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WHISTLE STOP: THE SUPPRESSION OF WHISTLEBLOWERS IN THE
CANADIAN GOVERNMENT

by

Brendan Tweedie

A Thesis
Submitted to the Faculty of Graduate Studies
through Communication Studies
in Partial Fulfillment of the Requirements for
the degree of Master of Arts at the
University of Windsor

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2010

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AUTHOR'S DECLARATION OF ORIGINALITY

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ABSTRACT

The international community is increasingly becoming aware of the consequences and the risks involved with blowing the whistle on organizational misconduct. Subsequently, there has been a growing trend within the international community of developing legislation designed to protect whistleblowers against retaliation. This study performs a Critical Discourse Analysis on *The Public Servants Disclosure Protection Act* of 2005, the first bill in Canadian legislative history to offer federal government whistleblowers protection. The author argues the primary aim of this Act is not to protect whistleblowers from retaliation or to eliminate wrongdoing from the public service, but rather to control the context under which whistleblowing can occur. It is thus an instrument of oppression serving not to protect whistleblowers, but suppress them.

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CHAPTER ONE: WHISTLEBLOWING – AN OVERVIEW

Introduction

Nobody grows up wanting to become a whistleblower. Conversely, authority figures, such as parents, teachers and coaches, condition children to respect seniority and follow orders. Moreover, children condition themselves not to “tattletale,” “snitch” or “rat” on one another. This aversion to dissent often stays with people throughout their teenage years and adulthood. In the 1960s, Stanley Milgram, a name familiar to any psychology student, performed a study wherein participants were ordered to administer increasingly severe shocks to an innocent victim who, unbeknownst to the participants, was actually an actor pretending to be shocked. In the end, 26 of the 40 participants were willing to administer a potentially lethal shock of 450 volts, the maximum amount (Milgram 1963, p. 371). The Milgram experiment, as it is known, is an excellent illustration of people’s propensity to obey superiors regardless of the consequences to themselves or others.

This proclivity to conform to authority is what makes the act of whistleblowing such a remarkable phenomenon. If individuals are willing to inflict pain on an innocent victim simply because an authority figure instructed them to then how likely are they to report wrongdoing when it involves a peer or superior? One would assume the chances are slim. Yet, individuals, on occasion, have done this very thing and put themselves, their career and family at risk in the process. These individuals are known as whistleblowers. They are brave persons who, instead of following the convenient path of conformity, choose to stand up for what they feel is right. The path of the whistleblower is not a pleasant one. They often suffer various forms of retaliation and are sometimes

fired and blacklisted from their industry. Many find themselves out of work, out of money and perhaps even out of friends. To make matters worse, many whistleblowers are unaware of or underestimate the risks that go along with disclosing wrongdoing. In reality, most are just trying to do their jobs the best they can. Indeed, few individuals purposely set out to become whistleblowers and fewer still have an easy time of it.

The international community is increasingly recognizing whistleblowers as very important sources of information about wrongdoing. At the same time, the international community is also increasingly becoming aware of the many risks and consequences that whistleblowers incur as a result of their coming forward. In accordance with these two trends, many governments have developed, or begun to develop, laws designed “to make it safe for employees to disclose misconduct that they discover during the course of their employment” (Kaplan 2001, p. 37). These laws are often referred to as “whistleblower protection” or “whistleblowing legislation.” The emergence of such laws over the past couple of decades has not been without controversy. While there are some who view whistleblower protection as an essential first step towards creating a culture that accepts and encourages whistleblowing (Kaplan 2001, p. 37), there are others who view whistleblower protection as being costly and ineffective (Thomas 2005, p. 173). Despite this controversy, there is a growing trend amongst the international community of enacting legislation designed specifically to protect whistleblowers against retaliation (Kaplan 2001, p. 37).

There are also many researchers who subscribe to the belief that laws are “subservient to power” (Ramirez 2007, p.183). The study of whistleblowing protection is therefore a very interesting point of investigation since whistleblowers are often at odds

with powerful economic and political interests. If law is submissive to the welfare of the elite then the development of effective whistleblower protection presents an obvious conflict of interest for policymakers. This contradiction begs the question: what is the primary goal of whistleblowing legislation? Does it aim to protect the whistleblower from the organization or the organization from the whistleblower? Does it encourage the expression of dissenting opinions or discourage them? Does it empower whistleblowers or discipline them? Does it give whistleblowers a voice or does it ultimately silence them? These questions are at the heart of this thesis. In order to investigate these points of interest, Critical Discourse Analysis is used to analyze the *Public Servants Disclosure Protection Act* (hereinafter referred to as the PSDPA) of 2005. The Act is the first in Canadian legislative history to offer federal public servants protection against retaliatory measures as a result of reporting misconduct within the government (Canadian Broadcasting Corporation 2004).

The ability of whistleblower protection to effectively safeguard whistleblowers should matter to all organizations and all people. This is because no organization is immune from bad decisions or mistakes and these decisions or non-decisions, as the case may be, can put the public at risk. This risk can adopt many forms. It may be that a grocery store is selling contaminated food, that hazardous waste is being dumped into a town's water supply, that fraudulent investors are stealing people's life savings or that politicians are inappropriately spending tax dollars. In most cases, the first people to become aware of a wrongdoing and the potential risk it poses to the public, be it environmental, physiological, or financial, will be those working with or within the organization responsible. Consequently, when it comes to sounding the alarm about a

wrongdoing and its potential consequences, nobody is in a more privileged position than employees. However, the unfortunate reality is that employees are also the people who stand to lose the most when it comes to reporting wrongdoing. Without proper support and protection, employees who blow the whistle on wrongdoing often face severe discrimination, harassment and alienation and some even lose their job, destroy their career and become a pariah in their chosen industry.

Similarly, the protection of whistleblowers within Canada's public sector is an issue that should concern all Canadians. After all, there is not a single Canadian citizen who is unaffected by the decisions and actions of the federal government. The Canadian government is also fundamentally different from a private organization in that its primary mandate is to serve the public interest as opposed to the interests of shareholders or investors. Subsequently, when wrongdoing does occur within the public sector, it is often not a select few, but large populations and perhaps even the public as a whole who suffer the consequences. In order for the Canadian government to follow through on its mandate and best serve the public interest, it must foster a culture of accountability and transparency. This includes creating a work environment where it is safe and acceptable for employees to voice a concern about a wrongdoing. The development of effective whistleblower protection is one way to foster such an environment, since it permits employees to express dissenting opinions without fear of retribution. If the Canadian government fails to draft effective whistleblowing legislation, its employees may remain silent when wrongdoings occur for fear that they will be victimized, lose their job, or do irreparable damage to their career. Ultimately, it will be the public who pays the price.

Definitions

Though “whistleblowing” is a relatively modern term within the English language, the action to which it refers is far from new. For centuries, individuals have been coming forward and exposing wrongdoings that either pose a threat to, or are a matter of, the public interest. The Oxford English Dictionary first mentions whistleblowing in a supplement to its 1986 edition. It defines whistleblowing as “to ring an activity to a sharp conclusion, as if by the blast of a whistle; now usually by informing on (a person) or exposing (an irregularity or crime)” (Vandekerckhove 2006, p.7). Since then, the term has become widely known and used in industry, business, media, politics, academia and popular culture.

The origins of the term are unclear, although “whistle” has long been considered a synonym for such words as “speak,” “call,” and “squeal.” Some have suggested the term can be traced back to the schoolyard or playing field where an authority figure or referee blows a whistle to indicate that the rules of play have been violated in some manner (Jubb 1999, p. 77). Others have suggested the term derives from the caricature of the “bulbous-cheeked English Bobby wheezing away on his whistle when the maiden cries ‘stop thief’” (Johnson 2002, p. 4). However, individuals who blow the whistle on wrongdoing are quite unlike a playground monitor, referee, or English Bobby in that they are not in a position of power. They do not have the authority to orchestrate the degree of change they deem necessary and therefore have to appeal to higher powers for assistance. It is perhaps more appropriate to compare the whistleblower to a person on a city street who cries out for help when feeling threatened. It is their hope that, by calling attention to the situation, the law can in some way intervene and protect not only them, but the larger

community as well. The whistleblower therefore does not invoke a “whistle of authority” when they blow, but rather an imperative petition or, as Westin (1981) puts it, a “whistle of desperation” (p. 2).

There is much disagreement in recent literature as to how to properly define whistleblowing. Many definitions of whistleblowing only include individuals who report wrongdoing to “outsiders” (Farell and Petersen 1982, p. 406). Other definitions include individuals who report wrongdoing both inside and outside an organization (Calland and Dehn 2004, p. 9). Some definitions exclude individuals who are required by their jobs to report wrongdoing (Jubb 1999, p. 78). Other definitions do not make this distinction (Miceli and Near 1992, p. 21). James (1984) points out that the term is typically reserved for individuals who disclose wrongdoing for moral reasons (p. 249). In contrast, Barton (1994) and Miceli and Near (1997) argue that anger and spite can be very important motives for whistleblowers. Alford (2001) proposes yet another definition. He suggests that a person only becomes a whistleblower when they suffer some degree of retaliation for their actions (p. 18). Meanwhile, Bok (2000) describes whistleblowing as having three basic elements: dissent, breach of loyalty and accusation (p. 71).

While there is no universally accepted definition of whistleblowing, the one developed by Miceli and Near (1992) appears to be the most cited in recent literature. They 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 that may be able to effect action (p. 45).

This definition is broader than most because it includes individuals who choose to report wrongdoing within an organization, as well as individuals who report wrongdoing outside an organization. The authors do not differentiate between “internal” and “external” whistleblowers because their research indicates that individuals almost always report wrongdoing inside the organization prior to outside the organization (Miceli, Near, and Dworkin 2008, p. 8). It also includes individuals who are required by their jobs to report wrongdoing, individuals who appear to be motivated by non-altruistic factors, as well as both current and former members of organizations. The latter are sometimes referred to as “alumni” whistleblowers (James 1984, p. 249).

Miceli and Near’s definition is, as they concede, imperfect. They point out that “the question of what constitutes illegal, immoral, or illegitimate practices is clearly a perceptual one.” Thus, they conclude that further research is needed “to determine the circumstances under which activities, or omissions, are deemed illegal, immoral, or illegitimate by different individuals” (Miceli and Near 1992, p. 46). Vinten’s (1992) definition provides a much closer look at what types of wrongdoing often precipitate whistleblowing. He writes that whistleblowing involves the unauthorized disclosure of information that evidences “the contravention of any law, rule or regulation, code of practice, or professional statement, or that involves mismanagement, corruption, abuse of authority, or danger to public or worker health and safety” (p. 44). This definition of whistleblowing clearly emphasizes legal notions of wrongdoing by omitting any mention of “immoral” or “unethical” activity. However, in doing so, it overlooks the fact that many actions and decisions can be considered unscrupulous without necessarily breaking some predetermined standard of behavior or posing some risk to public or worker health

and safety. Such a definition of whistleblowing could unnecessarily limit the scope of legal protections for whistleblowers.

Another limitation of Miceli and Near's definition is that it does not mention that whistleblowers sometimes expose wrongdoing that has yet to be committed, although one could argue that any conspiracy to commit wrongdoing is a form of "immoral" activity. Their definition also does not include well-intentioned individuals who blow the whistle on perceived wrongdoings, but whose claims turn out to be erroneous. Jubb (1999) neatly accounts for both these types of whistleblowers in his definition of whistleblowing as "a deliberate non-obligatory act of disclosure...about non-trivial illegality, or other wrongdoing whether actual, suspected or anticipated..." (p. 78). The inclusion of the words "suspected" and "anticipated" in this definition clearly shows that Jubb doesn't require individuals to disclose only "actual" instances of wrongdoing in order to be considered legitimate whistleblowers.

The definition of whistleblowing informing this thesis is a slightly amended version of the one proposed by Miceli and Near (1992). The only significant changes are that Jubb's (1999) phrase "actual, suspected, or anticipated" has been added to Miceli and Near's description of wrongdoing and "employer" has been replaced with "organization" in order to broaden the definition's scope. Thus, for the purposes of this thesis, the act of whistleblowing is defined as:

the disclosure by organization members (former or current) of actual, suspected, or anticipated wrongdoing (i.e., illegal, immoral, or illegitimate practices) under the control of their organization, to persons or entities that may be able to effect action.

This definition is general enough that it covers every type of whistleblower imaginable under its domain, including individuals who report wrongdoing within an organization, individuals who are obligated to report wrongdoing, both past and present members of organizations, and individuals who disclose either suspected or anticipated wrongdoings. It also makes no presumptions about the motivations of whistleblowers. However, at the same time, it is narrow enough that it excludes casual discussions about wrongdoing with friends or co-workers who lack the ability to effect change. This definition is also general enough that it covers every type of wrongdoing imaginable under its domain, including wrongdoing that may be “immoral,” but not necessarily illegal or illegitimate. The inclusion of “immoral” practices in this definition of wrongdoing is vital considering many nations have recently decreased their regulations on organizational activity (Tombs and Whyte 2003, p. 9).

Perspectives

There is a wide range of both positive and negative perspectives on whistleblowing in both popular culture and scholarly literature. This spectrum of opinions varies from the viewpoint of whistleblowers as inherently virtuous to the viewpoint of whistleblowers as inherently villainous and everything in between. They have been called a great number of controversial names, ranging from “corporate heroes” to “corporate anarchists” (Culp 1995, p. 109); “corporate help” to “corporate hindrance” (Vinten 1992, p. 44); “public heroes” to “vile wretches” (Laframboise 1991, p. 74); and have even been compared to “Judas Iscariot” (Walters 1979, p. 167); and described as “saints” (Grant 2002, p. 391). Clearly, there is some disagreement as to whether or not the act of whistleblowing should

be considered positive or negative behavior. It is perhaps no surprise then that Thomas (2005) begins his article on whistleblowing with the assertion that it is first and foremost, “a morally ambiguous activity” (p. 147).

The prevailing view of whistleblowing within many organizations is that it is an act of disloyalty. The logic behind this perspective is best explained by Bok (2000), who points out that “the whistleblower hopes to stop the game; but since he is neither referee nor coach, and since he blows the whistle on his own team, his act is seen as a violation of loyalty” (p. 72). Likewise, Culp (1995) points out that most organization members possess such a “deep sense of institutional loyalty” they will remain “fiercely loyal to government agencies and private corporations, even in the face of damaging evidence of wrongdoing” (p. 115). Thus, regardless of the severity or frequency of the wrongdoing disclosed, employers and co-workers often view whistleblowers as being traitorous. It is for this reason that whistleblowers are sometimes called “snitches” or “tattletales.” This sentiment is clearly expressed in a *Forbes* magazine article on whistleblowing legislation entitled “Rat Protection” (Seligman 1981, p. 36). It is also echoed by Laframboise (1991), a former assistant deputy minister within the Government of Canada, who considers whistleblowing to be rarely justified and even claims that many whistleblowers are “more offensive to the community or to their peer groups than the acts on which they have blown the whistle” (p. 73). James Roche, former chairman of General Motors, is perhaps the most often quoted critic of whistleblowing. In 1971, he gave this notorious speech on the subject:

Some critics are now busy eroding another support of free enterprise – the loyalty of a management team, with its unifying values of cooperative

work. Some of the enemies of business now encourage an employee to be disloyal to the enterprise. They want to create suspicion and disharmony, and pry into proprietary interests of the business. However this is labeled – industrial espionage, whistle blowing, or professional responsibility – it is another tactic for spreading disunity and creating conflict (Quoted in Walters 1979, p. 168).

