusing to follow up on its promise to hire the complainant.

5. *Gloutnay* v. *Rozon*, 2022 QCCS 2578

Reinstatement of an employee by a civil court

Facts	• In 2019, the Groupe Juste pour rire inc. (GJPR) laid off one of its employees, a 53-year-old archivist with 25 years of service. Under the circumstances, the employer pays him a severance payment equal to 12 months' salary. • The employee, who believed he had a guarantee of employment for life, brought a civil action against the employer in order to be reinstated in his former employment and to be paid the wages he lost as a result of his termination, in addition to damages. The employee's lawsuit also targets other GJPR corporate entities to which he may have previously provided services, in addition to the employer's former founding president. As such, the Superior Court confirmed that only the employer can be required to honour a contractual commitment binding it to its former employee and that the former founding president cannot be held personally liable for this lifetime employment commitment.
Decision	• The Court confirmed that a guarantee of life employment, such as the one at issue in this case, is not contrary to public order as to its duration. • The Court also concluded that when analyzing such a guarantee of life employment, the parties' intention must be sought. In this case, the judge was of the view that the parties' common intention was to create a one-way guarantee of employment, in the sense that only the employer must guarantee the plaintiff's lifelong employment. • The judge therefore considered that the employer had waived its right under the *Civil Code of Québec* (CCQ) to unilaterally terminate an employee's employment by giving them a notice of termination. Consequently, the judge allowed the plaintiff's application for reinstatement, even though the employee's position has been eliminated and no longer exists. The judge argues that by abolishing the plaintiff's position, the employer breached its commitment to keep the plaintiff in his position for life. • The judge also awards the plaintiff an indemnity equal to the salary lost from the end of the twelvemonth severance pay to the date of the decision. • According to the judge, since the plaintiff had a guarantee of employment in the same position, he did not have to look for work in another field. In all cases, the Tribunal considers that the plaintiff has fulfilled any obligation to mitigate any damages he might have had, since he has sent his application to several companies operating in his field of activity. • As for the moral damages claimed by the plaintiff, the Superior Court ordered the employer to pay the plaintiff $20,000, which it described as conservative, to compensate him for the contractual fault committed by the employer, which led him to have suicidal thoughts.

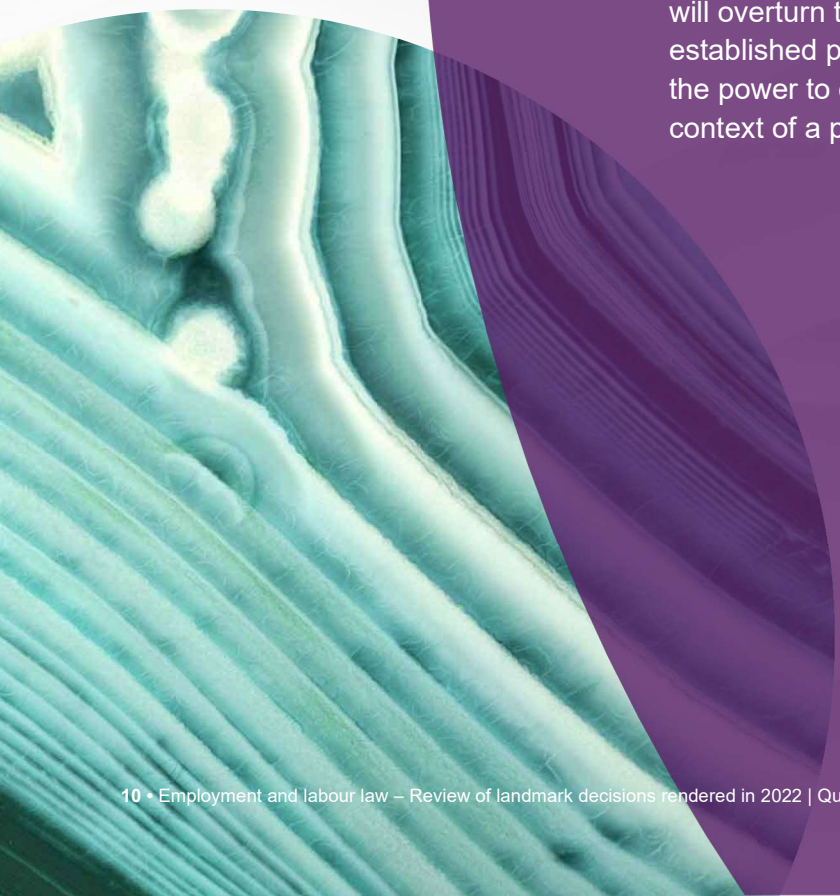
TO WATCH IN 2023

What will the Court of Appeal say?

