

# **The Need for Whistleblowing Legislation in Canada: A Critical Defence**

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## Introduction

This paper is about the need for whistleblowing legislation in Canada, at both the federal and provincial levels. The focus of the paper is squarely on the public service. Although certain jurisdictions (for example, the United Kingdom<sup>1</sup>) have a single disclosure regime covering both the private and public sectors, then general trend throughout the world is for distinct legislation for the two sectors. In Canada, there are already numerous statutory avenues for individuals in both the public and private sectors to blow the whistle; however, the grounds for disclosure are generally quite circumscribed, with the statutes tending to deal only with specific concerns, e.g. occupational health and safety or the environment.<sup>2</sup>

At present whistleblowing legislation is coming into vogue across Canada, at both levels of government. This paper argues that such legislation should have the modest goal of protecting good faith whistleblowers. This is opposed to loftier ambitions, which could be characterized as ‘cleaning up government for once and for all.’ The heart of this argument focuses on specific incidences of whistleblowers in Canada. While some of these whistleblowers are clearly gadflies, some of them are earnest in their concerns about the quality of governance in the country. It is argued here that, (a) the reasons for which good faith whistleblowers have come forward are reasons that we should all care about, and (b) the absence of protections means that it is likely that good faith whistleblowers are holding back when we don’t want them to.

The argument proceeds by (1) canvassing definitions of whistleblowing; (2) assessing the moral standing of whistleblowing; (3) discussing how whistleblowing fits into the employment relationship, with a specific concern with the unique employment situation of public servants; (4) discussing specific cases of whistleblowing in Canada; and, (5) finally offering some conclusions.

## Defining Whistleblowing

As Paul Thomas notes, there is a great deal of ambiguity in definitions of whistleblowing.<sup>3</sup> Janet Near and Marcia Miceli provide the classic general definition: “the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons

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<sup>1</sup> *Public Interest Disclosure Act 1998* (U.K.), 1998, c. 23.

<sup>2</sup> See Isabelle Cantin & Jean-Maurice Cantin, *La dénonciation d'actes répréhensibles en milieu de travail ou whistleblowing*, (Cowansville: Les Éditions Yvon Blais, 2005) at 43-59 (There are limited exceptions to this general proscribing of whistleblowing, particularly in New Brunswick; these are discussed below.).

<sup>3</sup> Paul G. Thomas, “Debating a Whistle-blower Protection Act for Employees of the Government of Canada” (2005) 48 *Canadian Public Administration* 147 at 149.

or organizations that may be able to effect action.”<sup>4</sup> Fred Alford hones that definition, offering that “[t]he matters about which the whistle-blower speaks out must involve harm to others, not just the whistle-blower. Usually these others are outside the organization.”<sup>5</sup> Further, and specifically speaking to the Canadian public sector, Kenneth Kernaghan and John Langford attempt to craft a broad definition of whistleblowing

as encompassing both the open disclosure or surreptitious leaking to persons outside the organization of confidential information concerning a harmful act that a colleague or superior has committed, is contemplating, or is allowing to occur.<sup>6</sup>

We can draw out two key points from the foregoing definitions. The first concerns the topics ripe for whistleblowing. We can define it as wrongdoing (an illegal, immoral, or illegitimate act) which is liable to cause harm to persons outside of the organization from which the wrong emanates. Thus, purely internal matters would not tend to be ripe for whistleblowing, i.e. under this definition, one could not properly be said to be blowing the whistle on a manager who is engaging in workplace human rights violations. While this seems simple enough in practice, it does raise questions. For instance, surely at some point a government department’s human relations climate becomes part of the public interest? As such, could an employee legitimately blow the whistle in such an instance?

Second, though the first two definitions do not suggest that a whistleblower must direct their disclosure outside of their organization, the final definition – directed at public servants – does make this stipulation. The notion that whistleblowing must be directed outside an organization has a strong pedigree. Ralph Nader, for example, argues that the heart of the issue in whistleblowing is determining “at what point should an employee resolve that allegiance to society ... must supersede allegiance to the organization’s policies ... and then act on that resolve by informing outsiders or legal authorities?”<sup>7</sup> In Nader’s understanding, whistleblowing is an activity which necessarily gives rise to a major ethical conflict – the decision about when one ought to turn against their employing organization in order to preserve the ‘public interest.’

The somewhat disparate nature of competing whistleblowing definitions has led Thomas to step back and state that there are “at least three types of whistle-blowing: internal disclosure, authorized external disclosure, and

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<sup>4</sup> Janet P. Near & Marcia P. Miceli, “Organizational Dissidence: The Case of Whistle-Blowing” (1985) 4 *Journal of Business Ethics* 1 at 4.

<sup>5</sup> C. Fred Alford “Whistle-Blowers: How Much We Learn From Them Depends on How Much We Can Give Up” (1999) 43 *The American Behavioral Scientist*, 264 at 266.

<sup>6</sup> Kenneth Kernaghan & John W. Langford, *The Responsible Public Servant*, (Halifax: Institute for Research on Public Policy, 1990) at 94.

<sup>7</sup> Ralph Nader, “An Anatomy of Whistle Blowing” in Ralph Nader, Peter J. Petkas & Kate Blackwell, eds. *Whistle Blowing: The Report of the Conference on Professional Responsibility* (New York: Grossman, 1972) 3 at 5.

unauthorized external disclosure.”<sup>8</sup> Thomas warns us that the three classes of whistleblowing have been conflated in the Canadian debate. As a consequence, whistleblowing has generally been considered as the unauthorized release of information. In pointing out this colloquial sense, it is important to note that in Thomas’ account, by no means need one go “external” in order to be a whistleblower. Indeed, the use of the term “external” raises questions of its own. From a public service perspective, what does it mean to “go external”? Is it outside of one’s unit? Of one’s branch? Of one’s ministry? Or, does it simply mean disclosure to the press?

Herein we will explore several cases in which individuals have blown the whistle. Some of these cases exhibit gadflies, some exhibit mistaken intentions, and some exhibit earnest, good faith whistleblowers. Although the slippery nature of the term leads to its wide use in this paper, a preferred definition of whistleblowing would focus on those who, in good faith, disclose wrongdoing to one in a position to take corrective action.

## **Whistleblowing – Morally Ambiguous?**

Whistleblowing has classically been villified. Former chairman of General Motors, James Roche once memorably noted that whistleblowing – scorned as part of a class of disloyalty including “industrial espionage” and “professional responsibility” – was but “another tactic for spreading disunity and creating conflict.”<sup>9</sup> Out of the corporate world and into the public service, H.L. Laframboise, a former Assistant Deputy Minister with the Canadian federal government, maintains Roche’s disdain for whistleblowers. “Vile wretches” according to Laframboise, are those “whose acts of whistleblowing are more offensive to the community or to their peer groups than the acts on which they have blown the whistle.”<sup>10</sup>

In the same broad vein, Thomas asserts that whistleblowing is a “morally ambiguous” activity.<sup>11</sup> He neither offers reasons for why this is the case, nor a definitive statement of what he means. Nevertheless, this assertion makes a substantial contribution to Thomas’ argument, as we will see below. Simply, if we are to accept as a first principle that there is some sort of moral pall over whistleblowing, we will necessarily be looking at a circumscribed discussion from the outset.

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<sup>8</sup> Thomas, *supra* note 3 at 151.

