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WHISTLE BLOWER PROTECTION: STRATEGIES FOR BC

“Sunlight is the best disinfectant”
U.S. Supreme Court Justice Brandeis

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WHISTLE BLOWER PROTECTION: STRATEGIES FOR BC

WHAT IS WHISTLE BLOWING?

'Whistle blowing' is the act of a person who, believing that the public interest overrides the interest of the organization he serves, tells the public or authorities outside her organization that the organization is involved in corrupt, illegal, fraudulent, immoral or harmful activity. Whistle blowing has a long and varied history.

Whistle blowers have been held up as conscientious heroes and scorned as traitors and malcontents. Thus, it is not surprising that whistle blower protection – whether it be in the form of common law doctrines, government policy, legislation or collective agreement provisions – will inevitably try to strike a balance. On the one hand, it will try to protect freedom of expression and disclosure in the public interest. On the other hand, it will try to protect the basic duty of loyalty owed by employees to their employers.

Consider the following examples:

- **Fish Protection biologists critique government decision to allow river diversion.** Scientists at the Department of Fisheries and Oceans criticize a high level agreement by the federal government to allow the Kemano Completion Project (to divert 87% of Nechako River flows from the Nechako-Fraser system). They point to overwhelming scientific evidence showing that the impacts on fish will be extreme. Eventually the scientists testify at BC Utility Commission hearings. At work, they face a poisonous work environment.
- **Public servant forbidden from speaking to environmental groups or swearing affidavit for legal proceedings.** When a BC Ministry of Water, Land and Air Protection's wildlife biologist warned the Ministry of Forests that logging in one area would lead to spotted owl mortality, her advice was ignored. Environmental groups subsequently contacted her and asked her to swear an affidavit. After initially being given permission to swear an affidavit, she was ordered not to talk to environmental groups or swear an affidavit.
- **Public servants reprimanded for exposing government acquiescence to public health risks.** Margaret Haydon and Shiv Chopra, drug evaluators for Health Canada, became concerned with the drug approval process for growth hormones for meat and milk stimulation and antibiotics. When their employer asked them to approve drugs, despite scientific recommendations to the contrary, Haydon and Chopra went to the media to raise their concerns. They were reprimanded. A judicial review later found that the actions of Haydon and Chopra were justifiable, and they should not have faced a reprimand.
- **Researcher breaches contract with Drug Company to expose public health dangers.** Apotex, a pharmaceutical company, threatens a medical scientist at Toronto's Sick Children's Hospital, Nancy Olivieri, with a lawsuit if she publishes data showing risks from an Apotex drug. Olivieri had signed a contract with

Apotex not to publish research without Apotex's consent. The hospital, concerned about losing revenue from drug companies, supported Apotex, and demoted Olivieri. It also launched a complaint against Olivieri with the College of Physicians and Surgeons, who rejected the hospital's allegations and completely exonerated her.

- **Public servant critiques government policy decision, alleges bias.** Dionys deLeeuw, a Senior Habitat Protection Biologist with the BC Ministry of Environment, Lands and Parks in Terrace blew the whistle on a conflict of interest within the ranks of the wildlife branch officials. The majority of those officials are hunters, who continue authorizing grizzly bear hunts, in part, because it directly serves their own interests. de Leeuw went on to show that the number of grizzly kills each year was far in excess of what was actually allowable by law. When de Leeuw tried to circulate his findings among his colleagues, Ministry of Environment, Lands and Parks bureaucrats confiscated his report, suspended him without pay and ordered him not to speak out.
- **A fish farm worker blows the whistle on illegal application of pesticides to farmed fish by his employer.** A fish farm worker in Scotland provides a signed statement to an environmental group stating that he personally purchased and applied a toxic pesticide not approved for aquatic use.

GENERAL ISSUES

Each of these raises different issues. Any attempt to protection for whistle blowers will need to grapple with the following issues:

- **What is the most effective and pragmatic way of protecting whistle blowers?** Should it be done by legislation, through government policy, through collective agreements, through attempts to set positive common law precedents. Likely, all these avenues should be explored.
- **What is the appropriate balance between the public interest and duty to employer or contractual commitments?** The law has struggled to draw an appropriate line between, on the one hand, actions in the public good and, on the other hand, the duty of loyalty owed to employers by employees, duties of confidentiality and contractual obligations (e.g. no publication without approval, confidentiality). Both business and government as employers rely on employee loyalty and confidentiality in order to function efficiently.
- **Should a different level of protection extend to the public service?** Some whistle bower protection only covers government employees, as they are supposed to be operating in the public interest and are spending public dollars. On the other hand, whistle blowing is inherently in the public interest, and therefore some argue whistle blowers should be equally protected regardless of their employer. Probably, the ideal solution is mechanisms that protect workers in different sectors in different ways.
- **Should protection extend to contractual obligations?** Should a consultant or scientist working on contract have a different level of protection from an

employee? Should government contractors be treated differently from government employees?

- **Can changes to freedom of information legislation provide protection?** In many instances, government disciplines employees for providing information, which, if recorded, would be accessible under freedom of information legislation. Would legislation stating that government cannot discipline employees for providing legally accessible information meet the needs for whistle blower protection (and also streamline the access to information process)?
- **From what should whistle blowers be protected?** Reprisals taken against whistle blowers can include harassment, a reprimanding letter, termination, transfer, action for breach of contract, loss of benefits, or loss of promotion opportunities. What range of activities should whistle blower protection prohibit as reprisals?
- **What steps must a whistle blower take before acting?** To what extent should the whistle blower be required to ascertain facts? Employees may not be privy to all the information necessary to make a fully informed complaint. On the other hand, looking carefully into employer misbehaviour could draw unwanted attention to potential whistle blowers.
- **To whom can a whistle blower complain?** What is the appropriate channel of communication? Many employees feel they need to draw attention to problems by going to the media or politicians. Employers, on the contrary, continually stress that employees must initially keep complaints internal and work their way up the chain of command. Government whistle blower protection often creates a body that can receive complaints, weigh them, and report to legislatures.
- **What remedies should a whistle blower be eligible to receive if wronged?** Most schemes allow for reinstatement of whistle blowers. Other possible remedies include compensatory and punitive damages, mandatory relocation, letters of apology, and restoration of benefits.
- **What consequences should employers face who take reprisals against whistle blowers?** While most whistle blower legislation focuses on protecting the whistle blower and rectifying the problems that were the reason for disclosure, some legislation includes stiff penalties and punitive damages against employers for taking action against whistle blowers.

How the courts have struck a balance in the past has sometimes been problematic. Would-be whistle blowers often feel intimidated and helpless when forced to choose between participating in immoral behaviour or face the consequences of speaking out. To remedy this situation some jurisdictions have introduced whistle blower protection legislation that provides either general protection, or more often, protection for specific disclosures.

EXISTING PROTECTIONS

There are a number of protections currently available to whistle blowers. These include:

- **No firing without just cause.** Common law and statutory¹ protection from being fired without “just cause”.
- **No discipline without just and reasonable cause.** Collective agreements forbid discipline without “just and reasonable cause”.
- **Freedom of expression.** The Charter of Rights and Freedoms protects Freedom of Expression, but only applies to governments.
- **Whistle blower protection in collective agreements.** Collective agreements often include provisions allowing whistle blowing, usually in narrow circumstances.
- **Protection against harassment in collective agreements.** Collective agreement harassment provisions may help avoid subtle disciplinary measures.
- **Government policies to allow whistle blowing.** Appropriate government policy may be an effective solution in many cases.
- **Statutory protection for whistle blowing.** Several federal and BC laws include narrow protections against whistle blowing.

As they apply to workers in BC, none of these protections is perfect.

Just and reasonable cause

The common law prohibition against firing without just cause and the standard collective agreement provision against firing without just and reasonable cause have both been interpreted to provide some protection from disciplinary action for whistle blowing. There is no discernable difference in how the common law and collective agreement standard are applied (although grievance procedures in collective agreements clearly provide a more accessible way of bringing forward complaints).

