

# MANA 479 – LABOUR LAW

## PART 1: THE CANADIAN CONSTITUTION

### 1. Constitutional Principles In Labour Law: Federal Vs. Provincial Jurisdiction Over Labour Law

- Constitution Act of 1867: legislated power are shared between Federal and Provincial jurisdiction
- Provincial: education, health, civil and property rights
- Federal: criminal law, bankruptcy, international trade, telecommunication, military, marriage, and postal service...
- Neither S91-92 specifically grants power over Labour Relations, it is determined by the courts
- Court cases determined that Labour Relations are part of Civil and Property Rights (Snider)

### 2. The Rule – Provincial Jurisdiction

- The Rule (Snider): legislating in the matter of Labour Relations and employment law is provincial jurisdiction (Property & Civil Rights)
- Federal cannot legislate in a matter of provincial jurisdiction

### 3. The Exception – Federal Jurisdiction

#### A) DIRECT JURISDICTION

The federal government has jurisdiction to legislate Labour Laws over (because they have exclusive power over them):

1. All employees of federal government (civil service, armed forces, RCMP...)
2. Teachers
3. Any business in an industry directly subject to federal regulation (s.91)

#### B) FEDERAL ENTERPRISES

1. Navigation & Shipping, interprovincial & international transportation, aviation, banking, canals, railways, broadcasting, telecommunication
2. Any work not exclusive to provincial jurisdiction
3. Any work declared to be for the general advantage of Canada or 2 or more provinces

#### B) DERIVATIVE JURISDICTION (Incidental)

- Employees who perform work which is not in federal regulation but the work is integral to a federal undertaking
- i.e. baggage handlers do not directly perform work under federal jurisdiction but it is an integral to a federal undertaking (Aviation)

#### C) HOW TO DETERMINE FEDERAL POWER WILL APPLY TO INDUSTRY?

##### Step 1: Functional Test

- Is the nature of the normal or habitual activities federal in nature?
- If YES, the enterprise is subject to federal labour laws (Direct Jurisdiction)
- If NO, Step 2.

##### Step 2: Core Test

- Are the activities integral to a federal undertaking and that provincial regulation in issue would hinder the core federal power?
- If YES, the enterprise is subject to federal labour laws (Derivative Jurisdiction)

#### Example of Derivative Jurisdiction

*Northern Telecom v. Communications Workers, [1980] 1 S.C.R. 115 case*

Step 1: NT is a manufacturer whose **normal or habitual activities are not federal** in nature but are of a provincial nature;

Step 2: Are the activities "integral to a federal undertaking"?

1. The general nature of NT operations and the role of the installation department
2. The nature of the corporate relationship between NT and the companies that it serves,
3. The importance of the installation work done by NT for Bell Canada compared with other customers
4. The physical and operational connection between the installation department of NT and the overall telephone system (federal undertaking)

Result: The SCC subsequently ruled that NT's activities were a "**federal work, undertaking**":

- The work of NT installers fell within the federal Parliament's jurisdictional competence. Functionally separate from NT's other operations, this work was performed primarily on Bell Canada's premises and formed an integral part of Bell Canada's federally regulated telecommunications network.
- The operations formed a distinct unit within the business of NT which could be treated separately

## Example of Court ruling no Derivative Jurisdiction

*Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail), 2012 SCC 23 case:*

- 14% of Tessier's activities involved stevedoring work for interprovincial/international shipping (Federal Jurisdiction);
- Is it there for subject to provincial rules? (Tessier wanted to avoid expensive contributions to CSST);
- ~~iii~~ The employees perform work that is vital to a federal undertaking, **but do not form a distinct unit within the business** (contrary to the NT case);
- The employees do not fall under federal jurisdiction because their work represents an insignificant part of their time or is a minor aspect of the overall operations of the enterprise;

## PART 2: INDIVIDUAL EMPLOYMENT CONTRACTS

### 1. The Employment Contract (articles 2085-2097 C.C.Q.)

**CCQ 2085 (Contract of Employment):** A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer.

**CCQ 2097.** A contract of employment is not terminated by alienation of the enterprise or any change in its legal structure by way of amalgamation or otherwise. The contract is binding on the successor of the employer.

#### A) TYPES OF CONTRACT

1. Individual Contract: Employers negotiate working conditions with each individual employee
2. Collective Bargaining Agreements: Employers negotiate working conditions with union  
Governed by Quebec Labour Code (for provincially regulated employers)  
Governed by Canada Labour Code (for federally regulated employers i.e. Banks, telecommunications, transportation)

#### B) THE INDIVIDUAL CONTRACT (Regulated by 3 important Laws)

##### 1. The Civil Code of Quebec

- Definition of individual employment contract (CCQ. 2085)
- Rights and Obligations of both the employer and employee
- Protections for employer's proprietary information
- Limits to non-competition agreements
- Recourses for unjust dismissal or dismissal without proper notice

##### 2. The Labour Standards Act

- Protections exclusively for employees in non-management positions
- Minimum working conditions (Minimum wage, statutory holidays, minimum vacation pay, minimum termination pay)
- Recourses against unjust dismissal for certain employees
- Recourses for psychological harassment;

##### 3. The Charter Of Human Rights And Freedoms (Public Order Rights)

### 2. Elements of Employment Contract

#### A) THE WORK

- Any type of work qualifies: Intellectual, manual - Regular, intermittent - Full-time, part-time
- The interruption of the work (strikes, lock-out, lay-offs, sick-leaves, maternity-leaves etc.) not affect the contract
- Employer must allow the work to be done
- The employee must perform the work personally

#### B) THE REMUNERATION

- Fundamental to the employment contract
- The remuneration may be in different forms (hourly, weekly, monthly, annual, commission, performance-based)
- It is an "onerous" contract (a volunteer cannot be considered an "employee" and claim the rights of an employee)

### *1. The Protection of the employee's Remuneration*

#### (1) Secured Creditors

- Under the Bankruptcy and Insolvency Act
- Employees have priority but not for the full amount
- Covers: wages, salaries, commissions or other compensation (discretionary bonus are not included)
- For salary covering up to 6 months immediately preceding the bankruptcy
- Maximum of \$2000 salary & additional \$1000 for expenses of traveling sales reps
- Any amount in excess: give it to ordinary creditor

#### (2) Similar protections exist in the event of "Liquidation" (Winding-up and Restructuring Act)

#### (3) Directors of the Corporation are also liable personally for up to 6 months unpaid salary

- Both under the Canada Business Corporations Act & the Quebec Business Corporations Act;
- Covers: salary, vacation pay and any other sum due for the performance of the work NOT notice of termination

