

**WHISTLEBLOWING IN THE PRIVATE AND PUBLIC SECTORS:  
SHOULD CANADA ADOPT A MODIFIED FORM OF THE  
AMERICAN WHISTLEBLOWING LEGISLATION?**

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**BY**

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A Thesis  
Submitted to the Faculty of Graduate Studies  
in Partial Fulfillment of the Requirements  
for the Degree of

**JOINT MASTERS OF PUBLIC ADMINISTRATION**

Departments of Political Studies  
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**Carol D. Thiessen      1997 (c)**

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## ABSTRACT

Presently, there is very limited federal legislation in Canada that will protect whistleblowers from retaliation when they expose unethical, illegal and illegitimate activities in organizations. The purpose of this thesis is to argue that Canada needs to adopt a modified form of the American whistleblowing legislation, in both the private and public sectors, in order to provide the whistleblower with an incentive towards reporting the unethical, illegal and/or illegitimate activities of a person or an organization.

This thesis shows that there is a need for whistleblowing legislation in Canada. It is in the public's best interest for wrongdoing to be exposed and then terminated in both the public and private sectors. Ontario's legislative experience in proposing whistleblowing protection legislation based on the American legislation provides valuable insight into issues that must be addressed when proposing this legislation.

It is argued that Canada should use the American whistleblowing protection legislation as a model for developing legislation within the Canadian context. A proposed modified form of the American whistleblowing protection legislation is developed for the public and private sectors. This proposed legislation supports and encourages the disclosure of wrongdoing through the process of whistleblowing by providing both protection and an incentive for whistleblowers. Furthermore, it is argued that a major media-laden political scandal will have to occur in the Canadian federal government for this legislation to be passed.

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# **CHAPTER ONE – The Issue of Whistleblowing In Perspective**

## **Introduction**

Whistleblowing is an emotionally charged and controversial issue. There is much debate as to whether whistleblowing should be encouraged within the private or public sectors. Opponents argue that the encouragement of whistleblowing can have negative repercussions on employee morale, loyalty and trust that in turn can affect an organization's efficiency, effectiveness and productivity. However, proponents argue that the positive outcomes stemming from the encouragement and protection of whistleblowing for both private and public organizations far outweigh any negative consequences that may occur as a result.

Two parties can assess the same situation regarding a potential whistleblowing context and come to polar opposite conclusions about whether there is a need for the employee to blow the whistle on the alleged activities. Whistleblowing is subjective in nature and therefore needs to be analyzed from the interests of the potential whistleblower, the general public and the organization, involving both private and public sectors. Whistleblowers sound an alarm about the organization they work for when they report the illegal conduct or fraudulent behaviour that is occurring.

It is the position of this author that ethics needs to be encouraged in organizations, for immoral, unethical and illegitimate activities never lead to the betterment of society in general. Whistleblowing is an employee's attempt at trying to rectify the wrongdoing that is occurring in the present work situation, and is rarely entered into without prior contemplation of the possible consequences of such an act. The question is whether the

ambiguity and confusion surrounding the issue of whistleblowing supersede the value of and the need for whistleblowing as a positive checkpoint system for organizations.

Should organizations, within the private and public sectors, establish policies that will encourage the reporting of wrongful activities and promote whistleblowing?

Organizational wrongdoing that continues because it is neither reported nor sanctioned may be financially costly and detrimental to the organization. Whistleblowing represents a critical mechanism by which top managers or senior officials may learn of organizational wrongdoing and take appropriate action. Proponents argue that whistleblowing leads to the constructive renewal of organizations and therefore should be encouraged. In this view, it is essential for all organizations to establish whistle-blowing policies that will provide employees with channels to report illegal, immoral or unethical activities. Thus, to support, encourage and affirm whistleblowing, as will be argued later, the Canadian government needs to establish laws that will clearly protect the whistleblower.

### **Significance of Whistleblowing**

It is very difficult to accurately estimate the levels of wrongdoing and whistleblowing within any organization.<sup>1</sup> There are many wrongdoings that go unreported, get covered up or never even addressed by the organization. In addition, no government agency in Canada keeps a record of the amount of whistleblowing reports per year in either the private or public sectors. However, there are a significant number

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<sup>1</sup> Brian K. Burton and Janet P. Near. "Estimating the Incidence of Wrongdoing and Whistle-blowing: Results of a Study Using Randomized Response Technique." *Journal of Business Ethics*, vol. 14, no. 1 (January 1995), p. 19.

of whistleblowing allegations reported in the newspaper and through other various media outlets each year.

One example of whistleblowing is Michael Gravel, a federal Conservative Party MP, who was charged in 1986 with ten counts of bribery or attempted bribery and eight charges of breach of trust after a public servant blew the whistle on him. It was alleged that he had accepted or sought about \$100,000 from contractors and other businesses in bribes when awarding federal government contracts for the Museum of Civilization project. After the Conservative party was re-elected in 1988, Gravel plead guilty to the charges, and was sentenced to two years in jail and fined \$50,000.<sup>2</sup>

The second example is the conflict of interest scandal in 1991, involving Bill Vander Zalm, Premier of British Columbia, which resulted in his resignation from office. Vander Zalm was charged with violating the conflict-of-interest codes that he had helped establish in his province. He used his political insight and office in the successful selling of his personally owned Fantasy Gardens to a foreign investor from Taiwan.<sup>3</sup>

A third example is the scheme that defrauded the people of Saskatchewan of nearly \$850,000 in 1995. Thirty-eight Conservative MLAs unanimously approved the diversion of twenty-five percent of his or her earmarked communication expenses to numbered companies, and from there into the pockets of both Conservative MLAs and cabinet members. Lorne McLaren, Labour Minister, was sentenced to three and a half years in jail for his part in a scheme where he personally took \$114,000. Four other

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<sup>2</sup> Sharon Sutherland. "The Canadian Federal Government: Patronage, Unity, Security, and Purity", in *Corruption Character & Conduct: Essays on Canadian Governmental Ethics*. Ed. John W. Langford and Allan Tupper. Toronto, Ont.: Oxford University Press, 1994, p. 115.

<sup>3</sup> Ian Greene and David P. Shugarman. *Honest Politics*. Toronto, Ont.: James Lorimer and Company, 1997, pp. 78-82.

MLAs have been convicted, three have been acquitted and another four have been charged. One other MLA committed suicide before an investigation could be launched into his affairs.<sup>4</sup>

The last example is the Somalia scandal where a Somali youth was killed by Canadian peacekeepers in their compound in March 1993. This scandal showed how the government and some of its departments obstructed investigation, lied about the facts and withheld information.

The world today is continually changing, increasingly competitive and completely unpredictable. Many organizations have faced hard financial times and have been forced to drastically downsize their operations due to the recession Canada has been experiencing over the past years. To survive, some organizations have taken on a Machiavellian attitude where the ends are all that is important and the means are irrelevant.<sup>5</sup> The message then being sent to all the employees is that “reaching the objectives is what matters, and how you get there does not matter.”<sup>6</sup> It is often when organizations take on this philosophy of ‘survival at all costs’ that there is a greater probability of questionable and criminal behaviour within the organization.

People are aware that there is little if any job security in today’s world and there is little hope of this changing in the near future. A prominent fear in most people’s lives is losing their current jobs. Organizations are continually putting greater demands on the employees in regard to their productivity, and in an attempt to keep their jobs, some

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<sup>4</sup> Greene and Shugartman, p. 1.

<sup>5</sup> Niccolo Machiavelli. *The Prince*. Ed. and trans. David Wooton. Indianapolis: Hackett Publishing Company Inc., 1995, pg. 10. Machiavellian theory states that the ends justifies the means. The doctrine of Machiavelli, which denies the relevance of morality in organizational affairs, holds that craft and deceit are justified in pursuing and maintaining power.

<sup>6</sup> Kenneth Labich. “The New Crisis in Business Ethics.” *Fortune*, April 20 1992, p. 167.

people resort to unethical behaviour.<sup>7</sup> Often people first start by committing small illegal or unethical acts, and then as time passes and their confidence grows, the wrongdoings increase in frequency and severity.

Issues of ethics, morality and legality for organizations are a timeless concern for society. People have a right to hold the public officials and businesses accountable for their actions, to make sure they act with integrity and efficiency. The public can pressure the government to create policies and laws to ensure that public officials act ethically, and to regulate the ethical conduct of businesses (see Chapter Two).<sup>8</sup> This concern for ethical practices has helped to raise the issue of whether people should be encouraged to blow the whistle on wrongdoings within their organization. If this is the case, there needs to be laws and policies that will protect the individual, as well as appropriate procedures for blowing the whistle. First, it is imperative that whistleblowing be defined within the private and public sectors.

### **Definition of Whistleblowing in Private and Public Sectors**

People often associate the term whistleblowing with the image of a person in a dominant authority position who blows the whistle to stop the activities of a person or group. For example, a referee in a basketball game blows the whistle for play to come to a stop whenever there is an infraction of the rules. However, employees who protest the wrongdoing within an organization are not invoking a whistle of authority when they

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<sup>7</sup> Labich, p. 167.

<sup>8</sup> John W. Langford and Allan Tupper. "The Good, the Bad, and the Ugly: Thinking About the Conduct of Public Officials", in Langford and Tupper, p. 3.

blow, but rather a whistle of desperation.<sup>9</sup> The person lacks the power and authority within the organization to make the changes being sought, and therefore feels compelled to blow the whistle to parties of greater power and authority in the hopes of correcting the situation. Whistleblowers simply sound an alarm about the organization in which they work when they report the unethical, illegal or fraudulent behaviour that is occurring.

There is much disagreement over the definition of whistleblowing. Miceli and Near define whistleblowing as the “disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations (internal or external) that may be able to take action to stop the wrongdoing.”<sup>10</sup>

One critic argues that the definition should be more specific about the illegal and illegitimate practices. In addition, the commentator contends that the immoral scenarios should be omitted from the definition since immorality is subjective and therefore cannot be adequately defined. The definition proposed by this critic is that “whistleblowing involves the unauthorized disclosure of information that an employee reasonably believes evidences the contravention of any law; rule or regulation; codes of practice or professional statement; or involves the mismanagement, corruption, abuse of authority, or a danger to the public or a worker’s health or safety.”<sup>11</sup> This definition of whistleblowing is too narrow. It does not take into consideration the situation involving immoral practices that are within the letter of the law that lead to inherent danger for the public.

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<sup>9</sup> Alan F. Westin. *Whistle Blowing: Loyalty and Dissent in the Corporation*. New York City, N.Y.: McGraw-Hill Book Company, 1981, p. 1.

<sup>10</sup> Marcia P. Miceli and Janet P. Near. *Blowing the Whistle*. New York City, N.Y.: Lexington Books, 1992, p. 45.

<sup>11</sup> Gerald Vinten. “Whistle Blowing: Corporate Help or Hindrance?” *Management Decision*, vol. 30, no. 1, January 1992, p. 44.

In comparison, Miceli and Near's definition covers all scenarios of wrongdoing by including immorality since it is possible that an activity may be immoral and harmful to society while being legal. The letter of the law may not have yet been created or developed to handle that particular situation.

A second commentator reasons that the definition should only involve the reporting of wrongdoing to external parties, since it is through the external reporting that the public becomes aware of, and a factor in, whistleblowing.<sup>12</sup> However, this criticism overlooks the main criteria in Miceli and Near's definition about reporting the wrongdoing to people or organizations that have the power to take the appropriate measures to change the situation if the allegations are true. It does not matter whether these parties are in or outside the organization, only that they have the required authority to potentially rectify the wrongdoing.

Laframboise contends that whistleblowers by definition are not 'public heroes.' Whistleblowing is only justifiable when the activities reported are more abhorrent to the peer or community values than the act of whistleblowing in itself.<sup>13</sup> However, Laframboise does not provide any guidance as to how a person would determine this, or upon what basis it would be appropriate for a person to make this conclusion. It is still left to the discretion of the person to determine whether the wrongful activity justifies reporting. In addition, Laframboise criticizes individuals who sit on a high moral perch and use whistleblowing as their justification for believing that they have a "duty" to

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<sup>12</sup> Timothy R. Barnett. "A Preliminary Investigation of the Relationship Between Selected Organizational Characteristics and External Whistle-blowing by Employees." *Journal of Business Ethics*, vol. 11, no. 1, 1992, p. 950.

<sup>13</sup> H.L. Laframboise. "Vile Wretches and Public Heroes: The Ethics of Whistleblowing in Government." *Canadian Public Administration*, vol. 34, no. 1, Spring 1991, p. 73.

report all wrongdoing, regardless of the severity. It has been shown that in certain circumstances, the process through which an individual blew the whistle was more harmful and destructive than the wrongful act itself. This author views Laframboise's opinion as being idiosyncratic since this is rarely the case in point for whistleblowers.

Within the government context, Kernaghan and Langford redefine whistleblowing as the "public servant's open disclosure or 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."<sup>14</sup> This definition does not contradict Miceli and Near's definition. However, Kernaghan and Langford's definition does not state whether the public servant may be a former employee and whether the public servant can report the whistleblowing through internal mechanisms.

This paper will use Miceli and Near's definition of whistleblowing in both the private and public sectors. In addition, this paper will only be focusing on situations where there has been a serious violation(s) within an organization. The question then becomes why individuals feel they must blow the whistle when they have identified a serious violation in an organization.

### **Identifying the Need for Whistleblowing**

There are a number of complexities in deciding whether or not there is a need for whistleblowing within the private and public sectors. Some theorists argue that whistleblowing encourages people to bring forward their concerns about wrongful

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<sup>14</sup> Kenneth Kernaghan and John Langford. *The Responsible Public Servant*. Halifax, N.S.: The Institute for Research on Public Policy, 1991, p. 94.

activities within organizations. Others suggest that whistleblowing will help to act as a deterrent for wrongdoers since there will be an increased risk that the person will be caught.<sup>15</sup>

Opposing positions remark that there is no need for whistleblowing in organization because all unethical and immoral activities are eventually discovered and stopped through a natural process within organizations. They contend that the high moral standards in the work environment will ensure that any illegal or immoral activities will not be tolerated. It is also argued that employees will use whistleblowing as a retaliative tool for their own personal agendas and many use whistleblowing as a way to avoid facing the justified personnel sanctions against them. In this view, whistleblowing provides people an opportunity to make pious moral judgements about an organization's activities. Some people, according to this argument, use whistleblowing as a way to protest the organization's mandate or policies that are in conflict with the individual's personal values and opinions.

Some commentators further argue that the investigation of improper actions by either internal or external agencies are often time-consuming, expensive and do not result in any concrete conclusions. It is sometimes difficult to determine the accuracy of the allegation based upon the facts known about the individual's or organization's conduct. As well, once all the facts surrounding the allegation are investigated, it may be a case where the whistleblower misinterpreted or made the wrong assumptions. The system that protects the employee's expression of wrongdoing must take into consideration the time,

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<sup>15</sup> Leonard J. Brooks. "Whistleblowers...Learn to Love Them." *Canadian Business Review*, Summer 1993, p. 19.

place and manner in which the employee voiced the concerns to ensure that the employee did it in the most discreet, and least disruptive and damaging way.

It is left to the discretion of the person contemplating whistleblowing to determine if it is in the public's best interest to bring forward the illegal, immoral or illegitimate. It would be helpful to the potential whistleblower if clear legal definitions of what constitutes a safe product, danger to the public's health and safety, and the improper treatment of employees could be developed. This ambiguity leaves it open for a wide range of personal judgements and perspectives as to what is the proper compliance of each activity. Some moralists argue that the only factor in a person's decision to blow the whistle should be to prove whether or not the activity is illegal, immoral or illegitimate. If it is, then the person has a moral obligation to report the wrongdoing. All other factors should be ignored when contemplating such an action.<sup>16</sup> However, there must be recognition for both the individual and the organization that there are both positive and negative consequences if the whistle is blown on any immoral, unethical or illegitimate activities.

### **The Consequences of Blowing or Not Blowing the Whistle**

People often apply the bee-sting phenomenon to whistleblowers. "A bee sting has only one sting to use and using it may lead to one's own mortality."<sup>17</sup> Correspondingly, a person will only blow the whistle in their organization one time, and this act may indeed lead to the end of that person's career in that organization and perhaps the industry. It

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<sup>16</sup> Kernaghan and Langford, p. 96.

<sup>17</sup> Vinten, p. 47.

has been shown that the consequences of whistleblowing for an individual are often financial struggle, career disruptions, emotional hardships, family strains and personal abuse.

Society rarely looks with favour on the person who informs the authorities of the wrongdoing of an individual or organization. Whistleblowers are often viewed as 'rats', 'squealers', 'informers' or 'finks.' The act of blowing the whistle is rarely considered a positive action for an individual to pursue. Society's perception of whistleblowers is skewed by the dramatic, media-hyped stories about whistleblowers. The media takes these emotion-laden moral dilemmas and blows the facts out of proportion. This can lead the public to making sweeping generalizations or stereotypes about whistleblowers, such as all people blowing the whistle act out of revenge, personal gain or are simply passing personal moral judgement on the organization. As well, the general impression is that the person is not a team player.

It is no doubt a fact that some whistleblowers do report the wrongdoing because of their own personal agenda, with little consideration of their personal moral or ethical standards. There are many reasons an individual may do this. The person may be envious, vengeful or jealous of a colleague, and therefore may simply want to 'stir up trouble' for them. As well, the person may be trying to cover up his or her own incompetence or illegal activity. There are times when a person may strongly disagree with a moral decision that the organization made, and therefore draw the conclusion that he or she needs to blow the whistle on the immoral activity. This conclusion may be right or wrong since moral issues are subjective in nature. In addition, not all whistleblowers are correct in their facts or documentation about what they allege. The

person may have been missing some vital information that skewed their perception of the situation, and led them to make inaccurate assumptions.

Loyalty is one of the fundamental moral codes that is taught and reinforced in people since infancy. A person who blows the whistle is often accused of being irresponsible and disloyal towards their employer. It is alleged that if the person were loyal to the organization they would have found an internal means to stop the wrongful activity without having to blow the whistle. Loyalty in this situation involves acting in accordance with what one has good reason to believe is in the organization or the general public's best interest. Loyalty does not imply that a person has a duty to refrain from reporting immoral or illegal actions of those to whom they are loyal. An employer who is acting immorally is often not acting in either the organization's or public's best interest and therefore an employee is not acting disloyally by blowing the whistle.<sup>18</sup>

Most people still believe that an individual who blows the whistle is "finking" and is disloyal towards his or her organization. Contrary to this public opinion of whistleblowers, research findings show that the typical whistleblower is an above-average performer who is highly committed and loyal to the organization. The employee is not disgruntled with his or her job and rarely blows the whistle out of revenge. The majority of whistleblowing cases receive little media attention and the person receives no financial gain.<sup>19</sup>

Some critics argue that an employee has no duty to be loyal to its employer since loyalty demands a reciprocal relationship. They contend that an organization is not a

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<sup>18</sup> Robert A. Lamer. "Whistleblowing and Employee Loyalty." *Journal of Business Ethics*, vol. 11, no. 1, 1992), p.127.

<sup>19</sup> Barbara Ettore. "Whistleblowers: Who's the Real Bad Guy?" *Management Review*, May 1994, p. 18.

proper object of loyalty since it is inanimate.<sup>20</sup> It is important that people, firms and society appropriately assign the blame for the situation on the individual or group that was directly responsible for acting wrongfully instead of the person who merely reports the activities.

Organizations should encourage employees to blow the whistle through internal means because it will lead to the least negative ramifications for the organization. Internal disclosures can often have positive benefits, since they provide an opportunity for the organization to correct the wrongful activities. They can lead to a reduction of organizational waste and mismanagement; improvement of employee morale; avoidance of legal regulations, fines, penalties and lawsuits; maintenance of the public's goodwill and avoidance of damage claims; and increased safety and well being of organizational members.<sup>21</sup>

The organizations that try to cover-up the activities, or ignore the internal disclosures, run the risk of the situation developing into a full-blown scandal. Often, scandals and external disclosures of wrongdoings bring about unwanted negative public attention, regulatory investigations and legal liability. The public will lose their trust in the organization's credibility and that may never be regained. Organizations may become hostile and defensive towards the whistleblower due to their fears of the possible negative consequences as cited.

Few people that observe wrongful activities report them to any person of authority. An individual who notices the illegal or unethical activities and turns a blind

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<sup>20</sup> Larmer, p. 125.

<sup>21</sup> Miceli and Near, pp. 11-13.

eye, becomes part of the problem. Organizational wrongdoing that is neither reported nor prohibited, and therefore continues, can be very costly to an organization and society as a whole. The organization that does not actively promote ethical behaviour within may be burned by an unexpected scandal. The consequences to society may be grave for public health, safety and welfare, and dollars may be at stake. Therefore, it is necessary that these activities be reported.

Often the public demands stricter ethical standards for public officials and the government than it would of the private sector. This helps to explain why the public strongly supports the development of whistleblowing mechanisms in government agencies for the purpose of reducing fraud, conflicts of interests, waste and other abuses of public trust, while the public is less enthusiastic and supportive about having such mechanisms established for the private sector.<sup>22</sup> This will be discussed in greater depth in chapter two.

Michael Hoffman makes the statement that “In today’s society, ethics are viewed as a matter of personal rather than community choice.” People have been conditioned to think that what is ethical and right for one individual may not be right for another. The public has come to believe that there are no moral absolutes, and this has led to little shared accountability and responsibility within our society. However, it is exactly this concept of shared accountability that moves people to blowing the whistle on wrongdoing, and it is these same values that lead to higher ethical standards in work

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<sup>22</sup> Tim J. Leech. “Whistleblowing in business: the Challenge and the Response.” *Canadian Public Administration*, vol. 34, no. 1, p. 79.

environments.<sup>23</sup> Individuals who are contemplating blowing the whistle must consider many factors, including the legislation that will or will not protect them.

### **Factors in Contemplating Whistleblowing**

“Whistleblowing is in itself neither right nor wrong, but rather depends on the context, which often is of high moral ambiguity with disputes about the true nature of the situation and differing perceptions.”<sup>24</sup> It stands to reason that public support for the whistleblower depends upon the situation since there are many ways to blow the whistle.<sup>25</sup> Furthermore, it may be socially desirable for the whistleblower to remain silent in some contexts. Whistleblowing is a complex legal and ethical issue. Individuals that are contemplating blowing the whistle must carefully consider many factors within the situational context, the organization and their personal situation.

It is of vital importance that the whistleblower accurately assesses the situational context. First, the person must determine if there is documented evidence to back up his or her allegation about the wrongdoing. With this documentation, the individual must try to ensure that he or she has the ‘whole picture’ and that he or she is not missing any essential information that would put the facts in a different light. Next, the individual must assess what, if any, biases he or she may personally possess in regards to assessing the situation. This will help ensure that the person is taking an objective rather than a subjective point of view.

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<sup>23</sup> Ettore, p. 21.

<sup>24</sup> Vinten, p. 47.

<sup>25</sup> Richard P. Nielsen. “Changing Unethical Organizational Behaviour.” *Academy of Management Executive*, vol. 3, no. 2, 1989, p. 123. See article for twelve different types of whistleblowing.

In addition, the person must determine exactly what law, code of practice or act has been violated. The illegality and/or impropriety of a particular act does not in itself justify blowing the whistle as previously mentioned. An individual must assess the severity of the wrongdoing to determine if it justifies blowing the whistle in the situation knowing the possible consequences of such an act. The individual may try to determine if the wrongdoer(s) or organization is knowingly committing the immoral, unethical or illegitimate activities. Next, the individual must determine the process and time frame for how he or she will blow the whistle on the wrongdoing. The person must take into consideration the process the organization may have outlined in its policies, any legal responsibilities they may have in reporting the illegal activities, and the probability that the organization will try to cover up the situation. There are also certain time limits within the law cited for reporting alleged violations.

Whistleblowers often feel caught between their loyalty to an employer and the loyalty they feel towards society. People often feel indebted to their employers for their job and this feeling grows the longer the relationship continues. One fear the individual has is that he or she will lose the respect of co-workers and superiors. Most people develop friendships with their colleagues and work becomes part of their social network. Whistleblowers are concerned that their reporting of wrongdoing may get their coworkers into trouble with the management because their expertise and ethics may be suspect. "Whistleblowing singles out those who knew or should have known about what was wrong, what the dangers were and who had the capacity to make the different choices."<sup>26</sup>

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<sup>26</sup> Kemaghan and Langford, pp. 95-96.

As well, it may lead to insight as to why others in the organization remained silent about the wrongdoing.

