Chapter 2
The Legal Response to Whistleblowing in Canada: Managing Disclosures by the "Up the Ladder" Principle

John P. McEvoy

Abstract Canadian law has generally adopted the "up the ladder" approach to whistleblowing in both public and private employment. This chapter addresses whistleblowing protection of employees at common law and civil law as well more recent legislative reforms to protect whistlebowers in relation to discrete matters invoking the principle of protection (such as children, the elderly and the environment).

Introduction

In the labour and employment law context, a whistleblower is an employee who discloses otherwise confidential information gained in the course of employment. The disclosed information may relate to "illegal, immoral or illegitimate practices"[1] undertaken by or on behalf of the employer such that its disclosure is detrimental to the employer's interests. An employee seeking corrective action typically makes the disclosure "to persons or organizations that may be able to affect action"[2] but disclosures are also made to the public at large through news and social media. Such disclosures risk the business reputation of the employer and may expose the employer to prosecution. Considered in this context, the legal position of a whistleblower depends on two competing interests: the private interest of the employer in the confidentiality of its information (the duties of loyalty, good faith, and confidentiality) and the public interest in disclosure of information about conduct detrimental to the public interest.

[1] Sean C. Doyle, "A Purposive Approach to Whistleblower Protection: A Comment on *Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*" (2007), 44 *Alberta Law Review* 903, at 903 quoting Terry Morehead Dworkin, "Whistleblowing, MNCs, and Peace" (2002), 35 *Vanderbilt Journal of Transnational Law* 457 at 461.

[2] ibid.

J.P. McEvoy (✉)
Faculty of Law, University of New Brunswick,
P.O. Box 4400, Fredericton, NB E3B 5A3, Canada
e-mail: mcevoy@unb.ca

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Disclosure of workplace information is not a new phenomenon. It has probably existed since human beings started working together in a common endeavour. But, what has changed is the means of communication; technology has made disclosures easier and to a broader audience. Instead of a conversation with an outsider, an employee can more widely disseminate information using social media and the internet. Who hasn't received an otherwise confidential email from someone who inadvertently used the "reply all" option? Or, known of someone who posted information on a social media website in the mistaken belief that the website is private and available only to certain "friends"? Such disclosures may breach the employee's duties of loyalty, good faith, and confidentiality and may subject the employee to disciplinary action by the employer. But, such disclosures are not the disclosures by whistleblowers in the sense understood in this chapter.

A whistleblower makes an intentional disclosure of information to achieve a broader public purpose. A whistleblower is not engaged in gossip and personal complaints. A whistleblower generally believes that s/he acts for a higher purpose outside of the direct employment relationship or status. Notwithstanding this identifiable higher purpose, personal vendetta may or may not be a factor in an employee's decision to make a disclose disclosure.

Canada is a federal state consisting geographically of ten provinces and three territories.[3] Considered from a jurisdictional perspective, Canada consists of 14 law units: the 10 provinces, 3 territories, and national level of government. The legislative assemblies of the provinces exercise general legislative jurisdiction in relation to labour and employment matters "within the province" while the national Parliament exercises jurisdiction in relation to labour and employment matters as an exception to the provincial jurisdiction; that is, in relation to labour and employment in matters of national interest, such as interprovincial and international transportation, the federal public sector, and nuclear energy. The three territories exercise legislative jurisdiction similar to that of a province but with jurisdiction delegated to the territorial legislature rather than the constitutionally mandated jurisdiction exercised by the provinces.

Canada is bijural. Nine of the ten provinces and the three territories are common law jurisdictions. Quebec is a civil law jurisdiction with a *Civil Code* enacted in 1991[4] (in force in 1994) to replace the first code adopted in 1865. Statutes enacted by the national Parliament conform to both common law and civil law concepts.

Whistleblower protection is generally understood as an exception to the duties every employee owes to the employer particularly, the duty of loyalty – and is managed by the legal requirement that an employee first disclose wrongdoing through internal mechanisms – the "up the ladder" principle. Whistleblower protection has been the subject of legislation in most Canadian jurisdictions, reviewed in

[3] The ten provinces east to west are Newfoundland and Labrador, Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia. The three territories in northern Canada are Nunavut, the Northwest Territories, and the Yukon Territory.

[4] *Code civil du Québec*, L.Q. 1991, c. 64 ("*C.c.Q.*").

grievance arbitration awards and court cases, including the Supreme Court of Canada, and the subject of increasing scholarly attention. The number of cases and scholarly publications cannot be described as extensive. A check with legal databases for the period 2008–2013 reveals a mere 54 instances of Canadian tribunal decisions relevant to the whistleblower context, a mere 58 court cases, and no articles in scholarly journals.[5]

Just as the law has embraced the whistleblower, so have many employers who recognize that the disclosure of wrongdoing – at least, internally – accords with their long term business interests. As a result, private sector employers are increasingly adopting internal whistleblower policies to enable employees to make disclosures within the employment relationship. At the same time, commercial service providers have been quick to see a business opportunity and have established external whistleblower services which are provided to an employer for a fee.

The Legal Basis for Whistleblower Protection

Common Law and Civil Law

At both common law and civil law, an employee has duties of loyalty, good faith and confidentiality to the employer.[6]

The duties of loyalty and good faith are general in nature. In exchange for the payment of wages or salary, an employee is to perform assigned lawful duties in

[5] LexisNexis Quicklaw separate searches for tribunal and court decisions using the term "whistleblower" and the time period 01 January 2008 to 30 June 2013. Searches conducted on 24 October 2013. Note that the numbers include appeals of the same matter so the number of individual instances of whistleblowing under consideration is less. A search of the Canadian Index to Legal Literature on the same database and for the same time period identified a number of articles on the subject in magazines for the legal profession but not in scholarly journals.

[6] See Ontario Law Reform Commission, Report on Political Activity, Public Comment and Disclosure by Crown Employees (Toronto, Ministry of the Attorney General, 1986) at pp. 32–74; CL Dubin, Q.C. and J Terry, "Whistleblowing Study": Commissioned by Industry Canada (Industry Canada, Competition Bureau, 20 August 1997) and "Whistleblowing Study: Addendum" (30 September 1997); C Brunelle et M Samson, "La Liberté d'expression au travail et l'obligation de loyauté du salarié: plaidoyer pour un espace critique accru" (2005) 46 Cahiers de Droit 847; I Cantin and JM Cantin, La dénonciation d'actes répréhensibles en milieu de travail ou Whistleblowing (Cowansville, Les Éditions Yvon Blais, 2005); KP Swan, "Whistleblowing – Employee Loyalty and the Right to Criticize: An Arbitrator's Viewpoint" in W. Kaplan, J. Sack, and M. Gunderson, Labour Arbitration Yearbook 1991 (Vol. II) (Toronto, Butterworths-Lancaster House, 1991) at 191–198; J Carson, "The Need for Whistleblowing Legislation in Canada: A Critical Defence", paper presented to the Canadian Political Science Association Conference, June 2006 and accessible at the C.P.S.A. website at www.cpsa-acsp.ca/papers-2006/Carson.pdf (as at 29 July 2013); The Labour Law Casebook Group, Labour and Employment Law: Cases, Materials, and Commentary, 8th edn (Toronto, Irwin Law, 2011) at 992–94; M Mitchnick and B Etherington, Labour Arbitration in Canada, 2nd edn (Toronto, Lancaster House, 2012) at chapter 12 "Disloyalty and Breach of Trust", at 271–277.

good faith and with appropriate skill for the employer's benefit. This duty includes the obligation not to undermine the employment contract by acts of dishonesty and not to enter into relationships or conduct inconsistent with the interests of the employer; for example, by accepting secret commissions from third parties. The duty of loyalty also extends beyond the workplace so that, even in private conduct on the employee's own time, the employee is not to engage in conduct inconsistent with the reputation and good standing of the employer.

The duty of confidentiality is more specific. It may arise by contract or imposed by law. By contract, the duty of confidentiality may be expressed as a term of the contract of employment because of the nature of the duties undertaken by the employee; for example, a human resources officer or a financial advisor. At common law, the duty may be imposed when an employer shares confidential information with an employee on the understanding that the employee will keep it confidential unless and until told otherwise.

In Quebec civil law,[7] *C.c.Q.* article 2088 imposes similar duties on an employee:

> 2088. The employee is bound not only to carry on his work with prudence and diligence but also to act faithfully and honestly and not to use any confidential information he may obtain in carrying on or in the course of his work.

The *Commentaires du ministre de la Justice*,[8] a background document to explain the *C.c.Q.* to the public and jurists alike, describes article 2088 as reflecting the state of the jurisprudence and doctrine on an employee's obligation of loyalty to the employer in relation to confidential information obtained in the course of employment. The *Commentaires* also affirms that this duty of loyalty continues after termination of the immediate employment relationship for either a limited (reasonable) or unlimited period of time.

The *C.c.Q.* recognizes a specific exception to the duty of loyalty and confidentiality. In relation to a trade secret, *C.c.Q.* article 1472 specifically protects a person from liability for having disclosed a trade secret "by proving that considerations of general interest prevailed over keeping the secret and, particularly, that its disclosure was justified for reasons of public health or safety." In other words, by proving that the public interest supersedes the private employment interest.

The intersection of the legal duties of loyalty, good faith, and confidentiality and the concept of the justified whistleblower had its initial Canadian development in arbitral jurisprudence concerning employer discipline of perceived employee misconduct.

Wm. Scott & Co. and Canadian Food & Allied Workers, *Local P16* (1976)[9] is considered a classic statement of the law. The employer fired an employee after a newspaper published negative comments attributed to her. The employee, who was also the union's financial secretary, had telephoned the newspaper to challenge a

[7] See I Cantin and JM Cantin, *La dénonciation d'actes répréhensibles en milieu de travail ou Whistleblowing* (Cowansville, Les Éditions Yvon Blais, 2005).

[8] Ministre de la Justice (Québec), *Commentaires du ministre de la Justice*, Les publications du Québec, Tome 1, at 1312–1313 (1993).

[9] *Wm. Scott & Co. and Canadian Food & Allied Workers*, *Local P16*, 1976 CLB 1780; [1976] B.C.L.R.B.D. No. 98; [1977] 1 C.L.R.B.R. 1; [1976] 2 WLAC 585.

statement it had published about her union's position on a matter of public interest. In a follow up article, the newspaper quoted her as having stated "you wouldn't believe the inefficiencies at the plant". The timing of this comment was not helpful because the employer and the union were already the subjects of public criticism in the media. An arbitration board dismissed the union's grievance and the Labour Relations Board of British Columbia dismissed the union's appeal. The Board a two step analytical approach asking first, if the employee engaged in conduct meriting discipline and, second, whether the discipline imposed by the employer was excessive in the circumstances. The Board answered these questions with a "yes" and a "no", respectively. It is to be observed that the employee did not first express her concerns to the employer before making a public statement.

Another now classic arbitral award, this time in the public sector, applied what is known as the "up the ladder" approach. In *Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees' Union* (1981),[10] two senior corrections officers grieved the termination their employment as being without just cause. The two employees expressed their personal concerns about conditions in the provincial penal institutions during radio, television and newspaper interviews and specifically criticized workplace policies of their employer. Their purpose, as presented by them, was to promote change for the better – they were, in brief, whistleblowers exposing matters of public concern and interest. After reviewing relevant arbitral decisions, the arbitrator addressed the duty of loyalty (fidelity):

> 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… However, the duty of fidelity does require the employee to exhaust internal "whistle-blowing" mechanisms before "going public". These internal mechanisms are designed to ensure that the employer's reputation is not damaged by unwarranted attacks based on inaccurate information. Internal investigation provides a sound method of applying the expertise and experience of many individuals to all problems that may only concern one employee. Only when these internal mechanisms prove fruitless may an employee engage in public criticism of his employer without violating his duty of fidelity. [emphasis added][11]

It is this "up the ladder" approach which informs Canadian law on whistleblower protection in the labour and employment context.

