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**Brief by the Québec Ombudsman
presented to the
Committee on Public Finance**

concerning Bill 87,
*An Act to facilitate the disclosure of
wrongdoings within public bodies*

Québec City, January 28, 2016

The mission of the Québec Ombudsman

The Québec Ombudsman ensures that the rights of citizens are upheld by intervening with regard to Québec government departments and agencies and the various bodies within the health and social services network to remedy situations that are prejudicial to a person or group of persons. Appointed by the elected members from all political parties and reporting to the National Assembly, the Québec Ombudsman acts independently and impartially, whether an intervention is undertaken in response to a complaint or series of complaints or on the institution's own initiative.

The respect of users and their rights, and preventing harm to them, is at the heart of the Québec Ombudsman's mission. Its preventive role is exercised in particular through its systemic analysis of situations harmful to large numbers of citizens.

Pursuant to the powers conferred upon it, it can propose amendments to acts and regulations and changes to directives and administrative policies with a view to improving them in the best interest of the people concerned.

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Acronyms

CLCC	Anti-Corruption Commissioner
LAF	Financial Administration Act
LCE	Act respecting public inquiry commissions
LCLCC	Anti-Corruption Act
LEDMM	Municipal Ethics and Good Conduct Act
LNT	Act respecting labour standards
LPC	Public Protector Act
LPU	Act respecting the Health and Social Services Ombudsman
LSSSS	Act respecting health services and social services
LSSSSAC	Act respecting health services and social services for Cree Native persons
UPAC	Permanent anti-corruption squad

Summary

The Québec Ombudsman subscribes to the government's will to develop and strengthen probity within public services. In this respect, it supports Bill 87's basic goals and means. However, in this brief, it nonetheless proposes improvements which, in its opinion, are likely to make the process fully effective and sustainable.

Its first comments concern the scope of the Act. Ambitious in the number of bodies subject to it, albeit the absence of some, its span could be broadened as to wrongdoings and protection against reprisals for whistleblowers who are not employees of the bodies in question.

Called upon to exercise a central role in processing disclosures of wrongdoings, the Québec Ombudsman also draws the legislator's attention to the Québec Ombudsman's avocation to advise and support these bodies, as well as to the powers that would allow the Act its entire breadth, not only for dissuasion, but also for the promotion of sound administration and good governance.

The Québec Ombudsman also makes several comments and recommendations about issues which do not directly affect it but that are nonetheless important for the proper operation of the disclosure mechanism overall.

Lastly, the brief addresses the question of the implementation of the Act by the Québec Ombudsman, notably from the perspective of the resources required given the extent of its mandate, the particular nature of its investigations and its significant advisory and support role.

Introduction

- 1 The Québec Ombudsman subscribes to any disposition to develop and strengthen probity within public services, as well as to the introduction of mechanisms that enable the disclosure of wrongdoings without risk of reprisal to whistleblowers acting in good faith. This is why it supports the Bill's basic principle and means, while proposing improvements with a view to ensuring successful implementation of the prospective Act.
- 2 The Québec Ombudsman has studied how disclosure of wrongdoing is handled by other institutions in Canada—mostly parliamentary ombudsmen like itself. This has convinced the Québec Ombudsman that it would be pointless to create an institution specifically for this purpose, which would entail sizeable outlays without any additional guarantee of efficiency. Several factors predispose the Québec Ombudsman to play a pivotal role in the proposed disclosure mechanism, as it does if an institution within the purview of the National Assembly is involved, with independence and impartiality vis-à-vis the National Assembly's executive power. The Québec Ombudsman already has the necessary expertise to do so.
- 3 Experienced in investigative methods and vested with the powers of a commissioner of inquiry, the Québec Ombudsman has in depth knowledge of government and its culture, environment, possibilities and constraints.
- 4 If the bill is passed, the Québec Ombudsman will be a key player in the overall process of disclosure of wrongdoing that will be established. Above and beyond processing per se of the disclosures submitted to it, it will also be called upon to provide advice and support, mainly to the chief executive officers of public bodies and to the officers designated within the body to deal with disclosures, but also to the employees of these bodies.
- 5 The Québec Ombudsman will therefore have a two-pronged role—to investigate disclosures and to be the professional go-to body for government employees responsible for dealing with disclosures. It is therefore important to determine as accurately as possible the procedures and resources that will empower it to competently and rigorously take up the new mandate to be conferred and the functions that would stem from it. This brief also deals with these dimensions.

1 The goals of the Act

- 6 In Québec, the government plays an important role in numerous spheres of the lives of citizens. Intervening daily with respect to the public service and its players, the Québec Ombudsman is well placed to be aware of this importance. It is also in a position to know that sound management and good governance are crucial if government resources are to be used for the primary purpose for which they were intended: quality public services for the benefit of citizens.
- 7 Every component of the government and all its players must exemplify probity. And yet, it can happen that ill-intentioned people act in ways contrary to the common good. The people aware of these wrongdoings and who reprove them do not always know where to go to report these actions to the highest authorities. They are afraid they will be ostracized if they denounce a colleague or, worse yet, a superior. They are torn between the duty to be loyal and their ethics which demand that they speak out.
- 8 For these people, the balance between, on the one hand, the duty to be loyal to their employer and, on the other, the feeling that, in the public interest, they must disclose the wrongdoings of which they are aware, is very difficult to achieve.¹ This is particularly true when there is no internal or independent whistleblowing mechanism. Certain people who decide to speak out against a situation publicly may well be in good faith, but misinformed. In such a case, they are likely to tarnish, if not destroy, the reputation of the presumed authors of the alleged wrongdoings. They may also, and rightly so, fear the consequences of such revelations.
- 9 This is why it is essential that an effective disclosure channel be available to these people so as to protect and preserve the reputation of the persons involved, with due regard for the presumption of innocence. It is inconceivable that honest people who, in good faith, denounce situations that they feel are unacceptable because they are contrary to the common good can be punished for having protected it. And yet, this happens.
- 10 Granted, there are mechanisms for given categories of wrongdoings in certain sectors. For example, in matters of the awarding of public contracts, corrupt activities can be reported to the Anti-Corruption Commissioner (CLCC). However, the sphere of application of the *Anti-Corruption Act* (LCLCC)² is more specific, and numbers of wrongdoings that might be committed in the public sector do not match the legal definition. This is why a mechanism that is broader and more comprehensive in scope is needed. This is provided for in Bill 87.
- 11 Such a mechanism must first of all be aimed at preventing wrongdoing, whether through dissuasion or the disclosure of information that nips wrongdoing in the bud. If wrongdoing is committed nonetheless, the Act must make its detection possible by facilitating disclosure. To achieve this, the mechanism chosen must be simple and inspire confidence. The authors of such wrongdoings must be duly punished and the whistleblowers duly protected. Lastly,

¹ In recent years, this search for balance and this specific issue have been identified by the courts, including the Supreme Court of Canada. See *Fraser v. P.S.S.R.B.* [1985] 2 S.C.R. 455, *Haydon v. Canada* [2001] F.C. 82, *Stenhouse v. Canada (Treasury Board)* [2004] F. 375, *Haydon v. Canada (Treasury Board)* [2005] C.A.F. 249 and *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771* [2005] 3 S.C.R. 425.

² CQLR, c. L-6.1.

the mechanism must prevent the recurrence and commission of similar acts, in that body and other bodies alike.

12 For the whistleblowing mechanism envisioned in the Bill to be successful, several conditions are imperative:

- ▶ prospective whistleblowers' trust in the mechanism;
- ▶ protection of confidentiality;
- ▶ protection of whistleblowers against all forms of reprisal;
- ▶ respect of the presumption of innocence and protection of the reputations of those against whom yet unproven, and possibly unfounded, allegations have been made;
- ▶ the quality (relevance, promptness and comprehensiveness) of investigations and respect for those involved (procedural fairness);
- ▶ the collection, preservation and quality of evidence with a view to any legal recourse;
- ▶ the ability to act quickly to prevent wrongdoings about to be committed, or if wrongdoing occurs, to limit the damage.

13 The Québec Ombudsman feels that in several respects the Bill introduced is likely to satisfy these conditions. It borrows from several principles and provisions of interest in the legislation enacted by other parliaments in Canada.³ However, it perpetuates some of its shortcomings and omits some of its strengths. Therefore, improvements to the bill are desirable—and in some cases, crucial—if the goals of the Act are to be successfully implemented and respected.

14 In touch with its counterparts,⁴ the Québec Ombudsman is fully aware of the complexity and significance of the mandate conferred upon it. It intends to fulfill this mandate rigorously and without compromising its independence, which is essential to securing the trust of the public, the employees of public bodies and their directors.

