DENTONS

Employment and labour law

Review of landmark decisions rendered in 2023 | Québec

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December 2023

In this publication, we provide an overview of landmark decisions rendered in 2023 by the Supreme Court of Canada, the Court of Appeal, the Superior Court of Québec, the Québec Administrative Labour Tribunal, and grievance arbitrators. We also draw your attention to a number of matters to watch out for in 2024.

The decisions we would like to highlight relate to various subjects, including the notion of establishment, constructive dismissal, employers' occupational health and safety obligations, psychological harassment, dismissal for serious misconduct, and the interpretation of ambiguous clauses in a collective agreement.

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

1. *R. v. Greater Sudbury (City)*, 2023 SCC 28

Employers obligations in the absence of workplace inspections

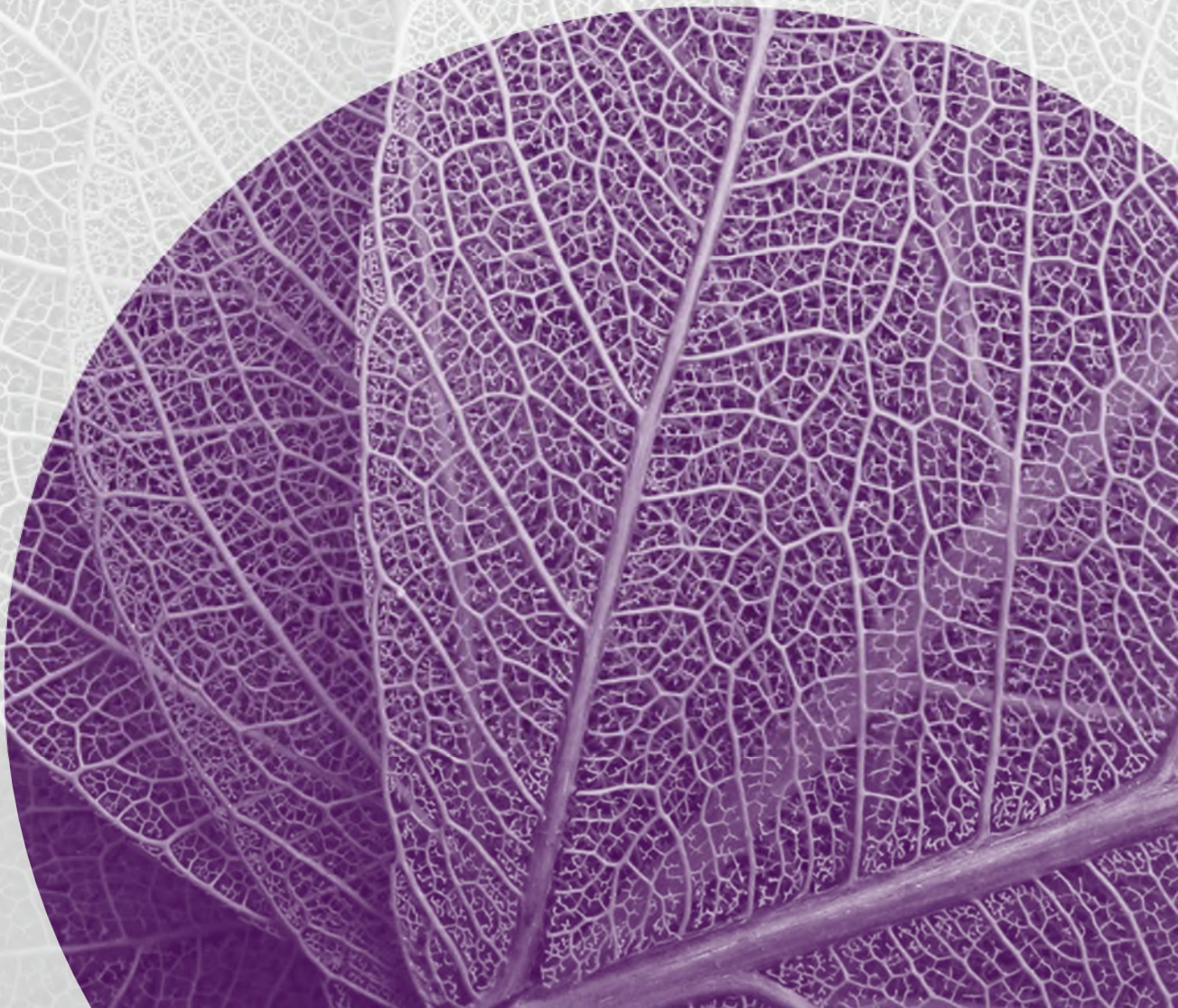
Facts

- In 2015, the City of Sudbury (the "**City**") contracted Interpaving Limited ("**Interpaving**") to undertake downtown water main repairs. The City's agreement involved delegating the execution of the reparation project to Interpaving, with only a small team of its inspectors overseeing quality control.
- During the project, an Interpaving employee operating a grader tragically struck and killed a pedestrian.
- Charges were brought against the City under Ontario's *Occupational Health and Safety Act* (the "**Act**") for purportedly failing to meet specific safety requirements outlined in *Ontario Regulation 213/91 – Construction Sites* (the "**Regulation**").
- The trial judge acquitted the City, determining that it did not fit the definitions of "constructor" or "employer" as outlined in the Act, due to its limited control over the workplace management. The judge concluded that the City had not contravened section 25(1)(c) of the Act, which demands that an employer "shall ensure that . . . the measures and procedures prescribed are carried out in the workplace." This decision was upheld by the Ontario Superior Court of Justice (the "**Superior Court**").
- However, the Ontario Court of Appeal disagreed, asserting that control was not a crucial factor in determining employer status and related health and safety obligations. As a result, it set aside the Superior Court's decision, sending the case back to determine the viability of the due diligence defence.

Decision

- The Supreme Court of Canada (the "**SCC**") was divided on the pivotal aspect of the judgment: four justices favoured allowing the appeal, while four took the view that it should be dismissed. Consequently, the appeal was dismissed.
- Justice Martin (Chief Justice Wagner and Justices Kasirer and Jamal concurring) upheld the decision of the Ontario Court of Appeal, affirming the City's classification as an employer and its breach of obligations under the Act. Additionally, she confirmed that the due diligence aspect should be revisited by the Superior Court.
- In her reasoning, Justice Martin emphasized that the purpose of the Act is to ensure the safety of workers in the workplace. She highlighted that the legislature has allocated health and safety responsibilities among the various stakeholders present in the workplace. According to her interpretation, the relevant provisions don't hinge on demonstrating an employer's control over workers or the workplace. Introducing such a requirement would limit the employer's duties, conflicting with the Act's purpose. Control becomes relevant when evaluating a due diligence defence.

- On the contrary, dissenting Justices Rowe and O’Bonsawin, Justice Karakatsamis concurring, were of the opinion to allow the appeal for further consideration. They stated that the City indeed acted as the employer of the quality control inspectors, thereby bearing the responsibilities stipulated by the Act. Their perspective posited that if certain requirements lack specific targets, they apply to the employer concerning the work controlled and conducted through its workforce.
- Lastly, dissenting Justice Côté was of the opinion to allow the appeal and reinstating the original acquittal verdict. In her view, Interpaving bore the responsibility for compliance with the Regulation’s requirements.