Special Statutes on the Protection of Whistleblowers: Public Sector Employees

In 1993, Ontario became the first Canadian jurisdiction to enact whistleblower protection legislation.[12] The Act established the office of Counsel to provide confidential advice to employees regarding their rights and obligations when considering

[10] Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees' Union (1981) 3 L.A.C. (3d) 140.

[11] ibid. at 162–163.

[12] *Public Service and Labour Relations Statute Law*, S.O. 1993. c. 38, Part IV "Whistleblowers' Protection".

disclosure of "serious government wrongdoing" – a phrase the Act defined as a breach of legislation, "gross mismanagement", "gross waste of money", "an abuse of authority", "a grave health or safety hazard… or a grave environmental hazard".[13] If and when an employee made a disclosure to the Counsel's office about "serious government wrongdoing", the Act authorized the Counsel (with the consent of the employee) to inform the appropriate head of the government department or agency about the disclosure and that person would then undertake an investigation and submit a report on the matter within 30 days. Subject to certain limitations, this report would be made public. The Act expressly protected an employee who followed its procedures in good faith from employer reprisal and protected the employee's identity.

Though enacted with good intentions, this Ontario statute was never proclaimed into law. With bad political timing, the governing political party lost the next provincial election and the new government decided not to implement its predecessor's legislative agenda.

Federal Legislation

Without legislative protection, whistleblowing employees in Ontario and elsewhere in Canada were subject to the protection available at common law or, in Quebec, civil law. Public pressure for legislative intervention grew as various government scandals came and went in the news media and public consciousness. One such matter became known as the "sponsorship scandal" over the misuse of federal funds intended to promote Canadian identity at approved cultural and other events. A public inquiry investigated the matter with extensive media coverage including daily television broadcast of the proceedings.[14] The federal government responded with the *Public Servants Disclosure Protection Act* ("*PSDPA*"), enacted by Parliament in 2005.[15]

The *PSDPA* requires the creation and adoption of codes of conduct for public sector employees. These codes are to be consistent with the good governance principle and require each department or agency of government to designate a "senior officer" to receive and deal with complaints of "serious government wrongdoing". Like the defunct 1993 Ontario statute, the 2005 *PSDPA* defines such "wrongdoing" in terms of a violation of federal or provincial laws, "misuse of public funds", "gross mismanagement in the public sector", "a substantial and specific danger to the life, health or safety of persons, or the environment", "a serious breach of a code of

[13] ibid. at s 28.13.

[14] For a brief backgrounder, see É Hurtubise-Loranger and R Katz, *Federal Public Sector Whistleblowing* (Ottawa, Library of Parliament Research Publications, 31 October 2008 and revised 26 June 2012).

[15] S.C. 2005, c. 46.

conduct" for the public sector, and "knowingly directing or counselling" the commission of any such wrongdoing.[16]

The *PSDPA* expressly permits a federal public sector employee to disclose information to the public in certain limited circumstances. Information may be directly disclosed if the employee has reasonable grounds to believe that the information relates to a "serious offence" under either federal or provincial law or involves "an imminent risk of a substantial and specific nature to the life, health and safety of persons or to the environment".[17] The limitation on such a disclosure is that it may only be done if "there is not sufficient time to make the disclosure" to a supervisor or senior officer as provided in the *PSDPA*.[18]

The *PSDPA* further requires that the identity of an employee making a disclosure be protected and that the disclosed information be kept confidential. However, if wrongdoing is found to have been committed, the information about the wrongdoing is to be disclosed to the public. The disclosure to the public may include information that might serve to identify the person who committed the misconduct but only if such information is "necessary to identify the wrongdoing".[19]

In terms of procedure, an employee covered by the *PSDPA* is authorized to disclose information to "his or her supervisor" or the designated "senior officer".[20] Such disclosure is not unrestricted as the *PSDPA* requires that an employee disclose "no more information than is reasonably necessary to make the disclosure" and that the employee "follow established procedure or practices for the secure handling, storage, transportation and transmission of information or documents".[21] Other restrictions apply to certain types of information – such as information subject to solicitor-client privilege and certain security information.[22]

The *PSDPA* established two administrative bodies to implement the procedures established by the Act and address the protections provided to whistleblowers. The first is the Office of the Public Sector Integrity Commissioner ("Integrity Commissioner") and the second is the Public Servants Disclosure Protection Tribunal ("Disclosure Protection Tribunal").

The Integrity Commissioner is a federal public officer appointed pursuant to resolutions adopted by the Senate and the House of Commons (the two Houses of Parliament) after consultation with the leader of each political party represented in either legislative body.[23] As a public officer appointed directly by Parliament, the Integrity Commissioner enjoys a level of independence from the executive government and from government departments and agencies.

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[16] ibid. at ss 5, 8 and 10.

[17] ibid. s 16.

[18] ibid.

[19] ibid. at s 11.

[20] ibid. at s 12.

[21] ibid. at s 15.1.

[22] ibid. at ss 13 and 17.

[23] ibid. at s 39.

It is the role and function of the Integrity Commissioner to investigate a disclosure of wrongdoing and to report to Parliament the findings of the investigation.[24] These reports include recommendations on means to avoid such wrongdoing in the future and whether disciplinary action should be considered by the employer in relation to the wrongdoer.

The Integrity Commissioner is also responsible to investigate a complaint of reprisal against an employee and, if appropriate, to attempt to settle any such complaint by conciliation. This investigative process is available to both present and former employees who claim that they have been or may be subjected to disciplinary action in reprisal for a disclosure of information protected by the *PSDPA*. The limitation period for filing a reprisal complaint is 60 days after the complainant knew or ought to have known of the act of reprisal.[25] If, after completing the investigation, the complaint is not settled the investigator submits a report to the Commissioner who then decides whethesr to refer the matter to the Disclosure Protection Tribunal. For the purposes of the Act, the term "reprisal" is broadly defined in section 2(1) to include employment related action "because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation" commenced under the Act and specifically defines "reprisal" to mean:

(a) A disciplinary measure;
(b) The demotion of the public servant;
(c) The termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;
(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).

It is this second body, the Disclosure Protection Tribunal, which conducts a formal adjudicative hearing to determine if the employee has indeed been subjected to reprisal and what remedy is appropriate in the circumstances. The remedial options include disciplinary action against the person responsible for the act of reprisal.[26] To ensure its institutional independence, members of the Tribunal are judges of either the Federal Court of Canada or of a provincial superior court and are each appointed for a term of 7 years.[27]

Provincial Legislation

Several provinces have enacted their own versions of public sector whistleblower protection legislation.

[24] ibid. at s 38(3.3)

[25] ibid. at s 19.1.

[26] ibid. at s 20.4.

[27] ibid. at s 20.7.

Nova Scotia acted first when, in 2004, it established whistleblower protection through a regulation under its public sector employment legislation.[28] In 2010, Nova Scotia became the first Canadian province to enact a distinct public sector whistleblower protection statute and issue a proclamation to have the statute enter into force as law.[29] Similar legislation now also exists in Manitoba, New Brunswick, Ontario, Saskatchewan, Alberta, and Newfoundland and Labrador under a title indicating "Public Interest Disclosure" either with or without the additional phrase "Whistleblower Protection".[30]

The provincial statutes follow the approach of the federal *Public Servants Disclosure Protection Act* in mandating both a disclosure procedure and employee protection from reprisal. These statutes require the selection of designated persons in government departments and units to receive information from employees seeking to disclose wrongdoing. The investigative role and functions of the Integrity Commissioner and the adjudicative role and functions of the Disclosure Protection Tribunal under the federal Act are assigned in the provincial statutes to the provincial Ombudsman and the provincial labour relations board, respectively, in the Nova Scotia, Manitoba, New Brunswick, and Newfoundland and Labrador legislation. In Ontario, Saskatchewan, and Alberta, the Integrity Commissioner and Disclosure Protection Tribunal roles and functions are assigned to a provincial Public Interest Commissioner whose authority includes investigating and reporting on a both a disclosure of information and a reprisal complaint. The statutes of Ontario, Saskatchewan, and Alberta provide for the possible future assignment of the provincial Commissioner's role to the provincial Ombudsman.

Like the federal statute, the statutes of three provinces – Nova Scotia, New Brunswick, and Manitoba – authorize an employee to make a direct public disclosure of information in limited circumstances. Such a disclosure may be made when an employee has information that reasonably concerns "an imminent risk of substantial and specific danger to the life, health or safety of persons or to the environment".[31] These statutes require an employee who intends to make such a disclosure to first disclose the information to an appropriate law enforcement officer or health agency, as appropriate; to follow the directions of that officer or agency

[28] *Civil Service Disclosure of Wrongdoing Regulations*, N.S. Reg. 205/2004 pursuant to the *Civil Service Act*, R.S.N.S. 1989, c 70, s 45.

[29] *Public Interest Disclosure of Wrongdoing Act*, S.N.S. 2010, c 42 replacing N.S. Reg.205/2004.

[30] *The Public Interest Disclosure* (*Whistleblower Protection*) *Act*, C.C.S.M. c P217 (w.e.f 2 April 2007); *Public Interest Disclosure Act*, S.N.B. 2007, c P-23.005 (w.e.f. 1 July 2008), now S.N.B. 2012, c 112; *Public Service of Ontario Act*, 2006, S.O. 2006, c 35, Sched. A "Part VI Disclosing and Investigating Wrongdoing" (w.e.f. 20 August 2007); *Public Interest Disclosure Act*, S.S. 2011, c P-38.1 (w.e.f 1 September 2011); *The Public Interest Disclosure* (*Whistleblower Protection*) *Act*, S.A. 2012, c P-39.5 (w.e.f. 1 June 2013); and *Public Interest Disclosure and Whistleblower Protection Act*, S.N.L. 2014, c P.37.2 (w.e.f. 1 July 2014). Note "w.e.f" means "with effect from" the date indicated which identifies when the statute came into effect.

[31] *Public Interest Disclosure of Wrongdoing Act*, above n 30, at s 8 (N.S.); *Public Interest Disclosure Act*, above n 30 ibid. at s 14 (N.B.); and *The Public Interest Disclosure (Whistleblower Protection) Act*, above n 30 at s 14 (Man.).

regarding the information to be disclosed in the public interest; and then, immediately after making the disclosure, to disclose the information to his or her supervisor or the designated officer in the department or unit.[32] The Alberta statute also permits an employee to make a disclosure in similar circumstances but limits the employee to making the disclosure to the Commissioner appointed under the statute.[33]

Both the Alberta and Saskatchewan statutes require that policies be established to address the procedures to protect confidentiality unless the information pertains to "an imminent risk of substantial and specific danger" to life, health, etc.[34] The Ontario and Newfoundland and Labrador statutes are silent on disclosures in such circumstances.

