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The Basics of Whistleblowing and Reprisal

Public Servants Disclosure Protection Tribunal Canada

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This document serves to introduce the concepts of whistleblowing and reprisal in both a general and legal context. The views expressed in this document do not necessarily reflect those of the Tribunal or its members. This document is provided for information purposes only.

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The Basics of Whistleblowing and Reprisal

What is Whistleblowing?

Ordinary Meaning

Whistleblowing has been defined in ordinary terms as follows:

> The disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.[1]

Whistleblowing in the Legal Context

Statutes and court cases tend to use terms such as **"public interest disclosure"** or **"disclosure of wrongdoing"** instead of the term "whistleblowing".

There is a long-standing principle that public servants owe a duty of loyalty to the Government of Canada. This means that public servants must exercise restraint in making public criticisms of the Government of Canada.[2.] This duty has been discussed in several court cases which are analyzed below. Essentially, this duty relates to the importance and necessity of an impartial and effective public service.[3]

There has been much debate in the courts about the balance between the right of freedom of expression (ss 2(b)) guaranteed by the *Canadian Charter of Rights and Freedoms*

[1] Janet P Near & Marcia P Micelli, "Organizational Dissidence: The Case of Whistle-Blowing" (1985) 4 Journal of Business Ethics 1 at 4.
[2] *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455 [Fraser] (available at : http://scc.lexum.org/en/1985/1985scr2-455/1985scr2-455.html)
[3] *Ibid, supra* note 2, paragraph 21.

(the *Charter*)[4] and the duty of loyalty. As Ralph Nader put it, "at what point should an employee resolve that allegiance to society … must supersede allegiance to the organization's policies…and then act on that resolve by informing outsiders or legal authorities?"[5]

Although this question is difficult to answer, there is a consensus that the duty of loyalty is not absolute and that certain circumstances do indeed justify breaching this duty. Defining these circumstances has therefore become the challenge in Canadian courts and tribunals.

Sources of Law

In legal language, the issue of whistleblowing may be addressed in two key sources: statutes and decisions of judges. The development of the law of whistleblowing in both of these sources is traced below.

a) Court Cases: Pre-Charter

Although the law pertaining to the disclosure of wrongdoing is a relatively new field, the dialogue in the courts pertaining to an employee's ability to protect the public by disclosing wrongdoing is several decades old. In 1981, J.M. Weiler, an arbitrator at the time, discussed the general issue of reporting wrongdoing in the context of the public service. In that decision, *Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees Union*, he has this to say about the balance between freedom of expression and the duty of loyalty:

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[4] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, 1982 [*Charter*].
[5] Ralph Nader, "An Anatomy of Whistle Blowing" in Ralph Nader, Peter J Petkas & Kate Blackwell, eds. *Whistle Blowing: The Report of the Conference on Professional Responsibility* (New York: Grossman, 1972), 3 at 5.

> 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. An employee need not, in every circumstance, follow Cervantes' advice, "A closed mouth gathers no flies." The duty of fidelity does not mean that the Daniel Ellsbergs and Karen Silkwoods of the world must remain silent when they discover wrongdoing occurring at their place of employment. Neither the public nor the employer's long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment to the attention of those who can correct such wrongdoing.[6]

In 1985, the Supreme Court of Canada established the foundation for the defense of whistleblowing in *Fraser.*[7] The Court acknowledged the importance of freedom of expression, but ultimately did not find that the defense of whistleblowing could be upheld in this case.

The Supreme Court identified three circumstances in which a public servant may put freedom of expression above the duty of loyalty in order to make disclosures of wrongdoing by other public servants:

1) if an individual was engaged in **illegal acts**;
2) if the policy in place **jeopardized the life, health or safety of individuals**; and
3) if the disclosure made by the public servant did not have an impact on his or her **ability, or on the perception of that ability, to effectively perform his or her duties.**[8] (emphasis added)

In order to determine whether there was an impact with respect to a public servant's ability to perform his or her duties (real or perceived), the Courts will look at possible

[6] *Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees Union* (1981), 3 LAC (3d) 140 at 162-163.
[7] *Fraser, supra* note 2.
[8] *Ibid, supra* note 2*,* paragraph 41.

impairment to perform both his or her specific job as well as any public service job. In some circumstances, an inference of impairment can be drawn without the need for direct evidence.[9]

Since *Fraser,* the courts have also identified relevant factors for determining whether the above conditions are met in a given situation:

- the *substance* of the criticism;
- the *context* of the criticism (the frequency and the forum or media in which it is made);
- the *form* of the criticism (the manner in which the criticism is expressed);[10]
- the *position and visibility* of the public servant;[11]
- the degree to which a public servant can prove an allegation;[12]
- whether the public servant takes steps to determine the facts before making public criticism;[13]
- whether the public servant raises concerns internally and uses internal mechanisms before making public criticism;[14]
- whether the public criticism is based merely on a policy disagreement;[15] and
- attribution of *inappropriate motives.*[16] (emphasis added)

If the disclosure of wrongdoing in question does not fit into one of the three identified circumstances, and taking into account the above-listed factors, the public servant may be subject to disciplinary action, including dismissal.

