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Legislative Assembly of British Columbia

BILL M 2**

WHISTLEBLOWERS PROTECTION ACT, 2017

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Explanatory Note

This bill will facilitate the disclosure and investigation of serious matters in the public interest that are potentially unlawful, injurious or dangerous to the public. The bill will also protect people who disclose information in the public interest against reprisals from their employers.

WHISTLEBLOWERS PROTECTION ACT, 2017

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

PART ONE – INTERPRETATION

Definitions

1 In this Act:

“board” means the Labour Relations Board appointed under the *Labour Relations Code*;

“chief executive” means

- (a) in relation to a ministry, the deputy minister of that ministry;
- (b) in relation to a government body, the chief executive officer or director of that body; or
- (c) in relation to an office, the officer of the Legislative Assembly in charge of that offices;

“conduct” includes an act or omission;

“designated officer” means the senior official designated under section 5 to receive and deal with disclosures under this Act;

“detriment” means

- (a) injury, damage or loss;
- (b) intimidation or harassment; or
- (c) discrimination, disadvantage or adverse treatment in relation to career, profession, employment, trade or business;

“disclosure” means a disclosure made in good faith by an employee in accordance with the Act;

“employee” means an employee or officer of a ministry, government body or office;

“government body” includes

- (a) a government body, government corporation or public body as defined in the *Financial Administration Act*;
- (b) a regional health authority established or continued under the *Health Authorities Act*;
- (c) a community care facility licensed under the *Community Care and Assisted Living Act*;
- (d) British Columbia Ferry Services, Inc. or the B.C. Ferry Authority;
- (e) any other body designated as a government body in the regulations;

“office” means

- (a) the office of the Auditor General;
- (b) the Representative for Children and Youth;
- (c) the Chief Electoral Officer; and
- (d) the Office of the Ombudsperson;
- (e) any other body designated as an office in the regulations;

“ombudsperson” means the Ombudsperson appointed under the *Ombudsperson Act*;

"private sector employee" means an employee or officer other than an employee or officer of a ministry, government body or office;

“public service” means ministries, government bodies and offices;

“reprisal” means any 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 co-operated in an investigation under this Act:

- (a) a disciplinary measure;
- (b) a demotion;
- (c) a termination of employment
- (d) any measure that adversely affects his or her employment or working conditions;
- (e) a threat to take any of the measures referred to in clauses (a) to (d); and

“wrongdoing” means a wrongdoing referred to in section 3.

Purpose

- 2** The purpose of this Act is
- (a) to facilitate the disclosure and investigation of significant and serious matters in or relating to the public service, that are potentially unlawful, dangerous to the public or injurious to the public; and
 - (b) to protect persons who make those disclosures.

Wrongdoing

- 3** 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;
- (d) knowingly directing or counselling a person to commit a wrongdoing described in clauses (a) to (c).

PART TWO – PROCEDURES FOR MAKING A DISCLOSURE

Procedure for disclosures

- 4** (1) Every chief executive must establish procedures to manage disclosures by employees of the ministry, government body or office for which the chief executive is responsible.
- (2) The procedures established under subsection (1) must include procedures
- (a) for receiving and reviewing disclosures, including setting time periods for action;
 - (b) for investigating disclosures in accordance with the principles of procedural fairness and natural justice;
 - (c) respecting the confidentiality of information collected in relation to disclosures and investigations;
 - (d) for protecting the identity of persons involved in the disclosure process, subject to any other Act and to the principles of procedural fairness and natural justice;
 - (e) for reporting the outcomes of investigations; and
 - (f) respecting any other matter specified in the regulations.

Designated officer

- 5** (1) Every chief executive must designate a senior official to be the designated officer for the purposes of this Act.
- (2) The designated officer designated under subsection (1) must receive and deal with disclosures by employees in the ministry, government body or office for which the chief executive is responsible.

Exception

- 6** (1) Sections 4 and 5 do not apply to a chief executive who determines in consultation with the Ombudsperson that it is not practical to apply those sections

given the size of the ministry, government body or office for which the chief executive is responsible.

(2) If no designation is made under section 5, the chief executive officer is the designated officer for the purposes of this Act.

Information about Act must be communicated

- 7 A chief executive must ensure that information about this Act and the disclosure procedures is widely communicated to the employees of the ministry, government body or office for which the chief executive is responsible on an annual basis.

Report about disclosures

- 8 (1) Each year, a chief executive must prepare a report on any disclosures of wrongdoing that have been made to a supervisor or designated officer of the ministry, government body or office for which the chief executive is responsible.

