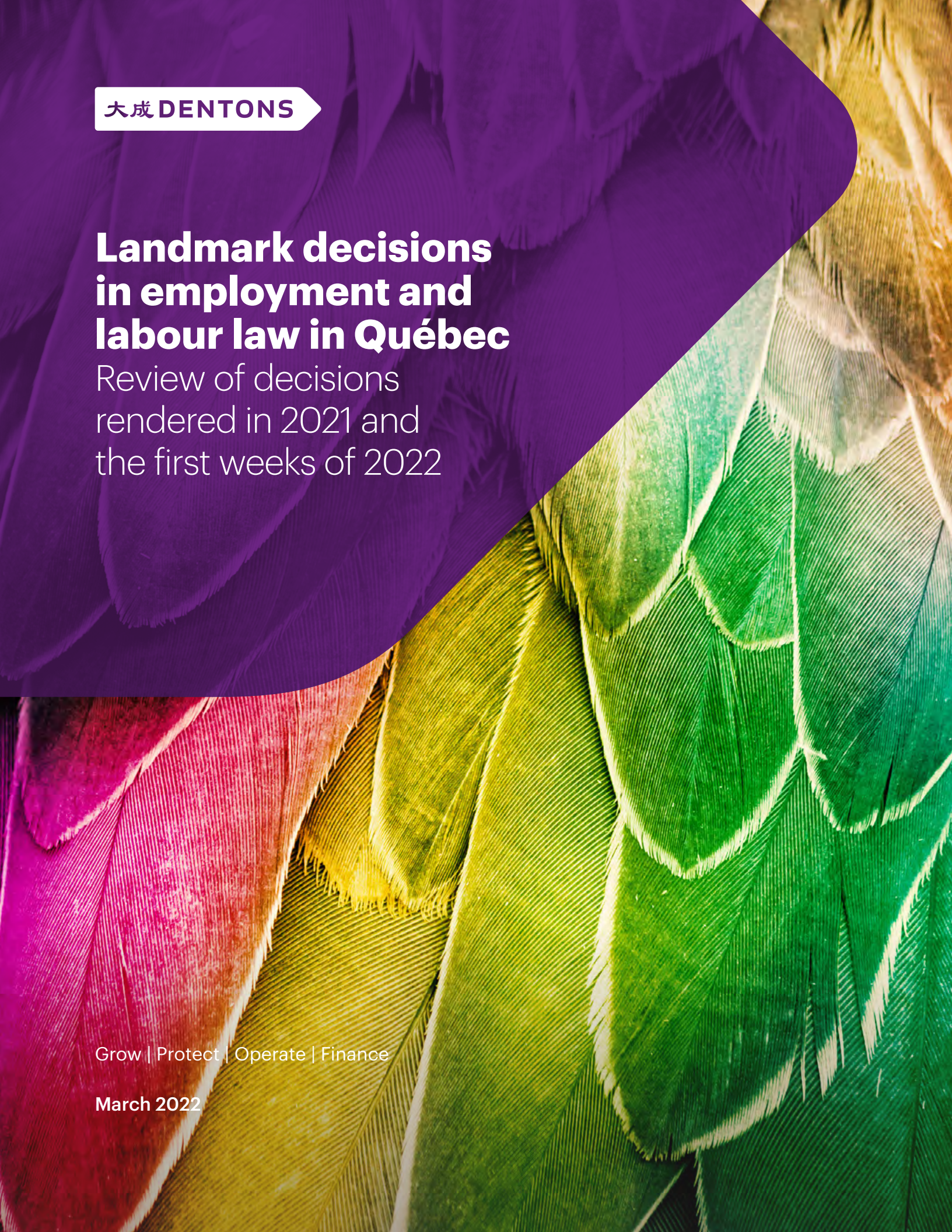
大成 DENTONS

Landmark decisions in employment and labour law in Québec

Review of decisions rendered in 2021 and the first weeks of 2022



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In recent months, in addition to adapting to the upheavals and managing the challenges of COVID-19 on the labour market, employers have had to continue to handle many more traditional issues, including in terms of hiring, psychological harassment, termination of employment, and labour relations.

