Historical Overview of Public Sector Whistleblower Protection In Canada

Public Servants Disclosure Protection Tribunal Canada

Updated: January 2015

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Timeline of Public Sector Whistleblowing in Canada

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1981	In ***Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees Union*** (1981), 3 LAC (3d) 140, arbitrator J.M. Weiler discusses the reporting of wrongdoing in the public service. He notes that the duty of loyalty to the employer does not impose an absolute "gag rule" on the employee from making public statements which are critical of the employer. He also states that employees should not be so fearful for their jobs that they do not disclose wrongdoing. This case is often cited in modern jurisprudence when a court is faced with a matter regarding the appropriate balance between a public servant's freedom of expression and the duty of loyalty.
1985	The Supreme Court of Canada establishes the foundation for the defense of whistleblowing in ***Fraser v Public Service Staff Relations Board***, [1985] 2 SCR 455. This was a judicial review of a termination grievance of a public servant who had publicly attacked major government policies, including the implementation of the metric system. The Supreme Court identifies situations where freedom of expression can prevail over the duty of loyalty: where the government is engaged in illegal acts, or if its policies jeopardize the life, health, or safety of the public, and where criticism does not have an impact on a public servant's ability to perform effectively the duties of a public servant or on the perception of that ability. The Court acknowledges the importance of freedom of expression (note: the facts of this case arose prior to the *Charter of Human Rights and Freedoms*), but ultimately did not find that the defense of whistleblowing could be upheld in this case.
December 1996	The **Task Force on Public Service Values and Ethics** releases its report entitled "**A Strong Foundation**" recommending that Parliament adopt "a statement of principles for public service, or a public service code," including a strong disclosure mechanism, to enable employees to voice concerns "about actions that are potentially illegal, unethical or inconsistent with public service values, and to have these concerns acted upon in a fair and impartial manner."

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September 5, 2000	The Federal Court releases its decision in ***Haydon v Canada***, [2001] 2 FC 82 (***Haydon No. 1***) concerning the public criticism by two Health Canada scientists of their employer's drug review regime. The Court finds that the common law duty of loyalty as articulated in *Fraser* sufficiently accommodates the freedom of expression as guaranteed by the Charter, and therefore constitutes a reasonable limit within the meaning of section 1 of the Charter. The Court also states that the first avenue a public servant should follow, before criticizing publicly a government policy, is to raise a concern internally. Note: this case precedes the *Public Servants Disclosure Protection Act* (PSDPA), which permits a public servant to pursue either internal (i.e. senior designated officer or supervisor for receiving disclosures) OR external (i.e., Office of the Public Sector Integrity Commissioner) means of raising concerns regarding wrongdoing (see sections 12, 13 and 16 of the PSDPA). The PSDPA also allows for disclosures in certain circumstances.
November 30, 2001	The Treasury Board adopts a **Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace** which requires that deputy heads of those government departments and organizations that are listed in Part I, Schedule I, of the *Public Service Staff Relations Act* (for which the Treasury Board is the employer) designate a senior officer responsible for receiving information about alleged wrongdoing in the workplace. The policy creates the position of a **Public Service Integrity Officer** (subsequently replaced by the Public Sector Integrity Commissioner), a neutral third party available to deal with disclosures that an employee believes cannot be raised internally, or that were not adequately dealt with by a department. Reprisals for disclosures made in good faith are prohibited under the policy.
2003	The ***Values and Ethics Code for the Public Service*** comes into effect. The Code becomes a condition of employment. The Public Service Integrity Officer, Dr. Edward W. Keyserlingk, tables his first annual report in Parliament. The report recommends the establishment of a legislative framework for the disclosure of wrongdoing in the federal public service. The Auditor General publishes her annual report in November. The report supports the establishment of a legislative framework for the

