



**COMM 315
MIDTERM NOTES**

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WEEKS 2, 3 & 4

EQUAL RIGHTS IN THE BUSINESS ENVIRONMENT

Introduction to the CCQ

Exercise of civil rights

§ **Good faith (CCQ s. 6):** Everyone has the obligation (is bound) to act in good faith, i.e. with good intentions.

s. 6. Every person is bound to exercise his civil rights in good faith.

§ **Reasonable manner (CCQ s. 7):** There are three types of injuries 1) bodily 2) moral 3) material. The judge will subjectively determine whether a right has been exercised in a reasonable manner. This decision is not determined based on absolute factors.

s. 7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

§ **Renounce (CCQ s. 8):** If the law aims to protect a right that is subject to public order, this right cannot be renounced. (e.g. Consumer Protection Act; Régie du Logement).

s. 8. No person may renounce the exercise of his civil rights, except to the extent consistent with public order.

§ **Public order (CCQ s. 9):** Aims to protect weaker parties from stronger parties trying to take away their rights (e.g. employers, landlords).

s. 9. In the exercise of civil rights, derogations may be made from those rules of this Code which supplement intention, but not from those of public order.

Quebec Charter of Human Rights AND FREEDOMS (Charter)

§ **Juridical personality (s. 1):** Recognized by the State as a person having full rights under the law.

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

He also possesses juridical personality.

§ **Assistance (s. 2):** Good samaritan.

s. 2. Every human being whose life is in peril has a right to assistance.

Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

§ **Fundamental freedoms (s. 3):** Everyone possesses these fundamental freedoms – they cannot be given up.

s. 3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

§ **Dignity, honour, reputation (s. 4)**

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

§ **Private life (s. 5):** Ex. Someone takes a picture of you in your home or in a public place if you are identifiable.

s. 5. Every person has a right to respect for his private life.

§ **Property (s. 6)** Anyone may use and dispose of his own property as he wishes. However, certain restrictions exist, e.g. zoning.

s. 6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.

§ **Home (s. 7)**

s. 7. A person's home is inviolable.

§ **Confidential info / professional secrecy (s. 9):** Confidential information is anything that individualizes you (e.g. age, religion, grades, financial info, medical info, name). Professional secrecy aims to protect the client and have him be honest. If any confidential information is leaked during a trial, the judge will step in. You have the right not to disclose any confidential information, but in certain cases, you will be asked to provide it (e.g. bank; school).

s. 9. Every person has a right to non-disclosure of confidential information.

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

The tribunal must, ex officio, ensure that professional secrecy is respected.

§ **Reasonable limits (s. 9.1):** Your fundamental freedom and rights may not be absolute. (e.g. Reasonable accommodations. RE: Commission Scolaire Marguerite Bourgeoy.)

s. 9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

§ **Discrimination (s. 10):** Definition of discrimination for the Charter. Discrimination is the process of making choices. You are allowed to discriminate. You can decide what to wear, what to eat, and who to talk to. The general rule is that you are allowed to make choices. However, in certain situations, the law says that you cannot make decisions/choices based on certain factors. These factors are exhaustive (i.e. to discriminate under the Charter, it has to be part of the list).

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, 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.

§ Harassment (s. 10.1)

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

§ Signs / symbols / notice (s. 11): Ex. Hate literature.

s. 11. No one may distribute, publish or publicly exhibit a notice, symbol or sign involving discrimination, or authorize anyone to do so.

§ Goods and services (s. 12): You cannot refuse to contract with someone on discriminatory grounds.

Ex. You walk into a store and say “I would like to buy a sweater”. When your credit card, debit card bounces and you decide to pay by cheque, the clerk refuses. Is this discrimination? No.

Ex. You’re in a restaurant having lunch and a homeless man comes in. He goes up to the front desk and pulls out a pocket full of coins to get pizza. The owner says no. This could be discrimination based on social condition.

s. 12. No one may, through discrimination, refuse to make a juridical act concerning goods or services ordinarily offered to the public.

§ Contractual clauses (s. 13): Ex. You’re renting an apartment and one of the clauses in the lease reads: “No babies”. This is discrimination under the Charter. However, a “No dogs” clause is enforceable because the dog is considered property. You might as well sign the lease because the no babies clause is not enforceable (against public order).

s. 13. No one may in a juridical act stipulate a clause involving discrimination.

§ Public place (s. 15): A public place includes privately owned establishments. It includes restaurants and shopping centers.

Ex. If you’re trying to get in the metro with your guide dog and they tell you to get out, that’s discrimination.

E.g. Denying access to children in a fancy restaurant is discriminatory. However, if they’re being a nuisance, you can tell them to leave. Same with bringing an infant into a movie theatre.

s. 15. No one may, through discrimination, inhibit the access of another to public transportation or a public place, such as a commercial establishment, hotel, restaurant, theatre, cinema, park, camping ground or trailer park, or his obtaining the goods and services available there.

§ Employment (s.16, 18.1, 20): You cannot practice discrimination in the hiring, firing, promoting and demoting of people. You cannot ask, during an interview or in an application form, any information mentioned in section 10 unless it falls under section 20 (qualifications and aptitudes necessary for the employment) or is part of an affirmative action program (promoting minority groups within organizations). Ex. You can ask about language skills in an application because it's an aptitude required for the employment.

s. 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.

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.

s. 20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

§ Criminal record (s. 18.2): You cannot be penalized based on the mere fact that you have committed an offense if a) your offense is unrelated to the employment or b) you have obtained a pardon.

s. 18.2. 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.

§ **Equal salary (s. 19):** The term “equivalent work” is used because there is no such thing as “equal work” – there will always be something a bit different.

Ex. (equivalent work): Processing calls at a call center; processing mail for Canada Post.

If I have a policy (e.g. loyalty; overtime, sale numbers) that provides incentives to all members, the person who makes great sales or puts in overtime can get a greater wage without it being discriminatory. But, if I only *selectively* gave it to some people, that could be discriminatory.

s. 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).

§ **Risk determination factors (s. 20.1):** Making a distinction based on age, sex or civil status is non discriminatory if that information is used for risk determination factors that are justified by quantifiable factors (i.e. actual actuarial data). You can also ask health related questions and use that information. Ex. Smokers pay higher insurance than non-smokers.

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 therefore 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.

§ Damages

- **Compensation (s. 49 1st paragraph):** What happens when you are a victim of discrimination? Civil law compensates victims of moral, material, and bodily prejudice.

Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

- **Punitive (s. 49 2nd paragraph):** One of the very few examples where a civil law has a punitive function. The punishment is there to set an example so others will not do it. Punitive damages will be allocated if the person knew or ought to have known (bad faith). If it was an honest mistake, then no punitive damages will be allocated.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

§ **Other laws (s. 52):** Ex. “Notwithstanding the Charter, every person must study in French.” If it’s within their constitutional power, they can do it. Quebec has the power to change that. Every provincial government has the power to take it back. The government passes a law, and has the power to take it back. The government can pass laws that are contrary to the Charter.

s. 52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

§ **Intent of Charter (s. 53):** If there is a question of interpretation within the Charter, the courts will keep in mind the intent of the Charter – which is to protect the rights and freedoms of people.

s. 53. If any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the Charter.

§ **Binds the State (s. 54):** The government is bound by the Charter. When the Government is acting as your employer, he is also a party to it – he is not acting in its legislative capacity of passing laws. So the government will act as a public entity or a private entity.

s. 54. The Charter binds the State.

§ **Jurisdiction of Quebec (s. 55):** It’s a Quebec law that has no extra-juridical application. It only applies in Quebec. Ex. they can’t say “Universities will only speak in French” because it is a federal matter.

s. 55. The Charter affects those matters that come under the legislative authority of Québec.

Legal Principles

- a) **Discrimination:** Power to make a choice. While you are free to make choices in most situations, when it comes to certain relationships with other people, the Charter has put some restrictions due to issues of public order (s. 10, 18.2, etc.).

- b) **Equal Opportunity:** Giving everyone a fair chance to have a job. In reality, it is hard to apply because not everyone is coming to you with the same set of work experience and credentials.

- c) **Affirmative Action:** Modified hiring policy. A policy where the Government has recognized that certain groups have been systematically denied access to certain rights. Those groups will be given preference to help. Employers will provide on-the-site training. You don't look for the best skilled worker; you give a preference to the minority group.

