

Québec, May 21, 2013

Mr. Sam Hamad  
Chair of the Committee on Labour and the Economy  
Hôtel du Parlement  
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**Subject: Bill 36 – An Act respecting the Banque de développement économique du Québec**

Mr. Chair,

Part of the Québec Ombudsman's mandate is to study bills and draft regulations presented in the National Assembly or published in the *Gazette officielle du Québec*. When considered necessary, the Québec Ombudsman intervenes under section 27.3 of its constituting Act, which confers the power to call to the attention of the chief executive officer of a public body or to the attention of the Government the necessity of such legislative, regulatory and administrative reforms deemed to be of public interest.

I have therefore studied the above-mentioned bill on which the Committee is currently holding consultations, presented on April 24, 2012 by the Minister of Industrial Policy and the Banque de développement économique du Québec.

Our legislative monitoring leads us to pay special attention to changes in the status of public bodies or the creation of new public bodies, with regard to the Québec Ombudsman's jurisdiction. It is only in this perspective that I am writing to you today, leaving it to the specialized stakeholders to take a position on the expediency and implementation aspects of the creation of the *Banque de développement économique du Québec* (BDÉQ or Bank).

**1 The Banque de développement économique du Québec: A new body not subject to the jurisdiction of the Québec Ombudsman**

The BDÉQ will result from the merger of Investissement Québec – currently not subject to the Québec Ombudsman's jurisdiction – and the regional offices of the Ministère des Finances et de l'Économie (the *economy* part of the department, which belonged to the former Ministère du Développement économique, de l'Innovation et de l'Exportation, or MDEIE) – currently subject to the Québec Ombudsman's jurisdiction.

I find that, in the current version of Bill 36, the new BDÉQ will not be subject to the Québec Ombudsman's jurisdiction. Indeed, Section 14 of the *Public Protector Act*<sup>1</sup> provides that a public body is subject to the Québec Ombudsman's jurisdiction only to the extent that its staff is appointed in accordance with the *Public Service Act*<sup>2</sup>. This is not the case for the new BDÉQ, the members of whose personnel will be appointed in accordance with the staffing plan established by the boards of directors (s. 76 of the bill<sup>3</sup>). This finding led me to certain reflections, which I wish to share with you.

### 1.1. The context of the existing Investissement Québec company

The mission of the existing "Investissement Québec" company, specified in Section 4 of the *Act respecting Investissement Québec*<sup>4</sup>, is to "contribute to the economic development of Québec in accordance with the economic policy of the Government", to "stimulate the growth of investments and support employment in all regions of Québec. In order to carry out its mission, the Company supports the creation and development of enterprises of all sizes through adapted financial solutions and investments, in a complementary fashion with its partners. In accordance with the mandate it is given by the Government, the Company conducts foreign investment prospecting and carries out strategic interventions."

Sections 5 and 18 AIQ specify that, in pursuing its mission, in addition to providing financial services, the Company administers any financial assistance programs developed by the Government or designated by the Government. When it carries out mandates assigned by the Government, Section 23 AIQ mentions that the Company is required to comply with the directives given to it by the Minister of Economic Development, Innovation and Export Trade – a function exercised since September 2012 by the Minister of Finance and the Economy.

The persons eligible for the services offered by Investissement Québec are profit-seeking enterprises as well as cooperatives and other social economy enterprises. (s. 11 AIQ).

Finally, the Act specifies that the Company may make a financial service dependent on the conditions or on compliance with the contractual obligations it determines (s. 16 AIQ). If an enterprise fails to comply with these conditions, the Company may either suspend the financial service or terminate it. The Company may also increase or reduce its obligations towards the enterprise, change the terms of those obligations, or take any other step it considers necessary to preserve its rights (s. 17 AIQ).

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<sup>1</sup> Chapter P-32.

<sup>2</sup> Other bodies that do not meet this criterion are nonetheless subject to the Québec Ombudsman's jurisdiction under Section 15 of the Public Protector Act.

<sup>3</sup> The same rule applies to the Bank's subsidiaries: "76. The secretary and the other members of a company's personnel are appointed in accordance with the staffing plan established by the board of directors."

<sup>4</sup> Chapter I-16.0.1, hereinafter AIQ.

In the course of its mission, Investissement Québec offers direct services to Québec and foreign enterprises. In 2009-2010 (before the merger with Société générale de financement), over 1,600 enterprises benefited from financial support from Investissement Québec. Over 1,450 eligible enterprisers should have benefited from tax credits in 2010<sup>5</sup>. In 2011-2012, the current Investissement Québec performed “1,412 financial interventions, particularly loans, loan guarantees and investments, to support 1,116 enterprises in Québec”<sup>6</sup>.