³ See the references at the end of the brief, in the *Canadian legislation analyzed* section.

⁴ The parliamentary ombudsmen of the following provinces and territories are tasked to handle the disclosure of wrongdoings: Nova Scotia, Newfoundland and Labrador, New Brunswick, Manitoba, Saskatchewan, Alberta, Yukon and Nunavut. At the federal level, the Public Sector Integrity Commissioner plays this role, and, for Ontario, the mandate was entrusted to the Office of Integrity Commissioner.

2 Measuring the Act against its goals

15 While subscribing to the goals of the projected Act, the Québec Ombudsman is concerned with ensuring that all the optimal conditions will coalesce to achieve them. This is why this section will feature its recommendations concerning the scope of Bill 87 with a view to improving the system thus established, primarily regarding the bodies subject to it, the nature and scope of wrongdoings and the extent of protection against reprisal.

2.1 The bodies subject to it

16 Section 2 of the Bill divides the public bodies subject to its application into eight categories. According to our estimate, as at January 1, 2016, more than 500 bodies and entities, with some 681,000 employees, would have been subject to it. In favour of making all entities subject to the Bill, the Québec Ombudsman draws parliamentarians' attention to certain elements, and, in particular, the fact that certain entities are not included in the list. In comparing this list with that in the *Anti-Corruption Act* (LCLCC)—since it is an Act with complementary goals,—it seems to the Québec Ombudsman that their scope should tend to be the same.

17 Municipal entities are not subject to Bill 87. The argument can be made that in terms of disclosure of wrongdoing, they are not covered anywhere in Canada. This is true, but in the context of modern Québec (more specifically, the work of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, and the investigations of the permanent anti-corruption squad (UPAC)), the Québec Ombudsman feels that their absence is hard to justify and, understandably, would perhaps elicit adverse public reaction. Furthermore, these entities are contemplated in the LCLCC.

18 The *Municipal Ethics and Good Conduct Act* (LEDMM)⁵ already contains a mechanism whereby “any person who has reasonable grounds for believing that a member of a council of a municipality (our underlining) has violated a rule of the applicable code of ethics and conduct may raise the matter with the Minister,”⁶ who, further to a preliminary examination, may refer it to the Commission municipale du Québec for an inquiry.⁷

19 However, this mechanism only covers certain situations. Disclosures concerning municipal employees or wrongdoings other than the kinds stipulated in the code of ethics and good conduct are excluded. For example, no provision is made for the protection of whistleblowers against possible reprisals.

20 If municipal bodies are not added to the Bill, the Québec Ombudsman will not be empowered to receive disclosures that are not covered by this mechanism. In view of this, two avenues can be considered.

21 First, the *Municipal Ethics and Good Conduct Act* could be amended to enable the Ministère des Affaires municipales et de l'Occupation du territoire (MAMOT) and the Commission municipale du Québec to also receive disclosures concerning municipal employees. It would then be fundamental for the Act to provide for all required protection against reprisal for whistleblowers who make disclosures pursuant to the Act.

22 Second, the Bill could be amended to make municipal bodies subject to it. In view of this, to prevent possible overlap by the two mechanisms, it would be advisable, without amending the Act, to provide that the Québec Ombudsman put an end to the processing

⁵ CQLR, c. E-15.

⁶ CQLR, c. E-15, s. 20.

⁷ CQLR, c. E-15, s. 22.

of a disclosure if the alleged wrongdoing is already undergoing preliminary examination or an inquiry under the LEDMM, or if a decision about the disclosure has been rendered by the Commission municipale du Québec.

- 23 With this in mind, the Québec Ombudsman has made recommendations for each of the two options.

Recommendations:

Concerning application to municipalities

Whereas:

Under subparagraph 11 of section 3 of the *Anti-Corruption Act*, municipalities and mandatory bodies of the municipality and supramunicipal bodies⁸ (bodies contemplated in sections 18 or 19 of the *Act respecting the pension plan of elected municipal officials* (c. R-9.3)) are subject to this Act;

The *Anti-Corruption Act* and Bill 87 have similar goals;

The *Municipal Ethics and Good Conduct Act* provides for a mechanism for disclosing elected municipal officers' breach of their code of ethics and good conduct, but not for wrongdoings committed by employees;

The *Municipal Ethics and Good Conduct Act* provides no protection against reprisals to whistleblowers;

It is advisable to avoid potentially contradictory recommendations and decisions.

The Québec Ombudsman recommends:

Either:

R-1 That the *Municipal Ethics and Good Conduct Act* be amended so as to make municipal employees subject to it and to provide adequate protection against reprisals.

Or:

⁸ “‘Supramunicipal body’ means a metropolitan community, any regional county municipality, intermunicipal management board, intermunicipal transit authority, intermunicipal board of transport, the Kativik Regional Government and any other public body the majority of the members of the board of directors of which are elected municipal officers.” *Act respecting the pension plan of elected municipal officials*, c. R-9.3, s. 18, para. 2.

**R-2 That section 2 of the Bill be amended by adding the following paragraph: municipalities as well as the bodies contemplated in section 18 or 19 of the Act respecting the pension plan of elected municipal officials (c. R-9.3).”
AND**

That section 11 of the Bill be amended by adding a third paragraph: “The Québec Ombudsman must also put an end to the processing of a disclosure concerning an entity contemplated in subparagraph (to be determined) of section 2 if the alleged wrongdoing has been the subject of a preliminary examination or an inquiry pursuant to Chapter III of the *Municipal Ethics and Good Conduct Act* or has been the subject of a decision by the Commission municipale du Québec.”

- 24 So, while the first two subparagraphs of section 2 of the Bill repeat almost verbatim the definition of public body within the meaning of the *Public Protector Act*,⁹ bodies with which the Québec Ombudsman is very familiar, the addition of the bodies and enterprises in subparagraphs 3 and 4 serves to extend this area of jurisdiction.
- 25 The Québec Ombudsman considers that the inclusion of all budget-funded bodies and bodies other than budget-funded ones, government enterprises, as well as the Commission de la construction du Québec and the Caisse de dépôt et placement du Québec, is absolutely appropriate.
- 26 Similarly, the Québec Ombudsman subscribes to the inclusion of public educational institutions and health and social services institutions (subparagraphs 5, 6 and 7 of section 2), whose realities it is familiar with. However, in analyzing the Bill, it became clear that making certain other bodies associated with these networks subject to the Act would be fitting.
- 27 First of all, the private institutions accredited for the purposes of subsidies pursuant to the *Act respecting private education*,¹⁰ also subject to the *Anti-Corruption Act*, are not included in section 2 of Bill 87. This difference is astonishing in itself.
- 28 As for the health and social services sector, subparagraph 7 of section 2 only concerns “public institutions within the meaning of the [LSSSS] as well as the regional council established under the [LSSSSAC].”¹¹ In limiting itself to public institutions, the Bill has a narrower scope than the *Act respecting the Health and Social Services Ombudsman* (LPU).¹² This means that private seniors' residences and community organizations, among other bodies in this sector,¹³ which fall within the Québec Ombudsman's jurisdiction under the LPU, are not subject to Bill 87. Is this because the guiding principle is public funds and not public services?
- 29 However, this provision is also more restrictive than the *Anti-Corruption Act*, intended for “any public institution or private institution that is a party to an agreement referred to in the [LSSSS] (chapter S-4.2).” Bear in mind that private institutions party to an agreement provide government-subsidized health services and social services at regulated fees. They therefore hold and generate public monies. The Québec Ombudsman considers that, logically, these institutions should be subject to the projected Act.

⁹ CQLR, c. P-32.

¹⁰ CQLR, c. E-9.1.

¹¹ Bill 87, s. 2, subpara. 7.

¹² CQLR, c. P-31.1.

¹³ Nor does this provision cover Corporation d'urgences-santé, subject to LPU. However, the Corporation is covered under subparagraph 3 of section 2, because it is listed in Schedule 2 of the *Financial Administration Act* (LAF).

Recommendation:

Concerning application to certain private health institutions under agreement

Whereas:

Private health institutions under agreement are publicly funded and provide health care and service at regulated fees;

They are subject to the *Anti-Corruption Act*.

The Québec Ombudsman recommends:

R-3 That section 2 of the Bill be amended by adding the words “or private institutions under agreement” after the word “public” in subparagraph 7.