- d) **Reverse Discrimination:** Flip side of affirmative action. Discrimination against a majority group in favor of a minority or historically disadvantaged group.

CASES

1. Grutter v. Bollinger et al.

Legal issues:

§ Discrimination; Reverse discrimination; Affirmative action

§ s. 10; s. 20

Parties:

§ Grutter (Appellant)

§ Bollinger (Respondent)

Facts/Decision:

§ A white woman, Grutter, with a 3.8 GPA and a 161 LSAT score did not get admitted into Michigan Law School. Her claim was reverse discrimination: "I did not get accepted and students with lower credentials got in because they are members of minority groups."

§ The university has an official affirmative action policy. They have to prove that this policy is not faulty. The university looks at 3 traditional factors when admitting students: GPA, LSAT, and letters of recommendations. It also looks at other "soft variables" such as assessment of the student's talents, difficulty of course, etc. Grutter claims she was discriminated based on race i.e. the Law School used race as a *predominant* factor when selecting candidates.

- § The court looked at the *Bakke* opinion and determined that the Law School considered race/ethnicity only as a “plus” in a particular applicant’s file. The minimum criteria were always GPA, LSAT and letters of recommendations. Ethnicity does not become the defining factor on whether you get in or not.
- § The program does not unduly harm non-minority applicants. Whether you are minority or not, you have to meet minimum requirements.

2. **B.C. Government and Service Employees’ Union v. The Province of B.C. : SCC**

Legal issues:

- § Discrimination; Reverse discrimination; BFOR
§ s. 20

Parties:

- § The B. C. Government and Service Employees’ Union (Appellant)
§ The Government of the Province of B.C. (Respondent)

Facts/Decision:

- § Tawney Meiorin, a female firefighter could not run fast enough according to her employer. All firefighters had to demonstrate their aerobic ability, but Meiorin fell short. The employer allowed her to try four times. Each time she failed – so she was fired. At this point, she went to arbitration. The arbitrator sided with Tawney, saying that there seemed to be adverse effect discrimination and that she should not be fired.

§ The Court of Appeal disagreed. They said it would be discriminatory if women were held to a lower standard than men.

§ SCC: Was the BC government justified in firing Meiorin?

- The SCC looks at a BFOR (bona fide occupational requirement). In order for the government to fire Tawney, they have to show that it is a BFOR – a minimum qualification that is absolutely necessary to meet the standard of the job. And if anyone cannot meet this standard, they can be fired.
- Meiorin Test: An employer can justify the impugned standard by establishing on the balance of probabilities:
 1. that the employer adopted the standard for a purpose **rationally connected** to the performance of the job; (OK)
 2. that the employer adopted the particular standard in an **honest and good faith belief** that it was necessary to the fulfillment of that legitimate work-related purpose; (OK)
 3. that the standard is **reasonably necessary** to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to **accommodate** individual employees sharing the characteristics of the claimant without imposing **undue hardship** upon the employer. (NO. Compensate under s. 49)

§ Here, the Government was not able to demonstrate step 3 - that it would experience undue hardship if a different standard were used. Individual differences can be accommodated by using a different standard. It was proven with satisfaction to the court that men and women have a different aerobic capacity; where men improve much faster than women. Therefore, you cannot take an average score of a sample and apply it to men and women as a whole. There should be an average score for men and an average score for women. à The test is flawed. Tawney should be restored to her position because no BFOR was established. When applying a BFOR, it should be different for men and women.

3. Commission Scolaire Marguerite Bourgeois v. Singh: Quebec CA

Legal issues:

§ Fundamental freedoms (religion); Reasonable accommodations

§ s. 3, s. 9.1

Parties:

- § Singh (Appellant)
- § Commission Scolaire Marguerite-Bourgeoys (Respondent)

Facts/Decisions:

- § A 12 year old boy went to school, carrying with him his kirpan. One day the knife cut through his clothes and fell to the ground. The school board told him he could not carry his kirpan with him because it is a knife. However, they told him he could wear a symbolic kirpan (i.e. a pendant). Obviously, that was unacceptable to the boy's family.
- § The Superior Court said: "You can bring it to school but it has to be worn under your clothes following certain conditions".
- § Court of Appeal: The school was not happy with that decision. And the boy's family was not happy with the restrictions placed with the wearing of the kirpan. The question is s. 3 of the Charter (freedom to practice religion) vs. s. 9.1 of the Charter (balancing your rights against the rights of society and the safety of those around you). The exercise of freedoms, even fundamental ones, does not enjoy absolute protection. However, anything can be a weapon in a school setting – even a pencil. Nevertheless, a reasonable line must be drawn and an inherently dangerous objects falls beyond that line → 9.1 overrides s. 3 of the Charter = No kirpan in school. The CA agrees with the school board's commission.

4. Commission Scolaire Marguerite Bourgeoys v. Singh: SCC

Legal issues:

- § Discrimination; Freedom of religion
- § s. 3; s. 9.1

Parties:

- § Commission Scolaire Marguerite-Bourgeoys (Respondent)
- § Singh (Appellant)

Facts/Decision:

- § The interference with the boy's freedom of religion is neither trivial nor insignificant, as it has deprived him of his right to attend a public school. By not allowing him to wear the kirpan, you are sending a message that some religious values are not as important as others. Also, the risk of the boy using the kirpan as a weapon for violent purposes is

very low. Basically, the danger to society is not high enough to endanger society and prevent him from wearing the kirpan à Section 3 overrides s. 9.1.

5. Therrien v. Min. of Justice

Legal issues:

§ Discrimination under 18.2; Effect of pardon; Criminal record

Parties:

§ Judge Richard Therrien (Appellant)

§ Min. of Justice (Respondent)

Facts/Decisions:

§ Therrien was convicted and sentenced to jail for a year for supporting the FLQ movement. After serving his sentence he continued his legal studies and was a lawyer for 20 years. In 1987, he applied and got a pardon. In 1991, he was invited to become a judge for the provincial court of Quebec. In the interview process, they asked him of his criminal past. He explained his offence and did not get the job. Two years later, he applied again and the same thing happened. A third time, in 1996, he applied again and did not disclose this information with the committee: he was appointed judge. As soon as he is appointed judge, he is almost immediately fired. Therrier claims discrimination under section 18.2 of the Charter.

§ The Charter does not apply here because the judiciary is not employment. It is considered an office. Employment requires a position of subordination. The employee has to work under the supervision and control of the employer. Therrien was never penalized because he had a criminal record: he was dismissed because he was not truthful by omitting this information. This would undermine public confidence in the justice system and make him unfit to perform his job. The court revoked his commission.

6. Syndicat Northcrest v. Anselem: SCC

Legal issues:

- § Freedom of religion; Reasonable accommodation
- § s. 3; s. 9.1

Parties:

- § Syndicat Northcrest (Respondent)
- § Amselem (Appellant)

Facts/Decisions:

- § Orthodox Jews living in a luxury condominium wanted to set up succahs on their balconies. The Syndicat refused, stating that the Jews had waived their rights when signing the co-ownership agreement.
- § SCC: Very divided decision 5 said yes to the succah, 4 said no succah.
- § Majority judgment: s. 3 of the Quebec Charter talks about religious freedoms. The condo association had suggested they build a communal succah – but the men said no.
 - Argument of Syndicat: s. 6 enjoyment of property issue
A succah would decrease the value of the condo building, because it isn't esthetic. This would violate the rights of the other condo owners. Evidence fell short..
 - Succah is allowed. It's up to the co-owners to show that the burden will be too severe. They have not proved it, hence the succahs are allowed.
 - à s.3 overrides s. 9.1.
- § Minority judgment: You signed the agreement, so live with it.

Weeks 5 & 6

MANDATES AND CORPORATIONS

I - MANDATES

What is a Mandate?

Mandate (CCQ. S.2130)

s. 2130: Mandate is a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power.

The power and, where applicable, the writing evidencing it are called the power of attorney.

§ Representation

§ Principle (mandator)

§ Agent (mandatary)

§ Power of attorney

A mandate is where a principle hires and agent to do a certain act; an agreement where the agent is engaged to represent the principle. When the mandate is signed, the principle is bound by the agent's signature, who is signing on his behalf.

Ex. Lawyers, notaries. Real estate agents are brokers – they are not agents.