The Company adopted *Our Commitment to Clients*<sup>7</sup>, which readily denotes direct contact and services for corporate citizens. This statement affirms that Investissement Québec employees strive to be objective and independent in their actions, and to treat their clients and partners fairly. The Company also has a complaints handling procedure<sup>8</sup> in which it undertakes that all complaints are treated diligently and impartially.

## 1.2. The context of the regional offices of the Ministère des Finances et de l'Économie

The Ministère des Finances et de l'Économie currently operates offices in 17 regions of Québec. According to the 2011-2012 annual management report of the MDEIE<sup>9</sup>, the Services aux entreprises et affaires territoriales (Business services and territorial affairs) sector of this Department (which included 17 regional directorates<sup>10</sup>), had 223 FTEs as at March 31, 2012. These offices, like the rest of the Department, are currently subject to the Québec Ombudsman's jurisdiction. They play a “front line” role with enterprises and their services, according to the Department's website, are “easily accessible in every region to help [them] strengthen [their] competitiveness and increase [their] productivity”<sup>11</sup>.

The *Déclaration de services*<sup>12</sup> presented in the *Économie* section of the website of the Ministère des Finances et de l'Économie is the Statement of Services of the former MDEIE.

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<sup>5</sup> Investissement Québec, *vosre partenaire d'affaires*, general brochure, available on the Investissement Québec website, [ <http://www.investquebec.com/fr/index.aspx?section=6> ], consulted on November 8, 2010 (no longer accessible).

<sup>6</sup> Investissement Québec, *Propulser l'entrepreneuriat pour propulser le Québec – Rapport annuel et rapport de développement durable 2011-2012*, p. 5, [Online]. [ [http://www.investquebec.com/documents/fr/publications/RAIQ\\_2011-2012\\_fr.pdf](http://www.investquebec.com/documents/fr/publications/RAIQ_2011-2012_fr.pdf) ] (consulted on May 14, 2013). [The quotation is translated.]

<sup>7</sup> Investissement Québec website [ <http://www.investquebec.com/fr/index.aspx?page=2000> ] consulted on May 14, 2013.

<sup>8</sup> *Idem*.

<sup>9</sup> Ministère du Développement économique, de l'Innovation et de l'Exportation, rapport annuel de gestion 2011-2012 – Notre expertise votre réussite, [Online]. [ <http://www.economie.gouv.qc.ca/bibliotheque/publications/page/rapports-15489/> ] Consulted on May 17, 2013.

<sup>10</sup> This sector also includes the following *directions* (directorates): Coordination régionale, Pôles et créneaux d'excellence, Développement des entreprises, Affaires économiques métropolitaines et Mission Cap Nord. The allocation of resources among the different *directions* is not specified.

<sup>11</sup> [ <http://www.economie.gouv.qc.ca/?id=136> ].

<sup>12</sup> Déclaration de services du ministère des Finances et de l'Économie, 2009 (Ministère du Développement économique, de l'Innovation et de l'Exportation) available on the page:

The Department undertakes to offer the public accessible, courteous, professional and respectful services; to treat requests rigorously; and to improve its services continuously. The Department also offers a mechanism for handling complaints<sup>13</sup>, to be filed "in complete confidentiality" with the Secretary General of the Department.

### **1.3. The characteristics of the Banque de développement économique du Québec constituted by Bill 36**

The mission of the BDÉQ is stipulated in Section 2 of the bill. It is to "support, in particular through financial interventions, the economic development of all the regions of Québec, in accordance with the Government's economic policy"<sup>14</sup>.

The purpose of combining Investissement Québec and the regional offices of the Ministère des Finances et de l'Économie is to create a "single window of delivery" in accordance with Section 3 of the bill:

"The Bank, with a view to creating a single window of delivery, sees to it that assistance services are provided to enterprises for business development and support in dealings with government departments and bodies.

These services are to include coordinating the activities of government departments and bodies regarding any project the Government considers strategic."

The BDÉQ is a mandatory of the State (s. 1). It coordinates the activities of its three subsidiaries (Développement économique Québec, Ressources Québec and Capital Émergence Québec), which are "responsible for the interventions not carried out by the Bank but inherent in the successful pursuit of its mission" (ss. 10, 11 and 12)<sup>15</sup>. They may also be designated as a mandatory by the Government (s. 17):

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[<http://www.economie.gouv.qc.ca/objectifs/informer/politiques-strategies-plans-daction/page/politiques-et-orientations-10440>].

<sup>13</sup> *Idem*.

