

Le COURRIER

VOL. 3, NO. 4 **SUMMER 2011**

Le COURRIER

VOL. 3, NO. 4 **SUMMER 2011**

TABLE OF CONTENTS

CAUTION IS APPROPRIATE WHEN ROADS PART	3
TWENTY YEARS ALREADY!	7
EMPLOYER DEDUCTIONS AGAINST WAGES	9
LABOUR DISPUTES AND STRIKEBREAKERS	15
THREE LAWYERS FROM LORANGER MARCOUX IN <i>THE BEST LAWYERS IN CANADA 2011</i>	19

This newsletter is published solely for information purposes. None of the contents or commentary contained herein should be considered as a legal opinion. For any specific legal questions or issues, the reader is invited to contact the law offices of Loranger Marcoux.



CAUTION IS APPROPRIATE WHEN ROADS PART

CAN EMPLOYER-EMPLOYEE AGREEMENTS CONCLUDED AT EMPLOYMENT TERMINATION TIME BE SET ASIDE?

Although this controversial issue had apparently been settled by the judgment of the Quebec Court of Appeal in *Betanzos v. Premium Sound'N'Picture Inc.*¹, a judgment of the Quebec Superior Court handed down during late 2009 has re-opened the debate on the issue as to whether a settlement dealing with employment termination conditions is always final and enforceable. This ruling was handed down in the matter *Desfossés v. Marketing Comunika inc.*².

Article 2631 of the *Civil Code of Québec* defines “Transaction” as being a contract by which the parties prevent, especially, a future dispute by way of mutual concessions or reservations. In other words, a transaction is essentially a settlement agreement. Although it is simpler in form, a “release and waiver” signed by solely one of the parties can nevertheless be qualified as a transaction further to which the creditor of an obligation, being the employee, waives his right to any claims in exchange for the payments and benefits granted under the release and waiver.

The *Code* provides that a transaction may be annulled upon the same grounds as a contract. That necessarily implies that parties to any such agreement must have given a valid consent.

That being said, an employer may terminate an employment agreement with an indefinite term subject to giving the employee proper notice of termination in

a timely manner (article 2091) or, failing that, a proper indemnity in lieu thereof. Article 2092 of the *Civil Code* provides that an employee may not waive his or her right to obtain compensation for any injury he or she suffers where insufficient notice of termination is given or where the manner of resiliation is abusive.

Article 2092 came into force when the new *Civil Code* was introduced in 1994. This provision had produced some unforeseen results in the courts. On at least two occasions in the past, the Superior Court had ruled that Article 2092 allowed the Court to set aside an employer-employee transaction which it deemed to be unconscionable, and to award an amount which it deemed reasonable.

Consent to any settlement must be “informed”

In November 2007, in *Betanzos v. Premium Sound’N’Picture Inc.* supra, the Court of Appeal ruled that it was possible to waive the protection granted by articles 2091 and 2092. However, this waiver could only be valid if consented after the acquisition of the right and not prior thereto, and only provided the consent of the employee to waive the right was informed. In this matter, the appellant had not waived his right to the indemnity in advance, but, to cite the court « he did it in an informed way since the transaction intervened following dismissal » (our translation). His waiver was therefore ruled valid under the circumstances.

In *Desfossés v. Marketing Comunika inc.*, supra, the notion that consent to the waiver has to be informed was central to the case. In this case, after the co-owner of the agency which employed Madame Desfossés discovered certain irregularities in the management of expenses charged as petty cash, he verified certain records and realised that Desfossés had also received other amounts to which she was not entitled as commissions for services performed for clients she was handling. As he viewed this as a fundamental breach of trust, he summoned her to a meeting held on January 30, 2007. During the meeting, he confronted her with the findings of his investigation and informed her that he had taken the decision to terminate her employment. On February 2, 2007, the parties signed a settlement which included terms governing severance pay to be paid to the employee.

After mentioning that neither the co-owner of the agency nor the employee were familiar with the rules governing severance pay owing to an employee, the Honourable Mr Justice Robert Castiglio concluded that a transaction had taken place between the parties and that no defect of consent had been proved. The

Honourable Justice also mentioned that an error in law was not a proper ground to nullify the entire transaction.

