Interpretation

of the Act respecting labour standards, its regulations and the National Holiday Act

Québec

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NOTE TO READERS

The Act respecting labour standards came into force on April 16, 1980 and amendments have been made to it over the years. This Act is an important piece of legislation in the labour world in Québec and plays an essential role in ensuring workers minimum conditions of employment. It is the Commission des normes du travail which is in charge of overseeing the implementation and application of the labour standards established by the Act.

This legislative text and its amendments have, on numerous occasions, been submitted to the Courts which have ruled on the interpretation that should be given to a number of its provisions. These decisions and the foundations on which they are based have guided the Commission in its action.

This document was prepared with a view to informing readers of the position adopted by the Commission concerning the interpretation that should be given to the various provisions found in the Act.

Users should, however, bear in mind that the comments expressed in this text reflect the situation as it currently stands. Indeed, the Direction générale des affaires juridiques may amend the position adopted in relation to certain provisions of the Act according to the evolution of jurisprudence in this field.

This document presents the interpretation currently given to the provisions of the Act respecting labour standards, its regulations and the National Holiday Act for application purposes. The related jurisprudence, if any, may be consulted on the web site of the Commission des normes du travail.

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August 2007

In this document, the masculine gender designates both women and men, as the case may be. The purpose of using the masculine gender is to make the text easier to read.

TABLE OF CONTENTS

Part I An Act respecting labour standards

Act respecting labour standards

CHAPTER I
DEFINITIONS

SECTION 1, 3), c)

"Spouses" are:

a) married, in a civil union and cohabiting;
b) two persons who are not married and who are the father and/or mother of the same child. In this case, no specific cohabitation period is required; they must simply be living in a marital relationship to be considered "spouses;
c) two persons who have been living together for one year or more, regardless of whether they have children.

SECTION 1, 4)

There is no obligation set down in the Act to establish or set an employee's working conditions in a written agreement. Therefore, the agreement referred to here may be verbal or even tacit.

SECTION 1, 6)

This means an employee in the employ of a natural person, which excludes all employees working for "a legal person" (corporations, joint stock companies) even if their duties may be similar to those of a domestic; they are therefore considered to be employees within the meaning of the Act respecting labour standards (ALS), and they do not have the status of domestics.

A domestic is a person who performs domestic duties in a dwelling for a natural person, even if in addition to these duties, he takes care of or provides care in that dwelling to a child, or to a sick, handicapped or aged person. In the latter case, the employee must perform domestic duties not directly related to the immediate needs of the person taken care of to be considered a domestic within the meaning of the Act.

The expression "provide care to" means providing a person with all the attention required and carrying out all the duties necessary to ensure his safety and well-being in general.

The immediate needs of a person depend on the state of that person and may vary from one individual to another. Therefore, washing the clothing of a young child is a task related to the "immediate needs" of that child.

It is important to not confuse the definition of "domestic" with that of "person who takes care of or provides care to others" stipulated in the exclusion of paragraph 2) of section 3 ALS.

Since June 26, 2003, a domestic who resides with his employer has benefited from the general minimum wage rate (s. 3 RLS) and a regular workweek of 40 hours (s. 52 ALS), following the repeal of sections 5 and 8 of the Regulation respecting labour standards. Consequently, labour standards apply to domestics, regardless of whether or not they live with their employer.

See the following standards that deal with domestics: sections 51.0.01 (room and board), 123.4 and 128 ALS.

SECTION 1, 7)

The term "any person" is an indicator that this definition must be given a very broad interpretation. The notion of employer is closely linked to the definition of "employee" found in paragraph 10) of section 1 ALS.

This is a notion that evolves according to the changes noted in the labour relations field (see the interpretation of section 95 ALS).

SECTION 1, 9)

Wages include, in addition to the remuneration, all the other benefits having a pecuniary value due for the work or services performed by an employee. Moreover, as soon as an employee receives any remuneration whatsoever for the work done, regardless of whether it is called a "bonus", "commission", "reward" or other, it is considered wages.

However, the "bonus" for the Christmas period generally represents a present and, as such, cannot be considered part of wages, contrary to other sums of money paid by the employer in relation to productivity, performance at work or for another reason.

It is important to note that the Commission's jurisdiction regarding claims for wages is limited. Indeed, the Commission may only claim the benefits having a pecuniary value that result from the application of the Act respecting labour standards or one of its regulations. This restriction is found in section 99 ALS.

Fringe benefits, granted to the employee in lieu of a portion of his wages, fall within the definition of "wages" within the meaning of paragraph 9 of section 1 ALS; however, fringe benefits that depend on particular events and of which the employee will not necessarily benefit, such as dental insurance premiums and life insurance premiums paid by the employer, are not wages. See the interpretation of section 41 ALS on the minimum wage and benefits having a pecuniary value.

Workmen's compensation, health insurance, employment insurance and private salary insurance benefits are not considered wages within the meaning of the Act respecting labour standards.

SECTION 1, 10), iii

It should be pointed out that this definition is much broader than that found in the Labour Code; it therefore encompasses a very large number of workers. More specifically, even managerial personnel are considered to be employees within the meaning of the Act.

The definition of the word "employee" includes two major elements. The first establishes that an employee is a person who carries out work for an employer and who is entitled to a wage; this is a contract between a natural person who hires out his services and another person (natural or legal) who accepts such hiring of services in consideration of pay. One notes in this relationship the presence of the following elements: existence of a position of authority, establishment of a work context, economic dependence related to the source of income (legal subordination). The contract may be written or verbal. This is the understanding of a classic employee.

There cannot be a contract of employment without consideration, a remuneration that the employer undertakes to pay. In this sense, the contract of employment differs from voluntary work. Moreover, the Act respecting labour standards does not deny the existence of voluntary work. This point is dealt with at greater length in the interpretation of section 40 ALS.

Jurisprudence has established that commissions are a method of remuneration that falls within the framework of the definition of wages within the meaning of the Act respecting labour standards and that the effect of this method of remuneration is not to exclude a worker thus paid from the definition of employee.

The second part of the definition refers to the worker who is party to a contract of employment including the elements listed in subparagraphs i, ii, iii, namely a person who presents the degree of autonomy of a dependent contractor. A

dependent contractor is someone who, although benefiting from a legal subordination that is not as close as that of a classic employee, remains closely linked to an employer in that he is directly dependent economically on the employer.

To determine whether or not we are in the presence of an employee, we must see if the contract in question is a contract of employment or a contract for services. A contract of employment must include elements of hire of services and pay agreed upon, whereas a contract for services is mainly identified by its independent nature regarding the performance of the work and by the notions of profits and losses in the performance of the contract. In fact, in order for there to be a contract for services, there must be no legal subordination relationship within the meaning of the aforementioned elements.

When the conditions of the contract of employment (verbal or written) are such that a worker can incur financial losses or make profits, the application of the notion of profits and losses elaborated by the jurisprudence becomes decisive. Indeed, if the financial risk for the worker is real, he is a self-employed worker and, from that point on, is not subject to the Act.

A worker may benefit from the advantages of certain laws (income tax) as a self-employed worker or otherwise and be considered an employee under the Act respecting labour standards.

EMPLOYEE WHO IS INCORPORATED OR HAVING REGISTERED A BUSINESS NAME

To determine the status of a worker who incorporates or who registers a business name, certain additional criteria specific to this situation will have to be taken into account:

— Did the employer make this approach obligatory?

— What benefit does the employer obtain from this?

— What benefit does the employee obtain from this?

— To what end is this status useful for the worker?

— Was the worker aware of the implications of incorporation or the registration of the business name?

— Did all workers of the enterprise proceed in like manner?

The Court of Appeal has had to rule on this question on a few occasions, in particular in the following cases:

- Dazé vs. Messageries Dynamiques (1991) RDJ 195
- Lalande vs. Provigo Distribution inc. 98T-1059
- Leduc vs. Habitabec inc. 94T-1240

Since May 1, 2003 section 86.1 ALS has stipulated that an employee is entitled to retain the status of employee where the changes made by the employer to the mode of operation of the enterprise do not change that status into that of a contractor without employee status (see the interpretation of section 86.1 ALS on this subject).

SECTION 1, 12)

Uninterrupted service is the period during which an employee is considered to be in the service of his employer. Therefore, there is uninterrupted service even if an employee is away from work, for example, on paid leave, unpaid leave, sick leave, a strike, a lock-out or following an occupational accident. It should be noted that uninterrupted service is not interrupted by the alienation or concession in whole or in part of the undertaking (see the interpretation of section 97 ALS).

It is important to distinguish the notion of uninterrupted service, found in the Act, from that of seniority, which generally is related to the application of a collective agreement. Indeed, a collective agreement may establish that seniority will be calculated, for example, in hours or according to precise dates with a view to gaining access to privileges or rights resulting from the agreement itself, whereas uninterrupted service corresponds to the employee's uninterrupted period of service.

The main objective of the notion of "uninterrupted service" is to maintain the employment relationship when certain events occur which interrupt the performance of work of the employee for his employer without severing the contractual relationship.

Uninterrupted service accrues as soon as a right stipulated in the Act respecting labour standards applies to the employee.

FIXED TERM CONTRACT

Uninterrupted service also accrues during the period in which fixed term contracts succeed one another, provided however that one may not conclude that there was a non-renewal of the contract at the time of an interruption of work during that period.

The proof of the non-renewal of the contract lies with the employer who will have to show that the interruption of work ensued from the end, the extinguishing of the contract of employment, the severing of the employment relationship, and that it was following the conclusion of a new and separate contract that the employee returned to work.

This is the legislative confirmation of a principle already established by jurisprudence whereby all of the successive fixed term contracts may constitute only one contract for an indeterminate term.

SEASONAL WORKER

To establish the uninterrupted service in the case of a seasonal worker, one must consider the true intention of the parties to "continue the contract" from year to year. Simply "mentioning" that it is a new contract each year does not suffice; the real intention of the parties must be considered.

The following elements should notably be taken into account:

— What does the statement of employment indicate?

— What is the number of "seasons" worked?

— Did the parties have discussions on the length of employment and on the possibilities of returning to work?

— Does the employee wonder about the possibility of returning to work or simply about the date of his return to work?

— Does the employer hold interviews every year or does he systematically re-employ the same persons?

— Do employees have to submit their job application each year?

— The length of work during a season is not in itself a decisive criterion for establishing uninterrupted service. However, is the duration long enough to justify the "continuous" nature of the employment relationship?

— Does one note a common desire on the part of the parties to continue the contract of employment?

All these facts must be taken into consideration to determine whether or not an employee has uninterrupted service. None of these items taken individually can be a determining factor.

CHAPTER II
SCOPE

SECTION 2

The scope of the Act respecting labour standards is delineated in this section. Various situations may arise:

1. An employee works solely in Québec.

The Act applies for an employer whose residence, domicile, undertaking, head office or office is in Québec or not;

2. An employee works both in and outside Québec.

a) For an employer whose residence, domicile, undertaking, head office or office is in Québec, the Act applies (s. 2, paragraph 1) ALS);
b) For an employer who does not have a residence, domicile, undertaking, head office or office in Québec: the legislation which applies is that of the location of the employer's undertaking;

3. An employee works solely outside Québec, but is domiciled or resides in Québec.

a) For an employer whose residence, domicile, undertaking, head office or office is in Québec, the Act applies (s. 2, paragraph 2) ALS);
b) For an employer who does not have a residence, domicile, undertaking, head office or office in Québec: the legislation which applies is that of the location of the employer's undertaking.

It is important to mention that for the application of paragraph 1, the employee may reside and be domiciled outside Québec.

Through the use of the terms "an employer whose residence, domicile, undertaking, head office or office is outside Québec", the clear intention of the legislator is to refer to employers doing business in Québec.

Moreover, in order for this Act to be applicable to the Crown, it must be specifically mentioned. The Act respecting labour standards applies to all government departments and agencies.

SECTION 3, 2)

Section 158.3 ALS stipulates that since June 1, 2004 the provisions of this Act apply to an employee whose exclusive duty is to take care of or provide care to a child or to a sick, handicapped or aged person, in that person's dwelling, including, where so required, the performance of domestic duties that are directly related to the immediate needs of that person. Consequently, since June 1, 2004, four conditions have to be met to exclude from the application of the Act an employee who takes care of or provides care to a child or a sick, handicapped or aged person in that person's dwelling. The first three conditions, already in application, remain basically the same but the fourth condition is new.

1. The employee must take care of or provide care to the person in that person's dwelling.

It is stipulated that the work must be done in the dwelling where the person cared for lives, which confirms the interpretation given by the courts.

Certain nuances are in order. Let's take the following example: a non-profit organization acquires an immovable in which it houses some twenty handicapped persons. The organization in question hires people in charge of seeing to the welfare of these persons. This is an enterprise whose main objective is to assist handicapped persons. In this case, the employee working for this enterprise will

be governed by the Act respecting labour standards as it does not involve "taking care of or providing care in the dwelling of that person" within the meaning of paragraph 2 of section 3.

Moreover, the expression "taking care of" means providing the person with all of the required attention and taking the necessary actions to ensure his safety and welfare in general.

2. The employee must perform this work exclusively.

If he also performs domestic duties not related to the immediate needs of the person, he becomes a "domestic" within the meaning of the Act (s. 1, para. 6) ALS) and subject thereto. Moreover, if the household duties performed by the employee are limited to those required by the immediate care of the person, such as the preparation of his meals, this exception continues to apply.

The immediate needs of a person depend on the person's state and may vary from person to person. For example, washing the clothes of a child of young age is a household duty related to the immediate needs of this child.

3. The employer must not perform this work for profit-making purposes.

As soon as the objective of the employer is related to the notion of profits, he is working for profit-making purposes (see jurisprudence on the site www.cnt.gouv.qc.ca). Consequently, if the employer is seeking to make a profit, we are no longer talking about a person entrusted with the care of another. The Act respecting labour standards applies to an employee whose employer is seeking to make a profit by means of this work.

4. These duties must be performed occasionally or be founded solely on a relationship of assistance to family or community help.

A new condition was introduced on June 1, 2004, namely the duties must be performed occasionally or be founded solely on a relationship of assistance to family or community help. Now, in addition to the first three conditions, one of these two criteria must be met in order for the employee to be excluded from the application of the Act.

The use of the expression "occasionally" implies that the hiring is irregular, occasional or takes into account the sporadic needs of the employer.

Providing care to a person as part of family assistance is based on natural and mutual support relations that exist in a family and is not limited solely to parents or children.

As for care provided within the context of community help, it is meant to reflect the mutual support that may exist at the level of a community or within a more limited group, such as community groups or groups that involve sharing between friends or neighbours.

PERSON WHO TAKES CARE OF OR PROVIDES CARE TO ANOTHER PERSON AND WHO DOES NOT MEET CONDITIONS 1, 2 AND 3

Effective June 1, 2004, the Act respecting labour standards applies to persons having custody or taking care of others, except with respect to the payment of overtime at a higher rate (s. 54, subparagraph 9) ALS).

See the following standards that also deal with persons who take care of or provide care to another person: s. 123.4, para. 3 and 128 ALS.

CONTRIBUTIONS BY THE EMPLOYER

The employer of a person who takes care of or provides care to others who meets only the first three conditions (because the performance of his duties does not take place on an occasional basis or within the context of family assistance or community help) is not subject to the payment of the contributions of Chapter III.1 as the remuneration of this employee is not "remuneration subject to contribution" within the meaning of subparagraph 2.1) of section 39.0.1 ALS.

SECTION 3, 3)

The Act does not apply to an employee governed by the Act respecting labour relations, vocational training and manpower management in the construction industry except with respect to the standards related to:

1) absences and leaves for family or parental reasons (which includes parental leaves, the maternity leave, the paternity leave and certain absences for family reasons, s. 79.7, 79.8 and 81.1 to 81.15 ALS) and psychological harassment (s. 81.18 to 81.20 ALS);

2) the annual leave indemnity where it is related to a maternity leave mentioned in (1) above (s. 74 ALS);

3) any regulation related to a leave mentioned in (1) above (s. 89 ALS);

4) the nature of public order of the standards mentioned in (1) above and their effect (Chap. IV, Division. IX, s. 93 to 97 ALS);

5) the recourses permitting the exercise of and respect for the ensuing rights (Chap. V and VII, s. 98 to 123.3 and 139 to 147 ALS).

Moreover, the Act respecting labour standards applies to the employer operating in the construction industry with regard to his employees who are not governed by the Act respecting labour relations, vocational training and manpower management in the construction industry. This may concern clerical staff, for instance.

The Act respecting labour relations, vocational training and manpower management in the construction industry applies to the employers and employees of the construction industry (s. 19; this provision also stipulates certain exclusions).

Employees and employers are defined in section 1 of said Act:

"r) "employee": any apprentice, unskilled labourer or workman, skilled workman, journeyman or clerk working for an employer and entitled to wages."

"j) "employer": anyone, including the Gouvernement du Québec, who has work done by an employee."

SECTION 3, 4)

In order for this exception to be applicable, it is not enough to ascertain the presence of a tariff set in a field, one must be able to conclude that the remuneration of the employee is set by regulation or legislation.

For example, the election officers whose remuneration is set by the Regulation respecting the tariff of remuneration and expenses of election officers (R.R.Q., 1981, c. E-3.3, r.9.2.1) or by the Regulation respecting the tariff of remuneration payable for municipal elections and referendums (R.R.Q., 1981, c. E-2.2, r.2) are not subject to the Act respecting labour standards (subject to section 3.1 ALS).

SECTION 3, 5)

Each of the conditions mentioned in this provision must be present in order for the exception to apply. To be excluded from the application of the Act, the employee must meet the following four conditions, namely:

— be a student;

— who works during the school year;

— in an establishment chosen by an educational institution;

— pursuant to a job induction programme approved by the Ministère de l'Éducation, du Loisir et du Sport.

It is important to distinguish between a student within the meaning of paragraph 5) of section 3 AL and a trainee within the context of a practical training period.

SECTION 3, 6)

The Act respecting labour standards does not apply to senior managerial personnel, except for the standards related to:

1) absences and leaves for family or parental reasons (which includes parental leaves, the maternity leave, the paternity leave and certain absences for family reasons; s. 79.7, 79.8 and 81.1 to 81.15 ALS) and psychological harassment (s. 81.18 to 81.20 ALS);

2) the annual leave indemnity when it is related to a maternity leave mentioned in (1) above (s. 74 ALS);

3) any regulation related to a leave mentioned in (1) above (s. 89 ALS);

4) the nature of public order of the standards mentioned in (1) above and their effect (Chap. IV, Division. IX, s. 93 and 97 ALS);

5) the recourses permitting the exercise of and respect for the ensuing rights (Chap. V and VII, s. 98 to 123.3 and 139 to 147 ALS).

Senior managerial personnel are exempt from the application of the Act (except for the aforementioned standards), whereas intermediate and lower managers will be subject to it, even as regards the notice of termination of employment or layoff and the related indemnity. Increased overtime, however, is still not applicable to these managers. (s. 54, subparagraph 3) ALS).

No definition of "senior managerial personnel" is found in the Act. However, jurisprudence has devised various criteria to determine whether or not a person falls within the category of senior managerial personnel. Generally, these criteria or indicators may make possible the analysis of this notion of "senior managerial personnel" without however constituting the only possible or decisive criteria. It should be recalled that this is an exception excluding certain employees from almost the entire application of the Act and as such, it must be interpreted restrictively.

SENIOR MANAGER TITLE

The mere fact that a person has the title of senior manager is not enough to establish that this is necessarily the case; at most, this designation can serve as a clue for determining the person's status.

This problem of title risks coming up in the public service or in big businesses in particular. Indeed, in the public service, it is not unusual for persons to be designated under the name of "senior manager" without however being directly answerable to the deputy minister or the executive director of an agency.

POSSIBILITY OF ABSENCE OF A SENIOR MANAGER IN AN UNDERTAKING

This criterion becomes applicable for a small business in which the senior management function is exercised by the owner himself or the principal shareholder.

A FEW CRITERIA FOR DEFINING SENIOR MANAGERIAL PERSONNEL

1. The hierarchical level in the organizational structure

A senior manager must be part of senior management. He must report to the owner, president, board of directors or general manager of the enterprise.

It is important to consider the size of the undertaking in the evaluation of this criterion. In a small enterprise, there is generally only one "boss" who performs senior management functions, namely the person who directs the affairs of the undertaking, often the owner himself or the principal shareholder. In contrast, in a big enterprise, where it is impossible for senior management to be assumed physically and materially by only one person, there is a "division" of the exercise of senior management into very precise sectors.

2. The level of decisions

A senior manager participates in the preparation of the main orientations of the undertaking, the major decisions that concern the undertaking as a whole, namely its profitability or its growth, the undertaking's strategies and general policies. It is important to differentiate between the management of day-to-day operations assigned to a simple executor, and the preparation of the policies that serve as a framework for these operations, a responsibility that lies with a senior manager.

3. Level of autonomy

A senior manager enjoys great autonomy and a major decision-making power.

4. Management of personnel

A senior manager manages management personnel. In fact, the term "senior" presupposes that there are other managers in the undertaking. He must play a key role in the management of personnel with respect to the power to bind the undertaking and third parties.

5. Conditions of employment

A senior manager is among the best remunerated employees in the undertaking.

APPLICATIONS

1. A person who reports directly to the board of directors or the general manager

In big enterprises that operate several establishments, the question comes up as to whether one must also consider as being a senior manager the person who directs one of the establishments of the undertaking.

The answer would be "yes" insofar as there are other levels of managers "below" this person who ultimately will be responsible for managing part of the undertaking.

However, the managers of small branches, for instance a store, should be excluded, in opposition to a plant director of a big enterprise.

2. Person who sits on the board of directors of a subsidiary enterprise

It may happen that a holding company designates a person to sit on the board of directors of an enterprise in which it holds interests. This person is likely to be considered a senior manager when he acts as a representative to direct the affairs of the subsidiary enterprise.

3. Advisory manager

Some persons could be considered "senior managers" without being in charge of the management of a sector of the enterprise. These are advisory managers who support hierarchical managers, but they are special cases.

4. Status of shareholder

Just because a person is a shareholder in the company does not necessarily mean that he is a senior manager, although this may be a useful criterion depending on the percentage of participation.

EXCEPTIONS TO THE APPLICATION OF THE ACT RESPECTING LABOUR STANDARDS PROVIDED FOR IN OTHER STATUTES

Other statutes provide for exclusions to the full application of the Act respecting labour standards. Here are a few of these exclusions:

1. Health professionals

Section 19 of the Health Insurance Act (R.S.Q., c. A-29) stipulates that:

"The provisions of the Labour Code (R.S.Q., chapter C-27) and of the Act respecting labour standards (chapter N-1.1) do not apply to a health professional to whom an agreement made pursuant to this section applies who provides insured services in a facility maintained by or on behalf of an institution."

The expression "professional in the field of health" (health professional) is defined in subparagraph *b)* of section 1 of the Health Insurance Act:

"*b)* "professional in the field of health" or "professional": a physician, dentist, optometrist or pharmacist legally authorized to furnish insured services;"

It is in subparagraph *o)* of section 1 that the term "institution" is defined:

"*o)* institution: an institution governed by the Act respecting health services and social services or by the Act respecting health services and social services for Cree Native persons."

In the Act respecting health and social services for Cree Native Persons (R.S.Q., c. S-5), "institution" is given the following definition in section 1:

"*a)* institution: a local community service centre, a hospital centre, a social service centre or a reception centre."

In the Act respecting health services and social services (AHSS) (R.S.Q., c. S-4.2), reference must be made to sections 79 and 94 to 99.1 to find out the institutions referred to. This basically involves any person or partnership carrying on activities inherent in the mission of one or more of the following centres:

— a local community service centre;

— a hospital centre;

— a child and youth protection centre;

— a residential and long-term care centre;

— a rehabilitation centre.

It should be noted that a group of professionals operating a private health facility is not an institution (s. 95 AHSS).

2. Penal conviction – compensatory work

Section 340 of the Code of Penal Procedure (R.S.Q., c. C-25.1) stipulates that:

"Chapter III of the Public Administration Act (chapter A-6.01), the Labour Code (chapter C-27), the Act respecting collective agreement decrees (chapter D-2), the Public Service Act (chapter F-3.1.1), the Act respecting manpower vocational training and qualification (chapter F-5), the Act respecting labour standards (chapter N-1.1), Chapter IV of the Building Act (chapter B-1.1), the Master Electricians Act (chapter M-3), the Master Pipe-Mechanics Act (chapter M-4) and the Act respecting labour relations, vocational training and manpower management in the construction industry (chapter R-20) do not apply when compensatory work is carried out under this chapter."

3. Incarcerated person

Section 202 of an Act respecting the Québec correctional system (R.S.Q., c. S-40.1) stipulates that:

"Chapter III of the Public Administration Act (chapter A-6.01), Chapter IV of the Building Act (chapter B-1.1), the Labour Code (chapter C-27), the Act respecting collective agreement decrees (chapter D-2), the Public Service Act (chapter F-3.1.1), the Act respecting workforce vocational training and qualification (chapter F-5), the Master Electricians Act (chapter M-3), the Master Pipe-Mechanics Act (chapter M-4), the Act respecting labour standards (chapter N-1.1) and the Act respecting labour relations, vocational training and workforce management in the construction industry (chapter R-20) do not apply to inmates and offenders who carry out

1) work inside a correctional facility;

2) work outside a correctional facility in an enterprise operated by the reintegration support fund of the facility; or

3) hours of community service under a probation order or a suspension order."

4. Employment-assistance measure or program

Section 11 of the Individual and Family Assistance Act (R.S.Q., c. A-13.1.1) stipulates that:

"Except in the cases and to the extent determined by regulation, the provisions of Chapter III of the Public Administration Act (chapter A-6.01), the Labour Code (chapter C-27), the Act respecting collective agreement decrees (chapter D-2), the Public Service Act (chapter F-3.1.1) and the Act respecting labour standards (chapter N-1.1) apply to an employment activity engaged in within the framework of a measure or a program established by the Minister."

The regulation to which reference is made is entitled the Individual and Family Assistance Regulation. Section 6 of the regulation stipulates the following:

"The provisions of the Labour Code (R.S.Q., c. C-27), the Act respecting collective agreement decrees (R.S.Q., c. D-2), the Public Service Act (R.S.Q., c. F-3.1.1) and the Act respecting labour standards (R.S.Q., c. N-1.1) do not apply to work activities that are not governed by the Code or the Acts.

The provisions also do not apply to work activities carried out under employment-assistance measures or programs focused on training or the acquisition of skills. They also do not apply to work activities carried out under employment-assistance measures or programs that include workplace exploration intended to clarify vocational orientation or to support entry on the labour market or job preparation, for the first 4 weeks of each training period, or to work activities carried out under the Young Volunteers employment-assistance measure.