<sup>9</sup> James M. Roche, “The Competitive System, To Work, To Preserve, and To Protect” in *Vital Speeches of the Day*, 1 May 1971 at 445, cited in Kenneth D. Walters, “Your Employees’ Right to Blow the Whistle” (1975) *Harvard Business Review* 26 at 27.

<sup>10</sup> H.L. Laframboise, “Vile Wretches and Public Heroes: The Ethics of Whistleblowing in Government” (1991) 34 *Canadian Public Administration* 73 at 73.

<sup>11</sup> Thomas, *supra* note 3 at 148, 152.

Moral ambiguity could be defined as the situation that arises when two (or more) countervailing duties which direct one to two (or more) distinct actions. Whistleblowing, one could argue, falls into this categorization as the act of blowing the whistle on an employer places one's duty of fidelity to their employer (discussed below) in direct contrast to one's duty to not be complicit in a wrongful act. In this way, whistleblowing is morally ambiguous via a "just following orders" type of morality. As Nader notes, this defense reached its nadir at Nuremberg, and it has not seen much recovery since.<sup>12</sup>

The duty of fidelity which an employee owes an employer is clear cut, and has been well-defined by law. As we will see below, whistleblowing is contemplated as an exception to this overarching duty.<sup>13</sup> Indeed, the duty of fidelity is ever being circumscribed as other duties become ever more ingrained. As noted, the recent past has seen the likes of Roche and Laframboise decry whistleblowers. While this may have been in line with the ethos then, it simply is no longer. Take this hypothetical situation:

An employee of a government agency provides documents and correspondence to an opposition MPP which disclose that senior managers of the agency are pressuring their subordinates to falsify data. The falsified data is being used to justify the awarding of a grant or licence to a particular company. Ordinarily, the company would not have been eligible for the grant or licence under the terms of the agency's statute and mandatory policies.<sup>14</sup>

Leave the hypothetical (and certainly poor – more on that below) method of disclosure aside, and focus on the wrongdoing undertaken by senior management. In the contemporary setting, what could credibly be called "morally ambiguous" about the hypothetical employee blowing the whistle here, within, let's assume, the proper channels?

Thomas' worry over moral ambiguity has more to do with a concern that whistleblowing could become "inherently virtuous" in the popular consciousness, due to the adoption of whistleblowing legislation.<sup>15</sup> Perhaps Thomas shares Laframboise's view: that given the opportunity, those vile wretches will waste no time in stepping forward. This is a reasonable concern, but one which can be allayed by looking at some of the incidences of whistleblowing in the recent Canadian past, as we will do below.

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<sup>12</sup> Nader, *supra* note 7 at 11.

<sup>13</sup> See, e.g. *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70 ¶14 ("Whistleblower laws create an exception to the usual duty of loyalty owed by employees to their employer. When applied in government, of course, the purpose is to avoid the waste of public funds or other abuse of state-conferred privileges or authority.") [*Merk*].

<sup>14</sup> *Whistleblowing: A Discussion Paper on the Protection of Public Employees who Disclose Serious Wrongdoing* (Toronto: Management Board Secretariat, 1991) at 3.

<sup>15</sup> Thomas, *supra* note 3 at 164.

Beyond concerns about whistleblowing legislation providing a platform to gadflies throughout the government, his use of “moral ambiguity” as counterpoised with “inherent virtue” strongly suggests that Thomas sees great moral difficulties with whistleblowing, no matter the context. Conversely, it is argued here that the context is essential. Simply there will arise situations in which whistleblowing is the best course of action. We will explore such contexts below. However, we will first explore the duties an employee owes an employer, and the specific employment relationship in the public service.

## The Employment Relationship

### *Duty of Loyalty*

The common law holds that there is an implied terms of contract between employee and employer which set out “judges’ prevailing conception of what an ideal employment relationship should be.”<sup>16</sup> One of the implied terms of the employment relationship, the duty of fidelity (or loyalty) is “the cornerstone.”<sup>17</sup> It enjoys this central role as it allows employers to maintain control over their employees the duty holding “that within the terms of the contract the employee must serve the employer faithfully with a view to promoting those commercial interests for which he is employed.”<sup>18</sup> In short, it is the employees’ job to do the job as asked, not to criticize.<sup>19</sup>

As it dates from prior to the Industrial Revolution, it is not surprising that the duty of fidelity has been moderated over time, no longer extending indefinitely. The bearing this process of limiting has had on whistleblowing stems from the notion, first enunciated in the mid-nineteenth century, that

[c]onfidential communications involving fraud are not privileged from disclosure. ... The true doctrine is, that there is no confidence as to the disclosure of iniquity. You can not make me the confidant of a crime or a fraud, and be entitled to close up my lips upon a secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence can not exist.<sup>20</sup>

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<sup>16</sup> Harry Arthurs, Richard Brown & Brian Langille, *Labour and Employment Law*, 6th ed. (Kingston: Industrial Relations Centre, 1998) at 106.

<sup>17</sup> Geoffrey England, *Individual Employment Law*, (Toronto: Irwin Law, 2000) at 38.

<sup>18</sup> *Secretary of State for Employment v. Associated Society of Locomotive Engineers and Firemen and Others (No. 2)*, [1972] 1 I.C.R. 19 at 62 (C.A.).

<sup>19</sup> Limitations regarding legality and safety are, however, contemplated by the Court while stating this duty, see e.g. *Stein v. British Columbia (Housing Management Commission)* (1992), 41 C.C.E.L. 213 ¶21 (An employer “may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.”)

<sup>20</sup> *Gartside v. Outram* (1856), 26 L.J. Ch. 113 [*Gartside*].

Thus, there is a whistleblowing exemption to the common law duties which emerge from an employment relationship. The question facing us is what sort of wrong gives rise to the exemption? Clearly the *Gartside* measure cited above is one of fraud, however, as the Ontario Law Reform Commission noted, since that decision “the nature of the wrongdoing justifying a whistleblowing exception to the common law duty has expanded.”<sup>21</sup> Perhaps the high-water mark for this expansion has been set by Lord Denning, who wrote that an employee may disclose “any misconduct of such a nature that it ought in the public interest to be disclosed to others.”<sup>22</sup> Though the exact nature of what constitutes “the public interest” has proved to be of concern to numerous courts, some judgements have stated in *dicta* that the public interest exception “should be restricted to instances of wrongdoing of grave public importance.”<sup>23</sup>

The Law Reform Commission notes that the success of a common law whistleblowing defence to a breach of confidence is dependent on both the evidence backing the disclosure, as well as to whom the disclosure was made.<sup>24</sup> With respect to what sort of evidence warrants disclosure, the Law Reform Commission argues that there is minimal guidance from the Courts. However, authorities point to two considerations: (1) a disclosure is justified only if the whistleblower has a reasonable ground for believing that a crime or civil wrong has occurred or will take place, and (2) that good faith on the part of the whistleblower must be proven.<sup>25</sup>

On the question of to whom confidential information ought to be delivered, the Law Reform Commission report points back to Lord Denning *Initial Services*:

[t]he disclosure must, I should think, be to one who has a proper interest to receive the information. Thus, it would be proper to disclose a crime to the police; or a breach of the *Restrictive Trade Practices Act, 1956*, to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press.<sup>26</sup>

In *Initial Services*, the whistleblower had already resigned his position with the company, thereby concluding his duty of loyalty. For one still in the employ of the alleged wrongdoer, “[l]oyalty would appear to demand that disclosure beyond internal channels should be the very last resort.”<sup>27</sup> Internal channels, where they

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<sup>21</sup> Ontario Law Reform Commission, *Report on Political Activity, Public Comment and Disclosure by Crown Employees*, (Toronto: Ministry of the Attorney General, 1986) at 64 [OLRC Report].

