Legislative Summary **LS-430E**

BILL S-6: PUBLIC SERVICE WHISTLEBLOWING ACT

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LEGISLATIVE HISTORY OF BILL S-6

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:		First Reading:	3 October 2002
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BACKGROUND

A. Introduction

On 3 October 2002, a Private Senator's public bill, Bill S-6, the Public Service Whistleblowing Act, was introduced in the Senate by the Hon. Noel Kinsella.(1) The bill would establish a mechanism for dealing with the reporting of wrongdoing in the federal Public Service. Although federally to date there have been no government bills on the subject,(2) a number of Private Members' bills have been introduced in the House of Commons.

- Bill C-293, an Act to amend the Canadian Human Rights Act, the Canada Labour Code and the Public Service Employment Act (whistleblowing) (3rd Session, 34th Parliament) was introduced in the House of Commons by Ms. Joy Langan on 24 September 1991. It was later debated at second reading and dropped from the *Order Paper*.

- A virtually identical Private Member's bill, Bill C-248, was introduced in the House by Mr. Pierre de Savoye on 11 May 1994 (1st Session, 35th Parliament). This bill also was subsequently debated at second reading and dropped from the *Order Paper*.

- A later and different Private Member's bill on the subject was introduced in the House by Mr. de Savoye on 19 June 1996; this bill, Bill C-318, Whistle Blowers Protection Act (2nd Session, 35th Parliament) died with the dissolution of Parliament, having received only first reading. ,

- Bill C-499, a similar Private Member's bill with some additional provisions, was introduced in the House by Mr. Pat Martin on 23 April 1999 (1st Session, 36th Parliament) but did not go beyond first reading. It was subsequently re-introduced as Bill C-239 in the House by Mr. Martin on 18 October 1999 (2nd Session, 36th Parliament) but died on the *Order Paper*

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(1) The bill is very similar to Senator Kinsella's earlier bill (S-6, 1st Session, 37th Parliament), as amended by the Standing Senate Committee on National Finance. That bill died on the *Order Paper*. In the 2nd Session of the 36th Parliament, Senator Kinsella had a similar bill (S-13) on the subject, but that bill died with the dissolution of Parliament.

(2) There is, however, a federal government policy concerning the matter. The policy took effect on 30 November 2001. See Commentary.

with the dissolution of Parliament. It was later re-introduced as Bill C-206 in the House by Mr. Martin on 2 February 2001 (1st Session, 37th Parliament) and subsequently died on the *Order Paper*.

- Another Private Member's bill, Bill C-508, Whistle Blower Human Rights Act, was introduced in the House by Mr. Gurmant Grewal on 17 October 2000 (2nd Session, 36th Parliament). It died on the *Order Paper* with the dissolution of Parliament. It was subsequently re-introduced as Bill C-201 in the House by Mr. Grewal on 1 February 2001 (1st Session, 37th Parliament) and once again died on the *Order Paper*. It was later re-introduced as Bill C-201 in the House by Mr. Grewal on 2 October 2002 (2nd Session, 37th Parliament).

- Bill C-351, Public Service Whistleblowing Act, was introduced in the House by Mr. Greg Thompson on 29 May 2001 (1st Session, 37th Parliament). The bill, similar to Senator Kinsella's bills on the subject, died on the *Order Paper*. It was later re-introduced as Bill C-241 in the House by Mr. Thompson on 23 October 2002 (2nd session, 37th Parliament).

As a background to discussion of Bill S-6, the following section of the paper describes the current law on whistleblowing in Canada.

B. Current Law on Whistleblowing in Canada

In Canada, as in certain other jurisdictions, most notably the United States, a number of statutes – particularly those covering environmental or occupational health and safety matters – protect employees within their jurisdiction against retaliation for having exercised certain rights conferred by the statutes. One such provision at the federal level in Canada is section 16 of the new *Canadian Environmental Protection Act, 1999*, which provides for protection against employment reprisals for employees who, in good faith, give designated officials information relating to offences under the Act.

Governments in Canada, however, at both the federal and provincial levels, have thus far generally declined to enact broader whistleblower protection legislation such as exists in certain other countries. In the United States, for example, legislation at the federal level covers federal public-sector employees, while legislation in some States protects public-sector workers and in some other States protects both public- and private-sector workers. It would appear that the only such general legislation in force in Canada is section 28 of New Brunswick's *Employment Standards Act*, which applies to employers in both the private and public sectors. In general, this Act provides protection against employment reprisals for employees who make

complaints against their employers for the alleged violation of any provincial or federal legislation.

