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# Employment Law in Canada:

## Provincially Regulated Employers
## Québec

# Federal and provincial jurisdiction

In Canada, the power to make laws is divided between the federal and provincial governments. In the area of employment law, the federal government only has jurisdiction over employment laws for specific works and undertakings within the exclusive federal constitutional jurisdiction, such as shipping, railways and banks. The vast majority of employment relationships, however, do not come within the exclusive federal jurisdiction and are governed by the laws of the province in which they are located.

The general rule, therefore, is that the provinces have jurisdiction over employment matters generally, while the federal government has jurisdiction only in exceptional cases, in respect of the specific works and undertakings. Only the laws of the Province of Québec, the second most populous Canadian province and the only one with a civil law system and a majority of its population who is French-speaking, will be addressed in this summary. Information respecting the laws of Ontario, Alberta and British Columbia is available through McMillan's offices in Ottawa and Toronto, Calgary and Vancouver, respectively.

# Minimum standards of employment

In Québec, minimum standards of employment are defined by the *Act Respecting Labour Standards* (the "ALS"). Some of the minimum standards at the time of writing are set out below:

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| Minimum wage | $10.75 per hour (or $9.20 per hour for employees who receive gratuities or tips).<br><br>(Exceptions exist for certain industries, such as liquor servers) |
| Hours of work | 40 hours per week<br><br>Overtime over 40 hours per week (1.5 times regular wage) |
| Public holidays | 8 paid statutory holidays (New Year's Day, Good Friday or Easter Monday at the employer's choice, the Monday preceding May 25th (National Patriots' Day), June 24th (Québec National Holiday), Canada Day, Labour Day, Thanksgiving, and Christmas Day) |
| Paid vacation | Two consecutive weeks after one year of service (4% of wages as annual leave indemnity or vacation pay), plus one separate one week unpaid leave if requested by the employee; three weeks after five years of service (6% of wages as annual leave indemnity or vacation pay) |
| Pregnancy leave | 18 weeks of job-protected leave without pay. Since January 1, 2006, employees are entitled to receive an allowance under the *Québec Parental Insurance Plan* |
| Paternity Leave | 5 weeks of job-protected leave without pay. Since January 1, 2006, employees are entitled to receive an allowance under the *Québec Parental Insurance Plan* |
| Parental Leave | 52 weeks of job-protected leave without pay. This leave is in addition to the maternity or paternity leaves. Since January 1, 2006, employees are entitled to receive an allowance under the *Québec Parental Insurance Plan* |
| Other Health and Family-Oriented Leaves | Short-term and extended job-protected absences or leaves, usually without pay, owing to sickness, organ or tissue donation for transplant, accidents or family obligations |

# The *Charter of the French Language* and the Québec Market Place

Adopted on August 26, 1977, the *Charter of the French Language* (the "French Language Charter") declares French as the official language of the Province of Québec. Among its manifold objectives, the French Language Charter aims to generalize the use of the French language in the Québec labour market by, among other things, requiring that all written communications from an employer that have an impact on its contractual relationship with its employees be drawn up in French. These communications may also be drawn up in a language other than French, at the request of the parties.

Québec employees are entitled to carry on their activities in French and may not be dismissed or laid-off on the sole basis that they are exclusively French-speaking or have insufficient knowledge of a language other than French. Furthermore, an employer may not make the knowledge of a language other than French a condition of obtaining employment, unless the nature of the duties requires such knowledge.

The French Language Charter applies to all corporations doing business in Québec. In addition to its general requirements, the French Language Charter also contains specific requirements regarding "francization of enterprises" that apply to corporations with 50 or more employees in Québec. According to these requirements, corporations that employ 50 employees or more for a period of six months must register with the *Office québécois de la langue française* (the "OQLF") and are obliged to conduct an analysis of their language situation with the assistance of the OQLF. If the OQLF concludes, after reviewing the corporation's analysis, that the use of French is generalized at all levels of the corporation, it will issue a francization certificate. However, if the OQLF concludes that the use of French is not generalized, the corporation is required to submit a plan outlining how it intends to generalize the use of French within the corporation. Corporations with 100 employees or more are further required to form a francization committee whose mandate is to ensure that the use of French remains generalized within the enterprise. Refundable tax credits are available for eligible employers.

# Termination of employment in Québec

Termination of employment is one of the most significant areas of employment law. Usually, the analysis of a termination begins with an examination of whether there is a serious reason for the termination, followed by an assessment of the employer's obligations in connection with the termination. The notion of "serious reason" is found in the *Civil Code of Québec* (the "CCQ") and is the equivalent of the common law notion of "cause".

## Termination for serious reason

There is no employment "at will" in Canada. An employer is generally only entitled to dismiss an employee from employment without notice where it has a serious reason in law to do so.

There is no end to the various types or degrees of conduct or misconduct that can constitute a serious reason for termination of the employment. Single incidents of serious misconduct that constitute a serious reason do occur from time-to-time. For example, employees are sometimes caught stealing or misappropriating significant assets or resources from their employer. In such cases, where strong evidence of the theft or misappropriation is obtained, a serious reason for the termination of the employment may exist. However, such cases are relatively rare.