A related fear for the whistleblower is that the organization or political party will suffer such severe financial, legal or negative publicity, that the organization may have to be closed down or the political party may not be re-elected. The whistleblower fears that everyone in their organization, including themselves may be unemployed. Furthermore, the whistleblower must contemplate the possibility that the organization's illegal and unethical activities may worsen when they blow the whistle. The act of whistleblowing does not in itself guarantee that the ethical conduct and climate of the organization will improve. For example, the wrongdoer, when dismissed by the organization, may be replaced by an employee who is less ethical.

The major reason that an employee often chooses not to disclose the wrongdoing is the fear of retaliation. Retaliation towards a whistleblower can be done through covert and overt ways by co-workers, superiors and administration. It has been established that ninety-five percent of all whistleblowers experience some form of retaliation.<sup>27</sup>

Retaliation can involve such things as ostracism; demotion from the current job position; reassignment to other departments; relocation to remote areas; false complaints about job performance; withholding of pension; investigations into personal life; and harassment of family and friends. It is sometimes very difficult for the whistleblower to prove that this harassment is a result of blowing the whistle. Correspondingly, people also fear that

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<sup>27</sup> Timothy R. Barnett, Daniel S. Cochran and G. Stephen Taylor. "The Internal Disclosure Policies of Private-Sector Employers: An Initial Look at Their Relationship to Employee Whistleblowing." *Journal of Business Ethics*, vol. 12, no. 1, 1993, p. 127.

there will be no further advancement in their career, both with their current employer and within the industry as a whole.<sup>28</sup>

An example of this is how Frank Wills, the alert night watchmen who helped blow the whistle on the Watergate scandal, had problems finding any type of job for years. However, the people that were indicted and convicted of criminal charges went on to either respectable jobs in the private sector, wrote books earning profits or even were again nominated for office.<sup>29</sup>

Whistleblowers often pay a high organization and personal price for reporting the wrongdoing in an organization. While a person is making the decision whether or not to report the wrongdoing, he or she will go through an agonizing period of self-examination, self-doubt and internal conflict. The individual will apply his or her rationalizing abilities to figuring out the perceived personal benefits and costs involved in blowing the whistle. There are three main considerations in this decision. One consideration is the whistleblower's family. During this deliberating period, family members will likely be anxious, apprehensive, emotional, stressed and insecure about financial matters. The family's support or non-support of the situation will be critical to the potential whistleblower in making the decision to blow the whistle. A second consideration is the individual's career. The person's reputation, both personally and professionally, will be on the line when she or he blows the whistle. In addition, the person must realize that blowing the whistle may result in the need to make a career change. The last consideration relates to the individuals themselves. The person must consider the

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<sup>28</sup> Ettore, p. 20.

<sup>29</sup> Dennis F. Thompson. *Political Ethics and Public Office*. Cambridge, Ma.: Harvard University Press, 1987, p. 92.

physical, spiritual and mental strains this decision will put upon him or her. An individual must weigh the effects on the psyche of both speaking out and remaining silent. Often the person sees the situation as sacrificing oneself for the good of the organization or society as a whole. It is essential that the person is able to live with whatever course of action is chosen.

The individual will then balance the social component between one's perceived responsibility towards the public with one's responsibility towards his or her employer. "The person's feeling of disloyalty will be at war with those of obligation and possibly outrage at something very wrong in the company and great frustration that no one seems to want to listen."<sup>30</sup> In some cases, the person has to make the moral choice about whose loyalty will be betrayed.

### **Thesis Statement and Structure**

There is no whistleblowing protection legislation in Canada that compares well to that in place now in the United States. This paper will argue that Canada needs to adopt a modified form of the American whistleblowing legislation, in both the private and public sectors, in order to provide the whistleblower with an incentive towards reporting the unethical, illegal and/or illegitimate activities of a person or an organization. The whistleblowing legislation can provide a monetary incentive for the whistleblower that will help offset the individual's personal risks, costs and related career consequences of blowing the whistle. As well, the whistleblowing legislation can protect the whistleblower from the wrongful backlash of the organization in which the individual

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<sup>30</sup> Ettore, p. 19.

blew the whistle. Whistleblowing legislation will encourage employees, management and organizations to be more ethical in their behaviour, conduct and work practices.

Chapter one has identified the significance and need for whistleblowing. There are different definitions and consequences for whistleblowing within the private and public sectors. Individuals must consider all the factors involved when contemplating blowing the whistle. The structure of the remainder of the thesis is as follows.

Chapter two examines Canada's past and present legislation regarding whistleblowing. Some forms of legislation apply only to either the private or public sectors. Whistleblowing may be mandatory for public servants given certain situations, such as illegal activity; gross waste of public funds; and threats to public health or safety. Kenneth Kernaghan expands this by stating that public servants may have to choose between their loyalty to the government of the day and their personal conviction that the public has a right to know about the wrongdoing.

Chapter three provides a Canadian example of whistleblowing protection legislation that was introduced at a provincial level. The Ontario government example will be related to the concepts and factors previously described in this paper, and provide insight that can be incorporated into the later proposed whistleblowing protection legislation for Canada.

The fourth chapter describes the American model of whistleblowing legislation. It is crucial that this paper examines the major events that led to the adoption of the whistleblowing legislation in the United States. The current amended and past adopted forms of whistleblowing legislation will be described. These models of whistleblowing

will be analyzed to assess which parts of the models should be emulated and which should be avoided.

The fifth chapter applies the American model of whistleblowing legislation to the Canadian context. It is essential that the similarities and differences are clearly outlined between the American and Canadian governments as these affect the possibility of adapting the American model. The paper will then examine both the strengths and difficulties in applying the American model within the Canadian framework. Further to this, the paper will analyze for organizations, within the private and public sectors, some of the costs and benefits of applying the American whistleblowing legislation.

Chapter six describes the modifications of the American whistleblowing legislation that will be required when adopted in Canada. This paper examines how the proposed whistleblowing protection legislation would effect the public and private sectors. It is important to look at the relevant issues surrounding this proposed whistleblowing protection legislation.

## **CHAPTER TWO – Whistleblowing in the Private & Public Sectors**

### **Introduction**

There is presently no federal or provincial legislation in Canada that provides specific protection for whistleblowers in either the private or public sectors. A person contemplating blowing the whistle does not often know how the law could be applied to the specific situation, regardless of the sector. It is important that the whistleblower knows his or her rights, the wrongdoer's rights and even the organization's rights. Only then can the potential whistleblower make an informed decision.

The public and private sectors are interconnected. Each sector is influenced by, and makes decisions based upon the other's actions. One of the primary reasons the private sector needs to be analyzed regarding whistleblowing legislation is that the government grants billions of dollars worth of contracts to the private sector each year. There is much need for legislation that would protect individuals that would blow the whistle on unethical, illegal and illegitimate business dealings that may transpire between businesses, governments and/or Crown Corporations.

The first section of this chapter will look at whistleblowing in the private sector. Secondly, the differences between the private and the public sectors will be explored, especially in regards to whistleblowing. The third section will closely examine whistleblowing in the public sector, and redefine whistleblowing to be applicable in the public sector. Next, it is crucial to outline when and how a public servant is required to blow the whistle. The fifth section analyzes the relevant legislation that can be applied to whistleblowing. A sixth section investigates the potential costs for organizations when they do not have internal whistleblowing mechanisms. The last section discusses the

following two issues: the reasons why opposition parties are very supportive of whistleblowing legislation; and the role the media plays in whistleblowing.

### **Whistleblowing in the Private Sector**

There is often a double standard in the private sector regarding whistleblowing. As Donald R. Soeken states “if a person blows the whistle on somebody who is below them in the organizational structure, they will receive a pat on the back from management. If a person blows a whistle on someone above them, the whistleblower will be fired.”<sup>31</sup> This implies that management often supports the reporting of wrongdoing in the organization as long as it does not involve any judgements of their activities.

Researchers have found that retaliation in the private sector against the whistleblower depends upon the severity of the wrongdoing. The retaliation will increase proportionately to the amount the organization feels it may lose in the exposing of the wrongdoing. As well, the more severe the wrongdoing is, the greater the probability that the whole situation will become a media spectacle. This negative publicity will likely lead to an increase of negative consequences for the whistleblower, the person(s) responsible for the wrongdoing and the organization.

“At common law, an employee owes his or her employer the general duties of loyalty, good faith and, in appropriate circumstances, confidentiality. The duty of good faith requires an employee to perform assigned tasks according to the best interests of his or her employer.”<sup>32</sup> There is frequently an unwritten rule in organizations that employees

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<sup>31</sup> Ettore, p. 20. For an interesting case on this, see Kurt Eichenwald. “He Told. He Suffered. Now He’s a Hero.” *New York Times*, Sunday, May 29, 1994, s. 3.

<sup>32</sup> Johansen, p. 29.

should first blow the whistle internally, then to law enforcement agencies and lastly, to the media. If the whistleblower does not follow this progression, the person will likely suffer greater retaliation by their organization.<sup>33</sup>

Organizations in the private sector vary enormously in size, in management structure and philosophy, and in the constraints under which they operate.<sup>34</sup>

Whistleblowing in one industry may be very different from another in regards to internal mechanisms, the rights of whistleblower and wrongdoer, and the consequences of whistleblowing. This paper will not look into the industry-specific differences.

Some organizations in the private sector provide processes for employees to blow the whistle internally on potential wrongdoing, and establish written codes about ethical conduct. There are various reasons why organizations in the private sector would be willing to develop such internal mechanisms. Some organizations believe it is their moral duty, while others are concerned with the bottom line and the potential liability of directors and officers.<sup>35</sup> It is important to understand the different reasons why organizations in the private sector and the public sector are willing to develop mechanisms to promote whistleblowing in their organizations.

### **Differences Between the Private and Public Sectors**

There are noticeable differences between organizations that are private and those that are public. The organizational factors involved for a person contemplating the

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<sup>33</sup> Marcia P. Miceli and Janet P. Near. "Whistleblowing: Myth and Reality." *Journal of Management*, vol. 22, no. 3, 1996, p. 509.

<sup>34</sup> Graham T. Allison. *1992 Classics of Public Administration*. Belmont, Ca.: Wadsworth Publishing Company, 1992, p. 466.

<sup>35</sup> Leech, p. 81. Exposed wrongdoing could lead to negative publicity, which in turn may lead to lost market share and lost profits. This would greatly affect an organization's bottom line.

decision of blowing the whistle are different in a government versus a non-government organizational context. This section will examine the differences to determine if separate whistleblowing protection legislation should be proposed for the private and public sectors.

The first major difference is that the primary purpose of the private sector is to make a profit and the primary purpose of the public sector is to serve the public. Organizations in the private sector must focus on the “bottom line” if they are to survive in the midst of competition. The public sector and politicians must respond to the specific needs and demands of the citizens if they are to survive in the next election. Furthermore, the public sector (with some exceptions, such as certain Crown Corporations) is often in a monopolistic situation that allows them to not worry about losing their market share.<sup>36</sup>

A second difference is that the public sector operates in an environment of politics and effectiveness, whereas the private sector mainly operates in an environment of efficiency. For example, the public sector might not implement financial (i.e. cutting operating costs by laying off ten staff) because it is incompatible with the political priorities at that time. The politician’s main priority is gaining and maintaining public support. The government does sometimes make less efficient decisions for political gains. The private sector’s main focus is on being efficient so as to better compete with its competitors and gain both a larger profit and market share.<sup>37</sup>

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<sup>36</sup> Kenneth Kernaghan and David Siegel. *Public Administration in Canada*. Toronto, Ont.: Nelson Canada, Third Edition, 1995, p. 7.

<sup>37</sup> Kernaghan and Siegel, pp. 8 – 9.

The third major difference is that there are frequently clearer lines of authority and responsibility in the private versus public sectors. It is not always apparent within governmental agencies exactly who the employer is of the public servants. The public employee could associate this role with one's specific department, Minister, the Public Service Commission, the Treasury Board, the governing party, or even the public. There are often clearer lines of responsibility and reporting structures within organizations in the private sector. Employees of the private sector are viewed as having responsibilities and duties of trust to shareholders and the organization as a whole.<sup>38</sup> Organizations develop hierarchical structures that show the communication and accountability lines between these parties. This helps to decrease any confusion that may arise about accountability within the organization.

When a person blows the whistle, the question of who is responsible for the wrongdoing when it is reported becomes paramount. Since many officials in the public sector act together with many others when making decisions, there may be more than one person or one department involved and accountable for the wrongdoing. Conflicting and multiple accountability lines can be a disincentive for people to act ethically and legally because they may believe that the wrongdoing will go undetected or will not be traceable.

A fourth difference is that the human resource environment is much more complicated in the public sector than the private sector. There are much more stringent codes, statutes and procedures for hiring and firing employees within government.<sup>39</sup> The public sector, over the last century, has tried to eliminate many of the patronage jobs by

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<sup>38</sup> Michael Starr and Mitchell Sharp. *Ethical Conduct in the Public Sector: Report of the Task Force on Conflict of Interest*. Ottawa, Ont.: Canadian Government Publishing Centre, 1984, p. 161.

<sup>39</sup> Kemaghan and Siegel, p. 9.

establishing these strict guidelines. The main task of managing employees in either the private or public sector is to ensure their behaviour is acceptable in the eyes of the law, in line with the expectations of key stakeholders, and consistent with the direction of senior management.<sup>40</sup> The civil service and the political appointees are at times very hostile towards each other. However, it can be argued that the private sector also can involve great hostility between union and non-union contract employees.<sup>41</sup>

The fifth major difference is that the public sector is held up to greater public scrutiny than the private sector. The decisions that the government makes have an impact on citizens' lives in all different facets. The private sector has some extremely large organizations that also have dealings in very extensive and far-reaching areas. However, the government is still by comparison the largest organization in our country that affects our lives.<sup>42</sup>

The media pay very close attention to the decisions that governments make and often even speculate on the decision the government will make in the future. For example, polls will be conducted on what the public would like the Progressive Conservative (PC) government in Manitoba to spend their surplus budget on. The decisions made in the private sector are less often reported in the press, and the press has less of an impact on future decisions that they make.<sup>43</sup>

Another issue is how organizations in the private and public sector are held responsible for the wrongdoing they committed. While organizations in the private

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<sup>40</sup> Leech, p. 80.

<sup>41</sup> Allison, p. 461.

<sup>42</sup> Kernaghan and Siegel, p. 10.

<sup>43</sup> Allison, p. 462.

sector cannot be imprisoned, they can be punitively fined and sentenced to probation and they can suffer the stigma of a criminal conviction.<sup>44</sup> It should be noted that some Acts have made provisions for senior officers of organizations to be charged and jailed for violations.

An organization will likely take efforts to seek out and protect whistleblowers, and discipline the wrongdoers if the law states a stiff fine for the wrongdoing. The question then becomes what happens if the organization in the private sector does not mind paying the fines and does not believe that the stigma negatively affects the organization. Fines must be set at a high enough, punitive amount to provide financial incentive for the organization to act legally and ethically. The fines should make the organization feel that it must comply to survive financially. Furthermore, there needs to be enforcement of these fines by the government.

The question then becomes how do citizens hold the government accountable for their wrongdoing since they cannot be fined? Citizens, like shareholders of a corporation, had nothing to do with the decision of the wrongdoing, nor can they prevent the wrongdoing, but they do have to deal with the consequences of the wrongdoing.<sup>45</sup> "Governments and their officials are granted discretion to act on behalf of all citizens, and they sometimes are permitted to adopt methods (such as violence) that would be punishable if used by private parties."<sup>46</sup> Based upon this, officials who break the law sometimes claim immunity on ethical grounds, stating that their actions were necessary for the greater good of the public. This can be related to the Machiavellian theory, where

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<sup>44</sup> Thompson, p. 75.

<sup>45</sup> Thompson, p. 88.

<sup>46</sup> Thompson, p. 67.

the official would claim that the ends or outcome justified the means he or she used (see chapter one).<sup>47</sup>

The law clearly denies politicians that immunity based on other ethical principles. It is assumed that the individual still had a choice to do the wrongdoing. Public office means that the person has a fiduciary obligation and duty to act for the sole benefit of the citizens. "Thus when someone abuses the trust that accompanies a public office, the abuse is seen as aberrant behaviour, something which should not go unpunished. The assumption that individuals should, and do, conduct themselves with propriety and in deference always to the public interest, remains generally unchallenged."<sup>48</sup> An official cannot be protected from criminal liability even when he or she may have received an order from the highest official in the organizations.<sup>49</sup>

Politicians in a democracy are accountable first to the citizens and then to their party organization. These politicians are held accountable to the public through and at elections. Politicians may be required to publicly disclose their records and their reasons for seeking support. Citizens can hold governments accountable for their actions by not voting them into power at elections.<sup>50</sup> It should be noted that some provincial governments have passed legislation that allows their voters to hold politicians accountable within the judicial system. For example, the Manitoba government passed the Legislative Assembly and Executive Council Conflict of Interest Act in January 1989.

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<sup>47</sup> Greene and Shugarman, p. 164.

<sup>48</sup> Starr and Sharp, p. 1.

<sup>49</sup> Thompson, p. 69.

<sup>50</sup> Greene and Shugarman, p. 208.

This Act allows any voter to take Members of the Legislative Assembly to the Court of Queen's Bench over an alleged conflict of interest.<sup>51</sup>

Graham T. Allison draws the conclusion "that private and public management are at least as different as they are similar, and that the differences are more important than the similarities."<sup>52</sup> Different legislation would need to be developed for the private and public sectors since there are major differences in the factors involved for individuals contemplating blowing the whistle in either situation.

### **Public Sector Context**

The reporting of wrongful acts within the private sector does not usually involve the release of confidential information. This does not hold true for the public sector. Whistleblowing in the public sector frequently involves the release of confidential information to unauthorized recipients. The unauthorized recipients may include other individuals in the same or different department within the government.

Within the public sector context, there is much disagreement as to the applied definition of whistleblowing. Kernaghan and Langford redefine whistleblowing as a "public servants open disclosure or 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."<sup>53</sup>

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<sup>51</sup> Manitoba. *Manitoba Government Legislative Assembly and Executive Branch Conflict of Interest Act*. Winnipeg, Man.: Queen's Printer, January 1989, p. 15.

<sup>52</sup> Allison, p. 472.

<sup>53</sup> Kernaghan and Langford, p. 94.

Opponents to whistleblowing legislation argue that public servants never have a right to release confidential information to the public since other countries will also have access to the information. They contend that other countries may use this confidential information against our government and country. However, “there is a modern movement towards the increased access to and disclosure of government information that is founded, at least in part, on the perceived needs of a democratic state for openness and a free exchange of ideas and information.”<sup>54</sup> It is only through the release of information that the public will be able to hold the government accountable for its actions.

Other critics argue that the “leaking of government information” is not a form of whistleblowing since it involves the anonymous reporting of the activities. If the allegations are backed with strong evidence, the public servant should be willing to let his or her name stand behind the allegations. However, Kernaghan and Langford disagree that the leaking of information should be treated as a separate phenomenon. Both contend that the methods of open disclosure and leaking involve the same means, the unauthorized release of information. It is only the choice of the method itself that raises ethical dilemmas for the individual.<sup>55</sup>

The dilemma occurs when a public servant is asked to carry out orders that require laws to be broken. If the public servant follows the orders, they are liable for a criminal offence and if the employee does not follow the order, the individual will be subject to internal discipline. Once the views of the officials are known in government, the public servant is expected to either fall in line or resign.<sup>56</sup> The loss of a career and the

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<sup>54</sup> Kenneth Kernaghan. “Whistle-blowing in Canadian governments: ethical, political, and managerial considerations.” *Optimum*, vol. 22, no. 1 (1991-1992), p. 40.

<sup>55</sup> Kernaghan and Langford, p. 94.

<sup>56</sup> Kernaghan and Langford, p. 13.

potential loss of an economic future is a very high price for one to pay for the public interest. Hence, there is a need for protective laws for whistleblowers. Others argue that confidential information is sometimes withheld for reasons of bureaucratic convenience and that sometimes officials use confidentiality to cover up their own mistakes.<sup>57</sup>

Some critics have viewed whistleblowing as an employee's criticism of government decisions since it involves the exposition of confidential information. The Institute of Public Administration of Canada's (IPAC) Statement of Principles provides a guide about a public servant's right to "public criticism" of the government.<sup>58</sup> However, public servants can publicly criticize the government without it being considered whistleblowing. The Supreme Court of Canada has stated in relation to this situation that:

*"Public Servants have some freedom to criticize the government. But it is not an absolute freedom.... 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>59</sup>*

### **Mandatory Whistleblowing in the Public Sector**

Whistleblowing may be mandatory for a public servant given certain situations, such as illegal activity; gross waste of public funds; and threats to public health or safety. A public servant may face disciplinary and potential criminal charges if the individual does not blow the whistle on the wrongdoing. On the other hand, public servants that do engage in whistleblowing may be subject to disciplinary action for violating their oath of

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<sup>57</sup> William J. Barnds. *The Right to Know, to Withhold & to Lie*. New York, N.Y.: Council on Religion and International Affairs, 1969, p. 18.

<sup>58</sup> Kernaghan and Langford, p. 68.

<sup>59</sup> Kernaghan and Siegel, p. 339.

office and secrecy or such statutes as the Official Secrets Act and the Criminal Code.<sup>60</sup> Potentially, a public servant may have to choose between one's loyalty to the constitution, the law and one's personal conviction that the public has a right to know about the wrongdoing.<sup>61</sup>

The Institute of Public Administration of Canada has issued a Statement of Principles regarding the conduct of public employees. Under the heading of 'accountability', it states that "public servants have a responsibility to report any violation of the law to the appropriate authorities." It is implied that public servants have a duty to report the violation they observe, regardless of who the public official is or what governmental agency it is. "No one and no policy is above the law."<sup>62</sup> Supporters argue "...surely, our responsibility to Canada is greater than any duty we owe to our political masters of the day."<sup>63</sup>

Kernaghan and Siegel argue that public servants must ensure the following four prerequisites are present before they are both required and justified in blowing the whistle. The first prerequisite is that it must be clear that the action or the omission has caused, is presently causing or will cause a demonstrable harmful effect. There are three subsections of this first prerequisite that help to qualify the needed severity of the wrongdoing. One subsection is that a public official or government agency clearly breaches the boundaries of the law, policies, regulations and constitution. For example, this could involve the bribery of government inspectors, illegal campaign contributions,

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<sup>60</sup> Kernaghan and Siegel, p. 511.

<sup>61</sup> Kernaghan. "Whistle-blowing...", p. 38.

<sup>62</sup> Westin, p. 138.

<sup>63</sup> Kernaghan and Siegel, p. 366.

graft, misuse of financial resources or deliberate violations of labour laws. These legal standards are clear and the party's violation is alleged to have been known and deliberate. The second subsection involves establishing that there are clear and imminent dangers or threats to public health and safety. Lastly, a public servant has a responsibility to blow the whistle when a professional standard is being violated.<sup>64</sup>

A second prerequisite is that the public servant must be able to support the allegations with unequivocal evidence (The public servant must be able to demonstrate the legitimacy of his or her claim of wrongful activity to the satisfaction of a disinterested third party). Another prerequisite is that the public servant must try to report the wrongdoing through the established authority channels to see if the perceived harm can be corrected on an internal basis. Some senior officials argue that the public servant must first raise the issue with the Deputy Minister or even the Minister before seeking other means of reporting the wrongdoing. This may be unrealistic for all public servants, especially if the person is a junior public servant. Furthermore, if the public servant does raise the issue, she or he will be unable to go the "anonymous" route later.<sup>65</sup>

The last prerequisite is that the whistleblower must have good reason to believe that the unauthorized disclosure of the confidential information will lead to appropriate changes to rectify the wrongdoing. The public servant is not justified in reporting the wrongdoing to parties that do not have the authority to eradicate the problem. Opponents frequently argue that the media are such a party since they do not have this authority and therefore, the public servant should not be allowed to blow the whistle to the media. This

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<sup>64</sup> Kemaghan and Langford, pp. 96-97.

<sup>65</sup> Kemaghan and Langford, p. 98.

author does not agree with this argument. The media can play an important role of mobilizing public opinion that in turn may place pressure upon the government to rectify the wrongdoing. It is my contention that public servants should be able to blow the whistle to external parties, including the media, when they have evidence of wrongdoing. Since there is a lack of clear reporting lines in the public sector, the public servant is often left to personally decide who is the best person or organization within the government or the external public to tell about the wrongdoing.