- It should be noted that the employer filed a notice of appeal of this decision and that the Court of Appeal denied the employee's motion to dismiss the appeal. Moreover, in a judgment on motions concerning the provisional execution of the judgment, the Honourable Judge Healy of the Court of Appeal expressed himself as follows with regard to the judgment of the Superior Court:

  [Our translation] "... without deciding the outcome of the appeal, I note that the trial judgment suffers from an obvious deficiency. In a strictly civil context and without supporting his position, the judge created an important precedent by requiring the respondent to be reinstated in his former duties, when his position no longer exists and the case law is clear on the limitation of the Superior Court's power with respect to this remedy."

- In light of this extract, it seems likely that the Court of Appeal will overturn this decision, which is contrary to a well-established principle in Québec civil law that courts do not have the power to order the reinstatement of an employee in the context of a proceeding under the CCQ.



6. *I4C Information Technology Consulting Inc.* v. *Darveau*, 2022 QCCS 3986

Employer access to employees' personal accounts (emails, social media, etc.) that connect through their work tools

Facts

- Two employees who have been working for I4C Information Technology Consulting Inc. (I4C) for the past seven years have resigned to pursue their own competitive business, LBM Conseils inc. (LBM).
- Shortly after the resignations, I4C discovered that its former employees, through their company LBM Conseils inc., were doing business with some of its consultants and clients.
- Once the work tools are returned, i.e., a laptop and mobile phone, the employer accesses the Google and GoDaddy accounts of the former employees and finds that they contain information that could be used by LBM to compete with I4C. Under these circumstances, I4C obtained an interim injunction requiring the former employees to comply with the non-solicitation clause of their employment agreements.
- In the days that followed, I4C emailed its clients and contacts, including those found on the Google and GoDaddy accounts of its former employees, to inform them of the court order against the former employees. The former employees are concerned that I4C has obtained and keeps personal and business information from their personal accounts. They file a request for a safeguard order to have I4C identify all information extracted from these accounts and cease using them, give them access to the list of clients and contacts to whom it sent the email notifying them of the provisional injunction and refrain from sending them any other communication alleging fraud. Finally, they ask the Court to order the President of I4C to rewrite to each recipient of the original email to clarify that they can choose to do business with LBM if they so wish.

Decision

- The Court noted that under section 5 of the *Charter of Human Rights and Freedoms*, an employee has a right to privacy with respect to personal and professional information they keep on social media accounts. In this regard, the Court clarified that the fact that the information was accessible via the work computer and work mobile phones does not result in a waiver of the right to respect for privacy, since this information was stored in a cloud and protected by a password.
- In this case, the Court finds that the breach of privacy is serious and irreparable, as I4C was not required to produce, disclose or share information obtained on Google and GoDaddy accounts.
- With respect to I4C's email, the Court concludes that the defendants have a right to know who received it and there is no inconvenience to I4C in disclosing this information.
- The other requests for safeguard orders are denied. Indeed, the passage of time between the sending of the email and the request for a safeguard order means that the emergency criterion specific to this type of order is not met.

7. *Charron* and *Centre intégré universitaire de santé et de services sociaux du Centre-Sud-de-l'Île-de-Montréal – Centre hospitalier de Verdun*, 2022 QCTAT 4663

Admissibility of a recorded conversation without the knowledge of the employer's representatives

