Whistleblower Protection Still in Its Infancy in Canada

By M. Philip Tunley

WHISTLEBLOWERS ARE IMPORTANT TO FREE *expression. Why? They reveal information about corruption, illegalities and unethical behaviour that political parties and governments want to keep secret—information that a democracy needs. Whistleblowers are also critical sources for journalists, sources that will dry up unless the whistleblower and the journalist's right to shield sources are protected.*

Canada is a notoriously tough place for whistleblowers, and despite minor improvements, the country generally lived down to its reputation in 2010.

The case of Sean Bruyea, a retired Canadian intelligence official, highlighted the trend. Bruyea had returned from service in the Gulf War of 1991-92 with a diagnosis of post-traumatic stress disorder. His battle with Veterans Affairs began simply as passionate advocacy on behalf of Canada's veterans, and as a vocal critic of the department's *New Veterans Charter* initiative, both in the media and before Parliament. Unfortunately, the more successful his advocacy campaign, the more Bruyea found himself subjected to significant retaliation by officials at Veterans Affairs. His personal battle with the department expanded to include separate legal claims for damages against three officials and the Government, after he learned that officials involved in his medical care were linking his advocacy to his condition, and were providing information about his medical treatment and status to policy officials responsible for responding to his campaign.

That case settled abruptly in November 2010 after a sustained media uproar following a report by federal Privacy Commissioner Jennifer Stoddart. She described as "alarming" her findings that sensitive medical information about Bruyea was repeatedly shared with officials "who had no legitimate need to see it." Her report also confirmed that, since at least 2005, Bruyea and other veterans advocates had become the target of a concerted campaign by officials at Veteran Affairs, which included tactics such as withholding payment of

Retired Capt. Sean Bruyea at a news conference in Ottawa, 2006.

medical travel claims to discourage their advocacy. In this case Bruyea was vindicated—he received a formal apology from the minister of Veterans Affairs.

The Bruyea case is particularly interesting because the primary senior "whistleblower" protection official at the federal level, Christiane Ouimet, then the public sector integrity commissioner, had earlier refused to investigate his case, claiming she was not convinced the conduct he was reporting amounted to "wrongdoing" within her legislative mandate. Apparently, a distinction could be drawn between direct wrongdoing in the administration of government affairs, and collateral wrongdoing by officials seeking to discourage legitimate public advocacy and criticism about how public policy and administration are carried out. Obviously, from a free expression point of view, this is a distinction without a difference.

However, within a month, the credibility of the entire federal whistleblower protection system suffered another blow when the auditor general reported that Ouimet had engaged in inappropriate conduct towards her own staff. That conduct included berating, marginalizing and intimidating staff, and in one case involved retaliatory disclosure of personal information about a staff member who had blown the whistle on Ouimet's own conduct. The auditor general's report also found that Ouimet was failing to properly perform her mandated functions, including reluctance to investigate complaints of wrongdoing in federal government administration, and decisions to close investigations that were not supported by the evidence on file.

To put these events in context, it must be recognized that Canada's efforts to protect whistleblowers are still in their infancy. It was only in 1985 that the Supreme Court of Canada recognized the "whistleblower" defence in public sector staff grievances. However, the Court appeared to limit the defence to cases in which an employee was disciplined or fired after reporting that the government was engaged in illegal acts or in policies that jeopardized the life, health or safety of the public. Subsequent efforts by lower courts to suggest that the *Charter*'s freedom of expression guarantee might broaden the availability of the defence and make it available "wherever the public interest is served" have met with little success pending reconsideration by the Supreme Court of Canada.

In another notorious example of official retaliation against whistleblowing employees, Dr. Shiv Chopra and other Health Canada physicians were fired in 2004 after complaining of being subjected to pressure to approve veterinary drugs without adequate evidence of safety. The Federal Court of Canada set aside a decision by federal integrity authorities dismissing Chopra's complaint, but only on the narrow procedural ground that the authorities failed to conduct the investigation in accordance with their mandate, and failed to investigate and analyze many of the issues and concerns raised. However, Chopra and the other complainants were not reinstated.

A decision of the Supreme Court in 2005 may have signalled a somewhat more generous and sympathetic approach to the interpretation of whistleblower protection laws. It concerned the interpretation of a Saskatchewan statute that prohibited any employer from retaliating against any employee who reports conduct amounting to an offence to any "lawful authority." Linda Merk, a bookkeeper employed by a

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Former integrity commissioner Christiane Ouimet on Parliament Hill in Ottawa, March 10, 2011.