In addition, the provisions do not apply to a person who carries out certain work activities under a social assistance and support measure or program if the activities are part of the person's efforts to develop his or her self-sufficiency and promote his or her social and professional integration."

SECTION 3.1

The provisions related to psychological harassment and retirement (Chap. IV, Division. V.2 and VI.1) apply to every employee and every employer, even those who are excluded from the application of the Act in section 3.

CHAPTER III
THE COMMISSION

SECTION 5, 1.1) See paragraphs 13) to 15) of section 39 ALS for more details on the powers granted to the Commission regarding the distribution of information documents and section 87 ALS on the obligation that the employer has in this respect.

SECTION 5, 5) It is officially up to the Commission, when a disagreement arises as to the application of the Act and its Regulations, to inform the employer and the employee of the standards regarding which there is a disagreement and attempt to have the parties conform to them.

SECTION 8 This provision determines the composition of the Board of directors so that it is representative of the various groups in society. In addition, the conditions for appointing members are specified.

In addition, it ensures a balance on the Board of directors regarding the respective interests of employees and employers.

SECTION 29, 3) See the Regulation respecting a Registration system or the keeping of a register.

SECTION 39, 5) The Commission may accept a partial payment of the amount payable by the employer for an employee who consents to this or for a group of employees where the majority give their consent.

ARTICLE 39, 8) The Commission exercises its recourses under the legislative powers that it is granted and not as a representative of an employee (see the interpretation of section 98 ALS).

SECTION 39, 15) Paragraphs 13) to 15) of section 39 ALS give new powers to the Commission. The Commission may decide to intervene with an employer to indicate to him, for example, where one of the information guides produced by the Commission must be posted on the work premises. Section 87 ALS establishes a distribution and posting standard, which the employer must comply with.

CHAPTER III.1
CONTRIBUTIONS

DIVISION I
INTERPRETATION

SECTION 39.0.1, **"employer subject to contribution", 16)**

The bodies listed in this section are subject to the other provisions of the Act. Indeed, the Court of Appeal is of the opinion that if the legislator specifically excluded such "bodies" from the application of the provisions on contributions, it was because they were deemed subject to the other provisions of the Act.

SECTION 39.0.1, **"remuneration subject to contribution", 2.1)**

The employee referred to in subparagraph 2.1) of this definition is one:

1. who takes care of or provides care to the person in that person's dwelling;

2. who performs this work on an exclusive basis; and

3. whose employer does not seek to make a profit by means of this work.

These are the first three conditions of paragraph 2) of section 3 ALS, which are explained in the interpretation of this section.

DIVISION II
CONTRIBUTIONS AND PAYMENT

SECTION 39.0.2 At the time of the entry into force of Chapter III.1, the rate applicable to the contribution was set at 0.08%. See the Regulation respecting contribution rates (c. N-1.1, r.5.3).

A supplementary contribution is required from employers of the four sectors specifically referred to and corresponds to the regular rate of employers, namely 0.08%, to which is added a supplementary contribution at the rate of 0.12%, for a total of 0.20%.

CHAPTER IV
LABOUR STANDARDS

DIVISION I
WAGES

SECTION 39.1

The exclusion from the application of this section of employees of a small farm was abolished on May 1, 2003. Henceforth, this section applies to these employees.

FARM WORKERS

Up until April 30, 2003, the Act and its regulations distinguished between various categories of farm workers by excluding them from one or more labour standards.

Beginning on May 1, 2003, some of these categories disappeared and employees of the agriculture sector are henceforth designated as farm workers and acquire the right to the provisions dealing with wages (s. 40 ALS and following), including the right to the minimum wage. With respect to the right to the minimum wage, some exceptions are provided for in the Regulation respecting labour standards, namely an "employee assigned mainly to non-mechanized operations relating to the picking of processing vegetables" (s. 2, para. 6) RLS) as well as an "employee assigned mainly to non-mechanized operations relating to the picking of raspberries, strawberries or apples" whose wage is established on the basis of yield (s. 4.1 RLS).

All are entitled to the provisions dealing with the annual leave. For a farm worker hired on a daily basis, the annual leave indemnity may be paid at the same time as his wages (s. 75 ALS). As for the weekly rest period, the farm worker's consent is now necessary for the employer to be able to postpone it (s. 78 ALS).

However, farm workers do remain excluded from the computation of overtime for the purposes of increasing their regular wages, as do workers assigned to canning, packaging and freezing fruit and vegetables during the harvesting period (s. 54, subparagraph 7) and 5) ALS). This means that for all of the hours worked over and above the regular workweek, these workers must receive their regular wage rate for all of the hours worked.

SECTION 40

Paying an employee a wage that is less than the minimum wage established by the regulation is prohibited.

The right to the minimum wage implies that employees must obtain the equivalent of the minimum wage for each hour worked, regardless of the payment method determined by the employer.

LEARNING OR TRIAL PERIODS

"Learning", "initiation" or "trial" periods must be remunerated (see the presumption in subparagraph 4) of section 57 ALS). The Act does not allow an employer to impose, as a hiring condition, a period during which the acceptance of free work is obliged or imposed by the employer. Criteria such as subordination, control, availability and work may be used to establish the right to wages.

Moreover, certain exclusions exist for trainees or students who are following an apprenticeship or programme of vocational training recognized by law (see the interpretation of paragraphs 2) and 3) of section 2 RLS).

VOLUNTARY WORK

It is sometimes hard to determine what constitutes voluntary work. During the study on the definition of the term "employee" (s. 1, para. 10)), it was mentioned that the Act respecting labour standards does not deny the existence of voluntary work. However, alleging that the smooth operation of the enterprise does not require the hiring of new employees, that the applicant(s) has (have) no experience or that the workers agreed to work for free does not justify non-compliance with labour standards. In this context, one cannot claim that the worker agreed to work on a voluntary basis.

Certain criteria may be used when analyzing a situation and determining whether a worker is carrying out work on a voluntary basis or if, on the contrary, he is carrying out the work without being paid even though he should be paid under the Act.

— In "the employee" performing any work whatsoever?

— Is there a relationship of subordination between the employer and the "employee"? Must he comply with the employer's requirements as to the way the work is carried out, the work schedule or his availability for work? Does the employer count on the employee's services?

The type of undertaking may also prove to be pertinent. Thus, voluntary work should not exist in a profit-oriented undertaking.

AGREEMENT OF NO EFFECT

It should be reiterated that labour standards are of public order. Any stipulation or agreement which contravenes a labour standard is absolutely null (s. 93 ALS). The amount of minimum wage payable is a standard. Public order requires that the employee receive the minimum wage for all hours worked. Therefore, it is prohibited to stipulate a lower wage than that provided by the Act and its regulations; even more so, it is prohibited to stipulate that there will be no wage at all.

SECTION 41

The employee must receive at least the minimum wage. Consequently, the employer cannot deduct the pecuniary value of the benefits (room, automobile, transportation, etc.) that he provides his employee from the minimum wage that the employee receives. See the interpretation dealing with sections 85 (special clothing) and 85.1 ALS (cost of material and equipment).

However, it is important to note that the employer may take into account, when computing the wage, the value of certain benefits offered, but only on the portion of the wage which represents the difference between the amount actually earned by the employee and the minimum wage prescribed.

ROOM AND MEALS

Moreover, when the conditions of employment of an employee require that he reside or take his meals at the establishment or the home of his employer, the latter may charge a maximum amount of $40.00 per week for room and meals (s. 6 ALS). It should be noted that an employer cannot charge an amount for the room and meals of his domestic who resides or takes his meals at the home of this employer (s. 51.0.1 ALS).

SECTION 41.1

This provision refers to an employee working on a part-time basis. Indeed, an employer cannot remunerate that employee at a rate of wage lower than that granted to other employees performing the same tasks in the same establishment for the sole reason that he works fewer hours every week.

The conditions for this section to apply are the following:

1. The employee must be an employee who ordinarily works fewer hours per week than other employees performing the same tasks.

In the case of an employee who works an irregular number of hours every week, it should be shown that he usually or regularly works fewer hours than other employees performing the same tasks.

2. It is with the "other employees performing the same tasks" that the comparison must be made.

These may be employees working "full time", but also employees working "part time" who work a greater number of hours than the employee concerned. Therefore, the Act makes no distinction between "regular part time" and "casual part time".

3. It is the rate of wage that is compared.

There is no need to compare the wage conditions of all employees of an establishment, but rather only the rates of wage of employees who perform the same duties.

4. Employees must work in the same establishment.

The establishment generally refers to the physical place where the work is carried out. However, this notion does not necessarily correspond to a building or a civic address. This notion may be determined with respect to a management or activity unit governing physical facilities. For example, separate buildings may be grouped together to form a single establishment, provided that there is a management or activity unit. Conversely, it is possible to have several establishments in the same building or physical facilities when there is sufficient functional autonomy between the management or activity units found there.

As an illustration, the existence of a subsidiary having functional autonomy may be an indicator making is possible to determine the existence of a management unit or activity unit that is autonomous at the functional level.

It should be noted that major geographical separations may be indicative of separate establishments.

5. The reason given must not solely be that the employee works fewer hours.

The fact that section 41.1 ALS mentions "for the sole reason" necessarily implies that another reason could be invoked by the employer. Therefore, it must be determined whether there is a true and valid reason other than the number of hours worked. Thus, a rate of wage that would be based on qualifications, experience or yield would constitute a valid reason within the meaning of section 41.1 ALS.

The analysis must be made by considering the method of wage advancement in force in the enterprise. This advancement must obviously not be discriminatory for an employee who works fewer hours per week.

For example, a raise in an employee's wage based on the accumulation of a certain number of hours worked could be allowed provided that the same calculation

method is used for the other employees performing the same tasks in the same establishment and provided that this way of doing things is set out in a collective agreement or a decree or is a common practice in the undertaking.

BURDEN OF PROOF

Where an employee has established that the conditions mentioned in section 41.1 ALS apply to him, it will be up to the employer to prove the existence of that other true and valid reason.

EACH EMPLOYEE INDIVIDUALLY

Each case must therefore be treated individually, and not with regard to a group of employees, since the rate of wage must be the same. For example, one cannot examine the global wage conditions of a group of part-time employees and conclude that they have approximately or overall the same rate as that paid to full-time employees.

EXCEPTION

It should be noted that this provision does not apply to employees who earn more than twice the minimum wage.

SECTION 42

The term "wages" is defined in paragraph 9) of section 1 ALS.

In order for the employer to be able to make the payment by bank transfer, the employee must consent thereto in writing. If the bank transfer is not made to a financial institution suitable to the employee, he may refuse to agree in writing to said transfer, unless the transfer as well as the institution have been determined by a collective agreement.

A cheque that cannot be cashed within two working days following its receipt or a cheque without sufficient funds does not constitute payment of wages. In these cases, the Commission des normes du travail may file a claim.

Non-compliance with this provision makes the employer liable to penal proceedings (see the interpretation of subparagraph 6) of section 140 ALS).

SECTION 43

The aim of this section is not to set payment intervals at 16 days, but rather to establish a maximum period separating two successive payments.

For example, in the case of an employee paid every Thursday and who was to quit his job on Wednesday, his employer would have until the following Thursday to pay the wages owed. After that period, the Commission des normes du travail would have the power to claim the amount owed.

As for the payment of overtime, premiums or any other amount exceeding the regular wage earned during the week preceding the payment of the wage, an employer can take advantage of a longer payment period. Indeed, these amounts may be paid at the time of the next regular payment of wages.

SECTION 46

The requirements set out in this provision are aimed at allowing the employee to understand and verify the calculation of his wages. Therefore, the pay sheet must include sufficient information for the employee's understanding.

In the first paragraph, the use of the expression "where applicable" means that only the pertinent information relevant to each case needs to appear on the pay sheet.

Moreover, since the payment of overtime may be replaced, under certain conditions, with a leave (s. 55 ALS), the employer must specify on the pay sheet the number of overtime hours that have been paid or that are replaced by a leave, in addition to the applicable premium (subparagraph 6)).

This section does not stipulate the form that the pay sheet must take. This information may appear for example on paper or in electronic format. However, the employer has the obligation to "remit" a pay sheet to the employee and not only to make it available.

Non-compliance with this provision makes the employer liable to penal proceedings (see the interpretation of subparagraph 6) of section 140 ALS).

SECTION 47

The purpose of this section is to protect employees who may, in certain cases, agree against their will to sign documents for the sole purpose of keeping their job or position. Therefore, the employee's signature or initials on a document cannot be held against him when filing a claim under the Act.

SECTION 49

Section 49 is an exception to the general principle whereby the employee is entitled to the entirety of his remuneration; it must be interpreted restrictively.

The first paragraph of this section refers to the deductions from the wages made for the benefit of a third person. The employer may make this deduction without the express consent of the employee because he is authorized to do so under a law, a regulation, a court order, a collective agreement, a decree or a mandatory supplemental pension plan. One must understand that in these cases, the employer does not do this at his own initiative.

No other deduction, whatever the nature, may be made by the employer from the wages unless the employee consents thereto in writing for a specific purpose also stipulated in writing. The expression "for a specific purpose" is in opposition to a general deduction without a precise indication of the debt. The employee must know exactly the elements that make up this deduction, for example the expiry date of the deduction. It is essential that the parameters of the debt be specified in writing using particulars such as: the reason for the deduction, the amount in question, the duration of the deduction, the frequency of the deduction or any other necessary particular. Sections 85 and 85.1 ALS specify the deductions related to work clothing or material.

It is important to note that the written authorization of the employee, allowing the deduction of certain amounts from wages, may be revoked in writing at any time. The effect of such a revocation will be to prohibit the employer from making any such deduction whatsoever.

OPPOSABILITY OF MEANS OF DEFENCE AGAINST THE COMMISSION

When the Commission makes a claim on behalf of an employee, it does not act as the representative of the employee but rather in its own name, pursuant to the Act (s. 39, para. 8) and s. 98 ALS). In this capacity, it is not possible to oppose against the Commission the means of defence that would be opposable against the employee personally, except when the amount of money owed by the employee to the employer is liquid and exigible under Article 1673 of the Civil Code of Québec, it would then be a legal compensation. In fact, three conditions are required:

1. The debt must be admitted and certain;

2. The debt must be liquid, namely the exact amount of the debt must be known by the parties;

3. The debt must be exigible, namely the term must have expired; the debt is due at the time the compensation is effected. For example, an amount which, based on the consent of the parties, is to be reimbursed on July 1, 2008 is not exigible before that date.

RECOURSE IN THE EVENT OF A DEDUCTION

The nature of the claim depends on the type of deduction made from the wages. For example, the deduction made for an annual leave indemnity should pave the way for a "claim for an annual leave indemnity that was not paid" under sections 74 or 76 ALS, rather than to a "claim for a sum deducted illegally" under section 49 ALS. The claim will be based on section 49 only if the main issue of the case is that the deduction was not made in accordance with that section.

SECTION 50

A gratuity or tip is made up of sums voluntarily remitted by customers and the service charges added to the bill. The gratuity may be paid directly or indirectly to the employee. It is paid directly by the patron, to the employee, when it is given from hand to hand. It is paid indirectly when the employer collects it on behalf of the employee under either one of the following circumstances:

— the patron uses his credit card or debit card;

— the patron pays the employer the service charges added to the bill.

These amounts belong exclusively and "by right" to the employee who rendered the service to the patron. They do not belong to any other employee who did not render this service to the patron.

An employer is expressly prohibited from imposing on his own initiative the sharing of gratuities or tips on employees and from intervening in the establishment of a tip-sharing arrangement.

GRATUITIES OR TIPS COLLECTED BY THE EMPLOYER

When it is the employer who collects the gratuity or tip, he is under the obligation to remit the amount in its entirety to the employee who rendered the service. The employer cannot decide to keep a portion of this gratuity or to remit it, in whole or in part, to an employee who did not render the service to the patron.

DETERMINING THE WAGE TO BE PAID

Whatever form the gratuity or tip takes, the employer must pay the employee the wages due to him, without taking gratuities or tips into account. Moreover, this wage must be at least the prescribed minimum wage, without taking gratuities or tips into account.

An employee who ordinarily receives gratuities or tips within the meaning of the definition of "employee who receives gratuities or tips" in section 1 RLS (in effect since June 26, 2003) may find himself paid, by the employer, as the minimum hourly wage, the specific rate set in section 4 RLS, without taking into account gratuities or tips. The minimum wage rate stipulated in section 4 RLS is only payable to an employee who receives tips or gratuities within the meaning of section 1 RLS. The interpretation of section 1 RLS specifies the definition of "employee who receives gratuities or tips".

SERVICE CHARGES AND ADMINISTRATIVE COSTS

In addition to the sums remitted voluntarily by the patron, service charges, added to the patron's bill, are deemed to be a gratuity. Hence, they must be remitted in their entirety to the employee. However, the administration fees added to this bill are not a gratuity or tip. Given the fact that the legislator has stipulated that service charges are deemed to be part of the gratuity, the employer is under the obligation to clearly identify what constitutes administration fees. When there is some doubt as to the nature of the administration fees charged to the patron, the employer will have the burden of showing that they fall within this category of fees and are not disguised service charges.

TIP-SHARING ARRANGEMENT

The employee to whom the gratuity or tip belongs within the meaning of section 50 is entitled to participate, on a free and voluntary basis, in a tip-sharing arrangement. The existence of such an arrangement may be verbal or written.

A group of employees may, for convenience reasons, decide to ask the employer to manage the application of this arrangement and the distribution of gratuities that ensue therefrom. A tip-sharing arrangement becomes a hiring condition for employees, if it arises from a desire freely expressed by the employees contemplated.

The Commission cannot claim the amounts not remitted under a tip-sharing arrangement for an employee who has withdrawn from such an arrangement. The Commission is not empowered to institute proceedings against an employee who does not meet his obligations towards the other employees concerned by the tip-sharing arrangement.

INDEMNITY ON THE WAGES INCREASED BY THE GRATUITIES OR TIPS

The "gratuities attributed" under section 42.11 and "reported" under section 1019.4 of the Taxation Act are part of the wages for the computation of the indemnities stipulated in sections 58, 62, 74, 76, 80, 81, 81.1 and 83 of the Act respecting labour standards (but not that of section 84.0.13 ALS). Gratuities and tips are also taken into account in the case of the indemnity for a non-working day with pay under a collective agreement or decree (s. 59.1, para. 2) ALS) and for that stipulated in the National Holiday Act.

"GRATUITIES ATTRIBUTED OR REPORTED" WITHIN THE MEANING OF THE TAXATION ACT

The gratuity reported is one that the employee who receives gratuities reports, in writing, to his employer at the end of each pay period. The gratuity collected by the employer and remitted to the employee is also considered a gratuity reported, provided that the employer indicates these amounts in the payroll journal and makes the related tax deductions.

The gratuities attributed refer to the attribution by the employer of an amount equal to the amount by which 8% of the total of the amounts of all tippable sales that are attributable to the employee exceeds the total of the amounts of each tip in respect of tippable sales (s. 42.11 of the Taxation Act). The employer must attribute gratuities when those gratuities reported by the employee are less than 8% of the amount of the sales that may give rise to the collection of a tip. The attribution must normally be made at the end of the pay period, namely when the employer calculates the employee's remuneration.

These notions only apply to an employee who performs his duties in a "regulated establishment", namely:

"a) a place situated in Québec specially laid out where lodging or food for consumption on the premises is ordinarily provided in return for payment;

b) a place situated in Québec where alcoholic beverages are served for consumption on the premises in return for payment;

c) a railway train or a vessel, operated in connection with a business carried on entirely or almost entirely in Québec and on which food or beverages are served;

d) a place situated in Québec where, in connection with the carrying on of a business, food or beverages for consumption elsewhere than on the premises are provided in return for payment;"

"tippable sale" means a sale in a regulated establishment that, in keeping with the prevailing custom in Québec, is likely to entail tipping by the customer, but does not include a sale of food or beverages for consumption elsewhere than on the premises of the regulated establishment" (s. 42.6 of the Taxation Act).

"42.7. For the purposes of the definition of "regulated establishment" in section 42.6, a regulated establishment does not include:

a) a place situated in Québec where mainly lodging or food, or both, are provided by the week, month or year in return for payment;

b) place where the activity consisting in the providing of food and beverages is carried on by an educational institution, a hospital institution, a shelter for needy persons or victims of violence or any other similar establishment;

c) a place where the activity consisting in the providing of food and beverages is carried on by a charity or a similar organization but is not carried on a regular basis;

d) a cafeteria;

e) a fast food outlet in which the employees do not ordinarily receive tips from the majority of customers."

SECTION 50.1

An employer is prohibited from requiring that an employee pay any expenses whatsoever related to the use of a credit card and including the proportion of these expenses attributable to tips. This provision is based on the principle set out in section 50 ALS whereby the gratuity belongs to the employee and is not part of the wages that are owing to him.

SECTION 50.2

The employer must receive the report of gratuities from the employee. He is also required to separate the gratuities reported by the employee and the gratuities that he attributed.

SECTION 51

The amount referred to here has been established in section 6 RLS.

It should be noted that it is only in cases where the working conditions of the employee oblige him to reside or eat his meals in the establishment of the employer that the employee may benefit from the rates indicated in this section.

SECTION 51.0.1

See the definition of domestic in paragraph 6) of section 1 ALS.

SECTION 51.1

This refers to the contribution with respect to the subject remunerations to be paid to the Minister of Revenue as stipulated in section 39.0.1 ALS and following.

DIVISION II
HOURS OF WORK

The Act respecting pre-hospital emergency services (R.S.Q., c. S-6.2) excludes from the application of this division and section 78 of the Act respecting labour standards an employee who holds the position of ambulance technician.

To be excluded from the application of sections 52 to 59 and 78 ALS, an employee must be an ambulance technician and work for the holder of an ambulance service permit who entered into a contract with the regional board. This contract must stipulate that the work schedules are made up of periods of work, on-call periods and periods of rest.

All of these conditions must be met in order for the exclusion to apply.

It should be noted that these provisions entered into force on March 8, 1989.

Section 76 of the Act respecting pre-hospital emergency services stipulates that:

"Division II of Chapter IV and section 78 of the Act respecting labour standards (chapter N-1.1) do not apply to employees of holders of ambulance service permits who are ambulance technicians whose work schedules, as established under contracts entered into pursuant to section 9, are made up of periods of work, on-call periods and periods of rest."

Section 9 of the same Act reads as follows:

"The agency must, within the framework of the organization of pre-hospital emergency services, enter into a three-year service contract with any ambulance service permit holder operating in its region under which the holder undertakes to provide the services as determined between the holder and the agency according to the schedules authorized by the agency."

SECTION 52

The purpose of section 52 is not to establish a regular workweek, but rather a method for computing the remuneration payable for all of the hours worked by the employee in a week when they total more than 40 hours. Therefore, this provision creates the obligation for the employer to pay the employee at a premium rate after 40 hours of work per week.

A regular workweek may vary from one undertaking to another provided, however, that the minimum prescribed by law is respected.

Moreover, sections 9 to 13 RLS stipulate certain exceptional cases related to the length of the regular workweek.

SECTION 53

This provision concerns the calculation of overtime.

In cases where the Commission authorizes it, an employer may stagger the working hours on a basis other than a weekly basis; in other words, for the purposes of calculating overtime, an employer may, with the authorization of the Commission, use a reference period other than the regular workweek. Therefore, an employer may stagger the working hours of his employees over several weeks.

Such a staggering shall be for a maximum period of one year, with the possibility of renewal, taking into account section 115 ALS.

The Commission's authorization is not required where the staggering of working hours is provided for in a collective agreement or a decree.

SECTION 54, **between the 1st paragraph and subparagraph 1)**

The length of the regular workweek determined in section 52 (40 hours) does not apply to the workers mentioned in this provision for the purposes of increasing the wage rate. They must, however, be remunerated for the hours worked over and above 40 hours per week, but at the regular rate, without an increase. In all cases, whatever the employee's remuneration method (by the hour, the week or other), he must receive at least the minimum wage for all of the hours worked, even those exceeding 40 hours per week, unless it is an employee excluded from the application of the minimum wage.

SECTION 54, 2)

The number of hours of the regular workweek does not apply to a student employed in a vacation camp, whether it is profit-oriented or non-profit. Nor does it apply to a student employed in a social or community non-profit organization, such as a recreation centre.

The intention of the legislator is to focus the source of the exception on the goal sought by the employer organization and not on the work done by the student for the organization.

THE RECREATION DEPARTMENT OF A CITY OR A MUNICIPALITY

In the case where a city or a municipality hires students by way of its recreation department, the situation may be analyzed from two different standpoints depending on the internal organization of the municipality:

1. The recreation department is a distinct legal entity

Frequently, the recreation department working in a city is a separate legal entity. This non-profit organization is independent, separate from the city itself. It does not generate a profit; its social and community vocation is obvious. Hence, a student working within the framework of such a structure is subject to the exception stipulated in subparagraph 2) of section 54 ALS (also see the interpretation of subparagraph 2) of section 77 ALS and of paragraph 1) of section 2 RLS).

2. The city or the municipality hires directly

The situation differs when the city, without going through an "intermediary", proceeds directly and for its own benefit to hire a student.

Despite the fact that the social vocation of the city is recognized in that it is acting on behalf of the municipal community, its activities and powers are very broad. The various purposes of all its activities do not meet the definition of a "social or community non-profit organization" within the meaning of subparagraph 2) of section 54 (see the interpretation of subparagraph 2) of section 77 ALS and paragraph 1) of section 2 RLS).

SECTION 54, 3)

The managerial personnel of an undertaking, referred to in the third paragraph, is someone who has a decision-making power and who acts as the employer's representative in its relations with the other employees. It should be recalled that "intermediary" or "junior" managerial personnel are referred to here, since under paragraph 6) of section 3 senior managerial personnel are excluded from the application of the Act respecting labour standards.

The notion of managerial personnel has been studied many times in judicial precedents. The title is not necessarily a criterion. Certain criteria of appreciation have been elaborated in order to determine whether the duties of an employee correspond to those carried out by a member of managerial personnel:

— Relations with senior management: participation in decisions, the preparation of the employer's policies, etc.;

— The powers granted by senior management: responsibility for the establishment (opening – closing), autonomy with respect to orders, advertising, power to sign cheques or other documents, etc.;

— The powers held over other employees: hiring, dismissal, reprimand, supervision, power to give orders, ability to set conditions of employment, control over or authorization of absences, vacations and expenses, etc.;

— Conditions of employment: schedules and vacations, method of remuneration, own office, etc.

SECTION 54, 4)

The aim of this exception is not to exclude all employees working outside the employer's establishment. The notion of "whose working hours cannot be controlled" is therefore decisive.

In order for the exception to apply, it must be absolutely impossible for the employer to exercise a control over his employee's work schedule. It is not enough for the employer to ignore or not count the working hours. When the employer has the possibility of knowing the work schedule, of verifying how the employee uses his time and of imposing certain obligations in this respect, the employee's working hours can be controlled within the meaning of the Act.