[9] *Ibid*, paragraph 48.
[10] *Fraser, supra* note 2*,* paragraph 48 and 50.
[11] *Ibid,* paragraph 38.
[12] *Read v Canada (AG),* 2005 FC 798 at paragraph 100 (available on CanLII: http://canlii.ca/t/1kx5v).
[13] *Haydon v Canada (Treasury Board)* [2004] FC 749, [2005] 1 FCR 511, paragraph 63 [*Haydon 2*], upheld by the Federal Court of Appeal, 2005 FCA 249 (available on CanLII: http://canlii.ca/t/1l470).
[14] *Haydon v Canada*, [2001] 2 FC 82 at paragraph 120 [*Haydon 1*], *Haydon 2 ibid*, paragraph 47, *Read, supra* note 10*,* paragraph 123 (available on CanLII: http://decisions.fct-cf.gc.ca/en/2000/t-199-99_15866/t-199-99.html).
[15] *Stenhouse v Canada (Attorney General)*, 2004 FC 375, [2004] 4 FCR 437, paragraph 39 (available on CanLII: http://canlii.ca/t/1gqgb).
[16] *Chopra v Canada (Treasury Board)*, 2005 FC 958, [*Chopra No. 2*], paragraph 44 (available on CanLII: http://canlii.ca/t/1l5p0).

b) Court Cases: Post-Charter

The facts that gave rise to the *Fraser* decision occurred before the *Charter* came into place. Before the *Charter*, freedom of expression was simply characterized as a deep-rooted democratic value. When the *Charter* was passed, the right to freedom of expression was officially enshrined under section 2:

> **2.** Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> **(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;**
> (c) freedom of peaceful assembly; and
> (d) freedom of association.[17] (emphasis added)

As a result, from that time on, any discussion around whistleblowing, freedom of expression and the duty of loyalty had to consider the *Charter* and the right to freedom of expression enshrined in section 2. In addition, section 1 of the *Charter* had to be taken into consideration.

As a general rule, rights guaranteed under the *Charter* can only very rarely be infringed, and if infringed, are subject to the reasonable limits of a democratic society. Section 1 of the *Charter* describes the test that the courts must consider in determining whether a *Charter* right should be infringed. That provision states that:

> **1.** The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it **subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.**[18] (emphasis added)

[17] *Charter*, *supra* note 4, section 2.
[18] *Ibid*, section 1.

In *Haydon 1*, a post-*Charter* decision, the Federal Court discussed the duty of loyalty and the right to freedom of expression in the context of the Charter. The Court stated 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.*[19]

Therefore the duty of loyalty, generally speaking, is a reasonable limit on the right to freedom of expression. In other words, it is generally accepted that the duty of loyalty is a good enough reason to infringe on the right to freedom of expression – but there are exceptions.

The rules set out in *Fraser* are still used to guide tribunals and courts as to when the right to freedom of expression should *not* be limited by this duty.

Several other cases have gone before the courts on the issue of whether or not there was whistleblowing. The analysis in those cases has generally required that if whistleblowing was found to have occurred, the next question was whether or not the disclosure was a reasonable limit under the *Charter*. These cases have considered many factors, such as:

- the content, accuracy or truthfulness of the criticism or information in question;
- the sensitivity of the information;
- the manner in which the criticism was made public;
- the extent to which the employer's reputation and ability to conduct its business was compromised; and
- the interest of the public in the information.

[19] *Haydon I, supra* note 14, paragraph 89. This conclusion was later quoted in *Haydon 2, supra* note 11.

Issues pertaining to reprisal and whistleblowing can be raised in a variety of fact situations and contexts. Here are some examples:

- providing information on RCMP investigations to a writer on apparent immigration fraud;[20]
- providing information to a journalist writing a book about motorcycle gangs;[21]
- commenting on a department's ban based on public health and suggesting a political pretext;[22]
- attributing questionable motives to a minister and his department;[23] and
- disclosure by a union official regarding the border system.[24]

c) Whistleblowing Legislation

The first **federal statute** that addresses whistleblowing and reprisal in a comprehensive fashion is the ***Public Servants Disclosure Protection Act*** .[25] This Act was passed in 2007. While principles from *Fraser* and *Haydon* are expressed in this statute, this legislation also provides a very comprehensive framework for looking at whistleblowing, reprisal, and the avenues for making a disclosure of wrongdoing.

Section 8 of the act expands upon the circumstances set out in *Fraser*, by defining a wrongdoing as any of the following:

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[20] *Read, supra* note 10.
[21] *Stenhouse, supra* note 15.
[22] *Haydon II, supra* note 13.
[23] *Chopra*, *supra* note 16.
[24] *King v Treasury Board (Canada Border Services Agency)* 2008 PSLRB 64 (available on CanLII: http://canlii.ca/t/21zs4).
[25] *Public Servants Disclosure Protection Act,* S.C. 2005, c. 46 [the *Act* or the *PSDPA*].

