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BILL 1

AN ACT RESPECTING PUBLIC INTEREST DISCLOSURE

Received and Read the First Time.....
Second Reading.....
Committee.....
Third Reading.....
Royal Assent.....

HONOURABLE STEVE KENT
Minister of Municipal and Intergovernmental Affairs and
Minister Responsible for the Office of Public Engagement

Ordered to be printed by the Honourable House of Assembly

EXPLANATORY NOTES

This Bill would enact the *Public Interest Disclosure and Whistleblower Protection Act*.
The Bill would

- provide a mechanism for the disclosure and investigation of wrongdoings in or relating to the public service that an employee believes may be unlawful, dangerous to the public or injurious to the public interest; and
- protect persons who make disclosures under the Act from reprisals.

A BILL

AN ACT RESPECTING PUBLIC INTEREST DISCLOSURE

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Be it enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

Short title

1. This Act may be cited as the *Public Interest Disclosure and Whistleblower Protection Act*.

Definitions

2. In this Act

(a) "board" means the Labour Relations Board appointed under the *Labour Relations Act*;

(b) "chief executive" means

(i) in relation to a department, the deputy minister of that department, and

(ii) in relation to a public body, the person generally responsible for the management or operation of that body;

- (c) "citizens' representative" means the Citizens' Representative appointed under the *Citizens' Representative Act*;
- (d) "commissioner for legislative standards" means the Commissioner for Legislative Standards appointed under the *House of Assembly Act*;
- (e) "department" means a department created under the *Executive Council Act* and includes a branch of the executive government of the province;
- (f) "disclosure" means a report in writing of a wrongdoing which has been committed or is about to be committed, where that disclosure is made in good faith by an employee in accordance with this Act;
- (g) "employee" means an employee or officer of the public service;
- (h) "public body" means
- (i) a corporation, the ownership of which or a majority of the shares of which is vested in the Crown,
 - (ii) a corporation, commission or body, the majority of the members of which, or a majority of the members of the board of directors of which, are appointed by an Act, the Lieutenant-Governor in Council or a minister,
 - (iii) a school board or school district constituted or established under the *Schools Act, 1997*, including the conseil scolaire francophone, and
 - (iv) a corporation, commission or other body designated by regulation as a public body,
- but does not include Memorial University of Newfoundland;
- (i) "public service" means a department or a public body;
- (j) "reprisal" means one or more of the following measures taken against an employee because the employee has, in good faith, sought advice about making a disclosure, made a disclosure or cooperated in an investigation under this Act:
- (i) a disciplinary measure,
 - (ii) a demotion,
 - (iii) termination of employment,
 - (iv) a measure that adversely affects his or her employment or working conditions, or
 - (v) a threat to take any of the measures referred to in subparagraphs (i) to (iv); and
- (k) "wrongdoing" means a wrongdoing referred to in section 4.

Purpose

3. The purpose of this Act is to facilitate the disclosure and investigation of significant and serious matters in or relating to the public service that an employee believes may be unlawful, dangerous to the public or injurious to the public interest, and to protect persons who make those disclosures.

Wrongdoings to which this Act applies

4. (1) This Act applies to the following wrongdoings in or relating to the public service:

- (a) an act or omission constituting an offence under an Act of the Legislature or the Parliament of Canada, or a regulation made under an Act;
- (b) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of an employee;
- (c) gross mismanagement, including of public funds or a public asset; and
- (d) knowingly directing or counselling a person to commit a wrongdoing described in paragraph (a), (b) or (c).

(2) This Act applies only in respect of wrongdoings that occur after the coming into force of this Act.

Discipline for wrongdoing

5. An employee who commits a wrongdoing is subject to appropriate disciplinary action, including termination of employment, in addition to and apart from another penalty provided for by law.

Request for advice

6. (1) An employee who is considering making a disclosure may request advice from the citizens' representative.

(2) The citizens' representative may require the request for advice to be in writing.

Disclosure by employee

7. (1) Where an employee reasonably believes that he or she has information that could show that a wrongdoing has been committed or is about to be committed, the employee may make a disclosure to the citizens' representative.

