"Whistleblowing Study"
ADDENDUM

Commissioned by
Industry Canada
Competition Bureau

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John Terry

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DELIVERED BY COURIER
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Mr. Don Mercer
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Dear Mr. Mercer:

Re: Whistleblowing Study

In my study, which I presented to the Director and to you and your colleagues on September 8, 1997, I summarised, for reasons which I had detailed earlier, the advantages and disadvantages of whistleblowing legislation as providing significant benefit to the Competition Bureau, and whether such legislation would help to encourage whistleblowers to co-operate with it.

In my study, the advantages and disadvantages were summarised as follows:

Advantages

1. *The legislative model provides express, clear statutory protection for employees who blow the whistle*. Currently, employees who are fired or disciplined for disclosing corporate wrongdoing can grieve to an arbitral board (if they are unionised), complain to an adjudicator (if they are covered by legislation such as the *Canada Labour Code*) or sue for wrongful dismissal. But many employees may be unaware of these remedies, and, therefore,

reluctant to bring forward complaints. By amending the *Competition Act* to protect whistleblowing employees, Parliament will send a clear message to employees that they will be protected if they blow the whistle.

2. *It can allow for reinstatement and punitive damages, not just compensatory damages.* Although unionised employees or those governed by statutes like the *Canada Labour Code* can be reinstated by an arbitral tribunal or adjudicator, the courts are very reluctant to order reinstatement in a case of wrongful dismissal. An amendment, such as Bill C-266, would ensure that employees who are fired for merely complying with the *Competition Act* could be reinstated. In addition, it would allow courts to award employees punitive damages, and is therefore likely to be taken seriously by employers.

3. *It could create a criminal offence for employers who take reprisals against an employee who blows the whistle.* Currently, employees can seek reinstatement or compensation from their employer. But employers are not guilty of an offence if they fire an employee for disclosing information to the Director. The creation of a criminal offence with the possibility of severe penalties would provide a very serious deterrent to corporations which consider taking disciplinary action against a whistleblowing employee.

4. *It encourages employees to report wrongdoing to the appropriate authorities, rather than to the media.* The whistleblowing cases that have arisen before arbitral tribunals in Canada have generally involved employees who disclose information to the public or the media, rather than those who notify law enforcement authorities. In general, it is more appropriate for employees to complain to enforcement authorities, so that steps can be taken quickly to deal with the matter and so that corporate reputations are not unfairly tarnished through possible exaggeration by the media. Because most whistleblowing legislation protects only employees who report disclosures to the authorities, it helps to

encourage employees to make responsible reports, rather than sensationalist media disclosures.

5. *If drafted to protect internal whistleblowing, legislation would encourage employees to raise complaints within firms before disclosing them to the Director or the media.* As discussed above, internal whistleblowing programs can often be more effective than external ones. Statutory amendments could be drafted to protect employees who raise complaints within the company. In addition, the legislation could require that the reporting first be internal, before the employee makes any report to the Director. The danger with the second approach is that many employees may be uncomfortable raising such issues within the company, unless it has a secure, confidential internal disclosure program. The first approach -- protecting the employees when they complain either internally or externally -- would offer employees a more effective choice as to which route to take.

6. *Some Canadian commentators have emphasized the need for adopting whistleblowing legislation.* Although they have called for broad whistleblowing legislation, their comments can be applied equally to statute-specific protections. For example, Myers and Matthews Lemieux, *supra,* argue at pp. 219-220:

> Given the importance of this issue to the protection of the public interests, and the fact that it is unlikely to become an issue that is easily dealt with at the bargaining table, Canadian legislators should show leadership by enacting appropriate legislation. **Since the common law does not provide for reinstatement of an employee in appropriate cases, the legislature must establish a tribunal not only to administer the provisions of the legislation, but also with wide remedial powers to provide damages for loss of income as well as reinstatement of employment and "make whole" remedies. ... A model Canadian statute must cover all employees in both the private and public sectors as well as any**

persons employed by the Crown and its agencies. While business is likely to argue that this is further unwarranted intrusion into the free enterprise system, it must be remembered that the whistleblower is usually acting in the public interest. As a result, such an employee should not have to totally risk his or her economic security without any protection from the state. Generally speaking, the broader the scope of coverage, the greater the protection for the individual employee.