PHOTO: THE CANADIAN PRESS/FRED CHARTRAND

labour union local, reported financial abuse by local union officials to the international union. The Supreme Court overturned lower court decisions that would have restricted the term "lawful authority" to public enforcement agencies, upheld Merk's subsequent dismissal, and dismissed charges against the local union officials responsible. The Court held instead that, given the remedial purposes of the provision and its labour law context, the term "lawful authority" should include reporting "up the ladder" within the employer organization, to those who exercise the private law authority to remedy the abuses in issue. The Court noted that, even in a private employment context, the focus on conduct giving rise to an offence provides a sufficient "public interest focus" to support such a remedial, purposeful interpretation.

Yet, the Supreme Court has since turned down several opportunities to revisit the scope of public sector integrity laws, notably in the 2006 case refusing leave to hear an appeal by former RCMP officer Robert Read. Within months thereafter, an independent report found the RCMP's management "horribly broken" in relation to the treatment of RCMP officers who, in an unrelated instance, blew the whistle on the force's pension fund scandal, and in relation to the subsequent delay of and interference with investigations into those allegations.

However, as is noted elsewhere in this review in more detail, in 2010 the Court took further steps to recognize and extend whistleblower protection in the context of two important decisions about journalist source protection. First, in the *National Post* decision, the Court went beyond the simple law enforcement rationale, and located whistleblower protection squarely within the context of the *Charter* guarantee of freedom of expression and the broader public interest, when it stated:

> It is in the context of the *public* right to knowledge about matters of public interest that the legal position of the confidential source or whistleblower must be located. The public has an interest in effective law enforcement. The public also has an interest in being informed about matters of importance that may only see the light of day through the cooperation of sources who will not speak except on condition of confidentiality.

Even more directly, in the *Globe and Mail* decision, the Court recognized the importance of not subjecting journalists to the same legal constraints and obligations that apply to their sources. For example, the sources may owe duties of loyalty and confidentiality to their employers. Those legal duties and constraints are very largely responsible for the slow and uneven development of direct legal protection for whistleblowers, even when expressly legislated. However, in the context of journalists' source protection, citing U.S. authority, the Court stated:

> Moreover, there are sound policy reasons for not automatically subjecting journalists to the legal constraints and obligations imposed on their sources. The fact of the matter is that, in order to bring to light stories of broader public importance, sources willing to act as whistleblowers and bring these stories forward may often be required to breach legal obligations in the process. … [I]t would also be a dramatic interference with the work and operations of the news media to require a journalist, at the risk of having a publication ban imposed, to ensure that the source is not providing the information in breach of any legal obligations. A journalist is under no obligation to act as legal adviser to his or her sources of information.

This ruling, combined with the Court's broader protection of the identity of journalists' confidential sources, greatly strengthens the role of the press in whistleblower protection.

On balance, then, 2010 can be seen as a year of small steps forward against the relatively unsympathetic legal status quo in Canada, in both direct and indirect protection of whistleblowers. First, the strong media support surrounding Bruyea's case, and the response it created, demonstrate a significant shift in public perceptions of these issues, and resulting political sensitivities. Second, the Supreme Court's recognition of a unique role for journalists, including their ability to protect confidential sources in appropriate circumstances, strengthens their role as an alternative, extra-governmental watchdog.

Both developments will undoubtedly increase the pressures on public integrity authorities at both the federal and provincial levels to do a better job. However, both should also help to broaden the kinds of "wrongdoing" for which these protections are available. The analysis must move beyond its current focus on the sanctity of an employee's duties of loyalty and confidentiality, and the resulting need to establish government involvement in illegal acts or in policies that jeopardized the life, health or safety of the public to override those interests. That focus properly caused diplomat Richard Colvin to disclaim the title of "whistleblower" altogether, and to point out that his terms of employment included the obligation to respond to a summons to testify about the Afghan detainee issue before a House of Commons committee when it was served on him. In other words, from Colvin's perspective, employment in a public position includes an element of public accountability.

Similarly, from a free expression perspective, it is surely essential that our entire scheme of whistleblower protection laws be extended to include a broader range of conduct that, to paraphrase the Supreme Court, the public has an important interest in being informed about, and which may only see the light of day when sources are able to speak confidentially and without fear of retaliation.

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