Constant supervision: how does the recent court decision impact CPEs, daycare centres and home childcare providers?

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On January 15, 2020, the Court of Québec handed down an important decision that could have an impact very quickly on the entire childcare network.[1].

In its ruling dealing with a breach of the obligation to provide constant supervision of the children, the court questioned the concept of *auto-pauses* (also known as *pauses jumelées or pauses autogérées*). This widespread practice consists of having a single childcare staff member, usually an educator, temporarily supervise two groups of napping children to allow another childcare staff member to go on a break.

The court took advantage of the opportunity to delimit the obligation of constant supervision set out in section 100 of the *Educational Childcare Regulation*[2] (The "Regulation"), awhich applies indiscriminately to all childcare providers: the *centres de la petite enfance* (CPEs), daycare centres and home childcare providers.

Finally, the court made some interesting comments on the calculation of the ratios, although this was not a central issue in the dispute.

The court's reasons and comments will likely lead childcare providers to question the organization of their work, their practices, directives and even their individual or collective work agreements.

Decision

Facts

In April 2018, an inspector from the *Ministère de la Famille* visited a CPE to conduct a full inspection for the renewal of its permit, and to deal with a complaint about child supervision during naps.

In the afternoon, the inspector entered a room and found seven children lying on small mats scattered on the floor. Some of them were not sleeping and no educator was present. However, in an adjacent room, an educator was sitting along the back wall. This second room had ten other children, also lying down for a nap. The evidence showed that an observation window separated the two rooms, which were also connected by a shared bathroom. The court noted that it was impossible at that time for the educator to get a full view of the adjacent room, in particular, because of the furniture that was dispersed about the room and partially obstructed the view. A statement of offence for failure to maintain constant supervision was issued to the CPE, although the practice of placing two groups under the supervision of a single educator at nap time, to allow a colleague to take a break, is a well-known practice.

The concept of constant supervision

To date, there are very few decisions dealing with the concept of constant supervision in a childcare context. The court, therefore, used this opportunity to consider this concept in greater detail [translation]:

> « [23] The CPE [...] must ensure that the children to whom childcare is provided are constantly supervised for their safety;
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> [24] The French adjective *constante* [constant] is defined in the *Larousse* dictionary as follows:
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> [translation] that which is uninterrupted, continuous; durable.
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> [25] *Le Petit Druide des synonymes et des antonymes* has the following synonyms for the adjective *constante*: [translation] continual, continuous, at every moment, unceasing, uninterrupted, perpetual, without end. The antonyms are: [translation] discontinuous, intermittent, irregular.
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> [26] The *Larousse* dictionary defines the French word surveiller [to supervise] as the act of observing attentively. In the decision in *Directeur des poursuites criminelles et pénales c. Centre de la petite enfance (CPE) Le petit sentier*, Judge Rivest noted that it is the action of watching over someone in one’s care and/or for whom one is responsible, taking care of them, being attentive.
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> [27] There are few reported decisions dealing with this issue. Based on the decisions filed with the pleadings, the Court finds that the adequacy of the supervision depends on the specific facts of each case.
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> [28] Since young children are involved in this case, the Court finds that this supervision must be visual and auditory to be effective.
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> (References omitted)

Applying this reasoning to the facts in this case, the court found, beyond any reasonable doubt, that the children in the group for which there was momentarily no educator were not under constant, but rather “intermittent", supervision.

Due diligence and the *auto-pause* concept

At trial, the CPE presented a so-called "due diligence" defence, arguing that all reasonable precautions were taken to avoid committing the offence. In particular, it referred to an internal memo sent to all the employees on how to proceed during an *auto-pause*. According to the memo, educators must be near the observation window and walk regularly between the two rooms to verify the children's status. In the event that a child wakes up, the instruction is then to respond to his or her needs promptly and engage in a quiet game with the child in order to respect the other children's nap time. The CPE demonstrated that this directive had been communicated to all the staff and that it was regularly discussed at meetings. In addition, a pedagogical adviser ensured that this rule was respected. The failure to comply with this obligation could result in disciplinary sanctions up to and including dismissal.

