2009 Labour and Employment Law Client Conference

Québec Region

Tuesday, November 3, 2009

Mount-Royal Centre
2200 Mansfield Street, Montréal
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2009 Labour and Employment Law Client Conference

Conference Program

8:00 a.m.  Continental breakfast and registration

8:45 a.m.  Welcome and Introduction  
    Sunil Kapur

9:00 a.m.  What's New in Labour and Employment Law?  
    Nathalie Gagnon and André Baril

    This presentation will address hot topics such as collective dismissals, managing criminal records, and managing consequences of a termination of employment.

10:00 a.m.  Fighting Back: How Employers Can Combat Workplace Violence  
    Jacques Rousse and Martine Bélanger

    This presentation will address workplace violence and how employers can prevent, control and cope with incidents that may arise.

10:30 a.m.  Break

10:45 a.m.  After the Break-Up: The Obligations of Departing Employees  
    Simon-Pierre Hébert and Claire Ezzeddin

    This presentation will provide an overview of departing employees’ duties and the legal processes former employers can use to enforce these obligations.

11:15 a.m.  Constructive Dismissal: When “I quit!” becomes “You’re fired!”  
    Rachel Ravary and Amélie Lavertu

    Following a brief overview of the law on constructive dismissal, this presentation will discuss how constructive dismissal issues can be avoided when implementing common cost-cutting measures.

11:45 a.m.  Lunch, team introductions and questions

McCarthy Tétrault
1:30 p.m. Workshops

A. Collective Bargaining in Québec (given in French)
   Pierre Jolin, André Baril and Mathieu Fournier

   *In this workshop, we will review the guiding principles of collective bargaining in Québec.*

B. Reasonable Accommodation in Tough Economic Times
   Jacques Rousse and Rachel Ravary

   *This workshop will focus on how to accommodate employees appropriately and practically in the current economic landscape.*

C. An Employer’s Guide on How to Handle Employee Medical Information (given in French)
   Nathalie Gagnon and Simon-Pierre Hébert

   *This workshop will provide an overview of the state of the law relating to requests for medical information.*

2:30 p.m. Break

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3:45 p.m. Cocktail
Lawyer Profile

ANDRÉ BARIL

Biography

André Baril is a partner in our Labour and Employment Group in Montréal.

Mr. Baril practises in the areas of administrative and labour law, collective bargaining, constitutional law and charters of rights and freedoms. He has extensive experience in university grievance adjudication matters, as well as federal labour law. His practice also extends to maritime law.

Mr. Baril acts before arbitration and administrative tribunals, as well as courts of law, on a regular basis.

He received his B.Sc. in 1987 from McGill University and his BCL in 1990 from Université de Montréal. He was called to the Québec bar in 1991. Mr. Baril is a member of the Canadian Bar Association.
Biography

Martine Bélanger is an associate in our Labour & Employment Group in Montréal.

Ms. Bélanger acts for private and public sector employers. She offers legal counsel on a variety of matters including the interpretation of collective agreements, accreditation processes, the transfer of rights and obligations between employers, business closures, occupational health and safety issues, psychological harassment, disciplinary measures, employment contracts, the rights and obligations that arise from employment contracts, employment standards, terminations of employment, etc.

Ms. Bélanger received her bachelor’s degree in civil law (BCL) from the Université du Québec à Montréal. She was called to the Québec bar in 2006 and is a member of the Canadian Bar Association and of the Young Bar Association of Montréal.
Lawyer Profile

CLLAIRE EZZEDDIN

Biography

Claire Ezzeddin is an associate in our Labour & Employment Group in Montréal. She represents management in a variety of labour and employment matters.

Ms. Ezzeddin graduated with great distinction from McGill University’s Faculty of Law, where she obtained both civil law (BCL) and common law (LLB) degrees. While at McGill, she served as an editor of the McGill Law Journal and interned at public legal education organizations in Québec, Ontario and British Columbia. Prior to studying law, Ms. Ezzeddin received her Master’s degree in English from Queen’s University and her BA in English (with First Class Honours) from McGill University.

Ms. Ezzeddin was called to the Québec and Ontario bars in 2009, after articling in McCarthy Tétrault’s Montréal and Toronto offices. She is a member of the Québec bar, the Law Society of Upper Canada, and the Canadian Bar Association.
Biography

Mathieu Fournier is an associate in our Labour and Employment Group in Québec City.

His practice covers different aspects of labour and employment law, including human rights and freedoms, labour standards, occupational health and safety as well as the interpretation and negotiation of collective agreements.


Mr. Fournier received his Bachelor of Civil Law degree (LLB) from Université Laval in 2007. He was called to the Québec Bar in 2008 and is a member of the professional development committee of the Jeune Barreau de Québec.
Biography

Nathalie Gagnon is a partner in our Labour and Employment Group in Montréal.

Ms. Gagnon deals particularly with issues related to individual rights (employment contracts, employment standards, discipline, and termination) as well as union related matters. She regularly appears before administrative and civil courts on behalf of private and public sector employers.

She has spoken frequently at various conferences and seminars on labour and employment related subjects, including management of issues particular to the Québec work environment such as rules governing termination, employer/employee obligations under the Civil Code of Québec and harassment in the workplace.

Ms. Gagnon received her bachelor of laws from the Université de Montréal in 1993. She was admitted to the Québec bar in 1994.
Biography

Simon-Pierre Hébert is a partner in our Labour and Employment Group in Montréal.

Mr. Hébert’s practice covers numerous aspects of labour and employment law including hiring, termination of employment, labour standards, wrongful dismissal, occupational safety and health as well and the interpretation and negotiation of collective agreements. He also practices commercial litigation.

He received his bachelor’s degree in Civil Law in 2000 from Université Laval. Mr. Hébert was called to the Québec bar in May 2002.
Biography

Pierre Jolin is a counsel in our Labour and Employment Group in Québec City.

Mr. Jolin practises primarily in the areas of human resources, civil litigation and construction law. He pleads frequently before the courts.

For many years, Mr. Jolin was a partner in one of the major law firms in Québec City before joining McCarthy Tétrault.

Mr. Jolin is a board member and an advisory member for many institutions. He has also taught civil law at Université Laval.

He appears in several editions of the Canadian Legal Lexpert Directory, a guide to the leading law firms and practitioners in Canada. In the 2009 edition, he is recommended as a leading lawyer in the area of labour. Mr. Jolin appears in the 2006 edition of The Best Lawyers in Canada in labour law of the National Post.

Mr. Jolin was admitted to the Québec bar in 1969 after completing legal studies in the Faculty of Law at the Université Laval.
Biography

Sunil Kapur is a partner in our Labour and Employment Group in Toronto. Mr. Kapur’s practice is focused exclusively on management-side labour, employment and human rights law.

Mr. Kapur has advised and represented employers in the sectors of financial services, manufacturing, transportation, education, health care, security, information technology, resources and public service. Mr. Kapur has advised and represented those employers in labour board proceedings, arbitration, mediation, collective bargaining, employment litigation, judicial reviews, civil appeals and human rights. Mr. Kapur has advised numerous fortune 500 companies on labour and employment matters arising from mergers and acquisitions. He regularly provides training for clients on a wide range of issues.

Mr. Kapur is a member of the Advisory Committee to the Ontario Labour Relations Board. He is also a part-time member of the Ontario Human Rights Tribunal.

Mr. Kapur is a regular speaker on labour, employment and human rights matters. He is a member of the business committee of the Toronto Board of Trade, the business and employment sections of the American Bar Association, the Ontario and Canadian Bar Associations and the Canadian Association of Counsel to Employers.

Mr. Kapur received his B.Sc. from the University of Toronto in 1992. He was an Ontario Graduate Scholar and has won several academic awards from the University of Toronto. Mr. Kapur received his LLB from Osgoode Hall Law School in 1995 and was called to the Ontario bar in 1997.
Biography

Amélie Lavertu is an associate in our Labour & Employment Group in Montréal.

Ms. Lavertu offers legal counsel on different aspects of labour and employment law, including human rights and freedom, labour standards, harassment, interpretation of collective agreements, accreditation processes, and industrial relations in the construction industry.

Through her practice, Ms. Lavertu has developed considerable knowledge of issues related to labour and employment law, administrative law, and access to information in the academic context.

Ms. Lavertu obtained her BA (Hons.) in Criminology in 2004 and her Bachelor of Laws (LLB) in 2006, both from the Université de Montréal. She has also completed her course work for a Master in business law.

Ms. Lavertu was called to the Québec bar in 2007 and is a member of the Canadian Bar Association and the Young Bar Association of Montréal.
Biography

Rachel Ravary is an associate in our Labour and Employment Group in Montréal.

Ms. Ravary’s practice is focused exclusively on management-side labour and employment law, and she has advised and represented employers in various industry sectors, including manufacturing, health care, education, pharmaceuticals, non-profit, hospitality, mining, banking, finance and investment.

Ms. Ravary has developed an expertise in a variety of employment-related matters including labour standards, human rights, privacy, access to information, pay equity, and workers’ compensation. Ms. Ravary also regularly represents both provincially and federally regulated employers in litigation before the various administrative tribunals, as well as before the civil courts and labour arbitrators. A significant portion of Ms. Ravary’s practice is devoted to providing employment advice in all manners of corporate restructuring, mergers and acquisitions.

Ms. Ravary regularly speaks at conferences and conducts workplace seminars and training on a variety of employment matters. She participates actively in pro-bono matters and is a founding member of the Legal Education Program on Human Rights, organized in association with the Québec Branch of the Canadian Bar Association.

Ms. Ravary received her bachelor’s degree in political science from the University of Ottawa in 1998, and her BCL and LLB from McGill University in 2002. She was called to the Québec bar in 2003 and is a member of the Canadian Bar Association and of the Junior Bar Association of Montréal.
Biography

Jacques Rousse is a partner in our Labour and Employment Group in Montréal and coordinates the group’s activities in Québec.

Mr. Rousse provides advice on all matters with respect to human resources and in the event of litigation, he acts before arbitration boards, administrative tribunals and the civil courts in matters related to labour relations and contracts of employment. Mr. Rousse also appears before commissions in matters concerning workers’ compensation and occupational health and safety. Furthermore, he has acquired considerable experience in collective bargaining as well as in labour and employment matters related to restructurings and mergers and acquisitions.

Mr. Rousse is a member of the *Ordre des CRHA et CRIA du Québec*. He has spoken at conferences and seminars related to labour relations, human rights and occupational health and safety.

He received his LLL from the Université de Montréal in 1981 and was called to the Québec bar in 1982.
Lawyer Profile

MARTINE ST-LOUIS

Biography

Martine St-Louis is counsel in our Labour and Employment Group in Montréal.

For almost 20 years, Ms. St-Louis has assisted businesses in the admission of foreign workers into Canada. In addition, she counsels companies as well as individuals and their family through various stages of their establishment in Canada, either on a temporary or permanent basis. She works closely with a multidisciplinary team to provide solutions to related international taxation, social coverage and pension plans.

Ms. St-Louis received her LLB from the Université de Montréal in 1987 and was called to the Québec bar in 1988.
Fighting Back: How Employers Can Combat Workplace Violence

Martine Bélanger and Jacques Rousse
Fighting Back: How Employers Can Combat Workplace Violence

Introduction

On the afternoon of December 7, 2007, an employee was sent home from his job at Precision Plastics because his supervisor detected alcohol on his breath. Later that day, he returned to the plant, brandishing a shotgun. The employee found his supervisor, aimed the gun at him and threatened to kill him. He then fired the gun once into the air. Before the situation could escalate any further, the supervisor was able to talk him into putting the gun down. The employee was later arrested by police. Unfortunately, stories like these are becoming increasingly common in the workplace.

In a recent study, the Canadian Initiative on Workplace Violence found that 66% of employers surveyed reported an increase in aggressive acts in their workplace over the past 5 years, and an 82% increase in both formal incident reports and grievances.\(^1\) In Quebec alone, approximately 1800 employment injuries each year between the years 2004 and 2007 were linked to workplace violence.\(^2\) In response to this trend, 78% of Canadian employers surveyed reported having taken concrete action to prevent or minimize occurrences of workplace aggression.\(^3\)

Incidents of violence in the workplace can cost a company in many ways. In addition to administrative sanctions and civil liability, employers may suffer from lost productivity due to poor employee morale and high turn-over, or from a tarnished company image. It is therefore important that employers be able to recognize workplace violence. Moreover, it is essential that employers be aware of their obligations with respect to such violence, and that they develop effective strategies to both prevent and cope with any incidents that may arise.

Defining Workplace Violence

The notion of workplace violence is not limited to physical acts of aggression, but includes a variety of behaviours that can be considered vexatious, abusive or harmful. The Dictionnaire de droit québécois et canadien broadly defines “violence” as any act of aggression that affects a person’s moral or physical integrity.\(^4\) Similarly, the Canadian Centre for Occupational Health and Safety has defined

\(^1\) [http://www.workplaceviolence.ca/research/survey1.pdf](http://www.workplaceviolence.ca/research/survey1.pdf) (Survey).


\(^3\) Survey, supra note 1.

workplace violence as “any act in which a person is abused, threatened, intimidated or assaulted in his or her employment.” This includes:

- Physical attacks - hitting, shoving, pushing or kicking
- Verbal or Written Threats - any expression of an intent to inflict harm
- Threatening Behaviour - such as shaking fists, destroying property, or throwing objects
- Verbal Abuse - swearing, insults, or condescending language
- Harassment - any behaviour that demeans, embarrasses, humiliates, annoys, alarms, or verbally abuses a person and that is known or would be expected to be unwelcome. This includes words, gestures, intimidation, bullying, or other inappropriate activities.

The Canada Occupational Health and Safety Regulations (the “Regulations”), a regulation enacted under the Canada Labour Code that governs employers and employees under federal jurisdiction, adopts a similarly wide definition of workplace violence:

20.2 In this Part, “work place violence” constitutes any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee.

In Quebec, the notion of “psychological harassment” has been more thoroughly defined in An Act respecting Labour Standards (the “LSA”):

[...] “psychological harassment” means any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee.

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6 (SOR/86-304).
7 (R.S., 1985, c. L-2).
8 S. 20.2.
A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment. 9

As appears from all of these definitions, and as will be further elaborated, the focus is on the employee, and how that employee is affected by certain words, actions, or gestures, regardless of their source or ultimate intention.

**Recognizing Workplace Violence: A Closer Look at Harassment**

While certain actions may be easily recognizable as incidents of violence—a boss physically pushing his employee as he screams at him, or an employee threatening to kill his colleague—in some situations it may be more difficult to distinguish psychological harassment from other manifestations of interpersonal conflict. Behaviour will be considered to be “psychological harassment” if it has all of the following attributes:10

- **It is vexatious**  
  Vexatious words or actions attack a person’s pride or self-esteem. Behaviour is vexatious if a reasonable person, placed under the same circumstances and having the same personal attributes as the complainant would consider it injurious to their sense of self-worth.11

- **It manifests repetitively**  
  Things that may seem harmless in isolation can often have a serious cumulative affect.12

- **It is hostile or unwanted**  
  Hostile behaviour is that which is aggressive, antagonistic, adversarial or threatening. Unwanted behaviour is that which is not desired, whether this is made explicit or is merely implicitly evident.13 Note that either unwanted or hostile behaviour fulfills this condition; the behaviour need not be characterised as hostile if it is unwanted.

- **It affects the victim’s dignity or integrity**  
  Dignity refers to a person’s pride, respect, and self-esteem. It refers to the fundamental and intrinsic aspects of what it is to be human. Marginalising someone, de-valuing him, or

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9 R.S.Q. N-1.1., s. 81.18.
12 Centre Jeunesse, supra note 10.
13 Ibid.
treating him unjustly will all affect that person’s sense of dignity."14

- It results in a harmful work environment

A harmful work environment is one that is detrimental and psychologically unpleasant. This concept is an overreaching one, and comprises more than sustaining a concrete injury.15

If each of these elements is present, psychological harassment has occurred, even if there was no malicious intent on the part of the perpetrator.16 Sexual harassment obviously falls under the definition of “psychological harassment,”17 and the term also includes harassment based on the grounds of discrimination prohibited in the Quebec Charter of Human Rights and Freedoms (the “Quebec Charter”), including sex, race, national origin, sexual orientation, or social condition.18

There is a wide range of behaviours that can be considered to be psychological harassment. Some examples are:

- Repetitive name calling, belittling and/or swearing;19
- Inappropriate sexual comments and gestures;20
- Pressuring an employee not to file a complaint with the CSST, accusing her of being difficult and generally belittling her21
- Using insinuation, intimidation, and threats in order to dominate and control; pointing out someone’s weakness for the purpose of humiliating them;22
- Stabbing a colleague with a knife and threatening to kill him; and23

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14 Breton, supra note 11.
15 Centre Jeunesse, supra note 10.
16 Breton, supra note 11.
18 Charter of Human Rights and Freedoms, R.S.Q. c. C-12, s.10.
19 Lalonde v. Pavages Chenail inc., 2007 QCCRT 191 (Lalonde); Centre Jeunesse, supra note 10.
20 Centre Jeunesse, supra note 10.
• Making decisions and acting in a way that undermines an employee's competency and credibility, diffusing false information about his capabilities, and attacking his reputation.\(^{24}\)

An isolated incident, if it is sufficiently serious, may also be considered to be psychological harassment.\(^{25}\) Examples of sufficiently serious incidents include unwanted and unsolicited sexual touching,\(^{26}\) and yelling and proffering threats of physical aggression with a raised fist.\(^{27}\)

Workplace violence is not limited to incidents that occur in a traditional workplace or that occur within working hours, as long as these incidents are work-related. For example, a motel owner was recently found guilty of psychological harassment after he had inappropriately sexually touched one of his employees when she came to stay at the motel during non-working hours. Not only did the harassment occur at the job site, but the motel owner had mentioned the employee’s work schedule; therefore the employer-employee relationship remained intact.\(^{28}\) Similarly, incidents of workplace violence can occur off-site (e.g. conferences, remote offices), at work-related social events, or even at a home office via telephone or e-mail.

**Rights and Obligations: The Legislative Framework**

Various legislative provisions guarantee an employee’s right to work in a violence-free environment. In Quebec, both *An Act respecting Occupational Health and Safety*\(^{29}\) and the Quebec Charter\(^{30}\) articulate a worker’s general right to working conditions that have proper regard for his health, safety and physical well-being. Of course, workers also benefit from the fundamental rights accorded to everyone by the Quebec Charter:

1. Every human being has a right to life, and to personal security, inviolability and freedom [...] 

4. Every person has a right to the safeguard of his dignity, honour and reputation.

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\(^{25}\) *LSA*, supra note 9, s. 81.18; *Poirier*, supra note 17, p. 84.

\(^{26}\) *G.S.*, supra note 17.


\(^{28}\) *G.S.*, supra note 17.

\(^{29}\) R.S.Q. c. S-2.1, s.9.

\(^{30}\) R.S.Q. c. C-12, s.46.
10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

10.1. No one may harass a person on the basis of any ground mentioned in section 10.

Other legislative provisions impose a corresponding duty upon employers to take measures that ensure the protection of these rights. Article 2087 of the Civil Code of Quebec (“CCQ”) stipulates:

The employer is bound not only to allow the performance of the work agreed upon and to pay the remuneration fixed, but also to take any measures consistent with the nature of the work to protect the health, safety and dignity of the employee.

Article 81.19 of the LSA makes it an employer’s duty to see to the prevention of psychological harassment in the workplace:

Every employee has a right to a work environment free from psychological harassment.

Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it.

These obligations are incumbent on the employer in relation to all contracts of employment. By law, the provisions of the LSA relating to psychological harassment are incorporated into all collective agreements.31

Although employers under federal jurisdiction also have a general duty to “ensure that the health and safety at work of every person employed by the employer is protected,” the Regulations32 articulate even more concrete obligations. Pursuant to section 20.3:

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31 S. 81.20.
The employer shall develop and post at a place accessible to all employees a workplace violence prevention policy setting out, among other things, the following obligations of the employer:

(a) to provide a safe, healthy and violence-free workplace;

(b) to dedicate sufficient attention, resources and time to address factors that contribute to workplace violence including, but not limited to, bullying, teasing, and abusive and other aggressive behaviour and to prevent and protect against it;

(c) to communicate to its employees information in its possession about factors contributing to workplace violence; and

(d) to assist employees who have been exposed to workplace violence.

The regulation also requires employers to:

- Identify factors that contribute to workplace violence;\textsuperscript{33}
- Assess the potential for workplace violence;\textsuperscript{34}
- Implement systematic controls to eliminate or minimize workplace violence or a risk of workplace to the extent reasonably practicable;\textsuperscript{35}
- Develop appropriate procedures to respond to workplace violence, including emergency notification procedures as well as measures to assist employees who have experienced workplace violence;\textsuperscript{36}
- Provide information, instruction and training on the factors that contribute to workplace violence.\textsuperscript{37}

These detailed and specific responsibilities may serve as useful guides for all employers in their quest to create safe and violence-free working environments, especially as those employers who are not

\textsuperscript{32} Supra note 6.
\textsuperscript{33} s. 20.4.
\textsuperscript{34} s. 20.5.
\textsuperscript{35} s. 20.6.
\textsuperscript{36} s. 20.8.
\textsuperscript{37} s. 20.10.
proactive about meeting their legal obligations run the risk of incurring liability, as well as having to cope with challenging workplace issues.  

**Employer Liability: The Scope of the Obligation**

Employers are not merely liable for their own acts of violence. They can also be held responsible where acts of violence are perpetrated by other employees, or even third-parties.

**Administrative Liability under the LSA**

An employee who believes that he or she is the victim of psychological harassment may take administrative action. Should the administrative tribunal hearing the case find that the employer failed to take reasonable action to prevent the psychological harassment, or that the employer, aware of the inappropriate behaviour, did not put a stop to it, it may render any decision it deems fair and reasonable, including:

- ordering the employer to reinstate the employee;
- ordering the employer to pay the employee an indemnity up to a maximum equivalent to wages lost;
- ordering the employer to take reasonable action to put a stop to the harassment;
- ordering the employer to pay punitive and moral damages to the employee;
- ordering the employer to pay the employee an indemnity for loss of employment;
- ordering the employer to pay for the psychological support needed by the employee for a reasonable period of time determined by the Commission.

The employer’s obligation here is one of means. An employer is not expected to be able to ensure that the workplace is always harassment-free. However, he is required to take all reasonable measures to prevent such harassment, and to make sure it stops the moment it comes to his attention. As discussed below, this can involve implementing and making employees aware of a harassment policy, which specifies that harassment is not to be tolerated and which sets up a mechanism for divulgence, inquiry, and conciliation in a manner that is efficient, objective, and respectful of the dignity of those involved. Similarly, this may simply mean recognizing an escalating situation and finding a way to

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38 See also Human Resources and Skills Development Canada’s “Guide to Violence Prevention in the Workplace.”

39 Employer’s obligations under s. 81.19 in the LSA.

40 Poirier, supra note 17, p. 66.
diffuse it before it goes any further. While what “reasonable measures” are will vary depending on the workplace and the situation, it is clear that an employer, when faced with even a possible situation of harassment, may not simply do nothing.

When faced with any possible act of aggression or harassment in the workplace, an employer must:

- Undertake a complete inquiry;
- Obtain a version of the facts from each party involved;
- Verify the versions of events with witnesses; and
- Impose an appropriate disciplinary sanction (taking into account any aggravating and attenuating factors).

This is the case even if the act appears to be accidental, or a joke gone wrong.