In Ontario, section 58(6) of the *Public Service and Labour Relations Statute Law Amendment Act, 1993*, which received Royal Assent on 14 December 1993, added a new Part IV (sections 28.11-28.43), entitled "Whistleblowers' Protection," to the *Public Service Act*, to give broad protection for public-sector whistleblowers in that province. According to section 28.43 of the *Public Service Act*, however, Part IV is to come into force on a day to be named by proclamation of the Lieutenant Governor. This has not occurred because after the legislation was enacted, the New Democratic Party government was replaced by a Progressive Conservative government, now in its second mandate, whose agenda does not include proclamation into force of Part IV.

In Canada, therefore, whistleblowers in both the public and private sectors are forced to rely chiefly on the protection offered by the common law. As noted in the Ontario Law Reform Commission's *Report on Political Activity, Public Comment and Disclosure by Crown Employees* (1986), under the common law an employee owes his or her employer the general duties of loyalty, good faith and, in appropriate circumstances, confidentiality.

- "Loyalty" embraces the obligation to: perform assigned work diligently and skillfully; refrain from any sort of deception related to the employment contract; avoid any relationships, remunerative or otherwise, that might give rise to an interest inconsistent with that of the employer; and conduct oneself at all times so as not to be a discredit to one's employer.

- "Good faith" requires an employee to perform assigned tasks according to the best interests of his or her employer.

- "Confidentiality" may give an employee a duty to keep certain information confidential until released from that duty by the employer. This duty may arise by contract, or it may be imposed by equity whenever the employer entrusts an employee with "confidential" information on the understanding that it is not to be disclosed without authorization. A general duty of confidentiality may arise by virtue of a particular relationship between the employer and the employee.

When an employee breaches these duties and reveals a confidence or some information, believing that to do so is in the public interest, the employer routinely takes disciplinary action, which may include dismissal. In the face of such punishment, some employees have sought protection from the courts or, if they are governed by a collective agreement, through a grievance procedure.

When the wrongdoing has been serious and the public's interest in disclosure is clear, the courts have permitted a very limited "public interest" defence in these cases. They have emphasized the need for the employee to use internal remedies first, to be sure of the facts, and to exercise good judgement in his or her actions. Arbitrators have applied similar criteria. In general, it may be said that employees currently have only a narrow range of protection and may seriously jeopardize their careers by breaching their duties to their employers.

For several years, the Professional Institute of the Public Service of Canada (PIPSC), a national union representing approximately 36,000 professional and scientific employees, has been calling upon the federal government to enact legislation to protect federal public-sector employees from potential reprisals for "blowing the whistle." The Public Service Alliance of Canada (PSAC) – which represents more than 150,000 federal public servants and employees of agencies, Crown corporations and the territories – has also recommended enactment of such legislation.

DESCRIPTION AND ANALYSIS

A. Purpose of the Bill

Bill S-6 would be entitled the Public Service Whistleblowing Act (clause 1). Its purpose, set out in clause 2, would be to:

- educate Public Service employees on ethical practices in the workplace and promote the observance of those practices;
- provide a means for Public Service employees to make allegations of wrongful acts or omissions in the workplace, in confidence, to an independent Commissioner who would investigate them and seek to have the situation dealt with and who would report to Parliament in respect of confirmed problems that had not been dealt with; and
- protect Public Service employees from retaliation for having made or for proposing to make, in good faith and on the basis of reasonable belief, allegations of wrongdoing in the workplace.

B. Interpretation

Clause 3 would define a number of terms for purposes of the bill.

- "Commissioner": a commissioner of the Public Service Commission designated as the Public Interest Commissioner under clause 4.

- "Employee": a person who was an employee within the meaning of the Public Service Employment Act, i.e., a person appointed to the Public Service under the authority of the Public Service Commission where "Public Service" refers to the positions in or under any department or other portion of the Public Service of Canada specified in Schedule 1 to the *Public Service Staff Relations Act*.

- "Public Service": the parts of the Public Service covered by the *Public Service Staff Relations Act*.