(2) The identity of an employee making a disclosure shall be kept confidential to the extent permitted by law and consistent with the need to conduct a proper investigation.

Content of disclosure

8. (1) A disclosure made under section 7 shall be in writing and shall be signed by the person making it.

(2) A disclosure shall include the following information, if known:

- (a) a description of the wrongdoing;
- (b) the name of the person alleged to
 - (i) have committed the wrongdoing, or
 - (ii) be about to commit the wrongdoing;
- (c) the date of the wrongdoing; and
- (d) whether the wrongdoing has already been disclosed and a response received.

Citizens' representative to facilitate resolution within public service

9. Where an employee makes a disclosure to the citizens' representative, the citizens' representative may take the steps he or she considers appropriate to help resolve the matter within the public service.

Disclosure despite other Acts

10. An employee may make a disclosure under this Act, notwithstanding a provision in another Act or regulation that prohibits or restricts disclosure of the information.

Where disclosure restrictions continue to apply

11. (1) Notwithstanding section 10, nothing in this Act authorizes the disclosure of

- (a) information or documents which would disclose the deliberations of the Executive Council or a committee of the Executive Council; or
- (b) information or documents that are protected by solicitor-client privilege.

(2) Where a disclosure involves personal information or confidential information, the employee shall take reasonable precautions to ensure that no more information is disclosed than is necessary to make the disclosure.

Other obligations to report not affected

12. Nothing in this Act relating to the making of a disclosure is to be construed as affecting an employee's obligation under another Act or regulation to disclose, report or otherwise give notice of a matter.

Purpose of investigation

13. The purpose of an investigation by the citizens' representative into a disclosure of wrongdoing is to bring the wrongdoing to the attention of the chief executive of the appropriate department or public body and to recommend the corrective measures that should be taken, when appropriate.

Investigation by citizens' representative

14. (1) The citizens' representative is responsible for investigating disclosures that he or she receives under this Act.

(2) An investigation shall be conducted as informally and expeditiously as

possible.

(3) The citizens' representative shall ensure that the right to procedural fairness and natural justice of all persons involved in an investigation is respected, including persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings.

(4) Notwithstanding another provision of this Act, the citizens' representative shall not investigate a decision, recommendation, act or omission made or done by an individual in the course of acting as a solicitor or Crown prosecutor in the public service.

When investigation not required

15. (1) The citizens' representative is not required to investigate a disclosure and the citizens' representative may cease an investigation if he or she is of the opinion that

- (a) the subject matter of the disclosure would more appropriately be dealt with, initially or completely, according to a procedure provided for under another Act;
- (b) the disclosure is frivolous or vexatious, or has not been made in good faith or does not deal with a sufficiently serious subject matter;
- (c) so much time has elapsed between the date when the subject matter of the disclosure arose and the date when the disclosure was made that investigating it would not serve a useful purpose;
- (d) the disclosure does not provide adequate particulars about the wrongdoing as required by section 8; or
- (e) there is another valid reason for not investigating the disclosure.

(2) Where the citizens' representative believes that a disclosure made to the citizens' representative would be dealt with more appropriately by

- (a) the auditor general, the citizens' representative may refer the matter to the auditor general to be dealt with in accordance with the *Auditor General Act*; or
- (b) the commissioner for legislative standards, the citizens' representative may refer the matter to the commissioner for legislative standards to be dealt with in accordance with this Act.

(3) Where a matter is referred to the auditor general under subsection (2), the reprisal protections set out in this Act apply to the employee or former employee who made the disclosure to the citizens' representative.

(4) Where a matter is referred to the commissioner for legislative standards under subsection (2), the commissioner for legislative standards has and shall exercise the powers and duties of the citizens' representative under this Act.

(5) Where the citizens' representative does not investigate a disclosure, ceases an investigation or refers a disclosure to the auditor general or the commissioner for legislative standards under this section, the citizens' representative shall report on the matter to the employee who made the disclosure in the manner and at the time the citizens' representative considers appropriate.

Conducting an investigation

16. (1) The citizens' representative and persons employed under the citizens' representative have the powers and protections provided for in the *Citizens' Representative Act* when conducting an investigation of a disclosure under this Act.

