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Labour and Employment

COMMENTS ON BILL 35 ENTITLED

"AN ACT TO MODIFY THE OCCUPATIONAL HEALTH AND SAFETY REGIME, PARTICULARLY IN ORDER TO INCREASE CERTAIN DEATH BENEFITS AND FINES AND SIMPLIFY THE PAYMENT OF THE EMPLOYER ASSESSMENT"

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ON APRIL 23, 2009, THE MINISTER OF LABOUR, MR. DAVID WHISSELL, INTRODUCED BILL 35 IN THE NATIONAL ASSEMBLY, AMENDING THE *OCCUPATIONAL HEALTH AND SAFETY ACT*. THE BILL WAS ASSENTED TO ON JUNE 10, 2009.

THIS BILL MAKES SIGNIFICANT AMENDMENTS BOTH TO THE *ACT RESPECTING OCCUPATIONAL HEALTH AND SAFETY* (HEREINAFTER, THE "AOHS") AND THE *ACT RESPECTING INDUSTRIAL ACCIDENTS AND OCCUPATIONAL DISEASES* (HEREINAFTER, THE "AIAOD"). THE PRINCIPAL AMENDMENTS ARE: A MODIFICATION OF THE METHOD OF LEVYING ASSESSMENTS UNDER THE AIAOD; THE CONVERSION OF CERTAIN ALLOWANCES AND BENEFITS; A GRADUAL INCREASE OF THE FINES LEVIED UNDER THE AOHS; AND THE INCLUSION OF EMPLOYEES OF EMPLOYMENT AGENCIES WITHIN TO SCOPE OF THE AOHS. THESE AMENDMENTS HAVE FOUR MAIN OBJECTIVES: INCREASE PREVENTIVE MEASURES, REDUCE FINANCIAL AND ADMINISTRATIVE CHARGES ON BUSINESSES, OFFER BETTER FINANCIAL SUPPORT TO FAMILIES, AND REDUCE BENEFITS TO INCARCERATED PERSONS.

IN THIS ARTICLE, WE WILL REVIEW THE CHANGES INTRODUCED BY THE BILL AND THEIR LIKELY CONSEQUENCES, AND HIGHLIGHT CERTAIN CRITICISMS MADE DURING THE PASSING OF THE ACT.

ENHANCE PREVENTION

INCREASE IN FINES UNDER SECTIONS 236 AND 237 OF THE AOHS.

Section 236 of the AOHS sanctions any violation of the Act or regulations, and the refusal to comply with a decision or order rendered under the Act or regulations.

Under section 237 of the AOHS, every person commits an offence who, by action or omission, does anything that directly and seriously compromises the health, safety or physical well-being of a worker.

The amendments increase the fine of legal persons provided for in sections 236 and 237 of the AOHS, doubling them as at July 1, 2010, and tripling them as at January 1, 2011. Beginning on January 1, 2012, these amounts will be reassessed on an annual basis.¹ In addition, the amendments introduce the concept of subsequent offences, which can increase the fine up to six fold the fine for a first offence. Thus, by 2011, legal persons will be subject to maximum fines under section 237 of the AOHS of \$60,000 for a first offence, \$150,000 for a second offence, and \$300,000 for a subsequent offence.

¹ Under section 237.1 of the AOHS, added under Bill 35, the amount will be revalorized using the method described in sections 119 to 123 of the AIAOD.

THE FOLLOWING TABLE ILLUSTRATES THE SCHEDULE OF CHANGES THAT WILL TAKE EFFECT IN COMING YEARS TO FINES FOR LEGAL PERSONS:

Offence	Section 236	Section 237
Current	<ul style="list-style-type: none"> • 1st offence: <ul style="list-style-type: none"> > Min.: \$500 > Max.: \$1,000 • Subsequent offence: <ul style="list-style-type: none"> > Min.: \$1,000 > Max.: \$2,000 	<ul style="list-style-type: none"> • 1st offence: <ul style="list-style-type: none"> > Min.: \$5,000 > Max.: \$20,000 • Subsequent offence: <ul style="list-style-type: none"> > Min.: \$10,000 > Max.: \$50,000
July 1, 2010 to December 31, 2010	<ul style="list-style-type: none"> • 1st offense : <ul style="list-style-type: none"> > Min.: \$1,000 > Max.: \$2,000 • 2nd offence: <ul style="list-style-type: none"> > Min.: \$2,000 > Max.: \$4,000 • Subsequent offences: <ul style="list-style-type: none"> > Min.: \$4,000 > Max.: \$8,000 	<ul style="list-style-type: none"> • 1st offense : <ul style="list-style-type: none"> > Min.: \$10,000 > Max.: \$40,000 • 2nd offence: <ul style="list-style-type: none"> > Min.: \$20,000 > Max.: \$1000,000 • Subsequent offences: <ul style="list-style-type: none"> > Min.: \$40,000 > Max.: \$200,000
Effective January 2011	<ul style="list-style-type: none"> • 1st offense : <ul style="list-style-type: none"> > Min.: \$1,500 > Max.: \$3,000 • 2nd offence: <ul style="list-style-type: none"> > Min.: \$3,000 > Max.: \$6,000 • Subsequent offences: <ul style="list-style-type: none"> > Min.: \$6,000 > Max.: \$12,000 	<ul style="list-style-type: none"> • 1st offense : <ul style="list-style-type: none"> > Min.: \$15,000 > Max.: \$60,000 • 2nd offence: <ul style="list-style-type: none"> > Min.: \$30,000 > Max.: \$150,000 • Subsequent offences: <ul style="list-style-type: none"> > Min.: \$60,000 > Max.: \$300,000
Effective January 2012	Fines will be reassessed every year using the method provided for in sections 119 to 123 AIAOD.	