A recent case, *Roc v. Poulbec*, demonstrates the extent of this obligation. In that case, one of the employees was stabbed in the rear end with a knife used by another employee to de-bone chickens. The employer arrived on the scene shortly thereafter, and told the employee who was stabbed that he should go to the hospital. He then spoke with the “stabber,” who said that it was simply an accident; that he had accidentally caught the other employee with the knife while turning around. He was reprimanded and told to be more careful. The employee who was stabbed returned to work the next day and appeared to be fine. The employer never asked for his version of events, and he never volunteered this information. Two working days later, the stabber, holding a knife in his hand, yelled to the victim complainant that he would kill him the next time. The complainant, afraid for his life, fled to his car and waited for the police. It was revealed during the hearing that friction between the two men had existed prior to these events. The Commission des relations du travail (the “CRT”) found the employer liable for the moral damages that resulted from this threat. Had the employer obtained the complainant’s version of the events, he would have realised a problem existed and could have taken measures to prevent the harassment from continuing. The judgement also pointed out that where employees have tools that may be used as weapons, the employer must take extra care to ensure that these are not being used inappropriately.

In another case, it was found the employer of a small jewellery store did not meet her obligations due to her inaction when one employee screamed in another’s face during a meeting.

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43 Barre and 2533-0507 Québec Inc., 2006 QCCRT 0608.
Civil Liability

Employers also risk civil liability for the actions of their employees, as well as their own. Harassment by an employer has always been considered a fault under the general negligence provision of the CCQ. \(^{44}\) Similarly, an employer may incur civil liability for negligently allowing harm to come to an employee, contrary to its legal obligations (article 2087 CCQ). Pursuant to article 1463 CCQ, an employer is also strictly liable for the faults its employees commit in the function of their duties, which means that it is liable whether or not it is at fault.

For example, in a recent case, \(^{45}\) an altercation occurred between the employees of two different companies, both working at the Pierre Elliot Trudeau Airport. After being spoken to rudely by the complainant, the employee of the defendant company said: “retourne dans ton pays, espèce d’immigré.” These words were found to constitute an infringement of the complainant’s rights under articles 4 and 10 of the Quebec Charter, and the company was held solidarily liable (with the employee) for the moral damages sustained by the complainant.

Given that acts of violence often infringe fundamental Charter-protected rights, such as a person’s right to dignity, the employer may also be exposed to liability for exemplary damages, as well as moral. \(^{46}\)

Criminal Liability

On March 31, 2004, the Criminal Code of Canada (the “Criminal Code”) was amended to expand the criminal liability of organizations, as a result of the Westray mining disaster that saw the death of 26 miners.

Previously, corporations could be convicted of a crime under the Criminal Code for the acts and omissions of a person who was a “directing mind” or “alter ego” of the corporation (i.e. someone who has a policy development and supervision function). Bill C-45 broadened the range of organizations that can be held criminally liable and the range of individuals whose acts can be attributed to such entities. It also codified, in section 217 of the Criminal Code, a legal duty on “[e]very one who undertakes, or has the authority, to direct how another person does work or performs a task... to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.”

Bill C-45 makes it easier to hold an organization criminally liable for accidents in the workplace, and adds a specific duty for workplace safety to the Criminal Code. It does not change the standard for

\(^{44}\) 1457 CCQ; UQTR, supra note 24.
\(^{45}\) Commission des droits de la personne et des droits de la jeunesse v. Entreprise conjointe Pichette, Lambert, Somec, 2007 QCTDP 21 (CanLII).
\(^{46}\) S. 49.
proving criminal negligence – there must be wanton or reckless disregard for the lives or safety other persons. That means that something more is required than simple negligence or the mere breach of a health or safety regulation.

Pursuant to Bill C-45 every director, partner, employee, member or agent of an organization can be the cause of the organization’s liability - not just the directing mind. Also, collectively, the act of two or more representatives may result in an offence, even if the act considered individually is not an offence.

Section 735 of the Criminal Code provides that an organization will be fined in lieu of imprisonment. It increases the maximum fine for an organization from $25,000 to $100,000 for a summary conviction. If the offence is laid as an indictable offence, the amount of the fine is at the discretion of the court, without a limit being set.

It seems that the Criminal Code will likely be reserved for the more egregious violations of workplace health and safety (i.e., involving a marked departure from the reasonable standard of care). Generally, managers and employees who make reasonable efforts to follow applicable health and safety standards and policies will not be at risk of prosecution under Bill C-45.

Lessons Learned

More often than not, small steps can make a big difference in limiting employer liability. It is important for an employer to keep certain things in mind:

• Recognition. Learn to recognize harassment. Psychological harassment is often characterised by dominance, an attempt to impose one’s will upon another, and the exertion of pressure. If negative comments are aimed at a person rather than at the subject of the differences, then the situation is better characterized as one of harassment than one of interpersonal conflict.47

• Escalation. Beware of tensions that can easily escalate into incidents of violence. Simply being aware of relationships between employees can go far to preventing future problems, and can contextualize incidents that may otherwise appear isolated.

• Documentation. By documenting accidents, incidents, inquiries, and sanctions, an employer can prove that the necessary steps were taken if faced with possible liability. Similarly, documenting incidents or accidents may

47 Landesman, supra note 22; Centre Jeunesse, supra note 10.
reveal significant patterns in behaviours, which, viewed individually, are meaningless.

**Steps to Prevent Workplace Violence**

An employer can also limit its liability by implementing a few simple strategies, aimed at preventing workplace violence:

- Undertake risk assessments to determine the possibility or prevalence of workplace violence;
- Review the workplace design to determine whether there are any design features that would contribute to workplace violence;
- Develop a policy on workplace violence;
- Provide regular training for employees on issues of workplace violence;
- Do not condone threats or other violence;
- Be consistent in disciplinary action;
- In collective bargaining negotiations, bargain for the automatic penalty of discharge for violence;
- Be careful of provocation;
- Offer a confidential Employee Assistance Program to allow employees subject to workplace violence or those with personal problems to seek help;
- Be fair and consistent in dealing with employees;
- Monitor absenteeism; and
- Watch for troubling behaviour patterns that may indicate psychological problems.

**Developing a Policy on Workplace Violence**

Having a comprehensive violence prevention policy in place can minimize the chance of outbreaks of violence in the workplace. Policies and procedures are useful for setting clear expectations regarding the standards of acceptable behaviour and the consequences for violating them.
(a) Policies

Workplace violence policies should:

- Be brief and simple;
- Convey that all employees are responsible for maintaining a safe work environment;
- Provide clear definitions of all prohibited conduct;
- Cover incidents involving co-workers as well as incidents involving outside individuals;
- Implement a “zero tolerance” policy to convey a strong message that violence is unacceptable, but be cautious about using the label “zero tolerance”. Zero tolerance should not be confused with automatic suspension or dismissal - it simply means that no degree or type of violence is acceptable in the workplace;
- Affirm that the business will respond appropriately to all reported incidents and state reporting procedure;
- Encourage reporting and provide multiple options for reporting without promising strict confidentiality, and put in place a whistle-blowing mechanism to help witnesses and victims to report violence;
- Ensure the policy contains clear prohibitions and sanctions against retaliation or reprisal;
- Affirm that the business will act to stop inappropriate behaviour and violence;
- Include a dispute resolution mechanism for minor incidents;
- Indicate clearly that all physical assaults will be reported to the police, and follow through on this policy;
- Consider describing the process of initiating a complaint under the policy, as well as the procedures that will be followed during the investigation, as this ought to encourage consistency in administering the policy;
- Where the relationship allows, consult the union in the policy drafting process so that it will not attack the legitimacy of the policy;
- Include designating and training a response team to investigate reports of violence or harassment. It is advisable to include union and employee representatives, as well as medical...
staff, to ensure a comprehensive investigation of complaints and confidence in the investigation;

- Specify the consequences that may be imposed if the policy is violated. These consequences should range in severity from a verbal or written reprimand up to a suspension or dismissal. The policy should also explain that more severe consequences will be imposed for more serious or subsequent violations. Inflexible policies that mandate a specific disciplinary response tend to be more problematic to enforce before a court or tribunal;

- As part of any disciplinary/corrective response, consider whether offenders should be required to undergo a psychological assessment to help determine the appropriate conditions to be placed on their employment, such as regular anger management counselling. Monitor and assess the employee’s participation in such conditions;

- Ensure the policy is enforced to avoid the risk that the employee’s behaviour is seen to be condoned, as condonation often leads to the undermining of employers’ discipline decision before a tribunal; and

- Ensure the policy is accompanied by training in order to assist employees in risk identification, risk avoidance, conflict management, emergency response and reporting. This will make staff better able to identify employees at risk of violent behaviour and to intervene when there is an escalating risk of a violent incident.

(b) Procedures

Some examples of prevention procedures are:

- Developing procedures to keep in contact with employees working alone or in isolated conditions;

- Considering a “buddy system” for workers who are required to work late and who arrive at or leave the workplace in the dark;

- Where employees deal with the public, creating a reporting system to inform employees about clients, patients or customers who exhibit aggressive or violent behaviour; and

- Developing procedures to enforce rules regarding customers (e.g. cutting off alcohol service to intoxicated customers) and how to handle customers who conduct themselves inappropriately. These procedures will be of particular concern to employees who provide services in the health, education or criminal justice systems and in the hospitality industry.
Policies and procedures will only be valuable if used and will only be used if clear and practical. Expect that developing and implementing policies and procedures will take time, resources and hard work. A policy that sits in a drawer gathering dust will not minimize the potential for workplace violence.

**Investigating Complaints of Violence**

The decision to investigate a workplace incident and whether the investigation is performed properly can have serious consequences for an employer. For example, an employer may not be able to establish just cause, may be penalized if an employee’s employment is terminated following a disorganized, unfair or incomplete investigation, or may be sued for defamation or breach of privacy.

Decide who should conduct the investigation. Because a person’s gender may affect his or her perceptions of violence or harassment, employers may choose to have an investigation team consisting of at least one male and one female to ensure that there is an investigator of the same gender as the complainant and the accused.

Consider whether to engage in-house or external investigators. In-house investigators are cost-effective and understand the company’s structure, culture and policies. External investigators may be perceived as more neutral and may have specialized skills and extensive experience. External investigators are especially appropriate when allegations involve senior executives.

Regardless of whether in-house or external investigators are chosen, investigators should:

- Be able to avoid bias;
- Be respectful and sensitive;
- Have suitable interpersonal skills;
- Have an understanding of the company’s policies on violence and harassment; and
- Be trained in investigative techniques, including fact-finding, questioning, decision-making, assessing credibility, and documentation.

**When Conducting the Investigation, Investigators Should:**

- Select a neutral location for conducting interviews; and
- Interview the complainant, the accused and witnesses (collectively, the “Interviewees”). The accused should be interviewed once sufficient facts have been gathered so that the accused can know the case against him or her.
When Interviewing, Investigators Should:

- Explain the investigators’ function and the investigation process;
- Review the complaint with the Interviewee, if appropriate;
- Obtain consent/release forms;
- Review the limits of the investigators’ duty of confidentiality;
- Obtain signed statements, where practical;
- Provide the complainant and accused with reasonable time estimates for conclusion of the investigation and resolution of the complaint;
- Obtain documentary evidence;
- Take detailed, comprehensive notes;
- Produce an investigation report;
- Make suggestions for resolution of the complaint; and
- Perform all of the above in a timely manner.

Refusal to Cooperate

Employees are often reluctant to cooperate: the complainant fears retaliation and exclusion, the accused fears a negative outcome and witnesses simply do not want to get involved, especially when the accused is a senior or popular employee.

Investigators should ensure that the investigation is not hostile or intimidating and should explain the limits on confidentiality under the circumstances. Company policy should stress that it is every employee’s duty to cooperate in any investigation and employees should be reminded that failure to do so could constitute insubordination.

An employer cannot rely on lack of cooperation to avoid responding to a complaint of violence or harassment.

Confidentiality Concerns

The lack of confidentiality in an investigation can taint the careers of the parties involved, as well as the investigation itself. Allegations of violence or harassment can result in retaliation, stress,
Fighting Back: How Employers Can Combat Workplace Violence

humiliation or make it impossible for the parties involved to work together. Furthermore, witness recollections may be tainted by rumours and gossip.

Nevertheless, investigators should never make false promises of confidentiality and should positively inform the complainant that complete confidentiality is impossible. The details of the complaint must be disclosed to the accused, and possibly, to the witnesses. While indiscriminate disclosure of the complaint could give rise to a claim for defamation by the accused, necessary disclosures in furtherance of an investigation are protected by the defence of qualified privilege.

Meeting the Complainant’s Expectations

A complainant who is unsatisfied with the employer’s response can make a complaint or file a suit against the employer based on violation of human rights legislation, the employer’s strict liability for the acts of the accused, constructive dismissal for failure to provide a safe working environment, intentional infliction of mental suffering or defamation (for example, verbal sexual harassment). Therefore, an employer must ensure that the complainant perceives that the employer is responding to his or her complaint. To this end, employers should:

• Provide counselling to all employees following a workplace incident;
• Notify the complainant of his or her right to call the police;
• Reaffirm a commitment to the company’s policy on workplace violence;
• Explain the investigation process to the complainant;
• Offer estimated timing and duration for the various stages of the investigation;
• Provide updates; and
• Ensure timely resolution.

Employers should avoid any measures that appear to penalize the complainant. For example, a well-meaning decision to transfer the complainant out of contact with the accused could be perceived as retaliation. Regardless of the conclusion reached by the Investigators, the employer should follow up with the complainant a few months after the investigation to ensure that there have been no repeat incidents or retaliation.

Meeting the Accused’s Expectations

Similarly, an accused may assert a claim against an employer for an improper investigation, especially if the accused is terminated as a result of the complaint and subsequent investigation. A claim may be founded on wrongful dismissal, constructive dismissal (for example, if the accused is suspended
without pay during the investigation), defamation, intentional infliction of mental suffering, etc. Where an accused’s violent behaviour is a result of a mental disability, an employer’s failure to accommodate him or her to the point of undue hardship could constitute a violation of human rights legislation. As part of the disciplinary response, employers may be able to require perpetrators of violence to undergo psychological assessments in order to determine the appropriate conditions for continuing employment. You can also require participation in programs such as anger management counselling in appropriate circumstances. The perpetrator’s participation in such remedial programs must be aggressively monitored and objectively assessed.

Investigations in a Unionized Setting

A collective agreement may impose conditions on the investigation process. For example, it may require notice of the complaint to be given to the union, union representation of the accused at interviews and meetings and details of the allegations be set out in writing. It may also affect the investigator’s ability to interview witnesses who are part of the bargaining unit and the choice of discipline if the allegations are substantiated. Employers should consult with the union about the investigation process when drafting the company workplace violence policy so that the union is less likely to attack the legitimacy of the process (although the union can question the application of the policy or the severity of the discipline meted out in a particular case).

Dealing with Violence in the Workplace: the Disciplinary Issue

Labour arbitration decisions suggest that while discharge may be the safest and surest way to deal with an employee who poses a threat to the dignity, safety, or security of others, discharges may not always be upheld. Discharge will be supported when a serious incidence of violence or harassment is involved, but the determination of an appropriate sanction must take into the various attenuating and aggravating factors.

Generally, such factors include:

- Whether a lesser disciplinary measure would help the employee alter his or her behaviour and be better able to work in harmony with others; 48
- Whether the behaviour took place in a context lacking role definition and in which there existed a number of interpersonal conflicts, causing a generally harmful work environment; 49
- The employee’s past disciplinary record;

49 Centre Jeunesse, supra note 10.
• The employee’s willingness to make amends or apologize; and

• Any other factors relevant in the circumstances.

Of course, the severity of the fault is also taken into account. If the behaviour of the perpetrator shows sufficient fault or departure from the normal standards of behaviour, the employer is entitled to see to his dismissal. This is even more true in the case of gross fault, where the employee’s behaviour shows a complete carelessness or imprudence regarding others. However, in the case of lighter faults, those that a reasonable person would not commit, but that are not very serious and do not cause a great harm, dismissal would be inappropriate.\(^{50}\)

Similarly, as sanctions will often be regulated by collective agreements, it is important for employers ensure that they have indicated that workplace violence will be a cause for sanctions and/or dismissal.

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\(^{50}\) Bertrand, supra note 27.
After the Break-Up: The Obligations of Departing Employees

Claire Ezzeddin and Simon-Pierre Hébert
After the Break-Up: The Obligations of Departing Employees

Introduction

In this new and uncertain economic climate, company restructuring is inevitable. Be it by lay offs or by the hiring of new key employees, employers will see their workforce change drastically in the following years. This climate of change will bring on the challenge of protecting employer rights and interests when the time comes for an employee to move on.

This paper includes an overview of the duties of departing employees as well as the legal processes for enforcement of these duties by former employers. It includes a discussion of the practical steps that employers can take to minimize risk and potential harm from competition by former employees, including the use of effective restrictive covenants in employment agreements, the protection of intellectual property, and appropriate resignation procedures. Finally, it discusses the enforcement of restrictive covenants and employee obligations.

What are the Duties Owed by Departing Employees to their Former Employer?

The law provides that departing employees are free to compete with their former employer subject only to the post-termination obligations included in their employment contract and duties owed pursuant to the law.

Duties Owed Pursuant to Québec Law

Employees owe certain duties to their employer by operation of the law, particularly the Civil Code of Québec (CCQ). First, employees must provide reasonable notice of their intention to resign, just as employers must provide reasonable notice of termination (article 2091 CCQ). What is “reasonable” depends on the particular circumstances of the case.

The other main duties of employees are found at article 2088 CCQ which states:

2088. The employee is bound not only to carry on his work with prudence and diligence, but also to act faithfully and honestly and not to use any confidential information he may obtain in carrying on or in the course of his work.
These obligations continue for a reasonable time after cessation of the contract, and permanently where the information concerns the reputation and private life of another person.

Therefore, the law imposes an obligation of loyalty and good faith as well as an obligation of discretion on a departing employee.

**Duty of Loyalty and Good Faith**

All employees are subject to a duty of loyalty and good faith. They are obliged to be honest in their dealings with their employer and avoid any activity which puts them in a conflict of interest.

It is a breach of the duty of loyalty and good faith for an employee to compete with the employer, whether by working for a competitor or developing a competing business, at any time during the currency of the employment relationship.

The duty of loyalty survives the termination of the employment relationship, albeit in slightly different form. Depending on circumstances, departing employees who have not signed restrictive covenants may be free to compete with their former employers either by starting their own business, working for the competitor or by trying to solicit the former employer’s clients.

However, in doing so, the employee cannot use any dishonest methods nor can he use privileged information that he acquired while working for his former employer. In other words, competing with a former employer is generally neither illegal nor disloyal if it is done in good faith.1

An important decision regarding the duty of loyalty is *Improtchêque Inc. v. St-Gelais*2 which states, among other things, that a duty of loyalty is less intense for a departing employee than a current one.

The exact nature of the duty of loyalty varies for each employee depending on factors such as the:

- Particular nature of the job or of the company;
- Duration of employment;
- Hierarchical positioning of the employee and his responsibilities;
- Relationship between the employee and the clients;

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• **Access to confidential information.**

A particular application of the duty of loyalty is the solicitation of former co-workers and clients. Even though this is not necessarily a forbidden practice, certain ground rules apply. For example, an employee is forbidden from using a stolen or confidential clients list. However, the use of such a list may not be forbidden if it can be easily reconstituted by using legal means such as the phone book or a business directory.\(^4\) An employee who has a special relationship with clients might, however, be forbidden from contacting those clients for a certain time after his departure, other than by using general methods of solicitation addressed to the public at large such as newspapers, radio or television advertisements.\(^5\)

As for the solicitation of former co-workers, it is illegal if the goal is to paralyze the employer’s activities and therefore eliminate the competition.\(^6\)

A decision on this matter was rendered recently by the Supreme Court of Canada. In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*,\(^7\) the branch manager, investment advisors and their assistants in two branches of RBC Dominion Securities (RBC) left their employment to accept positions offered to them at Merrill Lynch, RBC’s direct competitor. Their mass departure, without notice, caused the near collapse of the branch. They took with them confidential client records, which were later returned to RBC. Their employment contracts with RBC did not contain Non-Compete covenants.

The court held that non-key (non-fiduciary) employees have no legal duty not to compete against their former employer following the termination of the employment relationship, even during the reasonable notice of resignation period. However, departed employees may be liable for specific wrongs such as the improper use of confidential information.

As stated by the Court:

> The contract of employment ends when either the employer or the employee terminates the employment relationship, although residual duties may remain. An employee terminating his or her employment may be liable for failure to give reasonable notice and for breach of specific residual duties. Subject to these duties, the employee is free to compete against the former employer.\(^8\)

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\(^7\) 2008 SCC 54 (CanLII).

The Court also found that the branch manager had acted improperly and in bad faith in orchestrating the mass departure of coworkers while still being employed by RBC, and both the branch manager and Merrill Lynch were held liable to compensate RBC for its resulting losses.

**Duty of Discretion**

Employees are obliged pursuant to their duty of confidentiality not to make use of or disclose the confidential business information of their employer.

In assessing whether particular information is confidential business information, the courts will consider:

- the extent to which the information is known outside of the business;
- the extent to which the information is known by employees and others involved in the business;
- the extent of measures taken to guard the secrecy of the information;
- the value of the information to the business and to its competitors;
- the amount of effort or money expended in developing the information;
- the ease or difficulty with which the information can be properly acquired or duplicated by others; and
- whether the confider and the confidee treat the information as confidential.

Any ambiguity as to scope or categories of information which an employer considers confidential ought to be addressed by including express confidentiality provisions, including comprehensive definitions of what constitutes confidential business information, in the employment contract.

Furthermore, the employee has the obligation not to disclose personal information he may have acquired while working for the employer. This is a specific application of other laws protecting personal information such as articles 35 to 41 CCQ, article 5 of the Québec *Charter of Human Rights and Freedoms*\(^9\), *An Act respecting the Protection of Personal Information in the Private Sector*\(^10\) or *An Act respecting Access to documents held by public bodies and the Protection of personal information*\(^11\).

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After the Break-Up: The Obligations of Departing Employees

Here are a few examples of information that has been considered confidential:

- commercial or fabrication secrets;
- plans and mock ups related to the development of a new product or technique;
- secret costumer lists;\(^{12}\)
- marketing strategies, business plans, financial data, trade secrets (to the extent they are not lawfully in the public domain).\(^{13}\)

An example of a clear breach of this obligation can be found in *Armanious v. Datex Bar Code Systems Inc.*\(^{14}\) In this decision, the appellants worked as sales representatives for the respondents who were operating a company of importation and distribution of barcode reading machines. The appellants gave their resignation in 2000 and started their own company. In the year preceding the resignation, they had started to develop a scheme in order to steal the respondents’ clients by reducing sales, stealing computer data and erasing this data from the respondents’ computers. This led not only to the respondents’ simultaneous loss of their entire sales team but also to the paralysis of their activities for several months. The Court of Appeal found that, under these circumstances, an injunction precluding the appellants from soliciting the respondents’ clients or using their confidential information for a period of 12 months was reasonable.

**Duration of these Obligations**

Article 2088 para. 2 CCQ states that the obligations of loyalty and discretion continue for a reasonable time after termination which represents the time needed by the employer to face the competition that is created by his former employee.\(^{15}\)

In assessing what a reasonable delay is, the courts will take into account:

- the degree of responsibility or hierarchy held by the former employee;
- the nature of the employee’s behaviour that may be viewed as disloyal or indiscreet;


\(^{14}\) 2001 CanLII 11301 (QC C.A.).

• the nature of the information held by him.¹⁶

However, these obligations are permanent when it comes to personal information and, according to certain authors, for trade secrets.¹⁷

Duties Owed Pursuant to Contract

The duties of discretion and loyalty provided by the law offer some protections against post-employment competitive activities by departing employees. However, in certain circumstances, the employer may be particularly vulnerable. For instance:

• the employee may have or be expected to develop special relationships of confidence and trust with the employer’s personnel, such that the employer will be vulnerable to the employee soliciting or influencing others to terminate their employment;

• the employee may have or be expected to develop special relationships of confidence and trust with the employer’s customers or suppliers, and thus be at risk if the employee solicits them or attempts to divert business opportunities; or

• the employee may have or be expected to obtain confidential business information of such significance and sensitivity that the employer will be vulnerable to the employee making use of or disclosing this information to others.

In such circumstances, the former employer ought to consider contractual restrictions on post-employment activities.