<sup>14</sup> S. 2, 1<sup>st</sup> paragraph. The section continues as follows: "These interventions may, in particular, support

- (1) the creation, establishment, growth and retention of enterprises in Québec;
- (2) private investment, innovation and productivity in enterprises;
- (3) the internationalization of Québec enterprises, and export trade, in accordance with the international relations policy developed by the Minister of International Relations;
- (4) the cooperation and social economy sector;
- (5) exploration for, and the development and processing of, the mineral substances in the domain of the State that are governed by the Mining Act (chapter M-13.1) and renewable resources, and the development of green technologies; and
- (6) prospection for and attraction of foreign investments, in accordance with the mandate given to the Bank by the Government.

The Bank exercises any other function assigned to it by the Government.

<sup>15</sup> In addition, each subsidiary has its own mission, specified later on.

- "(1) to administer financial assistance programs developed or designated by the Government;
- (2) to grant and administer any one-time financial assistance the Government determines for projects that are of major economic interest for Québec; and
- (3) to carry out any other mandate.

The administration of the sectoral parameters provided in Schedule A to the Act respecting the sectoral parameters of certain fiscal measures (chapter P-5.1) is considered to be a mandate given to Développement économique Québec by the Government."

The bill also specifies that the "mandatary answers to the Government, however, for the administration of these programs and for the other mandates the Government gives it to carry out" (s. 20).

Apart from *Ressources Québec*, which has the mandate "to analyze investment proposals for sums credited to Capital Mines Hydrocarbures, invest those sums and manage the investments" (s. 36) and *Capital Émergence Québec*, whose mission "to the exclusion of Développement économique Québec, is to facilitate business startups and restarts by contributing risk capital, by investing in a group of persons or property whose object is to facilitate business startups and restarts or by financing such a group" (s. 53), the mission of the *Développement économique Québec* subsidiary is to "contribute to the economic development of Québec by stimulating investment growth and supporting employment in all regions of Québec. To that end, Développement économique Québec supports the creation and development of enterprises of all sizes through customized financial solutions, interventions other than financial interventions, and investments. In accordance with the mandate it is given by the Government, Développement économique Québec conducts foreign investment prospecting and strategic interventions" (s. 30).

This subsidiary "provides assistance services to enterprises for business development and support in dealings with government departments and bodies" (s. 31) and must "be present and able to carry on its activities in all the administrative regions of Québec" (s. 32).

While according to the AIQ, the persons eligible for the services offered by Investissement Québec are profit-seeking enterprises as well as cooperatives and other social economy enterprises (s. 11 AIQ), the bill more generally provides that "[t]he services of Développement économique Québec are available to enterprises, whatever their juridical form" (s. 33).

Similarly to Investissement Québec, the bill provides that the Bank and its subsidiaries "may make the delivery of services subject to the conditions or contractual obligations they determine"(s. 95) and that in case of failure to comply with these conditions and fulfill these obligations, the Bank or the subsidiary could suspend or terminate delivery of the service, increase or reduce its obligations towards the

company, change the terms of those obligations, or take any other step it considers necessary to preserve its rights (s. 96).

In the course of their mission, the BDÉQ and its subsidiaries, particularly *Développement économique Québec*, thus will offer direct services to Québec and foreign enterprises.

## **2. The relevance of subjecting the Banque de développement économique du Québec and its subsidiaries to the Québec Ombudsman's field of jurisdiction**

### **2.1. Financing and subsidization of economic actors with public funds**

State activity related to financing and subsidization of economic actors (enterprises, cooperatives and others) with public funds has grown incessantly. State intervention in the economy is an important part of government action:

“The interest shown by the central Administration in subsidization is directly linked to the economic impact of this action process within society. This impact will be displayed, in particular, by the dependence developed in its regard by various social entities, operating at all levels of society. [...] As a means of economic action, subsidies require the State to be fair and equitable to everyone”<sup>16</sup> (our underlining).

[TRANSLATION]

The concept of “subsidy” the authors use here concerns “*any form of economic assistance granted by the State*”<sup>17</sup>. The Public Administration that grants such financial assistance from public funds must respect certain conditions: duty to act equitably, contractual fairness, compliance with charters of rights and freedoms, compliance with the administrative rules specific to each financial assistance program. These conditions of performance of such State action have impacts during the stages of granting, implementing and administering financial assistance, and during the withdrawal or termination of this assistance.

At all these stages, the action of the public body that grants, administers or withdraws the financial assistance may have major consequences for the person concerned (enterprise or natural person). There are few recourses or channels for control of this form of government action: hierarchical recourse or provisions of the enabling document, limited judicial control before the Superior Court, recourse to the Québec Ombudsman<sup>18</sup>. Appeals or actions in administrative review of decisions regarding the granting or administration of financial assistance programs are exceptional.

