



NATIONAL ASSEMBLY

FIRST SESSION

FORTIETH LEGISLATURE

Bill 61

**An Act mainly to recover amounts paid
unjustly by public bodies in relation to
certain contracts in the construction
industry**

Introduction

**Introduced by
Mr. Bertrand St-Arnaud
Minister of Justice**

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EXPLANATORY NOTES

The purpose of this bill is to establish rules adapted to the recovery of amounts paid unjustly as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of public contracts in the construction industry.

More specifically, the Minister of Justice, in the Minister's capacity as Attorney General, is granted the right to institute proceedings to repair injury caused to certain bodies as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of any public contract in the construction industry.

The bill provides rules to govern the exercise of this right of recovery, including by establishing certain presumptions, allowing the Minister to transact and to grant discharges on behalf of bodies and setting a five-year prescription period for the institution of recovery proceedings.

In addition, any reimbursement program the Minister creates to make it possible to reimburse certain amounts obtained in the course of the tendering, awarding or management of any public contract in the construction industry for which there may have been fraud or fraudulent tactics must be published in the Gazette officielle du Québec.

Any person designated to attempt to bring the parties to an agreement within the framework of such a program is not compellable and cannot be prosecuted for acts performed in good faith in the exercise of their functions.

A fund dedicated to financing the activities carried out for the purposes of this Act is created.

The Act respecting contracting by public bodies is amended to provide that an application for authorization to enter into contracts filed by an enterprise found guilty of certain offences will not automatically be refused by the Autorité des marchés financiers, and that the conviction will be taken into consideration by the Authority in assessing the enterprise's integrity for the purpose of granting such authorization.

Lastly, the bill contains transitional and final provisions, including with respect to when certain provisions will cease to have effect.

LEGISLATION AMENDED BY THIS BILL:

- Act respecting contracting by public bodies (chapter C-65.1).

Bill 61

AN ACT MAINLY TO RECOVER AMOUNTS PAID UNJUSTLY BY PUBLIC BODIES IN RELATION TO CERTAIN CONTRACTS IN THE CONSTRUCTION INDUSTRY

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS:

CHAPTER I

PURPOSE AND DEFINITIONS

1. This Act provides for measures to recover amounts paid unjustly as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of public contracts in the construction industry.

2. For the purposes of this Act, unless the context indicates otherwise,

(a) “**public contract**” means a contract between a public body and an enterprise in the construction industry;

(b) “**enterprise**” means a legal person established for a private interest, a general, limited or undeclared partnership or a natural person who operates a sole proprietorship;

(c) “**construction industry**” means a sector of activity that includes various players such as professionals, suppliers of materials and contractors in order to carry out the kinds of construction work provided for by the Act respecting labour relations, vocational training and workforce management in the construction industry (chapter R-20);

(d) “**public body**” means a body described in section 4 of the Act respecting contracting by public bodies (chapter C-65.1) as it reads on (*insert the date of assent to this Act*) as well as a municipal body within the meaning of section 5 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1).

CHAPTER II

SPECIFIC RULES APPLICABLE TO JUDICIAL PROCEEDINGS

3. On proof that an enterprise has committed fraud or engaged in fraudulent tactics in the course of the tendering, awarding or management of a public contract, it is presumed to have caused injury to the public body concerned.

In such a case, the directors or representatives of the enterprise, acting in any capacity whatsoever at the time the fraud or fraudulent tactics occur, are held liable unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.

The enterprises and persons referred to, respectively, in the first and second paragraphs are solidarily liable for the injury caused.

4. The Minister may institute proceedings against an enterprise or a person referred to in the second paragraph of section 3 to repair the injury caused to a public body as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract.

5. The injury is presumed to correspond to an amount equivalent to a percentage of the total amount paid by the public body concerned for the contract concerned. The percentage is determined by the Government and published in the *Gazette officielle du Québec*.

The amount referred to in the first paragraph bears interest from the date of the final payment made by the public body concerned for the contract concerned, at the rate determined under section 28 of the Tax Administration Act (chapter A-6.002).

6. The Minister may, subject to providing proof, claim an amount greater than that determined under section 5.

7. A proceeding under section 4 is brought before the court of the judicial district chosen by the Minister.

8. The Minister may, with the authorization of a judge of a competent court acting in chambers, register before judgment a legal hypothec in respect of the property of an enterprise or a person referred to in the second paragraph of section 3 if the recovery of the Minister's claim could be in jeopardy.

9. A prescription period of five years applies to the right to institute proceedings under section 4.

10. An application addressed to a court or to a judge acting in chambers under this chapter is heard and decided by preference.

