

Whistleblowing in Canada: A New Framework of Analysis

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I. Introduction

The issue of whistleblowing within Canada's federal civil service has had a long and rocky history in the country. As one critic described it, the Canadian experience in the quest for effective whistleblower protection for public employees has been a story of "broken promises, foot-dragging and false starts"¹. Unlike other countries such as the United States, Australia and New Zealand that were quicker off the mark², Canada only passed a comprehensive disclosure act for its federal public service in 2005; a full twelve years after it was first promised by Jean Chrétien's Liberals in the 1993 election campaign. This does not mean that there was scant interest in the issue; to the contrary, prior to the passage of the Public Service Disclosure Protection Act (PSDPA) in 2005 whistleblowing had been the subject of not only election promises, but also a whirlwind of reports, commissions, and policy changes. And although the PSDPA was further amended in 2007 as part of the Conservative government's new Accountability Act, the debate appears to be far from over. In the eyes of many it still remains to be seen whether this new legislation will live up to its lofty promise of creating a more ethical and values-based government, and fostering an environment within the civil service in which employees may honestly and openly raise concerns without fear of reprisal.

Criticisms of Canada's disclosure law have largely focused on the more narrow aspects of the legislation; for example, the limited enforcement powers of the Public Sector Integrity Commissioner (the agency responsible for overseeing the PSDPA), the fact that it does not cover all government departments and agencies; and the prohibition of disclosers from seeking redress through the public courts system. More fundamentally, however, the existence of the law begs the question of the extent to which statutory frameworks can by themselves effect wider cultural and value change within an organization, in the absence of other measures. In other words, in our rush to bring more accountability and integrity to government, we have tended to see legislative approaches as a panacea for the ills of modern governance. At the same time, the mere existence of the legislation seems to have done little to build confidence amongst employees that it is safe to come forward. Indeed, the paucity of complaints of alleged wrong-doings that have been made to date appears to substantiate this³. Not only do civil servants remain reluctant to speak out, but despite efforts to more positively reframe the act of disclosure, in the eyes of many, whistleblowers remain "vile wretches" as opposed to public heroes⁴.

This paper will begin with an exploration of some of the definitions and assumptions embedded in the idea of whistleblowing, which as we argue render it an activity fraught with ambiguity and moral uncertainty. In the third section of the paper, the rather circuitous path that eventually resulted in the final passage of the Public Servants Disclosure Protection Act in Canada in 2005 will be briefly examined. The focus of the fourth section will be an assessment of some of the lingering questions and concerns that have been raised with regard to the PSDPA specifically, and Canada's approach to disclosure in general. As we shall argue in section five of the paper, there still remains a fundamental disconnect between the intent of whistleblower legislation and the culture of the public sector environment. In order to make this legislation more meaningful we maintain that a new framework of analysis is needed, that would both modernize our views of disclosure and shift the focus from the individual whistleblower to the organization as a whole. At the same time, disclosure laws not only set up an adversarial relationship between employees within an organization, but they are also placed at the wrong end of the puzzle. The goal of the organization should be to prevent wrong-doing from happening in the first place, through the

fostering of an organizational climate based on trust, collegiality, continuous self-monitoring and institutional learning. Within such a reconfiguration, the Emergency Management (EM) model, based on the steps of mitigation, preparedness, response and recovery, offers promise in overcoming some of the shortcomings associated with more traditional approaches to disclosure.

II. Whistleblowing: Definitions, Assumptions and Moving Targets

The most obvious question that comes to mind when we consider the issue of whistleblowing in Canada is why it took over twelve years for a disclosure law to be passed in the House of Commons – a monumentally long undertaking, even for the federal government. While we can point to any number of factors to help explain this laggardly effort, one of the central reasons is undoubtedly the inherent opacity associated with the idea. The construction of effective disclosure mechanisms, in Canada as elsewhere, has been hampered by the difficulties involved in clearly delineating the act of whistleblowing. In other words, what exactly constitutes whistleblowing? What kinds of activities can individuals legitimately blow the whistle on? Who can justifiably blow the whistle, and to whom?

Scholars have offered a variety of definitions of whistleblowing. Marcia Miceli and Janet Near, for example, define it as the disclosure by a member of an organization of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to take action to stop the wrong-doing⁵. Others, such as Gerald Vinten, offer a more legal definition of whistleblowing, given the subjective difficulties in delineating “immoral” or “illegitimate” activity⁶. Frederick Elliston views disclosure as a political act; suggesting that “as a form of dissent to the powerful actions of others, it invites comparison to political dissent in the form of civil disobedience”⁷. For Canadian political scientists Kenneth Kernaghan and John Langford, whistleblowing within the context of the federal civil service is understood as a bureaucrat’s “open disclosure and surreptitious leaking to persons beyond the boundaries of the individual’s own agency or department of confidential information concerning a harmful act that a colleague or superior has committed, is contemplating, or is allowing to occur”⁸.

As we move deeper into the concept of disclosure, its thornier and more subjective elements emerge. That some kind of “powerful action”, “harmful act” or “wrong-doing” is central to the act of whistleblowing is not in dispute. Just what these transgressions entail, however, is a more difficult question, and one in which there is little consensus. While the violation of a specific law or regulation may be viewed as a straightforward case of malfeasance, many questionable activities that involve disclosure do not neatly fall into this category. More often than not, the dilemma for the employee is determining whether or not a specific act is serious enough, or bad enough, to risk coming forward. In this way, how wrong-doing is defined depends largely on value judgments; the particular perceptions of the various individuals and organizations involved. Yet, “this is a critical issue, because observers must agree on what constitutes wrong-doing before they can agree that the whistleblowing is valid”⁹.

In some public policy domains, such as vulnerable individuals in need of protection, it is not only an ethical benefit to disclose an alleged wrong-doing, it is a legal requirement to do so. The strongest and most universal statutory obligation to disclose questionable activities is in the field of child welfare. Typical requirements demand that individuals who have reasonable grounds

to suspect that a child is or may be in need of protection report directly to a Children's Aid Society¹⁰. In this case "reasonable grounds" is a very liberally-applied test; an individual does not need to be sure that a child is or may be in need of protection to make a report. In this way child protection legislation urges disclosure that may err on the side of safeguarding a child even if there is doubt that the child is in harm.

Other legislative requirements focus on classes of professions that have a duty to report alleged cases of wrong-doing, especially those perpetrated by members of their own profession. Colleges of Physicians and Surgeons across the country, for instance, routinely require registered members to report other members in a variety of situations where a danger may be posed, including personal impairment, hospitalization and sexual misconduct¹¹. Similarly, the nursing profession, including registered nurses, nurse practitioners, licensed graduate nurses and student nurses, have a professional, ethical and legal responsibility to report any unsafe practice or professional misconduct of regulated health professionals that may pose a significant risk to the public¹². There is also a wide range of obligations to disclose alleged dangerous acts. Physicians and surgeons, for example, are duty-bound by law to report gunshot wounds of patients who present at public hospitals, while in the area of workplace safety and health employees are obligated to report an accident or injury to self.

Despite this plethora of examples, however, our unease toward the act of disclosure, whether motivated by a legislative requirement or a sense of the larger good, remains deeply ingrained. With a culture that offers few guideposts in terms of how one should act in the face of wrong-doing, the individual who chooses to blow the whistle on others occupies a dubious position within society. It is for this reason that whistleblowing is the ultimate moving target; as Paul Thomas describes it, a morally ambiguous activity that is defined by controversy, emotion and angst. When done in good faith, for legitimate reasons and where the outcomes are positive, whistleblowers are lauded as courageous heroes. However, as Thomas reminds us, not all whistleblowers are driven by purely altruistic motives, nor do all situations of perceived wrong-doing justify whistleblowing¹³. In these situations, where the act of disclosure is undertaken for inappropriate reasons and seen to cause more harm than good, whistleblowers are seen as tattlers, squealers and "vile wretches".

