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Federal Public Sector Whistleblowing

Publication No. 2008-63-E
31 October 2008
Revised 26 June 2012

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Federal Public Sector Whistleblowing **(In Brief)**

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CONTENTS

1	INTRODUCTION.....	1
2	BACKGROUND.....	1
3	THE <i>PUBLIC SERVANTS DISCLOSURE PROTECTION ACT</i>	1
4	THE GOMERY COMMISSION FINDINGS AND THE ACT	3
5	OTHER FEDERAL AND PROVINCIAL LEGISLATION.....	4

FEDERAL PUBLIC SECTOR WHISTLEBLOWING

1 INTRODUCTION

An allegation of corporate or bureaucratic misbehaviour usually comes from a current or former employee. The “whistleblower” discloses the wrongdoing of either his or her employer or a fellow employee. Typically, the allegation involves a breach of law or a potentially serious threat to public health and safety. Although such a disclosure may be held in high esteem by society, the whistleblower often faces less agreeable consequences, including reprisal by the employer.

2 BACKGROUND

Disclosing wrongdoing in the public sector and protecting public servants who make disclosures is not new. It has been the subject of task forces, policies, codes, reports, studies and both government and private members’ bills since 1996.¹

However, the findings of the *2003 November Report of the Auditor General of Canada*² and the subsequent commission of inquiry into the Government of Canada sponsorship programs from 1997 to 2001 and its advertising activities from 1998 to 2003, known as the Gomery Commission,³ brought to the fore the need for better protection for whistleblowers who attempt to disclose wrongdoing in the federal public service.

According to the Phase 1 report of the Gomery Commission (*Who Is Responsible?*), attempting to disclose questionable business practices and possible mismanagement of public funds during the periods under review did, in fact, cost one public servant his job.⁴ That public servants might be reluctant to report questionable practices within their departments or agencies seemed likely, given the real possibility of reprisal, together with a lack of protection for whistleblowers.

3 THE *PUBLIC SERVANTS DISCLOSURE PROTECTION ACT*

Such findings led to the creation of a legislative framework to protect whistleblowers, the *Public Servants Disclosure Protection Act* (PSDPA).⁵ Often referred to as “whistleblower legislation,” this legislative measure was passed by Parliament in November 2005 and came into force in April 2007. However, it was substantially amended by the *Federal Accountability Act* (FAA) in 2006, before it even came into force.

The PSDPA contains a lengthy preamble recognizing that the public service of Canada is an important national institution and part of the essential framework of Canada’s parliamentary democracy. It further recognizes that public servants owe a duty of loyalty to their employer and enjoy freedom of expression; the Act strives to achieve a balance between these two principles.

The PSDPA establishes a mechanism for the disclosure of wrongdoing in the federal public service, Crown corporations and other public agencies. While the term “public sector” as defined in the Act includes the Royal Canadian Mounted Police, it does not include the Canadian Forces, the Canadian Security Intelligence Service or the Communications Security Establishment. In its original version, the PSDPA protected only public servants who in good faith disclosed wrongdoing. The FAA amended the Act to also protect private sector employees who disclose wrongdoing within the federal public service.

The PSDPA requires that Treasury Board establish a code of conduct applicable to the federal public sector. It also requires that each chief executive of a department or agency establish an internal mechanism for disclosure, including the appointment of a senior officer to receive and act on wrongdoing disclosures. This protects the identity of people involved in the disclosure process and the confidentiality of information collected in relation to disclosures and investigations.

The PSDPA creates an independent Public Sector Integrity Commissioner, appointed by the Governor in Council following approval by Parliament. The commissioner reports directly to Parliament and has powers to investigate alleged wrongdoing and reprisal, make recommendations to chief executives on corrective measures and review reports on measures taken by chief executives in response to those recommendations. As regards investigations, the PSDPA provides that the commissioner has all the powers given by Part II of the *Inquiries Act*, including the power to search the premises of a public office or institution; examine documents, papers, records and books; summon any person to give evidence; administer an oath; and summon any witness.

The PSDPA defines both “wrongdoing”⁶ and “reprisal.”⁷ It also establishes two separate mechanisms for dealing with complaints of wrongdoing and complaints of reprisal.

Section 13 provides for the mechanism allowing the commissioner to investigate wrongdoing. The PSDPA states that a public servant who has knowledge of wrongdoing may disclose it either to his or her supervisor or directly to the commissioner. Following an investigation, the commissioner submits his or her observations, conclusions and recommendations to the chief executive of the federal institution that is the subject of the complaint. If the complaint is found to be justified, the commissioner must present a report to Parliament setting out his or her conclusions and recommendations to the chief executive, within 60 days of the finding that wrongdoing has occurred. The PSDPA provides that a public servant who commits wrongdoing is subject to disciplinary action, including possible termination of employment.

Section 19.1 establishes a mechanism for disclosing alleged reprisals to the commissioner. Sections 19 to 21.9 give the commissioner the power to hear complaints, conduct investigations and attempt to bring about a settlement between the parties. If no agreement is reached, the commissioner cannot enforce a settlement on the parties but can refer the matter to the independent Public Servants

Disclosure Protection Tribunal, which will rule on the complaint and decide whether remedies and disciplinary action are necessary.

