

WHISTLE BLOWING IN THE PUBLIC SERVICE OF CANADA

by

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ABSTRACT

The lack of a comprehensive statute to assist federal public servants in exposing wrongdoing within government has been a factor in the recent media attention focused upon the federal Privacy Commissioner. This has contributed, in large part, to his resignation from office. This incident highlights the complex relationships that exist for public servants who encounter and consider disclosing to the public wrongdoing within the federal government.

This thesis is intended to contribute to the discussion of the issues involved in a public servant's duty of loyalty owed to the government and the confusion in the jurisprudence between whistle blowing and criticism of government policy. It investigates the scope of the Supreme Court of Canada's decision in *Fraser v. Public Service Staff Relations Board* and Federal Court, provincial appellate court, and administrative tribunal decisions that apply it. In particular, this thesis examines the relationships at law that underlay a theoretical foundation for those decisions.

The relationship between whistle blowing and criticism of government policy by public servants as it relates to the common law duty owed by them to the government is examined. Consideration is also given to the role and extent that a civil servant's freedom of expression plays in shaping that duty of loyalty. Current government initiatives and proposed federal legislation are reviewed, since each establishes a different regime for addressing whistle blowing by federal public servants. An assessment of the current state of the common law and these initiatives from the perspective of law reform of this area of the law completes the discussion.

The conclusion of this thesis is that the continuing confusion in the courts and administrative tribunals concerning separation of whistle blowing from government policy criticism is best addressed through the proposed federal legislative initiative. It seeks to create a regime that will adequately resolve the approach to adopt in relation to whistle blowing as a form of permissible organizational dissent by federal public servants in Canada.

TABLE OF CONTENTS

Abstract	ii
Table of Contents	iii
Acknowledgements	vi
Dedication	vii
Chapter 1: Introduction	1
1.1 The Federal Privacy Commissioner Matter.	2
1.2 Organizational Disclosures	5
1.3 Scope of Thesis	6
1.4 Brief History of Federal Whistle Blowing Legislation.	11
1.5 Organization of Thesis	13
Chapter 2: Nature of the Phenomenon	16
2.1 Introduction	16
2.2 Distinction Between Whistle Blowing and Criticism of Government Policy	16
2.3 The Nature of Whistle Blowing	25
2.3.1 Wrongdoing Examined	26
2.3.1(i) Legal Aspect of the Definition of Wrongdoing	26
2.3.1(ii) Problems in Definition of Wrongdoing	28
2.3.2 The "Public Interest"	33
2.3.3 An Empirical Consideration of Whistle Blowing	35
2.3.4 Aspects of Empirical Research into Whistle Blowing	38
2.4 Definition of Whistle Blowing	44
2.4.1 Empirical versus Legal Definitions of Whistle Blowing	45
2.4.2 Empirical Definitions Generally	50
2.4.3 Jubb's Definition of Whistle Blowing	53
2.5 Definition of Whistle Blowing Used in this Thesis	54
Chapter 3: Whistle Blowing in the Employment Law Context	62
3.1 Duty of Loyalty and Confidentiality	63
3.2 Internal Reporting Requirement	69
3.3 Public Service Staff relations Board.	73
3.4 Labour Arbitration Jurisprudence	75

3.5	<i>Ratio Decidendi</i> and <i>Obiter Dicta</i> in <i>Fraser v. PSSRB</i>	80
3.6	The <i>Fraser</i> Decision	83
3.7	Balancing of Interests versus Bright Line Test	92
3.8	Application of the Principles in <i>Fraser</i>	108
3.8.1	Court Cases	109
3.8.2	Tribunal Decisions	115

Chapter 4: Freedom of Expression and the Common Law

	Duty of Loyalty	117
4.1	The <i>Canadian Charter of Rights and Freedoms</i>	119
4.1.1	The <i>Charter</i> and the Common Law	119
4.1.2	Section 1 Analysis	122
4.1.3	Freedom of Expression	124
4.1.3(i)	Rationales for Protecting Expression	124
4.1.3(ii)	Political Rationale	125
4.2	Whistle Blowing	127
4.2.1	Court Cases	127
4.2.1(i)	The <i>Fraser</i> Decision.	127
4.2.1(ii)	The <i>Haydon</i> Decision	129
4.2.1(iii)	<i>AUPE v. Alberta</i>	136
4.3	Conclusion	141