The statutes enacted by these provinces prohibit acts of reprisal being taken against an employee who, acting in good faith, sought advice pertaining to making of a disclosure, actually made a disclosure, or who cooperated in the investigation of a disclosure. The Ontario and Newfoundland and Labrador statutes specifically provide that an employee who engages in a reprisal action, or who directs another employee to engage in reprisal action, is subject to disciplinary action including suspension and dismissal.[35] The other provincial statutes do not include a similar disciplinary provision. The provincial statutes (except for New Brunswick and Newfoundland and Labrador) also make it an offence to take reprisal action against an employee and render a person convicted of such an offence subject to a fine – for example, in Nova Scotia, Manitoba and Saskatchewan, not exceeding $10,000; in Alberta, not exceeding $25,000 for a first offence and not exceeding $100,000 for a second offence; and in Ontario, not exceeding $5000.[36]

The provincial statutes contain other notable features. For example, the statutes of both Alberta and Saskatchewan declare that no civil cause of action "lies against a department, public entity or office of the Legislature, or an employee of any of them, for making a reasonable human resource management decision in good faith".[37] The Manitoba statute contains provisions extending protection against employment reprisal actions to private sector employees and persons contracting with the government.[38]

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[32] ibid.

[33] *The Public Interest Disclosure (Whistleblower Protection) Act*, above n 30 at s 10(1)(f) (Alberta).

[34] ibid. s 5(1)(c) and *Public Interest Disclosure Act*, above n 30 at s 6(1) (Sask.).

[35] *Public Service of Ontario Act, 2006* above n 30 s 143 and *Public Interest Disclosure and Whistleblower Protection Act*, above n 30 at s 21(2) (N.L.).

[36] *Public Interest Disclosure of Wrongdoing Act*, above n 30 at s 35 (Nova Scotia); *The Public Interest Disclosure (Whistleblower Protection) Act*, above n 30 at s 33(4) (Manitoba); *Public Interest Disclosure Act*, above n 30 at s 40 (Saskatchewan); *The Public Interest Disclosure (Whistleblower Protection) Act*, above n 30 at s 49 (Alberta); and *Public Service of Ontario Act, 2006*, above n 30 at s 145(2) in combination with the *Provincial Offences Act*, R.S.O. 1990, c P.33, s 61 which establishes the general fine applicable when a statute does not otherwise express a specific fine or range of fines which is the situation with the *Public Service of Ontario Act, 2006*.

[37] *The Public Interest Disclosure (Whistleblower Protection) Act*, above n 30 at s 27 (Alberta) and *Public Interest Disclosure Act*, above n 30 at s 42 (Saskatchewan).

[38] *The Public Interest Disclosure (Whistleblower Protection) Act*, above n 30 at ss 30, 31 and 32 (Manitoba).

Although, as already mentioned, Newfoundland and Labrador in 2014 enacted general public whistleblower protection legislation similar to that of other provinces, that province first enacted disclosure protection legislation in response to the recommendations of an inquiry into the management of the provincial House of Assembly as Part VI of its *House of Assembly*, *Accountability*, *Integrity and Administration Act*.[39] The Act is, however, of limited application because it defines "wrongdoing" in terms of conduct by "a member, the speaker, an officer of the House of Assembly and persons employed in the House of Assembly service and the statutory offices".[40] Thus, the legislation is directed at the integrity of the democratic process and public administration in the House of Assembly itself. The Act implements a recommendation from a commission of inquiry into administrative and financial controls applicable to the provincial Legislature after a series of abuses were made public, including instances of abuse of member's allowances, inadequate record-keeping, and the purchase of items such as "magnets and rings and pins".[41] Not surprisingly, given its rather limited scope, the statute does not address disclosures in situations presenting a "substantial and specific danger" to the life, health, or safety of persons or to the environment.

The Newfoundland and Labrador legislation is a helpful reminder that the federal and provincial public interest disclosure statutes are not generally applicable to Parliament or the provincial Legislative Assemblies. This is because the definition of "public service" is typically defined with reference to government departments and agencies without mention of the legislative bodies. The reason for this exclusion is usually found in the separation of the legislative, executive, and judicial branches of government and the importance of maintaining the relative independence of each, particularly the historical privileges of a deliberative assembly.[42]

In Quebec, the relevant statue is the *Anti-Corruption Act* of 2011.[43] For the purposes of this statute, wrongdoing is defined as a breach of federal or provincial

[39] S.N.L. 2007, c H-10.1 (Bill 33).

[40] ibid. at s 54(1)(e). The *Act*, at s 2(r), defines the phrase "statutory offices" as referring to the Chief Electoral Officer, Commissioner for Members' Interests, Child and Youth Advocate, Information and Privacy Commissioner, Citizen's Representative, and "other offices of the House of Assembly, with the exception of the office of the Auditor General, that may be established under an Act".

[41] HJ Derek Green, Commissioner, *Rebuilding Confidence*: *Report of the Review Commission on Constituency Allowances and Related Matters* (St. John's, Government of Newfoundland and Labrador, 2007). The specific instances of abuse are referred to in the statement in the House of Assembly by Hon. Tom Marshall, Minister of Finance and President of Treasury Board, on second reading of Bill 33, above n 39. See: *House of Assembly Proceedings*, 45th General Assembly, 4th Session, Vol. XLV, No. 3 (Hansard) (14 June 2007) available at www.assembly.nl.ca/business/hansard.

[42] In the case of Newfoundland and Labrador, the provincial Assembly in the year 2000 had denied authority to the provincial auditor general to audit its accounts and decided to retain the services of external auditors for this purpose. But, in fact, it failed to do so and the accounts went unaudited for 2 years. See: second reading statement of Ms. E. Marshall in *House of Assembly Proceedings*, ibid.

[43] S.Q. 2011, c. 17; R.S.Q., c L-6.1 (the title of the Act in the French language is *Loi concernant la lutte contre la corruption*). On 23 September 2014, the Quebec National Assembly gave first read-

law that "pertains to corruption, malfeasance, collusion, fraud or influence peddling in, for example, awarding, obtaining or performing contracts granted, in the exercise of their functions, by a body or a person belonging to the public sector"; "misuse of public funds or public property or a gross mismanagement or contracts within the public sector"; and "directing or counselling" such misconduct.[44] This statute appears somewhat inspired by the model of the European Anti-Fraud Office, established in 1999.[45]

The *Anti-Corruption Act* establishes the positions of public officers known as the Anti-Corruption Commissioner and the Associate Commissioner. Public sector employees or, indeed, any person[46] may disclose "wrongdoing" to the Anti-Corruption Commissioner who then assigns Commission staff to examine and to investigate the information, as appropriate. The Anti-Corruption Commissioner issues two public reports annually and makes recommendations to government on any "wrongdoing" disclosed. Though the Anti-Corruption Commissioner is generally required to protect the identity of a person making a disclosure of information, the Act makes an exception to permit disclosure of personal identify information to the Director of Criminal and Penal Prosecutions if the disclosed information relates to criminal misconduct.[47]

The Act's specific emphasis on corruption in relation to the "awarding, obtaining or performing" of public sector contracts reflects concerns revealed by fairly recent scandals in Quebec, particularly in the construction industry. The Quebec statute is unique in conferring a proactive role on the Associate Commissioner who essentially directs teams of auditors to review public sector contracts.

The Quebec statute addresses whistleblowing and whistleblower protection from reprisal by making it an offence punishable by fines of up to $20,000, if the defendant is a natural person, and of up to $250,000, if a legal person (corporation).[48] While reprisal is not defined, a reprisal is presumed if it involves "the demotion, suspension, termination of employment, or transfer of a person… or any disciplinary

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ing to Bill 192, *An Act to amend the Anti-Corruption Act as concerns protection of whistleblowers* which would broaden the protection of whistleblowers by enacting a scheme of protection similar to that in other jurisdictions in Canada. As a private member's Bill from an opposition party, it is not expected that Bill 192 will be enacted but it may foretell a future legislative initiative by government.

[44] ibid. Art 2.

[45] See Council Regulation (EURATOM) No 1074/1999 (25 May 1999) concerning investigations conducted by the European Anti-Fraud Office (OLAF).

[46] Above n 43 at Art. 26: "Any person who wishes to disclose a wrongdoing may do so by disclosing information to the Commissioner that the person believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the person has been asked to commit a wrongdoing."

[47] Above n 24 at Art. 31. This disclosure of identity serves to facilitate the investigation and prosecution of criminal misconduct by the Director of Criminal and Penal Prosecutions.

[48] ibid. at Art. 33.

or other measure that adversely affects the employment or working conditions of such a person."[49]

Though the federal and provincial statutes impose obligations on persons to whom a disclosure is made to protect a whistleblower's identity, these obligations are not absolute. A public sector employee who wishes to protect his or her identity is generally not able to make a disclosure anonymously using the internal procedures provided by the public interest disclosure statutes. It is for this reason that the authors of a text on whistleblowing note the advantages of making a disclosure through the good offices of legal counsel.[50] The authors note that the standards of professional conduct applicable to lawyers can serve to protect the identity of a client and thus facilitate an anonymous disclosure of wrongdoing.[51]

General Statutes Including Protection of Whistleblowers

Criminal Law

Criminal law in Canada is a matter within the exclusive jurisdiction of Parliament; as a result, criminal law is uniform across Canada.

The *Criminal Code of Canada*, section 425.1 protects the whistleblower employee by making it an offence for an employer to "take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment" of an employee in order to induce the employee not to disclose information that the employer has breached either federal or provincial law or, if the employee has made such a disclosure, to retaliate against the employee.[52] The prohibition is broadly

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[49] ibid.

[50] I Cantin et JM Cantin, La dénonciation d'actes répréhensibles en milieu de travail ou Whistleblowing, above n 6, at 43.

[51] ibid. the authors quote M Proulx and D Layton, *Ethics and Canadian Criminal Law* (Toronto, Irwin Law, 2001) at 194:

> Where legal-professional privilege does apply, there is no doubt that a client's identity will be confidential within the meaning of professional conduct. The ethical rules in Canada go much further, however, placing a general obligation on counsel not to reveal the identity of a client or the fact of being consulted unless required by the nature of the matter.

Cantin et Cantin, then add, at p. 43, footnote 79: "Il nous semble que ce principe s'applique tant aux matière criminelles que civiles."

[52] *Criminal Code of Canada*, R.S.C. 1985, c C-46 as amended by An Act to amend the Criminal Code (capital markets fraud and evidence gathering), S.C. 2004, c 3, s 6 which inserted the following section:

> Threats and Retaliation Against Employees/Punishment
>
> 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,

expressed to apply to the employer and also to a "person acting on behalf of an employer or in a position of authority in respect of an employee". The retaliation offence arises when an employer acts after the employee has disclosed information to "a person whose duties include the enforcement of federal or provincial law" which obviously includes both police officers and persons with particular responsibilities; for example, in relation to environmental or health laws.

Parliament enacted these "compelling silence" and retaliation offences in 2004 as part of a package of legislative amendments addressing insider trading and the capital markets. The wording is not specific to insider trading and is obviously broad enough to apply to whistleblower employees generally. To date, there do not appear to have been any criminal prosecutions of employers for violating *Criminal Code*, section 425.1.[53]

Employment Standards

Federal, provincial, and territorial legislation establish minimum employment standards in relation to such matters as minimum wages, maximum hours of work, vacations and holidays, leaves of absence from work, sexual harassment, layoff, and termination of employment.[54] These statutes also prohibit an employer from taking reprisal action against an employee who makes a complaint that the employer has breached a minimum standard. In such instances, the complaint is personal in the

(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 offence 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

(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.