Under the common law an employee owes his employer a duty of fidelity -- " a duty to serve his employer with good faith and fidelity and not deliberately do something which may harm his employer's business." However:

...those employees who learn of wrong-doing and seek to correct it, who see practices or products that may endanger society and seek to correct them, or who are directed to do illegal or immoral acts and object to doing them. For these employees, if no other avenue of redress is available, public expression of certain information, even though it may be critical of the employer, should be encouraged not deterred by fear of losing their job.

....

¹ E.G. s. 240 of the Canada Labour Code.

With respect to public criticisms of the employer, the duty of fidelity does not impose an absolute “gag rule” against an employee making any public statements that might be critical of his employer.”²

Each case must be decided on its own merits. Factors that arbitrators and courts have taken into account include:

- Has the whistle blower tried to ascertain the truth of the information?
- Were internal complaint channels available and used?
- Was the criticism sustained or vitriolic or did it contain “editorialization”? Alternatively, was it measured and factual?
- How confidential or sensitive was the information?
- Is the disclosure a serious issue? Does the action complained of jeopardize life, health or safety? Does it touch on important matters of general public concern?
- Are the statements true or false?
- Was the employer's reputation was damaged or jeopardized?
- How did the criticism affect the employer's ability to conduct its business?
- For public service employees, does the criticism of government interfere with the public perception of a neutral civil service? Even if an employee is not speaking out on issues related to his or her work, courts have upheld the dismissal of a management level civil servant that had launched a sustained critique of government policy. According to the court, this level of criticism interfered with public perception of a neutral civil service. Courts will take the form of criticism and stature of the employee into consideration. According to the Supreme Court of Canada:

“It is obvious that it would not be “just cause” for a provincial Government to dismiss a provincial clerk who stood in a crowd on a Sunday afternoon to protest provincial day care policies, it is equally obvious that the same Government would have “just cause” to dismiss the Deputy Minister of Social Services who spoke vigorously against the same policies at the same rally.”

Examples of how courts have applied these factors include:

- **Arbitrator upholds firing of prison guards who conduct repeated media interviews critiquing the prison system of cover ups, mis-use of government funds through junkets, etc.** The decision was based on the following factors: (1) The criticisms against the Corrections Branch were unfounded; (2) The officers did not extend reasonable efforts to determine if their allegations were accurate; (3) The officers did not exhaust internal

² In *Re Ministry of Attorney-General v. British Columbia Government Employees Union (BCGEU)*, [1981] 3 L.A.C. (3d) 140.

mechanisms to bring their concerns to management's attention before they went public; and (4) The allegations against the Corrections Branch went beyond mere recitation of the incidents, and included personal editorialization and comments.³

- **Supreme Court of Canada upholds firing of Revenue Canada auditor who made vitriolic criticisms of federal policies concerning metrification and the constitutional entrenchment of a Charter of Rights.** The employee had compared the Prime Minister of the day to the Nazi regime and was outspoken in public venues such as open line radio shows. The court said:

"...in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government."⁴

- **Federal Court overturns disciplinary action against civil servants that speak out on public health threat.** While exercising their duties as drug evaluators, the two scientists became seriously concerned about the drug approval process regarding growth hormones for meat and milk production, and the process regarding bovine growth hormone in particular. The scientists made repeated efforts to raise their concerns internally, including reporting to the Prime Minister and the Health Minister. Frustrated by a lack of response, the scientists agreed to be interviewed on Canada AM. While on national television they expressed their concerns regarding the drug review process and the impact these problems could have on the health of Canadians. In response to the interview, a director from Health Canada met with one of the scientists and issued a letter of reprimand and warned that further "misconduct" would result in more severe disciplinary action. The court held that disciplining the Health Canada scientists was improper; the scientists had been speaking on a matter of legitimate public concern, and they had tried to resolve the issue internally first.⁵

³ *In Re Ministry of Attorney-General v. British Columbia Government Employees Union (BCGEU)*, [1981] 3 L.A.C. (3d) 140.

⁴ *Fraser v. Public Service Staff Relations Board* [1985] 2 S.C.R. 455.

⁵ *Haydon v. Canada*, Docket T-200-99, (F.C.T.D.).

The Charter of Rights and Freedoms

Freedom of expression in Canada is protected under section 2(b) of the *Canadian Charter of Rights and Freedoms*.⁶ The leading case using a Charter analysis is the Health Canada case referred to above.⁷ The court held that the freedom of expression of a public servant, was "restricted only to the extent necessary to achieve the objective of an impartial and effective public service."⁸ However, the court relied primarily on pre-Charter common law in defining the balance between freedom of expression and duty to employers.

Thus, the Charter does not clearly expand the right of government employees to speak out. (The Charter applies to government only, and does not prohibit limits to freedoms that exist under contract or common law.⁹ Thus, any protection by the Charter to whistle blowers only applies to public servants). The Charter may have symbolic value, and would likely block any attempt to remove common law protection through legislation. In the appropriate case, it may be possible to expand the scope of Charter protection.

Collective bargaining agreement provisions against whistle blowing

Based on a review of a small collection of collective agreements, standard whistle blower provisions in collective agreements tend to be narrow and may add little to general protections (e.g. no discipline except for just and reasonable cause). For instance, Canadian Autoworkers core language for Health, Safety and Environment includes the following:

- a) The parties agree that it is the Responsibility of the company and its employees to notify the appropriate authorities if there is a release of hazardous substances in the air, earth or water systems.
- b) No employee may be disciplined for performing his/her duty.

Similarly, language in a CUPE contract provides:

No employee shall be dismissed, disciplined or penalized as a result of reporting illegal violations in connection with pollution, WCB regulation, theft or other illegal violations unless it is determined that the employee is in any way involved in the infraction.

Neither provision provides much, if any, protection beyond that accorded by common law or "Just and reasonable cause" clauses. The main benefit may be in

⁶ Section 2(b) of the Charter states: (2) Everyone has the following fundamental freedoms: *b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

⁷ Docket T-200-99, (F.C.T.D.).

⁸ *Haydon*, above at footnote 5.

⁹ *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573.

terms of clarity of the terms. Also the CUPE language clearly establishes that there is no need to raise the problem internally, and may allow disclosure to the media. The CAW language is less effective requiring disclosure to “appropriate authorities”. There is a small risk that “appropriate authorities” could be interpreted as meaning authorities within the organization.¹⁰

Collective bargaining agreement provisions against harassment

In cases where formal disciplinary action is considered unjust or unreasonable, employees can grieve the disciplinary action. However, often the employers react to whistle blowing in a far more insidious manner, harassing the employee or creating a poisoned work environment for the whistle blower.

Depending on collective agreement provisions regarding harassment, employees may or may not have recourse when faced with a poisoned work environment. To provide effective recourse for whistle blowers, harassment policies will need to define harassment widely. In particular, harassment cannot be limited to comment or conduct arising from grounds such as sex, race, creed, colour, etc.

Moreover, the definition of harassment should include creation or encouragement of a “poisoned work environment”. Alternatively, the BC Women’s and Children’s Health Centre defines harassment as “conduct that would be considered by a reasonable person to interfere with the climate of understanding and mutual respect for the dignity and worth of each person.” It defines personal harassment as “objectionable or unprofessional conduct or comments directed toward a specific person which serves no legitimate work purpose and has the effect of creating an intimidating, humiliating, hostile or offensive work environment.”¹¹

Policies on whistle blowing

The federal government has policies aimed at facilitating disclosure of wrongdoing within government. Under pressure to pass general whistle blower protection, the federal government adopted its ‘Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace’¹² and set up the Public Service Integrity Officer (PSIO). Under the policy, government departments are charged with putting in place internal mechanisms allowing employees to disclose information concerning wrongdoing within their organisations; ensuring that these disclosures are addressed in an appropriate and timely fashion; and ensuring that employees who disclose information are treated fairly and protected from reprisal.

The policy defines wrongdoing broadly as including:

¹⁰ It should be note that the CAW contract was not reviewed in its entirety. It is possible that definitions or context may negate this interpretation.