Chapter 5: Existing and Proposed Whistle Blower Mechanisms

5.1	Accountability Mechanisms Generally	142
5.1.1	Internal Complaint Process – Policy Based	144
5.1.2	Ombudsman	144
5.1.3	Judicial Supervision	147
5.1.4	Comparison of Mechanisms	147
5.2	Specific Accountability Mechanisms	148
5.2.1	Bill S-6 (Ombudsman)	148
5.2.1(i)	Purpose	149
5.2.1(ii)	Definitions	149
5.2.1(iii)	Public Interest Commissioner	151
5.2.1(iv)	Internal Reporting Requirement	152
5.2.1(v)	Investigation and Report	157
5.2.1(vi)	Protections and Offences	162
5.3	Treasury Board Policy (Executive Regulator)	165
5.4	Comparison of Bill S-6 with Treasury Board Policy	172
5.5	Comparison of Bill S-6 and the Policy with the Common Law	178
5.6	Law Reform Aspects of Bill S-6 and the Treasury Board Policy	179

Chapter 6: Conclusions and Recommendations for the Protection of Public Servants Who Expose Wrongdoing	. 184
6.1 The Incident Concerning the Office of the Privacy Commissioner.	. 184
6.2 The Success and Effectiveness of Law Reform	. 188
6.3 Implementation of Law Reform Measures	. 189
6.4 Recommendations	. 191
6.5 Limitations of the Study	. 194
 Bibliography	 . 196
 Appendix 1	 . 210

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DEDICATION

This is déjà vu all over again.

Yogi Berra

CHAPTER 1

INTRODUCTION

*The only thing necessary for the triumph of evil is for good men to do nothing.*¹

Whether or not this quotation is universally true is beside the point: it certainly seems to be the moral impulse compelling a conscientious employee to speak out publicly and disclose confidential information involving that organization's wrongdoing. And so this person is labeled as a whistle blower, with all the positive and pejorative connotations the term carries with it. On the one hand, people do receive praise and recognition for exposing wrongdoing; on the other, a person can be treated as one of the lowest forms of organizational life – an organizational leper - not only by management, but surprisingly by co-workers as well, in a work structure and culture that marks the whistle blower as difficult and treats him or her accordingly.

Openly, individual members of the public may applaud the character and actions of a whistle blower, but secretly they might be fearful, apprehensive or hostile towards those who disclose organizational wrongdoing for the common good – the “public interest”. In discussing the enforcement of confidentiality agreements between an organization and its employees involving matters of public interest, Weinstein discusses what he terms the “essential role” that

¹ Edmund Burke (circa 1770) as cited in N. Rees, *Cassell Companion to Quotations* (London: Cassell, 1997) at 131.

whistle blowers occupy in shaping the debate on issues of public interest² or even initiating it (“sparking debate where none previously existed”).³ This is the argument he advances for providing free speech protection under the First Amendment to the U.S. Constitution to employees who become whistleblowers.⁴ In Canada, federal public servants who have spoken out on matters that are considered to be “an important public issue” have been held to have not breached the duty of loyalty owed to their employer, the government.⁵ Westin believed that control over democratic governments was facilitated by the publicity that whistle blowers bring to bear on government.⁶

1.1 The Federal Privacy Commissioner Matter

The former Privacy Commissioner, George Radwanski (“Radwanski”), is in many ways a poster child for the introduction of a universal whistle blowing protection law for the federal public service in Canada. Although he is the protagonist in this rather somewhat sordid affair, the story and focus of this thesis is *not* about him, because he is an Officer of Parliament and not a federal public servant in the narrow sense. Rather, the focus is about the wrongdoing that occurred and perhaps even thrived in the public service work environment for which he was responsible.