Normally, serious reason or potential serious reason cases arise in the context of much less serious conduct, such as attitude, attendance or job performance problems. A serious reason may exist in these cases, but usually only if the employee has continuously failed to meet the employer's reasonable, expressed expectations, despite repeated warnings to the contrary. In that regard, the Courts (and other authorities of Québec) generally require the employer to provide a series of progressive, clear, written warnings to the employee regarding the employee's unsatisfactory conduct and the need to improve or correct that conduct before terminating the employment relationship for a serious reason. The employee should be notified that the employment relationship is in jeopardy as a result of the maligned conduct, and should be given a reasonable opportunity to improve or correct the conduct before being dismissed for a serious reason.

As should be clear from the foregoing, termination of employment for a serious reason is considered exceptional, and a substantial burden is placed on an employer to establish that it has a serious reason to end the employment relationship without notice or pay in lieu of notice.

## Termination without a serious reason

In the absence of a serious reason for dismissal, employers must generally provide employees with working notice of termination of employment or pay in lieu of notice.

However, unlike other Canadian provinces, the Québec legislature extended job protection measures to employees with two or more years of uninterrupted services for the same employer, similar to the "grievance right" enjoyed by unionized employees. Once an employee reaches this benchmark period, an employer cannot terminate him or her without a "good and sufficient cause". Examples of good and sufficient cause include those related to the enterprise itself, such as a decline in business, reorganizations, implementation of a new technology, and sale of the enterprise. Other examples of good and sufficient cause may focus on the employee, and include misconduct, bad attitude, insufficient performance and incompetence. As such, in Québec and unlike the other Canadian provinces, an employer cannot simply terminate an employee with over two years service on a simple "without cause" basis. There needs to be good and sufficient cause to terminate and, unless the threshold of serious reason is also reached, there must also be notice or pay in lieu of notice.

If an employee believes that he or she was dismissed without good and sufficient reason, the ALS entitles him or her to file a complaint, within 45 days of his or her dismissal, to the *Commision des normes, de l'équité, de la santé et de la sécurité du travail* (the "CNESST"); the complaint, if not resolved earlier, will be adjudicated by the Administrative Labour Tribunal (in French it is called the *Tribunal Administratif du travail*, and referred to as the "TAT"). Employees may use, without charge, the CNESST in-house lawyers throughout this process.

The TAT has broad discretion in deciding these cases. If the TAT concludes that the employee was dismissed without good and sufficient cause, it may order his or her reinstatement, order the employer to compensate him or her for the wages he or she would have earned had he or she not been dismissed, and/or render any other decision it believes to be fair and reasonable in the circumstances. The foregoing is not applicable to senior managerial personnel; that is, a person who participates actively in the strategic orientation of the company, who works closely with its direction personnel, etc. Furthermore, this recourse is not applicable when the dismissal was done for economic reasons.

In Québec, an employee's entitlements on termination without a serious reason arise from three potential sources:

a. Minimum standards established in the ALS;

b. the right to reasonable notice of termination provided for in the CCQ; and

c. termination provisions in an enforceable written employment contract.

Each of these is briefly discussed below.

## A. The ALS

The ALS sets out minimum standards for individual notice of termination and lay-offs for a period of more than six months. This obligation is not applicable when the employee (i) has less than three months of uninterrupted service, (ii) whose contract for a fixed term or for a specific undertaking expires, (iii) has a committed a serious fault (which is a significantly higher threshold than good and sufficient cause) and (iv) for whom the termination or the layoff is a result of superior force.

### Notice of Termination

The ALS provides minimum standards for individual notice of termination and collective dismissals.

An employer can comply with the notice requirements under the ALS by providing working notice, compensatory indemnity in lieu of notice or a combination of both. During the statutory notice period of a collective dismissal, the employer must maintain group health and welfare benefits, whether or not the employer chooses to provide working notice or an indemnity in lieu of notice.

### Individual Notice

Individual notice of termination requirements are based on the length of the employee's period of employment, as follows:

| Period of employment | Length of notice |
|---|---|
| Less than three months | no notice |
| Three months or more, but less than one year | one week |
| One year or more, but less than five years | two weeks |
| Five years or more, but less than ten years | four weeks |
| Ten or more | eight weeks |

### Collective Dismissals

A different set of requirements must be complied with in the case of a collective dismissal. A collective dismissal occurs when an employer terminates the employment of 10 employees or more or lays-off at least 10 employees of the same establishment for more than 6 months in the period of a 2 consecutive months. Those requirements do not apply to (i) a layoff of employees for an indeterminate period, but in fact less than 6 months, (ii) in respect of a business whose activities are seasonal or intermittent, and (iii) in respect of a business affected by a strike or lock-out.

