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Verifying impediments

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Children are precious, and their health, safety and well-being are at the very heart of childcare providers' responsibilities.

Several actors work with or alongside children on a daily or occasional basis in order to provide them care and education. In selecting people who work with children, providers collect and use a great deal of information about them, including their studies, experience, qualifications and abilities. Detailed criminal record checks are generally performed as well.

THE LEGAL OBLIGATIONS

To ensure that people who work with young children or are regularly in contact with them do not have a problematic past (including a criminal record) connected with their duties, the legislator has laid out the obligations and powers of childcare providers. For example, the *Educational Childcare Act*[1], (the **Act**) and the *Educational Childcare Regulation*[2] (the **Regulation**) contain provisions specifically dealing with verifications of impediments. As a result, the educational childcare system has the benefit of provisions which enable it to request relevant information lawfully, even if it constitutes personal information. Parameters governing these verifications have also been enacted.

The Regulation begins by providing that an applicant for a childcare or day care centre permit, or a person applying for recognition as a home childcare provider, must submit an application, and include a consent to a verification of the information necessary to establish whether an impediment exists. The applicant must also provide an attestation establishing that no impediment exists, or an attestation of information that may establish an impediment, as the case may be, for himself and each director or shareholder of the business.[3]

The concept of "impediment" is defined as "grounds for permit refusal set out in paragraphs 2 and 3 of section 26 and in the second paragraph of section 27 of the Act".[4]

Those provisions are worded as follows:

> **26.** The Minister may refuse to issue a permit if:
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> […]
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> (2) the applicant or a director or a shareholder of the applicant exhibits or has exhibited behaviour that could reasonably pose a threat for the physical or emotional safety of the children to whom the applicant proposes to provide childcare;
>
> (3) the applicant or a director or a shareholder of the applicant is charged with or has been convicted of an indictable or criminal offence related to the abilities and conduct required to operate a childcare centre or a day care centre;

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[…]

27. Police forces in Québec are required to communicate any information required by regulation that is needed to verify the existence of an impediment under paragraph 2 or 3 of section 26.

The investigation to that end must be concerned with any sexual misconduct, failure to provide necessities of life, criminal operation of a motor vehicle, violent behaviour, criminal negligence, fraud, theft, arson and drug or narcotic-related offence.

[…]

In addition to the above, and subject to certain limitations, an applicant or permit holder must also ensure that "no person of full age working in the applicant's or holder's facility during the hours when childcare services are provided [...] has an impediment related to the abilities and conduct required to hold a position in a childcare centre or a day care centre [...]"[5] The same rule, with the necessary modifications, applies to the home childcare coordinating office staff members "assigned to manage the office, to recognize or to monitor or provide technical and pedagogical support to the home childcare providers the office has recognized."[6] As for home childcare providers, they must meet requirements regarding the persons who assist them, and regarding any person of full age who lives in the residence where the care is provided.[7]

If the applicant or permit holder fails to show that no impediment exists, the Minister may refuse to issue a permit, or may suspend it, revoke it or refuse to renew it.[8] The coordinating office may do the same in relation to the recognition of a home childcare provider.[9]

Accordingly, to determine whether an impediment exists, personal information must be collected, used and disclosed by various persons. Quite apart from the obligations set out in the Act and the Regulation, those persons must ensure that they comply with all the rules contained in legislation governing the protection of personal information, which we will not be addressing in this newsletter.

ASSESSING THE IMPEDIMENTS

Not all socially unacceptable behaviour reasonably poses a threat to the physical or emotional safety of children receiving childcare. Similarly, indictable and other criminal offences are not necessarily connected to the abilities and conduct required to run a childcare or day care centre. And it is only in such cases that the behaviour or past history can be a basis for refusing to issue a permit or recognition or for suspending, revoking or refusing to renew it.

Unfortunately, the jurisprudence on this issue in the context of educational childcare is rather limited. However, we believe that decisions which deal more generally with criminal records in the employment context can serve as guidance. For example, in order to determine whether there is a connection between a person's criminal record and the position, the courts agree that a concrete and detailed analysis of the situation must be carried out, and that one must avoid limiting the analysis to the general nature of the offence. From this perspective, and based on the circumstances, the following elements should be among those considered:

> the nature of the duties, having regard to the context in which the business operates and the services it provides;
> the characteristics specific to the clientele;
> the impact that the offence could have on the clientele, the reputation of the business or establishment, and the quality of the services provided; and
> the risk of reoffending.[10]

In our opinion, drawing from the general principles applicable to employment, the above factors should also be considered in determining whether an indictable offence or criminal offence is related

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to the abilities and conduct required to operate a childcare or day care centre. With the necessary adjustments, these principles can also serve as guidance in assessing behaviour to determine whether one could reasonably pose a threat for the physical or emotional safety of the children. Other criteria, such as the nature of the offence, the date of its commission and the sentence imposed, if any, should be taken into account as well.[11]

The people responsible for considering the issue of impediments must always avoid automatic decisions, and must examine the characteristics and implications of each case in an informed manner, weighing the information collected in relation to the person's role in delivering the care. In doing so, they can refer to *La vérification de l'absence d'empêchement dans les services de garde éducatifs*,[12] a 2004 publication of the Ministère de l'Emploi, de la Solidarité sociale et de la Famille. Although the document was written before the Act came into force, and although it cannot replace the applicable legislation and is not a formal reference source, it can help inform decision-makers' thinking.