There still exists the lingering perception that there is a code of silence that binds together the members of a group, and that the violation of this code is a traitorous act. A breach of loyalty is interpreted as the decision, first and foremost, to turn one's back on the organizational family – to disconnect from it in order to then expose its wrongs. This idea of the code of silence is so powerful that it is in fact reflected in our common law tradition. Under Canadian common law, an employee is seen as owing a duty of confidentiality and loyalty to his or her employers. This duty requires that an employee not disclose confidential information obtained during the course of employment without the employer's consent¹⁴. There are exceptions where a government employee's duty of confidentiality may be excused. However, the conundrum for the whistleblower is that the general backlash against their breach casts them in such a low light that their motivations and judgment are viewed as equally suspect.

The typical and often overwhelmingly negative persona of disclosure rests with the fact that it involves more than simply leveling a warning of a potential danger. It also involves accusation – assigning blame and locating responsibility for the danger with a particular individual

or organization¹⁵. In this way the consequences of the action can be severe and far-reaching, not only for the whistleblower, but also for those who are accorded blame for the alleged offense. Even in those situations where an accusation is meritorious, it forces organizations to confront issues and behaviors it doesn't necessarily want to confront. In Fred Alford's assessment, reprisals against whistleblowing seem to relate as much to the organization's reactionary effort to "neutralize the disruptive and deregulating impact of moral behaviour" as it does to personal vindictiveness. As he points out, the central feature of a disclosure of wrong-doing is the airing of the matter through reporting, discussion and investigation. Whistleblowing then represents a major defeat of the normal culture of an organization that works continuously to "disrupt moral behaviour by not discussing it and not discussing not discussing it," so that in the absence of discussion the problem ceases to exist¹⁶.

While the issue of disclosure is rarely straightforward in any organization, in the context of the public sector it becomes an even murkier affair. The moral complexities involved in the act of whistleblowing are compounded by the conflicts of values that it can entail for the faithful bureaucrat. On the one hand, civil servants are exhorted to be loyal to their employer; to hold information in confidence, to remain neutral, anonymous and responsible in the conduct of their work. The duty of loyalty, while a key aspect of any employee-employer relationship, takes on a heightened importance when applied to the public sector. This is made clear by the fact that public servants must typically swear both an oath of loyalty as well as an oath of secrecy before commencing their employment¹⁷. At the same time, however, public servants are just that – the servants of the people; the keepers of the public trust. In this light, disclosure is seen as a legitimate act if done in order to preserve the public interest. Precisely what constitutes the public interest, however, and how this is to serve as a reference point for civil servants in deciding whether or not to come forward with a complaint, has never been fully elucidated.

An increasing number of jurisdictions at both the national and sub-national level are passing whistleblowing laws for their public sectors¹⁸. The intent of these disclosure laws has been to encourage civil servants to come forward and report malfeasance, while at the same protect them from reprisals. In this way, policymakers have attempted to reframe whistleblowing from an ethical violation to an ethical benefit (as demonstrated by the tendency to use the more benign term "disclosure" instead of the more pejorative and emotionally charged label of "whistleblowing"). However, in so doing they have tended to gloss over the ethical conflicts and moral ambiguities that are inherent in the act of disclosure. This in part explains why, despite the existence of these laws, so relatively few whistleblowers are willing to come forward with their complaints. At the same time, the available data suggests that in many cases these laws have also failed to live up to their promise to protect employees from reprisal¹⁹.

The matter of where a whistleblower deposits his or her disclosure is also a hotly debated topic, and in many ways speaks to whether the act is perceived to be legitimate or not. Within the literature, there is a clear and consistent preference for internal disclosure mechanisms over external routes²⁰. Internal routes can help organizations correct the problem expeditiously while avoiding the negative publicity and media frenzy that public disclosures typically entail. They can also help sort out the conflict between confidentiality and disclosure. "The employee's duty to work first through internal mechanisms is designed to create a middle road to reconcile the duty of loyalty (non-disclosure of confidential information) with the public interest in an employee reporting employer wrong-doing"²¹. Despite this apparent consensus, however, the conflict between internal

versus external disclosure has been a long-standing one, and has been muddied by inconsistent court decisions that recognize exceptions to the duty of confidentiality and loyalty (to whatever varying degrees). The fail-safe that is offered to whistleblowers reporting outside of internal processes tends to apply only in extenuating circumstances.

Proponents of disclosure legislation maintain that such laws, when properly designed, provide an appropriate internal vehicle for the assessment of complaints. Canada's approach to disclosure, following the lead of other jurisdictions such as Australia, the United Kingdom and the United States, has similarly emphasized a preference for internal mechanisms. In fact, the Tait Report (to be discussed shortly) asserted that the wrong of disclosing confidential government information to external entities was greater than any wrong associated with the incident prompting the disclosure in the first instance. This cast the die for subsequent developments within the federal government on frameworks for the disclosure of wrong-doing that steered complaints towards internal processes.

III. The Development of Canada's Disclosure Law

The issue of whistleblowing in Canada fully burst onto the national political scene during the 1993 federal election campaign. The Liberal Party under Jean Chrétien publicly declared that, if elected, it would implement legislation to provide for the safe disclosure of wrong-doing by federal civil servants. While the promised bill failed to materialize, the issue was revisited in 1996 in work of the Task Force on Public Service Values and Ethics, headed up by John Tait. During its consultations with civil servants, the Task Force had been told that there was no point in asking employees to uphold public service values or maintain high ethical standards if they were not given the tools to do so. It therefore recommended in its final report, *A Strong Foundation*, that government adopt a public service code of ethics, and that contained within this code be mechanisms for the safe disclosure of wrong-doing in the workplace.

In November 2001, the government responded in part to the Tait Report's recommendations with the release of its *Policy on the Internal Disclosure of Information Concerning Wrong-doing in the Workplace*. Overseen by the Treasury Board Secretariat, this new policy was designed to encourage public servants to come forward if they felt wrong-doing had occurred. As outlined in the policy, "wrong-doing" was defined as the violation of any law or regulation; the misuse of public funds or assets; gross mismanagement; or a substantial and specific danger to the life, health and safety of Canadians or the environment²². The policy attempted to strike a balance between allegiance and dissent; to reconcile the long-standing civil service values of neutrality, loyalty and confidentiality on the one hand with public accountability on the other. Hence, as the Policy noted, while "public servants owe a duty of loyalty to their employer" and should therefore refrain from making "trivial or vexatious disclosures of wrong-doing", they also had a responsibility to "serve the public interest". Exactly what constituted the "public interest", however, and how this was to serve as a moral guide for civil servants in deciding whether a perceived transgression was sufficiently serious to justify coming forward, was not clarified.

The Internal Disclosure Policy outlined a process whereby employees were first instructed to report to their immediate supervisor, or a Senior Officer within each department, if they

suspected that a wrong-doing had been committed. While the government envisioned that these internal mechanisms would be sufficient in the vast majority of complaints, it also appointed a Public Service Integrity Officer (PSIO). However, employees were allowed to directly approach the PSIO only when they truly felt that their issue could not be disclosed within their own department; or where they had made a complaint in good faith through departmental mechanisms but believed that it hadn't been appropriately addressed.

The ink had barely dried on the Internal Disclosure Policy when questions regarding its effectiveness began to surface in the wake of a series of scandals in the federal government. Allegations regarding the misappropriation of funds, contracting irregularities and abuse of authority in the Chrétien administration led to increasing pressure on the government to adopt stricter legislation for whistleblowers. Such events as the circumstances surrounding former Privacy Commissioner George Radwanski prompted many to question why public servants still remained reluctant to report instances of unethical or improper behavior, even when it appeared that they knew what was going on. In a subsequent survey conducted by the Treasury Board Secretariat of employees in the Privacy Commissioner's office, 63% of respondents claimed to have been aware of acts of wrong-doing since November 2001. Of these individuals, 92% said that they did not report these acts for fear of reprisal, and 96% believed that nothing would be done by managers anyway even if they had come forward²³.