However, he added that any transaction which intervenes at the time of dismissal of an employee is not necessarily enforceable purely on the grounds that the transaction intervened after the dismissal. He points out that any employee who is confronted with dismissal is more often than not in a position of vulnerability and may agree to a transaction at a time when he or she is not capable of properly weighing its impact. Thus, a review of the circumstances surrounding the signature of the transaction was necessary in order to determine whether the employee’s consent to waive his or her right to proper notice of termination pursuant to Article 2091 of the *Civil Code* was fully informed.

For Justice Castiglio, the circumstances underlying signature of the transaction by the employee were such that her consent could not be deemed as informed. He observed that she was still under the shock of her employer’s decision to terminate her employment at the time she agreed to the transaction and consulted nobody prior to signing, other than the employer’s accounting firm who merely informed her of the relevant provisions of *An Act respecting Labour Standards*.

The Honourable Justice provided several examples of circumstances which would support a finding that the consent of an employee signing a transaction could be deemed as properly informed. For example, this would be the case for a transaction concluded at the time of dismissal where the employee was properly informed of his or her rights by a union representative or legal counsel, or a transaction signed by the employee after an exchange of several offers and counter-offers over the course of several days and allowing time to reflect over the subject matter.

It is noteworthy that in this matter, even if the court concluded that the transaction signed on February 2, 2007 was not automatically enforceable against the employee, the Court nevertheless came to the finding that the plaintiff employee was not entitled to notice of termination because the employer had serious grounds for terminating her employment.

Whether or not one agrees with this judgment, which for the moment stands alone, it should be seen as a warning with respect to the prudence which an employer has to exercise when formulating an offer of settlement to an employee whose employment is being terminated. In these situations, haste to finalize

matters is understandable, but ill-advised. It is much more appropriate to grant a reasonable period of reflection to the employee being offered the termination package.

It is also customary, according to circumstances, to invite the employee to consult the adviser of his or her choice and to ensure that the employee acknowledges in the settlement agreement that he or she has had the opportunity to consult either a lawyer or other adviser concerning the settlement. In the same manner, an employee who comes back with counter-offers or who asks and is granted an additional delay to consider the offer of the employer is at the same time providing additional grounds for the argument that consent to the settlement was fully informed, in the event of any future litigation.

Jean-Marc Brodeur

TWENTY YEARS ALREADY!

In 1991, at a time when many Quebec and Canada law firms were rushing to create “mega-firms” at both the provincial and national level, a group of eight lawyers went against the prevailing wisdom and founded **Loranger Marcoux**, a “boutique” law firm designed to offer specialized professional services in the field of Labour and Employment Law. During the twenty years which followed, Loranger Marcoux has succeeded in establishing an enviable reputation both in the legal community as well as in the field of labour relations.

The expertise and quality of services of the law firm are widely recognized by clients and within the business and legal communities. Recently, the magazine *Canadian Lawyers* placed Loranger Marcoux on its list of the top ten boutique law firms in Canada, the sole Quebec firm representing management to be included, identified as leaders in the practice of Labour and Employment Law.

For twenty years, we have actively participated in the growth and development of our clients’ businesses, while maintaining strong personal contact with the client. The client remains front and centre of our focus as Labour and Employment Law practitioners. So, with twenty years of rewarding work now behind us, it’s time for us to pause and thank each one of you for the trust and confidence you have vested in us over these years. We intend on redoubling our efforts to advance and defend your interests over the next twenty years!



¹ 2007 QCCA 1629, November 23, 2007.

² [2010] R.J.D.T. 109.



EMPLOYER DEDUCTIONS AGAINST WAGES

CAN AN EMPLOYER SET OFF AMOUNTS DUE BY AN EMPLOYEE AGAINST WAGES?

As a member of management, you surely had occasion to wonder whether you are entitled to hold back all or part of the wages of one of your employees in order to reimburse a debt which the employee has incurred towards your employer. This type of issue arises, for example, when an employee receives an overpayment of wages due to a clerical error. You should be aware that under certain circumstances, this practice is entirely legal, even where the employee objects to it. Under Quebec law, we refer to a mechanism named compensation.

Article 49 of An Act respecting labour standards and compensation

The uncertainty surrounding the right to deduct sums of money against an employee's pay arises out of the fact that Article 49 of *An Act Respecting Labour Standards* provides that no employer may make deductions from wages unless required to do so pursuant to an act, a regulation, a court order, a collective agreement, an order or decree or a mandatory supplemental pension plan. This provision also stipulates that the employer may make deductions from wages if the employee consents thereto in writing and for the specific purpose mentioned in such writing.