Restrictive Covenants - Types

Employers and employees may include in their employment contracts express restraints or limitations on an employee’s ability to engage in post-termination competitive activities. These obligations are known as restrictive covenants.

There are four common categories of restrictive covenants, which are described in greater detail below:

1. Non-Competition clauses;

2. Non-Disclosure clauses;


3. Non-Solicitation of Employees clauses; and

It is important to note that, to a certain extent, these clauses are limited by article 2089 para. 2 CCQ as to their duration, their geographical scope and the nature of the restricted activities.

**Non-Competition**

The broadest form of restrictive covenant is the Non-Competition covenant. It is intended to limit generally the departing employee’s ability to engage in competitive activities.

**Non-Disclosure**

A Non-Disclosure covenant prevents the employee from disclosing and using the confidential information and trade secrets of his former employer learned while working for that employer. This type of covenant is narrow and specific in its scope and is therefore more likely to be upheld as reasonable by a court.18

**Non-Solicitation of Employees**

A Non-Solicitation of Employees covenant is a covenant designed to limit a departing employee’s ability to solicit or influence other employees to terminate their employment with the former employer. Its aim is to prevent the departing employee from taking advantage of his relationships with other employees to the detriment of the former employer.

**Non-Solicitation of Customers**

A Non-Solicitation of Customers covenant operates so as to prohibit the solicitation by the departing employee of the customers of the former employer for a period of time following the termination of employment. It is intended to prevent the departing employee from taking advantage of any relationships of confidence and trust which he or she developed with these clients to the employer’s detriment.

In cases where the departing employee has relationships of confidence and trust with suppliers, the former employer may wish to expand the Non-Solicitation covenant to include post-employment solicitation of suppliers as well as customers.

Restrictions Provided by Law to Non-Compete Covenants

Article 2089 CCQ imposes certain legal restrictions on Non-Compete covenants by stating the following:

2089. The parties may stipulate in writing and in express terms that, even after the termination of the contract, the employee may neither compete with his employer nor participate in any capacity whatsoever in an enterprise which would then compete with him.

Such a stipulation shall be limited, however, as to time, place and type of employment, to whatever is necessary for the protection of the legitimate interests of the employer.

The burden of proof that the stipulation is valid is on the employer.

Even though, by the phrasing of this article, these restrictions seem to apply only to Non-Compete covenants, the courts and authors have interpreted them as also being the relevant criteria for the evaluation of the reasonableness of all other restrictive clauses which can be assimilated to Non-Compete covenants by their nature. ¹⁹

The determination of reasonableness is dependent on the facts of each particular case. However, certain guidelines emerge from the jurisprudence:

- the clause must be written in express terms and cannot be agreed upon orally;
- the courts will uphold the clauses that are moderate in their restrictions;
- the three limitations (time, space, nature of activity) are interrelated. If a clause restricts a great number of activities, it will have to be more limited in time, etc.;
- each of these three limitations has to be valid for the clause to be valid; ²⁰
- the clause must be limited to what is necessary to protect the legitimate interests of the employer such as the protection of a trade secret or of confidential information detained by a key employee. ²¹

Great care should be taken in the drafting of restrictive covenants and they should not be a standard “add-on” to every employment contract.

²⁰ Ibid., at 364.
²¹ M.-F. BICH, supra., note 3, at 278.
Drafting the Covenant - Clearly Drafted Express Terms

As mentioned above, article 2089 CCQ states that non-competition clauses must be drafted in express terms and must stipulate the scope of the restrictions in question. As a result of these criteria, courts require clauses to be drafted clearly and without ambiguity. If challenged in court, an ambiguous, overbroad or unreasonable clause will be found to be invalid, and an employer will lose the valuable protection of the clause.

Until recently, courts in other provinces demonstrated willingness in some circumstances to overlook ambiguously drafted or unreasonable covenants and to enforce them to the extent found reasonable by the court. British Columbia courts drew from the common law doctrine of notional severance in order to take such an approach to problematic restrictive covenants in.

In a recent decision, Shafron v. KRG Insurance Brokers, the Supreme Court of Canada rejected the use of notional severance to salvage ambiguous or unreasonable restrictive covenants and reaffirmed the general principle that restrictive covenant must be drafted clearly, reasonably and without ambiguity in order to be upheld and enforced by courts. The case involved an employment contract containing a Non-Compete clause that was deemed ambiguous in its geographic scope. The British Columbia Court of Appeal had applied notional severance in order to give meaning to the clause. In rejecting the application of notional severance to restrictive covenants in employment contracts, the Supreme Court of Canada noted that such a practice disadvantages employees by providing no incentive to employers to ensure that a given covenant is reasonable, thereby increasing the risk that an employee will be forced to respect an unreasonable covenant:

[The doctrine of notional severance] invites the employer to impose an unreasonable restrictive covenant on the employee with the only sanction being that if the covenant is found to be unreasonable, the court will still enforce it to the extent of what might validly have been agreed to.

In addition to rejecting the notional severance of restrictive covenants, the court discussed the practice of “blue pencilling” or striking out portions of text, as necessary, in order to salvage what would otherwise be an unreasonable or ambiguous covenant. The court stated that this practice should only be available in very rare circumstances, where the text removed is trivial and not relevant to the main purpose of the restrictive covenant.

The Supreme Court of Canada’s complete rejection of notional severance of restrictive covenants and near-total repudiation of blue penciling of the same served to clarify and entrench the importance of carefully drafted covenants. The case provides an important reminder that ambiguous or unreasonable restrictive covenants in employment contracts will not be enforced.

22 2009 CSC 6.
The *Shafron* decision may even lead to an evolution in Quebec law in spite of its origins in a common law jurisdiction. Prior to the *Shafron* decision, the Quebec Court of Appeal had expressed willingness to partially enforce or salvage clauses know as “descending scope,” “ladder,” or “Russian doll” covenants. Such clauses involve alternate descriptions of the scope of the restrictive covenant and specifically state that if the most broadly expressed covenant is deemed invalid by the court, then the next broadly expressed covenant will be enforceable, and so on.

In *Drouin v. Surplec Inc.*, the Quebec Court of Appeal dealt with a covenant which stated that the employee was not allowed to compete with the employer or solicit his clients and employees for a period of 24 months. The covenant provided, however, that if a 24 month period was deemed to be invalid by the Court, then the period would be reduced to 22 months, and if 22 months was deemed to be invalid by the Court, the period would be reduced to 20 months, etc. The “ladder” of possible durations ended with a proposed 12 month period of restricted competition and solicitation. Justice Chamberland of the Quebec Court of Appeal stated that a clause such as this only allowed an employee to be certain that he had an obligation equivalent to the most minimal obligation which it expressed. He suggested that it might be possible for this minimal threshold (in this case, the 12 month period) to be upheld as a valid restriction, so long as it was considered certain and reasonable in the circumstances.

After *Shafron*, it should be considered most likely that courts throughout Canada, including Quebec courts, will refuse to enforce even a minimal threshold expressed in a “Russian doll” or “ladder” type covenant. A judge of the Ontario Superior Court has recently endorsed such an interpretation, stating that in his opinion “*Shafron* sounds the death knell for descending scope restrictive covenants.” Employers should scrupulously avoid using such clauses.

It is important to distinguish “Russian doll” or “ladder” style clauses from clauses which clearly articulate obligations which change, or, more specifically, dissipate over time. For example, an employer may want to articulate obligations which decrease in geographic scope over a particular period of time. A carefully drafted covenant may accomplish this goal so long as an employee’s obligations at a particular moment in time are reasonable, clear and unambiguous.

Restrictive covenants must be carefully drafted in order to properly protect employers. For further practical information on restrictive covenants, employers are encouraged to consult the checklist contained as an appendix to this paper. Ideally, restrictive covenants in employment contracts should be drafted or reviewed by an employment lawyer.

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24 In this case, the question was theoretical because the event giving rise to the litigation occurred beyond the 12 month period.

Ownership of Inventions

The employer is generally the owner of all inventions, improvements and ideas developed by an employee in the course of the employment. However, employees have certain rights as against the employer pursuant to various provisions in copyright, trade mark and patent law.

It is important, therefore, for any employer engaged in product development, or relying on inventions and unique innovations in its business, to include express provisions in their employment contracts which clarify the employer’s rights and the employee’s corresponding obligations.

These provisions should, at a minimum, include the following:

- a statement of the employer’s rights in the employee’s efforts;
- a requirement that the employee report all ideas and inventions in the course of employment; and
- a requirement that the employee cooperate in assigning ownership to the employer and in applying for protections such as patents, trade marks and copyright.

What are the Options and Legal Processes Available for Enforcing the Duties Owed by Departing Employees to Their Former Employers?

The means by which a former employer proceeds will depend in large part on the ends being sought:

1. If the former employer seeks compensation or damages for losses suffered as a result of the wrongful conduct of a departing employee, the former employer can commence litigation in the courts.

2. If the former employer seeks compliance by the departing employee with his duties, either on an interlocutory basis pending the trial of an action or for an extended period of time thereafter, the former employer must apply to court for an injunction requiring the departing employee to cease all wrongful conduct.

It is possible for the employer to seek both damages and an injunction, especially if the restrictive covenant contains a penal clause that establishes in advance the amount of the indemnity that is due to the employer. However, if the judge considers that the amount is abusive, he can reduce it according to article 1623 para. 2 CCQ.

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Test on an Application for an Interlocutory Injunction

Many cases require quick action by the former employer to prevent a departing employee from starting his own business or joining the business of a competitor. In such cases, it may be necessary for the former employer to apply to the court for an interlocutory injunction. An injunction is a court order prohibiting a party from engaging in wrongful conduct. An interlocutory injunction is an injunction which subsists for a finite period of time or up to the date of trial.

Article 752 of the Code of Civil Procedure (CCP) states that:

752. In addition to an injunction, which he may demand by a motion to institute proceedings, with or without other conclusions, a party may, at the commencement of or during a suit, obtain an interlocutory injunction.

An interlocutory injunction may be granted when the applicant appears to be entitled to it and it is considered to be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.

In order to succeed in an application for an interlocutory injunction against a departing employee, the former employer must present sufficient evidence to satisfy a court that:

- there is appearance of right;
- the former employer would suffer irreparable harm as a result of the departing employee’s wrongful conduct; and
- the balance of inconvenience favours the granting of the injunction.

Appearance of Right

It is not necessary for an applicant to show that the claim will likely succeed. It need only show that the claim is not frivolous or vexatious and that there is a serious question to be tried.

In cases where the granting of an injunction will effectively dispose of the issues between the parties, the court will hold the applicant to a higher standard. In those cases, the applicant must establish a strong prima facie case. Likewise, in cases involving claims of defamation where the effect of the injunction would be to restrain free speech, the courts will grant an injunction only in the clearest of cases.
Irreparable Harm

The applicant must show that it would suffer irreparable harm if its application for an interim injunction was not granted.

The Supreme Court of Canada described the concept of irreparable harm in its 1994 decision in *R.J.R. MacDonald Inc. v. Canada (A.G.)* as follows:

‘Irreparable’ refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include... where one party will suffer permanent market loss or irrevocable damage to its business reputation.

Balance of Inconvenience

The court will weigh the effect on the former employer of not granting the injunction against the effect on the former employee or new employer of granting the injunction.

This part of the test is often determinative of the application. Where there is potential for irreparable harm to both parties, the court will seek a just and equitable balance. Preference will often be given to the status quo, with the court acting against the party who has disturbed it.

Provisional Injunction

An application for an injunction can be brought without notice to the departing employee if the urgency of the situation requires it. This is called a provisional injunction and is defined by article 753 CCP:

753. The application for an interlocutory injunction is made to the court, by written motion, supported by an affidavit affirming the truth of the facts alleged and served upon the opposite party, with a notice of the day when it will be presented. In case of urgency, a judge may nevertheless grant it provisionally even before it has been served. Notwithstanding the foregoing, in no case, except with the consent of the parties, may a provisional injunction exceed 10 days. [Our emphasis]

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The burden on provisional injunctions is higher than the burden imposed on applicants who come before the court after giving notice of their application to the departing employee. An applicant proceeding *ex parte* must persuade the court that there is extraordinary urgency. The applicant also must provide full and frank disclosure of all material facts in its possession, including any evidence which favours the departing employee. Failure to do so can result in the injunction being set aside regardless of the merits of the application.

**Article 2095 CCQ**

A former employer will not be permitted to enforce contractual duties otherwise owed to him by a departing employee if the former employer terminates the employment relationship without cause. Article 2095 CCQ provides:

2095. An employer may not avail himself of a stipulation of non-competition if he has resiliated the contract without a serious reason or if he has himself given the employee such a reason for resiliating the contract.

Employers ought to keep this rule in mind when considering how best to handle the termination of its key employees.

**What Steps can an Employer take to Minimize the Risk and Potential Harm from Competition by Former Employees?**

Litigation is often the only effective means by which a former employer can enforce the duties owed to it by departing employees and in doing so protect its business interests. Swift and forceful action, whether that be through a court proceeding or arbitration, can serve to deter other employees from engaging in similar wrongful activity. However, litigation is time-consuming and expensive, both in terms of the costs that a former employer could expect to pay to its legal team and in terms of the internal human resources that must be committed to the case.

Former employers can seek to minimize the risk of wrongful competitive activity by departing employees, and therefore avoid litigation, by taking the following preventive measures:

1. Approach standard form employment agreements with a high degree of caution. Appropriate time and consideration ought to be given to the terms of the written employment agreement at the outset of the employment relationship and ought to be reassessed at regular intervals throughout the employment relationship so as to ensure the ongoing suitability and enforceability of restrictive covenants and confidentiality provisions.

2. Audit existing employment agreements, especially those in place with key employees, to determine whether the restrictive covenants and confidentiality provisions continue to be...
appropriate and enforceable. Legal advice should be sought before any changes are made as a failure on the part of an employer to provide new consideration could render them enforceable.

3. **Adopt business practices which operate to protect trade relationships and trade secrets.** For example, maintain multiple contacts with clients so that the loss of a single employee is not fatal to the overall relationship, and limit access to confidential business information to identified “need-to-know” employees only.

4. **Adopt policies for the management and protection of confidential business information which are simple and easily comprehensible,** and train employees on these policies at the time they are hired and on a regular basis thereafter.

5. **Monitor employee compliance with such policies,** including, if appropriate, through the use of technology which scans outgoing messages for release of confidential information and mandatory processes for accessing confidential information that cannot be circumvented.

**A Final Word**

*Protection* - of intellectual property, key customer relationships, and the other vital aspects of your business - and *prevention* - of the actions of former employees that can be most damaging - are the keys. To the extent you can improve protection and take preventive measures, the more likely you are to secure your business interests and avoid the costly process and inherent risks of litigation.

Once you understand what you need to protect, and in those cases where the preventive measures are not enough, it is important to consistently enforce the restrictive covenants and other contractual and legal rights and remedies available. Anything less will undermine the integrity and enforceability of your contracts and policies, no matter how carefully crafted.
Appendix: A Checklist of Considerations for Restrictive Covenants

Non-Competition

Is the former employer, by reason of the relationships which departing employee is expected to develop and the trade secrets which he is expected to have access to, vulnerable to competitive activity by the departing employee?

- If so:
  
  (a) For what period of time is the former employer vulnerable? In considering this question, it is important to remember that the courts rarely enforce restrictive covenants which extend beyond a period of two years and that non-competition covenants of such duration are typically enforced only against senior management.

  (b) What is the geographic area in which the former employer is vulnerable? Is it limited to a particular city or sales region? If so, how can that geographic area best be described so that there is no uncertainty as to its limits?

  (c) To what particular activity on the part of the departing employee is the former employer expected to be vulnerable? Is it any activity which is generally competitive with the business of the former employer or a particular activity or business operation?

  (d) Is the scope of the restraint fair, taking into account all of the circumstances? Can the former employer protect its business interests by a lesser form of covenant such as, for example, a Non-Solicitation covenant?

- If not, a Non-Competition covenant is unnecessary and ought not to be included in the employment agreement.

Non-Disclosure

Is the former employer, by reason of the confidential information or trade secrets which the departing employee has access to, vulnerable to the departing employee using or sharing that information with competitors?

- If so, for what period of time is the former employer reasonably expected to be vulnerable, taking into account the nature of the industry and the particular circumstances of the former employer, including for instance the sensitivity of the information held by the employee?
• If not, a Non-Disclosure covenant is unnecessary and ought not to be included in the employment agreement.

Non-Solicitation of Employees

Is the former employer, by reason of the relationships which the departing employee is expected to develop with other employees, vulnerable to the departing employee inducing or influencing its employees to terminate their employment with the former employer?

• If so, for what period of time is the former employer reasonably expected to be vulnerable, taking into account the nature of the industry and the particular circumstances of the former employer, including for instance its usual employment attrition?

• If not, a Non-Solicitation of Employees covenant is unnecessary and ought not to be included in the employment agreement.

Non-Solicitation of Customers

Is the former employer, by reason of the relationships which the departing employee is expected to develop with existing and prospective customers, vulnerable to the departing employee inducing or influencing these customers to not do business with the former employer?

• If so:

  (a) For what period of time is the former employer reasonably expected to be vulnerable taking into account the nature of the industry and the particular circumstances of the former employer, including for instance customer mobility and business cycles?

  (b) How long is it expected for another employee to develop similar relationships with these customers?

  (c) Which customers are at risk? It may be sufficient to limit the restraint to only those customers with whom the departing employee had direct dealings.

• If not, a Non-Solicitation of Customers covenant is unnecessary and ought not to be included in the employment agreement.
Every effort has been made to ensure the accuracy of this publication, but the comments are necessarily of a general nature, are for information purposes only and do not constitute legal advice in any matter whatsoever. Clients are urged to seek specific advice on matters of concern and not rely solely on the text of this publication.
Constructive Dismissal: When "I quit!" becomes "You're fired!"

Amélie Lavertu and Rachel Ravary
Introduction

Many employers are currently faced with unprecedented negative financial and market conditions and business challenges. In an attempt to reduce costs, employers are considering various changes to their workforce. When considering options to reduce overall costs, it is important to remember that if an employer is viewed to have unilaterally changed a fundamental aspect of the employment relationship, constructive dismissal may arise, resulting in additional cost to the employer. Following a brief overview of the law on constructive dismissal, this paper will discuss how to avoid constructive dismissal issues when implementing common cost-cutting measures.

Constructive Dismissal - General Principles

The Supreme Court of Canada has stated that a constructive dismissal occurs when:

(i) the employer unilaterally makes substantial changes to the essential terms of an employee’s (written or implied) contract of employment without the consent of the employee; and

(ii) a reasonable person in the same situation as the employee would have felt the essential terms of the employment contract were being substantially changed.

Where constructive dismissal is found to have occurred, an employee will, in most cases, be entitled to terminate the employment relationship, and treat himself or herself, in all respects, as having been wrongfully dismissed. The employee will thereby be entitled to bring a claim for damages against the employer or seek reinstatement pursuant to section 124 of An Act respecting labour standards (ALS).1

Even if an employer acts with genuine concern for its own interests or the employee, this does not necessarily mean the employer can avoid liability for constructive dismissal. In Farber v. Royal Trust Co.,2 the Supreme Court of Canada held that the fact that an employer acted bona fide and without the intention to dismiss the employee did not prevent the employer from being liable for constructive dismissal when it eliminated the position of a regional manager and offered him another position with no base salary. However, once constructive dismissal is established, courts will consider the intention of the employer in the assessment of damages.3 Evidence supporting abusive behaviour or malicious intent may give rise to moral damages in addition to compensatory damages.4

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1 R.S.Q. c. N-1.1.
3 Ibid.
What is a Substantial Change to an Essential Term of Employment?

In determining whether the changes to the terms of employment are “substantial”, each case must be examined on its own facts. Accordingly, there is no “hard and fast” rule.

Nevertheless, courts have found the following changes resulted in constructive dismissal:

- a reduction in compensation;
- a change in compensation structure (e.g., from salary to commission);
- a reduction in hours of work;
- a reduction/change in sales territory;
- a change in benefits;
- a geographic relocation;
- a change in job duties;
- a change in status;
- a demotion;
- a change in conditions of work.

Not every unilateral change will result in constructive dismissal. Indeed, employers may exercise their managerial authority to implement a wide variety of changes, including changes to the structure of the organization or to its means of production, all of which may ultimately affect employees. Because the line between a legitimate use of direction powers and constructive dismissal varies depending on the terms and conditions of the employment contract, a change that could give rise to a finding of constructive dismissal for one employee might not result in constructive dismissal for another. The success of an allegation of constructive dismissal will depend on all of the circumstances of the employment relationship, as well as on the nature of the change. For example:

- the geographic relocation of an employee would not be a constructive dismissal where the employment agreement gives the employer the right to transfer the employee;

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5 This list is not an exhaustive list of changes that may result in constructive dismissal.

6 In Quebec, these powers are codified under art. 2085, Civil Code of Quebec.
• a change in bonus amount will not be a constructive dismissal if the bonus payment is discretionary;

• a minor change in compensation will not be a constructive dismissal;

• a lateral transfer may not be a constructive dismissal, particularly if compensation arrangements and status remain the same.

Cumulative Effect

Constructive dismissal will usually take place after one significant unilateral change. However, it is possible for the cumulative effect of many changes to result in breach of the employment contract. For example, each of the following may not, on its own, result in constructive dismissal: a 4% reduction in salary; a change from an office with a window to one without; a change in title in the context of reorganization; a change in reporting relationships from the president to the vice president in the context of reorganization. However, if two or more of these changes occur, the chance of the employee successfully claiming constructive dismissal will increase.

In Opdekamp v. Services Ultramar Inc., the Quebec Labour Relations Board held that the combined effect of a series of actions and inactions by an employer resulted in the constructive dismissal of a gas station manager. In that case, the employer held secret meetings with the manager’s subordinates without her knowledge; he forbade the manager from smoking at work despite an established tolerance to smoking within the company; he unduly delayed the confirmation of her vacation; he refused to compensate a sick day and he interfered with the management of personnel. In holding the employer liable for constructive dismissal, the Labour Relations Board also ruled that certain changes to the terms of the employment should not be viewed in isolation.

What Options Does an Employee have in Response to Constructive Dismissal?

An employee who believes that he or she has been constructively dismissed may:

• explicitly agree to the change in employment;

• continue to work under the new terms of employment and thereby “condone” the employer’s action;

• continue to work by clearly stating he or she does not accept the changes and is therefore working without prejudice to his or her position that the employer’s action is constructive dismissal;

• cease working and allege constructive dismissal.

**Strategies that may Trigger Constructive Dismissal Claims**

**Restructuring that Results in Demotion**

A downward change in reporting function does not automatically result in a finding of constructive dismissal. The issue in such cases is how fundamental the employee’s reporting is to the overall employment and whether the overall change is a demotion. In *Lebrun v. Groupe Promutuel, fédération de sociétés mutuelles d’assurance*, an employee was deemed to be constructively dismissed following a demotion from the position of director of actuaries to that of simple actuary. The Court of Quebec noted the change in the employee’s position occurred in the context of legitimate modifications brought by the employer to the company’s organization structure meant to overcome economic difficulties. However, the end result was that the employee occupied a position quite inferior to the one previously held and the Court determined that the employee had been constructively dismissed.

The court in *Lebrun* found that even though the decision may have been made for corporate or financial reasons and there was no intention to harm the employee, constructive dismissal still existed. It should also be noted that in this case, the court qualified the employer’s actions as humiliating and embarrassing for the employee. The employee was forced to work under the direct supervision of a person whom he had himself hired in his position as a director of actuaries. As well, his former private workspace was moved to an area dedicated to interior landscaping.

Whether a downward change in reporting function would give rise to constructive dismissal depends, to a large extent, on whether it results in a loss of prestige, which could be seen as a demotion within the organization. A 1999 Quebec Superior Court decision found that the actions of an employer caused the reduction of the employee’s “overall sphere of influence” and constructive dismissal was established. In that case, friction developed between the plaintiff, a branch director of a distribution company, and the company’s new owner. The new owner downgraded the position of the plaintiff to that of assistant branch director, restricted his access to the pricing of products, and terminated his interest in the

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8 While not common, in some circumstances an employee may continue to work and commence an action alleging constructive dismissal against the employer.


profits generated by the company. The Superior Court ruled those changes reduced the status of the employee within the organization, which amounted to a substantial change to essential work conditions.