This legislation should also address the type of acts of an employer which will be forbidden. It is the writers' view that any retaliatory conduct by an employer that is linked to the whistleblower's actions should be proscribed. Consequently, all disciplinary actions including discharge should be disallowed. In addition, the legislation should be broad enough to prohibit certain types of action which an employer may characterize as being non-disciplinary in order to avoid the legislation.

As well, the legislation must address the type of employee conduct that will be protected. Consistent with the purpose of the legislation, legislators must ensure that the legislation is not drafted so narrowly that only disclosure of extreme violations of federal and provincial laws will result in protection for the whistleblower. Therefore, it is suggested that an appropriate whistleblower's statute would allow employees to report not only illegal actions, but also actions which would be characterized as being unethical, immoral, etc. For example, it might not be illegal for a company to emit chemicals into the air or a water supply in certain concentrations. However, it would be unethical for a company to dump such chemicals in two different batches in order to lower the concentration to a level within the acceptable limit so as to defeat the purpose of health and safety or environmental protection

> legislation. Surely, there is a public interest in knowing about these circumstances which warrants protection of the whistleblower.
>
> There are several difficult issues which would have to be addressed in relation to this portion of the legislation. **First, when and in what circumstances must an employee exhaust all internal avenues before blowing the whistle, i.e., bringing the matter to the public's attention? Second, to whom should the information be disclosed? Although the statute must be broad enough to protect a wide range of employee action from employer retaliation, it is also reasonable to include in such a statute a denial of statutory protection if an employee knowingly makes a false accusation or otherwise acts in bad faith.** [Emphasis added]

Kenneth P. Swan, in his book *Whistleblowing Employee Loyalty and the Right to Criticize: An Arbitrator's Viewpoint,* also makes the case for legislative action. He states at p. 191:

> **Properly designed, statutory provisions relating to whistleblowers can assist in defining the kinds of disclosure that ought to be protected in the public interest, and can provide procedures for channelling the concerns of prospective whistleblowers so as to avoid the intolerable cost of the release of sensitive information in an honest but mistaken cause.** Some aspects of this approach will obviously be specific to the public sector, while others may have application across a broader spectrum of employment. Once the interests to be protected are identified, it becomes easier to design a structure which protects the interests of the concerned employee, the affected employer, and the public at large.

and at p. 198 concludes, in part, as follows:

> In my submission, the current employment law on the subject of whistleblowing is so far too amorphous to provide adequate protection either for well-meaning whistleblowers, or for sensitive information in the hands of governments. The paucity of reported cases, and the requirement that all determinations be made after the fact of disclosure, heighten the hazards of failing to come to grips with the issues of public policy involved.
>
> **A carefully drafted statutory protection for whistleblowers could ensure that information about alleged wrongdoing reaches the appropriate authorities, including eventually the legislature and the public, while minimizing the damage possible from precipitous release of sensitive information, and providing some source of advice and assistance for employees who are uncertain or may be mistaken about the wrongdoing they think they have encountered. Given the potentially beneficial outcome of the exercise of drafting statutory whistleblower protection, attention to this matter is long overdue. Our federal and provincial governments should act quickly to address these vital issues for the public service, the broader public sector, and for private employment.** [Emphasis added]

Disadvantages

1. *Employees who notify the Director about their employer's alleged anti-competitive conduct are already protected under statute and common law.* As discussed above, unionised employees can grieve to arbitral boards, employees governed by the *Canada Labour Code*, or similar statutes, can seek remedies before adjudicators, and other employees can sue for wrongful dismissal. In addition, employees can also make use of the 1-800 complaints hotline, and are protected under various confidentiality provisions. Although new statutory provisions may allow for higher damages to be obtained, or, as Swan suggests, may provide more

certainty for whistleblowers, they arguably add little to the protections already available.

2. *Although legislation may specifically authorize courts to order reinstatement, that is unlikely to be an appropriate remedy for whistleblowing employees.* As Kenneth Swan, *supra,* has said at p. 193:

> Often, there is clear evidence that the relationship of trust implicit in employment has been completely poisoned. No matter whose fault that poisoning may be, the continuance of the relationship may simply be impossible ... it is instructive that a significant number of the whistleblowers who have been at least partly vindicated by subsequent adjudicative proceedings no longer work for the employer whose conduct they criticized.