- a misuse of public funds or a public asset;
- a gross mismanagement in the public sector;
- an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment;
- a serious breach of a code of conduct established under the Act; and
- knowingly directing or counselling a person to commit any of these wrongdoings.

In addition to the above expansion of the definition of 'wrongdoing', the Act also does the following:

- builds upon the "whistleblower defence" discussed in the cases mentioned above;
- confirms the need to consider the duty of loyalty owed by public servants as well as the primacy of freedom of expression;
- establishes the **Public Servants Disclosure Protection Tribunal** (Tribunal). The creation of the Tribunal means that the Commissioner may now apply to it where "warranted" (subsection 20.4(1)) for a determination as to whether or not reprisal was taken; and
- allows the Tribunal to grant an order of remedy in favour of a complainant as well as an order of disciplinary action against any person who was determined by it to have taken a reprisal (subsections 21.4(1) and 21.5(4)).

As stated by the Tribunal in *El-Helou v Courts Administration Service* (*2011-PT-01*):[26]

> the *Act* creates a much broader system for disclosure protection within the public service at several junctures and at different levels: **internally** to a supervisor or to the departmental Senior Officer (section 12) of a department or agency; **externally** to the Commissioner (section 13); or where there is not sufficient time to disclose a serious offence under Canadian legislation or an imminent risk of a

[26] *El-Helou v Courts Administration Service,* 2011 PT 01 [*El-Helou 1*]. (available at: http://www.psdpt-tpfd.gc.ca/CasesAffaires/2011-01/Documents/El-Helou%20-%20Interlocutory%20Decision%20on%20the%20Tribunal's%20Jurisdiction.pdf)

substantial and specific danger, the disclosure may be made to the public (subsection 16(1)) [emphasis added].[27]

What is a reprisal?

Ordinary meaning

The Oxford Dictionary defines a reprisal as "an act of retaliation".[28]

Reprisal in the Legal Context

a) The Public Servants Disclosure Protection Act

Section 2 of the Act defines a reprisal as:

> *"reprisal"* means any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33 [Section 33 is the provision in the Act allowing the Commissioner to commence an investigation into a reported wrongdoing].[29]
>
> (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).

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[27] *Ibid,* paragraph 47.

[28] Online Oxford Dictionary, accessed October 21st, 2011: http://oxforddictionaries.com/definition/reprisal.

[29] Section 33 of the *Act* reads:

33. *(1) If, during the course of an investigation or as a result of any information provided to the Commissioner by a person who is not a public servant, the Commissioner has reason to believe that another wrongdoing, or a*

As stated in the decision issued by the Tribunal, *El-Helou v Courts Administration Service* (*2011-PT-02*): "the definition of 'reprisal' is worded in such a way that a multitude of subtle and incremental issues can be examined".[30]

b) Public Servants Disclosure Protection Tribunal Decisions

As mentioned above, the Act provides for the creation of this Tribunal to hear cases on reprisal referred to it by the Commissioner.

As highlighted in *2011-PT-01*, "the Tribunal recognizes that it must play its role to ensure that this new legislative scheme not be "enfeebled".[31] In the same decision the Tribunal highlights that its jurisdiction is conferred by the application made by the Commissioner.[32]

However, once the Application has been referred to the Tribunal, the Tribunal plays a full adjudicative function with full powers of inquiry. It is up to the Tribunal to decide whether or not reprisal has occurred within the meaning of the Act. This adjudicative function emphasizes the importance that the parties be heard.

In *2011-PT-01* the Tribunal states that, "[t]his is confirmed in several provisions of the Act which emphasize the central importance afforded to the parties being heard, and of the right of this Tribunal to conduct a hearing with the full powers of inquiry of federally appointed

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wrongdoing, as the case may be, has been committed, he or she may, subject to sections 23 and 24, commence an investigation into the wrongdoing if he or she believes on reasonable grounds that the public interest requires an investigation. The provisions of this Act applicable to investigations commenced as the result of a disclosure apply to investigations commenced under this section.

Restriction

(2) The Commissioner may not, in the course of an investigation commenced under subsection (1), use a confidence of the Queen's Privy Council for Canada in respect of which subsection 39(1) of the Canada Evidence Act applies, or information that is subject to solicitor-client privilege, if the confidence or information is disclosed to the Commissioner.

[32] *Ibid* at paragraphs 81-82.

judges".[33] It should be underscored that Tribunal hearings are full hearings of evidence rather than simply reviews of the Commissioner's inquiry. It is also noteworthy that when the Tribunal has made an order relating to reprisal, an employer or any person may request that this order be filed in Federal Court to ensure its enforceability.[34]

Concluding Remarks

The above text provides a brief background into the areas of whistleblowing and reprisal as well as the Tribunal's role in this area of the law. For further information on these topics, as well as on the Tribunal itself, please refer to the Tribunal's website.

[33] *Ibid, supra* note 11 at paragraph 31.
[34] *Ibid.*