This insight provides an overview of landmark employment and labour law decisions rendered in 2021 and 2022 by the specialized labour and employment authorities, as well as by the Québec Superior Court and Court of Appeal. The decisions discussed in this document include issues related to discrimination, psychological harassment, legal duty of loyalty, employment injuries, constructive dismissal, unionization of first-level managers and the use of replacement workers in a telework context.

If you would like more information or have any questions, contact one of the authors or a member of our group.

See also our review of decisions related to COVID-19.

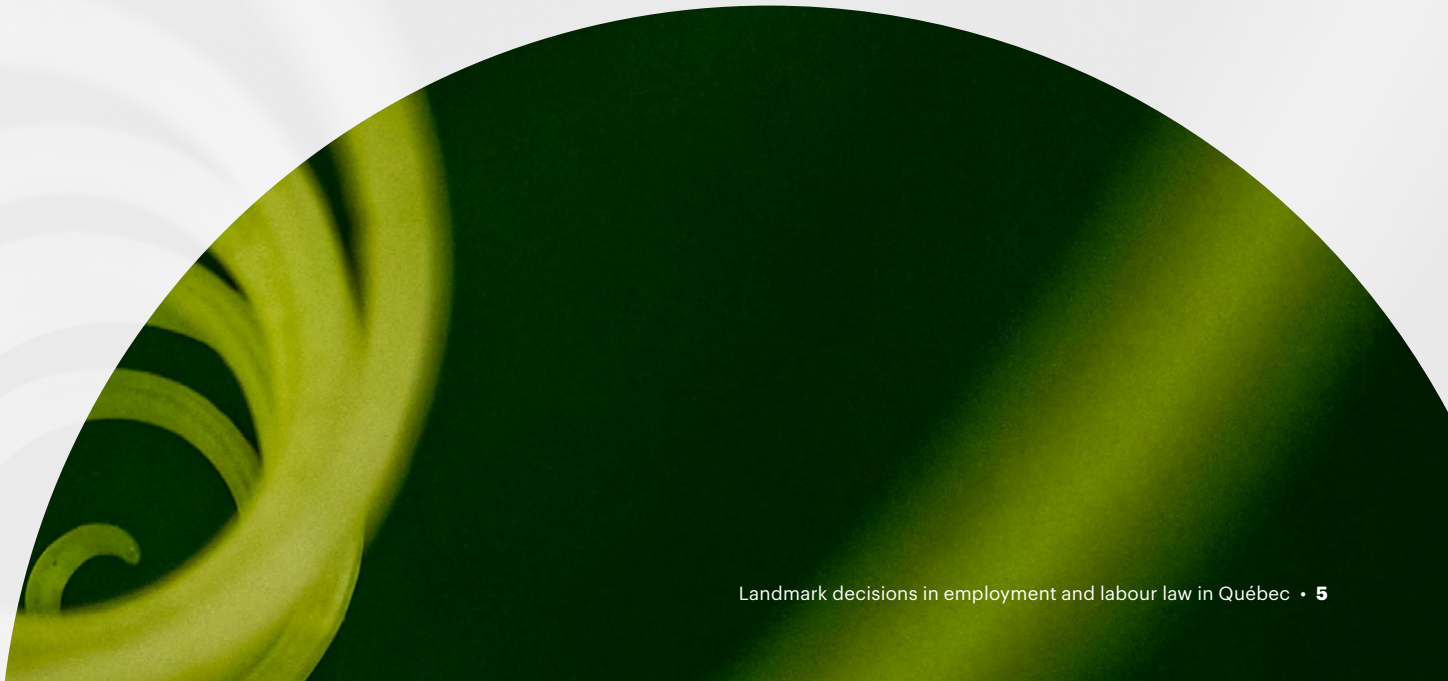
1. *Commission des droits de la personne et des droits de la jeunesse (M.R.) c. Société de transport de Montréal (STM)*, 2021 QCTDP 35 **(Hiring discrimination)**	
The facts	• An electronics technician applies to work for the employer, the Société des transports de Montréal. • The Commission des droits de la personne et des droits de la jeunesse (the **Commission**) accuses the employer of having violated the fundamental rights of the candidate, in particular his right to benefit from a hiring process free from discrimination, by requiring him to answer a very elaborate questionnaire on his state of health and by requiring that he submit to a complete medical evaluation (vision, hearing, urine, blood sugar and blood pressure tests), all in contravention of sections 10 and 18.1 of the *Charter of human rights and freedoms* (the **Québec Charter**). • In its defence, the employer alleges that the forms and medical examinations administered during the hiring process are not discriminatory, and in particular, that the issues related to diabetes, blood pressure, depression and drug and alcohol use are rationally connected to the skills and qualifications required for the position.

