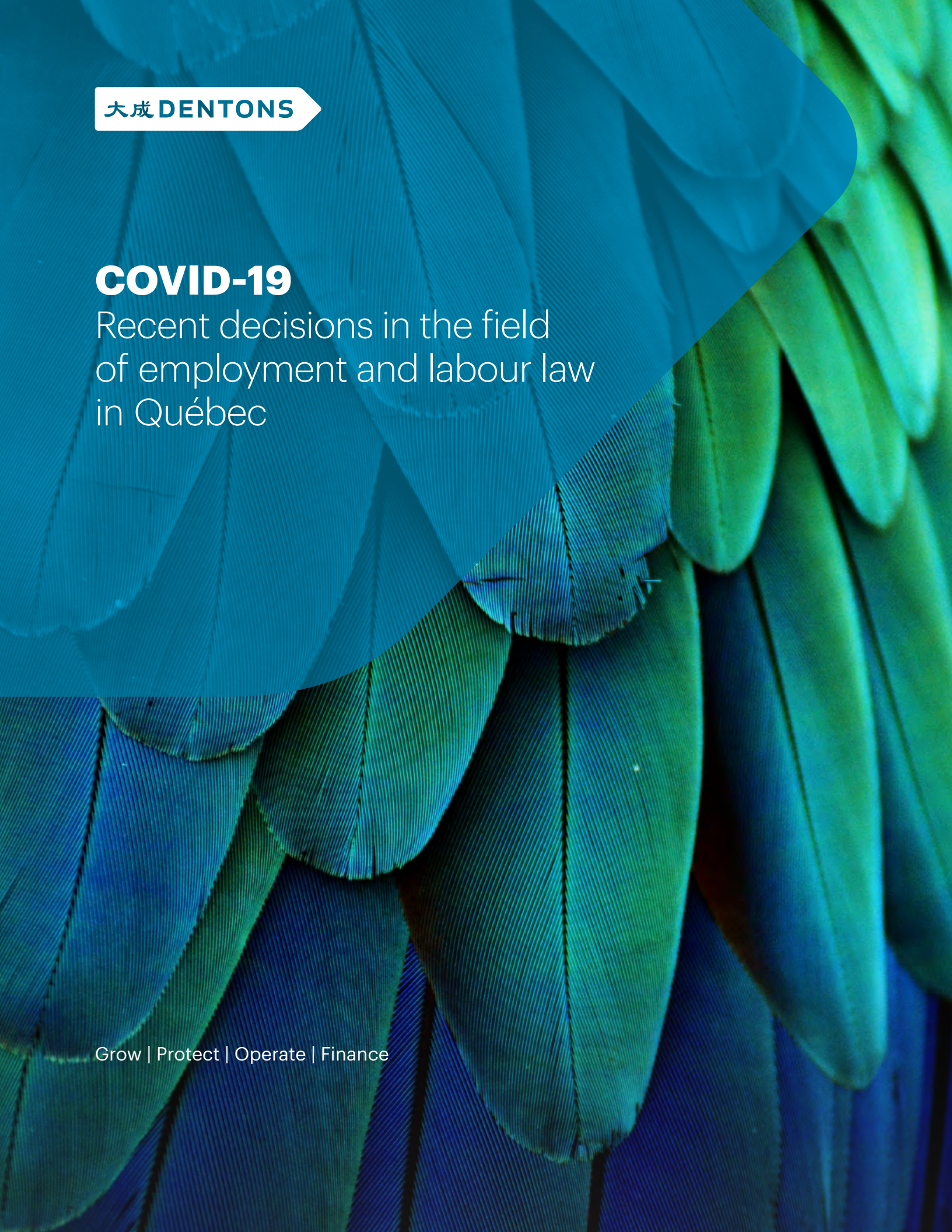
大成 DENTONS

COVID-19

Recent decisions in the field of employment and labour law in Québec



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For almost two years now, the pandemic has been turning the business world upside down and bringing its share of challenges for employers. Over the past year, important decisions related to COVID-19 have been made by various decision-making entities in Québec in employment and labour law. As we begin the year, we review some of these decisions in the hope of enlightening you on the issues you are facing in your workplaces during these extraordinary times. The decisions outlined in this document relate in particular to compulsory vaccination, disciplinary measures for non-compliance with health rules, remuneration during periods of quarantine and teleworking.

