

Remarks for Golden Whistle Award

13 May 2017

Introduction

It seems fitting that, since Edgar Simpson has given us an overview of the ten-year history of this award, I should give you an overview of Canada's track record in creating laws to protect whistleblowers. I'll also share with you some very interesting developments that are taking place as we speak, and my hopes for the future.

Whistleblowers and whistleblowing have been around for a very long time. For example, in the early 1600's the astronomer Galileo got into trouble because his scientific observations – which showed that the Earth went round the Sun – challenged the religious teachings of the day and hence the authority of the church. He was investigated by the Inquisition, threatened with torture, tried more than once and finally imprisoned – he was under house arrest for the last 9 years of his life.

However, it was only quite recently that efforts began to recognize and protect whistleblowers. In 1972 Ralph Nader wrote a book called whistleblowing (giving us the name we use today) which led to conferences and civil society groups organizing. In 1977 the Government Accountability Project (GAP) was formed in Washington, DC. GAP is still in operation today and has represented countless high-profile whistleblowers including Edward Snowden. The USA passed its first whistleblower law in 1989, and today has countless laws covering various levels of government, regions and industries.

The next wave of legislation came in the 1990's with laws being passed in several Australian states, and then in the UK.

Canada's history

Canada could have got started in the 1990's but didn't. In 1993 the Chrétien government came to power on a promise to 'clean up' the perceived corruption of the Mulroney era, including whistleblower protection legislation. However this government not only failed to deliver on this promise, but in 2002 blocked a private member's bill, saying that such a law was not necessary. So during 13 years of Liberal rule there was no progress on this front.

Ironically by 2006 the Liberal party was now seen as corrupt, in part as a result of the Sponsorship Scandal (kudos to Allan Cutler), and the conservatives came to power on a promise to 'clean up'. This included a number of very specific promises to protect whistleblowers which were supposedly fulfilled by their first major bill, the Federal Accountability Act. This gave us the Public Servants Disclosure Protection Act (PSDPA) – which came into force in 2007 – and this is the law that we still have today.

The PSDPA created two new bodies: an Integrity Commissioner, who is an agent of Parliament (like the Auditor General); and a special purpose Tribunal which can award whistleblowers compensation for reprisals and also punish the aggressors. This system

has two main processes: one of making disclosures of wrongdoing, which are supposed to be investigated; and one for the whistleblower to complain if they suffer reprisals.

Unfortunately, this law is deeply flawed. In fact when it was being debated it was described by one MP as “an Act, not to protect whistleblowers, but to protect Deputy Ministers from whistleblowers” – and that description has proven to be pretty accurate.

Just how bad is it? Let me give you some numbers. Bear in mind the context: the law is supposed to protect about 400,000 employees in the public service, and it has been in force for 10 years. You might expect that during that time it might have protected a few hundred whistleblowers – or at least a few dozen – compensating them and helping them put their lives back together. Nothing like this has happened.

In ten years:

- Not a single whistleblower has completed the Tribunal process to be awarded compensation.
- Only seven whistleblowers have even been allowed to go the Tribunal. Five of these settled and two are still in process. I have spoken to nearly all of them and I can tell you that when whistleblowers settle like this is not a victory – they are cutting their losses when they realize that they have no chance of winning before the Tribunal (because of the way the law is written).
- About 250 whistleblowers have come forward with complaints of reprisal – which seems to me a very small number. I believe that this is because whistleblowers, when they see what happens after they report wrongdoing, lose confidence in the system and simply don't bother to report reprisals.
- Not a single person has been punished by the Tribunal for taking reprisals against a whistleblower.

With 400,000 employees, one would imagine that there would be significant number of cases of wrongdoing found. But the Integrity Commissioner has found very few: only 13 cases in 10 years. In five out of the ten calendar years there the Integrity Commissioner found no wrongdoing at all.

We could also think of this in terms of money, because research shows that whistleblowers are highly effective at exposing fraud, and research also reveals that a typical organization may lose 2-5% of its resources to corruption.

Our federal government is a vast enterprise, spending about a billion dollars a day (the latest budget projects expenditures of \$330 billion). Even just one percent of that would be 10 million dollars a day, lost stolen, or wasted.

Yet if we look at the 13 cases of wrongdoing that our integrity commissioners have uncovered, these are pretty small change. Most of them are individual ‘bad apples’ involved in wrongdoing such as mismanagement or bullying. The sums of money involved have usually been trivial. The commissioner has never uncovered anything involving major fraud like the sponsorship scandal nor any hint of impropriety regarding

major projects like the gun registry, or the F-35 procurement, or the Phoenix payroll system.

So this system clearly isn't protecting the public purse either.

Let's talk briefly about Phoenix. I knew from whistleblowers three years ago that the Phoenix project was a fraud. Since then whistleblowers have been going to the media with horror stories and coming to Canadians for Accountability, yet our Integrity Commissioner has made no report regarding misconduct associated with this disastrous project. Why is this – we think because most whistleblowers don't trust him to investigate it properly – or to protect them.

We have even been told by one whistleblower that they went to the integrity commissioner but were given the brush off – they were told to go somewhere else.