2. *Lareau v. Centre du Camion Gamache Inc.*, 2023 QCCA 667

Modification of working conditions upon return from sick leave, psychological harassment, constructive dismissal

Facts

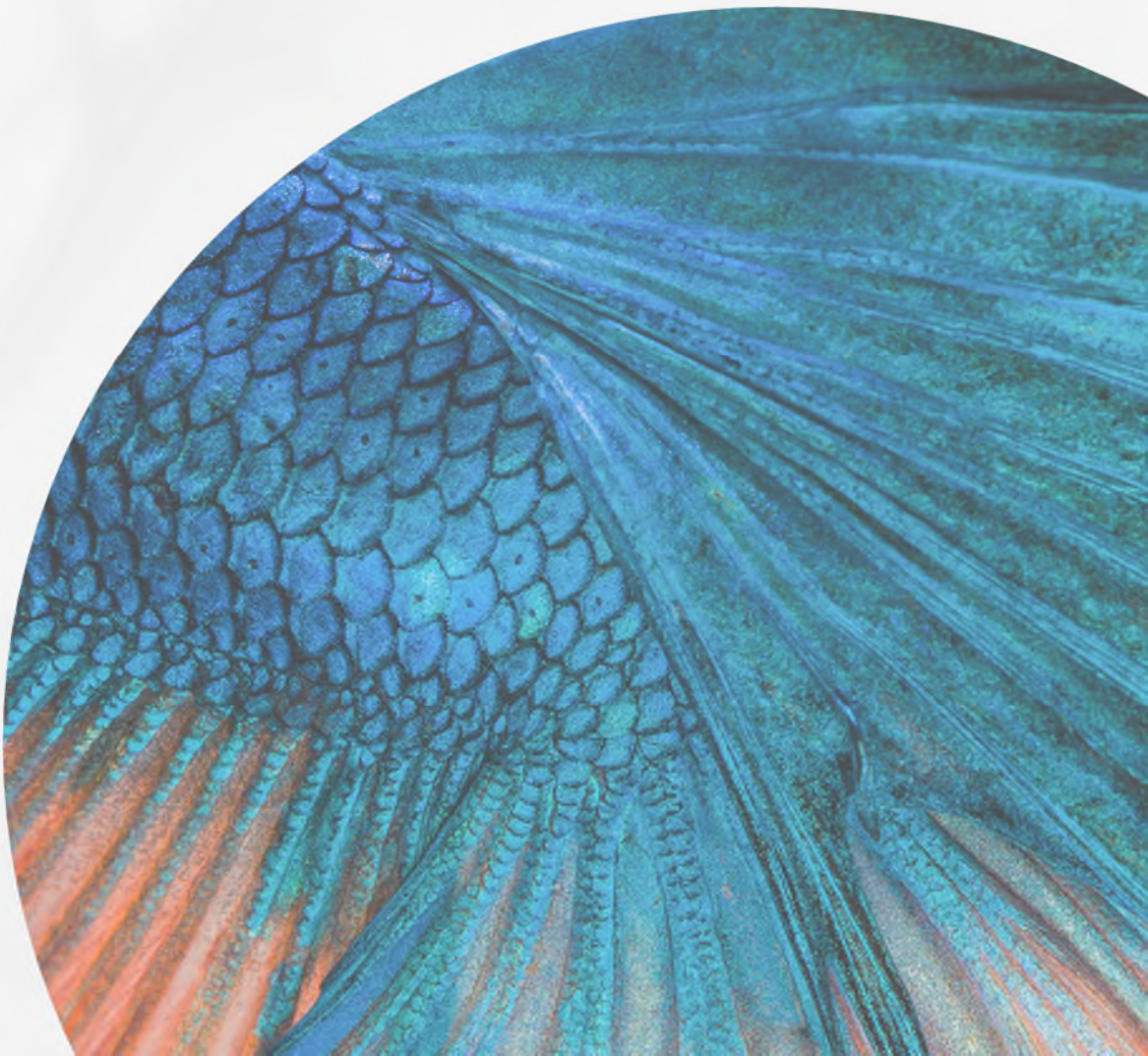
- Mr. Lareau (the "**Employee**") was working at Centre du camion Gamache Inc. (the "**Employer**") starting in 1991. Notably, he served as the Sales Manager from 1998 onward.
- In March 2013, after enduring months of illness believed to be burnout, the Employee went on sick leave, and the Employer eliminated his position. Later, in December 2013, he discovered his health issues were due to a cerebral aneurysm and commenced treatment.
- By July 2014, following his neurologist's advice, the Employee requested a gradual return. However, the Employer responded coldly, citing concerns among sales staff about his prior behaviour.
- In October 2014, after agreeing to the Employer's stipulated return conditions, the Employee resumed work in a sales representative role.
- In January 2015, the Employer notified the Employee of a 50% base salary reduction, commission cuts, and cancellation of his retention plan, justifying the changes by the fact that he no longer held a managerial position. A dispute arose but was partially resolved in March 2015, the parties agreeing to maintain the previous conditions, excluding the retention plan. They formalized their agreement in a written contract.
- Throughout and following this period, the Employee felt ignored and harassed, particularly by one of the owners. He also perceived newly implemented policies as retaliatory measures.
- In June 2015, the Employer issued the Employee's the first disciplinary warning of his career, hinting at the necessity of reaching a termination agreement.
- July 2015 saw the Employee sending a formal notice to the Employer, alleging harassment and non-adherence to the revised employment terms. The Employer initiated an investigation, concluding a "personality conflict" between the Employee and one of the owners.
- In September 2015, the Employee lost his reserved parking space due to a new policy and witnessed the adoption of a new code of conduct.
- By October 2015, the Employee's former assistant (when he was the director of sales) became his immediate superior, prompting complaints.
- Upon returning from vacation, the Employee found his office occupied by the new superior and noticed he did not receive both his salary and vacation pay during his vacation, a deviation from past practices.
- On October 30, 2015, the Employee submitted a second formal notice, resigning on the same day after 24 years of service, alleging constructive dismissal. Subsequently, he filed a damages claim.
- The Superior Court dismissed the claim, asserting that the Employer's decisions did not substantially alter the Employee's working conditions to force his resignation. Additionally, it found no evidence of psychological harassment, negating the claim of constructive dismissal.

Decision

- The Court of Appeal identified three reviewable errors made by the Superior Court judge in the judgment: 1) The judge imposed a heavier burden on the Employee by requiring a demonstration that the Employer's actions aimed specifically at forcing resignation, surpassing the standard set by the Supreme Court in similar cases; 2) the Superior Court

failed to acknowledge significant breaches of the employment contract concerning remuneration and duties by the Employer, which amounted to constructive dismissal; 3) it erroneously equated the absence of psychological harassment with the absence of constructive dismissal, although the two are not necessarily interconnected.