1. *Professionnel(le)s en soins de santé unis (PSSU-FIQP) et CHSLD Vigi Reine-Élizabeth, 2021 QCTAT 1401*

July 26, 2021

Obligation of employers in terms of occupational health and safety

(Appeals for judicial review filed by the employers and the Attorney General of Québec)

Facts

- Following various complaints filed with the Commission des normes, de l'équité, de la santé et de la sécurité du travail (the **CNESST**) concerning in particular the lack of personal protective equipment (**PPE**) and work organization linked to COVID-19 in several long-term care residential centers (**CHSLD**), an inspector produced several intervention reports. These were challenged before the Tribunal administratif du travail (the **Tribunal**), by both the unions and the employers involved.
- The unions argued that employers did not meet their obligations with respect to occupational health and safety, including PPE, safe work organization and facility ventilation.
    - Regarding the issue of PPE, the recommendations of public health organizations and the CNESST concerning this issue in health care settings have evolved throughout the pandemic, due to a constant evolution of scientific knowledge in relation to COVID-19. At the time of the hearing, the CNESST recommended that employers impose the use of a respiratory protective device, such as the N95 mask, only in hot zones, and that of a surgical or procedural mask in all other circumstances. However, the unions felt that these recommendations did not ensure the health, safety and physical integrity of health care workers, particularly in the warm and hot areas.
- The employers maintained that (i) the CNESST inspector could not intervene since she had not observed the existence of any danger in the workplace; (ii) because of their obligations under other laws of public order such as the *Act respecting health services and social services* (**ARHSSS**) and the *Public Health Act* (**PHA**), they could apply constraints to the residents of their facilities in order to protect the workers, and by doing so (iii) they fulfilled all of their obligations in terms of prevention, health and safety at work; and (iv) the Tribunal did not have the necessary powers to impose specific working methods; its competence being limited to determining whether the measures taken by the employers were sufficient.

Decision

- The Tribunal concludes that the intervention of the CNESST inspector was justified due to the Tribunal's identification of a situation threatening the health, safety and physical well-being of workers in CHSLDs.
- The laws are presumed to be consistent with each other and the Court must seek their harmonization. The achievement of the objectives of the *Occupational Health and Safety Act* (OHSA) in matters of prevention and health at work can only reinforce the achievement of the objectives of the ARHSSS and the PHA. Thus, employers cannot use their obligations under the ARHSSS or the PHA to avoid their obligations under the OHSA.
- In general, the case law indicates that the Tribunal cannot impose specific work methods, since its duty is to assess whether the measures taken are sufficient. However, in this case, the Court considers that the interests of justice require it "to examine the other avenues widely discussed during the proceedings" and that, under its enabling legislation, it "must render the decision which should have been returned, which may involve identifying or favouring PPE, a work method or even a type of work organization."
- The Tribunal finds that the surgical or procedure mask is not an appropriate PPE for employers' workers who are required to provide care and housekeeping in hot or warm areas. The PPE that allows employers to fulfill their health and safety obligations is a respiratory protection device, whether it is an N95 or a mask that is equivalent or offers superior protection.
- The Court also concludes that the obligations of employers are not fulfilled with regard to the organization of work.
- With respect to ventilation, as there is insufficient evidence, the Tribunal cannot conclude that there is a lack of ventilation.

2. *Syndicat canadien de la fonction publique (SCFP), section locale 5159 c QSL Canada inc., 2021 CanLII 73152 (QC SAT)* (Mr. Dominic Garneau)

August 12, 2021

Disciplinary measures for non-compliance with health measures (Federal law)

Facts	• The employer operates a world-class company specializing in port operations and stevedoring, including on the site of its main client (Alcoa). • The grievor is employed as a longshoreman in cargo handling and has approximately four years of seniority with the employer. • The union contests a disciplinary measure (four months of suspension) that the employer imposed on the grievor at the start of the COVID-19 pandemic, after the latter failed to wash his hands before the start of his shift in violation of a mandatory directive from the employer and maintained his refusal to do so, despite the intervention of his superintendent.