<sup>22</sup> *Initial Services, Ltd. v. Putterill*, [1967] 3 All E.R. 145 at 148 (C.A.) [*Initial Services*].

<sup>23</sup> OLRC Report, *supra* note 21 at 65.

<sup>24</sup> *Ibid.* at 68.

<sup>25</sup> *Ibid.* (It is noted, however, that if the disclosure evinces a crime, the motivation of the whistleblower is not relevant, as there is clearly no confidence associated with a crime.)

<sup>26</sup> *Initial Services*, *supra* note 22 at 148.

<sup>27</sup> OLRC Report, *supra* note 21 at 69.

are likely to be effective, are superior to 'going public.' This saves unnecessary breaches of confidentiality, as well as any needless embarrassment through disclosures that may be prejudicial to the employer.

## ***Duty of Loyalty in the Public Service***

The duty of loyalty is a more central concern in the public service than in the private sector. This is made clear simply by the fact that public servants typically must swear both an oath of loyalty as well as an oath of secrecy before commencing their employment.<sup>28</sup> Beyond the oaths, it is constitutional convention that guides duty within the public service. Arising not from written law, but rather out of historically accepted practices and customs. While of "great importance" in the eyes of the Court, such conventions are not imbued with the solidity one normally associates with the constitution.<sup>29</sup> Importantly, "[c]onventions are not ... legally enforceable; they are flexible and change over time. A convention is not a constitutional guarantee."<sup>30</sup>

Though not legally enforceable, conventions play a central role in defining the contours of the state. The Supreme Court has traced this central role back to the foundation of Canada, finding in the preamble to the *Constitution Act, 1867* an acknowledgement of the importance of constitutional conventions.<sup>31</sup> Although this may not seem the sturdiest of constitutional hooks upon which to hang an argument, the Supreme Court has nonetheless recently written of conventions that "it would be impossible to conceive of our constitutional structure without

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<sup>28</sup> See e.g. *Public Service Act*, R.S.O. 1990, c. P.47, s. 10 [*PSA*]. (The *PSA* states: "10.(1) Every civil servant shall before any salary is paid to him or her take and subscribe before the Clerk of the Executive Council, his or her deputy minister, or a person designated in writing by either of them, an oath of office and secrecy in the following form in English or French:

I, ....., do swear (or solemnly affirm) that I will faithfully discharge my duties as a civil servant and will observe and comply with the laws of Canada and Ontario, and, except as I may be legally authorized or required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a civil servant.

So help me God. (omit this phrase in an affirmation)"

"(2)Every civil servant shall before performing any duty as a member of the regular staff take and subscribe before the Clerk of the Executive Council, his or her deputy minister, or a person designated in writing by either of them, an oath of allegiance in the following form in English or French:

I, ....., do swear (or solemnly affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second (or the reigning sovereign for the time being), her heirs and successors according to law.

So help me God. (omit this phrase in an affirmation)".)

<sup>29</sup> *Ontario Public Service Employees Union v. Ontario (AG)*, [1987] 2 S.C.R. 2 ¶85.

<sup>30</sup> *Grant v. Canada (AG)*, [1995] 1 F.C. 158 ¶3 (T.D.).

<sup>31</sup> *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 ¶94-96 (Per Lamer C.J.: "the preamble indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged.").



them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.”<sup>32</sup>

The principles contained in constitutional “conventions assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions.”<sup>33</sup> Thus, though not properly legally enforceable, constitutional conventions exert a powerful force on the interpretation of both the written constitution and statutory law. Given the Court’s recent writing, Sossin notes that, if anything, constitutional conventions have only grown in significance.<sup>34</sup>

### ***Public Service Neutrality***

The traditional, idealized understanding of the public service which emerges from these conventions is often referred to as the “iron triangle.”<sup>35</sup> This is a euphemism used to describe the form which the public service takes in Westminster-style jurisdictions. The conventions of ministerial responsibility, political neutrality and public service anonymity form the points of the triangle, and each of these pull together to create specific conditions of the employment in the public service. The key point on the triangle is ministerial responsibility, which holds ministers to be both collectively and individually responsible. Collective responsibility dictates that ministers must not disclose Cabinet deliberations, and that they must publicly support Cabinet decisions. Individual responsibility dictates that ministers must be answerable to Parliament for the actions of their public servants, and must resign their position in the face of serious errors on the part of their public servants.<sup>36</sup>

A further component of ministerial responsibility holds that “ministers are responsible for protecting the conventions of political neutrality and public service anonymity.”<sup>37</sup> These two corners of the triangle are well-represented in the “ideal model” of public service neutrality, which Kernaghan argues has six components:

- 1) Politics and policy are separated from administration: thus politicians make policy decisions; public servants execute those decisions;
- 2) Public servants are appointed and promoted on the basis of merit rather than of party affiliation or contributions;
- 3) Public servants do not engage in partisan political activities;

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<sup>32</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ¶51.

<sup>33</sup> *Ibid.* ¶52.

<sup>34</sup> See Lorne Sossin, “Speaking Truth to Power? The Search for Bureaucratic Independence in Canada” (2005), 55 U.T.L.J. 1 at 12.

<sup>35</sup> *Ibid.*

<sup>36</sup> For a full discussion, see Kenneth Kernaghan, “The Future Role of a Professional, Non-Partisan Public Service in Ontario” (Panel on the Role of Government, Research Paper Series No. 13, 2003) at 5.

<sup>37</sup> *Ibid.* at 11.

- 4) Public servants do not express publicly their personal views on government politics or administration;
- 5) Public servants provide forthright and objective advice to their political masters in private and in confidence; in return, political executives protect the anonymity of public servants by publicly accepting responsibility for departmental decisions; and
- 6) Public servants execute policy decisions loyally, irrespective of the philosophy and programs of the party in power and regardless of their personal opinions; as a result, public servants enjoy security of tenure during good behaviour and satisfactory performance.<sup>38</sup>

As we can see, specifically with regard to points number 4, 5 and 6, the public servant's duties impact directly on whistleblowing.

However, these six points amount to little more than a catalogue of an ideal type bureaucracy. In reality, as Sossin points out,

bureaucrats are deeply enmeshed in politics ... [i]t is because of this commingling of the bureaucratic and the political that the constitutional principles that demarcate the appropriate sphere of bureaucratic and political activity become both so daunting and so crucial.<sup>39</sup>

Political neutrality is therefore difficult to work out in reality. Importantly, in terms of whistleblowing, it is this corner of the iron triangle that most concerns us. Courts have held that, in Ontario, there is "a public right that has been recognized for well over a century: the right to have government administered by an impartial civil service."<sup>40</sup> As the Law Reform Commission states "[t]he current restrictions on the rights of Crown employees to engage in political activity are intended to reinforce this convention of political neutrality."<sup>41</sup> As noted above, the oaths required of public servants statutorily buttress this convention.

As noted above, the three of Kernaghan's list of six tenets of an ideal public service listed above most related to whistleblowing are numbers 4, 5, and 6. Accordingly, we ought to expound upon each of those three in turn, a task which has, helpfully, already been undertaken by the Law Reform Commission.