Consequently, the exception is only applicable in those cases where the employee is entirely free to come and go without the employer having the possibility of controlling his working hours. See the exception to the application of the minimum wage provided for in paragraph 4) of section 2 RLS in the case of an employee remunerated entirely on commission who works in a commercial activity outside the establishment and whose working hours cannot be controlled.

SECTION 54, 7)

A farm worker (see the interpretation at the start of the division on wages under section 39.1 ALS) is a person who performs farm-related tasks as part of a farming operation.

In the expression "farm worker", the dominant aspect is growing. The tasks for which he is hired must be of a farming nature. To be able to consider an employee a farm worker, he must participate in working the soil and the land with a view to producing plants or animals. An employee who devotes all of his work time in the fields to ornamental crops would be considered a farm worker. However, the proportion of time devoted to other duties may result in the exception related to a farm worker not being applicable.

To determine if you are in the presence of a farming operation, it is necessary to look for the goal, the main purpose of the operation in question. This analysis must be made according to the normal and usual activities of the undertaking.

The jurisprudence considers that the operation of a farm comprises not only the exploitation of the proceeds of the soil but also the raising of farm animals and the sale of cultivated products. When it is a corporation that operates the farm, this operation must be its main activity; otherwise the exclusion does not apply.

Farm workers are also referred to in section 78 ALS.

SECTION 54, 9)

Since June 1, 2004, the length of the regular workweek has not applied to an employee who takes care of or provides care to a child, a sick, handicapped or aged person when three conditions are met:

1. The employee must take care of or provide care to the person in the person's dwelling;

2. The employee must perform this work on an exclusive basis; and

3. This work must not serve to procure profit for the employer.

These three conditions are explained in the interpretation of paragraph 2) of section 3 ALS.

SECTION 54,

after the reference codes

While the regular workweek of forty hours set in section 52 of the Act does not apply to these employees, the government reserves the right to set by regulation a regular workweek that it will determine, where necessary, for the employees referred to in subparagraphs 2), 5), 6), 7), and 9) of section 54 ALS.

SECTION 55

Any work performed in addition to the regular workweek of 40 hours entails a premium of 50% of the prevailing hourly wage. This means that the employee who usually receives $10.00 per hour will see his hourly wage increase by $5.00 per hour (which totals $15.00 an hour) for each hour of overtime.

Where the employee works for a set weekly wage and where he did not previously agree upon the number of working hours or the hourly rate, the wage must be computed in accordance with the regular workweek of 40 hours and the minimum wage ($8.00 per hour as of May 1, 2007) to check if the remuneration received by the employee meets the requirements of the Act.

EXAMPLE

For an employee who receives fixed wages of $600 per week, without the number of working hours or the hourly rate having been agreed upon, and who works 60 hours during a week:

Hourly rate = $8

Increased rate = $12

40 hours x $8 =	$320
20 hours x $12 =	$240
Total wages required by the Act =	$560

In this example, the $600 in wages received by the employee complies with the Act, as it exceeds these requirements. It should be noted that this interpretation only applies when the hourly rate is not determined.

SEVEN-DAY WEEK

A week extends over a period of seven days and it is not permitted (except under the exception of section 53) to obtain an average by taking into account, for the following week, a number of hours less than the regular workweek.

PROOF OF CLAIM

To claim payment of overtime, the Commission must be in a position to prove that the employee indeed worked those hours at the request of his employer or, at least, to his knowledge (see the interpretation in section 57 ALS).

COMPENSATORY LEAVE

It is only at the request of the employee or in cases provided for by a collective agreement or decree that an employer may replace the payment of overtime by a paid leave. Therefore, he may not impose it, since the general rule is the payment of such hours, whereas the replacement by paid leave is the exception. Each time an employee works overtime, he may ask that the payment be replaced by a leave. However, it is up to the employer to make the final decision whether or not to grant the request. If he agrees to it, the leave must be taken within the twelve months following the overtime worked (subject to the provisions of a collective agreement or a decree), at a date agreed upon by the parties.

If the leave was not taken during that period, the hours must be paid at the end of the twelve months following the time they were worked. It should be noted that a collective agreement or a decree may provide the possibility of postponing the leave until the following year, for example.

If the parties have agreed upon the date for taking the leave, it is at that time that the compensatory indemnity becomes due.

Moreover, where the contract of employment is terminated before the employee has taken his leave at the agreed upon date, the overtime hours must be paid with the last payment of wages.

SECTION 56

The purpose of this section is to establish a method for computing overtime.

For the purposes of this calculation, the days where the employee is on annual leave as well as statutory general holidays with pay are considered to be workdays and the corresponding hours are added to the total number of hours actually worked during the week.

It should be pointed out that, for this provision to apply, the employee must necessarily have benefited from a leave. Although he is entitled to an indemnity, this section does not apply to an employee who never works on the day of the holiday.

SECTION 57,

between the 1st paragraph and subparagraph 1)

Section 57 establishes, for each of the situations described in the four subparagraphs that make it up, a presumption that the employee "is deemed to be at work" (see the interpretation in section 55 ALS on overtime). This presumption may be overturned by evidence submitted by the employer. The evidence that the employer may submit ensues from the obligation that he has to establish the framework for the performance of the work in terms of what he asks the employee to do, how to do it, as well as the time that is to be devoted to this work. The employer has this obligation for each of the situations described in the four subparagraphs of this section.

SECTION 57, 1)

This subparagraph provides for three conditions of application:

1. the employee must be at his employer's disposal;
2. the employee must be on the work premises; and
3. the employee must be obliged to wait for work to be assigned.

When these three conditions are met, the employee is deemed to be at work. This is a simple presumption, namely it may be overturned by another proof submitted by the employer as mentioned previously.

The mandatory nature of the availability is a decisive factor. The voluntary availability that an employee offers to his employer out of professionalism or for another reason would not entail the application of section 57.

This availability must be required by the employer as part of the performance of work. If the conditions of performance are such that this availability is required despite the fact that the employer did not request it expressly, the employee could benefit from the wages corresponding to the time devoted to the performance of his task, save for its unreasonable nature, which would then have to be demonstrated by the employer.

Some facts may point to the existence of this obligation imposed on the employee. The normal work schedule, the nature of the undertaking's activities and the quantity of work to be done during a given period are all criteria that should be analyzed.

The idea is to evaluate the constraint imposed by the employer on the employee to reserve his availability during the stipulated period because he is likely to do the work required.

On the subject of availability, it is important to take into account the global context of the situation. For example, a bus driver hired to do a trip extending over several days cannot be considered as being "at his employer's disposal" twenty-four hours a day during the period in question.

Moreover, an employee hired to meet the needs of the resident clientele of a residential centre, with the obligation of remaining on site during a specified work shift and of performing the necessary work when required, could be considered as being at his employer's disposal. However, an employee with a pager and who is at home could not claim payment for his hours of availability given that he is not on the work premises.

In the case of the caretaker of an apartment building, it may be hard to determine the number of hours devoted to work since he generally lives in the building for which he is responsible. Here once again, the employer must indicate to the employee the timeframe allocated for the work to be done. However, it may be necessary to evaluate the number of hours that the employee must devote to his work and the number of hours of availability required by the employer taking into account various elements such as the number of apartments, the nature of the building, the various tasks to be performed and their frequency, etc.

However, it should be pointed out that the required availability cannot extend to the daily periods when the caretaker is in his apartment and he may be disturbed at various times. During these periods, it is only when the employee is called upon to perform precise tasks and which he has noted down or for which he can evaluate the time required for their performance, that the Commission can claim the corresponding wages.

SECTION 57, 2)

This subparagraph refers to all categories of breaks excluding the break for meals stipulated in section 79 ALS. This provision creates no obligation for the employer to grant his employees a coffee break. However, when he does, he must remunerate the employees for this period.

SECTION 57, 3)

Since May 1, 2003, the Act has stipulated that the time required for trips made at the employer's request is deemed to be time devoted to work and gives entitlement to wages. The time devoted to the normal trip made by the employee, as

for all employees in Québec, to travel to his place of work in the morning and to return home at the end of the day is not covered by this subparagraph. However, any other travel situation required by the employer could be considered. See the general criteria for interpreting section 57 ALS as well as the interpretation given in section 85.2 ALS.

SECTION 57, 4), **after the reference codes**

This subparagraph establishes the interpretation found in the jurisprudence whereby an employee is entitled to receive a wage when he is taking part in a trial (see the interpretation of section 40 ALS) or training period done at the employer's request, whether inside or outside the establishment. This time must be considered time worked. The Act does not permit the imposing as a hiring condition of a period during which free work is obliged or imposed by the employer (see the interpretation of section 85.2 ALS).

SECTION 58

An employee who reports to work at the request of his employer or in the regular course of his work and who works less than three consecutive hours is entitled to a compensation equal to three hours of wages at the prevailing rate.

For example, in the normal course of his work, an employee usually works six hours a day. On a given day, the employer decides to have the employee work for a period of two hours instead of his usual six hours. The employee will be entitled to an indemnity equal to three hours of work, namely the two hours worked and one additional hour, in order to equal the minimum of three hours required.

This provision does not apply when:

1. a case of superior force occurs preventing the employer from assigning work to the employee (e.g.: a fire);

2. the nature of the work or the conditions for carrying out the work are such that the presence(s) of the employee is for a period of less than three hours.

When the daily duration of work is planned for less than three hours, due to the nature of the work or its conditions of performance, the employee cannot claim the indemnity.

SECTION 59.0.1

On May 1, 2003, the legislator introduced a new standard granting the employee the right to refuse to work beyond a certain number of hours to limit the hours of work. The total number of hours calculated from the first hour worked makes it possible to determine if an employee can exercise his right of refusal. This provision applies to managers, except for senior managers.

One must distinguish between the right of refusal granted to the employee from the case of this same employee who is party to a labour agreement which provides for a schedule that exceeds the limits stipulated in section 59.0.1 of the Act. For example, an employee hired to work on the basis of a schedule of 55 hours per week. In such an instance, if the employee systematically refuses to work his schedule set at 55 hours per week, this could be assimilated with a failure to respect the agreement for which he was hired. An employee cannot use the right of refusal for the future to modify his conditions of employment agreed upon with the employer.

The right of refusal may be exercised daily, weekly, or both.

1. The right of refusal may be exercised on a daily basis:

— for an employee having a regular schedule, more than 4 hours beyond his usual hours or more than 14 hours per 24-hour period, whichever is shorter;

— for an employee whose usual hours are variable or done on a non-continuous basis, more than 12 hours per 24-hour period.

The regular schedule does not necessarily imply that the employee works the same number of hours every day. For example, an employee who works on the basis of a schedule of 8 hours on Monday, 7 hours on Tuesday and 10 hours on Friday, and who does this schedule on a weekly basis, has a regular schedule.

2. The right of refusal may be exercised on a weekly basis, regardless of the employee's schedule, after:

— more than 50 hours per week, unless there is an authorization to stagger working hours on other than a weekly basis, as stipulated in section 53 (staggering of working hours);

— more than 60 hours for an employee who works in a remote territory or on the territory of the James Bay region.

An employee who works in a remote area or in James Bay may refuse to work:

— if he has a regular work schedule: more than 4 additional hours per day or more than 14 hours per 24-hour period, whichever is shorter;

— if his working hours are variable or done on a non-continuous basis: more than 12 hours per 24-hour period;

— more than 60 hours of work per week.

It should be noted that the regular workweek of these latter employees is 55 hours according to sections 12 and 13 of the Regulation respecting labour standards.

The legislator places a restriction on the right to refuse to work in certain specific cases. The right of refusal cannot be exercised:

1. if the life, health or safety of workers or the population is in danger;

   This principle is already established in section 2 of the Charter of Human Rights and Freedoms (R.S.Q., c. C-12) which confirms the right to assistance for a human whose life is in danger.

2. in case of a risk of destruction or serious deterioration of movable or immovable property or other case of superior force;

   For the employer, the case of superior force does not concern the continuation of his production, but rather the implementation of means to preserve goods and services.

3. if the refusal violates the employee's professional code of ethics.

DIVISION III
STATUTORY GENERAL HOLIDAYS AND NON-WORKING DAYS WITH PAY

SECTION 59.1

The provisions regarding statutory general holidays do not apply to employees who are entitled to at least seven days of paid leave in addition to the National Holiday under a collective agreement or decree. Neither do these provisions apply to employees in the same establishment who are entitled to a number of days of paid leave, in addition to the National Holiday, at least equal to that provided for in this agreement or decree (without necessarily being subject it).

This means that an employee who is governed by a collective agreement which provides for more non-working days with pay than the Act respecting labour standards, but who is not entitled to them because he is on probation, for example, will be subject to the section of the Act on statutory general holidays and non-working days with pay.

Moreover, the "floating holidays" provided in certain collective agreements may be considered as equivalent to statutory holidays for the purposes of the application of section 59.1 ALS.

The "establishment" is the physical location where the work is carried out (see the interpretation of section 41.1 ALS).

EMPLOYEE WHO RECEIVES GRATUITIES OR TIPS

Since May 1, 2003, these employees must in all cases receive an indemnity calculated on the basis of the wages earned increased by reported or attributed tips, regardless of whether the employees are unionized or not.

SECTION 60, 2)

The Easter holiday corresponds to Good Friday or Easter Monday, at the employer's option.

SECTION 60, 3)

The Monday preceding May 25th corresponds to National Patriots' Day (Order-in-council 1322-2002, previously Fête de Dollard).

SECTION 60, 4)

July 1st or, if this date falls on a Sunday, July 2nd is a statutory holiday.

It should be noted that under section 3 of An Act respecting hours and days of admission to commercial establishments (R.S.Q., c. H-2.1), the public cannot be admitted, subject to certain exceptions, to a commercial establishment, on the following days:

1. 1 January;
2. 2 January;
3. Easter Sunday;
4. 24 June;
5. 1 July;
6. the first Monday in September;
7. 25 December.

The scope of this Act is stipulated in section 1:

"This Act applies to commercial establishments where products are offered for sale by retail to any member of the public, including a member of a club or cooperative or of another group of consumers.

Any space or stall in markets, particularly in covered markets and flea markets, is considered to be a commercial establishment."

SECTION 62

This provision establishes the method for computing the indemnity payable under this Division, which has been simplified since May 1, 2003. Moreover, a greater number of employees have become eligible for the payment of the indemnity (see the interpretation of section 65 ALS).

The indemnity calculation method is the same as that of section 4 of the National Holiday Act for the national holiday leave.

CALCULATION OF THE INDEMNITY

The employee must receive, for each statutory holiday, an indemnity corresponding to 1/20 of the wages earned during the four complete weeks of pay preceding the week of the holiday, excluding overtime. Overtime is determined on the basis of the employee's regular workweek or, failing that, the regular workweek provided for under the Act or the regulation.

In the case of an employee remunerated in whole or in part on commission, the indemnity is equal to 1/60 of the wages earned during the twelve complete weeks of pay preceding the week of the statutory holiday, without regard for the amount of the commissions. In this case, the wages earned correspond to the basic wages (where such is the case) and the commissions earned during the twelve-week period, even if they are not yet paid to the employee.

Annual leave periods are assimilated with days worked for the purposes of the calculation. The indemnity received in this respect during the reference period constitutes wages and must be taken into account in the calculation of the statutory holiday indemnity. (See the definition of "wages" of paragraph 9) of section 1 ALS).

The computation is based on the wages earned during the reference period, regardless of the number of days or hours actually worked by the employee. If the employee did not work complete weeks during the pay period, the indemnity of 1/20 of the total wages earned for this period will be less than that paid to the employee who worked full time during the entire period.

EXAMPLES

An employee is remunerated at an hourly rate of $12.50. He always works 8 hours per day.

1. Full-time employee

The employee ordinarily works 5 days per week. He receives a regular pay of $500 per week and will receive an indemnity of $100.

$500 x 4 weeks = $2,000

$2,000 ÷ 20 = $100

2. Employee with an irregular schedule

The employee works 5 days the first week, 4 days the second week, 5 days the third week and 2 days the fourth week. Consequently, his pays are not always of the same amount. He will receive an indemnity of $80.

$500 (week 1) + $400 (week 2) + $500 (week 3) + $200 (week 4) = $1,600

$1,600 ÷ 20 = $80

3. Employee having worked only two of the four weeks

The employee works 5 days per week, but has only been in the employ of the undertaking for two weeks. He receives a regular pay of $500 per week. He will receive an indemnity of $50.

($0 x 2 weeks + $500 x 2 weeks) = $1,000

$1,000 ÷ 20 = $50

4. Employee having worked overtime

During the four weeks preceding the week of the leave, the employee works 6 days per week for a weekly total of 48 hours. The regular 40-hour workweek of section 52 of the Act applies to the worker, who will receive an indemnity of $100.

40 hours x $12.50 per hour = $500 (weekly wages, without overtime)

$500 x 4 = $2,000

$2,000 ÷ 20 = $100

SECTION 63

In this case, it is up to the employer to decide whether to pay the indemnity stipulated in section 62 (in addition to the wages earned by the employee during the statutory holiday) or grant a compensatory holiday. The employee cannot contest that decision. The compensatory holiday is not, however, a leave without pay and the employee must receive the indemnity of 62 ALS for that day.

Where the employer decides to grant the compensatory holiday, that holiday must be taken within three weeks before or after the general holiday. If the compensatory holiday is granted, but outside of that period, this is a penal offence which cannot, however, lead to a civil claim.

SECTION 64

In the case of an employee on annual leave, no time-frame is set by the Act for taking the compensatory holiday, although it should be taken during the current reference year.

It is up to the employer to decide whether to pay said indemnity or grant the compensatory holiday. The employee cannot contest this decision.

The compensatory leave is not a leave without pay and the employer must pay the indemnity stipulated in section 62 ALS for this day.

SECTION 65

This provision sets the only condition for the application of section 62 ALS. Since May 1, 2003, the legislator has abolished the requirement that the holiday coincide with a working day for the employee and the latter no longer needs to be credited with 60 days of uninterrupted service to be eligible for the non-working statutory holidays with pay stipulated in section 60 ALS and to receive the related indemnity.

The employee must be present at work on the working day that precedes or follows this day, subject to an absence with the employer's authorization or for a valid cause. The employee whose presence on the statutory holiday is required but who does not show up will not be able to benefit from it or from the stipulated indemnity, unless he has a valid cause or the absence is authorized by the employer.

It should be noted that the expression "valid cause" refers to a situation that is beyond the person's control (death, illness, etc.).

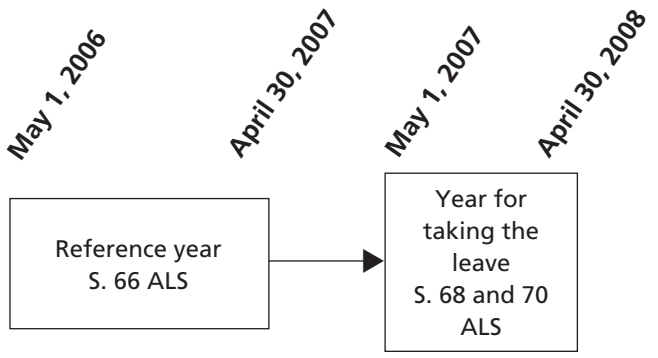
A working day is the day when the employee is scheduled to report for work or when he usually works.

DIVISION IV
ANNUAL LEAVE WITH PAY

SECTION 66

The purpose of this section is to establish the period during which an employee acquires entitlement to an annual leave.

A date other than May 1st can be set as the starting point for the reference year by agreement (group or individual) or by order. In these cases, the parties can agree expressly or tacitly to the date marking the starting point of the reference year. It may involve, for example, the date when the employee begins working. This period must be for 12 consecutive months.



According to this diagram, the reference year is from May 1st to April 30th. It is during this year that an employee progressively acquires entitlement to the annual leave. For example, an employee who begins working on June 1, 2006 progressively acquires entitlement to the annual leave during the reference year, namely from his hiring date until April 30, 2007. The employer will have until the end of the year in which the leave is to be taken to grant the employee his leave, namely April 30, 2008 (also see the interpretation of sections 68, 70 and 115 ALS).

SECTION 67

Where an employee is credited with less than one year of uninterrupted service with an employer, the length of his annual leave is equivalent to one working day for every month of uninterrupted service (within the meaning of paragraph 12) of section 1). However, the employee's leave shall not exceed two weeks.

It should be noted that the employee may demand that the leave be uninterrupted.

SECTION 68

The annual leave of an employee who is credited with between one and five years of uninterrupted service with the same employer shall be at least 2 weeks. The employee may demand that the leave be uninterrupted.

SECTION 68.1

This provision applies to an employee who benefits from an annual leave of a minimum duration of two consecutive weeks under section 68. The latter may request an additional leave, without pay, to bring his total annual leave up to three weeks. The employer cannot refuse if the employee makes this request.

However, the employee cannot demand that the taking of the leave be continuous in relation to the two weeks stipulated in section 68. Nevertheless, the employer may consent thereto. It should be noted that the additional leave cannot be divided.

SECTION 69

An employee who benefits from three weeks of annual leave is entitled to take it without interruption, subject to section 71 ALS.

SECTION 70

The annual leave must be taken in the year that follows the end of the reference year.

TAKING THE ANNUAL LEAVE EARLY

Since May 1, 2003, at the employee's request, the taking of the annual leave during the reference year is now expressly permitted. This is the only case of taking a leave in advance authorized and permitted under the Act. However, the employer may choose whether or not to consent thereto. Moreover, it is not necessary that the entire annual leave be taken in advance. When the leave is not taken in full, the balance will have to be granted during the subsequent reference year.

POSTPONEMENT OF THE ANNUAL LEAVE TO THE NEXT YEAR

It is possible to postpone an annual leave to the following year when the employee is absent owing to sickness, accident or for family or parental reasons at the end of the twelve months that follow the end of the reference year and when, as a result, he was unable to take his annual leave during that year. Such a postponement is made at the employee's request, with the employer's consent. If the leave is not postponed, the employer must immediately pay the indemnity related to the annual leave to which the employee is entitled.

Paragraph 4 of section 70 stipulates that a period of salary insurance, sickness insurance or disability insurance interrupted by the taking of the annual leave is continued, where applicable, after this leave, under the same conditions as before the leave.

SECTION 71

Unless the establishment is closed during the annual leave period, an employee can demand that his vacation be divided into two periods. If he wishes to divide it into more than two periods, he will have to obtain his employer's consent.

An employer cannot impose a divided vacation on an employee except in the following case: if, before March 29, 1995, the employer already was in the habit of closing his establishment for the holiday period, he may then divide an employee's annual leave into two periods. One of those two periods must correspond to the period during which the establishment closes and the other must be for a minimum length of two uninterrupted weeks.

Moreover, if the employee only has one week of annual leave or less, it may not be divided.

SECTION 71.1

A collective agreement or a decree may set out terms which are different from those provided for by legislation with regard to an uninterrupted annual leave or a divided leave.

SECTION 72

The choice of the date of an employee's annual leave is left up to the employer.

Non-compliance with this provision is a penal offence which does not give rise to a civil claim.

SECTION 73

The annual leave cannot be replaced by a compensatory indemnity, except in the following cases:

1. where a collective agreement or a decree has a specific provision to that effect;

2. where the establishment closes for two weeks on the occasion of the annual leave and where an employee requests that his third week of leave be replaced by such indemnity.

SECTION 74

The employee referred to in section 67, 68 or 69 ALS is entitled to an annual leave indemnity which is equal to 4% or 6% of the gross wages he earned during the reference year, depending on the length of his uninterrupted service with the employer.

GROSS WAGES

The use of the expression "gross wages" implies that one must take into account the wages and the various indemnities (statutory holidays, annual leave, miscellaneous leaves, overtime, bonuses, commissions, reported and attributed tips) received during the preceding reference year (on this subject, see the interpretation of paragraph 9) of section 1 ALS).

ABSENCE FOR SICKNESS, ACCIDENT, MATERNITY OR PATERNITY LEAVE

Where the annual leave indemnity of an employee is reduced due to the fact that he was absent, during the reference year, owing to sickness, accident, maternity or paternity leave, the indemnity is then calculated as follows:

Weekly average of the wage earned during the period of work, multiplied by two or three (depending on the number of weeks of annual leave to which the employee is entitled under sections 68 and 69 ALS).

EXAMPLE

During a reference year, an employee worked 26 weeks, earning an average weekly wage of $200; he was absent from work due to sickness for 26 weeks. The employee was entitled to two weeks of leave under section 68.

The annual leave indemnity is then calculated as follows:

26 (weeks of work) x $200.00 (wage) = $5,200.00

$5,200.00 ÷ 26 = $200.00 (average weekly wage)

$200.00 x 2 (weeks – section 68 ALS) = $400.00

The annual leave indemnity is thus $400.00.

It should be emphasized that under no circumstances shall the indemnity exceed the compensation to which an employee would have been entitled, had he not been absent from work or on leave for one of the three reasons listed in the second paragraph.

Moreover, it is specified that, for an employee on maternity or paternity leave, the government is entitled, by regulation, to determine a compensatory indemnity higher than that provided for in the second paragraph of section 74 but not exceeding that to which the employee would have been entitled had he not been absent from work.

OTHER ABSENCES

It should be noted that this exception regarding the method for calculating the annual leave indemnity is valid only in cases where the employee is absent by reason of illness or accident or on maternity or paternity leave. Consequently, an employee who is absent following a layoff, for instance, cannot benefit from said indemnity for this layoff period.

In this latter case, the indemnity must be calculated in proportion to the length of time at work.

EXAMPLE

An employee worked 44 weeks, earning a weekly wage of $200.00; he was absent for four weeks by reason of sickness; and he was laid off for four weeks. This employee is entitled to an annual leave of two weeks under section 68 ALS.

The indemnity must be calculated in the following manner:

44 (weeks of work) x $200.00 (wage) = $8,800.00

$8,800.00 ÷ 44 = $200.00 (average weekly wage)

$200.00 x 2 (weeks - section 68 ALS) = $400.00

$400.00 x 48 (weeks worked + weeks off sick)

÷ 52 (number of weeks in the year) = $369.23

Consequently, the annual leave indemnity is $369.23.

SECTION 74.1

No employer may reduce the annual leave of a part-time employee or change the method of calculating the indemnity pertaining to it for the sole reason that the employee works fewer hours per week. That employee is entitled to the same leave and the same method of calculating the indemnity as the other employees who perform the same tasks in the same establishment. The same protection is granted the employee with regard to the rate of wage under section 41.1 ALS (on this subject, see the interpretation under this section).

SECTION 75

The effect of this provision is to prohibit the employer from paying the indemnity related to the annual leave by weekly installments or otherwise, unless a collective agreement or a decree provides therefor.