#### (4) Employee salary Exempt from Seizure by creditors

- 70% of gross salary is un-seizable - 30% is seizable after deducting - 50% is seizable for support payments
- \$180/week (person with up to 2 dependents) - \$30/week extra for any additional dependent
- Employee cannot be disciplined by directors if salary seized by creditors
- Employer calculates seizable portion and remits to Court
- Employee can avoid multiple seizure of salary by voluntarily depositing the seizable portion with the Court
- Creditors can still seize other assets

### 3. SUBORDINATION (key element of employment contract)

- Used to establish the employer-employee relationship
- The most significant factor that distinguishes an "employee" from "independent contractors"
- Determines whether the employer will be taxed and assessed certain fees (CSST etc.) for the employee
- Determines whether employee is included in the bargaining unit
- The employee must accept the direction and control of the employer over the work
- Failure to accept directions can result in discipline
- The employer cannot ask employee to break the law
- The employer cannot use this to intrude on employee's privacy
- The employer cannot dictate where the employee will live

#### *1. Categories Of Subordination*

##### (1) Legal Subordination

- The employee submits his work to the control of the employer
- His work is integrated into the operations of the enterprise
- Employer determines what, where, when, how to perform the work
- i.e. instructions, codes of conduct, activity reports, quality control requirements, productivity requirements...

##### (2) Economic Subordination (Dependent Contractor)

- The former may be considered an employee, while the latter is not
- Can be considered an independent contractor for tax purposes OR dependent contractor for employment law purposes

##### (3) Dependent Contractor

1. An economic control over the activities of a small business can be considered subordination (employer-employee relationship)
  2. Contractors who provide exclusive services to clients who are able to exert economic control over them (i.e. dictating the price of the service)
  3. Pricing control, uniforms, general directives, exclusivity of services, availability requirements
  4. Economic dependence on the employer;
- Courts often consider these employees if the former employer continues to exercise control over their activities

### **3. Formation of The Employment Contract**

- Formed by simple exchange of consent (Oral or written)
- The more important the position, the more detailed written contract (Reduces chances of dispute)
- Capacity: must be 14 years old for employment contract
- May be a contract of adhesion (one side imposes the content of the contract to the other, i.e. car rental agreement)
- Most cases of entry-level position are contracts of adhesion
- Labour Standards Act and Public Order laws are the minimum requirements for employment contracts

### **4. Characteristics of the Employment Contract**

#### **A) GENERAL CHARACTERISTICS**

- Onerous: Remuneration
- Successive performance: require that the obligations be performed at several different times or without interruption
- Synallagmatic: affecting two parties
- Cancellation of employment of contract: cancel for the future, cannot undue what has been done
- Right to terminate: not for minor violations of contractual obligations (i.e. late payment of salary, minor misconduct)
- Intuitu personae: Must be performed personally cannot sub-contract/delegate without agreement of employer
- The employer may be a group of interrelated corporations
- The employee may be moved around between the various businesses
- There are rights and obligations for both parties

#### **B) CONTRACT FOR SERVICES**

- Tax authorities often revise the status of a “contractor” and declare him to be an “employee”
- Result:
  1. Retroactive social benefits for employer
  2. Rejection of various deductions for contractor’s expenses
  3. Inclusion of the “employee” in the union “bargaining unit”

#### *1. Criteria To Identify Employee/Contractor*

##### **1) Is There Subordination?**

- Does the “employer” exercise authority over the “employee”?
- Who determines: hours of work, specific tasks, how work is performed?

##### **2) The Economic Criterion**

- Is the transaction characterized by an element of risk for the “contractor”?
- i.e. is the “contractor” responsible for his own expenses?
- Is he paid by the hour or by the job?

##### **3) Ownership of the Tools for the Job**

- Does the “contractor” supply his own tools/employees for contract?
- Employers supply all tools required, whereas contractors must supply their own

##### **4) Integration of the Employee’s Services**

- Are the worker’s activities an integral part of the “employer’s” regular business activities?
- Does the “Contractor” work exclusively for one client?

##### **5) The Specific Result of the Work**

- Is the worker hired for a specific task and the relationship is over when completed?

##### **6) How do the Parties Treat their Relationship?**

- Clear contract? Detailed billing? Contractor is incorporated? Renewal of contract? benefits provided by the employer?

## 2) Who Is The Employer?

*Case Agence Océanica inc .c. Agence du revenu du Québec, 2014 QCCA 1385;*

- Oceania is a placement agency for nurses who signs contract with clients to provide nursing personnel (Paid on contractual basis)

- Nurses:

1. Had no contract with the client
2. Paid their own uniforms and professional dues
3. Could refuse any particular placement
4. Had no non-competition or non-solicitation obligation to client
5. Received direction and supervision from client
6. Received a salary without possibility of profit/loss

Should these nurses be considered “employees” or “contractor” of the client? Quebec Revenue Agency declared them to be **employees**  
Why?

1. **Complete integration of the nurses in the organizational structure of the customer** (the hierarchy, patient care protocols to be observed, the assignment of work, work schedule, evaluation of work, etc.), lead to the conclusion of the existence of a **contract of employment**.
2. **The characteristic elements of the contract for services** (free choice of means and pace of execution of work, the risk of loss and opportunity for profit) **are absent**.

3) *Are Uber Drivers Employees Or Independent Contractors?* California Labor Commission ruled they are employees

## C) DISCRIMINATORY INTERVIEW QUESTIONS

**Charter s. 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, gender identity or expression, 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

**Charter s. 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.

### A) General

- Employer can dismiss on the basis of false declarations made during hiring
- Employer cannot ask discriminatory questions based on art. 10 and 18.1 (illegal)
- Some discriminatory questions may be necessary for tax reasons and social benefits (Date of birth)
- Cannot be asked prior to an offer of employment having first been extended
- A medical questionnaire or exam can only take place post-offer of employment

### B) The Medical Questions (s.10)

Medical questions are discriminatory unless they are used to evaluate the candidate’s ability to perform his essential duties:

1. Employer must show it is necessary for the purpose of s. 20 (Aptitudes and qualifications for employment)
2. Questions cannot oblige the candidate to reveal medical info, which is not required to perform the job
3. Cannot be used in regard to qualification for employer’s insurance plan;

### C) The Criteria For The Employer’s Right To Fire

1. A false declaration on an element the employer had the right to know allows to fire based on the false declaration
2. If employee knowingly lied
3. A false declaration on a question prohibited by art. 18.1 cannot be a factor

#### 4. Obligation of Employee

**CCQ 2088:** The employee is bound not only to perform his work with prudence and diligence, but also to act faithfully and honestly and not use any confidential information he obtains in the performance or in the course of his work. These obligations continue for a reasonable time after the contract terminates and permanently where the information concerns the reputation and privacy of others.