¹¹ Pamela Fayerman, “Hospital workplace poisoned: lawsuit” *Vancouver Sun* December 5, 2001.

¹² Available at http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_851/idicww-diicaft1_e.html#_Toc516303225

“a violation of any law or regulation; or (b) misuse of public funds or assets; or (c) gross mismanagement; or (d) a substantial and specific danger to the life, health and safety of Canadians or the environment.”

The PSIO is designed to be a neutral, third-party agent who can deal with disclosures of wrongdoing an employee believes cannot be raised internally, or has not been dealt with adequately within a department or agency. In particular, he or she assists employees who:

- believe that their issue cannot be disclosed within their own department; or
- raised their disclosure issue(s) in good faith through the departmental mechanisms but believe that the disclosure was not appropriately addressed.

After reviewing and investigating disclosures the PSIO makes recommendations for action. Annual reports are made to the President of the Privy Council for tabling in Parliament.

It is too early to determine the effectiveness of the PSIO as it only began in November 2001. However, the broad definition of whistle blowing, the ability to bring matters to a relatively independent officer, and the tabling of reports in Parliament could prove effective. However, because the federal approach is not enshrined in legislation, there is a risk that it will not be followed, and, because the PSIO does not report directly to Parliament, there is a risk of political interference. There is also a risk that the PSIO will be less independent than parliamentary officials such as the Auditor General.

A provincial policy may be equally valuable. It could potentially place responsibility for receiving reports of wrongdoing with the Auditor General or Ombudsman.

Statutory protection from whistle blowing applicable to BC

Federal Law

Federal whistle blower legislation is generally weak. There have been attempts to introduce more comprehensive whistle blower legislation federally but without success. Several federal acts¹³ include whistle blower protection, but protection is limited to those who report offences under certain statutes to appropriate authorities.¹⁴ There is no general provision protecting federal or federally regulated employees who report infractions of federal or provincial legislation, nor any protection that protects employees who report behaviour that is legal but poses a threat to public safety, the environment or public health. Protection is limited to employees. Extracts from relevant legislation are attached in the appendix.

¹³ See Appendix B.

¹⁴ Relevant sections of the legislation are in Appendix B.

Provincial Law

Provincial whistle blower protection is limited to the *Forest Practices Code of BC Act*.¹⁵ It applies to private and public sector and prohibits reprisals against a wide variety of persons who take part in *Forest Practices Code* proceedings (including prosecutions and statutory complaint provisions).¹⁶

A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, or otherwise discriminate against, a person because that person complains or is named in a complaint, gives evidence or otherwise assists in respect of a prosecution, complaint or other proceeding under this Act, the regulations or the standards.

Whistle blower protection legislation has been introduced in BC, but never passed. Most recently in 1994 a private members bill was introduced into B.C.'s legislature entitled *Whistle Blowers' Protection Act*. The Bill was aimed specifically at providing protection for whistle blowers of environmental pollution. Unfortunately, the Bill was never passed into law and B.C. still does not have adequate whistle blower protection.

Statutory Protection applicable to other jurisdictions

Many jurisdictions have whistle blower protection that is broader than the statutory protection available in BC. These include:

New Brunswick Employment Standards Act – All employees protected from reprisals for providing information related to alleged offences.

Section 28 of New Brunswick's *Employment Standards Act*, which applies to both public and private sector employees. Employees are protected from reprisals related to them making complaints against their employer with respect to any alleged violation of provincial or federal legislation.¹⁷

Ontario Environmental Bill of Rights -- Right of Participation in Environmental Decisions Protected.

Under Part VII of the *Environmental Bill of Rights*¹⁸ any person (not just government employees) can make a complaint to the Ontario Labour Relations Board alleging an employer has taken a reprisal against an employee on a prohibited ground. Protected activities include:

- participating in decision-making about environmental statements, policies, or legislation;

¹⁵ R.S.B.C. 1996, c. 159

¹⁶ Section 179, See Appendix F.

¹⁷ See Appendix page 23

¹⁸ S.O. 1993, c.28, See Appendix, page **Error! Bookmark not defined.**

- applying for reviews or investigations;
- complying with or seeking enforcement of legislation;
- giving information to an appropriate authority for the purposes of investigation or review; and
- giving evidence in a proceeding.

The onus rests with the employer to prove that the reprisal was not taken on a prohibited ground. If it is found that the reprisal was based on a prohibited ground, the Board has a range of remedies to choose from, including (but not limited to):

- an order directing the employer to cease doing the act or acts complained of;
- an order directing the employer to rectify the act or acts complained of; and/or
- an order directing the employer to reinstate in employment or hire the employee, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount assessed by the Board against the employer [S.O.1993, c.28, s.110].

Yukon Environment Act: protects all employees from reporting adverse environmental effects to authorities.

Yukon provisions are similar in effect to the Ontario Environmental Bill of Rights. All employees, not just those in the public sector, are protected from reprisals if, for the purpose of protecting the environment, they report wrongful behaviour or adverse environmental impacts to appropriate authorities, or refuse to do work that is contrary to the Act, make complaints or call for investigations under the *Environment Act*. The legislation explicitly states that protection will be granted to employees “notwithstanding any enactment or contractual provision which imposes a duty of confidentiality on an employee.”

Part IV of the Ontario Public Service Act (not in force): provides avenue of complaint and public reporting of serious government wrongdoing.

In 1993, Ontario passed general whistle blower protection legislation for public service employees, but the legislation has not been brought into force by the subsequent government. The legislation is a comprehensive Code that forms a new part of the *Public Service Act*.¹⁹ Employees can report confidential information to an officer of the legislature. Generally, if the officer believes that credible information discloses serious government wrongdoing, and the employee consents, the officer must require government to respond to the allegation. The allegation and response must be made public unless the officers decides that doing so is not in the public interest. Serious government wrongdoing is defined by the Act as illegal activity,

¹⁹ Section 58(6) of the *Public Service and Labour Relations Statute Law Amendment Act, 1993* added a new Part IV to the *Public Service Act*, R.S.O. 1990, c.P-47. (See Appendix at page 24)

gross mismanagement, gross waste of money, or acts or omissions that pose a grave health, environmental or safety hazard. Employees cannot be disciplined for disclosing information to the officer in good faith.

Northwest Territories *Environmental Rights Act*: protection from reporting environmental violations.

Potential whistle blowers are protected from employer reprisals when reporting pollution violations.

Queensland *Whistleblowers Protection Act*: Protecting Public Sector Disclosure of Government Misconduct:

As a result of corruption in the public service the Australian state of Queensland passed the *Whistleblowers Protection Act*. The principal object of the Act is to promote the public interest by protecting people who disclose unlawful, negligent or improper conduct affecting the public sector, danger to public health or safety and/or danger to the environment. To be eligible for protection under the Act disclosure must be made with an honest belief based on reasonable grounds that the information shows wrongdoing. It must also be disclosed to an appropriate public sector entity.²⁰ A person may choose which entity they wish to disclose to, as long as the entity has the ability to act on the disclosure. If the entity fails to act on the information, the disclosure can be made to another "appropriate entity." Any reprisal against someone who made a public interest disclosure is punishable with a maximum penalty of imprisonment for two years, and employees can apply for damages or injunctions to stop reprisals. The Act also provides numerous administrative provisions to ensure whistle blowers' information is not used inappropriately, and provides a defence of absolute privilege for making a public interest disclosure in any proceeding for defamation. The hallmarks of the Queensland model are: confidentiality is vigorously protected; potential whistle blowers have a wide range of choices of disclosure, but no ability to go public or to the media.