Walters (1979) suggests that there are likely more than a few persons within the business community who still share Roche's point of view (p. 167).

However, the notion that whistleblowers are disloyal organization members has been refuted in recent literature. Vandekerckhove and Commers (2004), for example, argue that there is no contradiction between whistleblowing and organizational loyalty so long as loyalty is conceptualized as “rational loyalty.” The object of rational loyalty is not an organization itself, but “the explicit set of mission statement, value statement, goals and code of conduct of an organization” (p. 231). Thus, when people disclose wrongdoing, they are not acting in a way that is disloyal to their organization; rather they are demonstrating rational loyalty by staying true to their organization's long-term goals and overall mission statement. After all, if someone is taking action that is putting an organization at risk then its members should want to know as soon as possible so that the wrongdoing can be rectified and the consequences to the organization limited. In this sense, whistleblowing is much more than an act of organizational loyalty, it is also, as Vandekerckhove and Commers put it, an “organizational need” (p. 226).

Similarly, Miceli, Near and Dworkin (2008) conceptualize whistleblowing as a form of prosocial behavior, which can benefit the organization involved as much as it can benefit the greater community. They argue that whistleblowing helps organizations by reducing the risk of lawsuits and potential punitive damages and by preventing the loss of

valuable organization members, who would rather leave than be a part of an organization that accepts wrongdoing and suppresses dissent (p. 34). They also argue that the act of whistleblowing does not have to be wholly altruistic in order to be considered prosocial. In contrast, they maintain that whistleblowers often have mixed motives when coming forward and point out that most whistleblowers experience some form of personal gain from the cessation of wrongdoing (p. 36). Lewis (2001) and Callahan, Dworkin, Fort, and Schipani (2002) also view whistleblowing as a benefit to organizations. The former points out that whistleblowers give organizations the opportunity to correct wrongdoing before it escalates while the latter conceptualize whistleblowing as a way of improving organizational efficiency, social responsibility and employee morale.

Miceli and Near (1997), however, concede that some instances of whistleblowing are not prosocial, but in fact antisocial. The authors give three criteria for identifying antisocial whistleblowing: the intentions of the whistleblower, the process used by the whistleblower and the consequences of the whistleblowing (p. 134). The antisocial whistleblower is therefore an individual who blows the whistle on wrongdoing in a manner that is both intentionally and actually harmful to either individual organization members or the organization as a whole. In contrast, people who blow the whistle with the sole intention of benefiting themselves are not considered antisocial by Miceli and Near, but merely selfish. While instances of antisocial whistleblowing do undoubtedly occur, the authors point out that a large majority of whistleblowing is prosocial rather than antisocial (p. 132).

Martin (1999) provides another perspective on whistleblowing by drawing many similarities between whistleblowers and nonviolent activists. He argues that both take

principled stands and speak out against improper behavior; both seek to foster an open, democratic discussion of the issues; and both are willing to pay the price for dissent (p. 7). Additionally, he points out that the opponents of whistleblowers and nonviolent protestors are alike in that both seek to stifle dialogue and discussion through various forms of silencing (p. 8). In fact, the only difference between the two that he sees is that whistleblowers typically utilize formal procedures when voicing their concerns and tend to expect their complaints to be treated seriously; whereas nonviolent activists typically utilize alternative procedures when voicing their concerns as they are seldom under the impression that society's formal complaint procedures provide a solution to injustices (p. 12). Other researchers have also equated whistleblowing with activism. For example, Elliston (1982) compares and contrasts whistleblowing to civil disobedience and Graham (1986) theorizes whistleblowing as "principled organizational dissent." Similarly, Greene and Latting (2004) have drawn parallels between whistleblowing and the concept of advocacy in the field of social work. They note that many definitions of advocacy, at least in a social work context, are very similar to those of whistleblowing (p. 223).

Though there is no one correct way of conceptualizing whistleblowing, there are most certainly wrong ones. To view it always as an act of disloyalty and whistleblowers as merely "snitches" or "tattletales" is far too simplistic and unrealistic a perspective to be taken seriously. However, to view it always as an act of altruism and whistleblowers as solely "heroes" or "martyrs" is equally simplistic and unrealistic. Essentially, the act of whistleblowing is far too complicated to be considered either wholly good or bad. Thus, regardless of how one perceives whistleblowing, it is important to see whistleblowers for what they really are – human. They are people who act on a variety of

motives and in a variety of ways and their actions have good and bad, as well as planned and unplanned, consequences. The question then becomes: do they contribute positively to society more often than not? The general consensus among Canadians, at least according to Thomas (2005), is that they do and that more needs to be done to protect them (p. 154).

Consequences

The consequences of whistleblowing can be quite severe, particularly for the individual blowing the whistle. Vinten (1992) uses the analogy of a bee sting to illustrate the stark fate of the whistleblower. He writes, “a bee has only one sting to use and using it may lead to one’s own mortality” (p. 47). Similarly, individuals who blow the whistle on wrongdoing often see their careers come to an abrupt and unceremonious end as a result of their actions. Many lose their jobs and some find themselves blacklisted from their industry, bankrupt and unable to retire. As one whistleblower laments, “nobody wants to hire former whistleblowers. They are all afraid of what we would do if we were asked to tell the truth about some problem” (Glazer and Glazer 1989, p. 228). Alford (2001), after interviewing a series of whistleblowers, comes to a similarly bleak conclusion. He notes, “a typical fate is for a nuclear engineer to end up selling computers at Radio shack” (p. 20). Indeed, whistleblowers typically experience a variety of social, psychological, financial and sometimes even physical consequences.

The most often discussed consequence of whistleblowing is retaliation against whistleblowers. Miceli, Near, Dworkin (2008) define retaliation against whistleblowers to be “undesirable action taken against a whistle-blower – and in direct response to the

whistle-blowing” (p. 11). By undesirable action, the authors are referring to both negative actions taken, such as a whistleblower being demoted, as well as positive actions not taken, but which ought to have been taken, such as a whistleblower being unfairly denied a promotion. Martin (1999) provides a more precise look at some of the different ways whistleblowers are retaliated against. The means of reprisal are impressive and include:

ostracism by colleagues, petty harassment (including snide remarks, assignments to trivial tasks, and invoking of regulations not normally enforced), spreading of rumours, formal reprimands, transfer to positions with no work (or too much work), demotion, referral to psychiatrists, dismissals, and blacklisting (p. 9).

Though extensive, this list is not exhaustive. There are many types of retaliation not listed above, ranging from blatant uses of physical force to subtle, yet equally insidious, forms of psychological abuse. In some cases, an organization may even harass or attack a whistleblower’s friends or family instead of, or in addition to, the actual whistleblower; while in other, more rare cases, a whistleblower may even pay the price of dissent with his or her own life. Karen Silkwood, for example, was killed in a suspicious car crash after discovering her employer, a plutonium plant, was missing forty pounds of plutonium and doctoring quality control reports. She was headed to a meeting with union officials to hand over evidence when she was killed (Baltakis 2004, p. 185).

Many studies have researched the frequency and severity of employer retaliation against whistleblowers. Westin (1981) notes that, of the ten whistleblowers he looked at, only one was able to win their job back and only two others were awarded compensation in court for what happened to them. The other seven, he writes, “have been unable to obtain reinstatement, damages, or vindication of their professional reputations” (p. 133).

Glazer and Glazer (1989) studied sixty-four whistleblowers and found that only “twenty were able to hold on to their positions; of these, all worked in the public sector” (p. 206). Similarly, Alford (2001), after interviewing several dozen whistleblowers, found that “a little over two-thirds lost their jobs” (p. 19). Furthermore, a survey of 87 whistleblowers revealed that all but one experienced retaliation. In total, most of the whistleblowers in the private sector and half of those in the public sector lost their jobs while 17% lost their homes, 8% filed for bankruptcy, 15% divorced their partners and 10% attempted suicide (Vinten 1992, p. 47). Another survey completed primarily by whistleblowers in the public sector found similar results. It revealed that, of the 161 whistleblowers questioned, many reported having experienced “severe retaliation and overwhelming personal and professional hardship” as a result of their disclosing wrongdoing (Vinten 1992, p. 47).

One of the most frequently observed means of reprisal is for an organization to discredit the mental or moral stability of a whistleblower. Alford (2001) contends that many whistleblowers are subject to malicious smear campaigns that attempt to portray them as being “sick, ill, morally suspect, criminal or disturbed” (p. 104). In order to achieve this, an organization might refer a whistleblower to an in-house doctor, counselor or therapist and demand that they undergo extensive psychological testing. According to one psychologist who worked for the U.S. government, many of the patients sent to him by management “were actually whistleblowers, not crazy people, and they were chiefly distressed not by alcohol or drugs, but by their supervisors daily harassment of them” (Rothschild and Miethe 1994, p. 265). In some extreme cases, an organization might even hire a private detective to dig up dirt on the whistleblower so that his or her mental

state or moral character can be disparaged. Alford (2001) refers to this technique of trying to label a whistleblower as mentally ill or morally suspect as the “nuts or sluts” approach to whistleblower retaliation (p. 105).

It is also common for whistleblowers to suffer retaliation from their coworkers. Rothschild and Miethe (1999) conducted a study in which 69% of whistleblowers reported having been criticized or avoided by their coworkers. The same study also revealed that 68% lost their jobs and 64% were blacklisted from getting another job in their field as a result of blowing the whistle (p. 120). Many coworkers likely retaliate against whistleblowers because they view blowing the whistle as a breach of loyalty, trust or confidentiality worthy of punishment. However, it could also be that many coworkers retaliate against whistleblowers because they view blowing the whistle as a personal affront or attack on their own moral or ethical beliefs and subsequently lash out in frustration. It has also been shown that whistleblowers are sometimes involved with, or perhaps even partly responsible for, the wrongdoing they report (House and Daniels 1995, p. 538). In such situations, coworkers may consider the act of whistleblowing to be not only disloyal or insulting, but hypocritical as well.

The research of Rothschild and Miethe (1999) also suggests that retaliation from coworkers and employers is most likely and most severe when the wrongdoing disclosed involves a large sum of money (i.e., over \$100,000), is systemic in nature, or is reported to someone outside the organization. Furthermore, their research indicates that African Americans are nearly twice as likely as Whites to suffer retaliation (p. 122). It has also been consistently shown that high-level and long-term employees who blow the whistle on wrongdoing typically experience equal or greater amounts of retaliation than low-level

or less experienced employees (Vinten 1992, p. 47; Rothschild and Miethe 1999, p. 122). It could be that high-level and long-term employees experience equal to more retaliation because the information they report is more costly to organizations or it could also be that their dissent is viewed by employers and coworkers as a much greater breach of loyalty than that of low-level or less experienced employees.

The act of whistleblowing also has significant consequences for the organization involved in the disclosed wrongdoing. Thomas (2005) argues that, “regardless of how a complaint is resolved, there is bound to be some cost in terms of expenses, staff time, productivity, damage to employee morale and/or loss of reputation for the organization” (p. 150). Furthermore, he adds that in the case of political institutions, governments, and organizations within the public sector, these “costs are ultimately borne by taxpayers” (p. 151). Similarly, Green and Latting (2004) argue that, “if evidence exists to substantiate an organization’s wrongdoing, the accused organization may lose hundreds of millions of dollars through lawsuits, restitution, decreased productivity, and tarnished reputations” (p. 221). However, others have argued that even if an organization is cleared of all wrongdoing, its reputation will likely sustain prolonged or perhaps even permanent damage (Thomas 2005, p. 151). Many critics of whistleblower protection argue that it will allow people to falsely accuse organizations of wrongdoing as a means of corporate or political sabotage. This fear, however, is largely unsubstantiated in research and it is quite possible that most saboteurs would attack organizations regardless of whether or not they are covered by whistleblower protection.

Clearly, the consequences of blowing the whistle on wrongdoing can be severe for both the whistleblower and the organization involved. These consequences, however,

tend to pale in comparison to the consequences of not blowing the whistle on wrongdoing when it occurs. The consequences of remaining silent in the face of illegal, illegitimate or immoral activity can be felt by not only the would-be whistleblower, who will likely be plagued by guilt, but the organization as well. After all, if an individual chooses to ignore wrongdoing, he or she puts themselves and the organization at greater risk by not giving the organization the chance to rectify the wrongdoing. Moreover, depending on the type of wrongdoing, not blowing the whistle can also have severe consequences for the public. The undisclosed wrongdoing could involve a misuse of tax dollars, a flawed product or fraudulent service, or pose some other threat to the health and safety of customers and community members. It could also pose a threat to the environment, such as the illegal dumping of hazardous waste, the unnecessary slaughter of animals, the excessive clear-cutting of forests or the destruction of other equally important ecosystems. The evasion of such consequences is what makes the act of whistleblowing worthwhile and why one study found that 90% of whistleblowers, even after experiencing personal hardships as a result of their dissent, replied “they would still report misconduct if they had a chance to do things all over again” (Rothschild and Miethe 1999, p. 121).

CHAPTER TWO: WHISTLEBLOWING IN THE 21ST CENTURY

Introduction

The issue of whistleblowing first received widespread public attention in the early 1970s. It was during this time period that two of history's most memorable whistleblowers came forward: Daniel Ellsberg, who in 1971 leaked the Pentagon Papers, and William Mark Felt, Sr. (aka Deep Throat), who in 1972 exposed President Richard Nixon's involvement in Watergate. These very controversial and much publicized scandals launched the term "whistleblower" out of obscurity and into everyday vernacular and turned the issue of whistleblowing into a popular, albeit contentious, topic of discussion. Since then, the issue of whistleblowing has continued to receive a great deal of attention in Western popular culture, most of which has been positive. *Time* magazine even dubbed 2002 the "Year of the Whistleblower" after it named three whistleblowers as its "Persons of the Year;" a trio that included Sherron Watkins and Cynthia Cooper, who blew the whistle on accounting fraud at Enron and Worldcom respectively, as well as Coleen Rowley, who blew the whistle on the FBI's mishandling of information related to the September 11, 2001 terrorist attacks (Lacayo and Ripley 2002). Hollywood has also celebrated real-life whistleblowers on numerous occasions through films such as *Serpico* (1973), *All The President's Men* (1976), *Silkwood* (1983) and most recently, *The Insider* (1999) and *Erin Brokovich* (2000).

The academic literature on whistleblowing has shared a similar evolution. It first began in the early 1970s and has grown steadily ever since. Vandekerckhove (2006), in order to chart the growth of whistleblowing research between the years of 1971 and 2002,

conducted a search for the terms “whistleblowing” and “whistle blowing” in several academic journal databases. His results reveal that the average number of articles published per year on the topic of whistleblowing jumped from 0.5 in the 70s, to 2.6 during the 80s, to 8.3 during the 90s, to 10.6 between the years of 2000-2003 (p. 12). He also points out that the tone of the articles since the end of the 1990s onwards is “less conflicting” and generally more accepting of whistleblowing as a legitimate method of disclosure (p. 16). Similarly, Thomas (2005) suggests there is far less moral ambiguity associated with whistleblowing now than there has been in the past. He notes, “whistleblowers have been transformed from villains to superheroes, at least when their courageous decisions to come forward serve a popular cause” (p. 179).