Ex. I am leaving the country and I want to sell my dog. I tell my neighbor I will give her 10% of the sale price of at least \$100 if she sells the dog. She will be representing me. In other words, she is making decisions on my behalf; I am bound by her decision. She sells the dog. As my agent (mandatary), her signature binds me. I don't care how she sells the dog; I don't care to whom she sells the dog to. All I care about is the minimum price. The power that the agent holds is called a power of attorney.

Acceptance (CCQ s. 2132)

s. 2132: Acceptance of a mandate may be express or tacit. Tacit acceptance may be inferred from the acts and even from the silence of the mandatary.

§ Express acceptance: verbal or written = acceptance.

§ Tacit acceptance: Inferred from actions = acceptance.

§ Ex. My friend takes my car, picks up the keys and leaves when I ask her to sell the car. She has tacitly accepted to sell it and act as my agent.

§ Silence on its own = no acceptance.

Ex. A homeless man walks up to you and tells you "I love you I want to marry you". You walk away without saying anything. Obviously, you have not accepted.

Gratuitous or onerous (CCQ. S.2133):

s. 2133: Mandate is either by gratuitous title or by onerous title. A mandate entered into between two natural persons is presumed to be by gratuitous title but a professional mandate is presumed to be given by onerous title.

§ Gratuitous: free. Presumed between two natural persons.

§ Onerous: you pay money. Presumed when mandate is professional.

Remuneration (CCQ s. 2134)

s. 2134: Remuneration, if any, is determined by the contract, usage or law or on the basis of the value of the services rendered.

Duty of agent

Fiduciary duty (CCQ. S. 2138)

s. 2138: A mandatary is bound to fulfill the mandate he has accepted, and he shall act with prudence and diligence in performing it.

The agent must act in the best interest of the mandator (principle) or the corporation.

He shall also act honestly and faithfully in the best interests of the mandator, and avoid placing himself in a position that puts his own interest in conflict with that of his mandator.

Inform principle (CCQ. S. 2139)

s. 2139: During the mandate, the mandatary is bound to inform the mandator, at his request or where circumstances warrant it, of the stage reached in the performance of the mandate.

The mandatary shall inform the mandator without delay that he has fulfilled his mandate.

The agent must keep the principle informed as to the status and fulfillment of the mandate.

Ex. You have sold the principle's house. You should inform him as soon as possible because in reality he would want his money as soon as possible.

Delegation (CCQ s. 2142)

s. 2142: In the performance of the mandate, the mandatary, unless prohibited by the mandator or usage, may require the assistance of another person and delegate powers to him for that purpose.

The mandatary remains liable towards the mandator for the acts of the person assisting him.

As an agent, you are allowed to employ a sub-agent, unless the mandate indicates otherwise.

Ex. I employ you to sell my dog. You get very sick and ask your friend to sell it for you and give him half of your commission in return. However, if the sub-agent does something wrong, the agent is liable to the principle.

Double agent (CCQ. S. 2143)

s. 2143: A mandatary who agrees to represent, in the same act, persons whose interests conflict or could conflict shall so inform each of the mandators, unless he is exempted by usage or the fact that each of the mandators is aware of the double mandate; he shall act impartially towards each of them.

Where a mandator was not in a position to know of the double mandate, he may have the act of the mandatary declared null if he suffers injury as a result.

A situation where you, the agent, are being paid by both sides.

Ex. I have a dog that I want to sell for at least \$100 and will give my agent 10%. A friend of the agent comes up to her and says she wants help finding a dog and would give you \$5. In this case, the agent would need the consent of both parties. The problem is that the agent has a fiduciary duty towards both principles, where she must act in each person's best interest: sell for highest price versus sell for lowest price.

Principles of Nullity vs. Cancellation

Cancellation: If you sign a contract on Jan. 1st 2012 and canceled it on July 23rd 2012, it is valid until it is canceled i.e. for a period of 7 months. It stops on the day of the cancellation.

Nullity: If a contract is annulled, it is deemed void and unwritten: to never have existed. It is retroactively annulled to the day it was entered into.

Confidential information (CCQ s. 2146)

s. 2146: The mandatary may not use for his benefit any information he obtains or any property he is charged with receiving or administering in carrying out his mandate, unless the mandator consents to such use or such use arises from the law or the mandate.

If the mandatary uses the property or information without authorization, he shall, in addition to the compensation for which he may be liable for injury suffered, compensate the mandator by paying, in the case of information, an amount equal to the enrichment he obtains or, in the case of property, an appropriate rent or the interest on the sums used.

The agent may not use any confidential information received by the principle without his consent.

Ex. I ask you (agent) to go to the Eastern Townships to buy 200 acres for me. My plan is to build a factory, which would eventually increase the value of the land around it. You cannot use this information to buy land around it unless you get the principle's consent. If you use this information for your benefit, you are liable for any profits that came from your investment and compensation for damages suffered.

Party to the act (CCQ s. 2147)

s. 2147: The mandatary may not, even through an intermediary, become a party to an act which he has agreed to perform for his mandator, unless the mandator authorizes it or is aware of his quality as a contracting party.

Only the mandator may avail himself of the nullity resulting from the violation of this rule.

This is where the agent tries to buy the item himself.

Ex. I hire someone to sell a house for me. I would like to get approximately \$500,000 for it. The agent calls his brother in law and tells him to buy the house so they can resell it and split the profit. As an agent, you cannot buy it yourself or through an intermediary without the consent of the principle. You find out that the house is full of problems. If you do this, the principle can nullify the transaction but the agent cannot. The agent who scammed the principle would love to get rid of the item – but can't. Only the principle can nullify the transaction.

Cooperation (CCQ s. 2149)

s. 2149: The mandator is bound to cooperate with the mandatary to facilitate the fulfilment of the mandate.

The principle has an obligation to reasonably cooperate with the agent.

Ex. The agent calls the principle and asks a few questions about the dog he is trying to sell e.g. did the dog get his rabies shots.

Exceeding mandate (CCQ s. 2152)

s. 2152: The mandator is bound to discharge the mandatary from the obligations he has contracted towards third persons within the limits of the mandate.

The mandator is not liable to the mandatary for any act which exceeds the limits of the mandate. He is fully liable, however, if he ratifies such act or if the mandatary, at the time he acted, was unaware that the mandate had terminated.

The agent has two obligations:

1) Act within the scope of the mandate i.e. do not exceed your mandate

§ Proof: mandate (signed between agent and principle)

2) Disclose the mandate to the buyer i.e. be able to prove the buyer knew you were an agent. In this case, the agent is not responsible for any resulting problem.

§ Proof: sign a contract of sale with the third party (signed between agent and buyer)

Ratification (CCQ s. 2152, 2153)

s. 2152: The mandator is bound to discharge the mandatary from the obligations he has contracted towards third persons within the limits of the mandate.

The mandator is not liable to the mandatary for any act which exceeds the limits of the mandate. He is fully liable, however, if he ratifies such act or if the mandatary, at the time he acted, was unaware that the mandate had terminated.

s. 2153: The mandator is presumed to have ratified an act which exceeds the limits of the mandate where the act has been performed more advantageously for him than he had indicated.

When the principle lets the agent off the hook after the fact for having acted outside the scope of her mandate.

Ex. I can't find someone who wants to buy the dog for \$100. I find a buyer for \$85. I call the principle and inform him. He says: go ahead, sell it for \$85 and you'll get \$5 commission. Here, ratification does not come into play. Instead, the original mandate was modified.

Ex. (Ratification). Principle hires agent to buy bricks within a certain price range \$0.96 - \$1.00. Agent finds bricks for \$0.93. This is an example of going outside the scope of the mandate to the advantage of the principle. In this case, the agent does not need the consent of the principle and can go ahead and buy the bricks. Ratification is presumed.

Liability of Principle (CCQ. S. 2152, 2157, 2160)

s. 2152: The mandator is bound to discharge the mandatary from the obligations he has contracted towards third persons within the limits of the mandate.

The mandator is not liable to the mandatary for any act which exceeds the limits of the mandate. He is fully liable, however, if he ratifies such act or if the mandatary, at the time he acted, was unaware that the mandate had terminated.

The principle is liable under the contract if the agent has acted within the scope of the mandate.

s. 2157: Where a mandatary binds himself, within the limits of his mandate, in the name and on behalf of the mandator, he is not personally liable to the third person with whom he contracts.

