

1994 BILL 212

Second Session, 23rd Legislature, 43 Elizabeth II

THE LEGISLATIVE ASSEMBLY OF ALBERTA

BILL 212

WHISTLEBLOWER PROTECTION ~~ACT~~

MR. DICKSON

First Reading

Second Reading

Committee of the Whole

Third Reading

Royal Assent

Bill 212
Mr. Dickson

BILL 212

1994

WHISTLEBLOWER PROTECTION ACT

(Assented to , 1994)

HER MAJESTY, by and with the advice and consent of the
Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act

(a) "board" means the Public Service Employee Relations Board established under the *Public Service Employee Relations Act*;

(b) "department" means a department of the Government or of the public service of Alberta established by an Act of the Legislature;

(c) "employee" means an employee of an institution and includes anyone employed by a person, corporation, partnership or sole proprietorship that has contracted with the Government of Alberta to provide goods or services;

(d) "head" means

(i) in the case of a department, the member of the Executive Council having the administration of a department, or

(ii) in the case of any other institution, the person designated as head of the institution under an Act of the Legislature or the regulations;

- (e) "institution" means
 - (i) a department of the Government of Alberta, and
 - (ii) any agency, board, or commission, corporation or other body designated as an institution in the regulations;
- (f) "public file" means any report submitted to the Ombudsman by a head and made public by the Ombudsman.
- (g) "serious government wrongdoing" means an act or omission of an institution or of an employee acting in the course of his employment and includes the following:
 - (i) contravening a statute or regulation,
 - (ii) gross mismanagement,
 - (iii) gross waste of public money,
 - (iv) abuse of authority, or
 - (v) causing or allowing a grave health or safety hazard or a grave environmental hazard;

Ombudsman

2 The Ombudsman shall advise employees concerning

- (a) what constitutes serious government wrongdoing that ought to, in the public interest, be disclosed,
- (b) whether particular information may reveal serious government wrongdoing that ought to, in the public interest, be disclosed,
- (c) the process by which information is made public or disclosed to particular agencies under this Act,
- (d) the Ombudsman's powers and duties,
- (e) the employee's rights and obligations in seeking to make allegations of serious government wrongdoing public through the Ombudsman or in seeking to disclose those allegations to any other person, and

(f) the employee's rights and obligations under this Act.

Information
disclosed to the
Ombudsman

3(1) An employee may disclose to the Ombudsman information from an institution that the employee is required to keep confidential

(a) in order to seek advice concerning his rights and obligations under this Act, or

(b) if he believes that the information may reveal serious government wrongdoing that ought to be disclosed in the public interest.

(2) Notwithstanding subsection (1), a lawyer employed by an institution shall not disclose to the Ombudsman any privileged information that he has received in confidence from an institution or an employee during the course of his employment.

(3) An employee may disclose information to the Ombudsman regardless of whether the information is in oral or written form.

(4) If an employee, acting in good faith, believes on reasonable grounds that a record may reveal serious government wrongdoing, the employee may copy the record for the purpose of disclosing it to the Ombudsman and may disclose that copy to the Ombudsman.

(5) Subsection (4) does not authorize an employee to remove an original record from an institution for the purpose of disclosing it to the Ombudsman.

(6) No proceedings lie against an employee for copying a record or disclosing a record or information to the Ombudsman in accordance with this section, unless it is shown that he acted in bad faith.

Disclosure of
information

4(1) Subject to section 10(2) neither the Ombudsman nor any employee of the Ombudsman shall disclose information received from an employee under this Act to any person without the consent of the employee who disclosed the information.

(2) If an employee seeks advice from or discloses information to the Ombudsman, neither the Ombudsman nor any employee of

the Ombudsman shall disclose the identity of the employee to any person without the employee's written consent.

(3) Notwithstanding subsections (1) and (2), the Ombudsman may disclose information received from an employee and the employee's identity to the Royal Canadian Mounted Police or a municipal police force if the Ombudsman believes on reasonable grounds

(a) that a crime is likely to be committed if he does not do so, and

(b) that the disclosure is necessary to prevent the crime.

(4) Subsection (3) does not authorize the Ombudsman to disclose to the Royal Canadian Mounted Police or a municipal police force a copy of a record that an employee has disclosed to the Ombudsman under section 3.

(5) Notwithstanding subsections (1) and (2), if the Ombudsman believes on reasonable grounds that it is in the public interest that information disclosed by an employee be disclosed to the public or persons affected and that it reveals a grave health or safety hazard to any person or a grave environmental hazard, the Ombudsman shall, as soon as practicable, disclose that information to the head of the institution to which it relates.