Depending on the number of employees dismissed within that period, the notice of collective dismissal requirements range from 8 weeks to 16 weeks for each employee (regardless of their period of employment). The individual notice and the notice of collective dismissal are not cumulative. If the employer provides no notice or insufficient notice, the employee is entitled to claim the higher of the indemnities paid in lieu of individual notice or collective dismissal.

An employer undertaking a collective dismissal must also comply with certain statutory obligations, including the filing of a notice of collective dismissal to the *Ministère du Travail, de l'Emploi, et de la Solidarité sociale, Direction générale des opérations d'Emploi-Québec*. This notice requires the employer to provide information about the collective dismissal, including the number of affected employees, the sector of activity of the business and the reason(s) for the collective dismissal.

## B. The Common Law: Reasonable Notice

The entitlements to notice of termination established by the ALS are minimum standards only: greater obligations may be imposed by the terms of an employment agreement or, in the absence of an agreement, by common law. In the Province of Québec, the common law is found in the CCQ.

When an employer intends to terminate an employment contract with an indeterminate term without alleging a serious reason, it must provide the employee with reasonable notice of termination or an indemnity in lieu of notice, the delay of which is not established by the CCQ. Although an employment contract may contain provisions addressing the issues of the notice of termination and/or pay in lieu of notice, the CCQ contains a public order provision (a provision to which parties cannot contract out of) that renders unenforceable any employee renunciation of the right to obtain compensation for injury suffered where insufficient notice of termination is given or where he or she is victim of an abusive termination. As a result, unless an employee freely consents to a release at the time of termination and declares himself or herself satisfied of the notice of termination or payment in lieu thereof, any provisions contained in an employment contract regarding notice or pay in lieu of notice may be challenged by the employee.

Reasonable notice provided for in the CCQ is usually greater than statutory entitlements to notice. The determination of reasonable notice varies from case-to-case, and is dependent upon a number of factors, including the following:

- the employee's age;
- the position and responsibilities held by the employee;
- the length of the employee's service;
- the quantum of the employee's remuneration; and
- the availability of replacement employment.

A rough rule of thumb in respect of reasonable notice is that a managerial or professional employee is entitled to a month of notice, or pay in lieu of notice, for each year of service. This, however, is a very rough rule, and some courts have expressly disapproved of the use of it.

At the lower range of service, awards of notice for managerial and professional employees are generally greater than one month per year of service, whereas at the higher range of service, the awards are often less than one month per year.

When dealing with non-managerial or non-professional employees, the common law entitlement to notice may be in the range of two to three weeks per year of service, although it may vary from that range.

Is there a "maximum" notice entitlement at common law? A 24-month "cap" on notice has been acknowledged by some courts, and is rarely exceeded. This level of award is generally reserved for employees of very long service who are at a professional or managerial level.

It is sometimes said that determining reasonable notice for employees is more of an art than a science. Employers are encouraged to avoid formulaic approaches to assessing notice obligations, but rather to obtain legal advice on a case-by-case basis.

A claim for damages brought pursuant to the CCQ in connection with the failure to provide reasonable notice includes claims for all compensation that should have been provided during the period of notice, less any income from alternative employment (or self-employment) earned during the notice period. An employee has a duty to mitigate his or her damages and must therefore attempt to find new sources of revenue. Failure to comply with said duty may induce Courts to reduce the quantum of the amount granted. However, employees are entitled, at a minimum, to the notice, or compensatory indemnity in lieu of notice, provided for in the ALS, regardless of whether they have mitigated the loss of their employment.

Reasonable notice of termination at common law is inclusive of minimum statutory notice under the ALS. Again, the common law notice entitlement can be satisfied by way of working notice, pay in lieu of notice or a combination of both.

It should be noted that the common law principle of reasonable notice does not apply to unionized employees. A unionized employee's entitlements on termination are derived from only two sources: the right to notice provided for in the ALS and any rights contained in an applicable collective agreement.

Courts in Québec have also recognized that employers are held to a duty of good faith and fair dealing when terminating a person's employment. At a minimum, employers are expected to be fair, candid and compassionate in the manner of dismissal and not, for example, to allege a serious reason for the termination without such reason. Failure to do so may result in an award that will translate into a lengthened reasonable notice period. The legal source of this award derives from the obligation to exercise civil rights in good faith, codified in the CCQ, rather than the employee's right to a reasonable notice of termination. Furthermore, in such situations, Courts may (and usually do) also grant moral damages. Punitive damages may be awarded where there is evidence that the employer, in terminating an employee, intended to interfere with one or more of the employee's rights under the Québec *Charter of Human Rights and Freedoms* (the "Charter").

## C. Contract

The parties to every employment relationship have an employment contract with one another, whether they realize it or not. An employment contract or agreement need not be in writing but may in fact be oral or implied. The terms of the employment agreement may provide for such matters as the length of the employment relationship, and the obligations arising in connection with the termination of the relationship. Generally, however, the terms of the employment agreement relating to such matters must be reduced to writing in order to be enforceable.