Speaking to the fourth tenet – that public servants ought not to express their personal views on government policies – the Law Reform Commission notes that if it were taken literally, the expressive rights of public servants would be narrowly constrained indeed. Nonetheless, there are very few guidelines on what sort of expression on the government's ability is allowable. The absence of guidelines is reasonable as it is a difficult task, at best, to draw a bright line

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<sup>38</sup> *Ibid.*

<sup>39</sup> Sossin, *supra* note 34 at 7ff.

<sup>40</sup> *Re Ontario Public Service Employees Union and Ontario (AG)* (1980), 31 O.R. (2d) 321 (C.A.) at 331.

<sup>41</sup> OLRC Report, *supra* note 21 at 13.

separating acceptable from unacceptable speech. Although there will clearly be comments at each pole, there is a large grey area in which it is difficult to determine the acceptability of an utterance.<sup>42</sup> Of particular note, it is often difficult to distinguish “between public statements motivated by partisan considerations and those motivated by concern for the public interest.”<sup>43</sup>

The fifth tenet requires that public servants provide confidential forthright advice, and in return receive anonymity. This constitutional convention fits with ministerial responsibility, as public servants advise the minister privately, in return for the minister taking public responsibility for the outcome of a policy, either good or bad, thereby sheltering the public servant. Anonymity is not, however, absolute – the position of senior public servants is often well known. What matters, though, is that their individual views on policy matters are not made known.<sup>44</sup>

The sixth tenet holds that loyal service to the government of the day is repaid with security of tenure. In return for loyally serving the elected government, public servants are able to count on maintaining their employment, except in the event of downsizing or just cause dismissal. Thus, this tenet holds that merit animates career progress in the public service, thereby allowing for the continuity of a knowledgeable public service across governments.

Political neutrality in practice falls short of the ideal type put forth in the tenets listed above.<sup>45</sup> Though less than ideal, the need for some measure of political neutrality remains. This need has been eminently well-stated by Justice Douglas of the United States Supreme Court, who wrote that:

[p]olitical fortunes of parties will ebb and flow; top policy men in administrations will come and go; new laws will be passed and old ones amended or repealed. But those who give continuity to administration, those who contribute the basic skill and efficiency to the daily work of government, and those on whom the new as well as the old administration is dependent for smooth functioning of the complicated machinery of modern government are the core of the civil service. If they are beneficiaries of political patronage rather than professional careerists, serious results might follow... . Public confidence in the objectivity and integrity of the civil service system might be so weakened as to jeopardize the effectiveness of administrative government. Or it might founder on the rocks of incompetency, if every change in political fortunes turned out the incumbents, broke the continuity of administration, and thus interfered with the development of expert management at the technical levels. Or if the incumbents were political adventurers or party workers, partisanship might color or corrupt the processes

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<sup>42</sup> *Ibid.* at 19ff.

<sup>43</sup> *Ibid.* at 21.

<sup>44</sup> *Ibid.* at 22ff.

<sup>45</sup> *Ibid.* at 25.

of administration of law with which most of the administrative agencies are entrusted.<sup>46</sup>

Though that passage was delivered in 1947, some 60 years hence we can still say that there is considerable interest in a neutral public service. This is understandable as this neutrality profits the public, the government, and public servants. Consequently, any whistleblowing protections will necessarily have to be sensitive to the demands of neutrality. Indeed, the political neutrality of civil servants has been front and centre in terms of the Canadian experience with public servants' disclosures.

## **Public Servants' Disclosures in Canada**

Thus far we have seen that the scope available for whistleblowing in the public service is proscribed by the enhanced duty of loyalty foisted upon public servants, via both statutory controls (e.g. oaths) and by constitutional convention (e.g. the neutrality of the public service). In order to put some flesh on this discussion, it is important to look at how these duties and conventions have been assessed in situations in which public servants have made public disclosures.

The key decision on the duty of loyalty as related to critical commentary on government policies by public servants is the Supreme Court decision in *Fraser v. Public Service Staff Relations Board*.<sup>47</sup> For the sake of understanding, it is useful to briefly recount the facts of the case. Fraser had been employed by Revenue Canada for ten years prior to his dismissal. Beginning the process leading to his dismissal, Fraser wrote a rather innocuous letter to the editor of his local newspaper decrying metrification. He also attended a city council meeting on the topic, in the course of which he was quoted and photographed with a placard in the local newspaper.

As a consequence, Fraser was suspended from work for three days and directed to refrain from similar actions. He subsequently attended another council meeting (this time televised), during which he spoke out against both metrification and the *Charter of Rights*, both of which were hot debate topics at the time (early 1982). Fraser then appeared on an open line radio talk show, though he prefaced his appearance by stating that he would not discuss any matters pertaining to Revenue Canada. During his radio appearance he likened Prime Minister Trudeau to a Polish dictator. Subsequently, Fraser was warned by his employer that further disciplinary action would be taken if he did not cease his public campaigning. Fraser maintained that his right to free speech allowed him to comment on the government, so long as his comments were unrelated to his own department. He then appeared on an open line television programme. Consequently, Fraser was suspended for 10 days. During that suspension, due

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<sup>46</sup> *United Public Workers of America v. Mitchell*, 330 U.S. 75 at 121ff.

<sup>47</sup> [1985] 2 S.C.R. 455 [*Fraser*].

to his growing media profile, Fraser made yet another open-line appearance. This appearance led to his dismissal, following which his invective grew in intensity with him, most notably, comparing Prime Minister Trudeau and the Canadian government to the Nazi regime.<sup>48</sup>

It should by now be apparent that Fraser was not a whistleblower. He was, rather, a gadfly. Take this recounting of Fraser's immediate supervisor's description of him

as an individual who expressed his views strongly. He thought that Mr. Fraser was capable of going to the press and made reference to two previous incidents involving Mr. Fraser ... . In the one instance Mr. Fraser wanted to express his disappointment to "The Globe and Mail" in having had an application for leave to take an extended vacation without pay rejected; and in the other instance, Mr. Fraser wished to express his disenchantment with the denial by the Public Service Commission of his application for leave to run as a candidate for Parliament.<sup>49</sup>

Thus, we should labour under no illusions concerning the righteousness of Fraser's quest. Nevertheless, he grieved both of his suspensions, as well as his dismissal, arguing that public servants are free to criticize government, so long as the criticism is sufficiently remote from his or her job or department.<sup>50</sup> The arbitrator found that Fraser's first suspension was unwarranted, but that his second suspension and dismissal were both just. Fraser appealed the decision all the way to the Supreme Court, where the adjudicator's findings were upheld.

Speaking generally about the duties of a public servant, Chief Justice Dickson, on behalf of the Court, discussed the balancing required when public servants air their views on the government. Noting that free speech rights are never absolute (for example, consider libel or slander), Chief Justice Dickson found that while public servants are free to criticize the government, this is not an absolute freedom. The acceptability of criticisms is a highly contextual consideration, as evinced by the Chief Justice's example: it would unjust for the government to dismiss a provincial clerk who simply attended a demonstration on day care policy; it would, however, be just to dismiss the Deputy Minister of Social Services if he or she were to speak at the same demonstration.<sup>51</sup>

Referring to the "necessity of an impartial and effective public service" Chief Justice Dickson noted the separation of powers in Canada between the executive, legislative, and judicial branches of government. The public service's role, as part of the executive branch, is to "administer and implement policy." In order to carry out this task effectively, the Chief Justice wrote that "the public

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<sup>48</sup> *Ibid.* at 458-60.