United Kingdom Public Interest Disclosure Bill

In July of 1999 the British Parliament passed the *Public Interest Disclosure Bill* to provide general whistle blower protection. While the legislation provides protection, the disclosure must be one that a court would find lawful and justifiable in the public interest in an action for breach of confidence. The U.K. model has been criticized on numerous grounds. It has been stated that the onus rests too heavily with the whistle

²⁰ Public sector entity is described in schedule 5(2) of the Act as: a committee of the Legislative Assembly; the Parliamentary Service Commission and the Parliamentary Service; a court or tribunal; the administrative office of a court or tribunal; the Executive Council; a department; a local government; a university, university college, state college or agricultural college; a commission, authority, office, corporation or instrumentality established under an Act or under State or local government authorization for a public, State or local government purpose; a government owned corporation [with some exceptions]; and, an entity, prescribed by regulation that is assisted by public funds.

blower to show that they should be protected, as opposed to the onus resting with the employer to show that the alleged whistle blowing was false, not in the public interest, or merely self-serving. In addition the legislation is seen as weak and confusing, and adds little to no protection than what existed at common law.²¹

The United States Model

For over a decade the United States has had federal whistle blower protection under the *Whistleblower Protection Act*. The Act is an anti-retaliation statute that prohibits the federal government from taking reprisals against employees who blow the whistle on public sector wrongful acts or omissions. An internal mechanism for whistle blowers is provided, so that employees can make confidential disclosures of wrongdoing, without fear of reprisals.

Under the Act, employees make disclosure to either the Special Counsel, Inspector General of an agency, another employee designated by an agency head to receive such disclosures, or any other individual or organization such as Congress or the media, provided the disclosure is not otherwise prohibited by law.

The Office of the Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. It investigates complaints from people who allege to have suffered reprisals from disclosing information. It also acts as a safe channel for federal workers who wish to disclose violations of laws, waste of funds, abuse of authority, or danger to public health and the environment. The OSC can investigate disclosures and make reports to the President or Congress. Fourteen examiners conduct preliminary investigations into about 2000 complaints a year. In the year 2000, there were close to 4,000 allegations of prohibited personnel practices to the OSC.²²

The Merit Systems Protection Board (MSPB) deals with appeals and stay applications filed by an employee, former employees, or applicants for employment who allege they were discriminated against because of whistle blowing. The Board hears the case and can order a broad spectrum of remedies.

CONCLUSIONS: OPTIONS FOR REFORM

The following options for improving the situation in BC are possible:

Test Cases

Unions could bring test cases to arbitrators and the courts in an effort to clarify and expand the protections available under the common law, just and reasonable cause provisions, and the *Charter of Rights and Freedoms*. This could be quite effective, if the right cases are brought forward, and they are well argued. However, there is a high

²¹ See www.freedomtocare.org/page69.htm.

²² OSC Report to Congress, Available at: <http://www.osc.gov/documents/ar-2000.pdf>

risk that this strategy could backfire if courts are less liberal than expected. This is not recommended as an overall strategy; however, if cases arise, interested public interest groups should be alerted and consideration given to encouraging interventions from interested NGOs.

Collective Bargaining Strategies

Unions could develop model language for collective agreements that covers a range of different situations. The language should seek to, at the very least, equal the protections available under a liberal interpretation of the common law, and not be restricted to breaches of law. For public service employees, consideration should be given to provisions that specifically allow disclosure of information that is accessible under the provincial *Freedom of Information and Protection of Privacy Act* or the federal *Access to Information Act*. Consideration should also be given to a provision that allows disclosure to independent officers of the legislature – e.g. the Auditor General or the Ombudsman.

Well defined harassment policies could also help avoid informal sanctioning of whistle blowers. The definition of harassment should not be limited to factors such as race, gender, creed etc. Definitions of harassment from the BC Women's and Children's Health Centre (see above) are a good starting point.

Government Policy

A government policy on whistleblower protection, similar to that adopted by the federal government, would be a significant step in the right direction, but will only assist public service employees. It should be noted that the federal policy was adopted in response to pressure for legislation. Thus, it may be a positive outcome of a campaign for law reform.

New Legislation

Clearly drafted legislation on whistle bower protection is probably the ideal solution, but the current federal government is likely to resist such calls due to their recent adoption of policy. It also appears unlikely that the Province would adopt whistle bower protection at this time, although a sustained campaign may be effective over the long term.

Before commencing on any campaign, it is essential for the campaigners to be clear on their objectives. Whistle bower protection such as exists in New Brunswick, Northwest Territories or the UK will do very little, if anything, for whistle blowers. Careful consideration has to be given to all the issues raised above.²³

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²³ At pages 2 to 3.

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The ideal legislation would be a framework that applies to all employees (both in the public and private sector) who make complaints to officials regarding illegality or threats to public safety, health and environment. Part of that framework should also include a system for disclosing mismanagement within the government, such as that found in the US, Queensland and *Ontario Public Service Act* models. This system should also provide an exemption from confidentiality requirements of contractors (with certain exemptions such as solicitor-client privilege).

Any legislation should include the following:

- Broad definition of protected activities: Protection should not just be extended to employees who report provincial offences, but rather it should include (at a minimum) acts or omissions that are likely to cause environmental harm, endanger public health or safety, or are an offence under any law in force in Canada.
- Coverage should extend to all persons, not just government employees: Government provisions should apply to contractors where they are carrying out functions analogous to the civil service.
- A wide range of remedies: Reinstatement, compensation for lost income and relocation are but a few of the potential remedies that should be available.
- Confidentiality provisions: Experience from other jurisdictions has proven the importance of confidentiality. Even with strong statutory protection, “only a minority of people in any organization are likely to challenge organizational loyalty and risk the social stigma that would follow.”²⁴
- Protection against a broad spectrum of reprisals: A definition for reprisal should encompass all negative personnel actions, including unwanted transfers and negative inactions, such as failure to promote.
- Low standard of proof: US federal protection states that an employee must only show that his or her disclosure of information was ‘a factor’, as opposed to having to prove that it was the predominant or motivating factor in the subsequent negative personnel action or inaction. Having to prove that disclosure of information was the motivating factor is a difficult task, and could dissuade some potential whistle blowers from coming forward.
- Onus of proof on the employer: Once an employee has made out a prima facie case that a reprisal was linked to disclosure of information, the onus of proof should switch to the employer to prove that the disclosure played no role in the subsequent negative personnel action or inaction.

²⁴ Briefing Note on U.S. Whistleblowing Protections, available at www.gov.mb.ca/health/documents/cardiac/17prae.pdf.

- A duty to disclose illegality: Switching disclosure from a personal initiative into a positive duty will encourage potential whistle blowers to come forward, and should help strengthen protection for whistle blowers.
- Realistic statute of limitations: Too often in other jurisdictions the statute of limitations has been 30 to 60 days. This short time line can leave whistle blowers without protection – by the time they become informed of their rights, contact a lawyer and file a complaint the limitation period could have already elapsed. A more realistic limitation would be closer to a year.
- Appropriate channels for disclosure: Public servants should have freedom to disclose to an independent agency that would then be responsible for investigating the complaint and making reports. Studies have shown that pessimism that nothing will be done is as strong a factor, or stronger, than fear of retaliation in silencing potential whistle blowers. Any legislation must set up effective mechanisms for investigation and remedial action to correct wrongdoing exposed by whistle blowers.
- Prohibitions on release of information that is publicly accessible: No civil servant should be disciplined for passing on information records that are accessible through Freedom of Information.
- Exemption from confidentiality provisions: Employees, such as Dr. Olivieri, who breach contractual confidentiality provisions when speaking out in the public interest should not be subject to employer reprisals. This exemption would not apply to solicitor-client communications.
- No limitations on the common law. Legislative protection should specifically add to and not detract from common law rights or protections.

In the interests of balance and fairness, whistle blower legislation could include:

- Provisions punishing abuse of the system: People caught using the system for personal gain, or acting for other reasons than in the public interest should be penalized. Obviously these situations would be rare, and this provision should be used sparingly, but it could provide assurance for employers.

APPENDIX A — MODEL US WHISTLE BLOWER PROTECTION ACT

Several non-governmental organizations in the United States have done extensive work on whistle blower protection issues. The National Whistle blower Centre (www.whistleblowers.org) developed a piece of model legislation. While this legislation is American in focus, it gives an excellent starting point for what Canadian whistle blower protection legislation should look like. The legislation is inclusive, allows for a wide range of avenues for disclosure, and sets an appropriate burden of proof.

