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Investigation and Disclosure: The Court Stresses the Importance of Protecting Whistleblowers

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In a decision handed down on December 9, 2019,¹ the Québec Superior Court stressed the importance of keeping the identity of whistleblowers and their statements confidential in the context of investigations into wrongdoing within a public body. Confidentiality can be lifted only when there are serious grounds to believe that the investigation procedure did not follow the rules of procedural fairness and the requested information is necessary and relevant to prove a breach of procedural fairness.

The Protection of Whistleblowers in Québec

The *Act to facilitate the disclosure of wrongdoings relating to public bodies* (CQLR, c D-11.1) (*Disclosure Act*) was adopted in 2016 following the Charbonneau Commission's report in order to "facilitate the disclosure, in the public interest, of wrongdoings committed or about to be committed in relation to public bodies and establish a general protection regime against reprisals" (section 1).

This statute, which came into force on May 1, 2017, prohibits any form of reprisals or threats aimed at preventing a person from making a disclosure or participating in an investigation. It also allows the Public Protector (Québec's ombudsman) to investigate while taking all necessary steps to ensure that the identity of the whistleblower or witnesses remains confidential (sections 10(4) and 11).

The Decision

In 2017, the Public Protector launched an investigation against the former President of the Commission des droits de la personne et des droits de la jeunesse (CDPDJ). Two disclosures were made against her under the *Disclosure Act* on grounds of alleged abuse of authority and serious breaches of standards of ethics and professional conduct.

After the Public Protector published three investigative reports, the former President of the CDPDJ applied for judicial review to have the reports cancelled on the ground that the Public Protector allegedly breached his duty to act fairly. She also asked for the disclosure of several items in the Public Protector's investigation file, including recordings, stenographic notes and notes taken during witness interviews as well as correspondence between one of the witnesses and the Public Protector.

Without ruling on the validity of the Public Protector's reports at this stage, the Superior Court dismissed most of the former President's communication requests. The Court held that the identity of whistleblowers or elements forming part of the investigation file can, exceptionally, be revealed when

- there are serious reasons to believe that the process that was followed did not abide by the rules of procedural fairness, particularly when the person subject to an investigation shows that there are serious grounds to believe that he or she was not heard or that the decision-making or administrative body conducting the investigation had a closed mind in carrying out the investigation and assessing the evidence; and
- precise facts and specific information confirm that the requested information, including the identity of the whistleblowers or witnesses and the content of their statements, is relevant and necessary to support the alleged breach of procedural fairness.

In its decision, the Court also reiterated that information relating to a disclosure must remain confidential even once the investigation is over and the final report has been issued.

Impact of Decision on the Protection of Whistleblowers in Québec

This decision reminds us of the importance of protecting the identity of whistleblowers in a context in which an increasing number of Québec public bodies have set up or are covered by a whistleblowing program. It strengthens the protection afforded to whistleblowers and witnesses under the *Disclosure Act* in the context of disclosures involving government departments, government bodies, government enterprises and municipalities. The same principles might also apply to witnesses and whistleblowers covered by other disclosure programs, including that of the Autorité des marchés publics, the Agence du revenu du Québec and several private enterprises that have such programs. In short, this decision will certainly help fight against and prevent wrongdoing.

¹ *Thermitus v Protecteur du citoyen*, 2019 QCCS 5205.

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