

General Framework for the Application of Monetary Administrative Penalties

Section 90.1 of the *Act respecting the protection of personal information in the private sector*, CQLR, chapter P-39.1 (Private Sector Act), allows monetary administrative penalties to be imposed. The penalties may be imposed by persons designated by the Commission d'accès à l'information (the Commission). Section 90.2 of the Private Sector Act also provides that the Commission must develop and make public a general framework for the application of monetary administrative penalties.

The general application framework sets out the guidelines and criteria for the application of the monetary administrative penalties regime. However, the decision to impose a monetary administrative penalty is in the discretion of the person designated by the Commission.

1. Objectives of the general framework

- Set out guidelines and criteria for the application of the monetary administrative penalties regime, to guide the designated person in the exercise of their discretion to impose penalties;
- Promote fairness, consistency and uniformity in the treatment of failures to comply with the Private Sector Act; and
- Inform enterprises and the general public about the guidelines and the applicable criteria.

2. Criteria that guide the treatment of failures

When a failure set out in section 90.1 of the Private Sector Act is found to have occurred, the designated person must consider criteria that include the following in deciding whether to impose a penalty:

- the nature of the failure;
- the objective seriousness of the failure;
- the repetitiveness and duration of the failure;
- the sensitivity of the personal information concerned by the failure;
- the number of persons concerned by the failure;
- the risk of serious injury to which they are exposed;
- the measures taken by the person in default to remedy the failure or mitigate its consequences;
- the degree of cooperation provided to the Commission to remedy the failure or mitigate its consequences;
- the compensation offered by the person in default, as restitution, to every person concerned by the failure; and
- the ability to pay of the person in default, given such considerations as the person's assets, turnover and revenues.

3. Monetary administrative penalties

3.1 Objectives

A monetary administrative penalty is an administrative measure available to the Commission so that it can effectively play its role in oversight and enforcement of the obligations imposed by the Private Sector Act.

The purposes of monetary administrative penalties include enabling the Commission to take action when a failure set out in section 90.1 of the Private Sector Act occurs, in order to:

- urge a person carrying on an enterprise to rapidly take the measures required to remedy the failure; and
- deter repetition of a failure.

3.2 Person designated for imposing monetary administrative penalties

The person who is designated by the Commission for imposing monetary administrative penalties holds the following office:

- Director of the oversight division; or
- where that person is absent or the office is vacant, the person acting in place of the person.

When a failure to comply with the Private Sector Act occurs, it is up to that person to assess the advisability of imposing a monetary administrative penalty, taking into account the circumstances of each case.

3.3 Circumstances in which monetary administrative penalties are generally imposed by the Commission

A monetary administrative penalty is generally imposed by the designated person when a failure to comply with the Private Sector Act has occurred, taking into consideration the criteria set out in division 2 of this General Application Framework.

A monetary administrative penalty may not be imposed on a person because of a failure to comply with the Private Sector Act if a statement of offence has already been served for a failure to comply with the same provision on the same day, based on the same facts.

3.4 Terms for the imposition of monetary administrative penalties

3.4.1 Notice of non-compliance

Notification of a notice of non-compliance is the method by which the person designated by the Commission informs a person who has failed to comply that a failure to comply with section 90.1 of the Private Sector Act has occurred.

The notice urges the person in default to take the measures required to remedy the failure without delay. The notice must mention the fact that the failure could give rise to a monetary administrative penalty, among other things.

Before imposing a monetary administrative penalty, the designated person must have notified the notice of non-compliance to the person in default. When the notice is received, the person in default may communicate with the Commission to submit additional observations.

3.4.2 Notice of claim

A monetary administrative penalty is imposed by notification of a notice of claim setting out the amount claimed, the reasons for it, and the time from which it bears interest.

The notice of claim must also include information on the procedure for recovery of the amount claimed, in particular with regard to the issue of a recovery certificate under section 90.14 of the Private Sector Act and its effects.

The notice must also set out the right to apply for a review of the decision, the time limit for applying for a review, and, where applicable, the right to contest the review decision before the Court of Québec and the time limit for bringing such proceedings.