- The Court of Appeal upheld the Employee's appeal and originating claim. As a result, the Employee was awarded compensation equivalent to an 18-month notice period and nearly $500,000 in additional damages based on specific clauses within his employment contract. However, the claim for damages related to psychological harassment was rejected, as the evidence presented did not substantiate a finding of harassment.



3. *Tecsys inc. v. Patrao*, 2023 QCCA 879

Notice period, employer's bad faith (lack of transparency regarding reason for dismissal)

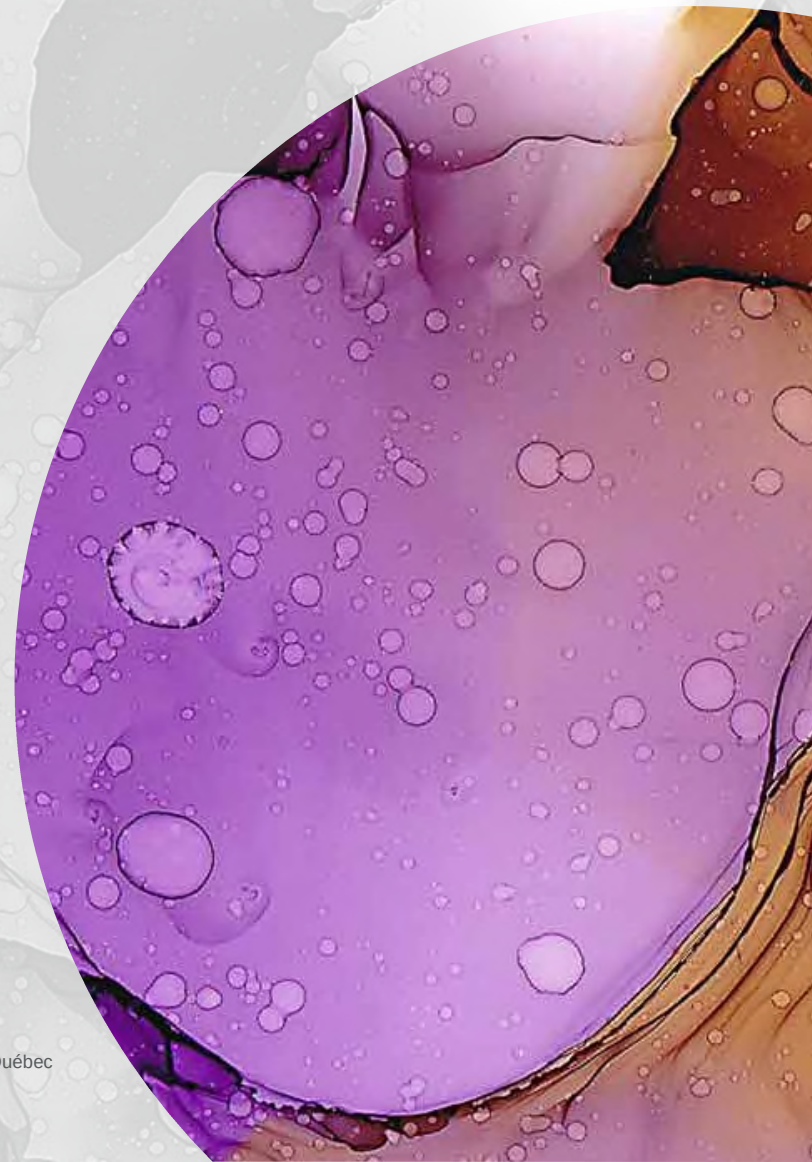
Facts	• Mr. Patrao (the "**Employee**") served as the Senior Vice President of Global Operations at Tecsys Inc. (the "**Employer**") for three and a half years. • His termination in March 2017 occurred via a brief telephone conversation where the Employer cited a "cultural fit" issue. At 49 years old, he had an annual salary of approximately $600,000. • The severance offered by the Employer amounted to around 3.66 months' salary. • Following his termination, the Employer declined to provide a letter of recommendation unless he agreed to sign a final release in exchange for the severance payment. • Despite extensive job search efforts, it took the Employee roughly 20 months to secure a new position, earning 50% less than his previous salary with the Employer. • During his tenure, the Employee significantly contributed to boosting the company's sales, leading to record-breaking levels in 2016-2017. • Months after the dismissal and just before the hearing, the Employer acknowledged terminating the Employee's employment contract without cause. • The Superior Court partially granted the Employee's originating application ordering the Employer to pay him a termination notice equivalent to 13 months' remuneration, the outstanding annual bonus, $20,000 for moral damages, and $20,000 for abuse of process. • Subsequently, the Employer challenged this Superior Court ruling by appealing to the Court of Appeal of Québec.
Decision	• The Court of Appeal disagreed with the trial judge's decision to grant damages to the Employee for abuse of the process. It found that the Employer's shift in characterizing the dismissal, though significant, didn't exhibit conduct sufficiently blameworthy or reckless to warrant an abuse of process declaration. • The determination of the notice period considered several factors: the Employee's age, tenure, compensation, role, and the prevailing job market conditions in the Montréal region for a similar position with the Employer. • The Employer's lack of transparency regarding the reason for dismissal was deemed relevant by the Court of Appeal to determine the length of the reasonable notice to which the employee was entitled as it directly correlated with the challenges the Employee faced in securing post-dismissal employment. • However, the Court of Appeal clarified that the Employer's denial of a recommendation letter should not extend the notice period. The indemnity for the notice period serves a compensatory purpose exclusively. • Any harm resulting from this denial ought to be separately compensated through an award of moral damages. • The Court of Appeal determined that the Employer's dismissal approach was abrupt and displayed bad faith, justifying the moral damages granted by the initial court ruling.

4. *Municipalité du Canton de Potton v. Roger*, 2023 QCCS 341

Injunction, breach of loyalty and confidentiality obligations and breach of contractual obligations arising from a termination agreement

Facts	• Mr. Roger (the "**Employee**") held the position of General Manager and Secretary-Treasurer (DST) at the Municipalité du Canton de Potton (the "**Employer**") from April 2010 to November 2018. • The parties executed a settlement in which they agreed to terminate the Employee's employment. The agreement involved severance pay equivalent to 16 months' salary • The agreement also incorporates a mutual release clause, along with confidentiality and non-disclosure obligations. • On October 27, 2019, the Employee circulated a document via email to approximately a hundred individuals, addressing and criticizing six contentious matters related to the Employer. • The Employer seeks a permanent injunction from the Court to prevent the Employee from engaging in disloyal behaviour towards the municipality, using privileged information obtained during employment, or tarnishing the reputation of the Employer or its elected representatives. • Additionally, the Employer is pursuing punitive and moral damages against the Employee. • In a counterclaim, the Employee contends, among other grievances, that the Employer's allegations in their claim are defamatory towards him.
Decision	• The Superior Court found the Employee in breach of article 2088 of the *Civil Code of Québec*, emphasizing that an employee's obligations of loyalty and confidentiality persist for a reasonable period after the termination of his employment, even when terminated without serious cause. • In this case, given the important position held by the Employee and the severance pay he received, the Employer was entitled to expect him to faithfully observe his legal duty of loyalty during the 16 months of his notice of termination. • The Court ruled that the Employee violated both the confidentiality and loyalty clauses within his employment agreement. • By making unauthorized use of a list of citizens' email addresses that he had compiled during his time with the Employer, the Superior Court found that the Employee had breached a clause in the transaction binding the parties, under which they had mutually undertaken "not to make any gesture or utter any comment or disclose any information that could be detrimental to the other party or its image." • Furthermore, by retaining and using the email list for personal purposes, the Employee failed to meet his contractual obligation to return all Employer-owned equipment, tools, or materials upon termination. • The judge concluded that the Employee's actions, including denouncing multiple employee departures post-2017 municipal elections, constituted multiple breaches of confidentiality and loyalty obligations. • The Employee was ordered to pay $25,000 in moral damages to the Employer.