A public servant may find that he or she is certain that the first three prerequisites are being met, but is unsure of whether the fourth prerequisite is being met in the particular situation. "The IPAC's Statement of Principle states that it is the responsibility of the public servant to seek approval from an appropriate government authority whenever they are uncertain as to the legality or propriety of expressing their personal views."<sup>66</sup> This would remove a whistleblower's choice for anonymity when seeking guidance about a situation involving wrongdoing. Furthermore, it may provide the wrongdoers with a 'heads-up' warning about the allegations that may soon be laid. This Statement of Principle does not state or recommend to the public servant what the appropriate or inappropriate government authority would be in any given situation. It should be recognized that IPAC does not make mention of any protection or support the public servant would receive once assuring that these four prerequisites were met in a situation where there is wrongdoing.

The statement under the IPAC's heading of 'confidentiality' declares that "the public employees should not disclose to any member of the public, either orally or in

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<sup>66</sup> Kernaghan and Langford, p. 70.

writing, any secret or confidential information acquired by virtue of their official position.”<sup>67</sup> Based upon this statement, government agencies often terminate public servants for blowing the whistle. The only exception to a public servant’s duty of keeping confidential information is when the disclosure of information is in the public’s best interest.<sup>68</sup> “No one knows at what point the organization’s right to privacy is superseded by the public’s right to know.”<sup>69</sup> It is extremely difficult for a person to prove with documentation that the disclosure was required and was in the public’s best interest.

Public servants who engage in whistleblowing may be subject to disciplinary action under various public service acts, such as the Official Secrets Act and the Criminal Code. “All public servants must take the ‘Oath of Secrecy’ which includes the requirement that they will not, except as legally required, disclose information that they acquire by virtue of their public office.”<sup>70</sup> The literal interpretation of the ‘Oath of Secrecy’ implies that any disclosure of information is prohibited, regardless of the circumstances.

Some people argue that whistleblowing constitutes a violation of the public servant’s duty. By reporting the activities outside of one’s department, the person is indeed making a public comment. As mentioned, the Supreme Court of Canada has stated that a public servant is allowed to make a public comment when the government is engaged in illegal acts or if its policies jeopardize the health, life and safety of the

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<sup>67</sup> Institute of Public Administration of Canada. *Statement of Principles Regarding the Conduct of Public Employees*. Toronto, Ont.: Institute of Public Administration of Canada, 1986.

<sup>68</sup> Vinten, p. 47.

<sup>69</sup> Kenneth Kemaghan. “Rules are not Enough: Ethics, Politics, and Public Service in Ontario” in *Corruption Character & Conduct: Essays on Canadian Governmental Ethics in Langford and Tupper*, p. 181.

<sup>70</sup> Kemaghan. “Rules are not Enough...”, pp. 180-181.

individual or others. This comment must also not effectively hinder the public servant's ability to do his or her duty. Only then will the Courts provide some protection for the whistleblower from the criminal allegation that the individual violated his or her duty as a public servant.

Public employees are also subject to common law about an employee's broad duties of loyalty, good faith and confidentiality. The common law helps to ensure that employees will not purposely do anything, such as disclosing confidential information, which may prejudicially affect their employer's business.<sup>71</sup> An example of this occurred when Saskatchewan's New Democratic Party government in 1991 tracked down the various public servants that leaked highly sensitive cabinet documents to the opposition parties. The government successfully argued in the courts that these public servants were violating their duty of loyalty by purposely disclosing confidential information to the opposition parties.

Although various departments have rules about whistleblowing, there are no clear procedures or mechanisms for handling whistleblowing reports within the government framework. This results in great ambiguity and confusion amongst public servants as to what appropriate steps to take when reporting wrongdoings. There are many ways for a public employee to report the wrongdoing, and it is essential that the person is aware of all the alternatives and weighs each carefully. For example, public servants can leak information to action groups; report activities to the Attorney General; make appeals to various professional societies; or seek compensation through the courts. Politicians and public employees exercise considerable discretion and authority in deciding what

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<sup>71</sup> Kernaghan. "Whistle-blowing...", p. 40.

measures of confidentiality and privacy are appropriate. Public servants who are dismissed for blowing the whistle can appeal to the arbitration and grievance boards.

The Government Accountability Project has outlined seven strategies for the whistleblower in the public sector.<sup>72</sup> First, it is essential that the person contemplating blowing the whistle discuss it extensively with family and friends. A second strategy is to first try to highlight the wrongdoing in a non-accusatory fashion within the system. Next, it is important that the person develops documentation or a specific record of all activities that occur within the work environment. Fourthly, the whistleblower should make a detailed memorandum and have it witnessed, and then mail the letter to themselves and another trusted person. A fifth strategy is to pinpoint and copy any key records that would help verify the allegations. The sixth strategy is for the whistleblower to create a support circle or network since he or she will be experiencing extreme stress in their lives. It is best for the whistleblower to choose his or her support circle or network since he or she will then be assured of confidentiality and anonymity regarding his or her situation. A person can also usually find support through an associated professional society. Lastly, the individual should seek the help of an attorney and other specialists.<sup>73</sup>

### **Relevant Legislation Regarding Whistleblowing**

The public's interest in the ethical conduct of government has increased and diminished as various acts of wrongdoing were exposed and publicized. "But since the

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<sup>72</sup> The Government Accountability Project is a non-profit agency that provides legal and advocacy assistance to employees in the public and private sectors who have blown the whistle on lawlessness and threats to public safety and the environment in the United States. The Government Accountability Project was established in 1977 to help whistleblowers, which, through their individual acts of conscience, serve the public interest.

<sup>73</sup> Ettore, p. 22.

early 1970s, there has been a continuing anxiety among the public and within government about the ethical standards of public officials.”<sup>74</sup> When wrongdoing was exposed, the federal and most provincial governments responded by establishing written codes of public service ethics. These codes are a statement of principles and standards about the right conduct of the public employees.<sup>75</sup>

Canada established the Civil Service Act in 1918 in an attempt to decrease patronage appointments. The Civil Service Act (now known as the Public Service Employment Act) helped to ensure people were hired and promoted based on merit instead of party affiliation or contribution. The Civil Service Act does provide a limited amount of protection for whistleblowers since the Act outlines the procedures for terminating an employee. However, there are many other ways that employees can be retaliated against in the work environment.

Prime Minister Lester Pearson in 1964 distributed a letter to the cabinet ministers about ethics. That letter has since served as the codes of ethics for cabinet members. Since then, various Prime Ministers have sent letters that have subsequently been adopted as codes. There are still no written codes of ethics for MPs and senators. The office of Assistant Deputy Registrar General (ADRG) was established to ensure the compliance with the codes of ethics that were set down by the Prime Ministers.<sup>76</sup>

“No government in Canada has enacted whistleblowing legislation that provides broad protection for whistleblowers.”<sup>77</sup> Throughout different times in history, there has

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<sup>74</sup> Kemaghan and Siegel, p. 359.

<sup>75</sup> Kemaghan and Siegel, pp. 359-360.

<sup>76</sup> Greene and Shugarman, pp. 49-50.

<sup>77</sup> Kemaghan. “Whistle-blowing...”, p. 36.

been pressure by the public for businesses and governments to maintain higher ethical standards. Society at times has believed there should be greater protection for those who blow the whistle internally rather than through external means. Some people believe that legislation that protects people that blow the whistle externally will only encourage people to report wrongdoings through external instead of internal means. Furthermore, a national survey found that most people believe there should be greater legislative protection for people who report illegal conduct, as opposed to those who report unethical activities or behaviour.<sup>78</sup>

“The Liberal platform for the 1993 election, contained in the well-publicized ‘red book’, devoted one of eight chapters to ‘governing with integrity.’”<sup>79</sup> The ‘red book’ promised an independent Ethics Counsellor that would replace ADRG and the development of a written guideline for conduct for all cabinet ministers, MPs and senators. The Liberals did change the title of ADRG to Ethics Counsellor in 1994. However, the Ethics Counsellor is not the independent agency that the Liberals promised since the Ethics Counsellor still reports to the Prime Minister. This means that the Prime Minister ultimately settles any conflict of interest that the Ethics Counsellor is investigating.<sup>80</sup>

The legislative environment in Canada has not yet produced a comprehensive act to protect whistleblowers. In many cases, unless the employee sues for wrongful dismissal or makes the case public in a dramatic way, the employer has the upper hand.<sup>81</sup>

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<sup>78</sup> Elletta Sangrey Callahan and John W. Collins. “Employee Attitudes Towards Whistleblowing: Management and Public Policy Implications.” *Journal of Business Ethics*, vol. 11, 1992, pp. 939.

<sup>79</sup> Greene and Shugarman, p. 52.

<sup>80</sup> Greene and Shugarman, p. 52.

<sup>81</sup> Brooks, p. 20.

However, there are some Acts that relate to the whistleblowing situation. First, the Industrial Relations Act of 1971 gives every employee the right not to be unfairly dismissed by an employer. Next, the Environmental Protection Act encourages persons to report their knowledge of actual or potential violations by their organizations. This Act specifies that an employer cannot dismiss, discipline, coerce, intimidate or penalize employees for complying with the Environmental Protection Act.<sup>82</sup> The courts specify the different fines and jail terms for the various violations. A third relevant Act is the Occupational and Safety Act. This Act states that employees can refuse work that may cause injury to that person or another worker.<sup>83</sup> There is one other relevant potential Act that is pending in the House of Commons. Bill 318 was first read in the House of Commons on June 19, 1996 and it provides legal protection to federal employees that report wrongdoing to the Auditor General of Canada. A committee is still reviewing this particular Bill.

The Criminal Code makes provisions against bribes, fraud, etc. that are committed by individuals. The Criminal Code is used to hold the wrongdoer accountable to society. However, it is argued that criminal law to date has often been used to punish the crimes of the citizens rather than in the punishment of official crime.<sup>84</sup>

“The government of Canada has traditionally operated on the principles that all government information is secret unless the government decides to release it.”<sup>85</sup> The Access to Information (ATI) Act allows the federal government to keep a great deal of

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<sup>82</sup> Canada. *Environmental Protection Act*. Ottawa, Ont.: Supply and Services Canada, 1988, sec. 58.

<sup>83</sup> Brooks, p. 20.

<sup>84</sup> Thompson, p. 66.

<sup>85</sup> Kemaghan and Siegel, p. 505.

information confidential. The whistleblower normally reveals or exposes some confidential information that is protected by the ATI Act. Some whistleblowers argue that they released the confidential information because they were acting on behalf of the public's interest.

“The courts have permitted a very limited ‘public interest’ defense in these cases when wrongdoing has been serious and the public’s interest is clear.”<sup>86</sup> Even then, the court will need to be assured that the whistleblower accessed the proper internal channels before deciding to tell external parties. The courts have provided very little protection for the whistleblowers and many may seriously be jeopardizing their careers when they breach their duties to their employers. The question for organizations is what are the pros and cons for the organization if the wrongdoing is allowed to continue?<sup>87</sup>

### **The Potential Costs for Organizations**

Present legislation does not require organizations to establish mechanisms by which employees can report wrongdoing or blow the whistle. Whistleblowing represents a critical mechanism by which top managers, shareholders or citizens may learn of organizational wrongdoing and take appropriate action. Organizational wrongdoing that continues because it is sanctioned or not reported may be financially costly and detrimental to such an organization. This section will examine the costs involved in not establishing internal mechanisms for whistleblowers in the public and private sectors.

There can be many potential costs for an organization that ignores the reports of wrongful activities and it most often leads to dire results for the organization. One

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<sup>86</sup> Johansen, p. 30.

<sup>87</sup> Johansen, p. 30.

potential cost is that the severity of the wrongdoing will slowly grow over time. It is very rare that the wrongful acts will simply disappear on their own accord without ever being addressed at an organizational level.

A second potential cost is the amount of mandatory fines an organization may be charged with for crimes of fraud, bribery, money laundering, anti-trust violations, breaching securities and contract laws, etc. These fines can reach into the hundreds of millions of dollars.<sup>88</sup>

“It is generally assumed though that wrongdoing in an organization will harm the organization’s performance.”<sup>89</sup> An unscrupulous organization may see the very costs listed in the prior paragraphs as the standard cost of doing business in that industry. However, this argument helps to provide support for whistleblowing protection legislation. A hypothetical example of this would be an air carrier company cutting corners on the mechanical checks and safeties of the airplanes when they are receiving only \$5,000 fines when caught violating the law. It is in these unscrupulous organizations that the whistleblowers have the potential to receive the greatest amount of retaliation by the organization, and therefore need adequate legal protection.<sup>90</sup>

A third cost to the organization is the amount of negative publicity that will be incurred by the scandal created by the wrongdoing when it becomes public knowledge. The public often view organizations that ignore the reports of wrongdoing as condoning and perpetuating the behaviour. In the public sector, this negative publicity may result in a political party’s members losing considerable public support. Whereas in the private

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<sup>88</sup> Labich, p. 172.

<sup>89</sup> Miceli and Near, “Effective Whistle-blowing, p. 682.

<sup>90</sup> Miceli and Near, “Effective Whistle-blowing, p. 687.

sector. this may result in a loss of market share, profits and contracts for the organization, and could easily cause the agency's public image irreversible harm.<sup>91</sup> The public may view an organization with an internal mechanism for whistleblowing as being more ethical and the organization may subsequently receive less public backlash from the wrongdoing.

Organizations that have internal processes for whistleblowing provide themselves with an opportunity to 'fix' the problems and prevent them from developing into a full-blown media scandal. These external disclosures usually put the organization in the worst light in the public's eye. Therefore, it would be wise for organizations to develop and establish internal whistleblowing processes since external disclosures have the greatest potential for damage for the organization.<sup>92</sup>

A related potential cost that could be avoided by having an internal process for whistleblowing is the negative consequences of allegations of wrongdoing that were proven later to be incorrect. This may simply be due to an employee not having all the facts about a particular situation. For example, Ministers are answerable to the legislature for the acts of their administration subordinates, and therefore any allegations may result in great embarrassment for the Minister. A Minister is held accountable even if the allegations were later found to be unsubstantiated or if the offense of the public servant(s) was committed without the knowledge or consent of the Minister. It depends upon the severity of the allegations, but it may result in the Minister resigning, being

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<sup>91</sup> Burton and Near, p. 27.

<sup>92</sup> Barnett, p. 950.

forced to resign or being reassigned to another department. As well, the careers of the public service managers may be damaged by the whistleblowing reports.<sup>93</sup>

Another related potential cost to the organization of ignoring the wrongdoing is that it strengthens the cases of litigation suits that may be filed by the victims of the alleged wrongdoing. Organizations will greatly strengthen their legal position if it can be shown that they were taking corrective action towards the wrongdoing once it was reported.

Lastly, the organization may lose its most effective and productive employees if the activities go undetected, are ignored or continue. Most people have high moral standards and will choose to work in an ethical work environment. The organizational culture will begin to change if employees see that unethical people are the ones receiving the promotions. Eventually a kind of morale will set in that will turn off the employees with higher personal standards and this will in turn begin to stifle innovation, decrease trust and loyalty throughout the organization.<sup>94</sup>

Independent third parties often view whistleblowing in an organization as a positive development since it normally results in monetary savings and gains. The act of whistleblowing could reflect the "organization's general dissidence and may act as an impetus for change."<sup>95</sup> Whistleblowing frequently leads to the constructive renewal of organization and therefore should be encouraged. "Whistleblowers should be seen as reformers who are putting the organization back on course."<sup>96</sup> Organizations need to

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<sup>93</sup> Kernaghan, p. 39.

<sup>94</sup> Labich, p. 172.

<sup>95</sup> Miceli and Near. *Blowing the Whistle*, p. 229.

<sup>96</sup> Mark J. Somers and Jose C. Casal. "Organizational Commitment and Whistle-blowing." *Group & Organization Management*, vol. 19, no. 3, September, 1994, p. 271.

establish whistleblowing policies and mechanisms that will provide employees with channels to report illegal, immoral or unethical activities. These whistleblowing policies will differ considerably between the private and public sectors.

### **Opposition Parties**

It is not surprising that the private members' bills that have been introduced into the Federal Parliament to protect whistleblowers have usually come from opposition members or newly elected governments.<sup>97</sup> Governing parties have found little support in their own parties for supporting the introduced whistleblowing protection legislation. It is important to explore the reasons why the opposition party may be very encouraging and supportive of the whistleblowing protection legislation.

Opposition parties have much to gain by exposing the wrongdoings of the current government. In addition, the governing party that proclaims the whistleblowing bills will look particularly negative in the eyes of the public since there will be no other benchmarks with which to compare the frequency of the whistleblowing reports. The opposing parties would then be able to substantiate how the current party in power is immoral and unethical.

Public servants who blow the whistle are likely to be perceived by the public as opposing the current governmental party, regardless of their motivation or the facts involved.<sup>98</sup> However, a public servant's loyalty to a particular government should not be a consideration in a person's decision to blow the whistle. Ideally, an individual's moral decision of whether or not to blow the whistle should stand independently of one's party

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<sup>97</sup> Kemaghan. "Whistle-blowing...", p. 39.

<sup>98</sup> Kemaghan. "Whistle-blowing...", p. 39.

ties. It is harder for an individual to make the decision to blow the whistle with confidential information when it is over a controversial political issue.<sup>99</sup> Controversy leaves a lot of room for people to make personal judgements about the situation.

There is no political party in Canada that has developed its own code of ethics or conduct for its members. However, the Reform Party does have a code that is used in the screening process of new candidates. Codes of ethics could be very educational and help prevent wrongdoing from occurring within parties and the various levels of government. There is much opposition by some parties to developing such a code. Change will probably only occur if one party develops a credible code and finds new public support because of it. The rest of the parties will then be sure to follow in the development of codes of ethics.<sup>100</sup>

## **Media**

A key function of the media is to provide information to the public. The media allow us as citizens, to become informed of the decisions that are happening across our country. This communication allows people to stay somewhat connected to events occurring throughout the various provinces, despite the vast distances. It has been argued that “the media play a critical role as two-way channels of communication between the governors and the governed.”<sup>101</sup>

Governments regularly use the media to communicate with its citizens and keep the country abreast of the decisions that the government is making. However, the

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<sup>99</sup> Kerhaghan and Langford, p. 97.

<sup>100</sup> Greene and Shugarman, pp. 202-204.

<sup>101</sup> Kerhaghan and Siegel, pp. 502-503.

government does try to minimize the amount of negative media and public backlash from these messages. Public servants emphasize and tell the media the things that support their superior, department, etc. and try to keep secret any information that would adversely affect them.<sup>102</sup>

It is basically considered, though, that the media are in an adversarial relationship with the government. It has been argued that the fundamental importance of media is to 'keep the government honest.'<sup>103</sup> Wilson argued that "citizens are better educated, and have high standards for proper official conduct; party bosses have lost power and media has strong incentive to find and expose improper influence and corruption."<sup>104</sup> Citizens regularly criticize politicians for violating moral principles and acting unethically. People want to be informed by the media of these situations. This criticism can help to sustain moral responsibility and democratic accountability.<sup>105</sup>

The media have been criticized for their 'agenda setting' and showing favorites amongst politicians and political parties. Although the media cannot tell people what to think, they can influence what people talk or think about by paying attention to a particular topic for a long time. This attention can lead citizens to call for reform on a particular action. It is also argued that there is frequently a concentration of ownership of the media that may make the media be less than objective or impartial. It has been argued that the media do not always act ethically and responsibly when they are informed of alleged wrongdoing. There are times when the media print an allegation that is

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<sup>102</sup> Kernaghan and Siegel, p. 503.

<sup>103</sup> Starr and Sharp, p. 18.

<sup>104</sup> James Q. Wilson. American Government: Brief Version. Lexington, Mass.: D. C. Heath and Company, 1994, p. 210.

<sup>105</sup> Thompson, p. 89.

without support or evidence. The accused has rights as well, and there can be enormous potential for abuse.<sup>106</sup>

Some whistleblowers do go first to the media to expose the alleged wrongdoing before seeking any internal process. As well, some people blow the whistle for their own personal motives that are less than ethical and responsible. The reporter does not often know the motives of the person giving the private or confidential information.<sup>107</sup> There is some question as to whether it is the responsibility of the reporter to ensure that the person who leaked the information is doing this for public interest.

The media are subject to legal restraints such as the Official Secrets Act and laws of libel. The ATI Act permits the government to keep a great deal of information confidential, thereby making it illegal for the media to publish such information. The media may potentially be liable if it reports the wrongdoing that the whistleblower has exposed.

## Summary

“It is clearly the public perception – reinforced by the media – that a government which is unduly secretive must have something to hide. That something is, as often as not, the incidents of waste of resources, negligence with respect to the health or safety of the public, conflicts of interest, or misdirection of funds.”<sup>108</sup>

Many employees in both the private and public sectors turn a blind eye to the conflict of interest violations, the inappropriate political activity, the unethical and

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<sup>106</sup> Greene and Shugarman, p. 16-17.

<sup>107</sup> Wilson, p. 88.

<sup>108</sup> Kemaghan and Langford, p. 90.

immoral behaviour and even the illegal and illegitimate activities that they witness by other employees in their organization. These employees do not believe that the people committing the wrongdoing will receive any more than a slap on the hand or that the wrongdoing will be rectified. Therefore, the potential whistleblowers do not believe that blowing the whistle on the wrongdoing is worth the possibility of losing their job or career. The whistleblowers need to believe that there will be a rapid and conscientious effort of the organization to terminate the reported wrongdoing.<sup>109</sup>

Whistleblowing is considered to be effective when the alleged or reported wrongdoing has been terminated at least in part because of the whistleblowing and that this occurred within a reasonable time period. A reasonable time period would be determined based on the situation.<sup>110</sup>

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<sup>109</sup> Miceli and Near, "Effective Whistle-blowing", p. 680.

<sup>110</sup> Miceli and Near, "Effective Whistle-blowing", p. 681.

## CHAPTER THREE – Ontario’s Legislative Experience

### Introduction

“In modern Canadian government, ethics management is the ascendant philosophy.”<sup>111</sup> Kenneth Kernaghan argues that Ontario is now the leader in this movement since it has adopted strict controls over ministers, a legislated code of conduct for elected officials, a freedom of information and privacy law, strict electoral financing laws, whistleblowing protection legislation for public servants and a commitment to extend such practices to the province’s municipalities.<sup>112</sup> Therefore, it is crucial to examine this Ontario government policy in greater detail.

The Ontario government example was chosen for a number of reasons. First, this paper can examine the events that led up to the Ontario government introducing the whistleblowing protection legislation. As well, it is important to analyze the reasons why the legislation was never enacted. Another reason is that the Ontario Law Reform Commission (OLRC) recommended the creation of the Office of Special Counsel based upon the model of whistleblowing protection legislation in the United States. This examination will provide useful information as to the things to avoid, improve and emulate when proposing whistleblowing legislation for the federal government. Only one example can be fully examined due to space limitations. This whistleblowing protection legislation is still an issue in Ontario.

The first section of this chapter will look at the major political events that led to the proposed Whistleblower’s Protection legislation. Secondly, it is also important to

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<sup>111</sup> Langford and Tupper, p. 13.

<sup>112</sup> Langford and Tupper, p. 13.

examine the other issues that surrounded the introduction of this legislation. The last section will outline the proposed legislation and provide an update about its progress or lack thereof.

### **Major Factors Leading to Proposed Whistleblower's Protection Legislation**

There have been various major factors that have led the Ontario government to proposing Whistleblower's Protection legislation. One factor was the extent of scandals, patronage and wrongdoing that public officials participated in over a long period of time. There was much pressure from the public to bring about change when there was a media-hyped scandal. Campaigning parties often made election promises about introducing whistleblowing legislation once in power. A second major factor was the report of the OLRC in 1986. The third major factor was the specific Acts that the Ontario government had passed in regards to whistleblowing issues and the establishment of the Ethics Commissioner. A fourth major factor was the NDP's Throne Speech in 1990 declaring their intention of introducing whistleblowing legislation. Each factor will be discussed below.

The first major factor was the scandals, the related public outrage and the resulting campaign promises to restore the public's trust in public officials around elections. The Progressive Conservative Party in Ontario was in power from 1943 to 1985. Critics argue that there were often 'close links' between the government and the private sector where there was much alleged conflict of interest and political patronage.

"During 1972, widespread public interest in the ethical standards of public officials was rekindled by vigorous mass media coverage of alleged conflicts of interest

involving Ontario Cabinet Ministers and resulting in a minister's resignation."<sup>113</sup> These scandals in 1972 led Premier William Davis to replace unwritten rules with formal conflict of interest guidelines for ministers. An example was that one of the guidelines forbade ministers from purchasing real estate unless it was for personal use, and if this was the case, the real estate holdings were to be placed into a blind trust.<sup>114</sup> Soon after, the Public Service Act was amended in 1973 to provide conflict of interest guidelines for public servants.