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	disclosure of wrongdoing in the federal public service (Chapter 2 – Accountability and Ethics in Government). The House of Commons Standing Committee on Government Operations and Estimates publishes a report entitled "Study of the Disclosure of Wrongdoing (Whistleblowing)". The report recommends the enactment of legislation to facilitate the disclosure of wrongdoing by public servants and to protect them from reprisals.
March 2004	The government introduces Bill C‑25 (*Public Servants Disclosure Protection Act*). The Bill dies on the Order Paper when the election is called.
May 21, 2004	The Federal Court releases its decision in ***Haydon v Canada (Treasury Board)***, 2004 FC 749 (upheld on appeal 2005 FCA 249) (***Haydon No. 2***). Dr. Haydon was a scientist at Health Canada who made public statements to the effect that the Government's ban on beef from Brazil was related to a trade dispute rather than to legitimate public health concerns. The Court found that the statements made by the employee to the press were not related to health and safety and accordingly fell outside the exception to the duty of loyalty rule outlined by Chief Justice Dickson in *Fraser*. The Court also noted that Dr. Haydon's comments affected the perception of her ability to conduct her duties effectively and that they had an impact on the public perception of the operations and integrity of the Canadian Food Inspection Agency and Health Canada.
October 2004	The government introduces Bill C-11 (*Public Servants Disclosure Protection Act*).
February 2005	The Supreme Court of Canada issues its decision in ***Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771***, [2005] 3 SCR 425. An employee was fired after having reported financial misconduct to the general president of the union. She argued that under the Saskatchewan labour relations scheme, she should be reinstated on the basis that she reported to a lawful authority. The Court recognizes that individuals within an employer organization have the authority to deal with whistleblowing. It also states that laws pertaining to whistleblowing attempt to reconcile the employee's duty of loyalty with the public interest in the suppression of unlawful activity and therefore constitute an exception to the duty of loyalty. The Court

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	recommends the use of the "up the ladder" principle of internal disclosure.
March 2005	The Supreme Court of Canada issues its decision in ***Vaughan v Canada***, [2005] 1 SCR 146. A federal public servant, on leave without pay, was notified that he was surplus and that he would be laid off. He sought to obtain early retirement incentive benefits, but his application was rejected and he was laid off. The lay-off could be subject to arbitration under the federal labour relations regime, but not the claim for early retirement incentive benefits. The employee brought an action in Federal Court that was struck down. The Supreme Court of Canada reiterates that the principles in a previous decision, ***Weber v Ontario Hydro***, [1995] 2 SCR 929, apply and that the employee ought to have filed a grievance. The Court states that the absence of recourse to independent adjudication does not necessarily mean that the courts will get involved. The Supreme Court notes, however, that the absence of third-party adjudication may, in certain situations, impact on a court's exercise of its residual discretion. It cites whistleblower cases as one example.
July 8, 2005	The Federal Court releases its decision in ***Chopra v Canada (Treasury Board)***, 2005 FC 958. Drs. Shiv Chopra, Margaret Haydon and Gerard Lambert were Health Canada scientists who complained to the Public Sector Integrity Officer (PSIO) that they were pressured to approve potentially unsafe veterinary drugs. The PSIO rejected their complaints. The Court sets aside the decision of the PSIO and refers the matter back for reconsideration. The PSIO had not investigated all the drug approval processes which were the subject matter of the complaint in rendering its decision.
November 25, 2005	**Bill C-11, the *Public Servants Disclosure Protection Act*, receives Royal Assent.**
August 22, 2006	The Federal Court of Appeal issues its decision in ***Read v Canada (Attorney General)***, 2006 FCA 283. Corporal Read had investigated the system used to issue visas at the Canadian Mission in Hong Kong. He became convinced that senior Immigration Department officials, aided and abetted by members of the RCMP, had covered up flaws in the visa issuance system and potentially allowed criminals into Canada. He gave media interviews on this subject critical of the RCMP. The Court states that a legitimate public interest is not an exception to the duty of loyalty owed by employee to employer. In disclosing confidential information, the appellant acted in an irresponsible manner and breached the duty of loyalty. Even if otherwise justified,