(2) The report must include the following information:

- (a) the number of requests for advice about disclosing information;
- (b) the number of disclosures received and the number acted on and not acted on;
- (c) the number of investigations commenced as a result of a disclosure;
- (d) the number of investigations referred to the Ombudsperson or Auditor General;
- (e) in the case of an investigation that results in a finding of wrongdoing, a description of the wrongdoing and any recommendations or corrective actions taken in relation to the wrongdoing or the reasons why no corrective action was taken;
- (f) in the case of an investigation conducted by Ombudsperson, whether, in the opinion of the Ombudsperson, there are any systemic problems that give rise to the wrongdoings.

Public access to report

- 9 (1) The report described in section 8 must be included in the annual report of the ministry, government body or office, if an annual report is made publicly available.

(2) If an annual report is not made publicly available, the chief executive must make the report available to the public on request.

PART THREE – MAKING A DISCLOSURE

Obligation to investigate disclosure

- 10** The person or body to whom an employee makes a disclosure has a duty to conduct a competent and timely investigation into that claim.

Request for advice

- 11** (1) An employee who is considering making a disclosure may request advice from the designated officer or the Ombudsperson.

(2) The designated officer or Ombudsperson may require the request for advice to be in writing.

Disclosure by employee

- 12** If 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 any of the following:

- (a) the employee's supervisor;
- (b) the employee's designated officer;
- (c) the Ombudsperson.

Disclosure to Auditor General regarding Office of Ombudsperson

- 13** (1) If an employee of the office of the Ombudsperson is seeking advice or making a disclosure regarding that office, the advice may be sought from, or the disclosure made to, the Auditor General.

(2) If a disclosure is made pursuant to subsection (1), the Auditor General must carry out the responsibilities of the Ombudsperson under this Act in relation to that disclosure.

Content of disclosure

- 14** A disclosure made under section 12 or 13 must be in writing and must include the following information, if known:

- (a) a description of the wrongdoing;
- (b) the name of the person or persons alleged to

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

Ombudsperson to facilitate resolution within ministry

15 When an employee makes a disclosure to the Ombudsperson, the Ombudsperson may take any steps he or she considers appropriate to help resolve the matter within the ministry, government body or office.

Public disclosure if situation urgent

16 (1) If an employee reasonably believes that a matter constitutes an imminent risk of a substantial and specific danger to the life, health or safety of persons, or to the environment, such that there is insufficient time to make a disclosure under section 12, the employee may make a disclosure to the public

(a) if the employee has first made the disclosure to an appropriate law enforcement agency or, in the case of a health-related matter, the Provincial Health Officer or a medical health officer; and

(b) subject to any direction that the agency or officer considers necessary in the public interest.

(2) Immediately after a disclosure is made under subsection (1), the employee must also make a disclosure about the matter to his or her supervisor or designated officer.

PART FOUR – TYPES OF INFORMATION THAT CAN BE DISCLOSED

Confidentiality provisions

17 Subject to section 18, a person who makes a disclosure does not by doing so

(a) commit an offence under any enactment that imposes a duty to maintain confidentiality with respect to a matter or any other restriction on the disclosure of information;

- (b) breach an obligation by way of oath or rule or practice under an agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of information with respect to a matter.

Where disclosure restrictions continue to apply

18 (1) Nothing in this Act authorizes the disclosure of

- (a) information described in subsection 12(1) of *The Freedom of Information and Protection of Privacy Act*, except in circumstances mentioned in subsection 12(2);

- (b) information that is protected by solicitor-client privilege;

- (c) in the case of a disclosure to the public under section 16, information that is subject to any restriction created by or under an Act of the Legislature or the Parliament of Canada, or a regulation made under an Act.

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

Other obligations to report not affected

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

PART FIVE – INVESTIGATIONS BY OMBUDSPERSON

Purpose of investigation

20 The purpose of an investigation into a disclosure of wrongdoing is to bring the wrongdoing to the attention of the appropriate ministry, government body or office, and to recommend corrective measures that should be taken.

Investigation by Ombudsperson

21 (1) The Ombudsperson is responsible for investigating disclosures that he or she receives under this Act.

(2) An investigation is to be conducted as informally and expeditiously as possible.

(3) The Ombudsperson must 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.

Notice of the Investigation

22 Before conducting an investigation of a disclosed matter, the Ombudsperson must inform the relevant body of his or her intention to do so in writing.