There were many scandals in the 1980s that plagued the Progressive Conservative government leading up to the 1985 election. An example of one of the major scandals that led to increased public support for stricter ethical guidelines for public officials occurred in 1982. A forester in the Ontario Ministry of Natural Resources was fired for alleging to an opposition member of the legislature that the ministry was violating its own policy by granting timber-cutting rights in an area where the volume of suitable timber was insufficient.<sup>115</sup>

The Liberal government promised, as part of their 1985 platform, legislative protection for public servants that disclosed confidential information about serious government wrongdoing since the Ontario government had not provided adequate protection in the past. The protection for public servants would be for the exposure of illegal activity and gross abuse of public funds.<sup>116</sup> There was a great deal of public outrage in regards to the patronage practices of Prime Minister Brian Mulroney at that

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<sup>113</sup> Kenneth Kernaghan. "The Ethical Conduct of Canadian Public Servants." *Optimum*, vol. 4, no. 3, 1973, p. 8.

<sup>114</sup> Kernaghan. "Rules are not Enough...", p. 177.

<sup>115</sup> Kernaghan and Siegel, p. 511.

<sup>116</sup> Kernaghan. "Rules are not Enough...", p. 181.

time. This public outrage increased the pressure on the campaigning parties to respond to the alleged unethical, illegal and immoral acts of public officials.<sup>117</sup>

Shortly after Liberal leader David Peterson was elected into the Premier's office, some of his Ministers became involved in some serious conflicts of interest in 1986. "The political and personal embarrassment arising from the disclosures and allegations of conflict of interest has prompted the Ontario government's political opponents to focus on this problem area, to exaggerate the gravity of some offences, to make irresponsible allegations and to lump as many questionable activities as possible under the general rubric of conflict of interest."<sup>118</sup> The opposition party persistently attacked Premier Peterson's government for its real and alleged wrongdoing because Peterson had attacked the preceding government's ethics with similar ferocity and had been elected for his ethical, moral stance.<sup>119</sup>

The second major factor was the OLRC's report in 1986. Premier Peterson directed the OLRC to review the ethical guidelines for public officials and the process for reporting the wrongdoing in the Ontario government. The OLRC released a report in 1986 that made two major conclusions that were strongly influenced by the American whistleblowing legislation.<sup>120</sup> One was that conflict-of-interest legislation should be introduced instead of relying upon written guidelines. The second was that government employees should not have to rely on the limited common law "public interest" defence alone if they are disciplined for whistleblowing. Rather, the public servant or

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<sup>117</sup> Kernaghan. "Rules are not Enough...", p. 186.

<sup>118</sup> Kernaghan. "Rules are not Enough...", p. 184.

<sup>119</sup> "Opposition fumes at Peterson." *Globe and Mail*. Toronto, Ont.: December 13 1991, p. A8.

<sup>120</sup> Ontario Law Reform Commission. *Report on Political Activity, Public Comment and Disclosure by Crown Employees*. Toronto, Ont.: Ministry of the Attorney General, 1986, pp. 322.

whistleblower should be given statutory protection. More important, the public servants should have access to a system whereby they could make their revelations in confidence to an impartial third party, have them investigated and made public if warranted.”<sup>121</sup> The OLRC at that time examined the whistleblowing protection legislation in the United States, and studied the inter-related matters of whistleblowing, confidentiality, public comment and political activities.<sup>122</sup>

The OLRC made the following statement:

*“If, today, government can no longer justify confidentiality for all information...then we cannot see how the principle of confidentiality can be invoked in order to cover up serious government wrongdoing. The modern movement toward increased access to, and disclosure of, government information is founded, at least in part, on the perceived needs of a democratic state for openness and for the free exchange of ideas and information. Public awareness of government activity is seen as an essential means of monitoring, and holding the government accountable for, such activity.”*<sup>123</sup>

The Ontario deputy commissioner of Employment Equity stated that it is very confusing for a public servant to know at what point the public’s right to know supersedes an individual’s right to privacy, and that nobody seems to have the answers.<sup>124</sup> The OLRC’s report in 1986 criticized the Oath of Secrecy by saying that the “wording was unclear, and recommended that it be abolished in favour of a more comprehensive duty of confidentiality.”<sup>125</sup> In response to this, the Ontario government explained, in a separate document, the meaning of accountability, how that fits into the management

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<sup>121</sup> Johansen, p. 31.

<sup>122</sup> Ontario Law Reform Commission, p. 322.

<sup>123</sup> Ontario Law Reform Commission, p. 340.

<sup>124</sup> Kernaghan. “Rules are not Enough...”, p. 181.

<sup>125</sup> Management Board Secretariat. *Whistleblowing: A Discussion Paper on the Protection of Public Service Employees who Disclose Serious Wrongdoing*. Toronto, Ont.: Management Board Secretariat Office, 1991, p. 7.

philosophy, what managers are accountable for, and how they will be held accountable.

This helped to ensure that the managers would design and operate effectively an accountability system that made accountability clearer.<sup>126</sup>

The Government of Ontario felt it was imperative to define administrative responsibility for the public servants as:

*“The obligation of public servants to be answerable for fulfilling responsibilities that flow from the authority given them.... Internal accountability holds public servants answerable to their line superior for their own actions and the actions of their subordinates.... External accountability holds public servants answerable to the public as well. The normal channel through which this requirement is satisfied is the minister.”<sup>127</sup>*

The third major factor is the related Acts that the Ontario government has introduced and passed in regards to whistleblowing issues, and the establishment of the Ethics Commissioner. There are three relevant Acts in Ontario that are only applicable to provincial public officials. First, there is the Member’s Conflict of Interest Act that the Government of Ontario introduced and passed in 1988. Next, there is the Election Finances Act that covers elected officials to ensure they handle their campaign finances in an ethical manner during elections. Lastly, there is the Freedom of Information and Protection of Privacy Act of Ontario passed in 1988. The Act states that the “public has a right to access information held by the government institutions; exemptions to this access should be limited and specific; and decision to deny access should be reviewed by an independent body.”<sup>128</sup> Furthermore, this Act removes the threat of civil or criminal actions against public servants that disclose confidential information in good faith. This

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<sup>126</sup> Allan Tupper. “Alberta: The Search for an Ethical Balance” in Langford and Tupper, pp. 158, 171.

<sup>127</sup> Kernaghan and Siegel, p. 357.

<sup>128</sup> Kernaghan and Langford, pp. 85-86.

is Ontario's major mechanism for managing the government's collection and use of information.<sup>129</sup>

Some critics have argued that Peterson appointed the first ethics commissioner in 1988 in a cosmetic effort to restore public faith in his government's integrity, for there were some major conflict-of-interest scandals in the prior two years of being in office. Eleanor Caplan, one of Peterson's chief ministers, was accused of a conflict of interest because her husband was an officer of a company that negotiated \$3 million in provincial government financing. This contradicted the Premier's conflict-of-interest guidelines.<sup>130</sup> Shortly after this scandal, another erupted about one of Peterson's ministers. This time it was Rene Fontaine, Minister of Northern Development and Mines, who was accused of failing to disclose all of his personal holdings, which again violated the conflict-of-interest guidelines. The Premier was being blamed for his failure to ensure that his ministers were complying with the guidelines he established.<sup>131</sup>

Premier Peterson responded by requesting that John Black Aird, the former lieutenant governor of Ontario, review the guidelines for cabinet ministers and make any necessary recommendations. Aird concluded that the present guidelines were too vague and poorly worded. Therefore, Aird recommended the establishment of conflict-of-interest legislation and an independent ethics commissioner.

In 1988, the Ontario government replaced the older conflict of interest legislation with new legislation that was applied to both Cabinet Ministers and members of the

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<sup>129</sup> Kernaghan. "Rules are not Enough...", p. 180.

<sup>130</sup> Ontario. *Report on the Allegation of Conflict of Interest Concerning Eleanor Caplan, MPP*. Toronto, Ont.: Standing Committee on Public Accounts, September 1986, p. 62.

<sup>131</sup> Ontario. *Report on the Allegation of Conflict of Interest Concerning Rene Fontaine, MPP*. Toronto, Ont.: Standing Committee on Public Accounts, September 1986, p. 28-29.

legislature, and called for the appointment of a conflict of interest or ethics commissioner to ensure compliance with said legislation. “An ethics commissioner is an independent official who provides advice to elected officials about how to comply with the government’s ethics rules and investigates complaints about possible breaches. If an investigation determines that there has been a breach of the rule, the commissioner can sometimes recommend a particular sanction to the legislature, such as declaring a member’s seat vacant.”<sup>132</sup> The Honourable Gregory Evans, former chief justice of the Supreme Court of Ontario, became the first permanent Ethics Commissioner. This was the first time in Canadian history a government made such an appointment.<sup>133</sup>

A fourth major factor was that the New Democratic Party, the new government of Ontario, announced in their November 1990 Throne Speech that they intended to provide protection for whistleblowers.<sup>134</sup> The Rae government was the first in Canada to declare its public intention of improving protection to whistleblowers.<sup>135</sup>

When NDP leader Bob Rae was in opposition, he often criticized the Liberal’s conflict-of-interest legislation as not being an adequate method for the prevention of potential conflict of interest situations. Therefore, Premier Rae, in 1990, amended the conflict of interest guidelines to include the families of the Ministers and their assistants. Furthermore, it required those members of the cabinet and parliamentary assistants to dispose of “any assets, liability or financial interest which causes or could appear to

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<sup>132</sup> Greene and Shugarman, p. 129.

<sup>133</sup> Kemaghan. “Rules are not Enough...”, p. 177.

<sup>134</sup> Ontario Government Legislative Assembly. *Official Report of Debates*. Toronto, Ont.: Hansard Reporting Services, November 20, 1990, p. 2099.

<sup>135</sup> Kemaghan. “Rules are not Enough...”, p. 188.

cause a conflict of interest; and all business interests.”<sup>136</sup> These guidelines were interpreted and enforced by the Premier, not the Ethics Commissioner. This may lead to potential conflict of interest situations for the Premier since he or she would be enforcing these guidelines in respect to his or her own party members. The Premier would have to publicly expose the conflict of interest that one of his or her Ministers had been participating in, which in turn may lead to negative publicity for the Premier and his or her political party.

The Conflict-of-interest Act was later renamed the Members’ Integrity Act under the Rae government in 1994 and again placed under the enforcement of the ethics commissioner. However, the title of the “Ethics Commissioner” was changed to “Integrity Commissioner” to reflect the changes in the Act. This Members’ Integrity Act prohibits MPPs and cabinet ministers from using their public office position to further their private interest or improperly benefit the private interests of someone else or to use information not available to the general public for this purpose.<sup>137</sup>

The Ethics Commissioner’s office has an annual expenditure of \$200,000 and on average handles about one hundred inquiries per year. “It is remarkable that in eight years, there have been fewer allegations of conflict of interest than in 1986, the year prior to the introduction of the original conflict-of-interest guidelines. This attests to the usefulness of an independent ethics commissioner who can advise the elected members about how to avoid conflict of interest in their individual situations.”<sup>138</sup>

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<sup>136</sup> Ontario. *Premier’s Conflict of Interest Guidelines*. Toronto, Ont.: Office of the Premier, December 12 1990, s. 1.

<sup>137</sup> Greene and Shugarman, p. 133.

<sup>138</sup> Greene and Shugarman, p. 139.

## **Other Related Issues**

There are a few issues related to the introduction of the whistleblowing legislation in Ontario that should be mentioned. One issue was the role that the media played in having the government introduce this legislation. A second issue is the criticism that the Ontario government received by establishing the Members' Integrity Act in 1994. The third related issue is the private sector's response to the government's concern over ethical behaviour and conduct. Lastly, it is important to recognize how the opposition plays a role in the present government by proposing whistleblowing legislation.

The first related issue is the role that the media played when the government introduced whistleblowing legislation. As discussed, the Ontario governments in the past two decades have been plagued with scandals. The print media have been tremendously effective in stimulating and maintaining the public's interest in ethical issues over the years. Extensive publicity about unethical behaviour, especially conflict of interest, involving officials in Ottawa has also stimulated and reinforced concern about ethics in the Ontario government.<sup>139</sup> The public's concern about ethics has put immense pressure on the parties at election time to make promises that their party will put into place guidelines that will ensure the public officials conduct themselves ethically. There was some public support for individual whistleblowers that were retaliated against by being fired after he or she exposed the wrongdoing of the government. These cases were often well documented in the media. The public believed that the whistleblower should be protected against such retaliation and sympathized with the whistleblower since it often served the public's interest to have the wrongdoing exposed.

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<sup>139</sup> Kemaghan. "Rules are not Enough...", p. 183.

A second issue was the criticism that resulted from the passing of the Members' Integrity Act. It was argued by Ian Scott, Ontario's attorney general in 1988, that the Members' Integrity Act was unnecessarily strict and was a direct result of the governments being pressured by an overly cynical public that had been misled by exaggerated media stories about political corruption.<sup>140</sup> Greene and Shugarman also argued that the Act prevented and limited many people from various backgrounds from entering into politics simply because they could not own any businesses.<sup>141</sup> Others argued that politicians should not have any businesses so that all of their attention and focus will be on their elected position. Most critics believed that this Act was relatively mild, but did acknowledge the potential for danger of over-regulation. However, some commentators believed that the criticism that erupted from the passing of the Members' Integrity Act and the fallout of this legislation during the 1990 election resulted in the Rae government postponing their introduction of the whistleblowing legislation till 1993. Many people, both in the private and public sectors, were upset with the limitations this Act placed upon officials.

Another related issue is the response of the private sector to the government's concern about ethical conduct. The private sector in Ontario has responded to both the public and government concern about ethical conduct by adopting codes of ethics, providing workshops on ethics for employees, and emphasizing and rewarding ethical leadership in the organizations.<sup>142</sup> The legislation that the Ontario government was planning on introducing for whistleblowing protection was only for the public sector.

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<sup>140</sup> Greene and Shugarman, p. 135.

<sup>141</sup> Greene and Shugarman, p. 136.

<sup>142</sup> Kemaghan. "Rules are not Enough...", p. 183.

Therefore, many organizations in the private sector had a limited investment in whether the government passed such legislation. However, the private sector was largely not supportive of the Members' Integrity Act since it forced any private sector person who was interested in entering into politics to give up any and all businesses. In the past, politicians that owned businesses could put those holdings into a 'blind trust' when they entered into politics. However, the new legislation does not have the option of a 'blind trust' for business owners. Many within the private sector saw this as an extremely prejudicial Act and as an unnecessary limitation that would not solve the wrongdoing that was occurring in the government. It is this author's opinion that the current law is too strict. 'Blind trusts' should be mandatory and are an effective approach to eliminating potential conflict of interest situations for people entering politics. It is my recommendation that the Members' Integrity Act should focus more specifically on defining ethical and unethical conduct of politicians.

Some commentators have also argued that the private sector was not supportive of the Whistleblower's Protection legislation because they feared that it might lead to similar legislation being introduced for the private sector in the future. The related False Claims Act in the United States allows for whistleblowers to sue private organizations, and the private sector would not be supportive of any potential for major lawsuits and fines.

The fourth issue is the role that opposition parties play in the introduction of whistleblowing legislation. "The pattern in Ontario has been for opposition parties to proclaim their capacity for higher levels of ethical performance than the governing party, to develop 'new and improved' rules when they come to power, and then to see ministers

and their political staff become involved in serious ethical problems once in power.”<sup>143</sup> This pattern has been demonstrated in the 1985, 1990 and 1995 elections. Opposition parties want to help enforce the belief in the public that their present government is unethical and therefore, should be replaced with their more ethical party. In order to convince the public that their party is more ethical, the campaigning party often makes promises of the introduction of new legislation that will ensure the ethical conduct of their government. This will supposedly help to rebuild the public’s trust in the government.

### **The Proposed Whistleblower’s Protection Legislation**

There are many factors and issues that led to the Rae NDP government introducing the Whistleblower’s Protection legislation as Bill 117 in 1993. Some of these pressures were supportive of the legislation, while others were adamantly opposed. It is important to examine the legislation that was proposed.

In 1986, the OLRC advocated for whistleblowing protection legislation to be introduced in the Ontario government and made recommendations for the legislation based on the United States federal whistleblowing legislation. After the Throne Speech in 1990, the Rae government had the Management Board Secretariat do a report that analyzed the United States federal whistleblowing protection legislation and the present needs for protection of whistleblowers in the Ontario government.<sup>144</sup> The OLRC and the Management Board Secretariat both recommended the creation of an Office of Special

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<sup>143</sup> Kernaghan. “Rules are not Enough...”, p. 187.

<sup>144</sup> Management Board Secretariat, pp. 1-3.

Counsel (OSC). This would be modeled similarly to the federal OSC in the United States.

Honourable Bob Mackenzie, Minister of Labour, introduced Bill 117 on November 4, 1993. Bill 117 was introduced to revise the Crown Employees Collective Bargaining Act, to amend the Public Service Act and the Labour Relations Act, and to make related amendments to other Acts. The intent of the Act was to protect the Ontario Government employees from retaliation for disclosing allegations of serious government wrongdoing, and to provide a means for making those allegations public.<sup>145</sup>

The following paragraphs describe the Whistleblowers' Protection Act that was assented on December 13, 1993. The objectives of the whistleblower protection legislation were to protect the whistleblowers from retaliation and to ensure that the wrongdoing disclosed by the whistleblower was responded to appropriately. Whistleblowers could choose to disclose the wrongdoing by either informing a Special Counsel, an independent agency that would be established to receive such allegations, or deciding on their own which channel was best for them. If the whistleblower decided to choose his or her own channel, he or she could expose the wrongdoing to the media, MPs, opposition parties, police, ombudsman, etc. The whistleblower could rely upon the common law 'whistleblower's defence' to avoid any charges for unauthorized release of confidential information as long as he or she acted in good faith. There is some question as to how one would prove that he or she acted in good faith since it is not defined.<sup>146</sup>

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<sup>145</sup> Legislative Assembly of Ontario. *Official Report of Debates*. Toronto, Ont.: Hansard Reporting Services, November 4, 1993, p. 3963.

<sup>146</sup> Ontario. *Crown Employees Collective Bargaining Act: Whistleblowers' Protection Act*. Toronto, Ont.: Queen's Printer, December 1993, chapter 38, pp. 693-695.

The Lieutenant Governor in Council would appoint a lawyer as a Special Counsel for a renewable five year term. The Special Counsel would have two main objectives. One would be to receive allegations of wrongdoing in the strictest confidence, and to provide advice and guidance regarding the allegations. The potential whistleblower could report any allegation of wrongdoing in either confidentiality or anonymity, and he or she could receive advice without any fear of retaliation. The second objective would be to act as a safe conduit for disclosure of wrongdoing and, where appropriate, to ensure that an agency responds to allegations of wrongdoing.<sup>147</sup>

The Special Counsel would ensure that the allegation of wrongdoing represented: a violation of a statute, regulation or rule; or mismanagement, waste of funds, or abuse of authority; or a danger to the health or safety of employees and/or the public; or other wrongdoing of a similar nature, and which should be disclosed in the public interest.<sup>148</sup> If this were the case, the Special Counsel could take further action by requiring the head of the provincial agency to prepare a report on the matter, which could later become public. The Special Counsel could also advise the whistleblower that they feel the allegation is groundless and/or that it may be more appropriate to bring the allegations to the attention of another party, like the police or ombudsman.

The legislation recommended that all Crown employees be included in the protection of whistleblowers. Furthermore, the legislation recommended that a statutory right of grievance be established in the Public Service Act for when a whistleblower

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<sup>147</sup> Management Board Secretariat, pp. 10-12.

<sup>148</sup> Management Board Secretariat, p. 12.

suffers retaliation. The Crown Employees Grievance Settlement Board or the Public Service Grievance Board would hear this grievance.<sup>149</sup>

Although the Ontario Whistleblowing Protection Legislation was passed in 1993, it has never been implemented because neither the Rae nor the Harris governments have taken the steps to appoint a counsel. It has been argued that both governments have not implemented the legislation because the governments fear that a great deal of wrongdoing will be exposed to the public. Opposition members alleged in 1996 that Conservative Premier Mike Harris used funds donated by his constituency association to pay for his golf club membership and a number of other personal expenditures. This could be one of the reasons why the whistleblowing protection legislation has not been enacted. Premier Harris may be intimidated that the legislation may lead to his resignation.<sup>150</sup>

### **Summary**

It is easy for opposition parties to criticize the present government's ethical conduct and make campaign promises of implementing radical change of ethics in the government. Keeping those campaign promises once elected is a very complex and tedious task for a new government since there are many issues involved with the introduction or implementation of new legislation. "Not only in Ontario, but in other Canadian governments, politicians have found that the practical realities of governing make it difficult to adhere to the ethical standards they have demanded of others."<sup>151</sup>

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<sup>149</sup> Ontario. *Crown Employees Collective Bargaining Act: Whistleblowers' Protection Act*, pp. 701-703.

<sup>150</sup> Greene and Shugarman, p. 140, 202.

<sup>151</sup> Kernaghan. "Rules are not Enough...", p. 184.

If the Ontario government proceeds with its announced plans for implementation of the Whistleblower's Protection legislation, this could have a watershed effect on the management of whistleblowing in Canada by providing a model for action in other governments.<sup>152</sup> Ontario would be the first government that would have adopted a modified form of the whistleblowing legislation of the United States. It is important to critically analyze the United States whistleblowing legislation in order to better understand if and how that legislation could be adopted into a Canadian context.

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<sup>152</sup> Kernaghan. "Whistle-blowing...", p. 36.

## CHAPTER FOUR - The American Model of Whistleblowing Legislation

### Introduction

John Stuart Mill wrote over a century ago:

*The proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which anyone considers questionable; to censure them if found condemnable. and if the men who compose the government abuse their trust, or fulfill it in a manner which conflicts with the deliberate sense of the nation, to expel them from office.... This is surely ample power, and security enough for the liberty of the nation.<sup>153</sup>*

Federal employees are an important party that, like elected representatives, watches over the government to ensure that it is acting with integrity and honesty. Whistleblowers need to be given adequate legal protection if they are to expose the wrongdoings, to the public or external parties, that are occurring in one of the agencies of the government and/or an external organization that is violating the law, rules or regulations of the government.

The American public has been generally supportive of the government providing protection for employees who act in the public's interest by disclosing conduct by their employer that constitutes a breach of law or regulation, or that which is otherwise contrary to public policy.<sup>154</sup> The public's growing support and encouragement for the government to increase whistleblowing legislation has been heightened and linked to

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<sup>153</sup> G. Calvin Mackenzie. *American Government: Politics and Public Policy*. New York, N.Y.: Random House Inc., 1986, p. 134.

<sup>154</sup> David Johansen. *U. S. Legislative Protection for Public Sector Whistleblowers*. Ottawa, Ont.: Library of Parliament, Research Branch, 1989, p. 1.

major media-laden scandals that have occurred throughout the history of the American government.

This chapter will first examine the major factors that led the American government to establishing the legislation that provides protection for whistleblowers. Secondly, it is important to review the various federal statutes that make provision for protection for whistleblowers. Next, the Whistleblower Protection Act will be explored in detail. The fourth section will look at the False Claims Act that provides compensation for whistleblowers when they sue private organizations. Lastly, this chapter evaluates the American federal statutory protection for whistleblowers.

### **Major Factors Leading to Whistleblowing Legislation**

There were many factors that led the American government to be the leader in developing legislation for whistleblowers in their country. The first factor was the situation with patronage employees of the late eighteenth century. A second major factor was the evolution of Congress over the years. It was Congress' responsibility to investigate the allegations of illegal or improper conduct by the Executive Branch. Congress often ignored these allegations and these shortcomings were greatly demonstrated to the public in the Watergate scandal. This scandal, which was the last major factor, put immense pressure on the following government to introduce whistleblowing legislation that would provide protection for people who exposed wrongdoing in the government.

