

Whistleblowers: All truth is good, but not all truth is good to say

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Law Now. Jun/Jul 2003. Vol. 27, Iss. 6

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“I detest that person who hides one thing in the depth of his heart and speaks forth another.”

- Homer

The urge to do right burns passionately in many hearts. Most of us have been in situations where what was being said or done was in conflict with our consciences. We don't want to be a party to any wrongdoing in our midst. We want the freedom to speak out according to our consciences and sometimes taking the concerns outside the organization, including airing them in public, seems the only recourse.

Yet we know that virtually everyone instinctively dislikes the bearer of bad news. When people are threatened or confronted, they circle the wagons. To them, loyalty is a virtue and speaking out is betrayal. They sometimes see these people as natural trouble makers. What have conscience-bound individuals done in those circumstances?

In this age of sensitivities to words and platitudes, many Canadians are troubled about what they should do or say against wrongdoing to which they are exposed. It is easy to ignore the challenge, to shrug it off as "not my problem." Others are convinced they must do something about it, if that means only telling someone else about it.

A recent international example of this phenomenon is the UN weapons inspectors in Iraq. It was believed that Iraqi scientists would only feel secure to speak honestly about development of weapons of mass destruction if they were interviewed outside of the country, where they were free of fear of government retaliation against them or their families.

Historically, blowing the whistle about something to others has been risky. Despite the increasing emphasis at work on equality, employee rights, workplace democracy, and quality of life issues, the whistleblower can be seen as disloyal or a snitch. The implied common law duty of the employee of fidelity to the employer can get one fired or cause one to suffer other retaliation for blowing the whistle at work. Unwanted whistleblowing is still likely to be seen today as sanctionable worksite misconduct. It can render one's job less secure or hurts one's chances of promotion.

No one likes to have one's actions negatively reported to others. If the person whose action is complained of discovers who made the report, a defamation suit, costly to defend, could follow.

Not only is there no obvious advantage in acting on one's conscience, there are clear hazards for doing so. The immediate and sharp response of a manager is usually to silence the person bearing the unwelcome news, the practical working out of the instinct to "shoot the messenger." One notes that, for example, Linda Tripp was the only person ever indicted for the Lewinsky/Clinton events [but has since been charged in the criminal system. eds.note].

In the Walkerton water crisis, the people who blew the whistle were challenged for coming forward. By contrast, one of the people in charge, who admitted to lying, was in line to receive a large financial payout.

Whistleblowing is associated with the pejorative concepts of mess-ups and coverups. It is a part of our system of informal social checks and balances, freedom of expression, freedom of conscience, and institutionalized conflict of interest.

Yet, as Miguel de Unamuno, philosopher and writer (1864 - 1936), said "sometimes to remain silent is to lie." Some of the most important social changes have come about as a result of ordinary people pointing out wrongdoing by others. There is increasingly a recognition that there more to life than to compromise on one's principles and acquiesce in what may lead to even greater harm.

For the better practice of the freedoms of speech and conscience, to facilitate the exercise of one's legal rights, and to acknowledge that whistleblowers play a valuable social role in law enforcement, law makers are slowly granting more protection for whistleblowers and others who assert their legal rights. Most of the legislation is in the form of protection from retaliation. The courts are also slowly re-shaping the common law to permit, if not encourage, whistleblowing.

The Anatomy of a Whistleblower

It is impossible to generalize, but the whistleblower is an individual who often has high expectations for honesty, integrity and performance. That person will expect it from others and may be idealistic or naive in that expectation. Often more likely to follow one's conscience and be determined, the whistleblower may be seen as untrustworthy, disloyal, and a meddler.

Whistleblowers demand accountability and integrity in a firm. They want to bring about change. As a voices in the wilderness, they are often unpopular, isolated, and shunned. They are perceived as unreliable, in contrast to trusted team players in the organization. They are the ultimate marginalized minorities in organizations - damaged goods - who can expect little overall protection from the law.

In a few instances, the law imposes a direct duty to blow the whistle on wrongdoing. Some statutory professionals are required to report wrongdoing to their self-governing bodies. This is an ethical obligation to serve the interests of their profession. For example, physicians, are expected to go beyond the physician/patient relationship to report private medical conditions to regulatory authorities where public safety or health may be at stake. Teachers have been encouraged, as part of their jobs, to detect and report child abuse in their students and mandatory reporting in other circumstances has also been considered.

