

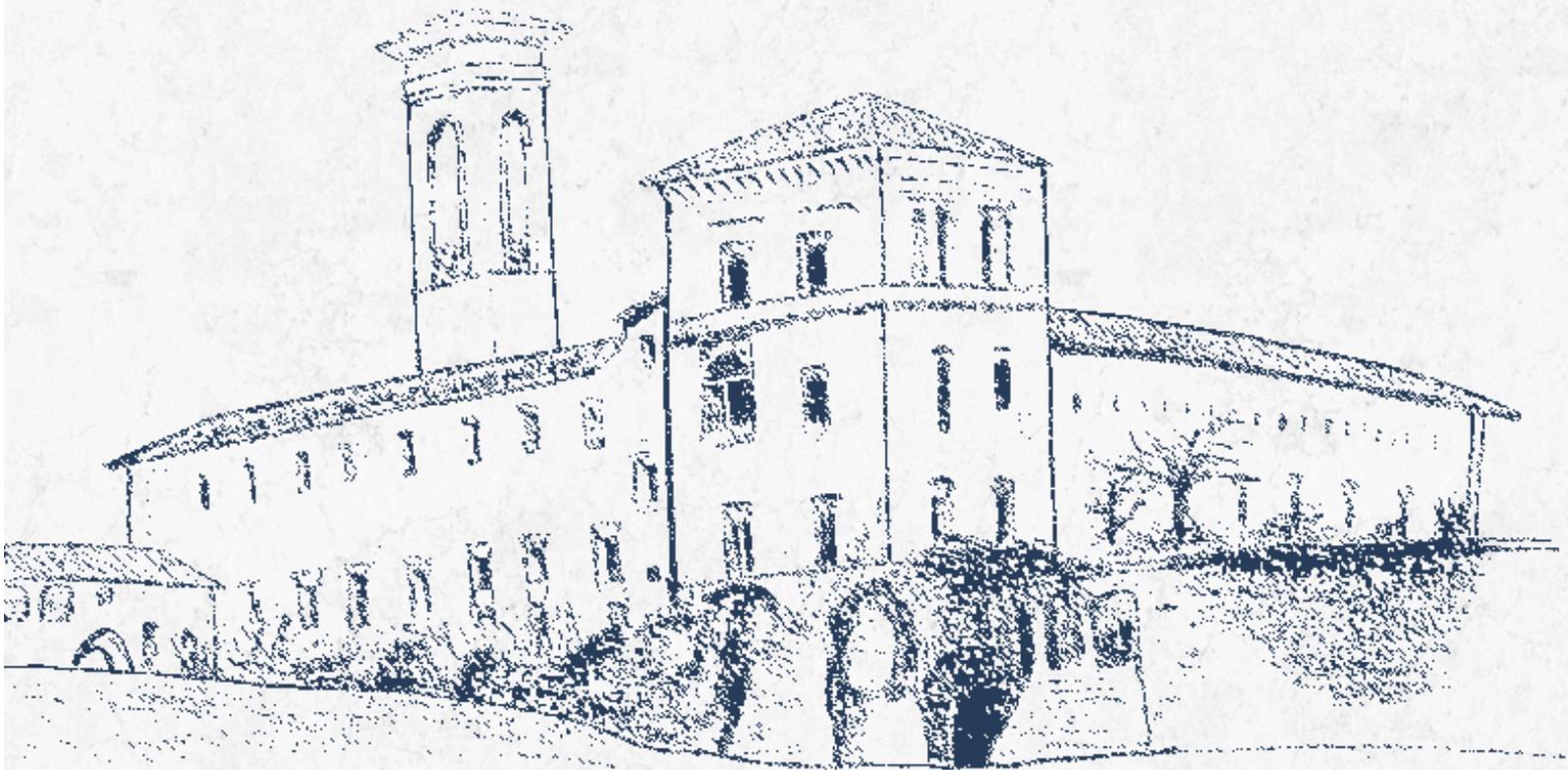
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Malice and Whistleblowing

Peter Bowal *

1. Introduction

The voice of conscience is so delicate that it is easy to stifle it; but it is also so clear that it is impossible to mistake it.

Madame De Stael, writer (1766-1817)

Two unrelated events are playing out half a world apart as I collect my thoughts for this article. One is the perplexing account of a Norwegian woman, Marte Deborah Dalely, who reported to police – presumably because she sought justice in the matter –that she was sexually assaulted by a co-worker in Dubai, United Arab Emirates. For making the report of criminal activity to the public authorities responsible for enforcing the law, she was herself detained in custody for four days, charged with having extra-marital sex and sentenced to 16 months of imprisonment, three months longer than the perpetrator¹. After massive outrage was expressed by the international media and after high level Norwegian diplomatic interventions, she was pardoned by Dubai ruler Sheikh

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¹ B. Murphy, *Norwegian Woman gets 16 Months in Jail for Having Sex Outside Marriage after Reporting Alleged Rape in Dubai*, in *National Post*, Postmedia, 2013, <http://news.nationalpost.com/2013/07/21/norwegian-woman-gets-16-months-in-jail-for-having-sex-outside-marriage-after-reporting-alleged-rape-in-dubai/> (accessed September 3, 2013).

Mohammed bin Rashid al-Maktoum². This was an extraordinarily iniquitous case of “re-victimize the victim” and “punish the messenger.” The pardon still left the impression that she remained somehow guilty of a crime for reporting a crime.

The second story broke in June 2013. Some of the world’s largest chocolate companies, including Nestlé and Mars, and their executives³, were criminally charged with fixing the price of chocolate in its multi-billion dollar market in Canada⁴. The corporate accused could be fined a maximum of \$10 million each and the individual accused, if convicted, face terms of imprisonment of up to five years⁵.