In a recent decision[13] about the dismissal of a childcare centre employee whose "attestation of information that may establish an impediment" mentioned the existence of [translation] "behaviour that might pose a risk" to children's safety, the arbitral tribunal recalled certain principles and obligations applicable to the assessment of impediments:

> [TRANSLATION]
>
> [47] […] [The board of directors] has a duty to treat the person fairly, and must therefore demand the matter be the subject of an internal investigation whose findings are submitted to her in writing. In that investigation, the person must be given the opportunity to provide her version of the events. The childcare centre's management can make a recommendation to the board, but the board is not required to follow it. It might decide to consult a lawyer to ensure it understands the legal aspect of the matter. It might decide to hear the person before making a decision.
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> […]
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> [54] The childcare centre's board of directors should not have contented itself with a simple oral statement from the centre's director, and then wrongly determined that it had no choice but to dismiss [the worker] in order to comply with a directive of the Ministère de la Famille, the nature of which was not specified […].
>
> [55] If it had acquainted itself with chapters 6 and 8 of the document entitled *La vérification de l'absence d'empêchement dans les services de garde éducatifs*, the board would undoubtedly had found criteria that it should have taken into account, such as aggravating factors, or, on the contrary, mitigating factors. In determining whether the conduct complained of constituted a genuine risk to the children's safety, the board should have verified whether the incident was isolated or whether there was a re-offence, and should have taken the time that had elapsed since the incident into account, considered the quality of the employee's work since she began with the centre, ascertained how cooperative she was with the investigation, etc. Lastly, it could have used the analytical table in the document, drawn on the table as inspiration for its own set of criteria to be used in weighing the pros and cons in order to make a fair, informed and reasoned decision.
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> [56] A childcare centre's board of directors is made up of volunteers. It depends on the centre's administration for its information. If it is not adequately informed, it is difficult for it to fulfill its role fully. The remarks in the preceding paragraph therefore apply to the centre's management as well […].

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> […]
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> [58] In order to be fair, the procedure that the board must follow in such circumstances would best be inspired by the [TRANSLATION] “fairness principles” set out in the Ministère’s 2004 document: transparency; the right to make representations; impartiality and objectivity; confidentiality; diligence and caution; and the duty to manage responsibly and obtain adequate information.
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> [59] The board has a duty to assess all aspects of the situation and determine, based on a fair procedure, whether the behaviour [the worker] is alleged to have committed constitutes a genuine risk to the safety of the children who frequent the childcare centre. It must therefore do its homework.
>
> [Footnotes omitted.]

In light of these remarks from a case in which a person’s behaviour was assessed, but also in light of the principles discussed further above, it bears repeating that those who are responsible for ensuring that individuals who work alongside children in day care centres and childcare centres do not have an impediment must carry out that responsibility by taking the necessary time and consulting the resources necessary to make an informed decision, not one based on unjustified prejudice or social stigma stemming from past conduct or a past conviction.

Unless each case is evaluated seriously, decision-makers might find their decisions challenged. They might also be the subject of legal proceedings, which could, among other things, reverse their decision, reinstate the employee, or award financial compensation. In our view, if the investigation is handled particularly badly, the decision-makers might, subject to certain legal protections, be found personally liable.

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[1] CQLR, c. S-4.1.1.
[2] CQLR, c. S-4.1.1, r. 2.
[3] Subsections 10(7) and 60(13) of the Regulation.
[4] Section 1 of the Regulation, “impediment”.
[5] Section 4, para. 1 of the Regulation.
[6] Section 4, para. 2 of the Regulation.
[7] Subsection 60(13) of the Regulation. In addition, s. 6 of the Regulation lists the cases in which a permit holder or home childcare provider must ensure that a new consent to investigation and a new attestation are provided.
[8] Sections 26 and 28 of the Act.
[9] Subsections 60(13) and 75(4) of the Regulation.
[10] In this regard, see, among other things, *Syndicat québécois des employées et employés de service, section locale 298* et *Oasis St-Damien inc.*, 2012 CanLII 99864 (QC SAT) at paras. 104 to 108.
[11] See for example *M.F.* c. *Centre de la petite enfance A*, 2012 QCTAQ 09495.
[12] Ministère de l’Emploi, de la Solidarité sociale et de la Famille, *La vérification de l’absence d’empêchement dans les services de garde éducatifs* by Éric Dufresne (Québec: Ministère de l’Emploi, de la Solidarité sociale et de la Famille, 2004).
[13] *Syndicat des travailleuses et travailleurs de la petite enfance de la Montérégie* c. *Centre de la petite enfance Vos tout-petits*, 2014 CanLII 47169 (QC SAT).

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