Not all restructuring operations that unilaterally affect an employer’s position will give rise to a finding of constructive dismissal. Where the change does not result in a loss of prestige, in a loss of benefits or in a reduction of income, courts may simply defer to the legitimate exercise of the employer’s managerial authority. In *Provost v. Vidéotron Télécom Inc.*\(^{11}\), the Quebec Superior Court dismissed the claim of an employee who was reassigned to a sales position within the company after holding the position of an account manager. The employer had terminated the plaintiff’s earlier position after restructuring its operations. The court ruled the changes to the terms of employment fell within the legitimate scope of the employer’s power to manage his business, as there was no loss of income, prestige or other benefits. “The decision to close a department, to abandon a product or to lay off employees for economic reasons belongs to the employer. (...) It is also well established that in the context of employment relations, the employer always holds management powers. He may decide whether an employee will be reassigned to other tasks.”\(^{12}\)

**Relocation**

The geographical relocation of an employee may give rise to a claim by the employee that he or she has been “constructively dismissed” as a result of the transfer. There is no “hard and fast” rule for determining whether a specific geographic relocation will give rise to a successful claim for constructive dismissal. Each case will depend on its own particular facts, as our courts have yet to establish a “threshold” increase in commuting distance which the courts will apply in determining whether or not a specific geographic relocation gives rise to a constructive dismissal.

In determining whether a transfer or relocation amounts to constructive dismissal, courts have considered the following questions:

(i) Do the terms of the employment contract - either expressly or by implication - entitle the employer to relocate an employee?\(^{13}\)

(ii) Is the proposed geographical relocation reasonable? In assessing the “reasonableness” of the geographical relocation, the court will consider:

a) whether the relocation is accompanied by other alterations of the terms of the employment contract;\(^{14}\)

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\(^{12}\) Ibid.

b) whether the relocation occurs with other substantial changes, such as a demotion, a significant change in job responsibilities, or a reduction in remuneration;¹⁵

c) whether the relocation will impose substantial hardship (i.e. due to family, personal, or financial circumstances) on the employee;¹⁶ and

d) whether the relocation is outside of a reasonable commuting distance.¹⁷

(iii) Did the employer act in good faith and/or in the protection of its legitimate commercial interests? In assessing the “business motives” behind the employer’s decision to relocate, the court will consider:

a) whether the relocation is accompanied by other alterations of the terms of the employment contract;

b) whether there is any evidence that the employer has acted in bad faith (i.e. whether the relocation is an attempt to force the employee to resign or accept a significant reduction in remuneration or job responsibility);

c) whether there are any indications of “good faith” conduct on the part of the employer, particularly in terms of its treatment of the employee(s) at the time of transfer (i.e. whether there has been an offer to pay the employee’s expenses related to the relocation, sufficient notice of the relocation, or increased pay and/or job responsibilities, etc.);

d) whether the employer had a legitimate business rationale for relocating the employee(s).

Importantly, courts are increasingly giving priority to the employer’s need to remain flexible and efficient and to maintain a mobile workforce. Consequently, the courts have become more permissive of employee relocations, particularly where there is evidence of good faith conduct and legitimate business interests driving the relocation.

¹⁷ The relevant distance to measure is both the distance between the new and old workplace and, more importantly, the increased commuting distance that the employee must travel from his/her home to the new workplace.
Assuming that a proposed relocation creates the potential for constructive dismissal claims employers may wish to consider the following steps in order to minimize its exposure to such claims:

- provide reasonable advance notice of the affected employees;
- ensure that the compensation, working conditions and job responsibilities of affected employees are not changed as a result of the relocation;
- educate affected employees about the process and rationale for the relocation (i.e. through employee information sessions or written communications);
- reimburse affected employees for increased commuting costs; and/or
- provide a relocation bonus to affected employees.

**Layoffs**

In Quebec, layoffs are governed by the ALS\(^{18}\) and by the Civil Code of Quebec (CCQ)\(^{19}\) for non-unionized workplaces; and by collective agreements and, to a certain extent by the ALS, for unionized workplaces. In a unionized workplace, most collective agreements spell out the specific requirements for layoffs. In those circumstances, employers must consult the collective agreement and must follow the process outlined therein in consultation with the Union, where appropriate. Note that federally regulated employers have to be concerned about possible deemed terminations, even under a collective agreement.

**Layoffs in a Non-Unionized Workplace**

Pursuant to the ALS, an employer must give its employee written notice before terminating the employment contract or before laying off the employee for more than six months. The length of the notice varies between one week and eight weeks, depending on the length of the employee’s uninterrupted service. The CCQ also provides that an employer must give its employee notice of termination within a reasonable time when terminating a contract of employment with an indeterminate term. According to a certain line of authorities, laying off an employee for more than six months without prior notice may result in a finding of constructive dismissal.\(^{20}\)

In some cases, courts held that an employer’s refusal to recall the employee after a temporary layoff, or to offer the employee the same position upon recall can also constitute constructive dismissal. In *Colangelo v.*

\[\text{References}\]

18 Section 82.
19 Art. 2091.
Aqua Leader Inc.\textsuperscript{21}, the Quebec Labour Court ruled that a layoff carried out in conformity with the law nonetheless constituted a constructive dismissal because the employer failed to recall the employee while recalling many of her colleagues. The employer provided Colangelo with proper notice before laying her off as part of a greater reduction of the company's personnel. Shortly after the layoffs, the employer hired additional workers and recalled some of the workers it had laid off who had less seniority than Colangelo. In these circumstances, the court ordered Colangelo's reinstatement.

In the Cunningham \textit{v. Fonderie Poitras Ltée}\textsuperscript{22} decision, an employee that had 30 years of experience in a plant was laid off. The layoff was the direct result of a decrease of orders, and the employer gave the employee eight weeks of notice, as is provided by the ALS. The employee considered this amount to be insufficient and thus claimed eight months of salary, as well as other pecuniary benefits. The court rendered its decision by highlighting that since a return to work was not foreseeable, the employer should have proceeded with a permanent layoff rather than a temporary layoff. Consequently, the employer should have immediately indemnified the employee. This decision distinguishes itself from others because Justice Bond took into account the employer's behaviour. Indeed, the latter was well aware that the employee would never return to the plant. Therefore, the judge modified the notice period to four months of salary in order to compensate the employee for the stress and inconveniences related to the job hunting period that he underwent.

**Change in Compensation**

Not surprisingly, the law recognizes that compensation is one of the most essential terms of the employment contract and that a reduction in compensation, or a change in the way that total compensation is calculated, will be a substantial change to the employee's contract of employment.\textsuperscript{23}

There is no hard and fast rule as to how great the reduction in compensation must be before it will be considered a substantial change, triggering a potential finding of constructive dismissal. Generally, there is very little tolerance for reductions in salary and the cases recognize the very serious impact on employees of even minor salary reductions. Although there are some cases that suggest that a reduction of anything less than 10% of salary would not be constructive dismissal,\textsuperscript{24} there are other cases where reductions of as little as 3% to 5% of total compensation have been ruled to be substantial changes.\textsuperscript{25} In some cases the courts focus on the percentage change, while other decisions point to the

\textsuperscript{21} REJB 1997-04142 (T.T.).
\textsuperscript{22} D.T.E. 2009T-164 (C.Q.).
\textsuperscript{24} There is no set scale to determine when a reduction in compensation will result in constructive dismissal. A change of less than 5% is not likely to result in constructive dismissal. A change of more than 10% is more likely to result in constructive dismissal. A change of between 5% and 10% is a grey area.
total dollar value - suggesting that the higher the original salary, the smaller the percentage decrease necessary to trigger a finding of constructive dismissal.

Notice of such a change should be provided whenever possible and the change should ideally be implemented across the board. Selective reductions may increase the risk of discrimination claims, particularly when an identifiable group is more significantly affected (e.g. older employees). Also, employees are more likely to feel the reduction is fair if it applies to everyone, and they may, therefore, be less inclined to allege constructive dismissal.

Furthermore, there may be instances where the motivation of the employer in decreasing pay will be a factor. This may turn on whether the pay reduction was a business necessity. For example, whether the reduction was necessary to stave off pending insolvency or whether it was the result of a business (or political) strategy could influence a determination of constructive dismissal. If an employer attempts to justify salary reductions on the grounds of economic necessity, the Court will scrutinize that defence and likely look at all the circumstances surrounding the decision, including alternate means of costs savings and whether the salary reductions were applied throughout the organization or whether a particular individual or group of individuals was selected to bear a disproportionate burden of the reductions.

The following cases summarized below highlight various circumstances where an employee’s compensation has been changed by the employer and the employee has claimed constructive dismissal:

**Change in Salary**

In *Baril v. Investissement Imqua Inc.*, the Quebec Superior Court found that an employee who lost 30% of her income as a result of a restructuring meant to address economic hardship was constructively dismissed. Baril was hired as a restaurant manager. When the restaurant failed to turn out the expected profit, the owner decided to cut Baril’s salary from $40,000 a year to $28,000 a year. Baril opposed the change and resigned. The Court awarded her damages of $23,300, but dismissed her claim for moral damages ruling the proposed changes were not made in bad faith. By contrast, in *Leduc v. Vignola*, the Quebec Superior Court found the termination of an employee’s base salary of $150 a week and the reduction of commission from 20% to 19.6% did not result in constructive dismissal. The court ruled those changes were justified in the context of a legitimate business reorganization.

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Change in Commission Structure

In *Lacoste v. GSF Impeka Inc.*\(^{29}\), the Court of Quebec found an employer had constructively dismissed his sales manager by unilaterally making commissions on sales contingent upon the profitability of the contracts of sale. Lacoste accepted a position as a sales manager with GSF Impeka Inc. after being promised commissions on every new contract. The terms of employment provided that commissions were to be paid one month after each sale. However, less than one month after Lacoste’s first sale, the employer refused to pay the commission, citing the unprofitability of the sale contract. Lacoste quit his job. The court ruled the employer acted in bad faith and awarded Lacoste $30,000 in compensatory damages and $2,000 in moral damages.

Loss of Employment-Related Benefits

In *Leduc v. Scierie Ced-Or Inc.*\(^{30}\), the Quebec Superior Court held an employer liable for constructive dismissal based on a demotion that was ultimately intended to cancel the employee’s share in the profits of the company. Leduc was hired as a general manager pursuant to an employment contract that provided he would benefit from an interest in the company’s profits. The contract also provided for a “golden parachute clause,” whereby Leduc would receive a sum equal to his salary for two years in the event of termination. The employer unilaterally changed Leduc’s position to that of a sales manager, a position that did not entitle the employee to a share of the company’s profits. The Superior Court held the change was constructive dismissal and awarded Leduc $83,000 in damages, the amount he was entitled to under the “golden parachute” clause.

In the context of a takeover, the potential loss of stock options or other employment-related benefits could also trigger a claim of constructive dismissal. While available records show no judicial decisions on this point in Quebec, jurisprudence in other common law provinces suggests courts will consider the economic situation of the employee before and after the takeover to assess whether or not constructive dismissal occurred.

**Employer Defences to Constructive Dismissal Claims**

**Condonation**

Even if an employer changes an essential aspect of the employment relationship, constructive dismissal will not exist if the employer can successfully argue that the employee accepted the change. In *Wermenlinger v. Gestion Financière Talvest Inc.*\(^{31}\), the sales manager of a finance company claimed he was constructively dismissed after the reorganization of the sales territory left him with fewer brokers

\(^{29}\) 2004 QCCQ 50356.


\(^{31}\) D.T.E. 97T-917 (C.S.).
under his direct supervision. The Quebec Superior Court dismissed Wermenlinger’s claim, noting that he had participated in, and assented to, the decision to reorganize the sales territory. The change in the employment relationship was not imposed unilaterally, the court ruled: “If he didn’t agree with the reorganization he could have resigned; the fact that he was a party to the discussions that preceded the decision precludes him from founding an action on its result. (…) For a finding of dismissal, there must be a unilaterally imposed decision by the party in power.”

Reasonable Notice of the Change

Remembering that the test for constructive dismissal is a unilateral substantial change to an essential term of employment without either reasonable notice of the change or the employee’s consent, subject to the potential implications related to the application of section 124 ALS, one way to avoid triggering constructive dismissal is to give the employees reasonable notice of the pending change. Reasonable notice would be similar in length to the amount of notice to which an employee would be entitled upon termination of his or her employment, under the CCQ. Reasonable notice is based on a number of factors including length of service, age, seniority, position, annual salary and availability of comparable alternate employment in the locale where the employee works. Therefore, if it is possible to give the employees advance notice of the pending salary reductions or other impending changes that may be deemed “substantial”, it would significantly minimize the risk of a finding of constructive dismissal.

Duty to Mitigate

An employee has an obligation to mitigate losses arising from a constructive dismissal, which includes both the obligation to make reasonable efforts to find a new job and the obligation to accept reasonable offers of employment. In Fleurexpert Inc. v. Trudel, the Court of Quebec found an employee was constructively dismissed, but that he was not entitled to damages as he failed to mitigate his losses. The employee resigned from a full-time position after a unilateral change in the compensation structure caused a drop in his income. He found a new part-time job immediately after his resignation. The court refused to award him compensatory damages citing his unwillingness to work full-time to make up for the loss of income.

A court will consider all the circumstances in determining whether an employee had an obligation to continue work under the new employment terms in mitigation of his or her losses. A court is likely not to require the employee to continue work for the employer where the employment relationship is acrimonious or otherwise untenable or the change is humiliating or embarrassing for the employee. For example, the obligation to mitigate losses does not require an employee to continue work under new

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32 Art. 2091.
34 2008 QCCQ 6327.
terms that expose him or her to a substantial drop in income or to a loss of status. In Drolet v. Re/Max Quebec Inc.\textsuperscript{35}, the Superior Court held an employee was justified in resigning after her employer announced changes likely to reduce her salary by more than 40%. In D’Amours v. Banque Nationale du Canada\textsuperscript{36}, the Quebec Superior Court held an employee who was demoted after more than 22 years of service did not have an obligation to continue work in mitigation of her losses.

\textbf{Conclusion}

When assessing available cost-savings options in order to protect your workplace during an economic downturn, employers must consider possible constructive dismissal claims. When approaching a potential employment-related change, one of the best ways to ensure its success and to decrease the risk of litigation is to obtain enforceable employee buy-in.

In a non-unionized context, obtaining agreement with large numbers of employees can be more difficult because of the need to ensure there is a properly documented agreement with each employee. Achieving such negotiated changes will be accomplished most easily after a comprehensive communications strategy that ensures employees understand the issues facing the employer, and the limited alternatives available to the employer. Such a strategy should consider the following:

- control the rumour mill with regular, consistent, and open communication;
- have a consistent, single point of contact and communication in order to control and manage the flow of information;
- engage employees in discussions and strategic planning relating to the company’s future;
- provide employees with the tools, resources and training to take on extra duties; and
- encourage employee initiative and innovation.

\textsuperscript{35} 2006 QCCS 1990.
\textsuperscript{36} D.T.E. 98T-1158 (C.S.).
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What’s New in Labour and Employment Law?

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Introduction

The world of labour and employment law is constantly evolving. Over the years, it must adapt to new realities, whether legal, economic or social. This past year was really no different. The purpose of this presentation is to review and report recent developments, specifically in collective dismissals, the management of criminal records as well as impact management of the termination of the employment relationship.

1. Impact of Section 18.2 of the Charter of Human Rights and Freedoms when hiring: the case of Ville de Montréal

The Quebec legislature, in its desire to promote the spirit of rehabilitation and reintegration into society, adopted section 18.2 of the Charter of Human Rights and Freedoms (the “Quebec Charter”) seven years following the implementation of this quasi-constitutional act. This section provides that no one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence.

The influence of the Quebec Charter in the management of labour relations is undeniable, but as we shall see, it extends way beyond the simple employer-employee relationship. Indeed, the employer shall have to take into consideration the content and the scope of rights and freedoms when hiring. Here is a ruling that clearly outlines the current state of the law:

a) The Ruling

In this ruling, the Supreme Court of Canada disposes of the protection of the application of Section 18.2 of the Quebec Charter when hiring. In May 1995, a young woman applied for employment with the Service de police de la Communauté urbaine de Montréal (“SPCUM”). In November of the same year, the SPCUM contacted her to inform her that her application was rejected, without giving any justification for said refusal. Surprised of the outcome of her application, the young woman asked for the reasons behind the rejection of her application. She was told that she did not satisfy the “good moral character” requirement considering her criminal record related to a shoplifting incident that took place in 1990, when she was 21 years old. She pleaded guilty to a charge of theft and was conditionally discharged.

1 Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse), 2008 SCC 48.
Further to a complaint with the Commission des droits de la personne et des droits de la jeunesse, the Human Rights Tribunal had come to the conclusion that there was discrimination based on Section 18.2. In the case of a pardon, the SPCUM could not reject the application on the simple reason of having been found guilty of a criminal offence. The case came before the Court of Appeal, which upheld that ruling.

Justice Deschamps, writing for the majority, came to the same conclusion as prior courts. Madam Justice Tirst concluded that the job of police officer is considered an “employment” by virtue of the law, that the statutory pardon further to a conditional discharge is a pardon and that the rejection of the SPCUM was based solely on the presence of a criminal record.

The Court also determined that s. 20 of the Quebec Charter (the defence based on *bona fide* occupational requirement ("BFOR")) does not apply, when we find ourselves before a case relating to s. 18.2 of the Quebec Charter. The majority confirms previous caselaw by stating that s. 18.2 is an independent provision and people with criminal records must take advantage of the complete benefits under this protection. According to the majority, a person who has received a pardon has a solid immunity and cannot be discriminated against because of a record.

b) The practical consequences of this ruling

This case is interesting for several reasons. First of all, the Supreme Court of Canada is reminding employers of the importance to conduct a real investigation prior to rejecting an application or to dismissing an employee based on having a criminal record. In this case, if the SPCUM had truly documented its refusal and had had reasons other than the sole conviction for shoplifting to reject the application, chances are that this case would not have gone this far. Being found guilty cannot be the only reason to reject employment, but the employer may also demonstrate the absence of “good moral character” through other means.

Finally, it is interesting to note the dissenting opinion written by justice Charron, with the approval of Justice Binnie. Leading case law has always denied the application of s. 20 of the Quebec Charter in cases of discrimination based on the protection of s. 18.2 of the Quebec Charter. However, the dissenting judge states that the current state of the law on this issue does not reflect today’s reality and both provisions must be interpreted jointly, at the risk of creating absurdities. Should an employer, in a contestation based on s. 18.2, be successful in convincing a judge that he is justified in presenting a defence of *bona fide* occupational requirement, then an employer could dismiss or refuse to hire a person with a criminal record and a pardon basing his decision on the fact that there is a rational connection between the conviction and the nature of the employment. Therefore, the mere fact of being found guilty could be sufficient for the employer to refuse to hire or to dismiss an employee. The scope of this dissent is rather theoretical for now but it may be interesting to keep in mind that some judges see in the defence of a BFOR a mechanism that could potentially apply in cases of discrimination based on s. 18.2 of the Quebec Charter.
2. Discrimination based on a criminal record and false declarations at the time of employment: *Cree School Board*

When an employer wishes to fill a position where he believes that the job requires a high degree of integrity, he may use a series of methods to get what he wants, namely relevant questions in the employment form. However, such means must be used effectively for decisive results.

   a) The Ruling

On September 26, 2005, Mr. Wadden applies for a position of “light vehicle operator” and caretaker for an elementary school. The employment form included a question asking if he had ever been found guilty of a penal or criminal offence with a connection with the employment he is applying for, and for which he did not receive a pardon.

To this question, Mr. Wadden answered no. Yet, he had a significant criminal record including a series of offences such as: obstruction of a law enforcement agent, breaking and entering, failure to show up in Court, death threats and illegal possession of a firearm.

Less than one month after his hiring, the School Board discovered the criminal past of the applicant and terminated the employment relationship for having a criminal record related to his job.

Mr. Wadden appealed the employer’s decision. The adjudicator in this case, Mr. Claude Rondeau, after reviewing the evidence, grants Mr. Wadden’s grievance and orders his reinstatement. Facts in the case show that Mr. Wadden did not believe it relevant to disclose his criminal record since he did not see any connection with the job he was applying for and the fact that the employer did not inform him of the details of the job.

In his ruling, adjudicator Rondeau substantiates his argument by putting the offences committed by Mr. Wadden into the context they took place and by analyzing the duties he would have to perform as part of his job. He concluded that Mr. Wadden has very limited contact with children and when he does, these contacts are in the presence of another responsible adult. He concludes that Mr. Wadden did not make a false declaration, as his criminal record is not related to his employment.

The Superior Court of Quebec first contends that the applicable standard of review is the standard of reasonableness. The higher courts must therefore act with the greatest degree of judicial deference in cases of judicial review pertaining to the application of s. 18.2 of the Quebec Charter. And, the court concludes that adjudicator Rondeau acted within his jurisdiction and that his decision is reasonable under the circumstances.

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The Court of Appeal of Quebec sustained the decision of the Superior Court by restating that the applicable standard of review is the standard of reasonableness and that the adjudicator had followed a clearly reasonable and rational thought process. The judge restated that because of the formulation of the question included in the employment form, Mr. Wadden had not produced a false declaration. In this case, the question only addressed a connection between the job and the criminal record, no matter the nature of the criminal record. In the absence of bad faith of the applicant in his answer, and his honest belief that there was no connection between his criminal record and the job he had applied for, the court ruled that it could not conclude to a false declaration.

b) The practical consequences of this ruling

By this ruling, the Court of Appeal of Quebec has extended the application of s. 18.2 of the Quebec Charter, which previous caselaw had closely limited to a very restrictive interpretation. We must keep in mind that the employee had a heavy criminal record and that he applied for a job with a school board, but faced with an unclear question in the employment form and weak evidence that had not convinced anyone of the connection between Mr. Wadden and the children, the courts had no other choice than to conclude that s. 18.2 of the Quebec Charter applied.

An employer who wishes to reject an application where the applicant's record includes a criminal or penal offence must therefore make sure that the duties of the job applied for conflict with the offence committed. An employer can always, should there be no pardon given, dismiss or refuse to hire an employee with a criminal record if the employer can prove that the offences have an objective connection with the employment. In this case, the dismissal was considered as illegal since nothing in the evidence presented could establish this objective connection with the duties of the job.

Furthermore, it is better to adequately formulate the question on the employment form. A specific question on the type of unwanted behaviour will make it easier to come to the conclusion of a false declaration, and then ask for the invalidity of the contract ab initio.

3. First definition of "Unforeseeable Event" in collective dismissals: Les Industries Troie inc. ³

In 2002, the Quebec legislature introduced new provisions with regards to collective dismissals in An Act respecting Labour Standards ("LSA")⁴. Among these provisions, section 84.0.13 par. 3 LSA, provides that an employer, in the case of a superior force or an unforeseeable event, may be exempt from giving notice to dismissed employees. Although the notion of superior force is largely documented in law, the same does not hold for the notion of "unforeseeable event", which, until this ruling, had not received a clear interpretation. Let us analyse what the courts think:

⁴ R.S.Q., c. N-1.1.
a) The Ruling

Justice Bond of the Court of Quebec was to determine if the sudden and drastic loss of contracts in the textile industry could constitute an unforeseeable event. This situation did not in any way represent a superior force. Such a notion could have applied if the plant had been the victim of a major fire that would have lead to its closure. In this case, the judge had the mandate to distinguish between the notion of “superior force” and “unforeseeable event”, on the premise that the legislator is deemed not to speak in vain and that therefore, there must be a difference between these two notions. The basis of this thought process consisted of knowing if the sudden and drastic loss of contracts constituted a foreseeable event that the employer was normally in a position to foresee in light of the elements at hand at the time of these cancellations.