##### A) GENERAL

- No specific contract is required to establish employee's Duty of Loyalty and Discretion (AUTOMATIC)
- Extent of the obligation depends on the nature of the duties
- Obligation existing during the employment
- Obligation after termination of the contract requires a non-competition clause

##### B) LOYALTY

###### (1) Loyalty – Diligence

1. Diligence: imposes an obligation of quality and quantity (be productive and produce quality work)
2. Function of: the nature of the duties & terms of the contract
3. Incompetence: employee can sometimes be dismissed for incompetence and lack of productivity

###### (2) Loyalty – Prudence

- Requires employees to act with reasonable care, in the best interest and for the benefit of the employer
  1. Respect employer policies
  2. No conduct which affect reputation of the employer (include behaviour outside the workplace)
  3. Employee cannot take unjustifiable risks
  4. Employee must use good judgement (must obtain professional advice if needed & must be fully informed of issues)
- Failure to respect this obligation can lead to sanctions including dismissal
  1. Depend on severity of circumstances
  2. Employee can be liable for damages of wilful actions which harm the employer (i.e. disclose public interest, whistle blowers)
  3. Exemption of liability under 1472 CCQ  
A person may free himself from his liability for injury caused to another as a result of the disclosure of a trade secret by proving that considerations of general interest prevailed over keeping the secret and, particularly, that its disclosure was justified for reasons of public health or safety.
- Act Honestly and Faithfully
  1. Based on need for trust between employer and employee (Breach of Trust)
  2. Dishonesty or Breach of Trust on part of employee is a fire-able offence
  3. Must avoid conflict of interest:
    - a) Employee cannot personally benefit from position
    - b) Employer can recover profits earned from employee's dishonest actions
    - c) Employee cannot grant favours from competitors

*Is a single dishonest act sufficient to dismiss disloyal behaviour?*

*McKinley v. BC Tel, [2001] 2 S.C.R. 161, 2001 SCC 38*

- McKinley took a leave of absence and then requested a less stressful position (accommodation refused by BC Tel)
- BC Tel learns he had lied about his medical condition and ability to work and fires him
- A single act of dishonesty is not an automatic cause for dismissal (its a question of severity)
- McKinley's dismissal was unjustified

A two-step test assessing the gravity of the misconduct is necessary

Step 1: The employer must prove the employee's conduct was deceitful

Step 2: Is the nature and degree of dishonesty sufficient to justify dismissal? (dishonesty result in a breakdown in the employment relationship)  
Need to balance the severity of the misconduct with the appropriate sanction under all the circumstances

Answering the last question requires that all factual elements be taken into consideration:

1. Position and employment history of the employee
2. Nature and degree of seriousness of the employee's dishonesty
3. Employee's degree of collaboration/acknowledgment of the misconduct
4. Good faith of the employee vs. intentional dishonesty

*Can the employee hold another job or operate his own business?*

- As a general rule yes (unless justifiable exclusivity clause in contract)
- During employment: employee cannot work for competitor
- After employment: absent non-competition clause, employee can work for competitor

*(3) Loyalty – During Employment*

- Must place interest of employer has part of his work
- Must conduct himself with honesty
- Must maintain confidential information
- Must not interfere or hinder the company
- Must not place himself in a conflict of interest
- Must not take ownership of employer's property or use it improperly
- Must not hinder business opportunities

*(4) Loyalty – Post Employment*

- Continues for a reasonable time after termination
- Depend on circumstances, rarely extends few months
- Extent of obligation depend on: nature of employment, level of position of employee & reason for termination
- Not equivalent to non-competition clause
- Employee may compete provided that it is a fair competition
- Cannot use confidential information, tactics & misrepresentation about former employer
- Cannot solicit clients from former employer

### C) DISCRETION

*(1) General*

- Obligation to safeguard of confidential information (not to use for personal benefits or disclose to others)
- What is considered confidential info. can result from: characterization in employment contract or Factual Analysis
- Examples: financial information, business strategies, clients, manufacturing strategies and procedures
- Disclosure of confidential information may be justified by reasons of Public Interest (CCQ. 1472)
- Obligation of confidentiality exist during employment
- Obligation continues for reasonable time after employment
- Obligation continues permanently regarding reputation or privacy of other employees (i.e. HR info., medical info.)

*(2) Determining “Reasonable” delay involves*

1. Level of responsibility and hierarchy of employee: key employees and those given much access
2. Nature of information: it may conflict with employee right to earn a living (why it rarely exceeds few months)

### D) NON-COMPETITION AGREEMENT

**CCQ 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 compete with him. However, the stipulation shall be limited as to time, place and type of employment, to what 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.

*(1) General*

- No agreement is required for (AUTOMATIC, Loyalty obligation covered in CCQ. 2088):
  1. Protection against solicitation of employer's clients
  2. Protection of confidential information
  3. Prevent employee from working for a competitor while employed
- May be included in employment contract, used to prevent employee from working for competitor after leaving
- Rarely hold up in court, because it generally violates fundamental right to earn a living

*(2) Conditions of Form*

- Required written agreement:
  1. Signed before, during or after expiration of employment contract
  2. Inevitable Disclosure (implied non-competition) does not apply in Quebec
- Expressed in term of:
  1. What job the employee is prevented from doing
  2. Geographic area it applies
  3. Time period it will be in force

(3) *Non-Competition Agreement Must be Reasonable (2 Competing Rights)*

1. EMPLOYER'S right to protect "Legitimate Business Interest": can only protect against unfair competition
2. EMPLOYEE'S right to "Earn a Living" (Public Order Rights): skills, abilities and experience belong to employee

(4) *Elements of Reasonableness*

- If failing to do so: non-competition agreement invalid
  - If any of the 3 elements is unreasonable: agreement is considered null and contrary to Public Order rights
  - If employer overreaches: loses non-competition clause
  - If case of ambiguity: favour employee
1. JOB: what is the employee prohibited from doing? (The more extensive, the more it will be considered unreasonable)
    - What is the type of employment?
    - What do we want to prevent? (i.e. solicitation, geographic capacity, specific competitors)
    - Directly or indirectly (title)? (i.e. employee, consultant, investor, shareholder etc.)
  2. TIME: what period during which employee is prohibited from competing?
    - Lower the position and duties, shorter period of non-competition
    - Shorter notice of termination to which employee is entitled, shorter period of non-competition
    - Normally, non-competition should be compensated
  3. PLACE: what is the geographic area where the employee is prohibited from competing?
    - If employee is exclusively based in Quebec, the prohibition cannot go beyond

(5) *Factors, which May Justify*

1. Employees intimate knowledge of employer's affairs
2. Employees responsibilities
3. Competition level of industry

(6) *Burden of Proof: Employer must prove: 3 elements & legitimate business interest*

