

**SUPREME COURT OF CANADA**

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| **Citation:** Dionne *v.* Commission scolaire des Patriotes, 2014 SCC 33, [2014] 1 S.C.R. 765 | **Date:** 20140501  **Docket:** 34854 |

Between:

Marilyne Dionne

Appellant

and

Commission scolaire des Patriotes and Commission des lésions professionnelles

Respondents

- and -

Commission de la santé et de la sécurité du travail and

Fédération des syndicats de l’enseignement

Interveners

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 46) | Abella J. (McLachlin C.J. and Cromwell, Moldaver and Karakatsanis JJ. concurring) |

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Marilyne Dionne Appellant

v.

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Fédération des syndicats de l’enseignement Interveners

**Indexed as:** Dionne ***v.*** Commission scolaire des Patriotes

2014 SCC 33

File No.: 34854.

2014:  January 13; 2014:  May 1.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for quebec

*Employment law — Occupational health and safety — Unsafe workplace — Contract of employment — Whether pregnant supply teacher qualifies as eligible “worker” for Preventive Withdrawal and earnings-replacement indemnity under applicable provincial legislation — Whether refusal to perform work in unsafe workplace precludes formation of contract of employment — Act respecting occupational health and safety, CQLR, c. S-2.1, ss. 1 “worker”, 2, 4, 11, 12, 14, 30, 40, 41 — Civil Code of Québec, art. 2085.*

Quebec’s *Act respecting occupational health and safety* is designed to provide financial security when workers are required to withdraw temporarily from the workforce to avoid unsafe work. It sets out specific health and safety protections for pregnant women whereby they can refuse to perform work under conditions that present a health or safety danger to themselves or their fetus, and to have a reassignment of work to avoid those risks. If that reassignment is not possible, they have the right to take Preventive Withdrawal during which they stop working and receive income replacement benefits during their pregnancy.

D, a pregnant supply teacher, learned from her doctor that she was vulnerable to contagious viruses which can harm the fetus. Because these viruses can be spread by groups of children, a classroom posed a risk. The School Board offered her a one-day teaching position, which she accepted. Due to the health risk in the workplace, the Commission de la santé et de la sécurité du travail told D that she was entitled to reassignment or Preventive Withdrawal. The School Board appealed to the Commission des lésions professionnelles (“CLP”), which concluded that D was ineligible for Preventive Withdrawal because of her inability to go into the classroom. D was therefore outside the scope of the protection provided by the *Act*. On judicial review, the Superior Court found the CLP decision to be reasonable. A majority in the Quebec Court of Appeal agreed with the Superior Court.

Held: The appeal should be allowed.

The purpose of the *Act respecting occupational health and safety* is to ensure the health and safety of workers by protecting them from workplace dangers. Under the statutory scheme, when a worker relies on the right to refuse unsafe work, any new assignments or temporary withdrawal from the workplace are not seen as an absence from work, they are deemed to be a substitute for the work that the employee would ordinarily be expected to perform but for the danger. A refusal to perform unsafe work is not a refusal to fulfill the employment contract, it is the exercise of a legislated right. Workers are thereby protected from having to choose between job security and their health or safety.

Like any other worker entitled to refuse to do unsafe work, a pregnant worker is deemed by the *Act* to still be “at work” while on reassignment or Preventive Withdrawal. The *Act* therefore protects pregnant women in two significant ways: it protects their health by substituting safe tasks for dangerous ones, and it protects their employmentby providing financial and job security. To confront the discriminatory assumptions which had historically attributed incapacity to work to women who were pregnant, the scheme protects not only their right to work, but to work in a safe environment by deeming them to be as available to work as a non-pregnant worker.

A contract was formed when D accepted the School Board’s offer to supply teach and therefore became a “worker” in accordance with the definition in the *Act*. The legislated right of a pregnant worker to withdraw from an unsafe workplace cannot be used to conclude that her Preventive Withdrawal negates the formation of the contract of employment. D’s pregnancy was not an incapacity that prevented her from performing the work, it was the dangerous workplace that prevented it. That triggered her statutory right to reassignment or Preventive Withdrawal. What prevents the performance of work is the employer’s inability to provide a safe working alternative, not the pregnancy. To conclude otherwise negates the objectives of the *Act* and penalizes pregnant women for doing precisely what the legislative scheme mandates: avoiding workplace health risks during pregnancy.

