Disclosure of Wrongdoing and Protection Against Reprisals: The Federal and Quebec Experience

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Disclosure of Wrongdoing and Protection Against Reprisals: The Federal and Quebec Experience

Author: Rachel Dugas

Senior Counsel
Public Servants Disclosure Protection Tribunal Canada[1]

INTRODUCTION

Legislation on the disclosure of wrongdoing and protection against reprisals is relatively new in Canada. In fact, it follows a line of cases that began to emerge in the 1980s.

1. History of disclosure[2] of wrongdoing in Canada

It was in 1981 that arbitrator J.M. Weiler discussed the disclosure of wrongdoing in the public service. In that case,[3] arbitrator Weiler noted that the duty of loyalty to the employer did not impose an absolute "gag rule" on the employee from making public statements which are critical of the employer. Arbitrator Weiler also stated that employees should not be so fearful for their jobs that they do not disclose wrongdoing. The case has often been cited in jurisprudence when a court is faced with a matter regarding the appropriate balance between a public servant's freedom of expression and the duty of loyalty.

A few years later, in 1985, the Supreme Court of Canada established the foundation for the "whistleblower" defence in *Fraser*.[4] It was a judicial review of a termination of a public servant who had publicly attacked major government policies, including the implementation of the metric system.

In its inquiry into the traditions in the public service, the Supreme Court examined the duty of loyalty. The qualities considered essential for the public service, that is, impartiality, fairness and integrity, could also be understood through the role of the executive in implementing and administering government policy and the principle of separation of powers. The Supreme Court stated, however, that the duty of loyalty is not absolute and could not support an absolute "gag rule" against an employee. In some instances, a public servant's freedom of expression was permissible.

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[2] Federally, the term used in French is "divulgation" whereas in Quebec, the French legislation uses "dénonciation". In English, "disclosure" is used for both.

[3] *Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees Union* (1981), 3 LAC (3d) 140.

[4] *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455.

The Supreme Court identified three areas in which a public servant may make disclosures of wrongdoing by other public servants: 1) if an individual was engaged in illegal acts; 2) if the policy in place jeopardized the life, health or safety of individuals; and 3) if the disclosure made by the public servant did not have an impact on his or her ability, or on the perception of that ability, to effectively perform his or her duties.

The *Canadian Charter of Rights and Freedoms* (the Charter) had not been proclaimed at the time of the facts in *Fraser*, but the Supreme Court acknowledged that freedom of speech was a deep-rooted democratic value. The Supreme Court found in the *Fraser* decision (and in several other decisions that followed in which the Charter was directly at issue) that it was important to strike a balance between freedom of expression and the duty of loyalty to the employer. Even though the Supreme Court recognized the importance of freedom of expression, it found that the "whistleblower" defence could not be raised in the case.

The Supreme Court, in *Fraser*, stated that the common law duty of loyalty was recognized by the Charter as a limit "prescribed by law" under section 1. That duty is considered essential to promoting an effective public service and to the functioning of a democratic society. This was also highlighted by the Federal Court in *Haydon No 1*.[5]

Haydon no 1 involved two Health Canada scientists' public criticism of their employer's drug review regime. The Federal Court found that the common law duty of loyalty as articulated in *Fraser* sufficiently accommodates the freedom of expression as guaranteed by the Charter, and therefore constitutes a reasonable limit within the meaning of section 1 of the Charter. The Court also stated that the first avenue a public servant should follow before publicly criticizing a government policy is to raise a concern internally.

This decision incorporated the principles of *Fraser* within the scope of the Charter by associating the duty of loyalty of public servants with one of the reasonable limits provided for in section 1 of the Charter. The Federal Court recognized that a public servant might be protected by the Charter and common law when he or she discloses illegal acts or practices or policies that may threaten public safety. It also specified that the "whistleblower" defence, which arises from *Fraser*, applies to issues of public interest.

In *Stenhouse*,[6] the Federal Court found that the applicant's public disclosure of confidential documents did not fall within the "whistleblower" defence. The applicant's Oath of Secrecy was breached, which resulted in disciplinary action. The breach was analogous to a breach by a public servant of the common law duty of loyalty. The disclosure did not fall under the limited permissible exceptions for members of the Royal Canadian Mounted Police (RCMP) because the disclosure was not in the public interest. The goal of disclosing the confidential documents was not to expose an illegal act that jeopardizes the life, health or safety of individuals. The applicant's Oath of Secrecy was breached because of his disagreements and dissatisfaction with the RCMP policy.

A Health Canada employee continued to publicly disclose acts that she felt were wrongdoings. In *Haydon No 2*,[7] Dr. Haydon, a scientist at Health Canada, made public statements in an interview with the *The Globe and Mail* to the effect that the federal government's ban on beef from Brazil was related to a trade dispute rather than to legitimate public health concerns. She was suspended for five days. The Federal Court of Appeal found that the statements made by

[5] *Haydon v Canada*, [2001] 2 FC 82.
[6] *Stenhouse v Canada (Attorney General)*, 2004 FC 375.
[7] *Haydon v Canada (Treasury Board)*, 2004 FC 749 (upheld on appeal: 2005 FCA 249).

the public servant to the press were not related to health and safety and accordingly fell outside the exception to the duty of loyalty rule outlined in *Fraser*. The Court also noted that Dr. Haydon's comments affected the perception of her ability to conduct her duties effectively and that they had an impact on the public perception of the operations and integrity of the Canadian Food Inspection Agency and Health Canada.

In 2005, the Supreme Court of Canada issued a decision in *Merk*.[8] A union employee was discharged after having reported financial misconduct to the president of the union. She argued that, under the Saskatchewan labour relations scheme, she should be reinstated on the basis that she reported to a lawful authority. The Supreme Court recognized that individuals within an employer organization have the authority to deal with whistleblowing. It also stated that laws pertaining to whistleblowing attempt to reconcile the employee's duty of loyalty to his or her employer with the public interest in the suppression of unlawful activity and therefore constitute an exception to the duty of loyalty. The Court recommended the use of the "up the ladder" principle of internal disclosure.

In 2006, the Federal Court of Appeal issued its decision in *Read*.[9] Corporal Read had investigated the system used to issue visas at the Canadian Mission in Hong Kong. He became convinced that senior Immigration Department officials, aided and abetted by members of the RCMP, had covered up flaws in the visa issuance system and potentially allowed criminals into Canada. He gave media interviews on this subject wherein he criticized the RCMP. The Court stated that a general legitimate public interest is not an exception to the duty of loyalty owed by an employee to his or her employer. In disclosing confidential information, the appellant acted in an irresponsible manner and breached the duty of loyalty to his employer. Even if otherwise justified, Corporal Read should have exhausted internal redress mechanisms before going public with his criticisms.

In 2010, the Federal Court released its decision in *Detorakis*.[10] This was the first judicial review of a decision by the Public Sector Integrity Commissioner (PSIC). The public servant had made several information requests to his employer, the Canadian Nuclear Safety Commission. He became concerned that public records has been concealed and tampered with and that evidence had been fabricated in order to affect the proceedings of a tribunal. The applicant attempted to have his complaints investigated by the Office of the Information Commissioner (OIC). However, given his complaint was submitted after the one-year complaint deadline, the OIC found the matter outside its jurisdiction. The applicant then requested that his complaints be heard by the PSIC, but the PSIC declined to deal with the matter. The Court found that the PSIC's decision was reasonable as the applicant's complaints engaged a process provided for under another Act of Parliament. While the PSIC's decision was upheld, Justice Russell expresses sympathy for the applicant's concern that his allegations of wrongdoing were falling through the cracks: "From a strictly legal perspective I can find no reviewable error in the Commissioner's Decision. However, there is a lingering concern that the complaints raised by the applicant have not been adequately addressed and that the alleged wrongdoing may go unexamined".[11]

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[8] *Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 SCR 425.
[9] *Read v Canada (Attorney General)*, 2006 FCA 283.
[10] *Detorakis v Canada (Attorney General)*, 2010 FC 39.
[11] *Ibid.*, paragraph 129.