Whistle blower Protection Act

§ 1. Short Title

This Act may be cited as the "*Whistle blower Protection Act*."

§ 2. Definitions

(a) "Employer" means any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly on behalf of, and shall also include any public or privately owned corporation, all branches of State Government, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board or any other agency or instrumentality thereof. Employer shall also include agents, contractors or subcontractors of an employer.

(b) "Employee" means any individual who performs services for or under the control and direction of an employer for wages or other remuneration. Employee shall also include applicants for employment, former employees or an authorized representative of an employee.

(c) "Public body" means:

(1) the United States Congress, and State legislature, or any popularly- elected local governmental body, or any member or employee thereof;

(2) any federal, State, or local judiciary, or any member or employee thereof, or any grand or petit jury;

(3) any federal, State, or local regulatory, administrative, or public agency or authority, or instrumentality thereof;

(4) any federal, State, or local law enforcement agency, prosecutorial office, or police or peace officer;

(5) any federal, State or local department of an executive branch of government; or

(6) any division, board, bureau, office, committee or commission of any of the public bodies described in the above paragraphs of this subsection.

(d) "Supervisor" means any individual with an employer's organization who has the authority to direct and control the work performance of the affected employee or who has authority to take corrective action regarding the violation of the law, rule or regulation of which the employee complains.

(e) "Retaliatory action" means the discharge, suspension, demotion, harassment, blacklisting or the refusal to hire an employee, or other adverse employment action taken against an employee in the terms and conditions of employment, or other actions which interfere with an employees ability to engage in protected activity set forth in § 3.

(f) "Improper quality of patient care" means, with respect to patient care by an employer that is

health care provider, any practice, procedure, action or failure to act which violates any law or any rule, regulation or declaratory ruling adopted pursuant to law, or any professional code of ethics.

§ 3. Protected Activity

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

(a) Discloses, threatens to disclose or is about to disclose to a supervisor or to a public body, an activity, policy or practice of the employer, a co-employee or another employer, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;

(b) Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care;

(c) Discloses, threatens to disclose or is about to disclose to a supervisor or to a public body, an activity, policy or practice of the employer, a co-employee or another employer, that the employee reasonably believes is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment;

(d) Assists, or participates in a proceeding to enforce the provisions of this law; or

(e) Objects to, opposes or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal; or

(3) ***is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.*** [emphasis added]

§ 4. Forum.

Upon a violation of any of the provisions of this act, an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction. Upon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in the suit.

§ 5. Burden of Proof.

A violation of this statute has occurred only if the employee demonstrates, by a preponderance of the evidence, that any behavior described in § 3 was a contributing factor in the retaliatory action alleged in the complaint by the employee. However, relief may not be ordered under § 6 if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action (retaliatory action) in the absence of such behavior.

§ 6. Remedies

All remedies available in common law tort actions shall be available to prevailing plaintiffs. The court shall also, where appropriate, order:

- (a) An injunction to restrain continued violation of this act;
- (b) The reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position;
- (c) The reinstatement of full fringe benefits and seniority rights;
- (d) The compensation for lost wages, benefits and other remuneration;
- (e) The payment by the employer of reasonable costs, expert witness and attorney's fees; and
- (f) Compensatory or exemplary damages.

§ 7. Posting

An employer shall conspicuously display notices of its employees' protections and obligations under this act.

§ 8. Preemption

Nothing in this act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or State law or regulation or under any collective bargaining agreement or employment contract. No employee may waive through a private contract any right set forth in this statute, except as set forth in § 9, and no employee may be compelled to adjudicate his or her rights under this statute pursuant to a collective bargaining agreement or any other arbitration agreement.

§ 9. Settlement

The rights afforded employees under this statute may not be waived or modified, except through a court approved settlement agreement reached with the voluntary participation and consent of the employee and employer. An employer may not require an employee to waive, as a condition of settlement, his or her right to reasonably engage in conduct protected under § 3 of this statute.

APPENDIX B: FEDERAL WHISTLE BLOWER PROTECTION

Federal whistle blower protection is all statute-specific. Relevant sections of the various statutes are included below.

Canadian Environmental Protection Agency²⁵

16. (1) Where a person has knowledge of the commission or reasonable likelihood of the commission of an offence under this Act, but is not required to report the matter under this Act, the person may report any information relating to the offence or likely offence to an enforcement officer or any person to whom a report may be made under this Act.

(2) The person making the report may request that their identity, and any information that could reasonably be expected to reveal their identity, not be disclosed.

(3) No person shall disclose or cause to be disclosed the identity of a person who makes a request under subsection (2) or any information that could reasonably be expected to reveal their identity unless the person authorizes the disclosure in writing.

(4) Despite any other Act of Parliament, no employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that

(a) the employee has made a report under subsection (1);

(b) the employee, acting in good faith and on the basis of reasonable belief, has refused or stated an intention of refusing to do anything that is an offence under this Act; or

(c) the employee, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done by or under this Act.

Canada Labour Code²⁶

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee

²⁵ R.S.C. 1985, c.33

²⁶ R.S.C. 1985, c. L-2

remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

- (a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
- (b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
- (c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

R.S., 1985, c. L-2, s. 147; R.S., 1985, c. 9 (1st Supp.), s. 4; 2000, c. 20, s. 14.

147.1 (1) An employer may, after all the investigations and appeals have been exhausted by the employee who has exercised rights under sections 128 and 129, take disciplinary action against the employee who the employer can demonstrate has willfully abused those rights.

(2) The employer must provide the employee with written reasons for any disciplinary action within fifteen working days after receiving a request from the employee to do so.

2000, c. 20, s. 14.

148. (1) Subject to this section, every person who contravenes a provision of this Part is guilty of an offence and liable

- (a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than two years, or to both; or
- (b) on summary conviction, to a fine of not more than \$100,000.

Canadian Human Rights Act²⁷

59. No person shall threaten, intimidate or discriminate against an individual because that individual has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Part, or because that individual proposes to do so.

²⁷ R.S.C. 1985, c.H-6.

Pest Control Products Act²⁸ – not yet in force

47(1) A person who knows about a contravention of this Act or the regulations, or the reasonable likelihood of such a contravention, may report any information relating to the contravention to an inspector.

(2) When making a report, the person may request that their identity not be disclosed, and no person shall disclose or permit the disclosure of that identity or information unless the person who made the request authorizes the disclosure in writing.

(3) Despite any other Act of Parliament, no person shall dismiss, suspend, demote, discipline, deny a benefit of employment to, harass or otherwise disadvantage a person for having

(a) made a report under subsection (1);

(b) refused or stated an intention of refusing to do anything that the person reasonably believed was or would be a contravention under this Act; or

(c) done or stated an intention of doing anything that the person reasonably believed was required by or under this Act.

(4) Every person who contravenes subsection (2) or (3) is guilty of an offence and liable

(a) on summary conviction to a fine of not more than \$200,000 or to imprisonment for a term of not more than six months, or to both or;

(b) on conviction on indictment, to a fine of not more than three years, or both.

Transportation Safety Board Regulations

Another federal program of note is the Transportation Safety Board's SECURITAS program, a program based in part in Transportation Safety Board Regulations²⁹ It is designed to receive voluntary reports on safety concerns related to transportation. Incidents and unsafe acts or conditions can be reported and will be treated confidentially. The Transport Safety Board will then review the complaints, and make recommendations as necessary. The program is created under TSB regulation.

²⁸ Bill C-53, SC 2002

²⁹ SOR 92/446

APPENDIX C: PROVINCIAL & TERRITORIAL WHISTLE BLOWER PROTECTION

Forest Practices Code of BC Act

- s. 173 A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, or otherwise discriminate against, a person because that person complains or is named in a complaint, gives evidence or otherwise assists in respect of a prosecution, complaint or other proceeding under this Act, the regulations or the standards.

New Brunswick Employment Standards Act

- s. 28. Notwithstanding anything in this Act an employer shall not dismiss, suspend, lay off, penalize, discipline or discriminate against an employee if the reason therefore is related in any way to

...

