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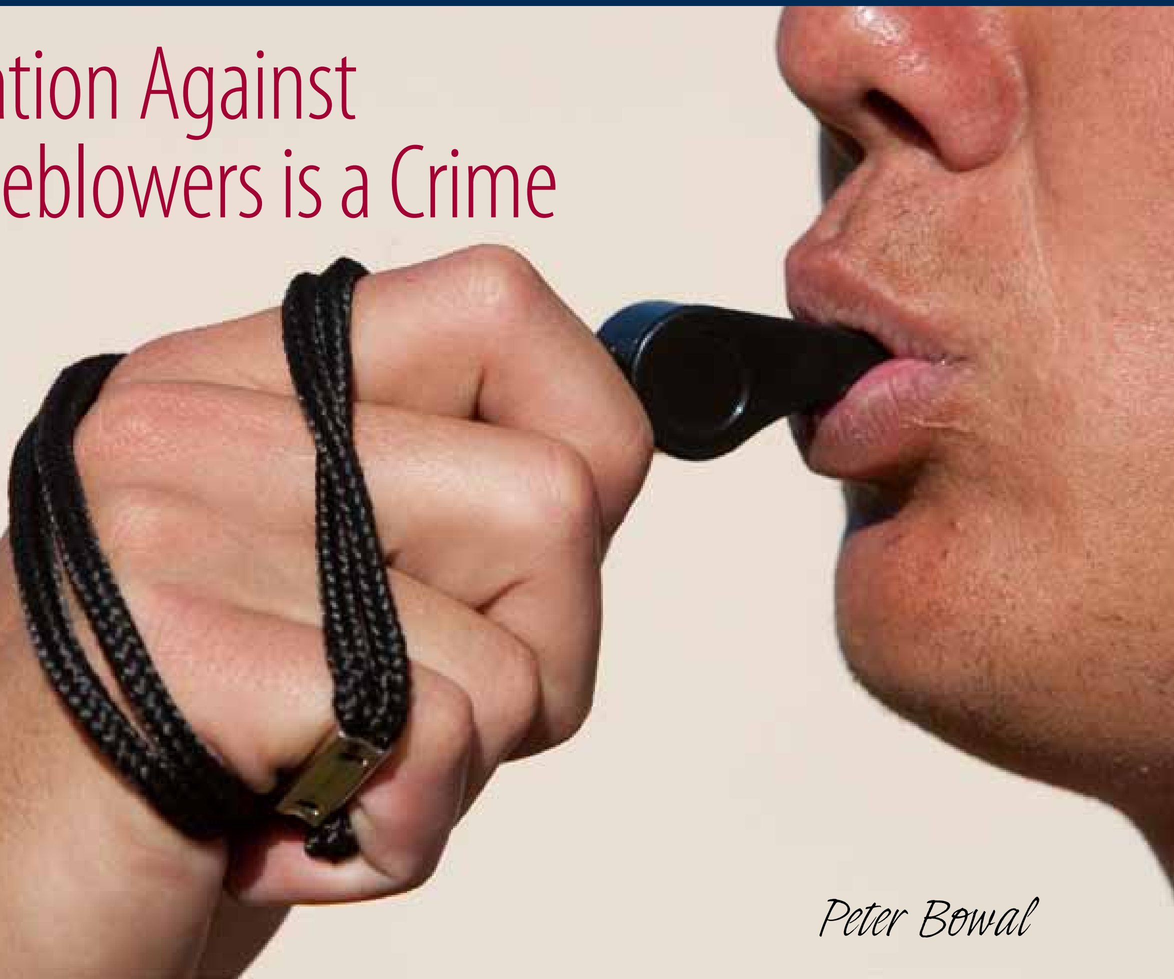

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Peter Bowal

Introduction

In the aftermath of several large, well-publicized corporate frauds on the North American financial markets, and several embarrassing public sector abuses in Canada, such as the sponsorship scandal – which some say could have been forestalled or moderated by timely and bold insider reporting to authorities – the Canadian government enacted 425.1 of the *Criminal Code* of Canada.