According to the Minister, this measure is one of a number of measures aimed at increasing prevention, which is the best way to reduce accidents and loss of life. Furthermore, these changes are also part of a broader plan that is being implemented through various means, including advertising and awareness campaigns. The imposition of fines under the Act is one of the means of achieving this objective. Moreover, fines have not been increased or indexed since 1979. Thus, in determining the increase, the Minister assessed what the current fines would have been had they been indexed annually for the past thirty years.

This measure has been broadly contested by employers. First, it was criticized for having a significant financial impact on Quebec businesses during the current economic recession, given that they are already subject to a broader range of penal offences than businesses in the other Canadian provinces. The Conseil du patronat du Québec expressed its concerns about the implementation of these measures in a document issued in May 2009 entitled *Commentaires du Conseil du patronat du Québec*.² Other organizations, such as the Association de la construction du Québec, the Québec Forest Industry Council and the Association des constructeurs de routes et de grands travaux du Québec, have also expressed similar reluctances and concerns.

Some organizations, such as the Conseil du patronat du Québec,³ also suggested that the notion of subsequent offence be clarified (same offence, facts of the same nature, in the same establishment, on the same building site, etc.), while some organizations felt that specific parameters should be set for the imposition of fines.

Given that most businesses in Quebec are small to medium-size and that large fines might be fatal to some, result in job losses, or even cause some closures, some parties suggested that the economic viability of the business should be taken into account when imposing fines. Both the Association de la construction du Québec⁴ and the Conseil du patronat du Québec⁵ expressed fears about the financial impact of such fines on the economic viability and the hiring rate of Quebec SMEs.

Others suggested that the economic crisis was not a valid reason to delay the application of the Bill, arguing that fines would not be imposed on businesses which make the necessary efforts to improve their operations. The major labour unions of Quebec supported the Bill. Michel Arsenault, the president of the QFL, reacted positively to the Bill, stating that "[translation] although the QFL prefers prevention and rehabilitation, tripling the fines will nevertheless send a clear message to delinquent employers."⁶

² CONSEIL DU PATRONAT DU QUÉBEC, *Commentaire du Conseil du patronat du Québec*, URL : « <http://www.cpq.qc.ca/UserFiles/File/Memoires/2009/commentaires0509.pdf> », Website consulted on August 25, 2009.

³ CONSEIL DU PATRONAT DU QUÉBEC, *supra*, note 3.

⁴ ASSOCIATION DE LA CONSTRUCTION DU QUÉBEC, *Projet de loi 35 : il faut reporter l'entrée en vigueur des augmentations des amendes en SST*, URL : « http://www.acq.org/files/pdf/provincial/Presse_et_publications/Communiqués/2009/Communique_290409.pdf », Website consulted on August 25, 2009.

⁵ CONSEIL DU PATRONAT DU QUÉBEC, *supra*, note 3.

⁶ FÉDÉRATION DES TRAVAILLEURS ET TRAVAILLEUSES DU QUÉBEC, *Nouvelle*, URL : « <http://www.ftq.qc.ca/modules/nouvelles/nouvelle.php?id=1853&langue=fr> », Website consulted on August 25, 2009.

Similarly, Roger Valois, vice-president of the CSN, stated that "[translation] by providing for increased fines for delinquent employers and additional penalties for those who commit repeated offences, the Bill certainly gives them an incentive to do more prevention."⁷

Moreover, on the issue of the economic consequences of increasing the fines, during parliamentary debates, the Minister of Labour stated that the fines are not a payroll tax, but a penalty on businesses who commit a serious offence by choosing not to abide by the rules for the protection of employees.

On the other hand, some parties felt that the increase of the fines should not be based on a calculation equivalent to the indexation necessary to achieve a present value more closely resembling the level of fines in Ontario and the other Canadian provinces. For example, a first offence in both Ontario⁸ and Alberta⁹ carries a fine of \$500,000, while it is \$589,010 in British Columbia.¹⁰ In Alberta and British Columbia, the relevant laws also provide for a fine of close to \$1 million for a repeat offence.

However, fine as amended by the Bill are now getting closer to those of the other Canadian provinces, although the maximum fine of \$250,000 for a first offence in most of these provinces is substantially greater than the maximum amounts in Quebec. Indeed, the maxima in Quebec of \$60,000 for a first offence and \$150,000 for a second offence are well short of this amount.