At the same time, many public and private institutions have also begun to view whistleblowing in an increasingly positive light. For evidence of this, one needs to look no further than the large number of governments and businesses that have passed, or are currently developing, whistleblower protection policies. Moreover, many governments and businesses have recently held commissions or conferences on whistleblowing in order to raise awareness about the plight of the whistleblower (Johnson 2002, p. 116). There has also been an increase in the number of hotlines and non-profit organizations available to whistleblowers as resources. Groups such as the Government Accountability Project (United States), Federal Accountability Initiative for Reform and Canadians for Accountability (Canada), and Public Concern at Work (United Kingdom) have made it their mission to inform and protect those who blow the whistle on wrongdoing.

Indeed, over the past forty years, interest in whistleblowing amongst the public, the academic community, the media and public and private institutions alike has grown

considerably and the general attitude towards whistleblowing has become increasingly positive. These ongoing trends prompt the questions: why the increase in attention for whistleblowing and why the shift in attitude towards whistleblowers? There are at least two different explanations. It could be that whistleblowing is more frequent than before and thus generates more interest and is more widely accepted; or, alternatively, it could be that whistleblowers are more important sources of information than before and thus attract more attention and are more readily welcomed. Vandekerckhove (2006) argues regardless of how the growing interest in and shifting attitude towards whistleblowing is interpreted, they point to “a changed societal context in which social actors – business, media, consumers, employees, governments – operate.” These societal changes, he adds, are typically associated with the umbrella term, “globalization” (p. 19).

The research of Vandekerckhove (2006) illustrates an important gap in the current literature on whistleblowing. Since the 1970s, from Brabeck’s (1984) study of the ethical characteristics of whistleblowers, to Glazer and Glazer (1989) and Alford’s (2001) interview-based documentation of the whistleblower experience, much has been written on the definition, ethics and consequences of whistleblowing. However, comparatively little has been written on how globalization has created a climate that is highly conducive to whistleblowing. The following chapter attempts to bridge this gap in the literature by situating the act of whistleblowing in a modern context. It argues that societal changes over the past couple of decades have created an unprecedented need for whistleblowers as sources of information about wrongdoing. In doing so, it provides a backdrop against which recent trends in whistleblowing research can be understood and helps bring the discussion of whistleblowing out of the twentieth century and into the new millennium.

Organizational Structure

The latter half of the twentieth century brought with it a loosening of boundaries between countries and a heightened interconnectivity between people, cultures and nation-states. In particular, the globalization of the marketplace, the development of highly efficient transportation methods, the emergence of the Internet and the proliferation of wireless technology have all combined over the past few decades to facilitate the flow of people, products and information across the globe. As a result, it is now easier and faster than ever before for people and places to connect with each other. On the one hand, this has seemingly made the world a smaller and smaller place; however, on the other hand, it has led to a significant increase in both the size and complexity of organizations. Many of today's larger organizations employ hundreds, if not thousands, of people and some even have offices scattered across the globe or are affiliated or owned by an organization that does. The latter are often referred to as "multinational" corporations, "transnational" organizations (e.g. NGOs, charitable organizations) or "international" organizations (e.g. United Nations) in order to reflect their global presence.

The unfortunate aspect of all this organizational growth is that, as organizations become larger and more complex, their activities often become less visible to the public, making it harder to monitor workplace activity and detect wrongdoing (Rothschild and Miethe 1994, p. 260). This is especially true when an organization has a large number of members or is based out of more than one country, state or province. Typically, the more people an organization employs and the more places it operates out of, the more complicated it is to reconcile information about the organization, its activities and any potential wrongdoing. The fact that different jurisdictions often have dissimilar, if not

contradictory, laws and policies regarding organizational activity and disclosure can even make this task impossible. Miethe and Rothschild (1994) suggest the expansiveness of modern organizations inevitably keeps many types of wrongdoing hidden from public view. Specifically, they argue, “the size and complexity of the modern bureaucratic organization virtually guarantee that defective or lower-quality production activities will remain invisible to public scrutiny” (p. 328). To put it simply, modern organizations have expanded to the point where their size and complexity is sometimes preventing wrongdoing from being exposed and wrongdoers from being held accountable.

Miethe and Rothschild (1994) also argue that, in addition to modern organizations becoming larger and more complex, occupations have become “more professionalized, specialized, and expertise-based over time” (p. 328). This is particularly evident in post-industrial economies, which tend to place a greater emphasis on services, information and research than manufacturing-driven industrial economies. The significance of this trend is that, as employment duties and responsibilities become more esoteric, the detection of wrongdoing becomes more difficult, if not impossible, for all except a privileged few within the organization. For example, a financial record with accounting irregularities may appear completely legitimate to the untrained eye, but to someone with expertise in the area, such as a company accountant, it may be evidence of fraud. Unfortunately, as Miethe and Rothschild (1994) note, “where complex accounting systems and regulatory guidelines are understood by only a few, there are ample opportunities for unlawful and unethical business practices” (p. 329). The fact that many wrongdoings are only visible to insiders with specialized knowledge and privileged access to data, figures and records makes whistleblowers particularly valuable sources of information.

The size and complexity of modern organizations and the increasingly specialized nature of jobs have also encouraged many organizations to adopt decentralized structures, a trend Vandekerckhove (2006) describes as the “flattening” of organizations. He defines the decentralized organization “as an organization without one central point of decision making” and notes this typically implies “employees at a lower level are given more discretionary power” (p. 77). The main benefit of decentralization is that, by eliminating time-consuming chains of command, it makes the decision making process in an organization much faster and more efficient. In other words, it is no longer the case that important organizational decisions have to navigate several levels of management; rather, they are increasingly being made by lower level managers, who are often more familiar with the situation. Hence, Winfield (1994) points out that, “as businesses, industries and public sector agencies become ever larger and decentralized, it is increasingly unlikely that those at the top will know what is going on at ground level” (p. 22). The danger of decentralization is that, as organizations become less hierarchical, it becomes more difficult to determine how a particular decision or action came to be. In the end, this makes it harder to identify who in an organization is responsible when a wrongdoing does occur.

Accountability

In an ideal world there would be no need for whistleblowing because organizations would be more than willing to open themselves up to scrutiny both from their employees and the public. There would be nothing to gain from deception, deceit and duplicity because transparency and disclosure would be all pervasive. However, in the absence of

such a world, whistleblowers are necessary checks on corporate and political power. In reality, where everyone does not always act in the best interests of the greater good and people are not always made accountable to the public, whistleblowers represent the last line of defense against corporate and political corruption. They are ambassadors of accountability if you will: unofficial public representatives who at great expense to themselves see to it that wrongdoers are exposed and made liable for their actions – a role that has never been more important than it is today.

In an interesting article on the role of accountability in advanced capitalism, Green, Vandekerckhove and Bessire (2008) argue the concept of accountability, which originally “implied a responsibility by the powerful to act in the interests of the common good” and “demanded full disclosure of information in the interests of meaningful democracy,” has become distorted over the years and gradually lost touch with the public interest (p. 199). They attribute these changes mainly to the ideology of the free market and the growing influence of the global economy, both of which reinforce the pursuit of individualistic interests rather than the pursuit of collective interests. Moreover, the authors also link the distortion of accountability to the decentralization of organizations. They argue that as lower level managers become more autonomous with respect to decision-making, they become more strictly accountable to their superiors and their subordinates more strictly accountable to them. Thus, they conclude, decentralization leads to a “tighter type of managerial control” wherein employees must follow the instructions of their immediate supervisor at all cost (p. 199). The concept of accountability, in other words, no longer implies looking out for the greater good, it merely implies satisfying the demands of one’s boss:

There is nothing in place to encourage employees to protect consumers or the community, let alone their own interests, now solely dependent on satisfying their managers' wishes, however self-interested, irrational or whimsical (Green et al. 2008, p. 201).

The distortion of the meaning of accountability over the years is an instance of hegemony as defined by Gramsci (1971) in that it entails the domination of one social group over another. Slack (1996), echoing Gramsci, defines hegemony as "a process, by which a hegemonic class articulates (or co-ordinates) the interests of social groups, such that those groups actively 'consent' to their subordinated status" (p. 117). The concept of accountability has become hegemonic because, in losing touch with the public interest, it has come to reflect the ideas and values of only a powerful few. The term no longer implies that employees should act in the best interest of their customers and community. In contrast, it implies that employees should act only in accordance with their immediate superior's wishes, regardless of the cost to themselves or others. As Green et al. (2008) argue, the concept of "accountability is being used as a means of ideological and physical control in the interests of powerful institutions and for the good of a minority" (p. 206).

The hegemonic struggle over the meaning of accountability is one of the reasons why whistleblowers are such valuable sources of information. In a world where the concept of accountability has lost touch with the public interest, whistleblowers help return the concept to its native roots. They remind everyone that accountability used to entail so much more than simply meeting targets and deadlines and satisfying the demands of one's superior. They remind everyone that powerful organizations, such as governments and corporate institutions have responsibilities outside of generating profit

and obligations to all stakeholders in society, not just campaign supporters and corporate stockholders, and thus need to be held accountable to the general public.

Control Efforts

The growth in the size and complexity of organizations, the decentralization of many organizations and the distortion of accountability over the years have all muddied the transparency of organizations and made it much harder to detect wrongdoing. However, surprisingly these changes have not been met with more intense forms of monitoring and stricter regulations. In fact, as Tombs and Whyte (2003) point out, if there is one discernible trend in organizational control efforts across almost all industrialized nations over the past quarter century, “it is that control efforts have diminished” (p. 9). Likewise, Buttell and Gould (2004) argue that the globalization of the marketplace and the liberalization of trade barriers have created an intensely competitive atmosphere where nation-states must vie for corporate investment by reducing their regulatory measures on organizational activity. They refer to this downward regulatory spiral as the proverbial “race to the bottom” (p. 40). The situation has become so dire and regulatory measures have sunk so low that some even suggest the entire concept of the corporate crime has “disappeared by definition” (Snider 2000, p. 172).

Snider (2000) argues that organizational control efforts can be reduced “through decriminalization (the repeal of criminal law), through deregulation (the repeal of all state law, criminal, civil and administrative) and through downsizing (the destruction of the state’s enforcement capability)” (p. 172). Environment Canada’s dwindling budget throughout the 1990s is a good illustration of how traditional methods of enforcement

have been reduced in Canada. In 1992-1993, Environment Canada had its budget slashed by 30 percent and it was reduced again in 1994-1995 from \$705 million to \$507 million. At the same time, the number of personnel at Environment Canada dropped from 10,000 to under 4,000 and the number of federal environmental charges laid every year in Canada dropped by 78 percent (Snider 2000, p. 178). Similarly, Durhon (2005) argues that the Royal Canadian Mounted Police (RCMP) unit charged with investigating corporate crimes is “chronically underfunded” to the point where Canada has developed an international reputation for being a safe haven for corporate criminals.

The reduction of organization control efforts across almost all industrialized nations over the past quarter century has left many industries either unregulated or self-regulated and many organizations accountable to nobody but themselves. In particular, powerful trends such as decriminalization, deregulation and downsizing have either entirely eliminated or severely compromised the ability of organizational control mechanisms (i.e. any person or body charged with monitoring organizations and enforcing laws and regulations) to detect and investigate illegal, illegitimate and immoral activity. These developments have made whistleblowers particularly valuable sources of information about wrongdoing. Winfield (1994), who describes whistleblowers as a “safety net” in the event that other control mechanisms fail, argues this very point. He claims the most feasible way of “regulating what goes on inside private and public sector enterprises is through the vigilance of individual employees” (p. 23). Indeed, in the absence of effective organizational control mechanisms, whistleblowers are perhaps our best hope at curbing political and corporate corruption.

Media

The media, which are often referred to as the “fifth estate” and relied upon as a corporate and political watchdog, are another organizational control mechanism that is failing to live up to expectations in the twenty-first century. Throughout history, from Carl Bernstein and Bob Woodward of Watergate fame to Lowell Bergman, the *60 Minutes* producer who helped Jeffrey Wigand blow the whistle on the tobacco industry in 1994, there are many examples of the media, particularly investigative journalists, using whistleblowers as sources of information about wrongdoing in order to fulfill their responsibility as the “fifth estate.” Peters and Branch (1972) illustrate the longstanding relationship between whistleblowing and investigative journalists when they describe whistleblowers as “first cousins to outside muckrakers, perhaps, appearing alongside them in sour historical currents when reform is needed” (p. 6). However, recent trends within the media industry have made it more difficult for investigative journalists to act as checks on corporate and political power. These developments have made investigative journalists more reliant than ever on whistleblowers as sources of information about wrongdoing.

The importance of whistleblowers within the world of investigative journalism is illustrated in the work of Liebes and Blum-Kulka (2004). Their research indicates that the outbreak of scandal is more frequently controlled by the whistleblower than the actual journalist. Moreover, they suggest that the term “investigative reporting” is often nothing more than a “euphemism devised by a paper or a TV channel to give themselves primary credit for obtaining the scoop” when, in fact, a whistleblower deserves the lion’s share of the credit (p. 1159). The comments of Erica Johnson, an investigative reporter with the

CBC, support the findings of Liebes and Blum-Kulka (2004). During a public forum on whistleblowing, she admitted that her show *Marketplace* is heavily dependant on whistleblowers for information (Johnson 2003). The research of Dworkin and Callahan (1993) emphasizes the importance of whistleblowers as sources of information for not just investigative journalists, but all journalists. They argue that whistleblowers facilitate the media's independence from the powerful public relations industry by decreasing the media's reliance on "officially packaged information" (p. 394).

The research of Liebes and Blub-Kulka (2004) also suggests that investigative journalism's dependence on whistleblowers has become particularly acute over the last decade. They attribute this to "the constraints of increasing commercialization and cutthroat competition, which restrain journalists from doing investigative work," (p. 1168). Similarly, Raphael, Tokunaga and Wai (2004) point out that there are at least three powerful constraints on investigative journalism in today's highly commercialized media environment: first, corporate media ownership restrains journalists from publishing news stories that conflict with business interests; second, the media's increasing dependence on advertising revenue from large companies threatens journalistic independence; and third, the high cost of investigative reporting makes it an unfavorable form of news for media organizations that are increasingly concerned with the "bottom line" (p. 166). The constant pressure on the media to cut costs and only report news in alignment with powerful commercial interests has made whistleblowers particularly valuable sources of information for today's journalists, who often lack the resources necessary to investigate and expose wrongdoing independently. By providing journalists with information that would otherwise be unattainable, whistleblowers greatly enhance

the media's ability to act as a check on corporate and political power and a protector of the public interest.