Facts	• The worker is challenging before the Administrative Labour Tribunal (ALT) a CNESST's decision refusing a claim for an employment injury of a psychological nature, namely an adjustment disorder. • The worker states that the employer abused its management rights and that this is the cause of her adjustment disorder. • During a meeting with her union representative and two employer representatives, the worker captured an audio recording of their conversation. During the break, the worker and her representative left the room so that both parties could discuss confidentially. However, the worker left her mobile phone in the room, which was still recording and captured the discussion between the two employer representatives. • The employer objects to the admissibility of part of this recording on the grounds that it was captured without the representatives' knowledge and that the worker who left the room was no longer participating in the exchange. • The worker argues that she had rational reasons for making this recording and that the means used was reasonable in the circumstances. She also points out that this surreptitious recording shows the employer's attitude and hostile intent and wishes to introduce it into evidence.
Decision	• The ALT acknowledges that, because of the context and substance of the discussions between the employer's representatives, their right to privacy was indeed violated. • However, the ALT is of the opinion that this infringement was justified on the basis of rational reasons and the reasonableness of the means chosen by the worker. • It found that the worker had rational reasons to record the August 29, 2018, meeting, since at the time of the meeting, her union had filed several grievances, the worker felt vulnerable towards her employer and she wanted to gather evidence that would allow her to demonstrate its hostile attitude and comments. She was then convinced that its intention was arbitrary and unjustified. • The ALT is of the opinion that the method chosen is the least intrusive one possible, since the infringement takes less than 15 minutes and the recording captures only the words spoken during a formal meeting between the worker and the employer that took place at the workplace. • Therefore, the ALT concludes that the recording is admissible in its entirety. • The preponderance of evidence on the record shows that, taking into account the circumstances, the disciplinary measures imposed on the worker were not appropriate and fair. By targeting only the worker during her interventions, when she was not solely responsible, the employer failed its duty to act fairly. • The evidence shows that the employer's behaviour did not give the worker a real chance to change her ways and that by doing so, the employer abused its management right.

- Any reasonable person in the same circumstances would be destabilized.
- Such a situation goes beyond the normal, foreseeable and usual scope of work and constitutes an unforeseen and sudden event within the meaning of an *Act respecting industrial accidents and occupational diseases* (AIAOD).
- The medical evidence on file establishes a link between this event and the injury.
- For these reasons, the ALT states that the worker suffered an employment injury.

TO WATCH IN 2023

New provisions in the area of health and safety at work

- As of January 1, 2023, prevention mechanisms specific to construction sites will be enhanced. The amendments that will come into force provide for, among other things, a reduction in the worker threshold triggering, the creation of a construction site committee and the implementation of prevention programs specific to construction sites.
- Also as of January 1, protocols for the preventive withdrawal of pregnant or breastfeeding women will be developed and updated by the National Director of Public Health. Aiming to identify the dangers and working conditions related to the workplace, these protocols will be used within the framework of the application of the *For a Safe Maternity Experience* program by health professionals who carry out pregnancy follow-ups or postnatal follow-ups.
- As of April 6, 2023, the time limit for challenging a CNESST decision before the Administrative Labour Tribunal (ALT) will be extended to 60 days.
- Finally, also as of April 6, it will be possible to challenge directly before the ALT, without first going through the administrative review branch of the CNESST, decisions relating to an opinion from the Bureau d'évaluation médicale, an opinion from the Special Committee of presidents, an opinion from the Committee for Occupational Oncological Diseases as well as decisions related to financing.

8. *Union des employés et employées de service, section locale 800* v. *Compagnie WestRock du Canada Corp.*, 2022 QCTAT 4159

Employer's right to communicate with employees regarding collective bargaining

Facts	• The union filed a complaint against the employer for hindering union activities under section 12 of the *Labour Code* (LC). Essentially, the union alleges that the employer communicated with its employees in the context of negotiating the renewal of a collective agreement. It also blames the employer for participating in the distribution of a petition written by disgruntled employees. The purpose of this petition was to have the tentative agreement voted by the union members approved, while maintaining the status quo with respect to a specific article of the collective agreement. • More specifically, the union considers that the employer interfered with its operations when it sent a written communication to all unionized employees, after an agreement in principle was adopted and in response to a union tract. • Regarding the petition, the union accuses two employer representatives of having participated in its advancement by promoting its existence and suggesting that the president of the union was associated with it, which the union considers to be misinformation.
Decision	• The Administrative Labour Tribunal (ALT) finds that the employer did not violate section 12 of the LC by contacting its employees for the reasons detailed below. • First, the ALT is of the opinion that the employer's communication was only intended to inform employees of its perception of the bargaining, in a context where the union accused it of breaching its commitments and of not wanting to sign the collective agreement. The employer wanted to communicate its view of the situation in response to the allegations contained in the union tract calling into question its good faith. In addition, the ALT notes that the employer is not trying to dissuade or persuade unionized employees from making or not making a collective decision. It makes no promises or threats to employees and let them free to read or not read this communication. In addition, the ALT considers that the employer's statements are defensible and not intended to mislead employees. • The ALT also distinguishes the situation in this case from the situation in which the employer communicates directly with its employees during collective bargaining to obtain their buy-in on employer offers. The ALT reiterates that employers have the right to respond to correct the facts and to respond to inaccurate statements made about them. Moreover, the ALT reiterated that the union is not the only actor to benefit from the right to freedom of expression, even during the negotiation of a new collective agreement. • As for the second reproach, the ALT accepted the employer's version that it did not want to interfere in the petition's signing process. According to the ALT, the actions of the employer representatives are isolated and constitute mishandling, not gross negligence. Furthermore, it is established that the supervisors acted for themselves and not for the employer. • Thus, based on case law to the effect that (i) article 12 of the LC does not cover simple clumsiness committed by representatives of the employer without the latter's knowledge, and (ii) the commission of the offense supposes that the intervention was ordered by the employer or, at least, that it was known to him, the judge rejected the whole of the complaint for obstructing union activities.