Legislation

Several statutes in Canada prohibit retaliation against whistleblowers in certain defined circumstances.

A good starting point is the criminal complainant. Informants reporting crimes to the police are protected if the complaints are made in good faith and reasonable belief. In some cases, the identity of witnesses cannot be published (Criminal Code, section 486(3) and (4)), and young complainants are allowed to testify behind a screen (section 486(2.1-2)). Intimidating or otherwise interfering with a complainant or witness may constitute the crime of obstruction of justice. Section 139 of the Criminal Code states that "every one who willfully attempts in any manner to obstruct, pervert or defeat the course of justice" is guilty of a crime. One will be "deemed" to do so if one "dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence."

There are many other examples of legislative protection. In Ontario, whistleblower protections are found in the Occupational Health and Safety Act, the Labour Relations Act, the Human Rights Code and the Environmental Protection Act. The Alberta Human Rights, Citizenship and Multiculturalism Act, section 10(1) is typical. It says that "no person shall retaliate against a person because that person has made or attempted to make a complaint under this Act." The Act also protects people who have given evidence, or assisted in respect of the initiation or prosecution of a complaint or other proceeding under the Act.

The Ontario Occupational Health and Safety Act, section 36 reads: "No person shall dismiss or take any other disciplinary action against a worker by reason of that worker acting in compliance with this Act."

The Ontario Public Service Act provides for whistleblower protection to protect employees of the Ontario government from retaliation for disclosing allegations of serious government wrongdoing and to provide a means of making those allegations public. Serious government wrongdoing includes acts or omissions of an

institution or employee which impose grave health or safety hazards on any person.

The federal Competition Act has similar provisions: 66.1 (1) Any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under the Act, may notify the Commissioner of the particulars of the matter and may request that his or her identity be kept confidential with respect to the notification. (2) The Commissioner shall keep confidential the identity of a person who has notified the Commissioner 66.2 (1) No employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that (a) the employee, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that the employer or any other person has committed or intends to commit an offence under this Act International treaties also encourage whistleblowing as a method of law enforcement. In the environmental parallel accord to the NAFTA, the North American Agreement on Environmental Cooperation (NAAEC), the citizen complaint mechanism empowers the public to play a whistleblower role on matters of environmental law enforcement. Under Article 14, members of the public may submit a claim alleging a NAFTA partner has failed to effectively enforce its environmental law. Following a review of the submission, the Commission on Environmental Cooperation may investigate the matter and pursue a factual record of its findings.

Judicial Decisions Merk (Saskatchewan)

Section 74 of the Saskatchewan Labour Standards Act states, in part: "No employer shall discharge or threaten to discharge or in any manner discriminate against an employee because the employee (a) has reported or proposed to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act." In the recent Merk decision, the employer's dismissal of the whistleblower was upheld. Merk had complained to her employer (a union) that two officers in the union had received unlawful payments. The judge concluded that there may have been wrongdoing, but the internal investigator, a senior union official, was not a "lawful authority."

AUPE (Alberta)

Without breaching confidentiality, a social worker raised concerns about governmental department changes with his member of the provincial legislature, his department's minister, a member of the Opposition, and the Regional Board responsible for social services in his area. This embarrassed the Alberta government, which then tried to gag the 22,000 provincial civil servants on the basis that they forfeited their freedom of expression when they became public servants. The Alberta Court of Appeal disagreed.

Recognizing that public servants may hold a generally higher duty not to criticize government policy, a blanket prohibition against them from participating in public discussion goes too far. Each case will be considered on its own facts, but public servants speaking out against the operations in their own departments will not always be seen as a breach of their duty of fidelity.

Bakelight Thermostats Ltd (Ontario)

The law protects employees who report environmental violations of the law to government regulators and who are then fired for doing so. In the Ontario Labour Relations Board decision of Bakelight Thermostats Ltd the employer was ordered to pay an employee for lost earnings between the time of firing and resumption of other employment. The employee gave documents to the Ministry of the Environment, who then used them to successfully prosecute Bakelight.