Decision	• The arbitrator is of the opinion that the **willful** omission to comply with a health directive in the situation of the COVID-19 pandemic constitutes **serious** misconduct.
	• The arbitrator is of the opinion that although the measure is severe, it is not disproportionate taking into account the seriousness of the fault and all the applicable aggravating and mitigating circumstances.
	  • Aggravating circumstances include:
	  • Voluntary nature of the gesture, comparable to insubordination;
	  • The grievor's disciplinary history testifies to the fact that he displays a certain lack of concern with respect to health and safety rules;
	  • Context: the activities of the majority of businesses were suspended, except for those deemed to be priorities, and the grievor's action could have had significant consequences for the employer and/or his client.
	  • No mitigating factors (late regrets are not a mitigating factor).
	• Although it can have very significant economic consequences for a person, a long suspension is not equivalent to a dismissal.
	• Grievance dismissed.

3. *Association des travailleurs du préhospitalier (ATPH) et Coopérative des techniciens ambulanciers du Québec (CTAQ), 2021 QCTA 303* (Mr. Jean-Guy Ménard) August 13, 2021 Remuneration of employees in isolation

Facts	• The employer provides pre-hospital emergency and ambulance services. • The relevant facts take place when the majority of the population of Québec was not yet vaccinated and/or adequately protected. • At the relevant time, the guidelines of the Institut national de la santé publique du Québec (**INSPQ**) provided that anyone who had "significant contact" with a confirmed case of COVID-19 should immediately get tested and self-isolate until the results are obtained. • As part of her work, an ambulance technician had significant contact with a co-worker who had contracted COVID-19, and as a result, she had to undergo a test and isolate herself until the result of the test was obtained, which she only obtained a few days later and which turned out to be negative. • The employer refused to pay the employee for the days she was unable to work.

Decision	• The arbitrator retains the following from the legislation and the applicable collective agreement:
	  • No provision of the collective agreement imposes on the employer the obligation to remunerate an employee who must self-isolate and is unable to work due to preventive isolation.
	  • According to article 2085 of the Civil Code of Québec, the remuneration payable to an employee is consideration for work performed by the employee.
	• In the context of the pandemic and the INSPQ recommendations then in force, the employee was forced to self-isolate until she obtained a negative test and the employer had the obligation to remove her from work until she got a negative test.
	• Neither party had a choice of how to react.
	• Even if the COVID-19 pandemic constitutes a situation of force, this does not mean that the employer necessarily has the obligation to remunerate an employee who is unable to work for this reason of force majeure.
	• The obligation to remunerate an employee for a reason other than for work performed must result from a contractual obligation; in the absence of such a provision, the employer is justified in refusing to remunerate the employee who is unable to perform their work, for whatever reason.

4. *L'Écuyer c. Canadian Royalties inc., 2021 QCTAT 4901*
October 15, 2021
Medical prescription for continuing to work from home and exercising a right provided for in *Labour Standards Act*

Facts	• The employee, a mining engineer, filed a complaint for a prohibited practice under section 122 of the *Labour Standards Act* (LSA). • He alleges that he was unlawfully dismissed after asking to continue to perfom his duties by teleworking despite the reopening of his workplace. • Suffering from an immune deficiency making him more vulnerable to COVID-19, he had obtained a medical certificate prescribing his continued telework. • Five days after sending his medical certificate to this effect, he is informed of the end of his employment. • The employer claims that the employee did not exercise the right provided for in LSA, because the latter was never absent from work before the end of his employment. • The employer also maintains that the end of the employee's employment stems from a departmental reorganization and the uncertainty caused by the pandemic.
Decision	• Even if the medical certificate prescribing the continuation of telework does not constitute a work stoppage strictly speaking, it can lead to an absence for illness in the case of the employer's refusal. • The Court considers that this is sufficient to allow the application of the presumption of prohibited practice provided for in LSA. • In these circumstances, it is up to the employer to prove that they terminated the plaintiff's employment because of another just and sufficient cause. • In this case, the Court rules that the employee exercised a right provided for in LSA. The Court also concludes that the evidence presented by the employer demonstrates a real administrative reorganization and that it is not a pretext intended to cover up an unlawful dismissal.

