

WHISTLE BLOWING
WHEN MUST EMPLOYEES WHISTLE WHILE THEY WORK?

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Introduction

We need only give a cursory scan of current headlines to get a sense of the vital public interest served by whistle blowing. We have lately relied on civil servants with insider information to divulge an array of serious government misconduct, from the notorious federal sponsorship program to Toronto's MFP computer-leasing debacle. More recently, alarms were sounded over the immediate personal health interests of thousands of Canadians in connection with health risks flowing from the widespread use of popular new-generation painkillers.¹ One year after Canadians filled millions of prescriptions for these medications, Health Canada decided to withdraw market authorization for selective COX-2 drugs due to updated clinical trial results which revealed an increased, potentially fatal cardiovascular risk linked to the medication.

This latter, emerging controversy surfaces the difficulties met by researchers and public health workers whose public expression of legitimate concerns over health risks have been met with resistance and even reprimand. When Dr. Nancy Olivieri, a researcher at Toronto's Hospital for Sick Children, threatened to inform her patients or publish negative findings about the drug deferiprone, her research was terminated by the drug manufacturer Apotex, and legal action was threatened if she informed patients of the risks.² Her request for legal assistance from the Hospital was further denied by the administration, on the grounds that she had not received consent to publicly air her concerns. In a similar set of circumstances, Health Canada gave letters of reprimand to Margaret Haydon and Dr. Shiv Chopra for publicly airing their concerns over safety risks to Canadians associated with the use of bovine growth hormones and antibiotics in the livestock industry.³

These examples demonstrate the harsh institutional context that facing employees whose concerns over unsafe or unethical practices are not successfully answered through internal channels. Employees with insider knowledge may not be justifiably criticized if they choose self-preservation over selfless expression in the public interest.

In view of this grim reality, should employees be obligated to publicly disclose employer misconduct? That is in certain circumstances should employees and

¹ "Celebrex risk alarms arthritis sufferers," *The Globe and Mail*, page A1, Saturday, December 18, 2004.

² A good, independent review of the Olivieri dispute is found at <http://www.caut.ca/en/issues/academicfreedom/OlivieriInquiryOverview.pdf>

³ *Haydon v. Canada (T.D.)*, [2001] 2 F.C. 82

their bargaining agents be legally bound to blow the whistle on serious misconduct.

A review of the current law reveals no widespread legal obligation for employees to blow the whistle on misconduct in their places of work. At most, there may be potential instances of legal obligations for workers to blow the whistle in certain limited circumstances. For instance, professionals whose conduct is governed by self-regulating professional bodies may be obliged to publicly disclose.

Whistle blowing within the context of traditional definitions; i.e., the public disclosure of misconduct—legal and moral—generally has been a matter of personal choice. Non-public internal disclosure of malfeasance, a somewhat limited form of whistle blowing, generally viewed by trade unions and their members as a variation of “snitching” has a well established jurisprudential basis. The obligation to blow internally whether a product of corporate based employment policies or a general employment principle is derived from the duty of fidelity, sometimes described as the duty of loyalty. Every employee is under a duty to faithfully discharge his/her employment obligations in a manner designed to serve and advance the employer’s interests. The duty of fidelity obligates internal disclosure and serves as a barrier to whistle blowing in the truest sense; i.e., public disclosure.

There is clearly a difference between protecting public disclosure and obligating public disclosure.

As noted above, and as described below, few, if any, are under a duty to disclose publicly. The creation of some general statutory duty to publicly disclose, aside from generating obvious employer resistance, is unlikely to serve the public interest. The recent high profile instances of moral and legal misconduct by private corporations and public bodies for the most part derive from inadequate oversight and regulatory control. What is needed is more publicly regulated oversight not self-regulation through some broadly based duty to whistle blow. In the blue collar workplace, self-regulation without adequate regulatory oversight has a checkered history at best. Occupational Health and Safety Legislation which typically contains elements of whistle blowing and is primarily focused on self-regulation; i.e., voluntarism has done little to stem injuries and fatalities within workplaces. The sad fact is regardless of protections imposed few, if any, are likely to blow. Even if the whistle blower gets the facts right and has exhausted all internal channels, blowing the whistle invariably means economic hardship, at least in the short term.

In what follows, we will seek to define whistle blowing and examine its external and internal dimensions with specific emphasis on its jurisprudential relationship within a collective bargaining context to the duty of fidelity.

Whistle Blowing a Definition: Distinguishing Internal and External Dimensions

A 1971 national conference organized by Ralph Nader defines whistle blowing as “an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity.”⁴ This broad definition suitably indicates the necessary public dimension of the whistleblower’s comment on internal organizational malfeasance. The public dimension is a critically important defining trait of whistle blowing activity in its truest sense.