[53] No case reports of persons being charged with an offence under this section were identified in an electronic database search and a review of the commercially published annotated editions of the *Criminal Code*. Section 425.1 has been referenced in *Anderson v IMTT-Québec Inc*., 2013 FCA 90 (CanLII); *Merk v International Association of Bridge*, *Structural*, *Ornamental and Reinforcing Iron Workers*, *Local 771*, [2005] 3 SCR 425; *Cadillac Fairview Corporation Ltd. v Standard Parking of Canada Ltd*., 2003 CanLII 23598 (ON SC); and *El-Helou v Courts Administration Service*, 2011 CanLII 93945 (CA PSDPT). In *Anderson*, above, Mainville J.A. commented:

> – [44] The purpose of section 425.1 of the *Criminal Code* is not to allow an employee to make with impunity, reckless complaints to public authorities and without regard for the employer's internal mechanisms or respect for work colleagues. The provision does not allow an employee to avoid the consequences of a dismissal in progress by filing reckless complaints to public authorities against his or her employer and work colleagues. –

[54] At the federal level, such employment standards are found in the Canada Labour Code, R.S.C. 1985, c L-2, Part III "Standard Hours, Wages, Vacations and Holidays", ss 166–267. This statute only applies to employees in federally regulated employment, for example, persons engaged in interprovincial and international transportation, and to all private employees in the three northern territories.

sense that, by making a complaint, the employee acts in his or her self-interest in anticipation that it will result in an order that the employer comply with the standard and compensate the employee in respect of the standard.

Employment standards legislation protects employees who provide information or give evidence that an employer has breached the statutory standards. Typically, such information is provided to an inspector appointed under the statute and the evidence is presented before an administrative board with responsibility to adjudicate complaints. Thus, the protection is limited to that process.

The federal statute, the *Canada Labour Code*,[55] makes it an offence for an employer to retaliate against an employee who files a complaint or gives information or evidence and, upon successful prosecution, the employer is subject to a fine not exceeding 5000 dollars.[56] Territorial legislation follows the same approach.[57]

The provincial statutes generally take a different approach to enforcement. The prohibition on employer retaliation is itself an employment standard which can be made the subject of a complaint to be investigated and adjudicated. Generally, offence provisions become relevant, after final adjudication, if the employer fails to comply with the order for compliance or compensation issued by the administrative tribunal. In some provinces, such as Saskatchewan, offence provisions are used to invoke the jurisdiction of the provincial court (an inferior court) which, after trial, delivers a verdict on the specific charge(s) alleging that the employer breached one or more employment standards. Upon a conviction, the court is authorized to order civil remedies to the employee such as the payment of wages and, if discharged contrary to the statute, reinstatement.[58]

Three provinces – New Brunswick, Saskatchewan and Quebec – provide broader whistleblower protection in their respective employment standards statutes. For example, the New Brunswick Legislature amended the employment standards statute in 1988 to provide that "an employer shall not dismiss, suspend, lay off, penalize, discipline or discriminate against an employee if the reason therefor is related in any way to… (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".[59] Thus, the protection is not restricted to a complaint of a breach of the employment standards statute itself. Saskatchewan amended its employment stan-

[55] ibid.

[56] ibid. s 256(1): "Every person who… (c) discharges, threatens to discharge or otherwise discriminates against a person because that person (i) has testified or is about to testify in any proceedings or inquiry taken or had under this Part, or (ii) has given any information to the Minister or an inspector regarding the wages, hours of work, annual vacation or conditions of work of an employee, is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars."

[57] e.g. *Labour Standards Act*, R.S.N.W.T. 1988, c L-1, s 68(b)(i).

[58] *Labour Standards Act*, R.S.S. 1978, c L-1, ss 87(1) and 89.

[59] *Employment Standards Act*, S.N.B. 1982, c E-7.2 as amended by S.N.B. 1988, c 59, s 9.

dards legislation to provide similar whistleblower protection in 1994 and Quebec did so in 2011.[60]

In 2005, the Saskatchewan employment standards statute came before the Supreme Court of Canada for interpretation in *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*.[61] The Saskatchewan statute protects an employee who has or proposes to disclose information "to a lawful authority" about an offence contrary to federal or provincial law.[62] In *Merk*, the bookkeeper and office manager of a local trade union disclosed instances of alleged financial misconduct by her immediate supervisors. She disclosed the information, not to the police, but to other members of the union local, including her father, a former president of the union local. These persons then disclosed the information to the president of the international union of which the local was an affiliate. In response, the international union sent a representative to investigate the matter. After release of the investigator's report, the employee herself wrote to the president of the international union concerning her complaint of alleged misconduct by her supervisors. The union local subsequently terminated her employment and the matter came before the courts as a prosecution against the employer for breach of the provincial statute.

The critical issue was the meaning of "lawful authority" for the purposes of the provincial statute. Should it be given a narrow interpretation as referring only to persons with authority to address the specific misconduct, such as the police? Or should it be given a broader interpretation to include representatives of the international union? The trial and appeal courts in Saskatchewan interpreted the phrase narrowly as referring to persons exercising public authority, such as the police, and not encompassing private authority such as that of the international union. The majority of the Supreme Court of Canada took a different approach. Referring to the general acceptance in labour and employment law of the "up the ladder" approach to reconcile the employee's duty of loyalty to the employer and the public interest in whistleblowing, the Court interpreted "law authority" expansively to include:

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[60] See *Labour Standards Act*, R.S.S. 1978, c L-1, s 74 as amended by S.S. 1994, c 39, s 41 and *Loi sur les normes du travail*, L.R.Q., c N-1.1, art 122 as amended by L.Q. 2011, c. 17,art 56. The Quebec statute is expressly linked to disclosures of wrongdoing covered by the provincial anti-corruption legislation.

[61] *Merk*, above n 53.

[62] Above n 60 s 74:

> Discrimination by employer prohibited
>
> 74(1) No employer shall discharge or threaten to discharge, take any reprisal against or in any manner discriminate against an employee because the employee:
>
> (a) has reported or proposed to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada; or
> (b) has testified or may be called on to testify in an investigation or proceeding pursuant to an Act or an Act of the Parliament of Canada.
>
> (2) Subsection (1) does not apply where the actions of an employee are vexatious.

> not only the police or other agents of the state having authority to deal with the activity complained of "as an offence" but also individuals within the employer organization who exercise lawful authority over the employee(s) complained about, or over the activity that is or is likely to result in the offence.[63]

Thus, the statutory whistleblower protection protected the employee when she disclosed information to the international union; she had complied with the "up the ladder" principle. Accordingly, termination of her employment constituted a prohibited act of reprisal.

Labour Relations

Federal, provincial, and territorial legislation on labour rights to collective bargaining expressly protect employees who "testify or otherwise participate in proceedings" under the statute from reprisal or discriminatory treatment by the employer.[64] Generally, an act of reprisal constitutes an unfair labour practice because the employees are normally engaged in their individual and collective rights to participate in the formation and management of a trade union. The legislation equally applies to trade unions which take reprisal action against employees who testify or otherwise participate in proceedings adverse to the interests of the trade union.

In addition to treating reprisal actions as an unfair labour practice, the federal legislation also makes such conduct an offence punishable by a fine not exceeding $5000.[65]

The relevant statute in Newfoundland and Labrador differs from that in other provinces and at the federal level by extending the testimonial protection from employer reprisal to employees who "testify or otherwise participate in proceedings under this Act or another law" [emphasis added].[66] The statute also protects an employee from reprisal because the employee made "a disclosure that he or she may be required to make in a proceeding under this Act or other law".[67]

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[63] *Merk* above note 53 at para 38 (per Binnie J.). The Court rejected the argument that the statutory provision was penal in nature and should, therefore, be interpreted narrowly. Instead, the Court concluded that a plain meaning approach to interpretation should be informed by the labour relations nature of the statute and, thus, given a large and liberal construction. Between the date of the oral argument before the Supreme Court of Canada on 10 February 2005 and the date of decision on 24 November 2005, the Saskatchewan Legislature on 27 May 2005 amended the Act to define "lawful authority" to include "any person directly or indirectly responsible for supervising the employee". See: *An Act to amend The Labour Standards Act*, S.S. 2005, c 16 s 8.

[64] For example: *Industrial Relations Act*, R.S.N.B. 1973, c I-4, s 5(3); *Labour Relations Act*, *1995*, S.O. 1995, c 1 Schedule A, s 87(1); *Labour Relations Code*, R.S.B.C. 1996, c 244, s 5(1); *Canada Labour Code*, R.S.C. 1985, c L-2, s 94(3)(iii) [re employer], s 94 [re trade union], s 147 [general prohibition], s 256(1) [offence provision].

[65] Canada Labour Code, ibid. s 256(1).

[66] *Labour Relations Act*, R.S.N.L. 1990, c L-1, s. 25(1)(a).

[67] ibid. s 25(1)(b).

Occupational Health and Safety

Canadian occupational health and safety legislation focusses on the mutual responsibilities of employers and employees to take positive measures to promote workplace health and safety. The legislation provides for the establishment of standards relating, for example, to the safe use of equipment, the use and storage of chemicals, and the establishment and duties of workplace health and safety committees and officers. An employee, faced with what is reasonably believed to be an unsafe working condition, is obliged to report the matter "up the ladder".

The first level of disclosure is to the employee's supervisor who, with the employee, is obligated to attempt to resolve the matter. If not resolved, the matter may proceed to further levels of internal review involving employee health and safety representatives and eventually health and safety officers appointed for the purposes of the Act. Pending resolution of the matter, an employee may refuse to operate equipment or refuse to undertake an assigned task if the employee reasonably believes the circumstances pose a danger to the employee or to another employee.

The legislation uniformly prohibits the employer from taking or threatening to take any disciplinary action (reprisal) because an employee has exercised rights or obligations declared by the legislation, including making a formal complaint; disclosed information to any person performing duties required by the legislation; or testifies at an inquiry or proceeding held for the purposes of the legislation. As expressed in the *Canada Labour Code*, Part II, "Occupational Health and Safety", section 147:

> 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 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.[68]

Similar employer reprisal provisions exist in the relevant provincial legislation.[69]

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[68] Canada Labour Code, above n 64.

[69] For example, the Ontario *Occupational Health and Safety Act*, R.S.O. 1990, c O.1, s. 50(1) states:

> 50.(1) No employer or person acting on behalf of an employer shall,
>
> (a) dismiss or threaten to dismiss a worker;
> (b) discipline or suspend or threaten to discipline or suspend a worker;
> (c) impose any penalty upon a worker; or
> (d) intimidate or coerce a worker,

Environmental Protection

Environmental protection legislation has a logical connection with the contemporary whistleblower employee. Yet, the legislation in a number of provinces is silent on whistleblower protection. In many instances, the legislation is somewhat dated so that express inclusion of employee whistleblower protection may be expected in the future. But, notwithstanding the symbolic value of express whistle blower protection provisions in such legislation, it is also a reasonable inference that such provisions are considered unnecessary because of the protection provided at common law and civil law; the *Criminal Code*; in employment standards and occupational health and safety legislation; and the general whistleblower protections available to public sector employees.