- 30 Other than subparagraph 8 of section 2, which refers to all persons appointed or designated by the National Assembly to an office under its jurisdiction, together with the personnel managed by them, the Québec Ombudsman notes that the National Assembly itself is not subject to the Bill. It sees this as entirely warranted with regard to MNAs and political staffers. However, the administrative services of the National Assembly (that is, the “services contemplated in Divisions III and V of Chapter IV of the *Act respecting the National Assembly*,” covered by subparagraph 2 of section 15 of the *Public Protector Act*, are not mentioned in section 2 of Bill 87. In the Québec Ombudsman's opinion, this omission, which is probably just an oversight, should be corrected.

Recommendation:

Concerning application to the administrative services of the National Assembly

Whereas:

The services contemplated in Divisions III and V of Chapter IV of the *Act respecting the National Assembly* are administrative, not political, services;

The members of the personnel of these services are part of the personnel of the public service.

The Québec Ombudsman recommends:

R-4 That section 2 of the Bill be amended by adding the following subparagraph: “the “services contemplated in Divisions III and V of Chapter IV of the *Act respecting the National Assembly* (chapter A-23.1);”

- 31 Subparagraph 8 of section 2 also makes the Québec Ombudsman subject by definition, which is self-evident. However, it considers it important that provision be made for a distinct organization tasked to receive and process disclosures of wrongdoing that may be committed within the Québec Ombudsman itself. Even if there is an internal procedure, the possibility of seeking recourse through an independent mechanism similar to that afforded by the Québec Ombudsman for all other cases is crucial to preserving the impartiality or the appearance of impartiality needed for the effectiveness and very credibility of the disclosure process.

- 32 The Québec Ombudsman feels that the ideal solution would be to have the Act provide that whistleblowers contact another institution of the National Assembly, namely, the Ethics Commissioner, with whistleblowers obviously having the same protection provided by the Bill.

Recommendation:

Concerning disclosure with regard to the Québec Ombudsman

Whereas:

The Québec Ombudsman is not immune from allegations of wrongdoing;

The people wishing to disclose information about such acts, including the employees of the Québec Ombudsman, must be afforded the same recourse and protection by the Act;

These people and employees must be able to contact an independent and impartial body in complete confidence.

The Québec Ombudsman recommends:

R-5 That the following section be added after section 5 of the Bill:

“When it receives a disclosure of information that could show that a wrongdoing has been committed or is about to be committed within the Québec Ombudsman, it must communicate the disclosure to the Ethics Commissioner.

Any person may contact the Ethics Commissioner to disclose information that could show that a wrongdoing has been committed or is about to be committed within the Québec Ombudsman.

The Ethics Commissioner exercises the same powers and has the same immunity conferred on the Québec Ombudsman pursuant to this Act.”

- 33 Also, the Québec Ombudsman notes that other entities subject to the *Anti-Corruption Act* are not within the Bill's sphere of application. Cases in point are childcare centres, day care centres benefiting from subsidized childcare spaces and the home childcare coordinating offices contemplated in the *Educational Childcare Act*.¹⁴ If the legislator were to add any of these entities pursuant to subparagraph 9 of section 2 of the Bill, the Québec Ombudsman could assume the mandate.

2.2 Nature and scope of wrongdoings

- 34 In the opinion of the Québec Ombudsman, sections 3 and 4 of the Bill provide a clear and sufficiently flexible definition of what a reportable wrongdoing is or is not.
- 35 One of the goals of the Bill is to “facilitate the disclosure of wrongdoings committed or about to be committed within public bodies.”¹⁵ (our underlining) However, the Québec Ombudsman is of the opinion that the acts qualified as wrongdoings must also include those committed with regard to public bodies, as in the vast majority of Canadian jurisdictions.¹⁶

¹⁴ CQLR, c. S-4.1.1.

¹⁵ Bill 87, s.1.

¹⁶ Canadian provinces or territories whose jurisdiction extends to wrongdoings in or relating to public bodies: New Brunswick (s. 3), Manitoba (s. 1 (a) and s. 3), Alberta (s. 3(1)), Saskatchewan (s. 3), Yukon (s. 3), Newfoundland and Labrador (s. 3), Canada (s. 8).

- 36 This addition would make it possible to cover wrongdoings committed with regard to public bodies and reported by whistleblowers who are not employees (such as consultants, mandataries and subcontractors), but that nonetheless have adverse effects on these bodies. Take, for example, the sub-contractor who uses his relationship with a government body to misappropriate its funds or property, or a consultant's personal use of a government body's material or information resources. Whistleblowers can just as easily be government employees as other consultants. The wrongdoing, without being committed "within a public body," would be committed "with regard to" this body. However, the Bill as worded now would not enable the Québec Ombudsman to intervene in such circumstances.
- 37 This improvement, consistent with the solutions adopted by several parliaments in Canada, would broaden the scope of the Act, and, in turn, more wrongdoings could be investigated and, ultimately, the perpetrators punished.

Recommendation:

Concerning wrongdoings that could be committed against public bodies

Whereas:

Wrongdoings may also be committed with regard to public bodies by people outside these bodies;

These wrongdoings have an adverse effect on the public bodies and the people aware of them should be able to safely disclose them.

The Québec Ombudsman recommends:

R-6 That sections 1 and 5 be amended to add "or with regard to" after every use of the word "within."

2.3 Persons who can disclose wrongdoings

- 38 The Québec Ombudsman considers it fitting that the mechanisms for receiving and processing disclosures not be restricted to employees of public bodies. Valid information may also come from third parties (subcontractors, employees of government contractors, parents, users, etc.). It is therefore satisfied that *any person* (including former employees of the public body and every citizen, including legal persons) may make a disclosure to an independent body mandated to deal with disclosures. It is keen to ensure that these people will be well protected, an issue which will be discussed below.

2.4 Protection against reprisals: what protection and for whom?

- 39 Generally speaking, in other Canadian legislation, reprisal is defined as a measure taken against a public servant because he or she has, in good faith, sought advice about how to make a disclosure, made a disclosure or cooperated in an investigation conducted pursuant to a disclosure statute.
- 40 These measures include any kind of disciplinary action, demotion, dismissal, and anything that adversely affects a person's employment or work conditions and any threat in this regard. In many of these statutes, only public servants are protected because they are the only ones allowed to make a disclosure.

- 41 In Bill 87, even though the possibility of making a “protected” disclosure is in principle open to anyone pursuant to section 5, the underlying philosophy in matters of protection against reprisals is based exclusively on protection against employment-related measures.¹⁷ The Bill seems to have been designed primarily to protect whistleblowers who are public servants, not third parties.
- 42 Since the wrongdoings proscribed in Bill 87 are tantamount to prohibited employment practices under the *Act respecting labour standards*,¹⁸ only measures against a salaried worker are contemplated. These workers may be on the pay roll of a public body or a private company. As a result, there is no protection against reprisals that are not employment-related.¹⁹
- 43 Yet, since the Bill specifies that third parties—who may also witness the commission of wrongdoings within the government or with regard to the government, as the case may be—may avail themselves of the disclosure mechanism provided for, the Québec Ombudsman feels that it is crucial that they be granted equivalent protection.
- 44 It is easy to find examples of situations in which third-party whistleblowers could pay the price for the disclosures they make, despite all the care taken regarding confidentiality. For instance, what becomes of a parent on a Parents’ Committee who speaks out against wrongdoing by the school board and who finds himself or herself expelled from the committee, or whose child is penalized as a result? What about a consultant whose contract is cancelled further to disclosure or who, unjustly, no longer qualifies for new contracts?
- 45 None of these situations appears to be covered by the Bill as it now stands. Who can these people turn to, and what protection do they have?
- 46 The Québec Ombudsman feels that they should be able to return to the Québec Ombudsman, which is already familiar with their situation. After any audit or, if necessary, an investigation, if the Québec Ombudsman deems the complaint substantiated, it could make any recommendations it considers useful and require to be informed about any corrective measures taken to implement them.
- 47 This way of proceeding would not contradict the current mandate of the Québec Ombudsman, which, under subparagraph 5 of section 18 of the LPC, “cannot intervene in respect of an act or omission of a public body or a person, performed in the course of labour relations with the person or group whose interests would be concerned by the intervention,” because the reprisal complaints it would process would not concern events unrelated to employment. They would therefore not be prohibited practices within the meaning of section 122 of the *Act respecting labour standards*.

¹⁷ Bill 87, ss. 26 to 28 and 36 to 38.

¹⁸ CQLR, c. N-1.1.

¹⁹ Even though fines are provided for anyone who takes a reprisal (s. 28 of the Bill), which may have a dissuasive effect, they are not a protection or restitution measure per se for the people who are the victims of reprisals.

Recommendation:

Concerning the scope of protection against reprisals

Whereas:

The measures to protect against reprisals provided for in the Bill only concern reprisals related to the employment of a salaried worker;

Third-party whistleblowers could be the victims of other forms of reprisal that are unrelated to their employment.