It should be clear from the foregoing summary of common law entitlements that it is generally advisable, if possible, to enter into properly-drafted written agreements with employees, that define (and limit) employee entitlements upon termination of employment. Otherwise, a dismissal can be an uncertain and expensive exercise.

However, unlike the common law provinces, the benefits of a properly drafted employment agreement in Québec are more limited. As explained earlier, in Québec, an employee cannot renounce the right to obtain compensation for any injury suffered where insufficient notice of termination is given or when he or she is a victim of an abusive termination. In addition, provisions of an employment contract may be declared null and void if a Court concludes that the provisions are abusive and the contract was a "contract of adhesion", that is, a contract in which the essential provisions were imposed or drawn up by one of the parties and were not negotiable. Finally, employment contracts in Québec may be drawn up in English at the request of the parties. As such, and given the French Language Charter, it is good practice to insert a language clause pursuant to which both parties to the contract expressly acknowledge that they have required and consented that the contract be prepared in a language other than French.

Employers are advised to consult with employment law counsel when preparing employment agreements.

# Discrimination and the Charter

Prior to the introduction of human rights legislation in Canada, freedom of contract reigned supreme. The notion of discrimination in contract, employment, housing or services was historically rebutted at common law. In response, comprehensive human rights statutes were introduced in Canadian jurisdictions as early as 1962.

On June 27, 1975, the Québec National Assembly adopted the Charter, which came into force on June 28, 1976. The Charter is inspired by the *Universal Declaration of Human Rights*, the United Nations' *International Covenant on Civil and Political Rights* and the United Nations' *International Covenant on Economic, Social and Cultural Rights*. Unlike other Canadian provinces, in addition to fundamental civil and political rights, the Charter also covers social and economic rights, such as the right to free public education, to information, to financial assistance, to fair and reasonable conditions of employment and to a healthy environment. However, unlike the other civil and political rights protected by the Charter, the social and economic rights do not take precedence over the other laws and regulations adopted by the Québec National Assembly.

In Québec, employers subject to provincial law must abide by the provisions of the Charter. Employers operating out of other provinces or who are subject to federal law must abide by the provisions of the human rights legislation in those jurisdictions, which, for the most part, are based on the same principles as Québec's Charter.

## Purpose of the Charter

The Charter is a provincial law that sets out the civil, political, social and economical rights of Québec citizens and confers equal rights and opportunities without discrimination in specific areas such as jobs, housing and services.

## Prohibited grounds of discrimination

The Charter, subject to numerous exceptions and qualifications, prohibits numerous "grounds of discrimination." The list of prohibited grounds of discrimination in Québec is considerably more extensive than in other comparable legislation in North America. Fourteen prohibited grounds of discrimination, all applicable in the employment context, are listed in the Charter: race, colour, sex, pregnancy, sexual orientation, civil status, age (except as provided by law), religion, political convictions, language, ethnic or national origin, social condition, a handicap and the use of any means to palliate a handicap. Harassment in the workplace based on any of these grounds is equally prohibited.

The right to "equal treatment with respect to employment" covers things such as applying for a job, being recruited, training, transfers, promotions, terms of apprenticeship, dismissal and layoffs. It also covers rates of pay, overtime, hours of work, holidays, benefits, shift work, discipline and performance evaluations.

## Direct and indirect discrimination

Both direct and indirect discrimination are prohibited under the Charter. Direct discrimination arises where a requirement or qualification is on its face discriminatory. "ABC Co. looking

for strong men for yard work" is a clear example of direct discrimination as it excludes women from the selection process, and thus constitutes discrimination based on sex.

Indirect discrimination arises when a requirement or qualification, although not discriminatory on its face, has an adverse effect on a person identified by any one of the prohibited grounds of discrimination. "ABC Employer seeks applicants for great position. Applicants must have perfect vision." The requirement of "perfect vision" would have an adverse effect on the visually challenged, and therefore could constitute discrimination on the basis of handicap.

## Bona fide occupational requirement and duty to accommodate

A discriminatory standard, requirement or qualification may be justified in certain circumstances, but only if it can be established that the discriminatory standard, requirement or qualification:

a. is rationally connected to the function being performed;

b. was adopted in an honest and good faith belief that it was necessary to the fulfilment of that purpose; and

c. the individual cannot be accommodated without causing undue hardship to the employer, taking into account factors such as cost, financial assistance, if any, and health and safety concerns, if any.

## Complaint and adjudication process

An individual who has reason to believe that he or she has been discriminated against can pursue the matter by filing a complaint with *Québec's Commission des droits de la personne et de la jeunesse* (the "Commission"), setting out the particulars of the allegation. They may also institute legal proceedings in civil common law courts (which is a longer and more costly process). In a unionized environment, the arbitrator of grievances has the exclusive jurisdiction to adjudicate discrimination complaints that relate to the interpretation or the application of a collective agreement.

The Commission has the power to refuse or to cease to act for the complainant on preliminary grounds (e.g. the complaint is frivolous, made in bad faith, etc.). If, on its face, the complaint appears to be warranted, the Commission will conduct an investigation and advise all the interested parties accordingly. The Commission does not adjudicate complaints and may, during or after the investigation, refuse to pursue the complaint.