This injunction not to retaliate applies to all employers and employees in Canada, not just those in the federal public service, and it is enforced by the strong arm of the criminal law. The crime became effective on September 15, 2004. It is a quirky crime only because it surprisingly criminalizes employer retaliation against whistleblowing employees – an act which historically has not come close to being a crime – as an outgrowth of American law. Moreover, it seems to be a dead letter. There has never been a prosecution for this crime, much less a conviction.

The Criminalization of Business Misconduct

Criminal law figures most prominently in the public consciousness.[1] What is the purpose of criminal law? In the 1949 *Margarine Reference* case, the Supreme Court of Canada said that, in addition to a prohibition and penal sanction, criminal legislation must "serve a public purpose..."

It said that public purposes include "public peace, order, security, health, morality … these are the ordinary though not exclusive ends served by the law." Criminal law contemplates conduct harmful to an individual or to the public.

But historically, Canadian businesses have ultimately been governed by administrative law and regulation, enforced by administrative offences and penalties. These regulatory offences are less serious, and penalties are less harsh, than the category of wrongs known as crimes. Now, however, the federal government, responsible for all criminal law across the country, is criminalizing more business misbehaviour.

In the 1997 case of *R. v. Hydro-Quebec*, the Supreme Court of Canada considered whether the regulatory nature of the *Canadian Environmental Protection Act* was criminal. The Court upheld the legislation on the basis that it was intended to safeguard the public against the "public evil" of pollution. In *R. v. Cuerrier,* Cory J. found that there was "no prerequisite that any harm must actually have resulted." A "significant risk" of harm suffices for an act to be criminal.

The crimes in the *Criminal Code* Part V ("Offences Tending to Corrupt Morals") and Part X ("Fraudulent Transactions Relating to Contracts and Trade") have increased. Bill C-45, a remedial response to the Westray Mine disaster, came into force in 2004 (S. 217(1) *An Act to Amend the Criminal Code* (Criminal Liability of Organzations)). It now criminalizes breaches of what used to be provincial regulatory occupational health and safety standards in the workplace. In the last five years, more business misconduct has been elevated from the status of mere regulatory offences to criminal offences.

Regulatory Offences of Retaliating Against Employee Whistleblowers

Government regulators are unable to monitor and detect every instance of business wrongdoing. They depend on insiders within the company, and competitors, to detect and report violations of the law. Whistleblowers may be a valuable and inexpensive resource in law enforcement. To facilitate employees to come forward to assist federal and provincial regulators, they must be protected from reprisals for their reporting offences and other wrongdoing.

The principal method of protecting whistleblowers to date in Canada has been the insertion of provisions in some federal and provincial laws, which outlaw retaliation against insiders who make a complaint, or who co-operate with a regulatory investigation. This is done on a statute-specific basis for a narrow range of activities such as human rights, labour and occupational health and safety.

An example is 74(1)(a) of Saskatchewan's *Labour Standards Act* (R.S.S.1978, amended 1994) which reads:

> 74(1) No employer shall discharge or threaten to discharge or in any manner discriminate against an employee because the employee:
>
> (a) has reported or proposed to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada …

This Act prohibits employers from retaliating against employees who obey the law, refuse to break the law, report breaches of the law, co-operate in an investigation or give evidence in proceedings.

It is a quirky crime only because it surprisingly criminalizes employer retaliation against whistleblowing employees – an act which historically has not come close to being a crime – as an outgrowth of American law. Moreover, it seems to be a dead letter. There has never been a prosecution for this crime, much less a conviction.

Sarbanes-Oxley Origins

The 2002 Sarbanes-Oxley legislative package (SOX) was a comprehensive reaction to U.S. business scandals that many say could have been prevented by strong whistleblower protections. SOX Section 1107 protects whistleblowers, even those who are not employees, by charging a felony against one who, with intent to retaliate, takes any action harmful to any person for providing truthful information to a law enforcement officer about the possible commission of any federal offence.

The Canadian Response: Section 425.1 of the Criminal Code

Section 425.1 of the *Criminal Code* imported SOX section 1107 into Canada. It creates a criminal penalty of up to five years imprisonment for any employer who retaliates against a whistleblower. The provision reads:

Threats and retaliation against employees

425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,

(*a*) 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 or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

(*b*) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (*a*) to a person whose duties include the enforcement of federal or provincial law.