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	Read should have exhausted internal redress mechanisms before going public with his criticisms. The facts of this case predate the PSDPA which gives public servants with concerns about potential wrongdoing several avenues of redress, both internal (the employer) and external (the Public Sector Integrity Commissioner).
December 12, 2006	The *Federal Accountability Act* (C-2) is granted Royal Assent. This statute, omnibus in nature, amends several statutes, including the *Public Servants Disclosure Protection Act*. The Act establishes a new system for disclosure of wrongdoing and protection from reprisal in the federal public sector, including the creation of the **Public Servants Disclosure Protection Tribunal.** The Act also provides for a statement of values and the establishment of a code of conduct to guide the public sector.
April 15, 2007	**The *Public Servants Disclosure Protection Act* comes into force.**
October 17, 2008	The Public Service Labour Relations Board releases its decision in ***Labadie v Deputy Head (Correctional Service of Canada)***, 2008 PSLRB 85. The grievor is a federal prison employee who was disciplined for attacking the integrity of his employer, the Department of Justice and the RCMP in a book he published. The employer's policies provided that he had to address alleged wrongdoing internally before going public and had breached the duty of loyalty. The Board found that the grievor had no foundation of evidence for his allegations and dismissed the grievance. The facts of this case arose prior to the coming into force of the PSDPA. Under the Treasury Board's *Policy on the Disclosure of Wrongdoing* then in force, employees had to follow the internal disclosure process, and could not make a public disclosure except in very specific cases, for instance, if there was an immediate risk to life, health or public safety.
January 13, 2010	The Federal Court releases its decision in ***Detorakis v Canada (Attorney General)***, 2010 FC 39. This was the first judicial review of a decision by the Public Sector Integrity Commissioner (PSIC). The employee had made several information requests to his employer, the Canadian Nuclear Safety Commission. He became concerned that the information record was concealed and tampered with and that evidence was fabricated for tribunal proceedings. The applicant attempted to have his complaints investigated by the Office of the

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	Information Commissioner (OIC). However, his complaint was submitted after the one-year complaint deadline, so the OIC found the matter was outside its jurisdiction. The applicant then requested that his complaints be heard by PSIC, which declined to deal with the matter. The Court finds that the decision of PSIC was reasonable as the applicant's complaints engaged a process provided for under another Act of Parliament. While the decision of PSIC is upheld, Mr. Justice Russell expresses sympathy for the applicant's concern that his allegations of wrongdoing were falling through the cracks: "From a strictly legal perspective I can find no reviewable error in the PSIC's decision. However, there is a lingering concern that the complaints raised by the applicant have not been adequately addressed and that the alleged wrongdoing may go unexamined" (para 129).
May 16, 2011	The British Columbia Information and Privacy Commission releases its investigative report ***Re BC Ferries***, [2011] B.C.I.P.C.D. No. 21, in which it discusses a company's practice of simultaneously releasing its responses to access to information requests to the public and the possibility that this practice may serve to prevent individuals or the media from making requests for information and thereby holding the government accountable for its actions. The report mentions the PSDPA in its canvassing of access to information practices at the federal and provincial levels of government and refers to the case report which the PSIC tables in the House of Commons when there is wrongdoing found in the Public Sector (see subsection 38(3.1)).
October 6, 2011	The first decision of the Public Servants Disclosure Protection Tribunal is issued (***El-Helou v Courts Administration Service*, 2011 CanLII 93945 (CA PSDPT)**). It is an interlocutory decision regarding the jurisdiction of the Tribunal. The complainant's motion requested that the Tribunal review all the allegations in the complaint, even though most of these allegations were not referred to the Tribunal in the Commissioner's application. The Tribunal denies the motion. It states that Parliament clearly intended that the Commissioner perform a screening function to determine whether an application to the Tribunal is warranted and the Tribunal cannnot, on its own initiative, bypass this role. The Tribunal also states that its role is to determine whether or not reprisal has taken place. It does not judicially review the applications before it. Finally, the Tribunal notes that its decision on the motion does not preclude the possibility that it consider evidence pertaining to the allegations that were dismissed by the Commissioner.

