



CENTRE FOR LAW  
AND DEMOCRACY

## *Canada*

# **Note on the Newfoundland Public Interest and Whistleblower Protection Act**

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## ***Introduction***<sup>1</sup>

In 1994 Jeffrey Wigand, a former executive of tobacco giant Brown & Williamson, decided to breach his confidentiality agreement to tell the public about the company's ongoing attempts to mask the harmful health effects of its products, including the use of carcinogenic flavour enhancers. Wigand's revelations provided evidence of active complicity by the tobacco industry in millions of deaths, and he was widely lauded for his moral stand. However, he paid a significant personal price, including threats, intimidation, and a lawsuit against him by his former employer.

Whistleblowers like Mr. Wigand have played a crucial role in exposing some of the biggest scandals in recent history. There is a clear public interest in allowing these voices to be heard and in ensuring that they do not suffer retribution for reporting misconduct. The importance of whistleblowers has been clearly recognised internationally. Article 33 of the *United Nations Convention Against Corruption*, for example, which Canada ratified on 2 October 2007, obliges States to consider appropriate measures to provide protection against "unjustified treatment" of those who report information about wrongdoing "in good faith and on reasonable grounds".<sup>2</sup>

From this perspective, the decision by Newfoundland and Labrador's House of Assembly to consider the Public Interest and Whistleblower Protection Act (Bill 1) is a welcome development, although it is worth noting that this legislation is long overdue. Canada and fully eight of the nine other provinces have already established legal protections for whistleblowers (with dedicated legislation in Canada and Alberta, Manitoba, Ontario, New Brunswick, Nova Scotia and Saskatchewan, and rules in Quebec and Prince Edward Island in, respectively, the Anti-Corruption Act and the Freedom of Information and Protection of Privacy Act).

While Bill 1 is in principle very welcome, the current draft has several shortcomings when considered in the context of international human rights standards, as well as better practice in Canadian and other jurisdictions. The most serious shortcoming is the failure of Bill 1 to protect employees who report wrongdoing in the private sector. The fact that Bill 1 exempts deliberations of the Executive Council from its ambit is also a major problem, especially given that this legislation only applies to

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<sup>2</sup> General Assembly Resolution 58/4 of 31 October 2003, entered into force 14 December 2005. Available at: <https://www.unodc.org/unodc/en/treaties/CAC/>.

serious wrongdoing or threats. Bill 1 could also be improved by allowing, as other Canadian jurisdictions do, for disclosures of information directly to the public under exigent circumstances, and by broadening the scope of wrongdoing which it covers.

In considering this issue, it is important to understand both the role of and the barriers to whistleblowing. The role is to serve as an information safety valve, whereby protection is provided for disclosures of information of overriding public importance, so that an effective solution may be found to the wrongdoing or threats that these disclosures expose. The barriers to engaging this protection are formidable. The onus falls largely on employees who take the brave step of exposing wrongdoing and who suffer consequences as a result to engage the protections provided by the law. While there are sanctions for abuse, experience in other jurisdictions shows that these are rarely engaged and that, rather, legitimate whistleblowers often have to go through long struggles to have their rights restored.

As a result of these factors, there is a far greater risk that few whistleblowers will come forward than that whistleblower protection will be abused. A law which is absolutely watertight against any instances of problematical whistleblowing will not provide sufficient protection for socially productive whistleblowing. In service of the larger goal of exposing wrongdoing, a proper balance is to recognise that some problematical whistleblowing must be tolerated. Better practice in this area is therefore to provide as robust protection as possible to whistleblowers who act reasonably and good faith, noting that these conditions already represent an important barrier to potential whistleblowers.

Bill 1 received its second reading on 12 May 2014 and is currently before Committee. The Centre for Law and Democracy urges Newfoundland and Labrador's House of Assembly to consider the following improvements before Bill 1 is passed into law.

## **1. Private Sector Whistleblowers**

While the mismanagement of public resources is potentially a cause for greater public concern than the mismanagement of private resources, there are often instances where private sector employees are confronted with extremely harmful behaviour, and where there is an equally powerful moral and social imperative to protect those who report wrongdoing. The Wigand case noted in the Introduction is a good illustration of this, as is the widespread misconduct in the banking sector which precipitated the 2008 global financial crisis.