The mandatary is liable to the third person if he acts in his own name, subject to any rights the third person may have against the mandator.

When the agent acts within the scope of the mandate and discloses his mandate to the buyer, he is not personally liable to the buyer. The agent is liable to the buyer if he acts in his own name (doesn't disclose the mandate). The buyer can sue the agent and also sue the principle.

s. 2160: A mandator is liable to third persons for the acts performed by the mandatary in the performance and within the limits of his mandate unless, under the agreement or by virtue of usage, the mandatary alone is liable.

The mandator is also liable for any acts which exceed the limits of the mandate, if he has ratified them.

The principle is liable to the buyer for the acts of the agent when the agent acts within the scope of the mandate unless, under the agreement or by usage, only the agent is liable.

Ex. I'm leaving the country and want to sell my car. I leave the car to the used car salesman. The buyer wants a warranty. Since the agent is the only person in Canada, he agrees to give the warranty if he receives a higher commission.

The principle is also liable for any acts he has ratified when the agent acts beyond the scope of the mandate.

Liability of Agent (CCQ s. 2157, 2158)

s. 2157: Where a mandatary binds himself, within the limits of his mandate, in the name and on behalf of the mandator, he is not personally liable to the third person with whom he contracts.

The mandatary is liable to the third person if he acts in his own name, subject to any rights the third person may have against the mandator.

s. 2158: Where a mandatary exceeds his powers, he is personally liable to the third person with whom he contracts, unless the third person was sufficiently aware of the mandate, or unless the mandator has ratified the acts performed by the mandatary.

When the agent exceeds the scope of the mandate, he is liable to the buyer. If the buyer knows that the agent is exceeding the mandate, the buyer loses his recourse against the agent and the principle (because he acted in bad faith).

Apparent mandate (CCQ s. 2163)

s. 2163: A person who has allowed it to be believed that a person was his mandatary is liable, as if he were his mandatary, to the third person who has contracted in good faith with the latter, unless, in circumstances in which the error was foreseeable, he has taken appropriate measures to prevent it.

Ex. You go to the Bay, pick up a pair of socks and go to a cash counter. The person behind the cash counter and buy them. As you walk out of the store, you are jumped on by security guards.

He happened to be the janitor – not a cashier. This is an apparent mandate: you are in good faith because you believed the janitor. Therefore, The Bay is liable to me who, in good faith, came to the cash counter. But if he looked like he a janitor, the buyer was not in good faith.

Vicarious liability (CCQ s. 2164) (see. s. 1463)

s. 2164: A mandator is liable for any injury caused by the fault of the mandatary in the performance of his mandate unless he proves, where the mandatary was not his servant, that he could not have prevented the injury.

In general, the principle is not liable for damage caused by the agent unless it can be shown that the principle could have prevented it. To prove you could have prevented it, there would need to be a physical proximity.

Ex. Employers are liable for damage caused by the employee in the performance in his work.

Ex. Parents are liable for damage caused by their children.

Termination of mandate (CCQ s. 2184, 2185)

s. 2184: Upon termination of the mandate, the mandatary is bound to render an account and return to the mandator everything he has received in the performance of his duties, even if what he has received was not due to the mandator.

The mandatary owes interest, computed from the time he is in default, on any balance in the account consisting of sums he has received.

The agent has to return everything he has received to the principle even if it implies a commission or kickback.

Ex. A supplier tells the agent: Buy from me and I will give you a brand new bicycle. This belongs to the principle.

s. 2185: A mandatary is entitled to deduct what the mandator owes him by reason of the mandate from the sums he is required to remit.

The mandatary may also retain what was entrusted to him by the mandator for the performance of the mandate until payment of the sums due to him.

If the principle owes the agent some money, the agent can deduct this from what he owes to the principle. Furthermore, if the agent has any other property of the principle, the agent is allowed to retain it until he is paid by the principle.

II - CORPORATIONS

Legal Forms of Business

Sole Proprietorship: One person carrying out business in his or her own name. There is no incorporation. Implies unlimited personal liability for the debts of the business. Advantage: simplicity.

Ex. If you rent a commercial lease and the business fails, the landlord can sue your business and cease all your personal assets to pay off the debts.

Partnership: Two or more persons carrying out a business under a common name for a common profit. All partners are personally liable for the debts of the business. It is managed by a unanimous shareholder's agreement. There is no separate legal person.

Corporation/Company: The most common form of business. It is a separate legal person. It has the same rights as a person has and is liable for its own debts. The owners (shareholders) are not liable for the debts of the corporation. A corporation cannot act by itself – it acts through its agents by the intermediary of mandates.

Civil Code of Quebec

Separate legal entity (CCQ. s. 301)

s. 301: Legal persons have full enjoyment of civil rights.

Even though corporations cannot act on their own, they act through their agents.

Name (CCQ. s. 305)

s. 305: Every legal person has a name which is assigned to it when it is constituted, and under which it exercises its rights and performs its obligations.

It shall be assigned a name which conforms to law and which includes, where required by law, an expression that clearly indicates the juridical form assumed by the legal person.

A company name will end with a certain word e.g., inc., ltd., corp. If you see a name that does not have this e.g., “Happy Bakery”, it is considered a trade name, not a corporation per se. It might be a corporation, partnership, or sole proprietorship carrying on business under a trade name.

Numbered company

The government's way of finding a company. It is a name by default.

Representation

Companies cannot act on their own therefore they do so through their directors and officers. The owners are called shareholders. Directors, who are elected by the shareholders, have the power to manage the company. Directors then delegate the ordinary day-to-day decisions to people they have appointed, i.e. officers. Shareholders are only liable for the money they have invested in the company. They are not liable for any debts of the company per se i.e. the creditors of the company cannot go after the shareholders on a personal basis. The shareholder can have all three functions: shareholder/director/officer. There is no prohibition.

Directors (CCQ s. 321)

s. 321: A director is considered to be the mandatary of the legal person (company). He shall, in the performance of his duties, conform to the obligations imposed on him by law, the constituting act or the by-laws and he shall act within the limits of the powers conferred on him.

A director is an agent.

Ex. BOD where decisions are made by majority vote.

Officers (CCQ s. 312)

s. 312: A legal person is represented by its senior officers, who bind it to the extent of the powers vested in them by law, the constituting act or the by-laws.

The officer is an agent. The officers, acting within a mandate, have the powers awarded to them by law.

Ex. President, Vice-President, Treasurer, Secretary: CEO, CIO, COO, CEO, in-house counsel.

Ownership

Shareholders, limited liability (CCQ s. 309)

s. 309: Legal persons are distinct from their members. Their acts bind none but themselves, except as provided by law.

Legal persons are distinct from their shareholders. In general, the shareholder, director, officer is not liable for the debts of the company. But there are exceptions.

Fraud (CCQ s. 316)

s. 316: In case of fraud with regard to the legal person, the court may, on the application of an interested person, hold the founders, directors, other senior officers or members of the legal person who have participated in the alleged act or derived personal profit therefrom liable, to the extent it indicates, for any damage suffered by the legal person.

In the case of fraud with regards to the company, the court may, on the application of someone who has an interest in resolving this issue (e.g. creditors, union, suppliers, community), hold the founders, directors, officers, members (shareholders) liable. Anyone participating in fraud may be liable.

Corporate veil (CCQ s. 317) àRE: 146400 Canada Inc. v. Network Transport Ltd.

s. 317: In no case may a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order.

You cannot hide behind a company to perpetrate a fraud.

Ex. I send scratch and win cards outside of Quebec and make each card a winner. On the card, it says: "If you win, call 1-900...". The telemarketers are trained to keep them on the line for as long as possible. The owner of that company cannot hide behind the company to say it wasn't him. He can't say "Don't sue me, sue the company". The courts have the ability, where in bad faith, lift the corporate veil.

Pre-incorporation contract (CCQ s. 319, 320) An exception to the rule of mandate.

s. 319: A legal person may ratify an act performed for it before it was constituted; it is then substituted for the person who acted for it.

The ratification does not effect novation; the person who acted has thenceforth the same rights and is subject to the same obligations as a mandatary in respect of the legal person.

s. 320: A person who acts for a legal person before it is constituted is bound by the obligations so contracted, unless the contract stipulates otherwise and includes a statement to the effect that the legal person might not be constituted or might not assume the obligations subscribed in the contract.