- The Employee was also ordered to pay $5,000 in punitive damages for having unlawfully and intentionally damaged the Employer's reputation, thereby contravening sections 4 and 49 of the *Charter of Human Rights and Freedoms*.
- Additionally, the Superior Court issued an injunction to prevent future occurrences from the Employee.
- The Employee's counterclaim was dismissed by the Superior Court due to failure in demonstrating that the Employer had damaged his reputation through discrediting rumours or engaged in abusive actions against him.



5. *Irving Consumer Products Inc. v. Perreault*, 2023 QCCS 1106

Provisional interlocutory injunction to prohibit an employee from engaging in his new employment – non-competition clause

Fact	• For six years. Mr. Perrault (the "**Employee**"), was a key employee of the Irving group. Notably, he managed the primary facility, located in Georgia, of Irving Consumer Products Inc. (the "**Employer**"). • Upon transitioning roles, he executed a new employment agreement, including a non-competition clause preventing him the Employee from engaging, in North America, with companies competing directly with the Employer for two years post-employment. This agreement was not including any choice-of-law provision. • January 2023 marked the Employee's decision to depart from his position, citing personal and professional motivations, notably the desire to relocate to Montréal where his ex-wife and children now resided. Shortly after, confirmation arrived that the Employee intended to assume the role of Vice-President at a competing firm in Montréal. • Seeking recourse, the Employer sought a provisional interlocutory injunction from the Court, aiming to bar the Employee from become employed with any competitor, in North America • Both parties reached an agreement stipulating that the Employee would refrain from commencing work at the new company until the Court delivered a ruling on the provisional injunction application.
Decision	• Injunctions serve to maintain the *status quo* and safeguard parties rights pending trial. In an urgent case, the court may grant a provisional injunction, for a maximum of 10 days, renewable. • A party seeking an injunction must establish three key elements: (i) a serious question to be tried, (ii) irreparable harm will result if the relief is not granted, and (iii) the balance of convenience shall favour the party seeking the injunction over the responding party, emphasizing its greater potential harm if the injunction is not granted compared to the defendant's potential harm if it is. For provisional injunctions, urgency without negligence on the petitioner's part is additionally required. In the case of a provisional injunction, the plaintiff must also demonstrate that the Court's intervention is urgent and that this urgency is not due to a lack of diligence on its part. In this file, the judge finds that it is clear that the criterion of urgency is met as prompt clarification is crucial regarding the Employee's entitlement to start the new job. • The "serious question" test primarily aims to establish that the issues submitted to the court are not frivolous or vexatious, carrying a relatively light burden. However, two exceptions exist: urgent rights demanding immediate action and provisional applications causing such severe prejudice that a trial would yield no further benefit. In these scenarios, the plaintiff must establish a strong likelihood of success at trial. • In this instance, the judge considers that exceptions to the serious question rule could potentially apply, notably due to the employee's family situation. While the issues submitted to the court were not frivolous, the Employer fails the more stringent "strong appearance of right" test. This is primarily due to distinct case facts compared to presented precedents and conflicting jurisconsult opinions within the case file.

- Moreover, the Employer has not fulfilled its obligation to prove suffering irreparable harm if the preliminary injunction is not granted. Their claims pivot on the possibility of the Employee sharing confidential information with a new employer. However, in cases where the injury has not occurred, the Court requires a high probability of its occurrence to fulfill this criterion, exercising caution before concluding.

- Granting the injunction would deprive the Employee of opportunities in his field, where he has amassed considerable expertise throughout his career. Given the speculative nature of the harm argued by the Employer, this tips the scale of inconvenience in favour of the Employee.
- The Employee's transparency during resignation, specifically requesting relief from the non-competition obligation, assists the Court in exercising its discretion more easily.

6. *Groupe CRH Canada Inc. v. Tribunal administratif du travail*, 2023 QCCS 1259

Replacement workers, notion of establishment, teleworking

Fact	• Groupe CRH (the "**Employer**"), operating a cement plant in Joliette, faced a lockout in the summer of 2021. • During this period, the union filed an application for an order with the Administrative Labour Tribunal (the "**ALT**"), alleging that Groupe CRH was unlawfully using non-unionized employees who were teleworking to perform the work of the locked-out employees. • The union argued that this violated section 109.1 g) of the *Labour Code* that prohibits an employer from "utilizing," in an establishment where a strike or lockout has been declared, the services of an employee he employs in the establishment to discharge the duties of an employee who is a member of the bargaining unit on strike or locked out. • On November 25, 2021, the ALT ruled in favour of the union, ordering the Employer to cease utilizing the services of the non-unionized remote worker for tasks previously performed by the locked-out employees. • Subsequently, the Employer sought a judicial review of this decision.
Decision	• The Superior Court, on April 21, 2023, overturned the ALT's ruling, lifting the order that restrained the non-unionized employee from remotely fulfilling the duties of the locked-out workers. • The Superior Court criticized the ALT's interpretation, indicating that the ALT's expansion of the term "establishment" to encompass the residence of a telecommuting employee, not part of the bargaining unit, was irrational and illogical. • Furthermore, the Superior Court judge contended that the ALT's widened interpretation of the term "establishment" under article 109.1 of the *Labour Code* contradicted its application in certification matters, leading to an inconsistency in this regard.

TO WATCH IN 2024

This decision has been appealed by the union representing the Employer's employees, and the Court of Appeal's decision will clarify the state of the law with regard to replacement worker provisions in a telework context.