² B.S. Weinstein, “In Defense of Jeffrey Wigand: A First Amendment Challenge to the Enforcement of Employee Confidentiality Agreements Against Whistleblowers” (1997) 49 S.C.L.Rev. 129 at 145.

³ *Ibid.*, at 147.

⁴ *Ibid.*

⁵ *Chopra v. Treasury Board (Health Canada)* [2001] C.P.S.S.R.B. No. 13 (P.S.S.R.B.) online: QL (CSBB)(PSSRB file no. 166-2-29385) at para. 91 (racial and ethnic discrimination).

⁶ A.F. Westin, *Privacy and Freedom* (New York: Atheneum, 1970) at 24. See also *Haydon v. Canada*, [2001] 2 F.C. 82 (T.D.) (hereafter “*Haydon*”) at para. 112 wherein Tremblay-Lamer, J. found that the public servant’s actions constituted an exception to the duty of loyalty but also described the exception as an “issue of public interest.”

The investigation into the extravagant travel and dining expenses of Mr. Radwanski began simply enough in March 2003 with clarification sought by the House of Commons Standing Government Operations and Estimates Committee ("the Standing Committee") in relation to Radwanski's annual report to Parliament.⁷ By the time it formally ended three months later with his resignation from office and the release of the Standing Committee's final report into the matter, a litany of his abuse toward civil servants had emerged, highlighted by a lunch hour public demonstration for his removal from office by many of his own staff.⁸ They also gave him a letter requesting he resign for the good of the office of the Privacy Commissioner, and they made this letter public.

During the formal investigation, the Standing Committee received testimony from his staff - some in support but most in opposition to Radwanski. Testimony was provided that can be characterized as a litany of wrongdoing and abuse of civil servants: Radwanski altered a letter submitted to the Standing Committee and enlisted his staff in doing so; that he created a culture of intimidation within the workplace;⁹ and that he even threatened his staff with retaliatory discharge if he discovered who had given damaging evidence against him to the Standing Committee.¹⁰ The cast of actors in this melodramatic

⁷ Canada, House of Commons, Standing Committee on Government Operations and Estimates, "Report 5: Matters relation to the Office of the Privacy Commissioner" (27 June 2003) at 5 (hereafter "Final Report"). Available online at Parliament of Canada website: <http://www.parl.gc.ca/InfoComDoc/37/2/OGGO/Studies/Reports/oggorp05-e.htm> (website last visited June 29, 2003).

⁸D. Martin, "And he still doesn't get it: Commissioner was undone by a sense of his own grandeur" *National Post* (24 June 2003) A1 at A5.

⁹ Final Report, *supra*, note 7, at 2.

¹⁰ *Ibid.*, at 8.

episode of mismanagement and other wrongdoing also included an anonymous civil servant whistleblower who sparked the investigation with the revelation of Radwanski's attempt to cover up his financially irresponsible practice towards managing the public purse.¹¹

The Standing Committee concluded that Radwanski had misled it via the altered letter and with respect to his testimony before it. This conduct caused the Standing Committee to lose confidence in Radwanski's ability to discharge the functions of his office. It also proposed a joint motion of the House of Commons and the Senate, that he be removed from office.¹² Finally, it recommended a thorough review of the existing protections for federal civil service whistleblowers and a comprehensive assessment of the options to remedy any deficiencies found.¹³

This is the backdrop against which the employment law duty of loyalty is assessed in terms of organizational dissent in this thesis. The narrative concerning the former Privacy Commissioner used above contains many of the key elements that will inform the subsequent discussion: perceived organizational wrongdoing and disagreement therewith, internal reporting of alleged wrongdoing, public disclosure of confidential (i.e., internal organizational) information, retaliation by management for the disclosure outside the organization and adjudication upon the matter substantively.

¹¹ *Ibid.*, at . 6, 7.

¹² *Ibid.*, at 17, 18.

¹³ *Ibid.*, at 19.