You have not yet incorporated your company. The legal person does not exist so therefore you cannot act for the principle. When you sign for a non-existing principle, you are personally liable. There is an exception to this rule: You can sign on behalf of a company that has not yet been incorporated

When the company ratifies the contract, you are deemed to be an agent.

Ex. I sign a commercial lease on behalf of a company that has not yet been incorporating. I am giving notice to the lessor that I am signing on behalf of the company to be incorporated.

Fiduciary duty (CCQ s. 322)

s. 322: A director shall act with prudence and diligence.

He shall also act with honesty and loyalty in the interest of the legal person.

The director and officer have a duty to act in the best interest of the principle (legal person).

cc. s. 2138 CCQ.

Confidential information (CCQ s. 323)

s. 323: No director may mingle the property of the legal person with his own property nor may he use for his own profit or that of a third person any property of the legal person or any information he obtains by reason of his duties, unless he is authorized to do so by the members of the legal person.

The director cannot use the property and information belonging to the corporation to generate a personal profit.

cc. s. 2146

Conflict of interest (CCQ s. 324)

s. 324: A director shall avoid placing himself in any situation where his personal interest would be in conflict with his obligations as a director.

A director shall declare to the legal person any interest he has in an enterprise or association that may place him in a situation of conflict of interest and of any right he may set up against it, indicating their nature and value, where applicable. The declaration of interest is recorded in the minutes of the proceedings of the board of directors or the equivalent.

Any conflict of interest the director may have should be declared to the company and you should abstain from engaging in such activities.

Directorship (CCQ s. 327)

s. 327: Minors, persons of full age under tutorship or curatorship, bankrupts and persons prohibited by the court from holding such office are disqualified for office as directors. However, minors and persons of full age under tutorship may be directors of associations constituted as legal persons that do not aim to make pecuniary profits and whose objects concern them.

Minors (under 18), adults who do not understand what they are doing, bankrupts, legally prohibited persons (e.g. someone who has been convicted of securities legislation fraud). A director may be anyone of full age with a head on his shoulders. However, minors and persons of full age under tutorship may be directors of non-profit organizations.

Indoor management rule (CCQ. s. 328)

s. 328: The acts of a director or senior officer may not be annulled on the sole ground that he was disqualified or that his designation was irregular.

Ex. I am dealing with the VP of finance of a large firm. I go to meet him in his office to discuss. Everything leads me to assume that he is a director/senior officer. We sign a contract. I can assume that that person had the authority to sign a contract. The contract may not be annulled on the basis that the officer was disqualified or his designation was irregular.

Incorporation: Federal vs. Provincial

Any company operating in Quebec can be incorporated provincially or federally because there exists a parallel jurisdiction. Neither one is more valuable over the other. In principle, there is no huge advantage either way.

- Federal: Canada Business Corporations Act
- Provincial: Business Corporations Act of Quebec

Business Corporations Act (Quebec)

Duties of Directors and Officers (s. 119)

s. 119. Subject to this division, the directors are bound by the same obligations as are imposed by the Civil Code on any director of a legal person.

Consequently, in the exercise of their functions, the directors are duty-bound toward the corporation to act with prudence and diligence, honesty and loyalty and in the interest of the corporation.

In their capacity as mandataries of the corporation, the officers are bound, among other things, by the same obligations as are imposed on the directors under the second paragraph.

Directors and officers are agents of the company and have a fiduciary duty. As so, the rules of mandate apply to them.

Liability for wages (s. 154)

s. 154. Directors of a corporation are solidarily liable to the employees of a corporation for all debts not exceeding six months' wages payable to each such employee for services performed for the corporation while they are directors of the corporation respectively.

While you are a director, make sure to pay the employee.

The director is only liable if

- a) Employee gets a judgment and sues the company within one year or after debt is due, or;
- b) If within one year of the employee leaving, the company becomes insolvent

However, a director is not liable unless the corporation is sued for the debt within one year after it becomes due and the writ of execution is returned unsatisfied in whole or in part or unless, during that period, a liquidation order is made against the corporation or it becomes bankrupt within the meaning of that expression in the Bankruptcy and Insolvency Act (R.S.C. 1985, c. B-3) and a claim for the debt is filed with the liquidator or the syndic.

Ex. If there are 5 directors, and there is a debt of \$100,000, you can collect the full amount from one of them.

Liability for dividends (s. 156)

s. 156. Directors of a corporation who vote for or consent to a resolution authorizing any of the following are solidarily liable to restore to the corporation any amounts involved and not otherwise recovered by the corporation:

...

- (4) a payment of a dividend contrary to section 104;

...

Declaration and payment of dividends

s. 104. A corporation may not declare and pay a dividend, except by issuing shares or options or rights to acquire shares, if there are reasonable grounds for believing that the corporation is, or would after the payment be, unable to pay its liabilities as they become due.

Directors who authorize the payment of a dividend contrary to section 104 (where the payment of the dividend would make the company insolvent), the director is liable for this amount. This is to prevent the shareholders from coercing the directors to paying dividends. You cannot strip assets out of the company to make the company insolvent.

Liability of shareholders (s. 224)

s. 224. Shareholders are not, as shareholders, liable for any act of the corporation.

However, they are debtors to the corporation for any unpaid amount on shares they hold in its share capital.

General rule: shareholders have no liability for the acts of the corporation. However, they are liable for any money they have put into the company (to buy shares).

Canada Business Corporations Act

Duty of care (s. 122)

1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Fiduciary duty of directors and officers.

Duty to comply

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

The shareholders have the power to limit the power of the directors.

No exculpation

(3) Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach thereof.

Directors and officers cannot, through private agreement, limit their liability by private contract. EXCEPTION: The only situation where they can limit their liability as director/officer is under a unanimous shareholder agreement (s. 146 par. 5). If a shareholder takes on the authority of the director (e.g. paying dividends), they will be held liable.

Liability of shareholders (s. 146 par. 5)

146. ... (5) To the extent that a unanimous shareholder agreement restricts the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation, parties to the unanimous shareholder agreement who are given that power to manage or supervise the management of the business and affairs of the corporation have all the rights, powers, duties and liabilities of a director of the corporation, whether they arise under this Act or otherwise, including any defences available to the directors, and the directors are

relieved of their rights, powers, duties and liabilities, including their liabilities under section 119 (*Liability of directors for wages*), to the same extent.

III – CASES

CASE 1 - Piec Estate v. Caisse d'économie polonaise: CSQ

Legal issues:

- Fiduciary duty (s. 2138 CCQ): A mandatary (bank) is bound to fulfill the mandate he has accepted and shall act with prudence and diligence when performing it.

Facts/Conclusion:

- 3 separate mandates:
 1. The niece was the liquidator of the aunt's estate upon death;
 2. The nephew was in charge of managing the aunt's money and dealing with the bank;

3. The bank was in charge of protecting the aunt's money.

- The aunt went for a trip to her native Poland. During her trip, she passed away.
- When the niece learned about the death of her aunt, she began liquidating her estate. At her surprise, she realized that her aunt's term deposit certificates of \$27,000 had already been withdrawn.
- The nephew, who learned about his aunt's death before everyone else, created a forged letter from his aunt, instructing the *Caisse d'économie polonaise du Québec* to pay her nephew the sum of \$27,000.
- The Caisse accessed the aunt's term deposit certificates, turned them into cash, and gave them to the nephew.
- The plaintiff (niece), is excessively upset and wishes to properly liquidate her aunt's estate – the way she was asked to by her aunt.
- The bank should have asked itself questions because the redemption of the term deposit certificates involved the renunciation of an important amount of accrued interest. Further investigation should have been conducted.
- The court is of the opinion that a number of factors should have alerted the bank to the possibility that the nephew was exceeding the mandate that the aunt had given him (Authorization for the nephew to close the account and give \$26,000 to the nephew). à The bank breached its fiduciary duty to the client. Since the bank did not act with reasonable care, it is liable for damages suffered by the niece.
- For this reason, the court condemns that bank to pay the niece the sum of \$27,000, with interests from the date of service.