- "Law in force in Canada": either a federal or provincial statute or an instrument issued under the authority of such a statute.

- "Minister": a federal Cabinet Minister.

- "Wrongful act or omission": an act or omission that was: a) an offence under any law in force in Canada; b) likely to cause a significant waste of public money; c) likely to endanger public health or safety or the environment; d) a significant breach of an established public policy or directive in the written record of the Public Service; or e) one of gross mismanagement or abuse of authority.

C. Public Interest Commissioner

The federal Cabinet would designate one of the commissioners of the Public Service Commission to serve as Public Interest Commissioner for purposes of the bill (clause 4(1)). The Public Interest Commissioner's functions would be deemed to be within the work of the Public Service Commission for the purposes of the *Public Service Employment Act* (clause 4(2)), and the powers granted to the Commissioner by the *Public Service Employment Act* for the purposes of that Act could be exercised for purposes of the bill (clause 4(3)).

Subject to clause 10, referred to below, the Commissioner, if he or she believed it was in the public interest to do so, could make public any information that came to his or her attention as a result of performing the Commissioner's duties or powers under the bill (clause 5(1)). The Commissioner, or a person acting on the Commissioner's behalf, could disclose information that, in the Commissioner's opinion, was necessary to conduct an

investigation under the bill or to establish grounds for the findings or recommendations of any report made under the bill (clause 5(2)). As well, the Commissioner, or a person acting on the Commissioner's behalf, could disclose information in the course of a prosecution for an offence under clause 21 of the bill or section 132 of the *Criminal Code* (perjury) for a statement made under the bill (clause 5(3)). The Commissioner would also be empowered to disclose to the Attorney General of Canada, or of any province, information relating to the commission of an offence against any law in force in Canada of which the Commissioner had uncovered evidence during the exercise of his or her duties or powers under the bill (clause 5(4)).

The Commissioner, or a person acting on the Commissioner's behalf, would not be regarded as a competent witness for any matter that came to his or her knowledge in the performance of the Commissioner's duties or powers under the bill other than in a prosecution for an offence under clause 21 of the bill or section 132 of the *Criminal Code* (perjury) for a statement made under the bill (clause 6).

No criminal or civil proceedings would be taken against the Commissioner, or a person acting on the Commissioner's behalf, for anything done, reported or said in good faith in performing the Commissioner's duties or powers under the bill (clause 7(1)). For the purposes of any libel or slander law, anything said, any information supplied, or any record or thing produced in good faith and on the basis of reasonable belief in the course of an investigation carried out by or on behalf of the Commissioner under the bill would be privileged, as would be any report made in good faith by the Commissioner under the bill and any fair and accurate account of the report made in good faith for purposes of news reporting (clause 7(2)).

The Commissioner would be required to promote ethical practices in the Public Service and to foster a positive environment for giving notice of wrongdoing by disseminating information about the bill and by such other means as he or she found fit (clause 8).

D. Notice of Wrongful Act or Omission

A Public Service employee who believed that another Public Service employee had committed or intended to commit a wrongful act or omission could file a written notice of allegation with the Commissioner and could request that his or her own identity be kept confidential (clause 9(1)). The notice would have to identify the employee making the allegation, the person against whom the allegation was being made, and the grounds for the

allegation (clause 9(2)). Such notice given in good faith and on the basis of reasonable belief would not be deemed to constitute a breach of any oath of office or loyalty or secrecy taken by the employee and, subject to clause 9(4), not to be a breach of duty (clause 9(3)). In giving notice under clause 9(1), no employee, unless prompted by reasonable concerns for public health or safety, would be permitted to violate any law in force in Canada or any rule of law protecting privileged communications between solicitor and client (clause 9(4)). An employee who made a request under clause 9(1) that his or her identity be kept confidential could waive the request or any resulting right to confidentiality at any time (clause 9(5)). Where the Commissioner was not prepared to give an assurance of confidentiality in response to a request under clause 9(1), the Commissioner could reject and take no further action on the notice (clause 9(6)).

Subject to any requirement imposed on the Commissioner under the bill or any law in force in Canada, the Commissioner would be required to keep confidential the identity of the employee who had filed the notice of allegation and who had been given the Commissioner's assurance of such confidentiality (clause 10).