**Cases Cited**

**Applied:** *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; **referred to:** *Commission des écoles catholiques de Québec v. Gobeil*, [1999] R.J.Q. 1883; *AT & T Corp. v. Hulteen*, 129 S. Ct. 1962 (2009); *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55, [2004] 3 S.C.R. 195; *Westmount (City) v. Rossy*, 2012 SCC 30, [2012] 2 S.C.R. 136.

**Statutes and Regulations Cited**

*Act respecting industrial accidents and occupational diseases*, CQLR, c. A-3.001, ss. 60, 63 to 76.

*Act respecting occupational health and safety*, CQLR, c. S-2.1, ss. 1 “worker”, 2, 4, 11, 12, 14, 30, 36, 40, 41, 43, 45.

*Civil Code of Québec*, preliminary provision, arts. 1385, 2085.

*Interpretation Act*, CQLR, c. I-16, s. 41.

*Regulation respecting the certificate issued for the preventive withdrawal and re-assignment of a pregnant or breast-feeding worker*, CQLR, c. S-2.1, r. 3.

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Cliche, Bernard, Serge Lafontaine et Richard Mailhot. *Traité de droit de la santé et de la sécurité au travail: Le régime juridique de la prévention des accidents du travail et des maladies professionnelles*. Cowansville, Qué.: Yvon Blais, 1993.

Gagnon, Robert P., Louis LeBel et Pierre Verge. *Droit du travail*, 2e éd. Sainte-Foy, Qué.: Presses de l’Université Laval, 1991.

Lafontaine, Serge. “Le retrait préventif de la travailleuse enceinte ou qui allaite: qui décide quoi?”, dans Service de la formation permanente du Barreau du Québec, *Développements récents en droit du travail (1991)*. Cowansville, Qué.: Yvon Blais, 1991, 133.

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Plante, Robert, and Romaine Malenfant. “Reproductive Health and Work: Different Experiences” (1998), 40 *JOEM* 964.

Quebec. Ministre d’État au développement social.  *Santé et sécurité au travail: Politique québécoise de la santé et de la sécurité des travailleurs*. Québec: Éditeur officiel du Québec, 1978.

Trudeau, Gilles. “Aspects constitutionnels du travail salarié”, dans Katherine Lippel et Guylaine Vallée, dir., *Rapports individuels et collectifs du travail*. Montréal: LexisNexis, 2009, 1/1 (feuilles mobiles mises à jour mars 2013, envoi no 6).

APPEAL from a judgment of the Quebec Court of Appeal (Dalphond, Giroux and Wagner JJ.A.), 2012 QCCA 609, SOQUIJ AZ-50844625, [2012] J.Q. no 2984 (QL), 2012 CarswellQue 3214, affirming a decision of Crête J., 2010 QCCS 1550, [2010] C.L.P. 251, SOQUIJ AZ-50628222, [2010] J.Q. no 3332 (QL), 2010 CarswellQue 3470, dismissing an application for judicial review of a decision of the Commission des lésions professionnelles, 2008 QCCLP 3215, SOQUIJ AZ-50496029, 2008 LNQCCLP 141 (QL). Appeal allowed.

Denis Lavoie, *Graciela Barrère*,Pierre Brun and *Isabelle Bolla*, for the appellant.

Yann Bernard, Paule Veilleux and René Paquette, for the respondent Commission scolaire des Patriotes.

Marie-France Bernier, for the respondent Commission des lésions professionnelles.

Pierre-Michel Lajeunesse and Marie-Anne Lecavalier, for the intervener Commission de la santé et de la sécurité du travail.

Claudine Morin and Nathalie Léger, for the intervener Fédération des syndicats de l’enseignement.

The judgment of the Court was delivered by

1. Abella J. — Quebec’s occupational health and safety legislation, together with legislation dealing withindustrial accidents and illnesses, creates a scheme designed to provide financial security when workers are required to withdraw temporarily from the workforce to avoid unsafe work. This appeal involves a pregnant supply teacher whose withdrawal from an unsafe workplace because of risks to herself and her fetus resulted in a tribunal finding that she was therebydisentitled to the statutory income replacement benefits. In my view, this finding negates the objectives of the scheme and penalizes pregnant women for doing precisely what the legislative scheme mandates: avoiding workplace health risks during pregnancy.