2. Background to the creation of federal and Quebec legislation

Like the evolution of the case law since the 1980s, federal reports and policies as well as various bills eventually lead to the *Public Servants Disclosure Protection Act*.

In 1996, the Task Force on Public Service Values and Ethics, led by the late John Tait, published its report entitled "A strong Foundation". The report recommended that the government adopt a statement of principles or a code including a strong disclosure mechanism to enable public servants to voice concerns about actions that are potentially illegal, unethical or inconsistent with public service values, and to have these concerns acted upon in a fair and impartial manner.

The Treasury Board Secretariat then adopted the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* on November 30, 2001. The policy: 1) required deputy heads to appoint a senior officer responsible for receiving the disclosure of information about alleged wrongdoings in the workplace; 2) created the public service integrity office and the position of a public service integrity officer; and 3) protected employees who made disclosures in good faith against reprisals.

In 2003, the *Values and Ethics Code for the Public Service* came into effect and formed part of the terms and conditions of employment in the Public Service of Canada. That same year, Dr. Edward W. Keyserlingk, the Public Service Integrity Officer, tabled his first annual report and recommended the establishment of a legislative framework for the disclosure of wrongdoing in the federal public service. That recommendation was supported by the Auditor General in her November 2003 report and by the House of Commons Standing Committee on Government Operations and Estimates in a report entitled "Study of the Disclosure of Wrongdoing (Whistleblowing)".

In March 2004, the federal government tabled Bill C-25, *An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings*. The purpose of the Bill was to replace the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*. Among other things, the Bill provided a definition of reprisal and considered the taking of a reprisal as wrongdoing. The Bill died on the order paper when the 2004 general election was called.

In October 2004, the federal government tabled Bill C-11, the *Public Servants Disclosure Protection Act*. The Bill received Royal Assent on November 25, 2005, but did not come into effect.

On December 12, 2006, Bill C-2, the *Federal Accountability Act*, was granted Royal Assent as part of a program to improve accountability. The statute, omnibus in nature, amended several statutes, including the *Public Servants Disclosure Protection Act*. The amendments established the current disclosure of wrongdoing and protection against reprisals regime in the federal public sector.

The *Public Servants Disclosure Protection Act* (PSDPA)[12] came into effect on April 15, 2007. The Act establishes the Public Servants Disclosure Protection Tribunal. The Act also provides for a statement of values and the establishment of a code of conduct to guide the public sector. The Act confirmed the need to consider the duty of loyalty owed by public servants as well as the primacy of freedom of expression and it serves to enhance public confidence in the integrity

[12] *Public Servants Disclosure Protection Act*, SC 2005, c 46.

of public servants. The Act encourages public servants to report any wrongdoing by providing them with legal protection against reprisals.

The passage of the Act represents a legislative response to major trends in jurisprudence. Recounting this history of the federal legislative framework in relation to the jurisprudence confirms that the Act was implemented after careful thought and study.

In Quebec, a similar phenomenon occurred. As part of Operation Marteau in October 2009 and allegations by investigative reporting programs on questionable practices by public bodies with respect to awarding public works contracts, service contracts and procurement contracts, the UPAC was created on February 18, 2011. On June 13, 2011, the *Anti-Corruption Act* (ACA)[13] was assented to.

[13] *Anti-Corruption Act*, RSQ c L-6.1.

GENERAL

1. Purpose of the laws

The purpose of the federal statute is to maintain and enhance public confidence in the integrity of public servants and public institutions.

Both the framework and the wording of the federal statute illustrate the importance that Parliament places on integrity in the federal public administration and on the need to establish relevant and effective procedures to achieve its objectives. The preamble[14] recognizes the following principles:

> the federal public administration is an important national institution and is part of the essential framework of Canadian parliamentary democracy;
>
> it is in the public interest to maintain and enhance public confidence in the integrity of public servants;
>
> confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings, and by establishing a code of conduct for the public sector;
>
> public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* and that this Act strives to achieve an appropriate balance between those two important principles;
>
> the Government of Canada commits to establishing a Charter of Values of Public Service setting out the values that should guide public servants in their work and professional conduct.

Essentially, the federal statute maintained the integrity of the whistleblower defence from the jurisprudence and built upon it. It also confirmed that a careful balance must be struck between the duty of loyalty and the right to freedom of expression.

In Quebec, the purpose of the legislation is to reinforce actions to prevent and to fight corruption in contractual matters within the public sector. It establishes a procedure facilitating the disclosure of wrongdoing with the office of the Anti-Corruption Commissioner (Commissioner).[15]

By comparing the purposes of these two laws, it appears that the purpose of the federal statute is broader than that of the Quebec statute, which is limited to corruption in contractual matters.

2. Scope of the laws

The federal statute applies to departments, the Treasury Board, other portions of the public administration (namely, agencies, offices, committees, commissioner's offices, commissions, boards, quasi-judicial tribunals, councils), Crown corporations and other public bodies. The following organizations are excluded from the application of the statute: the Communications

[14] Preamble of the PSDPA.
[15] Section 1 of the PSDPA.

Security Establishment, the Canadian Security Intelligence Service and the Canadian Forces.[16] However, those organizations must also establish procedures for the disclosure of wrongdoings, including the protection of persons who disclose the wrongdoings. Those procedures must, in the opinion of the Treasury Board, be similar to those set out in the federal statute.

In Quebec, the scope of the statute is directed at bodies and persons belonging to the public sector, namely, any public body, as well as educational institutions, school boards, childcare centres, public institutions or private institutions that are party to an agreement referred to in the *Act Respecting Health Services and Social Services*[17]and municipalities.[18] No exceptions are mentioned in the statute.

In both jurisdictions, we find that it was important to the legislator to apply the corresponding law in practice to all institutions under its jurisdiction.

3. Maintaining confidentiality

Protecting the identity of a person who makes a disclosure and the confidentiality of the information that that person communicates is an issue with respect to disclosure. In fact, the confidentiality of disclosed information will depend on how well the disclosure of wrongdoing procedures are operating.

Jean-Maurice and Isabelle Cantin summarize the confidentiality issue very well:

> [TRANSLATION]
>
> Employers must provide their employees with a safe and easy-to-use mechanism. Employees may have concerns about repercussions in their professional and private lives as well as in those of their family members. Employees may also be under the impression that their superiors and colleagues will not treat them the same way. Whatever the case, employers must find a way to make it easy for the person who must make a disclosure.[19]

Depending on the context, anonymity of the disclosure may be important for the person disclosing the wrongdoing, at least from his or her colleagues. However, the disclosure investigation process, like the reprisal complaint investigation process, must be carried out as objectively as possible by respecting the principles of natural justice and the current legislation on access and privacy.