<sup>49</sup> *Re Fraser and Treasury Board (Department of National Revenue)* (1982), 5 L.A.C. (3d) 193 at 195 (P.S.S.R.B.)

<sup>50</sup> *Ibid.* at 465.

<sup>51</sup> *Ibid.* at 469.

service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third ... [and] a further characteristic is loyalty.”<sup>52</sup>

Loyalty within the public service, as we have seen above, means loyalty to the government as employer, not loyalty to the party that holds power at a given time. However, Chief Justice Dickson wrote that

in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate 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 others, 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>53</sup>

In this vital passage, Chief Justice Dickson suggests that public servants may appropriately publicly criticize the government when that criticism amounts to what may reasonably be called whistleblowing. Alas, from *Fraser*, we can conclude that, though the loyalty of public servants is a rightful requirement of the government, “disclosing confidential government information may be appropriate – or even required – if the legality of government action or the health and safety of the public is imperiled.”<sup>54</sup>

From this Sossin notes that “if this logic is followed, all civil servants enjoy a measure of legal protection should they decide to become ‘whistle blowers,’ whether or not specific whistle-blower legislation exists to protect them.” Extrapolating further, Sossin argues that the Chief Justice’s comments recognize that a public servant’s duty of loyalty to the Crown, and to the public interest, “must in some circumstances be a higher obligation than the duty of loyalty owed to the government of the day.”<sup>55</sup>

While all this is well and good, Kenneth Swan argues that

[i]n the absence of some special statutory protection, the whistleblowing employee, and the publicly assailed employer, are left to the vagaries of the arbitration jurisprudence on these complex issues as a source for guidelines on how to conduct themselves.<sup>56</sup>

There are, indeed, numerous ambiguities within the jurisprudence which point to a crying need for whistleblowing legislation in Canada, both federally and provincially. The need arises from the specific duties of loyalty and neutrality

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<sup>52</sup> *Ibid.* at 470.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.* at 29ff.

<sup>55</sup> Sossin, *supra* note 34 at 13.

<sup>56</sup> Kenneth P. Swan, “Whistleblowing Employee Loyalty and the Right to Criticize: An Arbitrator’s Viewpoint” in William Kaplan, Jeffrey Sack & Morley Gunderson, eds., *Labour Arbitration Yearbook 1991*, vol. 2 (Toronto: Butterworths-Lancaster House, 1991) 191 at 192.

within the public service, as well as the right – affirmed in *Fraser* – of public servants to blow the whistle.

Along with *Fraser*, another leading case in the Canadian jurisprudence regarding the public comments of public servants is a British Columbia labour arbitration case dating from 1981. There, Arbitrator J.M. Weiler ruled on a case which directly concerned a public servant's duty of loyalty. The two grievors were employed by the British Columbia Corrections Branch, and had become "local celebrities" due to a "prolonged harangue in which they castigated the administration of provincial corrections" on talk radio and in newspapers.<sup>57</sup> Their campaign was, however, groundless.<sup>58</sup> The grievors did not heed calls to stop their media campaign, and they did not internally file their complaints before going public (a step which may well have cleared the air at a much earlier – and much less public – stage). They were consequently dismissed, a decision which was upheld by the Arbitrator.

In the decision, Arbitrator Weiler wrote of the disclosure of confidential information by 'whistleblowing' employees:

[w]ith respect to public criticisms of the employer, the duty of fidelity does not impose an absolute 'gag rule' against an employee making any public statements that might be critical of his employer. An employee need not, in every circumstance, follow Cervantes' advice, 'A closed mouth gathers no flies.' The duty of fidelity does not mean that the Daniel Ellsbergs and Karen Silkwoods of the world must remain silent when they discover wrongdoing at their place of employment. Neither the public nor the employer's long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment to the attention of those who can correct such wrongdoing. However, 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 the expertise and experience of many individuals to all problems that may only concern one employee. Only when these mechanisms prove fruitless may an employee engage in public criticism of his employer without violating his duty of fidelity.<sup>59</sup>

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<sup>57</sup> *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union*, (1981), 3 L.A.C. (3d) 140 (BC) at 145 [*Lehner*].

<sup>58</sup> *Ibid.* at 166.

<sup>59</sup> *Ibid.* at 162-63. (Ellsberg, an analyst at the time with the RAND Corporation, released the "Pentagon Papers" to the New York Times in 1971. The documents demonstrated a disconnect between public pronouncements and government knowledge about the war in Vietnam. Silkwood was an employee at the Kerr-McGee plutonium processing plant who identified numerous safety issues at her workplace owing to employer negligence. She was gathering evidence of such for her union, when she experienced suspicious personal plutonium contamination, and ultimately was killed in an mysterious single car accident.)

We can glean two important points from the foregoing excerpt. On the one hand, it affirms what we have seen in *Fraser* (as well as *Gartside* and *Initial Services*): a strong indication that the public interest can occasionally be served through disseminating otherwise confidential information. Second, we see again that the common law allows for public service external whistleblowing to occur, when it is the case that other avenues of redress (such as internal channels) have not borne fruit.

As we have seen though, this ability to blow the whistle is tempered by the constitutional convention of public service neutrality. In a recent case from Alberta, a public servant wrote a letter critical of government policy to an opposition MLA, (carbon copying it to his local MLA, and his department minister).<sup>60</sup> The employee was reprimanded for his letter, as well as cautioned to refrain from further public comment on government policies. He grieved both of these. The reprimand was found to be constitutional, while the direction against further comments was not. Simply, the direction he received was overbroad; in effect, it suggested that public servants were not able to comment upon any aspect of government policy.<sup>61</sup> The reprimand was justified, however, by an appeal to the centrality of political neutrality in the public service. In his decision, Justice Cooke wrote that

the democratic process involves the formation of a government following the decision of the electorate .... The formulation and implementation of programs is achieved not only by the elected members of the government but more significantly by the civil servants within the department responsible for a particular initiative. It would be inimical to the entire democratic process if a handful of civil servants within a department could undermine government policy by reason of their personal ideological positions and thereby thwart the will of the majority.<sup>62</sup>

It is notable that in *Gibson*, Justice Cooke pointed out – with emphasis – that his analysis proceeded from the fact that the public servant in question had made no attempt to utilize internal department channels prior to going public with his complaint.<sup>63</sup> The implication of this, in keeping with Chief Justice Dickson’s comments in *Fraser*, is that, had internal channels been utilized, the balancing act undertaken by the Court could have been different – this is but another demonstration of the ambiguities inherent in the current law.

The three foregoing cases drive home the point that the ability for public servants to blow the whistle on wrongdoing exists. The cases, though, are not entirely on point, as each of them is more illustrative of the behaviour of gadflies, rather than earnest whistleblowers. One case which exhibits a grievor who

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<sup>60</sup> *Alberta Union of Public Employees v. Alberta*, 2000 ABQB 600 [*Gibson*].

<sup>61</sup> *Ibid.* ¶55.

<sup>62</sup> *Ibid.* ¶43-45.