Background

1. *An* *Act respecting occupational health and safety*, CQLR, c. S-2.1,sets out specific health and safety protections for pregnant women whereby they can refuse to perform work under conditions that present a health or safety danger to themselves or their fetus, and to have a reassignment of work to avoid those risks. If that reassignment is not possible, they have the right to stop working and receive income replacement benefits during the pregnancy. These rights are set out in ss. 40 and 41 of the *Act*:

**40.** A pregnant worker who furnishes to her employer a certificate attesting that her working conditions may be physically dangerous to her unborn child, or to herself by reason of her pregnancy, may request to be re-assigned to other duties involving no such danger that she is reasonably capable of performing.

. . .

**41.** If a requested re-assignment is not made immediately, the pregnant worker may stop working until she is re-assigned or until the date of delivery.

“Delivery” means the natural or the lawfully, medically induced end of a pregnancy by childbirth, whether or not the child is viable.

1. In order to qualify for reassignment, the pregnant worker must present her employer with a Preventive Withdrawal and Reassignment Certificate completed by a doctor confirming the workplace danger.
2. The form and required content of the Certificate are set out in the *Regulation respecting the certificate issued for the preventive withdrawal and re-assignment of a pregnant or breast-feeding worker*, CQLR, c. S-2.1, r. 3. In the Certificate, the worker must identify her perceived workplace risks and a physician must confirm which work conditions carry dangers to the worker or her fetus, and whether she is otherwise medically capable of working.
3. Notably, a Certificate automatically constitutes an application for reassignment to a risk-free task (Bernard Cliche, Serge Lafontaine and Richard Mailhot, *Traité de droit de la santé et de la sécurité au travail* (1993), at pp. 243-44). If the employer cannot or does not reassign the pregnant worker, she can withdraw from work until she can either be reassigned or has given birth.[[1]](#footnote-1) A worker on Preventive Withdrawal is entitled to full remuneration for her first five working days after stopping work[[2]](#footnote-2) and thereafter receives 90 percent of her net salary for the days that she would normally have worked but for the health or safety risk.[[3]](#footnote-3) These benefits are paid out of a fund into which all Quebec employers contribute,[[4]](#footnote-4) and are calculated based on income earned by the worker during the year before her pregnancy.[[5]](#footnote-5) During her Preventive Withdrawal, she retains all the benefits connected with her regular employment.[[6]](#footnote-6)
4. Marilyne Dionne earned a bachelor’s degree in preschool and elementary education in December 2005. In early 2006, she was added to the Commission scolaire des Patriotes (“School Board”) list of about 500 supply teachers. The list is maintained pursuant to a collective agreement, which requires the School Board to maintain a list which may be used when replacement teachers are needed. Another collective agreement sets out the salaries and benefits payable to supply teachers called from the list. Replacements are called by a call centre. Rather than wait for a call, supply teachers occasionally call the centre directly to see if any work is available. The collective agreement does not oblige the School Board to call any particular teacher from the list, leaving the choice of teacher up to the Board.
5. Once on the list, Ms. Dionne worked frequently. She supply taught 88.15 of the 200 school days in the 2005-2006 school year, working nearly full-time in 2006.
6. Ms. Dionne learned she was pregnant on September 24, 2006. She contacted the call centre the following day to inform them that she was pregnant and that she was awaiting test results from her doctor in order to determine if she was immunized against certain infectious diseases.
7. On October 5, 2006, Ms. Dionne learned from her doctor that she was vulnerable to Parvovirus B-19, a contagious virus which can harm the fetus. Because this virus can be spread by groups of children, a classroom posed a risk. Her doctor completed a Preventive Withdrawal and Reassignment Certificate confirming that her workplace presented a health risk. Shortly afterwards, her doctor completed a second Certificate confirming that the workplace also put her at risk for exposure to rubella.
8. Ms. Dionne gave the Certificates to the Commission de la santé et de la sécurité du travail. On November 3, 2006, she was informed that if she received a contract, she was eligible for Preventive Withdrawal as part of the “For a Safe Maternity Experience” program. The Commission’s letter stated, in part:

[TRANSLATION] We inform you that you are eligible for the “For a Safe Maternity Experience” program.

However, given that you are a contract worker, and in the event your employer is unable to respect the risks identified in the CLSC report, your preventive withdrawal will begin the day when you are called to work by your employer to perform a contract. Your employer must provide us with the date, time and place.

Ms. Dionne kept the School Board informed of her medical situation and submitted copies of the Certificates to them.