Criticism has been held as “public” even if the comments were made to one individual representative of an employer’s customer. In *Re Serco Facilities Management Inc. and P.S.A.C.*,⁵ Arbitrator Oakley states that “A comment made to a customer is a public comment in the sense that it is made to a person who is outside the Employer.”⁶ Hence, workers raising concerns through national media outlets, through notification of public regulatory bodies, or through personal phone calls to customers alike, so long as they are raised to persons outside of the worker’s organization, fall within the truest definition of a whistle blower.

As noted above, public disclosure and internal disclosure need to be distinguished. The latter serves as a barrier to public disclosure. Although the duty of fidelity in principle supports disciplinary action for failing to report malfeasance internally, there is a growing trend for workplaces to implement internal procedures to address company misconduct, including internal reporting mechanisms for disclosing perceived misconduct, and the creation of company-wide Ombudsmen.⁷ Misconduct detected and corrected through such internal mechanisms averts the public airing of misconduct that is a core feature of whistle blowing in its truest sense, such internal mechanisms might be referred to as “whistle muting:” sounding an alarm only loud enough to be heard within the Employer’s organization.

The distinction between public and internal reporting of misconduct bears heavily on the issue of an employee’s obligation to blow the whistle. It is a central feature in duty of fidelity cases to examine steps taken by an employee to

⁴ N.M. Rongine, “Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistle blowing” (1985), 23 Am. Bus. L.J. 281, as quoted in M. Myers and V.J. Matthews Lemieux, “Whistle blowing: Employee Loyalty and the Right to Criticize: The Employee’s Perspective” in W. Kaplan, J. Sack and M. Gunderson, eds., *Labour Arbitration Yearbook* (Toronto, Butterworths, 1991), vol.2, p.212.

⁵ (2000), 91 L.A.C. (4th) 289.

⁶ *Serco*, *supra*, note 5 at 300.

⁷ See Sheldon Gordon, “Blowing the Whistle” *National*, November 2004, Volume 13, No. 7 November 2004 at pp. 27-9, for an overview of this growing trend.

resolve his/her concern internally. As will be discussed below, the increasing prominence of internal mechanisms for resolution of employee concerns will bear heavily on issues of an employee's obligation to blow the whistle.

Recent Legislation: Governing External and Internal Disclosure

It is important to note in the outset that the federal government has recently enacted two amendments to the *Criminal Code*⁸ which bear directly on the question of workers' obligation to blow the whistle on misconduct. Bill C-13, *An Act to amend the Criminal Code (capital markets fraud and evidence-gathering)*⁹ took effect on September 15, 2004. This Bill adds a new section 425.1, which prohibits employers from taking or threatening to take disciplinary action against an employee "with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act." Bill C-13 clearly engages the public, external dimension of disclosure, as defined above.

By comparison, Bill C-45 *An Act to amend the Criminal Code (criminal liability of organizations)*,¹⁰ which came into force on March 31, 2004, is much less clearly a regulation of external reporting measures. Rather, this statutory response to the Westray mine disaster, which establishes occupational health and safety negligence as a criminal offence and broadens corporate criminal liability, omits explicit reference to public reporting. Though the mischief targeted by Bill C-45 is organizations' commission of criminal offences, the duties enacted under the Bill are not clearly given as duties to resolve misconduct through external measures.

Finally, Bill C-11 *An Act to Establish a Procedure for the Disclosure of Wrongdoings in the Public Sector, Including the Protection of Persons Who Disclose the Wrongdoings*¹¹—which received its first reading on October 8, 2004—interestingly defines "protected disclosure" made by a public servant with reference to a full gamut of internal and external modes of disclosure of wrongdoing in the public sector. As will be explained below, this Bill generally, but not perfectly, corresponds with the common law of whistle blowing.

⁸ R.S., c. C-46

⁹ http://www.parl.gc.ca/37/3/parlbus/chambus/house/bills/government/C-13/C-13_3/90236bE.html

¹⁰ http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/government/C-45/C-45_3/90234bE.html

¹¹ http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-11/C-11_1/C-11-3E.html

EXTERNAL MEASURES

Who is Under an Obligation to Blow the Whistle?

1. Professional Employees

Professional employees are often subject to self-governing regulatory bodies, which in turn establish codes of conduct that bind the professionals' behaviour. These codes of conduct are developed and approved by the membership bodies to which a given professional belongs. Such professional codes of conduct uniformly exhibit interplay between the overriding professional value of client (or patient) confidentiality, and circumstances in which a professional's breach of confidentiality is acceptable, or even obligatory.

