

Policy Brief

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Who is a Whistleblower?

Pressing Need for Changes in Canada to defend democratic institutions

Executive Summary

Federal and Provincial legislation in Canada currently uses restrictive approaches to who is considered a whistleblower and eligible to make protected disclosures. This limits disclosures.

Whistleblowing is an acknowledged mechanism for fighting against behaviours which can harm people and the environment such as fraud, corruption, regulatory failure and abuses of power.

Democratic institutions in Canada are under pressure in this digital, post-truth environment. Some go as far as to say they are “disintegrating” due to political abuse. Protecting those who tell the truth about apparent wrongdoing - whistleblowers - is often the only way to know what is really going on in organizations and elsewhere.

To take full advantage of the potential benefit whistleblowers can bring to preventing public harms and shoring up accountability and democracy in Canada, a broader approach to determining what and who is a whistleblower is needed.

Background

Government interest in whistleblowing protection came to Canada slowly despite the efforts of parliamentarians from all parties, including the Bloc Quebecois, through motions and private members’ bills. This included a promise by the Liberal Party during the 1993 election to introduce whistleblower protection legislation should they be elected. The Professional Institute of the Public Service (PIPS) notes that all attempts were unsuccessful and, while they were elected, the Liberal promise was not kept. Canada’s Federal government’s *Public Servants Disclosure Protection Act (PSDPA)* finally came into force in 2007. The perception of the purpose of the act is inconsistent with the name as a former chair of the House of Commons committee reviewing the act in 2017 was reported to have said the PSDPA was *not* an act to protect whistleblowers, but to protect deputy ministers from whistleblowers. Further support for such an assessment came at an international research conference recently. Tom Devine from the US Government Accountability Project (GAP) revealed that Canada’s PSDPA does not contain even one of what experts consider “best practice” in such legislation, rendering it unworkable.

Most of Canada’s provinces now have passed whistleblower protection legislation, although in the case of the last two provinces – PEI’s legislation was not implemented following serious criticism and BC’s legislation went into force on Dec. 2, 2019.

Key Points

- * Federal and Provincial legislation in Canada uses restrictive approaches to who is a whistleblower thus limiting disclosures
- * Whistleblowers help fight against behaviours that harm people and the environment
- * Democratic Institutions in Canada are under pressure
- * A broader approach to deciding who is a whistleblower is needed to support accountability and democracy

Whistleblowing Canada Research Society

WBC is a non-profit corporation dedicated to advancing education on the whistleblowing phenomenon in Canada through research. This research is shared publicly to inform public discussion and public policy.

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Whistleblower Protection Legislation and Public Scandal

Interestingly, in a number of cases the legislation has been passed following a public scandal. The PSDPA for example, came on the heels of the 2004 “Sponsorship Scandal” and the revelation that advertising contracts worth millions from the federal “Sponsorship Program” were being illegally directed to government-friendly firms in Quebec. In British Columbia in 2012 seven health-care researchers were (wrongly) fired by the BC government for alleged misuse of data. One of them committed suicide. The whistleblower had gotten it wrong but by the time this was ascertained, it was too late. BC subsequently introduced and passed the *Public Interest Disclosure Act* implemented in Dec. 2019. It has also been criticized for being too restrictive. In Prince Edward Island three whistleblowers who in 2011 worked as provincial public service contractors in a provincial immigration program, held a news conference raising allegations of fraud and bribery in the program involving some at the most senior levels of government. The whistleblowers were fired. *The Public Interest Disclosure and Whistle Blowers Act* came afterwards although it has not been implemented and strongly criticized as not being “arm’s length” and thus ripe for abuse.

Weak Legislation

The Federal PSDPA, on which the provincial legislation is said to be modelled, has been roundly criticized for many failures not the least of which is, who is considered a whistleblower and included as eligible for protection. For example the federal legislation includes some public servants but not all. The Canadian Forces, the Canadian Security Intelligence Service and the Communications Security Establishment have been excluded. It has been left up to “the person responsible for each organization” to establish procedures applicable to that organization for the disclosure of wrongdoings and the protection of disclosers. The procedures must “in the opinion of the Treasury Board”, be similar to the procedures set out in the PSDPA (Section 52). This means that these employees are left without any legislative protection and must rely on the good will of the “person responsible”. While the Act says the RCMP is included, effectively this is meaningless as members must first exhaust internal complaints procedures (Section 19.1 (5)) and face all the complexities and opprobrium such procedures are known to unleash in unwelcoming, organizational cultures. While the PSDPA allows people outside the public service to provide information to the Public Sector Information Commissioner (PSIC), s/he cannot follow-up by investigating outside the Public Service. Contrary to claims on government websites, there is no protection under this law for reprisals taken against non-government employees. The private sector has not been included at all. This therefore means the majority of employees in Canada have little or no protection from reprisals.

Policy Alternatives

Existing Policy Approaches

It appears that who is a whistleblower, depends on the perspective of the person who is considering the question. In the case of legislators, the approach to the openness and transparency believed to come from protecting whistleblowers is a very cautious and restrictive one. In effect, more openness and transparency through protecting whistleblowers means giving up some power as the organization is open to more scrutiny. This may explain the reluctance to take a more expansive approach to who is included as a whistleblower thus warranting protection. In the case of one province this reluctance and ambivalence is clearly demonstrated in who is included in legislation as a whistleblower. The scope changed when the government changed in 2015. The draft legislation in 2015 before the election and based on Private Members Bills, was broader and included “non-employees”, contractors with government and private sector employees but died when the election was called. A new version given royal assent in 2017 does not mention “non-employees” or private sector employees but only includes public employees and contractors.