3. *As discussed above, the American experience suggests that specific legislative protections for whistleblowers have not been particularly effective, particularly if employees can already rely on common law remedies.*

4. *The public interest in whistleblowing in the competition law context may not be as strong as in an area such as the environment or occupational health and safety, where the life and health of the public is at stake.* The enforcement of competition law brings important benefits to consumers and to the economy in general. But violations of competition law do not impinge on the health and safety of Canadians in the same way as, for example, a toxic chemical spill or a dangerous workplace. Because of these differences, there may be less need to adopt special statutory whistleblower protections in the competition area than in other areas.

5. *As is always the case with policy implementation, it will take longer and be more difficult to enact a legislative amendment than to adopt a whistleblower protection policy through non-legislative means.*

I also summarised the advantages and disadvantages of adopting a non-legislative package of policies and initiatives which would educate employees about the protections they already have, and encourage employers to adopt internal compliance programs. The advantages and disadvantages of such a non-legislative model, which I had detailed earlier, were summarised as follows:

Advantages

1. *The non-legislative approach builds upon what is already available.* It does not require new legislation, so would avoid the procedural difficulties involved in enacting a legislative amendment. In fact, it does not even require new policies. What is required instead is an education program to inform employees and employers about the need to disclose information, the ways in which confidential disclosure can be achieved, the protections available to employees against reprisals, and the incentives for employers to establish internal disclosure programs.

2. *This approach avoids unnecessary duplication or inconsistent remedies.* It relies on existing provisions protecting the confidentiality and employment rights of whistleblowing employees.

3. *It relies primarily on internal disclosure, which American studies suggest is the most effective way to encourage employees to disclose information.*

4. *This approach, particularly the combination of compliance and immunity programs, has been used successfully by the Antitrust Division of the U.S. Department of Justice.*

Disadvantages

1. *The non-legislative approach offers little new incentive for employees who would rather not disclose wrongdoing to their employers.* Even if they are assured that they can grieve to get their job back, or sue for wrongful dismissal, many employees -- perhaps most -- will still be reluctant to risk disclosing evidence of wrongdoing without specific new statutory protections or a criminal prohibition.

2. *This approach will only encourage companies to adopt internal disclosure programs; it will not require them to do so.* Even with the incentives of amnesty or reduced sentences, it is unlikely that the majority of companies, especially small and medium-sized businesses, will commit the time and expense involved to put an effective compliance program into place.

3. *Because this approach relies on internal disclosure, it may allow serious Competition Act offences to remain hidden forever.* To use an example discussed earlier in the study, an employee may disclose evidence to his or her superiors that certain employees or departments within the organization have engaged in bid-rigging. The corporation may take steps to remedy the problem and the matter will end there. But if a serious violation of the *Act* has occurred and innocent third parties have been injured as a result of these activities, there is a strong argument that investigation and prosecution should occur.

4. *The non-legislative approach may not be viewed as strong or effective enough to respond to the concerns of consumers and Members of Parliament about retail gasoline pricing.*

In conclusion, I stated:

> Although there is much to be said in favour of legislation in the manner contemplated by Bill C-266, and as enacted in various statutes in the United States and Canada, I am not satisfied that such legislation would really provide a significant benefit to the Competition Bureau or would encourage whistleblowers to co-operate with the Bureau more than they do so now.
>
> I have set forth the main advantages of a legislative approach, but I note that, to date, such legislation appears to have had little impact in any of the jurisdictions which have resorted to it.

I favour a continuation of the non-legislative model which I have set forth earlier in this Study. As I have noted this builds upon what is already available.

What is required is, I think, an education initiative to inform employees and employers alike about the public duty, in appropriate cases, to disclose information, to inform employees and other members of the public about the existing hot line, the confidentiality provisions now in place, and the statutory and common law protections for employees who have been disciplined for blowing the whistle.

The education initiative should also stress to employers the importance of the immunity and the internal complaints programs, both of which have been used with particular success by the Antitrust Division of the U.S. Department of Justice.

Request for guidelines on legislation

At our meeting in Ottawa, I was asked to consider if, as a matter of policy, the Government of Canada felt it appropriate to pass whistleblowing legislation as an amendment to the *Competition Act* ("Act"), what important guidelines should be considered in the drafting of such legislation.