*Payette V. Guay Inc. (2013 SCC);*

- Payette sold crane business to Guay and was kept on as an employee and later fired;
- NCA was of a commercial nature not a condition of the employment contract;
  - a) In a Contract of sale, NCA is given more weight because there is no imbalance of power as between employer and employee
  - b) The person challenging the NCA has the burden of proof in this case;
  - c) Reasonableness depends on: sale price, nature of the business, the parties' experience and expertise and their access to legal advice;

(7) *Effects of Unjust Dismissal on Non-Competition Clause*

**2095 CCQ:** 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.

1. If employee was terminated unjustly: non-competition clause is null
2. If employees has terminated his contract for serious reasons: non-competition clause is null

(8) *Enforcing Non-Competition Agreement*

1. Against the employee:
  - Damages can be claimed for loss of business
  - Penalty clauses included in contract and claimed
  - Injunction used to prevent employee from working for new employer
2. Against the new employer:
  - Injunction used to prevent employee from working for them
  - Damages claimed if he induces employee to violate non-competition clause
  - Can fire new employee for non disclosing non-competition clause

*Can employer dismiss employee who refuses to sign non-competition agreement?*

*Jean v. Omegachem, QCA;*

- Employee agreed to sign a NCA;
- Terms were not disclosed until 3 years later;
- Dismissed for refusing (unless compensated with equivalent compensation)
- Dismissal was unjust;
- Should have been asked to sign agreement at the time of hiring;

## 5. Obligation of the Employer (CCQ, 2087)

**CCQ 2087.** 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

### A) THE WORK

#### (1) General

- Implied Term: Employers will not withhold work from the employee in bad faith or without justification
- Failing to do so: Constructive Dismissal (disguised termination)

#### (2) Aspects to the Obligation to Allow Performance of Work

##### 1. PROVIDE PLACE to work and render it accessible

- Provide tools, manpower & funding necessary
- Assume costs and responsibility of tools and equipment
- Employment contract can modify this obligation (i.e. employee works from home, provides his own car or tools etc.)

##### 2. PROVIDE WORK

- Must be what was agreed in employment contract
- Failure to do so: Constructive Dismissal Examples:
  - a) Providing work below quality level agreed on
  - b) Providing work below OR above employee skill level
  - c) Changing status, position or work conditions
  - d) Making excessive demands
- Employer may lay off temporarily for economic reasons without being considered termination
  - a) If lay-off is more than short period it is considered dismissal
  - b) Employee can always consider lay-off period as termination and can seek for another employment
  - c) LSA provides conditions for layoffs of 10+ employees OR for 6+ months
- Employer may suspend employee without pay for disciplinary reasons (on the job misconduct)  
Disciplinary actions provided in contract (i.e. Code of Ethics)
- Employer may suspend employee for administrative reasons (actions outside employment)

#### Conditions:

1. Must be necessary to protect legitimate business interest of employer reputation
2. Must be done in good faith
3. Must be justified with basic level of communication with employee
4. Must be for short period or it will be considered dismissal
5. Indefinite suspensions: can be unilateral change to contract OR constructive dismissal if unreasonable or unjustified
6. Employer has burden of proof
7. Must be **with pay**

### B) PROTECT THE HEALTH, SECURITY AND PRIVATE LIFE OF EMPLOYEE

#### (1) General (Reinforced by certain laws)

1. Art. 46. of the Quebec Charter of Rights:  
Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment, which have proper regard for his health, safety and physical well-being.
2. The Labour Standards Act in regard to psychological harassment:  
Articles 81.18 – 81.20 & 123.6 – 123.16;
3. Industrial Accidents and Occupational Diseases Act:  
Provides for all recourses in the event of work-related injuries and illnesses;
4. The Occupational Health And Safety Act  
51. Every employer must take the necessary measures to protect the health and ensure the safety and physical well-being of his worker. He must, in particular (...)

#### (2) Protect Dignity of Employees

- Must take Pro-active measures against sexual and psychological harassment (“strict liability” against this regard)
- Failure to prevent harassment: employer liable under LSA

*(3) Protect Privacy of Employees*

**1. The Protection Of Personal Information In The Private Sector Act**

**2. The Access To Documents Held By Public Bodies**

**3. The Protection Of Personal Information Act**

**4. Article 5 of the Quebec Charter of Rights:**

“Every person has a right to respect for his private life.”

**Article 35 CCQ:**

“Every person has a right to the respect of his reputation and privacy. – No one may invade the privacy of a person without the consent of the person unless authorized by law.”

i.e. cameras in the workplace must be justified (safety, security);

**Article 36 CCQ:**

The following acts, in particular, may be considered as invasions of the privacy of a person:

- (1) Entering or taking anything in his dwelling;
- (2) Intentionally intercepting or using his private communications;
- (3) Appropriating or using his image or voice while he is in private premises;
- (4) Keeping his private life under observation by any means;
- (5) Using his name, image, likeness or voice for a purpose other than the legitimate information of the public;
- (6) Using his correspondence, manuscripts or other personal documents.

**Article 37 CCQ:**

Every person who establishes a file on another person shall have a serious and legitimate reason for doing so. He may gather only information, which is relevant to the stated objective of the file, and may not, without the consent of the person concerned or authorization by law, communicate such information to third persons or use it for purposes that are inconsistent with the purposes for which the file was established. In addition, he may not, when establishing or using the file, otherwise invade the privacy or damage the reputation of the person concerned.

i.e. Employer must have reason to collect medical files;

**Article 38 CCQ:**

Except as otherwise provided by law, any person may, free of charge, examine and cause the rectification of a file kept on him by another person with a view to making a decision in his regard or to informing a third person; he may also cause a copy of it to be made at reasonable cost. The information contained in the file shall be made accessible in an intelligible transcript.

i.e. Credit reports and employment file;

**Article 39 CCQ:**

A person keeping a file on a person may not deny him access to the information contained therein unless he has a serious and legitimate reason for doing so or unless the information is of a nature that may seriously prejudice a third person.

A serious reason may include a sexual harassment complaint;

Employer would be justified in denying request to identify the complainant;

**Article 40 CCQ:**

Every person may cause information which is contained in a file concerning him and which is inaccurate, incomplete or equivocal to be rectified; he may also cause obsolete information or information not justified by the purpose of the file to be deleted, or deposit his written comments in the file.

Notice of the rectification is given without delay to every person having received the information in the preceding six months and, where applicable, to the person who provided that information. The same rule applies to an application for rectification, if it is contested.

**Article 41 CCQ:**

Where the law does not provide the conditions and modalities of exercise of the right of examination or rectification of a file, the court, upon application, determines them.