The mistrust felt by civil servants towards the Disclosure Policy was not contained to the Office of the Privacy Commissioner. The government's own annual reviews also revealed its limited impact in creating a more ethical and values-based public sector. Over the three full years of its existence, less than 250 allegations of wrong-doing were reported across all the various departments that fell under its domain; with few of these turning out to be actual instances of wrong-doing. Whether the scant number of cases was an indication of a healthy work environment or a lack of knowledge and trust amongst employees regarding the policy remained unclear²⁴.

These sentiments were echoed by the Public Service Integrity Officer himself, Edward Keyserlingk. In his 2002-2003 Annual Report, Keyserlingk pointed to a number of shortcomings in the existing disclosure regime, which he himself oversaw. In essence, he asserted that the Office of the PSIO as it was presently constituted did not have sufficient support and confidence amongst public sector employees to render it a credible organization. Civil servants remained reluctant to step forward, he noted, and of those that did, the majority of allegations of wrong-doing were not about serious violations of the public interest but rather human resource and employment disputes. He suggested that a whistleblowing law would be a good first step in helping to remove those structural factors that contribute to the natural fears and apprehension many employees might feel in coming forward with a disclosure. Nevertheless, he stressed the importance of combining a legislative approach with the promotion of what he referred to as "culture change" within the public service. The disclosure of wrong-doing should be publicly acknowledged by senior levels of government as an act of courage, he argued; and should be rewarded through such measures as merit awards. "Rather than simply allowing the disclosure of wrong-doing, such a culture would encourage whistleblowing as a meritorious act by rewarding employees for their commitment to the public interest"²⁵.

The debate surrounding whistleblowing in the federal civil service was further fueled by the government's decision to strike the Working Group on the Disclosure of Wrong-doing in September 2003. Chaired by Kenneth Kernaghan, the aim of the group was to provide a comprehensive framework for public organizations that would establish "an effective regime for the identification, disclosure and correction of wrong-doing". While in the end the Working Group recommended a statutory basis for the protection of public servants disclosing wrong-doing, it also cautioned against unrealistic expectations over the ability of such a public sector disclosure law, in and of itself, to influence broader behaviour within government. Ultimately, the Working Group concluded, the best way to address bad behavior is to prevent it from happening in the first place. The most effective way to accomplish this is by encouraging "rightdoing"; creating supportive, values-based working environments with a strong "culture of commitment" to the public interest. Such an environment would more strongly encourage public servants to act ethically and legally. Hence rather than a separate whistleblower law, the Working Group recommended that a new disclosure regime be enshrined within a broader legislative framework of values and ethics for the public service"²⁶.

In anticipation of a damning report by the Auditor General into the sponsorship scandal, and in need of some serious damage control, the Martin government was finally prompted to take action on the issue. As part of its efforts to "reinforce and protect ethical behavior throughout the public sector"²⁷, and to protect civil servants who had information on the sponsorship program, the Liberals quickly prepared a whistleblowing bill for tabling in the House of Commons. While ten years in the making, through a storm of reports, studies, task forces and working groups, the Public Servants Disclosure Protection Bill (Bill C-25) finally materialized -- only to be suspended when a federal election was called that spring.

The now Liberal minority government introduced into the House a revised disclosure bill, Bill C-11, in October 2004. While critics lauded the fact that the government was launching yet a second attempt to pass a comprehensive whistleblowing law for federal civil servants, like its predecessor the new bill was criticized for not providing sufficient protections for disclosers. Despite these apparent shortcomings, however, Bill C-11, the Public Servants Disclosure Protection Act (PSDPA), became law in November 2005. Twelve years after Jean Chretien's election promise, the federal government had finally passed a whistleblower protection act.

The story of Canada's road to disclosure legislation did not end here, however. When the Martin government fell in a non-confidence motion soon after the passage of C-11, Canada was once again plunged into an election campaign. Not surprisingly, given the centrality of the sponsorship scandal in the collapse of the Liberal administration, the issue of accountability in government figured prominently in the election debates. During the campaign the Conservative party captured the public's attention with its promises to clean up government through a variety of means, including the provision of "real protection" for whistleblowers. Soon after forming government the Conservatives introduced in the House the Federal Accountability Act and Action Plan (Bill C-2). Included in Bill C-2 were a series of amendments to the PSDPA; the purpose of which were to "create an environment in which employees and all Canadians can honestly and openly report wrong-doing in the federal government without fear of reprisal"²⁸.

Under Bill C-2 the Public Sector Integrity Commissioner (PSIC) was repositioned as an Agent of Parliament, and given wider investigative powers. The PSIC is also required to report to Parliament within 60 days on demonstrated cases of wrong-doing; these reports are to include recommendations on ameliorative actions as well as the response by the chief executive of the department or agency involved in the malfeasance (although much of the information that is gathered in the course of investigations will continue to be protected under the Freedom of Information Act). C-2 also provides for free legal advice (up to \$1,500.00) for whistleblowers, as well as monetary rewards of up to \$1,000.00 for civil servants who expose wrong-doing

Other substantive changes brought in with C-2 include the creation of a new body, the Public Servants Disclosure Protection Tribunal. Comprised of current and/or former judges appointed by the government, the purpose of the Tribunal is to deal with complaints from public sector employees who feel that they have suffered reprisal as a result of their disclosures. Where reprisals are found to have occurred, the Tribunal will have the authority to order remedial action. This could include reinstatement; the rescinding of any disciplinary measures; as well as compensation for victims of up to \$10,000. At the same time, the Tribunal can also order disciplinary action against person(s) found guilty of retaliating against a whistleblower.

IV. Shortcomings in Canada's Approach

Despite the Harper government's promise that with these latest reforms whistleblowers would be provided with "ironclad protection", a number of outstanding issues still remain. One of the most commonly heard criticisms from lobby groups such as Democracy Watch and FAIR refers to the limited enforcement powers of the Public Service Integrity Commissioner (PSIC). The PSIC, although described as an independent entity, is only authorized to report and make recommendations to Parliament; the office still has no power to order corrective action. Nor can the PSIC levy meaningful penalties, such as fines, suspensions or firing, against those who break the rules (the government-appointed Tribunal can only take action against those found guilty of retaliation). In many cases the public will also be denied the right to know the identities of politicians and government officials who are found guilty of wrong-doing. In the opinion of FAIR, the absence of mandatory corrective action weakens the ability of the legislation to encourage people to come forward. "Employees remain silent for two key reasons: one, they have no faith that anything will change; and two, fear of reprisal. In order to promote true accountability, persons who engage in harassment against an employee must be held personally responsible"²⁹.

At the same time, under the revised Act disclosers will receive a maximum of \$1,500.00 in compensation for legal services; a figure significantly out of step with actual legal costs. Employees brave enough to come forward with a complaint of wrong-doing typically spend large amounts of their own money on legal fees to protect themselves from retaliation. Similarly, given the fact that exposures of malfeasance can result in significant savings for taxpayers, financial incentives of \$1,000.00 hardly seem worth the effort. The maximum range of fines for employers found guilty of taking reprisals against whistleblowers is also only \$5,000 to \$10,000; in the eyes of some, hardly sufficient to actively discourage an employer bent on retaliation. As Democracy Watch concludes, "under these conditions, one wonders why any federal civil servant would incur the risk professionally and personally of choosing to come forward"³⁰.