However, the Court of Appeal has ruled that this Article refers solely to sums payable to third parties that they may recover through an employer, and not to sums owed directly to the employer¹. It may concern sums which the employee owes his or her union, or the Government, to cite the examples offered by the Court.

The employer therefore doesn't fall within the scope of this prohibition against making deductions without the consent of an employee. Where an employee has been overpaid or is otherwise indebted towards the employer, the employer may therefore be entitled to take advantage of the mechanism of legal compensation.

The legal compensation mechanism

Legal compensation is governed by Articles 1672 to 1682 of the *Quebec Civil Code*. These provisions create a mechanism which is automatically triggered where two parties are reciprocally debtor and creditor of each other. Compensation operates by extinguishing the mutual debts of the parties up to the amount of the lesser debt.

Compensation would therefore be triggered between the sum which the employee has to repay to his or her employer and the wages which the employer owes.

Any such compensation is not however possible unless the debt is "certain, liquid and exigible", to cite the language of the *Civil Code*. This means that the debt would have to be acknowledged or be virtually beyond dispute. The precise value has to be determined. If there is a deadline for payment, the deadline must have lapsed in order for the employer to legally seek reimbursement by way of this mechanism.

Management would be well-advised to keep in mind that where an employee disputes the existence of a debt in favour of his or her employer and raises serious grounds in support, the employer cannot take matters into its own hands and deduct pay to reimburse the alleged debt because the debt under this scenario would not be deemed "certain".

Examples from the case law

We will cite some examples from a number of situations which have given rise to rulings by the courts.

Following the filing of a grievance an arbitrator was called upon to decide whether the employer was justified in deducting sums which, pursuant to the collective agreement in force, had been advanced to its employee following a claim by the employee to the *Commission de la santé et la sécurité du travail* (CSST). It is worth noting that the employer deducted amounts against wages after the CSST had dismissed the claim, but notwithstanding the filing of an appeal by the employee. The arbitrator ruled that the debt was not yet "certain" because it was contingent upon the decision to be rendered in review by the *Commission des lésions professionnelles*². The employer should have waited before triggering compensation.

In another decision³, the employment agreement governing the broker and her employer provided that the broker was personally liable for insurance premiums invoiced and unpaid by her clients. When the broker left her employment, two premiums remained outstanding. The employer consequently deducted these premiums from amounts payable to the employee as salary and holiday pay, which gave rise to the claim made by the *Commission des normes du travail*, who alleged that since the existence of the debt was denied, legal compensation was not applicable.

Although the broker did not challenge the existence of the two unpaid premiums, she denied owing them to her employer. However, the contractual provisions were unequivocal in this regard. The unpaid premiums therefore constituted certain, liquid and exigible debts and compensation could automatically be triggered.

Along the same lines, the Court of Appeal has confirmed the right of the employer to use an employee's wages to seek reimbursement, not within the context of overpayments, but rather within the context of employment termination⁴.

In the *Motos Daytona* case, the employment agreement governing a motorcycle mechanic required the employee to give six weeks' notice to his employer if he wished to resign prior to the termination date under his

employment agreement. Failing that, he had to pay a penalty of \$3,000.00. As the employer owed its employee the sum of \$2,627.81 on the date of termination, the totality of this payment was withheld by the employer when the employee left his job without providing proper notice.

The *Commission des normes du travail* argued that the employee's debt was not "certain, liquid and exigible", because the clause providing for a penalty in the event of the employee's termination without notice might be found abusive by a court of law.

Both at trial and on appeal the judgments ruled in favour of the employer. The clause was deemed not abusive within a context where manpower was scarce and difficult to replace. Upon that ground, the employee had no serious ground to seriously challenge the existence of his debt. Compensation was automatically triggered.

On the other hand, where the debt which the employer sought to enforce was based upon an interpretation of a collective agreement which was challenged by the union, legal compensation was deemed inappropriate. As the dispute gave rise to a grievance, this necessarily entailed a ruling on the interpretation of the collective agreement. Under circumstances calling for a judicial ruling on the merits, the debt could no longer be deemed as liquid and exigible⁵.

In a final decision⁶, the collective agreement provided that in cases of overpayment, the employer was required to consult the employee in order to determine the terms of reimbursement. The employer had made an overpayment to an employee during her maternity leave. After her maternity leave, the employer consulted her but she refused her consent to any deduction against her wages. The Court of Appeal ruled that the employer had acted correctly by deducting 10% of her gross wages per pay cheque. The employer was merely implementing compensation which was triggered automatically by operation of law.