In recognition of this reality, better practice is to extend whistleblower protection to the private sector. For example, the United Kingdom's Public Interest Disclosure Act

applies across the private and voluntary sectors.<sup>3</sup> France, Hungary, Luxembourg, Malta, Slovenia, South Africa and Sweden all have legislation protecting whistleblowers in the private sector. This standard is also reflected in the Committee of Ministers of the Council of Europe's Recommendation on the protection of whistleblowers, which defines a whistleblower as "any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in public or private sector."<sup>4</sup>

Within Canada, there are a patchwork of rules at the federal level that protect private employees in some instances. Section 425.1 of the Criminal Code prohibits firing or demoting an employee who reports a violation of the law.<sup>5</sup> Similarly, Canada's Environmental Protection Act also prohibits employers from retaliating against an employee who reports environmental offences.<sup>6</sup> However, these laws do not apply broadly enough to adequately protect private sector employees seeking to expose wrongdoing such as, for example, unsanitary food preparation conditions.

Some Canadian provinces extend whistleblower protection to private sector employees. For example, Saskatchewan's Labour Standards Act states:

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.<sup>7</sup>

Section 28 of the New Brunswick Employment Standards Act provides similar protections to private sector workers. Manitoba's Public Interest Disclosure (Whistleblower Protection) Act also protects private sector workers, but only when reporting on offences committed by public bodies.<sup>8</sup>

Bill 1 also employs a narrow definition of public bodies, further exacerbating this problem. This is clear, for example, from a comparison of the definition of a public body in section 2(h) of Bill 1 with that in section 2 of Newfoundland's Access to Information and Protection of Privacy Act. That law is itself not considered to be best practice, which would also cover bodies which were controlled or substantially

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<sup>3</sup> 1 July 1998. Available at: <http://www.legislation.gov.uk/ukpga/1998/23/introduction>.

<sup>4</sup> Recommendation CM/Rec(2014)7, 30 April 2014. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>.

<sup>5</sup> R.S.C. 1985, c. C-46.

<sup>6</sup> S.C. 1999, c. 33.

<sup>7</sup> RSS 1978, c L-1. Available at: [www.canlii.org/en/sk/laws/stat/rss-1978-c-l-1/latest/rss-1978-c-l-1.html](http://www.canlii.org/en/sk/laws/stat/rss-1978-c-l-1/latest/rss-1978-c-l-1.html).

<sup>8</sup> S.M. 2006, c. 35. Available at: <http://web2.gov.mb.ca/laws/statutes/2006/c03506e.php>.

financed by funds provided by other public bodies and bodies carrying out a statutory or public function. While the rule on appointment of members or boards in section 2(h)(ii) of Bill 1 would cover some of these bodies, it would certainly not extend to all of them.

As a result of these limitations, Bill 1 as it currently stands leaves a major hole in the province's whistleblower protection framework and falls below better practice both in Canada and internationally.

### Recommendations:

- Bill 1 should be expanded to protect private sector whistleblowers.
- At a very minimum, Bill 1 should be expanded to cover private bodies which are controlled or substantially financed by public bodies or which carry out a statutory or public function.

## 2. Exceptions

In 2012, Newfoundland and Labrador's government was widely criticised for adopting Bill 29, which, among other things, significantly expanded the breadth of the exception for cabinet deliberations in the Access to Information and Protection of Privacy Act.<sup>9</sup> In response to these and other criticisms, in January 2014 Tom Marshall, who had just been sworn in as Premier, announced a broad review of that Act.

In light of this, it is troubling to see that Section 11(1)(a) of Bill 1, which exempts deliberations of the Executive Council from the law's whistleblower protection rules, essentially replicates the same problematic attitude towards openness at the cabinet level. It is recognised that governments need space to think and debate, and that it can be legitimate to exempt from the scope of an access to information law internal deliberations the disclosure of which would harm these government interests. However, given that Bill 1 only applies to evidence of gross mismanagement, criminal offences or substantial threats to health, safety or the environment, and to disclosures to the Citizens' Representative, it is clear that excluding cabinet deliberations is not legitimate. Indeed, it is difficult to conceive of

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<sup>9</sup> See, for example, "Emotions run high amid 'racism' talk in N.L. access debate", *CBC News*, 14 June 2012. Available at: [www.cbc.ca/news/canada/newfoundland-labrador/emotions-run-high-amid-racism-talk-in-n-l-access-debate-1.1144444](http://www.cbc.ca/news/canada/newfoundland-labrador/emotions-run-high-amid-racism-talk-in-n-l-access-debate-1.1144444), and James McLeod, "Debate shuts down on access legislation", *The Telegram*, 15 June 2012. Available at: [www.thetelegram.com/News/Local/2012-06-15/article-3009067/Debate-shuts-down-on-access-legislation/1](http://www.thetelegram.com/News/Local/2012-06-15/article-3009067/Debate-shuts-down-on-access-legislation/1).

what manner of conversations the government could legitimately be seeking to protect.