The payment of this indemnity must be made in a single installment not later than the date the employee goes on his annual leave or by paying the indemnity in proportion to the annual leave taken in the case of its division or the leave taken early stipulated in section 70 ALS.

Since May 1, 2003, the employer has been allowed to pay the indemnity for the annual leave of a farm worker at each pay, at the same time as his wages, but only if the employee is hired by the day. If the worker is hired on another basis, for example by the week, the indemnity must be paid in the same way as for other employees, namely in a single installment, prior to the start of the leave.

The payment of the indemnity on a basis other than that stipulated here is an offence of a penal nature, not giving rise to a civil claim (the employee having received the indemnity).

SECTION 76

When the contract of employment is terminated, the employer shall pay the employee not only the indemnity related to the annual leave which he should have benefited from had he remained at work, but also an amount equal to 4% or 6% of the total earnings accumulated during the current reference year.

EXAMPLE

— Gross wages earned during the previous reference year = $30,000

— Gross wages earned during the current reference year prior to the calculation of the indemnity = $8,200

(The notion of "gross wages" is examined in the interpretation of section 74 ALS.)

Calculation of the indemnity

$30,000 x 6% = $1,800

$8,200 (gross wages earned during the current reference year)

+ $1,800 (aforementioned indemnity)

= $10,000 (gross wages for the current reference year)

$10,000 x 6%= $600

Total indemnity ($1,800 + $600) = $2,400

SECTION 77, 2)

See the interpretation of subparagraph 2) of section 54 ALS.

SECTION 77, 3)

It should be noted that, in order to be excluded from the application of the section of the Act relating to annual paid leaves, a real estate agent must be entirely remunerated on commission.

SECTION 77, 4)

The representative referred to here is defined in section 149 of the Securities Act:

"Every natural person carrying on business as a dealer or adviser on behalf of a person subject to registration under section 148 must register with the Authority as the representative of that person."

Under the aforementioned section 148, "No dealer or adviser may carry on business unless he is registered as such with the Authority".

In these provisions reference is made to the Commission des valeurs mobilières.

Moreover, it should be noted that, in order to be excluded from the application of the division of the Act relating to paid annual leaves, a real estate agent must be entirely remunerated by commission.

SECTION 77, 5)

The Act respecting market intermediaries has been replaced, since October 1, 1999, by the Act respecting the distribution of financial products and services (R.S.Q., c. D-9.2). However, section 578 of this latter Act stipulates that a referral to the Act respecting market intermediaries is a referral to the Act respecting the distribution of financial products and services and that the expression "market intermediary in insurance" now designates an "insurance representative", or an "agent or broker in damage insurance or claims adjuster", or a "representative in insurance of persons".

Since October 1, 1999, the expression "market intermediary" used in subparagraph 5) of section 77 ALS therefore refers to one of these persons who are defined in sections 2 to 6 and 10 of the Act respecting the distribution of financial products and services (R.S.Q., c. D-9.2.)

"2. An insurance representative is either a representative in insurance of persons, a group insurance representative, a damage insurance agent or a damage insurance broker.

3. A representative in insurance of persons is a natural person who offers individual insurance products in insurance of persons or individual annuities from one or more insurers directly to the public, to a firm, to an independent representative or to an independent partnership.

A representative in insurance of persons acts as an advisor in the field of individual insurance of persons and is authorized to secure the adhesion of a person in respect of a group insurance or group annuity contract.

The following are not representatives in insurance of persons:

1) persons who, on behalf of an employer, a union, a professional order or an association or professional syndicate constituted under the Professional Syndicates Act (R.S.Q., c. S-40), secure the adhesion of an employee of that employer or of a member of that union, professional order, association or professional syndicate in respect of a group contract in insurance of persons or a group annuity contract;

2) the members of a mutual benefit association that does not guarantee the payment of a benefit upon the occurrence of a risk who offer policies for the mutual benefit association.

4. A group insurance representative is a natural person who offers insurance products in group insurance of persons or group annuities from one or more insurers. A group insurance representative also acts as an advisor in the field of group insurance of persons.

Actuaries who, in pursuing activities as an actuary, offer insurance products in group insurance of persons or group annuities are not group insurance representatives.

5. A damage insurance agent is a natural person who, on behalf of a firm that is an insurer or that is bound by an exclusive contract with a single damage insurer, offers damage insurance products directly to the public. A damage insurance agent also acts as an advisor in the field of damage insurance.

A person who offers liability insurance products for the insurance fund established by the Autorité des marchés financiers is not a damage insurance agent.

6. A damage insurance broker is a natural person who offers a range of damage insurance products from several insurers directly to the public, or who

offers damage insurance products from one or more insurers to a firm, an independent representative or an independent partnership. A damage insurance broker also acts as an advisor in the field of damage insurance.

[…]

10. A claims adjuster is a natural person who, in the field of damage insurance, investigates insured losses, appraises damages and negotiates the settlement of claims.

The following are not claims adjusters:

1) persons who, in pursuing activities in a field other than insurance, carry out one of the functions of a claims adjuster;

2) natural persons who act as appraisers within the meaning of Title VI of the Automobile Insurance Act (R.S.Q., c. A-25).”

SECTION 77,7)

The trainee referred to in subparagraph 7) is a person whose vocational training program is recognized by law. There must therefore be an Act or a regulation stipulating that a training program must be completed and the length of such program.

SECTION 77,

AT THE END AFTER THE REFERENCE CODES

The Government may, by regulation, have all of the provisions dealing with the annual leave apply to the students referred to in subparagraph 2.

DIVISION V
REST PERIODS

SECTION 78

Subject to the provisions regarding the staggering of working hours, an employee is entitled to a weekly minimum rest period of 32 consecutive hours.

In the case of a farm worker, this day of rest may be postponed to the following week if the employee consents thereto.

An employer contravenes this provision by imposing a sanction or other measure on the employee who refuses to work in order to benefit from his weekly rest period.

SECTION 79

A thirty-minute period must be granted to the employee for his meal time after five consecutive hours of work. It should be pointed out that a collective agreement or decree can have different provisions.

This period shall be paid if the employee is not authorized to leave his work station.

Leaving one’s workstation means being totally relieved of the obligation to perform his regular work during the meal period. For example, an employee, whose employer requires that he take his meals at his workstation in the event that customers might appear, must be remunerated for his meal period. This would not be the case for the person who is not allowed to leave the establishment for the meal period, due to the short duration of this period or to avoid being late. In this latter case, the employee is not at the disposal of his employer.

DIVISION V.0.1
ABSENCES OWING TO SICKNESS OR ACCIDENT

On May 1, 2003, all of the standards pertaining to absences owing to sickness or accident were incorporated in this new division. The latter expressly makes provision for the right of an employee to be absent for these reasons. This right was already protected by a specific recourse provided for under the old section 122.2 ALS, by way of a prohibition imposed on the employer from dismissing, suspending or transferring an employee who is absent for one of these two reasons, provided that the employee is credited with three months of uninterrupted service and his absence does not exceed more than 17 weeks during the last 12 months. Henceforth, this recourse is found in section 122 ALS.

SECTION 79.1

An employee who is credited with three months of uninterrupted service may be absent from work without pay owing to sickness or accident. The total absences must not exceed 26 weeks over a 12-month period. The starting point of this 12-month period is calculated from the date of the first absence.

In the calculation of the maximum period of 26 weeks of absence, an absence for another reason, such as a maternity leave, must not be considered.

INDUSTRIAL ACCIDENTS AND OCCUPATIONAL DISEASES

This provision does not refer to absences by reason of an occupational disease, which are already provided for under the Act respecting industrial accidents and occupational diseases.

RECOURSES

An employee who exercises this right benefits from protection against dismissal, suspension, transfer, discrimination or reprisals or any other sanction imposed on him, by way of the recourse stipulated in subparagraph 1) of section 122 ALS.

SECTION 79.2

An employee who must be absent owing to sickness or accident must notify his employer of his state as soon as he is able to do so. However, when the expression "as soon as possible" is used, one must take into account the employee's situation and the specific circumstances of each case. Indeed, it could happen that an employee is not able to notify his employer immediately, for example, in the case where he was involved in an accident and that owing to this fact, he was unable to contact the employer.

Moreover, the employee must give the employer the reasons that help specify the nature of the absence, namely if it is a sickness or an accident. It is not necessary for these reasons to be written; they are generally given to the employer orally.

Moreover, if the employer wishes to obtain more details on the reasons for the absence, other than the usual reasons provided by the employee and usually accepted by the employer, he must do so taking into account the limits associated with respecting the employee's privacy. Indeed, the state of health of the employee and his medical file are part of his private life. Respect for the right to privacy is protected by the Charters and by several laws, including the Charter of Human Rights and Freedoms (R.S.Q., c. C-12, s. 4, 5 and 9), the Canadian Charter of Rights and Freedoms (Constitution Act, 1982, part I), the Québec Civil Code (S.Q. 1991, c. 64, art. 3, 35 and 41), the Act respecting the protection of personal information in the private sector (R.S.Q., c. P-39, s. 5) and the Act respecting occupational health and safety (R.S.Q., c. S-2.1, s. 51).

SECTION 79.3

An employee retains his rights in group insurance and pension plans recognized in his workplace, despite his absence owing to sickness or accident. Since May 1, 2003, the Act no longer talks about equivalent plans but rather plans recognized in the workplace and in which the employer participates. The plan under which the employer assumes the entirety of the contributions is maintained. Indeed, no contribution is payable by the employee, but the employer must assume his usual share.

In the case of plans where the contributions are divided between the employee and the employer, the employee must continue to assume regularly his usual share of the contributions payable to maintain these plans during his absence. As soon as the employee assumes his share, the employer is required to pay his usual share.

The government may determine by regulation other advantages that an employee may enjoy during an absence owing to sickness or accident.

SECTION 79.4

In this case, the employer must reinstate the employee, with the same benefits, in his "former position". The former position, namely the position that the employee held at the time of his departure as well as the other related benefits are hence protected.

Upon returning to work, the employee must find the same conditions, in particular with respect to his position, his duties, his wages or his work, as if he had never been absent.

As a similar protection already existed for the employee who returns after a maternity leave, see the jurisprudence found under section 81.15.1 ALS regarding the employer's obligations when the employee returns to work.

THE POSITION NO LONGER EXISTS

In the case where the employee's former position no longer exists when he returns to work, he must benefit, as if he had never been absent, from all the rights and privileges existing when his position disappeared.

GOOD AND SUFFICIENT CAUSE FOR DISMISSAL

The consequences of the sickness or accident, as well as the repetitive nature of the absences, may be good and sufficient cause for dismissal, transfer or suspension. The employer who cites these consequences as a reason for dismissal, suspension or transfer has the burden of demonstrating that it is a good and sufficient cause.

The courts recognize that the employer has a duty to be reasonably accommodating within the context of such an absence.

SECTION 79.5

Since May 1, 2003, the Act has expressly stipulated that the employee retains the same rights as the employees dismissed or laid off, when the employer, during the period the employee was absent, makes layoffs or dismissals that would have included him. In particular, the employee retains his rights concerning return to work. For example, if rights such as seniority, right to recall, transfer, the right to reclassification apply in the undertaking, the employer must grant these rights to the absent employee.

SECTION 79.7

This section takes up in part the former section 81.2, which was replaced. It covers a greater number of family situations and permits a longer period of absence, now ten days per year. The leave is taken without pay.

The employee is required to notify the employer as soon as possible of the absence and to take the reasonable means at his disposal to limit the taking and the duration of the leave. When speaking of "as soon as possible", it is important to take into account the employee's situation and the specific circumstances of each case. The employee has the right to divide this leave into days. With the employer's consent, the days may also be divided.

The obligations referred to under this provision are those related to the care, health or education of his child or the child of his spouse. Unlike as had been the case prior to May 1, 2003, it is no longer necessary for the child to be a minor and the spouse's child is now included. The employee may also be absent owing to the state of health of other members of his family, namely his spouse, his father, his mother, his brother, his sister or one of his grandparents.

It should be noted that the absence authorized for a reason related to the state of health of the persons mentioned in this provision must be directly related to their state of heath. For example, the employee's father goes on a trip and his state of health requires that someone accompany him. The employee could not justify an absence to accompany him under section 79.7 of the Act, as under these circumstances, the reason for the absence is a "trip" and not an absence "because of the state of heath". However, it is clear that this provision applies to an absence to accompany a close relative who must travel to receive care and who requires assistance.

SECTION 79.8

Since May 1, 2003, an employee who is credited with three months of uninterrupted service may be absent for not more than 12 weeks over a 12-month period when his presence is required with certain members of his family owing to a serious illness or a serious accident. To benefit from this leave, the illness or the accident must affect one of the following members of the employee's family: his child, his spouse, the child of his spouse, his father, his mother, the spouse of his father or mother, his brother, his sister or one of his grandparents. The 12-month period is calculated beginning from the first absence.

The permitted absences must be seen in terms of weeks. The employee is free to divide the 12-week period into weeks according to his needs. This leave is taken without pay.

It should be noted that sections 79.7 and 79.8 ALS concern different reasons for an absence. An employee could be absent 10 days under section 79.7 ALS without affecting his right to the leave stipulated in section 79.8 ALS.

EMPLOYEE'S RIGHTS AND OBLIGATIONS

The employee must notify his employer as soon as possible. When speaking of "as soon as possible", it is important to take into account the employee's situation and the specific circumstances of each case.

If the employer requests it, the employee must also provide a document justifying the absence. This document will describe the serious illness or accident that

concerns one of the persons mentioned. See the reservations mentioned in the interpretation of section 79.2 ALS pertaining to the right to privacy.

Certain provisions of the Act apply to the employee's absence stipulated in this section, taking into account the necessary adaptations. These provisions concern participation in group insurance and pension plans (s. 79.3 ALS), the reinstatement of the employee in his former position (s. 79.4 ALS), rights in the event of dismissal or layoff (s. 79.5 ALS) and the fact that the effect of this section must not be to grant the employee advantages that he would not have benefited from otherwise (s. 79.6 ALS).

MINOR CHILD HAVING A SERIOUS ILLNESS THAT IS POTENTIALLY MORTAL

The legislator allows an employee to be absent beyond the 12-week period when his minor child has a serious illness that is potentially mortal. The total duration of the absence must not be more than 104 weeks (including the 12-week period), calculated from the first day of absence. The absence may be divided, but if such is the case, it must be taken within a maximum period of 104 weeks. To benefit from such an extension, the seriousness of the illness must be attested by medical certificate.

SECTION 80

On May 1, 2003, the total number of days of absence allowed was increased to five, four days of which are without pay.

See the interpretation of section 80.2 ALS.

SECTION 80.1

See the interpretation of section 80.2 ALS.

SECTION 80.2

The right of an employee to be absent from work for one day, with or without pay, by reason of the death or the funeral of a close relative has been extended to the members of the spouse's family. (The term "spouse" is found in paragraph 3) of section 1 ALS).

An employee who wishes to avail himself of this right must notify his employer as soon as possible. When speaking of "as soon as possible", it is important to take into account the employee's situation and the specific circumstances of each case.

The employee's right to be absent may be exercised at the time of the death or the funeral, but without exceeding the period between the death and the funeral.

SECTION 81

An employee may be absent with pay, on the day of his wedding (or his civil union), and without pay on the day of the wedding of one of his children or a child of his spouse, that of his father or his mother, of a brother or a sister.

These rights of absence can only be exercised at the time of the event. These absences cannot be postponed to a later date. The employee must, however, notify his employer of his absence at least one week ahead of time.

SECTION 81.1

The leave is for five days, two of which are remunerated, if the employee is credited with 60 days of uninterrupted service within the meaning of paragraph 12) of section 1 ALS. An employee who is not credited with 60 days of uninterrupted service will be entitled to five days of leave, but without pay.

Starting from January 1, 2006, the employee who adopts the child of his spouse can also benefit from this leave. In the past, such an employee was only entitled to two days of leave, without pay.

At the request of the employee, this leave may be divided into days during a period of fifteen days following the arrival of the child at the residence or termination of pregnancy.

The employee is under the obligation to notify his employer of his absence as soon as possible. When speaking of "as soon as possible", it is important to take into account the employee's situation and the specific circumstances of each case.

SECTION 81.2

Since January 1, 2006, an employee has been entitled to a paternity leave of not more than five uninterrupted weeks without pay at the time of the birth of his child. This leave must be taken at the earliest in the week in which the child is born and end no later than 52 weeks after the birth.

This paternity leave of five consecutive weeks is in addition to the other leaves stipulated in the Act, notably the five-day leave for the birth or adoption of a child (s. 81.1 ALS) and the parental leave of 52 uninterrupted weeks (s. 81.10 ALS). No specific time period is stipulated to notify the employer of the taking of this leave. In addition, no specific form (written or verbal) is required under the Act.

Moreover, the employee can use the recourse for a prohibited practice if he is dismissed or if the employer imposes any other sanction for having exercised his right to the paternity leave or upon his return from this leave (s. 122 and 123.2 ALS).

SECTION 81.3

There is no fixed limit as to the number of absences permitted. The right of a pregnant employee to be absent from work for a medical examination also extends to cases where the employee is examined by a midwife. See the interpretation of section 81.1 ALS concerning the obligation to notify "as soon as possible".

SECTION 81.4

Since May 1, 2003, the standards pertaining to the maternity leave have been found in this division of the Act.

In principle, the maternity leave lasts 18 uninterrupted weeks, without pay. With the employer's consent, the employee has the possibility to take advantage of a maternity leave lasting more than 18 weeks.

She may spread the leave as she wishes before or after the date of delivery. However, the leave must be taken continuously, subject to section 81.5 ALS, which provides for its suspension when the child is hospitalized during the leave.

For the calculation of the 18 weeks, the week of delivery is not taken into account if the maternity leave begins that week. This will be the case if the employee remains on the job until the time of delivery. The leave will begin on the first day of the following week.

SECTION 81.4.1

The purpose of this provision is to ensure a leave of at least two weeks for an employee who would have completed her maternity leave due to the fact that her delivery occurred later than anticipated. For example, this would be the case of an employee who reserved two weeks of maternity leave after the anticipated date

of her delivery, but who gives birth one week later than expected. She will then be entitled to one additional week of maternity leave.

It should be noted that the employee can always avail herself of the parental leave (s. 81.10 ALS) afterwards.

SECTION 81.5

This provision concerns the possible cases of suspension and extension of the maternity leave, which are in addition to those stipulated in sections 81.4 and 81.4.1 ALS.

HOSPITALIZED CHILD

An employee may suspend her maternity leave for the duration of the hospitalization of her child and continue the leave when her child is released from hospital. The employee could, for example, ask to return to work during this period without the total length of her maternity leave being affected. The employer must, however, consent thereto. This is the only case of a possible division of the maternity leave.

EXTENSION OF THE LEAVE DUE TO THE STATE OF HEALTH

It is possible to extend the maternity leave when the mother's or child's state of health so requires. It is the medical certificate issued due to the mother's or child's state of health that will specify the length of the extension. The employee who exercises this right is under the obligation to notify her employer and to give him a medical certificate before the end of the maternity leave. In this case, the notice does not have to be written.

SECTION 81.5.1

This provision grants a special maternity leave without pay to the employee in the following two situations:

1. where there is a risk to the health of the mother or her unborn child caused by the pregnancy;

One must distinguish between the special maternity leave stipulated in the Act and the re-assignment stipulated in sections 40 and following of the Act respecting occupational health and safety (R.S.Q., c. S-2.1). This latter leave refers to cases where there is a danger related to the work of the employee, namely caused by the work that she performs.

2. where there is a risk of termination of pregnancy.

This leave applies in the case of a risk of termination of pregnancy and must not be confused with the case of actual termination of pregnancy provided for under section 81.5.2 ALS.

In both cases, the only obligation that the employee has is to give her employer a medical certificate indicating that there is a danger as well as the expected date of her delivery.

If the employee has not resumed work at the start of the fourth week preceding the expected date of delivery, her special maternity leave will become the maternity leave stipulated in section 81.4 ALS.

SECTION 81.5.2

TERMINATION OF PREGNANCY BEFORE THE TWENTIETH WEEK PRECEDING THE EXPECTED WEEK OF DELIVERY

Since May 1, 2003, in the event of termination of pregnancy before the twentieth week preceding the expected week of delivery, the Act provides for a special maternity leave, without pay, of up to three weeks. It may be extended if a medical certificate provides for such an extension.

It should be noted that the special maternity leave stipulated in this provision may be combined with that mentioned in section 81.5.1 ALS.

TERMINATION OF PREGNANCY IN OR AFTER THE TWENTIETH WEEK OF PREGNANCY

When a termination of pregnancy occurs after the twentieth week, it is no longer a special maternity leave, but a maternity leave not exceeding 18 uninterrupted weeks. This leave is without pay and its duration begins from the week in which the termination of pregnancy occurs.

SECTION 81.5.3

The employee is under the obligation to notify her employer in writing as soon as possible in the event of a termination of pregnancy or premature delivery. This notice must be accompanied with the required medical certificate.

SECTION 81.6

The maternity leave is taken by sending a written notice to the employer at least three weeks before the employee is to go on leave, unless a medical certificate stipulates that she must stop working in a shorter time period. The notice must mention the date on which the leave will begin and the date on which the employee will return to work. It must be accompanied with a medical certificate or failing that, a written report signed by a mid-wife, confirming the employee's state of pregnancy and her expected date of delivery.

SECTION 81.10

The father and mother of a newborn child and a person who adopts a child are entitled to a parental leave of not more than 52 continuous weeks. Under section 81.13, an employee can resume work on a part-time or intermittent basis during his parental leave, If the employer consents thereto.

However, it should be pointed out that the Act does not require that the parental leave be taken immediately after a maternity leave. Therefore, it is possible for the mother to return to work after her maternity leave without losing the right to take a parental leave thereafter, provided that she meets the conditions related to the leave.

It should be pointed out that each of the parents is entitled to this leave of not more than 52 weeks.

In the case of same-sex spouses, see the interpretation of paragraph 3) of section 1 ALS.

SECTION 81.11

70-WEEK LEAVE

The parental leave may not begin before the week in which the baby is born and shall end not later than 70 weeks after the birth.

In the case of adoption, the leave can begin in the week that the child is entrusted to the care of his parents or if they must leave Québec in order for the child to

be entrusted to them, the week when they leave work to travel outside Québec. For example, mention may be made of the trips outside Québec that parents must make for an international adoption. In both these cases, the leave must end not later than 70 weeks after the child has been entrusted to the care of the employee.

104-WEEK LEAVE

The government has a power to regulate in order to provide for an extension of the parental leave up to a maximum of 104 weeks in some situations.

SECTION 81.12

The notice given to take the parental leave may be verbal or written. In contrast, a written notice must be given when taking a maternity leave (see section 81.8 ALS).

SECTION 81.13

The notice to the employer must be in writing.

Since May 1, 2003, the possibility to resume work part-time or on an intermittent basis during the parental leave is expressly provided for under the Act respecting labour standards. The employer's consent is, however, required. However, if an employee does resume work on such a basis during his parental leave, the maximum length of the leave cannot exceed the period of 52 uninterrupted weeks stipulated in section 81.10 ALS and will have to end within the limits stipulated in section 81.11 ALS. For example, if the employer consents to the employee's return to work by reason of two days per week during his parental leave, the employee is deemed to be on parental leave during the period of his return to work.

SECTION 81.14.1

Since January 1, 2006, the employee has had the right to request the division into days of the taking of a maternity, paternity or parental leave.

Three cases of division of the leave are provided for under the Act. They are the hospitalization of the child, the sickness of or an accident involving one of the parents (s. 79.1 ALS) or the leave taken for the serious illness of or a serious accident involving close relatives (s. 79.8 ALS).

SECTION 81.14.2

This new section basically takes up the second and third paragraphs of section 81.5 ALS which already provided for the suspension and the extension of the maternity leave. Since January 1, 2006, the legislator also permits the suspension and extension of the paternity and parental leave.

SUSPENSION

Provision is made for the suspension of a leave to allow the employee to return to work if the child must be hospitalized for the duration of the leave. Suspension requires an agreement with the employer.

If an employee decides not to return to work during the hospitalization of his child, for example in the case where this hospitalization is of short duration, the employee will be able to avail himself of the division of the leave stipulated in section 81.14.1 ALS.

EXTENSION

An extension of the maternity, paternity and parental leave is also possible if the health of the employee's child requires it. In the case of the maternity leave only, the extension is possible if the mother's state requires it.

In all cases, the employee must submit a medical certificate to his employer prior to the expiry of his leave. The length of the extension will be that indicated on this certificate.

See the interpretation of section 81.5 ALS.

SECTION 81.15 The absences and leaves for family or parental reasons do not affect the employee's participation in group insurance and pension plans recognized in the workplace. See the interpretation of section 79.3 ALS on this question.

SECTION 81.15.1 At the end of a maternity, paternity or parental leave, the employer must reinstate the employee in his "former position", namely the position that he held at the time he left. Upon his return, the employee retains the same benefits that he had prior to leaving, including the wages to which he would have been entitled, had he not been absent, which includes the wage increases that he would have enjoyed.

If the employee's former position no longer exists when he returns, he must nevertheless benefit, as if he had never been absent, from all the rights and privileges existing at the time his position disappeared. These rights and privileges include, for example, the benefits that the employee would have enjoyed by reason of his seniority.

A similar protection exists in relation to absences by reason of sickness or accident (see the interpretation of section 79.4 ALS).

DIVISION V.2
PSYCHOLOGICAL HARASSMENT

The notion of harassment has developed gradually in the labour relations field. An abundant jurisprudence, in particular on the themes of constructive dismissal and resignation, has recognized a form of protection in this field, both for employees benefiting from a collective agreement and for non-unionized employees.

Several forums have clarified the rights and obligations of the parties on this question. In the case of employees not covered by a collective agreement, courts of law and the commissioners of the Commission des relations du travail have had to examine the question, in particular by interpreting the notion of the right to dignity conferred by the Civil Code of Québec.

As for unionized employees, arbitrators on grievances have established for some time now various guidelines making it possible to identify what is meant by the concept of harassment in the workplace.

However, recourses are currently scattered and fragmentary, with processes and procedures that are adapted in varying degrees to the circumstances of each case.

Through these provisions, the objective of the legislator is first and foremost to make employers and employees aware of psychological harassment in the workplace and to permit actions upstream in order to avoid a deterioration of the work environment for the employee.

It was within this context that the new standards pertaining to psychological harassment integrated in the Act respecting Labour Standards (s. 81.18 to 81.20 ALS) were adopted. These standards are accompanied with a specific recourse (s. 123.6 to 123.16 ALS). They have been in effect since June 1, 2004.

This protection applies to all employees, including senior managerial personnel (s. 3.1 ALS). Every employer is responsible for the obligations related to this protection.