FAIR also takes the position that whistleblowers should be entitled to full freedom of speech rights; which essentially means the right to disclose a wrong-doing “anywhere, anytime, and to any audience” (unless the release of the information is specifically prohibited by statute, in which case disclosure should still be permitted to law enforcement agencies and/or to Parliament). Of particular concern to FAIR regarding Canada’s disclosure legislation is the fact that civil servants who come forward with a complaint do not have the right to access the public court system, even as a last resort³¹. As the group contends, given that whistleblowing may expose matters of substantial public interest that are highly embarrassing for the government, “the whistleblower must have access to our courts of law as the forum that is most independent and competent to serve as ultimate adjudicator”. The creation of any special-purpose judicial process, such as the Public Servants Disclosure Protection Tribunal, must be in addition to, not instead of, this right of access to the courts.

The more fundamental criticism, however, is the fact that the Disclosure Act continues to exist as stand-alone legislation, instead of being embedded within a wider statement of public service values and ethics which would constitute “a new moral contract between the public service, the Government and the Parliament of Canada”³². As envisioned by Kenneth Kernaghan, such a contract between the elected and non-elected spheres of government would serve “as the necessary foundation for public service values, and for ethical government.” As such, it would bind ministers, MPs and public servants alike in support of a professional public service and dedicated to the public interest. Neither Bill C-25 nor Bill C-11 which followed it (and which was eventually passed as the PSDPA), contains such a framework of ethics and values. While the PSDPA commits the Government to adopting a Code of Conduct, it does not signal or specify the form they should take. As Kernaghan concludes, “getting the balance right among contending considerations in a disclosure statute is extremely difficult. Disclosure of wrong-doing is only part of the many value and ethical concerns that need to be covered by a Charter of Public Service Values”.

Lessons drawn from other jurisdictions such as the United States point to the inherent limits of whistleblowing legislation to both protect complainants from reprisal as well as promote more ethical government. In terms of disclosure legislation, the United States is considered to be the gold standard. It certainly has the longest history; dating back to the 1820s when it first became illegal to defraud the American government. In 1989 the Whistleblower Protection Act (WPA) was passed to protect federal civil servants from reprisal; in addition, most states have also passed their own disclosure protection acts. The WPA extends to current and past federal employees, as well as those seeking employment with the national government. Some agencies are excluded from the WPA; these include the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and “certain other intelligence agencies excluded by the President”³³.

Despite its apparent strengths, however, critics argue that the WPA amounts to little more than a “cardboard shield”, offering little in the way of real safeguards to those bureaucrats who are brave enough to come forward and disclose a wrong-doing. According to the Government Accountability Project (GAP), the leading whistleblowing advocacy organization in the United States, over the years the WPA has been “gutted, eroded and discredited” by years of hostile court rulings, to the point that federal workers have virtually no protections from agency retaliation³⁴. While whistleblower protection laws have become politically popular in the United States as elsewhere, in many cases the rights they provide civil servants have proven to be largely symbolic and hence counterproductive. “In those instances, acting on rights contained in

whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all³⁵. Not only do whistleblowers remain reluctant to come forward because of the risk to their professional life, but there is no guarantee that corrective steps will be taken.

The questionable safeguards provided by the WPA have been further compromised in the wake of 9/11 and the subsequent War on Terror; events which many suggest have led to the wider erosion of civil liberties generally in the United States. In the name of homeland security, the protections afforded under the WPA have been counteracted by “gag orders, retaliatory investigations and other harassments that have become shamefully standard practice during the last seven years”³⁶. Most recently, the WPA was dealt a major blow as a result of a 2007 U.S. Supreme Court decision in *Garcetti v. Ceballos*. In a highly contentious, 5-4 decision the Court ruled that government employees did not have protection from retaliation by their employers under the First Amendment of the Constitution. Essentially, the majority ruled that in conducting their job duties, government employees are not entitled to the same constitutional right to free speech as private citizens. This decision was considered to be a major blow to the protection of disclosers, as the free speech protections of the First Amendment have long been used to shield whistleblowers from reprisal.

The American experience points to the limits of legislation in not only leading to effective organizational change, but in fostering a climate where employees truly feel safe enough to come forward with their allegations. While employees may be protected on paper, as long as these laws and the values, ethics and codes of behavior they promote are not fully internalized within the organization, their utility will remain circumscribed. Instead of putting all of our faith in a law that necessarily sets up an adversarial relationship amongst individuals within an organization, others advocate in favour of stronger self-monitoring mechanisms to gauge inappropriate behavior³⁷. Paul Thomas also points to the importance of leadership in promoting a political administrative culture that supports ethical awareness and responsible behavior. Employees take their cues from their superiors. If political leaders do not truly value disclosure, and view legislation as only a public relations exercise to ward off a restless electorate, the success of any legislative measure will remain limited. It appears that regardless of the laws, regulations and enforcement procedures that are implemented, only a small minority of employees will be willing to put their personal and professional reputations on the line and step forward with a complaint. As such, statutory approaches have “very real limits in terms of promoting ethical conduct and they have a cost”³⁸.

V. Re-framing the Act of Disclosure: the Emergency Management Model

In spite of the length of time it took to transpire, it appears that the passage of a disclosure law for Canada’s public service was the easy part; now, the real work of fully informing, acculturating and engaging the public service in their new rights and responsibilities must begin. There is still confusion over where exactly an employee with knowledge of a potential wrong-doing is supposed to go internally; not surprisingly given that there are 450,000 federal employees in well over a hundred departments, agencies and related organizations located throughout Canada.

At the same time, within the civil service pervasive and endemic cultural and psychological barriers to disclosure still remain. There are so few real cases of wrong-doing that the public sector as a whole remains woefully unpracticed in working through an actual disclosure. As such, there are limited opportunities for institutional learning; drawing on experience so that the organization can learn how to better handle these kinds of crises in the future. In the absence of practice, there are no lessons learned, no “sharpening the saw”. In the heat of an emotional and explosive disclosure of wrong-doing, brochures outlining prohibitions against reprisals will quickly be forgotten. Until disclosure is normalized and internalized within the culture of the organization, not only will employees remain reluctant to come forward, but organizations will be no better prepared to handle these kinds of disruptive events when they do occur.

Whistleblowing legislation can undoubtedly be beneficial in re-framing how we think about and deal with the issue of disclosure. By formally legitimizing good-faith reporting, it can send an important signal to employees that wrong-doing is not to be tolerated within the organization. Statutory frameworks can also help to place the act of disclosure in a more positive light, by shifting our traditional assumptions of whistleblowing as an ethical violation to that of an ethical benefit. However, not only is it debatable the extent to which such laws are able to provide real protection against reprisals, but the onus is still placed upon the individual discloser to amend what is in fact an organizational shortcoming. At the same time, laws only come into effect after a malfeasance has already occurred; they are reactive instruments. By focusing on the wrong end of the spectrum; namely after a questionable action has already transpired, legislation does little to effect system-level cultural change or a climate of “rightdoing” within public sector organizations. As Ralph Heintzman’s examination of values in driving public sector behaviour illustrates, the issue is not that civil servants are indifferent to public-service values, or view them as irrelevant to their work. “On the contrary, public servants appear to prefer values-based approaches to purely compliance approaches”; a finding that has also been born out by other studies³⁹.

In order for disclosure mechanisms to be rendered more meaningful they must be embedded within a framework that focuses on the front end of the spectrum; on creating a climate where the act of reporting itself is seen not only in a more positive and natural light but where systems are put in place to prevent wrongful acts from occurring in the first place. Within contemporary approaches the discloser is faced with an “either/or” scenario; the stark and morally vexing choice between remaining loyal to the employer (and thus turning a blind eye to malfeasance) or breaking trust, stepping forward and leveling an accusation. As reconceptualized disclosure becomes seen as one of several options available to complainant; typically the final resort when other continuous monitoring functions structured into organizational processes break down.