Disclosure of
serious
government
wrongdoing

5(1) On request by an employee, the Ombudsman shall review information the employee has disclosed to the Ombudsman to determine whether, in the Ombudsman's opinion, the information, if correct, may reveal serious government wrongdoing.

(2) Subject to subsection (3), the Ombudsman may require a report under this Act from the head of an institution if

(a) he determines that the information, if correct, may reveal serious government wrongdoing, and

(b) the information is sufficiently credible that the Ombudsman believes there may be serious government wrongdoing.

(3) The Ombudsman may refuse to require a report from the head of an institution if, in the Ombudsman's opinion

(a) it would be more appropriate for the employee to bring the allegation of wrongdoing to the attention of a responsible official in the institution to which the information relates, or

(b) it would be more appropriate for the employee to bring the allegation of wrongdoing to the attention of a law enforcement agency or a government agency whose mandate is to investigate similar allegations.

(4) The Ombudsman shall not determine that it would be more appropriate for the employee to bring an allegation of wrongdoing to the attention of a responsible official if the employee fears retaliation if the employee were to do so.

(5) The Ombudsman shall inform the employee of his determination under this section and of the reasons for it.

Disclosure to head
of institution

6 If the Ombudsman determines that he does not require a report from the head of an institution, the Ombudsman may, with the consent of the employee, disclose part or all of the information received from the employee to the head of the institution to which the information relates.

Submission of
report

7(1) Subject to subsection (2), the Ombudsman shall, by notice, require the head of the institution, to which information disclosed by an employee relates, to submit to the Ombudsman a report concerning the information the employee has disclosed if

(a) the Ombudsman determines that a report is required, and

(b) the employee consents to the Ombudsman requiring the report.

(2) If, notwithstanding subsection (1), the Ombudsman believes that it would not be appropriate to require the head of the institution to which the information relates to submit a report, he may, by notice, require a report from whatever Member of Executive Council he considers appropriate in the circumstances.

(3) Subject to subsection (4), the notice requiring a report shall include a written summary of the information disclosed to the Ombudsman that relates to the allegation of wrongdoing and

copies of any record which the employee seeks to have made public through the Ombudsman.

(4) The report required of either a head of an institution or Member of Executive Council, pursuant to subsections (1) or (2), must be submitted to the Ombudsman within 20 days after receipt of the Ombudsman's notice.

(5) The Ombudsman may, with the consent of the employee, delete from the summary records information that might directly or indirectly disclose the identity of the employee.

Investigation by
Ombudsman

8 The Ombudsman shall undertake such investigations as he, in his absolute discretion, determines are appropriate and may commence his investigation prior to receiving the report required by section 7.

Inquiry report

9(1) Upon completing his investigation, the Ombudsman shall prepare an inquiry report.

(2) The Ombudsman shall place his inquiry report in the public file unless he determines that it is not in the public interest to do so.

(3) To determine whether the inquiry report should be placed in the public file, the Ombudsman shall consider all of the relevant circumstances including

(a) if the inquiry report does not disclose serious government wrongdoing, whether its publication would unfairly damage the reputation of a person or an institution,

(b) whether the disclosure could reasonably be expected to endanger the life or physical safety of any person,

(c) whether the disclosure could reasonably be expected to prejudice or interfere with an investigation by a law enforcement agency, and

(d) whether the inquiry report might identify who the employee was whose information initiated the investigation.

(4) Before placing his inquiry report in the public file, the Ombudsman must show it to the employee whose information initiated the investigation and give the employee an opportunity to make submissions on whether it is in the public interest to place it in the public file.

(5) The Ombudsman may place the inquiry report in the public file without the consent of the employee whose information initiated the investigation.

Referral to law
enforcement
agency

10(1) The Ombudsman may refer a matter to a law enforcement agency or a government agency whose mandate is to investigate similar allegations and not prepare his own report.

(2) If the Ombudsman refers an allegation of serious government wrongdoing under subsection (1), he shall place notice of the referral in the public file unless he believes that doing so could reasonably be expected to prejudice or interfere with the investigation.

Adverse
employment action

11(1) No institution or person acting on behalf of an institution shall take adverse employment action against an employee where

(a) the employee, acting in good faith, has disclosed information to the Ombudsman under this Act, or

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

(2) For the purposes of this section, an institution or person acting on behalf of an institution takes adverse employment action against an employee if the institution or person

(a) dismisses, disciplines or suspends or threatens to dismiss, discipline or suspend an employee,

(b) imposes a penalty or threatens to impose a penalty on an employee, or

(c) coerces, intimidates or harasses or attempts to coerce, intimidate or harass an employee.