There are of course some people who are highly critical of media whistleblowers (Culp 1995, p. 133). Their basic argument is that individuals who report to the media are liable to be either vindictive employees out for revenge or attention seeking gadflies; however, this argument is largely unsubstantiated in scholarly research. In contrast, the research of Callahan and Dworkin (1994) indicates that media whistleblowers tend to be higher-level employees and feel more threatened than their counterparts (p. 171-174). Their findings also suggest that wrongdoings involved in media disclosures are likely to be more frequent in occurrence and involve larger sums of money than those reported through other channels (p. 173). Furthermore, their findings also reveal that whistleblowers are most likely to choose the media as a method of disclosure when the wrongdoing observed threatens public health and safety (p. 179). The findings of Callahan and Dworkin (1994) suggest that media whistleblowers are not only trustworthy sources, but also extremely valuable sources given the frequency and the magnitude of the wrongdoings they report.

Technology

The latter half of the twentieth century also brought with it new, sophisticated methods of communicating, recording and manipulating data. In particular, the proliferation of computer technology, the development of the Internet, and the invention of wireless gadgetry, such as laptops, mobile phones and handheld communication devices, have significantly altered the way people send and receive information and brought many

changes to the day-to-day operations of public and private organizations. However, by making it easier and faster to send information over large distances, these technological developments have not only facilitated lawful activity, but unlawful activity as well.

In general, technology can facilitate unlawful activity in two ways: it can be used to commit new crimes (i.e. those crimes which have been born out of technology) and it can be used to commit more conventional crimes, such as theft, extortion and fraud. The Internet, for example, has produced several new types of criminal behavior, including “hacking,” the use of computers to infiltrate other computer systems and “spoofing,” the creation of a fraudulent website that mimics the appearance and address of a genuine website. At the same time, the Internet has also provided new opportunities for those looking to commit more traditional crimes. Identity theft, in particular, has become more prevalent since the development of the Internet. In fact, it is estimated that identity theft has become “the fastest growing crime of any kind in our society” (Hoar 2001, p. 1423). The practice of stealing sensitive information, such as usernames, passwords, social security numbers, credit card numbers and bank account details, through fraudulent electronic communication is often referred to as “phishing.” In short, by changing the way people send and receive information, technology has transformed the modus operandi of many types of crimes, a development that poses obvious challenges for those responsible for investigating unlawful activity.

Technology, in addition to making it easier and faster to send information over large distances, has also made it easier and faster to send information confidentially and anonymously. Technological devices, such as encryption software, encrypted cellular phones, and anonymous re-mailers that forward e-mails without revealing their origins,

have all made it easier to send untraceable information. These tools allow criminals to plan and execute unlawful activities without physical interaction and without leaving a trail of damaging evidence, thereby reducing the risks of detection and prosecution. Moreover, these tools can be used to anonymously intimidate and threaten people in a position to blow the whistle on illegal activity. For example, criminals can use encrypted cellular phones, anonymous email accounts, as well as other electronic communication devices, such as digital cameras, video cameras and voice changers, in order to stalk, harass and bully potential whistleblowers. In other words, by facilitating increasingly anonymous, confidential and secure methods of communication, technology has made witnesses of wrongdoing more susceptible to abuse and wrongdoers less susceptible to detection and prosecution.

Technology can also be beneficial for whistleblowers. Throughout history, from cameras, to portable dictation machines, to photocopiers, technology has often been used by whistleblowers to collect evidence that corroborates their allegations of wrongdoing. Today, whistleblowers have an unprecedented number of recording apparatuses and data storage devices at their disposal. Household equipment, such as video cameras, digital voice recorders and external hard drives, are particularly valuable evidence-gathering tools and all are readily available at any electronics store. Moreover, the development of the Internet and the proliferation of computer and electronic communication technology have led to new resources and opportunities for whistleblowers. There are a growing number of websites that offer free advice and support for whistleblowers, as well as a growing number of individuals who are choosing to blow the whistle online. In 2006, Michael De Kort, a former Lockheed Martin engineer, used the popular video sharing

website *YouTube* to blow the whistle on critical security flaws in a fleet of Coast Guard patrol boats after his claims had been ignored by his bosses, government investigators, and a congressman. His controversial video made international headlines virtually overnight and has since been viewed over 150,000 times (Witte 2006). Another website *Wikileaks* allows whistleblowers to publish highly sensitive information about corporate and political wrongdoing without having to reveal their identity. The website published over a million leaked documents in its first year of operation, many of which generated international headlines and led to political reform (Wikileaks 2007). Thus, technology has, in a sense, empowered whistleblowers by granting them more anonymity and more access to valuable information and resources. As a result, individuals are more informed and better equipped to face the challenges of blowing the whistle than ever before.

Summary

The globalization of economies and technology over the latter decades of the twentieth century has created an increasingly intricate, aggressive and uncertain world. It is entirely possible that the hottest economy today could be in a recession tomorrow, that the latest technological product this week could be obsolete by next month and that a government with a high approval rating tonight could be in the public's "doghouse" by morning. In order to be successful in such a turbulent climate, many corporate and political organizations approach their work with a Machiavellian philosophy where the end justifies the means. The attitude being preached to their members is that the final result is all that matters – how you get there is irrelevant. This cutthroat atmosphere can

increase the likelihood of illegal, illegitimate and immoral behavior since it encourages individuals and organizations to strive for a competitive edge no matter what the costs.

Glazer and Glazer (1989) argue the pressure to remain competitive in a global economy is so great that many government and corporate executives will inevitably be tempted to find shortcuts and engage in risky behavior. They argue those that do end up engaging in risky behavior will often justify such decisions as necessary for technological and social progress:

To rationalize such decisions, they argue that all policies have some risks and that their choices are not outside the reasonable. No one, they assert, has created an accident-proof product, a perfect design, or a plan for pollution-free environment. A society that wants to benefit from high technology must be prepared to take certain risks (p. 255).

At a time when government and corporate executives are under constant pressure to cut corners and take greater risks in order to stay a step ahead of the competition, unlawful and unethical activity is bound to be prevalent in both the public and private sectors.

Unfortunately, due to the growth and decentralization of organizations, the perversion of accountability, the reduction of organizational control efforts, the commercialization of the media industry and the proliferation of computer and electronic communication technology – all trends associated with globalization – there is a lower probability that wrongdoing will be reported and punished in today's public and private sectors. The development of effective legal protection for whistleblowers is perhaps the most feasible way of overcoming this obstacle. This is because in today's extremely intricate and volatile political and corporate climates, whistleblowers are often the only persons in a position to expose unlawful and unethical activity. Moreover, legal

protection for whistleblowers is liable to prevent as many wrongdoings as it exposes.

Most corporate and political organizations require the public's confidence in order to be successful; thus, even the mere prospect of public exposure from whistleblowing may be enough to deter illegal, illegitimate, and immoral activity.

In summary, while the act of whistleblowing has long been an important defense against wrongdoing, it has never been more important than it is today. As wrongdoings have become less visible to the public as a result of the globalization of economies and technology, whistleblowers have become increasingly valuable sources of information about wrongdoing. Thus, when discussing the benefits of whistleblowing and legal protections for whistleblowers, it is absolutely imperative that the effects of globalization be taken into consideration. In a world that is becoming increasingly complex, competitive and unpredictable, whistleblowers sometimes stand alone as our only viable line of defense against political and corporate corruption. If we do not support and protect them, we have little hope of learning and controlling what goes on inside most organizations.

CHAPTER THREE: CRITICAL DISCOURSE ANALYSIS

Description

CDA is an interdisciplinary approach to the study of discourse that is often used in the social sciences to describe, interpret and explain the complex relationship between language, power and society. The primary goal of any CDA is to examine unequal power relations and how these relations can be reproduced and/or challenged through text, speech and other forms of communication. CDA is particularly interested in notions of “dominance, discrimination, power and control” and how such constructs are legitimated and/or illegitimated through discourse (Wodak 2003, p. 2). CDA is also interested in the production, distribution and consumption of discursive sources of power within “specific social, economic, political and historical contexts” (McGregor 2004). Because CDA is used to not only describe and interpret discourse, but also explain how and why discourse is produced, distributed and consumed, it is often thought of as both a methodology and a theory (Rogers 2004, p. 2).

CDA is generally considered to be a complex, multidimensional and democratic domain of study. Subsequently, different scholars have different interpretations about what gives this domain of study a sense of cohesion. One researcher even suggests that it is rather misleading to treat CDA as a formalized corpus of analytical and methodological techniques (Luke 2002, p. 97). Similarly, Wodak (2003) argues CDA research is “bound together more by a research agenda and programme than by some common theory or methodology” (p. 4). The shared research agenda that Wodak is referring to is a common interest in social justice issues. This common research interest is illustrated in the work

of van Dijk (1993), Fairclough (1995) and Huckin (1997), who notes, “CDA practitioners typically take an ethical stance, one that draws attention to power imbalances, social inequities, non-democratic practices, and other injustices in hopes of spurring readers to corrective action” (p. 79). Thus, one interlinking theme within the CDA paradigm is that its practitioners are typically drawn to and motivated by social justice issues, which they hope to better understand through the study of discourse.

The complexity of the discipline has not stopped some scholars from attempting to consolidate CDA into one formalized methodology. Fairclough’s (1995) multilayered approach to CDA is one of the more commonly used frameworks. This approach views every discursive event as having three distinct features: first, it is a spoken or written text; second, it is an example of discourse practice; and third, it is a part of social practice (p. 133). Huckin (1997) explains that within this framework, every spoken or written text is assumed to be the product of discursive practices, including processes such as production, distribution and interpretation. Moreover, these discursive practices are, in turn, assumed to be the product of much larger and more complex social practices (p. 79). The primary activity of CDA, then, is the simultaneous analysis of text and context. Similarly, Gee developed an approach to CDA that analyzes “the relationship between language bits (small “d”) and cultural models, situated identities, and situated meanings (big “D”)” (Rogers 2004, p. 7). Within these frameworks, it is the job of the analyst to continually shift back and forth between micro and macro analysis of the text at hand. Rogers (2004) points out that this “recursive movement between linguistic and social analysis is what makes CDA a systematic method, rather than a haphazard analysis of discourse and power” (p. 7).

Background

CDA did not emerge as a distinct academic discipline until the early 1990s. Wodak (2003) credits an academic conference at the University of Amsterdam in January 1991 as being the unofficial birthplace of CDA (p. 4). The ancestral roots of CDA, however, are in the field of critical linguistics, which has a slightly longer history. The discipline of critical linguistics was primarily developed at the University of Anglia throughout the 1970s and 1980s. It is similar to CDA, but unlike most linguistic traditions, in that it dismisses the notion of a deterministic relationship between texts and the social; instead, it views texts as “historically produced and interpreted” and “structured by dominance” (Wodak 2003, p. 3). Many of the researchers at the forefront of critical linguistic research throughout the 1970s and 1980s, such as Gunther Kress, were also influential in the development of CDA later on in the 1990s. Kress was even one of the key researchers in attendance at the 1991 conference at the University of Amsterdam (Wodak 2003, p. 4).

The Frankfurt School of Critical Theory (to which the term “critical” in CDA and critical linguistics refers) is another important ancestor of CDA. This particular school of critical theory emerged out of a growing dissatisfaction with the direction of orthodox Marxism in the early twentieth century. In contrast to the prevailing view of Marxism at the time, the Frankfurt School advocated a return to the epistemological commitments of early Marxism or what Miller (2005) describes as a “revolution of consciousness” (p. 69). This “revolution of consciousness” was demonstrated by the Frankfurt School’s dogged commitment to “the critical analysis of society’s current state as well as the development of normative alternatives” (Miller 2005, p. 69). In other words, the Frankfurt school was

not merely concerned with critiquing society, it was also concerned with making “theory itself a moral force” capable of transforming and revolutionizing the social world (Miller 2005, p. 69). Today, critical discourse analysts share many of the critical and normative goals of the Frankfurt School, particularly the desire to not only identify, but also resolve pressing social justice issues.

Metatheory

The metatheoretical commitments of CDA help set it apart from other approaches to textual analysis. In particular, the ontological commitments of CDA are thought of as one of the discipline’s defining characteristics. CDA research adopts what is known as a social constructionist ontological perspective. To assume such a perspective is to view discourse, and social reality in general, as being neither entirely objective nor subjective, but as an “intersubjective construction that is created through communicative interaction” (Miller 2005, p. 27). Thus, critical discourse analysts do not view social reality as being static or fixed, but rather open to change or malleable, which corresponds nicely with CDA’s ultimate goal of bringing about beneficial social change. This desire to improve society through research and knowledge is also directly related to the epistemological commitments of CDA.

The epistemological commitments of CDA correspond to what Habermas refers to as the “critical-emancipatory” knowledge interest. This epistemological perspective views “knowledge as a process of self-reflection” (Miller 2005, p. 73). For this reason, critical analysts are “constantly aware of how they are analyzing and interpreting” and generally overt about their research interest and any political motivations that might be

guiding their research (Wodak 1999, p. 186). Moreover, this epistemological perspective also sees knowledge as “serving the interests of change and emancipation” (Miller 2005, p. 73). Thus, critical discourse analysts typically assume that knowledge should act as a transformative and liberating social force. McGregor (2004) emphasizes the potential of CDA as a tool for social change and emancipation by describing it as “the discourse of the marginalized.” Likewise, both van Dijk (1993) and Wodak (2003) argue that critical discourse analysts should adopt the perspective of those who suffer the most.

It is the axiological commitments of CDA, however, that most clearly distinguish it from other forms of textual analysis. The axiological perspective of CDA is that values should play an active role in leading the research process. This axiological perspective is illustrated by Wodak (1999), who claims that critical discourse analysts “do not separate their own values and beliefs from the research they are doing” (p. 186), as well as Rogers (2004), who claims that the “intentions of the analyst always guide the theory and method of CDA” (p. 3). Likewise, van Dijk (1993) suggests that CDA practitioners should adopt an “explicit sociopolitical stance” in their work that encapsulates “their point of view, perspective, principles and aims, both within their discipline and within society at large” (p. 252). Simply put, the opinions, values and ethics of the critical discourse analyst will always shape, if not steer, the research process.

Strengths and Weaknesses

CDA could not be considered an avowedly critical framework if its practitioners did not offer some critiques of the method and theory. Subsequently, a number of CDA researchers have commented on the strengths and limitations of CDA. The active role of

values in the research process is one of the more common criticisms of CDA. Many researchers, especially those steeped in empiricist and post-positivist traditions, argue that value-driven research produces “ideological claims” rather than scientific knowledge (Hamilton 2002, p. 11). Thus, practitioners of CDA are often accused of projecting their political and social ideologies onto data rather than revealing them through the data. The integral role values play in CDA research may also lead to what Hammersley (1997) refers to as “overambition,” which occurs when researchers over-interpret their data or present their speculations as if they were well-grounded knowledge (p. 245).

Another common criticism of CDA is that it lacks a formalized and systematic methodology. It has even been described as “a kind of ad hoc bricolage which takes from theory whatever concept comes usefully to hand” (Widdowson 1998, p. 137). However, Widdowson (1998) points out that, while there may be considerable disagreement as to the degree to which CDA should adopt a rigorous analytical framework, most critical discourse analysts want to avoid simply engaging in “whatever partial interpretation” suits their research interest best (p. 148). It is for this reason that van Dijk (1993) calls for the discipline to promote “international theoretical and methodological integration” (p. 279). A more united front, at least in van Dijk’s opinion, would strengthen CDA by directing its many facets towards “a common aim, namely to analyze, understand and combat inequality and injustice” (p. 279).