As an example the Certified General Accountants of Ontario's *Code of Ethical Principles and Rules of Conduct*¹² expressly define instances in which external disclosure of confidential information acquired as a result of professional or business relationships is either mandatory or discretionary. Rules 201.1 and 201.2 read:

R201.1 Mandatory Disclosure

A member shall disclose the information:

- a. where disclosure is compelled by a process of law or by statute; or
- b. where such information is required to be disclosed by the board of governors of the Association or any of its committees, appointed thereby in the proper exercise of its duties.

R201.2 Discretionary Disclosure

A member is not forbidden from disclosing the information:

- a. where properly acting in the course of the duties incumbent on a member; or
- b. where a member becomes aware of an apparent or suspected criminal activity. Before making such a disclosure, a member should obtain advice from a member of the appropriate provincial or territorial law society as to the member's duties and obligations as a citizen in the context of the member's professional activities. A member so doing shall not be in violation of this rule regarding

¹² Found online at <http://www.cga-ontario.org/newfiles/public/publications/ethic.htm>

confidentiality, by reason only of the seeking or following of such legal advice or reporting.

Rule 201.1 obligates a CGA to publicly disclose confidential client information in aid of judicial or CGA procedures, such as testifying before disciplinary bodies or in court under summons. Apart from these limited instances, the Rules and in particular Rule 201.2 simply replicates the law of whistle blowing in general; that is, a CGA is permitted to make public disclosure of apparent or suspected criminal activity at his/her own personal and moral discretion. Whistle blowing per se is therefore not a widespread obligation for accountants.

Rules 2.03(2) and 2.03(3) of the Law Society of Upper Canada's *Rules of Professional Conduct*¹³ generally mirror the above distinction between mandatory and discretionary disclosure of confidential information. However, in light of the *Rules'* elaborate definition of the lawyer's obligation to maintain strict client confidentiality, the respective circumstances in which a lawyer shall disclose, or is permitted to disclose client information are much more stringently defined. Rule 2.03(2) indicates that lawyers are obliged to disclose information when required by law, but only as much information as is required to satisfy this obligation. Likewise, Rule 2.03(3) permits external disclosure of confidential information, but only insofar as disclosure is with respect to "imminent risk to an identifiable person or group of death or serious bodily harm." Even in such a pressing situation, lawyers' whistle blowing activity is narrowly permissive, and not at all obligatory.

Of all of the LSUC *Rules of Professional Conduct*, Rule 6.01(3) places perhaps the clearest, most pressing obligation on lawyers to blow the whistle on unethical behaviour encountered in practice. The Rule expressly provides a "Duty to Report Misconduct" in several given scenarios of lawyer misconduct, including the misappropriation of trust monies, participation in serious criminal activity related to a lawyer's practice, or any other situation where a lawyer's clients are likely to be severely prejudiced. The commentary to Rule 6.01(3) makes clear that if a lawyer counseling another lawyer learns of serious misconduct or criminal activity related to that lawyer's practice, the counseling lawyer must report this activity to the Law Society.

Note, however, that this obligation to blow the whistle is not absolute. Rule 6.01(3) specifies that a lawyer's obligation to report lawyer misconduct to the Law Society exists only insofar as it does not interfere with or breach the paramount solicitor-client relationship. A possible (if far-fetched) example in which this obligation should be exercised is thus one where, for instance, an associate lawyer accidentally witnesses clear evidence that other lawyers in her

¹³ Found online at http://www.lsuc.on.ca/services/RulesProfCondpage_en.jsp

firm are embezzling client funds to support an illegal drug trafficking operation; Rule 6.01(3) is designed to oblige that associate lawyer to blow the whistle to the Law Society, in the interest of preserving the integrity of the profession.

The controversial amendments to the LSUC *Rules of Professional Conduct*, released March 25, 2004, which oblige corporate legal counsel to internally report organizational misconduct "up the ladder" within the organization will be discussed later in the "Internal" component of this paper.

By comparison to lawyers and accountants, doctors in Ontario have the most direct, mandatory disclosure policy of any professional body; however, the extent to which this provision contemplates "external" disclosure is debatable. The College of Physicians & Surgeons of Ontario Policy #1-03, *Disclosure of Harm*,¹⁴ makes it obligatory for a physician to disclose harm sustained by a patient as soon as reasonably possible. The policy specifies, however, that this disclosure is limited to the patient, and only in serious circumstances where the harm is expected to negatively affect the patient's health. This policy expressly declines establishing an obligation to report to a third party, or go public with respect to the causes of the harm.

