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Honorable Ted Staffen, Chair
Select Committee on Whistle-blower Protection

Yukon Employees' Union has completed our report; this submission to this select committee is an important step toward providing adequate legislation and protection to workers who are witness to wrongdoing. Protection for these workers is necessary to ensure accountability paired with transparent practices. We thank you for the opportunity to participate in this important process and look forward to your presentation to the Legislative Assembly.

Sincerely,

Laurie Butterworth
President
Yukon Employees' Union

SUBMISSION OF THE
YUKON EMPLOYEES' UNION
(PUBLIC SERVICE ALLIANCE OF CANADA)

TO THE

SELECT COMMITTEE ON WHISTLE-BLOWER PROTECTION
OF THE
YUKON LEGISLATIVE ASSEMBLY

March 2008

Introduction

The Yukon Employees' Union (YEU) and the Public Service Alliance of Canada (PSAC) thank the Committee for the opportunity to identify what the Union believes are the essential issues that must be addressed in establishing whistle-blower protections within the Yukon Territory.

As you might expect, this submission will concentrate on the link between whistle-blower protections and workers. As you might already know, the YEU, in its own right and as a Component of the PSAC, has long called for the establishment of protections for workers who make disclosures of wrongdoing. Accordingly, we have drawn upon, and repeat, the various submissions we have made in advocating for whistle-blower protections in other jurisdictions, including the federal public sector.

At its core, the YEU calls for legislation that provides guidance, support and protection for workers who wish to speak out against wrongdoing.

It is undisputed that workers remain reluctant to do so. When they do come forward, the experience is often characterized by great sacrifice in their personal and work lives that is all too rarely remedied, much less recognized. This vulnerability sends a powerful message to workers who may have knowledge of wrongdoing to remain silent. Indeed, as recently as Fall 2007, a Yukon Territory public sector employee who felt compelled to speak out despite the significant pressures to remain silent, took the extraordinary, and no doubt very difficult, step of remaining silent until retirement.

To begin to address the reality that workers are reluctant to come forward, effective legislation is required. At the very least, the legislation must be administered by an independent agency reporting to directly the Assembly and it must contain real protection and remedies in the face of reprisal.

Why is the issue of whistle-blower protection so important? As our Union has stated on many occasions, there can be no doubt that public sector workers take great pride in their work, and take very seriously the goals of ethical governance and maintaining the integrity of the public service. Their active role in serving the public, and the public interest, is ever present. When they witness the exceptional – wrongdoing in the public service – they want to speak out. Whistle-blower protection is fundamental to protection of the integrity of public sector institutions because, year after year, workers remain reluctant, indeed afraid, to come forward and speak out. Whistle-blower protection, therefore, is a necessary precondition for demonstrating to the public that there exist mechanisms to ensure accountability and ethical governance in our public institutions.

Effective, legislated protection for those who disclose wrongdoing is long overdue. We trust that the following will assist the Committee in its work and we encourage - no, we challenge - this Committee to ensure that, in achieving the important objective of addressing wrongdoing, its recommendations establish meaningful protections against reprisal and an independent and transparent investigation and complaint mechanism.

To that end, the YEU offers the following input into the questions set out in the Assembly's Motion 125.

(1) Should all public institutions and private organizations performing "public" functions be covered?

The YEU submits that there is no reasonable rationale for denying protection to employees of private sector organizations who are performing functions for or on behalf of public and quasi-public sector institutions.

To leave them out sends a message to workers in these sectors that they do not matter and do not deserve protection even in the face of evidence of wrongdoing. It also sends a message to the public that the issues of maintaining and enhancing public confidence in the integrity of the public sector does not apply in its relationships with private organization that can, and do, involves links to the exercise of power, decision-making and the expenditure of public money.

(2) Should only employees or others – unions, advocacy groups, the media, citizens – be entitled to use this legislation?

The YEU believes that all organizations or persons should be entitled to the benefits and protections of legislation given that they may have knowledge of wrongdoing. Stated another way, it is untenable to suggest that an extensive range of individuals that have contact with or knowledge of public sector and private sector transactions touching on the public sphere should be prevented from access to whistle-blower legislation or should not be protected from reprisal in their employment when a disclosure is made.

(3) What types of wrongdoing will be covered?

The types of wrongdoing should be sufficiently broad as to capture a wide range of misconduct. However, any such definition must be supported by education and learning in the workplace and within the public sphere so that confusion about where to go for assistance (an agency, labour relations, staffing tribunals etc.) can be minimized.

One thing is critical. A finding of reprisal must constitute a wrongdoing and, therefore, be an offence under the legislation.

(4) Should the same office conduct the investigation, mediation and protection of whistle-blowers?

It cannot be debated that the success of whistle-blower legislation rests, to a significant degree, on the independence – both real and perceived - of the body responsible for administering it. This message was clear when the Federal Parliament undertook its review prior to the enactment of the *Public Servants Disclosure Protection Act*. The YEU states that a new and independent agency, reporting directly to the Assembly, must be established to administer all aspects of the whistle-blower legislation.