From the perspective of researchers, in order to ensure precision in their research they prefer to employ a standard definition which initially covered “employees”. A generally accepted one is “whistleblowers are organization members (including former members and job applicants) who disclose illegal, immoral, or illegitimate practices (including omissions) under the control of their employers, to persons or organizations who may be able to effect action” (Near and Miceli 1985). However, due to increasing awareness that almost anyone with access to an organization’s information can be a whistleblower, for example, suppliers, contractors, consultants, accountants, competitors, customers or clients a broader view is contemplated. One group of researchers suggest, to capture the broader perspective, and again for precision in research, two categories of whistleblowers be acknowledged – insiders and outsiders. The outsiders it is suggested to avoid confusion, should be called “bellringers”.

Ongoing research by the US’s Government Accountability Project (GAP) indicates that some countries have already adopted a broad definition of who is a whistleblower and thus eligible for protection from reprisals. For example Australia includes- “all persons/disclosers without qualifier”; France - “any physical person”; Ghana - “a person in respect of another

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person, or an institution"; India - "any person"; Kosovo - "any person as a citizen or employee"; Namibia - without qualifier "Any person who makes a disclosure about any employer". As GAP points out, these definitions would include legislative staff and presumably politicians. A recent decision by the Supreme Court of the UK in a landmark case this month provides an opening towards a broader scope regarding who is a whistleblower in that country. The decision determined that a Judge who was severely bullied causing a "mental breakdown" when she raised concerns about cost-cutting, can be a whistleblower and thus eligible for protection.

Policy Options

In Canada's case, a number of options can be considered as follows:

Recommendation 1. Restrictive Scope

Maintain the status quo. This might be an attractive option for government as change is not easy. Indeed, the previous government rejected the recommended amendments to the PSDPA to align more with best practices and make it more than just a weak paper shield for some whistleblowers. However, the imbalance in power relations in regards to whistleblowers as it now stands favors those in power positions to the detriment of the employee. There is indication that this approach would serve to maintain dysfunctional cultures in the Federal Public Service and diminish trust in the processes for disclosure already in place not to mention public trust. What can happen when there is no effective protection for disclosers in place has been shockingly exposed in a recent W5 documentary outlining the reason for an unprecedented class action lawsuit against the Canadian government and the Department of National Defence. The allegations are that soldiers in Somalia, Rwanda and Afghanistan were left with serious and long-lasting adverse reactions such as intense rage and suicidal ideation from the anti-malaria drug they were forced to take. The Somalia Inquiry, set up to investigate the aggressive (and murderous) behaviours of some soldiers in Somalia was shut down before it was finished. The law suit alleges this was done just as the Inquiry was about to begin investigating the role of the anti-malarial drug Mefloquine in the affair.

Recommendation 2. Broader Scope

Broaden the scope of who is a protected whistleblower by passing new legislation to meet the specific needs of organizations where national security implications may be at play and include the excluded organizations - the Canadian Forces, the Canadian Security Intelligence Service and the Communications Security Establishment in special legislation. Such special legislation in the US, *The Intelligence Community Whistleblower Protection Act*, enabled a current whistleblower to bring forward his concerns about the President to the Intelligence Community Inspector General, who could then forward it through the process and on to Congress. Congress is now moving to impeach the President. Such legislation in Canada would ensure the protection afforded whistleblowers in such security sensitive positions have the power of an effective law to back them up rather than processes established by their bureaucracies only. The PSDPA requirement that an RCMP member exhaust internal processes before going to the PSIC should also be amended to ensure they have other options. Requiring rigid adherence to an internal process would likely ensure little wrongdoing would ever get reported, especially if senior officers were involved, as the alleged wrongdoers would be essentially investigating themselves, a conflict of interest detrimental to a whistleblower.

Recommendation 3. Broadest Scope

In addition to the changes proposed in Recommendation 2, include everyone without qualifier who has information about a federal organization's questionable behaviour as being protected under a revamped and renamed *Public Interest Disclosure Protection Act*. This would include federally incorporated private organizations. This change would be predicated on the Government's acceptance and implementation of the unanimous recommendations of the all-party Government Operations and Estimates (OGGO) committee Report No. 9 in June 1917. These recommendations begin to broaden who is protected (Recommendation 1-F, G, and K) but do not go far enough as they do not include clients of government departments. Nor do they include the excluded organizations, legislative staff, politicians or Judges. The broadest scope i.e. "any person without qualifier" would also include legislative staff, and potentially politicians and Judges.

Policy Recommendation

The research conducted in the process of answering the question who is a whistleblower highlighted the pressing need for Canada to adopt a less restrictive approach to whistleblowers and whistleblowing. It is therefore recommended that the Canadian government adopt Recommendation 3- the broadest scope in declaring who is a whistleblower and entitled to strong protection under federal law. It is recommended the government:

- a) adopt the June 2017 Government Operations and Estimates (OGGO) Committee Report No. 9 and its amendments to the PSDPA to be more in line with best practices in whistleblowing legislation.



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b) broaden the scope of who is a protected whistleblower by passing new legislation to meet the specialized needs of the excluded entities under the PSDPA - the Canadian Forces, the Canadian Security Intelligence Service and the Communications Security Establishment. For the RCMP, refine the disclosure processes to provide more effective internal options such as secure, anonymous web-based systems.

c) include in the amended PSDPA everyone without qualifier who has information about a federal public and private organization's questionable behaviour as being protected under a revamped and renamed *Public Interest Disclosure Protection Act*.

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