Punishment

(2) Any one who contravenes subsection (1) is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(*b*) an offence punishable on summary conviction.

Analysis of Section 425.1

Who is Bound to Comply?

Section 425.1 places the direct burden of non-retaliation on three different categories of person:

- the employer (often the corporate entity or partnership),
- a person acting on behalf of an employer (including managers, subsidiaries of a parent corporation, and trustees), and
- a person in a position of authority in respect of the employee. Accordingly, issues of whether a supervisor was authorized to retaliate in any instance are avoided because all of them have direct compliance responsibility.

An important feature of this provision is its national scope. It applies to all employers in Canada. All other anti-retaliation legislation to date has been provincially-limited or activity-limited. All employers in Canada, public and private sector, for profit and not-for-profit, are bound.

Who Receives Protection?

Section 425.1 only protects those individuals who blow the whistle in their capacity as employees. Independent contractors, who technically are not employees, may have not protection from this crime.

Action Proscribed (*Actus Reus*)

These three categories of persons must not take nor threaten any "disciplinary measure against, demote, terminate or otherwise adversely affect the employment" of a whistleblowing employee. The prohibited action is any discipline and the lowest culpability threshold is "adversely affecting the [whistleblower's] employment." Theoretically, even shunning the whistleblower might be culpable.

Purpose of the Discipline (*Mens Rea*)

To convict an employer of this crime of retaliation, the Crown must establish beyond a reasonable doubt that the discipline was applied with the intent to discourage the employee from blowing the whistle (pre-emptive intent) or to retaliate for already having blown the whistle (punitive intent). There remain many possible opportunities for lawful discipline against employees. Employer motives for discipline may be mixed or ambiguous – and difficult to prove beyond a reasonable doubt.

All reductions of employment status are *prima facie* suspect when they occur against the employee reasonably soon after the whistleblowing has come to the attention of the employer or supervisor. Yet, proof of intent of retaliation beyond a reasonable doubt will be the main obstacle to prosecution.

However, the wrongdoing threshold for s. 425.1 to apply is high: the employer must be breaking the law. In some ways, this pre-supposes – perhaps unrealistically – that the average employee will know the law broadly and deeply enough to accurately determine when an offence has occurred.

What Wrongdoing?

There are many levels of wrongdoing that employees might witness and report. These include crimes and regulatory offences, abuse of power and trust, serious financial misappropriation or waste, breach of ethics, or the violation of the organization's own internal policies, rules and procedures. However, the wrongdoing threshold for s. 425.1 to apply is high: the employer must be breaking the law. In some ways, this pre-supposes – perhaps unrealistically – that the average employee will know the law broadly and deeply enough to accurately determine when an offence has occurred.

If an employee observes merely unethical (versus illegal) behaviour, breaches of the employer's own policies, manifest unfairness or an abuse of power, gross mismanagement of financial resources, or if the employee merely dissents in how the business in operated in some respect – these are matters over which the employer may retaliate.

To What Measure of Certainty of Wrongdoing?

Employees may *suspect* wrongdoing but they must determine whether that wrongdoing would constitute a federal or provincial offence. Whistleblowers are lay persons, rarely educated in the law. They are not likely to know the details of what constitutes an offence, evidence or standards of proof. How certain must they be before they can report to the regulators with impunity? The *Criminal Code* says that the employee must "believe" that an offence has been, or is being, committed, a subjective standard. The courts may imply a reasonableness requirement to the belief, looking at objective evidence to establish reasonable and probable grounds. The belief is not merely in the *wrongdoing*, but in an *offence:* the employee must relate the wrongdoing to an offence.

Past or Present Offences are Reportable

The *Criminal Code* refers to an offence that "has been or is being committed." Disclosures of prospective offences are not protected. Disclosure may be useful for regulators even where a past offence is statute-barred to prosecution.

External Whistleblowing Only Protected

An employee will only be protected from retaliation if the employee provides the information of wrongdoing "to a person whose duties include the enforcement of federal or provincial law." This includes police officers and regulators who are empowered to take enforcement action, although not necessarily with respect to the particular offence that is being reported.

What rationales support favouring external reporting to a law enforcement official?