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<sup>16</sup> Pierre ISSALYS and Denis LEMIEUX, *L'action gouvernementale – Précis de droit des institutions administratives*, 3<sup>rd</sup> ed., Cowansville, Éditions Yvon Blais, 2009, pp. 1236-1237.

<sup>17</sup> *Idem*, p. 1243. [TRANSLATION]

<sup>18</sup> *Idem*, p. 1296.

In this context, it appears advisable for Bill 36 to allow the persons who benefit from the BDÉQ's services to have recourse to the Québec Ombudsman, if applicable, to remedy a situation that may be prejudicial to them, resulting from the action of this government corporation. This is all the more true when all the services will be combined under a single body.

## **2.2. The clientele of the Banque de développement économique du Québec and its subsidiaries**

The fact that the BDÉQ and its subsidiaries, just like Investissement Québec, would offer direct services to small or large enterprises, regardless of their juridical form, justifies its subjection to the Québec Ombudsman's jurisdiction. The type of actions conducted in the past by Investissement Québec and that will be conducted by the BDÉQ regarding enterprises could result in situations that could be facilitated in their resolution by the Québec Ombudsman's intervention.

Contrary to a widespread idea among entrepreneurs and within the Public Administration, the *Public Protector Act* does not only apply to natural persons. In fact, the Québec Ombudsman is empowered to receive requests for service from any person, not only natural persons but also legal persons, particularly enterprises.

The Québec Ombudsman already deals with complaints filed by enterprises in the environmental, agriculture and food, taxation, revenue and natural resources sectors, to name only a few. The grounds of complaints are varied and may concern, in particular, the granting or refusal of subsidies, eligibility for financial assistance programs, relations with public servants of the departments or agencies concerned, inspections and controls, or issuance of authorizations.

It is interesting to note that, despite the Québec Ombudsman's current absence of jurisdiction over Investissement Québec and the fact that the possibility for enterprises to apply to the Québec Ombudsman is little known, it has already received complaints concerning this body. The Québec Ombudsman had to refuse to deal with these complaints, due to its absence of jurisdiction over Investissement Québec. However, this is indicative of a need.

## **2.3. The transfer of staff from the regional offices of the Ministère des Finances et de l'Économie to the Banque de développement économique du Québec: enterprises lose their recourse to the Québec Ombudsman**

It appears that the front-line role currently played by the regional offices of the Ministère des Finances et de l'Économie will continue to be performed by the BDÉQ's regional offices. However, in the current version of the bill, citizens who believe they are wronged by the actions or omissions of these offices would no longer have the possibility, as they currently do, to apply to the Québec Ombudsman for assistance.

The fact that citizens cannot turn to the Québec Ombudsman when various problems occur regarding the quality of services offered by the BDÉQ constitutes a loss of an accessible and informal non-judicial remedy.

### 3. In conclusion

Considering the nature of the BDÉQ's activities, the fact that it offers several direct services to citizens and that it performs financial assistance mandates entrusted to it by the Government, recourse to the Québec Ombudsman would allow citizens – whether legal or natural persons – eventually wronged by BDÉQ's acts or omissions, to find an adequate remedy, without the necessity of resorting to the courts.

If the BDÉQ were subject to the Québec Ombudsman's jurisdiction, the latter's role would not be to substitute its own assessment for that of the Bank regarding the expediency of granting or not granting financial assistance to an enterprise. Instead, it would have to ensure that this decision is made in accordance with the procedures, policies and standards applicable to the enterprises that receive these services, while respecting procedural fairness, in complete transparency for the citizens concerned.

In this sense, I consider it well founded that the BDÉQ be subject to the Québec Ombudsman's jurisdiction.

**Therefore, the Québec Ombudsman recommends:**

**R-1** That Section 15 of the Public Protector Act be amended to add the following paragraph:

“(10) the Banque de développement économique du Québec and its subsidiaries”.

Mr. Chair, please accept my best regards.

The Ombudsperson,

*Original signed*

Raymonde Saint-Germain

- c.c. Ms. Éline Zakaïb, Minister for Industrial Policy and the Banque de développement économique du Québec  
Mr. Nicolas Marceau, Minister of Finance and the Economy  
Mr. Stéphane Bédard, Government House Leader  
Mr. Pierre Moreau, Official Opposition Housing Leader  
Mr. Gérard Deltell, House Leader of the Second Opposition Group  
Mr. Luc Monty, Deputy Minister of Finance and the Economy  
Mr. Jacques Daoust, President and Chief Executive Officer of Investissement Québec  
Ms. Dany Hallé, Secretary of the Committee on Labour and the Economy  
Ms. Anik Laplante, Secretary of the Committee on Institutions