Federally, Parliament provided for protecting the identity of persons involved, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings to the extent possible subject to any other Act of Parliament and in accordance with the law.[20]

Parliament also provided that the PSIC shall ensure the confidentiality of information collected in relation to disclosures and investigations.[21] Furthermore, the PSIC and every person acting on

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[16] Subsection 2(1) of the PSDPA.
[17] *An Act Respecting Health Services and Social Services*, RSQ c S-4.2.
[18] Section 3 of the ACA.
[19] Jean-Maurice Cantin and Isabelle Cantin, *La dénonciation d'actes répréhensibles en milieu de travail ou whistleblowing*, Cowansville, Qc, Yvon Blais, 2005.
[20] Paragraph 22(*e*) of the PSDPA.
[21] Paragraph 22(*f*) of the PSDPA.

behalf of or under the direction of the PSIC shall not disclose any information that comes to their knowledge in the performance of their duties under the Act unless the disclosure is required by law or permitted by the Act.[22]

Furthermore, a balance is struck because of the PSIC's obligation to ensure that the right to procedural fairness and natural justice of all persons involved in investigations is respected.[23]

In Quebec, the Commissioner and Associate Commissioner must take all necessary measures to protect, to the extent possible, the identity of persons making a disclosure.[24] They must also ensure that the rights of all persons involved as a result of disclosures of wrongdoings are respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings.[25]

In both jurisdictions, the legislator sought to strike a balance between the rights of all parties involved.

4. Access to legal advice

Another issue with respect to disclosure is the access to legal advice. In fact, proceedings may be long and costly depending on the complexity of disclosures of wrongdoing and reprisal complaints.

According to the federal statute, the PSIC may provide access to legal advice to a public servant or person within the meaning of the Act if the public servant or person satisfies the PSIC that they do not have other access to legal advice at no cost to them and that the act or omission to which the disclosure relates likely constitutes a wrongdoing that could lead to an investigation.[26] The maximum amount for legal advice is $1,500.[27] The maximum amount may reach $3,000 in exceptional circumstances.[28]

Access to legal advice is limited in the federal statute. Moreover, no provision in the statute or its rules of procedure explicitly allows the Public Servants Disclosure Protection Tribunal (Tribunal) to award costs.

Even though the Tribunal can pay an amount equal to any expenses and any other financial losses incurred as a direct result of the reprisal[29] and one might be tempted to include costs in those concepts, the Supreme Court of Canada determined in *Mowat*[30] that costs are not included in the term "expenses".

In that case, the Canadian Human Rights Tribunal awarded costs under the *Canadian Human Rights Act*.[31] The Supreme Court analyzed the legislative history of the human rights regime and found that the Tribunal did not have that power. The Supreme Court referred to the term

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[22] Section 44 of the PSDPA.
[23] Paragraph 22(*d*) of the PSDPA.
[24] Section 31 of the ACA.
[25] Section 30 of the ACA.
[26] Subsections 25.1(1) to (3) of the PSDPA.
[27] Subsection 25.1(4) of the PSDPA.
[28] Subsection 25.1(6) of the PSDPA.
[29] Paragraph 21.7(*e*) of the PSDPA.
[30] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53.
[31] *Canadian Human Rights Act*, RSC 1985, c H-6.

"costs" as having a well-understood meaning and stated that the Canadian Human Rights Tribunal does not have jurisdiction to award costs without an explicit authority granted by Parliament. That decision therefore had a significant impact on federal quasi-judicial tribunals whose enabling act does not explicitly provide for the authority to award costs.

The authority to award costs is linked to access to justice, the capacity to retain counsel and the right to be heard. The lack of an authority to award costs could lead to an increase in unrepresented or under-represented parties before the Tribunal. In some cases, it could cause an individual to not proceed with his or her case. Furthermore, the balance between the parties could be affected in the event that an individual complainant or respondent is not represented.

Other federal statutes provide that decision-makers from quasi-judicial tribunals, such as the Canadian Radio-television and Telecommunications Commission (CRTC), the Competition Tribunal and the Specific Claims Tribunal, have the authority to award costs.

In Quebec, the Commission des normes du travail (CNT) may represent an employee who is not a member of a group of employees covered by a certification pursuant to the *Labour Code*,[32] which excludes most public servants in the Quebec public service who are represented by their unions.

[32] Section 123.5 of the *Act respecting Labour Standards* (ALS), RSQ c N-1.1.

SCHEME FOR DISCLOSURE OF WRONGDOING

This section will provide a brief overview of the scheme for the disclosure of wrongdoing. Federally, the jurisdiction for reviewing disclosures of wrongdoing is vested with the PSIC, whereas, in Quebec, the procedure for the disclosure of wrongdoing is centred on criminal law.

1. Definition of "disclosure"

Federally, a disclosure is protected when it is made in good faith by a public servant, that is, in accordance with the PSDPA, in the course of a parliamentary proceeding, in the course of a procedure established under any other Act of Parliament or when lawfully required to do so.[33] Quebec legislation does not provide a definition of protected disclosure. This is important because the prerequisite condition for a protected disclosure at the federal level is that it is made in good faith. There will probably be debates on the concept of good faith. For example, public servants could be accused by their employers of acting in bad faith with respect to their disclosure given their high level of expertise and knowledge on the subject-matter to which the disclosure relates, for example in the safety of hazardous materials, and that they should know that there has been no wrongdoing, whereas public servants could base a disclosure precisely on their high level of expertise for identifying a wrongdoing.

2. Definition of "wrongdoing"

The federal statute increased the scope of the circumstances established in *Fraser* by defining wrongdoings in or relating to the public sector in the following manner:[34]

1° a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act;

2° a misuse of public funds or a public asset;

3° a gross mismanagement;

4° an act or omission that creates a substantial and specific danger to the life, health or safety of persons or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;

5° a serious breach of a code of conduct established under section 5 or 6 of the Act;

6° knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs 1° to 5°.

The Quebec statute also provides a definition of wrongdoing. In that respect, a wrongdoing means the following:[35]

1° a contravention of a federal or a Quebec law or of a regulation made under such a law, if the contravention pertains to corruption,[36] malfeasance, collusion, fraud[37] or influence peddling in, for example, awarding, obtaining or performing contracts granted, in the exercise of their functions, by a body or a person belonging to the public sector.[38]

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[33] Subsection 2(1) of the PSDPA.
[34] Section 8 of the PSDPA.
[35] Section 2 of the ACA.
[36] For example: bribery of officers (section 120 Cr. C.) and municipal corruption (section 123 Cr. C.).
[37] For example: frauds on the government (section 121 Cr. C.) and fraud (section 380 Cr. C.).
[38] For example: issuance of a license, subsidy, contract for carrying out work, contract for providing insurance, service contract, equipment rental contract.

2° a misuse of public funds or public property or a gross mismanagement of contracts within the public sector; or

3° directing or counselling a person to commit a wrongdoing described in paragraph 1 or 2.

On several points, the federal and Quebec laws are practically identical. However, like the purpose of the law, the definition of "wrongdoing" in Quebec is limited to contracts awarded in the public sector. Furthermore, the federal statute goes further by providing for an act or omission that creates a substantial and specific danger to the life, health or safety of persons or to the environment and a serious breach of a code of conduct.