In this reconfiguration the emergency management (EM) model can serve as a useful guide. While designed to assist organizations and communities handle natural disasters or unforeseen crises, the EM model is not solely restricted to responding to events once they have occurred. Instead, it entails a constant regime of prevention and preparation activities; an ongoing process of continual monitoring of potential threats and revision of policies and practices to ensure the most up-to-date emergency management systems are in place. The framework of EM is typically comprised of four interdependent components: (i) mitigation (reducing the probability of an unexpected event, or its probable impact); (ii) preparedness (learning, training and action to achieve a simulated practice at managing an unexpected event); (iii) response (implementing pre-

determined plans and processes to control, manage and transition beyond the unexpected event); and (iv) recovery (restoring and returning to the original state, enhanced by actual practice and lessons learned)⁴⁰.

Like a flood or forest fire, whistleblowing can be viewed as an unexpected event that exacts a high cost to the individuals involved, the organization, and the public at large. As currently conceptualized, disclosure of wrong-doing within an organization can be described as a three stage process of dissent, breach of loyalty and accusation⁴¹. Within this continuum, an employee who perceives a particular event or action to be unethical dissents. In dissent, the employee decides that the consequence of the ethical violation they perceive is significant enough that it needs to be exposed for the purposes of having it ended, and thus decides to breach their loyalty to their employer. The employee then proceeds to expose the violation by voicing their accusations to an entity with the authority to intervene and end the wrong-doing, and who will in turn (it is hoped, but not always necessarily the case) appreciate the discloser for providing them with the opportunity to take ameliorative action.

In contrast to this is the EM approach. In the case of a potential natural disaster such as a flood, for example, the view of disclosure as an ethical benefit and moral imperative positions the action of the whistleblower in a positive and courageous light. He does not need to proceed externally in order for his disclosure to be welcomed and appreciated, and where appropriate, acted upon. At the same time, there is no confusion as to the morality of the action, or whether the act of whistleblowing is a greater sin than the substance of the disclosure itself. In other words, the brave soul who sounds the alarm bells about a potential hurricane or terrorist attack is not viewed as a tattler or turncoat, but instead as a hero and a savior of lives and property. Yet, when this same individual raises concerns about another employee within a government department threatening the public good with wrong-doing, the prevailing view is that the discloser has done something far worse than the transgression being exposed, merely through the act of exposure. The wholesale cultural norm that considers disclosure within an organization to be an act of tattling; of the violation of the code of silence, has allowed the rightful and beneficial disclosure of information in order to protect the public interest to be tarred with an illegitimate brush.

The first stage of the EM model, mitigation, accepts the fact that disasters and crises, while undesirable, are inevitable and unavoidable. Hence, rather than waiting for a calamitous event to occur and then reacting after the fact, mitigation involves a process of continually assessing internal and external environments to gauge both the likely occurrence of disaster and to mitigate its potential for damage. Through such continual self-evaluation and risk assessment, the organization as a whole is less likely to be caught "off guard", so to speak, when disastrous events do occur. At the same time, by recognizing disaster as a fact of life, through mitigation organizations can take pro-active steps to minimize the havoc caused by these kinds of events, and thus enhance their ability to more quickly recover afterward. Rather than an "add on" or isolated mechanism, however, mitigation is an ongoing course of action, involving the entire organization and woven into daily institutional practices and behaviors.

In the same way that the EM paradigm views natural disasters, we need to accept that acts of wrong-doing, while unpleasant and unfortunate, are possible in any kind of organization. Rather than waiting for them to occur, and then placing the onus upon individual employees to

bring them to the attention of authorities, the concept of mitigation will ensure that appropriately resourced, continuous monitoring and auditing systems are in place to ward off undesirable behaviors, before the organization is launched into full crisis mode. A second benefit of the idea of mitigation as a conceptual tool in public sector disclosure is that it shifts the focus from the individual whistleblower to the organization as a whole. Despite semantic changes (replacement of the emotionally-laden term 'whistleblowing' with the more benign idea of 'disclosure') within governmental frameworks, the prevailing view still tends to be one of blaming the individual rendering the complaint. When a discloser comes forward they become the focus of attention and scrutiny; yet in reality they are merely the messenger. The occurrence of wrong-doing reflects on the weakness of the organization as a whole; of some degree of shortcoming on its part by allowing a questionable activity to transpire in the first place.

A shift in focus from the individual to the organization will also help mitigate the moral distress often faced by an employee in deciding whether or not to come forward with a complaint of malfeasance. Whistleblowers typically report on the high levels of anxiety and turmoil they suffer when confronted with the chasm between what they believe is the right and good thing (coming forward), and what prevailing norms tell us is the right and good thing (not tattling). As the responsibility for bringing an end to the wrong-doing through the act of disclosure falls squarely on their shoulders, whistleblowers must typically suffer these negative feelings completely on their own. They are often seen as outcasts; caught in a morally uncertain void as the bonds of trust and collegiality that they once shared with their fellow co-workers and superiors are disrupted or forever broken. As a result, even with legislation in place, employees are typically reluctant to come forward and confront the immense personal toll that reporting necessarily entails. By shifting responsibility from the discloser to the organization, however, the moral distress accrued is transferred from the individual to the organization and its authorities.

The second step of the EM framework is that of preparedness. Whereas mitigation involves the active attempt to prevent or avoid disasters, preparedness is about being ready for the inevitable accidents that will occur at some point. It focuses on planning and practice; of preparing for a possible crisis and mapping out potential responses beforehand. In this way organizations and systems are in a constant state of readiness in advance of a crisis; operation and communication plans are developed, resources are distributed, and the requisite lines of authority and responsibility are established. A key aspect of the preparedness stage is simulation; of envisaging an actual emergency and going through all of the necessary steps.

In preparation for a possible occurrence of whistleblowing, management groups within the organization can practice the cultural environment they are expected to have in place to receive the disclosure. For example, employees and managers can run simulations where they are required to respond to a series of ethical dilemmas, and to role play the various scenarios that can arise. These kinds of games not only normalize situations where difficult decisions might have to be made, but can prompt dialogue on previously hidden topics like whistleblowing. Through participation employees across the organization can openly experience incidents of "pretend" moral distress, as experienced when one encounters a questionable event or occurrence, but in a safe and encouraging environment.

At the same time responses to these distresses can be practiced and bettered; not only habituating them but also reducing the level of emotionality that often accompanies them. As Ryan and Oestreich emphasize, "one of the best and most powerful ways to begin overcoming fear's influence is to discuss the undiscussables. It is a rich technique for accessing the hidden issues and problems covered up in relationships, work groups, and the organization as a whole ...it is also a principle of disclosure that should become a part of everyday communications"⁴². Normalizing the routine discussion of undiscussables also ensures that when disclosures of wrongdoing are declared they are not reacted to in panic and paralysis, which are the antithesis of sound emergency management practice. "By the time the shrill blast of a whistleblower is heard, the level of managerial conflict, concealment and cacophony may be so great as to limit any possible resolution of whistleblower grievances. Instead, high level legalistic salvos of charges and countercharges may be exchanged by managers with few questions satisfactorily answered, careers ruined and little long term positive benefit"⁴³.

Through these kinds of exercises, the spirit of disclosure legislation can be effectively brought to life with compatible actions. It would also help employees and managers alike practice a culture of "rightdoing". Just as governments have sought to re-model desirable behaviors in the area of gender, visible minorities and disability, so too must it re-frame historical assumptions regarding disclosure of wrongdoing. The benefits of sorting out and dispensing with inappropriate activities through practice and retraining, in advance of an actual unexpected event, is that old habitual responses are less likely to occur during the course of an actual disclosure.

The third phase of the EM model involves response – what individuals and organizations do when a crisis or disaster actually occurs. In part this involves following the carefully made plans and policies developed during the preparedness phase, but every situation presents unique challenges that cannot always be fully anticipated. Hence, while providing a blueprint for action plans also need to allow for sufficient creativity and innovation when applied "on the ground". Nonetheless, in planning for response EM practitioners know the anatomy of every form of natural disaster that could possibly beset the territory in their jurisdiction. A flood is not just a flood, it is a particular event quantified by a myriad of variables, characteristics, factors and conditions, analyzed in comparison to past occurrences of a similar nature and projected into a multiple future scenarios.