Justice Bond insists on the fact that an “unforeseen event” should not be interpreted as being an “unforeseeable event”. She concludes in the end that Industrie Troie must be exempt from its obligation of giving notice, as even if the loss of contracts was foreseeable, it was unforeseen that so many contracts would be lost in such a short time. The employer acted in good faith by notifying its employees of their dismissal and by giving them individual notices. The employer must therefore be exempt from giving a collective dismissal notice considering the loss of contracts reducing its production by 5,000 pairs of jeans per week, an event that a reasonable and diligent employer in the same circumstances and operating the same type of business would probably not have foreseen.

b) The practical consequences of this ruling

Considering that any exception in law must be interpreted in a restrictive manner and that a drastic loss or reduction in contracts or orders is often foreseeable by the employer, chances are that cases where employers are exempt from giving notice to the minister or paying compensatory indemnity to employees in the case of a collective dismissal further to an unforeseen event will not be frequent.

Nevertheless, as we have seen, in certain specific situations, such exoneration will be possible; the ultimate criterion will be based on the specific facts that lead to the unforeseeable event. In this regard, the employer should ask himself if a reasonably diligent person, under the same circumstances, would normally be in a position to foresee this drastic loss of contracts or orders, and that, in light of the information and data available.

If this is the case, the event may be qualified as unforeseen, and that, even if it is not totally unforeseeable, thus exonerating the employer from paying a collective dismissal indemnity to its employees. An unforeseeable event not having the same criteria as the superior force, the employer will not however be exempt from providing an individual notice or a compensatory indemnity to its employees.
4. Judicial applications for notice of termination in collective dismissals: *Langelier*\(^5\)

Where there is a dismissal or layoff, article 2091 of the *Civil Code of Quebec*\(^6\) ("CCQ") provides that, for a contract with an indeterminate term, the employer must give his employee a notice of termination in reasonable time. Therefore, in most cases, the employer would rather pay compensation in lieu of notice of termination to maintain a good working environment. The CCQ also provides, under article 2092, that an employee may not renounce his right to obtain a notice of termination in reasonable time. It should be noted that article 2091 does not apply to organized labour relations\(^7\) and that the provisions of the LSA on collective dismissals does not apply to senior managerial personnel. What happens when there is a conflict on the length of time of a notice of termination in collective dismissals?

a) The Ruling

Further to the closing of three of its plants, AGC Flat Glass (hereinafter "AGC") proceeds with a collective dismissal. Mr. Langelier, a senior manager for AGC, is 43 years old, bilingual, holds an MBA, performs highly specialized duties in a field where few companies do business, and has been an employee of AGC for 15 years. He is one of the people dismissed. When the dismissal was announced, AGC sent the dismissed managerial personnel an offer of termination conditional upon the execution of a release. Mr. Langelier was the only one of 37 employees to refuse to sign the release.

Mr. Langelier therefore finds himself before the Superior Court and asks for a notice of termination of 24 months, in addition to damages. The attorney for AGC submits that because it is a collective dismissal, Mr. Langelier loses the right to claim a notice of termination if the offer of termination includes a reasonable offer. The same attorney submits that: [translation] "... Dismissed employees are, in a way, lucky that the company chose to terminate its operations because, should they have declared bankruptcy, their compensation would have without a doubt been non-existent". The court rejects this argument and states that the employee is always free to exercise his rights under articles 2091 and 2092 CCQ.

Finally, the court grants a one-year notice of termination and no compensation for damages, in light of the absence of proof of any wrongdoing by the employer.

\(^5\) *Langelier v. AGC Flat Glass North America*, 2009 QCCS 1139.

\(^6\) *Q.S., 1991, c. 64.*

b) The practical consequences of this ruling

This Superior Court ruling reminds us of a fundamental principal in employment terminations. An employee may always refuse the offer of notice of termination proposed by the employer and submit his claim to the courts if he believes that he has a right to greater compensation.

The caselaw criteria to determine the amount of a reasonable notice of termination have been clearly defined for many years. When calculating the notice of termination, the employer must take into account the nature of the employment, the special circumstances in which it is carried on and the duration of the period of work, the number of years of service and the employee’s age. The employer who wants to proceed to a collective dismissal must therefore, in addition to giving individual and collective notices provided for under the LSA, give a reasonable notice of termination to the dismissed employee when he is eligible to such. The latter may always apply to the courts to obtain what he believes he has a right to.

5. What happens to insurance coverage in collective dismissals: Crocs Canada

In this case, adjudicator Marcel Morin was to decide if the employer who proceeds with a collective dismissal has to maintain group insurance coverage for the entire period of notice.

a) The Ruling

On April 15, 2008, Crocs Canada sent a notice to the Minister of Employment and Social Solidarity informing him that it was going to proceed with the collective dismissal of all of its employees who were members of the certification unit as of August 4, 2008. Although the dismissal was to take place in August 2008, the employer notified his employees on April 16 and 17, that the last day of work would actually be April 18, 2008. Therefore, the employer made the decision to suspend the work of its employees and pay them in full the 16-week indemnity in lieu of notice in compliance with the notice sent previously to the Minister. The employees are therefore no longer on the payroll as of April 18, thus giving rise to the termination of group insurance coverage provided for under the collective agreement, which was to terminate on June 1, 2008. Seized with the grievance, adjudicator Marcel Morin was to determine if, further to a collective dismissal, the employer had to maintain, for dismissed employees, the group insurance coverage during the full statutory notice period, notwithstanding the termination of work.

The collective agreement binding both parties provided that the employer agreed to pay the full amount of the monthly insurance premium for each employee on the payroll and member of the bargaining unit. The employer contends that under the provisions of the agreement relating to wages, to be considered an employee, work must be supplied. The employer also contends that the insurance

contract is clear and that to be eligible, an employee must work on a permanent and full-time basis according to a schedule of at least 20 hours per week.

Finally, the employer contends that s. 84.0.8 of the LSA only applies when the employer decides that employees will work out the period of notice of dismissal:

During the time period set out in section 84.0.4, an employer may not change the wages of an employee affected by the collective dismissal or, where applicable, the group insurance and pension plans recognized in the employee’s place of employment without the written consent of that employee or the certified association representing the employee.

The adjudicator concludes that the employer cannot be released of its obligation to pay the insurance premium by not requiring any work during the period of the notice of dismissal. According to the adjudicator, the notion of “regular wages” provided under s. 84.0.13 of the LSA includes the payment of insurance premiums in compliance with the collective agreement. The employer had therefore to continue to pay the insurance premiums until the end of the period of notice, namely August 5, 2008.

b) The practical consequences of this ruling

In a context where collective dismissals are increasingly used by employers, the payment of group insurance premiums must now be considered in the list of expenses incurred in such circumstances. The employer must therefore balance the financial impact of a collective dismissal as a means to reduce its costs instead of using another mechanism such as, for example, lay-offs. In addition, in the event of a collective dismissal, the employer must assess correctly if he chooses or not to require his dismissed employees to work out the period of notice.

It is also important to carefully read the terms and conditions of the “applicable” agreement, namely in this case, the collective agreement. Adjudicator Morin’s conclusion is consistent with a situation where the collective agreement provided expressly that the employer pay for the insurance coverage for his employees. The reading of the insurance contract is also an important contextual interpretation element. In this case, the adjudicator was influenced by a provision in the agreement that read:

[Translation] V) If the participant is no longer working for any other reason than those previously mentioned, the holder may, within thirty-one (31) days of the termination of employment, request the extension of insurance, except salary insurance, for a maximum period of six (6) months from the actual date of termination of employment.

The adjudicator concluded that if the provision had been applied, employees would have been covered during the notice period. However, all insurance contracts and all agreements do not have the same contents; therefore, each situation can be interpreted differently.
6. The notion of contract of employment and sub-contracting: *Dicom Express*\(^9\)

An increasing number of companies choose sub-contracting strategies to decrease their operating costs. Legally however, the relationship between an employer and his sub-contractor is not always clear. In this case, the Court of Appeal of Quebec was to determine if an incorporated “contractor” could be considered as an employee within the meaning of the CCQ.

a) The Ruling

In 1988, Claude Paiement was an employee of Dicom Express inc. ("Dicom"). At Dicom’s request, he incorporated a company that would from then on do business with Dicom. Further to the incorporation of the new company, Dicom gave that company two routes in the Val-d’Or area. In 1998, Mr. Paiement wanted to move to Montreal. He inquired from Dicom if there were any territories available in the region. Dicom mentioned the possibility of a territory in Ville Saint-Laurent. Confident about Dicom’s answer, Mr. Paiement moved to Montreal. After his arrival, Mr. Paiement found out that the territory he wanted was already assigned. Dicom then offered him the St-Bruno area, and then Granby. It did not take long for Mr. Paiement to discover that the new territory was a lot less profitable than anticipated. The latter had a nervous breakdown that kept him from working for a period of 15 months. Upon his return, Dicom advised him that there were no more available territories and that consequently, they had no work for him.

Mr. Paiement filed proceedings against Dicom to claim a termination indemnity, since he considered being an employee of Dicom, the reimbursement of his loss of income since his arrival in Montreal as well as damages related to his breakdown. The Superior Court granted Mr. Paiement’s motion by stating that there is a contract of employment between plaintiff and Dicom due to the close subordination relationship. It dismisses the defence based on the corporate structure by declaring that Dicom had required such a structure from his messengers.

The Court of Appeal of Quebec therefore had to determine if Mr. Paiement was an employee or not within the meaning of the CCQ. The employer states that, in spite of the fact that his sub-contractors have to respect a certain number of rules such as a specific pick-up and delivery schedule at specific banks, messengers must still provide their own vehicles, they can develop their territories and hire employees to help them.

The main difference between the contract of employment and the contract for services, both provided for under the CCQ, resides in the subordination, direction and control of the employer. In this case, it is undisputed that Dicom sets very strict terms and conditions for his sub-contractors and that they are largely dependent on Dicom economically, but they also have great latitude in other aspects. The fact that they can hire employees, such as Mr. Paiement during the 11 years of operation of his company

\(^9\) *Dicom Express inc. v. Paiement*, 2009 QCCA 611.
was a determining element in the decision. The Court of Appeal finally established the applicable framework: economic dependence does not create legal subordination.

As to whether a corporation can be an employee, the general rule established by caselaw says no. Justice Gendreau states however that the court may, sometimes, overlook the corporate veil if the technique of incorporation is a gimmick to discharge the employer from statutory obligations.

b) The practical consequences of this ruling

The consequences of such a ruling are financially significant for companies using sub-contractors. The Court of Appeal has reiterated that the legal relationship between a company and its sub-contractors does not stem from a contract of employment but from a contract for services. In reality, this means that the employer does not have to pay a termination of employment indemnity to its sub-contractors and that he must solely respect the terms and conditions of the agreement between the parties.

The court specifies however that some incorporated entrepreneurs may be considered as employees, if the gimmick is only to avoid the application of the law. However, as soon as an entrepreneur has a certain liberty to act (possibility of hiring employees, management of equipment, minimum schedule flexibility), the courts will treat him as a corporation, and not as an employee.

7. Language abilities and employment: Cossette

Nowadays, no one can dispute the importance of the English language, especially in employment. However, the province of Quebec has specific statutory provisions to preserve the French language. These provisions may, sometimes, cause problems to employers who require that their employees have a solid knowledge of English. Indeed, s. 46 of the Charter of the French Language prohibits any employer to require the knowledge of any language other than French as a condition to obtain an employment, unless the nature of the duties requires such knowledge. Let us analyse how the courts have recently interpreted this provision.

a) The Ruling

In the summer of 2007, Sandra Cossette applied for a position as security agent at the Montreal Casino. At that time, she states having read the requirements of the position, including those regarding the knowledge of the English language, and contended meeting these requirements fully. On October 31 of the same year, she had an interview and was asked to make an appointment with Télé-Université (“Téluq”) for a diagnostic evaluation in English. In November, she was told that her application was denied based on her performance on the English test. Mrs. Cossette then filed a complaint with the

Commission des relations du travail ("CRT") under s. 46 of the Charter of the French Language, believing that she had suffered prejudice by the Casino's decision.

Commissioner Côté-Desbiolles specified that s. 46 does not prohibit employers to require the knowledge of another language than French, but requires an employer to justify such requirement. Although Mrs. Cossette can prove that she has a basic knowledge of the English language, Casino de Montréal argues that a high level of knowledge of the English language is essential for the work of a security agent in its establishment. To do so, the employer demonstrated that 20% of its clientele has another language than French as its first language, that the objectives sought by the Casino are to extend the diversity of the clientele and the responsibilities of the position (communication with customers, intervention in specific and stressful situations) create a real need for a high level of knowledge of the English language. The Commissioner admits that the employer's burden of proof has been met as to the languages requirements.

Considering that the evaluation was done by a specialized external firm, plaintiff did not challenge the results of the test and therefore, the commissioner rejected Mrs. Cossette's complaint.

b) The practical consequences of this ruling

The CRT confirms the position of previous caselaw. The ruling shows that the burden of proof required from the employer is not very demanding and the courts quickly acknowledge the importance of knowing a second language. It is however undeniable that a requirement for high-level bilingualism must be justified by the position. If the employee does not have to interact in another language than French in his job, the employer cannot require the knowledge of another language.

To avoid potential conflicts on the evaluation of knowledge, we believe that, as in this case, it would be better to assign this aspect of pre-employment to experts. Imposing a specific level of knowledge is advantageous as it creates the same standard for all, and it will be easier to defend a specific degree of knowledge than an arbitrary evaluation.

8. Must we pay for our employees' permits to practice? Canadian Bonded Credits Ltd. 12

In 2002, Quebec legislature adopted s. 85.1 of the LSA to make sure employees receive their full wages and protect them against unjustified requirements by the employer that would result in deducting from their salary various types of contributions. S.85.1 of the LSA reads as follows:

85.1. Where an employer requires the use of material, equipment, raw materials or merchandise in the performance of a contract, the

employer must furnish them free of charge to an employee who is paid the minimum wage.

The employer cannot require an amount of money from an employee for the purchase, use or maintenance of material, equipment, raw materials or merchandise if the payment would cause the employee to receive less than the minimum wage.

The employer cannot require an amount of money from an employee to pay for expenses related to the operations and mandatory employment-related costs of the enterprise.

Quebec courts had never had the opportunity to address the notion of “expenses related to the operations and mandatory employment-related costs of the enterprise” included under paragraph 3 of s. 85.1 of the LSA. Here is how the Court of Appeal of Quebec analysed this section.

a) The Ruling

Canadian Bonded Credits Limited (“CBCL”) is a collection agency. In Canada, the title of collection agent is regulated and therefore requires a permit to perform the duties of the position. CBCL usually pays for the cost of the permit (approximately $800) and deducts $50 per week from the wages of the agents to be reimbursed for said expense. The distinctive element of this permit is that it cannot be transferred and is reserved for the performance of the duties of collection agent within the agency only. Unlike lawyers, for example, they cannot work for other establishments without getting another permit for this other establishment.

Plaintiffs are two former agents who, after their resignations, filed a complaint with the Commission des normes du travail (“CNT”) about this practice of payroll deductions from CBCL, a practice they deemed non compliant with s. 85.1 of the LSA. The Court of Appeal therefore had to define the terms “expenses related to the operations of the enterprise”.

Chief Justice Michel Robert confirms the ruling of the Superior Court by dismissing the appeal and condemning the practice of CBCL. He concludes that the expression “expenses related to the operations of the enterprise” refers to the expenses related to the normal activities of the enterprise in the realization of its main objective. Considering that the collection agent does not personally benefit from his permit outside its employer-employee relationship, it must be concluded that the cost of the permit is not related to the individual but rather is an integral part of the operations of the enterprise. CBCL cannot operate without hiring collection agents.
b) The practical consequences of this ruling

The Court of Appeal seems to have established an essential criterion, namely if the employer must pay or not the permit to practice of his employees. From now on, an employer faced with this situation will have to ask himself if the permit to practice is exclusively linked to his establishment or if the employee can personally benefit from the permit by exercising his profession in other enterprises. In his ruling, Justice Robert gives out the example of a driver who gets his driver’s licence solely for himself. His permit can be used in various situations, even outside the employer-employee relationship. In the case of drivers, nothing requires the employer to pay for their permits and he can proceed by payroll deductions to pay the costs incurred to obtain the driver’s permit.

9. How to use the right strategy in a non-competition clause: Shafron

In a context where specialized labour is quickly growing, it has become paramount for employers to keep a certain “control” on the actions of their former employees. The CCQ provides that the employer may contractually or expressly anticipate a non-competition clause with his employee.

2089. The parties may stipulate in writing and in express terms that, even after the termination of the contract, the employee may neither compete with his employer nor participate in any capacity whatsoever in an enterprise which would then compete with him.

Such a stipulation shall be limited, however, as to time, place and type of employment, to whatever is necessary for the protection of the legitimate interests of the employer.

The burden of proof that the stipulation is valid is on the employer.

However, such a clause must be used reasonably and be adapted to the reality of each employee to avoid being invalidated by the courts. The clause must not be too aggressive; it must provide for a reasonable non-competition period of time, over a reasonable territory and covering a specific type of work, necessary for the protection of the legitimate interests of the employer. If one of these criteria is not fulfilled, could the courts simply redraft it in a manner deemed more reasonable?

a) The Ruling

Mr. Shafron has been working for an insurance company called KRG since 1987. From 1987 through 2001, each of his contracts of employment included a non-competition clause preventing him from working within the “Metropolitan City of Vancouver” during the three years following his departure. In

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2001, Mr. Shafron leaves KRG for another insurance agency located in Richmond, in the suburbs of Vancouver. KRG launched a civil suit against him claiming that he was in breach of the non-competition clause.

The trial judge dismissed the action stating that the term "Metropolitan City of Vancouver" was neither clear, nor specific, nor reasonable. Nevertheless, the British Columbia Court of Appeal came to the conclusion that the non-competition clause was applicable by using the doctrine of notional severance, namely by reading down the inapplicable clause to make it applicable. The court thus interpreted the clause as meaning the City of Vancouver and adjoining municipalities.

The Supreme Court of Canada was to consider whether such practice by the courts was acceptable. Justice Rothstein, in a unanimous decision, rejected the doctrine of notional severance used by the Court of Appeal. The main reason behind this decision lies on the determination that employers are not prone to draft abusive clauses expecting courts to remove the unreasonable features thereof.

The court is neither open to the use of the blue-pencil rule, which consists in striking out a portion of a clause to make it applicable. Justice Rothstein considers that this doctrine should be used sparingly and solely in cases where the portion severed is unnecessary and is not part of the main subject of the clause.

b) The practical consequences of this ruling

This decision of the Supreme Court of Canada confirms that it is possible to rewrite a clause or to interpret it in a way to be deemed reasonable. In Quebec, such a conclusion reinforces previous caselaw. The wording of article 2089 CCQ already required that the clause be drafted in express terms but the Shafron decision consolidates this vision. The employer must therefore be extremely vigilant when drafting a non-competition clause. Should the territorial scope, time period or type of work be deemed unreasonable, the whole clause will be deemed invalid and the desired objective, namely the "control" over the former employee, will be completely offset?

10. Does the notice of termination apply to employees also? RBC Dominion Securities

We often hear about the notice of termination that the employer must give employees prior to terminating their employment relationship, but we must never lose sight that this obligation is not only the employer's. Employees also have obligations towards their employers and cannot act one-sided without being concerned with the consequences of their departure for the employer. Article 1375 CCQ requires the employee to conduct himself in good faith and honestly towards his employer:

The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.

Article 2088 CCQ also deals with the employee’s obligation of faithfulness, including his obligation to respect the confidentiality of his work:

2088. The employee is bound not only to carry on his work with prudence and diligence, but also to act faithfully and honestly and not to use any confidential information he may obtain in carrying on or in the course of his work.

These obligations continue for a reasonable time after cessation of the contract, and permanently where the information concerns the reputation and private life of another person.

This obligation of faithfulness will vary in proportion with the level of importance the employee has within the company. The higher the employee is, the more he will have to act faithfully towards his employer.

a) The Ruling

Don Delamont is an RBC branch manager in Cranbrook, British Columbia. Merrill Lynch Canada, a direct competitor, approaches him to organize a massive departure of employees towards his branch. Mr. Delamont then coordinates the RBC employees’ departure plan without the employer’s knowledge. In November 2000, the majority of RBC investment advisors, with the exception of two junior advisors, leave to work for Merrill Lynch, leaving the branch in near collapse. Although none of the employees had a non-competition clause in their contract of employment, RBC launched a civil action to claim compensatory, punitive and exemplary damages.

The B.C. Supreme Court ruled that the employees had not respected their obligations to give reasonable notice of termination and had competed unfairly against RBC. Justice Holmes came to the conclusion that the employees did not have any fiduciary obligations to RBC but that they had a general obligation not to compete unfairly. Merrill Lynch was also condemned to pay punitive damages for having unjustly copied confidential records. As for the B.C. Court of Appeal, it reversed some of the damages for the advisors’ unfair competition.

The Supreme Court of Canada partially reinstates the awards of the trial judge and states that an employee terminating his or her employment may be liable to damages for failure to give reasonable

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notice and for breach of specific residual duties, like the duty of confidentiality. Subject to these duties, the employee is free to compete against the former employer. The Court does not condemn the investment advisors to damages for unfair competition, as they did not have fiduciary obligations. The advisors were however condemned to damages for failure to have given notice. The Supreme Court of Canada also condemned Mr. Delamont, the advisors and Merrill Lynch, to compensate RBC for the financial losses for the next five years following their departure.

b) The practical consequences of this ruling

This ruling was rendered under the applicable law in British Columbia. However, the teachings of this decision can easily be applied in the province of Quebec where article 2091 CCQ reads:

2091. Either party to a contract with an indeterminate term may terminate it by giving notice of termination to the other party.

The notice of termination shall be given in reasonable time, taking into account, in particular, the nature of the employment, the special circumstances in which it is carried on and the duration of the period of work.

For an employer operating in a highly competitive industry, the knowledge of recourses available to employers is paramount. This decision reminds us that the obligation of giving notice of termination also applies to the employee and, where an employer suffers serious prejudice further to the employee's departure, he may apply to the courts for an award. Furthermore, in a case where a mass exit leads to significant losses for the enterprise, courts may conclude to bad faith and condemn employees to damages.

11. New Developments on the Issue of Clauses limiting the transfer of work: the Parmalat Canada inc. case

It is already well established in the case law that Article 45 of the Labour Code is only applicable in Quebec and has no extra-territorial reach. Consequently, the employer may sell, assign or transfer either a part, or the totality, of his operations to another province, and this, without affecting the transfer of the certification or of the collective agreement, as the case may be.

However, can the provisions of a collective agreement limit an employer’s right to transfer work performed in an establishment located in Québec to one of its other establishment located outside of the province?

In the case *Parmalat Canada v. Tremblay*¹⁷, the Superior Court of Quebec recently considered this issue, in the context of a review of an arbitration award that had validated the union's position.

a) The arbitrator’s decision

The union was certified to represent all office and laboratory employees, with the exception of the management secretary of the company, Les Aliments Parmalat Inc. In addition, the accreditation certificate indicated the address of the factory in Victoriaville.

The relevant article of the collective agreement provides:

> “2.02 An employee excluded from the bargaining unit shall not carry out work usually carried out by an employee if this could result in the lay-off or in the continuation of the lay-off of an employee.”

[Translation]

The parties had asked an arbitrator to determine whether Parmalat had the right to transfer work carried out by an employee in the Victoriaville factory, to a factory located in Ontario, with the understanding that this could result in lay-offs.

The arbitrator concluded that the employer could not act in such a manner and held that the collective agreement clause that forbade the transfer of work to employees outside the bargaining unit applied not only to the establishment in Victoriaville, but also to any other establishment, even if located outside Québec. Surprisingly, the arbitrator decided that such a collective agreement clause, irrespective of the context in which it had been imposed, should serve to protect the employment of employees covered by the accreditation certificate, regardless of where they are situated.

b) The Superior Court decision

The employer asked the Superior Court to review the decision of the arbitrator for several reasons, raising, in particular, its alleged extraterritorial reach.