This recommendation does not result in adding an agency that will duplicate efforts, resources and expertise that already exists. The need for this legislation arises precisely because there exists no capacity within the existing legislative framework to deal comprehensively and effectively with the disclosure of wrongdoing in the broader territorial public sector.

The creation of a new, well-funded and resourced agency will cost money. However, the failure to act may have already generated untold costs that could have been minimized, if not prevented, had effective tools been in place to deal with wrongdoing. The public, whose faith in public institutions is at stake here, is unlikely to view the monetary costs associated with establishing an effective agency as either wasted or unwarranted.

Fundamental also is the requirement that public sector workers be confident in the legislation and the institution it will create. The establishment of an independent agency is the only way to encourage that confidence. It is, similarly, the only way to show the general public and public sector workers that the territorial assembly is serious about addressing wrongdoing.

(5) Should employees be required to exhaust departmental procedures before approaching the whistle-blower protection office?

Under no circumstances should an individual be *forced*, at the outset, to proceed through an internal disclosure process or another existing procedure rather than through an independent agency.

As attitudes change, individuals may show their confidence in internal mechanisms by seeking out managers or senior officers. It is critical, however, to leave that judgment call in the hands of the individual employee. The prospect of being directed to internal mechanisms could be enough to cause an employee to decide not to come forward.

That being said, it is the YEU's position that any legislation can, and should, allow a person who has made a disclosure to elect to pursue an

allegation of reprisal through another administrative channel such as a labour relations board or arbitration. The successful investigation of the wrongdoing, however, must be done through an expert agency given the necessary power and authority.

(6) How will retaliation against whistle-blowers be defined and how long will protection exist?

Protection from reprisal is the most fundamental element to successful legislation. Any definition must be broad and purposive and take into the account the myriad ways in which individuals suffer reprisal – whether from the extreme forms of reprisal such as discipline, termination or demotion, to more subtle mechanisms such as ostracization and marginalization in the workplace. Whether an action or actions constitute reprisal, within this purposive definition, should be left to be determined on a case by case basis.

In the YEU's view, any independent agency must have the power to investigate and remedy allegations of reprisal. This is a power that should also be conferred on labour relations boards that fall under the legislative authority of the Assembly. With respect to persons employed under other labour relations jursdictions, such as the Canada Labour Code, the legislation should state – in declaratory and unequivocal terms – the prohibition on reprisal, and the definition of reprisal, set out in the legislation. An employee who elects not to pursue an allegation of reprisal with the agency, but rather with an arbitrator or the labour board, would continue to be able to rely on the declaratory principles in the legislation to challenge employer conduct.

Given the range of factors that prevent persons from coming forward, the YEU believes that no time limit should be specified. However, the agency should be invited – under a five year legislative review – to make recommendations with respect to time limits based on the body of experience over the reporting period.

If it is the public interest to know of wrongdoing, then how can we arbitrarily affix a time limit that would – later – prevent the allegation from being investigated or would prevent the individual making the disclosure from enjoying the benefits of the protections such legislation would offer.

(7) Should there be a reverse onus on the employer to demonstrate that adverse decisions on a whistle-blowing employee were not a reprisal?

Yes, there should. As stated elsewhere in this submission, the range of reprisals can be vast. And the workplace circumstances can involve long-standing workplace relationships that may have had moments of conflict. Employees, having established an adverse impact and the fact that a disclosure was made, should not be required to prove a negative. The burden should, and must, fall to the employer to demonstrate that there was no reprisal. Moreover, a reprisal should only be one factor – not the primary or sole factor – that gave rise to the action that constitutes a reprisal to run afoul of the legislation.

(8) What remedies for employees judged to be adversely affected will be specified in the legislation?

It is critical that any agency or other administrative tribunals, such as a labour board, have a broad and purposive authority to remedy

reprisals. Reprisal can occur in both subtle and overt ways. Its impacts can be monetary, can involve lost opportunities, damage to self-esteem, alienation in the workplace, damage to reputation and severe stress and anxiety. All these forms of reprisal impact not only the workplace, but an individual's private life, health and well being.

In order to remedy reprisals, therefore, remedial authority should not be limited to actual damages, but must include the power to award damages for pain and suffering and/or punitive damages. There should also be the power to award interim relief pending an investigation into the allegations, including the power to reinstate someone to employment.

Where powers are enumerated, for example, the words "including but not limited to" and/or "may order any remedy that it considers necessary or appropriate in the circumstances" should be at the forefront.

As a reprisal should be defined as a wrongdoing, once proved it is worthy of strong sanction.

(9) (a) What sorts of consequences will there be for employees who engage in reckless or malicious accusations of wrongdoing, and (b) for managers who engage in reprisal against employees who act in good faith?

The YEU has broken this question into parts (a) and (b) as they relate to two different systemic issues that whistle-blower protection addresses.