3. Wrongdoing disclosure regime

3.1 The federal experience

Federally, chief executives must establish internal procedures to manage disclosures, designate a senior officer to be responsible for receiving disclosures of wrongdoings in the portion of the public sector for which the chief executive is responsible and take appropriate action if the allegation is well-founded.[39] That obligation does not apply if the chief executive declares that it is not practical to apply those subsections given the size of that portion of the public sector.[40]

Any person can make a disclosure (public servants[41] or members of the public) at several junctures and at different levels. A public servant may make a disclosure internally (to his or her supervisor or to the senior officer designated for the portion of the public sector in which the public servant is employed)[42] or externally, that is, to the PSIC,[43] information that could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a wrongdoing. A public servant may also make a disclosure to the public if there is not sufficient time to make the disclosure and if the public servant believes on reasonable grounds that the act or omission constitutes a serious offence under the law or constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.[44] For members of the public, disclosures must be made to the PSIC.

However, the statute does not authorize the person making the disclosure to disclose to the PSIC any information that is subject to solicitor-client privilege.[45]

The PSIC's mission is to deal with disclosures of wrongdoing in the federal public sector by public servants or members of the public in a safe, confidential and independent manner.

The PSIC will deal with disclosure in the following manner:

1. *Receipt of the disclosure*: The PSIC receives, records and reviews disclosures of wrongdoings in order to establish whether there are sufficient grounds for further action.[46] It is

[39] Subsections 10(1) to (3) of the PSDPA.
[40] Subsection 10(4) of the PSDPA.
[41] The term "public servant" is defined in subsection 2(1) of the Act as follows: "every person employed in the public sector, every member of the Royal Canadian Mounted Police and every chief executive".
[42] Section 12 of the PSDPA.
[43] Subsection 13(1) of the PSDPA.
[44] Subsection 16(1) of the PSDPA.
[45] Subsection 13(2) of the PSDPA.

important to note that the PSIC may not deal with a disclosure if a person or body acting under another Act of Parliament is dealing with the subject-matter of the disclosure or the investigation.[47]

2. *Review of the admissibility of the disclosure*: An analyst, together with a legal advisor, will review the information presented. The review may include consulting experts and carrying out research on relevant issues of policy and law. A detailed report on the admissibility of the disclosure, including a recommendation to proceed or to not proceed, is presented to the PSIC.

3. *PSIC's decision*: The PSIC reviews the disclosure file and admissibility report in order to determine whether an investigation should be launched, additional action should be taken to determine whether an investigation is justified or the file should be closed.

4. *Investigation*: The PSIC has all the powers of a commissioner under Part II of the *Inquiries Act*.[48] The persons appointed by the PSIC will carry out an investigation in order to determine whether the allegations are well-founded. The PSIC must review the results of the investigations and make a report on his or her findings to the persons who made the disclosure and to the chief executives concerned. If the allegations are not well-founded, the PSIC closes the file. If the allegations are well-founded, the PSIC will make recommendations concerning the measures to be taken to correct wrongdoings and review reports on measures taken by chief executives in response to those recommendations.[49]

We note that the PSIC has discretion to refuse to deal with a disclosure or to commence an investigation or to cease an investigation for various reasons.[50]

3.2 The experience in Quebec

In Quebec, a person who wishes to disclose a wrongdoing may do so by disclosing information to the Commissioner that the person believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the person has been asked to commit a wrongdoing.[51]

It is noteworthy that the person making a disclosure of wrongdoing may do so despite *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*,[52] *An Act Respecting the Protection of Personal Information in the Private Sector*, [53] and any other communication restrictions under other laws of Quebec and any duty of loyalty or

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[46] Paragraph 22(*b*) of the PSDPA.
[47] Subsection 23(1) of the PSDPA.
[48] Subsection 29(1) of the PSDPA.
[49] Paragraph 22(*h*) of the PSDPA.
[50] Subsection 24(1) of the PSDPA: another proceeding was commenced; the subject-matter of the disclosure or the investigation is not sufficiently important; the disclosure was not made in good faith; proceeding would serve no useful purpose because of the length of time that has elapsed; the subject-matter of the disclosure or the investigation relates to a matter that results from a balanced and informed decision-making process on a public policy issue; there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation.
[51] Section 26 of the ACA.
[52] *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, RSQ c A-2.1.
[53] *An Act Respecting the Protection of Personal Information in the Private Sector*, RSQ c P-39.1.

confidentiality that may be binding on the person, in particular, with respect to an employer or a client. The Act does not however authorize a person making a disclosure to communicate information to the Commissioner that is protected by professional secrecy between a lawyer or a notary and a client.[54]

The Commissioner's mission is to coordinate actions to prevent and to fight corruption in contractual matters within the public sector.[55] The Commissioner is a peace officer for the whole territory of Quebec.[56] The Commissioner is supported by the Associate Commissioner for Audits, who is responsible for coordinating the audit teams that carry out, within their respective department or body, their mandates in their field of competence, in accordance with their responsibilities and powers under the law.[57] The audit teams inform the Associate Commissioner of any matter under audit that they believe could more appropriately be dealt with by an investigation or a proceeding relating to a penal or criminal offence under a federal or a Quebec law and report on any action taken in the case files sent to them by the Associate Commissioner for Audits.[58] The Associate Commissioner cannot be a peace officer.[59]

Under the Commissioner's leadership is UPAC, which coordinates and directs the strengths and expertise in place to fight corruption. UPAC is made up of staff from audit and investigation units. UPAC's audit partners are the Ministère des Affaires municipales, des Régions et de l'Occupation du territoire (MAMROT), the Régie du bâtiment du Québec and the Commission de la construction du Québec. UPAC's investigation partners are the Sûreté du Québec (Operation Marteau) and Revenu Québec. The investigators act under the authority of the Commissioner. They are peace officers for the whole territory of Quebec and are guided by the *Police Act* and the *Code of ethics of Québec police officers*.[60] UPAC also has a prevention and information component, as well as a unit that gathers information that will not be addressed in this report.

UPAC is also legally supported by a team of lawyers assigned to it, that is, the anti-corruption and anti-malfeasance office of the Directeur des poursuites criminelles et pénales (DPCP). The lawyers are devoted to Operation Marteau cases and cases from the Commissioner's investigators. The lawyers are responsible for advising the investigators, studying the files submitted by UPAC and instituting proceedings, primarily in matters related to fraud, breach of trust, corruption, possession and forgery.

The Commissioner will deal with disclosure in the following manner:

1. *Receipt of the disclosure*: The Commissioner receives, records and examines disclosures of wrongdoings for the purpose of providing appropriate follow-up action.[61]

2. *Review of the admissibility of the disclosure*: Upon receipt of a disclosure of wrongdoing, the Commissioner designates a member of the Commissioner's personnel to examine it and determine what action should be taken.[62]

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[54] Section 27 of the ACA.
[55] Section 4 of the ACA.
[56] Section 7 of the ACA.
[57] Sections 8, 15 and subsections 10(1) and (2) of the ACA.
[58] Section 15 of the ACA.
[59] Section 8 of the ACA.
[60] Section 14 of the ACA and *Police Act*, RSQ c P-13.1 and the *Code of ethics of Québec police officers*, OC 920-1990, (1990) GO 2, 2531.
[61] Subsection 9(1) of the ACA.