Comments on Bill C-58, *An Act to amend the Canada Labour Code and the Canada Industrial Relations Board Regulations, 2012*

Introduced by the federal Minister of Labour and Seniors, the Honourable Seamus O'Regan, on November 9, 2023, aims to address various concerns related to the practices of federally regulated employers, particularly regarding the use of replacement workers. The proposed amendments to the *Canada Labour Code* (CLC) are significant and include:

- Removing the necessity to demonstrate intent to interfere with the union's representational capacity (as outlined in section 94 (2.1) of the CLC) when prohibiting the use of replacement workers.
- Expanding the list of individuals whose services cannot be utilized during legal strikes or lockouts, encompassing employees hired after the notice to bargain collectively was issued, individuals in managerial or confidential roles with access to labour-related sensitive information hired post-notice, contractors excluding dependent contractors, or employees of other employers, with certain exceptions defined[1].
- Prohibiting an employer from employing an individual in a bargaining unit affected by a legal strike or lockout involving a complete work stoppage, unless situations pose risks to health and safety, the environment, or the employer's property, with specified exceptions.
- Introducing criminal offences and fines up to $100,000 per day for non-compliance with the aforementioned prohibitions.
- Granting the Governor in Council authority to establish regulations for imposing administrative monetary penalties to encourage compliance.
- Alterations to the strike and lockout maintenance processes aimed at fostering early agreements between employers and unions on the activities to be upheld during legal strikes or lockouts.
- Encouraging prompt decisions by the Canada Industrial Relations Board (the "Board") in cases of disputes.
- Reducing the need for referral to the Board by the Minister of Labour[2].

An interesting distinction is that, at present, Bill C-58 doesn't restrict the limitations on the use of replacement workers to the concept of "establishment," unlike the provisions in the C.T.[3].

Bill C-58 is currently undergoing its second reading in the House of Commons. Additionally, the new provisions will not be enforced until 18 months post-Royal Assent.

1. Bill C-58, s. 9(2)
2. The Minister will only be able to make such a reference to the Board when determining whether an agreement reached by the parties meets the requirements of the maintenance of activity legislation (Bill C-58, s. 6(5)).
3. See our summary of *Groupe CRH Canada inc.* v. *Tribunal administratif du travail*, 2023 QCCS 1259 above.

7. *Demers v. Tribunal administratif du travail*, 2023 QCCS 2548

Federally-regulated employer – Complaint under section 32 of the AIAOD - Constitutional jurisdiction

Fact	• In April 2019, Mr. Demers (the "**Worker**"), an Air Canada employee (the "**Employer**"), experienced a work-related injury. A disagreement over his entitlement to income replacement benefits prompted him to file a complaint under section 32 of the *Act respecting industrial accidents and occupational diseases* (the "**AIAOD**"). • The CNESST mediator decision-maker deemed the complaint inadmissible, citing the constitutional inapplicability of section 32 to Air Canada, a federally regulated company. Mr. Demers contested this decision before the Administrative Labour Tribunal (the "**ALT**"). • On November 8, 2019, the ALT, ruling on a preliminary issue, upheld the inadmissibility of the complaint based on the same grounds as the CNESST. This decision was reaffirmed on December 23, 2020, by an ALT's internal review panel. • Mr. Demers is pursuing a judicial review against these ALT decisions. • Subsequent to filing the judicial review, Air Canada issued a notice of *bene esse* to the Attorney General of Québec (the "**AGQ**") as per article 76 of the Code of Civil Procedure. • Both the AGQ and Mr. Demers petitioned the Tribunal to permit the judicial review appeal, citing the failure to provide notice during the ALT proceedings. • Alternatively, Mr. Demers argued that the decisions incorrectly applied precedents set by the Supreme Court of Canada in *Bell Canada*[4] and the Québec Court of Appeal in *Purolator Courrier Ltée v. Hamelin*[5]. He contended that the disagreement centred on employment injury compensation, not labour relations. • Air Canada countered, asserting that the absence of notice was not fatal and that the decisions aligned with the teachings of the Supreme Court of Canada and the Québec Court of Appeal. • The core contention revolves around whether the ALT erred in deeming section 32 constitutionally inapplicable without notifying the Attorney General of Québec.
Decision	• In matters questioning procedural fairness, the Tribunal applies the standard of correctness, enabling it to substitute its decision for that of the ALT if it disagrees with the findings of the administrative judges. • Initially, the Tribunal acknowledges that the absence of notice can nullify a decision unless expressly waived by the AGQ. • In this specific case, the lack of notice significantly prejudices the AGQ, depriving it of the chance to present arguments on the constitutional issue. Additionally, the evidence presented to the ALT was inadequate for a thorough decision on the constitutional matter. This absence of opportunity to present evidence hindered the AGQ from fulfilling its role as the guardian of public interest. • The Tribunal maintains that notifying the AGQ was essential, and the ALT made a legal error by not addressing its absence on its own initiative.

4. *Bell Canada* v. *Québec (Commission de la santé et de la sécurité du travail)*, [1988]
5. [2002] R.J.Q. 310

- Despite the Québec Superior Court's discretionary power in ruling on constitutional questions, the Tribunal determines that, since the file was incomplete, it's not in the interests of justice to make a merits-based decision.
- Consequently, the Tribunal granted the judicial review and remanded the case back to the ALT for a ruling on the Worker's lodged a complaint.

TO WATCH IN 2024

The case is scheduled for a hearing on February 8, 2024, at which time the Administrative Labour Tribunal will hear the parties on the merits of the case, including the admissibility of Mr. Demers' complaint.

8. *Marchetta v. Tribunal administratif du travail*, 2023 QCCS 3254

Notion of establishment in a telecommuting context and absence of activities in Québec – application of the LSA

Fact

- In 2014, Ms. Marchetta (the "**Employee**") was hired by Petros (the "**Employer**"), an American company, as an accountant. She primarily worked from her home in Québec but occasionally travelled to the US for client meetings.
- Petros terminated the Employee's employment in January 2019. Throughout her tenure, the Employee exclusively served American customers.
- Following her dismissal, in February 2019, the Employee filed a dismissal without a just and sufficient cause of complaint against the Employer, pursuant to section 124 of the *Act respecting labour standards* (the "**LSA**").
- The central issue of that case revolved around whether an employee, working in Québec solely for the benefit of clients outside Québec (specifically in the United States) for an American employer, falls under the protections of the LSA. In this case, the Employee's only link to Québec was her residence.
- Initially, the Administrative Labour Tribunal (the "**ALT-1**") ruled in favour of the Employee, interpreting the Employee's domicile as an extension of the employer's office, thereby applying the LSA.
- However, upon review, the Administrative Labour Tribunal (the "**ALT-2**") overturned ALT-1's decision. ALT-2 ruled that extending LSA coverage based solely on an employee's residence in Québec would subject any foreign employer to LSA jurisdiction, lacking any substantial activity in Québec. ALT-2 reversed ALT-1's decision due to jurisdictional concerns.
- The Employee appealed ALT-2's decision to the Superior Court, contending that ALT-2 had overstepped its review mandate, misinterpreted LSA's section 2, and omitted relevant facts regarding the complaint's merits. The Employee posited that LSA should apply to Québec residents and establishments within the region.
- Petros countered, asserting that ALT-2 had appropriately rectified ALT-1's fundamental error and stayed within the bounds of its review authority.
- The Superior Court is tasked with evaluating the reasonableness of ALT-2's decision and ensuring compliance with the administrative labour tribunal's review powers outlined in the Act.