9. *Centre intégré de santé et de services sociaux des Laurentides* v. *Commission des normes, de l'équité, de la santé et de la sécurité du travail* (C.A., 2022-11-02), 2022 QCCA 1500

Interpretation of section 95 of an *Act respecting labour standards* and joint and several liability of the client and subcontractor

Facts	• Résidence Yellen inc. and Résidence l'Éveil inc., the impleaded parties, have signed agreements with the Centre intégré de santé et de services sociaux (CISSS) for the administration of a residential center for people with disabilities, as intermediate resources. • The agreement entered into between Résidence l'Éveil and the CISSS is terminated, which leads to the closure of the residential center and the dismissal of the fourteen employees who work there, without them receiving individual or collective notice of the end of termination. • The CNESST then filed a claim for indemnities under an *Act respecting labour standards* (LSA), in which it jointly and severally claimed a collective dismissal indemnity from the CISSS and the third parties. • At first instance, the Court concluded that section 95 of the LSA applies and that the CISSS is responsible, like the third parties, for the payment of the amounts due to the dismissed employees, that is to say a notice of dismissal and the related annual leave allowance. Thus, the Court is of the opinion that section 95 of the LSA applies despite the absence of a main contract between the CISSS and the third parties, qualifying the latter as subcontractors. • On appeal, the CISSS drew a parallel with article 2102 of the *Civil Code of Québec* and argued that the terms "sous-entrepreneur" and "sous-traitant" (both meaning "subcontractor") converge on the principle that there must be a prime contract between a client and a contractor.
Decision	• The Court of Appeal dismissed the appeal and the position of the CISSS. In section 95 of the LSA, the legislator uses the terms "sous-entrepreneur" and "sous-traitant" (both meaning "subcontractor") without providing any definition. That said, the LSA is a law of public order. It must therefore be given a broad and liberal interpretation, since its purpose is to correct the imbalance of power between employers and employees. • The Court of Appeal stated that the fact that the CISSS' mission stems from the law and not from a contract with a client cannot cause the fourteen employees to lose the protection provided by section 95 of the LSA in the event of dismissal. • In this case, by applying the contextual approach to interpretation to section 95 of the LSA, it is possible to ensure that the purpose of the legislation is respected and that the text and context are respected, but also the legislator's intention. Ultimately, this section provides for joint and several liability between employers so that they cannot escape the application of the law by having employees of another employer perform tasks, as is the case here.