When investigation not required

23 (1) The Ombudsperson is not required to investigate a disclosure, and may cease an investigation if he or she is of the opinion that

(a) the subject matter of the disclosure could 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 relates to a matter that results from a balanced and informed decision-making process on a public policy or operational issue;

(e) the disclosure does not provide adequate particulars about the wrongdoing as required by section 14;

(f) the disclosure relates to a matter that could more appropriately be dealt with according to the procedures under a collective agreement or employment agreement;

(g) there is another valid reason for not investigating the disclosure.

(2) The Ombudsperson must, within two weeks of his or her decision, notify the person making the disclosure of his or her decision not to investigate a disclosure or cease an investigation under subsection (1) and give reasons for that decision.

Referring investigation to Auditor General

24 (1) If the Ombudsperson believes that a disclosure made to the Ombudsperson would be dealt with more appropriately by the Auditor General, the

Ombudsperson may refer the matter to the Auditor General to be dealt with in accordance with the *Auditor General Act*.

(2) If a matter is referred to the Auditor General under subsection (1), the reprisal protections set out in Part 6 of this Act apply to the employee or former employee who made the disclosure to the Ombudsperson.

Conducting an investigation

25 (1) The Ombudsperson and persons employed under the Ombudsperson have the powers and protections provided for in the *Ombudsperson Act* when conducting an investigation of a disclosure under this Act.

(2) If, during an investigation, the Ombudsperson has reason to believe that another wrongdoing has been committed, the Ombudsperson may investigate that wrongdoing in accordance with this Act.

Ombudsperson's report re investigation

26 (1) Upon completing an investigation, the Ombudsperson must prepare a report containing his or her findings and any recommendations about the disclosure and the wrongdoing.

(2) The Ombudsperson must give a copy of the report to the employee and the chief executive of the appropriate ministry, government body or office.

(3) When the matter being investigated involves the chief executive, the Ombudsperson must also give a copy of the report,

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

(b) in the case of a government body or corporation, to the board of directors and the minister responsible; or

(c) in the case of an office, to the Speaker of the Legislative Assembly.

Ministry to notify Ombudsperson of proposed steps

27 When making recommendations, the Ombudsperson may request the ministry, government body or office 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.

Report to minister or Speaker

28 If the Ombudsperson believes that the ministry, government body or office has not appropriately followed up on his or her recommendations, or did not co-

operate in the Ombudsperson's investigation under this Act, the Ombudsperson may make a report on the matter

- (a) in the case of a ministry, to the minister responsible;
- (b) in the case of a government body, to the board of directors and the minister responsible; or
- (c) in the case of an office, to the Speaker of the Legislative Assembly.

Annual report

29 (1) The Ombudsperson must make an annual report to the Legislative Assembly on the exercise and performance of his or her functions and duties under this Act, setting out

- (a) the number of general 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 Ombudsperson has made and whether the ministry, government body or office has complied with the recommendations;
- (e) whether, in the opinion of the Ombudsperson, there are any systemic problems that give rise to wrongdoings; and
- (f) any recommendations for improvement that the Ombudsperson considers appropriate.

(2) The report must be given to the Speaker, who must table a copy of it in the Legislative 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.

Special report

30 Where it is in the public interest to do so, the Ombudsperson may publish a special report relating to any matter within the scope of the Ombudsperson's responsibilities under this Act, including a report referring to and commenting on any particular matter investigated by the Ombudsperson.

PART SIX – PROTECTION OF WHISTLEBLOWERS

Protection of employee from reprisal

31 No person shall take a reprisal against an employee or direct that one be taken against an employee because the employee, in good faith

(a) has sought advice about making a disclosure from his or her supervisor, designated officer or chief executive, or the Ombudsperson;

(b) has disclosed, threatened to disclose or is about to make a disclosure in accordance with this Act;

(c) has objected or refused to participate in any activity, policy, or

(c) has co-operated or plans to co-operate in an investigation under this Act.

Complaint to British Columbia Labour Relations Board

32 (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) Section 14 of *The Labour Relations Code* (procedures for dealing with unfair labour practice) applies to a complaint filed under subsection (1), with necessary changes.

(3) If the board determines that a reprisal has been taken against the complainant contrary to section 31, the board may order one or more of the following measures to be taken:

(a) permit the complainant to return to his or her duties;

(b) reinstate the complainant or pay damages to the complainant, if the board considers that the trust relationship between the parties cannot be restored;

(c) pay compensation 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) pay an amount to the complainant equal to any expenses and any other financial losses that the complainant has incurred as a direct result of the reprisal;

(e) cease an activity that constitutes the reprisal;

(f) rectify a situation resulting from the reprisal;

(g) do or refrain from doing anything in order to remedy any consequence of the reprisal.