Decision	• The purpose of section 18.1 of the Québec Charter is to eliminate discrimination in the hiring process by prohibiting questions relating to the personal characteristics of candidates that are not related to the skills or qualifications required by the position for which they are applying.
	• The requirements of the position did not justify a candidate being questioned about past or present health concerns in order to ensure the safety of the employee and others. Many of the questions asked in the questionnaire and some aspects of the medical examination were discriminatory within the meaning of sections 10 and 18.1 of the Québec Charter.
	• In particular, the imposition of questions relating to past drug or alcohol abuse problems and urine tests to detect substance abuse or alcoholism was not justified given the risks of the duties and responsibilities of this position.
	• However, other information was required for a purpose rationally connected to the performance of the job and it was reasonably necessary for the employer to obtain this information to ensure that the candidate was able to perform their work in an effective and safe manner, namely:
	  • Information related to vision (due to the colour code governing the electrical field);
	  • Information related to an illness of the nervous system, muscles, bones and joints (due to job requirements related to fine motor skills and grasping);
	  • Information related to judgment, concentration, attention and alertness (due to welding, burn-in, electronic circuit and high voltage work); and
	  • Information related to consumption of certain medicines that may affect the level of concentration and alertness.

2. *Aluminerie de Bécancour inc. c. Commission des droits de la personne et des droits de la jeunesse (Beaudry et autres)*, 2021 QCCA 989
(Discrimination in working conditions, based on social condition (student status))