CASE 2 – DR. ANTHONY DOWELL V. NOTARY HAY ELLIS: CSQ

Parties:

- Dr. Anthony Dowell, Plaintiff
- Me. Edgar Hay-Ellis, Defendant

Legal issues:

- Fiduciary duty: s. 2138 CCQ: A mandatary is bound to fulfill the mandate he has accepted, and he shall act with prudence and diligence in performing it. He shall also act in the best interests of the mandator.

Facts/Conclusion:

- Joseph decides to purchase an apartment building under the name Dr. Anthony Dowell, a person with whom he had previously undertaken transactions such as this one.
- After the papers were signed, Dr. Dowell became the owner of the property incurred, and had substantially large obligations towards innumerable third parties, such as the mortgage creditor, tenants, and municipal/school authorities.
- Dr. Dowell (principle/mandator) hired Notary Edgar Hay-Ellis (agent) to take care of the property's trust account, where Joseph could issue cheques strictly for the day-to-day maintenance of the property.
- "In permitting himself to issue cheques without making even the slightest attempt to verify in what manner these requested payments related to the property the notary fell far short of the standard of conduct which the law imposes upon him. He never even required invoices (...). The defendant neither realized nor recognized the need for caution. On the contrary, he chose (...) to act blindly, putting faith in Joseph."
- Hay-Ellis did not act, in the exercise of his profession, with prudence and diligence. Dr. Dowell won the case.

CASE 3 – 146400 Canada Inc. v. Network Transport LTD.: CSQ

Parties:

- 146400 Canada Inc., Plaintiff
- Network Transport, Defendant

Legal issues:

- fraud (s. 317 CCQ): In no case may a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order.

Facts/Conclusion:

- 146400 Canada Inc. took over the lease that Network Transport had for a certain industrial property owned by Claridge Properties Ltd.
- The Offer to Lease was signed by the president of Network Transport, not on behalf of Network Transport, but rather on behalf of its wholly owned subsidiary in Quebec.
- Prior to the expiry of the lease term, Network Transport abandoned the leased properties without leaving the remaining amount due in rent.
- When 146500 Canada Inc. moved in, there was a substantial amount still due in rent. The owner of Claridge Properties Ltd. was now asking 146400 Canada Inc. to cover for the unpaid rent.
- Network Transport refuses to pay claimed by 146400 Canada Inc.
- Network Transport claims not being responsible for the unpaid rent because the plaintiff was actually dealing with the wholly owned subsidiary that is now closed.
- However, the plaintiff claims to have believed that, at all times, it was dealing with Network Transport as a lessee. There was no evidence of the contrary.
- The president of Network Transport induced the lessor to believe that it was dealing with the parent company and not the subsidiary: “ Mr. Bates (...) provoked a situation which, due to his fault, induced the lessor to believe that it was dealing with the parent shareholder, Network Transport Limited, rather than its wholly owned subsidiary Network Transport (Québec). By doing so, he committed a “fraud”.
- Although Network Transport Ltd. and its subsidiary are two legal entities, the Court retains the fact that their activities are united.

Weeks 7, 8 & 9

**THE ETHICAL AND LEGAL ISSUES ARISING OUT OF THE
EMPLOYER-EMPLOYEE RELATIONSHIP**

I - CIVIL CODE OF QUEBEC

A) EMPLOYMENT LAW ISSUES

Contract of employment

1) Subordination (CCQ 2085)

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

§ An employment contract is where the employee agrees to do be paid to do work for a limited period.

§ As an employee, he also agrees to be a subordinate to his employer (i.e. to follow instructions and be under the direction of the employer).

2) Fixed or indeterminate term (CCQ 2086):

2086. A contract of employment is for a fixed term or an indeterminate term.

§ An employment contract may be of fixed or indeterminate term.

o Fixed term: An employee is hired to replace someone who is on maternity leave.

o Indeterminate term: An employee is hired for a permanent, full-time position.

Health safety dignity (CCQ 2087)

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.

§ The employer is bound to pay the remuneration mentioned in the contract of employment.

§ He must also take necessary measures to protect the health, safety and dignity of the employee.

Fiduciary duty (CCQ 2088)***

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.

§ The employee has a fiduciary duty and cannot use any confidential information he may obtain in the course of his employment. These obligations continue i) for a reasonable time after the cessation of the contract and ii) permanently when the information concerns the reputation and private life of another person.

Whistle blowing

§ Whistle blowing occurs when an employee brings to light a problem that is going on in the company. The first step is internal whistle blowing, where the employee brings the issue to the boss. If the boss does not take the required measures to solve the issue, the next step is external whistle blowing, where the employee brings the problem to the attention of the outside world (e.g. government or media). Whistle blowing is when the employee goes against his fiduciary duty to follow ethics to help solve a problem.

Non-competition (CCQ 2089, 2095)***

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.

§ In the contract of employment, the employer may include a non-competition clause (the clause has to be written; there is no presumption). Such a clause forbids an employee from working for a competitor for a certain period of time after leaving. However, the clause must be limited as to the time, place and job description in order to protect the legitimate interests of the employer.

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.

§ A non-competition clause is rarely enforceable. The only case where the court will listen to the reason for a non-competition clause is if the employer terminates the employee for serious reason (2094 CCQ).

Termination of employment

1) Reasonable notice / Severance (CCQ 2091)***

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.

§ If the contract of employment is of indeterminate term, the employer or employee may terminate it by giving notice in reasonable time. The employer also has the option to give the employee severance.

2) Serious reason / without prior notice (CCQ 2094)***

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

§ The employer may resiliate the contract of employment without prior notice if there is a serious reason.

§ Applies to both fixed and indeterminate term contracts.

§ Ex. (Serious reason): Insubordination; Incompetence; Theft; Late for work on habitual basis.

Probationary period

§ The beginning of a work period, usually 3 months, where either party may terminate the agreement without recourse.

§ Applies only to indeterminate term contracts.

Public order (CCQ 2092) i.e. Indemnity in lieu of reasonable notice

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

§ Compensation for damage of loss if 1) insufficient notice or 2) compensation is insufficient

§ Ex. Employer cannot make the employee sign a paper saying he cannot sue for more compensation

Death (CCQ 2093)

2093. A contract of employment terminates upon the death of the employee.

Depending on the circumstances, it may also terminate upon the death of the employer.

§ When the employee dies, his contract ends. This is an exception to the rule. Normally, obligations do not end when someone dies (e.g. mortgage, debts). This is because an employment contract is based on a very personal skill set. In some cases (e.g. sole proprietorships), the contract may end upon the death of the employer.

Sale of business (CCQ 2097)

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.

§ An employee's contract is still in effect even if his employer goes through a buyout.

Privacy issue at work: (Cameras, phones, emails, computers)

§ As a general rule the employer can monitor within reason. He can't have a little monitor on everyone's computer or install cameras in the washroom; but he is allowed to monitor the company's property.

Workplace Code of Conduct

§ A Code of Conduct is a legal and ethical guide that gives employees the dos and don'ts of the corporation. On the flip side, the employer can say: "I have grounds to fire the person". The employee usually signs for it as well.

B) Independent contractor (CCQ 2098-2100)***

§ Def: An independent contractor is a consultant. This consultant is brought in from outside for his knowledge and has free reign to do whatever he pleases to solve a problem and write a report.

§ Independent contractors have GST and PST numbers. They bill you the price + tax.

2098. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.

§ No relationship of subordination exists. For instance, if you call your lawyer and tell him: Get me out of here. Don't try to tell him how to do his job; he is not your subordinate.

2099. The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

§ The independent contractor has a fiduciary duty towards the client.

§ Do not guarantee anything to your client. If the contractor guarantees a specific result, he becomes liable for that guarantee (unless he can prove there was an act of God).

§ Ex. A stockbroker guarantees you a 15% return. If you only get 14%, your stockbroker becomes liable.

2100. The contractor and the provider of services are bound to act in the best interests of their client, with prudence and diligence. Depending on the nature of the work to be carried out or the service to be provided, they are also bound to act in accordance with usual practice and the rules of art, and, where applicable, to ensure that the work done or service provided is in conformity with the contract.

Where they are bound to produce results, they may not be relieved from liability except by proving superior force.

C) Conditions of Liability

There exist two conditions of liability:

- 1) Breach of non-contractual duty/civil liability (CCQ 1457)
- 2) Breach of contract (CCQ 1458)

Breach of duty (CCQ 1457) (i.e. non contractual situation; civil liability)

1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

§ Breach of duty refers to a situation where, in the absence of a contract, a person injures another person (bodily, moral or material). He becomes liable to reparation of the injury he caused AND, in certain cases, to reparation of injury caused by someone in his custody. à vicarious liability.