Firstly, the Court noted that while the inclusion of the civic address in the text of the agreement was unprecedented in other collective agreements, this mere fact could not necessarily ground the conclusion that the parties intended to limit the reach of the contractual clauses to the factory in Victoriaville. In this regard, it should be noted that Parmalat had “inherited” both the collective agreement and the certification, following the purchase of the factory from Lactantia Ltd. At the time of the purchase, there was but one establishment. The Court concluded that the parties were considered to have taken into account the new reality of the business.

¹⁷ D.T.E. 2009T-665
The Court also dismissed the employer's argument with respect to the extra-territorial reach of the arbitrator's decision. The Court concluded that the employer had contractually limited his freedom to outsource tasks to other employees outside the bargaining unit. Employees outside the bargaining unit were held to include not only employees of the establishment identified by the collective agreement, but also employees of any other of the employer’s establishments.

According to the Court, the arbitrator’s interpretation of such an undertaking affects in no way the geographical reach of the accreditation certificate. Rather, the undertaking merely serves to protect the employment of the persons working in the certified establishment.

c) Practical consequences of this decision

This decision demonstrates the particular attention that employers must give to the provisions of a collective agreement which address outsourcing tasks. The extraterritorial reach of such a clause shall not be sufficient to limit its application; the employer who wishes to control subcontracting or outsourcing, with respect to one establishment or geographic region, will have to do so using express terms.

12. Reinforcement of the Pay Equity Act

a) History

The Pay Equity Act\(^{18}\) ("PEA"), which was unanimously adopted by the National Assembly on November 21, 1996, was adopted with the purpose of redressing the differences in compensation due to the systematic gender discrimination suffered by persons who occupy positions in predominantly female job classes. Ten years after the adoption of the PEA, the Rapport du ministre du Travail sur la mise en œuvre de la Loi sur l’équité salariale revealed that one out of every two businesses subject to the PEA had not completed or even begun its pay equity assessment.

In February 2008, following a consultation during a parliamentary commission at the National Assembly, a unanimous conclusion was reached specifying the necessity to modify and modernize the PEA. Representatives from women’s rights groups and unions spoke out by saying that the PEA was not sufficiently complied with while numerous employers expressed their concerns with regard to the obstacles that they faced while trying to apply the PEA. Therefore, on May 27, 2009, the National Assembly of Québec unanimously adopted Bill no 25, An Act to Amend the Pay Equity Act.

\(^{18}\) L.R.Q., c. E-12.001.
b) Modifications

Bill no 25 contains an obligation for businesses to complete, if this has not already been done, a first pay equity assessment by December 31, 2010, giving an additional delay to the employers who had not yet completed this assessment.\(^{19}\)

Moreover, businesses whose number of employees reaches 10 or more in the course of a given year (from January to December) become subject to the PEA.\(^{20}\)

Also, the new PEA provisions will regulate the employer’s maintenance obligations. Indeed, pay equity audits will have to be conducted every five (5) years.\(^{21}\)

c) The practical consequences of these modifications

As of January 1, 2011, businesses that will not have complied with the new provisions and completed their pay equity assessment will most likely receive complaints from their employees. In those cases, businesses will have to pay retroactively not only the adjustment that they should have paid in due time, including the interest, but also an additional indemnity.

\(^{19}\) Section 46 of Bill 25.
\(^{20}\) PEA, Sections 4 and 6.
\(^{21}\) Ibid., Section 76.1.
Every effort has been made to ensure the accuracy of this publication, but the comments are necessarily of a general nature, are for information purposes only and do not constitute legal advice in any matter whatsoever. Clients are urged to seek specific advice on matters of concern and not rely solely on the text of this publication.
Collective Bargaining in Québec

The Rules

Bargaining Notice

Unless another period is provided by the parties, notice to commence bargaining can be served when 90 days or less are left in the term of the current collective agreement or the expiration of an arbitration award made in lieu of a collective agreement. However, if notice is not given, the Labour Code (the “Code”) deems notice to have been given the day of the expiration of the collective agreement.

In the specific case of a newly certified association that has not given notice, the notice to commence bargaining is deemed to have been received 90 days after the date the association obtained certification.

Once a notice to commence collective bargaining has been served, the union and the employer are to begin “good faith” bargaining immediately (once the notice has been received).

Bargaining in Good Faith

The requirement for good faith bargaining generally means that both parties must be sincere in their attempts to reach an agreement. This includes meeting with the other side and making every reasonable effort to conclude an agreement. The bargaining process calls for a certain amount of give and take. Failure to agree with the other side's bargaining demands does not, in itself, mean that a party is not bargaining in good faith. However, a deliberate strategy by either party to prevent reaching an agreement is considered to be bad faith bargaining. If one party engages in that kind of conduct, the other party can lodge an unfair labour practice complaint with the Commission des relations du travail (the “CRT”), unless an arbitrator was nominated to commence collective bargaining of a first collective agreement.

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2 Ibid., art. 52.2 para. 1.
3 Ibid., art. 52.2 para. 2.
4 Ibid., art. 53.
Communicating with Employees

The employer is free to communicate its views on any matter provided that it does not use “intimidation or coercion” under the Code.8

The right of the employer to communicate directly with employees during collective bargaining will be interpreted in light of:

- the union’s exclusive bargaining authority, which generally means the employer cannot negotiate directly or individually with employees and affect the credibility of the union; and
- the unfair labour practice provisions of the Code.

See “Communication Strategy” below.

Bargaining to Impasse

While the union and employer are given wide latitude to bargain concerning terms and conditions of employment, they are not permitted to bargain to impasse matters that are inconsistent with public order and the provisions of laws such as the Code, or the Canadian Charter of Rights and Freedoms (the “Canadian Charter”) and the Charter of Human Rights and Freedoms (the “Québec Charter”).10 Any attempt to bargain such matters to impasse may be found to be bargaining in bad faith. However, the Code does not impose a bargaining process in order to reach a consensus. The parties’ only obligation is to negotiate with diligence and good faith.11

Required Provisions

Duration

The Code provides that every collective agreement must have a term of at least one year, although the parties are free to agree to a longer term and usually do so. The duration of a first collective agreement

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11 Labour Code, supra note 1, at art. 53; F. Morin, J.-Y. Brière & D. Roux, supra note 9 at 1022-1024, n. IV-102.
12 Labour Code, supra note 1, at art. 65 para. 1.
must not exceed three years\textsuperscript{13}. The duration of any other collective agreement can be fixed by the parties for a longer term (if the parties do not decide of a specific term, the agreement is presumed to be in force for one year.)\textsuperscript{14}. During the life of the agreement, changes to any of its provisions can be made only with the consent of both the union and the employer.

**Content of the Collective Agreement and Sufficient Cause for Dismissal**

The Code does not impose a particular content to the collective agreement. However, no provisions of the collective agreement can contravene to the labour standards contained in *An Act Respecting Labour Standards*\textsuperscript{15} and the rights protected by the Canadian Charter and the Québec Charter. These rules are of public order and will apply if no agreement or decree grants an employee a more advantageous condition of employment\textsuperscript{16}.

**Conciliation and Arbitration**

Either party may apply for conciliation under art. 54 of the Code at any stage of the negotiations. The Minister of Labour (the “Minister”), upon receiving such request, must designate a conciliation officer\textsuperscript{17}.

The Minister can also appoint, on his or her own initiative, a conciliation officer in a collective bargaining dispute if he or she feels that such an officer will likely assist the parties in reaching a collective agreement\textsuperscript{18}.

The conciliation officer meets with the parties and works on resolving the areas of disagreement for a new collective agreement. The right to strike or to a lock-out shall be acquired 90 days after the receipt of the notice to bargain or of the assumed date of receipt and this even though a conciliator is involved in the negotiation. The parties shall then choose between continuing to negotiate with the support of the officer even if a strike or lock-out is declared according to the Code\textsuperscript{19}.

Both the union and the employer, by mutual consent, could also submit their dispute to an arbitrator to avoid the acquisition of the right to strike or to lock-out at the end of the 90-day time limit\textsuperscript{20}. In such a case, the arbitrator’s award has the same effect of a collective agreement signed by the parties\textsuperscript{21}.

\textsuperscript{13} *Ibid.*, art. 65 para. 3.
\textsuperscript{14} *Ibid.*, art. 66.
\textsuperscript{15} R.S.Q. c. N-1.1.
\textsuperscript{16} *Ibid.*, arts. 93-94.
\textsuperscript{17} *Ibid.*, art. 54.
\textsuperscript{18} *Ibid.*, art. 55.
\textsuperscript{19} *Ibid.*, art. 58; F. Morin, J.-Y. Brière and D. Roux, *supra* note 9, at 1029-1031 n. IV-106.
\textsuperscript{20} *Labour Code*, *supra* note 1, at art. 58.
However, in the specific case of the bargaining of a first collective agreement, one party can submit by itself the dispute to an arbitrator after the intervention of the conciliator has not been successful\(^\text{22}\). The parties may then agree upon one of the matters of the dispute and their agreement shall be recorded in the arbitration award\(^\text{23}\).

**Last Offer Vote**

If collective bargaining is unsuccessful, even during a strike, the employer can ask the CRT for a vote by the employees in the bargaining unit on the employer's last offer received by the union during bargaining\(^\text{24}\). This extraordinary option will only be available if the CRT considers “that it may foster the negotiation or making of a collective agreement”\(^\text{25}\). The mere persistence of the work related conflict should not constitute a sufficient purpose\(^\text{26}\). The existence of an impasse is required\(^\text{27}\).

Where the vote favours acceptance of the offer, the terms of the offer voted upon should logically become the new collective agreement between the parties\(^\text{28}\). The employer can only require one last offer vote in the same round of bargaining\(^\text{29}\).

In the case of the bargaining of a first collective agreement, the CRT cannot order a secret ballot when the Minister has already submitted a dispute to an arbitrator\(^\text{30}\). At that point, the arbitrator may decide the content of the collective agreement and its decision is binding on the union and employer(s)\(^\text{31}\).

\(^{21}\) Ibid., art. 93.
\(^{22}\) Ibid., art. 93.1.
\(^{23}\) Ibid., art. 93.7.
\(^{24}\) Ibid., art. 58.2; \textit{ABB inc., division des transformateurs v. Métallurgistes unis d'Amérique, section locale 9486}, D.T.E. 2006T-681 (C.R.T.).
\(^{26}\) F. Morin, J.-Y. Brière & D. Roux, supra note 9, at 1069-1071, n. IV-126.
\(^{27}\) \textit{ABB inc., division des transformateurs v. Métallurgistes unis d'Amérique, section locale 9486}, supra note 24.
\(^{29}\) \textit{Labour Code}, supra note 1, at art. 58.2 para. 2.
\(^{30}\) Ibid., arts. 93.1-93.9; \textit{Gingras v. Syndicat des chauffeurs d'autobus scolaires, région de Québec (CSD)}, D.T.E. 2003T-768 (C.R.T.); \textit{Cinéma Famous Players inc. v. Alliance internationale des employés de scène de théâtre et de cinéma des États-Unis et du Canada (IATSE), section locale 523, Québec}, D.T.E. 2005T-561 (C.R.T.); F. Morin, J.-Y. Brière & D. Roux, supra note 9, at 1094-1095, n. IV-146.
\(^{31}\) \textit{Labour Code}, supra note 1, at arts. 67, 68 & 95.4.
**Strike or Lock-out**

**Requirements for a Strike or Lock-out**

Before there can be a lawful strike or lock-out:\(^{32}\):

- an association of employees must be certified;
- the term of the collective agreement must have expired\(^ {33}\);
- the delay of 90 days since the reception of the notice to commence bargaining or since it was deemed to have been received must have elapsed\(^ {34}\);
- the union must get majority support for a strike by way of a properly conducted secret ballot vote. (The non respect of this condition does not change the legality of the strike or lock-out. Only penal provisions may apply.)\(^ {35}\).

Once these steps are realised, whichever comes later, the union or employer may, but need not, commence strike or lock-out action at any time.

The union declaring a strike or the employer declaring a lock-out must give a notice to the Minister within 48 hours of declaring the strike or lock-out (the absence of notice does not change the legality of the strike or lock-out\(^ {36}\)).

If any of the preconditions mentioned above are not met and a strike or lock-out is nevertheless declared, an application may be made to the CRT\(^ {37}\) to have the strike or lock-out declared illegal. A variety of remedies, including cease and desist orders, are available to the CRT\(^ {38}\). Furthermore, penal provisions may apply to all participants to a strike or lock-out in violation of the provisions of the Code\(^ {39}\).

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\(^{34}\) *Ibid.*, art. 58.2.


\(^{36}\) * Syndicat des employées et employés des magasins Zellers d’Alma et de Chicoutimi (CSN) v. Turcotte*, supra note 35.


\(^{39}\) *Ibid.*, art. 142.
What is a “Strike” and How Can the Employer Respond?

Any concerted cessation of work with the actual or intended effect of limiting production or service is a “strike” and any such activity prior to meeting most of the requirements above is illegal. A complaint may be made to the CRT in the event of illegal strike activity.

Once a motion for certification is submitted by an association of employees, the employer cannot change the conditions of employment of its employees unless they obtain the certified association’s consent. The same rule applies at the expiration of the collective agreement. In fact, even at that time, the employer has limited rights to manage differently the workforce and to require proper performance of work duties. It must respect the status quo.

Once the requirements for a legal strike have been met, strike activity may be a complete walkout or boycott to convince the employer to accept the employees’ demands. Limited strike activity and slackening of work designed to limit production such as occasional work stoppages, slowdowns, refusals to do certain types of work or overtime are strictly prohibited by the Code. Penal provisions may apply in these specific cases.

The employer’s ability to require the work to be done is restricted if the strike is legal. The employer’s options are:

- have the work done by non-bargaining unit personnel (subject to restrictions on using replacement workers);
- lock-out the bargaining unit employees.

Replacement Workers

During a lock-out or a legal strike, an employer cannot use any person to do bargaining unit work if the person was hired between the day the negotiation stage began (by the reception of the notice to commence bargaining) and the end of the strike or lock-out. Nor can the employer use an employee who ordinarily works at another of the employer’s places of operations or a non-union employee from the

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40 Ibid., art. 59 para. 1.
41 Ibid., art. 59 para. 2.
43 Labour Code, supra note 1, at art. 142.
44 Ibid., arts. 53 & 109.1 a).
same place of operations\textsuperscript{46} to discharge the duties of an employee who is a member of the bargaining unit on strike. However, an employer could, under certain circumstances, utilize a person in the establishment, other than an employee (a manager for example), to accomplish these tasks\textsuperscript{47}.

**Picketing**

When there is a legal strike or lock-out, the union can picket the place or places where bargaining unit work is done under the control or direction of the employer. In fact, picketing is a component of the freedom of expression\textsuperscript{48}. It may also picket at another site where the employer is having bargaining unit work done that, but for the strike, would have been done at the employer’s premises, or where an “ally” (a person who is assisting the employer in a lock-out or in resisting a strike) operates.

A union can even picket the place of a third party in link with the work-related conflict, such as customers and suppliers. Of course, this picketing must be done peacefully, with respect of the limits of the freedom of expression (without any acts of violence and intimidation and without infringing the rights of property)\textsuperscript{49}.

**Filing the Collective Agreement**

The Code requires the filing of two originals or two true copies of the collective agreement and its schedules with the Minister within 60 days of the signing of the collective agreement or of any amendment to it. The default of filing these originals or true copies in this time limit gives the right to certification to other associations. Such filing has retroactive effect to the date provided in the collective agreement for its coming into force or to the date of the signing of the collective agreement\textsuperscript{50}.

**Planning For the Best / Preparing for the Worst**

**Do Your Homework**

Prior to bargaining, there are a number of steps you should take to ensure that you have obtained and considered the information you need to be ready to bargain, to explain and evaluate your proposals or to respond to the union’s proposals.

1. Collect and review internal data on grievances/arbitrations.

2. Collect data with respect to the bargaining unit and relevant cost issues, including:

\textsuperscript{46} Ibid., art. 109.1 g).

\textsuperscript{47} Ibid.


\textsuperscript{49} Ibid., para. 38 & ss., 68, 73 & ss. & 78; F. Morin, J.-Y. Brière & D. Roux, supra note 9, at 1058-1065, n. IV-121-122.

\textsuperscript{50} Labour Code, supra note 1, at art. 72.
• benefits costs and claim rates,

• sick leave costs,

• overtime costs by classification, location and shift,

• total average compensation per worker and breakdown by regular wage, overtime, additional compensation (such as productivity bonuses, shift premiums) and benefits,

• total number of employees with a breakdown by shift and classification,

• overall cost of shift differentials, emergency recall and other special pay and breakdown by classification and shift,

• vacation costs,

• absenteeism rate,

• accident rate by classification, location and shift, and

• demographic data of bargaining unit by sex, age and seniority.

3. Obtain a legal review of the existing collective agreement, particularly with respect to changes to applicable legislation such as employment standards and employment insurance, and the effect of recent arbitral/court decisions.

4. Gather and review current information on terms of settlement in the industry - useful sources include:

   • Commission des relations du travail (http://www.crt.gouv.qc.ca/publications.asp#docinfo)


   • Statistics Canada (www.statcan.ca)

   • Conference Board of Canada (www.conferenceboard.ca)

5. Review company short and long term business goals to ensure alignment of bargaining positions and goals.
Develop Company Goals and Proposals

Identification of the company’s goals in bargaining is a key part of the planning process. The goals should align with anticipated economic conditions and the company’s long range business plan.

In developing proposals and in bargaining, consider that the union and company usually have a fundamentally different view of the collective agreement.

Unions tend to believe a collective agreement is permissive, and that the employer cannot do something unless it says so in the collective agreement. However, the fact is that the employer has the right to manage its business subject only to specific restrictions in the collective agreement, in generally applicable laws of public order51 and in charters52.

Accordingly, the employer’s key goal is to maintain a strong and expansive management rights clause and minimize the restrictions in the collective agreement.

Develop a Strategic Plan for Bargaining, Including a Potential Breakdown or Impasse

Prior to bargaining, you should develop a strategic plan for the management of the process of bargaining, including any potential breakdown or impasse in that process. Your goal is to control the process and be ready for any steps the union might take. Planning and being prepared for a labour dispute, and showing the union that you are prepared for any eventuality, can dramatically increase your bargaining power.

To develop a strategic plan, you should consider the following factors:

Notice to Bargain

Determine the earliest date on which a notice to commence bargaining may be given, and whether the company wishes to give notice in the event the union does not53. Remember that the date notice given is the key date for notably determining whether an employee will be an excluded replacement worker54. (See “Replacement Workers” above and below.)

51 See for example An Act respecting Labour Standards, R.S.Q. c. N-1.1
53 Labour Code, supra note 1, at arts. 52-53.
54 Ibid., arts. 53 & 109.1 a).
Conciliation or Arbitration

Either party may apply for conciliation under art. 54 of the Code. Appointment of a conciliation officer has the advantage of helping the parties to reach an agreement but it does not delay strike action\(^55\). The submission of the dispute to an arbitrator has the advantage of avoiding strike action. The dispute can be submitted to an arbitrator by mutual consent or by one party only in the case of a first collective agreement\(^56\). Of course, the arbitrator’s award will have the same effect as a collective agreement signed by the parties and will be legally binding for the union and the employer(s)\(^57\).

An application for conciliation must identify the main causes of dispute and the number of employees affected by the certification. The current form for an application for conciliation can be found at http://www.travail.gouv.qc.ca/faq/codedutrad/m531/.

Last Offer Vote

At any stage of the negotiations, even during a strike or a lock-out, the employer can ask the CRT for a vote by the employees in the bargaining unit on the employer’s last offer received by the union\(^58\). Generally this is only recommended in situations where there is reliable evidence for the CRT that this option “may foster the negotiation or making of a collective agreement”\(^59\). The existence of an impasse is required\(^60\).

Likelihood of a Strike or Lock-out

Consider how likely it is that a strike or lock-out will ensue. If a strike or lock-out is likely, consider in advance the extent to which the company can continue to operate and what preparation is required. (See “Continuing Operations” below.) If operations have to be partially or fully shutdown, consider the steps and timeline for an orderly shutdown.

\(^55\) Ibid., art. 58; F. Morin, J.-Y. Brière & D. Roux, supra note 9, at 1029-1031, n. IV-106.
\(^56\) Labour Code, supra note 1, at arts. 58 & 93.1.
\(^57\) Ibid., art. 93.
\(^58\) Ibid., art. 58.2 para. 2; see ABB, division des transformateurs v. Métallurgistes Unis d’Amérique, section locale 9486, supra note 24.
\(^59\) Labour Code, supra note 1, art. 58.2 para. 1; See also Ste-Béatrix (Municipalité de) v. Syndicat canadien de la fonction publique, section locale 4290, supra note 25.
\(^60\) ABB inc., division des transformateurs v. Métallurgistes unis d’Amérique, section locale 9486, supra note 24.
**Replacement Workers**

Non-union employees generally are not allowed to do bargaining unit work during a lock-out or a legal strike\(^61\). Moreover, an employer may not use any person (which includes managers and representatives of the employer) to do bargaining unit work when this person was hired between the day the negotiation stage began and the end of the strike or lock-out\(^62\). Nor can the employer use an employee who ordinarily works at another of the employer’s places of operations\(^63\). The best option for an employer remains to utilize a person other than an employee (such as a manager) hired before the day the negotiation stage began\(^64\). This person could not come from another establishment where a strike or a lock-out has been declared because some employees were members of the same bargaining unit\(^65\).

**Continuing Operations during a Strike or Lock-out**

If you intend to continue some of the bargaining unit operations, assess in advance the impact a strike or lock-out may have upon deliveries as well as upon any contracted services. If alternate arrangements need to be made, develop a plan in advance and consider notifying all affected business partners. Consider the needs of the business including inventory availability (i.e. whether it should be increased or moved to another location) and ingress/egress from facilities. Also, taking into account the restrictions on replacement workers, consider the necessary preparations (such as training or licensing) to enable other people to do bargaining unit work.

**Timing of a Strike or Lock-out**

Consider whether the company is better able to withstand a strike or lock-out at a particular time, and factor this timing into the strategic plan and the bargaining dates and process.

**Resolution of a Strike or Lock-out**

Consider the extent to which your workplace can sustain a strike or lock-out and at what stage you may have to return to the table for business reasons. Knowing the threshold for the health of your business in advance will assist in identifying the point at which a new proposal or renewed bargaining may be necessary.

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\(^{61}\) Labour Code, supra note 1, at art. 109.1 g).

\(^{62}\) Ibid., art. 109.1 a).

\(^{63}\) Ibid., art. 109.1 e).

\(^{64}\) Ibid., art. 109.1 a) g).

\(^{65}\) Ibid., art. 109.1 f).
Benefits during a Strike or Lock-out

The employer is not obliged to distribute the wages to its employees while there is a cessation of work because of a lock-out or a strike. Nor is the employer obliged to distribute benefits following directly from the performance of the work such as bonuses.

However, it seems that employees have the right to receive secondary benefits usually distributed by third parties such as wage insurance in case of sickness and benefits from the Commission de la santé et de la sécurité au travail even if there is a strike or lock-out. Consider what your position will be on this issue and your financial status before acting.

Vacation Pay Before or During a Strike

Unions will often encourage their members to ask for a payout of their vacation pay in advance of or during a strike. However, unless there is a collective agreement stating the opposite, the employer has the right to decide the period when the employees will have the possibility to take their annual leave. Because employees are entitled to know the date of their annual leave at least four weeks in advance, an employer could refuse this vacation pay before or during a strike if it is aware of this event at least 28 days before and should refuse the request unless required by the collective agreement or statute. Once the employer has chosen the period of vacation, it could not change its mind during the four weeks preceding these vacations.

Prepare for the Bargaining Process

To the extent possible, in advance of, or at the start of bargaining, you should reach an agreement with the Union on procedural matters. These procedural matters include:

- the place of bargaining, and if off-site, the responsibility for cost;

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67 F. Morin, J.-Y. Brière & D. Roux, supra note 9, at 1077, n. IV-131.