Luke (2002) puts forth another criticism of CDA. He suggests that the discipline has been too focused on “ideology critique” or critical aims and not focused enough on normative goals. Specifically, he argues that, while CDA has done a commendable job identifying what is problematic with texts and discourse, it has “progressed little in terms

of the building of an analytical stance on the normative goals of discourse” (p. 106). Subsequently, Luke calls for critical discourse analysts to move beyond the ideology of critique and to concentrate more on what should be done with texts and discourse in order to promote productive uses of knowledge and power.

Interestingly, many of the most commonly cited weaknesses of CDA research by some are considered to be strengths by others. In response to the accusation that CDA produces nothing but “ideological claims” most critical discourse analysts would argue that no research method or theory is impartial despite what empiricists and post-positivists claim. Hammersley (1997), for example, challenges the neutrality of conventional research on two counts: first, he points out that all studies are influenced by the researcher’s political beliefs, social location and assumptions about the nature of society; second, he points out that conventional research, in pretending to be neutral, is in fact reinforcing dominant ideologies and supporting the status quo (p. 239). Thus, many critical discourse analysts argue that “if the process of analysis is always interpretive...why not be as explicit as possible about one’s background values” (Wetherell 2001, p. 385). In this sense, it can even be argued that CDA is less biased than conventional research methods because it is more overt about the role of values in the research process.

It has also been argued that the lack of a formalized methodology within CDA research is not a weakness, but in fact a strength of the discipline. For example, Luke (2002) suggests that to treat CDA research as a formalized corpus of methodological and analytical techniques would be to miss the point of CDA altogether. This is because, in his opinion, CDA and discourse are similar in that both are “contingent upon particular

historical conditions, agents and possibilities” (p. 97). Thus, he argues that CDA should not be allowed to sit “in media res” rather it should constantly be infused with “new, hybrid blends of analytic techniques and social theories” (p. 98). Luke’s perspective is similar to that of Max Horkheimer, a prominent researcher within the Frankfurt School, who maintained that the use of only one research methodology would always lead to distorted results (Wodak 2003, p. 10). In this sense, it can be argued that having no formalized methodology provides CDA researchers the flexibility necessary to gain the clearest possible picture of the issue at hand.

The most obvious strength of CDA is its commitment to not only diagnose, but also remedy power imbalances, social inequalities, non-democratic practices, and other injustices. In order to achieve such lofty goals, CDA practitioners undertake research and analysis with the intent of spurring themselves and their readers into remedial action. As Rogers (2004) points out, “CDA explicitly addresses social problems and seeks to solve social problems through the analysis and accompanying social and political action” (p. 4). Thus, for critical discourse analysts, the identification and analysis of social justice issues are only the first step of the solution process. Though the normative goals of CDA are certainly noble objectives by anyone’s standards, the ability of CDA to actually achieve these goals is certainly debatable. However, at least two researchers are optimistic. Luke (2002) maintains that CDA has the potential to “construct and transform knowledge and power relations in productive, equitable, and enfranchising ways” (p. 106). Meanwhile, McGregor (2004) simply states “it is amazing that something as simple as looking closely at our language can be so liberating!”

Existing Research

CDA is a particularly appropriate methodology for studying pieces of legislation since such documents typically contain language that legitimates power. The very definition of law, after all, suggests a collection of rules that have been prescribed by an authoritative power for the purposes of control. This, in turn, suggests that legislation has the capacity to reinforce, reproduce, and perhaps even naturalize, certain ideologies, power structures and social practices over others. CDA provides researchers with the tools necessary to deconstruct the text and context of legal documents in a way that reveals what ideologies, power structures and social practices they are either legitimating or illegitimating. CDA also encourages researchers to situate their analysis within the specific social, economic, political and historical climate that gave rise to the production, distribution and utilization of the document under examination. The contextual analysis element of CDA research is particularly important when probing legislation since legal documents are always created with a specific purpose and in response to specific social concerns.

The use of CDA to examine whistleblower protection is a particularly interesting point of investigation when one considers the view shared by many researchers that “law is subservient to power” (Ramirez 2007, p. 183). This school of thought views law as having a legitimating function, which serves to maintain the power and privileges of the ruling class. This argument even applies to laws that appear to be regulating the activity of powerful corporate and political organizations (e.g., whistleblower protection). Snider (1987), for example, contends that such laws are generally resisted by the ruling class during the initial stages of development, but then sponsored by the majority of the ruling class towards the end. Typically, she adds, as more and more of these powerful interests

come on the side of the impending legislation, the more successful they are at shaping the law to favor their own interests, or failing that, to do a minimum amount of damage to them (p. 43). If the goal of legislation is to preserve preexisting power dynamics, as many have suggested, then it follows that whistleblower protection will be designed to bring about as little change as possible. The act of whistleblowing, after all, is generally viewed as a threat to preexisting power structures, particularly the employee-employer relationship, one of the more traditional hierarchies of power in any capitalist society. Whistleblowers, as a result, typically find themselves at odds with very powerful economic and political interests. It is thus necessary to examine whistleblower protection with an eye towards how these interests might have factored into its construction.

There are a number of existing studies on the efficacy of whistleblower protection laws. The majority of these studies adopt a qualitative methodology, although there are a few exceptions. Moberly (2007), for example, uses employer and whistleblower “win rates” in order to empirically analyze the effectiveness of the *Sarbanes-Oxley Act*. The majority of these studies have also been undertaken by either law or business scholars within the United States, which might explain why the *Sarbanes-Oxley Act*, a United States law, has received the most attention as of late. In contrast, analysis on Canada’s PSDPA is rare to say the least. This scant body of research includes an article by Thomas (2005), who debates the necessity of such a bill, as well as the work of Canada’s former Public Service Integrity Officer, Edward W. Keyserlingk, who offers up his thoughts on the PSDPA in his 2004-2005 and 2005-2006 reports to Parliament. Additionally, the whistleblower advocacy organization, Federal Accountability Initiative for Reform (FAIR), has some analysis of the PSDPA on its website (<http://fairwhistleblower.ca>).

One obvious reason for this lack of scholarship is that the PSDPA was only passed in 2005 and only came into force in 2007. Keyserlingk, however, notes that the PSDPA is supposed to come under review after five years so further research into this area can be expected in the near future (Public Service Integrity Office 2006, p. 19).

The fact that law and business professionals have undertaken the majority of the existing research on whistleblower protection has resulted in quite a limited scope of analysis not only in terms of what pieces of legislation have been analyzed, but also in terms of how pieces of legislation have been analyzed. Few researchers have adopted an explicitly “critical” approach when analyzing whistleblower protection laws and fewer still have attempted to analyze this type of legislation from a social justice perspective. Moreover, it appears no researchers to date have adopted CDA as their methodology. Yet another limitation of the existing research on whistleblower protection is that authors rarely situate their analysis within a modern social, economic and political context. As a result, few studies have adequately addressed the importance of whistleblower protection in an increasingly intricate, aggressive and uncertain world.

This thesis attempts to fill in these gaps in the literature on whistleblowing and whistleblower protection by using CDA to analyze the PSDPA. The central argument is that the PSDPA is chiefly a disciplinary apparatus designed to manipulate whistleblowers as opposed to a legal coat of armor designed to protect them. In other words, the primary aim of this particular piece of legislation is not to eliminate wrongdoing within the public sector, but rather to control the context under which whistleblowing can occur. The establishment of set procedures through which organization members can make protected disclosures of wrongdoing is a process that is often referred to as the “institutionalization

of whistleblowing” (Vandekerckhove and Commers 2004, p. 231). The PSDPA is a prime example of how the institutionalization of whistleblowing can have a chilling effect on whistleblowing. While it would be irresponsible to draft whistleblower protection without forcing whistleblowers to adhere to some criteria, the PSDPA simply goes too far. It forces whistleblower claims to adhere to strenuous, and in some cases, unrealistic substantive and procedural requirements and, as a result, risks silencing more whistleblowers than it actually protects.

Application

There are a number of ways power can be embedded in discourse. Consequently, critical discourse analysts have many ways of identifying discursive sources of power. However, the type of analysis most relevant to the examination of whistleblower protection is the identification of context control. This type of analysis requires researchers to identify the degree to which participants involved in discursive events “control the occasion, time, place, setting and the presence or absence of participants in such events” (van Dijk 1993, p. 260). Typically, the degree to which participants control the contextual variables of a discursive event is a direct reflection of power or powerlessness. For example, as van Dijk (1993) points out, it is generally doctors who control context when meeting with patients and professors who control context when meeting with students rather than the other way around. In other words, the control of context is a particularly effective way of “enacting power” (p. 260). Subsequently, any time an organization attempts to regulate the circumstances under which its members can disclose wrongdoing, it is an example of the organization enacting power through discourse.

Thus, when applying CDA to whistleblower protection, a good point of departure is to investigate the extent to which the legislation attempts to control the contextual variables surrounding the act of whistleblowing. In order to do this, the researcher must ask four simple questions regarding the scope of the legislation: who, what, where and when? The first step is to identify exactly “who” is covered; the second is to identify “what” types of wrongdoing are deemed significant enough to warrant whistleblowing; the third is to identify “where” or to whom a whistleblower can report wrongdoing; and the fourth is to identify “when” or during what time period an individual is permitted to blow the whistle. This type of analysis is necessary in order to determine the extent to which whistleblower protection actually empowers whistleblowers against organizational dominance. If a piece of legislation is overly restrictive when it comes to controlling the contextual variables surrounding the act of whistleblowing, it runs the risk of deterring potential whistleblowers. Such legislation not only fails to protect whistleblowers from organizational dominance, it becomes a mechanism of organizational dominance itself. In contrast, if a piece of legislation adopts an overly flexible approach to context control, it runs the risk of encouraging frivolous and baseless disclosures or, alternatively, it could end up being too vague to be effective. If done properly, whistleblower protection should walk the fine line between overly restrictive and overly flexible context control.

The research of Huckin (1997) outlines some other methodological tools that are relevant to the analysis of whistleblower protection. These tools pay special attention to how the author(s) frames discourse. The first technique to consider is backgrounding, which refers to the deemphasizing or downplaying of particular information. The most extreme form of backgrounding is omission. This type of framing is significant because,

as Huckin notes, “if the writer does not mention something, it does not even enter the reader’s mind and thus is not subjected to his or her scrutiny” (p. 82). There are many ways that whistleblower protection can background or omit information. For example, whistleblower protection may omit potentially important types of wrongdoing, such as those that involve inaction, negligence or incompetence. Furthermore, whistleblower protection may omit a certain portion of the population from protection or neglect to mention potentially important types of disclosures, such as disclosures to the media or disclosures made over the Internet. The omission of this type of information is highly significant because it can lead to uncertainty as to whether or not a whistleblower is actually protected by a piece of legislation. This uncertainty could, in turn, lead to an individual coming forward with information about a wrongdoing only to find that they are not protected by the legislation and are thus susceptible to retribution. Alternatively, it could also lead to an individual unnecessarily withholding information about a serious wrongdoing out of fear of reprisal.

The opposite of backgrounding is foregrounding. This technique refers to the emphasizing or privileging of certain information in a text. Keyserlingk, after analyzing several disclosure regimes, found that legislation typically stressed one of three messages: “one message emphasized the significance and nature of the disclosure itself; another focused on the person making the disclosure; and the last targeted the elimination of wrongdoing” (Public Service Integrity Office 2004, p. 3). The type of message that whistleblower protection foregrounds is significant because it can have an impact on whether or not an individual decides to blow the whistle on wrongdoing. For example, legislation that foregrounds information about the disclosure typically emphasizes the

procedural and substantive criteria that claims of wrongdoing must satisfy in order to be protected and will likely dissuade individuals who are unsure of their claims from coming forward. In contrast, legislation that foregrounds information about the person making the disclosure typically emphasizes that individuals will be protected regardless of the nature or process of their disclosure and will likely lead to a large number of both legitimate and frivolous disclosures. On the other hand, legislation that foregrounds information about the elimination of wrongdoing typically emphasizes the mechanisms in place to deal with the situation and will likely encourage those individuals whose first priority is concrete change. Even very subtle forms of backgrounding and foregrounding can have a significant effect on the interpretation of whistleblower protection. In fact, the true objectives of whistleblower protection are often made most obvious in the smallest of details.

CDA also requires researchers to analyze discourse at a contextual level. Huckin (1997) explains that within this type of analysis, “a text is assumed to be the product of discursive practices, including production, distribution, and interpretation, which themselves are embedded in a mosaic of social practices” (p. 79). The PSDPA is a particularly interesting piece of legislation to analyze at the contextual level since it arose out of considerable controversy. It was largely passed in response to several high profile political scandals, including the “HRDC fiasco,” the “Radwanski affair” and, of course, the infamous “sponsorship scandal” (Thomas 2005, p. 160). Subsequently, at the time, the media and public were both calling for the government to clean up its act and to do so quickly. The controversial context out of which the PSDPA was born may have played a role in its rather seamless ascendance into law despite many shortcomings. Moreover, a

brief history of the events leading up to the PSDPA will be provided and the importance of whistleblower protection in a modern social, economic, and political context will be discussed.

Lastly, CDA proposes that research should not only strive to understand the problem at hand, but also strive to be part of the solution. According to Luke (2002), CDA is most effective when it concentrates on normative alternatives in addition to criticism. In keeping with this line of thought, the final chapter of this thesis will provide a list of recommendations as to how the PSDPA, and whistleblower protection in general, can avoid becoming yet another mechanism of organizational dominance and instead support and protect those individuals, who choose to blow the whistle on wrongdoing. The hope is that these recommendations will make a positive contribution towards creating a climate in which whistleblowers are respected as important checks on the power and influence of organizations.

CHAPTER FOUR: HISTORY AND ANALYSIS OF THE PSDPA

History

The roots of the PSDPA extend as far back as the 1993 federal election. The Liberal Party of Canada, led by Jean Chretien at the time, promised whistleblower protection for public servants as part of its highly successful election campaign platform, *Creating Opportunity: The Liberal Plan for Canada* or the “Red Book” as it became known (Thomas 2005, p. 157). The Liberals went on to win the election in decisive fashion and ultimately remained in power for the next thirteen years. However, it was not until late in 2005, twelve years after the original Liberal campaign promise, that the federal government finally passed the PSDPA and provided whistleblower protection for public servants.

Several developments in Canadian politics between the years of 1993 and 2006 helped to lay the groundwork for the eventual passage of the PSDPA. In 1996, a task force of deputy ministers authored a report entitled *A Strong Foundation* (commonly referred to as the Tait Report), which discussed the role of values and ethics in the public service. The task force strongly recommended the implementation of a disclosure policy that would allow public servants to voice concerns about illegal and unethical behavior (Johansen and Spano 2005, p. 3).

In 2001, the Treasury Board adopted a *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* (commonly referred to as the Internal Disclosure Policy or IDP). The policy created the position of Public Service Integrity Officer, a person responsible for receiving reports of wrongdoing that

employees believed could not be raised internally. However, in his first annual report for the year 2002-2003, the Public Service Integrity Officer “declared that the IDP lacked visibility and credibility with the public service because it was based on a statute passed by Parliament and was not enforced by an independent agency” (Thomas 2005, p. 159).