§ Ex. I am rushing to get to the bus today and I push you down the stairs. I have no contract saying "I will not hurt you", but I did breach my duty to society to act in a reasonable and safe manner.

Breach of contract (CCQ 1458) (i.e. contractual situation)

1458. Every person has a duty to honour his contractual undertakings.

Where he fails in this duty, he is liable for any bodily, moral or material injury he causes to the other contracting party and is liable to reparation (compensate) for the injury(...).

- § When a person does not respect his contractual obligations, he becomes liable for any bodily, moral or material injury AND liable to compensate for the injury.
- § Ex. I buy your bicycle, I give you a cheque and it bounces. I am liable to compensate for damages.

Vicarious liability (CCQ 1457, 1463)

1463. The principal is liable to reparation for injury caused by the fault of his agents and servants (employee) in the performance of their duties; nevertheless, he retains his recourses against them.

- § The employer is liable to compensate for injury caused by the fault of his employee in the performance of their duties. However, the employer can also turn around and sue the employee.
- § Ex. You're at work and bored. You throw a rock at a customer and it injures him. The employer is liable to the injured person.
- § Ex. If the employee throws rocks during his unpaid break, the employer is not liable.

D) Assessment of damages

Compensation: CCQ 1611

1611. The damages due to the creditor compensate for the amount of the loss he has sustained and the profit of which he has been deprived.

Future injury which is certain and able to be assessed is taken into account in awarding damages.

- § Compensation is based on actual loss and future injury (determined by expert opinion).

Punitive damages: CCQ 1621

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfill their preventive purpose.

Punitive damages are assessed (calculated) in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

- § If a victim is claiming punitive damages (i.e. if the law specifically allows it, e.g. Charter), these punitive damages are meant to punish you for doing something bad and also for to prevent others from doing it.
- § ***The CCQ does not permit for punitive damages. It has to come from the Charter or other specific laws.

II - Quebec Labor Standards Act (LSA), Psychological Harassment

Psychological harassment

- § This law deals with the right of the victim to sue the employer.
- § Harassment is not just employer harassing employee. It can be female employee harassing male employee, worker/worker harassment, etc. It is broad enough to cover any situation.

Definition: LSA 81.18

81.18. For the purposes of this Act, “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. Vexatious behaviour.

A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.

Employer’s obligation: LSA 81.19

81.19. Every employee has a right to a work environment free from psychological harassment. Duty of employers.

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

- § Inform your employees on what psychological harassment is. Once you know an employee is being harassed, you have to take measures to stop it.

Right of the employee. Filing a complaint: LSA 123.6, 123.7

123.6. An employee who believes he has been the victim of psychological harassment may file a complaint in writing with the Commission. Such a complaint may also be filed by a non-profit organization dedicated to the defence of employees' rights on behalf of one or more employees who consent thereto in writing.

123.7. Any complaint concerning psychological harassment must be filed within 90 days of the last incidence of the offending behaviour.

- § The employee has 90 days from the last time his employer harassed him to file his claim with the LSC.

Powers of commission: LSA 123.15

123.15. If the Commission des relations du travail considers that the employee has been the victim of psychological harassment and that the employer has failed to fulfil the obligations imposed on employers under section 81.19, it may render any decision it believes fair and reasonable, taking into account all the circumstances of the matter, 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;
ordering the modification of the disciplinary record of the employee.

Termination under the Quebec Labour Standards Act

Recourse: LSA 124

124. An employee credited with two years of uninterrupted service in the same enterprise who believes that he has not been dismissed for a good and sufficient cause may present his complaint in writing to the Commission des normes du travail or mail it to the address of the Commission des normes du travail within 45 days of his dismissal, except where a remedial procedure, other than a recourse in damages, is provided elsewhere in this Act, in another Act or in an agreement. Exception.

If the complaint is filed with the Commission des relations du travail within this period, failure to have presented it to the Commission des normes du travail cannot be set up against the complainant

§ An employer may fire an employee under:

- o CCQ 2091, by giving reasonable notice, contract of indeterminate term;
- o CCQ 2094, for serious reason, fixed or indeterminate term;
- o LSA 124 à Employee must have worked there for 2 years. If the employee believes he has not been dismissed for good and sufficient cause, he can file a claim within 45 days of his dismissal.
- o Ex. Good and sufficient cause = Bad economy. Insufficient cause = Employer prefers the other person to do the job.

Powers of commission: LSA 128

128. Where the Commission des relations du travail considers that the employee has been dismissed without good and sufficient cause, the Commission may

- (1) order the employer to reinstate the employee;
- (2) order the employer to pay to the employee an indemnity up to a maximum equivalent to the wage he would normally have earned had he not been dismissed;
- (3) render any other decision the Commission believes fair and reasonable, taking into account all the circumstances of the matter.

Domestic.

However, in the case of a domestic or a person whose exclusive duty is to take care of or provide care to a child or to a sick, handicapped or aged person, the Commission des relations du travail

may only order the payment to the employee of an indemnity corresponding to the wage and other benefits of which he was deprived due to dismissal.

- § If the employee has been dismissed without good and sufficient cause, the Commission may:
- o Order the employer to reinstate the employee; (get his job back)
 - o Order the employer to pay to the employee an indemnity up to a maximum equivalent to the wage he would normally have earned had he not been dismissed;
 - o Render any other decision the Commission believes fair and reasonable, taking into account all the circumstances of the matter. (includes severance pay instead of his job back)
 - o However, in the case of a domestic (homecare provider), the *normes du travail* will never order reinstatement.

Notice of termination: LSA 82, 82.1

82. The employer must give written notice to an employee before terminating his contract of employment or laying him off for six months or more.

Length of notice.

The notice shall be of one week if the employee is credited with less than one year of uninterrupted service, two weeks if he is credited with one year to five years of uninterrupted service, four weeks if he is credited with five years to ten years of uninterrupted service and eight weeks if he is credited with ten years or more of uninterrupted service.

Restriction.

This section does not deprive an employee of a right granted to him under another Act.

- § Before an employer terminates the contract of the employee or lays him off for 6+ months, he must give him a written notice.

§ Length of notice:

- One week: employee has worked there for less than one year
- Two weeks: employee has worked there for 1-5 years
- Four weeks: employee has worked there for 5-10 years
- Eight weeks: employee has worked there for 10+ years

82.1. Section 82 does not apply to an employee à EXCEPTION TO SEVERANCE PAY

- 1) who has less than three months of uninterrupted service; (probation period)
- 2) whose contract for a fixed term or for a specific undertaking expires; (fixed term contract)
- 3) who has committed a serious fault; (CCQ 2194)
- 4) for whom the end of the contract of employment or the layoff is a result of superior force.

- § If you want money, sue under CCQ 2091. If you want your job back, sue under LSA 124

III - CASES

Case 1: King v. Biochem (CSQ)

Legal issues:

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

Legal parties:

- Dr. King, Plaintiff
- BioChem, Defendant

Facts/Decision:

- Less than one year after being hired, Dr. King was fired “after having been given due warning for insubordination and lack of respect of colleagues and others with whom she interacted”. Dr. King believes she was “fired suddenly, having received no previous indication of being in jeopardy, her dismissal being caused by jealousy and petty complaints, some of which were false”.
- The employer claims to have fired King for “serious reason”, under CCQ 2094. If so, no prior notice of termination would have been required. However, the judge determined there was no serious reason to fire King. Therefore, King should have been fired under CCQ 2091.
 - o When firing an employee under CCQ 2091, prior notice of termination must be given to the employee – in this case, it would have been of 4 months. Since no prior notice was given, the employee must receive severance.
 - o Also, “special circumstances” need to be considered. Here, King was awarded 12 months severance and also got moral damages of \$50,000.
- Decision: King awarded indemnity plus interest on 12 months salary à The employer has to prove a serious reason under CCQ 2094. If he cannot prove it, he has to prove prior notice under 2091. If no prior notice was given, the employee must receive severance. In this case, King had worked 10 months but received 12 months of severance + damages.