The first major factor was that the American government was primarily staffed with patronage employees prior to 1883. The person up for election would promise jobs for key support by leaders in the community and Cabinet positions for support from

members within his or her party. These are just some of the patronage examples of the times. This patronage led to an administration that was in the hands of incompetent political hacks, and corruption was rife throughout the government. Some of the federal employees who were trying to expose corruption to the public were quickly silenced by being fired, threatened, transferred, harassed and occasionally killed. In 1881, President Garfield was assassinated by an angry, rejected job-seeker. Chester A. Arthur, the next President, wanted to prevent any more assassinations from occurring, especially his own. The Pendleton Act, in 1883, established the civil service system that was based on a merit principle for the hiring of federal employees. This Act merely helped to decrease the amount of patronage that was occurring in the federal government. The issue of patronage is as relevant today as it was in the 1880s.<sup>155</sup>

A second major factor was the evolution of Congress. The United States of America uses a presidential form of government. Therefore, Congress is responsible for the administrative oversight. Congress establishes various committees to scrutinize the decisions and actions of the executive branch. "The importance of administrative oversight derives from a view that was widely held among the authors of the Constitution: that the American people need not only be served by their government but protected from it as well."<sup>156</sup> A citizen can even make a complaint to Congress, and it will act as an Ombudsman and investigate the claim(s). The four techniques that Congress uses in administration oversight are oversight hearings, special investigations, personnel controls and financial controls.

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<sup>155</sup> Mackenzie, p. 239.

<sup>156</sup> Mackenzie, p. 135.

One example of a Congressionally mandated structure or organization that Congress established to help scrutinize is the Office of Government Ethics (OGE). The OGE is a branch of the Office of Personnel Management that is charged with ensuring that the executive branch officials retain a high standard of conduct. Furthermore, the OGE will review the allegations of wrongdoing of both the officials and the agencies. If the allegations are proven, OGE is limited to ordering “corrective action” to resolve the matters. The OGE cannot take punitive action against employees nor initiate criminal proceedings.<sup>157</sup> Another example of a Congressionally mandated organization is the General Accounting Office (GAO). GAO conducts investigations into any uses or administration of government funds or programs.

Max J. Skidmore and Marshall Carter Tripp argue that the “Congressional oversight of the Executive is often chaotic, uncoordinated and frequently confused.”<sup>158</sup> They contend that Congress is not an unbiased investigator, for it often fails to check on the most flagrant examples of wrongdoing and mismanagement when the Congressional majority party is the same as the President’s party. This could be attributed to the personal whims, biases, technical and research limitations, and personal connections of the members of the staff personnel to the members of the Executive Branch. Congress will need to look at ways to help eliminate the pressure placed on staff by the Executive Branch officials to dismiss the investigations and therefore, the allegations when the Congressional majority party is the same as the President’s party. As well, Congress will

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<sup>157</sup> W. John Moore. “The Office of Government Ethics: Vigilant Watchdog or Toothless Terrier”, in *The Reference Shelf: Ethics in Politics and Government*. Ed. Anne Marie Donahue. New York, N.Y.: H. W. Wilson Company, 1989, pp. 84-85.

<sup>158</sup> Max J. Skidmore and Marshall Carter Tripp. *American Government: A Brief Introduction*. New York, N.Y.: St. Martin’s Press, 1993, p. 141.

need to ensure that there are sufficient human, technical and research resources available to adequately investigate the allegations against the Executive Branch.<sup>159</sup>

The committees and organizations that Congress has established to scrutinize the Executive Branch cannot take punitive action towards the officials. However, the legislators themselves can take action against the wrongdoing of public officials. The House of Representatives may impeach an official by calling for a majority vote to impeach the person. The Senate sits as a court in this situation, and both parties are allowed to present their case. Once the cases have been presented, a vote is held to decide if the charged person is guilty of the alleged charges. Two-thirds of the vote is required to convict an official and conviction automatically results in the person's removal from office. This is the only way that Congress can remove Executive Branch officials that are committing wrongdoings.<sup>160</sup>

Article II, Section 4, of the Constitution specifies 'treason, bribery, or other high crimes and misdemeanors' as impeachable offenses. Since there is no clarification as to which acts constitute high crimes or misdemeanors, Congress gets to subjectively decide what it means in each situation. Most scholars agree that the impeachable offenses should include an act(s) involving illegality or unconstitutional behaviour. An official should not be impeached for unpopular behaviour.<sup>161</sup>

Impeachment is a difficult, slow and cumbersome process that rarely results in the impeachment of the accused.<sup>162</sup> Andrew Johnson, in 1868, was the only President that

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<sup>159</sup> Skidmore and Tripp, p. 141.

<sup>160</sup> Skidmore and Tripp, p. 142.

<sup>161</sup> Wilson, p. 241.

<sup>162</sup> Gary Wasserman. *The Basics of American Politics*. Toronto, Ont.: Little, Brown and Company, 1985, p. 119.

was ever impeached. However, the Senate did not convict Johnson. Opponents argued that the impeachment was entirely partisan for some people detested Johnson's 'soft' policy toward the South after the Civil War. There was much controversy surrounding the charges since many supporters viewed the charges as not referring to high crimes or misdemeanors. For example, charges are not in themselves crimes.<sup>163</sup>

There have continued to be scandals of illegal, immoral and illegitimate activities of the government since its conception in the United States. Some of these scandals have led the public to push the American government into establishing laws that would protect the people that blow the whistle on the government and act on behalf of the public's interest. The third major factor that led to the whistleblowing legislation was the Watergate scandal.

The Watergate affair happened during the first Nixon administration. The trials, investigations, hearings and committee deliberations related to the allegations of illegal acts arising from President Nixon's involvement in a cover-up were conducted over two years. The allegations against President Nixon were based on his effort to cover up his subordinates' involvement in the burglary of the Democratic National Committee headquarters in the Watergate building.<sup>164</sup>

The House Judiciary Committee had made a recommendation for the impeachment, and that vote was pending, when President Nixon resigned in August 1974.<sup>165</sup> It was clear to the public that Richard Nixon resigned the presidency in the face

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<sup>163</sup> Wilson, p. 241.

<sup>164</sup> Wilson, p. 241.

<sup>165</sup> Skidmore and Tripp, p. 181.

of most certain impeachment by the House and conviction by the Senate.<sup>166</sup> This scandal led the public to be very skeptical of integrity of the officials in office.

The Ethics Act permits the Attorney General to ask the Special Federal Court for an Independent Counsel when there is reason to believe that an official has violated a criminal law. Congress and President Carter believed that the Ethics in Government Act of 1978 and the establishment of the Independent Counsel would restore the public's confidence in the objectivity of investigations involving allegations of wrongdoing on high-level ranked government officials.<sup>167</sup>

Impeachment of officials is still a timely topic. There have been several federal judges that have been impeached throughout the years since Nixon. According to J. Q. Wilson, writing in 1994, the last federal judge was removed from office in 1986 for lack of integrity.<sup>168</sup> A case in point is the fact that President Bill Clinton is presently being investigated for his dealings with the Whitewater company, his potential perjury under oath for having an alleged affair with Monica Lewinsky and his pending criminal charges for sexual harassment. All of these allegations could result in President Clinton being impeached. Furthermore, most of these allegations have resulted from people blowing the whistle on the President's conduct and exposing it to the public.<sup>169</sup>

Potential impeachment of high-ranked public officials can act as a catalyst for reform regarding ethical conduct in government. However, the majority of people in the government are public servants who cannot be impeached. The Merit Systems

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<sup>166</sup> Wasserman, p. 119.

<sup>167</sup> Robert N. Roberts. "White House Ethics", in Donahue, p. 105.

<sup>168</sup> Wilson, p. 241.

<sup>169</sup> John F. Harris. "Clinton Finds No Escape," *Washington Post*, Wednesday March 25, 1998, p. A02.

Protection Board will internally discipline the average public servant for most wrongdoing that he or she has committed. Potential whistleblowers need to be informed of their rights and obligations regarding the exposure of wrongdoing in the public sector.

### **Specific Federal Statutory Provisions for Whistleblowers**

It is important to examine all of the federal statutes that have potential provisions for whistleblowers. Legislation can originate in either the House of Congress or simultaneously in the Congress and the House of Representatives. Only a Senator or a Representative may in the Senate and the House introduce a bill. The Senate and House of Representatives must approve the laws in identical form. "Lawmaking involves the comprehensive information gathering, prolonged discussion, complex and often tedious negotiation and political bargaining amongst adversaries."<sup>170</sup> The legislation for protecting whistleblowers has evolved over time in America.

Agencies within the government normally resist external demands and pressures for change and adamantly attempt to defend their own territory. This is done sometimes at all costs through illegal, immoral and illegitimate means. At times, Congress and the President have found it easier to create a new agency than to force an existing agency to implement programs it opposes. This type of approach has led to duplication, waste, corruption and collusion between agencies in the government.<sup>171</sup>

The public relies on whistleblowers to expose this duplication, waste, corruption and collusion. Over the years, there have been various statutes that have been enacted

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<sup>170</sup> Mackenzie, p. 120.

<sup>171</sup> Theodore J. Lowi and Benjamin Ginsberg. *American Government: Freedom and Power*. New York, N.Y.: W. W. Norton and Company, 1994, p. 279.

that provide general protection for whistleblowers and others that provide protection for employees exercising rights conferred by specific statutes. This section will look at the most relevant statutes, in chronological order, that will provide protection for people contemplating whistleblowing.

One of the relevant statutes for whistleblowers is the Freedom of Information Act. This Act was passed in 1967, but was significantly amended in 1974. The practice for federal employees of disclosing information on a 'need to know' basis was changed to a 'right to know' policy. This helped whistleblowers establish a legal defense for disclosing information about the illegal, immoral or illegitimate activities of the government. Whistleblowers could argue that the public had a 'right to know' about the wrongdoing.<sup>172</sup>

Next, the House and the Senate each passed their own codes of ethics in 1977. These codes were very similar in nature. The codes of ethics made it mandatory for the Senators and the Representatives to provide a personal financial audit each year. These new codes of ethics were created based on the assumption that financial transactions were associated with improper influence. Improper financial transactions could occur both inside and outside of the government. For example, a bribe to a public official could be paid from the opposition party, an individual, an interest group or a corporation. However, these codes of ethics did not deal with the issue of improper bargaining that occurs between government officials.<sup>173</sup>

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<sup>172</sup> Kenneth Kernaghan. *Freedom of Information and Ministerial Responsibility*. Toronto, Ont.: Commission on Freedom of Information and Individual Privacy, 1978, p. 33.

<sup>173</sup> Wilson, pp. 211-212.

Thirdly, the Ethics of Government Act of 1978 established a special prosecutor, later known as Independent Counsel, with the authority to investigate allegations of wrongdoing by the executive branch officials.<sup>174</sup> The Independent Counsel was part of the Office of Special Counsel. This Independent Counsel would prosecute the parties in the government that retaliated against the whistleblower, once the whistleblower filed a formal complaint with the Merit Systems Protection Board.

A fourth relevant statute is the Civil Service Reform Act. The Civil Service Reform Act in 1978 abolished the old Civil Service Commission and replaced it with the Office of Personnel Management (OPM). OPM is responsible for the screening and hiring of federal employees. The Civil Service Reform Act created a Merit Systems Protection Board (MSPB) that hears complaints from federal employees. This is the authority to which the whistleblower would make a complaint about any retaliation or reprisal that may have been directed toward the individual in his or her agency or organization.<sup>175</sup>

MSPB can provide limited protection for “whistleblowers” who expose the wrongdoings of their agency. The ninth principle of the United States Code, a legal framework governing personnel practices at a federal level, states that employees who speak out about government wrongdoing should be protected from retaliation. However, this protection cannot prevent the work environment from becoming hostile and negative for the whistleblower. Furthermore, MSPB cannot prevent the whistleblower from being transferred to another department, potentially even in a different state. It is extremely

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<sup>174</sup> Lowi and Ginsberg, p. 84.

<sup>175</sup> Skidmore and Tripp, p. 193.

difficult for a civil servant to be terminated for any reason. However, it is rare that a whistleblower will ever advance in their career within the public sector after exposing the wrongdoing.<sup>176</sup>

This Act helps to provide the most common means of appeal for federal employees who suffer retaliation by officials for blowing the whistle on wrongdoing. The whistleblower must provide legitimate documentation to support his or her allegations of wrongdoing by government officials, and must file a written complaint of retaliation with either the MSPB or the Office of Special Counsel. The whistleblower does have one other recourse, for the individual, under the collective bargaining agreement, would have access to grievance procedures.

The Civil Service Reform Act states that in order to receive protection, an employee must have adequate documentation proving there has been a violation of a law, rule or regulation; or there has been some gross mismanagement, waste of funds, abuse of authority; or substantial and specific danger to public health and safety.<sup>177</sup> This Act did not provide protection for whistleblowers that disclosed confidential information that was prohibited by law or specifically required by the Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.<sup>178</sup>

Whistleblowers do not always want to have their identities linked to allegations so that they become known to the public and the accused. Individuals want the wrongdoing to end but fear the consequences they may endure as a result of blowing the whistle. The Office of Special Counsel (OSC) is one of the solutions to this problem. A whistleblower

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<sup>176</sup> Skidmore and Tripp, p. 194.

<sup>177</sup> United States. *Civil Service Reform Act*. Washington, D.C.: Congressional Record, 1978, section 2302.

<sup>178</sup> Johansen, p. 6.

can use the Office as a mechanism to anonymously blow the whistle on the wrongdoing of an agency without the fear of retaliation and identification.<sup>179</sup>

“The Civil Service Reform Act of 1978 established ‘hot lines’ for whistleblowers. In addition, the Act helped to create agencies and sub-units to protect federal employees against retaliation when blowing the whistle on wrongdoing in their agencies.”<sup>180</sup> Other agencies have established confidential lines through which anonymity of the whistleblower can be protected. For example, the GAO established a whistleblowing hotline in 1979. This hotline was seen as a mechanism for combating fraud, waste and abuse in federal expenditures. It has also been argued that “hotlines” act as a deterrent for federal employees and even agencies as a whole to commit fraud.

However, it is not always possible for the whistleblower to remain anonymous and have the immoral, unethical or illegitimate activities end. Therefore, there needs to be legislation that offers clear protection for whistleblowers when they expose the wrongdoing.

### **The Whistleblower Protection Act**

The movement for the passing of specific legislation that would protect whistleblowers began in the mid nineteen-eighties. Critics contended that the OSC was not an advocate for whistleblowers. This was substantiated by a 1985 GAO report that indicated that OSC in 1984 had turned down ninety-nine percent of all of the whistleblowers’ complaints of retaliation that they felt they had endured from the

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<sup>179</sup> Johansen, p. 5.

<sup>180</sup> Marcia P. Miceli, Janet P. Near, and Charles R. Schwenk. “Who Blows the Whistle and Why.” *Industrial and Labor Relations Review*, vol. 45, no. 1, October 1991, p. 119.

wrongdoer(s).<sup>181</sup> Reports like this helped to substantiate the criticism that the Office of Special Counsel rarely protected the whistleblower from the retaliation that the person would experience in his or her agency. Subsequently, legislation was introduced to provide protection for the whistleblower that reported wrongdoing.<sup>182</sup>

President Reagan made an executive order during his presidency that stated federal employees had to sign Standard Form 189. Standard Form 189 held employees liable for the disclosure of classified information or information that could be deemed classifiable. The federal employees had to ask their supervisors if the information was classifiable before they could disclose the information to any other person, internally or externally. This led to a silencing process of whistleblowers for it gave the government the ammunition to both fire the employee in retaliation for breaking confidentiality and to bring charges upon the whistleblower for leaking confidential classified information.<sup>183</sup>

Bill 508 was introduced in 1988 to eliminate two other impediments that made it extremely difficult for whistleblowers and other victims of prohibited personnel policies to win their cases for redress. First, the Bill was to modify or overturn all inappropriate administrative and judicial determinations in an effort to make it more probable that whistleblowers could win their cases. Second, the Office of Special Counsel was appointed as the advocate for whistleblowers or other victims of prohibited personnel practices. The OSC would no longer act to defend and protect the merit system in the government.<sup>184</sup>

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<sup>181</sup> Rosemary Chalk. "Making the World Safe for Whistle-Blowers." *Technology Review*, vol. 91, no. 1, 1988, p. 55.

<sup>182</sup> Chalk, p. 55.

<sup>183</sup> Chalk, p. 57.

<sup>184</sup> Johansen, pp. 10-11.

This Bill was resoundingly passed by 418 votes to nil in the House of Representatives and by voice vote in the Senate, only to be vetoed by President Reagan on October 27, 1988. There was no opportunity for Congress to override the President's veto since the veto had occurred after the end of the Congressional session.<sup>185</sup> The Democrats argued that President Reagan was fearful of the ramifications this Bill may have had for him in regards to his conduct in office.

In 1989, the Attorney General negotiated Whistleblower Protection Act (WPA), which was at that time seen as a compromise between Congress and the Bush administration.<sup>186</sup> The Civil Service Reform Act was amended by the WPA, Public Law 101-12, on April 10, 1989. WPA was introduced for the same reasons as Bill S508.

The WPA states:

*The purpose of this Act is to strengthen and improve protection for the rights of federal employees, to prevent reprisals, and to help eliminate wrongdoing within the government by:*

1. *mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices: and*
2. *establishing:*
  - a) *that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices:*
  - b) *that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and*
  - c) *that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of the prohibited personnel practices remains the paramount consideration.*<sup>187</sup>

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<sup>185</sup> Johansen, p. 10.

<sup>186</sup> Johansen, p. 12.

<sup>187</sup> United States. *Whistleblower Protection Act*. Washington, D.C.: Congressional Record, April 1989, section 2.

This Act encourages civil servants to report the abuses of trust and illegality while protecting the person from the retaliations within their own agencies.<sup>188</sup> The intention of the Act was to provide a 'positive climate for whistleblowing.'<sup>189</sup>

An individual being retaliated against because he or she blew the whistle on their agency often uses WPA. The employer must prove that its actions were legitimate on independent grounds against said employee. When the whistleblower files a reprisal complaint, the allegations of wrongdoing are simultaneously forwarded to both the law enforcement and federal agencies.<sup>190</sup>

One result of WPA was that the Office of Special Counsel was created as an independent agency instead of a rather than a branch of MSPB. A second result of WPA is that the Special Counsel is required to maintain the anonymity of the whistleblower unless the individual consents to the disclosure of his or her identity or "unless the Special Counsel determines that the disclosure of the individual's identity is necessary because of the imminent danger to public health or safety or the imminent violation of any criminal law."<sup>191</sup> The Civil Service Reform Act could disclose the whistleblower's identity if it was "necessary to carry out the functions of the Special Counsel." The changes in WPA will hopefully help to alleviate the fear of retaliation and identity for the whistleblower exposing the wrongdoing.

A third result was that the WPA lowered the burden of proof for reprisals for whistleblowers while increasing the burden of proof for federal agencies defending the

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<sup>188</sup> Lowi and Ginsberg, p. 279.

<sup>189</sup> Kernaghan, *Freedom of Information and Ministerial Responsibility*, p. 8.

<sup>190</sup> Ettore, p. 22.

<sup>191</sup> Johansen, p. 7.

specific personnel decisions. The whistleblower has to prove by a preponderance of evidence that the whistleblowing was the contributing factor in the reprisal they experienced from their employer. The employer must provide 'clear and convincing' evidence that the organization would have taken the same course of action towards the person in the absence of whistleblowing. This helps to override case law that was requiring whistleblowers to prove that their exposing the wrongdoing was the 'predominant' or 'significant' motivator in the employer taking the reprisal actions.<sup>192</sup>

WPA is a federal statute that has been adopted by a few states. The state courts have drastically varied on the issue of providing protection for the whistleblower. The greatest degree of variance can likely be attributed to whether the whistleblower refused to participate in wrongful activity, and reported illegal activity or wrongful conduct.<sup>193</sup>

Whistleblowers usually have documentation to support the allegations of wrongdoing that they have reported. Therefore, the whistleblower may be exposed to charges of theft, violation(s) of confidential information, or misusing "classified" information as mentioned in violation of Standard Form 189. In recent years, an Anti-Gag Statute was passed to ban the spending of government funds to enforce the secrecy agreements.

Many federal laws have been amended to include a clause for protection of whistleblowers. These are collectively known as the whistleblower laws. "The basic goal is to provide a means of redress for people who have been punished by their employers for advocating adherence to government regulatory standards."<sup>194</sup> There are

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<sup>192</sup> Johansen, p. 12.

<sup>193</sup> Elletta Sangrey Callahan and John W. Collins. "Employee Attitudes Towards Whistleblowing: Management and Public Policy Implications." *Journal of Business Ethics*, vol. 11, 1992, p. 940.

<sup>194</sup> Chalk, p. 53.

provisions in some federal statutes that regulate against retaliation when the whistleblower makes a complaint to a specified public authority about their employer's breach of statutory duties. The statutes can help bring reinstatement, back pay, compensatory damages and attorney's fees.<sup>195</sup> Some of the federal laws include Occupational Safety and Health Act, the Water Pollution Act, and the Energy Reorganization Act. In April 1997, the United States Code was amended to increase protection for members of the Armed Forces.

Some states have adopted other statutes to provide protection for whistleblowers. "At least 26 states have provided direct support for whistleblowers by recognizing a 'public policy exception' to the traditional doctrine that employers can fire workers without cause."<sup>196</sup> This has helped to provide protection from retaliation for whistleblowers in the public sector.

There have also been agencies established to provide support to whistleblowers. The Government Accountability Project (GAP) in Washington, D. C., is the primary clearinghouse and resource centre for whistleblowers. People contemplating blowing the whistle need a "safe" place where they can go to find out information about their legal responsibilities and rights. GAP will also help the individual and his or her family deal with the enormous strain that this will place on their lives, and allow the whistleblower to feel that he or she is not alone. Another non-profit agency is the Fola Group Inc. The Fola Group assists individuals that are seeking to expose government fraud, waste and abuse, while protecting client "anonymity" and "confidentiality."

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<sup>195</sup> Johansen, p. 3.

<sup>196</sup> Chalk, p. 53.

## **False Claims Act**

The American government contracts with businesses for goods and services costing billions each year. The False Claims Act was established to prevent these companies from cheating the government on those goods and services. Whistleblowers can help put an end to this by disclosing the illegal and illegitimate activities of their employers. The False Claims Act provides monetary compensation for individuals that expose the wrongdoing of agencies or corporations.

There were major amendments to the False Claims Act in 1986. "Any person with knowledge of fraud or false claims against the government can bring a lawsuit in his or her name and in the name of the United States. The whistleblower does not have to have first-hand knowledge of the fraud; the person can have learned information from anyone else, like a friend, relative, co-worker, competitor, etc. The information must simply not be publicly disclosed and a case can not already be started on the same matter."<sup>197</sup> The False Claims Act is relevant in cases regarding the federal government, but does not cover state government or private cases.

The False Claims Act can be applied even when the fraudulent party does not directly cheat the government, but rather the party cheats the company that is receiving money from the government for goods or services or grants. The whistleblower first files the case in the federal court, where it is reviewed to determine if a valid case exists. The government has sixty days to evaluate the claim. The government will then determine whether both the whistleblower and the government will bring on the lawsuit. If the

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<sup>197</sup> United States. *False Claims Act*. Washington, D.C.: Congressional Record, 1986, section 1-2.

government does not accept the case, then the whistleblower can still bring forth the claim in his name only.

The reward can be substantial if the whistleblower wins the case. The company will have to pay the government a penalty of three times the amount it gained in fraud. If the case was in the name of the whistleblower and the United States, the whistleblower can receive between fifteen to twenty-five percent of the penalty that is paid to the government. If the case was in the name of the whistleblower only, the person can receive between twenty-five to thirty percent of the penalty. The amount a company may have to pay the government can easily range into the hundreds of millions or even billions of dollars. Therefore, the whistleblower could be looking at receiving an enormous reward or compensation for blowing the whistle on a particular situation.

### **An Evaluation of the Whistleblowing and False Claims Legislation**

It is important to evaluate the American legislation that makes the provisions for whistleblowers. The question is whether these statutes provide adequate protection and compensation for whistleblowers. Do these laws provide whistleblowers with a path of recourse if they endure retaliation from their employers? This section will closely examine the statutes that have been explained in the previous sections of this chapter.

The Ethics of Government Act was specifically geared towards situations in which there was illegal behaviour in the public sector. However, many abuses of the public office do not involve criminal or illegal activity. The Ethics of Government Act did not solve the potential credibility crisis in the public's eye because non-criminal

conduct can damage the public trust as much as criminal conduct.<sup>198</sup> Some critics do not agree with that claim, stating that the public is tolerant of some immoral and unethical, but not illegal conduct. A case in point is President Clinton's vote of confidence (i.e. sixty percent favorability rating and sixty-seven percent job approval) by the American public in the face of his alleged perjury of his alleged affair with a White House intern, Monica Lewinsky.<sup>199</sup>

The Civil Service Reform Act provided a great deal of protection for whistleblowers. However, the Act needed to establish the Office of Special Counsel as an independent agency rather than an arm of a government branch, MSPB, to conduct the investigations into the allegations. It is unclear as to whether the Office of Special Counsel acts as an arm of the government.