5. *Lavergne-Poitras c. Attorney General of Canada (Minister of Public Services and Procurement), 2021 FC 1232*
November 13, 2021
Compulsory vaccination (Federal law)

Facts	• The employer, a Transport Canada supplier, adopts a mandatory vaccination policy in order to comply with the federal government's policy regarding the compulsory vaccination of suppliers required to enter the workplaces of Government of Canada employees, entitled *COVID-19 vaccination requirement for supplier personnel* (the **Policy**). • Company policy provides that any employee not vaccinated by November 15, 2021 will be fired or terminated. • The plaintiff, Mr. Lavergne-Poitras, refuses to be vaccinated and files interlocutory injunction proceedings in which he asks the Court to suspend the application of the policy of the federal government until his contestation is heard on the merits. • The plaintiff asserts that the Provider Vaccination Policy was not validly adopted and violates his right to liberty and to security of his person guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms* (the **Charter**).
Decision	• The Court dismissed Mr. Lavergne-Poitras' motion for an interlocutory injunction after analyzing the three criteria that must be met when granting an interlocutory injunction: (1) a serious issue to be decided, (2) irreparable harm to the plaintiff, and (3) the balance of convenience in favour of the plaintiff. • The plaintiff has not demonstrated that he has a serious issue to decide regarding the violation of his rights guaranteed by section 7 of the Charter. • Loss of employment does not constitute irreparable harm, as lost wages can be recovered in the form of monetary damages. • The balance of convenience does not weigh in favour of suspending the Policy since the loss of employment is not greater than the harm that the general population could suffer if the injunction were granted, in particular the increased risks for the health of federal employees and the weakening of the Policy adopted by the federal government. These damages far outweigh those invoked by Mr. Lavergne-Poitras in the present motion.

6. *Union des employés et employées de service, section locale 800, et Services ménagers Roy ltée (grief syndical), 2021 QCTA 570* (arbitrator Mr. Denis Nadeau)
November 15, 2021
Compulsory vaccination (collection of information relating to vaccination status)

Facts	• Declaratory grievance rendered at the joint request of a group of employers in the field of housekeeping and the union representing the employees of this employer. • Employers themselves do not require their employees to be vaccinated against COVID-19. • However, employers wish to check the vaccination status of their employees in order to comply with the new requirement of several of their customers that people performing work on their premises be double vaccinated. • The parties ask the arbitrator to determine whether the fact that an employer requires its employees to disclose their vaccination status to meet the requirement of the client where they work infringes the right to privacy of employees in violation of the *Charter of Human Rights and Freedoms* (the **Charter**). • Clients of employers are not parties to the collective agreement and are not involved in arbitration.

Decision	• Requiring an employee to disclose their COVID-19 vaccine status violates the employee's privacy rights enshrined in section 5 of the Charter.
	• However, in the circumstances of this case, this infringement is "justified" within the meaning of section 9.1 of the Charter, because the invasion of employees' privacy is "inconsequential in relation to the major inconveniences recognized by the "current scientific findings," resulting from the presence of unvaccinated people in the workplace". Employers can therefore continue to collect information, but this must be done according to the following framework:
	  • Employers can only require the information for employees assigned to a contract where there is an obligation to vaccinate, and not for all employees, even if it would be more convenient for them.
	  • The nature of the information that may be requested is limited to that which is necessary to confirm that the employee is "adequately protected," according to the government definition.
	  • Collection should be done by the human resources department, rather than by the employee's supervisor.
	  • Information about a person's vaccination status should not be shared with third parties, including the employer's customers; the employer can only certify to customers who so require that the employees assigned to their specific contract are all "adequately protected."

7. *Lachance c. Procureur général du Québec, 2021 QCCS 4721*
November 15, 2021
Compulsory vaccination

Facts	**The government waived mandatory vaccination for health care workers shortly after this decision was rendered and, as a result, it is unlikely that the Superior Court will rule on the merits of the judicial review appeal since it is now moot.** • Request for a stay of application of the Decree concerning the ordinance of measures to protect the health of the population in the pandemic situation of the COVID-19 (the **Decree**) adopted by the Government of Québec under the *Public Health Act*. • This Decree requires health and social services workers to provide proof that they are adequately protected against COVID-19, otherwise they will be suspended without pay. • 137 health care workers filed an appeal for judicial review to have the Order declared invalid. In the meantime, they ask that the application of the Decree be suspended on the grounds that the current state of the health system is close to the breaking point, and that the application of the Decree would deprive the health establishments of the contribution of the applicants and other unvaccinated health workers, and therefore the population would be deprived of the health care and services to which they are entitled.