In 2003, the House of Commons Standing Committee on Government Operations and Estimates tabled a report entitled *Study of the Disclosure of Wrongdoing (Whistleblowing)*. The report recommended that the federal government enact legislation to protect public servants who disclose information about wrongdoing (Spano and Johansen 2005, p. 4). Then, in 2004, the Working Group on the Disclosure of Wrongdoing, which included Kenneth Kernaghan, a distinguished public service ethics professor, and Edward W. Keyserlingk, Canada’s Public Service Integrity Officer at the time, made very similar recommendations (Thomas 2005, p. 159).

It was also around this time period that a number of high profile political scandals involving the federal government reached a crescendo. In 2000, an internal audit found that Human Resources Development Canada, a now-defunct federal agency, had failed to track billions of dollars worth of employment program grants to make sure the money was spent appropriately (Martin 2000). In 2003, George Radwanski, Canada’s federal privacy commissioner at the time, was forced to resign after the Auditor General exposed his egregious travel and hospitality spending habits (Martin 2004). A year later, in 2004, the Auditor General revealed the federal government’s sponsorship program, a campaign designed to promote federalism in Quebec, had paid several communication agencies approximately \$100 million in exchange for little to no work (Iverson 2004).

The culmination of these lengthy, drawn out affairs in 2004 clearly demonstrated the need for whistleblower protection within the Canadian public service. Many of these wrongdoings likely could have been prevented or, at the very least, exposed earlier had whistleblower protection for public servants been in place at the time. Subsequently, on February 10th, 2004, the very same day that the Auditor General tabled its report on the aforementioned “sponsorship scandal,” the federal government declared that it would introduce whistleblowing legislation for public servants no later than March 31st, 2004 (Johansen and Spano 2005, p. 4).

Less than two months later, the federal government introduced the first version of the PSDPA (then known as Bill C-25) in the House of Commons. Throughout April and May 2004, the House of Commons Standing Committee on Government Operations and Estimates heard testimony on Bill C-25 and it was widely agreed that the legislation was “weak and inadequate.” Subsequently, on May 23rd, 2004, Bill C-25 died with the dissolution of Parliament after Prime Minister, Paul Martin, called a federal election (Thomas 2005, p. 161).

On June 28th, 2004, the Liberals were elected to a minority government and, when Parliament convened later that year, a revised PSDPA (now known as Bill C-11) was introduced into the House of Commons. The bill, while still flawed, was unanimously considered to be an improvement over its predecessor, Bill C-25, and subsequently given Royal Assent on November 25th, 2005. However, the PSDPA was delayed from coming into force because another federal election was called only a few days later (Public Service Integrity Officer 2006, p. 14).

During the subsequent election, the Conservative Party, led by Stephen Harper, called the PSDPA “weak” and promised to strengthen the legislation through five specific amendments (Conservative Party of Canada 2006, p. 10-11). On January 26th, 2006, the Conservative Party was elected to a minority government and, when Parliament convened later that year, Bill C-2, the *Federal Accountability Act* (hereinafter referred to as the FAA), was introduced into the House of Commons. The FAA contained some of the amendments to the PSDPA that the Conservative Party had promised during their election campaign. On December 12th, 2006, the FAA was given Royal Assent and finally, four months later, on April 15th, 2007, the PSDPA, as amended by the FAA, officially came into force (Public Service Integrity Canada 2008 p. 4).

Contextual Analysis

The PSDPA, like many whistleblower protection laws, was largely passed in response to a string of highly publicized political scandals that could have been less destructive and perhaps even avoided had whistleblower protection existed. The fact that the federal government announced its plans for whistleblower protection on the exact day that the Auditor General tabled its report on the “sponsorship scandal” is far from a coincidence. The report, which revealed irregularities in a government program designed to promote federalism in Quebec, strongly advocated the introduction of whistleblower protection. It did so in part because the whistleblower at the centre of the “sponsorship scandal,” Allan Cutler, a public servant at the time, was demoted after he went to his boss with concerns about suspicious payments made by the government to advertising firms as a part of the sponsorship program (Yaffe 2005). The “sponsorship scandal,” along with other political

controversies, such as the “HRDC fiasco” and the “Radwanski affair” fueled widespread cynicism about government accountability and whet the public’s appetite for political reform. Subsequently, when the Conservative Party campaigned for and eventually won the 2006 Canadian federal election, they did so by promising to enhance accountability and transparency in the public sector. The Party even had Allan Cutler run as their candidate in the Ottawa-South riding (Shufelt 2008).

The tremendous pressure on the federal government to clean up its act and to do so quickly reached a crescendo at the very same time the PSDPA was being conceptualized. This pressure came from a myriad of sources, including the Auditor General, media and public and likely influenced both the PSDPA’s design and the speed with which it was passed. As Thomas (2005) points out, “such situations are not the best circumstances to identify objectively the need for such laws and to debate carefully their structural and procedural components” (p. 179). The PSDPA is certainly no exception in this regard. The large amount of pressure on the government to institute political reform may have contributed to the premature passing of the PSDPA despite its many flaws. The Federal Accountability Initiative for Reform (2009) notes on their website that the PSDPA “was rushed through the Senate in December 2005, in the last hours before Parliament went into recess for the election.” Together, the pressure on the government to save face after several embarrassing scandals and the “rushed” nature of the PSDPA suggests the federal government, at the time, may have been more concerned with the optics of whistleblower protection than its actual substance.

Surprisingly, despite the large amount of media attention on the aforementioned controversies, there was relatively little media attention on the PSDPA at the time of its

passage. Only a handful of articles were written on PSDPA and fewer still were written about its deficiencies. Even the Legislative Summary of the PSDPA admits “there was very little commentary in the media when the bill was introduced in the House of Commons on 8 October 2004” (Johansen and Spano 2005, p. 33). It also describes media reaction to the passage of the PSDPA as “surprisingly muted” (p. 34). The lack of criticism of the PSDPA in the media likely facilitated its rather seamless ascent through the Senate. Had the media paid closer attention to the PSDPA and given its critics a greater voice, it might have forced policymakers to correct some of its faults. Instead, the media remained quiet as the federal government heralded the PSDPA as “part of the government’s broader commitment to ensure transparency, accountability, financial responsibility and ethical conduct” (Canadian Broadcasting Corporation 2004).

The context that gave rise to the PSDPA was clearly a less than ideal climate in which to develop and pass whistleblower protection. Subsequently, and perhaps even predictably, the PSDPA is a deeply flawed piece of legislation. The lack of adequate whistleblower protection for public servants in Canada is particularly disconcerting when one considers the globalization of economies and technology. Together, these trends have made organizations less accountable and wrongdoings less visible to the public than ever before and the Canadian public sector is no exception. It is an increasingly complex, competitive and unpredictable environment wherein whistleblowers are often the only persons in a position to expose illegal, illegitimate and immoral activity. Thus, at a time when whistleblowers are increasingly valuable sources of information about wrongdoing, public servants in Canada who wish to expose unlawful and unethical activity, must do so without the aid of effective whistleblower protection.

Description

The following is a general breakdown of some of the most important provisions of the PSDPA, as amended by the FAA. It should be pointed out that the PSDPA contains numerous clauses and exceptions that are not covered here. However, some of these clauses and exceptions will be discussed later on in the chapter. For a more complete understanding of the PSDPA, full text copies of both it and the FAA are available online through the Department of Justice Canada's website (<http://laws.justice.gc.ca/>).

Simply put, the PSDPA establishes a procedure for the handling of allegations of wrongdoing (referred to as disclosures) within the federal government. In order to do this, it requires the Treasury Board to establish a code of conduct applicable to the public sector. It also requires the chief executive of every department to designate a senior officer to be responsible for receiving and dealing with disclosures of wrongdoing. The specific duties and responsibilities of these senior officers are to correspond with those outlined in the Treasury Board's code of conduct.

Additionally, the PSDPA establishes a new Officer of Parliament, the Public Sector Integrity Commissioner (hereinafter referred to as the Commissioner). The Commissioner is an extra-departmental, independent third party responsible for receiving and investigating allegations of wrongdoing that public servants feel cannot be made to the senior officer within their own department. The Governor in Council is responsible for appointing the Commissioner. However, the appointment must be approved by resolution of the Senate and House of Commons. The standard term for a Commissioner is seven years, but this term can be shortened or extended by the Governor in Council at any time on address of the Senate and House of Commons.

Upon receiving a disclosure, the Commissioner has the power to decide whether or not the information warrants an investigation. If the Commissioner does decide to investigate then he or she must notify the chief executive of the relevant department and inform them of the impending investigation and the substance of the disclosure. While conducting an investigation, the Commissioner is granted access to all facilities and any information deemed necessary and even has the ability to subpoena witnesses. If, upon the conclusion of an investigation, evidence of wrongdoing is discovered, the Commissioner must report these findings, as well as any recommendations on how the wrongdoing should be handled, to the chief executive of the department. The Commissioner must also present a case report to Parliament detailing the specifics of the wrongdoing, any recommendations made by the Commissioner and the response of the chief executive to these recommendations.

In addition to handling allegations of wrongdoing, the Commissioner also receives claims of retaliation against public servants who have made disclosures (referred to as reprisal complaints). Upon receiving a reprisal complaint, the Commissioner must decide whether or not to investigate. If the decision is to investigate, the Commissioner, as with disclosures, must notify the chief executive of the relevant department of the impending investigation and the substance of the complaint. If, upon the conclusion of an investigation, evidence of a reprisal is discovered, the Commissioner will attempt to conciliate a settlement between all parties involved. This settlement could conceivably involve some form of disciplinary action against the persons responsible for the reprisal. The Commissioner, however, does not have the power to enforce a settlement. If a settlement cannot be reached, the Commissioner may then refer the matter to the newly

established Public Servants Disclosure Protection Tribunal (hereinafter referred to as the Tribunal).

The Tribunal is a collection of judges or former judges of the Federal Court of Canada or a superior provincial court that have been appointed by the Governor in Council. If the Commissioner refers a reprisal complaint to the Tribunal, the Tribunal will hear testimony and receive evidence from all parties involved and ultimately make a ruling on whether or not a reprisal occurred. If the Tribunal rules that a reprisal did take place, it has the power to order a remedy for the situation or disciplinary actions against those responsible for the reprisal. The Tribunal may also order the employer to pay the victim of reprisal up to \$10,000 in compensation for any pain and suffering that he or she may have experienced.

Textual Analysis

Scope of the Act

The PSDPA does not have as wide a scope as its title would suggest. The “public sector,” as defined in section 2 of the PSDPA, “does not include the Canadian Forces, the Canadian Security Intelligence Service or the Communications Security Establishment.” Accordingly, public servants employed by these organizations do not have access to the Commissioner or the Tribunal and are subsequently not protected from reprisals if they blow the whistle on wrongdoing. The legislative summary of the PSDPA states that these organizations are exempted because of “security concerns” (Johansen and Spano 2005, p. 7).

The exclusion of the Canadian Forces, the Canadian Security Intelligence Service and the Canadian Security Establishment from the PSDPA's definition of "public sector" is problematic for two reasons. First, it sets a clear double standard within the public sector. Members of these organizations are just as likely to witness wrongdoing and be retaliated against after disclosing information about a wrongdoing as any other public servant. Yet, the PSDPA unfairly denies them the same degree of whistleblower protection. In doing so, the PSDPA promotes a potentially dangerous culture of silence within these organizations wherein wrongdoings go unreported out of fear of reprisal. Second, the exclusion of these organizations because of "security concerns" sends the wrong message to other members of the public service about the confidentiality of the disclosure and complaint process. The PSDPA, in order to be even remotely effective, requires public servants to trust the Commissioner with highly sensitive, often very personal, information. However, by denying certain members of the public service access to the Commissioner because of "security concerns," the PSDPA severely undermines this trust. If the Commissioner cannot be relied upon to properly handle any security issues that might arise from a member of the Canadian Forces making a disclosure or a complaint then why should any public servant trust the Commissioner? The credibility of the Commissioner, the Tribunal, and the entire PSDPA is weakened by these exemptions. Any act offering whistleblower protection to public servants ought to cover the entire public sector without exceptions.

The PSDPA also contains special provisions for members of the RCMP. RCMP personnel are permitted to report disclosures of wrongdoing directly to the Commissioner, but unlike other members of the public service they cannot report

complaints of reprisal to the Commissioner without first exhausting all their organization's internal complaints procedures (PSDPA, section 20[2.1a]). Unfortunately, the problem with internal complaint procedures is that they can easily be used by an organization to punish and silence victims of reprisal. They can be long, drawn out affairs and may even require victims of reprisal to make their complaints to the very persons who retaliated against them. Members of the RCMP deserve direct access to an independent, extra-departmental third party every bit as much as other public servants. Yet, once again, the PSDPA sets a dangerous double standard by unfairly discriminating against a certain portion of the public sector.

Channels of Disclosure

A channel of disclosure is a person or body to whom a whistleblower can make a protected disclosure about a wrongdoing. There are four different channels of disclosure mentioned in the PSDPA. However, some channels are only considered appropriate under very limited circumstances.

Section 10[2] of the PSDPA requires the chief executive of every department within the public sector to designate a senior officer in charge of receiving and acting on disclosures of wrongdoing. This senior officer and a person's immediate supervisor represent the first channels of disclosure permitted by the PSDPA. A public servant is protected from reprisal if they report to either of these two parties:

any information that the public servant believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a wrongdoing (PSDPA, section 12).

Public servants, however, are not required to exhaust these internal procedures before they can report to the second channel of disclosure permitted by the PSDPA, the Commissioner. The original version of the PSDPA required that public servants believe “on reasonable grounds that it would not be appropriate to disclose the information to his or her supervisor, or to the appropriate senior officer” before approaching the Commissioner (PSDPA, section 13[1a]). However, the FAA contains an amendment to the PSDPA that allows public servants direct access to the Commissioner (FAA, section 200).

The third channel of disclosure is the Auditor General of Canada. Disclosures to the Auditor General are only permitted if they pertain to wrongdoing involving the Commissioner. The Auditor General, in this situation, would have all the “powers, duties and protections of the Commissioner” (PSDPA, section 14).

The PSDPA also allows disclosures to be made to the public. However, these disclosures have to meet very limited and subjective criteria in order to be protected. The PSDPA states that a disclosure can only be made to the public if there is not sufficient time to go through proper channels (i.e., a supervisor, a senior officer or the Commissioner) and the wrongdoing:

- (a) constitutes a serious offence under an Act of Parliament or of the legislature of a province or;
- (b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or the environment (PSDPA, section 16[1]).

Interestingly, the PSDPA omits any mention of the media, although it is reasonable to assume that disclosures to the public would include any disclosures to the media.