In response to your request, I have considered again the provisions of Bill C-266 (reproduced at Appendix D of my study), which provides an impressive starting point for considering legislation in this area.

In addition, I have re-examined the whistleblowing provisions in the *Canadian Environmental Protection Act*, R.S.C. 1985, c. C-15.3, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, the *Canada Labour Code*, R.S.C. 1985, c. L-2, Ontario's *Environmental Bill of Rights*, S.O. 1993, c. 28, Ontario's *Environmental Protection Act*, R.S.O. 1990, c. E.19 and Ontario's *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (all excerpted in Appendix A of my study).

I have also reviewed in particular the extensive whistleblowing provisions in Ontario's *Public Service and Labour Relations Statute Law*, S.O. 1993, c. 38 (excerpted in Appendix C of my study), which have been enacted but not yet proclaimed, and also took note of the recommendations made by Myers and Matthews Lemieux and Kenneth Swan, *supra*.

Guidelines for whistleblowing legislation

In my view, if the government decides to enact whistleblowing legislation as an amendment to the *Competition Act*, the legislation should contain the following *four* elements:

(i) a provision that clearly sets out the employee conduct that is protected (i.e. the whistleblower's "rights");

(ii) a broadly-worded provision prohibiting employers from retaliating against employees for exercising these "rights";

(iii) a provision that enables employees to apply to a labour relations tribunal or similar body for reinstatement, damages and/or punitive damages when their employer has retaliated against them for exercising their whistleblowing "rights"; and

(iv) a provision which states that employers who violate the prohibition in (ii) above are guilty of a criminal offence.

Bill C-266 also contains several provisions that are intended to protect the confidentiality of employees who disclose information to the Bureau. However, for reasons discussed below, I do not believe it is necessary to include these kinds of confidentiality provisions if new whistleblowing amendments are adopted.

In the rest of this addendum to my study, I discuss each of these four elements, as well as the issue of whether provisions on confidentiality should be adopted.

(i) A statement of whistleblowers "rights"

The first task in drafting a legislative amendment to protect whistleblowers under the *Competition Act* would be to determine what kinds of employee conduct should be protected. This determination should be undertaken carefully, since this provision will establish effectively the "rights" of whistleblowing employees. There are a variety of approaches one can take to defining the protected activities.

Proposed s. 64.2(2) of Bill C-266, for example, defines the protected activity as follows:

(a) the employee has notified or testified to the Commission that the employer or any other person to whom this Act applies has committed or intends to commit an offence under this Act;

(b) the employee has refused or stated an intention of refusing to do any thing that is an offence under this Act;

(c) the employee has done or stated an intention of doing any thing that is required to be done by this Act; or

(d) the employer believes that the employee will do any thing mentioned in paragraph (a) or (c) or will refuse to do any thing mentioned in paragraph (b).

Section 28.29(1) of Ontario's unproclaimed *Public Service and Labour Relations Statute Law* uses the following language:

(a) the employee, acting in good faith, has disclosed information to the [Counsel appointed to advise whistleblowing employees] under this Part; or

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

In my view, some combination of the proposed s. 64.2 of Bill C-266 and s. 28.29(1) of the Ontario legislation would be appropriate. In drafting the legislation, it is important to set out exactly what the protected activities are, so the employees know specifically what "rights" they have to report information and act, potentially against their employers, in compliance with the Act. In determining the parameters of an employee's whistleblowing "rights", I would offer the following guidelines.

Good faith The amendments proposed in Bill C-266 provide a good model for establishing the protected activities of whistleblowing employees. However, unlike s. 28.29 of the Ontario legislation described above and most of the American statutes described in Appendix B of my study, the proposed provisions of Bill C-266 contain no requirement that a whistleblowing employee act in *good faith* or on the basis of *reasonable belief*. This is an important omission, in my view, which would leave the provisions open to abuse by disgruntled employees. Surely, employers should not be prevented from disciplining an employee who has knowingly made a false accusation to the Director about his or her employer's conduct. Any whistleblowing amendment should require that an employee has acted in good faith or with a reasonable belief that an employer has violated the Act.