11. A public body must first obtain the authorization of the Minister in order to institute proceedings of the same nature as those provided for in section 4. Authorization is granted if the Minister is of the opinion that it is in the public interest.

In such a case, the proceedings must be brought before the court for the judicial district chosen by the Minister and the Minister must be impleaded. The rules set out in this chapter, except section 7, as well as those set out in

sections 22, except with respect to the lump sum, 34 and 36 apply, with the necessary modifications.

CHAPTER III

REIMBURSEMENT PROGRAM

12. The Minister publishes in the *Gazette officielle du Québec* any reimbursement program the Minister establishes so that an enterprise or a person referred to in the second paragraph of section 3 may reimburse certain amounts obtained from a public body in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics.

13. Within the scope of a program referred to in section 12, the Minister may act on behalf of a public body. For this purpose, the Minister may transact and validly grant a discharge in respect of contracts reported by an enterprise or a person referred to in the second paragraph of section 3.

14. No person designated within the framework of a program referred to in section 12 to attempt to bring an enterprise or a person referred to in the second paragraph of section 3 and the Minister to an agreement may be compelled to disclose anything revealed to or learned by the person in the exercise of their functions or to produce a document prepared or obtained in the course of such exercise before a court of justice or before a person or body of the administrative branch exercising adjudicative functions.

Despite section 9 of the Act respecting Access to documents held by public bodies and the Protection of personal information, no person may have access to such a document.

15. No designated person referred to in section 14 may be prosecuted for acts performed in good faith in the exercise of their functions.

16. Unless the enterprise or the person referred to in the second paragraph of section 3 and the Minister agree otherwise, nothing said or written within the framework of a program referred to in section 12 may be admitted as evidence before a court of justice or before a person or body of the administrative branch exercising adjudicative functions.

CHAPTER IV

MISCELLANEOUS PROVISIONS

17. This Act is public policy.

18. The Minister may transact on an amount that the Minister claims under this Act.

The Minister may also validly grant a discharge in respect of the contracts concerned.

19. A public body may not, without having obtained the authorization of the Minister, transact on an amount unjustly paid as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of any public contract. In the absence of such authorization, such a transaction has no effect against the Minister.

20. A public body is required to cooperate with the Minister in carrying out the purpose of this Act. To that end, it must in particular, despite the Act respecting Access to documents held by public bodies and the Protection of personal information, provide any document or information requested by the Minister in relation to a public contract.

21. The rules set out in sections 3, 5, 6 and 8 to 10, the second paragraph of section 11 with respect to the judicial district, section 17, section 22 except with respect to the lump sum, and sections 34 and 36 apply, with the necessary modifications, to a body described in section 7 or 7.1 of the Act respecting contracting by public bodies as they read on (*insert the date of assent to this Act*), when it institutes proceedings of the same nature as those provided for in section 4.

However, the Minister may act on behalf of such a body if the body so requests. In such a case, this Act applies, with the necessary modifications.

22. Any amount recovered by the Minister under this Act is divided between the Government and a public body or a body referred to in section 21 in the manner determined by the Government after deducting a lump sum equal to 20% of the amount recovered, for costs incurred by the Minister to administer this Act.

CHAPTER V

FUND IN RESPECT OF CERTAIN CONTRACTS IN THE CONSTRUCTION INDUSTRY

23. The Fund in respect of certain contracts in the construction industry is established at the Ministère de la Justice.

The Fund is dedicated to financing activities carried out by the Minister for the purposes of this Act.

24. The following are credited to the Fund:

(1) the sums that, under section 22, are paid to the Government or deducted as costs incurred by the Minister;

(2) the sums transferred to it by a minister out of the appropriations granted for that purpose by Parliament;

(3) the sums transferred to it by the Minister of Finance under sections 53 and 54 of the Financial Administration Act (chapter A-6.001);

(4) the gifts, legacies and other contributions paid into it to further the achievement of its purpose; and

(5) the revenue generated by the sums credited to it.

25. The sums that are required for the payment of any expense, including the costs incurred by the Minister to administer this Act, and of any cost related to an investment, and that are necessary to achieve the purpose to which the Fund is dedicated are debited from the Fund.

26. Any surplus accumulated by the Fund is transferred to the general fund on the dates and to the extent determined by the Government.

CHAPTER VI

AMENDING PROVISIONS

ACT RESPECTING CONTRACTING BY PUBLIC BODIES

27. The Act respecting contracting by public bodies (chapter C-65.1) is amended by inserting the following section after section 21.2:

“21.2.0.1. Section 21.1 and the first paragraph of section 21.2 do not apply if

(1) the offence that led to the conviction has already been considered by the Autorité des marchés financiers (the Authority) under Chapter V.2 and, when it was considered, an authorization was granted to the contractor or the authorization held by the contractor was not revoked or was renewed; or

(2) the conviction and the offence that led to the conviction have not yet been considered by the Authority in connection with an application submitted to it under Chapter V.2 and currently under examination, or following an advisory opinion provided under section 21.32.