Requiring every department to appoint a senior officer responsible for handling disclosures and allowing public servants direct access to the Commissioner are both welcome steps forward. However, the effectiveness of these two channels of disclosure largely depends on the individuals appointed to these positions. If the wrong individual is appointed to these positions then it could easily become a fox guarding the hen house situation wherein whistleblowers are silenced rather than supported. This is particularly true for the senior officer whose appointment does not have to be approved by anyone but the chief executive of the department. The Governor in Council's appointment of the Commissioner, at the very least, has to be approved by resolution of the Senate and House of Commons. The PSDPA should also be commended for establishing a channel of disclosure in the event that the wrongdoing disclosed involves the Commissioner. Such provisions will in all likelihood facilitate the disclosure of wrongdoing. However, in contrast, the criteria that must be met before a disclosure can be made public are so unnecessarily narrow that they will likely have the opposite effect.

The criteria for an acceptable disclosure to the public are problematic on a number of accounts. To begin with, it would be very difficult for a public servant to assess whether or not there is "sufficient time" to exhaust internal disclosure procedures considering the decision of the Commissioner to investigate a disclosure and the investigation itself are not bound by any sort of time limit. The wording of the criteria, particularly the use of adjectives such as "serious," "imminent," "substantial" and "specific," is also unnecessarily ambiguous. What exactly constitutes a "serious" breach of the law? Are they not all serious? Moreover, what constitutes an "imminent" risk or a "substantial" and "specific" danger? These narrow criteria have perhaps been chosen in

an effort to try and dissuade public servants from using the public as a channel of disclosure. The message being sent to potential whistleblowers is that the government is more concerned with keeping information about wrongdoing hidden from the public than it is with actually discovering and resolving wrongdoing.

The PSDPA also omits any mention of public service unions as a potential channel of disclosure. Noel Kinsella objected to this omission during the PSDPA's second reading before the Senate. He argued that public service unions have a strong history of protecting the employment rights of public servants and thus should be recognized by the PSDPA as a potential channel of disclosure (Senate Debates 2005, p. 2017). Likewise, Steve Hindle, president of the Professional Institute of the Public Service of Canada at the time, heavily criticized the PSDPA for cutting public service unions out of the disclosure process. He warned that the PSDPA's "failure to create an explicit role for bargaining agents" would ultimately "threaten the likelihood of public service employees having trust in its provisions" (Professional Institute of the Public Service of Canada 2004).

Disclosure of Wrongdoing

In order for a public servant to qualify for whistleblower protection under the PSDPA, their disclosure must involve an alleged wrongdoing. The PSDPA defines "wrongdoing" as follows:

- (a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act; (b) a misuse of public funds or a public asset; (c) a gross mismanagement in the public sector; (d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a

danger that is inherent in the performance of the duties or functions of a public servant; (e) a serious breach of a code of conduct established under section 5 or 6; (f) the taking of a reprisal against a public servant; and (g) knowingly directing or counseling a person to commit wrongdoing set out in any of paragraphs (a) to (f) (PSDPA, section 8).

Any public servant who discloses information about wrongdoing that does not fit neatly into one of these predetermined categories may not be protected under the PSDPA. That being said, some of these categories are potentially broad enough to include most, if not all, types of wrongdoing within the public sector. The “gross mismanagement” category, in particular, could have many different interpretations and cover a wide range of illegal, illegitimate and immoral activity.

However, while the definition of wrongdoing may be broad, the grounds on which the Commissioner can simply dismiss a disclosure of wrongdoing are even more so. In fact, regardless of the nature or the severity of the alleged wrongdoing, the Commissioner is never obligated to hear or follow up on a public servant’s disclosure. On the contrary, the Commissioner “may refuse to deal with a disclosure, or to commence an investigation – and he or she may cease an investigation – if he or she is of the opinion” that:

(a) the subject-matter of the disclosure or the investigation has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament; (b) the subject-matter of the disclosure or the investigation is not sufficiently important; (c) the disclosure was not made in good faith or the information that led to the investigation under section 33 was not provided in good faith; (d) the length of time that has elapsed since the date when the subject-matter of the disclosure or the investigation arose is such that dealing with it would serve no useful purpose; (e) the subject-matter of the disclosure or the investigation relates to a matter that results from a balanced and informed decision making process on a public policy issue; or (f) there is a valid reason for not dealing with the subject-matter of the disclosure or the investigation (FAA, section 203).

In other words, even if a public servant follows the proper procedures and the alleged misconduct falls within the Act's definition of wrongdoing, there is never any guarantee that the Commissioner will act on or even listen to their disclosure. The Commissioner might simply decide that the subject matter of the disclosure "has been adequately dealt with;" is "not sufficiently important;" is "such that dealing with it would serve no useful purpose;" or results from a "balanced and informed decision making process." Amazingly, the PSDPA does not even stipulate that a "balanced and informed decision making process" has to consider the public interest. Moreover, it is entirely up to the Commissioner to determine the motives of the public servant and whether or not the disclosure was made in "good faith." It is also entirely up to the Commissioner to determine whether or not there is a "valid reason for not dealing with the disclosure" that is not explicitly mentioned here.

These very vague and subjective provisions give the Commissioner far too much discretion regarding the acceptance and rejection of disclosures. It is alarming to think that wrongdoing can be shielded from investigation simply because the Commissioner deems it "not sufficiently important" or presumes it to be the result of a "balanced and informed decision making process." The unnecessarily broad grounds on which disclosures can be rejected and investigations refused or ceased by the Commissioner must be particularly disconcerting for public servants contemplating making a disclosure of wrongdoing. It sends the message that, even if a public servant adheres to every provision of the PSDPA, there is still a very real possibility that the Commissioner will do nothing at all.

Complaints of Reprisal

In addition to being able to receive disclosures of wrongdoing, the Commissioner is also able to receive claims of retaliation against public servants who have either made a disclosure or cooperated with an investigation in some way. Such claims are referred to as complaints of reprisal. The PSDPA defines a “reprisal” against a public servant as follows:

(a) a disciplinary measure; (b) the demotion of the public servant; (c) the termination of employment of the public servant... (d) any measure that adversely affects the employment or working conditions of the public servant; and (e) a threat to take any of the measures referred to in any of paragraphs (a) to (d) (PSDPA, section 2).

Noel Kinsella objected to this definition during the PSDPA’s second reading before the Senate. He argued that it “could conceivably not include a broad range of subtle, yet equally insidious, actions intended to punish the employee for making a good faith disclosure” (Senate Debates 2005, p. 2016). For example, continually denying a public servant a deserved promotion or raise would likely not fall within this definition. Thus, public servants should be aware that the PSDPA still tolerates many forms of very subtle retaliation.

One major problem with the PSDPA’s complaint process is that it imposes an overly restrictive time limit within which complaints of reprisal have to be made. Complaints of reprisal “must be filed not later than 60 days after the day on which the complainant knew, or in the Commissioner’s opinion ought to have known, that the reprisal was taken” (FAA, section 201). This is far too little time. In reality, it could be months or even years before a public servant realizes that they have been retaliated

against. This is particularly true if the reprisals are performed in a very subtle or systematic way, such as an employer repeatedly issuing negative appraisals of a public servant's work or repeatedly denying that public servant a deserved promotion or raise.

Another major problem with the PSDPA is that it fails to stipulate any sort of standard penalty for an act of reprisal. The Act simply states that public servants are subject to appropriate disciplinary action up to and including termination of employment if they commit a wrongdoing (PSDPA, section 9). The absence of such a provision will inevitably make some public servants question how serious the PSDPA is about punishing people who have been found guilty of reprisals. Keyserlingk argues this very point in his *2004-2005 Annual Report to Parliament*. He suggests that “because reprisal is not strongly repudiated [in the PSDPA], it is more likely to happen and more likely to be tolerated” (Public Service Integrity Office 2005, p. 25).

Beyond the Public Sector

While the PSDPA does allow private sector employees to make disclosures to the Commissioner about wrongdoing within the public sector, it does not offer them any sort of protection against reprisal. The Act clearly states that only public servants can make “protected disclosures” (PSDPA, section 2). In other words, private sector employees do not have the right to file a complaint of reprisal in the event that they are retaliated against for making a disclosure to the Commissioner or cooperating with an investigation.

The lack of protection for private sector employees is particularly troubling when one considers the frequency with which the government outsources work to individuals

and organizations within the private sector. The PSDPA, as it was passed in 2005, was heavily criticized for failing to acknowledge the thousands of people who work for the government as private consultants or subcontractors (Harris and Manning 2006, p. 24). These individuals are just as likely to encounter wrongdoing within the public sector as formal members of the public service. The FAA attempted to address this concern by amending the PSDPA to prohibit private sector employers from retaliating against employees who have provided information about public sector wrongdoing to the Commissioner (FAA, section 42.1). However, in reality, this provision does nothing of the sort. The PSDPA, even as amended by the FAA, still prohibits private sector employees from filing a complaint of reprisal with the Commissioner. Thus, it still denies private sector employees any sort of remedy in the event of retaliation and without a remedy there is no real protection. Ultimately, by denying them access to the Commissioner, the PSDPA leaves private sector employees who blow the whistle on public sector wrongdoing to fend for themselves against reprisals.

The PSDPA also prohibits the Commissioner from extending an investigation of an alleged wrongdoing beyond the confines of the public sector. The Act states, “If the Commissioner is of the opinion that a matter under investigation would involve obtaining information that is outside the public sector, he or she must cease that part of the investigation” (PSDPA, section 34). If an investigation is halted because it extends into the private sector, the Commissioner “may refer the matter to any authority that he or she considers competent to deal with it” (PSDPA, section 34). However, the Commissioner is under no obligation to do so. As a result, any investigation that requires evidence or testimony from individuals who are not public servants is liable to lead to a dead end.

Moreover, even if an investigation into wrongdoing involving both public servants and non-public servants is allowed to continue, it will likely result in unfair or incomplete conclusions. For example, without all the facts, the Commissioner may conclude that a public servant is exclusively to blame for a wrongdoing when in reality others outside the public sector are also to blame.

Restricting investigations to the public sector undermines the integrity of the Commissioner as an investigative body. It potentially denies him or her access to extremely valuable sources of information and public servants contemplating making a disclosure about wrongdoing are likely to see the entire investigation process as less credible as a result. Many may have doubts about the impact of such a restriction on the Commissioner's investigations. Some may even question whether a thorough and balanced investigation is possible without access to information outside the public sector. As Keyserlingk notes, "only an investigative regime permitted to follow the evidence wherever it leads merits full confidence and high expectations" (Public Service Integrity Officer 2006, p.19). The PSDPA, by denying the Commissioner access to potentially valuable sources of information beyond the public sector, clearly does not merit a lot of confidence in this regard.

Access to Information

Perhaps the most surprising aspect of the PSDPA is that it carefully blocks the media and the public from accessing any details of the Commissioner's investigations and findings. It does this by amending the *Access to Information Act*. The PSDPA, as amended by the

FAA, states the Commissioner “shall refuse to disclose any record requested under” the *Access to Information Act* that contains information:

obtained or created by him or her or on his or her behalf in the course of an investigation into a disclosure made under the Public Servants Disclosure Protection Act (FAA, Section 221).

Moreover, the PSDPA, as amended by the FAA, also states “the head of a government institution shall refuse to disclose any record requested under” the *Access to Information Act* that contains information:

created for the purpose of making a disclosure under the Public Servants Disclosure Protection Act or in the course of an investigation into a disclosure under that Act (FAA, Section 221).

In other words, the PSDPA puts the details of the Commissioner’s investigations into wrongdoing beyond the reach of the public, not only throughout the course of the investigations, but forever!

The PSDPA obviously has an obligation to protect the identities of accused persons and public servants who have made disclosures. However, the permanent exemption of the details of the Commissioner’s investigations from the *Access to Information Act* simply takes this matter too far. Keyserlingk argues, “such an absolute exemption surely constitutes an undue restriction on the right of the public to be informed about wrongdoing in the public sector” (Public Service Integrity Officer 2006, p. 19). Likewise, Harris and Manning (2006) point out that both the *Privacy Act* and the *Access to Information Act* already protect the identities of whistleblowers and accused persons during an investigation. Thus, they argue, “further constraints on the right of access to

information should be withdrawn as unjustifiable” (p. 25). This provision or “cover-up clause,” as it has been called, essentially means any wrongdoing discovered by the Commissioner can be permanently hidden from public view (House of Commons Debates 2005, p. 8364). The message being sent to potential whistleblowers is that the government is more concerned with covering up wrongdoings than it is with actually promoting transparency and accountability.

Discussion

The question that needs to be asked when analyzing the PSDPA, as with any piece of whistleblowing legislation, is whether it promotes occupational free speech and protects individuals against organizational hegemony, or whether it attempts to conform individuals to organizational dominance. In order to find the answer to this question, one needs to look no further than the PSDPA’s subtitle, “an act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings.” The structure of this subtitle is indicative of the PSDPA’s true objective: it prioritizes the procedural requirements for disclosures over the protection of whistleblowers. If the opposite were true then these two points would likely be reversed and the PSDPA would bear the subtitle: an Act to protect persons who disclose wrongdoings, including the establishment of a procedure for the disclosure of wrongdoings in the public sector.

The PSDPA attempts to conform individuals to organizational dominance by narrowly prescribing the conditions under which whistleblowing can occur. In other words, it attempts to “control context,” a particularly common way of enacting power

through discourse (van Dijk 1993, p. 260). The PSDPA carefully and deliberately prescribes who can blow the whistle and more importantly who cannot blow the whistle (i.e., members of the Canadian Forces, the Canadian Security Intelligence Service and the Communications Security Establishment). The PSDPA also carefully and deliberately prescribes what an individual can blow the whistle on and to whom. In doing so, it limits the types of wrongdoings that a whistleblower can disclose and the channels of disclosure that a whistleblower can use. Most notably, it omits any mention of two very important channels of disclosure: the media and public service unions.

One of the claims of the PSDPA is that it is supposed to protect whistleblowers from reprisal. Yet, as we have seen, it offers a very limited definition of reprisal and forces whistleblowers to adhere to unnecessarily strict time constraints when reporting reprisals. Moreover, the PSDPA clearly states that only those who follow the “established procedures or practices for the secure handling, storage, transportation and transmission of information and documents” will be protected (PSDPA, section 15.1). Thus, regardless of whether a disclosure is accurate and regardless of the severity or the frequency of the wrongdoing reported, if a whistleblower fails to follow the guidelines of the PSDPA exactly they will not be protected. This foregrounding of the procedural and substantive requirements of disclosures over all else serves not to protect whistleblowers, but to discipline them.

The PSDPA also fails to offer whistleblowers any kind of assurance that their disclosures will be heard or dealt with by the Commissioner. On the contrary, the Commissioner has been given wide discretion to do nothing at all. Furthermore, the Act offers no assurance that wrongdoing will be dealt with or wrongdoers will be punished.

It provides no standard penalty for reprisal and the Commissioner, with regards to resolving wrongdoing and reprisals, has no power to issue penalties, but only the power to make recommendations. As Gualtieri and Kilgour (2005) point out, “any whistleblower law worth its weight on paper must also contain the provision that those who offend will be punished and that corrective action will be taken.” The PSDPA does nothing to merit confidence in this regard. In contrast, it unnecessarily handcuffs the Commissioner by prohibiting him or her from obtaining information from outside the sector, thus potentially crippling many investigations from the very beginning.