If, after investigation, the Commission concludes that the complainant was a victim of discrimination and no settlement is reached between the interested parties, the Commission will refer the complaint to the Tribunal des droits de la personne (the "Tribunal"), which is the administrative tribunal responsible for adjudicating human rights complaints under the Charter. The Commission acts, without charge, for the complainant in the proceedings before the Tribunal.

## Potential remedies/damages

If the Tribunal finds that there has been a breach of the Charter, it may exercise its broad remedial powers. For instance, it can order:

a. reinstatement of employment;

b. compensation for past wage losses or compensation in lieu of reinstatement;

c. compensation for other lost employment benefits such as pension or medical benefits;

d. compensation for moral damages (injury to dignity, feelings and self-respect);

e. the award of punitive damages where the employer interfered intentionally with one or more of the employee's rights protected by the Charter;

f. the implementation of an anti-discrimination policy; and

g. other more general measures designed to prevent future discriminatory practices.

It is public policy in Québec to preserve and recognize the inherent dignity and self-worth of every individual regardless of the individual's colour, sex, etc. Employers are well advised to take human rights into consideration when defining and developing hiring, recruitment and promotional practices, and other employment policies.

# *An Act Respecting Industrial Accidents and Occupational Diseases*

Most employers in Québec are covered under the *Act Respecting Industrial Accidents and Occupational Diseases* (the "AIA"), which is the provincial mandatory, no-fault compensation insurance scheme for worker injuries arising out of, or in the course of, employment.

As the product of historical bargaining between workers and employers, the AIA provides for benefits to workers injured in the course of employment or disabled by specified industrial diseases. In exchange, workers relinquish their rights to commence civil actions against employers for negligence

causing bodily or other types of harm if their AIA claims are covered under the insurance plan.

## Administration

Administration of the AIA rests with the CNESST. The CNESST adjudicates claims, dispenses benefits, manages early and safe return to work programs and generally mediates and adjudicates disputes between employers and workers concerning workers' compensation and their rights and obligations under the AIA.

Employers or workers discontent with a final decision of the CNESST may have a right of appeal to the TAT. Appeals must be filed within prescribed time limits.

## Who is covered?

As noted, the vast majority of employers in Québec are covered under the AIA. In fact, every employer that has an establishment in Québec in which at least one employee is working must register with the CNESST. Sole proprietors, partners, independent contractors and directors of a company, who are generally not subject to the AIA, may also voluntarily elect coverage.

## Registration

Employers subject to the AIA must register their businesses within 60 days after the beginning of their activities and, at that time, inform the CNESST of the nature of their activities. Failure to do so could lead to a prosecution under the AIA and, if convicted, a fine. Furthermore, non-compliant employers are required to pay retroactively the premiums they should have paid to CNESST, with interest.

## Premiums

Employers collectively fund the AIA insurance program by way of premiums. An employer who comes within the scope of the AIA is required to contribute, while others who are not may elect to do so. Different costs, rights and protections apply to those who do not come within the scope of the AIA but nonetheless elect for coverage.

For administrative purposes, employers are divided into industry classes and subclasses, depending on their hazard potential. Premiums are based on regular assessments, which take into account factors such as payroll, industry classification (i.e. hazards) and experience ratings. Thus, employers judged more likely to cause compensable injuries contribute a proportionally greater share to the accident fund.

## Compensable injuries

Not all injuries, illnesses or accidents are compensable under the insurance plan. A worker (or his or her beneficiary, as the case may be) who is injured or dies as a result of a work-related accident, or suffers a work-related illness, generally qualifies for benefits. Entitlement, however, may be denied if the injury is due solely to wilful misconduct, unless it results in severe injury or death.

## Claims

A worker who sustains an injury or becomes ill as a result of being exposed to hazardous substances in the workplace must notify his or her employer as soon as possible to begin the claim process. Upon learning of a workplace injury or illness, the employer must submit the prescribed form to the CNESST two days after the date on which the worker returns to work if he or she does so within 14 days, or within 14 days after the beginning of the worker's inability to return to work.

Depending on the nature and gravity of the accident, employers are required to report workplace accidents or fatalities to committees, representatives and the CNESST within prescribed time periods. These periods range from 24 hours to 16 days.

In any event, workers must submit their claims for benefits within a period of six (6) months from the date of the accident or learning of their illness. The CNESST may in some circumstances extend the timeframe.

## Compensation benefits

If the CNESST approves a claim, the worker may be eligible for any of the following benefits depending on the circumstances and nature of the injury/illness:

## Retaliation

A worker who has sustained a workplace injury or illness and is receiving or has received benefits as a result is entitled to be free from retaliation from the employer.

## Bar against civil actions

AIA benefits replace and preclude a worker's right to commence a civil action against the employer, save and except for prescribed exceptions.

It should also be noted that the AIA confers various rights and duties to both workers and employers. It is therefore always important to refer the AIA in employment relationships.