(2) Sections 13, 14, 25 to 36 and 40 to 42 of the *Citizens' Representative Act* apply to the conduct of an investigation, with the necessary changes.

Investigating other wrongdoings

17. Where, during an investigation, the citizens' representative has reason to believe that another wrongdoing has been committed, the citizens' representative may investigate that wrongdoing in accordance with this Act.

Citizens' representative's report re investigation

18. (1) Upon completing an investigation, the citizens' representative shall prepare a report containing his or her findings and any recommendations about the disclosure and the wrongdoing.

(2) The citizens' representative shall give a copy of the report to the chief executive of the appropriate department or public body.

(3) Notwithstanding subsection (2), where the matter being investigated involves the chief executive, the citizens' representative shall give a copy of the report,

(a) in the case of a department, to the minister responsible; or

(b) in the case of a public body, to the board of directors and the minister responsible.

(4) The citizens' representative shall report on the result of his or her investigation to the employee whose disclosure initiated the investigation in the manner and at the time the citizens' representative considers appropriate.

Notification by department or public body

19. (1) When making recommendations, the citizens' representative may request the appropriate department or public body to notify him or her, within a specified time, of the steps it has taken or proposes to take to give effect to the recommendations.

(2) Where the citizens' representative believes that the department or public body has not appropriately followed up on his or her recommendations, or did not cooperate in the citizens' representative's investigation under this Act, the citizens' representative may make a report on the matter

(a) in the case of a department, to the minister responsible; or

(b) in the case of a public body, to the board of directors and the minister responsible.

Annual report

20. (1) The citizens' representative shall make an annual report to the House of Assembly on the exercise and performance of his or her functions and duties under this Act, setting out

- (a) the number of inquiries relating to this Act;
- (b) the number of disclosures received and the number acted on and not acted on;
- (c) the number of investigations commenced under this Act;
- (d) the number of recommendations the citizens' representative has made and whether the department or public body has complied with the recommendations;
- (e) whether, in the opinion of the citizens' representative, there are any systemic problems that give rise to wrongdoings; and
- (f) the recommendations for improvement that the citizens' representative considers appropriate.

(2) The report shall be given to the Speaker, who shall table a copy of it in the House of Assembly within 15 days after receiving it if the Assembly is sitting or, if it is not, within 15 days after the next sitting begins.

(3) Where it is in the public interest to do so, the citizens' representative may publish a special report relating to a matter within the scope of the citizens' representative's functions and duties under this Act, including a report referring to and commenting on a particular matter investigated by the citizens' representative.

Protection of employee from reprisal

21. (1) A person shall not take a reprisal against an employee or direct that one be taken against an employee because the employee has, in good faith,

- (a) sought advice about making a disclosure from the citizens' representative;
- (b) made a disclosure; or
- (c) cooperated in an investigation under this Act.

(2) A person who takes a reprisal against an employee or directs that one be taken contrary to subsection (1) is subject to appropriate disciplinary action, including termination of employment, in addition to and apart from another penalty provided by law.

Complaint to Labour Relations Board

22. (1) An employee or former employee who alleges that a reprisal has been taken against him or her may file a written complaint with the board.

(2) Where the board determines that a reprisal has been taken against the complainant contrary to section 21, the board may order that one or more of the following measures be taken:

- (a) the complainant be permitted to return to his or her duties;

- (b) the complainant be reinstated or damages be paid to him or her, where the board considers that the trust relationship between the parties cannot be restored;
- (c) compensation be paid to the complainant in an amount not greater than the remuneration that the board considers would, but for the reprisal, have been paid to the complainant;
- (d) an amount be paid to the complainant equal to the expenses and other financial losses that the complainant has incurred as a direct result of the reprisal;
- (e) the activity that constitutes the reprisal cease;
- (f) the situation resulting from the reprisal be rectified; and
- (g) a person do or refrain from doing any thing in order to remedy a consequence of the reprisal.

Labour Relations Act applies

23. Sections 15, 15.1, 16, 17.1, 18, 135, 136 and 139 of the *Labour Relations Act* and the rules of procedure for the board made under that Act apply to a proceeding before the board under this Act, with the necessary changes.