Pursuant to clause 9, the Commissioner would have to review a notice of allegation and could ask the employee for further information and make such further inquiries as were considered necessary (clause 11).

The Commissioner would reject, and take no further action on, a notice of allegation where he or she had made a preliminary determination that the notice: was trivial, frivolous or vexatious; failed to allege or give adequate particulars of a wrongful act or omission; breached clause 9(4); or had not been given in good faith or on the basis of reasonable belief (clause 12(1)). The Commissioner could determine that a notice of allegation had not been given in good faith if it contained a statement that the employee, at the time of making it, had known to be false or misleading (clause 12(2)). However, the Commissioner would not have to make such determination solely because the allegation contained mistaken facts (clause 12(3)). The Commissioner would be required to communicate his or her determination under clause 12(1) in writing, and on a timely basis, to the employee who had given the notice (clause 12(4)). As well, where the Commissioner determined under clause 12(1) that a notice had been given in breach of clause 9(4) or without good faith and on the basis of reasonable belief, he or she could so advise the person against whom the allegation was made and the Minister responsible for the employee who had given the notice (clause 12(5)).

The Commissioner would be required to accept a notice of allegation that he or she determined: was not trivial, frivolous or vexatious; did allege and give adequate particulars of a wrongful act or omission; did not breach clause 9(4); and had been made in good faith and on the basis of reasonable belief (clause 13(1)). In such a case, the Commissioner would also be required, in writing and on a timely basis, to so advise the employee who had filed the notice (clause 13(2)).

E. Investigation and Report

The Commissioner would investigate a notice of allegation accepted under clause 13(1) and would have to prepare a written report of findings and recommendations (clause 14(1)) except if satisfied that: the employee ought to first exhaust other review procedures; the matter could more appropriately be dealt with, initially or completely, through a procedure provided for under another statute; or the length of time between the wrongful act or omission and the date the notice had been filed was such that a report would not serve a useful purpose (clause 14(2)). Where no written report was required, the Commissioner, in writing and on a timely basis, would have to so advise the employee who had filed the notice of allegation (clause 14(3)). Information related to an investigation would be confidential and could not be disclosed except in accordance with the bill (clause 14(4)). Where the Commissioner produced a written report, he or she would be required to provide, on a timely basis, a copy of this to the Minister responsible for the employee against whom the allegation was made (clause 14(5)).

After considering such a report, a Minister would have to notify the Commissioner of what action had been or would be taken (clause 15(2)). In the case of proposed action, the Minister would be required to give such further responses "as seem[ed] appropriate to the Commissioner" until such time as the Minister advised that the matter had been dealt with (clause 15(3)).

If, in the Commissioner's opinion, it was in the public interest, he or she could prepare an emergency report and require the President of the Treasury Board to have this submitted to Parliament on the next day that either House sat (clause 16(1)). The emergency report would have to describe the substance of a report made to a Minister under clause 14(5) and the Minister's response or lack of response under clause 15 (clause 16(2)).

The Public Service Commission would be required to include in its annual report to Parliament (made pursuant to section 47 of the *Public Service Employment Act*) a statement of activity under this bill, prepared by the Public Interest Commissioner and including the information spelled out in clause 17(1) of the bill. The report could also include an analysis of the administration and operation of the bill and any further recommendations of the Commission (clause 17(2)).

F. Prohibitions

No person could take any disciplinary action against a Public Service employee who, acting in good faith and on the basis of reasonable belief: a) had disclosed or stated an intention to disclose to the Public Interest Commissioner that another Public Service employee had committed or intended to commit a wrongful act or omission; b) had refused or stated an intention to refuse to commit an act or omission that would contravene the bill; or c) had done or stated an intention to do something required in order to comply with the bill (clause 19(1)). Neither would a person be permitted to take any disciplinary action against an employee who he or she believed would do any of the above (clause 19(1)). "Disciplinary action" would mean any action that might adversely affect the employee or any term or condition of the employee's employment; it would include harassment, financial penalty, any action affecting seniority, suspension or dismissal, denial of meaningful work, demotion, denial of a benefit of employment, or an action that was otherwise disadvantageous to the employee (clause 19(2)). According to clause 19(3), a person who took disciplinary action against an employee within two years after the employee had given a notice of allegation to the Commissioner under clause 9(1) would be presumed, in the absence of a preponderance of evidence to the contrary, to have done so contrary to clause 19.