Thus, Bill 35 was passed despite the many criticisms of the new measures. The notion of subsequent offence is also not defined in the Act. The parties must therefore still look to the case law to construe this expression.

EXTENSION OF THE AOHS TO EMPLOYMENT AGENCIES.

In the interests of better prevention, section 51.1 of the Bill expressly expands the scope of the AOHS. The purpose of the new provision is to ensure that businesses which only use replacement workers are subject to the same obligations as other businesses. This paragraph provides that: "A person who, although not an employer, retains the services of a worker for the purposes of his establishment must fulfill the obligations imposed on an employer by this Act."

EASE FINANCIAL AND ADMINISTRATIVE CHARGES ON BUSINESS.

The Bill simplifies the procedure for paying assessments that are due to the CSST. To do so, the new provisions¹¹ provide for the periodic payment of assessments once employees have provided their services. The collection of the amounts payable to the CSST will be integrated into the existing payroll deduction system managed by the Department of Revenue. The Department of Revenue will therefore collect the assessments at the same time as employee payroll deductions are collected and assessments are paid to the government. The amounts payable to the CSST will simply be transferred to it thereafter.

Therefore, employers will no longer have to estimate their payroll at the beginning of the year to pay the required amounts to the CSST according to the anticipated assessment rate, even before work is done and profits are earned.

Minister Whissell estimates that these new measures for payment of the assessments will enable businesses to save \$75 million through the elimination of some million of transactions as well as the reduction of administrative tasks and the interest that businesses must pay.

INCREASE IN BENEFITS PAID TO FAMILIES OF DECEASED WORKERS.

According to the president of the CSST, Mr. Luc Meunier, the purpose of all the changes made to the death benefits was to further harmonize the benefits with those normally paid by the SAAQ.¹²

Thus, many adjustments have been made in the benefit amounts provided under the AIAOD to increase the benefits payable to the spouse and parents of deceased workers. The lump sum paid to both parents has been increased from \$11,350 to \$49,174¹³. In addition, the Bill increases the amount currently paid for funeral expenses from \$2,836 to \$4,599¹⁴.

Lastly, Bill 35 has introduced a new benefit¹⁵ payable to dependent children of workers without a spouse in the form of a lump sum ranging from \$94,569 to \$186,000. This benefit is also payable to adult children where the deceased worker provided for more than half their needs.

⁷ CONFÉDÉRATION DES SYNDICATS NATIONAUX, *Press release dated June 10, 2009*, URL : « <http://www.csn.qc.ca/web/csn/communiquer/-/ap/Comm10-06-09> », Website consulted on August 25, 2009.

⁸ Occupational Health and Safety Act, R.S.O. 1990, c. O.1, section 66.

⁹ Occupational Health and Safety Act, R.S.A. 2000, c. O-2, section 41.

¹⁰ Workers Compensation Act, R.S.B.C. 1996, c. 492, section 217.

¹¹ Sections 315 and following of the AIAOD.

¹² Parliamentary debate, Friday, May 29, 2009.

¹³ Section 110 of the AIAOD.

¹⁴ Section 111 of the AIAOD.

¹⁵ Paragraph 101.1 of the AIAOD.

REDUCTION OF INCOME REPLACEMENT BENEFITS TO INCARCERATED WORKERS.

The AIAOD currently provides that where an incarcerated worker suffers an employment related injury while at work in prison, he is entitled to an income replacement indemnity based on his gross annual income. However, before Bill 35 came into force, the gross annual income used to calculate this benefit could not be based on an income that was less than minimum wage, pursuant to section 65 of the AIAOD. As a result, incarcerated workers received a benefit of 90% of the minimum wage. And, since the salary paid to incarcerated workers is less than minimum wage, the benefit was higher than the actual salary.

The addition of section 81.1 to the AIAOD under Bill 35 therefore removes incarcerated persons from the application of the minimum wage provision under section 65 of the AIAOD, so that the calculation of their income replacement benefit is henceforth based on their actual income and not minimum wage.

However, if the incarcerated worker is still entitled to an income replacement benefit at the end of his incarceration, it will then be calculated on the basis of the minimum wage.

In accordance with these amendments, section 65 of the AIAOD will also continue to apply to an incarcerated person in the event of his death so as to prevent section 81.1 from decreasing the death benefit payable.

CONCLUSION

While many employers have voiced their concerns over the contents and adoption of Bill 35, some labour unions were equally vocal in expressing their dissatisfaction with omissions or deletions from the Bill. Many consider that the amendments to Bill 35 do not meet certain long-standing demands for changes to the occupational health and safety regime made by a number of organizations.

In closing, we note that the objective of Bill 35 to improve prevention and achieve a corresponding reduction in work-related accidents is directly in line with the express objectives of the Act, i.e. "the elimination, at the source, of dangers to the health, safety and physical well-being of workers."¹⁶ We should see quite soon whether the amendments will have a real impact on workplace prevention or only add to the financial burden of employers.

¹⁶ Section 2 of the AOHs.

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE LABOUR AND EMPLOYMENT GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

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