

Bill 87 and the Disclosure of Wrongdoings Relating to Public Bodies

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On December 9, 2016, the National Assembly adopted Bill 87, also known as *An Act to facilitate the disclosure of wrongdoings relating to public bodies* (the "Act"). Introduced by the Minister responsible for Government Administration and Ongoing Program Review, the Act is intended to facilitate the disclosure of wrongdoing committed, or about to be committed, in relation to public bodies and to establish a protection regime against any ensuing reprisals.

The Act defines wrongdoing as any act that constitutes or consists in a contravention of a law or a regulation applicable in Québec, a serious breach of the standards of ethics and professional conduct, a misuse of funds or property belonging to a public body, gross mismanagement within a public body, including an abuse of authority, any act or omission that seriously compromises or may seriously compromise a person's health or safety or the environment, and, finally, directing or counselling a person to commit such wrongdoing.

Although the Act applies to a large number of public bodies, in particular, government departments, government enterprises, school boards, university-level educational institutions, childcare centres and public and private institutions within the meaning of the *Act respecting health services and social services*, it is noteworthy that municipalities are excluded from the Act's scope of application.

The Act will, to a large extent, be applied by the Public Protector. He or she will handle the processing of disclosures and complaints of reprisals, the management of resulting investigations, where applicable, and will file reports upon the conclusion of such audits and investigations.

More specifically, regarding reprisals, the provisions of the Act prohibit taking any reprisals against a person on the ground that he or she, acting in good faith, has made a disclosure of any such act or has cooperated in an audit or an investigation with regard to such an act. In so doing, the Act establishes a regime of protection against reprisals, as well as a presumption that the demotion, suspension, dismissal or transfer of a person, or any other disciplinary measure or measure that adversely affects such a person's employment or conditions of employment, is a reprisal.

In that same spirit, the provisions of the *Act respecting labour standards* (the "ALS") are amended so as to be harmonized with the Act. That situation will henceforth be mentioned expressly in section 122 ALS, in subparagraph 11 of the first paragraph, recognizing such reprisals as a prohibited practice within the meaning of the ALS. In such a situation, the Act provides that the Public Protector will stand aside and refer the persons concerned to the *Commission des normes, de l'équité, de la santé et de la sécurité du travail* (the "CNESST") for the processing of their complaint.

Moreover, despite the apparent similarity between that new addition and subparagraph 7 of the first paragraph of section 122 ALS, providing protection against reprisals taken on the ground of the disclosure by an employee of a wrongdoing within the meaning of the *Anti-Corruption Act*¹ or on the ground of an employee's cooperation in an audit or an investigation regarding any such wrongdoing, these cases are nevertheless mutually independent and

must be assessed by the courts according to their respective definitions of "wrongdoing" and the scope of application of each statute.

The definition of "wrongdoing" within the meaning of the *Anti-Corruption Act* requires a contravention of a law or regulation applicable in Québec necessarily involving corruption, malfeasance, collusion, fraud or influence peddling, the misuse of public funds or public property or a gross mismanagement of contracts within the public sector, or directing or ordering a person to commit such wrongdoing. Its scope of application is also wider than that of the Act.

In short, by way of comparison, wrongdoing, as defined in the Act, seems to include more situations than those arising from the definition of the same term in the *Anti-Corruption Act*. Nevertheless, the latter statute's scope of application is wider than that of the Act.

We should add that, like the provisions of the *Anti-Corruption Act*, the Act specifically includes demotion in the ambit of the presumption as enacted.²

Accordingly, to benefit from the presumption, an employee must prove his status as an employee, the reprisals of which he or she has been the victim, the fact that he or she disclosed wrongdoing within the meaning of the Act, in good faith, or that he or she has cooperated with an audit or an investigation relating to that wrongdoing, and that there is a concurrence between the two latter facts.

Once the presumption is established, the employer will have the burden of demonstrating another just, sufficient and legally unobjectionable cause for the said reprisals, in order to rebut the presumption and seek dismissal of the complaint.

Lastly, we wish to underline that the Act includes penal provisions in cases of contravention of the protection against reprisals, as well as in cases of interference with any action taken by the Public Protector. Such fines may go as high as \$20,000.00 for a natural person and \$250,000.00 for all other cases.

The Act will come into force on May 1st, 2017, in order to permit the Public Protector to establish and implement a procedure to ensure the processing of disclosures.

¹ *The Anti-Corruption Act*, Chapter L-6.1 (adopted by the National Assembly in June 2011).

² Although section 122 ALS is silent with respect to demotion, the case law has recognized such situations as being reprisals within the meaning of that section, assimilating demotion to a constructive dismissal or a transfer.

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