<sup>63</sup> *Ibid.* ¶48.



comes much closer to the definition of a whistleblower, and illustrates – yet again – the ambiguities of the current jurisprudence is the curiously unreported *Forgie and Treasury Board (Immigration Appeal Board)*.<sup>64</sup>

Forgie was a Deputy Registrar working for the Immigration Appeal Board, who was discharged due to his release of internal documents and his public criticism of the Board. Prior to these difficulties, Forgie was “regarded by all ... as a very good employee.” He was regarded by superiors as “the most competent, conscientious and cooperative” employee of his cohort. His supervisor had told him that he “‘had it made at the Board’, by which he meant ... that, in view of pending staff changes, the grievor’s career prospects at the Board were excellent.”<sup>65</sup> It seems safe to say, therefore, that Forgie was neither a gadfly nor a vile wretch.

The catalyst for Forgie’s disclosure and criticism were his “legitimate” – and numerous – concerns about the propriety and fairness of the Board’s procedures.<sup>66</sup> The Board’s Executive Director testified that “there were no easy answers to his questions.”<sup>67</sup> Indeed, the questions were sufficiently complex that Forgie worried about his personal liability with respect to his role in Board business.

Owing in large part to his concerns about his personal liability, Forgie retained a lawyer, who was, in the main, an immigration lawyer. Forgie delivered some 300 pages of documentation to his lawyer which covered a wide gamut of the Board’s work, and were meant to back-up his claims. After assessing the documents, Forgie’s lawyer decided that other immigration lawyers should be asked to confidentially assess the documents; Forgie consented to this. His lawyer reported back that there could be personal criminal liability for Forgie, as he was involved in the possible breach of a statute. The prospect of personal liability aside, Forgie felt that the irregularities he had witnessed were a matter of serious public concern. As such, Forgie authorized his lawyer’s suggestion to both contact the RCMP regarding the prospects of a criminal investigation, and to have the Canadian Bar Association (CBA) make a representation to the Minister of State for Immigration stating Forgie’s concerns.<sup>68</sup>

Though the RCMP concluded that there was insufficient evidence on which to launch an investigation, the CBA did approach the Minister with a telex,

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<sup>64</sup> *Forgie and Treasury Board (Immigration Appeal Board)* (19 November 1986), 166-2-15843 (Public Service Staff Relations Board) [*Forgie*].

<sup>65</sup> *Ibid.* at 9.

<sup>66</sup> *Ibid.* at 15ff (Forgie’s concerns included: the role of the Board’s counsel, whether or not all appellants received sufficient notice of hearings, the Board’s practice of meeting as a whole, the existence of materials within the Board’s files of which appellants appearing before the Board have no knowledge, and the Board’s use of confidential material, about which the appellant was unaware, in order to make decisions in refugee cases.).

<sup>67</sup> *Ibid.* at 5.

<sup>68</sup> *Ibid.* at 12.

signed by the Chairperson of the CBA's Immigration Section.<sup>69</sup> A meeting ensued between five lawyers from the CBA's Immigration Section and the Chairperson of the Immigration Board. The Board Chairperson's meeting notes "show that, in her view, several of the allegations made were well-founded."<sup>70</sup>

Following this meeting, the Board made efforts to redress the difficulties which Forgie had raised. Nevertheless, Forgie anonymously went to the press with his concerns, and stories appeared in a number of papers detailing his accusations.<sup>71</sup> Speaking to why he chose to go to the press, Forgie offered two distinct reasons. First, he saw it as part of his duties as a Deputy Registrar – a position specifically authorized to speak to the press. Second, Forgie went to the press because he was "severely troubled" by a particular case in which the Board's decision prolonged an appellant's incarceration.<sup>72</sup>

Arbitrator Bendel was unmoved by Forgie's reasons, referring to his decision to go to the press as "irrational." Admittedly, Forgie's decision to go to the press did not demonstrate a great deal of judgment; his first reason in particular seems strikingly disingenuous. That said, the employer had begun to investigate the source of leaked information prior to the first news articles on the matter. While the employer asserted that this investigation was inaugurated only when the Board learned that the allegations were being taken to the press, no evidence that this was the catalyst for the investigation was offered.<sup>73</sup> After the articles appeared, the Board's investigator had little difficulty determining that it was Forgie who had passed information about the allegations to his lawyer, and ultimately the press.<sup>74</sup> Note, again, the question here is not solely focused on the release of information to the press – it also involves the release to the lawyers.

None of the witnesses called during the arbitration process questioned Forgie's good faith, with the consensus being that

while what he did may have been misguided or disruptive or otherwise wrong, he had probably acted out of a sincere belief that there was something deficient with Board practices and that going public would, in the long run, improve the system.<sup>75</sup>

That said, several of the employees of the Board who testified stated that "the could not trust the grievor" or that they "would not be comfortable" having to work with the grievor in the future. Moreover, the Chairperson of the Board testified that, following the news articles, "life at the board was 'impossible'." For

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<sup>69</sup> *Ibid.* at 15.

<sup>70</sup> *Ibid.* at 18.

<sup>71</sup> *Ibid.* at 21.

<sup>72</sup> *Ibid.* at 35ff.

<sup>73</sup> *Ibid.* at 20.

<sup>74</sup> *Ibid.* at 27.

<sup>75</sup> *Ibid.* at 42.

instance, staff were soon requesting locks for filing cabinets, and were hesitant to both write normal memoranda, or to discuss Board business in the corridors.<sup>76</sup>

This was the situation, even though those same staff did not doubt Forgie's good faith. Forgie's difficulty – in a legal sense – was that he did not identify that the Board was involved in illegal acts, which, owing to *Fraser*, the arbitrator suggests would have warranted Forgie's disclosures. Instead Forgie, in the eyes of the adjudicator, merely

felt that the practices were improper in the sense that they were inconsistent with proper quasi-judicial practice and that they denied natural justice to the parties before the Board.<sup>77</sup>

This is an accurate (though circumscribed) reading of *Fraser*. Though the Board was not engaged in the violation of statutes, its apparent violation of natural justice ought certainly to be a matter for public concern. It simply does not suffice for Arbitrator Bendel to state that

[i]t is part of normal, everyday legal process that decisions of bodies like the Immigration Appeal Board are reviewed by superior courts and are quashed, since, in the opinion of a reviewing court, the practices or procedures they follow are deficient.<sup>78</sup>

Whatever the deficiencies of the decision in *Forgie*, the case does a wonderful job of illustrating the vagaries of the law. No one doubted Forgie's good faith, or his abilities as an employee. No one claimed that there were not egregious difficulties with the processes at the Board. There were difficulties, however, with Forgie going to the press; the difficulties about him going to a lawyer were not made as clear.<sup>79</sup> The subject matter of Forgie's disclosure was also seen as problematic as it did not clearly fit into the category shaped by Dickson C.J. in *Fraser*.

## The Need for Whistleblowing Legislation

*Forgie* is an encapsulation of the ambiguities inherent in the law which currently surrounds whistleblowing. Taken together, these ambiguities cry out for legislation. As Swan remarks:

[p]roperly designed, statutory provisions relating to whistleblowers can assist in defining the kinds of disclosure that ought to be protected in the public interest, and can provide procedures for channeling the concerns of prospective

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<sup>76</sup> *Ibid.* at 40-41.

<sup>77</sup> *Ibid.* at 59.

<sup>78</sup> *Ibid.* at 60.