Activities beyond whistleblowing Proposed s. 64.2(2) of Bill C-266 prohibits employers from retaliating not only against employees who blow the whistle but also against employees who, presumably contrary to the employer's wishes, have

refused to commit an offence under the Act or done something required by the Act. This broad definition of protected employee conduct is consistent with most of the Canadian and U.S. legislation we have examined. In my view, although such activities are not strictly whistleblowing, they are the kinds of activities that are crucial steps in an employee's ultimate decision to blow the whistle. By protecting this kind of conduct, the legislation would encourage employees to speak out first within their workplace and thus help prevent employers from intimidating employees by taking retaliatory action prior to any whistleblowing taking place. So long as an employee is acting in good faith, it is appropriate to include these activities within the sphere of protection for whistleblowing employees.

Reporting employer actions that are not offences Proposed s. 64.2(2)(a) of Bill C-266 protects whistleblowing employees only when they have notified or testified that the employer has or intends to commit an *offence* under this Act. It appears to leave unprotected those employees who disclose information pertaining to the matters contained in other parts of the Act, such as the Part VIII provisions regarding restrictive trade practices, specialisation agreements, and mergers. In my view, limiting the protection in this way is overly restrictive and unfair to employees who in good faith disclose information to the Bureau about their employer's potentially anti-competitive conduct, but who are not sophisticated enough to understand the difference between the Act's offence and non-offence provisions. A legislative amendment should protect any employee who, acting in good faith or on reasonable belief, discloses information that pertains to his or her employer's activities under the Act.

Whistleblowing to the media or public Proposed s. 64.2(2)(a) of Bill C-266 protects whistleblowing employees only when they disclose information to the Act's enforcement authorities. This provision can be criticised on the ground that it does not protect employees who blow the whistle to the media or the public. In my view, however, it is appropriate to limit protection to employees who report to the Act's enforcement authorities. The protection should be designed to help enforce the *Competition Act*, not to enable employees to make claims to the press with, potentially, very little foundation. This will also help to ensure that any whistleblowing provisions can be applied to all corporations (not just federal undertakings), since they will clearly relate to the federal government's authority to enforce the Act under its trade and commerce and criminal law powers, rather being legislation in relation to labour relations, which falls within provincial jurisdiction.

Exhausting internal remedies One final issue to consider is whether the Act should require employees to exhaust their remedies within the corporation before they disclose information to the Act's enforcement authorities. As I discussed in detail in Part II of my study, many Canadian arbitral judgments dealing with whistleblowing employees have made it clear that an employee should try to resolve the matter internally before blowing the whistle. As I also discussed in Part III (C) and (D) of the study, corporate compliance and immunity policies in both Canada and

the United States encourage corporations to establish mechanisms to enable employees to confidentially bring forth complaints within the corporation. In my view, however, unless a corporation has an effective internal reporting mechanism that ensures confidentiality, this kind of internal reporting requirement will discourage many employees from ever reporting violations of the Act. In addition, as I stated at p. 38 of my study:

> ...the idea that problems can be reported and remedied internally, with no involvement from outside authorities, may not always be appropriate when an alleged criminal offence is involved. Suppose, for example, that an employee has strong evidence that his or her firm has engaged in bid-rigging. The employee takes the matter up with the firm's internal ombudsperson, who confirms the allegations and helps take whatever steps are necessary to ensure it will not happen again. But it can be argued that the matter should not end there. If a serious violation of the *Competition Act* has occurred, there is a strong argument that it should be properly investigated and prosecuted.

In short, I do not recommend that the Act should require employees to exhaust their remedies within the corporation before they disclose information to the Act's enforcement authorities.

(ii) A broadly worded prohibition against employer retaliation

Once the parameters of the protected whistleblowing activity have been defined, the next step in any legislative amendment is to prohibit any retaliatory measures by an employer that interfere with the protected activity. The federal and provincial legislative examples I have examined all take a broad approach to defining the kinds of employer retaliation that are prohibited.

The relevant provision in s. 64.2(2) of Bill C-266, for example, states:

> "No person shall dismiss, suspend, demote, discipline, remove a benefit or privilege of employment from, terminate the contract of, harass, coerce or otherwise disadvantage an employee on the grounds that ..."

Section 50(1) of Ontario's *Health and Safety Act* provides:

> "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, ..."