Arguably, CPSO Policy #1-03 may represent an express obligation on a professional employee to blow the whistle on malfeasance, even if only a partial obligation with respect of harm and not its causes. If possible harm is attributable to several patients, due to widespread prescription of a drug that a physician subsequently learns is associated with likely health risks (as did Dr. Olivieri) the physician is obliged under this Policy to notify all of the affected patients. Under such foreseeable scenarios, this Policy creates as direct an obligation to broadly expose organizational ills as is likely to be found enforced by self-regulating bodies of professional employees.

Others including health, social service and teaching professionals pursuant to either specific codes of conduct or a generally prescribed fiduciary duty may be under an obligation to disclose certain information. Again, it is important to note that without exception public disclosure is largely delineated in discretionary and not mandatory terms.

¹⁴ Found online at <http://www.cpso.on.ca/Policies/disclosure.htm>

II. Trade Union Officials.

Trade union officials come in all shapes and sizes. Some are employed directly by trade unions and accordingly, owe no duty of fidelity to any employer other than the trade union employer. Others continue to work for a specific employer and consequently, continue to owe a duty of fidelity to that employer regardless of their trade union activities.

As representatives of a bargaining agent, all trade union officials in carrying out their activities are cognizant of the bargaining agent's duty of fair representation to all employees represented in the bargaining unit.

The duty of fair representation in most collective bargaining statutes is defined negatively, by proscribing certain types of conduct.

Public disclosure of employer conduct by trade union officials is almost invariably connected to a collective bargaining interest and most often is designed to enhance bargaining leverage by generating a negative although not too negative impact on the employer's bottom line.

It seems obvious in light of the negatively defined duty of fair representation that a trade union through its officials is unlikely to be under any duty to engage in whistle blowing in the truest sense; i.e., externally. While whistle blowing might well enhance a trade union's bargaining leverage, might well work to the advantage of its membership, might well be in the best interests of employees in a bargaining unit in limited circumstances, there is nothing legally mandating whistle blowing. Indeed, trade union whistle blowing (external), which is not uncommon whether generated through the professional or volunteer trade union official, is subject to severe strictures.

For the professional, there is the array of common law torts including defamation and negligent misrepresentation. (See *Procor v. United Steelworkers of America et al.*¹⁵) For the volunteer who continues to work for the employer whom he/she publicly criticizes, there are the limitations and restrictions imposed on public comment inherent in the duty of fidelity. Public criticism of an employer is almost inevitably considered as contrary to the employer's interests.

In *Re Simon Fraser University and A.U.C.E.*, Loc. 2¹⁶, Arbitrator Bird explains this dynamic at p. 368:

Experience shows that, except in the most unusual circumstances, such as in the case of academics, public criticism of the employer almost inevitably

¹⁵ 71 O.R. (2d) 410

¹⁶ (1985), 18 L.A.C. (3d) 361

leads to a deterioration of working relationships with bad consequences for the employer, the employee, or both. Only when some higher purpose is served such as to expose crime or serious negligence, to serve the cause of higher learning, to fairly debate important matters of general public concern related to the employer or those in authority over him, as examples, can the employer be publicly criticized about the employer's conduct without breaching the duty of loyalty. Even then the criticism must be fair in that a deliberate omission and negligent misstatement of significant facts will be treated as a breach of the duty of loyalty and so will a failure to exhaust all reasonable opportunities to resolve the issue internally before making matters public. The employer's legitimate goals must be accorded respect by employees who are required to work towards accomplishing those goals.

The arbitral jurisprudence to be fair does distinguish in a limited manner between public criticism by a trade union official and a bargaining unit employee. The former has greater latitude by virtue of the conflict ridden nature of the collective bargaining relationship provided, of course, the public criticism relates to a collective bargaining objective.

In *Re Burns Meat Ltd. and Canadian Food & Allied Workers*,¹⁷ Arbitrator M.G. Picher articulates the privilege of the trade union official as follows::

While generally a company may be entitled to expect a degree of faithfulness and respect from employees in statements which they make after working hours, it is clear that an employer cannot hold employees to a standard of unquestioning loyalty, especially where union business is concerned. It would be unrealistic not to expect that a union steward will, whether in a speech or a newsletter, occasionally express strong disagreement with the company and its officers, and do so in vivid and unflattering terms...

If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system, they must not be muzzled into quiet complacency by the threat of discipline at the hands of their employer... The statements of union stewards must be protected, but that protection does not extend to statements that are malicious in that they are knowingly or recklessly false. The privilege that must be accorded to the statements of union stewards made in the course of their duties is not an absolute license or an immunity from discipline in all cases.