(b) the making of a complaint or the giving of information or evidence by the employee against the employer with respect to any matter covered by this Act; or

(c) the giving of information or evidence by the employee against the employer with respect to the alleged violation of any Provincial or federal Act or regulation by the employer while carrying on the employer's business;

or if the dismissal, suspension, layoff, penalty, discipline or discrimination constitutes in any way an attempt by the employer to evade any responsibility imposed upon him under this Act or any other Provincial or federal Act or regulation or to prevent or inhibit an employee from taking advantage of any right or benefit granted to him under this Act.

Yukon Environment Act

- 20 (2) No employer shall dismiss or threaten to dismiss, discipline, impose any penalty on, intimidate or coerce an employee, or commence or prosecute any legal action against because the employee, for the purpose of protecting the natural environment, or the public trust in relation to the natural environment, from material impairment,
- (a) reports or proposes to report to the appropriate authority any adverse effect or likely adverse effect;
 - (b) commences or proposes to commence an action under subsection 8(1);
 - (c) makes or proposes to make an application for an investigation under section 14;
 - (d) prosecutes or proposes to prosecute an offence pursuant to section 19;
 - (e) makes or proposes to make a complaint under section 22;
 - (f) lays an information or proposes to lay an information pursuant to section 181; or
 - (g) refuses to carry out an order or direction of the employer that would constitute a contravention of this Act, the regulations, or a term or condition of a permit or order.
- (3) A person who contravenes subsection (2) is guilty of an offence and is liable on summary conviction to a fine of not more than \$25,000 or to imprisonment for not more than 90 days or both.
- (4) Where an employer is convicted of an offence under subsection (3), the court may, in addition to any other penalty imposed, order the employer to take or refrain from taking any action in relation to the employee, including the reinstatement of the employee to his or her former position or equivalent position or the payment to the employee of wages and benefits lost by reason of the contravention of subsection (2).
- (5) This section applies notwithstanding any enactment or contractual provision which imposes a duty of confidentiality on an employee.

Ontario Public Service Act

The Ontario Public Service Act, Part IV Whistle blowers' Protection is not yet in force. From all indications it appears as if the current government has no intentions of bringing it into force. The legislation is aimed only at provincial government employees, and therefore private sector workers would be left without protection from reprisals. Contractors to the government do not appear to be covered by the legislation either. Further weakening this legislation is that disclosures are only allowed for 'serious government wrongdoing', requiring either the breaking of a

statute or 'grave' environmental harm. Disclosures can only be made to the Counsel, or under certain circumstances to the police. In addition, the legislation is long and complicated, potentially leading to confusion or uncertainty about what disclosures are protected.

Purposes

28.11 *The purposes of this Part are to protect employees of the Ontario Government from retaliation for disclosing allegations of serious government wrongdoing and to provide a means for making those allegations public. 1993, c. 38, s. 63 (6).*

Definitions

28.12 In this Part,

"Board" means the Ontario Labour Relations Board; ("Commission")

"Commissioner" means the Information and Privacy Commissioner appointed under the *Freedom of Information and Protection of Privacy Act*; ("commissaire")

"Counsel" means the Counsel referred to in section 28.14; ("avocat-conseil")

"employee" means an employee of an institution and includes an official of an institution; ("employé")

"head", in respect of an institution, means a head within the meaning of the *Freedom of Information and Protection of Privacy Act*; ("personne responsable")

"institution" means an institution within the meaning of the *Freedom of Information and Protection of Privacy Act*; ("institution")

"law enforcement" means law enforcement within the meaning of the *Freedom of Information and Protection of Privacy Act*; ("exécution de la loi")

"public file" means the public file maintained by the Counsel under section 28.37; ("dossier public")

"record" means a record within the meaning of the *Freedom of Information and Protection of Privacy Act*. ("document") 1993, c. 38, s. 63 (6).

Serious government wrongdoing

28.13 For the purposes of this Part, an act or omission constitutes serious government wrongdoing if it is an act or omission of an institution or of an employee acting in the course of his or her employment and if,

- (a) it contravenes a statute or regulation;
- (b) it represents gross mismanagement;
- (c) it causes a gross waste of money;
- (d) it represents an abuse of authority; or

(e) it poses a grave health or safety hazard to any person or a grave environmental hazard. 1993, c. 38, s. 63 (6).

Counsel

28.14(1) There shall be a Counsel to advise employees concerning allegations of serious government wrongdoing and to provide a means for making those allegations public.

(2) The Counsel shall be an officer of the Assembly. 1993, c. 38, s. 63(6).

Advice by Counsel

28.15 The Counsel shall advise employees concerning,

(a) what constitutes serious government wrongdoing that ought in the public interest to be disclosed;

(b) whether particular information may reveal serious government wrongdoing that ought in the public interest to be disclosed;

(c) the process by which information is made public or disclosed to particular agencies under this Part;

(d) the Counsel's powers and duties under this Part;

(e) the employee's rights and obligations in seeking to make allegations of serious government wrongdoing public through the Counsel or in seeking to disclose those allegations to any other person; and

(f) the employee's rights and obligations under this Part. 1993, c. 38, s. 63 (6).

Information Disclosed to Counsel

Disclosure of Information

28.16(1) An employee may disclose to the Counsel information from an institution that the employee is required to keep confidential,

(a) in order to seek advice concerning his or her rights and obligations under this Part; or

(b) if he or she believes that the information may reveal serious government wrongdoing that ought to be disclosed in the public interest, in order to make the information public.

Employee Who Is Lawyer

(2) Despite subsection (1), no lawyer employed by an institution shall disclose to the Counsel any privileged information that he or she has received in confidence from an employee in his or her professional capacity.

Form of Information

(3) An employee may disclose information to the Counsel regardless of whether the information is in oral or written form.

(4) If an employee, acting in good faith, believes on reasonable grounds that a record may reveal serious government wrongdoing, the employee may copy the record for the purpose of disclosing it to the Counsel and may disclose that copy to the Counsel.

(5) Subsection (4) does not authorize an employee to remove an original record from an institution for the purpose of disclosing it to the Counsel.

Employee Not Liable

(6) No employee is liable to prosecution for an offence under any Act,

(a) for copying a record or disclosing it to the Counsel in accordance with this section; or

(b) for disclosing information to the Counsel in accordance with this section.

(7) No proceedings lie against an employee for copying a record or disclosing a record or information to the Counsel in accordance with this section, unless it is shown that he or she acted in bad faith. 1993, c. 38, s. 63 (6).

Confidentiality

28.17(1) Subject to subsection 28.24 (5), neither the Counsel nor any employee of the Counsel shall disclose information received from an employee under this Part to any person without the consent of the employee who disclosed the information.

(2) If an employee seeks advice from or discloses information to the Counsel, neither the Counsel nor any employee of the Counsel shall disclose the identity of the employee to any person without the employee's consent.

Exception, Prevent Crime

(3) Despite subsections (1) and (2), the Counsel may disclose information received from an employee and the employee's identity to the Ontario Provincial Police or a municipal police force if the Counsel believes on reasonable grounds,

(a) that a crime is likely to be committed if he or she does not do so; and

(b) that the disclosure is necessary to prevent the crime.

(4) Subsection (3) does not authorize the Counsel to disclose to the Ontario Provincial Police or a municipal police force a copy of a record that an employee has disclosed to the Counsel under subsection 28.16 (4).

Exception, Grave Danger

(5) Despite subsection (1), if the Counsel believes on reasonable grounds that it is in the public interest that information disclosed by an employee be disclosed to the

public or persons affected and that it reveals an imminent grave health or safety hazard to any person or an imminent grave environmental hazard, the Counsel shall, as soon as practicable, disclose that information to the head of the institution to which it relates. 1993, c. 38, s. 63 (6).

DISCLOSURE OF SERIOUS GOVERNMENT WRONGDOING

Review by Counsel

28.18(1) On request by an employee, the Counsel shall review information the employee has disclosed to the Counsel to determine whether, in the Counsel's opinion, the information, if correct, may reveal serious government wrongdoing.