These standards clarify the employer's obligations that already exist under the provisions of the Civil Code of Québec and the Charter of Human Rights and Freedoms. These provisions establish the right to dignity, to respect and to the person's integrity, while guaranteeing employees fair and sufficient conditions of employment and a healthy work environment.

The application of these labour standards should make it possible to standardize the various case law definitions established by specialized courts of law.

SECTION 81.18

This section defines what psychological harassment is. The definition must be approached within the specific context of the employer-employee relationship. In other words, what could not be considered harassment under other circumstances, may be considered harassment owing to the legal subordination relationship between the parties.

Vexatious behaviour must take the form of conduct, comments, actions or gestures which, in the case of the first paragraph, must be repetitive in nature, i.e. continuity over time.

The vexatious nature is generally gauged from the standpoint of the person experiencing the situation and who is reporting it, without regard for the harasser's intentions. In the majority of cases, the assessment will deal with the nature, intensity and recurrence of the objectionable gestures, as well as their impact on the victim. The vexatious behaviour may be continuous in nature, demonstratable by the effect of the physical or psychological prejudices that link each of the gestures together[1].

These incidences of behaviour, comments, actions or gestures must be hostile or unwanted. Their consequence is to affect the dignity or psychological or physical integrity of the person against whom they are directed, and to create a harmful work environment for him. "Harmful" refers to an environment that is detrimental, bad or unhealthy.

The hostile gestures towards the employee are not necessarily flagrant. Indeed, it is not necessary that such a gesture be aggressive in nature in order for it to be considered hostile. For example, an employee could be the victim of comments, actions or gestures which, when taken on their own, may seem harmless or insignificant, but the accumulation or combination of them may be considered a harassment situation. In such a case, if the employee works alone most of the time, the hostile gestures will not necessarily be noticeable at first.

The term "unwanted" refers to all of the objectionable conduct. Indeed, the victim does not have to give verbal expression to his rejection of such behaviour; the essential element leading to the ascertainment of harassment is that the behaviour itself is unwanted. It must be possible for the facts in question to be objectively perceived as being unwanted[2].

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[1] Dhawan c. Commission des droits de la personne et des droits de la jeunesse, C.A. Montréal, 2000-06-26 D.T.E. 2000T-633 (C.A.) conf. Commission des droits de la personne du Québec c. Dhawan, D.T.E. 96T-285.

[2] Habachi c. Commission des droits de la personne, D.T.E. 92t-634 (C.A.).

The concept of human dignity means that a person feels respect and self-esteem. Human dignity is associated with physical or psychological integrity. It has nothing to do with the status or the position of a person in his work environment, but rather concerns the way in which a reasonable person feels in the face of a given situation. Human dignity is scorned when a person is marginalized, set aside and devalued[3].

It should also be pointed out that a single serious incidence of such behaviour may constitute psychological harassment. The harmful effect of this serious incidence must be felt over time by the person in question. The effect on the dignity or psychological or physical integrity of the employee and the harmful effect cannot be dissociated, in the case both of an isolated incidence and repeated incidences.

In this definition, the legislator is not referring to specific situations or individuals.

Behaviour that constitutes sexual harassment, whether it is manifested physically or verbally, could be considered psychological harassment.

It is worthwhile recalling that the Québec Charter of Human Rights and Freedoms and the Civil Code of Québec have specific provisions on this subject.

Section 46 of the Charter stipulates that: "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."

As for Article 2087 of the Civil Code of Québec, it states that:

"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."

IDENTIFICATION CRITERIA

The identification of the harassment must be made according to an objective analysis process.

In this respect, the criterion of a "reasonable person" put in the circumstances described in a harassment complaint is an objective identification standard. The point of comparison for this "reasonable person" must be a standard of conduct that is accepted or tolerated by society. As a reference, a person with ordinary intelligence and judgment is chosen to see how this person would have reacted in a given context.

The relevant point of view is hence that of a person who is reasonable, objective and well informed of all the circumstances and finding himself in a situation similar to the one related by the employee. Would this person conclude that this was a harassment situation?

The effect of the application of such standards must not be to deny the normal exercise by the employer of the management of his human resources. It is important to distinguish the actions taken by the employer as part of the normal and legitimate exercise of his management right, even if they involve unpleasant consequences or events, from those taken in a manner that is arbitrary, abusive, discriminatory or outside the normal conditions of employment.

[3] Law v. Canada (Minister of Employment and Immigration), [1999] 1 R.C.S.

SECTION 81.19

The work environment refers not only to the physical location where the employee performs his duties, but also any place where he may be called upon to work according to the needs of his job.

The reality of this work environment cannot disregard the persons with whom the employee comes into contact in the performance of his tasks. Consequently, the legislator is referring not only to the employer, his representatives and colleagues, but also to the clientele or third parties.

The Act respecting labour standards imposes an obligation of means on the employer. Under this obligation, the person is required to act carefully, diligently and by taking all reasonable steps in the search for the expected result, without providing the certainty of achieving this result. The example most often cited is that of a physician who, while taking all the means at his disposal to cure his patient, cannot guarantee that he will be successful.

For example, an employer who has an obligation of means could see his responsibility engaged, among other things, when: misdeeds were committed by the employer or one of his officers in the exercise of their duties; the employer failed in his obligation to ensure a suitable climate and suitable conditions of employment in the undertaking.

Conversely, the obligation of result, as its name indicates, requires that the person under this obligation provide a precise and well-defined result. An example of this obligation is that of a vendor who has undertaken to deliver the agreed upon goods at a specific date.

This responsibility falls on the employer and not on the person presumed responsible for the psychological harassment. It is the employer who has the responsibility of providing his employees with fair and reasonable conditions of employment and of respecting their health, safety, dignity and psychological and physical integrity.

Consequently, as soon as a harassment situation is brought to his knowledge, the employer is under the obligation to take the appropriate steps and impose the necessary sanctions to put a stop to such behaviour. This implies the existence and implementation of a procedure that is known, effective and adapted to the reality of each undertaking to permit the disclosure of cases of harassment and a rapid and objective response.

In his capacity as the person having the prime responsibility for the organization of work, only the employer can exercise the necessary authority to ensure a work environment that is healthy and free from harassment.

The fact that the employer is unaware of a harassment situation cannot relieve him of his responsibility. On the contrary, the employer's negligence or decision to turn a blind eye to a harassment situation engages his responsibility.

SECTION 81.20

An employee who has the right to file a grievance under his collective agreement will have to proceed in this manner. The provisions related to the definition of psychological harassment as well as the provisions concerning the right to an environment free from psychological harassment and the employer's obligations to maintain such an environment form an integral part of every collective agreement. Moreover, the provisions concerning the remedial powers of the Commission des relations du travail stipulated in sections 123.15 and 123.16 ALS are included.

The request for the services of a mediator designated by the minister must be a joint request.

For a non-unionized civil servant, the same provisions as above are deemed to form an integral part of his conditions of employment and it is the Commission de la fonction publique that exercises the powers stipulated in sections 123.15 and 123.16 ALS. The same is true for the members and heads of government agencies.

DIVISION VI
NOTICE OF TERMINATION OF EMPLOYMENT OR LAYOFF, AND WORK CERTIFICATE

SECTION 82 OBJECTIVE

This written notice is an advance notice that an employer gives his employee informing him of the employer's decision to terminate his employment. The objective of the notice of termination of employment is to humanize the circumstances surrounding the severing or quasi-severing of a contract of employment. This mechanism allows the employee to look for another job while retaining remuneration for the duration of the notice.

LENGTH OF NOTICE

The period of notice varies according to the length of uninterrupted service with the employer:

- less than three months – no prior notice;
- three months to less than one year – one week;
- one year to less than five years – two weeks;
- five years to less than 10 years – four weeks;
- ten years or more – eight weeks.

One may conclude from section 82 that, where an employee refuses to work during the period covered by the notice, he loses entitlement to the indemnity provided for in section 83 ALS.

An employee who notifies his employer that he will leave his job for good within a period of one week, for example, cannot, if he is immediately dismissed, claim an indemnity greater than one week of wages (even if under section 82 ALS he is entitled to a notice of two weeks).

Moreover, a notice of termination of employment given to an employee during the period when he is laid off is absolutely null, except in the case of a seasonal worker who ordinarily works less than six months each year.

An employee who ordinarily works less than six months per year due to the weather conditions related to the various seasons does not enjoy the same benefits. The notice of termination of employment given to him during the period when he is laid off will be valid.

A notice of termination of employment given during a layoff period to a seasonal worker who usually works more than six months per year during a period when he is laid off is null. The employer must then pay the indemnity set out in section 83 ALS.

The third paragraph of this section only refers to the employee during a layoff period, and not if he is on leave without pay, on sick leave or other leave. The notice given during these periods will not be considered null and void.

WRITTEN NOTICE

In any other circumstance, the employer is required to give the employee a written notice in the time periods stipulated in the second paragraph of section 82 ALS.

It should be noted that a verbal notice or notice by posting does not correspond to the requirements of the Act and cannot be invoked, unless the employee admits that he was notified thereof or learned thereof within the stipulated time period.

OTHER RECOURSES

Moreover, section 82 ALS does not create an exclusive recourse. An employee who benefits from a recourse under another legislative provision, such as Article 2091 of the Civil Code of Québec, may exercise it.

NOTICE OF COLLECTIVE DISMISSAL

See the interpretation of section 84.0.4 ALS.

SECTION 82.1

Junior and intermediary managers benefit from this provision (see the interpretation of paragraph 6) of section 3 and that of subparagraph 3) of section 54 ALS).

However, section 82 ALS does not apply to the following employees:

1) an employee who is not credited with three months of uninterrupted service;

See the interpretation of "uninterrupted service" in paragraph 12) of section 1 ALS.

2) an employee whose contract for a fixed term or for a specific undertaking expires;

CONTRACT FOR A FIXED TERM

A contract for a fixed term is a contract under which an employee is hired for a predetermined, fixed term, at the end of which the contract automatically expires without the employer being obliged to renew it.

EXAMPLE

An employee was hired as a replacement by the employer from May 1, 2005 to November 30, 2006. On that date, the employer who no longer requires the employee's services does not have to give him a notice under section 82 ALS, as the parties entered into an agreement whereby the contract expired on November 30, 2006.

A succession of contracts for a fixed term may constitute one contract of indeterminate length (see the interpretation of the notion of "uninterrupted service" in paragraph 12) of section 1 ALS). The performance of work then becomes continuous and the contracts are there only to specify the terms and conditions of this performance of work.

According to the jurisprudence, a contract is considered to be of indeterminate length, except where there is proof to the contrary. The party that alleges the existence of a contract for a fixed term has the burden to prove its existence.

Among the elements that may be considered in the qualification of the length of employer-employee relations, one finds, for example, an absence of formalities to be met between each renewal, the fact that the employee's work tools remain on the employer's premises or that his personal effects remain at the work station between each renewal, the fact that the employee could reasonably expect to be recalled.

SPECIFIC UNDERTAKING

An employee hired for a specific undertaking is an employee hired to perform a precise task, specific or defined work. Once this work has been completed, his employment ends. This could involve, for instance, an employee hired for the performance of a precise contract that the employer obtained or an employee who is hired to carry out a specific task (e.g. painting of a shed). In these cases, the employee does not necessarily know the exact length of his employment, but he knows that once the work for which he was hired is finished, his contract will end.

When it is a contract for a fixed term or for a specific undertaking that is terminated before its expiry, section 82 ALS does apply, as the exception only concerns contracts that expire.

EXAMPLE

An employer hires an employee for a two-year period, namely from January 1, 2005 to January 1, 2007.

On June 1, 2006, the employer terminates the contract early without prior notice.

The employee is entitled to an indemnity equal to two weeks of wages.

3) an employee who has committed a serious fault;

A serious fault is a fault serious enough to make it indispensable to immediately terminate the work contract (ref.: judicial precedents). It should be noted that a fault on the part of the employee may constitute good and sufficient cause for dismissal without, however, corresponding to the notion of serious fault. In such a case, a notice is required.

4) an employee for whom the end of the contract of employment or the layoff is a result of superior force;

Superior force refers to an event that is unforeseen and that is impossible to resist. The destruction by fire caused by lightening of the employer's establishment would be an example of superior force preventing the employer from giving work.

RESIGNATION

Moreover, the employer is also relieved from his obligation to give the notice stipulated in section 82 ALS in cases where an employee has resigned. The doctrine and jurisprudence consider that the intention to leave one's job for good is a right that belongs to the employee. It is up to the employer to establish this resignation. It must be clear, manifest, voluntary and unequivocal. The resignation may not be presumed, except where the employee's behaviour is incompatible with another interpretation. In case of ambiguity, the jurisprudence generally refuses to conclude that the employee did indeed resign.

SECTION 83

An employer who does not give the notice of termination of employment must pay the employee a compensatory indemnity equal to his regular wage for a period equal to the period of notice to which he was entitled. When the employer has given a notice of insufficient length, the indemnity must correspond to the employee's usual wages (excluding overtime) for the period not covered by the notice.

One must not take into account in the calculation overtime that has been paid or replaced by a leave of absence. These overtime hours are determined with regard to the regular workweek of the employee or a regular workweek as provided for by the Act or the regulation, if the undertaking has none. For example, for an

employee who has a regular workweek of 35 hours and is paid at the higher rate beginning from the 36th hour, the calculation of his indemnity will be on his regular 35-hour workweek, excluding the overtime worked.

Moreover, the basis for calculating the indemnity is different for an employee remunerated in whole or in part by commission, and this regardless of the amount of the commissions received. In that case, the average of his weekly wage must be established using the complete periods of pay in the three months prior to the termination of his employment or his layoff.

The expression "complete period of pay" means the period covered by the regular interval of pay up to a maximum of 16 days as provided for in section 43 ALS. The calculation of the indemnity is based on the wages earned during that period, regardless of the number of days or hours worked by the employee.

This indemnity must be paid:

1. at the time the employment is terminated;

2. at the time the employee is laid off for a period expected to last more than six months;

3. at the end of a six-month period after a layoff of indeterminate length or a layoff expected to last less than six months, but which exceeds that period.

INDEMNITY FOR TERMINATION OF EMPLOYMENT AND SEVERANCE PAY

Moreover, it is important to distinguish the indemnity for termination of employment (stipulated in section 83 ALS) from severance pay. Indeed, it is frequent for a labour agreement, whether individual or collective, to provide for the payment of a special indemnity for the loss of a job. For example, this indemnity may be calculated according to the employee's seniority. Such a contractual obligation cannot replace the legal obligation to give the notice stipulated in section 82 ALS, and failing that, the indemnity stipulated in section 83 ALS.

NOTICE OF COLLECTIVE DISMISSAL

The indemnities mentioned in section 84.0.13 ALS (collective dismissal) and in this section are not cumulative (s. 84.0.14 ALS). The employee will receive the greater of the two indemnities.

SECTION 83.1

This provision refers to employees who, under a collective agreement, are entitled to recall privileges for a period of over six months. These employees can demand payment of the layoff indemnity, from the first of the following dates:

1) from the expiry of the recall privileges if they have not been recalled to work, or;

2) one year after layoff where the recall privileges are for a period over one year.

If an employee is recalled to work prior to the first of these two dates, he cannot demand the payment of an indemnity if the length of work after recall is at least as long as that of the notice to which he would have been entitled under section 82 ALS.

Moreover, an employee recalled to work for a duration that is less than the notice will be entitled to an indemnity equal to the wages to which he would have been entitled for the duration of the notice, less the wages received for the days of work. For example, if the employee returns to work for three days, when he was entitled to a two-week notice, he may then require payment of an indemnity representing two weeks of wages, minus the three days worked.

An employee who refuses to return to work after a recall made in accordance with a collective agreement, cannot take advantage of the provisions under section 83.1 ALS; no indemnity is payable in such case.

Where the employee is not recalled owing to a case of superior force, no indemnity is payable to the employee.

SECTION 84

Section 84 ALS allows the employee to require from his employer that he issue the employee a work certificate. This certificate must not be confused with a letter of reference. Only the information stipulated in this section must be mentioned in the certificate.

DIVISION VI.0.1
NOTICE OF COLLECTIVE DISMISSAL

SECTION 84.0.1

This section defines what constitutes a collective dismissal.

It is a termination of employment, at the employer's initiative, which affects at least 10 employees of the same establishment for two consecutive months. The employees laid off for more than 6 months must also be considered employees contemplated by the dismissal. In this case, the employer will have to take into account various components when making these layoffs, as the minimum time period within which he must send the notice of collective dismissal depends on the number of employees dismissed. The legislator has imposed on the employer the duty to anticipate and act accordingly to ensure that a notice of sufficient length is given (see the interpretation of section 84.0.4 ALS).

As for the notion of establishment, see the interpretation in section 41.1 ALS.

SECTION 84.0.2

This provision stipulates that the provisions on collective dismissal do not apply to certain employees:

1) An employee who is not credited with three months of uninterrupted service

See the interpretation of paragraph 1) of section 82.1 ALS.

2) An employee whose contract of employment for a fixed term or for a specific undertaking expires

See the interpretation of paragraph 2) of section 82.1 ALS.

3) An employee to whom section 83 of the Public Service Act applies

Section 83 of the Public Service Act (R.S.Q., c. F-3.1.1) reads as follows:

"83. For reasons of urgency or of public interest, or for practical reasons, the Conseil du trésor may, after consulting the Commission de la fonction publique, exempt any position or class of positions, owing to its special nature, from any provisions of this Act it may indicate.

In no case may the Conseil du trésor exempt a position or class of positions from the application of sections 64 to 76."

4) An employee who has committed a serious fault

See the interpretation of paragraph 3) of section 82.1 ALS.

5) An employee referred to in section 3 ALS

This applies to the following persons:

— a person who takes care of or provides care to others (s. 3, para. 2));

— a construction worker (s. 3, para. 3));

— a dependent contractor if the government establishes by regulation the remuneration applicable to him (s. 3, para. 4));

— a student within the context of a job induction program (s. 3, para. 5)); and

— senior managerial personnel (s. 3, para. 6)).

See the interpretation in section 3 ALS.

SECTION 84.0.3

This provision stipulates certain situations where the provisions on collective dismissal do not apply.

After six months, when an employee is not recalled to work after a layoff for an indeterminate period, it will be necessary to check if this employee was among the employees contemplated by the collective dismissal.

As for intermittent activities, they can be defined as those that stop and resume by intervals, often according to sporadic requests or specific needs. They are similar to seasonal activities, except that they are not related to the seasons. For example, an undertaking that operates reception halls and that works according to the demand.

SECTION 84.0.4

The employer must give notice to the Minister of Employment and Social Solidarity before making a collective dismissal. This notice must also be sent to the Commission des normes du travail, the employees and the accredited association that represents them, if there is one (see section 84.0.6 ALS).

The dismissal contemplated by these provisions is that made for reasons of a technological or economic nature.

LENGTH OF NOTICE

The notice must respect the following minimum periods:

10 to 99 employees affected by the dismissal - notice of 8 weeks;

100 to 299 employees affected by the dismissal - notice of 12 weeks;

300 employees or more affected by the dismissal - notice of 16 weeks.

NOTICE OF TERMINATION OF EMPLOYMENT OF SECTION 82 ALS

Within the context of a collective dismissal, the length of notice depends on the number of employees contemplated by the dismissal, whereas the length of the notice of termination of employment of section 82 ALS is based on the period of uninterrupted service specific to each employee. That explains why even if the employer has given the notice of collective dismissal, he is not exempted from having to give the notice stipulated in section 82 ALS (or failing that paying the compensatory indemnity of section 83 ALS), as the length of the notice may be different according to the two provisions. The two indemnities are, however, not cumulative and the employee will receive the greater of the two (see the interpretation of section 84.0.14 ALS).

PENALTY

If no notice is given, the employer is liable to a fine of $1,500 per week (see the interpretation of section 141.1 ALS).

SECTION 84.0.5 If the employer was prevented from respecting the time periods of the previous section due to superior force or an unforeseen event, he must give the notice of collective dismissal to the Minister of Employment and Social Solidarity as soon as he can.

In these cases, it is up to the employer to show that an event occurred which may be considered superior force or the unforeseeable nature of the event.

See the interpretation of paragraph 4) of section 82.1 ALS for the definition of superior force.

As for the notion of unforeseen event, one may speak of an event for which the employer was unable to predict the potential consequences and which, moreover, does not have the uncontrollable nature of superior force. Hence, the unforeseen event is an event that is unknown to the employer, not caused by his fault, which leads to the impossibility to perform in a given situation. In this case, the employer who is not at fault cannot foresee, within a reasonable framework, the impact and the consequences of such an event.

For example, if a contract is cancelled for a reason that is not attributable to the employer, i.e. without it being the fault or the will of the employer, one could say that an unforeseen event occurred and that the contract had to be cancelled. Conversely, if several persons bid on a contract, it is foreseeable for each bidder that the contract may not be awarded to him. In this latter case, the employer could not invoke an unforeseen event to justify the failure to give the notice or the giving of a notice of insufficient length.

Moreover, it should be pointed out that in the case of collective dismissal, the role of the Commission des normes du travail consists of qualifying the event that justified the failure to send a notice of collective dismissal or the sending of a notice of insufficient length. Indeed, unlike in the case of the recourses provided for under the Act respecting labour standards, (see s. 122 and following) where it is up to the employer to justify the choice of the employees laid off, the Commission will not be required, within the context of these standards, to evaluate the employer's decision concerning the choice of employees affected by the collective dismissal.

SECTION 84.0.6 See the interpretation of section 84.0.4 ALS.

SECTION 84.0.7 The details of the content of the notice are found in section 35.0.2 RLS. This notice must be sent to the Minister of Employment and Social Solidarity.

SECTION 84.0.8 The wages of an employee and the group insurance and pension plans recognized in the workplace are protected for the duration of the notice. The employer could not modify these conditions of employment without the written consent of the employee or of the accredited association representing him.

SECTION 84.0.13 An employer who fails to give the notice of collective dismissal or who gives one of a duration that is less than that stipulated in section 84.0.4 ALS must pay the employee a compensatory indemnity equal to his usual wages, excluding overtime, for a period equal to that of the leave to which he was entitled. Under section 50 ALS, the reported or attributed tips must not be added to the calculation of the indemnity.

Moreover, in the cases referred to in section 84.0.5 ALS, namely those of superior force or when an unforeseen event prevents the employer from respecting the stipulated time periods of the notice of section 84.0.4 ALS, the employer will have to give the notice to the Minister as soon as he is able to do so, but will not be required to pay the related indemnity if the notice is insufficient.

SECTION 84.0.14

The indemnity of section 83 ALS (termination of employment or layoff) and the indemnity of section 84.0.13 ALS (collective dismissal or layoff) are not cumulative. However, the employer will receive the greater of the two.

SECTION 84.0.15

The provisions relating to the reclassification assistance committee do not apply when a collective dismissal involves less than 50 employees.

DIVISION VI.1
RETIREMENT

SECTION 84.1

This provision was incorporated in the Act respecting labour standards on April 1, 1982 by Chapter 12 of the Statutes of 1982 (Act respecting the abolition of compulsory retirement and providing amendments to certain legislation).

The legislator abolished definitively the right to dismiss an employee for the sole reason that he has reached or passed the age of retirement. In so doing, the legislator put an end to a certain discrimination against workers who, due to their age, could find themselves deprived of their job.

It is interesting to recall, as the Minister of State for Social Development mentioned in a parliamentary committee on the section-by-section examination of Bill 15 (Act respecting the abolition of compulsory retirement and providing amendments to certain legislation) that: "…the objective of the Act is to put an end to a certain discrimination, namely the obligation for workers to retire at age 65. Bill 15 gives a new right to decide at what time a person will withdraw from the work market." (National Assembly, Journal des débats, Commissions parlementaires, third session – 32nd Legislature, Commission permanente des affaires sociales, examination of Bill 15 – Act respecting the abolition of compulsory retirement and providing amendments to certain legislation, Tuesday, March 9, 1982 – no. 50, B-2599).

Hence, the legislator wanted to leave it solely up to the employee to decide the time at which he would retire. Consequently, an employer who would impose a sanction on the employee would do so, likely, due to the exercise by this employee of a right ensuing from the Act respecting labour standards.

Such a legislative measure is in line with the extension of the provisions of the Charter of Human Rights and Freedoms (R.S.Q., c. C-12). Indeed, section 10 of the Charter prohibits any discriminated based, among other things, on age. Section 16 prohibits such discrimination at work in the transfer, layoff, suspension or firing of a person.

SECTION 84.2

This provision prohibits an employer from having a child perform work that is disproportionate to his capacity or likely to be detrimental to his education, health or development.

The notion of "child" is not defined in the Act. It is reasonable to conclude that this applies to any child under the age of 18.

As for the type of work prohibited, it could refer, for example, to that involving too great a number of consecutive hours of work in relation to the child's age or to that involving physical requirements that are too great in relation to the child's capacity.

It should be noted that other statutes may prohibit or limit the work performed by children.

In case of non-compliance with sections 84.2 to 84.7 ALS, sections 139 to 144 ALS apply.

SECTION 84.3

When the child is under 14 years of age, another prohibition is added to the one stipulated in section 84.2 ALS. In this case, the employer must obtain the prior written consent of a parent or the tutor of the child. The employer is required to check the child's age.

The form that this document must take is not stipulated in the Act, but it should contain the name and age of the child, as well as the express consent that the child can work for the employer. Obviously, the consent must be signed by the holder of parental authority or the tutor.

The employer has the obligation to keep this document under the same conditions as those stipulated in section 2 of the Regulation respecting a registration system or the keeping of a register. He is under the obligation to keep it for three years.

SECTION 84.4

The obligation to attend school is established in section 14 of the Education Act (R.S.Q. c. I-13.3):

"14. Every child resident in Québec shall attend school from the first day of the school calendar in the school year following that in which he attains 6 years of age until the last day of the school calendar in the school year in which he attains 16 years of age or at the end of which he obtains a diploma awarded by the Minister, whichever occurs first."

SECTION 84.5

An employer who employs a child subject to compulsory school attendance must arrange the working hours so that the child can attend school during school hours.

SECTION 84.6

Section 35.1 of the Regulation respecting labour standards reads as follows:

"35.1 The prohibition against employing a child to work between 11 p.m. on any given day and 6 a.m. on the following day does not apply to work that is creation or interpretation in the following fields of artistic endeavour: the performing arts including theatre, opera, music, dance and variety entertainment, the making of films and records and other sound recordings, dubbing and the recording of commercials."

SECTION 84.7

Section 35.2 of the Regulation respecting labour standards reads as follows:

"35.2 The requirement that an employer schedule a child's working hours so that, having regard to the location of the child's family residence, the child may be at that residence between 11 p.m. on any given day and 6 a.m. on the following day does not apply in the following cases, circumstances, periods or conditions:

(1) creation or interpretation in the following fields of artistic endeavour: the performing arts including theatre, opera, music, dance and variety entertainment, the making of films and records and other sound recordings, dubbing and the recording of commercials; and;

(2) work for a social or community organization, such as a summer camp or a recreational organization, if the working conditions involve lodging at the employer's establishment, provided the child is not required to attend school on the following day."