Similarly, if it becomes difficult to exercise those rights, the court, upon application, settles the difficulty.

#### (4) *Surveillance of Employees in the Work Place*

##### 1. For Individual Employees

- Must not be carried out in an arbitrary manner
- Must be based on other evidence that already exist against the worker
- Must be conducted in the least intrusive way possible
- Must be reasonably required in light of circumstances

##### 2. For all Employees in General

- Must be necessary in order to manage the workplace
- Must be conducted in the least intrusive & reasonable manner possible
- Must be reasonably required in light of circumstances

##### 3. For Investigation Purposes

Example:

*Centre de santé et de services sociaux de la Vallée de la Gatineau v. Martin*

- Doctor observed that employee was not hampered by injury while in parking lot of the clinic before medical examination;
- Employer decided to conduct surveillance which confirmed doctor's observation;
- They later dismissed the employee;
- Arbitrator rejected surveillance evidence;
- SCQC reversed the decision in judicial review;
- **The medical report constituted reasonable grounds for the employer to verify that there was a genuine disability**

#### (5) *Employer Conducting Background Checks on Employees*

1. Must obtain consent from employee
2. Employee must be informed of the purpose, how information will be collected, used & disclosed
3. Must be limited to what is reasonably necessary to assess suitability of employee for employment

#### (6) *Employer Accessing Employee Computer Files*

*R. v. Cole, [2012]*

Supreme Court;

- Employer provided employee (teacher) with laptop which he could use for personal use
- Computer usage policy stated that the school board owned "all data and messages" on the computer, and that "users should not assume that files stored on network servers or hard drives of individual computers will be private."
- Technician discovers child porn, turns it over to police
- There exists a reasonable expectation of privacy if laptops were explicitly or implicitly authorized for personal use
- **Employer can search devices if personal use is not authorized**
- **Employer can have technical access as required for routine maintenance**
- But even if employer alerts police, police still need a warrant to search/seize

Implications:

- **Employers should establish clear computer usage policies:**
  1. The potential circumstances under which the employer may exercise access to information
  2. Employers should inform Employees that private internet access and communications, should be done using personal electronic devices
  3. Ensure that computer usage policies and actual practices are consistent and clear with respect to personal usage of employer hardware.
  4. When undertaking disciplinary action or investigating possible misconduct, Employers should not access personal employee information without "probable cause"

## 6. Duration of the Employment Contract

**CCQ 2085;** A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer.

### A) TYPES OF CONTRACTS

1. Indeterminate term contract (indefinite duration): Terminates with proper notice

**CCQ 2091:** Either party to a contract for 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 specific circumstances in which it is carried on and the duration of the period of work.

2. Fixed term contract **CCQ 2086:** Contract terminates on set date without notice (Notice of termination is built in)

### B) TERMINATION OF THE EMPLOYMENT CONTRACT BY AGREEMENT

1. Agreement (even a fixed term employment contract)

**CCQ 1439:** A contract may not be resolved, resiliated, modified or revoked except on grounds recognized by law or by agreement of the parties.

2. “Superior Force”

**CCQ 1470:** A person may free himself from his liability for injury caused to another by proving that the injury results from superior force, unless he has undertaken to make reparation for it. Superior force is an unforeseeable and irresistible event, including external causes with the same characteristics

3. Serious illness

4. Death **CCQ 2093:** A contract of employment terminates upon the death of the employee

However, the sale, merger etc. of the business does not affect the employment contract

**CCQ 2097:** A contract of employment is not terminated by alienation of the enterprise or any change in its legal structure by way of amalgamation or otherwise.

### C) TERMINATION OF THE EMPLOYMENT CONTRACT BY RESILIATION FOR A SERIOUS REASON

**CCQ 2094.** One of the parties may, for a serious reason, unilaterally resiliate the contract of employment without prior notice

#### A) General

- Applies to both employer (Dismissal with Cause) and employee (Resignation)
- Facts of each case determine if employee committed serious fault (Otherwise notice of termination must be given)
- Employer must have committed a fault (Otherwise employee must respect term of contract or give prior notice of resignation)
- The burden of proof is always on the employer to show the facts constitute a “serious reason”
- If there is a “serious reason” termination can be: Unilateral - Without prior notice or compensation

#### B) What Is A Serious Reason?

- Unlike the Labour Relations Board (LSA) or Arbitrators, in the event of a dispute before the Superior Court, the employee cannot be reinstated if the reason is deemed to be not serious, will receive compensation for damages only

#### C) Dismissal With Cause By Employer

1. Escalation of Sanctions is the rule for most forms of misconduct (Firing is last resort)
2. Dismissal on first offence is possible if the employee breaches the required trust between employer and employee  
The employee must have committed a “serious fault” or misconduct  
Art. 1604(2) CCQ: minor breaches of contract do not result in right to “resiliation” (termination)

*Croustilles Yum Yum enr. (division des Aliments Krispy Kernels inc.) c. Roy;*

- Employee of 35 years steals 2 bags of chips;
- Arbitrator and Superior Court uphold right of employer to dismiss on first offence;
- “le Salarié est alors très peu collaborateur, imprécis, vague et refuse souvent de répondre aux questions. Il qualifie son attitude de défiante, répondant à plusieurs questions par «On verra ça en arbitrage».”

Examples of Dismissal on first offence:

1. Dishonesty (theft, fraud)
2. Breach of trust (Serious conflicts of interest, Violations of loyalty obligations)
3. Serious Insubordination (Refuses to follow employer’s instructions without a reasonable excuse)
4. Employee misrepresentations of qualifications
5. Sexual harassment
6. Cumulative misconduct of employee

D) "Serious Reason" due to Incompetence of Employee

- Includes: issues of productivity, quality of work, repeated employee errors, lack of skills to accomplish the job
- Requires: employee have been notified of his deficiencies
  - a) Must be given the opportunity to improve or correct
  - b) Except in cases of "gross incompetence"

E) Absenteeism

- Rarely justifiable on the first offence
- Prolonged/repeated absences: even if the employee is not at fault (Alcoholism, drug dependency etc.)
- If the employee does not take the problem in hand the employer can dismiss
- Absenteeism must be "excessive" and not likely to improve
- Is an issue of: Bona Fide Occupational Requirement ("BFOR") (in good faith)  
Employer must accommodate the employee  
Failure to accommodate can result in discrimination (health or handicap)

C) Serious Reason: Absenteeism

- Prolonged innocent absenteeism due to illness; Employer has a duty to accommodate unless it causes undue hardship