Decision	• The Superior Court, after having applied the criteria that should guide the analysis of the granting of an application for a stay, namely urgency, colour of right on the merits, serious or irreparable harm and the balance of inconvenience, decides to let the Decree come into force.
	• First, the plaintiffs fail the serious or irreparable harm test for the following reasons:
	  • The Decree does not force health and social services workers to be vaccinated against their will so that it does not create a physically irreversible situation;
	  • Suspension of work is a compensable harm, particularly in monetary form.
	• In addition, at the stage of the application for a stay, the Court concluded that the public interest in the context of a health emergency weighed the balance of the disadvantages in favour of maintaining the compulsory vaccination requirement decreed by the government rather than in favour of workers refusing to be vaccinated.
	• Finally, we can read in the judgment that it is not up to the Court to substitute its opinion for that of the government. Rather, it is up to voters to judge the decisions made by the government in the context of the management of the pandemic.

8. *Syndicat des salariés municipaux de Chaudière-Appalaches c corporation municipale de St-Apollinaire, 2021 CanLII 122344 (QC SAT)* (arbitrator Mr. Dominic Garneau)

November 29, 2021

Remuneration during a period of mandatory isolation / Telecommuting

Facts	• The plaintiffs were placed in isolation pending their results of a screening test for COVID-19 following their contact with a confirmed case in the workplace.
	• The employer refuses to pay them during this period and also refuses to one of the complainants, who holds the position of administrative secretary, the possibility of carrying out her tasks by teleworking.
	• The arbitrator must answer the following questions:
	  • Does the employer have an obligation to pay these people while they are isolated at home, awaiting their test results?
	  • Does the employer's refusal to allow teleworking stem from an unreasonable exercise of its managerial rights?

Decision	• Under the law or the collective agreement, the employer has no obligation to remunerate an employee who is unable to provide their work while they are in isolation at home, awaiting the result of a screening test for COVID-19. • An *Act respecting occupational health and safety* requires all employers to take the necessary measures to protect the health of workers and to ensure their safety and physical well-being. The collective agreement, in this case, obliges the employer to comply with the laws and regulations decreed by the Government of Québec in matters of occupational health and safety. In this context, the arbitrator concludes that the employer did not "refuse" the performance of the employees' work. He only applied a public health directive by encouraging compliance with the instructions relating to isolation. • In this case, the employees are entitled to draw on the time banks provided for in the collective agreement in order to maintain remuneration during their confinement. • The arbitrator comes to the conclusion that the employer's decision to refuse that an administrative secretary work from home is unreasonable. He specifies that "COVID-19 creates an exceptional situation to which the parties must adapt. If the complainant does not benefit from a right to telework, the exercise of the employer's right of management nevertheless requires the latter to take into account the particular situation of each employee as well as the context."

9. *Neshatafshari et Hôpital Maisonneuve-Rosemont, 2021 QCTAT 5751*
December 1, 2021
Claim accepted for symptomatic COVID-19 with negative test

Facts

- The employee is a radiodiagnostic technologist with the employer and as part of her job, is in direct contact with beneficiaries suffering from COVID-19. During a particular event, she was exposed in an even more specific way to the COVID-19 virus.
- Due to the appearance of symptoms that could correspond to COVID-19 in the days that followed, the employee took several PCR screening tests, which all turned out to be negative. However, several doctors consulted by the employee indicated that they suspected a COVID-19 infection with "false negative" results.
- The employee presented to the Commission des normes, de l'équité, de la santé et de la sécurité du travail (the **CNESST**) a claim for employment injury in the form of "symptomatic COVID with negative test."
- The CNESST denied the employee's claim on the grounds that no diagnosis had been made and that it could not recognize the existence of an employment injury.
- The employee challenged this decision before the Tribunal administratif du travail (the **Tribunal**).

