LAW

WHISTLEBLOWING IN THE PUBLIC SECTOR: A BALANCE OF RIGHTS AND INTERESTS

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In recent years, accountability and transparency of public sector organizations, or the lack thereof, has been at the forefront of national news. As a result, there has been increased pressure on governments to facilitate the free flow of information from within public sector organizations. One of the methods in which governments facilitate this free flow is through legislation that protects whistleblowers, allowing them to bring forward their concerns about misconduct in the public sector without fear of retribution. Whistleblowing legislation in the public sector raises important questions concerning the competing interests of employees, employers and the public. On the one hand, whistleblowing promotes the

important public interest of accountability and transparency in the public sector. Furthermore, it serves to protect and enhance the freedom of expression of employees and, in particular, the freedom to express discontent with their employers. On the other hand, whistleblowing may conflict with the duty of loyalty that is the cornerstone of the employment relationship, particularly in the public sector. This article discusses the whistleblowing legislation that exists in Canada with a particular focus on whistleblowing legislation in the public sector. It also discusses how such legislation balances the important and competing interests identified above.

I. WHAT IS WHISTLEBLOWING

In general, whistleblowing refers to the disclosure by employees of illegal, immoral, or otherwise illegitimate practices of their employers to persons or organizations that may be able to affect action.[1] In the Canadian public sector, whistleblowing has been defined as "encompassing both the open disclosure or surreptitious leaking to persons outside the organization of confidential information concerning a harmful act that a colleague or superior has committed, is contemplating, or is allowing to occur."[2] As the above definitions demonstrate, there are two key factors that distinguish whistleblowing from other forms of employee disclosure:

1) the type of "misconduct" that is disclosed
2) the person to whom such disclosure is made

Whistleblowing legislation in Canada is designed to carefully define these factors and, in this way, balances the competing interests that are engaged by the concept of whistleblowing.

II. THE CANADIAN FRAMEWORK

Whistleblowing legislation acts to facilitate the ability of employees to report the misconduct of their employers by properly preventing employers from reprising against employees who blow the whistle. In the private sector, there are relatively few protections for employees who wish to report employer misconduct. Most provinces do have employment/labour standards legislation and occupational health and safety legislation that prohibit employers from reprising against employees who make complaints under those Acts.[3] Furthermore, many provinces have environmental protection legislation which prohibits employers from reprising against employees who bring forward complaints about environmental wrongdoing. However, in most provinces, there is no free-standing protection for employees engaging in whistleblowing.[4] Whistleblowing legislation in the private sector tends to focus on very limited forms of misconduct, i.e., the contravention of a specific piece of legislation or environmental wrongdoing, rather than facilitating the disclosure of employer wrongdoing in general.

The broadest protection for whistleblowers in the public sector is the 2004 amendments to the *Criminal Code*. These amendments are embodied in section 425.1 of the *Criminal Code*, which provides:

> 425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,
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> (a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offense that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or
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> (b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.

This provision makes it illegal for employers to use employment-related intimidation or retaliation against whistleblowers. Employers found guilty of retaliating against a whistleblower can be imprisoned for a period of up to five years.

There are two important elements of section 425.1 which serve to severely limit its scope. In the first place, section 425.1 only applies to employer wrongdoing which constitutes a criminal offense or an otherwise unlawful act. Secondly, section 425.1 only protects employees who report such unlawful conduct to a person "whose duties include the enforcement of federal or provincial law." It does not protect employees who disclose wrongdoings that do not constitute a criminal or other offense, nor does it protect employees who report misconduct to persons other than authorized law enforcement personnel.

Section 425.1 is equally applicable to the private and public sectors. However, in the public sector, there exists additional whistleblowing legislation that is far greater in scope than those discussed above. In particular, the whistleblowing legislation in the public sector is broader in terms of both the scope of the wrongdoings which may be disclosed as well as the persons to whom such disclosure may be made.

The *Public Servants Disclosure Protection Act (PSDPA)* protects whistleblowers in the federal public sector and is designed to strike a balance between the competing interests that are engaged in the concept of whistleblowing. This purpose is set out in the preamble to the *PSDPA*.

The *PSDPA* creates similar protections for whistleblowers as does section 245.1 of the Criminal Code, but with a slightly broader scope. In particular, the *PSDPA* applies to wrongdoings beyond simply those which constitute a violation of federal or provincial laws. The definition of 'wrongdoing' is found in section 8 of the *PSDPA*.