**Example:**

*Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, 2008 SCC;*

- Employee had a number of physical and mental problems;
- She had missed 960 days of work between 1994 and 2001
- **Employer had adjusted her working conditions to accommodate her**
- At the time of her dismissal she had been absent for 5 months
- **The employer must accommodate but is not obligated to change working conditions in a fundamental way**
- 1. If the employee's illness excessively hampers the proper operation of the business
- 2. If the employee remains unable to work for the reasonably foreseeable future and the employer has tried to accommodate her, the employer will have satisfied the test
- The dismissal is confirmed by the SCC

**Example 2:**

*McGill University Health Centre) v. Syndicat des employés de l'Hôpital général de Montréal, 2007 SCC 4;*

- The employer must accommodate employee's disability and inability to work
- Employer can dismiss in absence of evidence that she would be able to return to work in the foreseeable future
- **The employer could not continue to employ someone who had been declared to be disabled for an indeterminate period**
- The dismissal is confirmed by the SCC

C) Dismissal For Absenteeism: Discrimination

**Example:**

*Township of Langley V. CUPE, Local 403, (2016 B.C. Arbitration);*

- Employees dismissed because of their disabilities;
- Employer claimed dismissal justified as a BFOR
- Employer must accommodate employee's disability
- Employer's decision to dismiss was to save money on benefits
- Desire to save money was not in bad faith, but it is not automatically a BFOR
- Employer had no policy on how long it would wait until it would dismiss
- Employer's decision is therefore discriminatory

D) Dismissal For Drug Use (Medical Marijuana In The Workplace)

**Example:**

*French v. Selkin Logging, 2015 BCHRT 101;*

- Heavy machine operator working for a logging company used marijuana to manage his cancer-related pain;
- He did not have a proper prescription, did not inform employer of his marijuana use or its purpose;
- When Employer caught him, he refused to stop;
- Employer terminated his employment pursuant to its zero-tolerance drug and alcohol policy;
- Human Rights Tribunal concluded the termination was not discriminatory;
- Employee was not legitimately using marijuana;

E) *What Is Not A Serious Reason?*

- Cannot include dismissal of employees for discriminatory reasons (violating fundamental rights)
  1. Exercising a right under the LSA or parental leave
  2. Refusing to do dangerous work
  3. Exercising a right under the occupational health and safety laws
  4. Exercising rights under the Labour Code (union activities)
- Cannot include dismissal of employees
  1. Exercising rights under Charter of the French Language
  2. Being called as a Juror or witness in court
  3. Acting in capacity of volunteer firefighter or electoral officer
- Cannot sanction for providing information to enforcement of federal or provincial law (art. 425.1 Criminal Code) Whistleblowing to official government authorities, not the media

F) *Disguised Termination (Constructive Dismissal)*

**CCQ 2094.** One of the parties may, for a serious reason, unilaterally resiliate the contract of employment without prior notice.

1. Can result from the employer changing the working conditions of the employee

*Farber v. Royal Trust Co., [1997] 1 S.C.R. 846;*

- The employer unilaterally makes substantial changes to the essential terms of an employee's contract of employment
- The employee does not agree to the changes and leaves his or her job
- It is not necessary for the employer to have intended to force the employee to leave or to have been acting in bad faith
- The employee has not resigned, but has been constructively dismissed
- **The employee is entitled to compensation in lieu of notice and, where appropriate, damages**

2. Can result from the employer deceptively or strategically obtaining the resignation of the employee

- The employer uses (bad faith) tactics to obtain the employee's resignation
- Employee subjected to harassment, unjust reprimands, vexatious behaviour, humiliation, threats
- The employee is entitled to compensation in lieu of notice and, where appropriate, damages

D) **TERMINATION OF FIXED TERM EMPLOYMENT CONTRACTS**

A) *General*

- The fixed term contract is exception not the rule
- The contract must clearly indicate the intention to have a fixed term
- Salary and working conditions stipulated for one year do not mean the employment is for one year

B) *Three types of fixed term contracts*

1. Contract terminates on set date without notice

- Notice of termination is **built in**
- Cannot be terminated before expiration by giving a notice
- The employer or employee can still terminate without notice "for a serious reason"
- Failing such "serious reason", the employer must pay until the end
- Employee can be sued for damages if he does not complete the contract

2. Contract with a discretionary termination clause

Example 1:

*Walker c. Norcan Aluminium inc., D.T.E. 2012T-837 (C.A.);*

- The contract had a clause saying employment may be terminated:  
**[a] by the Employee, at any time, for any reason, on the giving of two month's written notice to the Employer**  
**[b] by the Employer in its absolute discretion and for any reason on giving the Employee 3 months' advance notice in writing and paying to the Executive 50% of the remaining term of the contract**
- Court of Appeal ruled that this is valid;
- This is the equivalent of a **penalty clause**

- The termination clause must use "**unequivocal, clear language**" otherwise Employer will be held to the remaining terms of the contract"
- Vague and ambiguous termination clauses will be unenforceable
- There is no duty to mitigate with fixed-term contracts

3. Contract with a termination clause conditional upon the arrival of an uncertain future event:

- i.e the reduction of the business activity (sales) to a certain amount
- This clause is only valid if the future event is entirely outside the control of the parties
- Cannot be an excuse to terminate without notice

*C) Implicit Renewal Of Fixed Term Contract*

**CCQ 2090:** A contract of employment is tacitly renewed for an indeterminate term where the employee continues to carry on his work for five days after the expiry of the term, without objection from the employer.

- Contract is renewed if employee continues to work for 5 days after expiration without objection from employer (becomes an indeterminate contract)
- Either party can terminate with notice
- The contract can also be renewed by agreement or by a clause in the contract allowing the parties to extend
- Repeated renewals may transform the contract into indeterminate contract

E) TERMINATION OF INDETERMINATE TERM EMPLOYMENT CONTRACTS

*A) General*

**CCQ 2091:** Either party to a contract for 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 specific circumstances in which it is carried on and the duration of the period of work.