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|---|---|
| Income replacement indemnity | Workplace insurance presently pays workers 90% of their net income, up to a maximum insurable coverage of $71,500 per year (as of January 1, 2016). The CNESST regularly revises the threshold of insurable earnings. |
| Compensation for bodily injury | Workers who suffer a permanent physical or psychological impairment are entitled to receive compensation for bodily injury that takes into account the anatomophysiological deficit, the disfigurement resulting from the impairment and the suffering and loss of enjoyment of life resulting from the deficit or the disfigurement. |
| Health care | Costs for health care services may be paid by workplace insurance (e.g. doctor's or chiropractor's visits, prescription drugs, etc.). |
| Return to work assistance | The CNESST assists workers and employers in facilitating workers' early and safe return to work following injuries or illnesses. Employers are required to reinstate certain workers back into their employment. When an employer is incapable of re-employing a worker after an injury or illness, the CNESST may provide programs to help the worker re-enter the workforce in another job or business. |
| Survivor benefits | The CNESST provides three types of benefits to the survivors of a worker who dies as a result of a workplace accident or injury:<br>a. Survivor Payments to the widowed spouse (lump sum up to $214,500 and monthly payments up to $2,307.92) and, in some circumstances, to his children;<br>b. Funeral and transportation costs; and<br>c. A general indemnity of $2,101. |

# *An Act Respecting Occupational Health and Safety*

Employers and employees both have a vested interest in workplace health and safety. Accordingly, occupational health and safety legislation across Canada generally places reciprocal rights and obligations on management and employees in an effort to ensure that Canadian workplaces are safe and healthy environments.

In Québec, occupational health and safety is regulated by *An Act Respecting Occupational Health and Safety* (the "AHSA"). Like most other occupational health and safety legislation in Canada, the AHSA sets out a comprehensive code of conduct for both management and employees, all in the interest of health and safety in the workplace.

The AHSA sets out the rights and duties of management and workers generally, while the Regulations enacted under the AHSA prescribe specific rights and obligations applicable to a variety of different workplaces, industries and a number of toxic substances. The AHSA may not apply to certain workplaces, and thus reference to the statute is always recommended.

## Administration and enforcement

As with the AIA, the CNESST also administers the AHSA. Inspectors are nominated under the AHSA to enforce its provisions, to inspect workplaces for compliance and to investigate serious accidents or workplace fatalities.

Québec workplaces are subject to routine compliance inspections and investigations. Inspectors possess extensive statutory powers, including, among others, the authority to: enter any workplace, question any individual, handle, use or test any equipment or machinery, inspect documents, take photographs and issue compliance orders.

## General rights and duties

The AHSA attempts to balance the general right of management to direct its workforce and control its production process with workers' legitimate concerns for health and safety. Aside from the multitude of specific duties imposed on employers in the Regulations enacted under the AHSA, employers are guided by an all-encompassing duty to take all reasonable precautions to protect the health and safety of workers. This general duty is also found in the CCQ; further, the Charter provides that workers have a right, in accordance with the law, to conditions of employment that have proper regard to their health, safety and physical well-being.

Recognizing that responsibility for health and safety in the workplace does not solely rest with employers, the AHSA is guided by four basic, two-pronged tenets: (1) the right to participate; (2) the right to know; (3) the right to refuse work and (4) the right to stop work.

## The right to participate

As noted above, employers and workers share mutual obligations and rights for health and safety in the workplace. Thus, although liability for health and safety in the workplace may ultimately rest with employers (and owners, corporate directors and officers, contractors and suppliers of equipment, etc.), workers also have extensive roles in ensuring safe and healthy workplaces.

Worker participation is generally done through a joint health and safety committee or, for certain categories of employers as defined by the Regulations, by a safety representative. The committee/representative works alongside the employer to oversee and enforce health and safety procedures in the workplace. Specifically, some of their responsibilities include:

1. identifying workplace hazards;
2. keeping registers of work accidents, occupational diseases and incidents that could have caused them;
3. making recommendations on ways to improve workplace health and safety; and
4. investigating accidents.

The AHSA places a general duty on employers to cooperate with and assist joint health and safety committees or representatives to carry out their statutory obligations. However, not all workplaces are required to have joint health and safety committees or representatives. The AHSA sets out specific thresholds as to when committees or representatives are required, and further defines rules respecting appointment of workers in joint health and safety committees.

## The right to know

Workers have the right to know about any potential or real hazards to which they may be exposed. This extends to a right to be trained and to have access to information on machinery, equipment, working conditions, processes and hazardous substances.

As a corollary to this right, employers are required under the AHSA to, among other things:

1. instruct, inform and supervise workers to protect their health and safety;
2. ensure that the organization of the work and the working procedures and techniques do not adversely affect the safety or health of the worker; and
3. comply with all prescribed duties, i.e.:

a. provide and maintain in good condition any prescribed equipment, materials and protective devices;

b. in accordance with the regulations, keep and maintain a register of risks related to certain jobs; and

c. give to interested parties, including employees, the health and safety committee and the CNESST, the list of the dangerous substances used in the establishment and of the contaminants that may be emitted;

Finally, the AHSA also imposes various duties and obligations on owners, corporate officers and directors, contractors and suppliers who service equipment or machinery.