The tribunal consists of a chairperson and between two and six members of the Federal Court or a superior court of a province. The chairperson assigns a member to hear the case, and can assign up to three members depending on the complexity of the case. The tribunal can summon witnesses, administer oaths and receive evidence. It must observe the requirements of due process, and its decisions may be subject to judicial review.

In its original version, the PSDPA made important consequential amendments to the *Access to Information Act*, the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act*. It placed a five-year ban on the release of information collected in the course of an investigation into a wrongdoing. The FAA amended this provision, which now protects from release, under the *Access to Information Act*, information created for the purpose of making a disclosure or information created during the course of an investigation. This new provision seeks to protect sensitive information held by the commissioner in a manner consistent with that accorded to other officers of Parliament who conduct investigations. It should be noted, however, that these non-disclosure provisions do not apply if the person who gave the information consents to the disclosure of the record.

Section 54 of the PSDPA requires that the Act be reviewed after five years to examine its implementation and analyze its effectiveness.

4 THE GOMERY COMMISSION FINDINGS AND THE ACT

The Phase 2 report of the Gomery Commission (*Restoring Accountability*) noted the whistleblowing legislation. While congratulating Parliament on its passage of the legislation, the Commission suggested that the Act could be “significantly improved” by the following amendments:

- broadening the definition of the class of persons authorized to make disclosures under the Act (“public servants”) to include anyone who is carrying out work on behalf of the government;
- making an open list of “wrongdoings” that can be disclosed, so that actions that are similar to the ones explicitly listed in the Act would also be covered;
- making the list of actions that are forbidden “reprisals” an open list as well;
- in the event that a whistleblower makes a formal complaint alleging a reprisal, placing the burden of proof on the employer to show that the actions were not a reprisal;
- setting an explicit deadline for all chief executives to establish internal procedures for managing disclosures; and
- revoking the Act’s consequential amendments to the *Access to Information Act* and the *Privacy Act*, as they are unjustified.⁸

Only the first of these recommendations was directly included in the FAA to amend the original PSDPA. As a result, private sector employees and the public have the right to make disclosures to the commissioner.

5 OTHER FEDERAL AND PROVINCIAL LEGISLATION

A number of Canadian federal and provincial statutes provide similar protection for employees against reprisal for exercising rights conferred by law. For example, section 16 of the *Canadian Environmental Protection Act, 1999* provides employees with protection from employment reprisals when, in good faith, they give the appropriate officials information relating to offences under the Act. However, governments at both the federal and provincial levels generally have not enacted broader legislative protections like those in place in a number of other jurisdictions, most notably the United States.

In Ontario, whistleblower protection measures for public servants have been in effect since amendments to the *Public Service Act*⁹ were enacted in 1993. Although Ontario's disclosure procedures were modified when the *Public Service Act* was repealed and replaced with the *Public Service of Ontario Act*¹⁰ in 2006, the current Act also provides public servants in Ontario with protection from reprisals and a means to make disclosures of wrongdoing.

As well, since 2006, New Brunswick,¹¹ Nova Scotia,¹² Manitoba¹³ and Saskatchewan¹⁴ have all passed stand-alone public interest disclosure legislation to protect provincial public sector employees who disclose wrongdoing in the workplace and to facilitate making and investigating such disclosures.

Section 28 of New Brunswick's *Employment Standards Act* and section 74 of Saskatchewan's *Labour Standards Act* prohibit employers in any provincially regulated industry from taking reprisals against employees who make complaints about their employer with respect to the alleged violation of any federal or provincial statute.

Finally, section 26 of Quebec's *Anti-Corruption Act*,¹⁵ passed in 2011, allows "any person" to disclose wrongdoing in the public sector or in a contracting process with the public sector to the Anti-Corruption Commissioner.

NOTES

1. For a review of the chronology of these activities, see David Johansen and Sebastian Spano, [Bill C-11: The Public Servants Disclosure Protection Act](#), Publication no. LS-482E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 2 November 2005; and Tara Gray, [The Public Servants Disclosure Protection Act and Proposed Amendments](#), Publication no. 05-56, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 9 February 2006.
2. Office of the Auditor General of Canada, [2003 November Report of the Auditor General of Canada](#).

3. The Commission of Inquiry into the Sponsorship Program and Advertising Activities [Gomery Commission] was appointed in 2004. Justice John H. Gomery was the Commissioner.
4. Gomery Commission, *Who Is Responsible? Fact Finding Report*, Minister of Public Works and Government Services, Ottawa, 2005. See, especially, pp. 201–203.
5. [*Public Servants Disclosure Protection Act*](#), S.C. 2005, c. 46.
6. *Ibid.*, s. 8.
7. *Ibid.*, s. 2.
8. Gomery Commission, *Restoring Accountability: Recommendations*, Minister of Public Works and Government Services, Ottawa, 2005, pp. 186 and 187.
9. [*Public Service Act*](#), R.S.O. 1990, c. P.47.
10. [*Public Service of Ontario Act*](#), S.O. 2006, c. 35.
11. [*Public Interest Disclosure Act*](#), S.N.B. 2007, c. P-23.005.
12. [*Public Interest Disclosure of Wrongdoing Act*](#), S.N.S. 2010, c. 42.
13. [*Public Interest Disclosure \(Whistleblower Protection\) Act*](#), S.M. 2006, c. 35.
14. [*Public Interest Disclosure Act*](#), S.S. 2011, c. P-38.1.
15. [*Anti-Corruption Act*](#), R.S.Q., c. L-6.1.