1. The call centre offered her a one-day teaching position on November 13, 2006, which she accepted. In total, Ms. Dionne received 10 offers to supply teach from the call centre between November 13 and 30, 2006, all of which she accepted. She was never reassigned.
2. On November 27, 2006, the Commission told Ms. Dionne that because a contract was formed on November 13, she was entitled to take Preventive Withdrawal and receive an income indemnity during her pregnancy so long as she remained eligible for the indemnity in accordance with the *Act*. The Commission’s quantification of her indemnity was not at issue before this Court.
3. The School Board asked the Commission to review this decision. On December 20, 2006, the Commission confirmed that Ms. Dionne’s right to Preventive Withdrawal and an earnings-replacement indemnity was triggered on November 13, 2006 when she received and accepted the offer from the School Board.
4. The School Board appealed to the Commission des lésions professionnelles(“CLP”). The CLP set aside the Commission’s decision and concluded that Ms. Dionne was ineligible for Preventive Withdrawal. In its view, withdrawal was only available to “workers” as defined in the *Act*. Ms. Dionne’s inability to go into the school due to health risks meant that she was incapable of performing the supply teaching work required by the School Board. This incapacity meant that no contract of employment had been formed. Without such a contract, Ms. Dionne was not a “worker” and was therefore outside the scope of the protection provided by ss. 40 and 41 of the *Act*.
5. On judicial review, the Superior Court found the CLP decision to be reasonable. A majority in the Quebec Court of Appeal agreed with the Superior Court.
6. The dissenting judge was of the view that the CLP’s decision would result in the denial of benefits to thousands of supply teachers. In his view, Ms. Dionne was not incapable of working, she was simply refusing, in accordance with her statutory rights, to perform work in an unsafe workplace. I agree.

Analysis

1. The purpose of the *Act respecting occupational health and safety* is to ensure the health and safety of workers by protecting them from workplace dangers. This purpose is delineated in s. 2:

**2.** The object of this Act is the elimination, at the source, of dangers to the health, safety and physical well-being of workers.

This Act provides mechanisms for the participation of workers, workers’ associations, employers and employers' associations in the realization of its object.

1. The protections set out in the *Act* reflect a long history of legislative measures in Quebec intended to address and improve workplace health and safety issues. These efforts culminated in the Quebec government’s extensive consultation process in the late ’70s to determine a general policy on occupational health and safety and to develop the necessary mechanisms to achieve health and safety goals (Fernand Morin et al., *Le droit de l’emploi au Québec* (4th ed. 2010), at p. 679; Robert P. Gagnon, Louis LeBel and Pierre Verge, *Droit du travail* (2nd ed. 1991), at pp. 29-30; Ministre d’État au développement social, *Santé et sécurité au travail:* *Politique québécoise de la santé et de la sécurité des travailleurs* (1978)). As a result of this process, in 1979 the legislature adopted the *Act respecting occupational health and safety* with the aim not only of protecting the health and safety of workers in the workplace, but also of eliminating the causes of workplace accidents and illnesses.
2. To achieve this protective purpose, the *Act* imposes a duty on employers not to expose workers to unsafe or unhealthy working conditions. Correspondingly, it gives workers the right to be informed of hazards, to participate in the management of workplace risks, and most pertinently, the right to refuse unsafe work found in s. 12:

**12.** A worker has a right to refuse to perform particular work if he [or she] has reasonable grounds to believe that the performance of that work would expose him [or her] to danger to his [or her] health, safety or physical well-being, or would expose another person to a similar danger.

1. Significantly, when a worker relies on the right to refuse unsafe work, he or she is deemed by s. 14 of the statute to still be “at work”:

**14.** Until an executory decision is rendered ordering a worker to resume work, the employer shall not . . . have the work performed by another worker or by a person who ordinarily works outside the establishment *and a worker who is exercising his [or her] right of refusal is deemed to be at work*.

1. Section 30 prohibits reprisals by an employer against employees who assert their right to refuse unsafe work:

**30.** No employer may dismiss, suspend or transfer a worker, practise discrimination or take reprisals against him [or her] or impose any other penalty on him [or her] on the ground that the worker exercised the right contemplated in section 12.