Decision

- The Court is of the opinion that the absence of a confirmed diagnosis of COVID-19 does not automatically prevent the employee's claim since it can take into consideration all the medical evidence, including the probable diagnoses.
- In this case, the presented medical evidence submitted to the Court demonstrates that a diagnosis of "probable COVID" has been made. Thus, the Court considers it probable that the employee was indeed infected with COVID-19.
- It is recognized that a viral outbreak, as well as a pandemic situation, can be considered as an unforeseen and sudden event.
- In addition, the Tribunal finds it likely that the employee was exposed to the virus while performing her job, which is sufficient to satisfy the criterion of a causal link between the workplace and the diagnosis.
- As a result of the foregoing, the Tribunal upholds the employee's challenge and declares that she suffered an employment injury.

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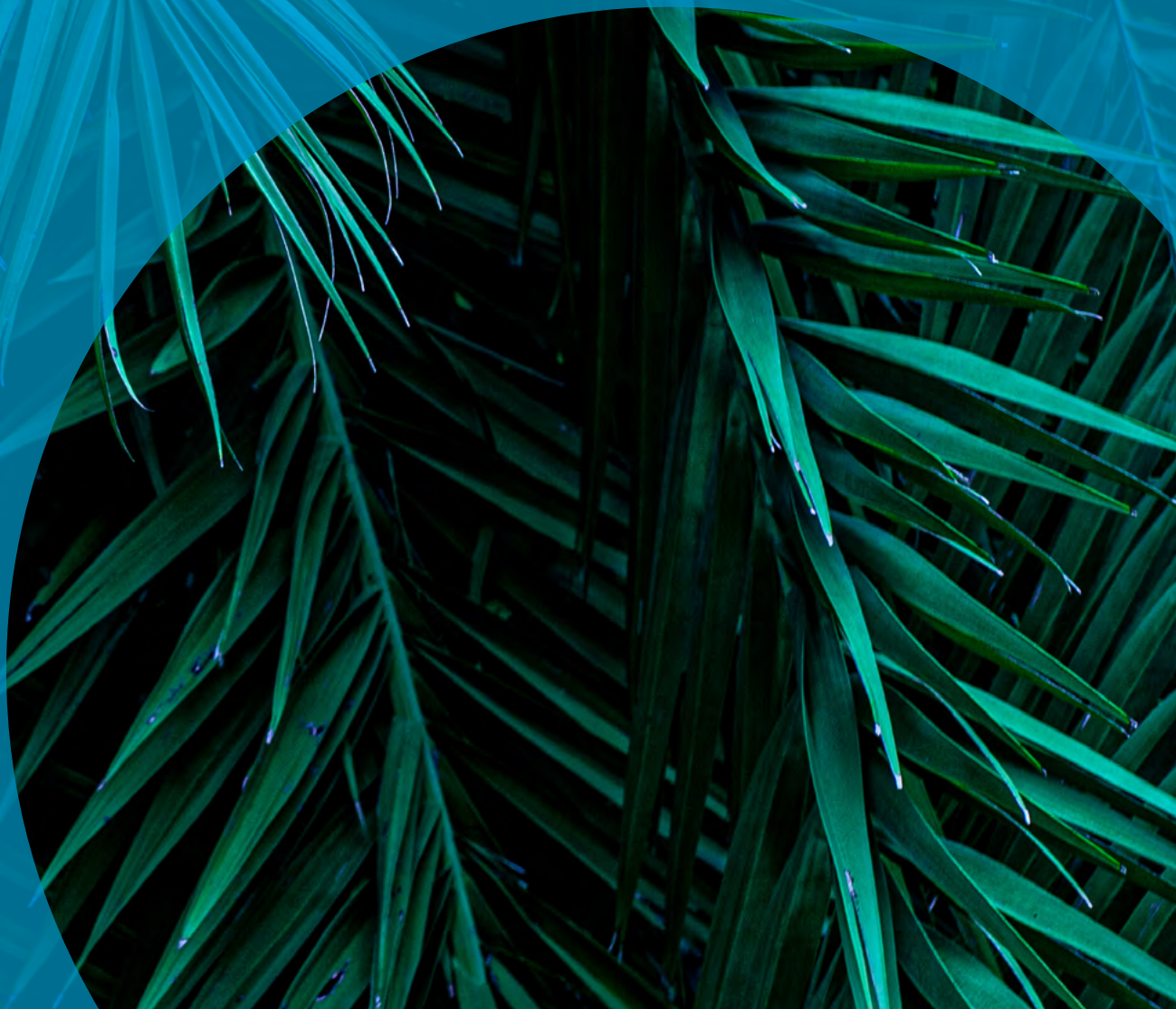