*"There is a need for checks against the abuses that are possible by the government. The mechanisms for investigation and prosecution of official abuse of such powers lie within the same agencies that may have abused power. Reforms have been proposed to establish defenses against government lawlessness. Unfortunately, no institutional arrangements have yet emerged that would effectively guard against the subversion of free and honourable government by those sworn to uphold it."*<sup>200</sup>

There is still some concern that Congress will exert too much influence over the Special Counsel in regards to particular cases. A hypothetical example would be that the Democratic government makes a formal complaint that the Republican Congress has used the Office of Special Counsel to purposely make any allegations against the present Democratic government a priority for the agency.

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<sup>198</sup> Roberts in Donahue, p. 105.

<sup>199</sup> Kathleen Hall Jamieson. "Facing Up to It: What Those Polls Are Telling Us." *Washington Post*, Sunday March 22, 1998, p. C01.

<sup>200</sup> Skidmore and Tripp, p. 182.

There is much public and judicial support for whistleblowing in cases where criminal laws are being broken. It is much harder to determine if whistleblowing was appropriate in cases where officials used their position in ways that are not clearly illegal, but rather immoral.<sup>201</sup> Most of the legislation excludes the protection for whistleblowers when they expose immoral or unethical activities. The legislation does not include immoral and unethical activities because immoral and unethical behaviour is rather subjective in nature. This legislation is less than ten years old and the courts are still interpreting it. It is my contention that the legislation may in the future broaden its protection of whistleblowers to include some immoral and/or unethical activities.

Some critics argue that having a dollar incentive for whistleblowers under the False Claims Act could lead to bounty hunting and profiteering by employees in certain situations. It is true that there may be a large settlement for the whistleblower and the person may be protected if there is reasonable belief of retaliation in the work environment. However, the process of blowing the whistle puts immense strain on the whistleblower's family, career, health and finances (for example, paying lawyer fees). While there is a chance that the whistleblower will receive a large settlement, there is an equal chance that the person will lose almost everything in their life. Losing almost everything would include their career, possessions due to bankruptcy, marriage, family life, etc. This is the reason why people rarely blow the whistle without carefully weighing all the variables in the situation.

The False Claim Act has also been criticized as being counterproductive to the WPA because it provides incentive for employees to bypass internal reporting systems.

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<sup>201</sup> Wilson, p. 211.

The Federal Sentencing guidelines require corporations to set up these internal reporting systems. Critics argue that the internal whistleblowing mechanisms in private organizations should be adequate for any potential whistleblower and that there is no need for the False Claims Act.<sup>202</sup> This criticism does not hold much weight since internal review procedures do not exist in the majority of organizations in the private sector. Furthermore, many internal reporting systems are ineffective and can actually help to cover up the indiscretions and illegal behaviour of the company. These may be particularly true when a wrongdoer in a private organization has an accomplice in a government department.

The recent amendments to the False Claims Act have stipulated time constraints on reporting the wrongdoing. If the person does not blow the whistle immediately, the whistleblower has less of a right to share in eventual damages. There is also a statute of limitation for asking protection under the WPA of one month from the retaliation of dismissal or any other act. The whistleblower is often not knowledgeable of the legal rights he or she is entitled to in that particular situation. Most whistleblowers have not gone through the process of blowing the whistle on wrongdoing, and therefore should be allowed a reasonable time period in which to learn about their legal rights and to deal with the enormous strain of the situation. There is much debate as to what a reasonable statute of limitation would be given the situation, yet little hard evidence on either side as to why it should be one month versus three months or more.

One of the biggest stumbling blocks is that the whistleblowing legislation has evolved inconsistently. There is no coherent body of law that protects all whistleblowers

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<sup>202</sup> Ettore, p. 23.

at the state, municipal, federal and corporate levels.<sup>203</sup> The United States needs to standardize the definition, procedures and compensation for whistleblowers between all federal laws with clauses for whistleblowing. Statutes of limitation should be equal, instead of ranging from one month to one year. I would propose that the statute of limitation be a minimum of one year. Furthermore, there should be one agency that receives all the allegations from whistleblowers and has the responsibility for investigating the claims. Each federal law usually names a different agency for reporting the wrongdoing, and this agency has changed over the years. It is very difficult for a person contemplating blowing the whistle to know what procedure he or she is to follow as outlined in the federal laws since it changes frequently from one agency to another.

There needs to be a permanent implementation of the federal Anti-Gag Statute that would ensure that WPA and other related statutes would supersede any statutes regarding provision for non-disclosure or other secrecy and confidentiality contracts. Non-disclosure agreements create work environments that leave the employees helpless to expose the violations, fraud or illegality they are witnessing. An individual contemplating blowing the whistle would have to recognize that he or she would face potential charges for exposing the wrongdoing to either internal or external authorities. There needs to be some legal protection for the whistleblowers that expose the wrongdoings of an agency with legitimate documentation by disclosing confidential or classified information.

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<sup>203</sup> Ettore, p. 22.

## Summary

The American form of whistleblowing legislation is far from providing ideal protection for whistleblowers. However, the legislation has continued to evolve over time. The present legislation does not provide clear parameters for protection for the whistleblowers. Each case is different. The question then becomes whether the law for legal protection for whistleblowers has peaked or if it will continue to expand in the future where it might state under what circumstances such protection will be given to whistleblowers.<sup>204</sup>

There is much insight the Canadian government can gain from examining the evolution of the whistleblowing legislation within the American government. The American government has been struggling with the issue of whistleblowing for over twenty years. Since the Canadian government is a different form of government, there will need to be an examination as to what, if any, United States legislation the Canadian government should emulate.

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<sup>204</sup> Callahan and Collins, p. 940.

## **CHAPTER FIVE – Applying the American Legislation to the Canadian Context**

### **Introduction**

“Governments are paying increased attention to the various means by which ethical conduct can be maintained and nurtured.”<sup>205</sup> One of the means available for encouraging and supporting ethical conduct is whistleblowing protection legislation. The Canadian government can look at the American whistleblowing protection legislation as one example of whistleblowing legislation.

The first section of this chapter will look at the basic similarities and differences between the American and Canadian governments. Secondly, it is important to outline the strengths and weaknesses of applying the American model of whistleblowing legislation to the Canadian context. Lastly, this chapter will analyze the main costs and benefits for the private and public sector in applying the American whistleblowing legislation.

### **Basic Similarities and Differences between American & Canadian Governments**

Two-thirds of North America consists of the United States and Canada. While a few commentators argue that the only commonality between these two countries is that they inhabit the same continent, it is imperative that the basic similarities and differences between the American and Canadian governments be examined. We will only examine these basic similarities and differences between these two countries due to the limited length of the thesis.

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<sup>205</sup> Kemaghan and Siegel, p. 317.

The American and Canadian governments originally come from English heritage and tradition. Both countries are founded upon a constitution. United States has a presidential government where the political power is shared by three separate branches of the government. These branches are the Executive Branch, the Legislative and the Judicial. Congress (House of Representatives and the Senate) is elected for a specific term, and the president is elected separately as well for a specific term. Major elections must take place only at constitutionally prescribed times in a regular cycle. This election inflexibility may lead to a “gridlock” where the Executive and the Legislative disagree over an issue, partly as a result of the fact that the two branches are controlled by different political parties. The citizens may have to wait a considerable time for the election to voice their opinion on the matter. This election system does help to institutionalize stability in the leadership of the country, but it also institutionalizes “gridlock.”

Canada has a parliamentary government where the political power is concentrated in the legislature, i.e. a fusion of powers. The legislature chooses the executive that is led by the Prime Minister and there is no separation of powers. If there is serious disagreement between the executive and the parliament, the result is a vote of non-confidence which will lead to the dissolution of Parliament and then the issue is presented to the people at new elections to determine whether the former leadership retains power or surrenders it to another party. Elections have to occur within a maximum length of time, but it is at the discretion of the Prime Minister as to when the election is called. This may lead to short terms of leadership for certain Prime Ministers that make decisions that are not supported in large part by the legislature or the public. The

parliamentary system allows the citizens to participate in deciding the major directions of government policies by ensuring through the election process that the elected party represents their views and continues to follow through on the winning party's broad platform campaign promises. Thus, the system is built to avoid "gridlock."

Two political parties, the Republicans and the Democrats, have normally dominated American politics. It is argued that there is only a relatively small difference between the parties, for the Republicans are slightly more conservative than the Democrats.<sup>206</sup> By contrast, the Liberal Party, the Progressive Conservative (PC) Party and the New Democratic Party (NDP) have dominated historically in Canada, providing a somewhat broader range of political party differences for voters to consider. In recent years, the Reform Party and the Bloc Quebecois Party have become more involved in the federal government politics. Since there is a large consortium of parties that the citizen can elect, there is no one constant opposition party for an individual party. This is very different from the United States where each party knows who their opposition party will be after each election. This political environment can play a factor in the strategy that a political party develops each year.

In April 1982, Canada adopted the Charter of Rights and Freedoms. The Charter of Rights and Freedoms is somewhat similar (recognizing that there are differences) to the United States Bill of Rights. It has been argued that Charter of Rights and Freedoms has led the Canadian society into having a more and ever increasingly "rights-based" culture like the Americans. This "rights-based" culture in Canada might lend support to

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<sup>206</sup> Mackenzie, p. 63.

the creation of legislation for protecting whistleblowers, as it is the whistleblower's right to be protected from retaliation.<sup>207</sup>

United States and Canada's populations are extremely diverse in culture and ethnic backgrounds. The governments must persistently try to create a united whole of distinctive and often disagreeing cultures. This is accentuated by the countries' vast amount of land that contributes to the same ethnic background group having different characteristics and goals depending upon which part of the country the group is located in. For example, the Francophones, the French Canadians of Manitoba, have many different traditions, rituals and even dialect versions than the French speaking people that live in Quebec.

Critics argue that "every nation has its own political culture, its own structure of beliefs and values that both drive and direct political action. A political culture reflects a fusion of ideas and experience that emerge and accumulate over time."<sup>208</sup> United States and Canada may both be multi-cultural countries, yet both are vastly different in their own national culture. "The unique political culture of a particular country will play a large role in determining the structure of its political system and the rules under which it conducts its politics."<sup>209</sup>

Both the American and Canadian governments are concerned about ethical conduct because there is a poor public image of politicians and public office holders in

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<sup>207</sup> F. L. Morton and Leslie A. Pal. "The Impact of the Charter of Rights on Public Administration." *Canadian Public Administration*, vol. 28, no. 2, Summer 1985, pp. 221-222.

<sup>208</sup> Mackenzie, p. 12.

<sup>209</sup> Mackenzie, p. 35.

general.<sup>210</sup> For example, a poll conducted by the Maclean's Magazine in 1993 showed that seventy-three percent of the Canadian participants said that their faith in politicians to serve the public interest had decreased significantly in the last few years.<sup>211</sup> Commentators have argued that a few publicized allegations and evident acts of wrongdoing by government lead the public to make assumptions and stereotypes about all government officials being corrupt.<sup>212</sup> There is no evidence that the behaviour of government has become less ethical in the past years.<sup>213</sup> Furthermore, there is no evidence that the behaviour of the government is less ethical than the behaviour of private citizens or organizations. However, this does not diminish the public pressure that the American and Canadian governments are facing to improve the ethical conduct of their governments and officials, and whistleblowing can help to maintain and promote ethical and legal conduct in the private and public sectors.

Wilson suggests that "the American government is the leakiest in the world. The bureaucracy, members of Congress, and the White House staff regularly leak stories favorable to their interests."<sup>214</sup> H. L. Laframboise argues that the practice of whistleblowing by public servants is much more prevalent in the United States than in Canada because of different values and behaviour patterns in the two countries.<sup>215</sup> Other commentators argue that the explanation for this lies in the structure of the American

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<sup>210</sup> R. Murray Lindsay, Linda M. Lindsay and V. Bruce Irvine. "Instilling Ethical Behavior in Organizations: A Survey of Canadian Companies." *Journal of Business Ethics*, vol. 15, no. 4, April 1996, p. 393.

<sup>211</sup> Brian Segal. "Why We Will No Longer Leave It to the Leaders." *Canadian Speeches*, vol. 7, no. 1, pp. 42.

<sup>212</sup> Starr and Sharp, p. 19.

<sup>213</sup> Kernaghan and Langford, p. 10.

<sup>214</sup> Wilson, p. 89.

<sup>215</sup> Laframboise, pp. 75.

government. Separate departments often share power and this leads one department to compete with another department of the government for power and funding. This can lead one department to leak stories to the media about another department in order to decrease public support for that department. Wilson argues that this is less likely to occur in Canada because the Prime Minister has the centralized power. The Prime Minister does not need to leak information to gain an 'upper hand' over the legislative assembly. Furthermore, the legislative assembly has very little information to be a good source for leaks.<sup>216</sup>

This section has shown that there are some major similarities and differences between United States and Canada. These provide the basis for the examination of applying the American legislation to the Canadian Context.

### **Strengths and Weaknesses of Applying the American Legislation to Canadian Context**

“At present, there is no federal or provincial legislation in Canada that provides the same broad protection for the public sector whistleblowers as in the United States at the federal level.”<sup>217</sup> The American legislation provides a model for how Canada could adopt legislation that would provide protection for whistleblowers in the public sector. It is important to examine some of the strengths and weaknesses of applying this American legislation to the Canadian context.

One strength is that both the United States and Canada are first world Western democratic countries. The belief is that the citizens should be free to hold governments

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<sup>216</sup> Wilson, p. 89.

<sup>217</sup> Johansen, p. 28.

accountable for their actions, and remove the officials from office who are not acting in the public's best interest. This whistleblowing protection legislation provides protection for whistleblowers that inform the public of the wrongdoing that is occurring in the public sector. It is assumed that it is in the public's best interest to terminate any wrongdoing in the government. Furthermore, this would include organizations that have contracted with the government, and therefore the public has a vested interest in how "their" tax dollars are being spent or abused.

The second related strength is that the social pressures for legislation in the two countries are similar in regards to whistleblowing.<sup>218</sup> As mentioned earlier, both countries have been under increasing pressure by the public to ensure their government is acting ethically. "During the past twenty-five years in particular, public concern about responsibility in government has been stimulated in Western democratic states, including Canada, by events involving illegal or unethical activities by both politicians and bureaucrats."<sup>219</sup> These widely publicized scandals often become the catalyst for reform in the government.

A third strength is that there is a major similarity between the United States' and Canada's common law (leaving aside Quebec's civil law). Both countries' judicial systems cite case law from other common law countries and from each other. The United States' common laws help shape the Canada's judiciary decisions, and vice versa. It therefore stands to reason that the American legislation and consequent, common law

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<sup>218</sup> Brooks, p. 19.

<sup>219</sup> Kemaghan and Siegel, p. 352.

could easily be applied to the Canadian context and may find ultimate appeal and support in the Canadian courts.

The fourth strength is that the American legislation provides a model for adopting similar legislation. There are many advantages of passing statutes over written codes. The American legislation ensures the enforcement of the law, the 'due process' for all parties concerned about the alleged wrongdoing, clarifies the potential sanctions, and establishes the reference point for parties seeking legal interpretation of their rights and obligations.<sup>220</sup> Furthermore, it is a useful instrument in administrative control. Many critics have acknowledged that the meaning of the oath of secrecy is too vague to provide sufficient guidance for public servants when they are in a situation where they are witnessing wrongdoing.<sup>221</sup> The legislation can help to provide legal clarity to the issue of whistleblowing.

Another strength is that the American legal framework was expressly intended to provide a "positive climate for whistleblowing."<sup>222</sup> This intention of the legal framework needs to be the same intention for the Canadian government when developing legislation regarding whistleblowing protection. The intention of the Canadian government should also include the promotion and encouragement of ethical conduct.

The sixth strength of applying the American legislation is that it provides an example of the Office of Special Counsel (OSC). It is argued that the Canadian government needs to establish a similar independent agency when adopting whistleblowing protection legislation. A confidential allegation and appeal mechanism

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<sup>220</sup> Starr and Sharp, p. 59.

<sup>221</sup> Management Board Secretariat, p. 7.

<sup>222</sup> Management Board Secretariat, p. 8.

could be processed through this independent agency that would supplement the legislation on the process for whistleblowing and the protection from the retaliation of superiors.

The OSC needs to be established for this legislation for a number of reasons. One reason is that OSC ensures that the process is effective, fair and just to all parties. The whistleblower may report the wrongdoing to OSC anonymously, identifying himself or herself or with the request to withhold their identity from public. OSC investigates the allegations to ensure the validity of the allegation. This helps to prevent any unnecessary damage to the reputation of the accused. Once the investigation is completed, the allegation is either dropped or charged. In either case, OSC ensures that the whistleblower does not receive any retaliation for disclosing the potential wrongdoing. One of the questions arising is whether the public has a right to know the whistleblower's identity or does the whistleblower have a right to withhold it.

The second reason is that the OSC would serve to legitimize the disclosure of serious government wrongdoing.<sup>223</sup> Canada would then have the means to track, monitor and evaluate the wrongdoing that is occurring in the government from one year to the next and from one party to another. This could be invaluable information to the government in the prevention of unethical behaviour, creation of new ethical guidelines and the education of employees regarding ethical conduct.

One weakness in applying this American legislation is that the structure of the governments in the United States and Canada are vastly different. The legislation that would be used in a presidential government would have to be adapted for a parliamentary

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<sup>223</sup> Johansen, p.31.

government. Other provisions would have to be put in place since there is a completely different government structure. However, the OLRC did not indicate any problems with directly applying the American whistleblowing protecting legislation into the Ontario government.

A second related weakness is that the legislative and political environment of the two countries is distinct. As discussed, the American government has a separation of powers and the Canadian government has a fusion of powers. There are two dominant political parties in United States and there are five significant political parties in Canada. These legislative and political environments will directly effect what and for whom the whistleblowing protection legislation will be developed; how and when it is introduced by a political party; the process for the passing of the legislation; and what the stumbling blocks and opposition may be in having the legislation passed.

The third weakness is that the American population is much more prone, than are Canadians, to litigate. "The criminal conviction of officials does not help the immediate victims of governmental crime; a civil suit for damages is suppose to serve this aim."<sup>224</sup> The American people have a culture that encourages people to sue for compensation when they feel they have been treated unfairly. Research has found that two-thirds of all the lawyers in the world live in United States, and that the country takes a rather litigious approach to matters.<sup>225</sup> Therefore, it is argued that this type of American legislation may encourage Canadian citizens to bring forth more lawsuits. As discussed, the Canadian society has grown to having a more "rights-based" culture like the Americans with the

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<sup>224</sup> Thompson, p. 91.

<sup>225</sup> Starr and Sharp, p. 60.

adoption of the Charter of Rights and Freedoms and this may lend support to the argument.

Some commentators have observed that as the 'ethics machinery' in the United States has been strengthened and extended, it has coincided with a continuing increase in the reporting of allegations of misconduct and subsequent lawsuits.<sup>226</sup> This does not conclude that this is necessarily a negative or positive consequence of the American legislation. It is my contention that this whistleblowing protection legislation has simply permitted the civil servants to disclose the wrongdoing that was occurring in the private and public sectors.

Another major weakness is that the American legislation applies only to the civil servants. It provides a very limited application to the public sector and does not address the private sector at all. The OLRC departed from the United States approach after their analysis of the American legislation by recommending that all Crown employees be included in the protection of the legislation. It was argued that these employees could obtain evidence of wrongdoing and therefore should be protected.<sup>227</sup> One issue that is not addressed is whether a public servant will be protected against retaliation if he or she blows the whistle on the wrongdoing of a public official's spouse or family. Therefore, this American legislation may not be extensive enough in its application.

A fifth weakness is that this American legislation "stands in contrast to what, more typically, has been the Canadian approach of an incrementalist response to particular problems as they have arisen by developing policies or rules, normally relating

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<sup>226</sup> Langford and Tupper, p. 13.

<sup>227</sup> Management Board Secretariat, p. 14.

to public administration instead of law enforcement.”<sup>228</sup> This will be discussed in the next section as it relates to how the legislation will affect the codes of ethics that are in the private and public sectors.

The sixth weakness is that there is limited information as to the effectiveness of this whistleblowing protection legislation in United States, as there has been little research conducted on this. In addition, the courts in the United States have not been consistent in recognizing when a public servant is justified in blowing the whistle. “The type of wrongdoing justifying the whistleblower’s defence has not been authoritatively defined by the courts.”<sup>229</sup> This American legislation has not provided sufficient guidance for the courts on what justifies whistleblowing for the civil servants. This would still be a issue if this were applied to Canada, for this legislation generally provides protection for civil servants when there has been an illegal act committed as defined by the Criminal Code. It does not adequately define when there is an unethical, immoral or illegitimate act in the work environment.

“There is much disagreement as to how serious the wrongdoing must be to justify the ‘disloyalty’ of disclosure.”<sup>230</sup> The American legislation does not provide clear guidance as to when blowing the whistle is justified. It is still up to the potential whistleblower to confidentially inquire at the OSC as to whether a particular situation justifies the blowing of the whistle. There should be a note in the Oath of the Office or codes that defines what official misconduct and unethical/illegal behaviour is so that the

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<sup>228</sup> Starr and Sharp, p. 59.

<sup>229</sup> Management Board Secretariat, p. 11.

<sup>230</sup> Kernaghan and Siegel, p. 510.

public servants are aware when they take their office. Presently, there are no provisions like this in the Oath of Office.

The American legislation does not clearly outline the disciplinary action that may be taken against the person(s) that allegedly committed the wrongdoing that was reported by the whistleblower. Furthermore, the American legislation does not specify how the allegations are to be investigated or the criteria to be used to determine if there is merit to a particular allegation. This leads potential whistleblowers to making the conclusion that 'nothing will be done' when they report the alleged wrongdoing.

Critics argue "that holding public servants accountable (objectively responsible) through an arsenal of formal controls is an important, but inadequate, means of promoting responsible behaviour."<sup>231</sup> The American legislation does not put a strong emphasis on educating the civil servants and officials about ethical conduct. The establishment of the legislation is somewhat limited and ineffective if the civil servants are not educated as to the protection they will receive through the legislation and what process they should follow when contemplating blowing the whistle. In addition, the legislation has time limits on the protection a whistleblower can receive from retaliation. Many whistleblowers are not aware or educated about these legal time limits and therefore are not protected from the backlash.

Lastly, some critics argue that the United States needs this whistleblowing protection legislation because their governmental controls are often non-existent and rarely enforced in regards to fraud in contracts with the private sector. It is argued that the Canadian government takes a strong role in enforcing the contracts it has with private

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<sup>231</sup> Kemaghan and Siegel, p. 369.

sector to ensure that there is no fraud occurring, and therefore, the country does not need to apply such legislation.<sup>232</sup> Canada's Auditor General disagrees with this statement, and recommends that legislation needs to be in place to ensure that the private sector must "tell the whole story" on how they are receiving and spending the government's money.<sup>233</sup> Auditor General L. Denis Desautels makes the statement in his 1993 Annual Report that "Overall, the federal bureaucracy, despite recent reforms, continues to mismanage itself and billions of dollars and to hides these excesses and errors from public scrutiny."<sup>234</sup>

The clear and written whistleblowing protection legislation can be useful, but it will not be sufficient to resolve the ethical dilemmas and situations of all potential whistleblowers. It is crucial to establish an independent agency that can provide guidance to a potential whistleblower about a particular situation involving an alleged wrongful act.

### **The Analysis of the Main Benefits and Costs of Applying the American Legislation for the Private & Public Sectors**

What are the main benefits and costs for applying the American legislation for the private and public sectors in Canada? The question becomes what impact would this American legislation have on these sectors? The American legislation includes three main entities that have not yet been established in Canada. The three entities are the WPA, the OSC and the False Claims Act. Many of the benefits are intertwined with the

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<sup>232</sup> Laframboise, p. 75.

<sup>233</sup> L. Denis Desautels. *Report of the Auditor General of Canada to the House of Commons*. Ottawa, Ont.: Auditor General of Canada, November 23, 1993, pp. 122-124.

<sup>234</sup> Barrie McKenna and Ross Howard. "Mismanagement Remains Critical Problem, Auditor-General Says." *Globe and Mail*. Toronto, Ont.: January 20, 1994, p. A1.

various costs of this legislation. The benefits and costs are limited for the private sector since the American legislation is primarily aimed at the public sector.