It is alleged that secret price-fixing meetings were held in coffee shops, restaurants and at industry conventions as far back as 2002. The Canadian competition regulator was only tipped off about the conspiracy by another chocolate company, perhaps Cadbury or Hershey, which sought to take advantage of the Canadian Competition Bureau’s Immunity Program⁶. However, that Program for third party competitors and protections for whistleblowing employees reporting law-breaking in their own companies are only extended by the applicable legislation where “the employee [is] acting in good faith and on the basis of reasonable belief”⁷. The competitor’s whistleblowing report to the regulators, whether corporate or individual, launched a six-year investigation which led to these charges⁸.

² B. Murphy, *Dubai pardons Norwegian Woman Who Was Sentenced to Year in Jail for Reporting Rape*, in *National Post*, Postmedia, 2013, <http://news.nationalpost.com/2013/07/22/dubai-pardons-norwegian-woman-who-was-sentenced-to-year-in-jail-for-reporting-rape/> (accessed September 3, 2013).

³ Under the Competition Act, RSC 1985, c C-34, s. 65(4), corporate officers and directors are deemed parties and equally liable with their corporate entities, if they “directed, authorized, assented to, acquiesced in or participated in the commission of the offence(s)”.

⁴ Competition Act, RSC 1985, c C-34, s. 45(1).

⁵ The maximum penalties have been increased since the dates of these alleged offences to \$25 million and 14 years of imprisonment: see Competition Act, RSC 1985, c C-34, s. 45(2).

⁶ http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02000.html (accessed July 16, 2013).

⁷ *Competition Act*, RSC 1985, c C-34, ss. 66.1 and 66.2.

⁸ The Competition Bureau has not identified the chocolate company who brought their attention to the cartel. Many have speculated that it was Hershey, which admitted to one meeting and a planned price increase with the group in 2007, but says it did not go further to participate in the conspiracy. Hershey has indicated that it plans to plead guilty to one count of price-fixing and ask for leniency under the Competition Bureau’s Immunity Program: *Whistleblower Revealed Alleged Cartel*, in *National Post*, June 7, 2013, page A1 and A6. Others note that Cadbury, a major player in the Canadian chocolate market,

What ties these two factually and geographically distinct events together is how the motives of the reporting party might have barred investigation of the reports. A rape victim is understandably upset and interested in justice being brought to bear against the perpetrator. A report of a crime would not reasonably be discounted merely because the informant is a distraught victim. Likewise, one might speculate how something as secondary as good faith of a competitor in the chocolate business seeking immunity in prosecution for a criminal conspiracy, or the motives of an employee making the tip, might have derailed an important and major investigation and prosecution. The motives of a former co-conspirator in reporting its competitors to regulators in return for immunity might be suspect enough to jeopardize law enforcement and justice if a demonstration of good faith was a pre-requisite to criminal process.

Why the legislated need for good faith in this realm of voluntary reporting and not in other scenarios?

Whistleblowing impacts personal reputations as much as it does wrongdoing. Whistleblowers come from all roles inside and outside of organizations with various states of personal knowledge of what they are reporting. Moreover, there may be a sense in organizations that some objective mechanism must be imposed on an inundation of random wrongdoing reports of variable seriousness. That is to say, the recipient of the reports could be readily overwhelmed with unsubstantiated, potentially reputation-ruinous reports and could use a few handy parameters to quickly assess which reports are most worthy of immediate attention. Good faith might be seen as one of these helpful parameters – as an effective delimiting control to achieve this triage objective.

Occasionally, whistleblowing legislation includes another pre-qualification such as “and on reasonable grounds.” This added “reasonable grounds” qualification is found in the *United Nations Convention Against Corruption*⁹ and the OECD *Anti-Bribery Convention*¹⁰, among others. “Reasonable grounds” obviously engages at a conceptual level, and to some extent overlaps, with good faith. Good faith is likely to be confused or conflated with “reasonable grounds.” On the other hand, arguable “reasonable

has not been charged and may indeed be the tipster under the Immunity Program: J. Gray, *Chocolate Fix: Three Charged in Alleged Pricing Scheme*, in *Globe and Mail*, June 7, 2013, B1 and B4 <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/chocolate-bar-executives-accused-of-price-fixing-in-canada/article12380660/> (accessed July 3, 2013).

⁹ Article 33.

¹⁰ Article IX (iii).

grounds” imports another *sui generis* pre-condition to the review and investigation of the report and protection of the whistleblower, *viz.* sufficient, credible proof of the wrongdoing at the time of making the report.

Good faith, while frequently a prerequisite in whistleblower protection statutes, is rarely defined in those statutes. The person or entity responsible for the interpretation and application of the legislation is left to ascribe whatever meaning they choose to the good faith requirement¹¹. This “and on reasonable grounds” qualification will not be further analyzed in this article.

The good faith requirement, which derives from defamation law, rests on the negative premise that if the whistleblower’s good faith cannot be demonstrated, either or both the whistleblower or the report is unreliable. Accordingly, it would be unsafe to invest further effort and reputational risk in reports of wrongdoing where good faith is not palpable.

Consider a fictional example of how the malice requirement might operate. Worker X is known to despise her boss Y, with whom she has had conflicts in the past and who two years ago won the promotion X was seeking. X has made two previous allegations against Y about signing authority and getting vendors to drop leftover construction materials at Y’s house. Y, who is a popular and successful division manager, vigorously denied any wrongdoing, snapping, “She’s still upset she did not get promoted last time, and continues to try to undermine my hard work and solid results.” No allegations were followed up.