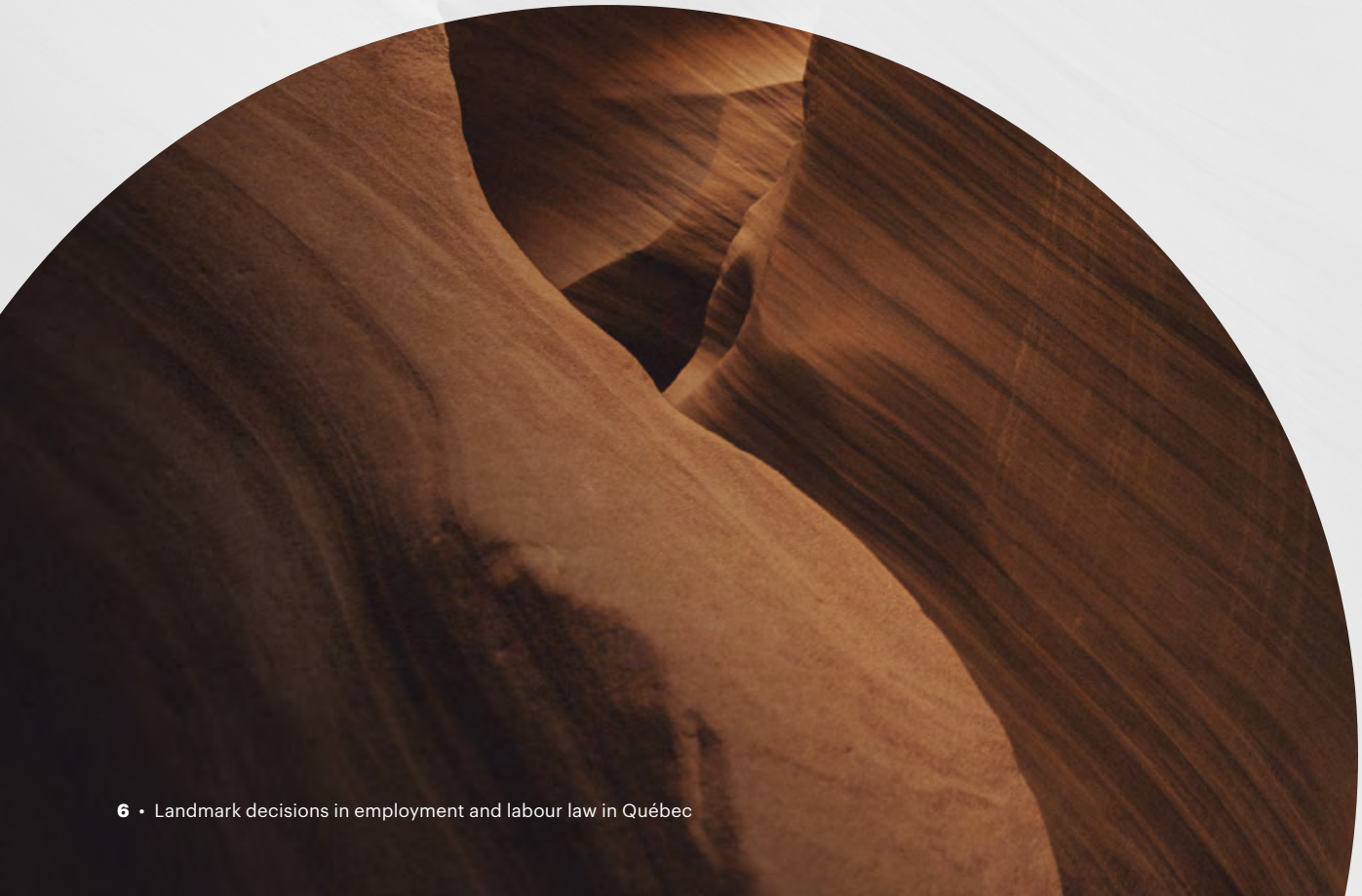
The facts	• The employer operates an aluminum products production and processing plant and a metal smelter. • The employer hires students to replace regular and seasonal employees during vacation periods, during the summer and during the holiday season. • Since 1995, the collective agreement has provided that student employees are paid less than the regular and seasonal employees they replace. • The preponderant evidence presented at trial was that students perform work equivalent to regular and seasonal employees. • The union alleges that students are the lowest paid employees and that this disadvantage is motivated by their age and social condition, since there is nothing in the duties and responsibilities that justifies differential treatment. According to the union, this is discrimination based on social condition and age within the meaning of section 10 of the Québec Charter. • The employer argues that student status is not included in the concept of social condition, that the different salary is motivated by the length of service of the students, and that they do not perform work equivalent to that of other employees.
Decision	• Under section 19 of the Québec Charter, every employer must, without discrimination, grant equal pay to the members of its personnel who perform equivalent work at the same location. However, there is no discrimination if a differential salary or differential wages are based on experience, seniority, length of service, merit assessment, quantity of production or overtime. • In this case, the employer was unable to demonstrate that the wage difference was based on one of the grounds listed in section 19 of the Québec Charter. • Student status is a social condition within the meaning of section 10 of the Québec Charter. As such, the lower wages offered to student employees constituted a prohibited distinction and undermined their fundamental right to equal pay for work of equal value. • Note that the rule for work is equivalency: it does not have to be the same or completely equal work.