Some Canadian jurisdictions include specific protection for whistleblower employees, particularly from employer reprisal. For example, the *Canadian Environmental Protection Act*, *1999*, sections 16(4) and 96(4) prohibit an employer from taking reprisal action against an employee who discloses to an enforcement officer, or other such official, information relating to the release of a toxic substance into the environment.[70]

Ontario's legislation addresses the whistleblower employee in two statutes. First, the *Environmental Protection Act*,[71] section 174(2) protects from employer reprisal any employee who "has given or may give information to the Ministry or a provincial officer or has been or may be called upon to testify in a proceeding related to one of those Acts or a regulation under one of those Acts" (referring to named statutes listed elsewhere in the Act). An employee subjected to reprisal (dismissal, discipline, intimidation or coercion) may file a complaint with the Ontario Labour Relations Board for redress in the form of reinstatement to employment, if dis-

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because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

For Quebec, see *Loi sur la Santé et la sécurité du travail*, L.R.Q., c S-2.1, art. 227 and for New Brunswick, see: *Occupational Health and Safety Act*, S.N.B. 1983, c O-0.2, s 24. The provisions in other provinces are similar.

[70] S.C. 1999, c 33, s. 96:

96. (1) Where a person has knowledge of the occurrence or likelihood of a release into the environment of a substance specified on the List of Toxic Substances in Schedule 1, but the person is not required to report the matter under this Act, the person may report any information relating to the release or likely release to an enforcement officer or to any person to whom a report may be made under section 95.

(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). . . .

[71] R.S.O. 1990 c E.19.

charged, or the payment of compensation. By section 174(10), the burden of proof rests with the employer to establish that it did not engage in an act of reprisal.

Second, the *Environmental Bill of Rights*, *1993*,[72] Part VII, sections 103–116 similarly addresses the challenge of employer reprisals. Again, a complaint of reprisal is adjudicated by the Ontario Labour Relations Board which may order appropriate redress, i.e., reinstatement or payment of compensation. In section 104(s), the *Environmental Bill of Rights* identifies the conduct which motivated the employer reprisal as including that the employee did in good faith "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"; or "6. Give evidence in a proceeding under this Act or under a prescribed Act".[73]

In essence, the federal and Ontario legislation mirror each other in prohibiting employer reprisal.

Miscellaneous

Statutory protection from employment related reprisal action is found in statutes of some provinces relating to vulnerable persons in society; for example, children, seniors, adults in need of protection, and foreign workers in vulnerable employment positions. These statutes prohibit employers from taking reprisal action because an employee has made a complaint in good faith about the care or condition of certain vulnerable persons in nursing homes, seniors' residences, child protection services, the care of health professionals, and vulnerable foreign workers employed as live-in care-givers.[74] Most provinces, however, have yet to enact such specific protections.

In 2011, the Legislature of Newfoundland and Labrador enacted specific whistleblower protection for employees who report that an adult person is in need of protection, sought advice about making such a report, or cooperated in an investigation of a report under the *Adult Protection Act*.[75] The adult person in need of protection would typically be a resident of a long term care or assisted living facility and the whistleblower would be an employee who became aware of a situation of concern. The provision prohibits any act of reprisal against such an employee and defines reprisal in the usual manner, applicable to employees, in terms of disciplinary action – i.e., demotion, termination, any measure that adversely affects employ-

[72] S.O. 1993, c 28.

[73] By regulation, a list of more than 20 provincial statutes are proscribed for the purposes of the *Environmental Bill of Rights*. See: *General Regulation* under *Environmental Bill of Rights* (1993) On. Reg. 73/94, s 3.

[74] For example: *Child, Family and Community Service Act*, R.S.B.C. 1996, c 46, s 101.1; *Nursing Homes Act*, R.S.O. 1990, c N.7, s 243; *Regulated Health Professions Act, 1991*, S.O. 1991, c 18, s 92.1; and *Employment Protection for Foreign Nationals Act*, S.O. 2009, c 32, ss 10, 24 and 41.

[75] *Adult Protection Act*, S.N.L. 2011, c A-4.01, s 31.

ment or working conditions, or a threat to take any such measure.[76] The statutory provision goes further and provides that a person taking a reprisal action is "subject to appropriate disciplinary action, including termination of employment".[77]

This more recent Newfoundland and Labrador whistleblower protection is in sharp contrast to that available to a person who discloses information about a child in need of protection in that province. The 2010 *Children and Youth Care and Protection Act*[78] merely states: "A person shall not interfere with or harass a person who gives information under this section." Express protection from employer reprisal would seem to enhance the position of both the whistleblower employee and the vulnerable child for the purposes of the statute.

Effectiveness of Whistleblower Protection Legislation

The effectiveness of federal and provincial whistleblower legislation is questionable particularly in its reliance on internal disclosure mechanisms, i.e., the "up the ladder" principle. To be truly effective, employees must have confidence in the confidentiality of the internal procedures established by the legislation or they will seek other venues such as, for example, an anonymous disclosure. Statistics gleaned from annual reports and the websites of official government agencies responsible to investigate and administer federal and provincial whistleblower legislation are informative.

The website of the federal Integrity Commissioner includes reports of investigations of disclosures of wrongdoing and of referrals of reprisal complaints to the Disclosure Protection Tribunal. There were two wrongdoing reports in 2012, five in 2013 and, to date, two in 2014.[79] Of these nine investigative reports, four involved alleged misuse of public funds, two involved alleged gross mismanagement, one concerned a breach of privacy, one concerned conflict of interest and inappropriate office behaviour, and one concerned alleged patronage in making employment decisions.

The four disclosures alleging abuse of public funds concerned: (1) a regional director of a government department who was revealed to have falsified travel claims and failed to keep proper financial records; (2) the director general of a government agency who used the employer's supplies and staff to conduct a private business during working hours; (3) two border control officers who, respectively, misused the employer's credit card for private purposes and breached the code of conduct by affiliating with persons known to be associated with crime and stating

[76] ibid. s 2(o).

[77] ibid. at s 31(2).

[78] S.N.L. 2010, c C-12.2, s 11(7).

[79] Website of the Public Sector Integrity Commissioner of Canada accessed on 28 November 2013 and 22 November 2014 at www.psic-ispc.gc.ca/eng under "Case Reports" and "Referrals to the Tribunal".

that he would not treat such persons objectively and professionally; (4) and a chief executive officer of a public corporation who was held responsible for the overpayment of retirement and severance allowances to two employees which wrongdoing was not determined to be gross mismanagement.

In two of the other reports, the disclosures of alleged wrongdoing were held not substantiated upon investigation. In the first, two managers had issued apprentice boat pilot licences to two persons who did not satisfy all the qualifications for the licence. The two managers issued the licenses because of problems recruiting employees to fill the vacant positions and in the knowledge that, as apprentices, the two license holders would be subject to supervision and training. In the second, a management level employee circulated to certain other employees a notice letter from the Integrity Commissioner advising of an investigation of a disclosure of alleged wrongdoing involving two named employees. The investigative report concluded the management level employee had failed in his duty to protect the identity of persons involved in the disclosure process, as required by the Act, but, instead of being a malicious act, it had been a faulty attempt to cooperate with the investigation. The report also noted that the matter was the subject of a separate complaint under the federal *Privacy Act*.[80] The remaining disclosure investigation report concerned allegations of gross mismanagement involving harassment and other abusive behaviour by the chairperson of an administrative tribunal against tribunal members and support staff. The report substantiated the allegations.

These reports include specific recommendations to improve practices and procedures to avoid similar acts of wrongdoing in the future but, as mentioned, do not necessarily include specific recommendations for specific employer responses to the wrongdoing employee (such as termination of employment). The published reports do indicate the employer's response to each recommendation and whether imposed that response included disciplinary action against the wrongdoer.

The federal Integrity Commissioner's website includes six instances in which reprisal complaints were referred to the Disclosure Protection Tribunal. Five of these referrals concerned termination of employment and one concerned the denial of security clearance. The Tribunal's website indicates that the five termination complaints were settled in mediation. The website identifies the security clearance matter as still an active file and that a preliminary hearing had been conducted on 31 August 2011. What the website does not report is that this matter was taken on judicial review to the Federal Court which quashed the Integrity Commissioner's decision and ordered the Commissioner to undertake further investigation.[81]

Nova Scotia, it will be recalled, was the first Canadian jurisdiction to establish whistleblower protection legislation for public employees. From 2004 to 2011 (when the provincial statute came into force to replace the previous regulation), the number of complaints to the Ombudsman far exceeded the number of internal dis-

[80] R.S.C. 1985, c P-21.

[81] Website of the Public Servants Disclosure Protection Tribunal accessed on 28 November 2013 and 22 November 2014 at www.psdpt-tpfd.gc.ca/Home-eng.html under "Cases". See also: *El-Helou v Courts Administration Service*, above n 53.

closures to the deputy department heads or their designates.[82] The Ombudsman received a total of 57 disclosures compared to 7 disclosures to the deputy department heads. These disclosures resulted in findings of only three instances of wrongdoing after investigations were completed.[83] In general, the deputy heads who received disclosures referred the matters directly to the Ombudsman – though in two instances, the deputy heads were able to resolve the matters themselves.

Interestingly, the 2007–2008 Annual Report on the Nova Scotia regulation reported the results of a survey of government employees concerning whistleblower protection under the then regulation and policies.[84] Sixty-six percent of employees who responded to the survey expressed awareness of the disclosure policy; 50 % were aware of the point of contact for making a disclosure; and 37 % responded that they would feel comfortable using the reporting process.[85] The annual report for the years following the survey showed relatively significant increases in the number of disclosures to the Ombudsman, from 1 in 2006–2007, to 15 in 2008–2009, to 23 in 2009–2010, and 26 in 2010–2011. Still, the numbers of disclosures remained relatively modest.

In New Brunswick, the statistical information about the 2007 provincial whistleblower statute (in effect from 2008) indicates a similar lack of use by public sector employees. Of 26 government departments and agencies listed on the government's main website, 8 addressed the statute expressly in its 2008–2009 annual report and 1 included the statute in the list of statutes for which the department or agency has responsibilities. Annual reports for 2011–2012 show an improvement with 11 departments or agencies addressing the statute expressly and 2 including it in the list of statutes. Eight of the 2011–2012 annual reports do not even mention the statute, including the Department of Health, the Department of Healthy and Inclusive Communities, and the Department of Justice and Consumer Affairs. One annual report, for the Department of Public Safety, reported that it had created an internal website to increase employee awareness about the whistleblower statute.[86] No departmental annual report, including those for 2012–2013, records any instance of an employee making any disclosure under the statute or referring any matter.

The annual reports of the office of the New Brunswick Conflict of Interest Commissioner for 2009 and 2010 reflect marginally greater interest in the disclosure legislation.[87] The Commissioner reported receiving 13 "queries/disclosures" in 2009 and 11 in 2010. Most of these "queries/disclosures" (13 of the 24 total) were

[82] Nova Scotia Public Service Commission, *Annual Report on the Civil Service Disclosure of Wrongdoing Regulation and Policy*, annually 2004–2005 to 2010–2011.

[83] ibid.

[84] Nova Scotia Public Service Commission, *Annual Report on the Civil Service Disclosure of Wrongdoing Regulation and Policy 2007–2008* at 4.

[85] ibid.

[86] Department of Public Safety, New Brunswick Emergency Measures Organization, *Annual Report 2009–2010* at 93.