<sup>79</sup> *Ibid.* at 65 (Arbitrator Bendel: "Since ... all other aspects of Mr. Forgie's alleged misconduct were regarded by the parties as ancillary to the main offence of publicly criticizing the Board, I do not feel I should comment on them.").

whistleblowers so as to avoid the intolerable cost of the release of sensitive information.<sup>80</sup>

Nevertheless, there is a great deal of resistance to whistleblowing legislation. Thomas, for instance, argues that the experience of jurisdictions that adopt whistleblowing legislation has been one of “disappointment” and that in those jurisdictions, there has been a “general failure” of their legislation.<sup>81</sup>

As argued above, Thomas seemingly comes at this topic from the perspective that whistleblowing is, in and of itself, wrong; this being the grounds for his assertion of “moral ambiguity.” However, a large part of Thomas’ concern emanates from a concern about those who wish to put whistleblowing forward as a “meritorious act” which always serves the public interest.<sup>82</sup> This type of rhetoric, Thomas frets, “sends the powerful symbolic message that the activity is inherently virtuous and merits encouragement.”<sup>83</sup>

Thomas concerns about this becoming the message of whistleblowing are not misplaced. The encouragement of whistleblowing has received a boost in the federal government’s *Accountability Act*, wherein whistleblowing employees are offered a monetary reward of up to \$1,000 for a successful tip.<sup>84</sup> The message sent by this attempt to reward whistleblowers is a worry that many aside from Thomas – including this author – share. Note, for instance, Lord Denning in *Initial Services*: “It is a great evil when people purvey scandalous information for reward.”<sup>85</sup>

This aspect of the *Accountability Act* is manifestly not what we need in whistleblowing legislation. Rather, what we do need is legislation which clearly defines when one can blow the whistle, to defines how one ought to make a disclosure, and to offer some protection to those who blow the whistle. As the foregoing discussion of *Fraser, Lehnert, Gibson, and Forgie* suggest, even in the absence of whistleblowing legislation, both gadflies and more earnest whistleblowers will still step forward.

Beyond the case law put forth herein, studies of the behaviour of whistleblowers bear this out. Joyce Rothschild and Terance Miethe argue that the prototypical whistleblowers are “organizationally naïve” and that they “truly believe that the organization wants its practices to be in line with its mission.” They characterize whistleblowers as “reluctant dissenters, moved neither by

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<sup>80</sup> Swan, *supra* note 56 at 194.

<sup>81</sup> Thomas, *supra* note 3 at 173.

<sup>82</sup> Thomas, *supra* note 3 at 164.

<sup>83</sup> *Ibid.*

<sup>84</sup> Bill C-2, *An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability*, 1<sup>st</sup> Sess., 39th Parl., 2006, cl. 53 [*Accountability Act*].

<sup>85</sup> *Initial Services*, *supra* note 22 at 149.

altruistic nor selfish concerns, but rather by a tide of events over which they feel they have little control.”<sup>86</sup> Further, Miethe argues that

there are few major differences between whistleblowers and other employees. Whistleblowers are only slightly more likely than other workers to endorse universal standards, believe in making sacrifices for the greater good, feel that people have a responsibility to prevent harm to others, and think they are persons of worth. External whistleblowers were generally more likely to hold these views than internal whistleblowers, but these differences are rather trivial. Contrary to claims that whistleblowers are more principled and ethical employees, there are no major differences between whistleblowers and non-whistleblowers on these psychological beliefs.<sup>87</sup>

Trying to categorize these marginal differences, C. Fred Alford argues that whistleblowers are narcissistic, inasmuch as the narcissistic personality wants to be “whole, good, pure and perfect.” There are two ways to achieve this perfection: by either lowering one’s standards until they meet the self, or, by attempting to “raise one’s miserable self as high as one possibly can so that one comes a little closer to these ideal standards.” The latter of these two is defined by Alford as narcissism moralized, and this, he reports, encapsulates most of the whistleblowers that he encountered in his study.<sup>88</sup>

Thus, one can characterize the whistleblower, but in so doing, one is characterizing only marginal differences between individuals. Very much are they – earnest whistleblowers, not gadflies – caught up in, as Rothschild and Miethe put it, a “tide of events.” Consequently, most whistleblowers are not aware of the costs of making their report.<sup>89</sup> As Alford has it, most people are not so aware because the costs entailed in going up against one’s employing organization are “not apparent until one crosses an invisible line.”<sup>90</sup>

The lack of clarity in what is likely to emerge from an attempt to blow the whistle is obvious when one steps back, as Alford has, and asks at what point one becomes a whistleblower? As Alford writes, “[i]n theory, anyone who speaks out in the name of the public good within the organization is a whistleblower. In practice, the whistleblower is defined by the retaliation that he or she receives.”<sup>91</sup> Indeed: why do we know about Keith Forgie? It is because he was discharged, and because he grieved that action. Does it really stretch the imagination – given the ambiguities in the whistleblowing law – to consider that perhaps other

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<sup>86</sup> Joyce Rothschild & Terance D. Miethe, “Whistle-blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption” (1999) 26 *Work and Occupations* 107 at 118.

<sup>87</sup> Terance D. Miethe, *Whistleblowing at Work: Tough Choices in Exposing Fraud, Waste, and Abuse on the Job* (Boulder: Westview, 1999) at 53.

<sup>88</sup> C. Fred Alford, *Whistleblowers: Broken Lives and Organizational Power* (Ithaca: Cornell University Press, 2001) at 63.

<sup>89</sup> Rothschild & Miethe, *supra* note 86 at 118; Miethe, *supra* note 87 at 54; Alford, *ibid.* at 10.

<sup>90</sup> Alford, *ibid.*

<sup>91</sup> Alford, *ibid.* at 18.

individuals have pointed out similar irregularities in some sphere of the government and not been fired?

Moreover, as Alford argues, the content of the whistleblower's disclosure has a substantial effect on how their disclosure is treated:

Imagine that an employee observes an unethical or illegal act by her boss and reports it to her boss's boss. This is the situation that is most likely to get the employee into trouble. Rarely do employees get fired for reporting the misbehavior of subordinates.<sup>92</sup>

Miethe refines this by categorizing the wrongs possibly facing an employee as either occupational or organizational misconduct. The former "involves activities that are committed for personal gain and not generally supported by the organization." Alas, such things as employee theft, bad work habits, or engaging in prohibited personnel practices. On these matters, whistleblowing is generally "safer," as the opprobrium will rain down only from the whistleblower's colleagues as opposed to higher management. Although safer to a degree, one ought not to discount the importance of this scale of retaliation.<sup>93</sup>

The more difficult type of whistleblowing is that which points to organizational misconduct, defined by Miethe as misconduct that "furthers the goals of the organization." Miethe argues that a report of this nature "will be viewed critically because it violates the norms of silence within organizations and indicates that these 'squealers' cannot be trusted to remain quiet about future organizational abuses."<sup>94</sup>

Thus, we can assert that whistleblowers are not much different than the typical employee. If anything, they are simply more conscientious. They witness malfeasance, and feel they ought to act on what they have seen. They are often ignorant of the consequences. Taking the facts that (1) positive ramifications emerge from good faith whistleblowing, and that (2) this whistleblowing already occurs without any protections together strongly indicates that good faith whistleblowers deserve some legal certainty with respect to their employment.

## **Status of Whistleblowing Legislation in Canada**

As noted at the outset of this paper, Isabelle Cantin and Jean-Maurice Cantin have undertaken a thorough canvass of whistleblowing legislation across Canada. They conclude that "[s]elon nos recherches, la province du Nouveau-Brunswick est l'une rares juridictions au Canada qui protège pleinement et

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<sup>92</sup> *Ibid.*

<sup>93</sup> Miethe, *supra* note 87 at 211.