10. *Marsella* and *Canadian National Railways* and *Vézina*, 2022 QCTAT 1312

Limit of one rebuttal

Facts	• On December 12, 2016, while working as an auto-ramp assistant, the worker sustained an employment injury. • The worker challenges the CNESST's decisions on the lack of a causal link between the new diagnoses and the December 12, 2016 event, the Bureau d'évaluation médicale (BEM)'s opinion on consolidation, sufficiency of care and treatment, permanent impairment of physical integrity and functional limitations. • Through these contestations, the worker is asking the Administrative Labour Tribunal (ALT) to add as accepted diagnoses those of right hip femoral-acetabular conflict, right hip hanging and post-scopy hematoma to the right hip and to conclude that these diagnoses are consolidated as of November 26, 2020 with permanent sequelae. • The employer is asking that the CNESST's decisions be upheld. • During the hearing, the worker's representative requested additional time to complete his rebuttal evidence and produce an additional report from his medical expert. • Counsel for the employer objected on the ground that it was not rebuttal evidence, but an attempt to improve the worker's evidence in chief that was declared closed.
Decision	• The ALT upheld the employer's objection on the basis that it was of the opinion that the evidence that the worker's representative wanted to obtain and produce did not constitute a rebuttal evidence, but an improvement to his evidence in chief. • The purpose of a rebuttal evidence is not to strengthen the evidence in chief, but to contradict or explain new and unforeseeable facts raised in the evidence submitted by the other party. • The employer's expert testimony is not unpredictable, as it was highly predictable that he would comment on the worker's testimony and express his opinion on it. In addition, the ALT points out that it is the very essence of expert medical evidence to further clarify, explain and comment on the opinion reported in its written report and to provide its opinion on the medical evidence presented before the ALT. • Since the employer's expert presence was announced a long time ago, the worker then chose not to require the presence of his own expert at the hearing. • Granting the worker's request would not promote the proper administration of justice. • On the merits of the disputes, the ALT accepted the conclusions of the employer's expert, concluded that the preponderance of evidence did not establish a causal link between the hip diagnoses and the accidental event. Consequently, in the absence of this causal link, the ALT upholds the decision rendered following the opinion of the BEM. • The ALT rejects all of the worker's challenges.

11. *Syndicat des professionnelles et professionnels municipaux de Montréal (SPPMM) v. Flynn*, 2022 QCCS 363

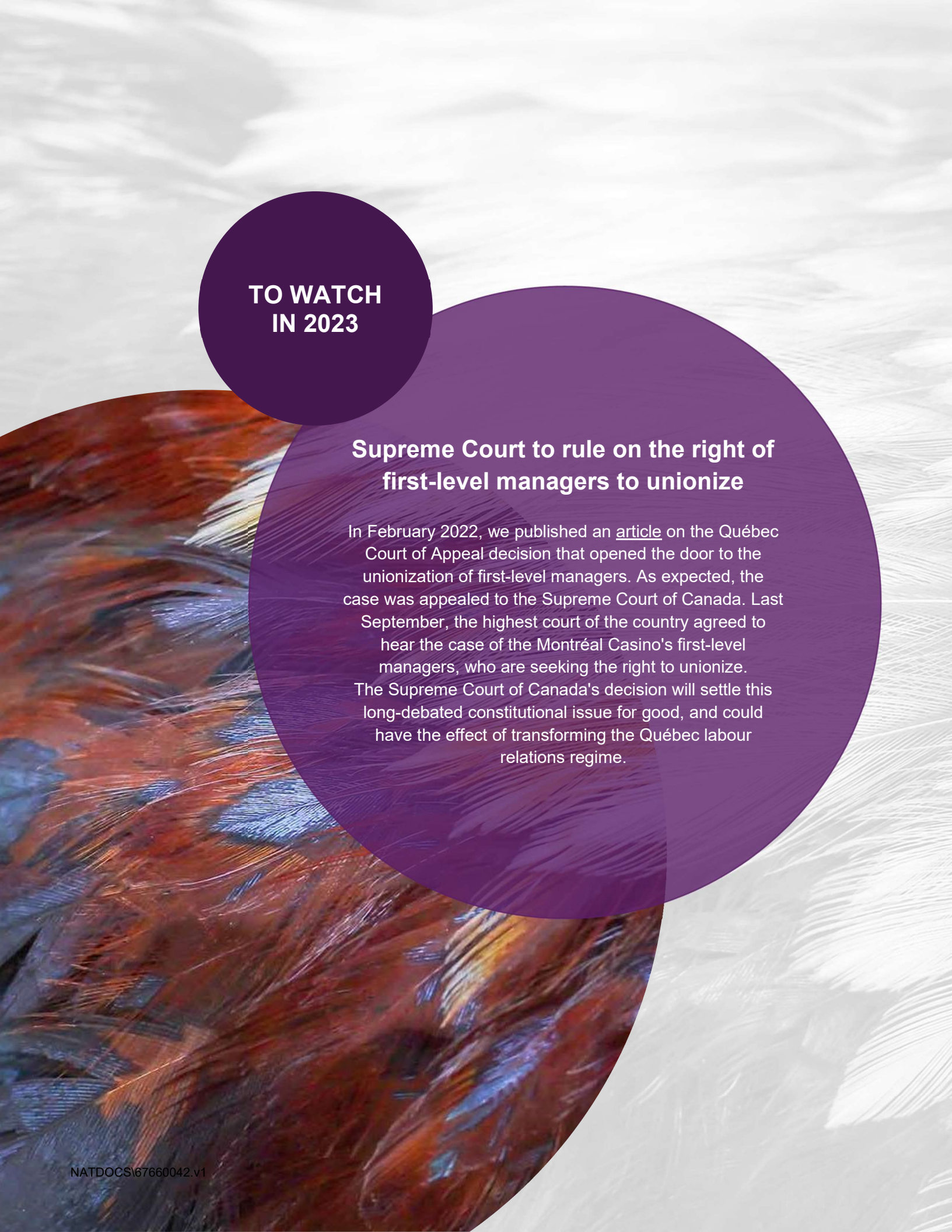
Electronic monitoring in a telework context

