



NATIONAL ASSEMBLY

FIRST SESSION

FORTY-FIRST LEGISLATURE

Bill 26

**An Act to ensure mainly the recovery of
amounts obtained as a result of fraud or
fraudulent tactics in connection with
public contracts**

Introduction

**Introduced by
Madam Stéphanie Vallée
Minister of Justice**

**Québec Official Publisher
2014**

EXPLANATORY NOTES

This bill provides for exceptional measures to make possible the recovery of amounts improperly paid due to fraud or fraudulent tactics in the course of the tendering, awarding or management of public contracts.

The bill provides that the Minister of Justice must publish in the Gazette officielle du Québec a voluntary, fixed-term reimbursement program to allow the reimbursement of such amounts in relation to which there may have been fraud or fraudulent tactics.

The Minister is authorized to act on behalf of a public body within the scope of this program, and may transact and grant a discharge in that capacity on behalf of a public body.

Within the scope of the program, the Government designates a person to act as director. One of the director's duties is to attempt to bring the parties to an agreement.

Moreover, the bill establishes certain special rules applicable to judicial proceedings to recover such amounts that may be instituted by a public body. It establishes certain presumptions, authorizes, on certain conditions, the reinstatement of actions previously dismissed on the grounds that the right to recover was prescribed, and extends the prescription period applicable to the right to institute proceedings.

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

Amendments are also made to the Act respecting contracting by public bodies so that an application for authorization to enter into a contract filed by an enterprise found guilty of certain offences will not be automatically refused by the Autorité des marchés financiers.

Lastly, the bill includes transitional and final provisions, in particular as regards the cessation of effect of certain provisions.

LEGISLATION AMENDED BY THIS BILL:

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

Bill 26

AN ACT TO ENSURE MAINLY THE RECOVERY OF AMOUNTS OBTAINED AS A RESULT OF FRAUD OR FRAUDULENT TACTICS IN CONNECTION WITH PUBLIC CONTRACTS

THE PARLIAMENT OF QUÉBEC ENACTS AS FOLLOWS:

CHAPTER I

PURPOSE AND DEFINITIONS

1. This Act provides for exceptional measures for the reimbursement and recovery of amounts improperly obtained as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of public contracts.

2. For the purposes of this Act,

(a) “**public contract**” means a contract between a public body and an enterprise;

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

(c) “**public body**” means a body described in section 4, 7 or 7.1 of the Act respecting contracting by public bodies (chapter C-65.1) 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

REIMBURSEMENT PROGRAM

3. The Minister publishes in the *Gazette officielle du Québec* a voluntary, fixed-term reimbursement program to make it possible for an enterprise or a natural person mentioned in section 10 to reimburse certain amounts obtained 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.

4. The reimbursement program the Minister intends to establish must be published as a draft program in the *Gazette officielle du Québec*, together with a notice stating the period that must elapse before the program may be

established and during which an interested person may send comments to the person specified in the notice.

5. Within the scope of the reimbursement program, the Minister acts on behalf of a public body. For that purpose, the Minister may transact and validly grant a discharge regarding the contracts concerned.

A public body may, however, in the cases and on the conditions determined by the Minister, intervene within the scope of the program, in particular if the value of the contracts concerning the public body reaches a level determined by the Minister.

6. The Government designates a person to act as program director. The person must exercise the functions of office in an impartial manner.

One of the director's duties is to attempt to bring the Minister and an enterprise or natural person mentioned in section 10 to an agreement.

For that purpose, the director must inform them of the scope of sections 7 and 8 and make recommendations to the Minister with regard to any reimbursement proposals received.

7. Unless the Minister and the enterprise or natural person referred to in section 10 agree otherwise, nothing said or written within the framework of the program may be admitted as evidence before a court of justice or before a person or body of the administrative branch exercising adjudicative functions.

8. The program director cannot be compelled to disclose anything revealed to or learned by the program director in the exercise of the functions of office 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.

9. The program director cannot be prosecuted for acts performed in good faith in the exercise of the functions of office.

CHAPTER III

SPECIAL RULES APPLICABLE TO JUDICIAL PROCEEDINGS

10. Any enterprise or natural person who has committed fraud or engaged in fraudulent tactics in the course of the tendering, awarding or management of a public contract is presumed to have caused injury to the public body concerned.

In such a case, the officers of the enterprise in office at the time the fraud or fraudulent tactics occurred 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 same holds for the directors of the enterprise if it is established that they knew or ought to have known that fraud or fraudulent tactics were committed in relation to the contract concerned.

The enterprises and natural persons referred to in this section are solidarily liable for the injury caused, unless such liability is waived by the public body.

11. The injury is presumed to correspond to the amount claimed by the public body concerned for the contract concerned if the amount does not exceed 15% of the total amount paid for that contract.

The public body may, subject to providing proof, claim an amount greater than that determined under the first paragraph.