Lastly, the PSDPA contains provisions that have clearly been designed to keep the public in the dark about wrongdoing in the public sector. Not only does the PSDPA offer very limited circumstances under which whistleblowers can make disclosures to the public, it also exempts the details of the Commissioner’s investigations and findings from the *Access to Information Act*. Thus, any wrongdoing disclosed to or discovered by the Commissioner, can be permanently hidden from public view. Such an absolute exemption will surely be disconcerting for any whistleblower whose main objective in coming forward is to see transparency and accountability within the public sector improved. In effect, this provision allows the government to neatly cover up any wrongdoing it does not want made public.

Simply put, the PSDPA is an instrument of oppression. Instead of protecting all truth-tellers, regardless of what they blow the whistle on and to whom, it forces public servants to adhere to highly restrictive substantive and procedural requirements when making disclosures. Instead of promoting occupational free speech and the exposure of wrongdoing, it disciplines and conditions public servants to act in a way that is

predictable and non-threatening to those in power. Instead of emphasizing the need for greater transparency and accountability in the public sector, it allows the government to keep wrongdoings permanently shielded from public inspection. The end result is that many public servants are liable to see the PSDPA for what it really is: a hegemonic piece of legislation that systematically legitimates the power of the organization over the individual and prioritizes the interest of a few rather than the interest of the public.

The tendency for the PSDPA to suppress whistleblowers rather than support them is illustrated in the Commissioner's first annual report to Parliament. During the 2007-2008 year, the Commissioner received 59 disclosures of wrongdoing, most of which were dismissed either immediately or after a preliminary review. In fact, of the 59 disclosures received, only three had resulted in an investigation at the time of the report. During that same year, the Commissioner also received 22 complaints of reprisal. Once again, most of these were dismissed after a preliminary review. In fact, only two of the 22 complaints received had resulted in an investigation at the time of the report. Moreover, the few investigations that were conducted revealed nothing. In total, "there were no settlements or applications to the Tribunal. There were no findings of wrongdoing, and therefore no recommendations from the Commissioner" (Public Sector Integrity Canada 2008, p. 24).

The Commissioner's second annual report to parliament reveals a similar pattern of dismissal. During the 2008-2009 year, the Commissioner handled 76 disclosures of wrongdoing, including 21 from the previous year. At the time of the report, only three disclosures had resulted in an investigation. In contrast, 59 had been dismissed, including 13 that were dismissed "because the subject-matter of the disclosure did not meet the definition of wrongdoing." The remaining 14 were still under review. During that same

year, the Commissioner also handled 23 complaints of reprisal, including three from the previous year. However, only one had resulted in an investigation at the time of the report. In contrast, 20 had been dismissed, including four that were dismissed “on the basis that the measures complained of did not meet the definition of reprisal” and three that were dismissed “because the complaint was not filed within the 60 days after the day on which the complainant knew, or ought to have known, that the reprisal was taken.” The other two were still under review. (Public Sector Integrity Canada 2009, p. 30-32).

The small number of investigations commenced and the relatively large number of disclosures and complaints dismissed under the PSDPA suggests that public servants with significant disclosures and complaints are either being denied by the Commissioner or not coming to the Commissioner at all. Unless wrongdoing is virtually non-existent within the Canadian public sector, these trends point to serious deficiencies within the PSDPA. Either the Commissioner has been given too much discretion when it comes to the dismissal of disclosures and complaints or public servants with significant disclosures and complaints do not feel comfortable reporting to the Commissioner. Neither of these explanations is mutually exclusive and both are cause for concern. If the Commissioner is not receiving or acting on significant disclosures and complaints, for whatever the reason, then the PSDPA is doing nothing but wasting valuable government resources.

Ultimately, the problem with the PSDPA is not the spirit of the law, but the letter of the law. While the Canadian government should be commended for joining countries, such as the United States, United Kingdom and Australia, in developing and legislating whistleblower protection for public servants, it should also be criticized for the many shortfalls of the PSDPA. As Krancher (2006) points out, when it comes to whistleblower

protection, “the devil is in the details.” The PSDPA, unfortunately, has more than its fair share of devils. Most notably, instead of liberating whistleblowers from organizational dominance, it does the reverse: it legitimates the power of the organization over the whistleblower by forcing whistleblowers to adhere to needlessly restrictive substantive and procedural requirements. As a result, public servants are liable to see the PSDPA as nothing more than an instrument of oppression that serves to suppress rather than support whistleblowers. Subsequently, instead of giving whistleblowers a voice at a time when they so badly need to be heard, the PSDPA may silence more whistleblowers than it will ever protect.

CHAPTER FIVE: CONCLUSION

Martin (2003) suggests whistleblower protection can be labeled “sincere, symbolic and cynical” (p. 121). In other words, a government’s introduction of whistleblower protection can be explained as a sincere attempt to safeguard whistleblowers, a symbolic gesture meant to satiate public demand for reform, or a cynical attempt to weed out whistleblowers and make them easier targets for retaliation. These three explanations are not mutually exclusive; in fact, they are sometimes compatible. As Martin points out:

Promoters of whistleblower laws may be quite sincere but the laws in effect can serve to give the illusion of protection. They may also lead employees to believe, mistakenly, that they are protected and thus to become easier targets than if the laws did not exist (p. 122).

Thus, regardless of how sincere a government may be about protecting individuals who disclose wrongdoing, “poor drafting, inadequate resources or ineffectual implementation” can render whistleblower protection at best a symbolic gesture and at worst, a cynical ploy (p. 121).

The PSDPA is no different. Regardless of how sincere the Canadian government may or may not have been about protecting whistleblowers at the time of the PSDPA’s creation, shortcomings in its design and implementation have rendered it ineffective. Hence, the PSDPA is perhaps most accurately described as not whistleblowing legislation, but whistle-stopping legislation. At best, it is a form of symbolic politics reminiscent of the archaic whistle-stop tour where a politician would travel the country by train, stopping only briefly in small towns to give short, theatrical speeches often from the rear platform of the very train he or she rode in on. Such a tour, like the PSDPA,

seemingly prioritizes style and appearance over substance in an attempt to solicit votes and drum up public approval prior to an election. At worst, however, the PSDPA and its shortfalls are a cynical attempt to actually stop whistleblowers in the Canadian government from coming forward and exposing illegal, illegitimate and immoral activity.

There is, of course, no such thing as perfect whistleblower protection. As Martin (2003) points out, whistleblower protection laws are fundamentally flawed on a theoretical level since they typically “come into play only after disclosures have been made and reprisals have begun” and “put the focus on whistleblowers and what is done to them” as opposed to the wrongdoing about which the whistleblower spoke out (p. 120-121). However, these inherent inadequacies of whistleblower protection do not mean we are better off without it, but rather simply reinforce the argument that, in order for whistleblower protection to best serve and protect whistleblowers, it must be crafted with great care and conscientiousness. The pitfalls of the PSDPA, while certainly regrettable, are thus far from insurmountable. In fact, many of its greatest weaknesses could easily be strengthened through a number of amendments.

Most importantly, the PSDPA should be amended to protect all individuals who disclose wrongdoing within the government, regardless of their place of employment. As Vandekerckhove (2006) argues, “whistleblowing policies ought to emphasize the right to and support of self-expression for *all* humans” (p. 310). By excluding members of the Canadian Forces, Canadian Security Intelligence Service, Canadian Security Establishment and private sector, the PSDPA clearly fails to achieve this. In contrast, by excluding these groups, the PSDPA raises the probability that these organization members will either face retaliation when coming forward or not come forward at all

after wrongdoing occurs. For evidence of this, one needs to look no further than the case of Richard Colvin, a Canadian diplomat who warned senior government officials that detainees transferred by Canadian soldiers to Afghan prisons were likely being tortured. Colvin has since had his credibility publicly attacked by several members of the Canadian government (MacCharles 2009). Brohn (2009) even refers to the government's treatment of Colvin as "implied character assassination."

The PSDPA should also be amended to protect all whistleblowers, regardless of the recipient of the disclosure. The function of an organization, be it in the public or private sector, is a matter which concerns not only the members and consumers of said organization, but all members of society. Subsequently, whistleblower protection should allow disclosures to be made to all members of society and permit a wide range of disclosure methods. After all, it is only ethical that whistleblower protection allow disclosures to be made to each and every stakeholder of an organization, the public included. Moreover, without going into too much detail, whistleblower protection should explicitly mention the role of media, labour unions and whistleblower advocacy organizations in the disclosure process. These entities have a long history of assisting whistleblowers in times of crisis and organizations should not only recognize them as legitimate channels of disclosure, but also utilize their knowledge and experience when developing whistleblower protection.

Moreover, the grounds on which the Commissioner can dismiss disclosures should be narrowed. In particular, the PSDPA should be amended so that there is no statute of limitations on disclosures of wrongdoing. The Commissioner should also not be allowed to dismiss disclosures based on the motivations of the whistleblower – only

the subject matter of the disclosure. Inevitably, there will be disclosures to the Commissioner that are not significant enough to warrant an official inquiry. However, the PSDPA should explicitly state that such disclosures are to be dismissed, not because the Commissioner considers them insufficiently important, but because it is in the public interest to do so. Likewise, the PSDPA should explicitly state that “a balanced and informed decision-making process on a public policy issue” takes into consideration the public interest. Lastly, in the event that a disclosure is dismissed, the Commissioner should have to provide the individual who made the disclosure a written explanation as to why it was dismissed.

The definition of reprisal in the PSPDA should also be amended to encompass all forms of harassment, including both actions taken and actions not taken. For example, part (d) of the definition could be changed from “any measure...” to “any measure taken or not taken that adversely affects the employment or working conditions of the public servant.” There should also be no time limit within which whistleblowers have to file complaints of reprisal. Many forms of retaliations are very subtle and can take place over long periods of time. This, in turn, can make it difficult for whistleblowers to accurately pinpoint when the reprisals first began. Some whistleblowers might even misinterpret the first few instances of reprisal as nothing more than a byproduct of a coworker or employer’s bad mood. Moreover, the stress of being retaliated against may interfere with a whistleblower’s ability to file a complaint in a timely manner. The PSDPA should also specify a standard penalty for reprisal. In not doing so, the PSDPA suggests that some reprisals against whistleblowers may not be considered punishable offenses.

Additionally, the PSDPA should be amended to allow investigations to extend into the private sector. The lines between the public and private sectors are being increasingly blurred as a result of globalization, privatization and outsourcing. Consequently, many, if not most, investigations may hinge on evidence that can only be provided by individuals or organizations outside the public sector. In some cases, individuals or organizations outside the public sector may even be partly to blame for a wrongdoing. By denying the Commissioner access to these potentially valuable sources of information, the PSDPA all but dooms many investigations from the outset. Obviously, some investigations may require resources that are beyond those of the Commissioner. In such instances, the Commissioner should not only have the option of turning over investigations to the proper authorities, he or she should be required by law to do so. For any whistleblower protection to be taken seriously, it must allow those charged with investigating wrongdoing to follow the evidence trail wherever it leads.

Lastly, the PSDPA should be amended to protect the public's right to know about wrongdoing within the Canadian government. Specifically, the details of investigations, including any evidence of wrongdoing or reprisal, as well as any referrals to the Tribunal or any recommendations made to Parliament or a department's chief executive in response to wrongdoing, must fall under the jurisdiction of the *Access to Information Act*. Obviously, whistleblower protection, in order to be effective, must provide whistleblowers with an acceptable level of confidentiality. However, as Keyserlingk has shown, this can be achieved without unduly restricting the public's right to access to information. He suggests the PSDPA should "protect against disclosure any information gathered during an investigation only while the investigation is under way. Once the

investigation is completed, the provisions of the *Access to Information Act* should apply” (Public Service Integrity Office 2006, p. 19). In some cases, it may be pertinent to keep the identity of a whistleblower permanently confidential. In such cases, any personal details about the whistleblower could be removed from reports or replaced with pseudo-details in order to protect the whistleblower’s true identity. There is absolutely no reason why all the details of investigations have to be kept permanently hidden from the public.

It is important to remember that whistleblower protection alone does not provide whistleblowers with adequate protection. After all, even the most airtight whistleblower protection policies and procedures cannot shield whistleblowers in organizations where a culture of reticence and suppression prevails. In contrast, as De Maria (2005) argues, whistleblower protection can actually be dangerous in such cultures if it creates a false illusion of protection (p. 217). Similarly, Vandekerckhove (2006) makes the point that “whistleblowing policies do not create but rather need democracy” (p. 314). In other words, the development of whistleblower protection policies and procedures is not a recipe for an open and accountable organizational culture, but rather one ingredient. Thus, it can be said that whistleblower protection is generally only as strong as the organizational culture it is steeped in.

Miceli, Near and Dworkin (2008) argue that the creation and maintenance of a positive organizational culture is just as important, if not more important, than the development of whistleblower protection policies and procedures when it comes to shielding whistleblowers from retaliation. They add that such a culture can be fostered through certain human resource initiatives, such as personnel decisions and training. Specifically, they point out that organizations can search for and select members “who

possess attributes associated with observation of wrongdoing, and whistle-blowing,” such as “negative affectivity,” “optimism,” and “proactivity” (p. 188-189). Moreover, they mention that organizations can provide members with orientation materials (e.g., handbooks or brochures) that outline the organization’s code of ethics and any anti-discrimination or anti-retaliation policies (p. 189). Lastly, they note that organizations can hold seminars and workshops, both for employees and managers, “dedicated exclusively to raising concerns, avoiding retaliation, and recognizing when retaliation is occurring” (p. 190).

Similarly, Martin (2003) concludes that organizations have overlooked the role of education, research, training and advocacy in whistleblower protection. He argues that organizations should focus less on whistleblower protection policies and procedures and more on the development and promotion of practical skills for dealing with organizational wrongdoing, such as “collecting data,” “writing coherent accounts,” “understanding organizational dynamics,” “building support,” “using the media,” and “self-understanding” (125-126). These “survival skills,” he argues, “provide a firm foundation for any employee wanting to take action concerning problems in an organization” (p. 127).

The research of Martin (2003) and Miceli, Near and Dworkin (2008) suggests that the Canadian government, in addition to amending the PSDPA to expand its scope, may need to invest more in whistleblowing education, research, training and advocacy if it wishes to better protect whistleblowers. There are several ways this could be accomplished. For example, the Canadian government could distribute handbooks that contain a code of conduct applicable to the entire public sector and an accessible, yet

comprehensive explanation of the PSDPA and how the Commissioner handles and investigates both claims of wrongdoing and complaints of reprisals. The Canadian government could also initiate studies on whistleblowing and organize conferences that feature whistleblowing research and seminars or workshops that develop and promote the practical skills individuals need to respond appropriately to wrongdoing. Such initiatives would go a long way towards fostering an open and accountable organizational culture that is both receptive to and supportive of whistleblowers.

To conclude, whistleblower protection, in order to be effective, must be part of a larger organizational commitment to creating and maintaining an open, positive and accountable culture. Thus, the ultimate goal of whistleblower protection should never be to increase the prevalence of whistleblowing rather it should always be to foster an environment where organization members feel free to express dissenting opinions. Only then will whistleblowers be regarded not as “tattletales,” “snitches,” or “rats,” but as organization members trying to do the right thing and only then will whistleblowers be truly protected. More importantly, only then will political and corporate organizations be socially responsible institutions wherein truth prevails over power.

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