Yet, X has never reported the serious revenue overstatements and sham sales from their division, which have been orchestrated by Y and in which, to date, she has reluctantly acquiesced and participated in. These accounting frauds have made their division the leader in corporate performance on paper and she also has enjoyed the accolades and bonuses. X knows the mischief will be detected in the next year or two and she reckons it would be best for her to break the news of Y’s corruption. Today, X feels slighted by Y at a meeting, exchanges sharp words with him, and then marches to the executive suite to report Y’s

¹¹ Vandekerckhove and Lewis point out that ‘good faith’ has been defined in incompatible ways – for example, by Transparency International similar to ‘reasonable grounds’, by the ICC as different from reasonable grounds, and entailing a motive aspect. See, W. Vandekerckhove, D. Lewis, *The Content of Whistleblowing Procedures: A Critical Review of Recent Official Guidelines*, in *Journal of Business Ethics*, Vol. 108, No. 2, 2012, 253-264.

fraudulent revenue and cost accounting. Facing the CFO, she is flushed and nervous as she anxiously sputters through the allegations. Her story seems contrived. It is also improbable and, if anyone gets a whiff of it, could start a run on the company's stock price. She has no proof and the report comes off as another personal tirade against Y. From this overall context, it appears to the CFO that X's report is *not* made in good faith.

In order for reports of wrongdoing to be investigated at all and for the whistleblower to be protected by confidentiality and against reprisal, the legislation and corporate whistleblowing policies require that reports must be made "in good faith" or "with proper motives". Occasionally, the applicable language sometimes states in the condition in the negative form, such as "without malice". All such variations are legally and practically relevant as the same theme in whistleblowing regulation. Without this legal standard of good faith being met, the whistleblower's report of wrongdoing is not investigated. The theory behind this standard holds that good faith serves a built-in filter for truth, in that it will lead to action upon fewer, but more reliable, reports. Culling bad faith reports spares wasteful investigations of the report of wrongdoing and preserves innocent third parties' reputations. Bad faith whistleblowers are deterred because they will know they will not be protected by confidentiality from reprisal.

Moreover, a bad faith report might even serve as an independent basis for workplace discipline against the whistleblower. This article argues that while the prerequisite of good faith appears designed to minimize mischief, it actually generates more uncertainty and opportunity for mischief than would be the case of presumptive good faith motives on the part of integrity reporters. As a general legal threshold qualification for acting on reports of wrongdoing, good faith ought to be discarded. There are several bases for this rejection of the good faith constraint. These include: definitional inconsistency, burden of proof, asymmetry, probity, and the proxy problem. After first canvassing the global popularity of the good faith standard in whistleblowing legislation, each of these rationales will be analyzed.

2. The Good Faith Requirement in Whistleblowing Legislation

In most whistleblowing legislation and corporate whistleblowing policies, a mandatory and minimum standard of good faith on the part of whistleblowers when they report wrongdoing is prescribed¹². In the recently enacted legislation in my Canadian province, “[t]he Commissioner is not required to investigate a disclosure or, if an investigation has been initiated, may cease the investigation if, in the opinion of the Commissioner [...] the disclosure [...] has not been made in good faith”¹³. The legislation that applies to federal public servants defines “protected disclosure” as “a disclosure that is made in good faith”¹⁴. The same threshold good faith requirement was, until very recently, found in the United Kingdom legislation¹⁵ in several provisions, starting with section 43F(1): “a qualifying disclosure is made in accordance with this section if the worker ... makes the disclosure in good faith”¹⁶. The *Enterprise and Regulatory Reform Act 2013*¹⁷ removed the good faith threshold but now allows the tribunal to reduce the compensation by up to 25% if it finds the protected disclosure was not made in good faith¹⁸. The whistleblower must also now hold a reasonable belief that the disclosure is made in the public interest¹⁹. Most other domestic European whistleblowing legislation sets a good faith standard or evaluates motives in some similar way²⁰.

In the United States, there is no malice or good faith provision in the federal *False Claims Act*, in the Dodd-Frank SEC whistleblower statute, in the *Internal Revenue Code*, section 7623(b), in the Sarbanes-Oxley Act, or in

¹² An exception is the Australian approach. See, for example, the Commonwealth *Public Interest Disclosure Act 2013*, in effect from July 15, 2013. Division 2 (Public Interest Disclosures), at ss. 25 *et. seq.* does not contain a good faith requirement.

¹³ *Public Interest Disclosure (Whistleblower Protection) Act*, SA 2012, c P-39.5, section 19(1) <http://canlii.ca/t/5218w> (accessed July 6, 2013).

¹⁴ *Public Servants Disclosure Protection Act*, SC 2005, c 46, section 2, <http://canlii.ca/t/lgj4> (accessed July 6, 2013).

¹⁵ *Public Interest Disclosure Act 1996, as amended* (UK, c. 18).

¹⁶ See also, sections 43G(1), 43H(1).

¹⁷ 2013 c. 24, Part 2, Protected Disclosures, received Royal Assent on 25 April 2013.

¹⁸ *Supra*, section 18(4).

¹⁹ Employment Rights Act 1996, c. 18, as amended, section 43B.

²⁰ See W. Vandekerckhove, *European Whistleblower Protection: Tiers or Tears?*, in D. Lewis, *A Global Approach to Public Interest Disclosure: What Can We Learn from Existing Whistleblowing Legislation and Research?*, Edward Elgar, Cheltenham, 2010, 15-35.

any state false claims legislation²¹. Under Dodd-Frank regulations, there are inducements to encourage whistleblowers to first report internally. However, malice on the part of a whistleblower will put a damper on the enthusiasm of regulators and prosecutors because malice undermines the whistleblower's credibility as a witness. Good faith is not required for protection under the federal *Whistleblower Protection Act of 1989*²², but a 'reasonable belief' standard applies²³.

Regional and international conventions focused exclusively upon combating corruption are important documents in which to situate whistleblowing protections because national law enforcement authorities are seriously disadvantaged in what they can detect in foreign business operations. These conventions also largely import a standard good faith pre-condition to whistleblower protection.

The United Nations *Convention Against Corruption* recommends signatory countries enact domestic legislation that protect whistleblowers who make only good faith disclosures. Article 33, subtitled "Protection of Reporting Persons" reads²⁴:

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment *for any person who reports in good faith* and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention [emphasis added]

The OECD Anti-Bribery Convention²⁵ did not in its prescriptions and commentary mention the role of whistleblowers in detecting and investigating international corruption. It was not until the 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public*

²¹ These statutes can be consulted at <http://taf.org/> (click on Resources by Topic). The Sarbanes-Oxley Act whistleblower provisions are at http://www.whistleblowers.gov/acts/sox_amended.html (accessed July 6, 2013).