[87] These annual reports are no longer available on the website of the Conflict of Interest Commissioner but were provided by the Commissioner's Office as email attachments.

reported as not relating to matters within the scope of the provincial *Public Interest Disclosure Act*; 8 of the 24 were described as "pending" in the sense of awaiting further information or referred to other procedures; 2 were simply general inquiries about the commissioner's role and function; and 1 was from a person who wanted to be anonymous and therefore declined to make a disclosure. In both annual reports, the Commissioner recommended that the Act be amended to provide for disciplinary sanctions to be made applicable to persons who take reprisal actions against an employee making a disclosure. In June 2011, the Ombudsman replaced the Conflict of Interest Commissioner's role under the statute and reported in its 2011–2012 annual report receiving four enquiries and one matter which was subsequently withdrawn in favour of an informal resolution.[88]

In Ontario, the annual reports of the Office of the Integrity Commissioner for the years 2008–2009 to 2012–2013 do not report substantial activity. The Ontario legislation requires the Commissioner to refer a disclosure of wrongdoing for investigation by a senior executive in the government department or agency concerned. The number of such referrals for investigation was seven in 2008–2009; three in 2009–2010; eight in 2010–2011; three in 2011–2012; and two in 2012–2013.[89] Many of these referrals resulted in findings of no wrongdoing which findings, on review, were accepted by the Commissioner. Nor, it should be noted, have the statutory prohibitions on reprisal resulted in significant work for the Labour Relations Board of Ontario in relation to employees governed by a collective agreement or the Public Service Grievance Board in relation to nonunionized employees.

A relevant decision of interest from the Public Service Grievance Board of Ontario is *Binda v. Ontario* (*Environment*).[90] This 2011 decision addressed a preliminary objection to the adjudication of a reprisal complaint because of a claimed disclosure under the *Public Service of Ontario Act*.[91] The complainant, Binda, a senior manager in the Ministry of the Environment, considered himself harassed and discriminated against as a member of a visible minority. He felt that other employees received preferential treatment from the employer to the detriment of his career advancement. This was the very wrongdoing that he disclosed as violations of the provincial *Human Rights Code* and of the *Occupational Health and Safety Act*. Subsequently, a workplace discrimination and harassment complaint was brought against Binda himself. Before the Grievance Board, Binda asserted his belief that somehow the fact of his "disclosure" had become known to his supervisors and co-workers and that the workplace discrimination and harassment complaint brought against himself was an act of reprisal (along with other alleged discriminatory acts against him by other employees).

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[88] Office of the Ombudsman, New Brunswick: *Annual Report 2011–2012* (May 2013) at 16. The 2012–2013 Annual Report is not yet available on the Ombudsman's website.

[89] See Office of the Integrity Commissioner of Ontario, *Annual Report*, available at www.oico.on.ca (accessed on 25 and 29 November 2013).

[90] *Binda v Ontario* (*Environment*), 2011 CanLII 93306 (ON PSGB).

[91] Above n 30.

The Integrity Commissioner had declined to deal with Binda's reprisal complaint because it was essentially an employment matter that could be appropriately addressed through grievance proceedings before the Public Service Grievance Board or, as a human rights complaint, before the Human Rights Commission. In making this determination, the Commissioner characterized the matters as falling within one of the exclusions from her jurisdiction to review a complaint, being an employment matter subject to an existing dispute resolution mechanism (per section 117 of the *Act*).

When the matter came before the Grievance Board, it dismissed the employer's preliminary objection to the reprisal complaint. The employer had characterized Binda's reprisal complaint as, in substance, a general harassment complaint. The Grievance Board disagreed and held "that to the extent the complainant's disclosure to the Deputy Minister included allegations of breach of a statute such as the *Human Rights Code*, it qualifies as a disclosure of wrongdoing"[92] within the meaning of the whistleblower provisions of the *Public Service of Ontario Act*.

Though the *Binda* decision is certainly defensible, it and other decisions like it will undoubtedly lead to future amendments to provincial whistleblower protection legislation to avoid duplication of procedures in relation to what is essentially the same matter and thereby promote administrative efficiencies.

In Quebec, the annual report of the Anti-Corruption Commissioner for 2011–2012 states that the office received 146 corruption complaints and that, after review, it processed 38 complaints. Of these 38 complaints, it referred 17 for investigation, 16 for audit reviews, and 5 for review by external agencies.[93] As of the end of the 2011–2012 reporting period, the Commission's work had resulted in the arrest of 8 persons on 12 criminal charges relating to embezzlement, fraud, and intimidation.[94] The 2012–2013 annual report recorded a substantial increase in activity with the number of complaints rising to 500.[95] After review, 206 complaints were referred for investigation, 42 for audit reviews and 3 to external agencies. The annual report also records that the Commission's work in 2012–2013 resulted in 66 criminal charges (53 against persons and 13 against corporate bodies), 11 other charges, and the arrest of 56 persons.[96] As noted above, much of this activity relates to allegations of corruption in the public sector construction industry which is the subject of a much publicized commission of inquiry.[97]

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[92] ibid. at para 22.

[93] *Le rapport annuel de gestion du Commissaire à la lutte contre la corruption 2011–2012* (Gouvernement du Québec, 2012) at 37. (The annual report is accessible online at www.upac.gouv.qc.ca).

[94] ibid.

[95] *Le rapport annuel de gestion du Commissaire à la lutte contre la corruption 2012–2013* (Gouvernement du Québec, 2013) at 38. (The annual report is accessible online at www.upac.gouv.qc.ca).

[96] ibid.

[97] The Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, commonly known as the Charbonneau Commission after its chairperson, Judge France Charbonneau. The Commission was created on 19 October 2011 and resulted in the

Courts and Whistleblower Protection

As mentioned, Canadian courts have long accepted the "up the ladder" principle as an appropriate balance of an employee's duties of loyalty, good faith, and confidentiality to the employer and the public interest in disclosure of wrongdoing, particularly wrongdoing involving illegal and harmful activity.

On facts which arose before the coming into force of the *Canadian Charter of Rights and Freedoms* in 1982, the Supreme Court of Canada clearly affirmed the right of public sector employees to a measure of freedom to express themselves on government policies and practices in a manner consistent with their role as public sector employees. In *Fraser v. Public Service Staff Relations Board*,[98] an employee who worked as an auditor with a department of the federal government took exception to the government's plan to require use of the metric system in Canada. Obviously, the work performed by Fraser, as an employee, was unrelated to the policy he criticized. His public commentary began rather innocently with a letter to a local newspaper and advanced to the level of national media appearances. Over time, his public statements became intemperate to the point that he characterized the federal government, and the then Prime Minister, to the authoritarian and undemocratic regime of Nazi Germany. Eventually, the government employer had enough and dismissed Fraser from his employment. Fraser grieved his dismissal as unjust.

The Supreme Court of Canada, on appeal, sought to balance Fraser's individual right to freedom of expression in a free and democratic society with his duty, as a federal public sector employee, to exercise some restraint in such expression "in order to ensure that the public service is perceived as impartial and effective in fulfilling its duties".[99] The Court held that a public sector employee owes the same duty of duty of loyalty that is owed by every employee to every employer; the duty of loyalty, in the case of a government employee, being to the employer and not to the political party forming the government. In dismissing the employee's appeal, the Court recognized limits to that loyalty:

> 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.[100] [emphasis added]

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resignations of the mayors of several communities in Quebec as well as the laying of criminal charges against a number of persons.

[98] *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455.

[99] ibid. at para 30.

[100] ibid. at para 41.

Thus, public expression by public sector employees is considered by the courts in a contextual manner. Factors include the position held by the employee and the form and nature of the expression. Evidence of impairment of the employee's ability to perform the functions of his or her position is not always necessary if it is reasonable to infer such impairment. Given the very public and vociferous nature of Fraser's expression, the inference was held properly made in the circumstances.

Considering whistleblowing as a form of expression, Canadian courts generally protect the public sector whistleblower by considering factors similar to those applicable to private sector employees when applying the "just cause" standard. The significant difference between public and private sector employees in relation to the exercise of freedom of expression is that the *Canadian Charter of Rights and Freedoms* applies to the federal, provincial, and territorial governments acting as employer but does not apply to private sector employers (that is, employers that are not "government").[101]

In *R. v. National Post*,[102] the Supreme Court of Canada described the essential role of the whistleblower in modern democratic society:

> [28] It is well established that freedom of expression protects readers and listeners as well as writers and speakers. It is in the context of the public right to knowledge about matters of public interest that the legal position of the confidential source or whistleblower must be located. The public has an interest in effective law enforcement. The public also has an interest in being informed about matters of importance that may only see the light of day through the cooperation of sources who will not speak except on condition of confidentiality. Benotto J. accepted the evidence that many important controversies were unearthed only because of secret sources (often internal whistleblowers) including:
>
> 1. The tainted tuna scandal, that led to the resignation of the Minister of Fisheries in Canada.
> 2. The story that Airbus Industrie paid secret commissions in the sale of Airbus aircraft.
> 3. The book For Services Rendered about the search for a suspected KGB mole in the RCMP Security Service, and CBC's The Fifth Estate program on that mole, code-named "Long Knife".
> 4. Stories dealing with the City of Toronto's health inspection system for restaurants.
> 5. A story describing the operation of an illegal slaughterhouse that created a major health hazard.
> 6. Stories about the fall of Nortel Networks that contrasted optimistic public forecasts by Nortel executives with internal Nortel discussions warning of a potential devastating market downturn.
> 7. Stories about wrongdoing by members of the RCMP security service in early 1977, including a break-in to obtain documents from a left-wing news agency in Montreal, Agence Presse Libre du Québec, illegal wiretaps in Vancouver and pen-registers.

It is important, therefore, to strike the proper balance between two public interests – the public interest in the suppression of crime and the public interest in the free flow

[101] Section 24 of the *Charter* is the application section. It provides that the *Charter* applies to "the Parliament and government of Canada" and to "the legislature and government of each province" in relation to "all matters within the authority" of each. The *Charter* does not apply directly to private legal relations.

[102] *R. v National Post*, 2010 SCC 16, [2010] 1S.C.R. 477.

of accurate and pertinent information. Civil society requires the former. Democratic institutions and social justice will suffer without the latter.[103]

The Court's specific focus on the public interests at stake and the lack of any mention of an employee's duty of loyalty simply reflects the specific factual context of the case. A newspaper which had received documents from a "secret source", alleging misconduct by a senior public official, challenged a judicial order to disclose these documents to the police. The newspaper asserted immunity from disclosure because its investigative journalist had promised confidentiality/anonymity to the "secret source", described in the case as person "X". The judicial order that the original documents be disclosed had been granted to facilitate a police investigation which determined that the already publicly disclosed documents were, in fact, forgeries.

The immunity from disclosure asserted by the newspaper lay in the right guaranteed by the *Canadian Charter of Rights and Freedoms*, section 2(b) as "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". In *R. v. National Post*, the Supreme Court of Canada acknowledged that, though freedom of expression applies to everyone, including whistleblowers, it was not appropriate to claim immunity from disclosure as a constitutionally protected right (negative freedom of expression) nor as a class immunity akin, for example, to solicitor-client privilege at common law. Instead, the Court adopted a contextual approach in which four elements must be established by the party asserting the privilege or immunity from a judicial order for disclosure. The four elements are:

> the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously [diligently] fostered" in the public good… Finally… whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth.[104]

In the instant matter, the Court concluded that the newspaper failed to satisfy the fourth element essentially because the disclosure sought by the judicial order was directed to real evidence of criminal conduct which would be essential to both the police investigation of serious crime and to any future prosecution of a person for that crime. Though certainly conscious of the freedom of expression arguments, the Court's analysis focussed primarily on the *Canadian Charter of Rights and Freedoms*, section 8 right to be "secure against unreasonable search or seizure". In context, the judicial order for disclosure was found to be reasonable.