The *PSDPA* also provides broader protection for whistleblowers in terms of the scope of persons to whom disclosure may be made. In particular, section 12 of the *PSDPA* provides that employees may disclose wrongdoings to their supervisors or other superiors within the organization. This type of up-the- ladder disclosure was endorsed by the Supreme Court of Canada in *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*,[5] and is embodied in most public sector whistleblowing legislation. Furthermore, section 13 allows a public servant to disclose wrongdoings to the federal Public Sector Integrity Commissioner.

In Ontario, the *Public Service of Ontario Act, 2006, (PSOA)* provides similar protection to whistleblowers in Ontario's public sector. The whistleblowing protections of the *PSOA* are contained in Part VI of the Act (sections 108 to 150) and are similar in scope and application to the *PSDPA*.

PSDPA PREAMBLE

Recognizing that

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it is in the public interest to maintain and enhance public confidence and integrity of public servants;

confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings, and by establishing a code of conduct for the public sector;

public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* and that this Act strives to achieve an appropriate balance between those two important principles.

WRONGDOING

- a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act;
- a misuse of public funds or a public asset;
- a gross mismanagement in the public sector;
- an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;
- a serious breach of a code of conduct established under section 5 or 6; and
- knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

Both the *PSDPA* and the *PSOA* prohibit employers from reprising against employees who disclose wrongdoings in accordance with the Acts. For instance, section 19 of the PSDPA provides that "[n]o person shall take any reprisal against a public servant or direct that one be taken against a public servant." In section 1 of the *PSDPA*, reprisal is defined as any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under the *PSDPA*:

(a) a disciplinary measure;
(b) the demotion of a public servant;
(c) the termination of employment of the public servant;
(d) any measure that adversely affects the employment or working conditions of the public servant; and
(e) a threat to take any of the measures referred to in any of paragraphs (a) to (d)

The *PSOA* contains a similar prohibition and definition of reprisal in sections 139(1) and (2).

III. LIMITS ON WHISTLEBLOWING PROTECTIONS IN THE PUBLIC SECTOR

While the protections for whistleblowers in the public sector are much broader than those in the private sector, such protections do not give public sector employees carte blanche to criticize their employers. In this regard, it must be remembered that, in general, employees owe a duty of loyalty and fidelity to their employers. The duty of loyalty and fidelity is manifested in whistleblowing legislation such as the *Criminal Code*, the *PSDPA*, and the *PSOA* by placing limits on the scope and application of whistleblowing protections. In particular, important limits are placed on what may be disclosed (i.e., a 'wrongdoing') and to whom it may be disclosed (i.e., internally or to a prescribed public official) that ensure that such legislation isn't misused by employees and relied upon as a justification for unduly criticizing their employer.

In the context of the public sector, the duty of loyalty and fidelity may be increased, with the result that public sector employers may have greater latitude in regulating what an employee may disclose to the public. The seminal case in this regard is the Supreme Court of Canada's decision in *Fraser v. P.S.S.R.B.*[6] In this case, the Supreme Court upheld the termination of a public servant who had publically criticized the policies of the acting government in the media. In so holding, the Supreme Court endorsed a view in which the interest in the actual and apparent impartiality of the public service justified an increased duty of loyalty on the part of public servants.

The Supreme Court's decision in *Fraser* is significant as it demonstrates the proper limits of whistleblowing protection in the public sector. In particular, it demonstrates the importance of placing limits on what may be disclosed and to whom. In Fraser, the conduct of the acting government did not amount to a "wrongdoing" within the meaning of any of the provisions discussed above. Furthermore, the employee in *Fraser* had disclosed such information to the media, rather than an approved individual. As such, the Supreme Court held that such whistleblowing was not worthy of protection and, instead, the duty of loyalty to the employer prevailed.

As the decision in *Fraser* and the cases that follow demonstrate, whistleblowing legislation does not operate to provide complete immunity to employees who are critical of their employers. In particular, whistleblowing legislation does not protect an employee who decides to air his or her grievances in a public forum which, in the modern age, includes social media sites such as Facebook and Twitter as well as Wikileaks. Rather, it allows employees to bring legitimate complaints of significant wrongdoing to those who are in an appropriate position to take action. In this way, whistleblowing legislation in Canada strikes an appropriate balance between the interests of the employee and the public, on the one hand, and the interests of the employer on the other.

JOSEPH COHEN-LYONS is an Associate lawyer at the Hicks Morley Toronto office and currently practices in all areas of labour and employment law. He provides advice and representation to employers and management on a wide range of labour and employment issues including labour disputes, grievance arbitrations, wrongful dismissals, employment standards, employment contracts, privacy, human rights and accommodation, and occupational health and safety.