1.2 Organizational Disclosures

It is helpful to differentiate whistle-blowing¹⁴ from other disclosures involving organizational wrongdoing in which the information “leaker” has some primary motive or goal other than the public interest in mind (such as embarrassment, manipulation for personal gain, securing power at the expense of a target/victim, enhancing career objectives, etc.). And more fundamentally, it is crucial that whistle blowing is distinguished from criticism of government policy; in the former government wrongdoing is sought to be exposed and corrected whereas in the latter disagreement with political considerations that manifest themselves in policy is raised for debate and discussion.

The portrayal of whistleblowers in the media may be confusing at best and even misleading. Jubb believed that whistle blowing “. . . has a sensational quality favoured by journalists, is often prominent in headlines and is used by them in a variety of contexts in which alleged misdeeds are exposed.”¹⁵ For example, in May 1989 Edwin Cohen was the president and Chief Executive Officer (“CEO”) of Barr Laboratories (a pharmaceutical company in the USA) when he testified before a congressional committee concerning payoffs made to employees of the US government’s Food and Drug Administration (“FDA”) by Barr’s competitors. His testimony resulted in four FDA employees being

¹⁴ The term “whistle blowing” is discussed in greater detail in the next chapter. For an initial idea of what it involves, one of the “standard” definitions states: “the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action” J.P. Near & M.P. Miceli, “Organizational dissidence: The case of whistle-blowing” (1985) 4 *Journal of Business Ethics* 1 at 4.

¹⁵ P.B. Jubb, “Whistleblowing: A Restrictive Definition and Interpretation” (1999) 21 *Journal of Business Ethics* 77.

prosecuted, convicted and imprisoned for accepting bribes. In reporting this story, Forbes magazine stated that Cohen "blew the whistle"¹⁶ and that Barr suffered as a result of Cohen's "whistle blowing".¹⁷ If the definition of whistle-blowing requires the person making the disclosure to be an organizational member (current or former), then Cohen was not a whistleblower. If, however, the definition is expanded to include whistle blowing by anyone concerning an organization's or organizational member's wrongdoing, then the definition may be over inclusive to the point of being limited in usefulness in terms of understanding the rationale for protecting employees who expose organizational wrongdoing in the public interest.

An examination of the definition of whistle blowing will be undertaken because there is a great disparity in how the term is considered and what is being studied, from a legal as well as social science perspective. This results in conflicting empirical research findings not only between different investigators, but also over time. As discussed later, an explanation is given for variations in the definition of the term.¹⁸

1.3 Scope of Thesis

I have restricted my analysis of whistle blowing to the federal civil service in Canada and have purposely excluded the private sector and the public service sector of each of the ten provinces (the two federal territories are encompassed by the analysis relating to the federal public service). To have included the private sector and/or the ten provinces and their schemes concerning whistle

¹⁶ Z. Sawaya, "Getting Even" Forbes Magazine (29 April 1991) 92.

¹⁷ *Ibid.*, at 95.

¹⁸ See Chapter 2, in section "An Empirical Consideration of Whistle Blowing"

blowing involving government wrongdoing would have greatly increased the length, scope and perhaps complexity of this work. The reason is that at the provincial / territorial level, there is too much variation in the laws re: whistle blowing and employment/labour relations. Restricted to a single jurisdiction, the federal government with a total of about 360,000 general government employees¹⁹ will provide ample opportunity to discuss the most important aspects of the role that freedom of expression plays in whistle blowing by public servants. Geographically and jurisdictionally in its daily encounters with the public, the federal civil service has the ability to affect the lives of more Canadians than any province or territory.

Further, the basic principles discussed in relation to exposure of wrongdoing committed by the federal government will largely be the same as would apply to a wrongdoing situation involving a provincial government (except for areas such as national security) and as would apply to the private sector also. However, where an aspect of the problem or discussion in relation to it may be enlightened by reference or consideration of a provincial approach, then it will be included to that limited extent (e.g., the definition of wrongdoing or the analysis of freedom of expression). In addition, the private sector has been excluded because a public service whistle blower invariably raises the issue that any disciplinary action for having made the disclosure violates his or her right to freedom of expression under the *Canadian Charter of Rights and Freedoms* (the

¹⁹ Statistics Canada, *Public sector employment, wages and salaries*, CANSIM Table 183-0002 website: <http://www.statscan.ca/english/Pgdb/govt54a.htm> (website last visited July 24, 2003). The figure given is for 2002.