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October 19, 2011	A second interlocutory decision of the Public Servants Disclosure Protection Tribunal is issued (***El-Helou v Courts Administration Service*, 2011 CanLII 93946 (CA PSDPT)**). It pertains to a motion for summary judgment. The Tribunal denies the motion, noting that it was premature. It considers the Commissioner's role as "gatekeeper" of complaints and the transparency and importance of the Tribunal proceedings once an application has been referred to it. It states that it would be too soon in the process to predetermine the outcome of the matter based only on the paper record of the screening function of the Commissioner and without a proceeding where the issues in the application could be fully heard.
November 25, 2011	A third decision of the Public Servants Disclosure Protection Tribunal is issued (***El-Helou v Courts Administration Service*, 2011 CanLII 93944 (CA PSDPT)**). It is an interlocutory decision which denies a motion to remove an individually-named respondent. The Tribunal states that the Act clearly affords the Commissioner the power to add parties to an application. In reviewing the provisions, it also states that it may be difficult, if not impossible, for a complainant to identify who may have committed the reprisal at the time the complaint is made. The identification of respondents by the OPSIC may only occur by way of a thorough and independent investigation. The Tribunal states that the respondent's motion is premature as there had not yet been any hearing on the matter. It reiterates what it had said in previous interlocutory decisions: that it is not within its power to judicially review the Commissioner's decisions as to what would and what would not be included in an application. Judicial review of the decisions of the Commissioner resides with the Federal Court.
December 20, 2011	A decision of the Public Servants Disclosure Protection Tribunal is issued (***El-Helou v Courts Administration Service*, 2011 CanLII 93947 (CA PSDPT)**). It is a fourth interlocutory decision regarding admissibility of evidence. The motion related to the admissibility of the investigators' evidence. The Tribunal finds that the motion is premature. The Tribunal states that it determines whether or not reprisal has taken place, within the meaning of the Act, on the balance of probabilities. It observes that the threshold that the Commissioner must meet to refer a complaint to the Tribunal in the form of an application is lower than the balance of probabilities. The Tribunal also states that the parties will have the opportunity to be heard and to advance their arguments in the ordinary course of its proceedings.
February 8, 2012	A decision of the Public Servants Disclosure Protection Tribunal is issued (***El-Helou v Courts Administration Service*, 2012 CanLII 30713**

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	(CA PSDPT)). It is an interlocutory decision regarding two motions to continue an interim confidentiality order. The motion was denied. The Tribunal points to jurisprudence which reconfirms the application of the open court principle in relation to court pleadings and evidence. It finds that, because the Tribunal proceedings are quasi-judicial in nature, the open court principle applies. It also notes that the wording of the Act does not restrict the application of the open court principle to its proceedings.
September 21, 2012	The Federal Court rendered the decision ***El-Helou v Courts Administration Service*** 2012 CF 1111. This was a judicial review of the decision by the Public Sector Integrity Commissioner dismissing two of the three allegations of reprisals made by Mr. El-Helou. The Tribunal refused to consider these allegations because they were not part of the Commissioner's referral application (see ***El-Helou v Courts Administration Services***, 2011 CanLII 93945 [CA PSDPT]). The court found that, notwithstanding the guarantees provided under the *Public Servants Disclosure Protection Act* and by the investigator, the applicant was denied procedural fairness. Since the investigator did not provide him with a copy of the investigator's report, nor did he provide him with an opportunity to comment on it, the applicant was not informed of the essential evidence; this was made worse by the breach of the investigator's explicit promise that the applicant would have the opportunity to comment on the report in question. Based on this, the court found that the investigator created a legitimate expectation that this would be the process followed in the investigation. The court also noted that the investigator breached his obligation to act fairly when, contrary to his statement, he did not address an allegation regarding a reprisal measure in his report. As a result, the Commissioner did not consider this allegation. For these reasons, the court allowed the application for judicial review, set aside the Commissioner's decision and remitted the matter to the Office of the Public Sector Integrity Commissioner for a new investigation.
March 25, 2013	The Public Servants Disclosure Protection Tribunal renders an interlocutory decision on a motion for adjournment in ***Lambert and Health Canada***, 2013-PT-01 (PSDPT). The employer had requested several extensions of time to either file its statement of particulars or postpone case management conferences. All of the employer's previous requests were granted by the Tribunal. Parties were informed of the scheduled hearing six months in advance. Two months prior to the hearing, the third counsel for the employer filed a motion for adjournment requesting that the hearing be postponed considering she needed time to prepare the