Facts

- The employer, the City of Montréal, uses a computer security software called Graylog, which is installed on all workstations and other technological devices provided to employees, to ensure the protection of the City's computer data and systems. Employee names are not associated with the data collected, but their employee user codes are.
- The software logs and files a daily log of employee visits to websites for business or personal use during working hours using the computer tools provided by the employer. The software does not target a specific employee, but allows the employer to detect the largest Internet users who are likely to violate its codes of conduct and Internet usage guidelines.
- The union alleges that by using the software, the employer is conducting constant or continuous electronic surveillance, which is illegal. The union also alleges that the software violates employees' privacy rights. Thus, their grievance concerned the respect of two fundamental rights protected by the *Charter of human rights and freedoms*, namely the right to fair and reasonable conditions of employment under section 46 and the right to privacy under section 5, as well as under articles 35 and 36 of the *Civil Code of Québec* (CCQ).
- The arbitrator dismissed the grievance and the union filed an appeal for judicial review.

Decision

- The Superior Court found that the arbitrator's decision was reasonable. Thus, it is relevant to provide an overview of her conclusions:
  - There is no violation of the right to fair and reasonable working conditions. The software's primary purpose is to avoid a threat (an external attack) or to react quickly in the event of an attack. It covers a very small part of what an employee normally does in the course of their work and reveals anonymized information. Secondly, the computer monitoring of internet connections made by thousands of users (22,000) cannot be assimilated to constant or continuous surveillance carried out, for example, by a camera which stares at, captures or spies on, an employee throughout their working day.
  - While an employee may have some subjective expectations of privacy when using the employer's computer devices, the data analyzed by the software and accessed by the employer in the login reports are not within the employee's private sphere. Furthermore, the employer puts in place guidelines limiting the use of computer and internet tools for business purposes that expressly provide for the employer's right to verify what employees do with those tools. In addition, the employer regularly reminds employees that the activity of internet users is recorded and can be checked at any time and that administrative and disciplinary measures may be imposed on offending employees.
  - Thus, the Arbitration Tribunal is of the opinion that the employees' reasonable expectation of respect for their privacy with regard to the data generated by browsing the Internet is considerably limited, especially since the software collects only raw data without associating the names of the employees concerned (only the user codes assigned to the employees are recorded).
  - Finally, the arbitrator, although not required to do this analysis in light of her previous finding, concluded that the employer had discharged its burden of establishing the need to achieve the objective and the proportionality of the means used to achieve it.



TO WATCH IN 2023

Supreme Court to rule on the right of first-level managers to unionize

In February 2022, we published an article on the Québec Court of Appeal decision that opened the door to the unionization of first-level managers. As expected, the case was appealed to the Supreme Court of Canada. Last September, the highest court of the country agreed to hear the case of the Montréal Casino's first-level managers, who are seeking the right to unionize.
The Supreme Court of Canada's decision will settle this long-debated constitutional issue for good, and could have the effect of transforming the Québec labour relations regime.