In applying the idea of response to the disclosure of wrongdoing, it is essential that organizations establish clear and confident understandings as to what constitutes undesirable and unacceptable conduct. As stated previously, a clear violation of a law or a regulation is fairly straightforward. However, most acts of wrongdoing fall short of these situations; and instead reflect more dubious activities which carry with them little or no signposts. Again, through simulation exercises employees and managers will be able to ensure that they have a clearer understanding of what are appropriate versus inappropriate behaviors. They will also have a better sense of the values, principles and ethics that are to guide them in fulfilling their responsibilities, and how these ideals can be concretely translated into their everyday tasks. At the same time, through modeling of the disclosure process – the steps that employees are to follow in the event that they witness a wrongdoing that has managed to escape routine auditing procedures – the act of whistleblowing becomes a normal, accepted part of organizational practice.

As our understandings of wrong-doing become more succinctly delineated and clarified through this process, organizations can learn to distinguish between the varying magnitudes of wrong-doing. This form of risk assessment is inherent in all emergency management processes and serves to triage reaction appropriately, both from the perspective of the individual weighing his or her need to bring forward a complaint, as well as the manager weighing the import of the disclosure. A fuller understanding of the different degrees of wrongdoing can also help increase the accuracy of the organization's reaction and response. The Privy Council Office of the Government of Canada offers a short definition of crisis within government that can be used at any organizational level to gain a sense of how to position a potential disclosure. In their assessment, "a crisis is a crisis when the media, Parliament or a credible or powerful interest group identifies it as a crisis. A crisis need not pose a serious threat to human life, but must somehow challenge the public's sense of appropriateness, tradition, values, safety, security or integrity of government"⁴⁴. Similar measurement frameworks can also help organizations quantify the magnitude, and thus the risk, associated with a potential disclosure⁴⁵.

Armed with knowledge about the limits of their responsibility to actually solve the problems indicated in a complaint of wrong-doing, except as directed by the arms-length investigation outcomes (which are certain to take some time to materialize), the inner workings of organizations now have the far more comfortable and stress-free task of simply learning about how a disclosure is going to work its way through the emergency management system. From this understanding, any part of the organization can develop an expertise in typical emergency management procedures and determine what, in such a circumstance, it will need to do in order to facilitate the larger process. The importance of preparedness in reducing the friction and fog that accompanies the uncertainty of an unexpected, and unpracticed, event cannot be over-emphasized. "When you work through a crisis on an ad-hoc basis, you run unnecessary risks. For example, if you don't recognize the states of a crisis, you may wait too long to act. Without setting up and testing relationships, you may run afoul of other departments or governments. You may lose time getting approvals, or learning the policies necessary to do the job"⁴⁶.

The response phase as envisaged by the EM approach also relieves the discloser, as well as the management of the organization, from the responsibility of having to investigate and take corrective action. In developing effective response mechanisms it is critical that whistleblowers be seen as reporting parties and not investigators. At the same time, managers must recognize that their most important task will be the professional and proactive hand-off of disclosures from the original source (the reporting employee) to those authorities charged with the ultimate examination and investigation of allegations. The analogy that can be drawn is to that of a school nurse finding evidence of some form of child abuse and reporting the matter to the school principal. Neither the school nurse, nor the principal, become embroiled in the investigation and verification of the abuse, nor do they assume direct responsibility for the subsequent steps that take the child out of harm's way and bring consequence to the abuser.

With a clearer understanding of the kinds of inappropriate actions that require reporting to investigating authorities, managers can be relieved of any sense of obligation to directly solve the problem. Similarly, in the difficult circumstance where managers find themselves in possession of neither the tools nor the authority to solve the problem, they will feel less bound to oppress the offense in order to reduce their feelings of ineffectiveness. As the public sector takes more active responsibility for effective and helpful frameworks to manage disclosures of wrong-doing, and

populate their organizations with the necessary expertise to appropriately invoke interventions to end verified transgressions, working level units can maintain their focus on enabling the open and positive flow of disclosures. In this dynamic, the hiding places that wrongdoers normally call upon for their longevity disappear and the direct flashpoints that have traditionally erupted between accuser and accused likewise fade away.

The last stage of the EM model, and in many ways the most critical, is the recovery phase. In this stage the organization reviews what happened in the aftermath of the crisis, gauges how well (or poorly) the response was, and determines what lessons can be learned in preparation for the next possible occurrence. As David Good emphasizes in his examination of the HRDC scandal, the nature of the recovery from wrong-doing is likely going to involve over-reaction⁴⁷. However, for the organization that has successfully transformed its understanding and acceptance of disclosure of potential wrong-doing as an ethical benefit, recovery from such an event should involve nothing more than natural sadness that such an act occurred, and perhaps some empathy towards the perpetrator who will now have to endure the consequences of their misconduct at the hands of the proper authorities. By eliminating the cultural prohibition against disclosure, and no longer positioning the act of reporting as a transgression worse than the substance of the complaint itself, no organization should suffer the moral distress of needing to destroy the whistleblower in order to get at the inappropriate behavior. In the absence of this moral distress, there is very little emotional trauma created by a disclosure of wrong-doing, and thus the psychological recovery required of an organization is quite moderate.

Recovery also leads into a new cycle of mitigation, preparedness and response, ideally on a stronger and more competent platform. An illustration of the kind of renewal and rebuilding process that can be spawned through the recovery concept follows the devastating impact of the sponsorship scandal on morale within the federal government. In the aftermath of the scandal a mammoth undertaking was initiated to re-acquaint and re-indoctrinate federal employees with public-sector values, and to facilitate work on the development of a new public sector charter of values and ethics as had long been recommended by Kernaghan and others. As described by Ralph Heintzman, the former Vice-President of the Office of Public Service Values and Ethics, "codes play more than one role for the professions, like the public service, they define and inspire. A values and ethics code should set out not just the rules but, more important, the vision of the good – the public-service good – that inspires public servants to do what they do, every day"⁴⁸. By establishing the standards and first principles of the profession, such a code also instills pride and motivation without which rules and compliance orders would remain a dead letter, perhaps observed only in their breach. A charter or code of values also plays a pivotal role in normalizing actions that keep an organization on its moral compass – even if that includes open disclosure of wrong-doing when an organization itself has strayed from the right course.

VI. Concluding Thoughts

As the term itself suggests, the act of whistleblowing is a jarring and abrupt experience that continues to suffer from moral ambiguity and deeply rooted, pejorative stereotypes. It is, in many ways, akin to a moving target. Disclosure is accepted as a legitimate activity when done in the name of the public interest; however this may be variously interpreted. Nonetheless, the lingering perceptions of whistleblowing as an act of cowardice and betrayal continue to discourage many

employees who witness wrong-doing from coming forward. The ethical dilemma posed by the act of disclosure has been a particularly thorny issue within the public sector, where the values of loyalty, confidentiality and neutrality remain a powerful and deeply entrenched aspect of organizational culture.

While a difficult and emotionally-charged issue, the acts of malfeasance that disclosure speaks to can and do have significant ramifications. In Canada, the 2004 sponsorship scandal clearly demonstrated how the fear of reprisal and loyalty to organizational codes of silence can coalesce in such a way that corruption and mismanagement are allowed to go unchallenged for extended periods of time. And while a series of changes (and governments) ushered in a new legislative regime that attempted to place the act of disclosure on a more positive footing, there is little that we can report conclusively. In the wake of the latest amendments to the Public Servants Disclosure Protection Act there has been a paucity of scandals, so the effectiveness and value of these recent statutory approaches remains untested. The limited volume of complaints since stronger disclosure mechanisms were introduced in Canada could mean one of two things. First, that the legislation has deterred wrongdoers who are convinced that the code of silence which still lingers within the public service won't hold in the face of disclosure protection. Alternately, it could mean that there really aren't many instances of wrong-doing to expose.