Case 2: DubÉ v. Volcano TECHNOLOGIES INC. (CSQ)

Legal issues:

- **Reasonable notice (or severance): CCQ 2091; Indemnity in lieu of reasonable notice (CCQ 2092)**
- **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.

Legal parties:

- Dubé, Plaintiff
- Volcano, Defendant

Facts/Decision:

- After 26 months of service, Dubé was terminated by Volcano due to the financial situation of the plant. He claims as indemnity an amount equivalent to 9 months of salary plus car allowance. But Volcano considers that according to the terms of the employment agreement, Dubé is entitled to no more than 2 weeks, which it has paid to him.
- Volcano gave Dubé prior notice of termination (CCQ 2091).
- He was fired with only two weeks of severance pay, as indicated in the employment agreement.
 - o In this agreement, the employer refers to the LSA: Volcano claims that by signing the agreement, Dubé understood that he was “renunciating his rights under the CCQ to receive more than one week per year of service in case of termination”. However, the simple fact that the employer refers to the LSA in the employment contract is not enough to constitute such a renunciation à You cannot give up your rights to sue under the CCQ is the contract says “You give up your rights to sue under CCQ and apply LSA” because it is against public order.
- Here, the court applied CCQ 2091 and ordered Volcano to pay Dubé 18 weeks severance.

Case 3: Hasanie v. Kaufel (CSQ)

Legal issues:

- § Breach of fiduciary duty (CCQ 2088) à Serious reason (CCQ 2094)
- § Reasonable notice/severance (CCQ 2091)
- § **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.

Legal parties:

- Hasanie, Plaintiff
- Kaufel, Defendant

Facts/Decision:

- Thomas & Betts bought out Kaufel Groupe Ltd. in 1998. Six months later, Kaufel terminated Hasanie and give him 10 months notice under CCQ 2091. While Hasanie is on vacation, the they come to find out that Hasanie has breached his fiduciary duty : he was trying to buy out a competing company. The employer then decides to fire him immediately under CCQ 2094 for serious reason, without severance.
 - o Hasanie argues he never breached his fiduciary duty because he had advised management. Not true, he could have gotten management's approval in writing.
 - o Furthermore, Hasanie claims he was being driven out of the company and had to save himself and his own future (i.e. constructive dismissal). There is no proof of this.
- Decision: Employer not required to pay indemnity or damages. àWhen an employee places his own interests above his fiduciary duty to his employer, this can be seen a serious reason to fire the employee without prior notice or severance: "Every employee owes a duty of loyalty to his employer. This duty would be the very essence of the employment contract. It is important that the employee must not advance his personal interests over those of his employer. (...)
Persons in senior management position such as plaintiff are held to a higher standard(...)"

Case 4: Copyfax v. Lambert

Legal issues:

- Non competition clause (CCQ 2089); Confidential information (CCQ 2088);
- Interlocutory injunction

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.

Legal parties:

- Copyfax, Plaintiff
- Claude Lambert, Defendant

Facts/Decision:

- NOTE: When you breach a clause for fiduciary duty or confidential information or non-competition clause, the company is not concerned about monetary damages; they are concerned about access to information – which is why they ask for an interlocutory injunction (i.e. court order to preserve the status quo and make you stop using the information and stop competing until judgment). The case deals with two interlocutory injunctions: 1) non competition clause 2) confidential information
- Lambert was fired under CCQ 2094 because he set up a competing business. Lambert had been working for Copyfax for a number of years and signed a contract that included a non-competition clause: time (14 months); place (25 miles) and job description. The question is: is the non competition clause enforceable? The court looks at the 3 factors to determine if it is reasonable. Burden of proof is on the employer:
 - o Job description: reasonable
 - o Duration (14 months): unreasonable
 - o Place (25 miles): unreasonable

- Limitations placed by non-competition clause are unreasonable. Therefore the clause will not be enforceable.
- Decision: Interlocutory injunction refused for non-competition clause; Interlocutory injunction granted for use of confidential information.

Case 5: A.R. Medicom v. Bergeron

Legal issues:

- Non competition clause (CCQ 2089); Interlocutory injunction

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.

Facts/Decision:

- As employees of Medicom Inc., Bergeron and Hubert both signed contracts of employments. However, each contract varied as to their non-competition clause. Medicom seeks an interlocutory injunction against both former employees. To determine if the non-competition clauses are enforceable, the court must determine if the limitations placed by the clauses are reasonable:

- o Bergeron

- § Time: 2 years

- § Place: worldwide

- § Job description: similar commercial activity or anything in competition with Medicom

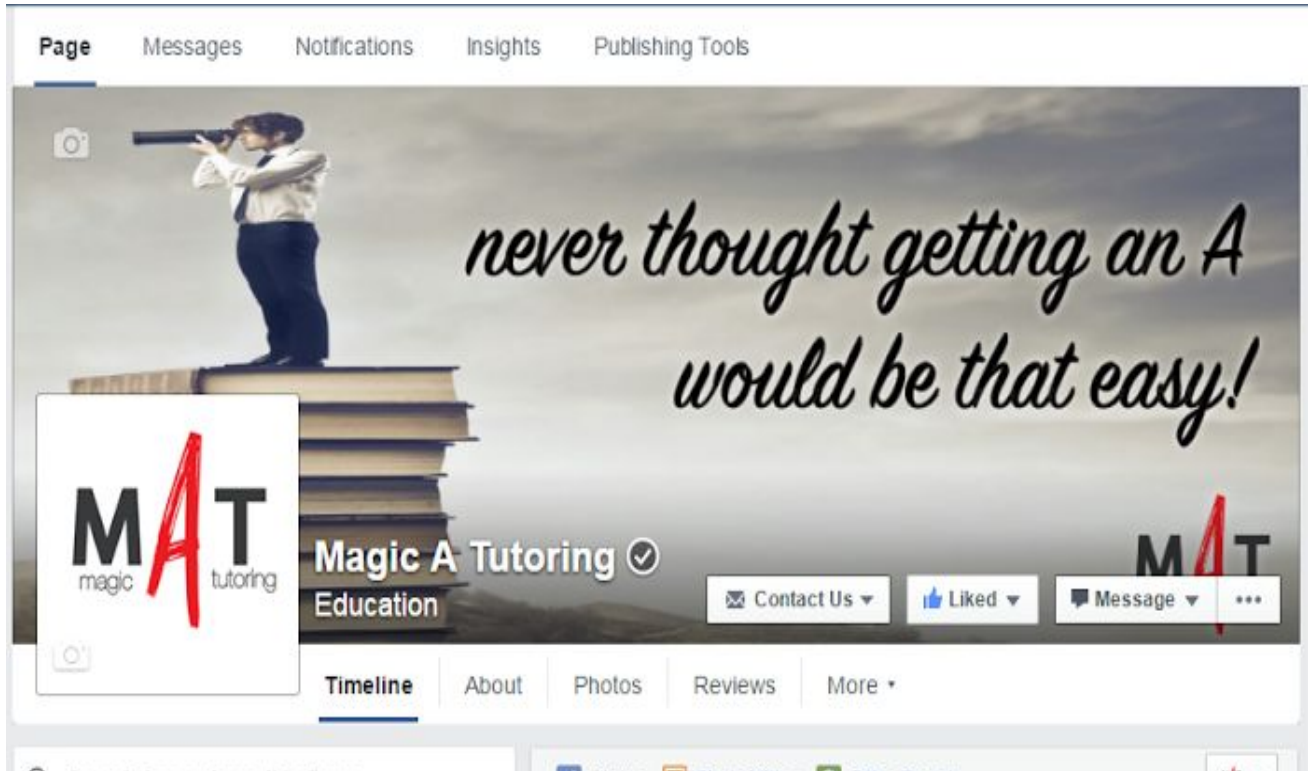
- o Hubert

- § Time: 3 years

- § Place: Canada

- § Job description: similar commercial activity or anything in competition with Medicom

- The restrictions placed on Bergeron and Hubert go beyond what is necessary to protect the legitimate interest of the employer”; it prevents them from working in their chosen field of work.
- The limitations are unreasonable: preventing the ex-employees from working in Canada/Worldwide: “It cannot be a legitimate interest of this employer to prevent these two men from working in their field, in any capacity whatever, even if working in that field is not in competition with the business”.
- Interlocutory injunction denied: Neither Bergeron or Hubert are bound by the non-competition clause.



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