Labour Relations Act applies

33 Sections 125, 126, 133, 140, 153 and 156 of the Labour Relations Code apply to any proceeding before the board under this Act, with necessary changes.

PART SEVEN – DISCLOSURE OF WRONGDOING BY OTHERS

Disclosure of wrongdoing by non-employee

34 If a person who is not 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 person may provide that information to the Ombudsperson.

Information for disclosure by non-employee

35 (1) Information provided to the Ombudsperson under section 34 must be in writing and must include the following information, if known:

- (a) a description of the wrongdoing;
- (b) the name of the person or persons alleged to
 - (i) have committed the wrongdoing, or
 - (ii) be about to commit the wrongdoing;
- (c) the date of the wrongdoing;
- (d) whether the information has already been provided to the ministry, government body or office concerned and a response received.

Ombudsperson may investigate

36 Upon receiving information under section 35, the Ombudsperson may investigate the wrongdoing.

Report

37 The Ombudsperson must give a copy of the report of an investigation under this section to the person who provided the information about the wrongdoing.

Protection for private sector employee who provides information

38 (1) No employer of a private sector employee shall take any of the measures listed in subsection (2) against an employee by reason primarily that

(a) the employee has, in good faith, provided information to the Ombudsperson about an alleged wrongdoing; or

(b) the employer believes that the employee will do so.

(2) The measures prohibited by subsection (1) are

(a) a disciplinary measure;

(b) a demotion;

(c) termination of employment;

(d) any measure that adversely affects the employee's employment or working conditions; and

(e) a threat to take any of the measures referred to in clauses (a) to (d).

(3) Nothing in this section affects any right of a private sector employee either at law or under a collective agreement or employment contract.

Protection for person contracting with government

39 No person acting or purporting to act on behalf of the government, a government body or an office shall

(a) terminate a contract;

(b) withhold a payment that is due and payable under a contract; or

(c) refuse to enter into a subsequent contract;

by reason primarily that a party to the contract or a person employed by a party to the contract has, in good faith, provided information to the Ombudsperson about an alleged wrongdoing in or relating to the public service.

PART EIGHT - GENERAL PROVISIONS

Protection from liability

40 (1) A person who makes a disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process for making the disclosure.

(2) A person who makes an involuntary disclosure made under administrative or judicial compulsion is not subject to any civil or criminal liability arising by way of administrative process for making the disclosure.

(3) Despite anything to the contrary in this section, a person's liability for his or her conduct is not affected by the person's disclosure of that conduct under this Act.

Liability protection for supervisor, officer, chief executive or Ombudsperson

41 (1) No action or proceeding may be brought against a supervisor, designated officer or chief executive, or the Ombudsperson, or a person acting on behalf of or under the direction of any of them, for anything done or not done, or for any 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 the person was acting in bad faith.

Offences

42 (1) No person shall, in seeking advice about making a disclosure, in making a disclosure, or during an investigation, knowingly make a false or misleading statement, orally or in writing, to a supervisor, designated officer or chief executive, or the Ombudsperson, or to a person acting on behalf of or under the direction of any of them.

(2) No person shall wilfully obstruct a supervisor, designated officer or chief executive, or the Ombudsperson, or any person acting on behalf of or under the direction of any of them, in the performance of a duty under this Act.

(3) No person shall, 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 mentioned in clauses (a) to (c).

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

Arranging legal advice

43 (1) If the designated officer or Ombudsperson is of the opinion that it is necessary to further the purposes of this Act, he or she may, subject to the regulations, arrange for legal advice to be provided to employees and others involved in any process or proceeding under this Act.

Limitation Period

44 A prosecution under this Act may not be commenced later than two years after the day the alleged offence was committed.

Regulations

45 (1) The Lieutenant Governor in Council may make regulations authorized by section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(a) designating a public sector body as a government body for the purposes of this Act;

(b) designating an entity that receives all or a substantial part of its operating funding from the government as a government body for the purposes of this Act;

(c) for the purpose of section 4, respecting the procedures to be followed in managing and investigating disclosures and reporting the outcome of investigations, including setting time periods for action;

(d) exempting Acts or regulations from the application of section 16 where the exemption is in the public interest;

(e) respecting the provision of legal advice under section 43, including determining the circumstances under which legal advice may be provided and the amounts that may be paid;

(f) defining any word or phrase used but not defined in this Act;

(g) respecting any other matter that the Lieutenant Governor in Council considers necessary or advisable to carry out the purposes of this Act.

Commencement

46 This Act comes into force on the date of Royal Assent.