"Charter")²⁰ This argument is not available to employees in the private sector (in the strict sense) since there is no involvement of the government (i.e., the Charter is not engaged).²¹

In addition, although there are federal statutes relating to official secrets and national security (most recently sections 13 and 14 in the *Anti-terrorism Act*) that may go as far as prohibiting a public servant's ability to publicly disclose government information (except in highly unusual circumstances – see s. 15(1)), this paper will not discuss those situations either. Such statutes would be invoked in comparatively rare and highly specific situations, and would not likely represent the vast majority of situations where whistle blowing occurs. These latter situations would most often include such aspects of government wrongdoing as: federal workplace safety, management practices, government waste of taxpayers' dollars, public health/safety concerns, and occasionally illegal activities, which are more the focus of the whistle blower's concern.

The main object of examination undertaken in this thesis is the phenomenon of organizational dissent that occurs within the federal government and how the law has responded to it – adequately or not. I question the adequacy of the response by administrative tribunals (principally the federal Public Service Staff Relations Board) and the courts, through use of the common

²⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11 ["Charter"].

²¹ *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 602, per McIntyre, J. for the Court: "Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the Charter rights of another, the Charter will be applicable. Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply."

law, to whistle blowing committed by public servants. Not because I think that they have been too harsh or too lenient in disciplining whistle blowers, but because the nature of the response provided is inappropriate (or at a minimum, is questionable) in relation to the nature of what is being addressed. I assert this proposition because starting with the Supreme Court of Canada decision in *Fraser v. Public Service Staff Relations Board*,²² the courts and labour arbitration tribunals have provided a misleading signal re: freedom of expression of federal public servants (as citizens in a democratic society) to politically criticize their employer, the government. Subsequent tribunal and court decisions have followed suit and misapplied the concept to whistle blowing situations, rather than restricting it to situations of *political criticism* of the government by civil servants, for which it was fashioned. Thus, in essence, I assert that although the breach of a public servant's duty of confidence is also a violation of the larger category of the duty of loyalty owed to the employer it is different in kind, and so the response provided should also differ in kind than that provided to a violation of the duty of loyalty. This is because the notion of wrongdoing, inherent to whistle blowing, separates whistle blowing from mere criticism of government policy (and which criticism is essentially based upon political opinion). However, as I will demonstrate, the courts and labour tribunals to date appear to have treated whistle blowing and criticism of government policy as the same kind of violation of a duty, when they are not.

²² *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, [1985] S.C.J. No. 71 online: QL (SCC) (hereafter "*Fraser*").

The complexity of the definition of whistle blowing and the relationship between whistle blowing and policy criticism will be examined subsequently by analyzing the conceptual mechanisms involved in whistle blowing as well as the environment in which they have been applied. Since whistle blowing situations have, in my view, often been inappropriately treated as if they were policy criticism situations, some instances of policy criticism will also be examined. Doing so will help to distinguish the important features of each, so that conceptual errors in their treatment may be recognized and avoided in the future.

So the essence of this thesis is really about whistle blowing. But implicit in any intelligible discussion of whistle blowing is the realization that organizational wrongdoing is the well-spring of whistle blowing. In other words, there cannot be any legitimate whistle blowing without some pre-existing wrongdoing of whatever kind by the organization. For whistle blowing is nothing more, conceptually, than the expression of dissent (by an "insider") with an aspect of organizational functioning, or rather organizational dysfunctioning since serious wrongdoing is involved.

My focus in this work is narrow; it does not take a broad approach to whistle blowing. The latter would involve considering whether the government should establish a whistle blowing regime, what form it would take (protection from retaliation vs. reward models), etc. Instead, I focus upon the claim of public servants to disclose government wrongdoing without fear of management retaliation or disciplinary action being taken against them. It is a more restricted approach to investigating and understanding selected legal aspects of the

phenomenon rather than comprehensively examining organizational wrongdoing and whistle blowing within the federal public service in Canada.