3. *Commissioner's decision*: After the examination, the Commissioner may decide no further action is required if the disclosure of wrongdoing is frivolous or does not fall within the Commissioner's mission. If the Commissioner decides to take further action regarding the disclosure, the Commissioner sends the case file to the Associate Commissioner or to the investigation units concerned.[63]

4. *Investigation*: The Commissioner may designate persons as investigators from among the personnel of the Commissioner.[64] The investigation units are coordinated by the UPAC director of operations. The investigation units carry out any investigation requested by the Commissioner and inform the Commissioner of the start of any penal or criminal investigation, provide the Commissioner with any information useful to the Commissioner's functions and report to the Commissioner on the progress made in investigations.[65] The Commissioner must inform the DPCP at the very start of any investigation and request advice from the latter.[66]

In the federal and Quebec regimes, the missions of the bodies differ, which takes them into different legal territories. In fact, the federal approach to disclosure is more centred on actions taken in the public sector, and the Quebec approach is more centred on criminal law. Of course, the disclosure of criminal acts in the federal public sector could lead to an RCMP investigation and possibly criminal charges.

Regarding procedures, both the federal and Quebec commissioners proceed essentially in the same manner regarding the receipt and admissibility of disclosures, the decision to investigate and the investigation itself.

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[62] Section 28 of the ACA.
[63] Section 29 of the ACA.
[64] Section 14 of the ACA.
[65] Section 16 of the ACA.
[66] Section 18 of the ACA.

SCHEME FOR PROTECTION AGAINST REPRISAL

Federal and Quebec legislators have both implemented procedures for the protection against reprisal. In both jurisdictions, those procedures are part of the recourse related to the labour law field. However, there are differences between the two regimes.

1. Reprisal concepts

The federal and Quebec definitions of reprisal and the corresponding prohibitions are worded in such a way that a multitude of subtle and incremental issues can be examined. The definitions and prohibitions are similar in both jurisdictions.

Under the federal statute, no person shall take any reprisal against a public servant or direct that one be taken against a public servant.[67] With that general prohibition comes the definition of the concept of "reprisal":

> [A]ny of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33 [into another wrongdoing]:
>
> *(a)* a disciplinary measure;
> *(b)* the demotion of the public servant;
> *(c)* the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;
> *(d)* any measure that adversely affects the employment or working conditions of the public servant; and
> *(e)* a threat to take any of the measures referred to in any of paragraphs (*a*) to (*d*).[68]

Furthermore, a public servant is subject to appropriate disciplinary action, including termination of employment, if he or she commits a wrongdoing.[69]

In Quebec, the statute states that it is forbidden to take a reprisal against a person who has disclosed a wrongdoing or has cooperated in an audit or an investigation regarding a wrongdoing, or again to threaten to take a reprisal against a person so that he or she will abstain from making such a disclosure or cooperating in such an audit or investigation.[70] More specifically, the ALS states that no employer or his agent may dismiss, suspend or transfer an employee, practise discrimination or take reprisals against him, or impose any other sanction upon him on the ground of a disclosure by an employee of a wrongdoing within the meaning of the ACA or on the ground of an employee's cooperation in an audit or an investigation regarding such a wrongdoing.[71]

The Quebec statute states the following: "[t]he demotion, suspension, termination of employment or transfer of a person referred to in section 32 [who makes a disclosure, among other things] or any disciplinary or other measure that adversely affects the employment or working conditions of such a person is presumed to be a reprisal."[72]

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[67] Section 19 of the PSDPA.
[68] Subsection 2(1) of the PSDPA.
[69] Section 9 of the PSDPA.
[70] Section 32 of the ACA.
[71] Subsection 122(7) of the ALS.
[72] Section 33 of the ACA.

2. Protection regime for reprisals

2.1 The federal experience

The wording in the federal statute is clear with respect to the steps in the process to protect public servants who disclose a wrongdoing from reprisal. When a public servant decides to make a disclosure to the PSIC, that is, a disclosure made outside of his or her organization, the statute sets out a two-stage process. The first stage is carried out by the public servant. If the public servant believes that he or she was a victim of reprisals after making a protected disclosure of wrongdoing, he or she must file a complaint with the PSIC. Public servants cannot file a complaint directly with the Tribunal. Only the PSIC can make an application to the Tribunal.

The PSIC carries out the second part. The PSIC makes an application to the Tribunal if the PSIC is of the opinion that an application is justified. The PSIC must use his or her discretion to determine whether an application will be made to the Tribunal.

1st stage: Office of the Public Sector Integrity Commissioner of Canada

The PSIC's mission is to deal with reprisal complaints made by public servants or former public servants in a confidential and independent manner. The PSIC must also protect public servants who make a disclosure of wrongdoing and those who collaborated in good faith with an investigation under the Act from reprisal.

The process for complaints with the PSIC takes place in five steps.[73]

1. *Receipt of the complaint:* The PSIC receives and reviews the complaint in order to establish whether there are sufficient grounds for further action.[74] It is important to note that the complainant is precluded from commencing any procedure under any other Act of Parliament or collective agreement in respect of the measure alleged to constitute the reprisal.[75]

2. *Review of the admissibility of the complaint:* After receiving the complaint, the PSIC determines its admissibility. The PSIC considers numerous factors in this review, namely, the form of the complaint,[76] when the complaint was filed,[77] remedies under another Act of Parliament or collective agreement,[78] the jurisdiction of the PSIC[79] and the issue of whether the complainant filed the complaint in good faith.[80]

If necessary, the PSIC carries out an in-depth review before launching an investigation. If the PSIC finds that the complaint is not admissible, the PSIC decision is final and the file is closed.

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[73] For more information, please consult the PSIC's Web site at http://www.psic-ispc.gc.ca/menu-eng.aspx.
[74] Paragraph 22(*b*) of the PSDPA.
[75] Subsection 19.1(4) of the PSDPA. For example, a strike under the *Public Service Labour Relations Act*, SC 2003, c 22, s 2.
[76] Subsection 19.1(1) of the PSDPA.
[77] Subsection 19.1(2) of the PSDPA.
[78] Paragraph 19.3(1)(*a*) and subsection 19.3(2) of the PSDPA.
[79] Paragraph 19.3(1)(*c*) of the PSDPA.
[80] Paragraph 19.3(1)(*d*) of the PSDPA.

3. *PSIC's decision with respect to an investigation*: If the PSIC decides to deal with the complaint, the PSIC may designate a person as an investigator to investigate a complaint.[81] At any time during the course of the investigation into a complaint the investigator may recommend to the PSIC that a conciliator be appointed to attempt to bring about a settlement. The conciliator will be appointed by the PSIC.[82]

If a settlement is reached, it must be approved by the PSIC.[83] In the event that the settlement relates to the remedy to be provided to the complainant, the PSIC must dismiss the complaint.[84] If the PSIC approves a settlement that relates to disciplinary action that is to be imposed on a person, the PSIC may not apply to the Tribunal for an order of remedy and an order of disciplinary action against persons identified in the application as being the persons who took the reprisal.[85]

If the matter remains unresolved, the investigator continues to investigate and submits an investigation report to the PSIC.[86]

4. *Decision to make an application to the Tribunal*

If, after receipt of the report, the PSIC is of the opinion that an application to the Tribunal is not warranted, he or she must dismiss the complaint.[87] If the PSIC is of the opinion that an application to the Tribunal in relation to the complaint is warranted, the PSIC may apply to the Tribunal for a determination of whether or not a reprisal was taken.[88]

In his or her decision-making process, the PSIC must take into account factors such as whether there are reasonable grounds for believing that a reprisal was taken against the complainant, whether the investigation into the complaint could not be completed because of lack of cooperation on the part of one or more chief executives or public servants and whether it is in the public interest to make an application to the Tribunal having regard to all the circumstances relating to the complaint.[89] These factors constitute the "basis" for the PSIC's decision to make an application to the Tribunal.[90]