The notice of claim must also inform the person that the facts on which the claim is founded may result in penal proceedings.

The notification of a notice of claim interrupts the prescription provided for in the *Civil Code of Québec* with regard to the recovery of the amount owing.

3.4.3 Amount of the monetary administrative penalty

The designated person has discretion regarding the amount claimed. The maximum amount of the penalty for a natural person is \$50,000 and in other cases¹ is \$10,000,000 or, if greater, the amount corresponding to 2% of worldwide turnover for the preceding fiscal year.

3.4.4 Undertakings

Following a failure referred to in section 90.1 of the Private Sector Act, a person may, at any time, enter into an undertaking with the Commission to take the measure necessary to remedy the failure or mitigate its consequences.

The undertaking must identify the acts or omissions constituting a failure and the provisions involved.

The undertaking may also include the conditions the Commission considers necessary and contain a requirement to pay a sum of money.

If the undertaking is accepted by the Commission and is complied with, no monetary administrative penalty may be imposed on the person carrying on an enterprise with regard to the acts or omissions mentioned in the undertaking.

3.5 Review

The decision to impose a monetary administrative penalty made by the person designated by the Commission may be reviewed.

3.5.1 Member responsible for reviewing the decision imposing a monetary administrative penalty

A member assigned to the Commission's oversight division is responsible for reviewing the decision.

3.5.2 Application for review

The person in default may apply to the Commission in writing for a review of the decision to impose a monetary administrative penalty. The application for review must be made in writing within 30 days after notification of the notice of claim.

The review is an internal administrative revision process that is generally carried out on the record. Before rendering its decision, the Commission gives the person in default an opportunity to submit observations and produce documents to complete the record.

3.5.3 Review decision

The application for review must be dealt with promptly. The review decision may confirm, quash or vary the decision under review.

The review decision must give reasons and be written in clear and concise terms. The review decision must be notified to the applicant and must state the applicant's right to contest the decision before the Court of Québec within 30 days following notification.

¹ The other cases include legal persons, general partnerships and limited partnerships.

3.6 Interest

The monetary administrative penalty bears interest at the rate determined under the first paragraph of section 28 of the *Tax Administration Act* (CQLR, chapter A-6.002) from the 31st day after notification of the notice of claim, unless it is paid in its entirety before that deadline.

Applications for review and applications to the Court of Québec do not suspend the accrual of interest. However, if the review decision is not rendered within 30 days after the application is received or 30 days after the time granted to the applicant to submit observations or produce documents, interest is suspended until the decision is rendered.

4. Penal proceedings

4.1 Objectives

The objectives when penal proceedings are prioritized are generally the following:

- to punish the person in default;
- to deter repeat offences;
- to publicly denounce an act or conduct that infringes the purpose of the Private Sector Act;
- to express social condemnation; and
- to enable the court to impose sentences that take into account factors that include the seriousness and consequences of the offence

4.2 Circumstances in which penal proceedings are generally prioritized

The Commission generally prioritizes penal proceedings, to have the penal justice system sanction an offence under the Private Sector Act, when it believes this is the most appropriate measure having regard to the objectives and to all of the circumstances of each case.

The circumstances in which penal proceedings are generally prioritized include, but are not limited to:

- The real or apprehended consequences of the offence are serious or very serious, in particular if a major violation has occurred or there is a high risk of a major violation
 - o of the privacy of the persons concerned;
 - o affecting a vulnerable clientele; or
 - o considering the sensitivity of the personal information concerned;
- Failure to comply with an order of the Commission;
- Adequate measures have not been taken by the person in default to remedy the offence despite the imposition of one or more monetary administrative penalties or the application of other administrative measures;
- The person in default acted intentionally or was negligent or reckless;
- The progress of an investigation or inspection by the Commission has been impeded;
- The hearing of a request by the Commission has been impeded by providing it with false or inaccurate information, by omitting to provide information it requires, or otherwise; or
- Multiple failures or offences under the Private Sector Act have been committed by the same person in default or have recurred over time.