Require Report

(2) Subject to subsection (3), the Counsel shall determine that he or she should require a report under this Part if,

- (a) he or she determines that the information, if correct, may reveal serious government wrongdoing;
- (b) the information is sufficiently credible that the Counsel believes there may be serious government wrongdoing; and
- (c) the information that may be included in the notice given under section 28.20 is sufficient to enable the head to conduct an investigation into the matter.

Exception

(3) The Counsel may refuse to require a report under this Part if, in the Counsel's opinion,

- (a) it would be more appropriate for the employee to bring the allegation of wrongdoing to the attention of a responsible official in the institution to which the information relates; or
- (b) it would be more appropriate for the employee to bring the allegation of wrongdoing to the attention of a law enforcement agency or a government agency whose mandate is to investigate similar allegations.

(4) The Counsel shall not determine that it would be more appropriate for the employee to bring an allegation of wrongdoing to the attention of a responsible official if the employee fears retaliation if the employee were to do so.

Inform Employee

(5) The Counsel shall inform the employee of his or her determinations under this section and of the reasons for them. 1993, c. 38, s. 63 (6).

No Serious Wrongdoing

28.19 If the Counsel determines that he or she should not require a report, the Counsel may, with the consent of the employee, disclose part or all of the information received from the employee to the head of the institution to which the information relates. 1993, c. 38, s. 63 (6).

Report Required

28.20(1) Subject to subsection (2), the Counsel shall by notice require the head of the institution to which information disclosed by an employee relates to submit to the Counsel a report concerning the information if,

- (a) the Counsel determines that he or she should require a report; and
- (b) the employee consents to the Counsel's requiring the report.

(2) If, because of the nature of the information, the Counsel believes that it would not be appropriate to require the head of the institution to which the information relates to submit a report concerning it, the Counsel may by notice require the report from whatever Minister of the Crown he or she considers appropriate in the circumstances rather than from the head referred to in subsection (1).

Contents of Notice

(3) Subject to subsection (4), the notice requiring a report shall include a written summary of the information disclosed to the Counsel that relates to the allegation of wrongdoing and copies of any records which the employee seeks to have made public through the Counsel.

Delete to Protect Privacy

(4) The Counsel shall, with the consent of the employee, delete from the summary or records information that might, directly or indirectly, disclose the identity of the employee. 1993, c. 38, s. 63(6).

Investigation and Report

28.21(1) Subject to section 28.25, a head of an institution who receives a notice requiring a report shall cause an investigation to be conducted concerning the information set out in the notice and report to the Counsel in writing within thirty days after receiving the notice.

Extension of Time

(2) On request from the head, the Counsel may extend the time required for preparing the report.

Curtailling Time

(3) The Counsel may require the report within a period less than thirty days after receiving the notice in exigent circumstances.

Personal information

(4) The head may collect personal information from a person or institution other than the person to whom the information relates and may disclose personal information to a person or institution if that collection or disclosure is necessary for the conduct of an investigation under this section.

Contents of Report

(5) The head's report shall set out,

- (a) the written summary and records provided by the Counsel under subsection 28.20(3);
- (b) the steps taken in the investigation;
- (c) a summary of the evidence obtained from the investigation;
- (d) any serious government wrongdoing that was discovered in the course of the investigation; and
- (e) any corrective action that has been taken or that will be taken as a result of the investigation.

Exempt Information

(6) The head may sever information from the report if the head determines,

- (a) that the information to be severed is exempt from access under any of sections 12 to 22 of the *Freedom of Information and Protection of Privacy Act* and that there is not a compelling public interest in disclosing the information that clearly outweighs the purpose of the exemption; or
- (b) that the information to be severed is exempt from access under another section of that Act.

(7) The head may sever information from the written summary and records provided by the Counsel under subsection 28.20 (3) if the head determines that the information to be severed does not relate to the allegation of serious government wrongdoing.

Set Out Severance

(8) If the head severs information under subsection (6) or (7), the report shall set out,

- (a) the specific provision of this Part under which the information is severed; and
- (b) the fact that, if the report has been placed in the public file, any person may appeal to the Commissioner for a review of the decision.

(9) If the head severs information under subsection (6), the report shall set out,

- (a) the specific provision of the *Freedom of Information and Protection of Privacy Act* under which the information is exempt from access; and

(b) the reason the provision applies to the severed information.

Submissions

(10) When the head reports to the Counsel, the head may make submissions to the Counsel concerning whether it is in the public interest to have the report placed in the public file. 1993, c. 38, s. 63(6).

If Report Inadequate

28.22(1) After receiving a report from a head, the Counsel may give a written direction to the head to revise the report if the report is not made in accordance with section 28.21 or if the report, directly or indirectly, identifies the employee whose information initiated the investigation as the source of the information.

Revised Report

(2) A head who receives a direction to revise a report shall provide the Counsel with the revised report, as directed, within the time required by the Counsel in the direction. 1993, c. 38, s. 63(6).

If Report Not Received

28.23(1) If the Counsel does not receive a head's report or revised report within the time required under this Part, the Counsel may report that fact to the Speaker who shall cause the Counsel's report to be laid before the Assembly if it is in session or, if not, at the next session.

(2) The Counsel's report under subsection (1) shall not include any information concerning the substance of any allegation of serious government wrongdoing. 1993, c. 38, s. 63(6).

Report in Public File

28.24(1) After receiving a report made in accordance with section 28.21, the Counsel shall make the report public by placing it in the public file unless the Counsel determines that it is not in the public interest to make it public.

Public Interest

(2) To determine whether it is in the public interest to make the report public, the Counsel shall consider all of the relevant circumstances including,

- (a) if the report does not disclose serious government wrongdoing, whether publication of the report would unfairly damage the reputation of a person or an institution;
- (b) whether the disclosure could reasonably be expected to endanger the life or physical safety of any person;
- (c) whether the disclosure could reasonably be expected to prejudice or interfere with a law enforcement investigation; and

(d) whether the report might identify who the employee was whose information initiated the investigation.

Head's Submissions

(3) The Counsel shall not place a head's submissions under subsection 28.21 (10) in the public file.

Submissions by Employee

(4) If the Counsel believes it is in the public interest to place the report in the public file, before deciding whether to place the report in the public file, the Counsel shall show the report to the employee whose information initiated the investigation and give the employee an opportunity to make submissions on whether it is in the public interest to place the report in the public file.

Consent Not Needed

(5) The Counsel may place the report in the public file without the consent of the employee whose information initiated the investigation. 1993, c. 38, s. 63(6).

Referral for Investigation

28.25(1) If, because of the nature of an allegation of wrongdoing, the head believes that rather than preparing a report it would be more appropriate to refer the matter to a law enforcement agency or a government agency whose mandate is to investigate similar allegations, he or she may refer it to the agency for investigation.

(2) If the head refers an allegation of wrongdoing to an agency and the agency agrees to investigate the allegation, the head shall give written notice to the Counsel that the agency will investigate the allegation, but the head shall do so within thirty days after receiving the notice from the Counsel.

(3) The head shall not include any information concerning the substance of the allegation of wrongdoing in a notice under subsection (2).

(4) If the head gives the Counsel notice under this section, the head is not required to prepare a report under section 28.21.

Notice of Referral in Public File

(5) After receiving a notice under this section, the Counsel shall make the notice public by placing it in the public file unless the Counsel believes that doing so could reasonably be expected to prejudice or interfere with a police investigation. 1993, c. 38, s. 63 (6).

PROTECTION OF EMPLOYEES

No Discipline, etc.

28.29(1) No institution or person acting on behalf of an institution shall take adverse employment action against an employee because,

(a) the employee, acting in good faith, has disclosed information to the Counsel under this Part; or

(b) the employee, acting in good faith, has exercised or may exercise a right under this Part.

Presumption

(2) There is a presumption that an institution has contravened subsection (1) if,

(a) the Counsel has required a head to submit a report to the Counsel concerning an employee's allegation of serious government wrongdoing; and

(b) after the Counsel has done so, that head or any other head has taken adverse employment action against the employee.