- Efficacy – if there is a violation of the law, it is thought most effective to take it to someone who can objectively deal with it in the public interest.
- External reports are documented to assist the Crown in achieving its evidentiary burden, including the use of s. 425.1.
- External reporting may preserve evidence: when employees complain internally, there is a risk that management might destroy evidence of wrongdoing.

- If concerned employees only raise the complaint with organizational supervisors, they will not receive the protection of s. 425.1. It is not a crime to retaliate against the employee in such a case. Accordingly, this provision encourages external reporting in preference to internal up-the-ladder reporting of wrongdoing, a feature that is unlikely to be in the organization's best interests.
- A well-meaning and loyal employee who reports concerns inside the organization for these reasons will not be protected under this criminal legislation. This is an important practical point for whistleblowing employees to keep in mind – while they may believe that it is in the best interests of the employer to receive their reports of wrongdoing, they will lose their protection from retaliation if they report internally.
- Research shows that retaliation against external whistleblowers tends to be more extreme, because managers tend to view external whistleblowers as disloyal. They are therefore in need of greater protection.

Employees must be careful to report what they believe to be offences with only pure motives on their part. A countervailing criminal offence of public mischief is reserved for those who, with intent to mislead, cause a peace officer to investigate.

Motives and Public Mischief

Employees must be careful to report what they believe to be offences with only pure motives on their part. A countervailing criminal offence of public mischief is reserved for those who, with intent to mislead, cause a peace officer to investigate. Not all regulators will be "peace officers" like police, but there may be other legal sanctions in legislation and at common law (eg. malicious prosecution) for filing frivolous and vexatious reports, such as S. 140 of the *Criminal Code*.

The punishment under s.140 is the same as that under s.425.1. Therefore, vengeful competitors or former employees who file false accusations could be subject to these penalties. If someone purposely misleads a federal or provincial agency the shield of s.425.1 will not be available.

Sanctions

The sanctions imposed against a retaliating employer will depend on whether the prosecution follows summary or an indictable procedure. A summary conviction is less serious and the offender can be sentenced to a maximum six months imprisonment and/or fined $2000. A summary offence will be heard by a provincial court judge and the charge must be laid within six months of the offence.

An indictable offence is more serious under the *Criminal Code* and there are more procedural issues than with a summary offence. A person convicted of this indictable offence is liable to imprisonment for up to five years.

Conclusion

Employees who seek to report wrongdoing which they observe in the course of their employment have always risked retaliation from their employers, especially if they have reported outside the organization. Historically, employees in Canada have owed a duty of good faith and loyalty to the employer. Now this duty must be reconciled with a new crime: retaliation by any employer against whistleblowing employees in specific circumstances.

All these factors severely constrain 425.1 from becoming meaningful whistleblower protection. No prosecutions have been brought to date. The crime may lie dormant on the books until another major public or corporate scandal cries out for action.

How well does this new offence under the *Criminal Code* operate? Its potential criminal deterrent effects on employers are limited. Some problems include:

- employees are unlikely to know federal and provincial regulatory legislation well enough to know when their employers are offending, and how to report to law enforcement authorities. Most employees "would rather walk than talk";
- the new law provides no incentive for whistleblowers to come forward;
- the proof of retaliation, motivated only by employer criminal bad faith, all beyond a reasonable doubt will always be a challenge;
- employers are not prohibited from disciplining employees in all instances; and
- the effectiveness of s. 425.1 will depend on the willingness of the Crown to enforce this law and to see retaliation against legitimate whistleblowers as a serious crime. Will the police and the Crown view this sort of employer response as criminal behaviour?

All these factors severely constrain 425.1 from becoming meaningful whistleblower protection. No prosecutions have been brought to date. The crime may lie dormant on the books until another major public or corporate scandal cries out for action.

However, the spectre of jail and fines may deter employers from disciplining the whistleblowing employee who reports employer misconduct under any federal and provincial legislation. To the extent that employers are slow to retaliate against conscience-bound whistleblowers, the objectives of this crime may yet be met.

Notes

1 The carefully staged "perp walk" for the evening news and newspaper front pages reminds us how effective a deterrent the criminal process can be for managers, and how business malfeasance has mainstreamed into the public criminal justice administration process.

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