

**Whistle blowing:  
Protection for Legitimate Whistle blowers**

**Marsha Thompson  
50.573 Administration  
April 9, 2001**

When, if ever, is a public servant morally justified in blowing the whistle? And should society legally protect legitimate whistle-blowers? These two questions are difficult to answer definitively and finally, yet I will make the attempt to do so. In my opinion, I believe it is necessary to have legislation that permits legitimate whistle blowing in order to ensure that the government remains in line with the public interest, protect public servants anonymity and immunize public service employees from disciplinary action.

To have a full understanding of the need to protect whistle-blowers, I will examine the key characteristics of whistle blowing, the criteria for morally justifiable whistle blowing, and the principles that define public servants duties. Furthermore, this paper will also examine the current legal mechanism that deals with whistle blowing, the consequences of whistle blowing and a recent legislative proposal, which protects whistle-blowers.

Before I discuss the key characteristics of whistle blowing, I will define the term whistle blowing, because it has been interpreted in many ways. At a general level, whistle blowing in government "broadly encompasses the open disclosure or an anonymous leak of confidential information to persons outside the organization concerning a harmful act that a colleague or superior has committed, is contemplating, or is allowing to occur."<sup>1</sup>

Whistle blowing has three characteristics and they are dissent, breach of loyalty, and accusation.

The first characteristic is dissent and according to Dennis Thompson, dissent has a continuum of possible actions that could take place. The continuum includes:

- "Internal protection combined with continuing co-operation with the development or implementation of the offending policy;
- Outside protest (usually in the form of a group statement or petition) in the context of continuing performance of assigned tasks;
- Open obstruction of policy, but still within the confines of the organization; and
- Covert obstruction, usually through the leaking of classified documents."<sup>2</sup>

All forms of dissent raise the issue of **loyalty**. Whistle blowing tests the boundaries of the loyalty that exist between the public servant, his/her superior, the agency, and the government of the day because it perpetuates the existence of competing loyalties.

This spectrum of competing loyalties consists of the Constitution, the law, or even the public servant's perception of the public interest. Finally, whistle blowing involves the accusation that certain individuals or a group is responsible for the misdeed in question.

### **Key Characteristics of Whistle-blowing**

After examining the definition and the characteristics of whistle blowing, it is necessary to look at what makes whistle blowing morally justifiable.

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<sup>1</sup> Kenneth Kernaghan, and John W. Langford. " *The Responsible Public Servant*" The Institute For Research on Public Policy, 1990.94

According to Kenneth Kernaghan and John W. Langford, the following criteria makes whistle-blowing justifiable:

- "If the act or omission in question be a seriously harmful one. The whistle-blower may be pushed to disclose confidential information in situations in which clear and serious dangers to the public exist.
- The accusation of serious harm must be supported by unequivocal evidence.
- The public servant is obliged to ascertain through regularly established channels within the organization that the perceived harm will not be corrected.
- Finally, the whistle-blower must have good reasons to expect that the unauthorized disclosure of confidential information will lead to the appropriate changes. This effectiveness test demands that one go to the audience that can do the most to eradicate the problem. If the whistle-blower sees no likelihood that unauthorized disclosures will improve the situation, then such an action is probably ill-considered regardless of the target audience chosen."<sup>3</sup>

### **Principles that define public servants duties**

After looking at whistle-blowing characteristics, it is necessary to examine the duties of the public servants in order to have a full understanding of the contradicting context whistle-blowers must face while making their decisions. The Institute of the Public Administration of Canada Statement of Principles states the conduct that is acceptable and not acceptable for all public servants. There are several principles that come into play when a public servant blows the whistle and they are accountability, public interest and confidentiality.

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<sup>2</sup> Dennis F. Thompson, "*The Possibility of Administrative Ethics*," *Public Administration Review* 45(Sept/Oct 1985). 557-58.

<sup>3</sup>.Ibid., p.100

The first principle that is relevant to whistle blowing is accountability.

According to the Institute of the Public Administration of Canada Statement of

Principles:

"Public awareness of government activity is seen as an essential means of monitoring, and holding the government accountable for, such activity. Public employees are accountable for the quality of their advice, for carrying out their assigned duties and for achieving policy and program objectives within the framework of law, prevailing constraints, direction from their superior, and the limits of the authority and resources at their disposal."<sup>4</sup>

In this case, whistle-blowing runs parallel to this principle because it exposes those who commit the wrongful act. Additionally, blowing the whistle also make the wrongdoers accountable for their actions to the government and the general public by exposing the inappropriate actions.

The second principle that is relevant to whistle blowing is the public interest. According to the Institute of the Public Administration of Canada

Statement of Principles:

"Public employees should resolve any conflict between their personal or private interest and their official duties in favour of the public interest. Public employees should seek to serve the public interest by upholding both the letter and the spirit of the laws established by the legislature or council and of the regulations and directions made pursuant to these laws."<sup>5</sup>

In these two statements lurk difficult dilemmas for the public servant. On one hand, the public servant is told to uphold the public interest.