We conclude from this review of the case law that a mere refusal by an employee to pay a debt is insufficient in itself to defeat legal compensation. He or she has to have reasonable and serious grounds for doing so.

Procedure to be followed where an employee's debt is certain, liquid and exigible

The employer first of all should notify the employee of any contemplated deductions. Next, the employer should be reasonable in its manner of deducting amounts against the employee's pay cheque for the purpose of reimbursement. In fact, on this very point, a court⁷ has ruled that in accordance with the usage, an employer should not seek reimbursement on a single pay but rather apportion repayments over several pays. In this matter, the employer had been more than reasonable, by only deducting twenty dollars against the employee's monthly wages up until total reimbursement. A gradual deducting of 10% of gross wages per pay has also been ruled as reasonable by the Court of Appeal⁸.

However, when dealing with employment termination, it appears from the case law under review that it may be possible to deduct the totality of the employee's final pay where his or her debt is equal to or exceeds the amount of any outstanding wages owed to the employee.

To conclude, the right of the employer to seek reimbursement from the wages of its employee is now clear, but the debt has to be unequivocally certain, liquid and exigible.

Carl Panet-Raymond

¹ *Syndicat des professionnels et professionnelles du réseau scolaire du Québec c. Commission scolaire de la Mitis*, D.T.E. 90T-1094; *Syndicat des professionnels de la Commission des écoles catholiques de Montréal c. Moalli*, EYB 1991-63607.

² *Syndicat des cols blancs de Gatineau and City of Gatineau*, D.T.E. 2009T-339 (T.A.).

³ *Commission des normes du travail c. Essor Assurances placements conseils inc.*, [2007] R.J.D.T. 1015 (C.Q.).

⁴ *Commission des normes du travail c. Motos Daytona inc.*, D.T.E. 2009T-735.

⁵ *United Steelworkers of America, section local 13148 and I.C.I Explosifs (Brownsburg plant)*, D.T.E. 96T-1428 (T.A.).

⁶ *Syndicat des professionnels et professionnelles du réseau scolaire du Québec c. Commission scolaire de la Mitis*, *supra*, note 1.

⁷ *Desjardins and Société des alcools du Québec*, D.T.E. 86T-491 (T.A.).

⁸ *Syndicat des professionnels et professionnelles du réseau scolaire du Québec c. Commission scolaire de la Mitis*, *supra*, note 1.



LABOUR DISPUTES

EMPLOYERS CAN STILL CARRY ON BUSINESS, NOTWITHSTANDING THE PROVISIONS PROHIBITING THE USE OF STRIKEBREAKERS

The anti-strike breaking provisions found at Article 109.1 of the *Quebec Labour Code* have recently come into public spotlight. During the course of a recent labour conflict which received wide media coverage, and during works undertaken by the National Assembly *Commission de l'économie et du travail* [Labour and Economics Commission], various questions have been raised and a number of points of view expressed with respect to the proper scope of these provisions.

At the time of this writing, there remains some controversy with respect to the underlying intent of Article 109.1. Some commentators see it as a mechanism to maintain the balance of power between parties engaged in a labour dispute. Others refer back to the intent of the legislator at the time the law was introduced, which was to limit cases of violence on the picket lines during strikes or lockouts.

Recent debate, however, has done nothing to alter the existing state of the law. Thus, during any strike or lockout, employers are not entitled to use the services of any employee who is a member of the bargaining unit on strike or locked out, subject to certain exceptions¹. The employer is also prohibited from using the services of any “person” hired between the day the negotiation phase begins and the end of the strike or the lockout in order to discharge the work duties of any

employee who is a member of the bargaining unit. Depending on the context, the term “person” specifically refers to a member of management of the business.

Furthermore, anti-strike breaking provisions include the prohibition against the employer using, **in the establishment** where a strike or lockout has been declared, the services of any person employed by another employer or the services of any contractor as well as, as the case may be, the services of any other “employees” whom it employs within the same establishment, in order to discharge the duties of an employee who is a member of the bargaining unit on strike or locked out.

Finally, where the employer has several establishments, it cannot use, **within the establishment** where a strike or lockout has been declared, the services of employees coming from any other establishment or the services of any “person other than an employee” which it employs in another establishment save and except, in this latter case, where the employees of this other establishment are members of the bargaining unit on strike or locked out.