*B) Proper Notice*

- Fixed term contract: the end of the contract is pre-determined
- Indeterminate term contract: a "notice of termination" is required
- Notice must be reasonable: failing which, employee can claim compensation in lieu of proper notice (CCQ. 2091)
- Employer has a right to terminate circumstances of economic reasons, lack of work, elimination of a position...  
However: Employee is entitled to proper notice of termination;
- Civil Code: does not define "reasonable" notice in weeks like Labour Standards Act
- LSA: sets a defined minimum notice of termination (Based on years of service)  
If that notice is insufficient, we can claim under CCQ.
- Notice needs to take into consideration:
  1. Nature of the employment: Level of responsibilities, how hard is it to find equivalent employment
  2. Duration of employment: The longer the service, the longer the notice
  3. Special circumstances in which it is carried out

*C) If employer fails to give proper notice*

- This is not unjust dismissal but wrongful dismissal
- Under CCQ: Employee cannot obtain reinstatement in these circumstances, only compensation
- Under LSA:
  1. Employee obtains job security (they cannot be terminated except for "serious reasons" or economic reasons)
  2. Employee gains this security if he has > 2 years service
  3. Employee can obtain re-instatement if unjustly dismissed
  4. Unionized employees may gain such job security under different conditions

F) TERMINATION OF FEDERAL EMPLOYEES

*Traditionally, the Common Law only recognized Unjust Dismissal protection for Unionized employees;*

- The SCC recognized that the Federal Labour Code has replaced the Common Law and grants protection against Unjust dismissal to non-unionized employees;
- **Federal Employers can no longer expect to be able to dismiss non-unionized employees by simply paying proper notice of termination**
- **Applies to Federal employees with 12 + months service if dismissed unjustly**
- **Such employees will be entitled to re-instatement**

#### A) *Special Circumstances*

1. Intention of the parties at the time of hiring
2. Education and expertise of the employee
3. Employee's family situation and medical condition
4. Conditions of the job market
5. Employee having undergone long training period
6. Employee having left a previous job; – i.e. recruited by the employer
7. Employee having moved to isolated area
8. Employee having special duties or contracts; i.e. on call weekends, long hours
9. Age of the employee can also be considered

#### B) *Discretionary right to Terminate*

- Civil Code: does not allow claim for reintegration (reinstatement) & can only terminate indeterminate contract
- This right only exists under the LSA or a Collective Bargaining Agreement

#### G) RENUNCIATION TO RECEIVE PROPER NOTICE

**CCQ 2092.** The employee may not renounce his right to obtain an indemnity for any injury he suffers where insufficient notice of termination is given or where the manner of resiliation is abusive.

- A renunciation by the employee to proper notice is invalid if it is “abusive”
  1. Employee cannot renounce in advance
  2. Employee must do so freely and knowingly
  3. Employee must receive valid consideration in return, not a grossly insufficient notice
- The employer can renounce in advance to a notice from the employee
- Purpose is to protect the vulnerable employee
- Some employers include probationary period (so they can terminate employees without notice)
- These clauses are not valid if the probationary period is longer than the LSA period of 3 months
- A better solution would be a “fixed term contract” of 4 or 6 months (cannot terminate before the term expires)

#### H) THE EFFECT OF THE ALIENATION (SALE, TRANSFER) OF THE BUSINESS ENTERPRISE

##### A) *General*

**CCQ 2097.** A contract of employment is not terminated by alienation of the enterprise or any change in its legal structure by way of amalgamation or otherwise. The contract is binding on the successor of the employer

- Does not terminate individual employment contracts
- New owner/employer must respect employment contracts
- Can still terminate by giving reasonable notice
- New employer must respect employment standards
- Does not terminate Collective employment contracts either

##### B) *Sale Of The Enterprise*

- Recognizes that businesses can be organized into complex corporate structures with several owners, shareholders
- Changes in structure, control should not affect employee working conditions
- The issue: does the new entity continue to exploit the same activity as the predecessor?
- The obligations toward employees will continue if there is continuity in the essential elements of activities
- Even a sale following bankruptcy may allow for the continuation of the enterprise
- Only the complete dismemberment of the business into its component parts terminates the enterprise

##### C) *Replacement Of The Enterprise*

- The replacement of one sub-contractor by another.
- This case applies by analogy as there is no “sale”
- The issue: does the new entity continue to exploit the same activity as the predecessor?
- Is the new sub-contractor was bound by the CBA of the employees of the previous sub-contractor.
- The supreme court ruled: this was not a case of “transfer of rights and obligations” as in a sale

**NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union, 2010 SCC 45**  
**ISSUE:** How do we determine whether Federal or Provincial Labour Laws will apply to an industry or particular business?

## FACTS

- **Operations:** NIL provides child welfare services to the children and families of seven First Nations in British Columbia.
- **Institutional Structure:** provincial accountability, federal funding, and a measure of operational independence.
- **2005:** Union applied to the B.C. Labour Relations Board (Provincial Labour Laws) to be certified as the bargaining agent of NIL
- **NIL:** objected. ARGUMENT → labour relations fell within Federal over “Indians” under s. 91(24) of the *Constitution Act, 1867*, because its services are designed for First Nations children and families.
- **BC Labour Relations Board** → dismissed NIL objection and certified the Union.
- **Supreme Court BC** → overturned the Board’s certification, finding that even though NIL’s operations served provincial ends, they did so by uniquely Aboriginal means.
- **BC Court of Appeal** → allowed Union’s appeal, concluding that NIL’s operations (labour relations) fell under provincial

## THE ESSENTIAL NATURE OF NIL/TU,O’S OPERATION (Step 1: Functional Test)

1. To provide child and family services (exclusive provincial matter) and employees exercise exclusively in BC
  2. The beneficiaries (Indians) may and should affect how the services are delivered, but does not change what NIL essentially does.
- **Result** → The presumption in favor of provincial jurisdiction over labour relations remains operative.  
Since the question of whether an entity’s activities lie at the “core” of a federal undertaking or head of power is **not part of the functional test & since the functional test is conclusive**, an inquiry into the “core of Indianness” is not required

## PROBLEM

- **Central Question:** whether the operation falls within the protected “core of Indianness” under s. 91(24)? (Step 2: Core Test)
- The proposition that the “core of Indianness” should be considered **only if the functional test is inconclusive is problematic**
  1. Deciding labour jurisdiction without consideration of the federal power hollows out the functional test.
  2. Conversely, to deem any Aboriginal aspect sufficient to trigger federal jurisdiction would threaten to swallow the presumption that labour relations fall under provincial jurisdiction.
- **Solution** → Do the Core Test

## CORE OF INDIANNESS

1. NIL/TU,O employs Indians and works for the welfare of Indian children in a culturally sensitive way that seeks to enhance Aboriginal identity and preserve Aboriginal values does not alter that essential function.
  2. NIL/TU,O’s ordinary and habitual activities do not touch on issues of Indian status or rights.
- **Result** → the child welfare services cannot be considered federal activities.

### *Theory Behind the Case*

- Canadian courts have long recognized that labour relations are presumptively a provincial matter.
- To displace that presumption: a court must conduct an inquiry having two distinct steps:  
STEP 1: “Functional test”, which examines the nature, operations and habitual activities of the entity to determine whether, it constitutes a federal undertaking.  
\*\* Only when this first test is inconclusive, should a court proceed to the 2<sup>nd</sup> step \*\*  
STEP 2: ask whether the provincial regulation of that entity’s labour relations would impair the “core” of the federal head of power at issue.