3. *Sahlaoui c. 2330-2029 Québec inc. (Médicus)*, 2021 QCCA 1310 (Motion for leave to appeal to the Supreme Court, October 29, 2021, 39918) (Legal duty of loyalty)	
The facts	• An orthotist prosthetist, Mr. Sahlaoui, had been working for the employer, Médicus, for about ten years when he resigned to start a competitor, Evo Technique Inc. • The employer is suing Mr. Sahlaoui for damages for breaching his obligation of loyalty prescribed in article 2088 of *the Civil Code of Québec* (the **CCQ**). He also seeks the responsibility of Evo Technique Inc. for encouraging this violation.
Decision	• The Court of Appeal dismissed Médicus' appeal in its entirety and concluded that the former employee did not breach his duty of loyalty both before and after his resignation. The losses suffered by Médicus following Mr. Salhoui's departure were the result of legitimate competition and not unfair competition. • The Court of Appeal noted that an employee's obligation during employment is quite heavy, especially for key employees or those who enjoy great professional latitude. However, looking for a new job never, in itself, constitutes a breach of the duty of loyalty. • Moreover, there are legitimate limits to the openness and transparency required under the terms of the employment contract, such that an employee can keep secret both their intention to change employment and the steps they take to do so. On the other hand, preparations for the departure of the employee during employment must not be carried out during working hours or with the tools and equipment of the employer. • The duty of loyalty is substantially mitigated after the employee leaves. The obligation of loyalty provided for in the CCQ cannot impose on the employee restrictions equivalent to those resulting from a well-drafted non-competition clause, particularly in terms of duration since the legal duty of loyalty only has effect for a reasonable period of time which rarely exceeds a few months (3 to 4 months). In the absence of restrictive covenants, only truly disloyal actions (e.g., hacking confidential information, concealing or misappropriating business opportunities, taking over the client list, or recruiting clients for one's own benefit) will justify court intervention.



4. *Costco Wholesale Canada Ltd. c. Roadnight*, 2021 QCCA 17 (Immunities provided for in the *Act respecting industrial accidents and occupational diseases* and constructive dismissal)

The facts	• The manager of a Costco warehouse has approached an employee (assistant manager) to discuss some aspects of her work that he finds problematic. At the meeting, he used a tone and language that she considered offensive and demeaning. • As a result of this incident, the employee retreats and falls into a state that forces her to be absent from work for a total period of 15 months, during which time the employee is covered by the employer's insurer, receiving disability insurance benefits. At the end of this period, the expert physician retained by the insurer believes that the employee has regained full capacity for work, but recommends that the parties hold a meeting before the employee is reinstated, with the goal of "de-dramatizing the situation." • At this meeting, the employee feels that the manager refuses to admit his wrongdoing and expresses no remorse. As a result, she abruptly ended the return-to-work meeting, alleged that she had been constructively dismissed, and demanded that the employer pay her a package. • Faced with the employer's refusal, she initiated a civil action to claim compensation in lieu of reasonable notice of termination and moral damages. • The employer presents a plea of inadmissibility based on the immunity of the employer and the co-employees under the *Act respecting industrial accidents and occupational diseases* (the **AIAOD**) which is rejected by the Superior Court, and alleges that the employee resigned freely and voluntarily. • The Superior Court dismissed the employer's preliminary argument and allowed the employee's action. It condemns the employer to pay a notice period indemnity and the employer and the director to pay moral damages.



Decision	• On the exception to dismiss action based on the immunity of the employer and co-employees under the AIAOD, the Court of Appeal concluded that:
	  • The purpose of the AIAOD is to repair occupational injuries and the consequences they entail for the beneficiaries, but also to facilitate the return to work of workers who are victims of such injuries;
	  • As soon as an employee's situation is potentially covered by the AIAOD, the immunity from prosecution that it provides apply, even if the employee does not use the regime established by this law;
	  • The issue of the employee's return to work, and the preparatory meeting to that effect, in which she considered the constructive dismissal to have materialized, was part of a continuum that formed a whole that was inseparable from the incidents that led to her disability;
	  • The employee could have availed herself of the mechanisms set out in the AIAOD in a timely manner if she felt that the employer refused to reinstate her following her employment injury;
	  • Consequently, the civil immunity provided for in the AIAOD prevented the Superior Court from hearing and deciding the action brought by the employee.
	• On the issue of constructive dismissal, the Court of Appeal concluded that:
	  • Nothing in the evidence shows that, following her sick leave, the manager or the employer had any intention of not reinstating the employee in her duties;
	  • The fact that the manager refused to apologize to the employee following an isolated incident, and that no employer representative insisted that she return to work does not mean that the employee's resignation was induced or forced in any way by the employer;
	  • Since she did not get along with her employer and was uncomfortable returning to work, the employee was perfectly free to resign. That being the case, it was her decision and she was not entitled to any amount as compensation for the notice period.