¹⁷ 101st Congress (1989-1990) S.20.ENR.

²³ *Supra*, section 1213.

²⁴ General Assembly resolution 58/4 of 31 October 2003, *United Nations Convention against Corruption*.

http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed July 8, 2013).

²⁵ *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organization for Economic Development, 1997*; adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINA; http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/ConvCombatBribery_ENG.pdf (accessed July 8, 2013).

*Officials in International Business Transactions*²⁶ that member countries were recommended to enact “appropriate measures ... to protect from discriminatory or disciplinary action public and private sector employees *who report in good faith* and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.” [emphasis added]²⁷.

The *Inter-American Convention Against Corruption*²⁸ likewise invokes good faith as a pre-requisite to whistleblower protection²⁹, as does the same Organization of American States’ comprehensive *Draft Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses*³⁰. Indeed, the outset of this extraordinary document limits its purpose to the protection of “any person who, in good faith, report[s] or witness[es]” acts of corruption³¹.

The *African Union Convention on Preventing and Combating Corruption*³², in Article 5, does not explicitly set a good faith standard³³. It does, however, mandate “national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences”³⁴.

The Council of Europe’s *Civil Law Convention on Corruption* incorporates good faith in Article 9 (Protection of Employees): “[...] for employees who have reasonable grounds to suspect corruption and *who report in good faith* their suspicion to responsible persons or authorities”³⁵. [emphasis

²⁶ Adopted by the Council on 26 November 2009, see *supra*.

²⁷ Article IX (iii), *Reporting Foreign Bribery*; see also, Annex II, *Good Practice Guidance on Internal Controls, Ethics, and Compliance*.

²⁸ Adopted at the third plenary session on March 29, 1996; <http://www.oas.org/juridico/english/treaties/b-58.html> (accessed July 10, 2013).

²⁹ Article 18 states: “Systems for protecting public servants and private citizens *who, in good faith, report acts of corruption*, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.” [emphasis added].

³⁰ Undated; http://www.oas.org/juridico/english/draft_model_reporting.pdf (accessed July 10, 2013).

³¹ Article I: Purpose of the Law.

³²

http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf (accessed July 10, 2013).

³³ See Article 5, subsections 5 to 7, inclusive.

³⁴ Article 5(7).

³⁵ Strasbourg, 4.XI.1999 (entered into force on 01 December 1999); <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm> (accessed July 10, 2013).

added]. Likewise, the *Recommendation on Codes of Conduct for Public Officials*³⁶ suggests “[t]he public administration should ensure that no prejudice is caused to a public official who reports any of the above on reasonable grounds and in good faith”³⁷. The European Court of Human Rights has also embraced a good faith standard³⁸.

On the other hand, the Council of Europe’s concise *Criminal Law Convention on Corruption* makes no reference to a good faith requirement³⁹. This is also true for the *Anti-Corruption Action Plan for Asia and the Pacific*⁴⁰, which merely recommends that member countries adopt measures for the “[p]rotection of whistleblowers”⁴¹.

3. Definitional Inconsistency and Confusing Application

While good faith and malice occupy a pivotal place in whistleblowing regulation, what do we know about it? Good faith is a very woolly concept. It is so vague as to be essentially meaningless. In practice, it means different things to different people and even will be applied differently by the same person according to the context. Good faith is undefined by the legislation that mandates it and it is difficult to define as

³⁶ Adopted by the Committee of Ministers of the Council of Europe on 11 May 2000 (Rec(2000)10);

http://www.coe.int/t/dghl/monitoring/greco/documents/Rec%282000%2910_EN.pdf (accessed July 10, 2013).

³⁷ Article 12(6).

³⁸ *Guja v. Moldova* (No.14277/04, Strasbourg, 12 February 2008); <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85016>; and *Heinisch v. Germany*(No.28274/08, Strasbourg, 21 October 2011), where good faith is one of six discrete requirements for protection (accessed July 11, 2013).

³⁹ Strasbourg, 27.I.1999; <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>Article 22 (Protection of Collaborators of Justice and Witnesses) states:

Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for:

(a.) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities;

(b.) witnesses who give testimony concerning these offences (accessed July 11, 2013).

⁴⁰ <http://www.oecd.org/site/adboecdanti-corruptioninitiative/meetingsandconferences/35021642.pdf> (accessed July 16, 2013).

⁴¹ See pillar 3.

a principle⁴². Good faith is not easily ascertainable or discernible in most whistleblowing scenarios.

It might be easier to define by reference to bad faith, which is also difficult to define but, like obscenity, may be easy to recognize when it presents in clear cases. Definition and application of the concepts of good faith and malice arise from defamation law, where malice vitiates the defence of qualified privilege. The leading British common law judicial decision which attempted to define malice was *Horrocks v. Lowe*, where Lord Diplock, speaking for the House of Lords, started by describing what malice is *not*⁴³.

A defendant is not malicious merely because he relies solely on gossip and suspicion, or because he is irrational, impulsive, stupid, hasty, rash, improvident or credulous, foolish, unfair, pig-headed or obstinate, or because he was labouring under some misapprehension or imperfect recollection, although the presence of these factors may be some evidence of malice.

Turning to what good faith *is* defined as, his Lordship continued:

what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, in 'honest belief'. If he publishes untrue defamatory matter recklessly without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true [...] But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is a positive belief that the conclusions they have reached are true. The law demands no more.

⁴² The only exception appears to be the OAS *Model Law*, *supra* at note 20, that feebly attempts to define both good faith and bad faith in the Article 2, as follows:

Good-faith whistleblower: any person who informs the competent authority of an act which that person considers could be an act of corruption that is liable for administrative and/or criminal investigation. *Good-faith witness*: any person who for whatever reason is in possession of relevant information about acts of corruption of an administrative and/or criminal nature and is willing to collaborate in its prosecution. *Bad-faith whistleblowing or testimony*: the act of providing the competent authority with information on an act of corruption, knowing that said acts have not been committed, or with falsified evidence or circumstantial evidence of their commission, in order for an administrative and/or criminal investigation process to be opened.