Any amount claimed under this section 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).

12. The Minister may, on behalf of a public body, bring an action against an enterprise or natural person referred to in section 10 after informing the public body of its intention and giving the public body reasonable time to bring an action itself.

In such a case, the Minister may transact on an amount the Minister claims under the first paragraph and validly grant a discharge regarding the contracts concerned.

13. The public body's claim in an action brought under this chapter confers on the public body a legal hypothec which may, on authorization, be registered on the property of any enterprise or natural person referred to in section 10.

The application for authorization is made to a judge in chambers. In urgent cases, it may be made without notice to the adverse party. If the authorization is granted, it must be served without delay on the enterprise or the natural person concerned.

The judge grants the authorization if the body's claim appears to be well-founded and if there is reason to fear that recovery of the claim might be jeopardized without such authorization.

14. A court that allows an action to be brought under this chapter must add a lump sum equal to 20% of any amount granted for injury, to cover expenses incurred for the purposes of this Act. The amount bears interest from the time the action is brought.

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

16. An action to repair injury caused after (*insert the date that is 20 years before the date of coming into force of Chapter III*) to a public body by fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract may not, if in progress on (*insert the date of coming into force of Chapter III*) or instituted within five years after that date, be dismissed on the grounds that the right is prescribed.

Any such actions dismissed on those grounds before (*insert the date of coming into force of Chapter III*) may be instituted again within five years after that date.

In such cases, this Act has the retroactive effect necessary to ensure its application.

CHAPTER IV

MISCELLANEOUS PROVISIONS

17. This Act is public policy.

18. Despite section 7, if a transaction is entered into under this Act, the Minister or the public body concerned, as applicable, must make public the names of the parties, the amount they agreed on and the period concerned.

19. The Government may determine rules for the apportionment between the Minister and a public body of any amount recovered under Chapter II and section 12, taking into account the losses sustained by the public body.

20. A public body is required to cooperate with the Minister in achieving the purpose of this Act. To that end, it must, in particular, provide any document or information requested by the Minister in relation to a public contract.

21. The Government may, by regulation, 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 assent to this Act*).

CHAPTER V

PUBLIC CONTRACTS FUND

22. The Public Contracts Fund 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.

23. The following are credited to the Fund:

- (1) the amounts paid to the Minister under this Act;
- (2) the amounts transferred to it by a minister out of the appropriations granted for that purpose by Parliament;
- (3) the amounts 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 amounts credited to it.

24. The amounts required to pay any expense, including the expenses incurred by the Minister for the purposes of this Act, and 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.

25. 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

26. 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 finding of guilty 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 finding of guilty and the offence that led to it 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.”

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

28. Section 21.28 of the Act is amended by inserting the following subparagraphs before subparagraph 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;”.

29. The Act is amended by adding the following section after section 58.1, enacted by section 23 of chapter 25 of the statutes of 2012:

“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 PROVISIONS

30. The expenditure and investment estimates for the Public Contracts Fund, set out in Schedule I, are approved for the 2014-2015 fiscal year.

31. Out of the amounts credited to the general fund, the Minister may transfer to the Public Contracts Fund the required appropriations allocated by Parliament for Program 2, “Administration of Justice”, of the “Justice” portfolio in the Expenditure Budget for the 2014-2015 fiscal year.

32. Expenditures and investments made after 31 March 2014 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 Public Contracts Fund are debited from the Fund.

33. A proceeding, pending before a civil court on (*insert the date of assent to this Act*), to repair injury caused to a public body by fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract may, on a party’s application, be stayed.

The application to stay the proceeding is made to a judge in chambers, who grants the stay if the party making the application undertakes to participate in the reimbursement program described in Chapter II.

34. From (*insert the date of assent to this Act*) to the end date of the program described in Chapter II, a public body must obtain the Minister’s authorization to institute an action to repair injury caused to it by fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract. The Minister grants the authorization if of the opinion that it does not hinder the achievement of the objectives of the reimbursement program.

35. From (*insert the date of assent to this Act*) to the end date of the program described in Chapter II, a public body may not, without the Minister’s authorization, transact on an amount improperly paid as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract. In the absence of an authorization from the Minister, such a transaction is null.

CHAPTER VIII

FINAL PROVISIONS

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

37. This Act comes into force on (*insert the date of assent to this Act*), except Chapter III, which comes into force on the date to be set by the Government.

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 III*), except with regard to any action brought prior to that date. Chapter V ceases to have effect on the date to be set by the Government.

SCHEDULE I
(Section 30)

PUBLIC CONTRACTS FUND

2014-2015 EXPENDITURE AND INVESTMENT ESTIMATES
(in thousands of dollars)

Revenues

Expenditures

72.4

Surplus or deficit for the fiscal year

(72.4)

Balance of loans or advances

(72.4)