As can be seen from the above, the restriction imposed on the employer principally concerns activities **within an establishment** where a strike or lockout has been declared. The notion of establishment has more recently given rise to litigation². Under the current state of the law, establishment means a location with physical boundaries possessing a civic address. It may also be comprised of an aggregate of several buildings which form an indivisible whole, operating under the same unit of management. An analysis of the geographical location and the organisational structure is therefore required in order to properly set the bounds of this notion of establishment which is key to determining the scope of application of Article 109.1 of the *Labour Code*.

However, at a time when new technologies are contributing to new methods of organisation of the workplace, allowing innovations such as work from remote locations, many are questioning the relevance of restricting prohibitions to a physical location. The Quebec Court of Appeal will certainly have the opportunity in the near future to rule on the notion of establishment in the matter concerning the *Journal de Québec*.

Although some questions may be resolved by the *Journal de Québec* ruling, under the law as it currently stands, the employer involved in a labour conflict unquestionably retains some flexibility to continue carrying on business. It may, among other things, use the services of management members who work there

during the normal course of business to carry out the duties of an employee who is a member of the bargaining unit, provided they were hired prior to the commencement of the bargaining phase. These management members may therefore, in all legality, carry out the work of a person on strike or lockout, and should not be treated as “scabs”!

Members of management hired after the day the negotiation stage begins may carry out management tasks. That may well include performance of the job duties of colleagues who are carrying out the work of employees. Also, the employer may carry on business inside its other establishments, where applicable, with the personnel of such establishments.

Pierrick Bazinet

¹ Essential services or agreement between the parties.

² *Journal de Québec v. Commission des relations du travail (Canadian Union of Public Employees, section locale 2808 (office employees) and Journal de Québec, a division of Corporation Sun Media)*, D.T.E. 2009T-695 (C.S.), Application for leave to appeal granted (C.A., 2009-11-19) (hereinafter the «matter concerning the *Journal de Québec* »)



THREE LAWYERS FROM LORANGER MARCOUX IN *THE BEST LAWYERS IN CANADA 2011*

Three lawyers from Loranger Marcoux, **Jean-François Munn**, **Jean Leduc** and **Jean-Marc Brodeur**, were selected for inclusion in *The Best lawyers in Canada** 2011 in the field of Labour and Employment Law.

Because *Best Lawyers* is based on an exhaustive peer-review survey and because lawyers are not required or allowed to pay a fee to be listed, inclusion in *Best Lawyers* is considered a singular honor.

Jean-François has been included on that list since 2006, the first year of the Canadian edition. Jean joined the list in 2010 while Jean-Marc has been listed for the first year in 2011.



We'll walk an extra mile in your shoes.

Loranger Marcoux - helping you manage your human resources and labour relations.



20
Y R S

LORANGER MARCOUX
lawyers *LLP*

1100 René-Lévesque Blvd. West
Suite 1460
Montréal, QC. H3B 4N4

T (514) 879-6900
F (514) 879-6907
LORANGERMARCOUX.COM



LORANGER MARCOUX
lawyers *LLP*

EXPERTISE

A law firm which offers specialized, high quality services in the fields of Labour & Employment law and Administrative law.

LAWYERS

Pierrick Bazinet
pbazinet@lorangermarcoux.com

Micheline Bouchard
mbouchard@lorangermarcoux.com

Jean-Marc Brodeur
jmbrodeur@lorangermarcoux.com

Audrey Dauphinais
adauphinais@lorangermarcoux.com

Ann Sophie Del Vecchio
asdelvecchio@lorangermarcoux.com

Caroline Desjardins-Saey
cdesjardins-saey@lorangermarcoux.com

Christine Fortin
cfortin@lorangermarcoux.com

Stéphane Gaudet
sgaudet@lorangermarcoux.com

Jean Leduc
jleduc@lorangermarcoux.com

Mélanie Lefebvre
mlefebvre@lorangermarcoux.com

Jean-François Munn
jfmunn@lorangermarcoux.com

Fany O'Bomsawin
fobomsawin@lorangermarcoux.com

Carl Panet-Raymond
cpr@lorangermarcoux.com

Jean-Claude Turcotte
jcturcotte@lorangermarcoux.com

André Loranger
aloranger@lorangermarcoux.com
Retired advocate

design : **RepubliiH**



20
Y R S

LORANGER MARCOUX
lawyers *LLP*

1100 René-Lévesque Blvd. West
Suite 1460
Montréal, QC. H3B 4N4

T (514) 879-6900
F (514) 879-6907

LORANGERMARCOUX.COM