1. Any new assignments or temporary withdrawal from the workplace are deemed to be a substitute for the work that the employee would ordinarily be expected to perform but for the danger. A refusal to perform unsafe work, therefore, is not seen as a refusal to fulfill the employment contract, it is the exercise of legislated protection (*Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 801).
2. This right to refuse to perform unsafe work is automatically incorporated into the contract of employment between an employer and a worker by virtue of the public order status of the *Act*. As Beetz J. explained in *Bell Canada*:

The essence of [the *Act*] the purpose of which is to safeguard the health of workers is that it articulates the terms of the contract of employment, in the same way as does a collective agreement which contains preventive clauses dealing with occupational health and safety. [p. 799]

1. Employers and workers are prohibited in s. 4 from derogating from these basic rights and are permitted only to enhance them:

**4.** This Act is of public order and any derogating provision of any agreement or decree is absolutely null.

However, an agreement or decree may provide, in respect of a worker, a person performing functions under this Act or a certified association, more favourable provisions for the health, safety and physical well-being of the worker.

1. The *Act* thereby regulates the rights and obligations of workers and employers by deeming the contract of employment to include working conditions that do not impair workers’ health, safety or physical well-being (*Bell Canada*, at pp. 799-800). Included among these deemed contractual working conditions are the right to refuse unsafe work and to continue to receivewages and other benefits notwithstanding this refusal, the requirement of availability and assignment to other duties, and the right to return to the employment at the end of the assignment or cessation of work (*Bell Canada*, at p. 802). Workers are therefore protected from having to choose between job security and their health or safety.
2. As this brief review shows, the *Act* sets out a broad framework of health and safety rights and gives workers the necessary tools by which to safely and confidently assert those rights.
3. Into this capacious protective tent, the legislature also added specific safeguards to address the health and safety concerns of pregnant women. These included rights for pregnant workers to be reassigned to other tasks or, if reassignment is not possible, to immediately withdraw from work in order to protect their health or the health of their fetus and to receive an income indemnity while away from work (Serge Lafontaine, “Le retrait préventif de la travailleuse enceinte ou qui allaite: qui décide quoi?”, in *Développements récents en droit du travail* *(1991)*,133, at p. 135; Cliche, Lafontaine and Mailhot, at pp. 237-38). These rights were designed to allow pregnant workers to continue working or, if no safe workplace alternative was available, to prevent them from being penalized economically (Katherine Lippel, “Preventive Reassignment of Pregnant or Breast-Feeding Workers: The Québec Model” (1998), 8 *New Solutions* 267, at p. 267). As Robert Plante and Romaine Malenfant noted in “Reproductive Health and Work: Different Experiences” (1998), 40 *JOEM* 964, at p. 967:

. . . the right to preventive reassignment plays a protective role for women’s jobs by reducing the likelihood of their being fired during pregnancy and by ensuring that the benefits associated with a job are maintained . . . .

1. Underlying the health and safety protections for pregnant women is an effort to prevent the discriminatory exclusion of women fromthe workplace based on pregnancy (see Karen Messing et al., “Equality and Difference in the Workplace: Physical Job Demands, Occupational Illnesses, and Sex Differences” (2000), 12 *NWSA* *Journal* 21, at p. 36; see also Gilles Trudeau, “Aspects constitutionnels du travail salarié”, in Katherine Lippel and Guylaine Vallée, eds., *Rapports individuels et collectifs du travail* (loose-leaf), 1/1, at pp. 1/14 and 1/15). To confront the discriminatory assumptions which had historically attributed an incapacity to work to women who were pregnant, the scheme protects not only their right to work, but to work in a safe environment, by deeming them to be as available to work as a non-pregnant worker (*Commission des écoles catholiques de Québec v. Gobeil*, [1999] R.J.Q. 1883 (C.A.), at p. 1893, *per* Robert J.A.; see also *AT & T Corp. v. Hulteen*, 129 S. Ct. 1962 (2009), at p. 1978, *per* Ginsburg J., dissenting). As Plante and Malenfant note, the prime objective of reassignment and Preventive Withdrawal is “to protect the health of the pregnant worker and that of her unborn child by eliminating dangers in the workplace, *thereby allowing her to continue working*” (p. 965 (emphasis added); see also Lippel, at pp. 269-70). If no reassignment alternative in the workplace is possible, she is entitled to withdraw from work.
2. Preventive Withdrawal operates within the context of the *Act*’s broader health and safety scheme which gives workers the security to refuse unsafe work. By providing financial and job security to a worker whose workplace has become dangerous because of her pregnancy, the *Act* protects a pregnant worker from having to choose between her employment (and income) on the one hand, and her health or the health of her fetus on the other, “a choice that is clearly difficult, if not impossible” (Plante and Malenfant, at p. 968). And, like any other worker refusing to do unsafe work, she is deemed by the *Act* to still be “at work” while on Preventive Withdrawal.
3. The *Act* therefore protects pregnant women in two significant ways: it protects their health by substituting safe tasks for dangerous ones, and it protects their employmentby providing financial and job security.
4. This is the statutory context for Ms. Dionne’s appeal. The remaining task is to determine whether she is a “worker” within the meaning of the *Act* and therefore entitled to access its protections. “Worker” is defined in s. 1 of the *Act*:

“worker” means a person, including a student in the cases determined by regulation, who, under a contract of employment or a contract of apprenticeship, even without remuneration, carries out work for an employer, except

(1) a person employed as manager, superintendent, foreman or as the agent of the employer in his relations with his workers;

(2) a director or officer of a legal person, except where a person acts as such in relation to his employer after being designated by the workers or by a certified association;

1. This definition reflects a clear intention to extend occupational health and safety protection as widely as possible, including to students, interns, apprentices and individuals, whether or not they are remunerated. Essentially anyone who carries out work for an employer is entitled to the *Act*’s protection unless he or she is in a managerial role. The scope of protection for pregnant workers is even more expansive, since s. 11 grants pregnant women who are managers, superintendents, foremen, and directors the same rights to reassignment and Preventive Withdrawal as “workers”.
2. While there is no need for remuneration under the *Act* to qualify as a “worker”, there must be a contract. The *Act* does not specifically define the term “contract of employment”, but the *Civil Code of Québec* does so in art. 2085:

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

1. There are therefore three requirements for formation of a contract of employment under the *Civil Code* — performance of work, payment of wages, and a relationship of subordination between the parties (*Cabiakman v. Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195, at para. 27; Morin et al., at p. 271). A contract must also have a cause and an object (art. 1385 of the *Civil Code*).
2. The CLP acknowledged that a supply teacher who goes into the school to teach fulfills all of the necessary elements for the formation of a contract of employment and is therefore a “worker” within the meaning of the *Act*. She would accordingly be entitled to protection under the *Act*, including Preventive Withdrawal in the appropriate circumstances. The dispute in this case therefore is not whether a supply teacher can claim rights under the *Act*, but whether a workplace danger acts as an impediment to contract formation in the first place.
3. The CLP was of the view that because Ms. Dionne could not enter the workplace to teach, this essential element of the performance of the contract was missing. As a result, no contract of employment was formed since Ms. Dionne’s invocation of her right to Preventive Withdrawal meant she could not work. This, with respect, is an unreasonable interpretation of the performance requirement for the formation of a “contract of employment” under the *Act*.
4. The *Act* defines “worker” differently than does the *Civil Code* — a person who carries out work even without remuneration rather than an employee who works for remuneration. It is therefore clear that the legislative intention was to reach a much broader worker constituency than that contemplated by “employee” in the *Civil Code*. This more generous interpretation of “worker” is warranted not only by the *Act*’s status as being of public order, it is permitted by the preamble to the *Code*, which allows other laws to “complement the Code or make exceptions to it” (see also *Interpretation Act*, CQLR, c. I-16, s. 41; *Westmount (City) v. Rossy*, [2012] 2 S.C.R. 136, at para. 21).
5. The difference in wording also helps inform the interpretation of the performance of work requirement for the formation of a “contract of employment” for purposes of the definition of “worker” under s. 1 of the *Act*. In my view, this requirement must be interpreted in a way that renders it meaningful in the context of a scheme designed to allow workers to withdraw from an unsafe workplace. In the same way that the legislature varied the *Civil Code* requirement of remuneration for the formation of a “contract of employment” under the *Act*, it also addressed the performance of work requirement by stipulating that when someone withdraws from an unsafe workplace after contract formation, he or she is still working. In other words, the “performance of work” requirement will be met even if, after the contract is formed, the worker withdraws for workplace health and safety reasons since at that point he or she is deemed by the *Act* to be “at work”.
6. The scheme is intended to protect pregnant workers who have a contract to work. It would be anomalous, to say the least, to use the legislated right of a pregnant worker to withdraw from an unsafe workplace to conclude that her withdrawal negates the formation of the contract of employment.