One main benefit to the public sector is the amount of money that the government can recover from fraud by establishing a False Claims Act. In the American legislation, the government is usually paid back three times the amount of money by the organization that committed the fraud. This becomes the standard amount recovered when an organization in the private sector is caught committing fraud against the government. Therefore, this could also be seen as a cost to the private sector since this legislation would require the average organization caught committing fraud to pay a higher, fixed percentage fine than compared to the present Canadian legislation concerning fraud. Organizations that are regularly paying these fines in order to continue to conduct business would not be supportive of this legislation since it increases the amount of money they would have to pay.

A related question is whether a person who blew the whistle should receive a percentage of the recovery or savings of the fraud money. The organization that committed fraud would have to pay this amount of compensation in addition to the fine they would be required to pay the government. Obviously, the organizations that do commit fraud would again not be supportive of this increase in the amount they would have to pay. A monetary reward could induce profiteering and bounty-hunting among the organization's employees. It may also undermine the internal whistleblowing process that an organization established in the private sector since the monetary compensation

may encourage potential whistleblowers to first disclose the allegations of wrongdoing to external parties.<sup>235</sup>

Another benefit is that the legislation would require the establishment of offices specifically charged with discovering and preventing crime in an organization and protecting officials who seek to report criminal activity there. The public sector would need to establish the equivalent of the OSC that would be charged with this task. The OSC provides a safe conduit for an employee to discuss the alleged whistleblowing in his or her organization without the fear of retaliation. It is much clearer for potential whistleblowers when the criminal code has been broken. The situation is much harder to determine if there has been wrongdoing when officials use their position in ways that are not clearly illegal, but may be unethical and/or immoral.<sup>236</sup>

Consequently, the government could require all organizations in the private sector that it contracts with to also establish a similar office in an attempt to prevent fraud. Dennis Thompson argues that “failure to maintain and protect institutions that help expose crime would itself be a crime.”<sup>237</sup> The absence of whistleblowing protection legislation speaks volumes to both the public and private sector employees in the acceptance of the continuance of the wrongdoing in the organization.

The OSC would help to keep the damages of false allegations to a minimum. This can be invaluable to both the private and public sectors. Public opinion and support can greatly affect each sector, and if that is lacking, there can be dire consequences for both. A hypothetical example would be when there are public allegations in the media by

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<sup>235</sup> Brooks, p. 21.

<sup>236</sup> Wilson, p. 211.

<sup>237</sup> Thompson, p. 71.

a public servant that an organization received a government contract because their Chief Executive Officer was “greasing” the palms of the department Minister. This public allegation could force the organization to shut down due to the loss of market share it enjoyed and the Minister may not be re-elected to office. Later, the allegation may be proven to be false. Having an internal whistleblowing process might have prevented the consequences that resulted from this public allegation.

Governments in Canada have a tendency to simply add ethical codes when there has been a major scandal or leaking of information.<sup>238</sup> Written codes about public service ethics are not panaceas for preventing unethical behaviour. There are a number of criticisms of governments that rely solely on codes of ethics. First, the codes are often too broad to be applicable to all situations. How does a person determine if the wrongdoing justifies disclosing confidential information because it may be in the public’s best interest? Next, the codes are very difficult to enforce, and therefore have little meaning for employees. Lastly, the codes are very subjective in nature.<sup>239</sup>

By contrast, some commentators have argued that well-crafted codes can be a positive force. First, governments often establish these codes to regain public trust and confidence in the ethical behaviour of the public officials. Next, these codes can help to reduce the uncertainty that employees face when deciding if there has been unethical or illegal behaviour. Another benefit is that these codes may be used for administrative control by holding employees accountable to certain conduct. Lastly, these codes can act as a deterrent for people considering committing unethical or illegal acts. By nature,

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<sup>238</sup> Kernaghan and Langford, p. 85.

<sup>239</sup> Kernaghan and Siegel, p. 361.

these written rules can be very helpful in promoting ethical and responsible behaviour among employees.<sup>240</sup>

Presently, there are no standard codes of ethics for governments across Canada. The federal government should create a code of conduct that could ideally become a model for the provincial and municipal governments. Furthermore, this code should stipulate what kinds of behaviours are prohibited and indicate the majority of penalties associated with any violations of these behaviours. The Criminal Code establishes a universal, national basic code of conduct for public servants that states some actions and behaviours that are illegal and illegitimate in all parts of Canada.<sup>241</sup> The whistleblowing protection legislation should be implemented to support and provide protection to employees as they hold their fellow employees accountable to this code. These codes of ethics are ineffective if the government cannot hold the public servants accountable to them. Since the public service unions have been urging the government to protect their members from retaliation for whistleblowing, it is therefore presumed that the unions would be in favor of the whistleblowing protection legislation.

“When clear ethical standards are in place, evidence suggests the majority of elected officials in Canada do behave ethically.”<sup>242</sup> There are two major problems with the standards for ethical behaviour. One is that the codes are either non-existent or not clear. The other is that there is a lack of an internal mechanism for scrutiny of unethical conduct in the government.<sup>243</sup> The public sector may have mixed opinions as to whether

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<sup>240</sup> Kernaghan and Siegel, p. 361-364.

<sup>241</sup> Langford and Tupper, p. 9.

<sup>242</sup> Greene and Shugarman, p. 31.

<sup>243</sup> Greene and Shugarman, p. 31.

this internal mechanism is an asset or a liability. It depends a great deal on whether the present political governing party is acting ethically.

Michael Starr and Mitchell Sharp argue that it is “the responsibility of public service management to ensure that procedures are in place to handle conflict of interest questions and that the methods by which officials may seek advice and have decisions reached in resolving conflicts are well known and understood.”<sup>244</sup> Ideally, the public sector should support the whistleblowing protection legislation since it would help to fulfill this responsibility. Although the whistleblowing legislation will provide guidance, it is still ultimately a person’s responsibility to ensure he or she is acting ethically in a work environment.

One of the largest benefits for the public sector of applying the American legislation to the Canadian context is the potential increase of public support for the governing political party. This legislation may help to alleviate the public pressure to create legislation that will protect the public servants that, acting in the public’s interest, blow the whistle on wrongdoing. However, it is also possible that the public may view the political party as being a very corrupt government once reports are released from OSC in the absence of comparative reports from prior political parties. This legislation may lead to both positive and negative feedback from the public.

“While business people support the use of whistleblowing mechanisms in government organizations, for the purpose of reducing fraud, conflicts of interest, waste and other abuses of the public trust, they are less enthusiastic about having such

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<sup>244</sup> Starr and Sharp, p. 51.

mechanisms in their own organizations.”<sup>245</sup> Some of the organizations are wary of the potential monetary fines they may have to pay under this legislation. However, it is the role of the government to ensure that the organizations in the private sector are acting ethically and legally.

This legislation may encourage the private sector to establish more internal whistleblowing mechanisms for promoting ethical conduct in their organizations. A number of large Canadian organizations have appointed ombudspersons and have undertaken to make their whistleblowing processes less risk-laden for both the complainant and the alleged wrongdoer.<sup>246</sup> The organizations should provide employees with a process to report their concerns about wrongdoing without jeopardizing their career and general well-being.<sup>247</sup>

As a result of this United States legislation, many American organizations in the private and public sectors have established hotlines for potential whistleblowers. Some critics argue that too many petty complaints would be received on a hotline to make it viable.<sup>248</sup> However, there has been no research evidence presented to substantiate this criticism.<sup>249</sup> Hotlines should be explained to staff as a mechanism that assists employees in maintaining the high standards of conduct that are expected of both employees and the organization as a whole. These hotlines for organizations can be administered either internally or through an external agency. People can receive direct information about

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<sup>245</sup> Leech, p. 79.

<sup>246</sup> Brooks, pp. 20-21.

<sup>247</sup> Leech, p. 81.

<sup>248</sup> Leech, p. 79.

<sup>249</sup> Dale L. Flesher and Thomas E. Buttross. “Whistle-blowing Hotlines.” *Internal Auditor*, August 1992, pp. 56-57.

whistleblowing and talk to the support person about their sensitive and confidential information.<sup>250</sup>

### **Summary**

There is growing, yet still modest, support in Canada for whistleblowing protection legislation which is similar to that in place in the United States.<sup>251</sup> There are some basic similarities and differences between Canada and the United States. Consequently, these make it impossible to simply introduce the identical American legislation regarding whistleblowing protection into the Canadian context. There needs to be modifications made to the American legislation to account for the differences, and uniqueness of Canada.

The American legislation does provide a model for Canada in regards to developing whistleblowing protection legislation. There are many things that can be learned from the success and failures of the American legislation. The next, and concluding, chapter will look at incorporating these into the proposed whistleblowing protection legislation in Canada.

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<sup>250</sup> Leech, p. 82.

<sup>251</sup> Kernaghan and Siegel, p. 511.

## CHAPTER SIX - Conclusion

### Introduction

Serious ethical deficiencies exist in Canadian politics because the infrastructures to support honest politics are partially built, neglected or non-existent.<sup>252</sup> All of the present related whistleblowing protection legislation in Canada has been passed as amendments to various Acts. The legislation is sparse, scattered and covers a broad range of unethical, illegal and illegitimate behaviour. It does not provide a clear outline for the proper process for blowing the whistle. Furthermore, there is little legal protection for those whistleblowers that disclose wrongdoing.

“In the eyes of many critics, modern democracy has deep flaws that lead to improper conduct. What is required is a democracy inspired and dominated by the norms of impartiality and fairness.”<sup>253</sup> The proposed whistleblowing protection legislation for the private and public sectors in Canada promotes, encourages and supports ethical conduct. The proposed modified form of the whistleblowing protection legislation is based upon the American model of the whistleblowing legislation. My recommendations also take into consideration the whistleblowing protection legislation recently passed by the Ontario government, which was based on American legislation.

The first section of this chapter will outline the proposed whistleblowing protection legislation for the public sector. Next, this chapter will discuss the formation of the Office of Government Ethics. A third section will explore the development of a False Claims Act. The fourth section will look at the proposed legislation for protecting

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<sup>252</sup> Greene and Shugarman, p. 194.

<sup>253</sup> Langford and Tupper, p. 12.

the whistleblowers in the private sector. A fifth section will analyze this proposed whistleblowing protection legislation and explore the issues surrounding the legislation. The last section will evaluate whether this proposed whistleblowing protection legislation should be introduced into the public and private sectors.

### **The Proposed Whistleblowing Protection Legislation for the Public Sector**

As has been argued earlier, Canada's federal government needs to adopt whistleblowing protection legislation that would be applied to all public servants, including all Crown Corporation employees in the federal government. There needs to be a comprehensive Act that will protect whistleblowers, thereby promoting and encouraging ethical conduct in the government. This section will describe the proposed whistleblowing protection legislation, known as the Canadian Whistleblowing Protection Act (CWPA) for the public sector.

The primary objectives of the proposed CWPA would be to protect the whistleblowers from retaliation; to outline the process for blowing the whistle; and to ensure that the wrongdoing disclosed was responded to appropriately. Whistleblowers will be encouraged by the CWPA to disclose illegality; improper conduct, waste and mismanagement of public funds, abuse of position, neglect of duty, improper use of funds, environmental damage, risks to public health and safety, and acts of omission. These parameters would need to be interpreted by the Federal Court of Canada. The Act outlines the process for whistleblowers to disclose wrongdoing, and the government authority that will receive and investigate the allegations of wrongdoing. This specificity of the process of exposing wrongdoing helps to provide legal protection for

whistleblowers and this will be discussed in greater detail in the next section of the chapter.

I am proposing, based upon the WPA, that the CWPA would state:

*The purpose of this Act is to strengthen and improve protection for the rights of public servants, to prevent reprisals, and to help eliminate wrongdoing within the government by:*

- 1. mandating that public servants should not suffer adverse consequences as a result of prohibited personnel practices; and*
- 2. establishing:*
  - a) that the primary role of the Office of Government Ethics is to protect employees, especially whistleblowers, from prohibited personnel practices;*
  - b) that the Office of Government Ethics shall act in the interests of the public and the public servants who seek assistance from the Office of Government Ethics; and*
  - c) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of the prohibited personnel practices remains the paramount consideration.*

Disclosing confidential information is one example of a prohibited personnel practice. The legislation will ensure that the government cannot terminate the whistleblower for exposing the government's unethical, illegal and illegitimate activities through the disclosure of confidential information. CWPA will provide legal protection when a public servant believes that it is his or her duty as a public servant to report the wrongdoing using the approach as outlined in IPAC's Statement of Principles as a model (see chapter two).

The legislation should state that a lawsuit may be brought against the government if a government entity takes any deemed negative or retaliatory action against an employee that made a protected disclosure of wrongdoing under the CWPA. An appropriate time limit for bringing forth the complaint of retaliation by a whistleblower

should be one year. The whistleblower needs adequate time to obtain legal guidance in regards to his or her rights, and seek the guidance of the OGE. As well, this takes into consideration the enormous emotional stress that the whistleblower is under in the situation.

It should be the responsibility of the employer to prove that any actions taken against the whistleblower were legitimate and defensible on independent grounds. The employer will have to provide convincing evidence that the organization would have taken the same course of action against the person in the absence of whistleblowing. This will help to override the case law that requires whistleblowers to prove that their whistleblowing was the 'significant' motivator in his or her employer taking reprisal action.

This author is proposing that the federal government's Code of Ethical Conduct be redrafted to incorporate other additional principles of ethical and unethical conduct. The Code of Ethical Conduct would be applicable and binding to all public office holders, and therefore, should be introduced and enacted as an Act. Furthermore, the code should be incorporated as a term or condition to all employment contracts with the Government of Canada. 'Public office holders' refers to ministers; parliamentary secretaries; Governor-in Council appointees; public servants; officers, directors or employees of federal boards, commissions, tribunals, Crown corporations and other agencies; officers and employees of the Parliament of Canada; and members of the Canadian Armed Forces and the Royal Canadian Mounted Police. In addition, each department, agency or crown corporation would develop more specific ethical guidelines that are relevant to their particular organization. These additional guidelines should be

consistent with the Code of Ethical Conduct. This Code of Ethical Conduct would ideally be a model for provincial and municipal governments.

A special amendment should be added to the Oath of Office. Elected politicians should be aware of the ethical conduct that is expected and required of them when they agree to take their position. This is another way to increase the awareness of public official's knowledge of what constitutes ethical and unethical behaviour.

There are a far larger number of public servants in government than politicians. Public servants exercise enormous power in the development, implementation, evaluation and administration of programs and services in the government. Politicians' ethical conduct is usually scrutinized and held accountable by the public at elections, whereas the public servants' ethical behaviour is usually handled as an internal human resource matter.<sup>254</sup>

It is imperative that the Official Secrets Act be amended to ensure that the government may not use an allegation of wrongdoing to bring forth charges against people that expose wrongdoing by disclosing confidential information. The Supreme Court of Canada has recognized that a public servant does not violate his or her 'Oath of Secrecy' when he or she releases confidential information surrounding a situation of wrongdoing. Therefore, the Official Secrets Act needs to be amended to recognize this ruling by the Courts since the literal interpretation of this Act still implies that any disclosure of information by public servants is prohibited, regardless of the circumstances. Non-disclosure agreements create work environments that leave the

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<sup>254</sup> Kemaghan. "Rules are not Enough...", p. 194.

public servants helpless to expose the government's unethical or illegal violations, fraud and/or illegitimate activities.

### **Office of Government Ethics**

There is presently no standard procedure, mechanism or government authority for handling whistleblowing within the public sector context. The CWPA specifies the process for whistleblowers to disclose wrongdoing and the government authority that will receive and investigate the allegations of wrongdoing. This second section will describe the proposed changes that will need to be implemented from the CWPA to ensure the allegations made by the whistleblower will be handled appropriately.

It is recommended that the Ethics Counsellors office be disbanded and that the Office of Government Ethics (OGE) be established. The OGE will need to have a clearer mandate, broader powers and more independence from the 'arm of the government' than is currently true of the Ethics Counsellor. The name change is being proposed to send a clear and direct message to both the citizens and the public servants that the government is concerned with unethical, illegal and illegitimate conduct. OGE will be an agency that is independent from the government and will report to a designated Commons committee.

The OGE would be primarily responsible for the investigation, advisory, enforcement and educational functions in regards to unethical, immoral, illegal and illegitimate behaviour for all public servants. It is important to clarify that while the OGE will only investigate the allegation, the Federal Court of Canada will deliberate on the allegations. The Federal Court of Canada would be the appropriate court since it hears cases involving claims against the Crown; claims by the Crown; claims involving the Crown; claims against or concerning officers or servants of the Crown; and

injunctions, judicial reviews and declaratory relief against federal boards, commissions and other tribunals.<sup>255</sup> The OGE will act as an enforcer by ensuring that government agencies or departments follow the proper process for filing reports about the alleged wrongdoing.

This Office will encourage consistency in the treatment of all whistleblowers across all ministries and agencies within the public sector. The OGE would protect public servants from retaliatory action if they disclosed information that revealed a violation of the law or regulation, mismanagement, waste of funds, abuse of authority, danger to health or safety, and other similar wrongdoing. Another responsibility of OGE would be to review policies around ethical issues and make the decisions as to when to allow exceptions to the rules where it is deemed appropriate. Furthermore, OGE should participate in the development of the supplemental ethical conduct guidelines for each department, agency and Crown Corporation to ensure they are consistent with the CWPA.

The head of the OGE should be the Special Ethics Counsellor. It is recommended that the incumbent of this position be a senior high court judge or lawyer with a well-known reputation for his or her integrity, ethics and fairness. The legal issues surrounding an allegation of wrongdoing demand highly technical legal expertise in order to ensure that the Special Ethics Counsellor is properly advising and advocating for the whistleblower in a situation. This chosen person must be above reproach from the government, public servants, opposition parties, the media and the general public. The

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<sup>255</sup> James John Guy. *How We are Governed: The Basics of Canadian Politics and Government*. Toronto, Ont.: Harcourt Brace Inc., 1995, pp. 215-216.

Special Ethics Counsellor should be appointed by Order-in-Council for a five year renewable term with the support of all parties in the Parliament.

There would be Ethics Counsellors reporting to the Special Ethics Counsellor that would aid in the carrying out of the duties of the OGE. It is recommended that these Ethics Counsellors be a mixture of experts from law (lawyers) and non-law fields (such as the social sciences). This will help to ensure that there is balance in the OGE of legal expertise and expertise in understanding what is in the public's interest regarding whistleblowing and wrongdoing.

The process for blowing the whistle would be as follows. A public servant would become aware of a situation that involves actual, potential or perceived illegal, unethical and/or illegitimate activities. The person could decide to call the Ethics Hotline to consult with an Ethics Counsellor as to whether this particular situation constitutes unethical, illegal or illegitimate behaviour. A public servant could also elect to make an identified or anonymous inquiry to the OGE in the strictest confidence. As well, the whistleblower can request to have his or her name kept confidential. The Ethics Counsellor could provide guidance and support to the public servant in regards to the proper procedure, legal rights, protection from retaliation, disclosure of confidential information, etc. that is established for the individual when there is evidence of wrongdoing. This helps the potential whistleblower make an informed decision as to whether they will disclose the wrongdoing. The Ethics Counsellor may also advise the whistleblower that they believe their allegation is groundless and/or that it may be more appropriate for the person to bring forth the allegations to the attention of another party, such as the police or ombudsman.

The OGE is modeled after the Human Rights Commission. OGE would initially ensure that the allegation of wrongdoing represented: a violation of a statute, regulation or rule; or mismanagement, waste of funds, or abuse of authority; or a danger to the health or safety of employees and/or the public; or other wrongdoing of a similar nature (i.e. unethical), and which should be disclosed in the public interest. This would hopefully help to screen and eliminate some of the false claims. Consequently, OGE would request a report from the department, agency or Crown corporation where the alleged wrongdoing occurred. This report would be due in thirty days. OGE would then give the documentation to the Federal Court of Canada to determine if there was evidence of wrongdoing. If there was, OGE would place both the agency report and employee's information and evidence in a public file unless making the information public would prejudice any police or other investigation. The department, agency or Crown Corporation may argue that the information is confidential and should not be disclosed to the public. OGE would then apply to the Federal Court of Canada for an order to release the information. It would be the court's duty to weigh the public interest in the disclosure against the asserted need for confidentiality.<sup>256</sup>

Once the report has been reviewed, the Ethics Counsellor would decide if the evidence merits a further investigation into the wrongdoing. The Ethics Counsellors would consult with the Special Ethics Counsellor to determine if such an investigation should be initiated. It must be the Special Ethics Counsellor's decision to investigate or not, without consultation with the Prime Minister or any other member of Cabinet. This will help to ensure that the Prime Minister or the Cabinet does not squelch any

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<sup>256</sup> Johansen, p. 31.

investigations for their personal and political gain. If a matter were so serious as to warrant police investigation, the present procedure for involving the police would be followed. The Ethics Counsellors would act as advocates for the whistleblower. OGE would also be responsible for ensuring that an agency responds appropriately to the allegations of wrongdoing and makes any necessary changes to rectify the situation.

Under this proposed legislation, an individual that is retaliated against for disclosing the wrongdoing may file a grievance with the Public Service Grievance Board. The person has the right to appeal the case to the Federal Court next, and then eventually, in rare cases to the Supreme Court of Canada.

The above outlined process for whistleblowing does not provide the whistleblower with the option of deciding to first bypass the internal OGE process and expose the wrongdoing to external parties. This CWPA specifies that a public servant must first access the internal OGE process by making an allegation. Whistleblowers may either identify themselves or request that their identity remains anonymous. Only after the initial allegation has been lodged with the OGE, would the whistleblower have the immediate choice to expose the wrongdoing to external parties, such as the media, MPs, opposition parties, police, ombudsman, etc. This would help to ensure that the whistleblower is acting in 'good faith.' There is also no time constraint on reporting the wrongdoing to the OGE.

Michael Starr and Mitchell Sharp argue that "what is striking about the role of ethics commissions or similar bodies is their ability to play a continuing and dynamic role in educating public servants, and indeed the general public, as to the nature of the rules

governing ethical conduct.”<sup>257</sup> OGE would be responsible for the development of the educational program regarding whistleblowing, ethical and unethical behaviour in the government. The educational program could include workshops, seminars, pamphlets, brochures, video tapes and an annual conference for the personnel officers in each department that is responsible for matters regarding ethical and unethical conduct. There is no point in developing this whistleblowing protection legislation if no public servant has ever heard of it.

Educational workshops would be mandatory for all public servants, regardless of their hierarchy level. These workshops would be designed by the OGE to outline the ethical conduct that is expected of public servants and describe the process for blowing the whistle on the wrongdoing. It is imperative that the reasoning behind the whistleblowing protection legislation be explained and discussed with the public servants. This and the entire education component will hopefully reduce the potential morale problems that may be created by employees feeling they must be constantly “looking over their shoulder.” All public servants need to understand and be educated as to what constitutes unethical conduct in the public sector. Furthermore, the workshops could exhaustively explain the complicated legal issues surrounding the disclosure of confidential information surrounding wrongdoing in the government. The prospect of disciplinary action and potential dismissal for employees that commit wrongdoing may act as a deterrent for some people contemplating unethical, illegal and illegitimate behaviour.

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<sup>257</sup> Starr and Sharp, p. 61.

## **False Claims Act**

The federal government contracts with organizations in the private sector for billions of dollars each year. Each year the government is also cheated out of millions of dollars by these organizations. The False Claims Act would be created to stop this from happening. This False Claims Act would provide a monetary incentive to whistleblowers to help the government save or recover money from organizations that have committed fraud or false claims.

It is this author's recommendation that the Canadian government adopt a False Claims Act. The False Claims Act would provide a monetary incentive system for whistleblowers and, whereby, the government also acknowledges and rewards the ethical behaviour of disclosing the wrongdoing.

The False Claims Act would state that any person with the knowledge of false claims or fraud against the government may bring forth a lawsuit against the organization in his or her own name and in the name of Canada. There is a time limitation of one year to bring forth the lawsuit. The whistleblower first files the lawsuit with the Trial Division of the Federal Court of Canada, where it is reviewed to see if a valid case exists.<sup>258</sup> There will be no lawsuit if the information is publicly disclosed or if the government has already sued the defendant for the fraud or false claim. This Act would not include tax fraud. The Canadian government has sixty days to evaluate a claim to decide if they want to accept the case. If the government does accept the case, the lawsuit is then under both the name of the whistleblower and the government of Canada. If the government

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<sup>258</sup> James John Guy, p. 214.

declines the case, the whistleblower still has the option of bringing forth the lawsuit under his or her name alone.