The Québec Ombudsman recommends:

R-7 That the following section be added after section 27 of the Bill: “Any person who believes, on the grounds described in section 26, that he or she has been the victim of reprisals that are unrelated to his or her employment, may file a complaint with the Québec Ombudsman. If, after examining the complaint, the Québec Ombudsman deems it to be substantiated, it proceeds in accordance with sections 14 and 15, taking into account the necessary modifications.”

3 The Québec Ombudsman's mandate within the projected mechanism

- 48 The principal means of disclosure provided for in the Bill is through the Québec Ombudsman. A pivotal player within the disclosure mechanism, it will have to act in complete confidence while ensuring that all the rights of those involved are upheld. To carry out this mandate fully, it will have powers—investigative powers in particular—and immunities, including those already recognized by the *Public Protector Act (LPC)* or the *Act respecting the Health and Social Services Ombudsman (LPU)*.
- 49 Tasked to investigate the disclosures it receives, it will be required to, among other things, determine whether a disclosure can be processed, make recommendations when it sees that a wrongdoing has been committed, follow up on these recommendations and report on its activities. It will also advise the bodies subject to the Act and provide information to would-be whistleblowers.

3.1 Confidentiality and the rights of the persons involved

- 50 The Québec Ombudsman insists that the procedure used protect whistleblowers' and witnesses' identity alike, but also that of the alleged perpetrator, at least while the investigation is underway.
- 51 The Québec Ombudsman is well versed in the high level of confidentiality required for the investigations it conducts under the LPC and the LPU. There already are strict measures that make it possible to preserve this confidentiality.
- 52 Conducted privately, the investigations by the Québec Ombudsman are confidential. The person designated by the National Assembly, Deputy Ombudspersons and employees take an oath before taking office, in addition to being liable to penal provision if they, without due authorization, disclose information obtained in the performance of their duties. Among other restrictions, they cannot be compelled to give evidence with respect to information obtained by them in the performance of their duties or to produce any document containing such information. And no one has the right to access such documents.²⁰
- 53 All of these measures have been incorporated into the Bill.²¹ One of its stipulations is that the procedure established by the Québec Ombudsman must “include measures to ensure that the identity of the person who makes a disclosure or who cooperates in an audit or investigation conducted on the basis of a disclosure remains confidential” and “measures to protect the rights of the persons involved in a disclosure, in particular during an investigation.”²²

3.2 The Québec Ombudsman's role of providing advice and support

- 54 Above and beyond the leading role it will be called upon to play in processing the disclosures submitted to it, the Québec Ombudsman will also be required to fulfill other

²⁰ LPC, s. 24, para. 1, and ss. 5, 11, 33 and 34.

²¹ Bill 87, s. 25: “Sections 24, 25, 30 to 33, 34 and 35 of the Public Protector Act apply to the Public Protector, with the necessary modifications, with regard to investigations the Public Protector conducts and the other acts the Public Protector carries out under this Act.”

²² Bill 87, s. 9 para. 1, subpara. 3 and 4.

important functions in terms of the performance of the process overall. These functions will require considerable efforts on its part.

- 55 Thus, even before being able to begin processing disclosures, the Québec Ombudsman will have to draft a procedure which will concretely establish and detail how disclosures can be made, how they will be processed, and the means and measures stipulated in section 9 of the Bill. It will also have to ensure that this procedure is made known, which will require communications initiatives, preferably in tandem with the bodies subject to the Act.
- 56 Responsible for drafting and publishing a “reference document for public bodies on the procedure to be established,”²³ the Québec Ombudsman will also to some extent be called on to provide advice and support, primarily to the chief executive officers of these bodies and to the designated officers, but also to their employees and employee representatives.
- 57 The reference document, which would include guidelines for the bodies subject to the Act concerning the essential elements in a disclosure procedure template, should also be presented—and explanations provided—to the directors and the internal disclosure officers as soon as the latter are appointed.
- 58 Once the disclosure mechanism is operational, the Québec Ombudsman will, among other duties, have to respond to information requests from anyone “about the possibility of making a disclosure” and to requests for “advice on the procedure or making a disclosure.”²⁴
- 59 The Québec Ombudsman will also have a certain power to control the internal disclosure process of public bodies insofar as, under section 18 of the Bill, it will be able to authorize expenses arising from chief executive officers’ obligation to establish a procedure and to appoint an internal officer to deal with disclosures.
- 60 Given the preceding, and to enable the Québec Ombudsman to fully play the advisory role proposed for it in Bill 87, it might be suitable for the Bill to formally specify that the bodies subject to the Act, pursuant to section 2, have a general obligation to cooperate. This cooperation must occur within the framework of the processing of disclosures by the Québec Ombudsman, as well as in the performance of its duty to provide advice and support. Note that a similar obligation exists in the *Act respecting the Health and Social Services Ombudsman* (paragraph 2 of s. 21).

Recommendation:

Concerning the cooperation required of public bodies within the framework of the performance of the duties that devolve to the Québec Ombudsman by the Bill

Whereas:

The Québec Ombudsman will be called upon to fulfill roles that will be important for the proper performance of the process, in addition to the processing of disclosures per se;

It will be essential that the bodies subject to the Act cooperate with the Québec Ombudsman, not only for audits and investigations, but also for making known the disclosure process and the rights of the people involved.

²³ Bill 87, s. 19, para. 2.

²⁴ Bill 87, s. 8.

The Québec Ombudsman recommends:

R-8 That the Bill be amended by adding a section after section 5 providing for a general obligation for bodies (employees and directors) subject to the Act to cooperate with the Québec Ombudsman within the framework of the application of the Act.

3.3 The Québec Ombudsman's powers

- 61 If the Bill is passed, the Québec Ombudsman will be given new powers or immunities, while existing powers and immunities (other than those concerning the confidentiality referred to in the preceding section) will be carried over. These powers and immunities are crucial if it is to fulfill its mission properly, in particular, the powers of public inquiry commissioners (s. 25 LPC), immunity from legal proceedings (s. 30 LPC), and immunity against extraordinary recourse provided by the *Code of Civil Procedure* or against injunctions (s. 31 LPC).²⁵ These powers and immunities are crucial to the Québec Ombudsman's fulfillment of the mandate that it would be given.
- 62 However, some of the powers that would devolve to it in the roles it currently fulfills pursuant to the LPC and the LPU do not carry over into the Bill. According to the Québec Ombudsman, this is an omission that could conceivably mean that the mechanism established will not allow its objectives to be fully attained. Above and beyond the mere detection and correction of wrongdoings, the Act will not achieve its full scope unless it promotes sound administration and good governance, not only through dissuasion, but also by preventing the recurrence of wrongdoings or the commission of similar acts.

3.3.1 Power to initiative

- 63 The Québec Ombudsman considers that the power to investigate on its own initiative is desirable. This power would enable it, if necessary, to intervene regarding the problems it observes within the context of the investigations it conducts or brought to light some other way, for example, further to multiple allegations which, taken individually, cannot be investigated but which all point towards the same conclusions. The Québec Ombudsman already has this initiating power in its classical role as parliamentary ombudsman under the LPC and the LPU.²⁶
- 64 These are long-standing provisions, and the demonstration of their relevance, if not their indispensability, in terms of the full achievement of a parliamentary ombudsman's mission, especially regarding the prevention of collective harm, has been demonstrated.

Recommendation:

Concerning the Québec Ombudsman's initiating power

Whereas:

The Québec Ombudsman's power to intervene on its own initiative has, in the past, enabled it to rectify situations that were harmful to great numbers of citizens;

²⁵ Bill 87, s. 25.

²⁶ LPC, s. 13, para. 2: "The Public Protector shall intervene on his own initiative or at the request of any person or group of persons acting on his or its own behalf or on behalf of another person." LPU, s. 20, para. 1: "The Health Services Ombudsman may, on his or her own initiative, intervene if the Ombudsman has reasonable grounds to believe that a natural person or a group of natural persons has been or may likely be wronged by an act or omission."

The relevance of this power has been demonstrated;

This power would enable the Québec Ombudsman to investigate situations that might otherwise persist or go unpunished.

The Québec Ombudsman recommends:

R-9 That the following paragraph be added after the second paragraph of section 10: “ It may also, on its own initiative, conduct the audits or investigations contemplated in the first paragraph and second paragraph when it has cause to believe that a wrongdoing has been committed or is about to be committed.”