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<sup>4</sup> Ibid., p.204

<sup>5</sup> Ibid., p.205

Yet, this principle does not give any advice to public servants that find themselves in situations where moral wrong doings are occurring within the limits of the law and run contrary to the public interest.

When an employee breaches these duties and reveals a confidence or some information, believing that to do so is in the public interest; the employer routinely takes disciplinary action, which may include dismissal. In the face of such punishment, some employees have sought protection from the courts or, if they are governed by a collective agreement, through a grievance procedure.

When the wrongdoing has been serious and the public's interest in disclosure is clear, the courts have permitted a very limited "public interest" defence in these cases. They have emphasized the need for the employee to use internal remedies first, to be sure of the facts and to exercise good judgement in his or her actions. Arbitrators have applied similar criteria. In general, it may be said that employees have at present only a narrow range of protection and may seriously jeopardize their careers by breaching their duties to their employers<sup>6</sup>.

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<sup>6</sup> David Johansen, *"Bill S-6: Public Service Whistle-blowing Act"*, Law and Government Division.3-5

The third principle that is applicable to whistle blowing is confidentiality.

According to the Institute of the Public Administration of Canada Statement of Principles:

"Public employees should not disclose to any member of the public, either orally or in writing, any secret or confidential information acquired by virtue of their official position. Within the bounds of law and property, public employees should be sensitive and responsive to the needs of the public, the news media and legislators for information on and explanation of the content and administration of government policies and programs."<sup>7</sup>

This principle also creates a controversial role for public servants and potential whistle-blowers. On one side, public servants are told to maintain this principle of confidentiality religiously. According to Kenneth Kernaghan and John W. Langford, all public servants are required to take an oath of secrecy not to disclose or make known, without due authorization, any matter or thing that comes to his or her knowledge by reason of employment in the public service.<sup>8</sup> On the other side, "public servants are confronted with commitments to 'open government' by the politicians they serve, and the use of 'leaks' by ministers, ministerial staff members, and their bureaucratic superiors. The Freedom of Information and Personal Privacy Act in Ontario removes the threat of civil or criminal actions against public servants that disclose confidential information in good faith."<sup>9</sup> In cases where government's actions run contrary to the public interest, it is necessary for public servants to blow the whistle and receive some sort of protection for their good deed.

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<sup>7</sup> Ibid., p. 206-7

<sup>8</sup> Ibid., p. 84

<sup>9</sup> The Freedom of Information and Personal Privacy Act, s.74

## Legal Protection for Whistle-blowers

After exploring the principles that influence the conduct of public servants, it is necessary to look at the legal mechanism that is presently in place for whistle-blowers. Current policy consists of "subjecting those individuals who engage in it to disciplinary action under the Criminal Code or the Official Secrets Act. The legislation prohibitions in disclosure of information are so broad and vague that virtually any unauthorized disclosure could result in criminal liability."<sup>10</sup> In any case, a public servant rarely knows until after the fact whether the common law, oaths of office, or official secret legislation has been violated.

Moreover, there a number of statutes, particularly those covering environmental or occupational health and safety matters, that protect employees within their jurisdiction against retaliation for having exercised certain rights conferred by the statutes. One such provision at the federal level in Canada is section 16 of the new Canadian Environmental Protection Act, 1999, which provides for protection against employment reprisals for employees who, in good faith, give designated officials information relating to offences under the Act. The only legislation that legally protects both public and private sectors is "section 28 of New Brunswick's Employment Standards Act, which applies to employers in both the private and public sectors, and which in general provides protection against employment reprisals for employees who make complaints against their employers with respect to the alleged violation of any provincial or federal legislation."<sup>11</sup>

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<sup>10</sup> Law Reform Commission of Canada, *"Crimes Against the State"*, Working Paper 49(Ottawa; Supply and Service Canada, 1986), Chs.3 and 4: and OLCRC, report, pp.101-103.

<sup>11</sup> David, Johansen. *"Bill S-6: Public Service Whistleblowing Act"*. Pg.4.



Currently, Canada does not provide protection for all public servant whistle-blowers, yet the Government of Canada provides protection for all private sector whistle-blowers. "In 1999 the Government of Canada established whistle-blower protections for those employed outside of the public sector in Bill C-20, the Competition Act."<sup>12</sup> The Government of Canada has chosen to create a double standard by protecting employees from the private sector and neglecting to do the same to public sector employees. On one hand, the government sees the importance of making sure that the private sector is obeying the law and of protecting the employee that bring forth the private sectors immoral or illegal actions. Yet on the other hand, the Government of Canada does not believe this should be applied to the public sector. Having no legal protection or recourse for all public servants deters public servants from reporting misdeeds in the public service. Considering the fact that all government actions affect many aspects of our lives, it is even more important to provide this type of protection to public sector employees. This type of protection will allow public servants to bring forth illegal or immoral actions of the government and have them rectified without fear for disciplinary action.