Except as authorized by the bill or any other law in force in Canada, no person could disclose to any other person the name of the employee who had given a notice under clause 9(1) and who had requested confidentiality under that clause, or any other information the disclosure of which would reveal the employee's identity, including the existence or nature of a notice, without the employee's consent (clause 20(1)). There would be an exception where a notice had been given in breach of clause 9(4) or not in good faith and on the basis of reasonable belief (clause 20(2)).

G. Enforcement

A person who contravened clause 9(4), 18, 19(1), or 20(1) of the bill would be guilty of an offence and liable on summary conviction to a fine not exceeding $10,000 (clause 21).

H. Employee Recourse

An employee against whom disciplinary action was taken contrary to clause 19 would be entitled to use every legal recourse available, including grievance proceedings provided for under a federal statute or otherwise (clause 22(1)). An employee could seek such recourse regardless of whether criminal proceedings based upon the same facts were or might be brought under clause 21 (clause 22(2)). In all recourse proceedings referred to in clause 22(1), an employee would be entitled to the benefit of the presumption in clause 19(3) (clause 22(3)). Grievance proceedings pending on the coming into force of the bill would be dealt with and disposed of as if the bill had not been enacted (clause 22(4)).

I. Review

On the expiration of three years after its coming into force, the bill would stand referred to such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established to review its administration and operation (clause 23(1)). Within one year after beginning a review under clause 23(1) or within such further time as the Senate, the House of Commons or both Houses of Parliament, as the case might be, authorized, the committee would be required to submit a report on its review (clause 23(2)).

J. Consequential Amendment

Clause 24 provides for a consequential amendment to Schedule II to the *Access to Information Act* concerning a list of statutory prohibitions against disclosure of information.

COMMENTARY

According to a newspaper report,(3) a number of Senators and MPs supported Bill S-6's predecessor in the 1st Session of the 37th Parliament.

In light of the current very limited protection for whistleblowers at common law, it is arguable that there is a strong need for legislative protection at both the federal and provincial levels. At the federal level, Bill S-6, as drafted, would apply to Public Service employees but would not cover parliamentary employees, because these are not part of the federal Public Service.

If Bill S-6 were enacted into law, Canada would be following the lead of a number of other jurisdictions that already have legislation to protect public-sector whistleblowers. The United States was one of the first jurisdictions to enact such legislation. At the federal level, Congress enacted the *Civil Service Reform Act of 1978*, which was subsequently amended by the *Whistleblower Protection Act of 1989*. Many U.S. states have also enacted specific whistleblower protection statutes, primarily for public-sector employees, but in some cases for private-sector employees also.

An example of whistleblower protection legislation in a Commonwealth jurisdiction came into force in Britain on 2 July 1999 in the form of the *Public Interest Disclosure Act.* The Act generally protects both public- and private-sector workers who "blow the whistle" against being dismissed or penalized by their employers as a result.

Australia is another example of a Commonwealth jurisdiction that has legislation on the subject. At the federal level, through provisions of the *Public Service Act 1999*, public service employees who report breaches or alleged breaches of the Australian Public Service Code of Conduct are protected against victimization and discrimination. Regulations under that Act set minimum requirements for the procedures that agency heads must establish for the reporting and investigation of whistleblowing disclosures. Several Australian states have also adopted legislation on the subject; for example, South Australia has enacted the *Whistleblowers Protection Act 1993*, and New South Wales has enacted the *Protected Disclosures Act 1994*.

In New Zealand, the *Protected Disclosures Act 2000* came into force on 1 January 2001, extending protection to both public- and private-sector whistleblowers.

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(3) "MPs like Senators' Whistle-blowing bill," *Ottawa Citizen*, 3 February 2001.

On 28 June 2001, the Hon. Lucienne Robillard, President of the Treasury Board of Canada, announced the federal government's *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*, effective 30 November 2001. The policy applies to all government departments and organizations of the federal Public Service that are listed in Part 1, Schedule 1, of the *Public Service Staff Relations Act*.(4)

(4) For further information, see David Johansen, *Federal Government Policy Concerning Protection for Public Service Whistleblowers*, PRB 01-21E, Parliamentary Research Branch, Library of Parliament, November 2001.