## The right to refuse work

Workers are entitled to refuse work or to refuse to work with machinery or equipment if they believe it is dangerous to either their own health and safety or the health and safety of another person. If a worker refuses work, the worker must immediately inform the worker's supervisor or employer, without retaliation by the employer.

The AHSA sets out specific procedures that must be followed in the event of a work refusal. In short, the AHSA mandates an internal investigation process, which involves the worker and any one of the following: a joint committee member, a safety representative or another worker. If the investigation does not resolve the work refusal, then either the employer or worker must require the intervention of a CNESST inspector to investigate and resolve the work refusal.

The ASHA spells out in great detail the worker's and employer's rights and obligations during a work refusal. Reference should be made to the AHSA should a work refusal arise.

## The right to stop work

In exceptional circumstances, an inspector may order a work stoppage or the complete or partial shut-down of a workplace if he or she considers that a worker's health,

safety or physical well-being may be in jeopardy.

### The right to protective re-assignment

An employee may request to be re-assigned to other duties if he or she provides a certificate attesting that, by being exposed to a contaminant during his or her work, in view of the fact that his or her health shows sign of deterioration, exposure to the contaminant endangers his or her well-being. If the employer is not in a position to offer new duties to the employee that do not endanger his or her health, the employee, during his job-protected leave, will receive for a period of no more than one year an income replacement indemnity as if he or she had been subject to a work accident or occupational disease. The costs of this leave are imputed to the employer as for a normal work accident or occupational disease.

### Preventive leaves for pregnant workers or workers who are breast-feeding

A pregnant worker or a worker who is breast-feeding who provides to her employer a certificate attesting that her working conditions may be dangerous to her unborn child or to herself by reason of her pregnancy, or to her child who she is breast-feeding, may request re-assignment to other duties involving no such danger. If the employer is not in a position to offer new duties to the employee, the employee, during her job-protected leave, will receive an income replacement indemnity as if she had been subject to a work accident or occupational disease, but those indemnities will cease to be paid to her from the fourth week before the week of the expected date of delivery if she is eligible for benefits under the Act Respecting Parental Insurance. Unlike the right to protective re-assignment for dangers related to contaminants, the costs of the income replacement indemnity is in these cases are imputed to all employers.

## Reporting Obligations

Depending on the nature and gravity of the accident, employers are required to report workplace accidents or fatalities to committees, representatives and the CNESST within prescribed time periods, which range from 24 hours to 16 days.

## Offences and Penalties

The AHSA can be enforced against anyone who has any degree of control over a workplace, materials or equipment found in a workplace, or control over the direction of the workforce.

If the internal self-enforcement mechanism of the AHSA fails to adequately address any health and safety issues in a workplace, or if the AHSA or Regulations are not complied with, the CNESST has the authority to enforce the law.

The CNESST may prosecute any person for a violation of the AHSA or its Regulations, or for failing to comply with an order that is rendered by an inspector or any other person pursuant to the AHSA.

Presently, if prosecuted and convicted of an offence under the AHSA, an individual (i.e. supervisors, directors and officers) can be fined up to $3,000 for a first offence. The maximum fine for the first offence of a corporation is currently $60,000.

In addition, Canada's *Criminal Code* contains provisions that could expose supervisors and other employees to criminal liability in the case of a workplace accident. The *Criminal Code* provides that anyone who directs an individual to do work, or has the authority to do so, has a legal duty to take reasonable steps to prevent bodily harm. A supervisor could be charged criminally if that legal duty is not upheld, resulting in a fine, imprisonment, or both.

# *Employment Insurance Act*

Most Canadian workers and employers contribute to a statutory income replacement insurance program administered under the authority of the *Employment Insurance Act, 1996* (the "EIA"). The insurance scheme is entirely funded by employer and employee premiums, which are calculated based on "insurable earnings," a defined term in the EIA. As a general rule, most employment in Canada is insurable unless specifically stated otherwise in the EIA.

Under the system, employers are required to withhold a certain percentage of employees' insurable earnings, and remit them into the fund, up to a prescribed maximum insurable amount.

The following highlights basic obligations imposed on employers. It is intended to assist managers and human resource professionals in responding to enquiries that are made from time to time from employees contemplating sick, maternity or parental leave.

## Eligibility and types of benefits available

There are essentially five (5) types of benefits available under the EIA, each intended to provide temporary income support in different circumstances. They are:

### 1. Regular benefits

An employee who has lost his or her job through no fault of his or her own (i.e. a layoff) may be eligible for income

replacement benefits known as regular benefits. If eligible, the claimant may be paid regular benefits for a period of 14 to 45 weeks, depending on the employment rate in the claimant's region at the time of filing the claim and the amount of insurable hours the claimant has banked. Eligible claimants must first observe a two week unpaid waiting period before receiving benefits.