3.3.2 Power to suggest reforms and to intervene publicly

- 65 Prevention is an integral part of the Québec Ombudsman's mission. In fact, it figures as the first policy thrust in its *Plan stratégique 2012-2017*.²⁷
- 66 It therefore feels that it should have the power to suggest reforms or to comment on its reports or interventions. For example, it should be able to signal the systemic problems it observes and to make public the required recommendations concerning improvement. This ability to produce special reports and comment on them should not be thwarted because those in charge of the body under investigation have failed to follow up, which is the present limit of section 15 of the Bill.
- 67 With a view to the improvement and education of other bodies, the Québec Ombudsman should be able to produce such reports without any prior recommendations having been made regarding a particular file, regardless of whether the recommendations were implemented, or even if there has been no wrongdoing within the meaning of the Act.
- 68 These reports could even, in the long term, foster public trust and act as a self-monitoring tool for public service personnel, in every sphere and at every level. If such a report stems from an investigation, the body concerned would not necessarily have to be named in it because the primary goal would be prevention. Section 27.3 of the *Public Protector Act* already provides for such situations.²⁸
- 69 Pursuant to Bill 87, the only public communication that the Québec Ombudsman would be allowed concerning its new mandate would be in its special reports—which would be produced only when its recommendations are not implemented satisfactorily—or in its annual reports.
- 70 The power of an ombudsman is one of persuasion. By definition, ultimately it makes recommendations which, despite not being coercive, are nonetheless effective, as witnessed in the results made public year after year.²⁹ The Québec Ombudsman therefore

²⁷ Protecteur du Citoyen, *Plan stratégique 2012-2017: Orientation 1 – Prévenir la manifestation des préjudices*.

²⁸ “The Public Protector may, so as to remedy prejudicial situations he has noted in the course of his interventions, avoid the recurrence of such situations or prevent similar situations, 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 or administrative reform as he deems to be in the public interest. If the Public Protector deems it expedient, he may explain the situation in a special report or in his annual report to the National Assembly.”

²⁹ The recommendation acceptance rate for individual files has ranged between 97% and 99% in the past three years. Protecteur du citoyen, *Rapport annuel de gestion 2014-2015*, p. 29.

feels that the power to comment publicly conferred by section 27.4 of the LPC³⁰ should apply to audits and investigations carried out pursuant to the projected Act, taking into account the necessary modifications.

- 71 Section 27.4 is already used sparingly and judiciously by the Québec Ombudsman and the same approach would be fitting within the specific context of investigations carried out pursuant to Bill 87 and within the framework of the specific issues brought to light by an investigation.

Recommendation:

Concerning the Québec Ombudsman's power to suggest reforms and to intervene publicly

Whereas:

The Act will not achieve its full breadth unless it makes it possible to promote sound administration and good governance, with a view to prevention;

The situations reported to the Québec Ombudsman may not be wrongdoings within the meaning of the Act but may nonetheless signal weaknesses that warrant being rectified across the entire public spectrum;

The fact that the director of a public body has taken satisfactory measures to implement the Québec Ombudsman's recommendations does not mean that other public organizations cannot learn from the situation;

It may be fitting to make suggestions as to legislative, regulatory or administrative reforms, in particular, in order to improve the way things are done within public bodies.

The Québec Ombudsman recommends:

R-10 That section 25 of the Bill be amended by adding: "27.3, 27.4," to the listing of sections.

3.3.3 Complementary powers

- 72 Other powers would improve the Act by allowing the Québec Ombudsman to play its role effectively, especially given the distinctive features of the processing of disclosure of wrongdoings.

Right of access to premises

- 73 Unlike most parliamentary ombudsmen in Canada, the Québec Ombudsman does not, within the framework of its constituting Act, have the right to access the premises of the bodies under its jurisdiction because this right is not enshrined in the Act respecting public inquiry commissions.³¹

³⁰ "The Public Protector, where he deems it to be in the public interest, may comment publicly on a report he has submitted to the National Assembly or on any intervention he has made. He may also comment publicly on any past intervention or on any intervention in progress where he deems it to be necessary in the interest of the person, group, public body, chief executive officer, public servant, employee or officer involved." LPC, s. 27.4.

³¹ CQLR, c. C-37.

- 74 Within the framework of the mandate conferred on the Québec Ombudsman by Bill 87, a power of this kind appears crucial. Bear in mind that the legislator intervened specifically in this respect to enable the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry to exercise this power within the framework of its mandate.³²
- 75 The Québec Ombudsman therefore proposes the addition of a provision granting it access to the premises of public bodies when it deems such access useful for carrying out audits and investigations. It has taken its lead from the legislative provisions in the constituting statutes of other Canadian ombudsmen, most of which apply to their mandate to investigate into disclosures of wrongdoing.

Recommendation:

Concerning the Québec Ombudsman's access to the premises of public bodies

Whereas:

The particular nature of the investigations conducted by the Québec Ombudsman further to the disclosure of wrongdoings requires that it have access to the premises of the body under investigation.

This power is not included in the *Act respecting public inquiry commissions*.

The Québec Ombudsman recommends:

R-11 That the following section be added after section 10 of the Bill.

"For the purpose of applying the present Act, the Québec Ombudsman may enter the premises of a public body at any reasonable time of day to perform the duties stemming from its area of jurisdiction. Before entering a premise pursuant to the first paragraph of section 10, the Québec Ombudsman must advise the director of the public body of its intention."

Delegation of powers to a person who is not a member of the personnel

- 76 The very nature of certain alleged wrongdoings could require use of special expertise in certain matters. It would therefore be useful to allow the Québec Ombudsman to delegate its investigative powers to persons other than its employees, as allowed under section 5 of the *Act respecting the Health and Social Services Ombudsman*.³³ This act of delegating would consist in giving a person who is not a member of the Québec Ombudsman's personnel the mandate to conduct an inquiry or delegate any other specific mandate to that person. In turn, this person would comply with the ensuing obligations, especially those concerning the utmost confidentiality of investigations.

³² *Act to confer certain powers of inspection and seizure on the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, S.Q. 2012, c. 17, s. 3.

³³ "The Health Services Ombudsman may give a person who is not a member of the Ombudsman's personnel a written mandate to examine a complaint and, where applicable, conduct an inquiry, or any other specific written mandate related to any of the Ombudsman's functions. The Health Services Ombudsman may delegate the exercise of any of the Ombudsman's powers to such a person."

Recommendation:

Concerning the Québec Ombudsman's use of external resources

Whereas:

The nature of certain alleged wrongdoings could require special expertise;

The Québec Ombudsman already has this power under the *Act respecting the Health and Social Services Ombudsman*.

The Québec Ombudsman recommends:

R-12 That the following paragraph be added after the first paragraph of section 25:

"The Health and Social Services Ombudsman may give a person who is not a member of the Québec Ombudsman's personnel a written mandate to examine a complaint and, where applicable, conduct an inquiry, or any other specific mandate related to any of the Québec Ombudsman's functions. It may then delegate the exercise of the required powers to this person."

3.4 Reasons for putting an end to the processing of a disclosure and the effects of refusal

- 77 Section 11 of Bill 87 sets forth the circumstances in which the Québec Ombudsman must put an end to the processing of a disclosure. However, there are no specifics as to the actions to be undertaken in cases in which the disclosure will not be processed. It should be expected that this matter may surface, especially when the Québec Ombudsman considers that "the subject-matter of the disclosure does not fall within the Public Protector's mandate."³⁴
- 78 The Québec Ombudsman does not believe that it must stop investigating only because the disclosure might be handled by another body, according to a procedure provided for in another statute.³⁵ If the wrongdoing meets the other requirements provided for in the Act, the Québec Ombudsman could proceed to examine the wrongdoing even if this requires the cooperation or expertise of this other body, while it nonetheless maintains control of the inquiry.
- 79 If, in the end, the Québec Ombudsman concludes that the subject-matter of a disclosure is not within its purview, it could not in all good conscience simply leave the whistleblower stranded, as it were. If in such a case, it urges the whistleblower to contact another body, will he or she have the same protection? This warrants clarification. Should it instead ask the consent of the whistleblower and transfer the file, potentially without revealing that person's identity, to the body in question? These are matters that the Québec Ombudsman must consider and that it could clarify in its procedure.

³⁴ Bill 87, s. 11, para. 2, subpara. 1.

³⁵ For example, a wrongdoing that jeopardizes occupational safety, by the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST); insider trading, by the Autorité des marchés financiers; and a wrongdoing with environmental consequences, by the Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques (MDDELCC).