¹⁷ (1980), 26 L.A.C. (2d) 379

This latter caveat is expanded upon by Arbitrator Burkett in *Re Canada Post Corp. and C.U.P.W. (Van Donk)*,¹⁸ who at pp. 344-5 explains:

The labour boards have defined the right of a union official to represent employees to encompass public criticism of the employer in matters related to collective bargaining and the administration of the collective agreement so long as the statements are not “malicious in that they are knowingly or recklessly false.” The labour boards hold that such a right operates during collective bargaining and during the term of the collective agreement. The arbitral awards in *Chedore and Treasury Board, supra*, and *Ministry of Attorney-General and B.C.G.E.U., supra*, which pre-date these labour board decisions, are, in my view, inconsistent with them. They circumscribe the representation rights of union officials, acting in their trade union capacity, well beyond that contemplated by the labour boards. It is inconceivable that a trade union official could ever be disciplined for exercising his/her right to represent employees as this right has been defined by the tribunals with statutory authority to define such rights.

Accordingly, as responsibilities pursuant to the above-described duty of fair representation, union officials have been seen as having an obligation to make external comment in certain circumstances. In *Re National Steel Car Ltd. and U.S.W.A.*¹⁹ the Grievor, a Union officer and co-chairperson of the Health and Safety Committee was terminated for—not just blowing the whistle—but raising an alarm by calling the fire department over mistaken perceptions of a fire in the workplace. This false alarm incident followed three fire outbreaks, one of which indirectly resulted in the death of the plant electrician. The Grievor subsequently contacted the *Hamilton Spectator* about the Company’s disregard for unsafe conditions at the plant.

In his award, Arbitrator Shime found that there was no evidence that the Company had failed to consider health and safety matters, and further held that the Grievor’s contacting the fire department was made without proper inquiries and due diligence in ascertaining whether there was a fire at the time. Although the Grievor’s actions were not malicious or knowingly false, and undertaken in his role as a Union official, he was nevertheless reinstated with a ten-month suspension due to poor judgment and neglect for proper internal avenues of inquiry.

¹⁸ (1990), 12 L.A.C. (4th) 336

¹⁹ (2001), 101 L.A.C. (4th) 316

III. Legislated Duties?

The "Westray Bill" C-45, *supra*, enacts section 217.1 of the *Criminal Code* to read:

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

While it is too early to be certain how this provision will be interpreted, there is at very least a potential obligation to publicly report unsafe work conditions where such whistle blowing activity constitutes "reasonable steps to prevent bodily harm" to a worker. However, as will be described, all workers are bound under a duty of loyalty to the organization, and "reasonable steps" may realistically entail predominantly internal reporting measures. Ultimately, the reasonability of a person's chosen mechanism for preventing harm, pursuant to s. 217.1, may well depend on the known effectiveness of the chosen mechanism for preventing bodily harm; a supervisor may, in extreme circumstances, be bound by s. 217.1 to eschew perfunctory internal reporting mechanisms and opt for timely whistle blowing.

Similar ambiguity arises over what "reasonable measures" may be necessary under s.22.2(c), which deems an organization a party to an offence if one of its senior officers "knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence." Again, we must wait for application of this provision to ascertain whether the scope of "reasonable measures" necessarily includes public whistle blowing.

Note however that neither Bill C-13, *supra*, nor the tabled Bill C-11, *supra*, provide direct obligations to blow the whistle. Bill C-13 offers protection against reprisal for whistle blowers but does not make whistle blowing mandatory. Similarly, and as will be described below, the degree to which Bill C-11 mandates public disclosure of wrongdoing in the public service directly codifies the common law requirement on employees to exhaust internal measures before blowing the whistle; even having expended internal reporting mechanisms to no avail, public servants are permitted but not obliged to publicly disclose wrongdoing as a final measure.

Sanctioning the Whistle Blower

The number of reported cases involving whistle blowers is relatively small and for the most part, involves public disclosure by trade union officials. Perhaps it is because few, if any employers are engaged in misconduct? Perhaps most employees are simply not sufficiently engaged to run the risks inherent in public disclosure. Or perhaps employees simply are not prepared to risk their economic and their colleagues' wrath in light of the barriers and the sanctions described and supported within the jurisprudence.

The right to go public is tempered by the duty of fidelity. The duty demands that an employee before engaging in public speech exhaust internal avenues to address his/her concerns and ensure that public criticism is founded on accurate facts and then stated dispassionately and objectively. The limited privilege described by Arbitrator Picher does not attach to the conduct and statements of employees other than trade union officials.