5. *Chaperon c. Montréal Auto Prix inc.*, 2021 QCTAT 4355 (Psychological harassment)	
The facts	• Mr. Chaperon has been employed as a mechanic with the employer, Montréal Auto Prix Inc., since 2016. • In 2019, Mr. Chaperon filed a complaint under section 123.6 of *the Act respecting labour standards* (the **LNT**) because he claimed to have suffered psychological harassment from some of his work colleagues, namely racist comments, throughout his term of employment. He also alleges that he was subjected to a racist insult and death threats from a co-worker on February 13, 2019. He criticizes the employer for failing to intervene to stop these manifestations of psychological harassment. • The employer argues that it was unaware that racist comments about Mr. Chaperon had been made by his colleagues before February 13, 2019. The employer also argues that this incident does not constitute psychological harassment, but rather a conflict between two co-workers. Alternatively, the employer argues that it complied with its legal obligation to stop the harassment after it was reported to him.

Decision	• The court notes the components of the concept of psychological harassment:
	  • Vexatious conduct that manifests itself in repeated behaviours, words, actions or gestures that are hostile or unwanted;
	  • The vexatious conduct undermines the dignity or the psychological or physical integrity of the employee;
	  • The vexatious conduct leads to a harmful work environment for the employee.
	• Unique conduct may also constitute psychological harassment when it is serious, impairs psychological or physical dignity or integrity, and has a continuing harmful effect on the employee.
	• The assessment of the vexatious nature of conduct is assessed on the basis of the reasonable victim test. This is the view of a normally prudent and diligent person who, under the same conditions, would consider that vexatious conduct was committed against her.
	• The preponderance of evidence did not demonstrate that Mr. Chaperon was confronted with repeated vexatious conduct by his colleagues before February 13, 2019. However, the racist insult and the death threats made during the incident on February 13, 2019, are part of the concept of psychological harassment.
	• Since the evidence shows that the employer's rapid response to the incident definitely stopped the psychological harassment against Mr. Chaperon, the employer respected its legal obligation to stop the harassment. The employee's complaint is therefore dismissed.

6. *Maax Bath inc. c. Racine,* 2021 QCCS 2885 (Motion for leave to appeal granted, 2021 QCCA 1650) (Paid leave for illness or family obligations provided for in the *Act respecting labour standards*)	
The facts	• The collective agreement governing the relationship between the employer, a bathroom products manufacturing company, and the union provides that employees are entitled to unpaid family or parental leave, as well as paid floating holidays during the year. • It is expected that these floating holidays can be used for different purposes, whether for appointments other than medical, leisure days, illness or family reasons. • Since the amendments made to the *Act respecting labour standards* (the **LNT**) in 2019, section 79.7 of the LNT provides that an employee may be absent from work for 10 days per year to fulfill certain family obligations listed in this article, and be remunerated for the first two days taken annually if they have three months of uninterrupted service. • The union filed a collective grievance contesting the employer's refusal to grant paid leave for family responsibilities or illness to certain employees, as provided for in the collective agreement and the new provisions of the LNT. • The arbitrator allowed the grievance and the employer filed an appeal for a judicial review of that arbitration award.
Decision	• In the arbitration award, the arbitrator declares that the employer must remunerate at least two absences per year for family obligations or illness, even in the case where the floating holidays provided for in the collective agreement have already been used for other reasons (e.g., leisure). • Otherwise, an employee who has already used during the year the days of floating leave to which they are entitled for personal reasons other than illness and family obligations, could lose the right to be absent for illness or family and to be paid if they needed it during the same year. • The Superior Court dismissed the judicial appeal. The arbitrator's reasoning was rational and consistent.