The Authority must send the Chair of the Conseil du trésor the information required for the purposes of the first paragraph.”

28. Section 21.26 of the Act is amended by striking out paragraphs 1, 4, 6 and 7 of the first paragraph.

29. Section 21.28 of the Act is amended by inserting the following paragraphs before paragraph 1 of the second paragraph:

“(0.1) whether the enterprise has, in the preceding five years, been found guilty of an offence listed in Schedule I;

“(0.2) whether the enterprise has, in the preceding five years, been found guilty by a foreign court of an offence which, if committed in Canada, could have resulted in criminal or penal proceedings for an offence listed in Schedule I;

“(0.3) whether the enterprise has, in the preceding two years, been ordered to suspend work by a decision enforceable under section 7.8 of the Act respecting labour relations, vocational training and workforce management in the construction industry (chapter R-20);

“(0.4) whether the enterprise has, in the preceding two years, been ordered by a final judgment to pay an amount claimed under subparagraph *c.2* of the first paragraph of section 81 of that Act;”.

30. The Act is amended by adding the following section after section 58.1:

“**58.2.** A contractor named in the register of enterprises ineligible for public contracts kept under Division II of Chapter V.1 for a reason other than those provided for in section 88 of the Integrity in Public Contracts Act (2012, chapter 25) may file an application for authorization with the Authority as provided for in Chapter V.2.

The granting by the Authority of such an authorization entails, despite any inconsistent provision, the removal of the contractor’s name from the register.”

CHAPTER VII

TRANSITIONAL AND FINAL PROVISIONS

31. The expenditure and investment estimates for the Fund in respect of certain contracts in the construction industry that are set out in Schedule I are approved for the 2013-2014 fiscal year.

32. Out of the sums credited to the general fund, the Minister may transfer to the Fund in respect of certain contracts in the construction industry the required appropriations allocated by Parliament for Program 2, “Administration of Justice”, of the “Justice” portfolio in the Expenditure Budget for the 2013-2014 fiscal year.

33. Expenditures and investments made after 31 March 2013 by the Minister out of the appropriations allocated by Parliament and corresponding, on the date they were made, to the type of expenditures and costs that may be debited from the Fund in respect of certain contracts in the construction industry are debited from the Fund.

34. Despite section 9, if in the 15 years preceding (*insert the date of coming into force of this section*), injury was caused to a public body by fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract, proceedings to repair the injury may not, if in progress on (*insert the date of coming into force of this section*) or instituted within five years after that date, be dismissed on the ground that the right is prescribed.

Proceedings dismissed on those grounds before (*insert the date of coming into force of this section*) may be instituted again within five years after that date.

35. The Government may, by regulation and before (*insert the date that is one year after the date of coming into force of this section*), take any measure necessary or useful for carrying out this Act and fully achieving its purpose.

A regulation made under the first paragraph is not subject to the publication requirement set out in section 8 of the Regulations Act (chapter R-18.1). Despite section 17 of that Act, it comes into force on the date of its publication in the *Gazette officielle du Québec* or any later date set in the regulation and may apply, after publication and if the regulation so provides, from a date not prior to (*insert the date of coming into force of this section*).

36. Cases pending before a civil court on (*insert the date of introduction of this bill*) and those brought between that date and (*insert the date of coming into force of this section*) with respect to proceedings of the same nature as those provided for in section 4 are subject to the rules established by this Act, with the necessary modifications.

37. The Minister of Justice is responsible for the administration of this Act, except Chapter VI.

38. Section 19 has effect from (*insert the date of introduction of this bill*).

39. The provisions of this Act come into force on the date or dates to be set by the Government, except Chapter VI, which comes into force on (*insert the date of assent to this Act*).

This Act, except Chapters V and VI, ceases to have effect on (*insert the date that is five years after the date of coming into force of Chapter II*), except with regard to any proceeding instituted prior to that date. Chapter V ceases to have effect on the date to be set by the Government.

SCHEDULE I
(Section 31)

FUND IN RESPECT OF CERTAIN CONTRACTS IN THE
CONSTRUCTION INDUSTRY

2013-2014 EXPENDITURE AND INVESTMENT ESTIMATES
(in thousands of dollars)

Revenues

Expenditures	<u>1318.5</u>
Interest	3.4
Surplus or deficit for the fiscal year	<u>(1321.9)</u>
Balance of loans or advances	(1321.9)