• how many people will be on the negotiating teams;

• the process for release of employees on the union negotiating team;

• the payment of employees on the union negotiating team (it is recommended that the company not agree to pay employees on the union negotiating team in advance, as an agreement to pay can be useful leverage at the end of the bargaining process);

• identifying who will take minutes for the company negotiating team and consider whether “joint” minutes will be kept which the union will be asked to approve;

• determining dates for bargaining, providing adequate time between sessions to review and respond to proposals; and

• considering whether to have a media “black-out” on the status and content of negotiations by the employer and union.

**Control the Documentation**

Control of paperwork is a key factor in bargaining and good organization of paper makes the whole process much easier. Keep in mind the following tips for controlling the documentation:

• Keep detailed minutes of bargaining, including identification of proposals which are tendered and the discussion or response around them. These minutes can prove very valuable in an arbitration if they demonstrate that one party provided an explanation of the intended effect of the proposal to the other party, and the proposal was accepted based on that understanding, as it demonstrates mutual understanding of the effect or application;

• Use a footer for all company proposals which includes the date of the proposal;

• Keep track of all accepted proposals. Some ways to do so are by having both parties sign off accepted proposals, printing them on a different colour of paper and placing them in a binder with a number tab which corresponds to each article of the collective agreement; and

• Remember that “he who drafts, prevails”: take control of the drafting process to the extent possible.

**Bargaining Process**

The usual process is to bargain non-monetary matters first, as once monetary issues have been bargained the union has little, if any interest in the non-monetary matters and the company will have little leverage in bargaining. Accordingly, the union and company proposals should be broken into monetary and non-monetary and the company should not table any monetary proposals until the final stages of bargaining.
We may be in one of those extraordinary times when major economic concessions are sought by employers. That may change the usual order and dynamic of bargaining and require the monetary proposals to be tabled early in the process.

Monetary proposals should be tendered and negotiated as a package and not piecemeal.

Throughout the process the company should continue to consider the likelihood of a strike or lock-out and negotiate to its own time preferences.

“Housekeeping” Review

Provisions in a collective agreement often inter-relate such that changes to one article may necessitate changes to other articles in order to ensure consistency in language and effect. Accordingly, throughout bargaining it is important that the entire document be reviewed for consistency to avoid unintended interpretations.

- If a word or phrase is defined to carry a particular meaning, then the defined term must be used throughout the collective agreement when that particular meaning is intended. For example, if “Probationary Period” is defined as meaning a 90 day period at the commencement of employment during which suitability for continued employment is assessed, it should be used throughout the collective agreement every time that period is referred to.

- If a different meaning is intended, use different words. Arbitrators assume that a word has the same meaning throughout the agreement, and different words are assumed to mean different things (for example, “sick leave” is not the same as “sick day”, and “work week” is not the same as “week”).

- It is key to avoid conflicting provisions, such as where overtime is defined in one article as meaning all hours over 8 in a day, but it carries a different meaning in a section on compressed work week.

- Try to identify and flag housekeeping issues in the bargaining process to minimize conflict with the union when these housekeeping changes are made.

The “find” function on computers can make these housekeeping tasks much easier.

The Memorandum of Agreement

The final step in bargaining is usually drafting the Memorandum of Agreement. It can take one of two forms:

(a) a memorandum which outlines the additions or changes to the existing agreement; or
(b) a “covering” agreement to which the final version of the collective agreement and the return to work agreement are attached.

A number of terms should be in the Memorandum of Agreement, including:

- the term of the collective agreement;
- that both bargaining committees unanimously recommend ratification of the agreement;
- that the agreement is subject to ratification and what constitutes ratification of the collective agreement (that is ratification by whom, and by what date);
- the triggering events by which the collective agreement takes effect; and
- the date the collective agreement takes effect and whether any portion is retroactive.

If there has been a strike or lock-out or other labour disruption, it is common to negotiate a return to work agreement which will often include provisions\textsuperscript{71}:

- outlining how and when the bargaining unit employees will return to work;
- guaranteeing no discipline for picket line activity;
- guaranteeing no union action against employees who crossed the picket line;
- confirming continuous service credit for things such as vacation and pension accrual;
- anticipating the consequences of civil or criminal actions; and
- integrating the return to work agreement as a part of the collective agreement.

\textsuperscript{71} F. Morin, J.-Y. Brière & D. Roux, \textit{supra} note 9, at 1071-1072, n. IV-127.
Every effort has been made to ensure the accuracy of this publication, but the comments are necessarily of a general nature, are for information purposes only and do not constitute legal advice in any matter whatsoever. Clients are urged to seek specific advice on matters of concern and not rely solely on the text of this publication.
Reasonable Accommodation in Tough Economic Times

Rachel Ravary and Jacques Rousse
Reasonable Accommodation in Tough Economic Times

Introduction

Accommodating employees in the workplace is an increasingly complex process. Employers struggle with the duty to accommodate: when is the duty to accommodating engaged? What personal characteristics require accommodation? How should the accommodation be managed and by whom? When we think about the duty to accommodate, we generally think of the disabled employee. There are other personal characteristics protected under human rights legislation, however, that may require accommodation. This paper focuses on accommodating disabilities, and also gives consideration to accommodating age, an issue becoming more frequent in today’s workplace. Given the current financial restraints facing employers, increased concerns arise with respect to how much accommodation is due and required. In this paper we examine how to accommodate employees appropriately and practically in the current economic landscape.

The Law

The Charter of Human Rights and Freedoms1 (the “Quebec Charter of Rights”) prohibits discrimination in employment on a number of grounds:

Section 10 of the Quebec Charter of Rights states:

10. Every person has the right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right. [Our emphasis]

Many other sections of the Quebec Charter of Rights prohibit discrimination in employment, namely:

16. No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension,

dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.

17. No one may practise discrimination in respect of the admission, enjoyment of benefits, suspension or expulsion of a person to, of or from an association of employers or employees or any professional order or association of persons carrying on the same occupation.

18.1 No one may, in an employment application form or employment interview, require a person to give information regarding any ground mentioned in section 10 unless the information is useful for the application of section 20 or the implementation of an affirmative action program in existence at the time of the application.

19. Every employer must, without discrimination, grant equal salary or wages to the members of his personnel who perform equivalent work at the same place.

A difference in salary or wages based on experience, seniority, years of service, merit, productivity or overtime is not considered discriminatory if such criteria are common to all members of the personnel.

Adjustments in compensation and a pay equity plan are deemed not to discriminate on the basis of gender if they are established in accordance with the Pay Equity Act (chapter E-12.001).

Thus, the Quebec Charter of Rights does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

The First Step

The first step in the analysis of discrimination is for an employee to demonstrate that discrimination has occurred\(^2\), or that he or she has been treated differently in a term or condition of employment on the basis of one of the enumerated grounds.

“Discrimination” can be described as a distinction or differential treatment of an individual based on a prohibited ground. According to the Supreme Court of Canada:

Discrimination may be described as a distinction whether intentional or not but based on grounds relating to personal characteristics of the individual or groups, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.

The Second Step

Once an employee or former employee can demonstrate that discrimination has likely occurred on the basis of one of the enumerated grounds, the employer has the burden of proof to establish that the discrimination is justifiable or that the offending term or condition of employment is reasonable.

In other words, the employer will have to prove that he fulfilled his duty of accommodation or attempted in good faith to accommodate the employee. The scope of accommodation finds its limits within the reasonability when the employer suffers “undue hardship”, as designated by the Supreme Court of Canada. The duty to accommodate arises when considering whether a workplace requirement or rule is a bona fide occupational requirement. The workplace rule at issue might be as simple as a dress or appearance code, a safety rule, a shift schedule or even a requirement that employees attend work regularly.

In British Columbia (Public Service Employees Relations Commission) v. British Columbia Government in Service Employees Union (the “Meiorin” case), the Supreme Court of Canada defined requirements employers must meet in fulfilling their duty to accommodate.

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A discriminatory standard can be justified if it is a *bona fide* occupational requirement. The employer will have to prove that:

1. The standard is rationally connected to the function being performed;
2. The standard was adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
3. The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the employer cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

Usually, employers have little difficulty demonstrating that the first two requirements of the *Meiorin* test have been met. But the third is the focus of most judicial consideration and the most difficult for employers to prove.

“Undue hardship” is a high standard and requires direct, objective evidence of:

- Quantifiable higher costs;
- The relative non-interchangeability of the workforce and facilities;
- Interference with the rights of other employees; or
- Health and safety risks.

The employer must assess each employee individually to determine whether it would be an undue hardship to accommodate his or her particular needs. Each case needs to be examined with its specificities.

When an employee suffers from a physical or psychological affection acknowledged by a medical doctor, Courts generally recognize the employee’s handicap. Also, as stated by the Supreme Court of Canada in the *Simpson-Sears* case, the employer must take reasonable steps in trying to accommodate, which may or may not result in full accommodation.

### Physical or Mental Disability

The terms “physical disability” and “mental disability” appearing within the *Quebec Charter of Rights* have been broadly interpreted by the *Commission des droits de la personne et des droits de la jeunesse* and by Quebec Courts. Physical disability is seen as any degree of physical disability, deformity, malformation or disfigurement that was caused by injury, birth defect or illness. For

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example, physical disabilities include epilepsy, amputation, visual or hearing impediments, paralysis, reduced physical coordination, reliance on an appliance or aid including a guide dog or a wheelchair, breast cancer, obesity, asthma, allergies, eczema, osteoarthritis, multiple sclerosis and much more.8

Mental disability includes any mental, developmental or learning disorder regardless of whether caused by defect at birth or injury through life and regardless of the duration of the disorder. For example, psychological disabilities include depression or personality disorders, speech impediments, chronic fatigue syndrome, fibromyalgia, bipolar syndrome, agoraphobia or anxiety disorders, addictions to drugs or alcohol.9

In assessing whether or not any physical or mental condition is a “disability”, tribunals will take into account a number of factors such as:

- The individual’s physical or mental impairment;
- The functional limitations which result from the impairment; and
- The social, legislative or other responses to that impairment or limitations.

The sole perception of a handicap may in itself come within the purview of the law.

The third factor is particularly important and will be assessed in light of the concepts of human dignity, respect and the right to equality. The employer must assess the nature of the condition or illness giving rise to the claim in order to determine if it is a disability that must be accommodated. As stated in the case Commission des droits de la personne et des droits de la jeunesse v. City of Boisbriand:

Thus, a “handicap” may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a “handicap” for the purposes of the Charter.

Courts will, therefore, have to consider not only an individual’s biomedical condition, but also the circumstances in which a distinction is made. In examining the context in which the impugned act occurred, courts must determine, inter alia, whether an actual or perceived


ailment causes the individual to experience “the loss or limitation of opportunities that take part in the life of the community on an equal level with others [...]. The fact remains that a “handicap” also includes persons who have overcome all functional limitations and who are limited in their everyday activities only by the prejudice or stereotypes that are associated with the ground [...]. 10

If the medical information clearly shows that the employee’s illness or injury has or may have an impact on their impact on their functional capacity to do their work, it is likely a disability that must be accommodated under human rights law.

Disability and Absenteeism

Employees may be absent from work because of culpable or non-culpable (innocent) reasons. Culpable absenteeism occurs when an employee is unable to fulfill attendance requirements because of factors that are within the employee’s control. Examples include being absent or late without a reasonable excuse or permission from the employer, a failure to call in or report for work, leaving work without permission or abusing emergency or sick leave. The response to culpable absenteeism11 does not usually engage the duty to accommodate.

Employers, in a unionized environment, will need to follow the disciplinary steps outlined in the collective agreement.12 For those employers with a non-unionized workplace, the concept of “progressive discipline” is still recommended. Thus, when dealing with an employee guilty of repeated culpable absenteeism, employers should consider oral warnings, written warnings, transfer/demotion, in certain cases, suspensions and, ultimately, termination for cause.

It should be noted that the Union has a legal obligation to cooperate in finding accommodation.13

Innocent absenteeism14, however, may require some accommodation by the employer. “Innocent absenteeism” is defined as the employee’s inability to fulfill attendance requirements because of factors beyond its control. Examples might include: medical reasons for absences, other personal excuses permitted by the employer or statutorily protected absences such as maternity or parental

10 Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Baisbriand (City), [2000] 1 S.C.R. 665, at paragr. 79.
14 Ibid., pp. 100-101.
leave. As will be described in greater detail below, the duty to accommodate to the point of undue hardship will arise where an employee is unable to attend at work due to factors protected by the *Quebec Charter of Rights*, including physical or mental disability.

Similarly, an employee can usually not be disciplined if any poor performance is a result of non-culpable absenteeism. Once the reason for absenteeism has been determined, if it is classified as non-culpable, an employer then needs to turn his attention on its duty to accommodate.

**Accommodation**

Examples of actions that can be put forward to meet the duty to accommodate for disability include:

- Modifying a work station;
- Providing special adapted equipments;
- Rescheduling shifts;
- Removing more taxing parts of the job for the concerned employee;
- Bundling tasks; and
- Reducing hours or increasing breaks during particular hours.

The duty to accommodate requires that all possible measures be considered and taken to the point of undue hardship. These measures must be highly individualized and tailored to meet the particular circumstances and needs of the disabled employee. However, the duty to accommodate is a “two-way street” and the employee also has some responsibilities with respect to accommodation. For example, an employee must:

- Make his/her needs known to the best of his/her ability;
- Participate in discussions regarding possible accommodation solutions;

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15 *Supra*, note 8, p. 39.
17 *Supra*, note 4, p. 121.
• Answer questions or provide information regarding relevant restrictions or limitations (including information from doctors where appropriate and needed); and
• Accept reasonable accommodation proposals.

It is worth noting that “reasonable accommodation to the point of undue hardship” does not necessarily mean “providing the disabled employee with the accommodation that he or she prefers”. Thus, it may be, for example, perfectly appropriate to provide a wheelchair/bound employee with ramp access to the workplace rather than a technically advanced lift system as perhaps requested by the individual.

Questions that a court, tribunal or arbitrator will ask where an employer is being judged on whether it has met the duty to accommodate include:

1. Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

2. If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

3. Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

4. Is there a way to do the job that is less discriminatory while still accomplishing the employer’s legitimate purpose?

5. Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

6. Have other parties who are obliged to assist in the search for possible accommodation fulfilled their role?

7. Is the accommodation suggested by the employer to the employee reasonable, rationally linked to the execution of work and made in good faith? If the employee refuses the accommodation presented by the employer, proofs of the attempts to find a reasonable solution, compromise or respectful alternative will be needed.
Limits of the Employer’s Duty to Accommodate

There is a limit to an employer’s duty to accommodate its disabled employees, the Supreme Court confirmed this year in *Hydro-Québec v. Syndicat des employés-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (S.C.F.P.-FTQ)*.\(^\text{18}\)

In this case, the Supreme Court overturns a decision of the Quebec Court of Appeal, clarifying the following points for employers:\(^\text{19}\):

- The employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work;
- The purpose of the duty to accommodate is not to completely alter the essence of the contract of employment;
- The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work;
- If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties - or even authorize staff transfers - to ensure that the employee can do his or her work, it must do so to accommodate the employee;
- Because of the individualized nature of the duty to accommodate in the variety of circumstances that may arise, rigid rules must be avoided.

In this recent case, the honourable Justice Deschamps specifies once again what the limits of accommodation are:

> Thus, the test for undue hardship is not total unfitness to work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test.\(^\text{20}\)

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\(^{19}\) Ibid., paragr. 14 to 19.

\(^{20}\) Ibid., paragr. 18.
Factual Context

The plaintiff, a unionized Hydro-Québec employee, suffered from a number of physical and mental conditions that caused her to miss work on a regular basis. In fact, the record showed that she had missed 960 days of work over the last seven and a half years.

The employer had made several unsuccessful attempts to adjust the employee’s working conditions so that she would be able to perform her work.

At the time of her dismissal on July 19, 2001, she had been off work for over five months, and her treating physician had recommended that she remain off work for an indefinite period. In addition, the company’s psychiatrist was of the opinion that the employee would not be able to return to work on a regular and continuous basis without continuing to have a significant attendance problem.

The arbitrator dismissed her grievance on the grounds that he did not believe she would be capable of performing regular and consistent work in the foreseeable future and that the solutions proposed by the union constituted undue hardship.

The Superior Court dismissed the union’s application for judicial review. However, the Court of Appeal allowed the appeal and overruled the arbitrator’s decision.21

In this case, the Supreme Court disagreed with the reasoning applied by the Court of Appeal on two grounds: the first relating to the standard for proving undue hardship, and the second dealing with the appropriate time for assessing whether the duty to accommodate has been met.

The Standard for Proving Undue Hardship

The Supreme Court held that the employer is not required to prove that it is impossible to integrate an employee who does not meet its attendance standards, but only that doing so would result in undue hardship. What constitutes undue hardship can take as many forms as there are circumstances.

Therefore, the Supreme Court denounced the approach taken by the Court of Appeal, which would effectively have required the employer to prove the employee’s total unfitness for work to discharge its burden, stating:

The purpose of the duty to accommodate is to ensure that the persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.22

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As such, the test is not whether it is impossible for the employer to accommodate the employee’s characteristics. Moreover, the employer is not required to change working conditions in a fundamental way, but rather to adjust the employee’s existing working conditions or duties, provided that this can be done without causing the employer undue hardship.

In all cases, if, despite the measures taken by the employer, the employee remains unable to perform his or her fundamental duties in the reasonably foreseeable future, the employer will have established undue hardship and will be justified in terminating employment. In other words:

[... ] The employer’s duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship in the foreseeable future.

The Supreme Court therefore allowed Hydro-Québec’s final appeal, restoring the arbitrator’s initial decision that employment termination in this case was appropriate.

**Important Effect of the Decision for Employers**

With respect to the employer’s burden to prove undue hardship, the following principles can be drawn a contrario from the Supreme Court’s decision:

1. The employer is not required to prove that it is impossible to accommodate the employee’s characteristics, or that the employee will be totally unable to perform his or her work in the foreseeable future;

2. A measure that would require the employer to modify working conditions in a fundamental way constitutes undue hardship;

3. A measure that would completely alter the essence of the employment contract (i.e., the employee’s obligation to perform work) constitutes undue hardship; and

4. When, despite the measures taken by the employer, the employee remains unable to resume his or her work in the reasonably foreseeable future, the employer will be justified in terminating employment.

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22 Supra, note 17, paragr. 14.
24 Ibid., paragr. 19.
After Accommodation — Ready for Dismissal?

In the case of managing a sick or disabled employee, dismissal may become a possibility, either because the employee’s disability cannot be accommodated short of undue hardship or the employee’s absenteeism for sickness or disability amounts to frustration of contract for non-union employees or excessive non-culpable absenteeism for unionized employees.

In a unionized workplace, subject to the express terms of the collective agreement, an employee can be terminated for innocent absenteeism on non-disciplinary basis where:

- The employee’s past record of absenteeism is undue or excessive;
- There is no reasonable prospect for improvement in the foreseeable future; and
- If the employee’s absences are related to a disability the employer can show that the attendance expectations required are a bona fide occupational requirement and that the employer has accommodated the employee’s disability to the point of undue hardship.

In a non-unionized workplace, an employee may be terminated for frustration of contract where the employee’s incapacity makes the performance of his obligations under the employment contract in the future either impossible or ridiculously different from the agreed terms of his employment.

The factors considered to determine if there is a frustration of contract are:

- The terms of the contract, including any provisions as to sick pay;
- How long the employment was likely to last in the absence of the illness or injury;
- The nature of the employment and, in particular, whether the employee occupies the key post which must be filled on a permanent basis;
- The nature and duration of the illness and the prospects for recovery; and
- The employee’s length of service.

There should be non-disciplinary warnings given prior to terminating the employee’s employment for excessive absenteeism, even if it is beyond the employee’s control. If no accommodation could allow an employee to return to work, the employer may be able to dismiss for innocent absenteeism.

The employer must ensure it has established the required elements for excessive innocent absenteeism and, particularly, a medical assessment of the prognosis for future attendance and the duty to

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25 Supra, note 12, p. 51.
accommodate a disability. Before a decision is made to terminate an employee, the employer should review the record of absenteeism, including the reasons for the absences, and the most current medical information available to see if there has been or may be an improvement in attendance in the future, or if accommodation is possible.

The employer should not rely on periods of absence arising from a disability or a workplace injury for which work benefits were payable in order to justify a discharge, unless the employer can demonstrate that it has accommodated the employee to the point of undue hardship.

**Recent Case Law**

*Syndicat des fonctionnaires municipaux de Montréal (SCFP) et Ville de Montréal*²⁶

A recent decision relating to the disability in the workplace was released by a Quebec arbitration board a few months ago. Michèle Roy was an auxiliary assistant librarian, working for the City of Montreal, spending her time between the Iberville and Côte-des-Neiges libraries. Her day-to-day tasks included handling the trolleys, gathering books and documents around the library, emptying the book return bin, working at the loans counter, verifying and classifying documents, etc. Due to a medical restriction, she advised her superior that she could no longer lift, push or pull charges exceeding 5 kg. She brought a medical certificate stating that this restriction would be permanent.

Subsequent to this notification, her assigned hours of work started to change and eventually diminished. Following placement on a calling list, the plaintiff apparently refused to work on a series of occasions because, she alleged, the work offered did not respect her functional restrictions. In February 2004, she received a letter informing her that she will no longer be receiving any working hours.

The City of Montreal maintained that the withdrawal of Ms. Roy’s scheduled hours cannot be considered a discriminatory measure since her physical limitations kept her from fulfilling tasks that are considered “essential” to the profession of assistant librarian. The employer claimed to have had made efforts to accommodate the plaintiff by accepting that she work at a slower pace and eliminating certain tasks, namely the gathering of the books, the carrying of supplies with the trolley and the emptying of the book return bin. However, the employer found these accommodation measures to be unsatisfactory as they had a prejudicial impact on the other employees, who consequently felt like they had to do part of Ms. Roy’s job.

In this case, it was admitted that the functional limitations of Ms. Roy constituted a handicap. It was decided by the arbitrator that the plaintiff had been treated in a discriminatory manner because of her handicap. At issue was whether the employer reached the level of “undue hardship” in its attempt to

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²⁶ *Syndicat des fonctionnaires municipaux de Montréal (SCFP) et Ville de Montréal*, D.T.E. 2009T-359 (T.A.), Mtre Serge Lalonde, arbitrator.
accommodate Ms. Roy. The arbitrator found it did not and that the City of Montreal had the duty to accommodate employees suffering from a handicap.

Il découle nettement de la preuve que ce sont les plaintes exprimées par les autres salariés qui ont été le facteur déterminant dans la décision de l’employeur de retirer le bloc d’heures à la plaignante. Il s’agit certes d’un élément que l’employeur est en droit de considérer, mais ce n’est pas parce que d’autres salariés expriment des réactions négatives que l’employeur est dispensé de considérer les autres facteurs pertinents à toutes démarches d’accommodement. [Nous soulignons] 27

Our translation:

It is clear from the evidence that the complaints expressed by the other employees were the determining factor in the decision to withdraw the plaintiff’s hours. This factor certainly had the right to be considered by the employer, but nonetheless, the negative response of employees does not exempt the employer from considering other relevant factors to accommodation measures. [Our emphasis]

Consequently, the arbitration board ordered the City of Montreal to reinstate Ms. Roy in her employment with proper accommodation, taking into account Ms. Roy’s functional limitations. The main message for employers arising out of this case is that while other employees’ perceptions can be taken into account in the evaluation of the limit of the duty to accommodate, they are insufficient on their own to constitute undue hardship.

The Aging Workforce

Population aging is a complex issue. Quebec seniors constitute the fastest growing population group in Canada. In 2009, it was estimated that 14.3% of the Quebec population was 65 years of age or older. As the “baby boomers” aged, the senior population is expected to reach 24.4% in 2026, and up to 30% in 205128.