3.5 Relations and information exchanges between the Québec Ombudsman and other bodies

- 80 Section 13 of Bill 87 provides that the Québec Ombudsman, in certain situations, sends the disclosed information to a police force or to the Anti-Corruption Commissioner (CLCC or UPAC).
- 81 That being said, given the complementary nature of their mandates, and the fact that the Québec Ombudsman's mandate is broader and more comprehensive, we would not be mistaken in assuming that there are likely to be situations in which a disclosure would concern an act committed within a public body and could be a wrongdoing within the meaning of Bill 87 but not within the meaning of the *Anti-Corruption Act* (LCLCC), UPAC's opinion being that this act is not related to a public contract. Reciprocally, UPAC could transfer the allegation or the file to the Québec Ombudsman.
- 82 If the legislator deems it necessary, the LCLCC could be amended accordingly. At the very least, in such cases, whistleblowers should be invited to contact the Québec Ombudsman, where they will have the same guarantees of protection.

4 Other issues in applying the Act

4.1 Public disclosure in cases of serious and imminent risk to a person's health or safety or to the environment

- 83 Under section 6 of the Bill, when certain well-defined conditions coalesce (urgency of a situation, wrongdoing that poses a risk to a person's health or safety or to the environment), a person may "disclose to the public any information he or she considers reasonably necessary to avoid that risk." Under certain conditions, whistleblowers would enjoy the same protection against reprisal as if they had gone to the responsible authority within his or her government body or to the Québec Ombudsman.
- 84 Even if there are those who would like to see public disclosure—undoubtedly through the media—permitted and protected all the time and for every wrongdoing, the Québec Ombudsman considers that the guidelines provided for are reasonable and will make it possible to prevent tarnishing of the reputation of people wrongly blamed. In this matter, the approach is comparable to that of several parliaments within Canada.³⁶
- 85 It bears pointing out that section 6 of the Bill, like other provisions elsewhere in Canada, also provides for disclosure prior to public disclosure (sometimes specifying a Chief Medical Officer in Health in the case of health situations). Whereas these pieces of legislation refer to a competent law enforcement agency, instead, the Bill stipulates prior disclosure "to a police force or the Anti-Corruption Commissioner." The opinion of the Québec Ombudsman is that specifically identifying these instances is restrictive and that they may not always be the most appropriate place to go in preventing the anticipated danger. In particular, it has questions about the appropriateness of disclosure to the CLCC in emergency situations concerning acts "posing a risk to a person's health or safety or to the environment," when, in fact, the CLCC handles cases of corruption or collusion in public contracts.
- 86 The Québec Ombudsman has noted that provincial legislations provide for the action to be taken after a public disclosure. In such circumstances, whistleblowers inform their superior or the internal disclosure officer immediately after having made the disclosure to the public and to the competent law enforcement agency. Bill 87 makes no provision for any of this.

Recommendation:

Concerning the public disclosure of wrongdoings

Whereas:

In cases in which public disclosure of a wrongdoing, having occurred, that poses serious and imminent risk to a person's health or safety or to the environment, the purpose of prior disclosure of information to an authority is to warn those in danger or to minimize the risks incurred;

Law enforcement agencies (public health officers, environmental emergency services, civil security) other than police forces can act promptly for the above purposes;

The danger calls for quick intervention, whether or not a public contract exists.

³⁶Notably, the Integrity Commissioner at the federal level (s. 16(1)), in Manitoba (s. 14), in New Brunswick (s. 14), in Nova Scotia (s. 8) and in the Yukon (s. 13).

The Québec Ombudsman recommends:

R-13 That section 6 of the Bill be amended by replacing “or to the Anti-Corruption Commissioner” by “a competent law enforcement agency.”

4.2 Disclosure mechanisms within public bodies

- 87 Section 5 of Bill 87 gives precedence to recourse to the Québec Ombudsman for disclosing wrongdoing, while nonetheless offering the option for employees to contact the officer designated within the body in question, if they wish to.
- 88 The Québec Ombudsman wishes to make it clear that in order to foster employees' trust in this mechanism and public confidence in these bodies, it is crucial that some consistency and uniformity in how disclosures are processed prevail, even though each body must have its own procedure. In addition to the inclusion of the elements deemed essential in an internal procedure, there must be the same guarantees of whistleblower protection within all public bodies. These bodies must aspire to consistency across the board in how they deal with disclosures and treat whistleblowers, witnesses and the people targeted by the allegations.
- 89 Even if the reference document that the Québec Ombudsman will produce will help to reduce disparities, it feels that it would be advisable for the Minister responsible for enforcing the Act to ensure that the procedures are consistent with one another before they are implemented.
- 90 The Québec Ombudsman also has questions about the fact that Bill 87 does not provide a single guideline for the directors of public bodies about how to designate the internal officer responsible for dealing with disclosures. The necessary qualifications or hierarchical rank are not spelled out. Details on this subject, as well as rules concerning the exercise of this responsibility alongside other functions, would attest to the importance accorded to it.
- 91 In another vein, the Québec Ombudsman considers that the bodies subject to the Act should be obliged to account for application of the Act in their annual reports. Such reporting, if only quantitative, seems essential for fostering public trust as well as for better assessment of the success of the mechanism established within public bodies. It would also make data available about the ratio of internal disclosures to disclosures submitted to the Québec Ombudsman. A single communication to the Minister after five years, and at the Minister's request, of the information specified in section 41³⁷ for producing the report on the implementation of the Act seems insufficient to the Québec Ombudsman.
- 92 This reporting could be included in the public body's annual management report, in the same way as data about the protection of personal information, access to information and ethics, for example.

³⁷ Bill 87, s. 41: “...the number of disclosures received, the number of well-founded disclosures and the number of disclosures the processing of which was ended under paragraph 3 of section 21.”

Recommendation:

Concerning reporting by public bodies

Whereas:

Public bodies' lack of reporting on the internal processing of disclosures is not conducive to public trust and the confidence of the employees of these bodies;

There could be useful lessons to be learned about the application of the Act from such reporting, if only quantitatively;

Public bodies' annual management reports already provide for similar obligations.

The Québec Ombudsman recommends:

R-14 That the Bill be amended so that the bodies subject to the Act be required to give an accounting in their annual management report of the number of disclosures received by the internal officer, as well as the number of well-founded disclosures and the number of disclosures the processing of which was ended.

4.3 Minister's report on implementation of the Act

- 93 Section 41 of the Bill provides that the Minister must, within five years of the coming into force of section 1, report to the Government on the implementation of the Act and on the advisability of maintaining or amending it. Even if it is stipulated that the report must be tabled by the Minister in the National Assembly within 30 days, there are no provisions as to follow up on this report.
- 94 The Québec Ombudsman considers that the report must be studied by the competent committee of the National Assembly. The committee would analyze the advisability of amending the Act and hear presentations on that subject by interested persons or bodies.

Recommendation:

Concerning the report on implementation of the Act

Whereas:

Other statutes³⁸ provide that

The competent parliamentary committee examine a public body's implementation report tabled in the National Assembly;

It is clear that such examination is useful and would enable all interested parties, including the Québec Ombudsman, to be heard.

³⁸ For example, the *Act respecting access to documents held by public bodies and the Protection of personal information*, c. A-2.1, and the *Tobacco Act*, c. T-0.01.

The Québec Ombudsman recommends:

R-15 That section 41 of the Bill be amended by adding a third paragraph specifying that the report tabled by the Minister must be studied by the competent parliamentary committee and that the committee must study the advisability of amending the Act and may hear the presentations on that subject by interested persons or bodies.

5 Implementation of the Act by the Québec Ombudsman

- 95 The challenge of implementing the Act incumbent on the Québec Ombudsman is stimulating, but also daunting.
- 96 If Bill 87 is assented to, the Québec Ombudsman will have to start work immediately, even before the wrongdoing disclosure mechanism is set in motion. These activities, whether they concern staffing, information resources (adaptation of the file processing system) or communications, to say nothing of the drafting of the procedure for dealing with disclosures and of the reference document for public bodies, will require considerable and sustained effort.
- 97 It is clear that the Québec Ombudsman cannot carry out this mandate with all due competence and rigour and without hampering fulfillment of its current duties unless the required resources and means are marshalled.
- 98 The Québec Ombudsman is aware of today's budgetary issues, and its estimate of the resources it would need in anticipation of its role in the overall wrongdoing disclosure process established by the Bill is rigorous and conservative. That being said, it is concerned lest planning and start-up of the activities related to this new mandate become derailed because of a lack of basic resources.
- 99 A few of the features of this new mandate are presented below. These characteristics make this new mandate different from the Québec Ombudsman's current mandate as well as from those of the other Canadian organizations tasked to process disclosures of wrongdoing. Additional resources are warranted given these particularities.