Campbell (Nova Scotia)

The Nova Scotia Court of Appeal found that two lawyers who held a press conference to denounce the police strip-searches of three schoolgirls had no liability for defamation to the police involved. The majority of the appellate court said citizens must be allowed "to cry out loud and long against their transgressors in the public forum and - in the case of children and others less capable of articulation of the issues - to have their advocates cry out on their behalf."

Other Regulatory Issues

The law on whistleblowing in Canada may be still largely undeveloped as a coherent subject because of a lack of consensus on numerous threshold issues, such as what kind of whistleblower reporting deserves legal protection and which does not.

A whistleblower is capable of significant mischief if the reported information is untrue or is conveyed to a party inappropriate to receive it. The law will have to consider what circumstances justify "ignoring of the whistleblower" and withholding legal protection. Should the timing and motives of the whistleblower be taken into account? Should warnings receive more legal protection than reports after the fact (i.e. a distinction between pre-emptive and retroactive effect)?

Legal protection for whistleblowing must recognize that all individual responses to consciences are not uniform. All people who find themselves in vulnerable positions do not equally embrace whistleblowing as an objective tool (as implied by the metaphor of a "whistle"). There are many other personal considerations and processes involved, such as internal soul-searching, preliminary to "making a loud noise". Some whistleblowers' prime motivation is embarrassment, vindictiveness, self-interest and self-preservation. Their reports may not be always factually reliable. If they are reliable, does it matter when or why they blow the whistle?

What about the nature of the outlet to whom the report is made? Does it make a difference if the whistleblower makes the first report to the wrongdoer or to a government regulator or to the media?

Should a complainant be required by the law to report wrongdoing first to the wrongdoer and give that person or organization a reasonable chance to correct the wrong? In some cases, this rule of apparent fairness would even impose too high a standard, such as in an emergency, in cases of intimidation or abuse, where there is no expectation that the recipient would act on the information, or where the reporting would likely result in the cover-up of a crime.

Should the law draw a distinction between public sector and private sector whistleblowing? We all have an interest and role in improving social welfare, but the private sector relationships are different, although they can sometimes have a serious impact on our community too. Should the whistleblower have to make a case for legal protection, such as particular vulnerability? Is a public disclosure qualitatively different from a private disclosure?

Does it make any difference if the whistleblower is acting out of a right versus a duty? Should the legal protection depend on whether there is a power and authority differential over the whistleblower (where more retaliation is likely) or on what information is being disclosed?

Should the legal protection consider the seriousness of the interest at stake and the non-whistleblowing alternatives? What other non-disclosure efforts were made? Is the remedy sought essentially personal to the individual whistleblower or more altruistic? How much proof of the allegation should the whistleblower be asked to provide in return for legal protection?

What kind of protection should be granted to whistleblowers? Legal remedies might include immunity from private lawsuits including defamation, no retaliation (or reversal such as reinstatement), privacy, and reimbursement of personal costs. In the United States, legislation even encourages whistleblowing of wrongdoing in the public sector by paying money to the whistleblower.

Conclusion

There has been minimal academic work undertaken in Canada to date on the subject of the legal regulation of whistleblowing. There is no consensus yet about whether the protection should be statutory or common law. Even the term "whistleblower" is non-specific and it has taken on a rather editorial, if not pejorative, connotation in the minds of the public. To many, it suggests shrillness, extraordinary publicity- and attention-seeking, trouble-making behaviour of a nuisance. On the other hand, just as there are different types of whistles that make different sounds, not all whistleblowers just want to make a noise to anyone.

The result of these unsettled issues means that today in Canada we do not have a generalized protection, right, or cause of action for whistleblowing activity. However, as Julian Huxley observed "sooner or later, false thinking brings wrong conduct." There must be a role for the private conscience in addressing wrongdoing. Since this subject invokes some of the most compelling considerations of secrecy, public policy; free expression and conscience, effective management in government, internal corporate operations and governance, intimidation and retaliation, curtailment of wrongdoing, and the exercise of power relationships, this is an activity over which a made-in-Canada regulatory framework is certain to grow.

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