With respect to (a), a disclosure of wrongdoing must be investigated under the legislation by an independent agency. If, after investigation, a conclusion is drawn that there has been no wrongdoing within the meaning of the *Act*, an individual could be directed to other available procedures that may be useful in addressing the problems identified. For example, individuals may not understand or correctly categorize the nature of the issues brought forward or their "correct" legal characterization. Agencies will, as experts, grapple with this very question on a case by case basis.

In this context, it is untenable to have – as a cornerstone of such legislation – express provisions dealing with penalties for filing a frivolous, vexatious or bad faith allegation. The legislation need say no more than that the agency is entitled to dismiss any allegations of wrongdoing that it has investigated and found to have been filed in a frivolous, vexatious or bad faith manner. This would bring it in line with other types of legislation, such as the *Canadian Human Rights Act* (see paragraph 41(1)(d) of the *Act*).

To provide for specific penalties would have a negative impact on one of the core objectives of whistle-blower legislation – to encourage persons to come forward. In the exceptionally rare case in which such a finding of vexatiousness might be found, the consequences of such a finding can and should be left within the realm of managerial discretion and subject to challenge under existing workplace dispute resolution mechanisms.

With respect to part (b) of this question, it is linked to part (a) in that the question is based on the presumption that *protection* from reprisal will only be triggered where a disclosure is "made in good faith". The

YEU cannot support such a precondition for protection from reprisal. This is not because we believe that the rare instance where a person does not make a disclosure in good faith should not be addressed. We have indicated, above, how we feel this can and should be addressed.

The YEU takes this position because the good faith requirement has a chilling effect on persons who might otherwise come forward. A good faith requirement, loaded into the right to seek protection under the legislation from reprisal, sends out a message to employees that they are at risk when they make a disclosure. This is because on the one hand they are accepting an invitation to disclose that is simultaneously accompanied by the threat of a defensive attack on their integrity by the person(s) accused of wrongdoing and, at the end of the day, discipline or a wide range of other workplace related repercussions. These two cannot be linked expressly in the legislation, as they will become inextricably linked in the minds of workers who elect – as a result – to remain silent.

In the context of internal investigations, this linkage has particularly troubling consequences given the lack of neutrality in the investigative mechanism. It is also troubling more broadly given that many additional workplace issues may surround an allegation of wrongdoing. If an individual employee has filed a harassment complaint against a manager, or is seen as a trouble-maker by an affected manager, or has a disciplinary record, and later makes a disclosure of wrongdoing relating to the same individual(s), he or she may worry about how the good faith requirement will be interpreted and applied. These types of concerns ought not to be front loaded into the considerations that go into the making of a disclosure of wrongdoing. And we are sure the

Committee will hear that fear of reprisal and a lack of protections there from are at the forefront of those considerations.

The YEU states that it is not necessary to require that a disclosure of wrongdoing must be made in good faith. Where a complaint is found to be frivolous, vexatious or made in bad faith, it can be dismissed outright. There are no requirements that a complaint before a labour board, a human rights commission or a court be initiated in good faith. Good faith is assumed. YEU states unequivocally that public sector and private sector workers in this context certainly deserve the respect that this assumption represents.

With respect to the sanctions for reprisal, the YEU submits that – as a wrongdoing – a finding of reprisal is serious and should invite consequences. To allow a person with managerial authority who has reprised against an employee to be found to have violated the legislation, but suffer no meaningful sanction would send the wrong signal to employees and to the public.

As with all decisions to impose discipline, the YEU believes strongly in providing decision-makers with a wide range of options which should include termination of employment. However, these matters should be decided on a case by case basis, taking into account mitigating circumstances and a range of other factors.

Conclusion

The YEU strongly encourages the Committee to report back to the Assembly with a vision for whistle-blower legislation that takes into account the issue we raise here.

There is no doubt that workers need legislation providing for the disclosure of wrongdoing and protection from reprisal. The YEU is committed to working with the Committee to see that this happens.

In closing, we repeat the remarks made by the PSAC in providing its submissions to the House of Commons prior to the enactment of the *Public Servants Disclosure Protection Act*. There is a constant struggle to achieve a balance between the principles of the duty of loyalty of employees to their employer and the guarantee to the right to freedom of expression as set out in the *Canadian Charter of Rights and Freedoms*. The challenge this Assembly faces is achieving that balance in a principled and effective way.

We encourage the Assembly not to see the duty of loyal and individual freedom of expression as being at odds in the context of wrongdoing. By seeing the concepts of loyalty and expression as in conflict, legislators may ultimately stifle expression – through good faith requirements, barriers to access to personal and other information, and inadequate reprisal protections – in the name of preserving loyalty to the *employer*.

We must, therefore, ensure that disclosure of wrongdoing, as an element of expression, is encouraged, respected and protected. Public and private sector workers, past and future, who witness wrongdoing are, if nothing else, confident that the inspiration for disclosure is loyalty and their deep commitment to public service and the integrity of our public institutions.