The whistleblower does need to have personal knowledge and evidence of the fraud, and cannot have learned about it from a third party, such as a friend, relative, etc. This is different from the United States' False Claims Act. This will help to eliminate some of the lawsuits brought forward by people that are needless and are based upon hearsay instead of personal knowledge and evidence. Hopefully, this will reduce the opportunity for people to bring lawsuits against organizations for their own personal agendas.

A lawsuit may also be brought forward under the False Claims Act when the fraudulent party is not directly committing fraud or a false claim against the government. This would apply when an organization is cheating another organization that is under contract with the government. All that is necessary to substantiate a lawsuit is that some of the money wrongfully obtained is paid or reimbursed by the government. This transitive part of the Act would be enforced in the private sector. For example, the government contracts with a concrete firm to pave a stretch of highway, and the subcontractor that does the work cheats the concrete firm. The lawsuit may be brought against the subcontractor under the False Claims Act.

There are benefits to both the whistleblower and the Canadian government if the lawsuit is won. If the case is won, the organization must pay the government three times the amount it gained in fraud. There is no present standard percentage fine that an organization must pay in Canada when they have committed fraud or made a false claim. It is my recommendation that Canada adopts the same standard fine percentage as the

United States since many American companies are conducting business in Canada under the Free Trade Agreement. There would be consistent fines for organizations committing fraud against the government in either country, recognizing that there is still a disparity between the Canadian and American dollar.

The whistleblower will receive a standard rate of twenty percent of the organization's fine paid to the government if the lawsuit was in the name of the individual and the Canadian government. If the lawsuit was in the name of the whistleblower alone, the individual will receive a standard rate of thirty percent of the organization's fine and his or her legal fees will be paid by the organization. The government is still in a win-win position if the lawsuit is brought in the person's name alone since the organization will still have to pay the fine.

It is my recommendation that the Canadian government propose standard fees and rewards under the False Claims Act. The present American legislation has a standard fine percentage, but allows the court to determine the exact reward for the whistleblower between a minimum and maximum percentage. I believe that there should be a standard percentage for the fine the government receives and the reward that the whistleblower receives. The same logic that holds true for setting a standard percentage fine should hold true for the standard percentage reward. Furthermore, I contend that the standard reward percentages provide reasonable compensation to individuals that blow the whistle. The standard reward would compensate the person for the tremendous stress and strain on his or her personal life, family, career, work environment, etc. I recognize that some people will be motivated to blow the whistle simply to collect the reward. However, I do

not believe this matters since the importance here is the termination of the fraud, not what is the underlying motives of the whistleblower.

A hypothetical example of this False Claims Act would be a company that received one million dollars by committing fraud against the government. The whistleblower takes the organization to court under his or her name alone and wins the case. The government would receive two million one hundred thousand dollars and the whistleblower would receive nine hundred thousand dollars. If the government joined the whistleblower in the lawsuit, the government would have received two million four hundred thousand dollars and the whistleblower would have received six hundred thousand dollars.

It is important to note that the whistleblower would receive protection in his or her job from retaliation under the CWPA if the case were not won. The Court would interpret the actions of the whistleblower bringing forth the allegations to ensure they were done so in 'good faith' and not out of malicious, personal or assaultive motives. If the allegations were brought forth in 'good faith', the whistleblower would receive full legal protection under CWPA.

### **Whistleblowing Protection Legislation for the Private Sector**

The fourth section of this chapter will examine whistleblowing protection legislation for the private sector. This paper will look only at general legislation for the private sector due to the space limitations. It is assumed that more comprehensive

legislation would have to be developed to address the complex and changing ethical needs and concerns that particular industries may have within the private sector.<sup>259</sup>

There have been ethics counsellors in some large organizations in the private sector for a long time and this has helped set a precedent for the public sector. Many of the ethics counsellors were mandated to act in an advisory role to employees about ethical issues and dilemmas in a confidential manner. This system allowed the employee to blow the whistle through an internal mechanism within the organization. Many organizations in the private sector have experienced the benefits of encouraging and supporting ethical conduct in their organization.

It is my recommendation that the government pass legislation that would ensure all organizations with which they contract will have a whistleblowing policy and establish an ethics counsellor within their organization. To address the limited resources of small companies, the firms could simply have this role of the ethics counsellor be combined with a present employee's role(s). The establishment of the ethics counsellors will encourage employees within the private sector to hold their organization accountable to ethical conduct. Furthermore, the ethics counsellors can inform the employees of the whistleblowing procedure and how the organization will protect the whistleblowers from retaliation. These ethics counsellors would be responsible for ensuring that all employees are aware and informed of the whistleblowing protection procedure and legislation. The contracted organizations' ethics counsellors could easily consult with the ethics counsellors from OGE over a particular situation. This system would help establish

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<sup>259</sup> Lindsay et al., p. 401.

continuity between the whistleblowing protection legislation in the private and public sectors, yet still recognize that there are major differences between the two.

Another recommendation would be that the government establishes a whistleblowing hotline for the employees of contracted organizations. There are a number of reasons why this would not be applied to all private sector organizations. Some of these are that it is impossible to 'police' all the various organizations in different industries; there are potential legal and political problems by extending this to all; and there is simply a practical financial need to limit this to contracted organizations. The hotline would be a confidential safe conduit for a private sector employee to receive advice when he or she is unsure whether his or her organization's ethics counsellor is acting impartially. There will be situations when an ethics counsellor may try to squelch an allegation due to the fact that the organization is still paying his or her salary. One such scenario is when an ethics counsellor hears of an allegation of fraud that the organization has been committing in a contract with the government, and he or she believes that the exposure of this will lead the organization into bankruptcy. The ethics counsellor may be worried about losing his or her position and being unemployed by the allegation.

It is imperative that legislation be established to protect the individuals, working in a private sector organization, that blow the whistle to the government about the illegal, unethical or illegitimate activities that their organization is engaging in. This disclosure of corruption or illegality by the private sector is in the government's, and albeit in the public's, best interest. As mentioned, this may lead to the government recovering or saving money.

There should be provisions that provide protection for the whistleblower from the organization in the private sector suing the individual for potentially breaking their contract by disclosing confidential information. Whistleblowers need to be protected by the law from charges and lawsuits when there is evidence of wrongdoing, and it is clearly in the public's best interest. As discussed in Chapter two, the courts have been very limited in acknowledging the 'whistleblower's defense.'

As mentioned, employees of an organization in the private sector are able to bring forth a lawsuit under the False Claims Act. This would provide the monetary incentive to disclose the wrongdoing that is occurring in their organization. I do not believe the monetary incentive system should be different in the private versus public sector. Therefore, it is recommended that the government look at establishing standard fines in the private sector for cases in which organizations are committing fraud or false claims against another organization.

It is this author's opinion that this proposed legislation would be the first step in the development of whistleblowing protection legislation in the private sector. There would need to be more research conducted to propose legislation that would adequately address the needs of whistleblowers in the private sector in situations that do not involve government contracts. However, it is my belief that the proposed legislation would be a catalyst to the government exploring this issue. To date, there has been little effort by the Canadian federal government towards addressing the issue of whistleblowing through legislation in the private sector.

## **Relevant Issues Surrounding the Proposed Whistleblowing Protection Legislation**

There are various other issues that are relevant to the proposed whistleblowing protection legislation for the public and private sectors. This section of the chapter will explore these in an attempt to better understand the issues, dynamics and politics surrounding this proposed legislation.

“The trial of a public official can dramatically focus public attention on crimes of government. It can, upon occasion, stimulate broader reforms that may help citizens hold officials more accountable in the future.”<sup>260</sup> I share the opinion that a major scandal of a highly-ranked public official(s) would likely have to occur for the governing political party to feel the pressure by the public to adopt the proposed whistleblowing protection legislation. As discussed, the majority of the reforms regarding whistleblowing legislation in America have been spurred on by the widely publicized scandals of highly-ranked public officials. Public support and encouragement of whistleblowing protection legislation has been heightened and linked to major media-laden political scandals. Therefore, we must assume that this pressure will also be needed to have the proposed legislation passed and implemented in the public sector.

If Canada adopted the proposed legislation, the OGE would be able to track, monitor and evaluate the wrongdoing that is occurring within the public sector. This could lead to great insight as to where the government needs to develop further legislation, increase education, etc. The Canadian government would have the statistical data to compare the ethical conduct of our government to that of other first world democratic countries (such as the UK, Australia or Germany).

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<sup>260</sup> Thompson, p. 93.

The proposed recommendation will need to be approved as a statute by the Parliament. We can assume there will be much discussion and debate in regards to the pending whistleblowing legislation in the private and public sectors. This alone may raise the awareness and education of ethical conduct in both sectors. I believe that the opposition parties will be very supportive of a bill that is introduced regarding whistleblowing protection legislation.

Opposition parties may see this legislation as a way to encourage the present public servants to blow the whistle on wrongdoing that has or is occurring in the government. The disclosure of wrongdoing by the present political party will be seen as a way to gain public support for the opposition parties. The opposition parties can then make campaign promises of higher ethical conduct than the documented governing party's ethical performance. Interestingly, the governing political party may be seen as one of the most corrupt governments in Canada's history due to the absence of comparative information and documentation of past governments' unethical performance. Thus, the first governing party to pass such legislation is likely in a very difficult public relations position.

It is the opinion of this author that an extensive process involving parties from the private sector needs to be part of the development of the related whistleblowing protection legislation for the private sector. The private sector will be more receptive to legislation that they have an opportunity to participate in to ensure the legislation addresses their particular concerns regarding unethical, illegal and illegitimate behaviour. There will still be strong resistance by organizations in the private sector that rely on unethical, illegal and/or illegitimate activities to conduct business.

Another important issue surrounding the success of the whistleblowing legislation for the public and private sectors is the commitment of the senior managers. As Dennis Thompson writes, “employee cynicism about ethical behaviour flows most directly from the perception that senior managers are paying only lip service to ‘good’ conduct, when what they really want is ‘successful’ conduct, and ethics be damned.”<sup>261</sup> Senior managers need to demonstrate to their employees that their organization is committed to ethical conduct. An employee will feel more apt to follow the whistleblowing procedure if it is incorporated as part of the organization’s policy and reviewed with all employees. If the organization is purposely engaging in unethical, illegal and illegitimate behaviour in order to conduct ‘business’, they will continue to be non-supportive and hostile towards those employees in the organization that are demonstrating ethics. However, the whistleblowing protection legislation was created for this purpose, to provide protection for people that hold their organizations accountable to ethical conduct.

### **Should Canada Apply this Proposed Whistleblowing Protection Legislation to the Public and Private Sectors?**

The preceding sections have outlined the proposed legislation and the relevant issues surrounding the passing of this legislation. Thus, the question is whether Canada should adopt the proposed whistleblowing protection legislation for both the public and private sectors. This last section will carefully analyze this question.

“The challenge in our society in the late twentieth century is to create conditions where all who wish can become actively involved, can understand and participate, can influence, persuade, campaign and whistleblow, and in the making of decisions can work

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<sup>261</sup> Thompson, p. 191.

together for the mutual good.”<sup>262</sup> The proposed legislation helps to create a ‘positive climate for whistleblowing’ within the public and private sectors.

Many commentators contend that during the past decade in Canada, the number of whistleblowing incidents involving government employees has increased significantly.<sup>263</sup> Other commentators contend that governments are constructing these new regimes for regulating the conduct of public officials in response to the public’s assertions about their declining integrity. However, it is impossible to determine if the government is more corrupt today in the 90s versus the 80s, 70s, etc. Furthermore, ethics and values that society holds also change over time.<sup>264</sup>

There is recent evidence of voters handing overwhelming defeats to governments with the reputation for dishonesty. “The interest in ethics is linked with what governments do and, increasingly in the modern era, what they fail to do.”<sup>265</sup> Politicians are answerable to the public through and at elections. Our democratic parliamentary government has been established to ensure that the governing political leaders and party continues to act in the public’s best interest, and it is often assumed that ethical behaviour and conduct is in the public’s best interest. It is contended here that the public would generally be supportive of the proposed legislation since it holds the government and organizations more accountable. Furthermore, it encourages employees to disclose wrongdoing and that is in the public’s best interest.

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<sup>262</sup> Vinten, p. 47.

<sup>263</sup> Kernaghan. “Whistle-blowing...”, p. 35.

<sup>264</sup> Langford and Tupper, pp. 1, 6-7.

<sup>265</sup> Langford and Tupper, p. 4.

The Legislature as an institution and the legislators as individuals occupy essential positions of democracy and carry the burden of a solemn public trust. Daniel Callahan and Bruce Jennings contend that ‘in the climate of scandal and growing public cynicism, legislators surely need to devote more visible and effective attention to legislative ethics.’<sup>266</sup> A visible and effective way is to adopt the proposed whistleblowing protection legislation.

Another concern that has been raised is the focus on the Big Brother connotations by having this “one stop” ethics office for all public servants. Some critics argue that there should not be a separate government-wide agency like OGE for the enforcement of the protection of whistleblowers in the public sector.<sup>267</sup> However, it is the position of this author that the OGE simply ensures that there is continuity and consistency throughout the public sector in regards to whistleblowing. Most governments have adopted ethical rules that have traditionally been scattered throughout various statutes, regulations and guidelines rather than being contained in a single document or Act. For example, the Treasury Board has a general ethical code and this has been further supplemented by various departmental codes. The general and the vast majority of the supplemental codes do not address the process of whistleblowing and the protection that will be given for whistleblowers. The supplemental codes that do address whistleblowing outline various procedures for blowing the whistle and provide different protection for whistleblowers. It is imperative that the CWPA be adopted to provide consistent, general guidelines and procedures that would be followed in all areas of the

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<sup>266</sup> Daniel Callahan and Bruce Jennings. “Ethics in the Legislative Process: An Overview”, in Donahue, p. 151.

<sup>267</sup> Thompson, p.195.

government. This will lead to less confusion and ambiguity for the public servants when faced by a situation where they are contemplating blowing the whistle. Furthermore, this will help to ensure that all parties involved in the allegation of the wrongdoing are treated fairly and justly.

The Task Force on the Conflict of Interest's report further supports this argument by concluding that there is "a clear need to develop the existing guidelines into a structure of principles and procedures which can be more readily understood by public office holders, Parliament and the public, which can be adapted to the circumstances of office holders with varying responsibilities, and which will result in greater consistency in application."<sup>268</sup> Charles Peters and Taylor Branch further argue that "Absolute protection is needed for employees whose responsibility it is to protect the public's health and safety in order for them to feel free to go to the public whenever that is being threatened by defective products, harmful services, etc."<sup>269</sup> This proposed legislation would demonstrate the government's commitment to ensuring that both the public and private sectors act in the public's best interest.

The issue from a public policy perspective is whether society should provide greater legal legislation for whistleblowers. The primary reason of whistleblowing legislation should not be to catch dishonest or wasteful employees, but rather protect the right of ethical employees to work in an ethical environment. The whistleblowing protection legislation should be enacted to protect those people who bring to the public's attention any matters that are contrary to the public interest.

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<sup>268</sup> Starr and Sharp, p. 8.

<sup>269</sup> Charles Peters and Taylor Branch. *Blowing the Whistle: Dissent in the Public Interest*. New York City, N.Y.: Praeger Publishers, 1972, p. x.

Unethical, illegal and illegitimate behaviour needs to be discouraged in all organizations, regardless of whether the organization is in the public or private sector. One way to do this is to establish legislation that will protect whistleblowers that expose the wrongdoing in the public's interest. Employees play a critical role in safeguarding the public against unethical, illegal and illegitimate behaviour by organizations in the private and public sectors. "The Canadian Bar Association in 1980 tried to address the issue of an officer's duty when confronted with an order to commit dirty deeds: 'The solution to the dilemma is not to give an immunity to prosecution for obedience to orders. The solution is to give immunity from disciplinary action for the obedience to the law.'<sup>270</sup> This argument helps strengthen the position that the government should pass whistleblowing protection legislation to provide protection from retaliation against whistleblowers.

Miceli and Near contend that whistleblowing will increase in the future due to the legal changes encouraging whistleblowing.<sup>271</sup> This may be a valid prediction. I do not think that a negative or positive conclusion can be drawn from such a statement. The increase of whistleblowing allegations does not correlate to the appropriateness of the proposed legislation.

It is my prediction that the CWPA could also save the government from potential lawsuits. The CWPA provides legal protection and grounds for public servants to disclose confidential information about a wrongdoing that will be used in an investigation and consequently, lead to a person(s) being charged. If there is no legal protection or

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<sup>270</sup> Greene and Shugarman, p. 180.

<sup>271</sup> Near and Miceli, "Effective Whistle-blowing", p. 703.

grounds for the disclosure of confidential information by public servants and there is an investigation based upon that confidential information, the government may be sued for improper procedure, defamation of character, etc. A case in point is Brian Mulroney's lawsuit that he won against the Canadian government for improper procedure of investigation that led to his character defamation.<sup>272</sup> The investigation was based upon confidential information that the RCMP acquired through illegal means (a public servant blew the whistle on Mulroney's wrongdoing by disclosing confidential papers, memos and documents). The CWPA would eliminate the grounds for potential lawsuits like this one.

My conclusion is that Canada needs to adopt the proposed whistleblowing protection legislation for the public and private sectors. I argue that the whistleblower should be given statutory protection from retaliation by his or her organization and receive monetary compensation. This should not depend on whether the whistleblower is in the public or private sector. The proposed legislation recognizes the different fiduciary duties that a public servant may have over an employee of an organization in the private sector, and the major differences between the two sectors. That is one of the main reasons why separate legislation was proposed for the public and private sectors.

The contention here is that a major media-laden political scandal will likely have to occur in the Canadian federal government for this legislation to be passed. If a major scandal did not occur, the CWPA would still be needed, but the pressure for it to be passed would be absent. The pressure would primarily be applied through the public, which would demand protection for those employees that disclosed the wrongdoing in the

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<sup>272</sup> Greene and Shugarman, p. 127.

public's interest. A political party would have to make a campaign promise to adopt whistleblowing protection legislation in Canada. The public will need to ensure the political party follows through with their promises when they are elected. In addition, the public must hold the political party accountable for implementing this legislation to ensure that it is not passed as a cosmetic form of legislation. This legislation will act as the first step towards other reforms in the future regarding whistleblowing in the public and private sectors.

### **Summary**

Lord Acton's dictum states that "power corrupts and absolute power corrupts absolutely."<sup>273</sup> Some people in the public and private sectors are in a position of authority where they have significant power over people. It is imperative that society provides protection for employees to disclose the wrongdoing that is occurring in organizations for ethical conduct should be strongly encouraged and promoted. Whistleblowing is about openness, accountability, equity, justice and ultimately, democracy.

The proposed whistleblowing protection legislation provides broad protection for the public sector whistleblowers. Furthermore, the False Claims Act provides monetary incentive to the whistleblowers in the private and public sectors. It is assumed that it is in the public's best interest to terminate any wrongdoing within either sector. This proposed legislation supports and encourages the disclosure of wrongdoing through the process of whistleblowing.

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<sup>273</sup> Langford and Tupper, p. 7.

Research will need to be conducted as to the effectiveness of the proposed whistleblowing legislation in the private and public sectors in Canada. The government will have to commit resources to analyzing and evaluating these changes. As well, the government must be willing to listen to the needs and opinions of the public in regards to whistleblowing in the public and private sectors.

“Canadian governments are not yet marching to identical ethical drummers. But all are moving towards greater formal regulation of official conduct, albeit at a different pace and in response to local traditions and circumstances.”<sup>274</sup> This proposed whistleblowing protection legislation would not be a cure-all for unethical, illegal and illegitimate behaviour in the public and private sectors. It will hopefully encourage and promote greater ethical conduct in these sectors. Furthermore, this legislation will ideally serve as a model of whistleblowing protection legislation to the provincial and municipal governments.

Whistleblowing will continue to be an emotionally charged and controversial issue. A whistleblower must make the subjective decision to blow the whistle on the unethical, illegal or illegitimate behaviour that is occurring within his or her organization. It is in the public’s best interest to have the wrongdoing terminated in the organization, whether in the public or private sector. Thus, to support, encourage and affirm ethical conduct, the Canadian federal government needs to adopt legislation that will provide protection for the whistleblower.

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<sup>274</sup> Langford and Tupper, p. 13.

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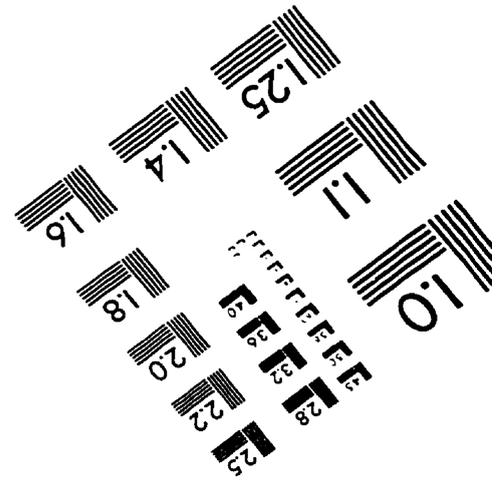
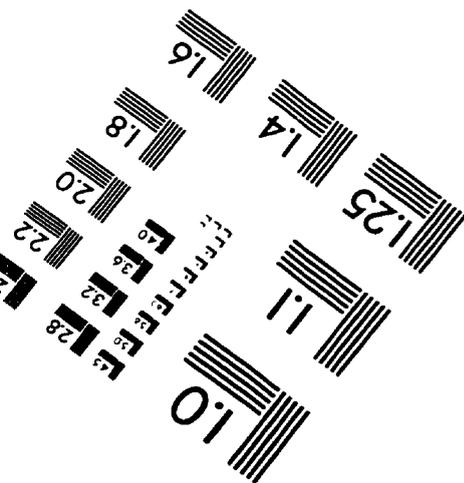
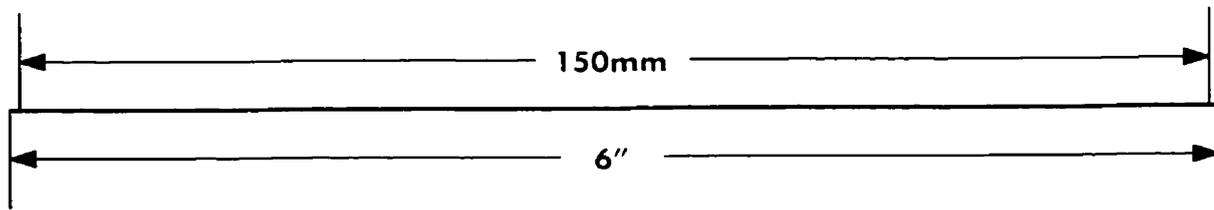
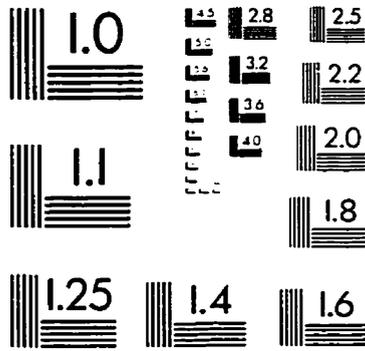
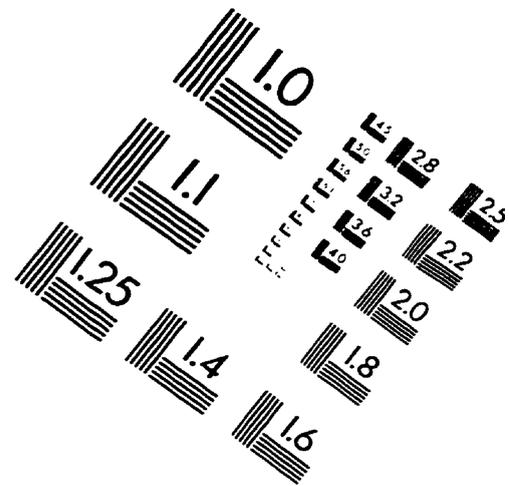
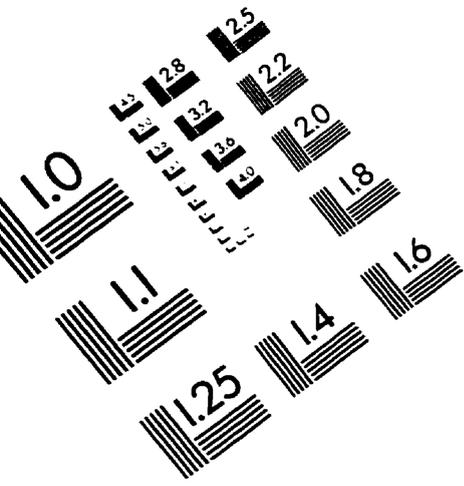
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