Changes in the workforce have led to increasing social and legal pressure for the removal of mandatory retirement policies. Since 1982, in Quebec, an employer cannot discriminate on the basis of age29,

27 Ibid., paragr. 77.
28 For more information, see the “Ministère de la famille et des aînés du Québec” at website www.mfa.gouv.qc.ca. Also; see “Ministère de la santé et des services sociaux du Québec” at www.msss.gouv.qc.ca and “Fédération des aînés du Québec” at www.fadoq.ca
29 Supra, note 2, p.84.
which includes discriminating against those over the age of 65. At section 10, the *Quebec Charter of Rights* states:

10. Every person has the right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

[Our emphasis]

The *Quebec Charter of Rights* also includes sections defining more specifically prohibited employment actions or measures. Hence, the prohibition of discrimination against age entails the following:

16. No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.

17. No one may practise discrimination in respect of the admission, enjoyment of benefits, suspension or expulsion of a person to, of or from an association of employers or employees or any professional order or association of persons carrying on the same occupation.

19. Every employer must, without discrimination, grant equal salary or wages to the members of his personnel who perform equivalent work at the same place.

A difference in salary or wages based on experience, seniority, years of service, merit, productivity or overtime is not considered discriminatory if such criteria are common to all members of the personnel. [...] 

However, section 20.1 of the *Quebec Charter of Rights* provides an exception:

20.1 In an insurance or pension contract, a social benefits plan, a retirement, pension or insurance plan, or a public pension or public insurance plan, a distinction, exclusion or preference based on age, sex or civil status is deemed non-discriminatory where the use thereof is warranted and the basis thereof is a risk determination factor based on actuarial data.
In such contracts or plans, the use of health as a risk determination factor does not constitute discrimination within the meaning of section 10.

Thus, legitimate retirement or pension plans may impose age provisions that seemingly discriminate against older workers. Note that some Québec laws or regulations can also constitute exceptions to the prohibition of discrimination on the basis of age.

Further, discrimination on the basis of age may be justifiable in some circumstances.

**Accommodation of Aging Workers**

The greatest issues with respect to accommodation and an aging workforce arise when older workers start to show performance decrements directly tied to their age. Stereotyping of older workers often includes the assumptions that older workers will demonstrate:

1. Decreased work motivation, capacity and potential for development;
2. Reduced flexibility and acceptance of change;
3. Decreased effectiveness, slowness
4. High stability and dependability; and
5. Technological limitations.

These stereotypes are based in part on the actual changes experienced as workers aged. There are some established relationships between age and physical and cognitive abilities, namely a decline as one ages. However, research cautions against using only chronological age itself as a predictor.

As people age, performance can decline on complex processing activities such as tasks involving divided attention or dual tasking or speeded responses. However, research also shows the general increase for job satisfaction and commitment for older workers, as well as an increase in job relevant knowledge and citizenship behaviour at work.

The workplace can be improved to increase successful performance by older workers. A checklist of factors to consider can include:

1. Consider the work design and potential aids, such as:
   - Charts;

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30 Supra, note 2, pp. 83-84.
• Written instructions; and

• Pictures;

2. Train all employees to use the potential aids rather than just targeting older workers;

3. Consider the training methods:

• Proceed-at-own pace tutorials;

• Learn from errors rather than minimize errors during training; and

• Use active learning techniques and discovery trainings;

• Diversity sensitivity training, including aging stereotypes;

4. Consider alternative work arrangements rather than work or retire, such as part-time or bridge employment;

5. Manage performance. Employers are entitled to evaluate employees in order to ensure satisfactory performance, regardless of age. However, increased performance evaluations that target certain employees because of their age may also constitute discrimination. Performance evaluations should be carried out for all employees. It is important that complete records are retained so that any change in performance is clearly documented;

6. Assist in appropriate retirement. Employers may wish to encourage their employees to start thinking about planning for retirement by offering retirement planning and counselling for employees and their partners. An employer and an employee may also choose to negotiate a voluntary retirement contract with a definite departure date. Finally, employers may offer retirement packages as an incentive to promote voluntary departures;

7. Be flexible. Employers may accommodate aging employees with more flexible working conditions, such as allowing an employee to work part-time, on flexible hours, in a job-sharing arrangement or working in a different capacity, such as a consultant. Arrangements provided for by the Québec Régime des rentes specifically provide for this.

The recent cases on this issue mention a series of considerations that have positively influenced the courts’ decisions:

1. The employee’s capacities or limitations evaluation had been made on an individual basis;

2. The absence of stereotypes in the workplace;

3. The equal treatment of employees;
4. The fair evaluation methods;

5. The employer’s flexibility and understanding.

Accommodation of an aging employee may, in some circumstances, be impossible short of undue hardship. To demonstrate undue hardship, the employer must provide objective, real evidence, which may be comprised of the following:

1. Quantifiable costs, such as increased costs or expanded pension and disability plans;

2. Increased health and safety risks, including the magnitude of the risks and who bears the risks (accommodated employee, other employees, the public, etc.);

3. The availability of other workers to assist when job duties are modified or reduced; and

4. Impacts on other employees.

As the demographics of the population change, so too will the needs of employers, employees and the dictates of the law. Employers should prepare for these changes by evaluating their workforce and the requirements of their workplace. Employers should determine what options are best for them to accommodate and manage the increasingly aging workforce.

**Promoting Retirements in a Declining Economy**

In the current economic climate, employers may wish to promote “early retirement” for some older workers, especially highly paid older workers. Depending on the existing pension and benefit plans, encouraging retirement may result in minimal costs upfront, but long term savings.

When dealing with the prospect of a voluntary retirement, it is important to take care to avoid any suggestion that might be used to make a claim of age discrimination. Inappropriate pressure for retirement at any age, or for “early” retirement, may be considered age discrimination. Employers who make retirement packages available to their employees should try to avoid:

- Conduct which suggest age discrimination, such as suggesting to an older employee that their position “takes a lot of energy”, or that it is time for the employee to “take things easy”;

- Pressuring employees to accept retirement packages;

- Associating retirement offers with job loss; and

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31 Supra, note 4, p. 113.

32 Supra, note 2, pp. 88-89.
• Placing conditions on packages (that are not part of bona fide benefits or pension plans) that exclude certain employees.

**Recent Case Law**

*Québec (Commission des droits de la personne et des droits de la jeunesse) v. 9063-1698 Québec Inc.*

A recent decision relating to age discrimination in the workplace was released by the Quebec Commission of Human Rights. In 1997, Ms. Lisette Pelletier was hired as a waitress and manager of the Italian restaurant “Chez Tony”, in the city of La Baie. In 1998, the restaurant was sold and the defendants Potvin and Audet acquired the establishment with the intention of renovating it into a pub.

A few weeks later, the shareholders of the company chose to hire a new manager: Chantal Marcoux, co-defendant. From that moment on, Ms. Pelletier was only asked to work as a waitress for approximately 20 hours a week.

At the time, Ms. Pelletier was 56 years old. She soon understood that the new owners wished to make the pub look younger to attract a new clientele. The plaintiff felt like she was not part of this new plan and was told by the new manager, Ms. Marcoux, that “she wouldn’t fit in the décor anymore”. A few weeks later, along with other older employees, Ms. Pelletier lost her job and was asked to give back her uniform.

Ms. Pelletier stated in her testimony that her sense of self-worth had been diminished. It took her several months to find a new job in another restaurant of the region. On their part, the company, the shareholders and Ms. Marcoux were unable to justify the lay-off of Ms. Pelletier short of discrimination. Justice Rivet ordered the three defendants to pay jointly and severally to the plaintiff a compensation of $10,658.75 for losses of salary and tips plus $4,000 for moral prejudice and $2,000 for aggravated damages and punitive damages.

The lesson for employers arising out of this case is that discrimination on the basis of age is forbidden. Moreover, an aging employee cannot be laid-off on the sole basis of his age. If an employee has physical limitations due to age, an employer has the legal obligation to accommodate him the best it can, the only limit being undue hardship.

**Conclusion**

The accommodation process has always been time consuming and intensive for employers. In today’s workplaces, where the economy is an issue and employers are facing increasing disabilities resulting from stress imposed by the workplace, as well as an aging workforce, it is even more difficult to

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accommodate employees. The *Hydro-Québec*\textsuperscript{35} case provides us with some hope that the duty to accommodate is being curtailed to something less than “impossible” hardship.

The economy affects the hardship analysis, depending on the particular circumstances of the case. Each situation will need to be assessed on a case-by-case basis and employers need to consider the interplay of human rights legislation with other legislation.

\textsuperscript{34} *Supra*, note 8, p. 48.

\textsuperscript{35} *Supra*, note 17.
An Employer’s Guide on How to Handle Employee Medical Information

Nathalie Gagnon and Simon-Pierre Hébert
An Employer’s Guide on How to Handle Employee Medical Information

Employers must face uncertain factors surrounding the solicitation of medical information from an employee on a regular basis. The frustration it carries can be explained by the fact that an abusive request by an employer could expose him to litigation for discrimination on the basis of disability, for infringement of privacy or of the right to physical integrity or still the violation of the provisions of a contract of employment or a collective agreement.

To argue this question, it is important to consider the interests the decision-makers must balance. On the one side, decision-makers must take into account the interests of employees wishing to protect the aspect of their private life related to their medical information. On the other side, an employer may have a legitimate business interest that justifies access to this information. While arbitral jurisprudence seems to support the proposal where an employer has the right to intervene in the privacy of an employee with regards to medical information in some circumstances, the scope and time of this request for information often remain uncertain.

We will be presenting an overview of the caselaw on the request for medical information in the following circumstances:

- Substantiating reasons for an absence;
- Clarifying a doubt as to the accuracy and adequacy of a medical certificate;
- Determining if an employee is able to return to work; and
- Undertaking an accommodation process.

It is important to note that though several decisions in this area have been rendered by arbitrators, the general principles apply to non-unionized work environments the same way.

**Substantiating reasons for an absence**

An employer has the right to request the reasons behind an employee’s absence and the latter has the obligation to justify his absence. However, caselaw is not as clear on the exact limit of such a request.

He can verify the medical condition of the employee who is absent from work for a long period of time due to a disability\(^1\). Indeed, the employer, by offering a job, has a right to expect the employee to perform his work.

Nevertheless, for short-term absences, the majority of caselaw tends to say that the employer cannot require the disclosure of medical information from the employee, except for compelling reasons. The

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burden of proof for such compelling reasons is on the employer. Repeat or chronic absenteeism, fraud or abuse may constitute such reasons. In Syndicat des employés professionnels et de bureau, Local 57 v. Caisse populaire Saint-Stanislas de Montréal ², states the following on the subject:

[Translation] [...] we believe that the right to respect for private life, a right given force by section 5 of the Charter of Human Rights and Freedoms, by articles 3 and 35-41 CCQ, as well as by the Act respecting the Protection of Personal Information in the Private Sector (applicable in this case), commands that the employer does not require the employee to disclose the nature or the symptoms of an illness, ailment or health issues that forces an employee to take leave for a short period of time, when there are no reasonable grounds to believe that there has been abuse or when the combined previous absences of the employee do not exceed reasonable limits. This is an information that the employee does not have to disclose and can keep for himself (including when the employer pays for the day or days of leave). The employer who requires clarification on the health condition of an individual further to a short term sick leave must have compelling reasons (or at least serious ones) to do so, reasons he must prove; he cannot just invoke the interest of protecting the health or the safety of the public or work colleagues or vague considerations on the necessity to control absences.

It must be noted that we are not stating that in the case of a sick leave, the employer never has the right to know the nature or the symptoms of an illness or ailment of the employee, but we are stating at the very least that the right of the employee to respect for his private life comes first when there is no abuse, or fraud (or allegations of abuse or fraud), or excess or going over a reasonable limit, or long term sick leave ³.

Failing a compelling reason or obvious doubt raised by the employer, the right of the employee to privacy has precedence over the right not to disclose a medical diagnosis for a short-term sick leave ⁴.

A minority of arbitrators has however considered that in view of the extent of the management power of the employer, justification of a short-term absence may be imposed unilaterally by the employer. This right would however be qualified and would depend on the facts specific to each case. In the case

³ Ibid p. 41 of the award.
of Praxair, arbitrator Mallette specified that if there is no statutory provision limiting the right of an employer to require a medical certificate and if the collective agreement is silent on the subject, we “reserve the complete right to the employer, without however the exercise of this right being discriminatory, abusive and arbitrary”.

Finally, let us note however that the employer could require medical proof or a medical examination if there are reasonable grounds to believe that the employee’s health conditions no longer enable him to perform his work. The employer has indeed the duty to protect the health and safety of the employee. The right of the employer to require from employees justification of their short-term absence, under the contract of employment or the collective agreement, must however be exercised in a reasonable fashion and in compliance with section 5 of the Charter of Human Rights and Freedoms (hereinafter referred to as the “Quebec Charter”), articles 3 and 5 of the Civil code of Quebec and section 5 of the Act respecting the Protection of Personal Information in the Private Sector.

Clarifying a doubt as to the accuracy and adequacy of a medical certificate

The question came up as to whether it was possible for an employer to declare being unsatisfied by a medical certificate provided by an employee explaining his absences or his state of disability. Most of the arbitrators acknowledge today the right of the employer to require an additional medical certificate or examination to verify the claims of an employee. Such an initiative must however be justified by serious and reasonable grounds.

In Union des employées et employés de service, section locale 800 and Collège Marie de France, an employee likely to be suspended for disciplinary reasons provided a medical certificate anticipating a two-week sick leave for depression. Arbitrator Jean-Louis Dubé reports the possibility for an employer to request a medical examination when the certificate seems deficient or incomplete:

[Translation] The conclusion to be drawn from this caselaw and doctrine in a case such as this one, is if the employer has reasonable and serious grounds as to the inability of the employee to work for medical reasons alleged by this employee, given all relevant circumstances including the unspecified and incomplete nature of the medical certificate or several medical certificates filed by the employee, this employer then has the right to require the employee to undergo a medical examination. Obviously, this medical examination must be limited to the facts at issue, meaning the contested medical condition. On the other hand, it can cover any contested medical condition. It is then up to the physician mandated by the employer to determine how to go about this examination according to the extent and the limits of his professional prerogatives and abilities.

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5 Syndicat des travailleurs de Praxair (C.S.N.) and Praxair Inc., D.T.E. 2002T-413, par. 66 ; A. Bond, supra note 4, p. 97 et seq.
6 Infra section “Determining if an employee is fit to return to work”.
7 R.S.Q., c. C-12, s. 5; Q.S. 1991, c. 64, ss. 3 and 5; R.S.Q. c. P-39.1, s. 5; Syndicat des employés professionnels et de bureau, Local 57 v. Caisse populaire Saint-Stanislas de Montréal, supra note 2 ; refer also to Association des policiers et pompiers de la ville de l’Ancienne-Lorette Inc. and Ville de l’Ancienne-Lorette, [1990] A.T. 738 (motion for evocation dismissed : D.T.E. 91T-240).
But, on this subject, taking into account the mandatory and quasi-constitutional nature of the *Charter of Human Rights and Freedoms* and the fundamental right to the respect of private life, I believe, in agreement with Ms. Marie-France Bich in *Caisse Populaire Saint-Stanislas de Montréal* referred to above, that we must not go beyond the real needs of the employer who must have access only, initially at the very least, to what is necessary (and not simply useful) to manage the issue in question9.

In *Syndicat des infirmières et infirmiers de l'Hôpital St-Luc (FIIQ) and Centre hospitalier de l'Université de Montréal - Pavillon St-Luc*10, where a nurse had chronic absences, arbitrator Viateur Larouche agreed with the previous judgment and acknowledged the right of the employer to require another medical certificate or examination to verify the sayings of an employee, providing there are reasonable grounds to believe that the certificate provided is deficient or incomplete:

[Translation] [150] Arbitrator Dubé in the case of *Union des employés et employées de service, section locale 800 v. Le Collège Marie de France* (May 12, 2004), conducted a thorough review of the caselaw dealing with the absence of a diagnosis in certain medical certificates and the deficient nature of diagnosis appearing in others.

[151] I carefully read this ruling and found that in such matters the right to privacy must certainly be respected but the right of the employer to make sure that the health condition of the employee during her absence of March 6, 7 and 8, 2004 was disabling and justified her withdrawal from work. I also found that according to the arbitrator referred to above, the employer can declare himself unsatisfied of the medical certificate provided, but only if he has reasonable grounds to consider this certificate deficient or incomplete. It appears to me that this is the situation that applies in the case at hand.

[152] Taking into account the circumstances of this case, the employer with reasonable grounds to verify the medical certificate given by nurse Provost, the decision to ask the latter to authorize him to consult the notes from Dr. Nguyen regarding her absence of March 6, 7 and 8, 2004, was justified11.

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9 *Ibid*. pp. 32 and 33 of the award.


11 *Syndicat des infirmières et infirmiers de l'Hôpital St-Luc (FIIQ) and Centre hospitalier de l’Université de Montréal - Pavillon St-Luc*, *supra note 4*, par. 150 to 152.
Determining if an employee is fit to return to work

The Act respecting Industrial Accidents and Occupational Diseases\(^\text{12}\) (hereinafter the "AIAOD") and the Act respecting Occupational Health and Safety\(^\text{13}\) (hereinafter the "AOHS") authorize an employer to request an employee to undergo a medical examination or to provide sufficient proof in the case of an industrial accident or occupational disease. The employee's refusal to comply with this request may be seen as insubordination subject to discipline\(^\text{14}\). Indeed, the employer must have the tools to see to his employees' safety.

Where the laws discussed above are not applicable and the employer has reasonable ground to doubt the ability of the worker to perform his usual work or that said employee was on an extended sick leave due to his disability, arbitral jurisprudence has also acknowledged the right of the employer to request factual evidence or a medical examination confirming this ability to work\(^\text{15}\).

In \textit{Banque Laurentienne du Canada} and \textit{Syndicat des employées et employés professionnels et de bureau, section locale 434 (SIEPB) (E.C.)}\(^\text{16}\), an employee of the Laurentian Bank took a sick leave due to his disability (psychological problems) and received his full salary for several weeks. The medical certificates provided by the employee stating his unfitness to work. When the employee wanted to return to work, the employer requested medical evidence to prove the complainant's ability to work. The employee did not provide new medical evidence and was suspended for administrative investigation. In reviewing the relevant jurisprudence on the subject, arbitrator Claude Fabien stated the following:

\begin{quote}
[Translation] Jurisprudence has acknowledged that an employer may suspend the return to work of an employee when he is not satisfied with the quality of the doctor’s note the employee has provided to demonstrate his ability to return to work. If the employer has reasonable grounds to doubt the accuracy of the first medical note, he may demand that his employee be seen by the expert he designates and he may legally suspend his return to work while waiting for the result of this follow-up medical assessment. This right is given to the employer, even when, initially the employee has met the initial onus of proving his ability with a first medical certificate. This solution applies
\end{quote}

\(^{12}\) R.S.Q., c. A-3.0001, s. 209.  
\(^{13}\) R.S.Q., c. S-2.1, s. 51(3)(5)(12) and 223 (13).  
even more in this case where complainant did not even meet the initial burden of proving his ability to return to work.\textsuperscript{17}

For the same reason, arbitrator Jean-Louis Dubé\textsuperscript{18} has acknowledged the right of the employer to request a medical examination to verify the ability of an employee who wishes to return to work:

[Translation] What is the conclusion to all of this? The employer's request to an employee to undergo a medical examination can happen mainly under two (2) circumstances. The first is where the employee wishes to return to work after a sick leave for an illness or an accident. He provides his employer with a medical certificate from his treating physician. The employer deems this certificate deficient and wants to make sure that the employee is able to accomplish his work. We can relate this case to that of an employee whose employer wants to withdraw him from work because he believes he is incapable of performing it for medical reasons. The second circumstance is that of the employee who claims he is unable to perform his work for medical reasons and then benefits from an indemnity to compensate for salary, to which the employer, directly or indirectly, contributes in whole or in part.\textsuperscript{19}

To sum up, in the eyes of arbitrators inability constitutes sufficient ground for an employer to require, in the event of a return to work after a long-term sick leave, a more detailed medical certificate or a medical examination. The employer may indeed have reasonable grounds to believe that an employee is still disabled and that his physical or mental condition does not enable him to perform certain specific functions.

**Undertaking an accommodation process**

Where a situation requires accommodations, just like the employer, the employee and the union also have obligations. The main obligation will be to collaborate in search for reasonable accommodation options. The Supreme Court of Canada, in *Central Okanagan School District No. 23 v. Renaud* expressed the following on the obligation of the employee:

[...] When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a

\textsuperscript{17} Ibid par. 108.

\textsuperscript{18} *Union des employées et employés de service, section locale 800 and Collège Marie de France*, supra note 8.

\textsuperscript{19} Ibid p. 3 of the award.
proposal that would be reasonable in all the circumstances is turned down, the employer’s duty is discharged20.

It shall also be the obligation of the employee to provide the most explanations to the employer in the search for a solution and to accept in good faith the proposed reasonable accommodation, even if this accommodation may present certain inconveniences for him. The employee cannot expect a perfect situation even if it is usually up to the employer to take the initiative of finding a solution21.

In Intragaz, Société en commandite and Syndicat des travailleuses et travailleurs Intragaz (CSN)22, an employee, on leave for two years for a major depression, refused to undergo medical examinations (after consulting with the union) to set in motion the accommodation process initiated by the employer. The employer therefore terminated the employment relationship. The arbitrator deemed that the employer’s request to know the medical condition of the employee was legitimate in the accommodation process and dismissed the grievance. His decision was upheld by the Superior Court23. The Court of Appeal dismissed the permission to appeal the decision of the Superior Court24.

The employee has the affirmative duty to give the employer the necessary information to collaborate in the accommodation process. If the employee does not provide sufficient information on his medical condition and that this information proves to be necessary for the accommodation process, it may be, according to the circumstances of the case, a breach of the employee’s obligation.

How to stay within the limits?

Certain medical information required from an employee goes beyond what an employer can have access to. For example, there are only few circumstances where an employer may have access to information pertaining to a diagnosis or a medical treatment25 and everything will depend on his real needs. Recently, arbitrator Jean-Louis Dubé26 reaffirmed that under all circumstances, the employee has the right to keep the personal factors leading to a medical condition confidential, and that, even if the employer is informed of the diagnosis.

This is therefore a question of balance between the right of management of the employer and those of the employee to physical integrity and privacy, which are not absolute27. The employer must be prudent before demanding a medical examination. Asking and employee to systematically yield to this requirement without serious grounds may be deemed abusive or unreasonable28.

23 Syndicat des travailleuses et travailleurs Intragaz - CSN v. Fortin, 2006 QCCS 969 (CanLII).
24 Syndicat des travailleuses et travailleurs Intragaz - CSN v. Intragaz, s.e.c., 2006 QCCA 834 (CanLII).
25 Supra section “Substantiating reasons for an absence”.
26 Union des employées et employés de service, section locale 800 and Collège Marie de France, supra note 8.
27 Ibid.
Guidelines for an employer who requests and uses medical information

The following principles may assist employers in their requests for medical information:

1. An employer cannot undertake excessive research to simply verify the medical aspect of an employee's absence.

2. An employer has the right to request additional information beyond the medical certificate provided initially by the employee, as long as he has reasonable grounds to doubt the accuracy of said certificate or its completeness. In such cases, the employer must clearly indicate the deficiencies of the initial certificate.

3. An employer can receive information pertaining to a diagnosis or a treatment only under very limited circumstances. He will have to demonstrate that he has serious grounds for obtaining such information.

4. An employer may request that an employee undergo a medical examination when such examination aims to make sure that the employee is able to perform his duties in a safe and effective manner and that there are reasonable grounds for doubting the ability of the employee.

5. An employer may ask for medical information when this information is directly related to the accommodation process and measures and they are essential to the realization of such process.

Ultimately, an employer must assess objectively the legitimate interests of his enterprise and therefore tailor the requests for medical information to respect these interests. However, the employer should not adopt the same approach for everyone. On the contrary, he must use a flexible and dynamic approach that takes into account the circumstances inherent to each case.
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