(3) There is a presumption that an institution has contravened subsection (1) if

(a) the Ombudsman has required a head of an institution or a Member of Executive Council to submit a report to the Ombudsman concerning an employee's allegation of serious government wrongdoing, and

(b) after the Ombudsman has done so, the head of an institution or a Member of Executive Council has taken adverse employment action against the employee.

(4) Every person who contravenes subsection (1) is guilty of an offence and, on conviction, is liable to a fine of not more than \$5000.

(5) A prosecution under this section shall not be commenced without the consent of the Board.

(6) 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.

(7) An employee who wishes to complain that an institution or a person acting on behalf of an institution has contravened subsection (1) may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if applicable, or file a complaint with the Board under section 70(4) of the *Public Service Employee Relations Act*.

(8) Subsection (7) shall not be interpreted to limit any right an employee may have under any other Act or at law to seek a remedy with respect to adverse employment action.

Complaints

12(1) An employee may file a written complaint with the Board alleging that an institution has contravened subsection 11(1).

(2) When the Board receives a complaint, it may inquire into a complaint and, if it does so, shall inquire into the complaint forthwith.

(3) Upon finding a contravention of this section, the Board may

- (a) issue an order directing the institution or person acting on behalf of the institution to cease doing the act or acts complained of,
- (b) issue an order directing the institution or person to rectify the act or acts complained of, or
- (c) issue an order directing the institution or person to
 - (i) hire the employee,
 - (ii) reinstate the employee with or without compensation,
 - (iii) compensate for loss of earnings or other employment benefits, in an amount assessed by the Board against the institution or person.

Compliance

13 If the institution fails to comply with a term of the Board's order within 14 days after the date of its release by the Board or after the date provided in the determination for compliance, whichever is later, the employee may file the Board's order with the Court of Queen's Bench and it may be enforced as if it were an order of that court.

14 The Lieutenant Governor in Council may make regulations

- (a) designating bodies as institutions for the purposes of this Act, and
- (b) designating heads of institutions for the purposes of this Act.

Public Service Act

15 *The Public Service Act is amended*

(a) *by repealing section 20 and substituting the following:*

20(1) Every new employee shall take and subscribe an oath in the following form:

I, _____, do swear that I will execute according to law and to the best of my ability the duties required of me as an employee in the public

service of Alberta and that I will not, without due authorization or unless permitted by the *Whistleblower Protection Act*, disclose or make known any matter or thing which comes to my knowledge by reason of my employment in the public service.

(2) Any employee who without due authorization or contrary to the *Whistleblower Protection Act*, discloses or makes known any matter or thing which comes to his knowledge by reason of his employment in the public service of Alberta is guilty of an offence and liable to a fine of not more than \$500.

(b) *Section 25(3) is amended by renumbering it as subsection (4) and adding "subject to subsection (3)" before "nothing";*

(c) *Section 25 is amended by adding the following after subsection (2):*

(3) An employee shall not be subject to dismissal, suspension or other disciplinary action by his department head if the employee, acting in good faith, has disclosed information to the department head or to the Ombudsman under the *Whistleblower Protection Act* or to a Member of the Legislative Assembly or has exercised any other right under the *Whistleblower Protection Act*.

(d) *Section 29 is amended by adding the following after subsection (6):*

(7) In every contract of employment under this section, there shall be implied the following term:

An employee shall be entitled to, in good faith, disclose to the head of department, board or agency or to the Ombudsman, or to a Member of the Legislative Assembly, information relating to an act or omission of an institution or of an employee acting in the course of his or her employment if

(a) it contravenes a statute or regulation,

(b) it represents gross mismanagement,

- (c) it causes a gross waste of public money,
- (d) it represents an abuse of authority, or
- (e) it poses a grave health or safety hazard to any person or a grave environmental hazard

unless it is not in the public interest to disclose such information.

(8) Any provision of a contract which purports to waive or limit the term set out in subsection (7) shall be deemed contrary to public policy and void.