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	case. The employer argued that it needed this additional extension to exercise its right to a full and ample opportunity to participate in the proceeding. The employer further submitted that it was in the interest of procedural fairness and the expeditious conduct of the hearing to adjourn the proceeding. The Tribunal stated that adjournments would be granted for serious reasons that are beyond the control of the parties. The Tribunal discussed the criteria found in recent case law in order to balance the right to an expeditious proceeding and the right of the parties to procedural fairness. The Tribunal applied criteria such as: the parties' interests; the effect on the regime that protects public servants against reprisals; the number of previous adjournments granted; the length of time for which an adjournment has been sought; the other parties' consent; whether the adjournment would needlessly delay or impede the conduct of the proceedings; the amount of time already afforded the parties for preparation of the case; the efforts made by the parties to proceed expeditiously; the parties' conduct in being present and ready for the hearing; counsel's knowledge of, and experience with, similar proceedings; and specific factors to the Tribunal such as scheduling difficulties. The Tribunal found that denying the motion would not impede the employer's right to procedural fairness. The employer will have full and ample opportunity to consider, challenge, or contradict any evidence. Furthermore, the employer is fully aware of the nature of the allegations so as to have ample opportunity to present its case to ensure that no injustice was caused to it. Finally, the Tribunal found that there were no serious causes for delay in the hearing that were beyond the control of the employer. The motion was denied.
October 2, 2014	The Public Servants Disclosure Protection Tribunal renders an interlocutory decision on a motion for recusal of the presiding member due to an apparent bias in the **Blue Water Bridge Canada cases [*Blue Water Bridge Canada*, 2014-PT-01, 2014-PT-02, 2014-PT-03 (PSDPT)]**. The basis of the motion is that in preparing for the hearing, the presiding member had read some of the documents that had been filed with the Registrar of the Tribunal pursuant to its Rules of Procedures. It was alleged that because the presiding member had access to those documents and had read some of them before they were produced as evidence, an informed person having thought the matter through could not be confident that the member would be impartial. The moving party's concern is not that the member is

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	actually biased, but that the public would think there is an air of partiality, an appearance of bias. In his decision, the member sees nothing prejudicial in a requirement that documents be filed before their formal production at a hearing nor in his reading of some of the documents; based on case law, in particular *British Columbia in British Columbia Institute of Technology v. British Columbia Government Services Employee's Union*, [1995] BCCAAA No. 52, whether to consult the filed documentation is within a member's discretionary power. Further, other jurisdictions in Canada require the filing of documents prior to the hearing and, furthermore, a decision maker is sometimes called upon by a party to review certain documents in deciding whether they should be struck. Although there might be some fact specific circumstances which might lead an objective observer to come to a conclusion of apparent partiality in like cases, as a general proposition, it is not the case. Finally, the Tribunal does not take part in any investigations on reprisals; these are, pursuant to the Act, the sole jurisdiction of the Commissioner. It follows that it would be improper to make an analogy with the facts in *2747-3174 Québec Inc v. Québec (régie des permis d'alcool)*, [1996] 3 SCR 919 (SCC) and charge that the member took part in the investigation. The presumption of impartiality has not been rebutted. The motion is therefore denied.