To qualify for regular benefits a claimant must have been without work and without pay for at least seven consecutive days and have worked the minimum prescribed number of insurable hours in the 52 weeks immediately prior to the claim. The minimum number of insurable hours required to qualify for regular benefits varies from region to region and from time to time, thus reference should be made to the EIA and its Regulations. The number of weeks for which benefits are payable to eligible claimants is contingent on the amount of insurable hours worked and the unemployment rate in the claimant's region, which again change from time to time.

### 2. Sick benefits:

An employee whose earnings are interrupted as a result of illness, injury or quarantine may apply for sick benefits. Sick benefits are payable to eligible claimants for a maximum period of 15 weeks, less a two week unpaid waiting period, for a net total of 13 weeks.

To qualify for sick benefits, the claimant must have accumulated at least 600 insurable hours in the previous 52 weeks or since the person's last claim. Qualifying requirements are amended from time to time. Thus reference to the EIA is always recommended.

### 3. Maternity benefits:

Since January 1, 2006, the Province of Québec is responsible for providing maternity benefits to its residents through the *Québec Parental Insurance Plan* ("QPIP") administered by the Ministry of Labour, Employment and Social Solidarity of Québec ("MLESSQ"). Québec residents must contact the MLESSQ if they desire to claim maternity benefits.

In order to be eligible, claimants must have at least $2,000 of insurable income during the 52 weeks preceding the maternity leave and must have paid QPIP premiums during that time. Eligible claimants are entitled to 18 weeks of maternity pay at a rate of 70% of their average weekly income.

### 4. Parental benefits:

Québec residents must meet the same eligibility criteria as with Maternity benefits and must address their application to the MLESSQ to receive parental benefits. Eligible claimants are entitled to 7 weeks of parental pay at a rate of 70% of their average weekly income, and a further 25 weeks of parental pay at a rate of 55% of their average weekly income.

### 5. Compassionate care benefits

An individual who has accumulated at least 600 insurable hours in the last 52 weeks (or since their last benefits claim) can receive compassionate care benefits of up to a maximum of 6 weeks if the person has to be absent from work to provide care or support to a gravely ill family member at risk of dying within 26 weeks. Compassionate care benefits are available for the care of a prescribed list of individuals, and may be shared with other members of an individual's family. A medical certificate must be provided to establish the entitlement.

The EIA sets out various rules, requirements, limitations and exceptions that may affect entitlement to income replacement benefits, which are frequently amended from time to time. Therefore, reference should always be made to the EIA and its Regulations.

## Benefits - quantum

At the time of drafting, the basic benefit rate under the EIA is 55 percent of a claimant's average insured earnings up to a maximum amount set out in the legislation. The EIA sets out a specific formula for calculating "average insured earnings." Moreover, benefit rates are often amended, so regular reference to the EIA is advised.

Benefits under the EIA are considered taxable income; therefore, provincial and federal taxes will be deducted.

Claimants are entitled to earn up to a certain allowable amount while receiving income replacement benefits under the EIA, without affecting their benefit entitlement. Any monies earned over and above the allowable amount will be deducted dollar for dollar from the benefits.

## Employer Obligations

The EIA sets out a number of obligations for employers. Particularly, employers are required to:

1. issue a Record of Employment within five calendar days after the later of: (a) the first day of the interruption of earnings; and (b) the day on which the employer becomes

aware of the interruption of earnings;

2. keep records of insurable hours worked for each employee, for a period of six years after the relevant year for which the records relate (since benefits are based on an hourly qualification system);

3. deduct and remit employment insurance premiums for each dollar of insurable earnings up to the yearly maximum; and

4. report severance payments, if any, paid to dismissed employees.

In addition to the foregoing, the EIA sets out a number of other obligations and offences, breach of which could lead to penalties, fines and prosecution. Thus, reference should be made to the EIA and its Regulations should issues arise.

## Administration

The Employment Insurance Commission (the "EIA Commission") oversees the EIA and manages the insurance fund. Human Resources and Social Development Canada administers income replacement benefits to eligible employees.

If an employer or a claimant disagrees with the EIA Commission's decision to either deny or grant income replacement benefits, then either party can appeal the decision within prescribed time limits to the adjudicative bodies authorized under the EIA to hear the appeal(s).

# A cautionary note

The foregoing provides a summary of aspects of Canadian law that may interest investors considering doing business in Canada. A group of McMillan lawyers prepared this information, which is accurate at the time of writing. Readers are cautioned against making decisions based on this material alone. Rather, any proposal to do business in Canada should most definitely be discussed with qualified professional advisers.

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# About McMillan

McMillan is a leading business law firm serving public, private and not-for-profit clients across key industries in Canada, the United States and internationally. With recognized expertise and acknowledged leadership in major business sectors, we provide solutions oriented legal advice through our offices in Vancouver, Calgary, Toronto, Ottawa, Montréal and Hong Kong.