DIVISION VII
MISCELLANEOUS OTHER LABOUR STANDARDS

SECTION 85

On May 1, 2003, the expression "uniform" was replaced by the expression "special clothing", which is much broader. Special clothing is clothing that the employer requires that the employee wear.

An employer who requires the wearing of this special clothing must supply it free of charge to the employee paid at the minimum wage. He cannot require from the employee an amount of money for the purchase, use or upkeep of this clothing that would cau se the employee to receive less than the minimum wage.

The law protects the right to the minimum wage (s. 40 ALS). All employees must receive at least the minimum wage after a deduction for expenses regarding their uniform is made.

The employer cannot require that an employee pay for special clothing that identifies him with the employer's establishment or that he purchase clothing or accessories sold by the employer, regardless of the wages received by the employee. For example, a clothing store cannot require that its employees pay for the clothing and accessories that are items in its trade.

EMPLOYEE WHO RECEIVES GRATUITIES OR TIPS

For the application of this section, an employee who receives gratuities or tips must receive a wage that is at least equal to the general minimum wage (see the interpretation of section 40 ALS).

When calculating if the employee who receives gratuities or tips earns at least the general minimum wage, his wages and his attributed or reported tips must be added.

Moreover, an employer who makes a deduction from the pay of the employee who assumes the costs of the clothing will first have to have the employee sign a precise written authorization to that effect. The specific purpose, namely the reimbursement of the clothing as well as its cost, will have to be mentioned in the writing, in accordance with section 49 ALS.

SECTION 85.1

THE EMPLOYEE IS PAID THE MINIMUM WAGE

The employer must provide free of charge, the material, equipment, raw materials or merchandise that the employee is required to use in the performance of his contract of employment.

THE EMPLOYEE IS PAID MORE THAN THE MINIMUM WAGE

An employer may require an amount of money for the purchase of material, equipment, raw materials or merchandise that the employee is required to use for the performance of his contract of employment, but the employee must, nevertheless, receive at least the minimum wage after having paid these expenses.

However, it is important to emphasize that the employer does not have to reimburse the employee when he already owns the equipment necessary for work at the time of hiring. For example, if an employee must use his toolbox for the purposes of his work, the employer will have to reimburse him for the subsequent usage and maintenance charges if the result of these expenses is to cause the employee to receive less than the minimum wage.

If the employer makes a deduction from the pay to collect the costs of material or equipment, he will have to have the employee sign a written authorization (see the interpretation of sections 49 and 85 ALS).

EXPENSES RELATED TO OPERATIONS AND EMPLOYMENT-RELATED COSTS

It is forbidden to require from an employee an amount of money to pay expenses related to operations (operating expenses) and the employment-related costs of the employer's undertaking, whatever the employee's wages.

The expenses related to operations may be defined as the costs inherent to the proper and smooth operation of the undertaking. For example, the charges related to a debit card are assimilated with such expenses related to operations.

Employment-related costs are those that are exclusively charged to the employer. They make up, among others, the amounts remitted to the government. Contributions such as those paid to the Commission de la santé et sécurité au travail (CSST) and to the Commission des normes du travail (CNT) are considered employment-related costs.

SECTION 85.2

An employer who asks an employee to travel or undergo training must reimburse the employee for the reasonable expenses incurred, for example transportation expenses, expenses for lodging or meals. If the employer has the employee pay the cost of training as well as the ensuing expenses, he must reimburse the employee these amounts.

Reasonable expenses are those that are usual and acceptable, as opposed to those that are exaggerated and extravagant. It is up to the employer to establish the reasonable framework in which the travel or training is to take place. If the employer adopts directives or a policy to this end, they will have to be reasonable and serve as a guide for the purposes of the application of this section.

As for the wages payable during these periods, see the interpretation of section 57 ALS.

SECTION 86.1

An employer is prohibited from changing the status of an employee into that of a contractor without employee status (self-employed worker) when the effect of the changes that he makes to the mode of operation of his undertaking does not

really alter this status. See the interpretation of section 1 ALS as to the criteria related to the notion of employee.

RECOURSE

An employee who considers that the changes do not result in a change to his employee status can submit a written complaint to the Commission. The complaint is not subject to a specific deadline, but must be made within a reasonable time period after the employer changed the employee's status. The Commission will then make inquiry and if it agrees to follow up on the complaint, it will refer the complaint to the Commission des relations du travail.

An employee whose complaint is rejected by the Commission can avail himself of the right to review stipulated in section 107.1 ALS. When the Commission decides not to take action, the employee may, in the following 30 days, ask the Commission to refer his complaint to the Commission des relations du travail.

In all cases, the Commission des relations du travail has 60 days from the filing of the complaint at its offices to make its decision.

SECTION 87

The employer shall give the employee any information document concerning labour standards furnished by the Commission.

The Commission may also, where it deems such action justified under the circumstances, oblige the employer to post or disseminate documents related to labour standards. The Commission may then intervene to indicate to the employer how he must disseminate the documents that the Commission transmits to him.

The Commission's powers in this regard are explained in paragraphs 13) to 15) of section 39 ALS.

DIVISION VII.1
DIFFERENCES IN TREATMENT

SECTION 87.1

The agreement and decree mentioned in this section are defined in paragraphs 4) and 5) of section 1 ALS.

The employee referred to in this provision is one who is "covered by a labour standard". It follows that the employee excluded from the field of application of the Act or not covered by a labour standard to which section 87.1 ALS refers, is also excluded from the application of this section, regarding the matter covered by the standard considered.

The matter covered is the matter dealt with by a standard stipulated in divisions I to V.I, VI and VII of Chapter IV, namely:

— wages;
— hours of work;
— statutory general holidays and non-working days with pay;
— paid annual leaves;
— rest periods;
— absences by reason of sickness or accident;
— absences and leaves for family reasons or parental reasons;
— notice of termination of employment or layoff and work certificate;
— miscellaneous other standards (e.g.: uniform).

The same is true for a labour standard that deals with this matter and that is established by a regulation issued in application of the Act respecting labour standards.

As an illustration, the standards pertaining to retirement (Division VI.1) are excluded from the application of section 87.1 ALS.

The stipulated protection deals with the matters covered by the Act respecting labour standards. As a result, different conditions of employment affecting, for example, paid sick leaves could not be considered as prohibited differences in treatment, as this matter is not foreseen in the Act.

It is worthwhile recalling that the condition of employment in question is the one dealing exclusively with a matter covered by the aforementioned types of standards. When it involves a matter covered by a standard, the condition of employment about which the employee is complaining would have to be compared not with the standard stipulated in the Act, but rather with the most advantageous condition of employment of which, where applicable, another employee performing the same tasks in the same establishment enjoys.

For example, under the Act respecting labour standards an employee is entitled to an annual leave indemnity equal to 4% of his gross annual wages. In actual fact, the conditions of employment applicable to the employees hired in the same establishment and performing the same tasks provide for an annual leave indemnity equal to 8% for employees hired before date X whereas for those employees hired after that date the indemnity is equal to 6%. The aforementioned employee is part of the second group and receives an indemnity equal to 6%. He could file a complaint under section 87.1 to claim the 2% difference by alleging that he is granted a condition of employment that is less advantageous than that granted to the other employees, solely by reason of his hiring date.

This principle ensuing from section 87.1 ALS only applies in the field of prohibited differences in treatment and the resulting claim is based not on the provisions of section 99 of Act, but rather on those of sections 87.1 and following of Division VII.I.

It is with the other "employees performing the same tasks in the same establishment" that the comparison of a condition of employment must be made. The establishment is a physical place where the work is performed.

The differences in treatment to which this provision refers are prohibited when they are based solely on the hiring date.

Starting from January 1, 2004, it is stipulated that the matter covered is that dealt with by a standard provided for in divisions I to V.1, VI and VII of Chapter IV.

SECTION 87.2

This provision is interpretative in nature.

Indeed, section 87.1 ALS prohibits differences based solely on the hiring date. The use of the term "solely" necessarily implies that other reasons may be invoked by the employer, including those of seniority and years of service stipulated in section 87.2 ALS. The same is true for reasons such as: qualifications, experience, performance, merit rating or quantity of production.

While seniority or years of service generally accrue after the date of hiring, it is important to note that they may progress differently between employees hired on the same date when they are based on the total number of hours worked, the

period when a position is held, the employment period in a given sector of the undertaking or in the same establishment of the employer. That is why a difference in treatment that is based on seniority or years of service is not prohibited.

However, it would be otherwise if the employer wanted, in relation to the same seniority and same years of service, to provide for conditions of employment that are less advantageous for the employees hired after a certain date.

SECTION 87.3

The first paragraph stipulates that when applying section 87.1 one must not take into account:

— conditions of employment, both temporary and permanent, that are granted to a handicapped person pursuant to a special arrangement. These conditions cannot serve as a basis for comparison;

— conditions of employment that are applied temporarily to an employee following a reclassification or demotion, an amalgamation of business or other internal reorganization. These temporary conditions of employment cannot serve as a basis for comparison.

The second aforementioned case is that of an employee who, following his reclassification, demotion, an amalgamation of business or internal reorganization, sees his conditions become more advantageous than those attached to the position resulting from this reclassification, demotion; or those granted to other employees following the amalgamation of business or internal reorganization. However, the conditions of employment of this employee must take on a temporary and not a permanent character. The result is that these conditions of employment must be standardized within a reasonable time period.

Moreover, the second paragraph of section 87.3 ALS stipulates that the wages and the related rules that are applied temporarily to an employee to avoid him being put at a disadvantage by reason of his integration either in a new wage rate or new pay scale cannot serve as a comparison in the application of section 87.1 ALS. These differences in wages that exist temporarily will not be taken into account provided that the two conditions stipulated are respected, namely:

— the new wage rate or the new wage scale must be established to be applicable to all the employees performing the same tasks in the same establishment, subject to the situation mentioned in the first paragraph of section 87.3 ALS;

— the difference between the wage applied to the employee temporarily outside the scale and the new rate or the new wage scale must be progressively eliminated within a reasonable time period.

Within the context of this integration, it is possible that the employee may temporarily receive a remuneration that is outside the scale, for the time required to eliminate the wage difference within a reasonable time period.

An illustration of the foregoing would be the case where, in an undertaking, there are two wage scales. The first one between $20,000 and $50,000 for employees on the job since January 1, 2005 and the second between $15,000 and $40,000 for employees on the job since January 1, 2006. To comply with the Act, the employer establishes a single pay scale applicable to his employees who perform the same tasks in his establishment, and which is between $15,000 and $45,000. To avoid employees with wages in excess of $45 000 being put at a disadvantage by reason of their integration in the new pay scale, the employer could, temporarily, decide to grant them special wage conditions, until the new scale reaches the wage conditions of these employees.

The employer must act in such a way that the wage difference is eliminated progressively. The wage increases, if any, that the employee outside the scale could receive, should not be the same as those of the other employees included in the scale who perform the same tasks in the same establishment as under such a scenario, the difference would never be eliminated.

Moreover, this elimination must take place within a reasonable time period, which could vary from one case to the next. The reasonable nature of the time period is determined on the basis of all of the elements likely to affect the elimination and the means implemented to achieve this elimination. The number of employees, the extent of the difference to be made up, the time period during which the conditions of employment are in force, and the employer's economic capacity are all factors that should be analyzed when determining if the time period is reasonable.

	Transitional provisions of the Act amending the Act respecting labour standards as regards differences in treatment
SECTION 5	Sections 87.1 and following as well as the amendment made to section 102 ALS are applicable effective from the date of the coming into force, if it is later than February 29, 2000: — of a first collective agreement; — of a new collective agreement; — of an arbitral award in lieu of a collective agreement.
SECTION 6	Sections 87.1 and following as well as the amendment made to section 102 ALS apply to every individual contract of employment and every agreement pertaining to conditions of employment (except for a collective agreement within the meaning of the Labour Code) effective July 1, 2000. Non-unionized employees are contemplated here. However, in the case of an accredited group of employees for which no first collective agreement has yet been entered into, sections 87.1 and following as well as section 102 ALS will only become applicable at the time of the coming into effect of said agreement, even if it occurs after July 1, 2000.
SECTION 7	Sections 87.1 and following as well as the amendment made to section 102 ALS are applicable effective January 1, 2001 to a collective agreement decree.
SECTION 8	To determine the date of the coming into force of a collective agreement, reference must be made to section 72 of the Labour Code which stipulates that although a collective agreement only takes effect following its filing at the Commission des relations du travail, it comes into force on the date stipulated by the parties or, failing that, on the date of the signing of the agreement.

DIVISION VIII
REGULATIONS

SECTION 88

This provision establishes the government's power to make regulations exempting certain categories of workers from the whole or part of the application of the various provisions of the Act dealing with wages, taking into consideration the amendments made by the Act.

The provisions related to wages apply to the employees for as long as they are not excluded by such regulations.

SECTION 89

This provision authorizes the government to make regulations regarding certain standards contemplated in the Act, taking into consideration amendments made to it.

Since May 1, 2003, domestics are no longer employees covered by subparagraph 4) of this section; the regular workweek established in section 52 ALS applies to domestics. Moreover, the government enjoys new regulatory powers conferred by subparagraphs 6) to 6.3). However, the regulatory power with respect to premiums, indemnities and various allowances, (subparagraph 7)), tools, showers, change-rooms and rest areas (subparagraph 8)) no longer exists.

SECTION 90

The government has the power to make the Act applicable to or exempt from its application certain categories of employers and employees, through regulation.

SECTION 90.1

The government may, by regulation, exempt certain categories of employees or employers from the application of the provisions of the Act dealing with retirement (Division VI.1 and s. 122.1 ALS).

DIVISION VIII.1
LABOUR STANDARDS IN THE CLOTHING INDUSTRY

SECTION 92.1

Section 92.1 ALS allows the government to set by regulation, in certain sectors of the clothing industry, the labour standards that apply to employers and employees of these sectors and which deal with various labour standards.

See the Regulation respecting labour standards specific to certain sectors of the clothing industry.

DIVISION IX
EFFECT OF LABOUR STANDARDS

SECTION 93

The labour standards contained in the Act and its regulations are of public order. These labour standards are a compulsory minimum, from which the parties to an individual contract of employment or a collective agreement may not depart, even if they are acting in good faith. These labour standards prevail even over their express renunciation by the employee. Any agreement contrary to these standards is automatically null and void.

For example, the clause of a contract stipulating a prior notice that is less than the minimum standards established by the Act respecting labour standards would be null and void, by the sole effect of the Act.

SECTION 94

When determining if a clause of a collective agreement is more advantageous than a labour standard, it is necessary to compare the provisions of the agreement in relation to the condition of employment with a precise standard of the Act of the same nature. It is up to the employer to prove that a condition of employment is more advantageous than a labour standard stipulated in the Act.

SECTION 95

This section stipulates that the employer-contractor is jointly and severally responsible for the obligations towards the employees of the subcontractor or intermediary who have been assigned to work in the performance of the contract for services, when these obligations are not met by the latter.

For example, an enterprise – the "subcontractor" or the "intermediary" – is doing work for an employer "contractor" or for several employers, more often than not under a subcontracting contract. The subcontractor or the intermediary– who is also an "employer" within the meaning of the Act (see the interpretation of paragraph 7) of section 1 ALS) – does not meet all his pecuniary obligations for various reasons. One of his employees then files a complaint with the Commission des normes du travail to claim wages.

If the evidence shows that amounts owing were not paid and that there is a contractual relationship between the employer-contractor and the subcontractor or intermediary, the latter, as co-defendants, will be held jointly and severally responsible towards the employee, notwithstanding any contrary agreement (s. 93 ALS).

The terms "subcontractor" and "intermediary" are not defined in the Act. Here are some useful definitions: "Contractor: one that performs work or undertakes to do something; subcontractor: an individual or business that contracts to perform part or all of another's contract; intermediary: one that performs a portion of the work granted to a principal contractor."

The Act does not precisely define what it means by "the pecuniary obligations fixed by this Act or the regulations". These obligations should, among other things, include the wages and all benefits of a pecuniary nature that result from the application of the Act and its regulations.

The employer-contractor is responsible for the payment of pecuniary obligations only insofar as they result directly from the performance of a subcontracting contract by the subcontractor or the intermediary.

This responsibility arises from the first day that the subcontracting contract is awarded and ends at the expiry of said contract. In other words, the deadline for the pecuniary obligation must be during the performance of the contract or at the end of said contract.

Moreover, when for the period contemplated by the claim, the employees of the subcontractor or of the intermediary performed work on a concurrent basis for several contractors, the joint responsibility of the latter will be determined in proportion to the amounts stipulated or that result from the application of the respective contracts of each party.

It is important to point out that the courts have concluded that a restrictive interpretation must be given to this provision.

Also see the interpretation of section 96 ALS.

SECTION 96

This section protects the civil claim of an employee from changes that an undertaking undergoes following an alienation or concession in whole or part. Section 96 ALS does not grant a right but rather a manner of applying the right to submit a civil claim.

The legislator has not defined the word "undertaking". Based on the jurisprudence, the undertaking represents the structured coordination of a series of material and human elements established with a view to carrying out a project having an economic or productive aim. The jurisprudence regularly makes reference to this notion of undertaking within the meaning of labour law, as in the case of section 45 of the Labour Code.

For the application of section 96 ALS, it is necessary to show the continuity of the operation of the original undertaking by the new employer. The Supreme Court notes that the undertaking must be found to be substantially the same with the new employer. The permanence of the undertaking, despite the change of employer, will be based on the proof of sufficient identification of the elements making up its "organic" reality. According to the Supreme Court, it is necessary to ascertain the transfer of a right to operate as well as the similarity of functions that make up the usual activities of the undertaking.

The Court will analyze, in particular, the extent of the transfer of activities that used to be performed by the old employer, all of the commercial equipment, goods on inventory, services offered, name of the business, the common clientele served, the goals pursued by the corporations, the employees hired by the new corporation, the initial suppliers of the undertaking and those still present with the new acquirer, the employees still on the job as well as the main representatives and directors of the undertaking, etc.

The expressions "alienation" and "concession in whole or in part" of an undertaking are not defined in the Act. In light of the legislator's objective to protect the employee, these expressions must be given a broad interpretation.

Alienation necessarily involves a transfer of ownership over a thing or a right. Usually, alienation involves a sale. The Supreme Court has concluded that there is a need for a legal tie between the former employer and the new one, be it direct or indirect. For example, this definition does not rule out the possibility that an intermediary, such as a receiver or trustee, intervenes in the legal relationship, but it confirms that the decision to alienate depends solely on the person who holds the ownership right, namely the owner of the undertaking.

A concession (in whole or in part) implies third-party management in the administration or the performance of the undertaking's operations without regard for the "legal" ownership of this undertaking. The term concession must be interpreted broadly to include every form of subcontract: a legal writing whereby a person, the grantor, grants to another person, the grantee, the possession of a right or a specific advantage. The following cases have been assimilated with concessions of undertaking: situations of subcontracting where the grantee, in addition to performing duties similar to those performed by the grantor, receives a right to operate dealing with a portion of the grantor's undertaking; cases of operating a franchise or reassignment of a temporary concession.

In the case of a partial concession, a certain degree of integration is maintained between the main undertaking and the portion of the undertaking granted. In such cases, the grantor may impose on the new employer restrictions in the performance of his work, as the grantor retains control over the operation of the main

undertaking, from which the concession ensues. A tight control by the grantor and the very limited autonomy of operation of the grantee are not obstacles to the transmission of the undertaking.

A civil claim means any civil debt, incurred or to be incurred, relative to the payment of an amount owing by the former employer in application of the Act respecting labour standards. Section 96 ALS refers to civil claims arising prior to the alienation but not yet paid at the time of the alienation or the concession of the undertaking. Consequently, the first employer is not responsible for civil claims ensuing from facts that occurred after the change of employer.

Through the use of the terms "Former employer and new employer" in section 96 ALS, one must understand that the debt is linked to the undertaking. The undertaking does not acquire the status of legal personality. That is why it is up to the employer who owns the undertaking to assume the obligations that arise from section 96 ALS.

An employee has a recourse against the former employer and the new employer. The acquirer or the grantee of an undertaking becomes jointly and severally responsible with the seller or the grantor for an unpaid claim. This principle of joint responsibility is also recognized in Article 1525 of the Civil Code of Québec by way of a presumption within the context of the operation of an undertaking. The Commission may, on behalf of the employee, institute proceedings against the former employer, the new employer or both, for the total amount of the debt.

The notification of an action against an employer having a solidary obligation interrupts the prescription of the recourse against the other employer, if the judgment concludes that each party is jointly responsible (see Article 2900 of the Civil Code of Québec).

On May 1, 2003, the reference to a sale by court order was removed. A sale by court order and any sale assimilated therewith is no longer an exception to section 96 ALS. This is an amendment to ensure concordance with section 45 of the Labour Code.

SECTION 97

The basic aim of this provision is to protect the continuity of application of all of the labour standards from which an employee may have benefited within the undertaking. See the interpretation in section 96 ALS for the notions of undertaking, alienation and concession.

The modification of the legal structure of the undertaking refers to amalgamation, division or any other change in its "organization". This would be the case, for instance, of an individual owner of an undertaking who decides to incorporate and to transfer his undertaking to this corporation; the undertaking has continued, but it is now part of the new corporation.

The aforementioned factors do not affect the continuity of application of the labour standards decreed by this Act. Indeed, one must avoid interpreting the Act respecting labour standards in the sole light of rules of civil law. The purpose of section 97 ALS is to rule out the effect of the basic civil law principle of the relativity of contracts, stated in Article 1440 of the Civil Code of Québec. In the Civil Code of Québec, this same principle is also ruled out by the text of Article 2097, which states that 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.

Section 97 ALS ensures the continuity of standards despite a change of employers. Indeed, in this case, the contract continues and the employer assumes responsibility for it. The employment relationship continues as if there had been no change.

Clearly, the legislator wanted the application of labour standards to be attached to the undertaking, regardless of the person who administers it. It is the connection of the employee's contract of employment with the undertaking rather than with the employer as an individual that determines the scope of the employee's rights. An illustration would be the case of an employee who has been working for undertaking A for four years. Undertaking A is sold to undertaking B. In one year, this employee, once he has reached five years of service, will be entitled to 6% for his annual leave indemnity.

Uninterrupted service is part of the standards covered by section 97 ALS. For example, if an employee is credited with two years of uninterrupted service, the legislator wanted him to be able to exercise a recourse for dismissal without good and sufficient cause regardless of the changes in the structure or administration of the undertaking for which he has worked.

Given the current state of the jurisprudence, an employee may benefit from certain rights under the Act respecting labour standards, this despite a take-over in the event of the insolvency or bankruptcy of the undertaking during his employment. There is no break in the employee's uninterrupted service when the undertaking never ceased its activities or its active operation.

CHAPTER V
RECOURSES

DIVISION I
CIVIL RECOURSES

SECTION 98

It is under paragraph 8) of section 39 and section 98 ALS that the Commission may, in its own name and on behalf of the employee, claim from the employer the unpaid wages. The Commission does not act as a representative of the employee, its mandate comes from the Act. See the interpretation of paragraph 9) of section 1 ALS for the definition of wage.

The Commission's power to claim the wages owing to an employee is not limited to a maximum amount. Nor is it limited to claiming the hourly rate of the minimum wage if a higher remuneration was agreed to. The Commission may claim any wage owing to an employee. For example, it may claim any commission owing to an employee remunerated on commission insofar as it can submit evidence of this debt to a court.

SECTION 99

In addition to wages, the Commission may claim payment of pecuniary benefits resulting from the application of the Act or a settlement, such as the annual leave, prior notice and statutory holiday indemnities, on the basis of the employee's hourly wage. The Commission may not submit a claim for benefits ensuing from the individual conditions of employment not stipulated in the Act. For example, the Commission could not make a claim for sick leave, as no provision of the Act provides for an indemnity for such leave.

SECTION 101

The aim of this provision is to protect the employee who makes a settlement directly with his employer without knowing all of the rights that he enjoys under the Act.

Where the Commission deems that the employee agreed to a settlement that is contrary to public order, it can claim the amounts payable to him and the settlement made cannot be invoked against it.

For example, an agreement signed by the employee and employer that stipulated that the employee waived payment of his annual leave would be null and void. The Commission could have this agreement declared null and void, as it would violate the Act whose provisions are of public order (see the interpretation of section 93 ALS).

SECTION 102

An employee may file, in writing, a complaint with the Commission. A non-profit organization dedicated to the defence of employees' rights (such as a union) may also file, in writing, a complaint with the Commission des normes du travail on behalf of the employee who consents thereto in writing.

If an employee is subject to a collective agreement or a decree, he must then show that he has exhausted the recourses arising out of that agreement or decree, namely that a final decision concerning this recourse was rendered. This final decision or decision not subject to appeal is one that is described as such in the Act.

The Court of Appeal in the case of the Campeau Corporation issued three conditions for the requirement of the prior exhaustion of recourses:

1. that a collective agreement be in effect at the time the employee exercises his recourse;
2. that this agreement contain provisions that are equivalent in nature to those stipulated in the Act respecting labour standards;
3. that it also contain an appropriate and effective mechanism for asserting and deciding on the violation of the right conferred by these provisions.

If one of these three conditions is absent, the employee does not have to exhaust these recourses, as either the recourse does not exist or he cannot assert rights that are not stipulated in the collective agreement.

The Court of Appeal stipulated in the case of Côté v. Savana that the civil courts declare that they are not competent to hear disputes which, in their substance, are work-related and for which the arbitration procedure was or could have been used.

Moreover, the provision of the collective agreement must deal directly with a standard referred to in the Act respecting labour standards and, by way of a grievance, give rise to the appropriate recourse. For example, the notice of termination of employment stipulated in the Act respecting labour standards could not be exchanged or compensated by another benefit conferred by a collective agreement, such as seniority, right to recall or severance pay.

Hence, the employee is under the obligation to exhaust his recourses (grievance) when the collective agreement contains provisions that are equivalent to or more advantageous than those of the Act.

Moreover, if a collective agreement contains a clause, the effect of which is to replace a provision of the agreement that runs counter to a law by the text of the Act, the appropriate recourse would be a grievance. The same is true when the agreement is amended by a referral to the Act respecting labour standards (Commission des normes du travail v. Les Chantiers Davie ltée).

When section 87.1 ALS (differences in treatment) is alleged in support of a complaint, the employee does not have to exhaust the recourses ensuing from his collective agreement or his decree. Instead, he must show the Commission that he has not used these recourses or if he did use them, that he withdrew before a final decision was rendered.