7. *Air Canada et Gentile-Patti*, 2021 QCTAT 5829 (Occupational injury in telework)	
The facts	• The worker is a customer service agent working from home for the employer. • The employer is contesting the decision of the review body of the Commission des normes, de l'équité, de la santé et de la sécurité du travail (the **CNESST**), which recognized that the worker suffered an employment injury when she fell down the stairs in her home on her way to take her lunch break. • The employer argues that the worker's fall down her stairs did not occur while at work, since the worker was no longer in her professional sphere, but rather in her personal sphere. • Furthermore, the employer argues that there is no connection between this activity and the work, and that when the unexpected and sudden event occurs at the worker's home, the Tribunal administratif du travail (the **Tribunal**) must take into account the reality that it is a place that is part of the worker's private life over which the employer has no control, particularly with respect to the keeping of the premises. • For her part, the worker argued that her fall was an unexpected and sudden event at work, since going to lunch is a comfort activity that the employee benefits from.

Decision	• The Tribunal agreed with the worker, concluding that her fall constituted an unforeseen and sudden event that occurred during work.
	• By teleworking, the worker's home becomes the workplace, namely the limited environment in which the worker performs their work.
	• Although at the time of the fall, the worker was not being paid and was preparing to carry out a personal activity, the context in which the incident occurred has certain dimensions that nevertheless allow to conclude that it is an event that occurred "in the course of work":
	  • The worker was at home on the day of the accident in order to perform her work;
	  • She had to connect to the employer's network on a specific schedule set by the employer. Within that schedule, the employer allows the worker to take breaks and lunch time. These breaks are therefore part of the work organization determined by the employer.
	• Without the imposition of a work schedule by the employer, the existence of a health or meal break would not be the responsibility of the work organization. There would therefore be no connection between these breaks and the work.
	• Finally, there is temporal and concurrency between the disconnection from the employer's network by the worker and the fall.

8. *Unifor, section locale 177 c. Groupe CRH Canada inc.*, 2021 QCTAT 5639 (Appeal for judicial review before the Superior Court, December 22, 2021, 500-17-119468-216) (Replacement workers and teleworking)	
The facts	• The union files an application for an interim order to prevent the employer from continuing to use the services of employees it employs in the establishment where the lockout was declared to perform the duties of employees in the locked-out bargaining unit. • The employer argued that one of the replacement workers performs telework, while the Code only prohibits the employer from having the work of locked-out employees performed **in the establishment where the lockout was declared.**
Decision	• In 2011, the Québec Court of Appeal in the *Syndicat canadien de la fonction publique, section locale 1450 et al. c. Journal de Québec*[1] decision confirmed that the anti-scab provisions apply only to work performed "in the establishment" of the employer. • Despite these lessons, the Tribunal concluded that the employer violated the provisions relating to replacement workers by having the duties of locked out employees performed by an employee who reports to the same establishment as the locked-out employees, from her domicile. • Since the beginning of the pandemic, teleworking has become widespread and in this context, it is necessary to interpret that the notion of establishment extends to the residence of employees performing their work remotely. • In particular, the Tribunal bases its decision on the constitutional protection afforded to the right to strike and explains that "rigidly and in a discarnate way restricting "the establishment" to the only physical address listed in the certification decision could have the effect of hindering or even denying the right of association of certain employees, performing their duties remotely at home or while travelling (salespeople, representatives, delivery agents, drivers, etc.)."