**McKinley v. BC Tel, [2001] 2 S.C.R. 161, 2001 SCC 38**

**ISSUE:** Is a single dishonest act sufficient to dismiss an employee on the grounds of disloyal behaviour?

**FACTS**

- The appellant is a chartered accountant who was employed by the respondents (“BC Tel”).
- **1993:** he began to experience high blood pressure as a result of hypertension.
- **By June 1994:** his blood pressure was rising on a daily basis and following his physician’s advice he took a leave of absence. The appellant had indicated to his employer that he wished to return to work, but in a position that carried less responsibility. He was advised that BC Tel would attempt to find another suitable position for him within its corporate structure.
- **August 31 1994:** BC Tel terminated the appellant’s employment (after 17 years of employment)
- **The appellant:**
  1. Rejected BC Tel’s severance offer
  2. Took the position that his employment was terminated without just cause, reasonable notice or reasonable compensation
  3. He brought a wrongful dismissal action in the BC Supreme Court.
- **B.C. Tel:** claim they had reasonable cause for the appellant’s dismissal, alleging that he had been dishonest about his medical condition, and the treatments available for it.
- **The Trial Judge Held that:**
  1. There was sufficient evidence to put the question of reasonable cause for dismissal to the jury.
  2. In order for reasonable cause to exist the jury must find: (a) the appellant’s conduct was dishonest (b) the dishonesty hinder employment relationship
  3. The jury could consider whether aggravated & bad faith damages were due for wrongful dismissal
- **The Jury:** favor of appellant, awarding him general damages, special damages, aggravated damages, and pension contributions.
- **The Court of Appeal:** set aside the jury award and ordered a new trial, finding that the trial judge committed a reversible error in instructing the jury that the appellant’s dishonesty would merit termination only if it was of a degree that was incompatible with the employment relationship.
- **The Appellant:** appealed to this Court and BC Tel cross-appealed, submitting that, if the Court dismissed the appeal, it ought to dismiss the appellant’s wrongful dismissal action outright rather than order a new trial. **RESULT** → Appeal was allowed

**FINDINGS**

- While there may not have been a full disclosure of all material facts by the appellant concerning his treatment and medication, an analysis of the record as a whole leads to the conclusion that the jury could have reasonably and judicially found that the appellant did not engage in dishonest conduct of a degree incompatible with his employment relationship. **RESULT** → no basis upon which to interfere with the jury’s verdict that B.C. Tel had not proven just cause warranting dismissal
- No basis for interfering with the trial decision on the issue of the extended notice period  
The trial judge’s analysis and jury charge adhered to the principles set out by this Court and the jury could, based on the evidence, reasonably find that the notice period should be extended.  
Although the appellant may have agreed to terminate his employment contract, this did not necessarily imply a waiver of his right to be treated fairly and in good faith by his employer.
- The order for aggravated damages must be set aside since the criterias were not met. (No sufficient evidence)
- Punitive damages should be withheld from the jury was sound and should be left undisturbed.  
B.C. Tel’s conduct was not sufficiently harsh, vindictive, reprehensible, malicious or extreme in nature to warrant punishment.

***Theory Behind the Case***

- Requires an assessment of the facts & context of the misconduct.
- Test: whether the employee’s dishonesty gave rise to a breakdown in the employment relationship.
- Just cause for dismissal exists where:
  1. Dishonesty violates an essential condition of the employment contract
  2. Breaches the faith inherent to the work relationship
  3. Fundamentally or directly inconsistent with the employee’s obligations to his employer.
- Trial judge must instruct the jury to determine:
  1. Whether the evidence established the employee’s deceitful conduct on a balance of probabilities
  2. If so, whether the nature and degree of the dishonesty warranted dismissal.
  3. Considers the context

**McGill University Health Centre) v. Syndicat des employés de l'Hôpital général de Montréal, 2007 SCC 4**  
**ISSUE:** What is the extent of the employer's obligation to accommodate an employee's disability and inability to work  
When can an Employer dismiss an employee who is unable to return to work in the foreseeable future?

## FACTS

- **In March 2000:** B took a leave of absence from her job at a hospital on account of health problems.
- For more than two years, following her doctor's orders, she tried unsuccessfully to return to work.
- After the expiry of a period of rehabilitation provided in the collective agreement and had been extended by the employer, B was to return to full-time work in September 2002, but she had an automobile accident.
- **In March 2003:** the hospital, citing B's prolonged absence, notified her that her employment relationship would be terminated on April 3, 2003.
- **The union:** filed a grievance contesting the decision and asked the hospital to negotiate a reasonable accommodation with B.
- **The arbitrator:** dismissed the grievance.
  1. Hospital had already accommodated B by granting her rehabilitation periods more generous than provided in agreement
  2. B was still unfit for work at the end of the three-year period provided for in the agreement.
- **The Superior Court:** dismissed the union's application for judicial review.
- **The Court of Appeal:** reversed decision and remitted the case to the arbitrator to assess the accommodation issue on an individualized basis and, if applicable, rule on the appropriate compensation.

## FINDINGS

- The arbitrator was aware of the scope of the employer's duty to accommodate.
- He took the clause of the collective agreement into account but did not merely apply it automatically.
- He considered all the events leading up to the termination of the employment relationship, together with the accommodation measures granted by the hospital in agreeing to rehabilitation periods longer than those provided for in the collective agreement.
- He also considered B's state of health and the absence of evidence that she would be able to return to work in the future.

## RESULT

- The arbitrator correctly concluded that the employer could not continue to employ someone who had been declared to be disabled for an indeterminate period.
- If B viewed the accommodation provided for in the collective agreement was insufficient & if she felt that she would be able to return to work within a reasonable period of time, she had to provide evidence on the basis of which he could find in her favor: but she did not claim any discrimination
- Both the arbitrator and the Superior Court judge found no discrimination in the employer's refusal to continue to employ someone who, after three years of absence due to illness, was still deemed incapable of returning to work by her own doctor.

### *Theory Behind the Case*

- The parties to a CA have a right to negotiate in good faith
- A clause of an agreement that provides for termination (should an employee be absent longer than a specified period of time) is clearly aimed at ill or disabled employees and, duty of enterprise to accommodate
- However, although the period negotiated by the parties is a factor to consider when assessing the duty to accommodate, it does not definitively determine the specific accommodation measure to which an employee is entitled, since each case must be evaluated on the basis of its particular circumstances.
- The right to equality is a fundamental right, and the parties to a CA cannot agree to a level of protection that is lower than the one to which employees are entitled under human rights legislation.
- In light of the individualized nature of the accommodation process, the parties cannot definitively establish the length of the period in advance.
- Undue hardship resulting from the employee's absence must be assessed globally starting from the beginning of the absence

**Automatic termination clauses in a collective agreement:** not presumptively discriminatory.