Decision

- The Superior Court affirmed the reasonableness of ALT-2's decision to review ALT-1's ruling.
- It emphasized that, according to legislative requirements, the LSA only applies to Québec employees when the employer maintains a connection with Québec through an establishment or legal presence.
- ALT-2's decision was deemed reasonable as it clarified the significant error made by ALT-1, highlighting the need to separately assess where the Employee works and the Employer's activities in Québec to establish a business office.
- Establishing an employer's business office in Québec necessitates concrete proof, such as using the employee's residence for business activities visible to the public, like official documentation or advertising.

- ALT-1 lacked substantial evidence linking the Employer's business activities to the Employee's Québec residence, thus failing to establish any office or business presence for the Employer in Québec.
- Simply having the Employee work from her Québec home with basic tools like a computer and telephone was insufficient to establish the Employer's business office in Québec.
- Consequently, the Court dismissed the appeal for judicial review based on these grounds.

TO WATCH IN 2024

On September 29, 2023, the Court of Appeal granted the Employee's leave of appeal case will certainly be heard on the merits in the course of 2024.

9. *Compagnie des chemins de fer nationaux du Canada et Pagé*, 2023 QCTAT 2330

Occupational deafness – Time between diagnosis and exposure

Fact	• Mr. Pagé (the "**Employee**") worked as a machinist and diesel mechanic in the railway industry from 1969 to 2003. • In 2020, 17 years following his retirement, he filed a claim for occupational deafness with the Commission des normes, de l'équité, de la santé et de la sécurité du travail (the "**CNESST**"), which was accepted. • The Employer, Canadian National Railway Company, contested the admissibility of this claim before the Administrative Labour Tribunal (the "**ALT**"). • The ALT had to determine whether the Employee's deafness originated from occupational factors, warranting compensation under the *Act respecting industrial accidents and occupational diseases* (the "**AIAOD**").
Decision	• Despite the deafness diagnosis in December 2020, the ALT concluded that the Worker had not sufficiently proven its occupational origin. • The ALT highlighted that the lack of concomitance between the alleged noise exposure and the deafness diagnosis precludes the application of the presumption stated in article 29 of the AIAOD. Therefore, the Worker shall demonstrate that his deafness is characteristic of his work or directly related to the risks peculiar to that work to qualify as an occupational disease. • Although noise exposure in the wheel shop was acknowledged, the ALT found the evidence insufficient to link the deafness directly to the job's risks. • The absence of precise noise level measurements at the workstation and the considerable gap between the moment the worker ceased to be exposed to the noise and the deafness diagnosis led the ALT to conclude that the Worker's deafness wasn't of occupational origin. • Consequently, the Court upheld the Employer's contestation, overturned the CNESST's decision, and ruled that the Worker did not suffer from occupational deafness.

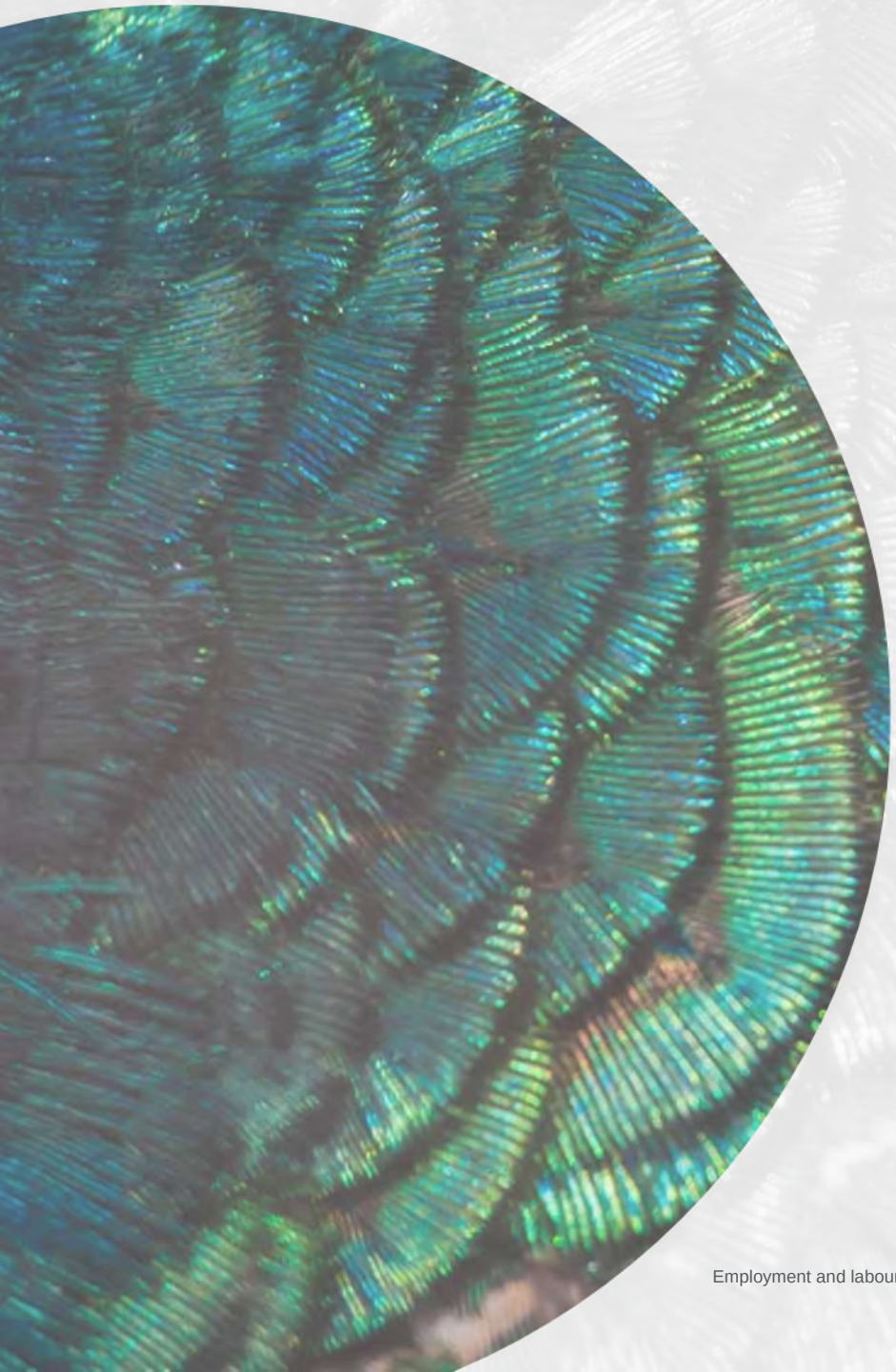
10. *Paccar Canada (Usine de Ste-Thérèse) et Leblanc*, 2023 QCTAT 3989

Power of the CNESST under the 3rd paragraph of article 224.1 of the AIAOD – Medical assessment procedure