Recent developments

The PSDPA contains a clause that it must be subject to an independent review after 5 years. This is a common provision, and it makes sense for a new and untested law to be reviewed, to make sure that it is working and to fine-tune it as necessary. In 2012, when this review came due, whistleblowing advocates feared that Treasury Board, who had written the law, would launch a review that was superficial or rigged, to avoid any serious criticism of the law. So we were campaigning strongly for a review that would be thorough and truly independent. However, the government went one better – it simply ignored this legal requirement and didn't launch the review! There was no announcement or explanation, just silence.

Roll on five years, and out of the blue I receive a call from Allan Cutler on a Friday afternoon. Allan tells me that he has been asked to testify to a parliamentary committee about the whistleblowing law. What's going on I ask – we're not sure. So I call the clerk of the committee to find out more and as we are chatting it suddenly comes to me "Is this the five year review of the law?" – Yes, it is he says.

Again, there's no explanation for the delay or why this should be done now, but some members of the committee tell us they believe that it is an attempt by the government to distract them from a suspected scandal that they are trying to investigate.

By Sunday evening we have found a committee member willing to work with us, and by Tuesday we had three whistleblowing advocates scheduled to testify and many more witnesses proposed to the committee.

In the 13 weeks since then, the committee has done a fine job, digging in and calling many more witnesses including whistleblowers. They also called legal experts from four other jurisdictions – the USA, UK, Ireland and Australia – and called some of them back a second time. It's also noticeable how the committee members are working on this issue in a non-partisan way, which is not typical. They seem gripped by what they have learned and keen to find solutions.

I have to contrast this with the complete lack of parliamentary oversight until now.

Some people here may recall that the first Integrity Commissioner, Christiane Ouimet, achieved a perfect score: during her three years in office she found zero cases of wrongdoing and zero cases of reprisal. Yet when she came to committee not only she was asked no tough questions, she was even showered with compliments on the fine work that she was doing – although she had found nothing.

When it later became public that Ouimet was under investigation by the Auditor General, she instantly ‘retired’. The AG’s report was devastating, revealing that Ouimet had engaged in exactly the kind of misconduct she was hired to prevent: failing to do her job, being an abusive manager, and taking reprisals against her own employees. Some described it a a ‘reign of terror’. Yet she was paid generously to leave with a package worth about \$500,000, and a gag order.

Even after the Ouimet fiasco, this lack of parliamentary oversight continued. Over the past decade three different integrity commissioners come to committee to testify after submitting their annual reports and not once has anyone else been permitted to testify, even while whistleblowers and whistleblower advocates like myself and Allan Cutler repeatedly asked to be called. Instead we sat in the public gallery, fuming, while year after year the integrity commissioner of the day got a free pass.

So it was very exciting, after ten years of beating our heads fruitlessly against the doors of Parliament, to be finally allowed to testify. Finally it looked as if something might change.

Nevertheless it is astonishing that in a modern democracy, an important agency that is so clearly failing to achieve its mandate should be allowed to continue for a decade with virtually no Parliamentary oversight or intervention.

Let me point out that I’ve been speaking only about the system for protecting whistleblowers who see federal government wrongdoing. But this is just a small part of what’s needed in Canada. Looking at the people who have received the Golden Whistle award it’s clear that we also need provinces to step up to the plate, so that people like Ken Pereira can be properly protected. Many have passed laws but none of them to be effective. We also need laws to cover the private sector so that people like Evan Vokes – the pipeline whistleblower – don’t need to lose their careers. At present there’s essentially no protection for private sector whistleblowers.

The future

What happens now?

We are looking to the committee to develop a strong report, proposing major changes to the law. We are encouraged that some committee members are looking to us for guidance in formulating their recommendations.

This is good because they face a formidable task. The law is so badly written and so full of loopholes that legal witnesses from other jurisdictions recommended scrapping it and starting again. Failing this, a very large number of amendments is needed to fix it – a tough task for the committee.

But that's not the end of the story, because after the committee tables its report, it's entirely up to the government whether it accepts the recommendations – and how long it may take to implement these. Right now this doesn't look too hopeful, given this government's track record on access to information.

Our access to information system in Canada is 34 years old and has gone from being one of the best in the world to one of the worst, with departments routinely claiming secrecy, refusing legitimate requests, allowing interminable delays and charging outrageous fees. The former Information Commissioner Suzanne Legault, who can rule on complaints about the system but has no power to order corrective action, called the system “a shield against transparency” and proposed 85 amendments. The liberals made a campaign promise to fix this quickly but now any major reforms are being delayed till 2018, and the President of Treasury Board has refused to commit to these being carried out before the next election.

So you can see why it is difficult to be optimistic about whistleblowing reforms, which were not a campaign promise and which have a much lower public profile than access to information. It may take a lot of pressure to get this government (or any government) to do the right thing. Fortunately there are more and more people involved who are organizing to do just this.

What can people here do about all of this?

1. Stay engaged and follow what it going on – e.g. by getting on mailing lists
2. Wait for the call to action – whether this is writing to your MP, signing a petition
3. If you really want to help and you have the time, roll up your sleeves and get involved.

Finally, I want you all to remember, as you hear Ken Pereira's story, that there are hundreds of others like him that we never hear about -- people who try to do the right thing, who put themselves at risk to protect us, and whose lives are devastated as a result. We owe it to these brave souls and we owe it to ourselves to continue the fight, even in the face of government intransigence, to demand better protection for them.

David W. Hutton

Whistleblower protection advocate
Senior Fellow, Centre for Free Expression,
Ryerson University
Former Executive Director of FAIR