5. *Scope of the application before the Tribunal*: At this step, the PSIC determines the scope of the application to be made. The PSIC must determine:

- whether the application will be comprised of all the allegations from the complaint, or only some of these allegations;[91]
- whether or not individual respondents should be named in the application, or simply the employer;

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[81] Subsection 19.7(1) of the PSDPA.
[82] Subsections 20(1) and (2) of the PSDPA.
[83] Subsection 20.2(1) of the PSDPA.
[84] Subsection 20.2(2) of the PSDPA.
[85] Subsection 20.2(3) of the PSDPA.
[86] Section 20.3 of the PSDPA.
[87] Section 20.5 of the PSDPA.
[88] Subsection 20.4(1) of the PSDPA.
[89] Subsection 20.4(3) of the PSDPA.
[90] The "basis" for the PSIC's decision is set out in paragraph 5(*b*) of the *Public Servants Disclosure Protection Tribunal Rules of Procedure*, SOR/2011-170 (Rules).
[91] *El-Helou v Courts Administration Service et al.,* 2011-PT-01.

- whether or not the Tribunal should be requested to consider an order respecting a remedy in favour of the complainant, in the event that it has found that reprisals were taken;[92]
- whether or not the Tribunal should be requested to consider an order respecting a remedy in favour of the complainant, and an order respecting disciplinary action against any person or persons identified by the PSIC in the application, in the event that it has found that reprisal was taken.[93]

The decisions in these steps pertain to the screening of a complaint that might or might not make its way to the Tribunal by way of an application by the PSIC. These decisions are the expression of the role that the PSIC plays as a "gatekeeper".

2nd stage: Public Servants Disclosure Protection Tribunal

The Tribunal is an independent quasi-judicial body. When the Tribunal receives an application, the PSIC becomes a party like the others. The creation of the Tribunal represents a different approach from traditional labour relations models for redress. In fact, the members of this Tribunal, including its Chair, are judges of the federal court.[94] This is an indication of the high degree of protection intended by Parliament, given the level of expertise, experience and independence of the judges. It is unusual that court judges sit as members of a quasi-judicial tribunal. The only other examples that we know of at the federal level are the Competition Tribunal and the Specific Claims Tribunal. Further, the existence of the Tribunal is based, in particular, on the fact that the PSIC does not have the power to impose corrective measures. The Tribunal also has the power to add parties, which is unique.

The Tribunal hears complaints referred by the PSIC and decides whether reprisals were taken.[95] It can also order remedies in favour of complainants[96] and disciplinary actions against the person who took the reprisal.[97]

The procedure for the application before the Tribunal involves five steps.[98]

1. *Receipt of the application*: The Tribunal receives the application referred by the PSIC. The Tribunal's jurisdiction is determined by the scope of the PSIC's application. Once the application has been referred to the Tribunal, the Tribunal's Chairperson must assign a member, or panel of three members if the complexity of the case justifies it, to deal with the application.[99]

The preliminary proceedings take place at this step, such as discovery and pre-hearing conferences.

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[92] Paragraph 20.4(1)(*a*) of the PSDPA.
[93] Paragraph 20.4(1)(*b*) of the PSDPA.
[94] Subsection 20.7(1) of the PSDPA.
[95] Subsections 21.4(1) and 21.5(1) of the PSDPA.
[96] Subsections 21.4(1) and 21.5(1) of the PSDPA.
[97] Subsection 21.5(1) of the PSDPA.
[98] For more information, please visit the Tribunal's Web site at http://www.psdpt-tpfd.gc.ca/Home-eng.html.
[99] Section 21.1 of the PSDPA.

2. *Hearing*: The second step in the hearing process is the hearing itself. The application is the originating document and is referred to the Tribunal by the PSIC. Therefore, it is the PSIC who initiates the proceedings.

Federal legislation does not make reference to dispute resolution services but certain methods may be used in an effort to resolve a dispute such as mediation and settlement conference.

3. *Tribunal determination as to whether or not reprisals have occurred*: During this step, the Tribunal must determine whether or not reprisals were taken against the complainant. There are important considerations here, relating to the parties and to what the Tribunal must determine, which relate back to the PSIC's application to the Tribunal.

4. *The Tribunal's determination as to remedy* (if applicable):

Should the Tribunal determine that reprisals were taken against the complainant and the PSIC has filed an application for remedy, then the Tribunal may only determine whether or not to grant a remedy to the complainant. In this situation, the parties to the proceeding are the PSIC, the complainant and the complainant's employer, or if the complainant is a former public servant, his or her employer at the time of the alleged reprisal and the person who took reprisals.[100] The Tribunal may identify somebody as having taken reprisal against the complainant, even if that person is not named in the proceeding. In fact, the Tribunal may add a party to the proceedings, where that person has been identified as someone who may have taken the alleged reprisals and may be directly affected by the Tribunal's determination.[101]

The Act shows that the inquiry as to remedy may not include all the parties, notwithstanding the parties' right to be heard. It is noteworthy that the Tribunal may limit the parties to a proceeding with respect to those portions of a proceeding relating to remedy.[102] In these situations, the Tribunal can limit the participation of any person or persons identified as being the person or persons who may have taken the alleged reprisal.

5. *The Tribunal's determination as to disciplinary measures* (only if applicable):

Should the Tribunal determine that reprisals were taken against the complainant and an application was made for remedy and disciplinary action, the Tribunal must conduct the hearing in two stages. During the first stage of the hearing, the Tribunal determines whether reprisals were taken and may order a remedy. During the second stage of the hearing, the Tribunal determines whether the person identified has taken reprisals and may order disciplinary action.[103] The same parties mentioned in the previous paragraph will be present during the first stage of the hearing regarding remedy.[104] For disciplinary action, the parties are the PSIC, each person who could be subject to disciplinary action and the person designated to make submissions regarding disciplinary action on behalf of the person or entity that would be required to implement the order by the Tribunal.[105] The complainant and the employer are absent in the disciplinary action stage of the hearing.