5.1 The scope of the mandate conferred on the Québec Ombudsman

- 100 In light of the quantitative and qualitative analyses of the mandates of the institutions that play a similar role elsewhere in Canada, and of the exchanges with those entrusted with these duties, it is clear that in facilitating the disclosure of wrongdoing for the entire public sector, that is, approximately 681,000 workers,³⁹ Québec is creating an ambitious system for itself. If municipal bodies were also subject, some 100,000 employees would be contemplated.
- 101 It bears pointing out that making the entire public sector subject to disclosure legislation is not something that is found in most other provinces. To take an extreme example, Ontario does not cover disclosures from its central ministries or Crown corporations, accounting for a few more than 88,000 of 1.1 million employees overall. Several provinces exclude the health and social services, education and higher education sectors, as well as agencies of the legislative branch, quasi-judicial bodies and Crown corporations. According to the data at the Québec Ombudsman's disposal, no organization tasked to deal with disclosures of wrongdoing covers more than 236,000 employees.
- 102 By covering all these sectors, Québec can expect to receive more disclosures than suggested by a simple comparison of provincial populations, without considering the possible inclusion of municipalities, over which no other Canadian disclosure institution has jurisdiction. Nor can we ignore the fact that Bill 87 enables "any person," and not just the

³⁹ Pursuant to the entities contemplated in section 2 of Bill 87.

employees of public bodies, to disclose wrongdoings committed within a public body to the Québec Ombudsman.

- 103 Other factors may also influence the potential number of disclosures that the Québec Ombudsman would have to handle. Citizens' high expectations in matters of probity and the efforts made by the various players to publicize the disclosure mechanism and to incite whistleblowers and internal officers to turn to the Québec Ombudsman are cases in point.
- 104 On the other hand, we must take into account that, in Québec, wrongdoings in matters of public contracts can be disclosed pursuant to the *Anti-Corruption Act*. This may be a factor in diminishing the demand at the Québec Ombudsman's level.

5.2 Investigations pursuant to the *Public Protector Act* and the new Act

- 105 Even though the new mandate assigned to the Québec Ombudsman under the Bill bears several similarities to its current mandate under the *Public Protector Act* and the *Act respecting the Health and Social Services Ombudsman*, it is different in some respects. In particular, the kind of investigation required could easily, in general, be longer to conduct than the individual investigations stemming from complaints carried out under these two Acts. At least, this is what experiences elsewhere in Canada suggest.
- 106 Even the goal of these investigations is very specific: to ascertain the commission of a wrongdoing by an individual (sometimes a person in a position of authority) that could prove to be an offence. The collection and conservation of evidence will require special procedures in response to this specific goal. From what the Québec Ombudsman has gleaned from other Canadian disclosure institutions, prior experience in police investigations or in audits may be very useful, while legal knowledge and expertise is fundamental.
- 107 Consequently, the investigators who will carry out these interventions must have specific experience and a particular professional background. While some of these people may already be in the employ of the Québec Ombudsman, it is clear that its resources must not be depleted so that it can fulfill its new mandate. What is at stake is the institution's very credibility.

5.3 Impact of the Québec Ombudsman's role of providing advice and support

- 108 As indicated earlier, if the Bill is passed, the Québec Ombudsman would exercise a two-pronged role: that of investigating disclosures, and that of providing internal disclosure officers with support.
- 109 As a result, certain mandate-related activities will be carried out independently from those involving disclosures and information requests received by the Québec Ombudsman. Resources should therefore be earmarked for its role of providing advice and support. Communications initiatives will also have to be undertaken to publicize the reference documents (the procedure template, for one) produced for public bodies. The Québec Ombudsman will have to ensure that there is a common understanding of the documents, especially by directors and internal disclosure officers, but also by employees and their representatives, as well as the public at large. Information and training sessions must be dispensed within public bodies, especially to internal disclosure officers.
- 110 The efforts needed for analyzing smaller public bodies' applications for exemption from the requirement to have their own disclosure procedure and internal disclosure officer, in accordance with section 18 of Bill 87, must also be taken into consideration.

- 111 These are but the principal elements that will have to be taken into account in analyzing the resources that the Québec Ombudsman would need in order to carry out its mandate successfully, beyond disclosure processing per se. To disregard this issue is to run the risk of not achieving the outcomes sought by this promising Bill.
- 112 Bill 87 is an expression of the will to strengthen citizens' trust in the government and its institutions. This objective deserves all the efforts crucial to its success.

Conclusion

- 113 The Québec Ombudsman subscribes to the government's will to develop and strengthen probity within public services, as well as to the introduction of wrongdoing disclosure mechanisms, without the risk of reprisal for all whistleblowers. Respect for citizens and their rights hinges on the promotion of sound administration and good governance. In this respect, the State must be exemplary.
- 114 Some will criticize the fact that the Bill, if passed, will only apply to the public sector, but the Québec Ombudsman already considers it a major step forward. It also draws attention to the fact that, to its knowledge, no other Canadian body is tasked to receive and process disclosures concerning all types of wrongdoing committed within or with regard to all entities, public and private. Some bodies cover both the public and the private sector, but only in a single field (for example, finance, the environment or occupational safety).
- 115 The scope of the mandate that would be conferred on the Québec Ombudsman is, among other attributes, broader than that given to most other parliamentary ombudsmen in Canada. Bill 87's chosen mechanism seems promising to the Québec Ombudsman, even if it bears improvement, as shown in the recommendations in this brief.
- 116 The Québec Ombudsman enthusiastically welcomes the mandate that the Act would confer on it if the Bill is passed and assented to. However, it must insist that appropriate resources (fewer than if a new disclosure organization were created) will be essential if the mechanism is to be more than a smokescreen and achieve the goals so long desired by many. The Québec Ombudsman reiterates that its current mission—essential for ensuring that citizens' rights are upheld in their interactions with public services—must not suffer because of this mandate,
- 117 In the coming days, other presenters will appear before the Committee on Public Finance with their comments and suggestions. The Québec Ombudsman will be very attentive to what they have to say and examine all of it with an open mind. In order to ensure that citizens benefit from the best possible mechanism, the Québec Ombudsman reserves the right to possibly make new recommendations at its second appearance, at the end of the hearings.

Appendix 1: List of recommendations

Recommendations:

Concerning application to municipalities

Whereas :

Under subparagraph 11 of section 3 of the *Anti-Corruption Act*, municipalities and mandatory bodies of the municipality and supramunicipal bodies⁴⁰ (bodies contemplated in sections 18 or 19 of the *Act respecting the pension plan of elected municipal officials* (c. R-9.3)) are subject to this Act;

The *Anti-Corruption Act* and Bill 87 have similar goals;

The *Municipal Ethics and Good Conduct Act* provides for a mechanism for disclosing elected municipal officers' breach of their code of ethics and good conduct, but not for wrongdoings committed by employees;

The *Municipal Ethics and Good Conduct Act* provides no protection against reprisals to whistleblowers;

It is advisable to avoid potentially contradictory recommendations and decisions.

The Québec Ombudsman recommends:

Either:

R-1 That the *Municipal Ethics and Good Conduct Act* be amended so as to make municipal employees subject to it and to provide adequate protection against reprisals.

Or:

R-2 That section 2 of the Bill be amended by adding the following paragraph: "municipalities as well as the bodies contemplated in section 18 or 19 of the Act respecting the pension plan of elected municipal officials (c. R-9.3)." AND

That section 11 of the Bill be amended by adding a third paragraph: "The Québec Ombudsman must also put an end to the processing of a disclosure concerning an entity contemplated in subparagraph (to be determined) of section 2 if the alleged wrongdoing has been the subject of a preliminary examination or an inquiry pursuant to Chapter III of the *Municipal Ethics and Good Conduct Act* or has been the subject of a decision by the Commission municipale du Québec."

⁴⁰ "'Supramunicipal body' means a metropolitan community, any regional county municipality, intermunicipal management board, intermunicipal transit authority, intermunicipal board of transport, the Kativik Regional Government and any other public body the majority of the members of the board of directors of which are elected municipal officers." *Act respecting the pension plan of elected municipal officials*, c. R-9.3, s. 18, para. 2.

Recommendation:

Concerning application to certain private health institutions under agreement

Whereas:

Private health institutions under agreement are publicly funded and provide health care and service at regulated fees;

They are subject to the *Anti-Corruption Act*.

The Québec Ombudsman recommends:

R-3 That section 2 of the Bill be amended by adding the words “or private institutions under agreement” after the word “public” in subparagraph 7.

Recommendation:

Concerning application to the administrative services of the National Assembly

Whereas:

The services contemplated in Divisions III and V of Chapter IV of the *Act respecting the National Assembly* are administrative, not political, services;

The members of the personnel of these services are part of the personnel of the public service.