The provisions of section 102 can only be given application within the context of a claim of a pecuniary nature. This provision would have no impact on a complaint filed according to the provisions related to prohibited practices (s. 123 and 123.1 ALS). An employee who wishes to complain about such a practice can and must complain to the Commission, notwithstanding any other remedial procedure.

SECTION 103

The aim of this provision is to protect an employee concerned by a complaint (even if he is not the one that filed it).

The Commission is forbidden from disclosing the identity of that employee during the inquiry unless the latter consents to it, regardless of the procedure of inquiry used (on location, by telephone or otherwise).

For example, within the context of an inquiry of the Commission made at its own initiative (see section 105 of the Act), the names of the employees in question will not have to be revealed during the inquiry, even if they did not personally file a complaint.

SECTION 105

The Commission is not required to wait for a complaint to be filed before making inquiry.

This power is granted to the Commission in relation to its obligation to oversee the implementation and application of labour standards (see sections 5 and 39 ALS).

For example, the Commission could intervene in an undertaking for all of the employees in order to validate the application of pecuniary and administrative standards stipulated in the Act, even if no specific complaint has been filed by one of the employees.

SECTION 106

The Commission may refuse to proceed with the inquiry when:

— the complaint is frivolous;

The term frivolous refers to something that is unreliable, that is trivial.

— the complaint is made in bad faith.

It may involve a case where an employee files a complaint for vengeance and misleads the Commission as to the facts giving rise to the complaint.

SECTION 107

The Commission may decide to put an end to its inquiry if it ascertains that the complaint is unfounded, frivolous or made in bad faith. In this case, it notifies the employee of its motivated decision by registered mail. Moreover, the Commission must inform the complainant of his right to request a review of the decision.

The right to have a decision reviewed is provided under section 107.1 ALS.

SECTION 107.1

This provision provides for the time period granted the employee to file an application for review as well as the period granted the Commission to render a decision whether to carry out an inquiry.

SECTION 108

Sections 108 and 109 ALS allow the Commission to secure the obtaining of documents by legal process, when the circumstances force it to do so.

Sections 9 and 11 of An Act respecting Public Inquiry Commissions stipulates specific powers which may be exercised within the framework of an inquiry.

"9. The commissioners or any of them may, by a summons under his or their hand or hands, require the attendance before them, at a place and time therein specified, of any person whose evidence may be material to the subject of inquiry, and may order any person to bring before them such books, papers, deeds and writings as appear necessary for arriving at the truth.

Every such person shall attend and answer all questions put to them […]

11. Any person refusing […] sufficiently to answer any question that may be lawfully put to him […] is in contempt of court […]"

SECTION 111

The 20-day waiting period mentioned in the first paragraph is calculated from the day of the mailing of the putting in default and not the day of its receipt.

The Commission must also send the employee a notice indicating the exact amount claimed in his favour. The sending of the notice to the employee does not require any formalities.

This putting in default as well as the sending of the notice to the employee are prior conditions for the coming into existence of the Commission's right to exercise a recourse on behalf of the employee.

SECTION 113

At the expiry of the twenty-day waiting period from the mailing of the putting in default to the employer and the notice to the employee as stipulated in section 111 ALS, the Commission can exercise the appropriate recourse on behalf of the employee, if the employer refuses or neglects to pay the amount claimed.

In addition to the other recourses provided under the Act, the Commission has the power to exercise the same recourses that an employee can exercise himself against the directors of a company or profit-oriented business corporation. The exercise of the recourse against the directors is subject to the sections of the Act applicable to each case, namely at the provincial level according to the Companies Act "C.A." (R.S.Q., c. C-58) and at the federal level, according to the Canada Business Corporations Act "C.B.C.A." (R.S.C. (1985), c. 44.).

In all cases, the responsibility of directors is limited to an amount equal to six months of wages (s. 96 C.A. and s. 119 C.B.C.A.). The wages include, in addition to overtime, vacation pay and other indemnities provided by law, except for the termination of employment indemnity. The restriction to six months of wages refers to the maximum amount and not a period fixed in time.

This responsibility will arise, both for the provincial and federal legislation, in the case of an employer company or corporation that is bankrupt under the Bankruptcy and Insolvency Act (R.S.C., c. B-3) or when the writ of execution is deemed unsatisfactory following a judgment.

PRESCRIPTION OF THE RECOURSE AGAINST DIRECTORS

Paragraph 2 of section 113 ALS stipulates that in the case of the recourse against the directors, the Commission exercises the recourse that the employee may exercise against them. The legal proceedings instituted by the Commission are not those stipulated in section 115 ALS which ensue from the Act respecting labour standards or one of its regulations. The exercise of this recourse against the directors is subject to the provisions of the Québec Companies Act and the Canada Business Corporations Act.

On the subject of the prescription of the recourse against the directors of a corporation, the federal legislation stipulates that their responsibility is only committed if the proceedings are instituted during their term of office or in the two years following the end thereof.

As for provincial companies incorporated under the Companies Act, this latter legislation is silent on the prescriptive period for the recourse against directors. It is possible to refer to the Civil Code of Québec. The three-year prescription for the personal recourse under Article 2925 C.C.Q. is open to the Commission for the recourse against the directors of a company incorporated under the Companies Act.

SECTION 114

The claiming of this lump-sum amount does not constitute an offence of a penal nature and does not give rise to an offence. The mere exercise by the Commission of the recourse on behalf of the employee grants the Commission the power to claim this 20% lump-sum amount.

This lump-sum amount will be legally due only once a judgment ordering the employer to pay it has been obtained. This amount, which belongs entirely to the Commission, serves as a source of financing authorized by the legislator.

The second paragraph stipulates that the amount due under the Act or its regulations bears interest from the putting in default. This paragraph refers to the rate set under section 28 of the Act respecting the ministère du Revenu. However, by way of the general provisions in matters pertaining to civil debts, such as Articles 1565, 1595 and 1617 of the Civil Code of Québec, the interest on the lump-sum amount of 20% is calculated from the time of the writ of summons within the meaning of the Québec Code of Procedure.

SECTION 115

A civil action (as opposed to criminal proceedings) brought under the Act respecting labour standards is prescribed by one year from each due date. The term "due date" means the date on which the performance of an obligation or a payment is claimable. Hence, the Commission has one year to claim the amounts owing, from the date on which the performance of an obligation or a payment is claimable. After that time period, the right to institute action no longer exists, subject to section 116 ALS.

In the computation of delays, the day that marks the starting point of the prescription is not counted, whereas the last day must be completely finished. In summary, the due date is the time when the right comes into being, and will vary according to one of the following four situations:

1. The wages: the one-year period begins on the date that the employee should have received his wages. For example, an employee paid every two weeks will have one year from each two-week period to claim the unpaid wages corresponding to each period.
2. The annual leave indemnity: the starting point of the prescriptive period begins at the expiry of one year after the end of the reference year, namely at the end of the period granted to the employee to take his annual leave (see the diagram and the interpretation in section 66 ALS).
3. The indemnity in lieu of the notice of termination of employment: the one-year period begins from the date of dismissal or permanent layoff. For a layoff of indeterminate length, the prescriptive period begins to run at the expiry of the six-month period following the start of the layoff. In case of a lockout, the time period is calculated on the basis of the date of receipt of the notice of layoff and not according to the lockout itself.
4. Statutory holidays and non-working days with pay: the period runs from the day when the statutory holiday normally should have been paid rather than from the date of the holiday.

In the case of a false entry in the payroll journal or in the case of a false remittance or fraud, the starting point of prescription against the Commission only begins from the time the Commission becomes aware of this fraud (see the interpretation of section 118 ALS).

For employees working in forestry operations, the starting point of the prescription begins on the first of May following the date of the performance of the work (see the definition of "forestry operation" in section 1 RLS).

See the interpretation in section 113 ALS relating to prescription of the recourse against directors.

SECTION 116

The sending of a notice of inquiry by the Commission, in the year that follows the date the debt becomes claimable, suspends the prescription for a period of six months from the time of its posting.

The Commission then has an additional six-month period to take action, which is added to the one-year period stipulated in section 115 of the Act.

The notice of inquiry must be sent by registered or certified mail. It is the sending of the notice of inquiry that suspends the prescription and not its receipt by the employer.

SECTION 118

It should be noted that only the Commission can avail itself of this provision, which cannot be invoked by the employee.

SECTION 119

The jurisdiction of a Court is determined by the total of the amounts claimed by several employees, regardless of the amount of their individual claim.

SECTION 119.1

Given the priority nature of a wage-related claim, the legislator allows the Commission to be heard by preference.

SECTION 120

This provision allows the Commission to make sure that the amount paid by the employer corresponds to the amount actually due to the employee.

As the dispute occurs between the Commission and the employer, the latter must obligatory make payment to the Commission. Any other payment or settlement is not opposable against the Commission.

SECTION 121

Since October 1, 1999, the Act respecting income security (c. S-3.1.1) has been replaced by the Act respecting Income Support, Employment Assistance and Social Solidarity (c. S-32.001). The amounts that were collectible under section 35 of the Act respecting income security are now collectible under section 102 of the Act respecting Income Support, Employment Assistance and Social Solidarity.

DIVISION I
RECOURSE AGAINST PROHIBITED PRACTICES

SECTION 122

An employee may exercise a recourse if he is dismissed, suspended, transferred, if the employer practices discrimination against him or takes reprisals against him or if the employer imposes any other sanction by reason of one of the eight grounds mentioned in section 122 ALS. The reinstatement as well as an indemnity equivalent to the wages and other benefits that the employee was deprived of by the sanction can be granted if the recourse is upheld.

On May 1, 2003, the Act added a new reason under the protection of section 122 ALS. The employee is protected in the case where the employer wants to take action due to an inquiry made by the Commission in one of the employer's establishments.

Moreover, the protection granted to the employee in relation to the refusal to work beyond his regular working hours for obligations related to care, health or education is no longer limited to a minor child. Indeed, this refusal extends to his child, whether or not he is a minor, to the child of his spouse or by reason of the state of health of his close relatives. The employee must have taken the reasonable means at his disposal to assume his parental or family obligations otherwise.

Moreover, the right of an employee to be absent owing to sickness or accident is now stipulated in Division V.0.1 of the Act (see the interpretation of sections 79.1 to 79.6 ALS). In this case, the condition required by the legislator in the application of presumption (see section 123.4 ALS) is the absence motivated by reason of sickness and not necessarily the proof of such sickness. The employee who exercises this right benefits from protection regarding the aforementioned sanctions by way of the recourse stipulated in paragraph 1) of section 122 ALS.

SANCTIONS

Dismissal occurs when the employer terminates an employee's employment. This term must be interpreted broadly to include layoffs, the non-renewal of a working contract in the case of a renewable contract, non-recall to work, indefinite suspension, etc.

A suspension consists of temporarily interrupting the employee's employment for a specified period, without severing his contract of employment. The employee is deprived of his employment and his wages for that period. This is generally a disciplinary sanction.

The transfer of an employee corresponds to a change in working conditions. The employee may be assigned to another position or another work place, for instance, or receive a significant reduction in the number of work hours, a reduction in wages, a substantial modification of his duties, a reduction in the level of responsibility, etc.

Protection is generally extended to reprisals, discriminatory practices and any other penalty that an employer is likely to impose on an employee for the reasons set out in section 122 ALS. These concepts therefore cover any change in the scope of work or working conditions of an employee and any measure of retaliation taken by the employer against an employee for any of the reasons mentioned in section 122 ALS.

The procedure to exercise such recourse is provided in sections 123 ALS and following.

SECTION 122.1

This section offers the employee a recourse against a prohibited practice if he believes that he was dismissed, suspended, forced to retire or was discriminated against or suffered reprisals on the ground that he reached or passed the age at which he should retire.

This recourse is in addition to those stipulated in section 122 ALS, which protects, among other things, the exercise by the employee of a right ensuing from the Act. This right, which is to remain at work and to choose the time of his retirement, lies with the employee. This decision must be free, voluntary and clearly expressed by the employee (see the interpretation of section 84.1 ALS in this regard). The concomitance of the measure related to the employee's age results in the application of the presumption in his favour. This implies that the employer has the burden to demonstrate that the imposing of the measure ensues from another good and sufficient cause.

In the exercise of a recourse against a prohibited practice, the employee is always free to raise the application of the Charter of Human Rights and Freedoms prohibiting discrimination based on age. The Commission des relations du travail is competent to hear and rule on such a dispute.

The legislator has prohibited forced retirement even if a law, a pension plan, an agreement (see the definition given in paragraph 4) of section 1 ALS, including an agreement – mutual or forced – on the conditions of employment), an arbitral award in lieu of collective agreement, a decree or the practice that develops or has developed at the place of business of the employer might provide for such forced retirement.

Under section 3.1 ALS, this provision applies to every employee and every employer, subject to the exceptions stipulated in the Regulation exempting certain categories of employees and employers from the application of Division VI.1 and section 122.1 of the Act respecting labour standards.

These exceptions are:

1. an employee who works exclusively as a fireman; or,
2. an employee who is a member of the Sûreté du Québec (a member of a municipal police force is not included in this exception).

See the interpretation of section 84.1 ALS.

SECTION 123

An employee who wishes to exercise the recourse provided for under section 122 ALS must file a complaint with the Commission des normes du travail within 45 days of the practice about which he is complaining. This deadline is strict. A complaint filed with the Commission des relations du travail within this time limit is also admissible.

The time limit is calculated in accordance with sections 151.1 to 151.3 of the Labour Code (beginning at the time when the measure that was taken against the employee has become effective). It should be noted that the complaint must be signed by the employee himself.

SECTION 123.1

See the interpretation of sections 122.1 and 123 ALS.

SECTION 123.2

The presumption that an employer indulged in a forbidden practice with regard to an employee who took a maternity leave, paternity leave or parental leave continues to apply for at least 20 weeks after that employee has returned to work. Such employee may therefore take advantage of the recourse set out in section 122 ALS during the leave, upon returning to work and for at least 20 weeks following the employee's return to work. The employee will be able to continue to benefit from presumption even beyond the 20th week if there is concomitance between the prohibited practice and the sanction imposed.

SECTION 123.3

The Commission may designate a person to attempt to settle the complaint to the satisfaction of the parties. The latter must, before designating the person to act as mediator, obtain the agreement of the parties, as the Act makes this a prerequisite. The mediator cannot act in the matter in any other capacity whatsoever.

Any verbal or written information gathered by this person remains confidential and cannot be disclosed. The aim of this measure is to establish a relationship of trust between the parties and the Commission, which can then act, with a full knowledge of the facts. For example, the mediator cannot show the information or documents that were revealed to him or of which he had knowledge in the performance of his duties.

The Commission offers the mediation service to an employee who files a complaint against a prohibited practice as well as against a dismissal not made for good and sufficient cause (s. 125 ALS). This process allows the parties to resolve, to their satisfaction, a complaint, while avoiding recourse to court intervention, as soon as possible.

SECTION 123.4

When no settlement is reached, the complaint is referred to the Commission des relations du travail. The provisions of the Labour Code apply.

If it is established, to the satisfaction of the Commission des relations du travail, that the complainant is an employee within the meaning of the Act respecting labour standards, that one of the facts mentioned in section 122 or 122.1 ALS occurred and that there is concomitance between these events, there is "simple presumption" in favour of the employee that the measure was taken against him by reason of the existence of this fact.

The employer then has the burden of reversing that presumption by proving that the measure arises from another just and sufficient cause.

"Simple presumption" is that which concerns presumed facts, namely the illegal sanction. It can be overturned by evidence to the contrary. Once the conditions established, the legislator instituted a presumption of fault or responsibility on the part of the employer regarding the measure imposed. By known facts, this measure, concomitantly with one of the situations mentioned in sections 122 and 122.1 ALS, the legislator makes probable an unknown fact that is often difficult to establish directly, namely a sanction for the inconveniences associated with one of the situations. For example, a pregnant employee is dismissed. There is simple presumption that her dismissal results from her state of pregnancy, whether or not the employer knew of it. It is up to the employer to prove that he took this sanction against the employee for another reason that is good and sufficient.

That explains why the hearing unfolds in two parts before the deciding party. First, the complainant must prove the conditions establishing the presumption he wishes to avail himself of. If this presumption is established to the satisfaction of the Commission des relations du travail, the employer then has the burden of overturning this presumption and will proceed on the proof of the "other good and sufficient cause", which must be a serious cause, in opposition to a pretext, and be the true cause of the dismissal.

When the Commission des relations du travail concludes that an employer engaged in a prohibited practice, it can order the reinstatement of the employee in his job as well as an indemnity equal to the wages and other benefits of which he was deprived by the sanction. Failing an agreement between the parties, the amount of this indemnity is determined by the Commission des relations du travail on application of the employer or the employee (s. 19, Labour Code).

The decision of the Commission des relations du travail is without appeal. At the request of an interested party and within a period of six months following this decision, the Commission des relations du travail may authorize the filing of the decision at the office of the clerk of the Superior Court of the district in which one

of the parties is domiciled. This decision then becomes enforceable. Under section 146.1 of the Labour Code, an employer who does not comply with the order of reinstatement and, where such is the case, of payment of an indemnity is guilty of an offence and is liable to a fine for each day of failure to comply.

The Commission des relations du travail cannot order the reinstatement of a domestic or a person whose exclusive duty is to care for or take care of a child or a sick, handicapped or aged person in that person's dwelling. In this case, the Commission can order the payment to the employee of an indemnity corresponding to the wages and other benefits of which he was deprived by the sanction imposed. Since May 1, 2003, this indemnity is no longer limited to three months of wages.

SECTION 123.5 The Commission des normes du travail may represent a non-unionized employee when exercising recourse provided for in sections 122 to 123.2 ALS. This power is not discretionary. The legislator wanted to protect the exercise of the employee's rights. The power to represent the employee is associated with the duty to represent him when the conditions of the recourse are brought together, and the employee requests it.

DIVISION II.1
RECOURSE AGAINST PSYCHOLOGICAL HARASSMENT

SECTION 123.6 The employee's complaint must be made in writing. The same is true for the complaint that could be filed by an organization that defends employees' rights, but the latter complaint must also be accompanied with a written authorization from each of the employees referred to in the complaint.

SECTION 123.7 This is a condition that gives rise to this recourse. The computation of the 90-day time period is established from the last incidence of psychological harassment. Consequently, the last incidence of such behaviour cannot date back more than 90 days.

SECTION 123.8 On receipt of the complaint, the Commission, within the context of the rules applicable to the inquiry stipulated in the Act, mandates an investigator who performs his role in accordance with the powers that he has under sections 108 to 110 ALS (see the interpretation presented in these sections).

Generally, the powers of inquiry are the same as those applied within the context of the civil recourse. The Commission or a person that it designates for the purposes of an inquiry is vested with the powers of immunity granted to commissioners appointed under the Act respecting public inquiry commissions (R.S.Q., c. C-37).

Moreover, a right to review is granted to the complainant in the case where the Commission refuses to pursue an inquiry on the ground that the complaint is unfounded or frivolous. Also see the interpretation presented in sections 106 to 107.1 ALS.

The investigator has the duty to check for the presence of a form of psychological harassment within the meaning of the Act. The inquiry will seek, in particular, to gather the factual elements making it possible to verify the validity of the complaint. In this sense, the inquiry will make it possible to show the existence or absence of a clear and patent desire on the part of the employer to ensure a work environment that is free from psychological harassment. Moreover, the inquiry

will help determine if the employer has taken appropriate steps and adopted an appropriate policy to prevent psychological harassment in his undertaking.

It should be mentioned that the establishment of a policy cannot, in itself, be a measure that will enable the employer to exonerate himself. It may, however, be an important element in the set of protection measures taken to avoid cases of harassment at work. See the interpretation of section 81.19 ALS on this subject.

SECTION 123.9

The decision of the Commission des normes du travail concerning the validity of the complaint or absence thereof is an administrative decision that is not binding on the employee concerned. He may ask to be heard by the Commission des relations du travail, even after the administrative decision of the Commission des normes du travail deeming the complaint to be unfounded. In this case, the employee must make an application for referral in writing.

The deadline for making this application for referral is 30 days from the decision of the Commission des normes du travail to not proceed with the inquiry. If the employee requests an administrative review of this decision (s. 107 ALS) and if it is refused, he will then have 30 days to request in writing that his complaint be referred to the Commission des relations du travail.

When such an application is submitted by a non-profit organization dedicated to defending the rights of employees, the employee's prior written consent is necessary.

The consequence of the refusal by the Commission des normes du travail to proceed with the employee's complaint, because the Commission deems it unfounded, is that the Commission des normes du travail can no longer represent the employee before the Commission des relations du travail. The employee must then see to his representation, either personally or by way of a representative of his choice.

SECTION 123.10

Mediation is possible throughout the inquiry process, but is not mandatory. It is an additional settlement method that is offered to consenting parties.

Also see the interpretation in section 123.3 ALS to the same effect (mediation within the context of a recourse against prohibited practices).

Unlike in the case of complaints for a prohibited practice or for a dismissal not made for good and sufficient cause, the complaint for psychological harassment gives rise to an inquiry by the Commission des normes du travail (see the interpretation of section 123.8 ALS).

SECTION 123.11

In such a case, the employee is deemed to be at work and the employer will have to pay him the wage agreed upon, corresponding to the working hours for the employee.

Also see the interpretation presented in section 57 ALS.

SECTION 123.12

In this case, the employee does not need to ask the Commission des normes du travail, orally or in writing, to refer his complaint to the Commission des relations du travail.

The referral is made automatically, without any further formality on the part of the employee, if the Commission deems that the complaint is founded and if a complete settlement between the parties has not been reached.

The decision of the Commission des normes du travail regarding the validity of a complaint is an administrative decision; the Commission does not usurp the role entrusted to the courts, which consists of ruling on the dispute.

SECTION 123.13

This representation power of the Commission des normes du travail is similar to that stipulated in sections 123.5 and 126.1 ALS (see the interpretation of sections 123.5, 126.1 and 81.20 ALS).

SECTION 123.14

The powers held by an arbitrator on grievances are conferred on the labour commissioner in charge of hearing the complaint for psychological harassment. For example, the commissioner must proceed diligently with the inquiry stemming from the complaint and make his decision based on the facts gathered during the inquiry. He may ask the parties and witnesses the questions that he deems useful.

In addition, it is worthwhile mentioning that the Commission des relations du travail enjoys broad powers to issue various types of orders, such as a temporary compliance order, which it deems appropriate to safeguard the rights of the parties (see sections 112 and following of the Labour Code (R.S.Q. c. C-27) concerning the powers of the Commission des relations du travail).

SECTION 123.15

All of the powers listed in this section are the same as those already granted to the Commission des relations du travail with respect to a complaint for a dismissal not made for good and sufficient cause. Paragraphs 1) to 7) of section 123.15 ALS relating to the powers of the Commission des relations du travail are descriptive and do not limit its powers. The Commission may "render any decision it believes fair and reasonable, taking into account all the circumstances of the matter".

A decision of the Commission des relations du travail filed in the Superior Court then becomes enforceable, like a final decision of this Court*.

* It is section 129 of the Labour Code which stipulates that:

"129. The Commission may, within six months after the date of the decision, on application by an interested party, authorize the filing of the decision at the office of the clerk of the Superior Court of the district of the domicile of one of the parties to whom the decision applies. The decision of the Commission becomes enforceable as if it were a final judgment of the Superior Court and has all the effects of such a judgment.

If the decision contains an order to do or not to do something, any person named or designated in the decision who transgresses the order or refuses to comply therewith, and any person not designated who knowingly contravenes the order, is guilty of contempt of court and may be condemned by the court having jurisdiction, in accordance with the procedure provided for in articles 53 to 54 of the Code of Civil Procedure (chapter C-25), to a fine not exceeding $50,000 with or without imprisonment for not over one year. These penalties may be imposed again until the offender complies with the decision."

SECTION 123.16

The Commission des relations du travail seized with a complaint must make a decision as to the existence or absence of harassment at work. When it ascertains that the employer failed to meet his obligations, it must make a motivated decision to this effect, according to the remedies stipulated in the section 123.15 ALS.

It is possible that an employee may have submitted a claim under the Act respecting industrial accidents and occupational diseases (R.S.Q., c. A-3.001) to determine if the psychological harassment of which he is a victim is an employment injury. This Act seeks to preserve the system of compensation based on the principles of insurance and collective liability without regard for the fault of the employee who is the victim of an employment injury.

In this case, if the Commission des relations du travail deems it likely that a decision rendered by the competent body will establish that the case involves such an employment injury, it will have to reserve its decision regarding the orders stipulated in paragraphs 2), 4) and 6) of section 123.15 ALS. These orders concern the indemnity related to lost wages, punitive and moral damages, and the funding of the psychological support required for the employee.

Consequently, the Commission des relations du travail will have to issue an order that will deal, in particular, with paragraphs 1), 3), 5) and 7) of section 123.15 ALS, as well as any other decision that it believes is fair and reasonable, taking into account all the circumstances of the matter. In so doing, the legislator wanted to ensure that the employee is not deprived of the compensation to which he would otherwise be entitled under the Act respecting labour standards.

It must, however, be noted that the opinion of the Commission des relations du travail as to the likelihood of the existence of an employment injury cannot be binding on the Commission de la santé et de la sécurité du travail or the Commission des lésions professionnelles, which have the exclusive power* to determine an employment injury under their enabling legislation.

Moreover, if the employment injury is recognized by the aforementioned empowered body, the Commission des relations du travail will not be able to issue an order on the subject matter listed in paragraphs 2), 4) and 6) of section 123.15 ALS.

* Sections 349 and 369 of the Act respecting industrial accidents and occupational diseases (R.S.Q., c. A-3.001) deal respectively with the exclusive powers of the Commission de la santé et de la sécurité du travail and the Commission des lésions professionnelles.

DIVISION III
RECOURSE AGAINST DISMISSALS NOT MADE FOR GOOD AND SUFFICIENT CAUSE

SECTION 124

Section 124 ALS institutes the recourse against a dismissal not made for good and sufficient cause. This recourse is an employment protection measure that is similar to a grievance, from which employees governed by a collective agreement generally benefit. Moreover, it reinforces the rules pertaining to the contract of employment stipulated in the Civil Code, by providing, where appropriate, the possibility for the employee's reinstatement in his job.

Like the other standards stipulated in the Act, section 124 ALS is also a labour standard which creates in favour of the employee who is credited with 2 years of uninterrupted service a right to employment and protects him against a dismissal made without reason or justification. The notion of good and sufficient cause is understood as being that which is real and sufficiently serious to justify the dismissal. Hence, the employer cannot impose a sanction that is disproportionate to the fault that the employee is blamed for. All of the circumstances of each case must be evaluated to determine the good and sufficient nature of the measure taken by the employer.

