

Discussion Paper on Proposed Amendments to the *Employment Standards Act*

Purpose

The Office of the Third Party is seeking public input on a proposed Private Member's Bill to amend the *Employment Standards Act* to provide improved whistleblower protection to employees working in the private sector.

Background

In May 2017, the government of PEI introduced Bill 76, The Public Interest Disclosure and Whistleblower Protection Act. The purpose of the bill is to provide members of the provincial public service with a process to disclose wrongdoing within the public service and to protect them from reprisals if they make a disclosure. With the introduction and eventual passage of this bill, public service employees will be given important protections so they can safely report wrongdoing and act in the public interest.

Members of the private sector do not have similar protections. There are limited protections under the *Employment Standards Act* and the *Occupational Health and Safety Act* that indicate that an employer cannot take reprisals on an employee who reports violations of those specific acts, but there is no overarching protection for employees who may disclose violations of other provincial or federal acts.

When addressing the issue of whistleblowing, it is essential to find a balance between an employee's duty of loyalty and confidentiality to their employer and the overall public interest in having wrongdoing disclosed. There are many examples where the public interest or public safety would be served by a timely disclosure of wrongdoing. Whether the issue is selling tobacco to minors or failing to meet health code standards or ensuring the safe use of pesticides or meeting necessary building standards, the well-being of the public is contingent on businesses large and small adhering to statutes and regulations. Yet, there is also legitimate concern that new protections might be used by employees who are lodging frivolous or vexatious complaints. Any new legislation needs to balance the needs of employers, employees and the public good.

Cross Jurisdictional Research

Although most provinces and territories have "whistleblower legislation" to protect public sector employees, only two provinces provide broad protections to private sector whistleblowers: Saskatchewan and New Brunswick.

Saskatchewan

Saskatchewan provides general protections to employees under Section 74 of the *Labour Standards Act*.

74(1) No employer shall discharge or threaten to discharge, take any reprisal against or in any manner discriminate against an employee because the employee:

- (a) has reported or proposed to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada; or
- (b) has testified or may be called on to testify in an investigation or proceeding pursuant to an Act or an Act of the Parliament of Canada.

(2) Subsection (1) does not apply where the actions of an employee are vexatious.

(3) In this section, “**lawful authority**” means:

- (a) any police or law enforcement agency with respect to an offence within its power to investigate;
- (b) any person whose duties include the enforcement of federal or provincial law with respect to an offence within his or her power to investigate; or
- (c) any person directly or indirectly responsible for supervising the employee. 1994, c.39, s.41; 2005, c.16, s.8.

New Brunswick

New Brunswick provides general protections to employees under Section 28 of the *Employment Standards Act*

28. Notwithstanding anything in this Act an employer shall not dismiss, suspend, lay off, penalize, discipline or discriminate against an employee if the reason therefor is related in any way to

- (a) the application by an employee for any leave to which the employee is entitled under this Act;
- (b) the making of a complaint or the giving of information or evidence by the employee against the employer with respect to any matter covered by this Act; or
- (c) the giving of information or evidence by the employee against the employer with respect to the alleged violation of any Provincial or federal Act or regulation by the employer while carrying on the employer’s business;

or if the dismissal, suspension, layoff, penalty, discipline or discrimination constitutes in any way an attempt by the employer to evade any responsibility imposed upon him under this Act or any other Provincial or federal Act or regulation or to prevent or inhibit an employee from taking advantage of any right or benefit granted to him under this Act.

1988, c.59, s.9

Criminal Code of Canada

Section 425.1 of the Criminal Code of Canada makes it a criminal offence for an employer to take disciplinary action against an employee who reports wrongdoing to lawful authorities. Although

introduced in 2004, as of 2016 “there do not appear to have been any criminal prosecutions of employers for violating Criminal Code, section 425.1.”¹

425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,

(a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

(b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.

Punishment

(2) Any one who contravenes subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

Proposed Amendment

The Office of the Third Party is proposing that an amendment be made to Prince Edward Island’s *Employment Standards Act*, similar to Section 74 of Saskatchewan’s *Labour Standards Act*.

The advantages of this model are:

- 1) It will only protect employees who make disclosures about offences or potential offences to lawful authorities, so for example an employee who disclosed wrongdoing to the media would not be protected. By limiting protected disclosures to “lawful authorities,” it means that disclosures must be made to bodies that are subject to strict rules to protect the privacy of all interested parties. In that way it lessens the breach of the employee’s duty of loyalty and confidentiality to their employer by only protecting disclosures made to authorities who are also bound by a duty of confidentiality.
- 2) It defines “lawful authority” broadly to include a direct or indirect supervisor of the employee. This will protect the employee if the disclosure is made internally within the organization, and will help to create an environment where incidents can be resolved internally.
- 3) It clearly states the employee will not be protected should the disclosure be considered vexatious.

¹ John P McEvoy, “The Legal Response to Whistleblowing in Canada: Managing Disclosures by the ‘Up the Ladder’ Principle” in G. Thusing and G Forst (eds), *Whistleblowing: A Comparative Study*, Springer International Publishing, 2016.

Comments Requested

The Office of the Third Party is seeking public input on this proposed amendment.

Responses to this discussion paper may be made public, but can be made anonymously if desired.

Responses will be used to evaluate the proposed legislation and to assess whether there are alternative or other regulatory measures that should be considered.

Please feel free to share your viewpoints or perspectives. Comments should be provided in writing to:

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or by email to jlmackinnon@assembly.pe.ca

or you may call 902-620-3977 to set up an in-person meeting.

Deadline for comments is Friday, October 27, 2017.