[1] 2011 QCCA 1635

***9. Héma-Québec c. Syndicat des techniciens(nes) de laboratoire de Héma-Québec - CSN*, 2022 QCCA 5 (Cancellation of a stay order of an arbitration hearing based on the reinforcement clause provided for in the *Labour Code*)**	
The facts	• At the request of both parties (employer and union), a dispute arbitrator renders a decision on whether he is bound, under section 93.7 of the *Labour Code* (the **Code**), by the agreements on certain clauses of the collective agreement entered into or withdrawn by the parties, before sending the notice by which he confirms to the Minister his decision to impose the content of an agreement on the parties. He answered that question in the affirmative. • The union filed an appeal for judicial review of this interlocutory award and requested that the arbitration be stayed until it was decided. A judge of the Superior Court ordered the stay during the proceedings of the appeal. • The employer asks the Court of Appeal to summarily quash this order of the Superior Court, on the grounds that it was rendered in violation of the privative clause provided for in the Code which protects the skill of the referee. In the alternative, he seeks leave to appeal from this judgment.
Decision	• The judge found that the stay granted by the Superior Court judge constituted an unreasonable intervention on her part, contrary to the Code, which provides that "except on a question of jurisdiction, no application for judicial review under the Code of Civil Procedure may be exercised nor any injunction granted against an arbitrator acting in his official capacity." • The Court of Appeal judge was of the opinion that the union's judicial review appeal did not raise any jurisdictional issue, since the arbitrator had simply interpreted his own home statute. • Unlike the Superior Court, the Court of Appeal determined that the three criteria for granting a conditional sentence order were not met. The Tribunal is of the view that there are no exceptional circumstances in this case that would preclude the application of the principle of non-intervention in interlocutory decisions by administrative bodies. • For these reasons, the judge of the Court of Appeal used his power under section 140 of the Code and allowed the application to summarily annul the judgment of the Superior Court ordering the stay.

10. Association des cadres de la société des casinos du Québec c. Société des casinos du Québec, 2022 QCCA 180 **(Unionization of first-level managers)**	
The facts	• The employer is a Crown corporation with five or more levels of management. In 2009, an association of employees filed a request for certification to represent certain "first-level" executives in its employ, namely operations supervisors (**OS**). • The employer opposes this motion, arguing, among other things, that executives are excluded from the concept of "employee" under the *Labour Code* (the **Code**) and therefore cannot be entitled to the unionization procedure provided for in the Code. The association opposes this plea and asks the Court to declare that this exclusion is constitutionally inoperative in the case of OS. • In an interlocutory decision, the Tribunal grants the association's request and declares constitutionally inoperative the exclusion of executives from the concept of employees, on the grounds that this exclusion infringes their freedom of association guaranteed by the *Canadian Charter of Rights and Freedoms* and the *Charter of Human Rights and Freedoms* (the Charters). • The employer appealed this decision and the Superior Court allowed it. It declared "applicable, valid and operative" the exclusion of executives from the concept of "employee" provided for in the Code. The Association, in turn, appeals the latter decision to the Court of Appeal.
Decision	• In order to determine whether the disputed exception constitutes an unjustified infringement of a fundamental right of OS, the Court must determine whether the definition of "employee" provided for in the Code, which automatically excludes any person occupying a management position, infringes on the freedom of association guaranteed to the members of the Association by the Charters. If so, the Court of Appeal then had to decide whether this infringement was justified on the basis of the Oakes test. • Taking into account the case law of the Supreme Court of Canada on the scope and purpose of freedom of association guaranteed by the Charters, the Court of Appeal, like the Tribunal, states that the section of the Code excluding the executives from the concept of "employees" is constitutionally inoperative with respect to OS, since in their case, this provision constitutes a substantial and unjustified interference with their freedom of association. • The Court of Appeal states that the two distinct categories that prevailed at the time of the Code's adoption, namely "workers and management; those who obey and execute, on the one hand, and those who command, at any level, on the other," have undergone significant changes and are now more diffuse. However, the exclusion of all levels of management from the definition of "employee" maintains this traditional view of labour relations. • Given the potential impact of its decision on the Québec labour relations regime in general, the Court considered it appropriate to suspend the inoperative nature of the exclusion of executives from the application of the Code for a period of 12 months.

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