Offence

(3) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine of not more than \$5,000.

Consent

(4) A prosecution under this section shall not be commenced without the consent of the Board.

Information

(5) An application for consent to commence a prosecution for an offence under this section may be made by a trade union or an employee's organization among others, and, if the consent is given by the Board, the information may be laid by an officer, official or member of the body that applied for consent.

Civil Remedy

(6) An employee who wishes to complain that an institution or a person acting on behalf of an institution has contravened subsection (1) may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if that is available, or file a complaint with the Board under section 28.30.

(7) Subsection (6) shall not be interpreted to limit any other right an employee may have under any other Act or at law to seek a remedy with respect to adverse employment action. 1993, c. 38, s. 63(6).

Complaint to Board

28.30(1) An employee may file a written complaint with the Board alleging that an institution has contravened subsection 28.29(1).

Inquiry

(2) The Board may authorize a labour relations officer to inquire into a complaint and, if it does so, the officer shall,

- (a) inquire into the complaint forthwith;
- (b) endeavour to effect a settlement of the matter complained of; and
- (c) report the results of the inquiry and endeavours to the Board.

Inquiry by Board

(3) If a labour relations officer is unable to effect a settlement of the matter complained of, or if the Board in its discretion dispenses with an inquiry by a labour relations officer, the Board may inquire into the complaint.

Determination

(4) If the Board, after inquiring into the complaint, is satisfied that an institution has contravened subsection 28.29(1), the Board shall determine what, if anything, the institution shall do or refrain from doing about the contravention.

(5) The determination may include, but is not limited to, one or more of,

- (a) an order directing the institution or person acting on behalf of the institution to cease doing the act or acts complained of;
- (b) an order directing the institution or person to rectify the act or acts complained of; or
- (c) an order directing the institution or person to reinstate in employment or hire the employee, with or without compensation, or to compensate, instead of hiring or reinstatement, for loss of earnings or other employment benefits in an amount assessed by the Board against the institution or person.

Agreement to Contrary

(6) A determination under this section applies despite an agreement to the contrary. 1993, c. 38, s. 63(6).

Failure to Comply

28.31 If the institution fails to comply with a term of the determination within fourteen days after the date of its release by the Board or after the date provided in the determination for compliance, whichever is later, the employee may file the determination, without reasons, in the form prescribed under the *Labour Relations Act* with the Ontario Court (General Division) and the determination may be enforced as if it were an order of the court. 1993, c. 38, s. 63(6).

Annual Report

28.41(1) The Counsel shall make an annual report on the activities of the Counsel's office to the Speaker of the Assembly.

(2) The Counsel's annual report shall include a summary of the number, nature and ultimate resolutions of allegations of serious government wrongdoing disclosed to the Counsel under this Act.

(3) The Speaker shall cause the report to be laid before the Assembly if it is in session or, if not, at the next session. 1993, c. 38, s. 63(6).

Rights Preserved

28.42 Nothing in this Part shall be interpreted to limit any right that an employee may have under any other Act or at law to disclose information about government wrongdoing in the public interest. 1993, c. 38, s. 63(6).

Commencement

28.43 Sections 28.11 to 28.42 come into force on a day to be named by proclamation of the Lieutenant Governor. 1993, c. 38, s. 63(6)

Ontario Environmental Bill of Rights³⁰

PART VII Employer Reprisals (Relevant Sections Only)

104. In this Part,

"Board" means the Ontario Labour Relations Board. 1993, c. 28, s. 104.

Complaint About Reprisals

105. (1) Any person may file a written complaint with the Board alleging that an employer has taken reprisals against an employee on a prohibited ground.

Reprisals

(2) For the purposes of this Part, an employer has taken reprisals against an employee if the employer has dismissed, disciplined, penalized, coerced, intimidated or harassed, or attempted to coerce, intimidate or harass, the employee.

Prohibited Grounds

(3) For the purposes of this Part, an employer has taken reprisals on a prohibited ground if the employer has taken reprisals because the employee in good faith did or may do any of the following:

³⁰ S.O. 1993, c.28

1. Participate in decision-making about a ministry statement of environmental values, a policy, an Act, a regulation or an instrument as provided in Part II.
2. Apply for a review under Part IV.
3. Apply for an investigation under Part V.
4. Comply with or seek the enforcement of a prescribed Act, regulation or instrument.
5. Give information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument.
6. Give evidence in a proceeding under this Act or under a prescribed Act. 1993, c. 28, s. 105.

Labour Relations Officer

106. The Board may authorize a labour relations officer to inquire into a complaint. 1993, c. 28, s. 106.

107. A labour relations officer authorized to inquire into a complaint shall make the inquiry as soon as reasonably possible, shall endeavour to effect a settlement of the matter complained of and shall report the results of the inquiry and endeavours to the Board. 1993, c. 28, s. 107.

Inquiry by the Board

108. If a labour relations officer is unable to effect a settlement of the matter complained of, or if the Board in its discretion dispenses with an inquiry by a labour relations officer, the Board may inquire into the complaint. 1993, c. 28, s. 108.

Burden of Proof

109. In an inquiry under section 108, the onus is on the employer to prove that the employer did not take reprisals on a prohibited ground. 1993, c. 28, s. 109.

Determination by the Board

110. (1) If the Board, after inquiring into the complaint, is satisfied that the employer has taken reprisals on a prohibited ground, the Board shall determine what, if anything, the employer shall do or refrain from doing about the reprisals.

(2) A determination under subsection (1) may include, but is not limited to, one or more of,

(a) an order directing the employer to cease doing the act or acts complained of;

(b) an order directing the employer to rectify the act or acts complained of; or

(c) an order directing the employer to reinstate in employment or hire the employee, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount assessed by the Board against the employer. 1993, c. 28, s. 110.

Agreement to the Contrary

111. A determination under section 110 applies despite a provision of an agreement to the contrary. 1993, c. 28, s. 111.

Failure to Comply

112. If the employer fails to comply with a term of the determination under section 110 within fourteen days from the date of the release of the determination by the Board or from the date provided in the determination for compliance, whichever is later, the complainant may notify the Board in writing of the failure. 1993, c. 28, s. 112.

Enforcement of Determination

113. If the Board receives notice in accordance with section 112, the Board shall file a copy of its determination, without its reasons, with the Superior Court of Justice, and the determination may be enforced as if it were an order of the court. 1993, c. 28, s. 113; 2001, c. 9, Sched. G, s. 4(2).

Northwest Territories Environmental Rights Act³¹

4(2) Any two persons resident in the Northwest Territories who are not less than 19 years of age and who are of the opinion that a contaminant has been released into the environment, is being released into the environment, or is likely to be released into the environment, may apply to the minister for an investigation of the release or the likely release.

7. (1) No person shall dismiss or threaten to dismiss an employee, discipline, suspend or impose any penalty on an employee or intimidate or coerce an employee because he or she

- (a) has reported or proposes to report to the appropriate authority any release or any likely release of a contaminant into the environment;
- (b) has made or proposes to make an application under subsection 4(2);

³¹ R.S.N.W.T. 1988, c.83(Supp.)

- (c) has commenced or proposes to commence to prosecute an offence under subsection 5(1); or
- (d) has commenced or proposes to commence an action under subsection 6(1).

(2) Subsection (1) does not apply in respect of any employee who proceeds or proposes to proceed in a manner described in paragraphs (1)(a) to (d) primarily for the purpose of intimidating, coercing or embarrassing his or her employer or any other person or for any other improper purpose.

(3) Every person who contravenes subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 90 days or to both.

(4) Where an employer is convicted of an offence under subsection (1), the judge may, in addition to prescribing a penalty provided for under subsection (3), order what action the employer shall take or what the employer shall refrain from doing and such order may include the reinstatement and employment of the employee with compensation for loss of wages and other benefits to be assessed against the employer. S.N.W.T. 2000,c.16,s.11(2),(3).

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