CONDITIONS FOR THE RECOURSE

It is up to the complainant to show, before the Commission des relations du travail, the conditions for the recourse instituted under section 124 ALS. The employer may object to the admissibility of the complaint that does not meet the conditions stipulated in the Act. Moreover, if these conditions are admitted by the employer, the complainant will generally not have to prove them.

The conditions for the recourse against a dismissal not made for good and sufficient cause are listed in section 124 ALS.

1. Notion of employee

The complainant must be an employee within the meaning of the Act respecting labour standards. However, while he may qualify as an employee, this recourse is not open to him if he has the status of a senior managerial employee (see the interpretation of paragraph 6) of section 3 ALS and that of section 3.1 ALS on this subject as well as the interpretation relating to the definition of employee in paragraph 10) of section 1 ALS).

In addition, the employee must be the holder of a contract of employment with an undertaking under provincial jurisdiction. Indeed, the Act does not apply to undertakings under federal jurisdiction, such as banks or broadcasting stations, which fall under the responsibility of federal parliament. The contract of employment involves the following elements: the performance of work by an employee, remuneration, as well as an employee/employer subordination relationship.

2. Uninterrupted service

Since May 1, 2003, to benefit from the recourse against a dismissal not made for good and sufficient cause, the employee must be credited with two years of uninterrupted service. Uninterrupted service is associated with the undertaking and not with the person who administers it. Uninterrupted service is calculated by considering the period of employment in the undertaking and not with the same employer. The Commission must make sure that the complainant meets this prerequisite, even at the complaint reception level, failing which the Commission cannot proceed to the other stages of the process. See the interpretation of paragraph 12) of section 1 ALS concerning the definition of uninterrupted service as well as that of sections 96 and 97 ALS related to the notion of undertaking and the impact of an alienation or concession of undertaking on uninterrupted service.

3. Termination of employment

The employee must also prove that there was a termination of employment. It is up to the employer to prove that there was good and sufficient cause for the dismissal (see the section "burden of proof"). The analysis of the circumstances of an end of employment must be given a broad interpretation, to cover all forms of termination of employment. Consequently, every act by the employer putting an end to the employee's employment relationship, regardless of how it is initially designated, may be assimilated with a dismissal. This termination of employment may ensue from disciplinary reasons, based on subjective considerations attached to the employee himself, or be the result of administrative considerations, based on facts related to the undertaking. In this case, it is a permanent layoff. For example, a severing of the employment relationship caused by the employee's negative attitude at work is disciplinary in nature, whereas that related to the economic difficulties of the enterprise is administrative in nature.

Among other often-alleged reasons for disciplinary measures, one could accept repeated absences and lateness, negligence in the performance of work or insubordination. At the economic or administrative level, technological changes or a

decline in business would be illustrations of reasons. Each of the reasons will have to be analyzed based on the circumstances of each case to determine if it constitutes good and sufficient cause for dismissal.

Moreover, when the employer modifies unilaterally and substantially the conditions of employment of an employee, prompting his departure without dismissing him directly, this may be a constructive dismissal. In such a case, it is not required that the employer act in bad faith or intentionally. All that is required is that the objective situation result in the severing of the contract of employment. The manifestations of a constructive dismissal can be characterized by changes such as a reduction in the number of hours of work, a reduction in wages, or a demotion to another position. Not recalling the employee to work after a layoff may be assimilated with a constructive dismissal.

It should also be mentioned that it is not necessary for the employee to have left his job to conclude that there was a dismissal. For example, the employee's acceptance of a forced transfer or demotion does not deprive him of his recourse against a dismissal not made for good and sufficient cause under section 124 ALS.

Thus, section 124 ALS grants the employee who believes that his termination of employment is equivalent to a dismissal not made for good and sufficient cause the right to file a complaint with the Commission des normes du travail.

4. Absence of another remedial procedure

A complaint under section 124 ALS cannot be filed "where a remedial procedure, other than a recourse in damages, is provided elsewhere in this Act, in another Act or in an agreement". The existence of another remedial procedure is sufficient to prevent recourse to section 124 ALS, even if the employee decides to not exercise said remedial procedure. However, this other procedure must be clearly established and available to the employee at the time he decides to avail himself of the recourse under section 124 ALS. Moreover, it must be able to give rise to the same results as those stipulated within the context of this recourse, including the power to rule on the existence or absence of a dismissal not made for good and sufficient cause, and order the reinstatement of the employee in his job (see the interpretation of section 128 ALS concerning the powers of the Commission des relations du travail in this regard).

Furthermore, the remedial procedure must be obligatory in nature, in that one of the parties must oblige the other to submit to the procedure; it must respect the principles of natural justice, in particular the right to be heard by an independent and impartial court, and the decision made within the context of the procedure must be enforceable.

Regarding the form that this "other remedial procedure" must take, the courts have established seven main criteria to consider this procedure equivalent to the recourse stipulated in section 124 ALS, namely:

— the procedure must be recorded in writing;
— it must be known to the parties;
— it must contain the names and the titles of the parties;
— it must contain the designation of the arbitrators or the procedure for appointing them;
— it must contain the subject matter of the disputes subject to this procedure;
— it must specify the time period imposed on the arbitrator to make his decision;
— it must specify the jurisdiction and powers of the arbitrator.

For example, a grievance procedure under a collective agreement, when it is at least equivalent to that stipulated in section 124 ALS, was assimilated with another remedial procedure preventing the exercise of the recourse under section 124 ALS.

Moreover, a recourse against a prohibited practice (see sections 122 ALS and following) is not a remedial procedure within the meaning of section 124 ALS. In this case, the two recourses are different in nature, aim for a different goal and give rise to decisions that are in no way similar.

5. Complaint filed within 45 days of the dismissal

The deadline for filing a complaint is 45 days. This is a strict deadline. However, in the case of a complaint filed late, the circumstances surrounding the late filing will have to be evaluated. Indeed, the complainant may not have been able to act earlier. This reason is a cause for interrupting prescription within the meaning of Articles 2904 and following of the Civil Code of Québec.

Moreover, a complaint mailed to the address of the Commission des normes du travail within the 45-day deadline is validly filed even if the Commission received it after the 45-day deadline. The date of the starting point of the 45-day period to file a complaint is the date on which the termination of employment became effective, and not that on which the employee is notified of this fact. However, in the case of a constructive dismissal, the period will begin either when the employee becomes aware of the changes and the effects on his contract of employment, or when he leaves his job definitively (see the interpretation of section 123 ALS related to the computation of time periods).

BURDEN OF PROOF

When the employee establishes the aforementioned conditions opening the way for the recourse, it is up to the employer to prove a good and sufficient cause for dismissal. A good and sufficient cause is one that is not a pretext and that is serious enough to justify a dismissal (see above). Moreover, this cause must be lawful. In this sense, an employer could not support his decision to dismiss by a cause that runs counter to fundamental principles, being discrimination founded on the Charter.

When the termination of employment is based on non-disciplinary grounds and results from economic or administrative considerations, this involves a permanent layoff. For example, an employee could see his position abolished following a drop in business. In this matter, the employer has the burden to prove the economic difficulties or the cause of the administrative reorganization. Moreover, he will have to show that the choice of the employee to be laid off is based on objective and impartial considerations, and not on elements specific to the employee in question. In this case, such a decision would be a good and sufficient cause. The employer cannot use the pretext of a permanent layoff to get rid of an employee that he deems undesirable.

Under some circumstances, it may be difficult to determine which of the two parties (the employer or the employee) put an end to the contract of employment. Resignation cannot be assumed. It is an action that lies with the employee. If the employer invokes the employee's resignation during a recourse against the dismissal, he has the burden of proving that the employee resigned. Under these circumstances, the Commission des relations du travail has the power to analyze all of the facts surrounding the resignation to determine its validity. A forced resignation is assimilated with a constructive dismissal (see under section 82.1 ALS the interpretation relating to resignations).

In all cases, the employer must provide preponderant proof of the facts supporting his claims. A preponderant proof is defined as proof that makes the existence of a fact more likely than its non-existence. It should be noted that the employee does not benefit, during a recourse under section 124 ALS, by the presumption that

exists in his favour during a recourse under sections 122 and 122.1 ALS (see the interpretation of section 127 ALS).

GRADUATION OF SANCTIONS

Within the context of the recourse under section 124 ALS, an employer must impose disciplinary measures gradually, namely according to the seriousness and frequency of the reproaches addressed to the employee. As dismissal is an extreme measure; it must only be imposed when all other solutions have been exhausted, when the employee has been notified of what he is being criticized for and has had reasonable time to rectify his behaviour. Needless to say, the theory of the escalation of sanctions does not apply if the employee committed a serious fault (see the interpretation given in section 82.1 ALS regarding this notion).

SECTION 125

This provision allows the Commission to assure the parties, if they consent thereto, the holding of mediation with a representative of the Commission. Mediation assures them full protection of confidentiality with respect to the conversations held during this process and the related settlement offers, as the case may be. The information disclosed during this stage will not be opposable to the parties thereafter. It should be noted that the Commission des relations du travail can rule on the existence of a transaction (agreement) reached during such a mediation process.

Also see the interpretation in section 123.3 ALS to the same effect (mediation within the context of a recourse against prohibited practices).

In addition, to ensure the employee the right to a full defence, the employer must provide a written presentation of the reasons for dismissal, upon request of the Commission. When the employer refuses or neglects to provide this writing to the Commission after having received a request to this effect, he may have a penal complaint filed against him (see the interpretation of sections 139 ALS and following).

SECTION 126

See section 123.4 ALS relating to the request to refer a complaint against a prohibited practice.

SECTION 126.1

The Commission des normes du travail may represent a non-unionized employee during the exercise of a recourse against a dismissal not made for good and sufficient cause (s. 124 ALS and following). This power is not discretionary. The legislator wanted to protect the exercise of the employee's rights. The power to represent the employee is associated with the duty to represent him when the conditions of the recourse are brought together and the employee requests it.

SECTION 127

When the Commission defers the complaint to the Commission des relations du travail under section 126 ALS, the provisions of the Labour Code mentioned in section 127 ALS apply, adapted as required. By way of section 127 ALS, the powers held by an arbitrator on grievances are conferred on the labour commissioner in charge of hearing the complaint under section 124 ALS. For example, the commissioner must proceed diligently with the handling of a complaint and make his decision based on the facts gathered during the investigation. He may ask the parties and witnesses the questions that he deems useful.

However, the powers of the Commission des relations du travail regarding specific remedial actions under section 124 ALS are those that are mentioned in section 128 ALS. In addition, the Commission benefits from expanded powers to make different types of orders, such as a provisional execution order, that it deems appropriate to safeguard the rights of the parties (see sections 112 and following of the Labour Code (R.S.Q. c. C-27) regarding the powers of the Commission des relations du travail).

SECTION 128

This provision establishes the powers of the Commission des relations du travail if it deems that an employee was dismissed without good and sufficient cause under section 124 ALS. The Commission has broad discretion as to the orders that it may make when it accepts a complaint. In this sense, the Commission has the power to order any measure that it deems appropriate and may thus substitute its judgment for that of the employer as to the sanction that should be imposed. For example, change a dismissal into a suspension.

In addition, the Commission has broad powers with respect to ordering reinstatement and the indemnities that should be granted. It should be mentioned that the powers of the Commission des relations du travail regarding a complaint under section 124 ALS are much vaster than those granted to it under the provisions dealing with prohibited practices (see the interpretation of sections 122 ALS and following).

The Court of Appeal summarizes the powers granted under section 128 ALS as follows:

"Hence, the remedy authorized under the Act has two objectives: the first, stipulated in subparagraph 2, seeks to reimburse the wages lost at the date of the arbitral award and the second, described in subparagraphs 1 and 3, is forward-looking and consists of the reinstatement of the employee in his position or, where this is not possible, in the granting of any other fair and reasonable measures dictated by the circumstances."

(Ref. : Immeubles Bona ltée v. Labelle, D.T.E. 95T-427 (C.A.)).

When the complaint is accepted, reinstatement is the remedy that is first and foremost in order. However, it is possible that under certain special circumstances, reinstatement is not the most appropriate measure. For example, this could be the case if the relationship of trust between the employer and the employee has been severed.

Moreover, under subparagraph 2 of section 128 ALS, the Commission des relations du travail has jurisdiction to order the employer to pay an indemnity equivalent to the wages lost since the dismissal. It should be mentioned that this indemnity to compensate for lost wages is not dependent on an order to reinstate the employee in his job or on any other form of indemnity or compensation granted under the third subparagraph of section 128 ALS. Section 128 gives the Commission des relations du travail the possibility to accumulate different types of potential remedies.

Regarding the power to "render any other decision that the Commission believes fair and reasonable, taking into account all the circumstances of the matter", this is another way of saying that the Commission des relations du travail has broad powers to compensate for the consequences of an unfair dismissal. By reason of this fact, it is empowered to order the granting of various types of damages, without specific limitations. For example, moral damages, exemplary damages, job

search costs, indemnity covering the loss of coverage of an insurance plan, loss of the use of an automobile provided by the employer).

In addition, as is stipulated in section 123.15 ALS regarding the possible remedies in the case of a complaint against psychological harassment, the Commission des relations du travail may, during a recourse under section 124 ALS, impose the orders that it deems appropriate according to the facts specific to each case. For example, ordering the employer to give the employee a letter of reference, giving the employee adequate training to prepare him for technological changes in the undertaking, etc. See the interpretation under section 127 ALS regarding the other powers of the Commission des relations du travail.

As for domestics or persons whose exclusive duty is to care for or provide care to the persons mentioned in the last subparagraph of section 128 ALS, the Commission des relations du travail can only grant these employees the payment of the wages and other benefits that they were deprived of by the dismissal. The powers of the Commission des relations du travail are more limited in this area.

The decision of the Commission des relations du travail is without appeal and is binding on the parties (see the interpretation of section 130 ALS).

SECTION 130

The decision of the Commission des relations du travail is without appeal. At the request of an interested party and within a six-month period following this decision, the Commission des relations du travail may authorize the filing of the decision at the office of the clerk of the Superior Court of the district in which one of the parties is domiciled, to ensure that said decision becomes liable to compulsory execution. The decision whose filing is requested must provide for an order that is enforceable, namely it must contain an order to do something or to refrain from doing something.

Under section 146.1 of the Labour Code, an employer who does not comply with the order is guilty of an offence and is liable to a fine for each day of failure to comply.

CHAPTER VII
PENAL PROVISIONS

SECTION 139

The term "offence" used in this division is defined as behaviour prohibited by the legislator that entails the criminal liability of its author. A repeat offence is the fact, for a person having incurred a penal conviction, of once again committing an offence of the same nature.

The offences contemplated by this provision are those related to destruction, alteration, falsification, omission, refusal or negligence in the keeping of documents such as payroll journals and pay sheets. For example, the refusal to keep a register or issue a pay sheet in accordance with the Act or the regulation is an offence.

SECTION 140

Every employer who hinders the legal action of the Commission or contravenes the Act is liable to the penalties stipulated in section 140 ALS. The expression "every employer" includes a company.

SECTION 141

An attempt is the fact of taking action with the intent of committing an offence without, however, the result sought being achieved, for reasons beyond the control of the author.

A person who aids or incites another to commit an offence is an accomplice to the author and is liable to the same penalties as the latter.

The potential fines are: $600 to $1,200 for a first offence and $1,200 to $6,000 for a repeat offence.

SECTION 141.1

There has been a new penal offence since May 1, 2003. It concerns the failure to give, being late in giving or the insufficient length of the notice of collective dismissal (see the interpretation of section 84.0.4 ALS) sent by the employer to the Minister of Employment and Social Solidarity. The extent of the lateness is calculated from the date on which the employer should have sent the notice, based on the deadlines stipulated in section 84.0.4 ALS. The term "week" is defined in paragraph 11) of section 1 ALS.

For example, an employer who sends a notice to the minister five and a half weeks before proceeding with a collective dismissal, when the notice should have been eight weeks under section 84.0.4 ALS, is liable to a fine of $4,500.

SECTION 142

The natural persons associated with a company, whether they act as head, director, employee or agent of the company, may be held liable for an offence committed by the company, if they ordered or authorized its accomplishment, or if they gave their consent or approval to such an offence. In these cases, the liability of these persons may be incurred with that of the company and they will be liable to the same convictions.

For example, an employee of a company who prohibits access to a person designated by the Commission to make an inspection (s. 109 ALS) will be deemed to be a party to the offence of the company itself and can have penal proceedings instituted against him.

SECTION 144 Within the context of the penal proceedings instituted under the Act respecting labour standards, the Commission des normes du travail may be the prosecutor. It has one year from the date on which it becomes aware of the commission of the offence to institute proceedings.

CHAPTER VIII
MISCELLANEOUS, TRANSITIONAL AND FINAL PROVISIONS

SECTION 158.1 See the interpretation in section 92.1 ALS.

SECTION 158.2 See the interpretation of section 92.1 ALS.

SECTION 158.3 Since June 1, 2004, persons who care for or who are entrusted with the care of others will be subject to the ALS, except for those who remain excluded by way of paragraph 2) of section 3 ALS (see the interpretation of this section).

The government may, by regulation, provide for special provisions for this type of worker. If such were the case, as of June 30, 2006, the wage of this employee will have to correspond to the general minimum wage rate.

SECTION 170 The Minister of Labour is responsible for the application of this Act, except for the provisions dealing with the contribution (Chapter III.1), the application of which is entrusted to the Minister of Revenue and certain provisions concerning the notice of collective dismissal (s. 84.0.1 to 84.0.7 and 84.0.9 to 84.0.12 ALS), the application of which is the responsibility of the Minister of Employment and Social Solidarity.

DIVISION I
DEFINITIONS AND INTERPRETATION

SECTION 1, A **"employee who ordinarily receives gratuities or tips"**

The use of the expression "employee who ordinarily receives gratuities or tips" refers to the notion of regularity in the payment of the gratuity or tip rather than the quantity of the gratuity or tip. The decisive element consists of checking if the majority of patrons generally tip the employee in question.

Moreover, it is customary for patrons to give the tip to the person who renders the service. Indeed, the jurisprudence has ruled that the person who renders the service to the patron is entitled to the gratuity or tip. For example, the staff members of a restaurant who take care of administration or maintenance do not provide direct services to the clientele in the room where the meals are served when the patron arrives. By reason of this fact, this staff cannot be considered employees who ordinarily receive gratuities or tips.

This definition of "employee who ordinarily receives gratuities or tips" specifies the types of undertakings in which an "employee who ordinarily receives gratuities or tips" works:

1. establishments that offer lodging to tourists and campgrounds;
2. places where alcoholic beverages are sold for consumption on the premises, such as bars;
3. enterprises that sell, deliver or serve meals to be eaten off the premises;
4. restaurants, except if they are places where the main activity consists in the providing of food services to patrons who order or choose the items at a service counter and who pay before eating, such as so-called "fast food" businesses.

See the interpretation in section 4 RLS.

DIVISION II
MINIMUM WAGE

SECTION 2, 1) See the interpretation in paragraph 2 of section 54 ALS.

SECTION 2, 2) This law must provide for the nature and duration of the vocational training.

SECTION 2, 4) The adjective "entirely" refers to a remuneration paid in full in the form of commissions.

See the interpretation in paragraph 4 of section 54 ALS for the notion of hours that cannot be controlled.

SECTION 2, 6) See the interpretation at the start of the division on wages in section 39.1 ALS.

This paragraph ceases to have effect after January 1, 2010 (see section 39.1 RLS).

SECTION 4 The expression "employee who receives gratuities or tips" is defined in section 1 RLS.

The specific minimum wage rate payable to an employee who receives gratuities or tips is an exception to the principle that every employee must receive the general minimum wage rate set in section 3 RLS and therefore must be given a strict interpretation. The result of the application of this exception must not be to allow an employer to remunerate all employees of his undertaking at the minimum wage rate for employees who receive gratuities or tips.

Since this minimum wage rate of employees receiving gratuities or tips is reserved for a specific category of employees and in precise undertakings, it is up to the employer to show in each case that he is entitled to remunerate his employees at that rate.

DIVISION IV
STANDARD WORKWEEK

SECTION 9 Since the Act does not contain a definition of the notion of "watchman", it is necessary to refer to the common meaning of the term, which is : "person who is in charge of guarding". The verb "guard" is synonymous with "watching over", "protecting" or "safeguarding".

A watchman is there to watch over things, without having the obligation to make a significant intervention during his work. Indeed, it is important to distinguish the work of an employee who is there to ensure the passive supervision of the premises and whose sole responsibility is to notify a person in charge in the event of an abnormal situation from that of an employee who himself has to take the corrective actions or to make the necessary repairs, for example on a production site when he ascertains an abnormal reading on a monitor or a dial. In the second case, the employee does not fall under the definition of a "watchman".

SECTION 10 The expression "forestry operation" is defined in section 1 RLS.

SECTION 11 The term "sawmill" is defined in section 1 RLS.

SECTION 12 The expression "remote area" is defined in section 1 RLS.

SECTION 13 See the interpretation in section 59.0.1 ALS.

DIVISION VI.0.1
NOTICE OF COLLECTIVE DISMISSAL

SECTION 35.0.1 See the interpretation in sections 84.04 to 84.07 ALS.

DIVISION VI.1
NIGHT-TIME WORK BY CHILDREN

SECTION 35.1 See section 84.6 ALS.

SECTION 35.2 See section 84.7 ALS.

SECTION 1 See the interpretation in section 84.1 ALS.

REGULATION RESPECTING THE EXCLUSION OF INSTITUTIONS SUBJECT TO SECTION 90 OF THE ACT RESPECTING LABOUR STANDARDS

SECTION 1

This provision concerns beneficiaries within the meaning of subparagraph *p* of the first paragraph of section 1 of the Act respecting health services and social services for Cree Native persons provided that they are working toward their physical, mental or social re-education. A beneficiary is defined as follows:

"*p)* "beneficiary": every person to whom health services or social services are furnished by an institution or foster family."

The expressions "institution" and "foster family" are defined in subparagraphs *a* and *o* of section 1 of the same act:

" *a)* "institution": a local community service centre, a hospital centre, a social service centre or a reception centre."

" *o)* "foster family": a family which takes charge of one or several adults or children, to a maximum number of nine, who are entrusted to it through a social service centre."

It should be mentioned that the regulation excludes from the application of the Act institutions within the meaning of subparagraph *a* of section 1 with respect to the aforementioned beneficiaries and not the beneficiaries themselves, whatever the place where they work.

Hence, "institutions" are excluded from the application of the Act with respect to every beneficiary within the meaning of the definition given above.

National Holiday Act

SECTION 2

June 24th is a statutory public holiday for all employees of Québec. Effective May 1, 2003, the only condition to benefit by this holiday is to be employed on the date of the holiday.

If June 24th falls on a Sunday, this day is a non-working day with pay for an employee for whom Sunday is ordinarily a working day. As for an employee for whom Sunday is not ordinarily a working day, June 25th becomes a non-working day with pay.

For the purposes of the application of section 2, when the paid leave is postponed to June 25th for the employee to whom this postponement applies, sections 4 to 6 of the National Holiday Act should be read by replacing June 24th with June 25th.

SECTION 4

Since May 1, 2003, the legislator no longer requires that a person have received wages during a minimum period of 10 days preceding the 24th of June to benefit from the indemnity. It is enough to have earned a wage during the reference period.

See the interpretation in section 62 ALS.

SECTION 5

Whereas in principle the 24th of June is a statutory public holiday for all working employees, this provision grants employees who must work on the 24th of June by reason of the nature of the activities of the undertaking entitlement to the wages for that day and to the indemnity provided for in section 4 NHA. If the employee does not report to work when he is required to do so, he will not be able to benefit from the advantages conferred by this section.

When an employee must work on the 24th of June by reason of the nature of the activities of the undertaking, the employer must pay him the wages corresponding to the work done and the indemnity provided for in section 4 NHA. In place of this indemnity, the employer can grant a compensatory leave of one day that must be taken on the working day preceding or following the 24th of June. The choice of paying the indemnity or granting the compensatory leave is at the option of the employer.

Moreover, this leave must be of one day, whatever the indemnity that the employee would have received under section 4 NHA.

An undertaking cannot interrupt its activities if this situation goes against the very nature of these activities or produces a result that truly has an adverse effect on the smooth operation of the undertaking.

For example, businesses of the hotel or restaurant sector cannot, by reason of the nature of their activities, interrupt services on the 24th of June. The same is true for a foundry where starting up machinery after a shutdown requires a great deal of time. As for convenience stores, since they are businesses which, by their very nature, offer "convenience" services, their activities do not have to be interrupted.

It should be mentioned that retailers or businesses offering pool-related services can interrupt their activities.

SECTION 6

The employee will benefit from the following conditions of employment, depending on whether or not he works on the public holiday:

A) The employee does not work on the public holiday.

1. If it is a day that is not normally a working day for the employee, the employer has the choice of granting the employee a compensatory leave of a duration equal to a normal day of work or of paying him the indemnity provided for in section 4 of the NHA. The compensatory leave must be granted on the working day preceding or following the 24th of June.

2. If the employee is on annual leave, the compensatory leave is taken on a date agreed upon between the employer and the employee.

3. If it is a day that is normally a working day for the employee, this day will be a non-working day and the employer will have to pay the employee an indemnity calculated in accordance with section 4 NHA.

A working day is a day on which an employee is actually called upon to work or a day on which the employee ordinarily works.

B) The employee must work on the day that is a holiday.

See the interpretation in section 5 NHA concerning the employee who must work on the day that is a holiday by reason of the nature of the activities of the establishment or the entity for which he works.

SECTION 8

The provisions of the National Holiday Act are of public order and may not be departed from even by agreement between the parties.

However, the Act shall not be construed in such a manner as to prohibit an agreement containing more advantageous conditions for the employee.

SECTION 17

In order for an Act to apply to the government, its departments and its agencies, the legislator must expressly stipulate this, as is the case here.

SECTION 17.1

The Commission des normes du travail oversees the implementation and application of the provisions of the National Holiday Act. It may, notably, exercise the civil recourses and the recourses against illegal dismissals related to the application of said Act.

This document presents the interpretation currently given to the provisions of the Act respecting labour standards, its regulations and the National Holiday Act for application purposes. The related jurisprudence, if any, may be consulted on the web site of the Commission des normes du travail.

If you have difficulties concerning the interpretation of the provisions or if you would like additional information, contact the Service des renseignements at the Commission des normes du travail.

Service des renseignements

The Service des renseignements of the Commission des normes du travail is a one-stop window where you can benefit from all of the services offered by the Commission or file a complaint.

From 8:00 a.m. to 5:00 p.m., from Monday through Friday, you can talk, at any time, with one of our employees who are able to provide information in some ten languages among those most commonly spoken by the cultural communities living in Québec. In addition, you have access to an electronic telephone information service 24 hours a day, 7 days a week, which, in most cases, allows you to obtain all the information that you need.

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