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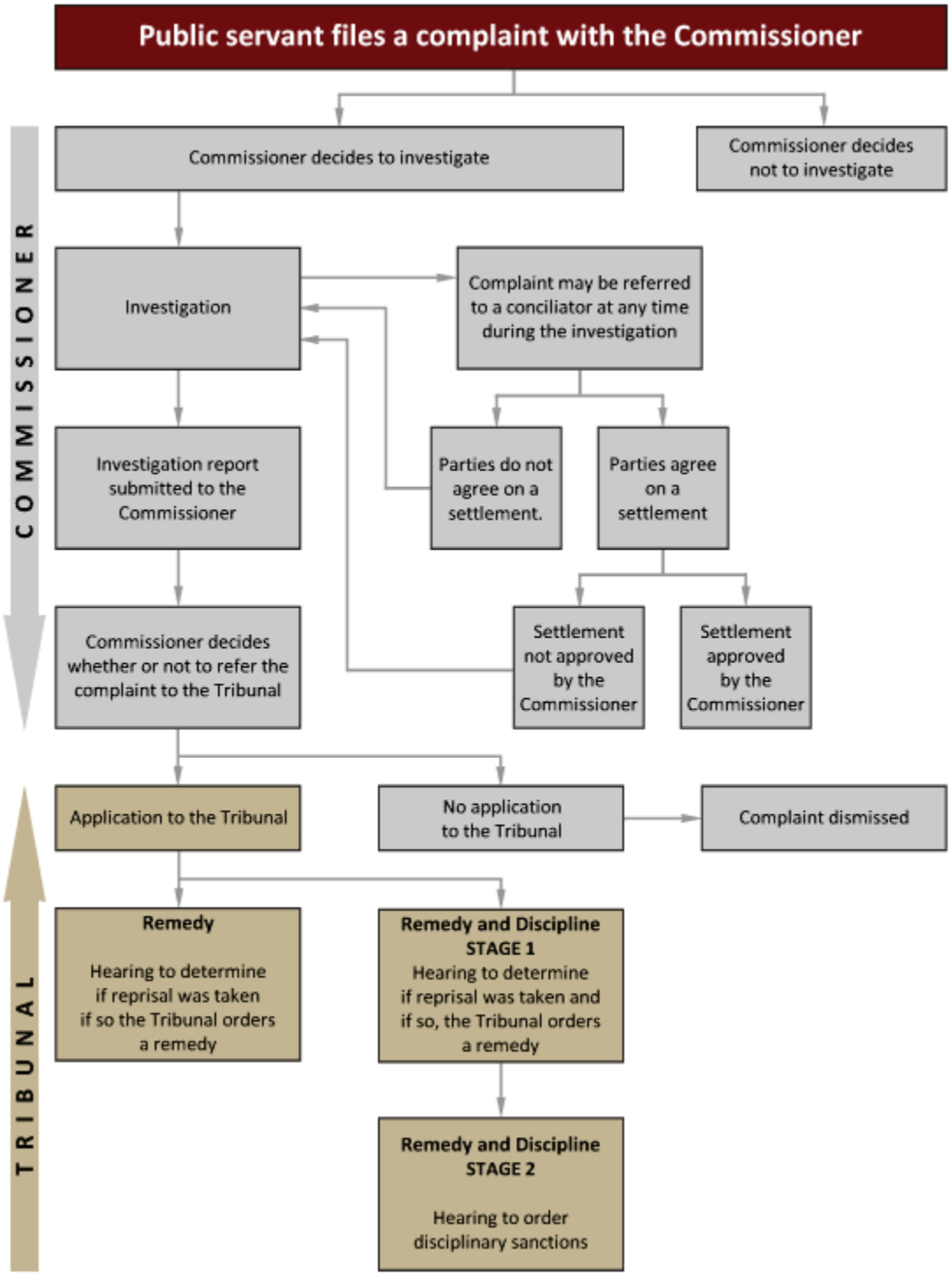
[100] Subsections 21.4(2) and (3) of the PSDPA.
[101] Subsection 21.4(3) of the PSDPA.
[102] Subsection 21.6(3) of the PSDPA.
[103] Subsection 21.4(4) of the PSDPA.
[104] Subsection 21.5(2) of the PSDPA.
[105] Subsection 21.5(5) of the PSDPA.

Figure 1: Reprisal complaint process



2.2 The experience in Quebec

The Quebec legislation added a remedy for reprisals in the ALS. The CNT deals with reprisal complaints and the Commission des relations de travail (CRT) hears them.

The mission of the CNT is to promote, through its actions, fair and balanced labour relations between employers and employees in accordance with the ALS. The CRT is an independent, quasi-judicial tribunal specialized in the area of labour relations. It has a range of remedies available to it related to individual and collective employment and labour relations.

The CRT determines the complaint of employees who believe that they were subject to a prohibited practice because of a disclosure of a wrongdoing within the meaning of the ACA.[106] The CRT is composed of commissioners with knowledge of the applicable legislation and ten years of experience relevant to the matters under the jurisdiction of the CNT.[107]

The procedure for hearing the complaint takes place in three steps.

1. *Receipt of the complaint*: The first step in the hearing is the receipt by the CNT of the complaint made by employees. In the case of unionized employees, they must file a grievance.

2. *Review of the admissibility of the complaint*: The CNT will assess whether the complaint is admissible. If it is, the CNT will offer mediation services. If no settlement is reached, the CNT will refer the complaint to the CRT, which will hear it.[108] The complaint will be heard and decided by one commissioner or a panel of three commissioners, as deemed appropriate.[109]

3. *Hearing*: The second step in the hearing process is the hearing itself. The CRT will be able to have a pre-hearing conference to familiarize itself with the positions of the parties and the admissions, but also to plan the conduct of the hearing.[110] At the hearing, the party that filed the application will be asked to present its evidence first.

It is noteworthy that the federal procedure is longer, with an investigation at the first step and a hearing at the second step, including the possibility of two hearing steps. The PSIC has to consider several factors in the admissibility of the complaint, which falls within the PSIC's role of gatekeeper, by filtering the complaints that may be sent to the Tribunal. Also noteworthy are the requirements that the federal legislation imposes on the PSIC with respect to settlement.

Certain features of the federal legislation consist in requiring the PSIC to consider specific factors provided in the federal legislation as a basis for his application and the PSIC's function must be to define the scope of the application before the Tribunal.

Finally, it should be noted that the decision-makers of the Tribunal and the CRT may sit alone or as a panel of three members. However, only the Tribunal is composed of judges of a court of justice. Further, it is important to note that the Tribunal has powers that are very specific to it such as adding parties and imposing disciplinary actions, powers which will be discussed later.

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[106] Section 123 of the ALS.
[107] Section 137.12 of the ALS.
[108] Section 123.4 of the ALS.
[109] Section 124 of the ALS.
[110] Section 135 of the *Labour Code*, RSQ c C-27 (LC).

3. Burden of proof

In Quebec, the burden is on employees to show that little time has passed between the incident and the measure received to benefit from the presumption that they were subject to reprisals after the exercise of a right protected by the LC. If it is shown to the satisfaction of the CRT that employees are exercising a right that devolves on them under the LC, there is a simple presumption in their favour that the sanction was imposed on them or the action was taken against them because they exercised such right. Thus, the burden of proof is upon the employer that it resorted to the sanction or action against the employees for good and sufficient reason.[111]

At the federal level, this presumption does not exist. The complainant and the PSIC must prove that reprisals were taken. The PSIC's threshold of proof for the referral of a complaint to the PSIC and the Tribunal's standard of proof are different.

The PSIC must have reasonable grounds to believe that reprisals have been taken to send the file to the Tribunal.[112] In *El-Helou No. 4*,[113] the Chairperson of the Tribunal stated:

> The term relates to a lower threshold, and is clearly different from the "balance of probabilities" which commonly refers to a civil burden of proof for finding that more likely than not, reprisal did in fact occur. (…)
>
> (…) The Act makes it clear that the Commissioner is performing a "gatekeeping" function when he or she refers an Application to the Tribunal. This screening function is not at all determinative of whether or not reprisal has actually occurred.[114]

Before the Tribunal, the threshold of proof is higher than before the PSIC. In the same decision, the Chairperson stated that "[t]he complainant must advance his or her own case before the Tribunal and meet the burden of proof of the balance of probabilities in order to establish that reprisal was taken".[115]

The proof of taking reprisals will be more challenging at the federal level than in Quebec where there is a rebuttable presumption in the employees' favour if they establish the event that occurred, the reprisals and the correlation between the two. In addition, the federal actions may turn out to be much harsher, such as the dismissal of the person who took reprisal.

4. Powers of the Public Servants Disclosure Protection Tribunal and the Commission des relations de travail

4.1 General powers

The Tribunal and the CRT have similar powers by their quasi-judicial nature. However, there are also significant differences when it comes to adding parties and issuing provisional orders.