<sup>94</sup> *Ibid.* at 210.

clairement les dénonciateurs par le biais d'une loi."<sup>95</sup> Additionally, the province of Ontario has had thorough whistleblowing protections for public servants as part of its *Public Service Act* since 1993.<sup>96</sup> These provisions have, alas, remained unproclaimed. The current government is, however, currently in the process of renewing the *PSA*. Whether or not this process of amendment includes whistleblowing protections remains to be seen, though all indications suggest that the government is giving such protections serious consideration. The federal government has had two notable attempts to implement whistleblowing protection, and is now onto their third.<sup>97</sup> This month, the government of Manitoba tabled for first reading whistleblowing protections for public servants.<sup>98</sup>

Obviously, then, things are changing. There seems to be a dawning recognition of the need for whistleblowing legislation in Canada – long a laggard on this front, when judged against comparator jurisdictions.<sup>99</sup> However, things seem to be changing in large part for the wrong reasons. Thomas hints at this when he describes whistleblowing legislation as generally failing.<sup>100</sup> In judging failure, Thomas utilizes a standard which asks if whistleblowing legislation “will transform cultures and norms of behaviour within public organizations.”<sup>101</sup>

The goal of whistleblowing legislation ought to be much more modest. I point to two main goals that whistleblowing legislation ought to strive for: (1) a clear mechanism for reporting, and (2) protections from reprisal for those who make legitimate disclosures within the proper channels.

Dealing with the first goal, consider Forgie. Of course, he offered his complaint to an outsider – his lawyer – in confidence at the outset. In my opinion, it is beyond question that internal reporting of alleged wrongdoing is superior to any external report. The main reason for this is simple: the whistleblower may not be right. This is made clear in one of Margaret Haydon's two run-ins with the disclosure regime of the federal government. As brief background to her disclosure, Canada was in the midst of a trade dispute with Brazil pertaining to aircraft manufacturing. During this dispute, unrelated concerns arose about the safety of Brazilian beef. Consequently, the Chief Veterinary Officer for Canada decided to suspend its importation into Canada, a move also taken by 32 other countries. Called at home by a reporter about the beef ban, Haydon, a drug evaluator with Health Canada, was asked about the dispute and was quoted as stating “[i]n my opinion, I don't think there's any

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<sup>95</sup> Cantin & Cantin, *supra* note 2 at 55.

<sup>96</sup> *PSA*, *supra* note 28 at ss. 28.11-28.43 [*PSA*].

<sup>97</sup> *Accountability Act*, *supra* note 84.

<sup>98</sup> Bill 34, *The Public Interest Disclosure (Whistleblower Protection) Act*, 4th Sess., 38th Leg., Manitoba, 2006.

<sup>99</sup> Comparable jurisdictions with broad whistleblowing protections include the United States (federal and state levels), the United Kingdom, Australia (federal and state levels), and New Zealand. See Cantin & Cantin, *supra* note 2 at 60-87.

<sup>100</sup> Thomas, *supra* note 3 at 173.

<sup>101</sup> *Ibid.* at 179.

difference [in risk] between Brazilian beef and Canadian beef. With the aircraft dispute, it's more a political move than a health one for the Canadian government."<sup>102</sup>

Haydon's comments were a surprise to the government. Immediate difficulties with the governments of both Brazil and the United States ensued.<sup>103</sup> Staff who would have been otherwise engaged had to be reassigned to deal with the quantity of briefing notes the Minister required to answer questions on the file.<sup>104</sup> In short, Haydon's comment caused the government serious difficulties both internally, and in its external relations. Importantly, she was incorrect in her inference, as such this is similar to what was seen above, in *Lehnert*.<sup>105</sup>

Internal reporting saves these difficulties from emerging. This is a finding that the court (in retrospect, rather ironically) made clear in Haydon's first episode of public disclosure.<sup>106</sup> However, for internal reporting to be useful, there needs to be a clear and trustworthy mechanism in place. In my opinion, the gold standard in Canadian legislation is, at this point, the unproclaimed whistleblower protections in Ontario's *PSA*. The *PSA* creates the office of Counsel, an officer of the legislature, who will confidentially hear and assess the legitimacy of whistleblowing complaints.<sup>107</sup> This provides an avenue for legitimate employee complaints to be made, and followed up upon.

As we have seen, in the absence of any surety whatsoever, people do blow the whistle. These actions have benefits in the public interest. In *Forgie*, for example, the Immigration Appeal Board's procedures were bad. This is a point beyond debate, and evinced by the fact that the CBA sent a telex of complaint to the Minister, as well as by the fact that the procedures were rather swiftly changed upon their exposure. If *Forgie* had not blown the whistle, would these procedures have changed? I think it is more than fair to say that this is an incidence of earnest, good faith whistleblowing.

Although, of course, we can never say so with certainty, presumably if there had been a clear avenue for reporting concerns, *Forgie* – a man who was noted as “the most competent, conscientious and cooperative” employee in his

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<sup>102</sup> *Haydon and Treasury Board (Health Canada)*, (25 January 2002), 166-2-30636 (Public Service Staff Relations Board) ¶2, aff'd *Haydon v. Canada (Treasury Board)* (F.C.), [2005] 1 F.C. 511 [*Haydon*].

<sup>103</sup> *Ibid.* ¶25-26.

<sup>104</sup> *Ibid.* ¶27.

<sup>105</sup> *Lehnert*, *supra* note 57 at note 55 and accompanying text.

<sup>106</sup> *Haydon v. Canada (Treasury Board)*, [2001] 2 F.C. 82 ¶120 (“More importantly, public criticism aired on national television was not the first step taken in order to have the issue of the safety and efficacy of the drug approval process addressed. The applicants endeavoured on several occasions to have their concerns addressed internally without success. As a general rule, public criticism will be justified where reasonable attempts to resolve the matter internally are unsuccessful.”).

<sup>107</sup> *PSA*, *supra* note 28 at ss. 28.14, 28.18.



area – would have taken it.<sup>108</sup> This would have saved him his job, obviously no small concern.

The second need for whistleblowing legislation concerns protections from reprisal. As we saw above, Alford goes so far as to argue that one is not even properly considered to be a whistleblower until one suffers a reprisal in the workplace. Indeed, the majority of whistleblowers suffer for their disclosure. For example, Rothschild and Miethe argue that “organizational retaliation against whistle-blowers (both internal and external reporters) is severe and common.”<sup>109</sup> As such, the corollary of a reporting mechanism simply must be a sound and thorough regime of protection from reprisals.

The two goals assessed here are modest in comparison to those – both for and against whistleblowing – who discuss lofty ambitions about changing workplace cultures, or stamping at wrongdoing once and for all. In the same way that the existence of the *Criminal Code* does not stop crime simply by proscribing certain actions (it rather defines certain acts as “wrong” and sets out a mechanism for dealing with such acts when they occur) whistleblowing legislation will not stamp out corruption, venality, and other poor practices. What it will do if crafted well, however, is to provide a mechanism for those who do step forward and make disclosures about malfeasance when it does occur. It may, also, compel more good faith whistleblowers to come forward. This cannot be a bad thing, as it is surely in the public interest to limit organizational malfeasance where we can.

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<sup>108</sup> *Forgie, supra* note 64 at 9.

<sup>109</sup> Rothschild & Miethe, *supra* note 86 at 120.