Consistent with the decision in *Fraser*, the duty of loyalty at common law and civil law has been repeatedly held to be a reasonable limit on a public sector employee's constitutional right to freedom of expression.

Two Federal Court decisions, both known as *Haydon v. Canada*, illustrate this position. In a 2001 decision, *Haydon v. Canada*,[105] three employees challenged

[103] ibid. at para 28 (per Binnie J.).

[104] ibid. at para 53.

[105] *Haydon v Canada*, [2001] 2 F.C.R. 82, 2000 CanLII 16081.

reprimand letters imposed by the employer, the federal Department of Health, as a disciplinary response to public statements made by the employees in which they expressed concern about the drug review process, particularly in relation to approval of growth hormones and antibiotics. The three employees had expressed their concerns as guests on a nationally televised morning news and information programme. Unlike *Fraser*, these employees did not seek media attention until after attempting without success to bring their concerns to the employer's attention through internal means, including a request for the intervention of the Health Minister and of the Prime Minister, to support an external investigation. On an application for judicial review of the employer's decision to impose discipline, a decision made by an assistant deputy minister, the Court undertook a *Canadian Charter of Rights and Freedoms* analysis. On this analysis, the Court concluded that, while the disciplinary action infringed the employees' freedom of expression, the common law limitation was justified in a free and democratic society because, in part, it recognized the *Fraser* exceptions to an employee's general duty of loyalty in circumstances of a serious risk to the life, health or safety of members of the public. On the evidence, the employees had made their public disclosure after first attempting to "go up the ladder" through the internal management structures and their concerns were directly related to matters of health and safety. The Court considered that the employees had made a reasonable effort to resolve their concerns internally and expressly noted that they had no personal interests at stake other than the public interest.

The second *Haydon* decision is from 2005 and is known as *Haydon v. Canada* (*Treasury Board*).[106] One of the employees involved in the 2001 case made another public disclosure to the media. The employee, a veterinarian, worked as a drug evaluator with Health Canada (the federal Department of Health) with expertise in relation to food-producing animals. In the context of a ban on the importation into Canada of beef from another country, due to concerns about exposure to B.S.E. ("mad cow disease"), the employee responded to a request for a comment from a journalist for national newspaper by stating, in effect, that the ban was not based on health concerns but was a political response due to another international trade issue between the governments of Canada and that other country. The employer responded to the employee's public comments by imposing discipline in the form of a letter instructing her to conform to internal policies regarding media contact. An arbitrator dismissed the employee's grievance of the employer's disciplinary action and the Federal Court of Canada dismissed her application for judicial review of the arbitrator's decision.

Before the Federal Court of Canada, the employee again argued that the employer's disciplinary action infringed her *Canadian Charter of Rights and Freedoms*, section 2(b) right to freedom of expression. The Court rejected the employee's characterization of herself as a whistleblower. The employee had not addressed a serious health and safety concern but had commented on the government's policy in relation to a trade matter specific to a foreign country. She had not taken steps to verify the accuracy of the information on which she based her opinion and had not first expressed her views internally so as to give the employer an opportunity to implement

[106] *Haydon v Canada*, [2005] 1 F.C.R. 511, 2004 FC 749 (CanLII).

corrective action, if appropriate. Thus, concluded the Court, the employee had engaged not in whistleblowing but in simple misconduct deserving of disciplinary sanction.

As reflected in the analysis and the result of the second *Haydon* decision, wrapping oneself in the whistleblower's cloak does not always immunize an employee from employer imposed discipline.[107]

Without statutory whistleblower protection, an employee may find arbitrators and courts reluctant to go beyond the common law and civil law duty of loyalty that the employee owes to the employer. That is the conclusion of a 2005 article published in *Les Cahiers de Droit*[108] in which the authors reviewed the legal regime in Québec and called for the "reconnaissance d'un espace critique accru en milieu de travail"/"recognition of accrued essential breathing space in the workplace"[109] consistent with recognition of the need to protect the greater public interest and freedom of expression in the whistleblower context. The authors consider that, in the modern context, freedom of expression is as fundamental in the workplace as minimum standards for hours of work though they acknowledge that the actual exercise of that expression by an employee must be subject to reasonable limits.[110]

The 2008 decision of the Commission des Relations du Travail in *Petitclerc c. Québec* (*Société immobilière*)[111] well illustrates the point. The government employer dismissed Petitclerc in response to statements he had made to a journalist, which were published in a newspaper, concerning the existence of asbestos in government buildings. At first instance, the grievance was argued on the basis that the employer had acted without just cause, particularly considering his position as a member of the union's health and safety committee. Petitclerc had argued that his public statements were justified as the acts of a whistleblower and as a union representative. The first instance commission member found that his published comments contained both exaggerated and inaccurate statements. Petitclerc had stated, in the absence of any proof to justify the statement, that the employer had done "next to nothing" in response to concerns raised by the union over a period of 15 years period and that the employer had challenged the validity of each concern. The commission member concluded that Petitclerc's alarmist statements had wrongly

[107] See also *Chopra v. Canada* (*Treasury Board*), (2006), 354 N.R. 48 (F.C.A.) – employee critical of government policy to collect anthrax antibiotics after 11 September 2001 terrorist attacks on the United States but failed to attempt to resolve the matter internally and immediate disclosure not justified under urgent health and safety exception – and *Re British Columbia* (*Ministry of Public Safety*) *and B.C.G.E.U.* (*Kambo*) (2009), 186 L.A.C. (4th) 143 (Steeves) – supervisory employee held not justified for release of confidential information via email to media "tip lines" concerning health and safety matters at correctional facility, including identify and health status of an inmate.

[108] C Brunelle et M Samson, 'La Liberté d'expression au travail et l'obligation de loyauté du salarié: plaidoyer pour un espace critique accru' (2005), 46 *Cahiers de Droit* 847.

[109] ibid. at 847–848.

[110] ibid. at 902 and 904.

[111] *Petitclerc c. Québec* (*Société immobilière*), 2008 QCCRT 302 (CanLII) dismissing review of the decision at first instance in *Petitclerc v Société Immobilière du Québec*, 2008 QCCRT 42 (CanLII).

created health concerns in the minds of both employees and other persons who visited the public buildings.

The appeal tribunal dismissed Petitclerc's appeal which he had grounded in his freedom of expression and his union position. The appeal tribunal agreed with the decision at first instance that Petitclerc had failed to satisfy the five conditions, applied in relevant jurisprudence, to be identified as a "whistleblower": (1) that the information communicated is true; (2) the disclosure is made in a reasonable and responsible manner; (3) internal remedies were exhausted; (4) the employer is a public institution; and (5) the matter is of public interest. On the evidence, Petitclerc was found not to have satisfied at least the first, second and third conditions.[112]

The courts and administrative tribunals have important contributions to make in relation to the interpretation and application of whistleblower protection legislation and of the development of the common law and civil law principles. The decisions to date have been relatively few but, as just discussed, they have been significant.

Specific Issues

Who Is Protected?

Scope of Protection: Employees and Self-Employed Persons

Common law and civil law recognize an employee's duty of loyalty, good faith, and confidentiality to the employer. The statutory provisions enacted at the federal and provincial levels of government generally reflect these common law and civil law principles but focus primarily on public sector employees. *The Public Interest Disclosure* (*Whistleblower Protection*) *Act* of Manitoba extends the scope of its protection from acts of reprisal by an employer to include private sector employees and those who contract with government.[113] Included in the group of protected persons who "contract with government" are self-employed persons who, as independent contractors, enter into a contract for services with a government department or agency.

The Quebec *Anti-Corruption Act* permits "any person" to make a complaint to the Anti-Corruption Commissioner and protects that person from reprisal action.[114] By using the phrase "any person" to identify those who may disclose "corruption" and be protected by the Act, the Quebec statute covers both employees and self-employed persons.

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[112] ibid. at 2008 QCCRT 42, at para 67:

> [67] Finalement, la déclaration ne rencontre pas les cinq critères établis par la jurisprudence pour qualifier un geste de « whistleblowing » : 1) ce qui a été communiqué est vrai; 2) la critique est faite de façon raisonnable et responsable; 3) les recours internes ont été épuisés; 4) l'employeur est une institution publique; 5) la question est d'intérêt public.

[113] Above n 30 and text at n 38.

[114] Above text at nn 43–49.

As discussed above, the *Criminal Code of Canada*, section 425.1 expressly prohibits employer from taking acts of reprisal and from compelling silence by inducing an employee not to make a disclosure. These prohibitions apply generally regardless of the nature of the employment in either the public or private sectors.[115] Grounded in criminal law, the focus of the provision is the punishment of the employer for wrongdoing and not directly on the protection of the employee. That protection is really an indirect effect of the prohibition. Protection of an employee who disclosed a breach of federal or provincial law by his or her employer finds expression in the employment standards legislation of New Brunswick, Saskatchewan, and Quebec.[116]

Protection of Persons Helping or Encouraging Whistleblowers

Neither Canadian common law/civil law principles nor the statutory provisions on whistleblowers expressly address the situation of persons who help or encourage whistleblower employees. One may safely presume that, if such a person is also an employee and the whistleblower is found not to be making a disclosure in good faith, the helping or encouraging employee might also be subject to disciplinary sanction unless acting in good faith. An employee who helps or encourages a disclosure not made in good faith would probably be found to have acted in breach of his or her duty of loyalty to the employer.

Protection of Persons Who Affirm a Whistleblower's Allegations

Federal and provincial public sector disclosure legislation expressly protects persons who affirm a whistleblower's disclosure of alleged wrongdoing by including such affirmation in the definition of "reprisal".[117] To be protected, the employee must act in good faith and affirm the whistleblower's allegation in the course of an investigation under the Act. Thus, an affirming employee is not protected from sanction if the employee's affirming statements are made in the news media or other public forum because such an act would be contrary to the employee's own duty of loyalty to the employer.

In addition, the *Canada Labour Code* and the employment standards legislation in New Brunswick, Saskatchewan, and Quebec expressly protect an employee who gives "information or evidence… against the employer with respect to the alleged violation of any Provincial or federal Act or regulation… while carrying on the employer's business".[118]

The *Criminal Code* provision on employer retaliation (section 425.1) is probably broad enough to cover an act of reprisal by an employer against an employee

[115] Above text at n 52.

[116] Above text at nn 59 and 60.

[117] Above text following n 25 and text at n 35.

[118] Above text at n 56 and at nn 59–60.

because that employee "provid[ed] information to a person whose duties include the enforcement of federal or provincial law".[119]

In more limited circumstances pertaining to the legislation itself, federal and provincial legislation on labour relations, occupational health and safety, and some provincial environmental legislation protect employees from employer reprisal because the employee testified in proceedings under that legislation or, in some instances, provided information relating to a breach of that statute.[120]

It should also be noted, in this connection, that an employee who testifies at a hearing, pursuant to a lawful summons to testify, is justified in answering questions concerning employer wrongdoing. Such testimony would not provide just cause for any employer reprisal action.

The Kind of Behaviour That Is Protected

Anonymous Whistleblowing

Common law and civil law principles and the federal and provincial statutory whistleblower protection legislation are silent on the subject of the anonymous whistleblower. Doubtless, this is because such legislation is structured in a manner to "manage" the disclosure of information about wrongdoing through internal procedures. An anonymous disclosure of information is inconsistent with an employee's duty of loyalty to the employer.