⁴³ [1975] A.C. 135 (H.L.).

According to this well-accepted definition, good faith attends all disclosures that are made in an honest, non-reckless belief in the truth of the allegations. The fact that the whistleblower is stupid, hasty, rash, improvident, credulous, foolish, unfair, pig-headed, obstinate, careless, impulsive or irrational (or all of those) in arriving at – what is to him or her – an honest belief that the allegations are true does not render the report malicious. It is a subjective standard.

On the other hand, a bad faith or malicious report must be both false *and* made in the knowledge (*scienter*) of that falsity or the reckless disregard for truth. The leading case on good and bad faith whistleblowing in the United Kingdom, where the applicable legislation creates three distinct levels of protection is *Street v. Derbyshire Unemployed Workers Centre*⁴⁴. The whistleblower, Street, came within the third tier of protection in section 43G where qualification for protection is harder to establish. In addition to proving "good faith" under section 43G(1)(a), one must show the disclosure was made in reasonable belief of substantial truth, that the disclosure was not made for personal gain, reasonable belief that one would suffer detriment or that evidence of the subject matter of his complaint would be concealed and "in all the circumstances of the case, it was reasonable for him to make the disclosure" (section 43G(1)(e)). Ms. Street made several different and serious allegations about several individuals but refused to be interviewed or co-operate with the investigations. The investigator exonerated the alleged wrongdoers and described Street "as being at best misguided and at worst malicious. He stated that the allegations were unfounded and possibly required serious disciplinary proceedings to be taken against her"⁴⁵. On appeal, the Employment Appeal Tribunal found Street's disclosures were motivated by personal antagonism, although the only evidence was that she had refused to co-operate in the investigation.

⁴⁴ [2003] UKEAT 0508_02_2209; [2004] 4 All ER 839, [2005] ICR 97, [2004] EWCA Civ 964, [2004] IRLR 687 [<http://www.bailii.org/ew/cases/EWCA/Civ/2004/964.html>](accessed on September 6, 2013).

⁴⁵ Court of Appeal decision, para 19.

The Tribunal said good faith⁴⁶:

involves the deployment of an honest intention and, just as in public law, actions of a person can be vitiated if a purpose is advanced not in accordance with the [whistleblowing] statute . . . It is not . . . the purpose of the [UK] *Public Interest Disclosure Act* to allow grudges to be promoted and disclosures to be made in order to advance personal antagonism. It is, as the title of the statute implies, to be used in order to promote the public interest. The advancement of a grudge is inimical to that purpose.

The Court of Appeal, citing the *dictum* above, upheld the Employment Appeal Tribunal's dismissal of the whistleblower retaliation claim on the basis that the ulterior and principal motive of personal antagonism vitiated good faith, even in the presence of reasonable belief in the disclosure's truth. Lord Justice Auld added that good faith has a core meaning of honesty, not merely an honest intention⁴⁷. However, in the context of whistleblowing legislation, good faith means more than honesty. Resentment or antagonism will not necessarily be regarded as "negating good faith, if when making the disclosure, the worker is still driven by his original concern to right or prevent a wrong"⁴⁸. In the end, it is not obvious from all this judicial verbiage, how Ms. Street's personal animosity outweighed her "original concern to right or prevent a wrong." Thus the *Street* case demonstrates how challenging, if not arbitrary, good faith analysis becomes.

Pursuant to the *Horrocks* definition and the *Street* analysis under the highly nuanced United Kingdom legislation, one expects the vast majority of reports to satisfy the legal standard of good faith and exceedingly few, flagrant ones to be malicious. Excessive predatory antagonism or mental illness would seem to be the only motivations for someone to advance a verifiably false report that he or she knew to be false or did not care about its truth. Both of these conditions would likely manifest themselves independently of the report.

While extraordinary personal *animus* might drive a malicious report, this legal test does not bind motives to malice. Indeed, personal motives for the report are wholly unrelated to the legal determination as to whether it was made in good faith. The *Horrocks* standard of 'honest, non-reckless belief in the truth of the report' applies without more.

⁴⁶ Employment Appeal Tribunal decision, para 29 – 30.

⁴⁷ Court of Appeal decision, para 41.

⁴⁸ *Ibid*, para 55.

A chronological paradox is observable in this respect. How can an organization or individual receiving the report know whether it is false without first investigating it? How can one know whether the whistleblower was possessed of an honest, non-reckless belief unless one investigates the basis of such belief? For the recipient to discard the report of wrongdoing at the outset on a unilateral assessment of bad faith means one is doing so without establishing that it is false at all or that, if it is false, it was rendered without an honest, non-reckless belief. In other words, it is logically inconsistent to reject any report of wrongdoing on the basis of good faith without first investigating it for truth and the honest belief of the whistleblower. Individuals responsible for receiving and processing reports will *never* be applying the correct legal test for good faith when they pre-emptively cast aside reports as the legislation and corporate policies permit them to do. To the extent that they do so, they are applying an incorrect legal interpretation of good faith and malice.

4. Burden of Proof

Under the *Horrocks* test it is reasonable to conclude that in practice very few whistleblower reports will qualify as malicious. As a matter of legal policy, it follows that good faith might be implied or presumed in all whistleblower reports. The presumption of good faith can be subject to rebuttal in appropriate cases at the control of the recipient. This would be a rational default position for the good faith issue.

Whistleblowing legislation and corporate whistleblowing policies, which duplicate their corresponding statutes in many respects, create a starting point that each whistleblower's good faith must be at least apparent, if not established. Good faith is *not* presumed. Rather, one might say malice is presumed or implied in whistleblowing regulation, because whistleblowers have the legal burden of establishing their good faith at the outset of their reports.