Public Service
Employee
Relations Act

16 *The Public Service Employee Relations Act is amended*

(a) *by adding the following after section 9:*

9.1 An employee subject to this Act or a bargaining agent may refer to the Board any matter concerning an allegation of serious government wrongdoing. The Board shall have the power to:

- (a) order the employer to desist from the offending conduct;
- (b) provide a remedy to an employee who has been the victim of a reprisal for disclosure of information, which reprisal is determined by the Board to be in violation of the *Whistleblower Protection Act*.
- (c) withhold information from public scrutiny where the Board considers disclosure to be against the public interest.
- (d) require the employer to report on corrective measures taken with respect to the alleged wrongdoing
- (e) continue to monitor the employee's place of employment to ensure that no reprisal has been taken against the employee.

(b) *Section 70 is amended by adding the following after subsection (3):*

70(4) No employer and no person acting on behalf of an employer shall:

dismiss, suspend an employee or subject an employee to disciplinary action in respect of disclosure in good faith of information concerning serious government wrongdoing.

Employment
Standards Act

17 *The Employment Standards Code is amended*

(a) *in section 2(2) by adding "and Division 11.1" after "Division 10"; and*

(b) *in Part 2 by adding the following after section 75:*

Division 11.1

Whistleblower Protection

75.1 In this Division, "contractor" means a person, corporation, partnership, or sole proprietorship contracting with the Government of Alberta for the provision of goods or services.

75.2(1) In every contract of employment for employees of the Government of Alberta and employees of contractors, there shall be implied the following term:

An employee shall be entitled, in good faith, to disclose to the head of a department, board or agency or to a supervisor or manager of a contractor or to the Ombudsman or to a Member of the Legislative Assembly, information relating to an act or omission of an institution or a contractor or of an employee acting in the course of his or her employment if

- (a) it contravenes a statute or regulation,
- (b) it represents gross mismanagement,
- (c) it causes a gross waste of public money,
- (d) it represents an abuse of authority, or

(e) it poses a grave health or safety hazard to any person or a grave environmental hazard

unless it is not in the public interest to disclose such information.

(2) Any provision of a contract which purports to waive or limit the term set out in subsection (1) shall be deemed to be contrary to public policy and void.

(c) by adding the following after section 117:

117.1(1) No employer subject to section 75.1 shall take adverse employment action against an employee because

(a) the employee, acting in good faith, has disclosed information to the Ombudsman under the *Whistleblower Protection Act*, or

(b) imposes a penalty or threaten to impose a penalty on an employee.

(2) For the purposes of this section an employer takes adverse employment action against an employee if the employer:

(a) dismisses, disciplines or suspends or threatens to dismiss, discipline or suspend an employee;

(b) imposes a penalty or threatens to impose a penalty on an employee; or

(c) coerces, intimidates or harasses or attempts to coerce, intimidate or harass an employee.

(3) There is a presumption that an institution has contravened subsection (1) if

(a) the Ombudsman has required an employer to submit a report to the Ombudsman concerning an employee's allegation of serious government wrongdoing, and

(b) after the Ombudsman has done so, the employer has taken adverse employment action against the employee.

(4) Every person who contravenes subsection (1) is guilty of an offence and, on conviction, is liable to a fine of not more than \$5000.

(5) This section shall not be interpreted to limit any other right an employee may have under any other Act or at law to seek a remedy with respect to adverse employment action.

117.2 Upon application by an employee as defined in the *Whistleblower Protection Act*, other than an employee who is subject to the *Public Service Employee Relations Act*, relating to any matter concerning an allegation of serious government wrongdoing, a justice of the Court of Queen's Bench of Alberta may

(a) order that the employer desist from the offending conduct;

(b) provide a remedy to an employee who has been victim of an unlawful reprisal for the disclosure of information which may include

(i) special damages in such amount as the court may determine, and

(ii) general damages in such amount as the court may determine;

(c) order that information be withheld from public scrutiny where the court considers such disclosures to be against the public interest; and

(d) require the employer to report on corrective measures taken with respect to the alleged serious wrongdoing.

(b.1) penalizing, disciplining, dismissing, coercing, intimidating, or attempting to coerce or intimidate any person by reason of the person contacting or attempting to contact a Member for the purposes of the *Whistleblower Protection Act*.

19 *The Individual's Rights Protection Act is amended in section 7*

(a) *in subsection 1 by adding "political belief," after "age";*

(b) *by adding the following after subsection (3):*

(4) In subsection (1), "political belief" means

(a) ideas, beliefs, or opinions about the organization and the exercise of power in society,

(b) partisan political activities carried out in the context of a federal, provincial or municipal political party,

(c) non-partisan political activities, such as bureaucratic, educational, or pressure activities, carried out in the context of a pressure group.