### **Consequences of whistle-blowing**

By looking at the consequences of whistle-blowing it might shed some light on the reasons for the unresponsive stance the Government of Canada has chosen to take on legal protection for whistle-blowers in the public sector.

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<sup>12</sup> Sheryl Groeneweg, "*A Comparative Analysis of Whistleblower Legislation in Australia, the United States and the United Kingdom*". Pg 2.

When a public servant decides to blow the whistle, there are a number of consequences that he or she is likely to experience. First of all, their colleagues often label the whistle-blower a “squealer”. In many cases there are attempts of organizational vengeance on whistle-blowers. Even if the whistle-blower moves to a new organization, he or she can be branded with the reputation for being disloyal. Whistle blowing can effectively end a career in the public service because of the act of disloyalty displayed by the whistle-blower.

Moreover, whistle blowing also affects the government at large. "The government as a whole can be damaged by the allegations of whistle-blowers. Such allegations may be especially damaging in the Canadian system of government because it operates on the principle of ministerial responsibility. Ministers are answerable to the legislature for the acts of their administrative subordinates and can, therefore, be greatly embarrassed by allegations of wrongdoing, even if the allegations are not substantiated or if the offence is committed by a public servant without the minister's knowledge and consent."<sup>13</sup>

Finally, whistle blowing can also affect the convention of public service anonymity and political neutrality that are tightly linked to ministerial responsibility.

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<sup>13</sup> Kenneth Kernaghan, " *Whistle-blowing in Canadian governments: ethical, political and managerial considerations*", *Optimum*, vol. 22-1.39

Certainly public servants that blow the whistle become highly visible to the public and are likely to be perceived, regardless of their motivation, as opposed to the government party.

### **A Proposed Resolution to the Consequences of Whistle-blowing**

After examining the consequences of whistle blowing, this paper will discuss the need for some form of independent complaint and appeals mechanism to supplement department rules on whistle blowing and to protect whistle-blowers. The Ontario Law Commission also understands the importance of protecting whistle-blowers by stating that "whistle-blowers should have statutory protection from reprisal in those instances where they disclose government information that should, in the public interest, be disclosed. If, today, government can no longer justify confidentiality for all information...then we cannot see how the principle of confidentiality can be invoked in order to cover up serious government wrongdoing."<sup>14</sup> Additionally, the Supreme Court of Canada also appears to provide some support for this view that there are circumstances in which public servants are justified in blowing the whistle on government wrongdoing. In the course of defining the boundaries of acceptable public comment, the Court observed that:

"A public servant may actively and publicly express opposition to the policies of government...if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or other, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability."<sup>15</sup>

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<sup>14</sup> Jos Tompkins and Hays, op.cit.325

A strong support for legally protecting whistle-blowers has led to the creation of Bill S-6. The Senate, in its third reading is presently reviewing the bill. This proposed legislation permits legitimate whistle blowing, ensures the anonymity, as much as possible, of whistle-blowing employees, and immunizes public sector employees from disciplinary or other measures under appropriate circumstances. "The purpose of Bill S-6 would be:

- to educate Public Service employees on ethical practices in the workplace and to promote the observance of those practices;
- to provide a means for Public Service employees to make allegations of wrongful acts or omissions in the workplace, in confidence, to an independent Commissioner who would investigate them and seek to have the situation dealt with and who would report to Parliament in respect of confirmed problems that had not been dealt with; and
- to protect Public Service employees from retaliation for having made or for proposing to make, in good faith and on the basis of reasonable belief, allegations of wrongdoing in the workplace."<sup>16</sup>

Bill S-6 would formulate an independent body, in the form of a Commissioner, which public sector employees would file a written report to. The Commissioner would review the report and determine if the allegations brought forth are not trivial. To preserve the anonymity of public servants, the Commissioner is required to keep the identity of the employee(s) confidential. Once the Commissioner has determined that the allegation is not trivial, he/she must prepare a report of the findings and give a copy of this report to the Minister of the department. This alone would preserve ministerial responsibility by giving the Minister the opportunity to respond to the problem.

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<sup>15</sup> Supreme Court of Canada, Neil Fraser and Public Service Staff Relations Board(1985) 2 SCR: 462-63

<sup>16</sup> David Johansen, "*Bill S-6: Public Service Whistle-blowing Act*", Law and Government Division.5

If the Minister does not respond to the problem brought forth, the Commissioner could prepare and submit an emergency report to Parliament. Bill S-6 also protects public sector employees from retaliation by prohibiting any disciplinary action against whistle-blowers. Additionally, the bill also provides the public sector employee with a legal recourse, where by they are entitled to grievance proceedings. Bill S-6 would adequately address the consequences of whistle blowing, once it becomes law. Overall, Bill S-6 would make government more accountable by providing the necessary legal protection for whistle-blowers in the public sector.

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