The exception for solicitor-client privilege under Section 11(1)(b) is problematical for similar reasons. If a public body discovers a serious threat to public safety, for example, one would hope that their first step would be to inform the people of Newfoundland and Labrador, rather than to call in lawyers for advice on liability. This provision is also open to serious abuse, given the ease with which solicitor-client privilege can be engaged by public bodies, regardless of the legitimacy of this. It would, however, be legitimate to have an exception for solicitor-client privilege where the privilege was held by an individual as such, rather than a public body

Significantly, Section 31 of Newfoundland and Labrador's Access to Information and Protection of Privacy Act provides for information about significant harms to the environment, health or safety to be disclosed in the public interest. In other words, an employee with information about a risk of harm that falls under solicitor-client privilege or the Cabinet confidences exception could be legally compelled to disclose it, while being denied protection from reprisals for his actions.

The specific exception under Article 2(h) for Memorial University should also be deleted, as there is no reason why whistleblowers at that institution do not deserve protection.

Section 28(b), which allows the Lieutenant-Governor in Council to make regulations excluding other legislation from the protection afforded by the whistleblower law "where the exemption is in the public interest", should be removed. It is clear that revealing severe threats to public safety or the environment, or gross mismanagement of public resources are public interests of the highest order. Given that the purpose of this legislation is to create a safe space for whistleblowers to come forward and be confident of protection, and taking into account the enormous challenges that whistleblowers face even with strong legal protection, this rule has the potential to undermine the effectiveness of the law's safeguards. Furthermore, this kind of power could easily be abused, as the history of power to exclude certain types of information from the ambit of access to information laws has amply demonstrated.

### Recommendations:

- Section 11(1)(a), which excludes information on Executive Council deliberations from the ambit of protection, should be removed.
- Section 11(1)(b), which excludes information covered by solicitor-client privilege from the ambit of protection, should be limited to cases where an

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- individual, rather than a public body, holds the privilege.
- Section 2(h) should be amended so that it no longer excludes Memorial University.
- Section 28(b), which allows for regulations exempting other legislation from the ambit of the law, should be removed.

### **3. Reporting Mechanisms**

Bill 1 only appears to provide protection in the context of disclosures which are made to the Citizens' Representative, rather than directly to the media or the public. Once the Citizens' Representative receives a disclosure, this engages a process of investigation and reporting by that office.

While one would hope that the Citizens' Representative would, in most cases, serve as an effective mechanism for dealing with misconduct, better practice laws recognise that there are cases where employees need to go directly to the public. Nova Scotia's Public Interest Disclosure of Wrongdoing Act allows an employee to disclose their information publicly if the employee reasonably believes that it "constitutes an imminent risk of substantial and specific danger to the life, health or safety of persons or to the environment such that there is insufficient time to make a disclosure" to the proper authorities.<sup>10</sup> A substantially identical provision can be found in section 14 of Manitoba's Public Interest Disclosure (Whistleblower Protection) Act and section 14 of New Brunswick's Public Interest Disclosure Act.<sup>11</sup>

Better practice laws also allow for public disclosure in certain cases. For example, South Africa's Protected Disclosures Act<sup>12</sup> mandates that disclosures should generally be made to a prescribed authority, such as the Auditor General. However, it also provides protection for "any disclosures" in certain cases. These include cases where the employee reasonably believes that, for a prescribed disclosure, the protection afforded by the Act will not be effective or that evidence of wrongdoing may be concealed or destroyed, or that disclosure to the appropriate authorities has failed to result in any investigative action within a reasonable period or that the wrongdoing is of an exceptionally serious nature. The protection only applies if the disclosure is made in good faith, including that the complainant has not made the disclosure for the purpose of any personal financial gain, other than as provided for by law. The UK's Public Interest Disclosure Act provides protection for public disclosures in substantially the same circumstances.

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<sup>10</sup> 2010, c. 42. Available at:

[nslegislature.ca/legc/statutes/public%20interest%20disclosure%20of%20wrongdoing.pdf](http://nslegislature.ca/legc/statutes/public%20interest%20disclosure%20of%20wrongdoing.pdf).