In *Re Interior Roads Ltd. and B.C.G.E.U.*,²⁰ an employee placed an anonymous phone call to a citizen—informing that the citizen's near miss by a company truck while walking was not an accident, and admonishing him to go to the police—severely damaging the employer's reputation. The employee's termination was upheld at arbitration; regardless of the safety risk posed by certain of the Company's drivers, Arbitrator Jackson held, the Grievor did not sufficiently exhaust internal measures, and his decision to place the telephone call warranted termination as "a serious act of misconduct."²¹

Dr. Shiv Chopra has been twice suspended, respectively, for publicly exposing perceived racism within Health Canada²² and unnecessary fear-mongering, post 9/11, in Health Canada's stockpiling of antibiotics against a possible bioterrorist attack.²³ His grievance regarding the former suspension was allowed, and the latter grievance denied, in view of the extent to which he had diligently attempted to resolve his perceived concerns internally. His off-the-cuff public whistle blowing over antibiotics stockpiling was to be particularly serious misconduct deserving of suspension, because he did not establish an immediate danger in the stockpiling policy that "required bypassing normal internal discussion venues."²⁴

²⁰ (2003), 123 L.A.C. (4th) 171.

²¹ *Interior Roads*, *supra* note 20, at 188.

²² *Re Treasury Board (Health Canada) and Chopra* (2001), 96 L.A.C. (4th) 367

²³ *Re Treasury Board (Health Canada) and Chopra* (2003), 124 L.A.C. (4th) 149

²⁴ *Re Treasury Board (Health Canada) and Chopra*, *supra*, note 23 at 175.

INTERNAL MEASURES:

Muting the Whistle?

Public disclosure is subject to the duty of fidelity. The duty of fidelity dictates that the whistle blower exhaust internal avenues prior to airing concerns in a public forum.

If public disclosure is a matter of choice, internal disclosure as noted above is not. The duty of fidelity appears to require an employee to bring to the employer's attention instances of misconduct. The cases in support of this proposition are reviewed below. Virtually all of them involve individual acts of dishonesty by other employees or first line managers. None raise much more difficult issue of internal whistle blowing involving institutional malfeasance or reprehensible conduct by senior manager.

With the perceived escalation of public disclosure of wrongdoing by private and public sector employers, employers both private and public have moved to establish and enforce codes of conduct which invariably impose on all employees a duty to raise internally breaches of the prescribed code. Whether this trend is considered a matter of good corporate governance or viewed more cynically as an effort to mute whistle blowing is really a matter of ideological perspective. Precluding public disclosure by ensuring the internal disposition of malfeasance certainly makes sense at least on the surface. It also provides the employer with available scapegoats in the event of disclosure and perhaps, more importantly, diminishes and dilutes demands for public oversight and regulatory control. Self regulation has often served as an effective and efficient guarantor of no regulation.

The impact of internal procedures for raising wrongdoing was dealt with in *Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees' Union*,²⁵ wherein Arbitrator Weiler articulates the issue as follows:

...the duty of fidelity does require the employee to exhaust internal "whistle blowing" mechanisms before "going public". These internal mechanisms are designed to ensure that the employer's reputation is not damaged by unwarranted attacks based on inaccurate information. Internal investigation provides a sound method of applying expertise and experience of many individuals to all problems that may only concern one employee. Only when these internal mechanisms prove fruitless may an employee engage in public criticism of his employer without violating his duty of fidelity.²⁶

²⁵ (1981), 3 L.A.C. (3d) 140.

²⁶ *B.C.G.E.U.*, *supra*, note 45 at 162-3.

The “snitch” cases as noted above all involve instances of employee theft, fraud or general dishonesty.

An employee’s awareness of a coworker’s theft from the employer may constitute serious enough dishonesty to warrant discipline, but the employee’s awareness must be based on stronger evidence than rumour or hearsay.²⁷ However, employees’ knowledge of a coworker’s theft followed by denial of this knowledge and failure to provide full explanations of their awareness have been upheld as just cause for discipline.²⁸

It is important to note that an employee’s failure to report knowledge of a coworker’s theft from the employer does not automatically implicate that employee as a party to the offence.²⁹ An employee who is essentially a “passive onlooker” to misconduct in the workplace and thereby acquiesces to the conduct does not engage in theft; still, acquiescence without reporting to the employer is “a serious industrial offence, even though the Grievor himself lacked dishonest intentions.”³⁰