The decision of the Supreme Court of Canada in the *National Post* case[121] should serve as a warning to an employee contemplating an anonymous disclosure that reliance on a confidentiality agreement with a journalist may not be sufficient to ensure anonymity. Even contemplation of sending a classic "brown envelope" to a journalist may not be sufficient protection of identity given modern forensic science. Disclosure through a lawyer may provide a solution because the lawyer is bound by professional ethics not to disclose the identity of a client.[122] (There are now commercial service providers who facilitate anonymous disclosures by employees – to be further discussed below).

Critically, anonymous disclosure of wrongdoing without first following internal procedures intended to bring the information to the employer's attention effectively deprives the employer an opportunity to take corrective action independent of public pressure to do so.

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[119] Above text at nn 52–53.

[120] Above text at nn 64 ff.

[121] Above text at nn 102 ff.

[122] Above text at nn 50–51.

Use of Internal Reporting Systems Before a Whistleblower Is Allowed to Appeal to Third Parties

Whistleblower protection laws enacted at the federal and provincial levels in Canada require an employee to follow the internal reporting procedures within the employee's department or agency of government. In one sense, the integrity commissioners and their equivalents are within that very reporting structure. If considered external to the internal reporting procedures, the legislation foresees direct disclosure of information to such commissioners, particularly in relation to a reprisal complaint.

The "up the ladder" principle is, of course, also found in the arbitral jurisprudence reflecting the common law and civil law in relation to an employee's duties of loyalty, good faith, and confidentiality.

Turning to the Media in Extreme Cases

Federal and provincial whistleblower protection statutes permit a public sector employee to make a public disclosure – or at least to make a disclosure to an official who is then authorized to make such a disclosure – in extreme cases. For example, the federal *Public Servants Disclosure Protection Act* permits direct public disclosure of information when an employee has reasonable grounds to believe that the information relates to a "serious offence" under federal or provincial law or involves "an imminent risk of a substantial and specific nature to the life, health and safety of persons or to the environment". Such a direct disclosure is constrained to situations in which time is not sufficient to permit disclosure to a supervisor or other senior officer.[123]

Similar provisions are found in the statutory schemes enacted in Nova Scotia, New Brunswick, and Manitoba.[124] The statutes enacted in Alberta and Saskatchewan refer to the need to adopt policies to address such situations.[125]

Protection of the Erroneous Whistleblower

Federal and provincial public sector whistleblower protection statutes in Canada qualify references to an employee, contemplating making a disclosure or who has made a disclosure of information, by use of the phrases "good faith" and/or "reasonably believes". These phrases, it is suggested, are sufficient to impose a burden on such an employee to act in the contemplated good faith or reasonable belief by taking some step to ensure a level of accuracy of the information intended to be disclosed. An employee who discloses information, without having taken some steps to ascertain its authenticity and accuracy, cannot generally be characterized as

[123] Above text at nn 17 ff.

[124] Above text at n 31.

[125] Above text at n 34.

having acted in good faith or with a reasonable belief. More specifically, an employee not acting in good faith or with a reasonable belief will not find himself or herself protected from employer reprisal actions.[126]

The general law of defamation has developed a form of privilege which appears broad enough to protect the erroneous whistleblower. As explained by Raymond Brown in a leading Canadian text on defamation law:

> There are certain occasions on which a person is entitled to publish untrue statements about another, where he or she will not be liable even though the publication is defamatory. One such occasion is called a conditional or qualified privilege. No action can be maintained against a defendant unless it is shown that he or she published the statement with actual or express malice. A communication is protected by a qualified privilege if it is fairly made on a privileged occasion by a person in the discharge of some public or private duty, or for the purpose of pursuing or protecting some private interest, provided it is made to a person who has some corresponding interest in receiving it. The duty may be either legal, social or moral. The test is whether persons of ordinary intelligence and moral principle, or the great majority of right minded persons, would have considered it a duty to communicate the information to those to whom it was published.

A communication is protected on a privileged occasion where a person seeks to protect or further his or her own legitimate interests, or those of another, or interests which he or she shares with someone else, or the interests of the public generally.[127]

The description appears equally applicable to an employee who discloses employer or fellow employee misconduct, that impacts private and public interests. As with whistleblower protection generally, the privilege serves to balance the private interest in nondisclosure with the private and public interest in disclosure. The employee is protected.

Whistleblower Motivation

As just discussed, the employee making a disclosure is subject to a good faith and/or reasonably believes standard. The actual motive of the employee, altruistic or not, does not appear to be a relevant consideration unless it undermines or negates good faith or reasonable belief.

Kinds of Acts Reportable by a Whistleblower

The federal and provincial public interest disclosure statutes in Canada broadly define the type of "wrongdoing" which might prompt an employee to disclose information. Using the federal *Public Servants Disclosure Protection Act* to illustrate the concept of "wrongdoing", the federal *Act* refers to general categories of wrongdoing rather than a catalogue of specific actions; thus, the federal *Act* refers to a violation

[126] Above text at n 35.

[127] RE Brown, Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States, 2nd edn, looseleaf (Toronto, ON: Carswell, 1999), vol. 3 at 135.

of federal or provincial law, "misuse of public funds", "gross mismanagement in the public sector", "a substantial and specific danger to the life, health or safety of persons, or the environment", "a serious breach of a code of conduct" for the public sector, and "knowingly directing or counselling" the commission of any such wrongdoing.[128]

In permitting an employee to make a direct public disclosure of information regarding a "serious offence" under federal or provincial law or "an imminent risk of a substantial and specific nature to the life, health and safety of persons or to the environment", the federal *Act* is implicitly concerned with current and pressing situations. Disclosure of information of a past incident which was thought at an earlier time to pose "an imminent risk of a substantial and specific nature" to the life or safety of persons, for example, would not qualify as a protected disclosure.

The only relevant time period applicable to a disclosure, under the federal *Act*, is the limit of 60 days for a making a reprisal complaint.[129]

The Quebec anti-corruption legislation is very much focussed on the awarding and performance of public sector contracts.[130]

Level of Whistleblower Protection

Protection Against Any Kind of Detriment or Against Dismissal Only

Federal and provincial whistleblower protection legislation plus the specific statutes applicable to such matters as employment standards, labour relations, etc. provide broad protection from virtually any employer reprisal action which detrimentally affects the employee.

Again, using the federal *Public Servants Disclosure Protection Act* to illustrate the point, section 2(1) of that *Act* defines "reprisal" as:

(a) A disciplinary measure;
(b) The demotion of the public servant;
(c) The termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;
(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).[131]

The broader or more inclusive meaning appears to be that in (d) in relation to "any measure that adversely affects the employment or working conditions". In this

[128] Above text at n 16.

[129] Above text at n 25.

[130] Above text at nn 43–44.

[131] Above text following n 25.

regard, provincial statutes mirror the federal in taking an expansive approach to the concept of employer "reprisal".

Onus of Proof in Dismissal Cases

Canadian arbitral awards and practice in relation to discipline and dismissal grievances place the legal onus or burden of proof on the employer to demonstrate just cause for the sanction imposed.[132]

Though not expressly addressed in the federal and provincial whistleblower protection statutes, the *Ontario Environmental Protection Act* illustrates this approach to the legal burden of proof by expressly placing the burden squarely on the employer to prove that its action was not a reprisal within the meaning of that *Act*.[133]

Collective Protective Action by Certain Interest Groups (e.g. Trade Unions, Consumer Protection Groups)

The federal and provincial statutes on whistleblower protection are silent on the role, if any, of certain interest groups (e.g. trade unions, consumer protection groups) to take collective action to protect whistleblower employees.

There is no reason, on first principles, why an interest group could not take protective action in the form, for instance, of moral support such as an act of charity or more tangible support in the form of financial aid to cover the legal costs incurred by the employee.

Conclusion

The whistleblower employee is not a new phenomenon in Canadian labour and employment law. It is, however, a new phenomenon as a subject for legislative action by the federal Parliament and the provincial and territorial Legislatures.

The legislative action has been somewhat predictable. The enacted public sector employment statutes serve to manage rather than facilitate a disclosure of wrongdoing by governments and government employees. As such, the framework reflects the existing state of the arbitral jurisprudence and court decisions on whistleblower employees by imposing the "up the ladder" approach to disclosure. It is this approach which is consistent with the duties of loyalty, good faith, and confidentiality which every employee owes an employer, whether public or private sector. Exceptions are recognized in situations when the disclosure of information is necessary in the public interest to prevent serious risks of harm to persons or the environment.

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[132] Mitchnick and Etherington, *Labour Arbitration in Canada*, above n 6 at 108.

[133] Above text following n 71.

Available statistical evidence does not demonstrate a significant use of federal and provincial whistleblower protection legislation. Greater effort by public sector employers is needed to instill a sense of confidence and trust in the statutory disclosure procedures. Most of all, there must be a sense of openness and willingness by public sector employers to address disclosed wrongdoing in a manner that appreciates the whistleblower rather than casting a negative light on their actions. These thoughts are well expressed in the 2007 report from Newfoundland and Labrador, *Rebuilding Confidence*: *Report of the Review Commission on Constituency Allowances and Related Matters*:

> A mechanism to promote good governance that has been developed in both the private and public sectors in recent years has been the notion of a "whistleblower" policy designed to encourage persons within an organization to report instances of behaviour of others in the organization that is considered improper, unethical or wrong. In the public sector, the policy is usually embodied in legislation and is often referred to by other names such as "public servants disclosure" or "public interest protection." The key elements of a whistleblower policy are: the provision of a well-publicized formal mechanism whereby a person concerned about the improper behaviour of another in an organization may express those concerns in confidence to another person who is regarded as independent; a process whereby those concerns will be investigated in a fair manner; and protection to the whistleblower against reprisals for having come forward. For the scheme to work, the policy must be communicated to all employees affected and key members of management should stress the importance of the policy. As well, potential whistleblowers must have confidence in the protections that are provided.[134]

It seems that, at least in the private sector, a good number of employers have responded to the need for confidentiality and confidence in the disclosure process by externalizing the requisite procedures. These employers have engaged commercial service providers to make available external reporting mechanisms which permit employees to make disclosures, even anonymous disclosures, to a service provider who then communicates that information to the employer for action, if needed.[135]

It is expected that the provinces and territories of Canada that have not yet enacted whistleblower protection statutes will do so in the not distant future. Finally, it is worth noting that, even though Canada is a state party to the *United Nations Convention against Corruption*,[136] the domestic legislation does not reference the *Convention* and it has not been invoked to support enactment of such legislation.

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[134] Above n 41 at 5-47-48.

[135] Examples of such service providers are CanaGlobe Compliance Solutions Inc. (website www.canaglobecompliance.com) and ConfidenceLine by CKR Global HR Services (website www.confidenceline.net).

[136] UN General Assembly Resolution 58/4 of 31 October 2003. Canada signed the *Convention* on 21 May 2004 and deposited the instrument of ratification on 2 October 2007. The *Convention*, article 33 provides for domestic whistleblower protection legislation:

> Article 33. Protection of reporting persons
>
> Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

It is probably a safe bet that there will always be whistleblower employees and whistleblower laws to protect them. The extent of that protection is today in Canada somewhat tricky because of the "up the ladder principle" but it is to be expected that true whistleblower employees will find a way to protect their employment.

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John P. McEvoy Professor at the Faculty of Law, University of New Brunswick, Canada. Former president of the Canadian Association of Law Teachers. Presently president of the Canadian Comparative Law Association as well as a vice-chair of the New Brunswick Labour and Employment Board.

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