While in the absence of further investigation it is difficult to render a definitive conclusion, lessons gleaned from the American experience points to a third possibility: the limited ability of legislation, in and of itself, to convince whistleblowers that it is safe to come forward without fear of reprisal. And it is for good reason that civil servants remain fearful. In his assessment of whistleblowing legislation in the United States, Tom Devine highlights the false promises that such laws hold for disclosers. In terms of their circumscribed ability to effectively protect civil servants from reprisal, these laws have almost made the situation worse, a case of one step forward but two steps back. As he states, civil servants disclose in good faith, assuming that they will be protected. Yet in reality the existing laws are a pyrrhic victory. "Employees had risked retaliation thinking they had genuine protection, when in reality there was no realistic prospect they could maintain their careers"⁴⁹.

Embedded in Canada's approach is the continuing expectation that the whistleblower will keep his or her disclosure inside the organization. This clear preference for internal, as opposed to external, mechanisms is seen as striking a compromise between the competing tensions of loyalty and dissent. The pressure and preference to keep knowledge of wrong-doing inside the organization, however, is problematic from a number of angles. It requires the whistleblower to seek redress from the same entity that, at the very least, served as a silent witness, if not an enabler, of the wrong-doing in the first place. Moreover, many would wonder how an organization that could be "taken in" by a wrongdoer could, upon being properly alerted of the transgression, somehow be capable of competently implementing corrective measures. Finally, for the whistleblower, strictly internal disclosure mechanisms virtually eliminate the possibility of a non-threatening avenue of appeal. If one level of the organization deems a disclosure baseless, the risk to the whistleblower of rebuff and reprisal for refusing to desist in his or her actions would only likely escalate.

Internal disclosure also runs counter to open and transparent government; the siren call of modern day governance. Extremely restrictive access to information laws make it difficult to attain

information on internal disclosures, and the outcomes that they spurred. If accountability is a priority of our parliamentarians, then where are the mechanisms to keep the public fully apprised of disclosures, the facts surrounding them, and in particular, the role played by the government organization or agency in question (in terms of what it did, or failed to do). The focus on internal disclosure recognizes that the perpetrator of the wrongful behavior may have acted independently and without the knowledge or complicity of the organization; hence rendering it blameless. However, another perspective would argue that the fact that an employee could actually engage in such behavior, undetected or unimpeded by any form of internal monitoring mechanisms, means that the organization is not blameless. Whether guilty by commission, or omission, the result is the same. In this light, public exposure and the negative fallout this would incur might sufficiently motivate the organization to take the necessary steps to properly prevent and pre-empt wrongdoing in the first place – in other words, promote “rightdoing” instead of merely reacting to wrongdoing after the fact. However, if the only appropriate disclosure is internal - and therefore under the public radar screen - then what is the consequence, penalty and deterrent for the organization?

We have argued that the answer may lie in adopting a new conceptual framework to how we think about whistleblowing. By adopting an emergency management approach, government organizations can learn how to better respond to and prepare for acts of disclosure. And in fact, within the public sector there are already in place internal accountability mechanisms, that if more properly resourced and utilized, could constitute the beginning of such a new approach. One such mechanism is the Office of the Auditor General (OAG). An integral aspect of provincial and federal governments, OAGs are empowered by autonomous legislation and operate at arms’ length from the public sector. Reporting directly to their respective legislatures, OAGs are responsible for conducting a variety of financial, performance and special examination audits to ensure that government practices and programs are being run with due regard for economy, efficiency, effectiveness and environmental sustainability.

While employees within the federal civil service are already free to disclose wrongdoing to the OAG, there are current drawbacks to choosing this route. If the OAG receives a complaint that merits investigation and is within its mandate to audit, it may choose to look into the matter. If and when an audit is complete, the issue could then be reported to Parliament or the department under review. However, the OAG cannot guarantee that employees who come forward with a complaint will be protected from reprisal⁵⁰ (although the extent to which the PSIC can offer similar guarantee, as we have argued, is also doubtful). Nonetheless, federal and provincial OAGs have long worked to proactively root out malfeasance in government departments and institutions, and are seen as credible and trustworthy keepers of the public trust.

Another internal route, located even deeper within the organization, is an expanded internal audit function which has been coined “modern comptrollership” by the federal government. As outlined in the 2000 report *Results for Canadians: A Management Framework for the Government of Canada*, the federal government’s comptrollership framework is an integral aspect of its efforts to modernize and strengthen public sector management. In contrast to more traditional comptrollership approaches that focus primarily on financial information, modern comptrollership is intended to provide managers with “integrated financial and non-financial performance information, a sound approach to risk management, appropriate control systems and a shared set of values and ethics”⁵¹. As a progressive step in the continuum of management improvement in the federal government, comptrollership is equipped and mandated to seek out potential wrongdoing in public

organizations. The open invitation to all employees within an organization to report possible corrections reduces the need for individual employees to feel as if they have no other option but to blow the whistle when faced with a wrong-doing. Unlike the OAG, whereby proactive disclosures are simply one of the many ingredients that decide the audit schedule, the comptrollership function welcomes leads and tips about where actions and behaviors within an organization need to be righted. It is the comptroller's stock and trade to ensure the organization is completely and fully meeting all conduct standards and it relies on inside intelligence to expose those areas where effort and attention might need to be applied.

Some states have embedded mechanisms for the disclosure of wrong-doing within their auditor and comptrollership processes. In Israel, for example, the State Comptroller audits government systems in general, while an Ombudsman deals specifically with investigations of wrong-doing, as reported in disclosures. This fusion of responsibilities and close working relationship between the State Comptroller and the Ombudsman is beneficial because the disclosures received by the Ombudsman can point to systemic problems in government operations that the Comptroller can identify as requiring an official audit⁵². This kind of organizational model holds promise for rendering disclosure mechanisms more meaningful and positive than purely legislative approaches suggest.

In looking ahead, the prognosis for the whistleblower is not promising. While legally federal civil servants may have technical protections to rely upon, they will likely be subjected to a continuing culture that brands them as disloyal if they choose to report questionable activities. Until the idea of disclosure is seen as an ethical benefit for the entire organization, rather than a violation of trust perpetrated by the individual whistleblower, civil servants will remain reluctant to come forward. Ultimately, lingering perceptions of whistleblowing is all about blaming the brave soul who risks it all to come forward, rather than heeding the content of the message. The fact that the whistleblower is doing nothing more than handing off information as they know it to an authority illustrates the ultimate irony of shooting the messenger.

Endnotes

¹As described by FAIR (Federal Accountability Initiative for Reform); an advocacy and lobby organization group formed in Canada in 1998. Founded by Joanna Gualtieri, a prominent whistleblower in the Department of Foreign Affairs who was herself a victim of reprisal, the group has long lobbied for effective legislation to protect the safe disclosure of wrong-doing in Canada. See their website at www.fairwhistleblower.ca.

²The United States passed the *Whistleblower Protection Act* in 1989. Australia amended its public service regulations in 1998 to allow the reporting of breaches of the Australian Public Service Code of Conduct to its Public Service Commissioner; in the same year, the United Kingdom passed a detailed *Public Interest Disclosure Act*.

³The total number of cases brought to the Public Service Integrity Officer (the precursor to the Public Service Integrity Commissioner) are 105 for 2002/03; 25 for 2004/05; and 15 for 2005/06. See Government of Canada, Public Service Integrity Officer, *Annual Reports to Parliament*, 2002-2003; 2004-2005, and 2005-2006.

⁴H.L. Laframboise, "Vile Wretches and Public Heroes: "The Ethics of Whistleblowing in Government". *Canadian Public Administration*, Vol. 34, No. 1, 1991, p. 73.

⁵Marcia Miceli and Janet Near, *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees*. (New York: Lexington Books), 1992, p. 45.