An employee caught with stolen company property cannot claim as defence to know who stole the property, while simultaneously refusing to divulge the alleged thief’s name; the employee is presumed to be the thief, and attract the corresponding sanction.³¹ In such instances where the employee who is caught with stolen company property refuses to inform on coworker alleged to be the “true thief,” just cause is premised not on the refusal to inform, but rather the worker’s possession of stolen property.³²

Conversely, an employee who admits to theft when caught with stolen property, but refuses to identify his/her accomplice is guilty of a serious offence. In *Re Air Canada and I.A.M., District Lodge 148*,³³ the Grievor’s twenty-year-long service was terminated after being caught with stolen gasoline and refusing to divulge who gave him access to the company gasoline stores. Arbitrator Keras concluded that the Grievor’s preference of loyalty to his friend over his loyalty to his employer was an aggravating factor that made it “impossible to rebuild the trust [that was broken].”³⁴ The Grievor’s termination was upheld on this basis.

Still, there appears to be a de minimis threshold for the seriousness of lack of fidelity and honesty, distinguishing the kinds of serious situations that oblige an

²⁷ *Toronto Transportation Commission* (1951), 2 L.A.C. 673.

²⁸ *Re United Steelworkers, Local 3129, and Moffats Ltd.* (1966), 17 L.A.C. 72

²⁹ *B.C. Hydro and International Brotherhood of Electrical Workers* (1985), 18 L.A.C. (3d) 113.

³⁰ *B.C. Hydro*, *supra* note 29 at 123

³¹ *Re Polymer Corp. Ltd. and Oil Chemical and Atomic Workers* (1973), 4 L.A.C. (2d) 148.

³² *Re Air Canada and International Association of Machinists* (1979), 24 L.A.C. (2d) 373.

³³ (1996), 52 L.A.C. (4th) 257.

³⁴ *Air Canada*, *supra* note 33 at 266.

employee to inform on a fellow employee from instances where such “snitching” would be unrealistic and unhealthy to workplace collegiality. In *Re Motor Coach Industries and International Association of Machinists*,³⁵ Arbitrator Freedman found that a coworker’s time theft of six minutes on time sheets was neither a falsification that obliged a fellow employee to report to the employer, nor circumstances that gave the employer just cause to terminate the latter employee. “It would be quite unrealistic, and inappropriate, to impose a duty on [the Grievor] to report what must have appeared to be a relatively minor transgression.”³⁶

It goes without saying that termination of workers’ employment for failure to report misconduct pursuant to the implied duties of honesty and fidelity will often have a negative impact on workplace harmony. For instance, in *Re Brink’s Canada Ltd. and N.A.P.E.*,³⁷ the two Grievors were terminated for omitting to disclose knowledge of their manager’s embezzlement of bank funds in a timely manner. The Grievors’ manager was an overbearing personality, and they did not disclose their concerns over the manager’s practices to the Company during its first investigation into the manager’s misconduct (by way of audit); rather, the Grievors waited for two years before sharing their full knowledge of the manager’s fraudulent actions. This lack of candour prompted the Company to discharge the Grievors.

Though the Arbitration Board found dismissal is too severe in the circumstances, reinstatement was felt to be “unproductive and hazardous to harmonious labour relations.”³⁸ While this outcome partly based on the nature of the business that Brink’s operated, and the corresponding high degree of professionalism (which was undermined by the workers’ failure to report their manager’s misconduct), it was also based on the finding that:

the rupture of the employment relationship was acrimonious. Both Grievors expressed strong emotions of anger at the treatment they felt they had received. The workplace is a relatively small one, and it requires a team effort based on trust in order to fulfill its mandate to its customers.³⁹

Lawyers’ Obligation to Follow Internal Avenues of Redress

In March 2004, the Law Society of Upper Canada introduced new *Rules of Professional Conduct* that require both in-house and external corporate lawyers

³⁵ (1981), 29 L.A.C. (2d) 438.

³⁶ *Re Motor Coach Industries*, *supra* note 35, at 447-8.

³⁷ (1998), 77 L.A.C. (4th) 260.

³⁸ *Brink’s Canada*, *supra* note 40 at 287.

³⁹ *Brink’s Canada*, *supra* note 40 at 284.

to report evidence of company misconduct to the persons from whom they take instructions. Under the new Rule 2.02(5.1), if this superior refuses to appropriately redress the “dishonest, fraudulent, criminal or illegal” conduct reported, lawyers are obliged to report the misconduct to the company’s chief legal officer. The Rule obliges lawyers to continue “advise progressively the next highest persons or groups,” up to and including the Board of Directors, until the misconduct is caused to be abandoned. Should the misconduct not be redressed, lawyers must “withdraw from acting in the matter in accordance with Rule 2.09.”