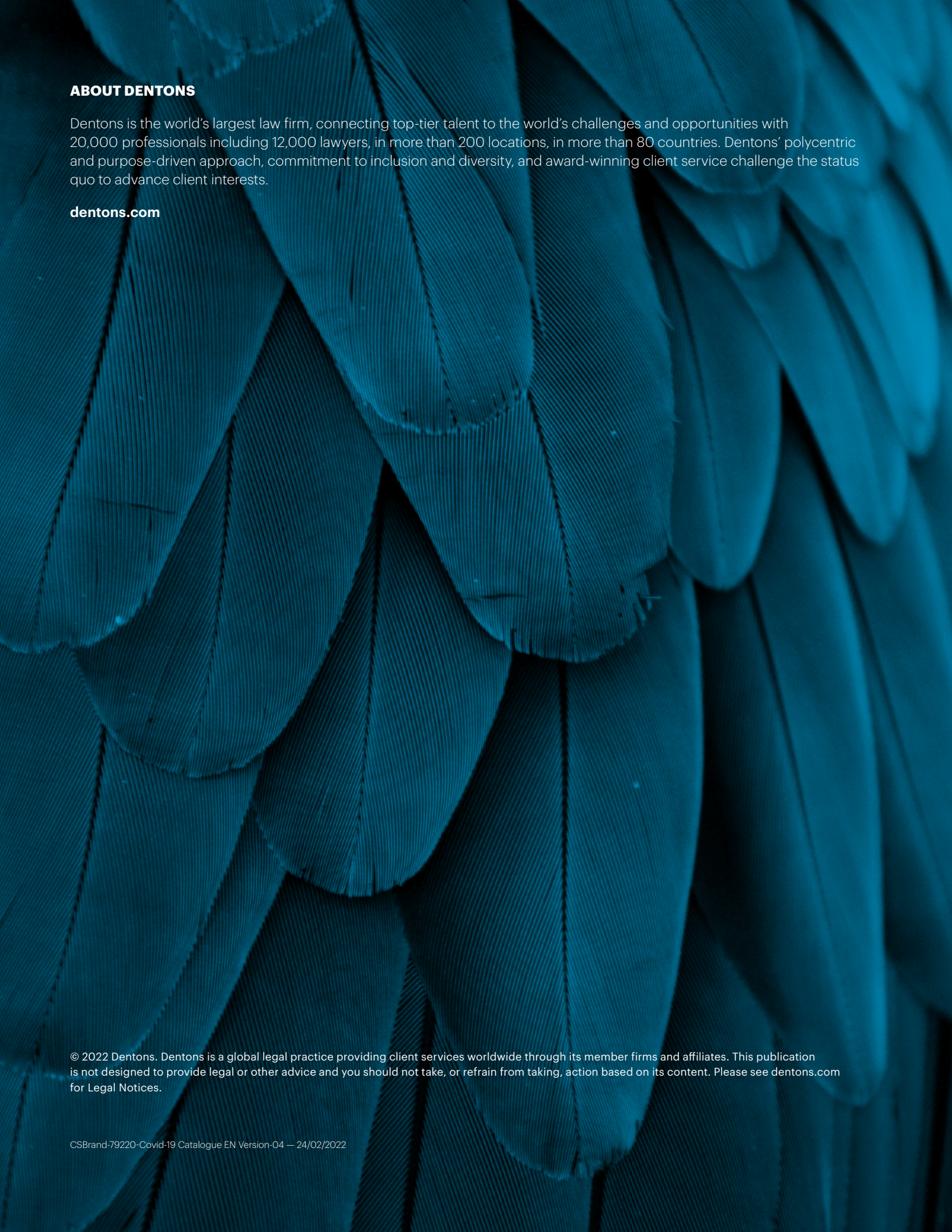

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