⁶Gerald Vinten, "Whistle-blowing: Corporate Help or Hindrance". *Management Decision*, Vol. 30, No. 1, 1992, p. 44.

⁷Frederick Elliston, "Civil Disobedience and Whistleblowing: A Comparative Appraisal of Two Forms of Dissent". *Journal of Business Ethics*, Vol. 1, Issue 1, 1982, p. 23.

⁸Kenneth Kernaghan and John Langford, *The Responsible Public Servant* (Halifax: Institute for Research in Public Policy), 2001, p. 94.

⁹Janet Near, "Whistle-blowing: Myth and Reality". *Journal of Management*, Fall, 1996, p. 508.

¹⁰Ontario Association of Children's Aid Societies. "Your Duty to Report." <http://www.oacas.org/childwelfare/duty.htm>.

¹¹For example, British Columbia's College of Physicians and Surgeons mandates that "a registered member must report to the registrar the condition of any person registered under this Act whom the member, on reasonable and probable grounds, believes to be suffering from a physical or mental ailment, emotional disturbance or addiction to alcohol or drugs that, in the member's opinion, if the person continues to practice medicine or surgery, might constitute a danger to the public or be contrary to the public interest. See College of Physicians and Surgeons of British Columbia. "Legislation – Medical Practitioners Act".

https://www.cpsbc.ca/cps/physician_resources/legislation/mpa/docs/2003/03/devans-13_0303130910.750.

¹²See, for example, the College of Registered Nurses of British Columbia. "Practice Standard For Registered Nurses and Nurse Practitioners." Pub. No. 436, February 2006, page 1. www.crnbc.ca.

¹³Paul Thomas, "Debating a Whistle-blower Protection Act for Employees of the Government of Canada". *Canadian Public Administration*, Vol. 48, No. 2, Summer 2005.

¹⁴Ontario Management Board Secretariat. *Whistleblowing: A Discussion Paper on the Protection of Public Employees Who Disclose Serious Wrong-doing*. Ontario Government. September, 1991. P. 5.

¹⁵Frederick Elliston, "Anonymity and Whistleblowing". *Journal of Business Ethics*, Vol. 1, Issue 3, 1982.

¹⁶Fred C. Alford, *Whistleblowers: Broken Lives and Organizational Power*. (New York: Cornell University Press), 2001, p. 21.

¹⁷Jonathon Carson, "The Need for Whistleblowing Legislation in Canada: A Critical Defence". Paper presented to the Canadian Political Science Conference, June 2006, p.7.

¹⁸Manitoba is the latest province in Canada to pass such legislation for its civil service; its *Public Interest Disclosure (Whistleblower Protection) Act* was proclaimed in April 2007. To date, a grand total of one complaint has been brought to the provincial Ombudsman, the office responsible for receiving and investigating allegations of wrong-doing.

¹⁹While it is still too early to judge the effectiveness of Canada's disclosure laws, there is a body of evidence on the American system that suggests the limited capacity of statutes to fully protect whistleblowers from reprisal. See, for example, Vinten 1992, 1993; Miceli and Near, 1992; Thomas, 2005.

²⁰Miceli and Near, 1992, p. 243.

²¹Justice Charles Dubin, *Whistleblowing Study*, 1997. Conducted for the Competition Bureau Canada. Available online at www.competitionbureau.gc.ca.

²²Treasury Board Secretariat, "Policy on the Internal Disclosure of Information Concerning Wrong-doing in the Workplace". Available online at www.tbs-sct.gc.ca. The categories of wrong-doing were expanded two years later to include breaches to the Values and Ethics Code for the Public Service.

²³Treasury Board of Canada Secretariat, "A Case Study on the Application of the Policy on the Internal Disclosure of Information Concerning Wrong-doing in the Workplace", *Report of Findings*, August 22, 2003, p. 2.

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- ²⁴ Canada Public Service Agency, Annual Report on the Policy on the Internal Disclosure of Information Concerning Wrong-doing in the Workplace, 2004-2005. Available online at www.psagency-agencefp.gc.ca/reports-rapports/idi-dii_0405_e.asp. In 2002-2003, 68 complaints of wrong-doing were made (of these, 59 were investigated); in 2003-2004, 90 complaints were brought forward (with 72 of these investigated) and in 2004-2005, 88 disclosures were made (with 71 investigated). Note that these were disclosures brought forward internally, and not externally to the PSIO.
- ²⁵ Public Service Integrity Officer, 2002-2003 Report to Parliament, p. 24.
- ²⁶ Eventually in 2003, the Treasury Board did implement a Values and Ethics Code for the Public Service, limited however to the core public administration of the federal government. The Code contains a series of updated conflict of interest guidelines, and outlines four broad categories that are to guide and support federal civil servants in the carrying out of their professional activities; these include democratic values; professional values; ethical values; and "people values". Adherence to the Code was also made a condition of employment in the federal civil service, and breaches to it became added to one of the five types of wrong-doing that had originally been identified in the Internal Disclosure Policy. The Code is available online at www.tbs-sct.gc.ca.
- ²⁷ Office of the Prime Minister of Canada, "Government of Canada to Introduce Legislation to Protect Whistleblowers" (News Release), February 10, 2004.
- ²⁸ Federal Accountability Act and Action Plan, available online at http://www.faa-lfi.gc.ca/fs-fi/09fs-fi_e.asp.
- ²⁹ FAIR, "The Accountability Act". Available online at www.fairwhistleblower.ca/accountability_act.
- ³⁰ Democracy Watch, www.dwatch.ca.
- ³¹ The *Public Servants Disclosure Protection Act* does not provide for an appeal of the Commissioner's decision to dismiss a complaint of reprisal. An application may be submitted for judicial review of the Commissioner's decision to the Federal Court under section 18.1 of the Federal Courts Act, R.S., 1985, c. F-7. *The Federal Courts Act*, however, does not empower the Federal Court to hold a new investigation on the merits of the case, but simply to review the decision order to ensure that the Commissioner acted within the jurisdiction of the PSDPA.
- ³² Kenneth Kernaghan, "Encouraging 'Rightdoing' and Discouraging Wrong-doing: A Public Service Charter and Disclosure Legislation" in Restoring Accountability - Research Studies: Volume 2 - The Public Service and Transparency. Commission of Inquiry into the Sponsorship Program and Advertising Activities, 2006.
- ³³ The website of the US Office of the Special Counsel offers a good overview of the Whistleblower Protection Act and the disclosure process in the United States. See osc.gov/wbdisc.htm.
- ³⁴ Tom Devine, Legal Director, Government Accountability Project. See their website at www.whistleblower.org.
- ³⁵ *Ibid.*
- ³⁶ Editorial, "Protection for Endangered Whistle-Blowers". The New York Times, December 27, 2007. Available online at www.nytimes.com/2007/12/27/opinion/27thu3.html.
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- ³⁸ Thomas, 2005, p. 181.
- ³⁹ Ralph Heintzman, "Public-Service Values and Ethics: Dead End or Strong Foundation?" Canadian Public Administration, Vol. 50, No. 4, 2007, p. 590. See also Australia, Public Service Commission. State of the Service Report 2003-2004, pp. 130.
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- ⁴⁷ David Good, The Politics of Public Management: The HRDC Audit of Grants and Contributions. (Toronto: University of Toronto Press), 2003.
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- ⁴⁹ Tom Devine, Government Accountability Project.

⁵⁰ Email correspondence from Suzanne Godbout, Senior Communications Advisor, Office of the Auditor General of Canada, April 24, 2008.

⁵¹ Treasury Board of Canada Secretariat. "Introduction to Modern Comptrollership". Available at http://www.tbs-sct.gc.ca/cmo_mfc/Intro2/intro_e.asp.

⁵² For more information on the Israeli model see The Ombudsman Web site, "The State Comptroller and Ombudsman"; <http://www.mevaker.gov.il/serve/site/english/eombuds-intro.asp>.