However, even hostile witnesses in criminal and civil courtrooms and defamation defendants enjoy the presumption that their evidence and their published statements, respectively, were made in good faith. A trial witness motivated by malice will lack credibility, but the fact that one is a hostile or adverse witness must objectively be proved by the trial opponent on a balance of probabilities. Otherwise, all witness evidence is presumed to be credible and made in good faith. Even if a witness is adjudged hostile at trial, the consequence is that, as a matter of evidence,

the evidence is not excluded but the weight of it is discounted by the decision-maker.

Defendants in a defamation lawsuit do not have to prove the good faith of their utterances in order to prevail. It is the plaintiff who has the burden of proving on a civil standard that the defendant's statements were actuated by malice. The law sets out a burden of proof upon whistleblowers that is more stringent than practised in other scenarios of disclosures scrutinized in the legal system.

As has already been alluded to, the recipient of the report may pronounce on a whistleblower's motives without knowing whether the allegations are true or without asking the whistleblower what one's motives were. It is not easy to imagine, in any event, how a report recipient will accurately judge what the whistleblower knows or honestly believes. Would one ask the whistleblower to check off a box on a form that affirms one is making the report in good faith? All whistleblowers would assert they are reporting in good faith and the recipient often has even less to go on to refute such an assertion. Placing the burden of proof of good faith on the whistleblower, even if one was examined about that matter, would yield little more that is of value than presuming good faith at the outset.

5. Asymmetry

We have seen that reports of wrongdoing that are contaminated by any measure of malice are assumed to be factually unreliable and less worthy of investigation than reports that are made in good faith. Apart from the assessment and investigation of reports, the malice rule further functions to decisively screen out reports that are potentially damaging to the reputations of putatively innocent individuals and organizations. It should be noted, however, that all allegations, even good faith ones, may damage reputations.

Good faith focuses exclusively on the messenger and diverts all attention from the substance of the message of wrongdoing. Immediate scrutiny of the messenger also perpetuates a sense that the organization and manager receiving the report must find favour with the messenger. The law and policy of good faith is interested in determining whether any whistleblower's report will be taken seriously – and an investigation within a potentially major, resource-consuming investigation – and not addressing the reported wrongdoing itself. As good faith is an internal restraint on whistleblowers, it signals that whistleblowing is to be viewed and handled as an indulgence on the part of the organization.

The good faith test is a concession conferred upon the whistleblower, one that must not be allowed to be abused. Addressing the reported wrongdoing appears to be secondary. One might even say that not being able to demonstrate good faith in one's report is seen as a greater evil or risk than the wrongdoing reported. An absence of good faith will likely be implied if the whistleblower is seen to abuse the 'privilege' of reporting wrongdoing. For example, more than a few reports, or several in close succession, may be seen as motivated by bad faith.

We can conceptualize this asymmetry in terms of meriting and forfeiting privilege. Captive whistleblowers ordinarily owe some measure of confidence to the putative wrongdoer and organization. This duty of confidence is over-ridden by a privilege, granted by public policy that supports both the freedom to disclose and the freedom from retaliation. Many agents possessed of public policy privilege will not exercise that privilege because retaliation remains a likely result. Given that high likelihood of uncompensable losses springing directly from whistleblowing, only when the motivation of malice is added to the mix will whistleblowing become likely. Proving malice reduces to proving the need to strip the whistleblower of this privilege. The very few obvious malice cases are easy to prove – it is all the others that become problematic with a good faith requirement.

Furthermore, there is no corresponding duty of good faith on part of any other person. The manager or organization to whom the report is made possesses no reciprocal duty of good faith in processing of the report or even in attaching bad faith to it. The recipient of the report may be lacking even more in good faith in excluding it or, if it is processed, how it is investigated and acted upon. The recipient of the report may not be a good judge or investigator of what is good faith. Whistleblowing legislation and corporate policies generally do not allow any appeals on the unilateral threshold good faith determination.

Before leaving this section, we reflect on the example of Christiane Ouimet, Canada's first Public Sector Integrity Commissioner, responsible for receiving and processing reports of wrongdoing in Canada's federal public service. Her generously-funded and staffed office only investigated⁷ of 228 reports in the less than three years in the job. Moreover, it was confirmed by the federal Auditor-General⁴⁹ that Ouimet

⁴⁹ http://www.oag-bvg.gc.ca/internet/English/parl_oag_201012_e_34448.html#hd3d (accessed July 24, 2013).

bullied, berated and intimidated her office staff, and retaliated against them, leading to an attrition rate of 50%⁵⁰.

6. Probity

This rationale for dispensing with the good faith requirement questions the accuracy of the premise for its existence. As already pointed out, bad faith is legally a very narrow thing, and (as will be discussed below) much of what is actually used to ignore wrongdoing reports is unrelated to bad faith. Rather, a myriad of reasons to ignore the wrongdoing can be coloured as “he can’t be serious” bad faith motives of the whistleblower.

This probity point is simple: the lack of good faith does not “prove” that the allegations are baseless. Malice or an inability to prove good faith does not necessarily mean there is no wrongdoing or that it ought to be excused. The premise that good faith reports are more factually reliable than reports tainted with some malice is unfounded and unproven.

In terms of personal *animus*, precise intentions are impossible to accurately gauge. Often whistleblowers do dislike to some degree the wrongdoer and under current legislation have no protection even though a modest dislike is not likely to diminish the reliability of the report. Some whistleblowers will dislike people who commit serious wrongs *per se*. They may seek resolution simply because the wrongdoing occurred, which may look like vengeance. Often any *animus* that arises only does so *after* the wrongdoing, wholly in response to the wrongdoing. This is a natural human response and should not be seen as a failure of good faith.