Despite the foregoing, the court rejected the CPE's due diligence defence. It stated that in the context of an *auto-pause*, the directive was not able to bring the CPE into compliance with the *Educational Childcare Act*[3] (the "Act"). It was in fact inevitable, in the court's view, that the educator would have to attend to a specific child at some point in time and would no longer be able to see what was happening in the other room.

The court concluded by adding that a reasonable person placed in the same circumstances should provide for a sufficient quantity of staff to replace the educators during their breaks. On this point, it noted that [translation] "the children's safety must take precedence over the economic interests of the [childcare] service providers"[4]. Furthermore, it stated that, despite the CPE's efforts to ensure compliance with its directives, it was the *auto-pause* concept itself that was problematic and, in the court's words, [translation] "completely inappropriate"[5].

Thus, the CPE was convicted of breaching the obligation of constant supervision of the children and ordered to pay a fine.

What is the impact with respect to the organization of work for childcare providers?

The court's decision will likely raise doubts about the organization of work for many childcare service providers, particularly permit holders who make use of the *auto-pause* concept. However, the ramifications could be much more far-reaching.

Level of supervision

We can easily imagine that the issue of adequate supervision could give rise to many challenges on a daily basis. The court indicated that such supervision must be auditory and visual, but may also vary depending on the circumstances.

The analysis of a situation could therefore be influenced by various things, such as the premises (private residence, facility, park, etc.), their layout (presence of furniture, size of openings, etc.), the location of the workers and children while services are being provided, and the nature of the activities conducted.

Given the court's requirement that the supervision must be both visual and auditory, the assessment of its adequacy would seem to be all the more likely to raise questions for home childcare providers and compliance officers in coordinating offices who conduct visits to monitor these providers.

Calculating ratios

It should be noted that the offence with which the CPE was charged in this case did not concern compliance with the ratios provided for under the Act for the number of children to childcare staff that are required to be present on the premises during the provision of services. The issue before the court was strictly to determine whether the CPE was providing constant supervision of the two groups of children at the time of the inspection.

While the court stated that it would reserve its comments on the question of the ratio, it nevertheless clearly added that it did not agree with the CPE's interpretation of the number of childcare staff that were needed to care for the children in its facility. Thus, despite the fact that the educators could not leave the facility during their breaks, the court noted that by ordering the educators to split their time between two rooms, the CPE was disregarding the ratios provided for in the Act. Thus, the court's view was evidently that the ratios set out in section 21 of the Act would apply to each group of children, and could not be calculated as a whole, across the entire facility.

The *auto-pause* concept

In light of the specific facts submitted as evidence, the court found that the very concept of *auto-pause* is inappropriate.

While some might therefore be tempted to conclude that all *auto-pauses* should be abolished, or that they are necessarily illegal, it should be remembered that each situation must be analyzed separately, based on its specific circumstances. Thus, a permit holder may still be able to show that they are in compliance with their obligation of constant supervision, for example, through a combination of adequate premises, resources, work instructions and protocols.

This being said, the fact that the court has raised doubts about the very concept of the *auto-pause* will necessarily lead permit holders to question the organization of their work. In a context in which the court relies, *inter alia*, on its own calculation of the ratios applicable to the group of children, it could be even more complex for permit holders to determine the scope of their obligations. The same thing can be said for the manner in which they will be able to meet their obligations taking into account their mission, budget, human and material resources, individual or collective work agreements, and the specific needs of the children in their care.

Conclusion

The decision rendered by the Court of Québec on January 15, 2020 sheds light on the notion of constant supervision in the context of the provision of childcare services. Thus, to ensure that they are in compliance with their obligations and avoid penal or administrative penalties, it may be appropriate for childcare providers to review the organization of their work.

A notice of appeal of this decision was filed on February 14, 2020 by the CPE. We will keep you informed of further developments.

Should you wish to obtain further information on this topic, or discuss possible solutions for your own situation, please do not hesitate to contact our team of professionals.

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1. *Directeur des poursuites criminelles et pénales c. Centre de la petite enfance Soulanges (CPE Soulanges)*, C.Q. Beauharnois, 760-61-124110-199, January 15, 2020 (hereinafter *DPCP c. CPE Soulanges*).
2. CQLR, c. S-4.1.1, r. 2.
3. CQLR, c. S-4.1.1.
4. *DPCP c. CPE Soulanges*, para. 42.
5. *Idem*, para. 45.