<sup>11</sup> R.S.N.B. 2012, c. 112. Available at: [laws.gnb.ca/en/showfulldoc/cs/2012-c.112//20130419](http://laws.gnb.ca/en/showfulldoc/cs/2012-c.112//20130419).

<sup>12</sup> Act 26 of 2000. Available at: <http://www.justice.gov.za/legislation/acts/2000-026.pdf>.



The Centre for Law and Democracy believes that to be effective whistleblower protection must be extended to public disclosures in certain cases. These include cases where employees, acting reasonably and in good faith, expose problems of a particularly serious or urgent nature, or problems which cannot be expected to be resolved satisfactorily for whatever reason by a 'prescribed' disclosure. In these cases, the requirement of reasonableness will act as a sufficient barrier against problematical whistleblowing to create an appropriate balance between this and protecting socially productive whistleblowing.

#### **Recommendation:**

- Bill 1 should provide protection to employees who, reasonably and in good faith, make public disclosures under certain circumstances, including where the harm is of an exceptionally serious or urgent nature, or where reporting to the Citizens' Representative is unlikely to be able to resolve the problem.

#### **4. Defining Wrongdoing**

According to section 4 of Bill 1, disclosures are justified if they expose wrongdoing, defined as an offence under an Act of the Legislature or the Parliament of Canada, an act or omission that creates a substantial and specific danger to the life, health or safety of persons or to the environment, gross mismanagement, including of public funds or a public asset, or knowingly directing or counselling a person to commit any of these acts.

Although this is a relatively broad definition, there are categories of misconduct which would fall through the cracks of this formulation. This problem can be rectified by adding abuses of authority, breaches of a code of conduct and miscarriages of justice to the list of wrongdoings.

A serious problem is that, pursuant to section 4(2), the law would only apply in respect of wrongdoings which were committed after it has come into force. Harmful actions committed in the past can continue to pose a threat today. For example, if toxic chemical products have been stored or disposed of improperly, the negative effects may not be noticed for months or even years. Disclosures about previous mismanagement may still be relevant, and it is always relevant to expose criminal wrongdoing. Moreover, even if the problems are no longer current, there may still be a public interest in exposing them in order to address the structural problems



which allowed the problems to take place in the first place, and to avoid them occurring in future.

### Recommendations:

- Abuses of authority, breaches of a code of conduct and miscarriages of justice should be added to the list of wrongdoings in Section 4(1).
- Section 4(2), which limits protection to disclosures about future wrongdoings, should be removed.

## 5. Protecting Whistleblowers

Coming forward as a whistleblower is always a challenge, even with strong whistleblower protection. There are a few ways in which Bill 1 could provide stronger protection to whistleblowers so as to encourage this important and socially beneficial activity.

First, the scope of protection against reprisals could be more robust. Section 10 provides protection against prosecution under laws which restrict the disclosure of information, while section 21 provides protection against employment related reprisals. What is missing here is protection against legal actions arising from otherwise protected disclosures that are not based on laws which restrict the disclosure of information. For example, the exposure of a risk of environmental harm might give rise to a tort action for loss of earnings. The need for protection along these lines is recognised in other areas of law, such as the protection for good faith disclosures under access to information laws (see section 71 of Newfoundland's Access to Information and Protection of Privacy Act) or protection against defamation liability where the person made a statement in pursuance of a moral duty, known as qualified privilege. Similar protection is needed here.

Second, section 7(2) provides for protection of the identity of a whistleblower only insofar as this is consistent with the need to conduct a proper investigation. While these are important interests, a better approach would be to balance the competing interests (i.e. the importance of protection of the identity with the benefits to an investigation from exposing the identity), rather than providing simply for investigations to override identity protection.

Third, the remedies available under section 22, and in particular the availability of financial compensation, are limited, in particular to direct losses associated with the reprisal. Thus, if an employee has to spend months fighting a reprisal, he or she may

claim direct costs associated with that, but nothing for his or her time (beyond lost work), stress or other burdens. It would be preferable to allow for compensatory damages to be awarded, at least in cases where the employee was specifically targeted with a reprisal for making the disclosure.

#### **Recommendations:**

- The law should provide whistleblowers with protection not only against employment related reprisals and sanctions under laws prohibiting the disclosure of information but more broadly with protection against legal sanctions in the context of protected disclosures.
- Section 7(2) should provide for the exposure of the identity of a whistleblower for purposes of an investigation only where the overall public interest favours this.
- The Labour Relations Board should have the power to award compensatory damages beyond direct costs in appropriate cases.