Section 28.29(1) of the *Public Service and Labour Relations Statute Law* prohibits an institution or person acting on behalf of an institution from taking "adverse employment action" against a whistleblowing employee.

In my view, this broad definition of the prohibited employer activities is appropriate, whether accomplished by means of a long list of prohibited acts as in Bill C-266 or defined broadly as "any adverse employment action". As M. Myers and V.J. Matthews Lemieux state, in "Whistleblowing Employee Loyalty and the Right to Criticize -- The Employee's Perspective", in W. Kaplan, J. Sack and M. Gunderson, eds., *Labour Arbitration Yearbook* (1991) 211 at p. 220,

> It is the writers' view that any retaliatory conduct by an employer that is linked to the whistleblower's actions should be proscribed. Consequently, all disciplinary actions including discharge should be disallowed. In addition, the legislation should be broad enough to prohibit certain types of action which an employer may characterize as being non-disciplinary in order to avoid the legislation.

(iii) Civil remedies

As I described in my study, whistleblowing employees in Canada already have certain remedies available to them if they are retaliated against by their employers. Unionised employees, and those subject to the *Canada Labour Code* or similar legislation, can apply for reinstatement or for damages. Others can bring an action in the courts seeking damages for wrongful dismissal. In any legislative amendment to the *Competition Act*, it is crucial that a tribunal be able to provide a broad range of remedies, including compensatory damages, punitive damages and reinstatement.

Once again, the provisions of Bill C-266 and Ontario's *Public Service and Labour Relations Statute Law* provide good examples of remedies provisions.

Proposed ss. 36(1) and 36(1.1) of Bill C-266 state that, in addition to making general damages awards, the court may make an order:

(a) to remedy or reverse any action taken by the employer that is the basis of the action; or

(b) to pay punitive damages to the employee.

Section 28.30 of the *Public Service and Labour Relations Statute Law* provides:

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

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

(a) an order directing the institution or person acting on behalf of the institution to cease doing the act or acts complained of;

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

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

But while it is relatively easy to list the remedies that should be available to employees whose whistleblowing "rights" have been violated, it is harder to determine what institution should be responsible for assessing whether a violation has occurred, and for granting the necessary relief. There are a number of options.

The approach taken in Bill C-266 is to give the courts jurisdiction over these issues, since they already have jurisdiction under s. 36 of the Act over actions brought by persons who have allegedly suffered loss or damage as a result of a violation of the Act. However, I have doubts as to whether the courts are the appropriate institution to deal with the claims of whistleblowers. The courts have ample experience and expertise in dealing with issues of wrongful dismissal. But they

have little experience with reinstatement, and court procedures can be more cumbersome and more expensive for employees than those of tribunals or other bodies.

Another option would be to create an office within the Competition Bureau to handle complaints from whistleblowers who have been retaliated against by their employers. But that would undoubtedly be costly to administer and could hardly be considered to be a neutral forum, in view of the fact that the whistleblowing employees would have been assisting the Bureau in enforcing the Act.

The whistleblowing provisions in Ontario's *Environmental Bill of Rights* and *Environmental Protection Act* designate the Ontario Labour Relations Board to hear employee complaints and determine remedies, while Ontario's *Occupational Health and Safety Act* and the unproclaimed provisions of the *Public Service and Labour Relations Statute Law* allow employees to choose between the Ontario Labour Relations Board or arbitration under their collective agreement, if they are covered by one.

The best course, in my view, is to give the jurisdiction to the Canada Labour Relations Board or an adjudicator under the *Canada Labour Code*. This remedy would take advantage of the expertise, and relative speed and autonomy of these institutions.

(iv) A criminal offence

Proposed s. 64.2(3) of Bill C-266 creates a criminal offence for employers who retaliate against employees for exercising their whistleblowing "rights". It states:

> "Every one who contravenes subsection (2) is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding two years or to both."

Section 28.29(3) of Ontario's *Public Services and Labour Relations Statute Law* also creates an offence, although a prosecution is not to be brought without the consent of the Ontario Labour Relations Board. This section states:

> "(3) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine of not more than $5,000.
>
> (4) A prosecution under this section shall not be commenced without the consent of the Board.