This amendment to the *Rules of Professional Conduct* places a strikingly strong obligation on lawyers to exhaust internal procedures for reporting misconduct, before removing themselves as counsel as a final recourse. Note, however, that the above-described, overriding value of preserving strict solicitor-client confidentiality precludes lawyers from choosing to publicly disclose the wrongdoing in any fashion. Accordingly, should a lawyer’s corporate client be so unresponsive as to provoke his/her withdrawal of services, the lawyer is prohibited from externally disclosing the reasons for which they have resigned, or reporting his/her former client to the authorities.

Statutory Duties to Mute the Whistle?

The above-referenced Parliamentary initiatives—Bill C-13, Bill C-45, and Bill C-11—seek to regulate and protect those who would disclose wrongdoing in their organizations.

As mentioned above, Bill C-13 most directly addresses employees’ public disclosure of an employer’s federal or provincial offences to a law enforcement agency. Given the specific kind of misconduct treated by Bill C-13—namely, capital markets fraud and insider trading—the Bill does not address internal measures, but is rather geared at protecting channels of divulging such offences to authorities. It seems implicit in the text of Bill C-13, then, that corporate misconduct in this manner will not be adequately redressed by internal reporting duties.

Bill C-45, the “Westray Bill,” creates new legal duties on operational authority within organizations, to prevent offences being committed and/or bodily harm arising from the work. However, these broad duties are not given in precise terms that enumerate the kinds of preventative measures required under the amended *Criminal Code* provisions. As discussed above, the result is an open-ended duty for officers, supervisors and directors to determine the most appropriate measures for preventing bodily harm or organizational crimes; depending on management’s responsiveness to internal reporting mechanisms,

the legal duties created by Bill C-45 may require internal and/or public reporting measures.

By contrast, Bill C-11's proposed protections for public servants' bona fide disclosure of wrongdoing most closely incorporate the above-described common law of employee duty of loyalty and the corresponding duty to exhaust internal mechanisms. Under clause 10 of the proposed Bill C-11, each chief executive *must* establish internal procedures to manage disclosures of wrongdoings, including the appointment of a senior officer to receive and act on such disclosures. Clause 12 authorizes a public servant to use these procedures and disclose perceived wrongdoing to the senior officer. In cases where that employee feels disclosure to the senior officer is not appropriate, or is not being effective, clause 13(1) authorizes a public servant to disclose the matter to the President of the Public Service Commission; in turn, clause 14 entitles the public servant to choose to disclose these concerns to the Secretary of the Treasury Board (instead of disclosing to the President of the PSC).

Given the order of the clauses, Bill C-11 clearly envisions disclosure to the public as an extraordinary course of disclosure. Clause 16(1) permits public disclosure only if offences are reasonably believed to be of such seriousness or imminent risk that there is "not sufficient time" to utilize internal measures. In instances of non-serious or imminently harmful offences, public servants are bound to internal mechanisms for disclosure. By expressly patterning several internal avenues for disclosure, and authorizing—but not obliging—public disclosure only in extreme circumstances, Bill C-11 generally replicates the dynamic found in the common law and arbitral jurisprudence.

However, it must be emphasized that none of the above-canvassed government Bills so clearly oblige workers to exhaust internal avenues of redress as the common law duty on employees (pursuant to worker's duty of fidelity). Accordingly, there is a potential discord between employees' statutory duties and protections, and their common law duties; it will be interesting to see how courts and arbitrators will balance these related, but imperfectly concentric duties in the future.

CONCLUSION

There is no legal duty imposed on employees with the possible exception of certain professional groups to publicly disclose employer malfeasance. Whistle blowing is a discretionary activity engaged in by those dedicated to the protection of the public interest notwithstanding the often serious potential negative impact of whistle blowing on their personal economic security and the reputations of their employers.

Public disclosure of employer wrongdoing is generally a protected activity provided the whistle blower meets certain conditions. The Whistleblower must have exhausted internal avenues of redress before engaging in public disclosure and must ensure the accuracy of the public comments. Accuracy may not be as important in the case of trade union officials at least in the context of their employment relationships in light of the adversarial nature of the collective bargaining relationship. A trade union official whose comments are the product of honest belief and are made without malice may be protected from disciplinary reprisal.

An employee's duty of fidelity significantly limits whistle blowing. The duty to preserve, protect and enhance an employer's interest forces an employee to exhaust internal avenues of redress. The duty also places upon employees the burden of disclosing wrongdoing internally.

Because the duty of fidelity is considered so fundamental to the employment relationship, employee breaches of this duty are regularly held at arbitration to be just cause for discipline.