12. *Syndicat des métallos, section locale 2008* v. *Procureur général du Canada*, 2022 QCCS 2455

Vaccination against COVID-19

Facts	• This decision decided an application for judicial review to challenge the constitutionality of ministerial orders issued by the Minister of Transport of Canada ordering mandatory vaccination in the federally-regulated sectors of marine, air and rail transportation in the context of the COVID-19 pandemic. • The union alleges that the orders violate section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) with respect to the right to liberty and security of the person, since they force employees to receive a vaccine against COVID-19, without justification and solely because their employer is subjected to the regulations of Transport Canada. Thus, the plaintiffs are challenging the provisions requiring the federal carriers to adopt mandatory vaccination policies for which the only exceptions would be medical contraindications and sincere religious beliefs. In addition, the union is challenging the suspension without pay of employees who refused to be vaccinated. • For his part, the Attorney General of Canada argues that no rights protected by section 7 of the *Charter* are violated, that no principle of fundamental justice is violated and, alternatively, that the vaccination obligation constitutes a reasonable limit under section 1 of the *Charter*.
Decision	• The Québec Superior Court found that the vaccine requirement that the federal government imposed on transportation sector employees is constitutional, even though it violates section 7 of the *Charter*. • In the judge's view, vaccination is a public health measure that is in the public interest because mandatory vaccination in the transportation sector has not only been effective, but has also allowed to avoid very serious problems. In this regard, the judge added that COVID-19 can be very severe and even lethal, not to mention that it can have consequences on the rate of absenteeism that jeopardize the proper functioning of the transportation system. • In order to determine whether the violation of fundamental rights is justified, the judge analyzed the following four criteria: (i) the pursuit of a "pressing and substantial" objective; (ii) the rational connection between that public health objective and mandatory vaccination; (iii) the least intrusive measure; and (iv) whether its salutary effects outweigh its harmful effects. • In the judge's view, vaccination was "the least intrusive measure that would have achieved the objective" of ensuring transportation safety, especially since "the precautionary principle had to be respected." As for measures such as wearing masks, social distancing, ventilation and hygiene, the judge noted that they were effective in reducing the transmission of COVID-19, but do not constitute sustained immunological protection in the event of infection. • Furthermore, the mandatory vaccination policies adopted as a result of the ministerial orders included exceptions for people who had a medical contraindication or a sincere religious belief that prevented them from getting vaccinated. The appeal for judicial review was therefore dismissed. • Finally, it is important to note that the vaccine requirement was repealed effective June 20, 2022.

Will the Supreme Court hear the appeal in *FTQ-Construction* v. *N. Turenne Brique et Pierre inc.*

In June 2020, the Superior Court accepted a class action filed on behalf of contractors who had been deprived of the work of their employees, on the one hand, and industrial employees who had been deprived of their remuneration, on the other hand, due to the disruptions or closures of construction sites in connection with the tabling of the *Act to eliminate union placement and improve the operation of the construction industry* in 2011.

At trial, the Superior Court found that the workers who had left the various construction sites were on an illegal strike, which had led to their closing. In addition, the judge found that the FTQ-Construction had committed a fault by failing to take the necessary measures to put an end to the illegal strike as soon as possible. Among other things, it ordered it to pay the members of the targeted groups an amount of $9,891,175, representing 50% of the disruptions experienced in the industry on October 25, 2011.

In July 2022, on the FTQ-Construction appeal, the Québec Court of Appeal confirmed that the FTQ-Construction was responsible for the wages of workers who had been forced to leave work sites, who had been denied access to work sites and who had been deprived of their wages without the right to provide their work on October 25, 2011. The Court of Appeal also confirmed that the FTQ-Construction is liable for damages suffered by employers who had paid wages without receiving work in return. However, the Court of Appeal specified that the FTQ-Construction did not have to reimburse the wages of the workers who participated in the illegal strike. Moreover, it overturned the Superior Court's finding ordering the union to pay moral damages to the workers, since the evidence did not show that all the members of the group suffered moral prejudice because of a feeling of powerlessness and humiliation. Finally, the Court of Appeal confirmed that the FTQ-Construction's fault of omission did not justify an award of punitive damages. (The reference for this decision is: *FTQ-Construction* v. *N. Turenne Brique et Pierre inc.*, 2022 QCCA 1014.)

A leave to appeal to the Supreme Court of Canada was filed by the groups of contractors and employees (file 40385). It will be interesting to follow the outcome of this appeal in the months to come.

TO WATCH IN 2023

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