The Québec Ombudsman recommends:

R-4 That section 2 of the Bill be amended by adding the following subparagraph: “the “services contemplated in Divisions III and V of Chapter IV of the *Act respecting the National Assembly* (chapter A-23.1);”

Recommendation:

Concerning disclosure with regard to the Québec Ombudsman

Whereas:

The Québec Ombudsman is not immune from allegations of wrongdoing;

The people wishing to disclose information about such acts, including the employees of the Québec Ombudsman, must be afforded the same recourse and protection by the Act;

These people and employees must be able to contact an independent and impartial body in complete confidence.

The Québec Ombudsman recommends:

R-5 That the following section be added after section 5 of the Bill:

“When it receives a disclosure of information that could show that a wrongdoing has been committed or is about to be committed within the Québec Ombudsman, it must communicate the disclosure to the Ethics Commissioner.

Any person may contact the Ethics Commissioner to disclose information that could show that a wrongdoing has been committed or is about to be committed within the Québec Ombudsman.

The Ethics Commissioner exercises the same powers and has the same immunity conferred on the Québec Ombudsman pursuant to this Act.”

Recommendation:

Concerning wrongdoings that could be committed against public bodies

Whereas:

Wrongdoings may also be committed with regard to public bodies by people outside these bodies;

These wrongdoings have an adverse effect on the public bodies and the people aware of them should be able to safely disclose them.

The Québec Ombudsman recommends:

R-6 That sections 1 and 5 be amended to add “or with regard to” after every use of the word “within.”

Recommendation:

Concerning the scope of protection against reprisals

Whereas:

The measures to protect against reprisals provided for in the Bill only concern reprisals related to the employment of a salaried worker;

Third-party whistleblowers could be the victims of other forms of reprisal that are unrelated to their employment.

The Québec Ombudsman recommends:

R-7 That the following section be added after section 27 of the Bill: “Any person who believes, on the grounds described in section 26, that he or she has been the victim of reprisals that are unrelated to his or her employment, may file a complaint with the Québec Ombudsman. If, after examining the complaint, the Québec Ombudsman deems it to be substantiated, it proceeds in accordance with sections 14 and 15, taking into account the necessary modifications.”

Recommendation:

Concerning the cooperation required of public bodies within the framework of the performance of the duties that devolve to the Québec Ombudsman by the Bill

Whereas:

The Québec Ombudsman will be called upon to fulfill roles that will be important for the proper performance of the process, in addition to the processing of disclosures *per se*;

It will be essential that the bodies subject to the Act cooperate with the Québec Ombudsman, not only for audits and investigations, but also for making known the disclosure process and the rights of the people involved.

The Québec Ombudsman recommends:

R-8 That the Bill be amended by adding a section after section 5 providing for a general obligation for bodies (employees and directors) subject to the Act to cooperate with the Québec Ombudsman within the framework of the application of the Act.

Recommendation:

Concerning the Québec Ombudsman's initiating power

Whereas:

The Québec Ombudsman's power to intervene on its own initiative has, in the past, enabled it to rectify situations that were harmful to great numbers of citizens;

The relevance of this power has been demonstrated;

This power would enable the Québec Ombudsman to investigate situations that might otherwise persist or go unpunished.

The Québec Ombudsman recommends:

R-9 That the following paragraph be added after the second paragraph of section 10: " It may also, on its own initiative, conduct the audits or investigations contemplated in the first paragraph and second paragraph when it has cause to believe that a wrongdoing has been committed or is about to be committed."

Recommendation:

Concerning the Québec Ombudsman's power to suggest reforms and to intervene publicly

Whereas:

The Act will not achieve its full breadth unless it makes it possible to promote sound administration and good governance, with a view to prevention;

The situations reported to the Québec Ombudsman may not be wrongdoings within the meaning of the Act but may nonetheless signal weaknesses that warrant being rectified across the entire public spectrum;

The fact that the director of a public body has taken satisfactory measures to implement the Québec Ombudsman's recommendations does not mean that other public organizations cannot learn from the situation;

It may be fitting to make suggestions as to legislative, regulatory or administrative reforms, in particular, in order to improve the way things are done within public bodies.

The Québec Ombudsman recommends:

R-10 That section 25 of the Bill be amended by adding: "27.3, 27.4," to the listing of sections.

Recommendation:

Concerning the Québec Ombudsman's access to the premises of public bodies

Whereas:

The particular nature of the investigations conducted by the Québec Ombudsman further to the disclosure of wrongdoings requires that it have access to the premises of the body under investigation.

This power is not included in the *Act respecting public inquiry commissions*.

The Québec Ombudsman recommends:

R-11 That the following section be added after section 10 of the Bill. "For the purpose of applying the present Act, the Québec Ombudsman may enter the premises of a public body at any reasonable time of day to perform the duties stemming from its area of jurisdiction. Before entering a premise pursuant to the first paragraph of section 10, the Québec Ombudsman must advise the director of the public body of its intention."

Recommendation:

Concerning the Québec Ombudsman's use of external resources

Whereas:

The nature of certain alleged wrongdoings could require special expertise;

The Québec Ombudsman already has this power under the *Act respecting the Health and Social Services Ombudsman*.

The Québec Ombudsman recommends:

R-12 That the following paragraph be added after the first paragraph of section 25: “The Health and Social Services Ombudsman may give a person who is not a member of the Québec Ombudsman's personnel a written mandate to examine a complaint and, where applicable, conduct an inquiry, or any other specific mandate related to any of the Québec Ombudsman's functions. It may then delegate the exercise of the required powers to this person.”

Recommendation:

Concerning the public disclosure of wrongdoings

Whereas:

In cases in which public disclosure of a wrongdoing, having occurred, that poses serious and imminent risk to a person's health or safety or to the environment, the purpose of prior disclosure of information to an authority is to warn those in danger or to minimize the risks incurred;

Law enforcement agencies (public health officers, environmental emergency services, civil security) other than police forces can act promptly for the above purposes;

The danger calls for quick intervention, whether or not a public contract exists.

The Québec Ombudsman recommends:

R-13 That section 6 of the Bill be amended by replacing “or to the Anti-Corruption Commissioner” by “a competent law enforcement agency.”

Recommendation:

Concerning reporting by public bodies

Whereas:

Public bodies' lack of reporting on the internal processing of disclosures is not conducive to public trust and the confidence of the employees of these bodies;

There could be useful lessons to be learned about the application of the Act from such reporting, if only quantitatively;

Public bodies' annual management reports already provide for similar obligations.

The Québec Ombudsman recommends:

R-14 That the Bill be amended so that the bodies subject to the Act be required to give an accounting in their annual management report of the number of disclosures received by the internal officer, as well as the number of well-founded disclosures and the number of disclosures the processing of which was ended.

Recommendation:

Concerning the report on implementation of the Act

Whereas:

Other statutes⁴¹ provide that

The competent parliamentary committee examine a public body's implementation report tabled in the National Assembly;

It is clear that such examination is useful and would enable all interested parties, including the Québec Ombudsman, to be heard.

The Québec Ombudsman recommends:

R-15 That section 41 of the Bill be amended by adding a third paragraph specifying that the report tabled by the Minister must be studied by the competent parliamentary committee and that the committee must study the advisability of amending the Act and may hear the presentations on that subject by interested persons or bodies.

⁴¹ For example, the *Act respecting access to documents held by public bodies and the Protection of personal information*, c. A-2.1, and the *Tobacco Act*, c. T-0.01.

Canadian legislation analyzed

1. **Alberta.** *Public Interest Disclosure (Whistleblower Protection) Act.* 2012, c. P 39.5
2. **Canada.** *Public Servants Disclosure Protection Act,* S.C. 2005, c. 46
3. **Manitoba.** *The Public Interest Disclosure (Whistleblower Protection) Act],* C.C.S.M., c. 217
4. **New Brunswick.** *Public Interest Disclosure Act,* SNB, 2012, c 112
5. **Nova Scotia.** *Public Interest Disclosure of Wrongdoing Act.* 2010, c. 42
6. **Nunavut.** *Public Service Act.* S.Nu., 2013, c. 26
7. **Ontario.** *Public Service of Ontario Act,* 2006, S.O. 2006, c. 35, Sched. A
8. **Saskatchewan.** *The Public Interest Disclosure Act.* The Statutes of Saskatchewan, 2011, c. P-38.1
9. **Newfoundland and Labrador.** *Public Interest Disclosure and Whistleblower Protection Act.* SNL 2014, c. P-37.2
10. **Yukon.** *Public Interest Disclosure of Wrongdoing Act*

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