A member of the oversight division of the Commission is responsible for making the decision to institute a penal proceeding, which is initiated by a statement of offence.

5. Categorization of monetary administrative penalties and fines

The Private Sector Act does not provide a fixed amount for the imposition of monetary administrative penalties and therefore offers the designated person broad discretionary power. To determine the appropriate and proportionate amount for the penalty, the designated person applies a two-step method.

First, the designated person categorizes the seriousness of the failure based on the criteria in division 5.1. The categorization results in a base amount, depending on who committed the failure.

Next, the base amount is increased or decreased, depending on the aggravating and mitigating factors set out in division 5.2. Despite the base amount, the amount of the penalty may go as high as the **maximum amount, which is \$50,000 for a natural person and, in the other cases, \$10,000,000 or, if greater, the amount corresponding to 2% of worldwide turnover for the preceding fiscal year.**

5.1 Criteria for categorization

The Private Sector Act does not provide a fixed amount for the imposition of monetary administrative penalties. In exercising their discretion, the designated person applies the following criteria in order to categorize the seriousness of the failure:

- the nature of the failure;
- the objective seriousness of the failure;
- the repetitiveness and duration of the failure;
- the sensitivity of the personal information concerned by the failure;
- the number of persons concerned by the failure; and
- the risk of serious injury to which they are exposed;

The following table shows the categories of failures:

Categories	Criteria
A	Minor failure, generally administrative in nature, the apprehended consequence of which is nil or minor.
B	Moderate failure associated with non-compliance with the rules governing the protection of personal information, the apprehended consequence of which is moderate.
C	Serious failure that, by reason of its nature, is prejudicial to the general objectives of protection of personal information, the apprehended consequence of which is major.
D	Very serious failure that violates the integrity of the protection of personal information, the apprehended consequence of which is major, real and/or irreparable.

5.2 Amount of monetary administrative penalties

5.2.1 Base amount

After categorizing the failure, the designated person imposes a predetermined base amount, depending on who committed the failure.

Category	Natural person	Other cases
A	\$ 500	\$ 1,000
B	\$1,500	\$ 4,000
C	\$3,000	\$ 8,000
D	\$5,000	\$15,000

5.2.2 Mitigating and aggravating factors

To determine an appropriate and proportionate amount for the penalty, the designated person increases or decreases the base amount based on the mitigating and aggravating factors shown by the particular circumstances of each case, including:

- the repetitiveness and duration of the failure;
- the sensitivity of the personal information concerned by the failure;
- the number of persons concerned by the failure;
- the risk of serious injury to which they are exposed;
- the measures taken by the person in default to remedy the failure or mitigate its consequences;
- the degree of cooperation provided to the Commission to remedy the failure or mitigate its consequences;
- the compensation offered by the person in default, as restitution, to every person concerned by the failure; and
- the ability to pay of the person in default, given such considerations as the person's assets, turnover and revenues.

The amount determined by the designated person may not exceed the maximum amount provided by the Act.

	Natural person	Other cases
Maximum amount	\$50,000	\$10,000,000 or, if greater, 2% of worldwide turnover for the preceding fiscal year

5.2.3 Summary of the amounts of possible penalties

Where a failure has occurred, the designated person imposes a penalty varying from the base amount to the maximum amount, as illustrated in this summary table.

Category	Natural person – base amount	Natural person – maximum amount	Other cases – base amount	Other cases – maximums
A	\$ 500	\$50,000	\$ 1,000	\$10,000,000 or, if greater, 2% of worldwide turnover for the preceding fiscal year
B	\$1,500	\$50,000	\$ 4,000	\$10,000,000 or, if greater, 2% of worldwide turnover for the preceding fiscal year
C	\$3,000	\$50,000	\$ 8,000	\$10,000,000 or, if greater, 2% of worldwide turnover for the preceding fiscal year
D	\$5,000	\$50,000	\$15,000	\$10,000,000 or, if greater, 2% of worldwide turnover for the preceding fiscal year