7. As Beetz J. confirmed in *Bell Canada*, Preventive Withdrawal is not a failure or inability to perform the work, it is deemed by the statutory scheme to be a *substitution* of the work. That is, exercising the right *is* the performance of the work (*Bell Canada*, at p. 801). The right to reassignment ensures that workers can continue to fulfill their employment obligations without risk to their health. The worker is offering himself or herself to perform work, but not work that endangers his or her health. In exercising her right to Preventive Withdrawal, she is not indicating that she is refusing to work, she is deemed to be asking instead that she be reassigned to safe tasks. What prevents the performance of work is the employer’s inability to provide a safe working alternative.
8. Upon accepting the School Board’s offer on November 13, 2006, Ms. Dionne was presented with a choice: she could attend at the school and teach for the day, exposing her fetus to danger, or she could rely on her Certificate to assert her right to Preventive Withdrawal under the *Act*. She chose the latter, and in so doing relied on her statutory right to refuse dangerous work. Upon invoking her Certificate, she was entitled to Preventive Withdrawal, and the School Board was immediately required to offer her other tasks compatible with her health needs. No such offer of reassignment took place.
9. There is therefore no justification for excluding Ms. Dionne from the protections of the *Act*. Since the CLP acknowledged that a teacher who performs a supply teaching contract is a “worker” under the *Act*, that means that if Ms. Dionne had not been pregnant, there would be no dispute that she would be entitled to a healthy and safe work environment each time she went into the school to teach, as would any “worker” under the *Act*. A pregnant supply teacher is no less qualified for employment than a teacher who is not pregnant, and her aptitude and qualifications do not change upon becoming pregnant.
10. A contract was formed on November 13, 2006 when Ms. Dionne accepted the School Board’s offer to supply teach and therefore became a “worker” in accordance with the definition in s. 1 of the *Act*. Her pregnancy was not an incapacity that prevented her from performing the work, it was the dangerous workplace, and that in turn triggered her statutory right to substitute that work with a safe task or withdraw.
11. The CLP’s interpretation of Preventive Withdrawal as an incapacity to perform work also limits the definition of a “worker” to someone who can perform work immediately without any health or safety issues. Pre-emptively excluding a portion of the workforce from the protective scope of the *Act*, as the CLP did by excluding pregnant contract workers, ignores the broad legislative purpose. It puts these women in the untenable position of having to choose between entering into an employment contract in order to work and protecting their health and safety. The *Act* is designed to make these two concerns — work and safety — compatible. The CLP’s approach, with respect, treats them as mutually exclusive.
12. The *Act* specifically allows Ms. Dionne to substitute her performance of the supply teaching contract with an alternative task or Preventive Withdrawal. Her invocation of the Certificate does not mean she is unwilling to work, it means that she is unwilling to expose herself or her fetus to health risks in the workplace. The CLP’s conclusion that Ms. Dionne could not enter into a contract because she was pregnant and refused unsafe work, ignores the fact that Ms. Dionne was deemed by s. 14 of the *Act* to be “at work” when she was on Preventive Withdrawal and left her having to choose between her work and her health. This is an approach that recreates the very Gordian Knot the statutory scheme was designed to cut. Because the CLP’s conclusion undermines the objectives of the *Act*,it is, in my respectful view, unreasonable.
13. I would allow the appeal with costs throughout.

Appeal allowed with costs throughout.

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Solicitors for the respondent Commission scolaire des Patriotes: Langlois Kronström Desjardins, Montréal.

Solicitors for the respondent Commission des lésions professionnelles: Verge Bernier, Québec.

Solicitors for the intervener Commission de la santé et de la sécurité du travail: Vigneault Thibodeau Bergeron, Québec and Montréal.

Solicitors for the intervener Fédération des syndicats de l’enseignement: Barabé Casavant, Montréal.

1. *Act respecting occupational health and safety*, s. 41. [↑](#footnote-ref-1)
2. *Act respecting occupational health and safety*, s. 36. [↑](#footnote-ref-2)
3. *An* *Act respecting industrial accidents and occupational diseases*,CQLR, c. A-3.001, s. 60. [↑](#footnote-ref-3)
4. *Act respecting occupational health and safety*,s. 45. [↑](#footnote-ref-4)
5. *Act respecting industrial accidents and occupational diseases*,ss. 63 to 76. [↑](#footnote-ref-5)
6. *Act respecting occupational health and safety*, s. 43. [↑](#footnote-ref-6)