Fact	• On December 11, 2019, Ms. Leblanc (the "**Employee**") fell in the workplace, and the Commission des normes, de l'équité, de la santé et de la sécurité du travail ("**CNESST**") recognized her resulting contusion to the right elbow and wrist, cervical sprain, and mild traumatic brain injury as employment-related injuries. • In July 2020, the Employee's doctor diagnosed major depression, linked by the CNESST to the December 11, 2019, injury. Medical disagreements emerged between the Employee's health professional and the one appointed by Paccar Canada (the "**Employer**"), leading to a medical assessment procedure under the *Act respecting industrial accidents and occupational diseases* (the "**AIAOD**"). • The CNESST sought an opinion from the Bureau d'évaluation médicale (medical assessment office) (the "**BEM**"), which, due to a shortage of psychiatry specialists, couldn't promptly forward the file for examination. • As the BEM failed to provide an opinion within the 30-day timeframe as per section 222 of the AIAOD, the Employer requested the CNESST to apply the 3rd paragraph of section 224.1 of the AIAOD, appointing a health professional to assess the contentious medical points. • The CNESST rejected the Employer's request, arguing that the 30-day period in section 222 of the AIAOD commences when the BEM designates a member, which had not occurred in this instance. Additionally, the power under paragraph 3 of section 224.1 of the AIAOD was deemed discretionary. This decision underwent administrative review and is now contested before the Administrative Labour Tribunal (the "**ALT**"), leading to the ongoing dispute.
Decision	• The ALT acknowledges that the crux of the issue lies in the BEM's inability to promptly assign a qualified health professional, leading to substantial delays in case processing. These delays significantly impact involved parties, notably the Employee and the Employer. • Emphasizing the urgency for solutions to mitigate these delays and ensure an expedited and equitable medical assessment process. • The ALT disagreed with the CNESST's assertion that the time limit in section 222 of the AIAOD had not commenced due to the absence of a designated member. It notes that the CNESST's position on this issue is dichotomous, having argued the contrary in *St-Hilaire and Mondelez Canada inc.*[6] concerning medical cannabis treatments prescribed by the health professional in charge of the work. • Addressing the CNESST's second argument, the ALT acknowledged the discretionary nature indicated by the term "may" in paragraph 3 of section 224.1 of the AIAOD. However, it stressed that such discretion should not be exercised arbitrarily, unjustly, or unreasonably. The Tribunal observed differing applications of this power between psychological injury and medical cannabis cases.

6. 2023 QCTAT 2529

- Considering the AIAOD's objective, the significance of the medical assessment process, the current impediment in BEM's timely appointments, and the law's silence on remedies for such issues, the ALT asserts that the legislature didn't intend for a literal application to hinder the medical assessment procedure's outcome.
- Finally, the ALT determines that applying the 3rd paragraph of article 224.1 aligns with the AIAOD's spirit. It upheld the Employer's challenge, mandating the CNESST to designate a health professional within 45 days.



11. *Connolly v. Unifirst Canada ltée*, 2023 QCTAT 4096

Psychological harassment, work conflict, subjective perceptions

Fact

- Mr. Connolly (the "**Employee**") alleges psychological harassment by three Employer representatives while working for Unifirst Canada Ltd (the "**Employer**"). He accuses them of behaviours aimed at exhausting him and prompting his resignation, including
  - allowing him to share strategic information with a departing General Manager who would join a competitor shortly.
  - Selecting a replacement candidate ("**FF**") to act as a conduit for the Regional Vice-President ("**MS**") to harm him.
  - FF meeting with an employee reporting to the Employee without his presence or being invited to join.
  - Refusal by FF and MS to provide a copy of the details of a psychological harassment complaint filed against him (no investigation took place due to the complainant being in sick leave when filing the complaint and then resigning).
  - Requesting the Employee to take days off after a tense interaction with another employee.
  - Investigating an anonymous psychological harassment complaint while the Employee was on "forced leave."
  - Imposing a three-day suspension and mandatory coaching as conditions for continued employment.
  - Accusing him of instigating a petition against FF.
  - Breaching confidentiality by allowing access to coaching invoices to FF's successor.
  - During a discussion, MS would have dismissed the Employee's opinion with "I don't care what you think."
  - During a meeting at which the Employer discussed the fact that the Employee needed to work more closely with the Regional Sales Director, and that he had, according to all those present, strongly opposed this, a Senior Vice-President ("**DD**") lost his temper with him by using profanities in a loud voice, before promptly leaving the meeting. This last event is qualified by the Employee as serious conduct constituting, in itself, psychological harassment.
- After the incident with DD, the Employee went on sick leave and did not return to work. Notably, despite the Executive Vice President's attempts to apologize, the Employee chose not to respond to their call.
- The Employee accepted compensation from the group insurer after their physician advised against returning to the Employer.

Decision

- The dispute primarily arises from a power struggle between the Employee and select Employer representatives. The Employee's combative nature, difficulty in following instructions, and reliance on past success as resistance to changes further fuelled this conflict.

- Many instances described by the Employee as harassment are rather reasonable management practices. Some cases are speculative, confused, or clumsily interpreted.
- The catalogue incident is a dispute and not psychological harassment, as the Employee actively participated in the conflict.
- The last incident, involving DD’s offensive words, does not constitute psychological harassment but rather an unwelcome angry response. The Employee's disrespectful and insubordinate attitude on that day was clearly that of a actively involved in a power struggle, fuelled by the Employee himself.
- Given the Employee’s sick leave after the latest incident and the involvement of the group insurer, the Employer was right not to seek the Employee’s version, especially since it learned of the harassment allegations only after the complaint was filed with the regulatory commission.
- Despite exemplary performance, an employee cannot shield themselves from their employer’s legitimate new directions.
- The Tribunal dismisses the Complaint.

Québec introduces Bill 42, *An Act to prevent and combat psychological harassment and sexual violence in the workplace*

On November 23, 2023, the Minister of Labour for Québec introduced Bill 42, titled, "An Act to prevent and combat psychological harassment and sexual violence in the workplace."

Through amendments to multiple Québec laws, including the *Act respecting industrial accidents and occupational diseases* (AIAOD), the *Act respecting labour standards* (ALS), the *Act respecting occupational health and safety*, and the *Labour Code*, the bill's core focus is to curtail instances of psychological harassment and sexual violence within professional environments.

Outlined within this bill are pivotal measures aimed at safeguarding workers in their workplaces and ensuring effective recourse avenues to uphold this protection. The primary goal is to prevent and combat situations of psychological harassment and sexual violence, underscoring the importance of fortifying the working environment and empowering individuals in their pursuit of safety and well-being.

- ***Act respecting labour standards***
    - Implementation of protection against retaliatory actions for employees reporting incidents of psychological harassment concerning a colleague or collaborating in the management of such reports or complaints.
    - Introduction of new requirements outlining the minimum components of policies designed to prevent and address psychological harassment.
    - Prohibition of amnesty clauses that mandate or allow employers to overlook disciplinary actions taken for misconduct involving physical, psychological, or sexual violence when instituting new measures for similar misconduct.
    - Implementation of a specific provision granting the Administrative Labour Tribunal (the "ALT") the authority to award punitive damages to victims of psychological harassment, even if the individual is concurrently receiving compensation for employment-related injuries resulting from the harassment under the AIODA.