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[111] Section 17 of the LC.
[112] Paragraph 20.4(3)(*a*) of the PSDPA.
[113] *El-Helou v Courts Administration Service et al*, 2011-PT-04.
[114] *Ibid*., paragraphs 37-38.
[115] *Ibid*., paragraph 49.

Addition of parties

The Tribunal may add a person or a party to the proceedings when it considers it necessary.[116] Under the federal legislation, this discretionary power is not explicitly subject to temporal restrictions during the proceedings, but it seems obvious that this power should be exercised at the earliest possibility.

This power has been positioned within section 21.4 of the federal legislation, which addresses applications before the Tribunal where the PSIC has asked that the Tribunal grant a remedy to the complainant, should it determine that reprisal occurred. The question might be asked as to whether or not a party can be added by the Tribunal, on its own motion, when an application by the PSIC is brought before the Tribunal so that it may grant remedy and take disciplinary action. In fact, section 21.5 of the legislation, which covers the nature of the Tribunal's determination in this area, is silent as to whether the Tribunal has the power to add other parties on its own motion in these situations.

Although the complainant may be able to identify the substance of reprisals and must do so for a complaint to be addressed by the PSIC's office, it may be difficult, if not impossible, for a complainant to identify who may have taken the reprisals. It is through a thorough and independent investigation that the individuals who may have taken reprisals may be more adequately discerned for the purpose of an application before the Tribunal. Once the PSIC is of the opinion that an application to the Tribunal is warranted, it is then up to the Tribunal to determine, using its full powers of inquiry, whether or not reprisal occurred and, in certain circumstances, whether or not individual respondents took reprisals.

In Quebec, there is no provision for the addition of parties to a proceeding. Of course, the CRT does not have discretionary power over parties as the Tribunal does, such as will be seen later.

Provisional orders

The CRT has the power to make any provisional order that it considers appropriate to safeguard the rights of the parties.[117] There are no similar provisions in the federal legislation allowing the Tribunal to issue a provisional order.

Provisional measures provided at the federal level are limited. The legislation contains provisions to address situations where public servants may be vulnerable because they filed a reprisals complaint. For example, a public servant may be temporarily assigned other duties by the chief executive.[118]

Other federal quasi-judicial tribunals have the power to issue provisional orders, e.g. the Canadian Transportation Agency, the CRTC, the Canadian Human Rights Tribunal and the Canada Industrial Relations Board.

4.2 Remedial powers

Several provisions of the federal legislation recognize the Tribunal's expertise in determining whether reprisals have occurred. In contrast to the screening function of the PSIC, the Tribunal

[116] Subsection 21.4(3) of the PSDPA.
[117] Subsection 118(3) of the LC.
[118] Section 51.51 of the PSDPA.

has broad adjudicative powers. If the Tribunal determines that reprisals were taken, it may grant a remedy to the complainant, such as:[119]

1° permit the complainant to return to his or her duties;

2° reinstate the complainant or pay compensation to the complainant in lieu of reinstatement if, in the Tribunal's opinion, the relationship of trust between the parties cannot be restored;

3° pay to the complainant compensation in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to the remuneration that would, but for the reprisal, have been paid to the complainant;

4° rescind any measure or action, including any disciplinary action, and pay compensation to the complainant in an amount not greater than the amount that, in the Tribunal's opinion, is equivalent to any financial or other penalty imposed on the complainant;

5° pay to the complainant an amount equal to any expenses and any other financial losses incurred by the complainant as a direct result of the reprisal; or

6° compensate the complainant, by an amount of not more than $10,000, for any pain and suffering experienced as a result of the reprisal.

In Quebec, the CRT may order employers to reinstate the employees to their employment, with all their rights and privileges and to pay them the equivalent of the salary and other benefits of which they were deprived due to dismissal, suspension or transfer. It may also order the employer to cancel the sanction or to cease practising discrimination or taking reprisals against the employees and to pay them the equivalent of the salary and other benefits of which they were deprived due to the discrimination or reprisals.[120]

The Tribunal and the CRT may order similar remedies. Nevertheless, the jurisdiction of the CRT is much broader because it can order the payment of "other benefits" whereas the Tribunal must limit itself to expenses, financial losses and compensation for any pain and suffering by an amount of not more than $10,000.

4.3 Powers with respect to sanctions

Under the federal legislation, the Tribunal has broad and unique adjudicative powers when disciplining an individual. In fact, the Tribunal may require the employer or the chief executive to take all necessary measures to take the disciplinary action, including termination of employment or revocation of appointment in connection with the reprisals.[121]

In doing so, the Tribunal must take into account the factors ordinarily considered by employers when they discipline their employees, including, but not limited to,

1° the gravity of the reprisal;

2° the level of responsibility inherent in the position that the person occupies;

3° the person's previous employment record;

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[119] Paragraph 21.7(1) of the PSDPA.
[120] Section 15 of the LC.
[121] Section 21.8(1) of the PSDPA.

4° whether the reprisal was an isolated incident;

5° the person's rehabilitative potential;

6° the deterrent effect of the disciplinary action;

7° the extent to which the nature of the reprisal discourages the disclosure of wrongdoing under this Act;

8° the extent to which inadequate disciplinary action in relation to the reprisal would have an adverse effect on confidence in public institutions.[122]

The CRT does not have these powers. It may be inferred that, owing to the seriousness of this order, that Parliament might have preferred not to include a presumption in the legislation with respect to the burden of proof. In fact, a presumption would create a reversal of the burden of proof for people who may be subject to disciplinary action.

5. Judicial review of the decision

The PSIC decisions are final. Nothing in the legislation allows for a reconsideration of the decisions in the screening process. Nor is the Tribunal provided with the power to do so. The only way to challenge the PSIC's decisions is through an application for judicial review before the Federal Court. On October 6, 2011, the Tribunal issued its first decision: *El-Helou v Courts Administration Service*.[123] It is an interlocutory decision regarding the jurisdiction of the Tribunal. The Tribunal explained that it does not judicially review the PSIC's applications that it handles.

The Tribunal's decisions are final and can be challenged through an application for judicial review before the Federal Court of Appeal.[124]

In Quebec, an application for judicial review is heard by the Superior Court of Quebec on issues of jurisdiction.[125]

CONCLUSION

There is no doubt that there is interest at the federal level and in Quebec in favour of promoting laws relating to the disclosure of wrongdoing and the protection of those who make disclosures. Nevertheless, the disclosure of wrongdoing and the protection against reprisals is an emerging area of law, which poses numerous challenges. Among the challenges that stakeholders face in this field are lack of knowledge of the federal legislation, the lack of legal tradition and the absence of case law on reprisals. This is not strictly the task of the federal jurisdiction because little case law exists in other Canadian jurisdictions. Other challenges such as access to justice, evidence of reprisals, remedies and sanctions to be ordered will certainly be part of the challenges that the Tribunal will face.

At the federal level, the current system has only been in existence for five years. The legislation will be revised shortly. We invite readers to watch for the changes that will be proposed by stakeholders in the field to legislation that has not yet been tested thoroughly.

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[122] Subsections 21.8(2) and (3) of the PSDPA.
[123] *El-Helou v. Courts Administration Service et al.*, 2011-PT-01.
[124] Subsection 51.2(1) of the PSDPA.
[125] Section 139 of the ALS.