As has already been mentioned, the good faith requirement focuses attention entirely on the messenger and not at all on the message, which is where the focus, as a matter of policy, should be. If a malicious whistleblower’s report discloses actual wrongdoing, the issue of malice is essentially moot. If the whistleblower is mendacious or malicious, which social science research reveals is rarely the case, or even reckless, and there is no (or immaterial) wrongdoing, the lack of corroborating evidence in most cases will soon be manifest. The malicious, false report is itself wrongdoing and would constitute sufficient grounds for termination or other employment discipline. If employees who act maliciously toward others are consistently disciplined by employers, a strong signal will be

⁵⁰ N. N., *Christiane Ouimet Explain Yourself*, in *The Globe and Mail*, February 11, 2011 <http://www.theglobeandmail.com/commentary/editorials/christiane-ouimet-explain-yourself/article565676/> (accessed July 24, 2013).

sent through the organization that this behaviour will not be tolerated. General standards of policy and law – such as requiring good faith – should not be set to the rarest of scenarios, such as the vilest of employees with the most corrupt motives.

7. The Proxy Problem

The proxy problem refers to the reality of intentionally or inadvertently invoking the element of good faith to summarily reject legitimate wrongdoing reports on other, unarticulated grounds. In practice, good faith may serve as a proxy justification to disqualify reports that ought to be investigated and acted upon.

This proxy problem arises from the natural human aversion to being told about problems which must be addressed and effectively managed. Ours is an age of good news stories and moving from success to success. Investor and public relations departments, not to mention management generally, operate full time in the business and expectation of marketing positive images, where bad news must be ignored, suppressed or glossed into some version of the good. Anyone who has ever served in a position of responsibility knows the powerful inner revulsion with which serious problems are greeted. Problems and wrongdoings are easily taken as a reflection of our management failure and they may, should they become well known, threaten our reputations, careers and other interests, not to mention the interests of our organizations.

Resources must be marshalled, difficult decisions must often be made, relationships will be strained and new risks will be taken. It is a natural instinct, therefore, for most people in leadership positions to want to ignore or minimize reports of serious wrongdoing when they are brought to their attention, unless their very position or organization is threatened by the allegations. Adapt this to whistleblowing and the human tendency of managers to avoid dealing with real unpleasant and disruptive issues/problems that are brought to their attention. They are hired and rewarded for other successes. As Sinclair observed: “[i]t is difficult to get a man to understand something, when his salary depends upon his not understanding it!”⁵¹. If functional gatekeepers are intrinsically motivated to avoid dealing with problems, the good faith requirement may be a handy

⁵¹ U. Sinclair, *I, Candidate for Governor: And How I Got Licked*, Farrar and Rinehart, New York, 1935, reprinted Los Angeles: University of California Press, Los Angeles, 1994, 109.

tool to achieve that objective. Managers and other recipients of wrongdoing reports may be inherently inclined to over-assess bad faith. Whistleblowers often have less power than the people to whom they report wrongdoing and the people whose wrongdoing they report about. Another means to apply established, formal power over the less powerful whistleblower is to take the position that the whistleblower was merely not acting in good faith in making the report. In this way, the good faith requirement can easily serve to cancel out the bottom-up organizational power that whistleblowing is intended to confer.

How and when the report is lodged may be perceived as a good faith issue. Poorly articulated or documented complaints may be seen to be malicious on the basis of those deficiencies alone. It is easy to say that someone is not acting in good faith merely because the report is unwelcome, arrives at an inopportune time, or identifies wrongdoing by someone the recipient admires and respects personally. Consider the many human communication variables, any one of which can vitiate a whistleblower's good faith from the perspective of the recipient of the report. Here are only a few of the obvious ones:

- when the report was made – bad timing; too busy
- how the report was made – immoderately expressed; anxious, hostile tone
- insufficiently documented or substantiated – “you can't prove it”
- report is frivolous
- misplaced ‘team’ structure – “go back and work it out”
- perception of the alleged wrongdoer – the more powerful, popular or unimpeachable in eyes of the report recipient – “how dare you say that about ...”

One might pause and reflect on the last of these factors. There are many examples on offer to show how a good reputation can trump or subvert an allegation of wrongdoing and paralyze regulators. Bernie Madoff had a good reputation as a stock broker, investment advisor and asset fund manager, as well as a community builder, friend of the rich and powerful, and prominent philanthropist⁵². He was also a criminal multi-billion dollar

⁵² N. N., *The Madoff Case: A Timeline* (March 12, 2009), in *Wall Street Journal*, http://online.wsj.com/article/SB112966954231272304.html?mod=googlenews_wsj (accessed July 26, 2013).

ponzi schemer who is now serving 150 years in prison⁵³. Financial analyst, Harry Markopolos, tried in vain to get the attention of American Securities Exchange Commission regulators to prove that Madoff could not mathematically and legally realize the gains he claimed to earn. Through numerous attempts over a decade, Markopolos failed to get enforcers to seriously investigate Madoff's frauds. His book chronicles the many exasperating efforts he and his team made to alert the government, the industry and the media to this massive fraud⁵⁴.

In Canada, Russell Williams was a decorated military pilot in the Canadian Forces. He held the rank of Colonel and commanded the flagship Canadian Forces base Trenton, Canada's largest and busiest military airbase. He had been entrusted to captain VIP flights for Queen Elizabeth II, Prince Philip, the Governor General, the Prime Minister of Canada and national cabinet ministers. His public reputation and acclaim was to give way to a dark side. He was also a serial criminal over many years. Within two weeks of receiving a medal for 22 years of "faithful service to the Canadian Forces and Canada," Williams was charged with two counts of first-degree murder. A few months later, he pled guilty to two murders, abductions, rapes, and 82 home break-ins⁵⁵. Like Bernie Madoff, Williams' good reputation was cover for a despicable criminal.

My last example is the true, recent story about an academic administrator responsible for an annual budget of almost \$20 million. She was the last party to sign a three-way contract. She later changed her mind about the contract. She scratched out her signature on the original document and hid it without telling any of the other two parties. After work under the contract had commenced, she maintained publicly that she had never agreed to the contract, suggesting at the same time that other parties were to blame for the problem. At best, she panicked and did not know how best to deal with this matter. The institution continued to cover for her and refused to produce the original contract. A Freedom of Information request produced the altered original contract. This tampering and

⁵³ R. Lenzner, *Bernie Madoff's \$50 Billion Ponzi Scheme*, in *Forbes*, December 12, 2008, http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in_rl_1212croesus_inl.html (accessed July 26, 2013).