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

In my view, it is appropriate to treat an employer's retaliation against a whistleblowing employee as a criminal offence. Given the prospect of a criminal prosecution and potential liability for a large fine or even a jail term, employers are likely to take any new whistleblowing provisions very seriously, as they should. The decision to initiate a prosecution will lie with the federal Attorney General. However, the Director could have a role in recommending whether or not to prosecute, just as he does with respect to other offences under the Act.

(v) No need for confidentiality provisions

In order to encourage employees to disclose information concerning their employer's wrongdoing to the Director of the Competition Bureau, there must be some assurance that their identity will be protected. Bill C-266 contains several provisions -- proposed s. 64.1 of the Bill -- that are intended to protect whistleblowing employees' confidentiality. But it is questionable whether those provisions are needed given some of the other provisions of the Act.

In my study, at p. 14, I described the existing confidentiality provisions under the *Competition Act* as follows:

> The process for receiving and investigating complaints under the *Competition Act* has a number of safeguards to protect the confidentiality of informants.
>
> First, the Competition Bureau has established a 1-800 hotline that enables any member of the public to complain, either anonymously or not, about an alleged violation of the Act. The toll free line, introduced in the summer of 1995, allows individuals to contact the Bureau 24 hours a day from across Canada. A special unit has been created to answer and respond to these calls. According to figures as of October 1996, the Bureau has received a very high number of calls, between 900 and 1000 calls each week requesting information or filing a complaint. While this service is available for all Canadians, it provides an important means for employees to anonymously register complaints with the Bureau.

> Second, where employee informants make their identities known to the Bureau, the Act contains a number of provisions designed to help protect their confidentiality. Section 29 of the Act prohibits any person enforcing or administering the *Competition* Act from communicating the names of informants to any person other than a Canadian law enforcement agency. Section 10(3) of the Act provides that the Director's inquiries shall be conducted in private. Finally, like other police informants, an employee providing information on a confidential basis in a Competition Bureau investigation is protected by the police informer privilege.

I also stated at p. 14 that,

> ... these safeguards are by no means fool-proof. Even if the identity of an employee informer remains confidential, an employer subject to an investigation may be able to guess the identity of the informant, on the basis of the employee's knowledge, responsibilities and/or past actions. In addition, if the investigation proceeds to trial, and the employee is required to appear as a material witness, the employee's identity will be disclosed.

But even with the strongest and most comprehensive confidentiality provisions, it is impossible to keep employers from guessing a whistleblower's identity or taking reprisals against a whistleblower who testifies at trial. These problems are likely to be dealt with best not by including new confidentiality provisions but by strengthening the remedies for whistleblowers whose employer has retaliated against them, as discussed above.

More importantly, I am concerned that the provisions of proposed s. 64.1 may actually weaken, rather than strengthen, employees' existing rights. In discussing this proposed new section at page 47 of my study, I noted that:

> Subsection (3), which allows the Director to disclose the informant's identity if the employee has knowingly provided false information, is a troubling provision. The police informer privilege has always had one exception only -- the informant's identity can be disclosed where it is necessary to demonstrate the innocence of the accused (see *R. v. Leipert*, [1997] 1 S.C.R. 281, 295). The police informer privilege is not waived merely because the

> informant is found to have knowingly provided false information. In my view, the same principles should apply to any confidentiality protections under the *Competition Act*. To discourage mischievous employees, it may be appropriate to deny protection from reprisals to persons who knowingly provide false tips to the Director. But it is draconian to apply the same principles to the confidentiality provisions, and deny informants the full protection they would enjoy under the common law.

To sum up, I do not believe that a provision such as the proposed s. 64.1 of Bill C-266 respecting confidentiality is necessary. Ample guarantees of confidentiality are already provided for under ss. 10(3) and 29 of the Act and pursuant to the police informer privilege. Provisions similar to those in s. 64.1(1) and (2) could be harmlessly included if the government wants to highlight the confidentiality provisions to provide additional encouragement for employees to bring forward complaints. But if the proposed s. 64.1 is included in new legislation, in my opinion, it should not include ss. (3).

Conclusion

I hope the foregoing is of some assistance to you. I will be pleased to respond to any queries you may have about what I have set forth. However, even if legislative action is taken, the non-legislative steps presently being pursued, and referred to in my study, should continue.

All of which is respectfully submitted.

Yours very truly,

Charles L. Dubin