- ***Occupational Health and Safety Act***

    - Inclusion of a definition of the concept of sexual violence, i.e. “any form of violence targeting sexuality or any other misconduct, including unwanted gestures, practices, comments, behaviours or attitudes with sexual connotations, whether they occur once or repeatedly, including violence relating to sexual and gender diversity.”
    - Empowerment of the government with specific regulatory authority to enforce measures mandating employers to prevent or put a stop to instances of sexual violence.

- ***Act respecting industrial accidents and occupational diseases***

    - Introduction of presumptions for employment injury to streamline the acknowledgment of work-related harm resulting from sexual violence, excluding strictly private contexts.

    - Extension of the timeframe to file claims for employment injuries stemming from sexual violence, granting victims an extended period (two years instead of six months).

    - Establishment of a particular rule stating that, safe exception, the costs of the benefits due by reason of injuries caused by sexual violence is imputed to the employers of all the units.

    - Implementation of new protocols safeguarding the confidentiality of employees’ medical records in cases contested by employers.

- ***Labour Code***

    - Mandate for grievance arbitrators to undergo training specifically addressing sexual violence prior hearing any grievances related to psychological harassment within the framework of the LSA.

Over the next few months, Bill 42 will be studied in a parliamentary committee and may therefore be subject to amendments, but we can expect the measures it contains to have significant implications for employers, who will have to adopt their policies and practices accordingly. We’ll be keeping a close eye on the situation and will keep you duly informed of relevant developments.

12. *Syndicat des salarié·es de la fromagerie (CSD) et Agropur Coopérative*, 2023 QCTA 65

Dismissal – Serious threat to the physical integrity of an employer's representative

Fact	• Agropur Cooperative (the "**Employer**") terminated Mr. Bolduc (the "**Employee**"), an operator with forty years of seniority, citing an incident where he allegedly threatened his supervisor with a knife after being asked to assist labourers while on duty. • At the time of the incident, the employee had 40 years of service and a clean disciplinary record. • Post the incident, the Employer conducted an investigation involving witness interviews, including one with the Employee. However, this interview was recorded without the Employer's knowledge by a union representative present. • The Employee, through his union, contests the dismissal, citing its excessiveness considering the circumstances, the Employee's lengthy service, and the lack of substantial proof of the alleged fault by the Employer. • The Employer contends that it has established the alleged fault and deems the dismissal a proportional action, especially as the Employee displayed no remorse during the investigation. Claiming the recorded meeting accurately depicted the interview's content, the Employer requested its presentation as evidence. • The Tribunal is tasked with determining the justification behind the Employee's dismissal. During the hearing, the union raised an objection to the admissibility of the audio recording as evidence, asserting its protection under litigation privilege as it was intended for the forthcoming arbitration preparation.
Decision	• With regard to the objection concerning the admissibility of the audio recording as evidence, the Tribunal concludes that the recording of a meeting held in the presence of the opposing party is not covered by litigation privilege, since the content of the recording is known to both the Employer and the Employee. • He also considers that the search for the truth and the best evidence rule are reasons that lead the Tribunal to conclude that the recording is admissible in evidence. Indeed, it is clear from the letter of dismissal that the Employee's behaviour during the meeting was one of the reasons that led to his dismissal and, consequently, one of the facts to be proven by the Employer. However, the litigation privilege cannot relate to the facts in dispute. • Regarding the merits of the dismissal, despite conflicting versions between the Employee and the Employer, the Tribunal finds the supervisor's account more credible. Therefore, he concludes that the Employer has established the facts on which the dismissal is based. • The Tribunal is of the opinion that the fact of seriously threatening the physical integrity of a representative of the employer justifies the imposition of a more severe measure, such as dismissal, than when the threats are directed at a colleague, since it is then the legitimate authority of the Employer that is challenged. The Tribunal also notes that in the

present case, the Employee has expressed no remorse and does not seem to have grasped the seriousness of his behaviour.

- The Tribunal is therefore of the opinion that, despite his very long seniority, the dismissal constitutes a measure proportionate to the fault committed by the Employee.
- Notably, the Tribunal highlights the rescindment of the vaccination requirement, effective June 20, 2022.

13. *Syndicat professionnel des ingénieurs d'Hydro-Québec inc. et Hydro-Québec*, 2023 QCTA 91

Interpretation of a collective agreement – Ambiguity arising from a new clause

Fact	• A dispute has arisen over call-back allowances for engineers working remotely following the renewal of the collective agreement. • Previously, a five-hour minimum allowance was granted for travel time, but with the shift to telecommuting, the interpretation of this allowance has become uncertain. • At the most recent renewal of the collective agreement, the parties introduced a revised allowance, inferior to the previous one, specifically for call-backs that don't necessitate the employee's physical return to the work site. This is outlined in clause 19.07 of the collective agreement. • Post the implementation of the renewed agreement, the employer declined to apply the five-hour allowance to tasks that were previously eligible for it. According to the employer's perspective, call-backs executed during telework are now exclusively governed by the new allowance, regardless of the task's nature, as long as the engineer is not required to commute to the employer's premises. • The grievances filed seek compensation based on the minimum five-hour allowance applicable to urgent or planned requests that mandate a return to work, as outlined in clauses 19.03 and 19.04 of the collective agreement. • The sole point of contention revolves around whether clause 19.07 exclusively governs all call-backs conducted during telework or if the more advantageous compensation detailed in clauses 19.03 and 19.04 can be applied to call-backs demanding that engineers return to off-site workstations.
Decision	• The Tribunal finds the texts unclear and notes contradictory conduct from both parties. • The interpretation aligning best with the collective agreement's structure ensures that, in telecommuting scenarios, call-backs adhere to the two allowances outlined in the relevant clauses, in line with the original intentions of the parties. • The employer's proposed literal and restrictive interpretation directly challenges the core values and principles guiding telework integration within the company. This approach generates unreasonable outcomes unlikely intended by the parties. • Interpreting each clause's essence effectively delineates the scope of each compensation, even when engineers are authorized for telecommuting duties. • Distinctions in call-backs persist based on the nature of the requested work, similar to when engineers work in-office. • Consequently, telecommuting engineers don't always qualify for the most advantageous compensation according to clauses 19.03 and 19.04. These clauses apply solely when urgent or planned needs mandate their return to the workstation to access the company's digital environment. Call-backs that can be resolved without this requirement, through phone consultations or alternative work forms, remain under the compensation specified in clause 19.07. • The decision regarding which compensation applies is not at the discretion of the engineer but is determined by the nature of the work needed to fulfill the communicated call-back requirement.

Contacts

Arianne Bouchard

Partner, Co-Lead of the national Employment and Labour group, Montréal
+1 514 878-5892
arianne.bouchard@dentons.com

Camille Paradis-Loiselle

Senior Associate, Montréal
+1 514 878-8859
camille.paradis-loiselle@dentons.com

Nicolas Séguin

Associate, Montréal
+1 514 878 5876
nicolas.seguin@dentons.com

Sarah-Émilie Dubois

Senior Associate, Montréal
+1 514 878-8824
sarah-emilie.dubois@dentons.com

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