⁵⁴ H. Markopolos, *No One Would Listen: A True Financial Thriller*, Wiley, Hoboken NJ, 2010, 376.

⁵⁵ T. Appleby, *Two Life Sentences for Sex Killer Williams's 'Despicable Crimes,'* in *The Globe and Mail*, Timeline: Col. Russell Williams, *Canadian Broadcasting Corporation*, 2010. <http://www.cbc.ca/fifth/2010-2011/abovesuspicion/timelinewilliams.html> (accessed July 26, 2013).

concealment of a signed contract arguably constituted several crimes. It also clearly violated the university's ethics policy. A full, documented package with this evidence was prepared by one of the contractual parties who sent it to her institutional superiors for their consideration.

The response was equally unsettling. The university's lawyer wrote the party (who remained a university employee) a stern, menacing letter, the upshot of which was "she has an excellent reputation." No effort was wasted on dealing with the substance of the allegations. This academic administrator was not only entirely shielded from any discipline and accountability in an integrity-critical public workplace but she was soon promoted to the executive suite. Soon all evidence of this incident officially disappeared, as the ill-fated original document completely disappeared from university records. It was replaced by a clean copy, likely mechanically altered, that evinced no sign at all that the academic administrator had ever seen or touched it, much less signed it. The cover up was complete, and demonstrated the lengths to which institutions and managers create a palace guard to protect their own in the face of overwhelming evidence of critical misbehaviour.

These three cases illustrate how popularity and reputation present as formidable forces to defeat objective inquiry into alleged wrongdoing. If reputation does not entirely thwart an investigation into the allegations, it may slow and complicate the investigation.

8. Conclusion

While they sometimes suffer a bad reputation, whistleblowers may be the most effective monitors of wrongdoing in society. In a major North American study published in 2007, more than 200 of the largest corporate frauds occurring between 1996 and 2004 were examined. Only 6% of the frauds were detected by the SEC, while only 14% were detected by auditors. The most important sources of fraud detection were the media (14%), industry regulators (16%), and whistleblower employees (19%)⁵⁶. Another recent English study showed that workers usually report internally and 60% of their reports do not receive any response at all from management and overall they believe nothing is done about the wrongdoing 74% of the time⁵⁷. What may be even more telling from this study is the observation that organisations are better at handling wrongdoing than they are at dealing with whistleblowers⁵⁸, a cautionary point perhaps to guide the good faith issue. Despite the urge to contain and control whistleblowing, as through mechanisms such as threshold good faith requirements, the better practice might be to unshackle the whistleblowers.

Corporate and government bureaucracy is pervasive and eternal. Whistleblowers are not equal to the strength and durability of bureaucracy. Organizations and managers will always be able to find ways to silence and defeat whistleblowers who, in turn, can rarely (if ever) be fully protected in the real world. It seems, therefore, that the benefit of the doubt on the good faith issue ought to go to the whistleblower. Given the persistent instinctive force of both regulatory non-compliance to gain advantage and to cover it up or gloss it once it has been brought to the attention of management, more disclosure is better than less.

Good faith and motives are, at best, themselves social constructions of reality. Legally, good faith is about honest, non-reckless belief. Bad faith is about lying, trumping up allegations or fabricating evidence, which are arguably much rarer occurrences than the wrongdoing which is reported. Effective enforcement of the criminal law⁵⁹ and civil law of employment,

⁵⁶ A. Dyck, A. Morse and L. Zingales, *Who Blows the Whistle on Corporate Fraud?*, in *Journal of Finance*, vol. 65, n. 6, 2010, 2213-2253.

⁵⁷ Public Concern at Work, *Whistleblowing: The Inside Story*, Public Concern at Work and University of Greenwich, London, 2013.

⁵⁸ *Supra*, 27 to 30 inclusive.

⁵⁹ For example, section 140 (public mischief) of the *Criminal Code of Canada*, RSC 1985, c C-46, <http://canlii.ca/t/522v7> (accessed July 26, 2013).

such as cause for discipline and dismissal, can usually take good care of that at the end of the investigation and outcome. Thus, presuming good faith in reports would be a superior approach to the current practice of putting the whistleblower's motives to the test in every case, at the outset of the report. Legal and factual doubt about good faith propagates uncertainty in whistleblowing, especially as it renders the motives and character of the whistleblower the first issue in the process. Policy should not place priority on shades of good faith where the overall primary objective of whistleblowing is to get wrongdoing addressed and stopped. The front-end focus on good faith offers a convenient, if hazardous, escape route to address the substance of the allegation quickly or at all. Reports must be assumed to be true and made in good faith until an independent, objective investigation establishes otherwise.

The annoyingly persistent, gadfly, troublemaking whistleblower is a myth. Social science literature informs us that whistleblowers are usually reflective, troubled, deliberative, anxious, and would 'rather walk than talk'⁶⁰. The volume of reports might be better addressed by competent and effective management.

Whether it is a matter of reporting a sexual assault, a chocolate cartel, a division manager who insists on overstating earnings and understating costs, an unresponsive, abusive high-ranking Public Sector Integrity Officer, a Ponzi schemer, a decorated military commander who is also a serial criminal, or a deceitful academic administrator who has no regard for signed contracts – the good faith and motives of the whistleblower are genuinely the least of the organization's practical concerns.

⁶⁰ M. P. Miceli, J. P. Near, *When Do Observers of Organizational Wrongdoing Step Up? Recent US Research on the Factors Associated with Whistleblowing*, in D. Lewis (ed.), *A Global Approach to Public Interest Disclosure*, Edward Elgar, Cheltenham, 2010, 74-90.

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