False or misleading statement

24. (1) A person shall not knowingly make a false or misleading statement, orally or in writing, to the citizens' representative or to a person acting on behalf of or under the direction of the citizens' representative

- (a) when that person is requesting advice about making a disclosure;
- (b) when that person is making a disclosure; or
- (c) during an investigation.

(2) A person shall not knowingly make a false or misleading statement, orally or in writing, respecting a complaint about a reprisal to the board or a person acting on behalf of or under the direction of the board.

(3) A person shall not wilfully obstruct

- (a) the citizens' representative or a person acting on behalf of or under the direction of the citizens' representative in the performance of a duty under this Act; or
- (b) the board or a person acting on behalf of or under the direction of the board in the performance of a duty under this Act.

(4) A person shall not, knowing that a document or thing is likely to be relevant to an investigation under this Act,

- (a) destroy, mutilate or alter the document or thing;
- (b) falsify the document or make a false document;

(c) conceal the document or thing; or

(d) direct, counsel or cause, in any manner, a person to do anything described in paragraphs (a), (b) or (c).

(5) A person who contravenes this section or section 21 is guilty of an offence and is liable on summary conviction to a fine of not more than \$10,000.

Protection from liability

25. An action or proceeding may not be brought against the citizens' representative or a person acting on behalf of or under the direction of the citizens' representative for anything done or not done, or for neglect,

(a) in the performance or intended performance of a duty under this Act; or

(b) in the exercise or intended exercise of a power under this Act

unless it is shown that he or she was acting in bad faith.

Arranging legal advice

26. Where the citizens' representative is of the opinion that it is necessary in order to further the purpose of this Act, he or she may, subject to the regulations, arrange for legal advice to be provided to employees and others involved in a proceeding under this Act.

Disclosures- frivolous, vexatious, bad faith

27. An employee who makes a disclosure of a wrongdoing, where the disclosure is frivolous, vexatious or in bad faith, is subject to appropriate disciplinary action in addition to and apart from another penalty provided for by law.

Regulations

28. The Lieutenant-Governor in Council may make regulations

(a) designating a body as a public body for the purpose of this Act;

(b) exempting Acts or regulations from the application of section 10 where the exemption is in the public interest;

(c) respecting the provision of legal advice under section 26, including determining the circumstances under which legal advice may be provided and the amounts that may be paid;

(d) defining a word or phrase used but not defined in this Act; and

(e) generally, to give effect to this Act.

RSNL1990 cL-1 Amdt.

29. (1) The *Labour Relations Act* is amended by adding immediately after section 17 the following:

Referral under Public Interest Disclosure and Whistleblower Protection Act

17.1 (1) An employee or former employee who alleges that a reprisal has been taken against him or her may apply to the board in accordance with section 22 of the *Public Interest Disclosure and Whistleblower Protection Act* for a determination of whether a reprisal has been taken contrary to section 21 of that Act.

(2) Notwithstanding subsection (1), where the board determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the board may, at any time before the complaint is considered, defer further consideration of the complaint until the outcome of the other proceeding.

(3) In making a determination under subsection (2), the board shall consider all relevant factors, including the subject matter and nature of the other proceeding and the adequacy of the remedies available in the other proceeding in the circumstances.

(4) Where the board defers consideration of a complaint, the board shall serve the parties to the complaint with a written notice of and the reasons for the deferral.

(5) The board may dismiss all or part of a complaint where the board is satisfied that

(a) this Act provides no jurisdiction to deal with the complaint or that part of the complaint;

(b) the complaint or that part of the complaint is trivial, frivolous, vexatious or made in bad faith; or

(c) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding.

(6) Where the board dismisses all or part of a complaint, the board shall serve the parties to the complaint with a written notice of and the reasons for the dismissal.

(2) Section 18 of the Act is amended by adding immediately after paragraph (k.2) the following:

(k.3) make a determination of whether a reprisal has been taken contrary to section 21 of the *Public Interest Disclosure and Whistleblower Protection Act*;

Commencement

30. This Act comes into force on July 1, 2014.

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