England *et al* contend that whistle blowing is an area of Canadian employment law that has been “relatively unexplored.”²³ In 1986 the Ontario Law Reform Commission published the most recent major comprehensive law reform report on whistle blowing and a civil servant’s duty of loyalty. And the caselaw emanating from the courts (as opposed to boards or tribunals) indicates that it is still evolving as no consistent analytical approach has been adopted in regards to the broader problem of public servants breaching their duty of loyalty.²⁴ It is the goal of this endeavour to shed some light on the murky world of organizational wrongdoing and the sometimes consequent dissent thereof by public servants within the federal government of Canada. A brief look at law reform of institutions will help to place the discussion of court and tribunal cases, government policy and proposed legislation in perspective.

1.4 Brief History of Federal Whistle Blowing Legislation

In order to better understand the context within which whistle blowing by federal public servants has occurred, it is important to present a brief summary of

²³ G. England, I. Christie & M. Christie, *Employment Law in Canada* 3rd ed. (Toronto: Butterworth’s, 1998) at 11.75.

²⁴ This is highlighted by the Federal Court approach adopted in *Haydon*, *supra*, note 6 and the ‘reverse’ Alberta Court of Appeal decision in *Alberta Union of Provincial Employees v. Alberta*, [2002] A.J. No. 1086 (Alta. C.A.) online: QL (AJ)(“AUPE”). In *Haydon*, the Federal Court found that the duty of loyalty was a reasonable limit upon a civil servant’s freedom of expression whereas in *AUPE* the Alta. C.A. found it was not. Both of these decisions are discussed in more detail in a later chapter. If, however, the specific issue of each case is placed within its ‘proper’ subcategory (whistle blowing and policy criticism respectively) within the larger duty of loyalty category, then arguably there might not be any inconsistency of approach. The confusion arises when adjudicative bodies are, I suggest, careless in their classification of the issues and/or characterization of the facts before them with the result that elements of the subcategories are blended together and applied inappropriately to the situation before them.

past and currently proposed whistle blowing legislation at the federal level in Canada. There have been a number of legislative attempts by private members to have Parliament provide protection for federal civil servants who disclose government information (whistle blowing). None have been successful despite efforts beginning more than 10 years ago:²⁵ 1) 1991 – Bill C-293;²⁶ 2) 1994 – Bill C-248;²⁷ 3) 1996 – Bill C-318;²⁸ 4) 1999 – Bill C-499;²⁹ 5) 1999 – Bill C-239;³⁰ 6) 1999 – Bill S-13;³¹ 7) 2000 – Bill C-508;³² 8) 2001 – Bill S-6;³³ 9) 2001 – Bill

²⁵ See D. Johansen, “Legislative History of Bill S-6” (February 5, 2001, revised April 10, 2001) website:

http://www.parl.gc.ca/common/Bills_ls.asp?lang=E&Parl=37&Ses=1&ls=S6&source=Bills_Senate Other site last visited September 18, 2002.

²⁶ Bill C-293, an Act to amend the Canadian Human Rights Act, the Canada Labour Code and the Public Service Employment Act (whistleblowing) (3rd Session, 34th Parliament) was introduced in the House of Commons by Ms. Joy Langan on September 24, 1991. It was later dropped from the Order Paper at second reading.

²⁷ Bill C-248, was introduced in the House by Mr. Pierre de Savoye on 11 May 1994 (1st Session, 35th Parliament). Its fate mirrored that of Bill C-293 mentioned previously.

²⁸ Bill C-318, Whistle Blowers Protection Act (2nd Session, 35th Parliament) was introduced in the House by Mr. de Savoye on 19 June 1996. It received 1st reading but then died when Parliament was dissolved before the Bill progressed any further.

²⁹ Bill C-499 was introduced in the House by Mr. Pat Martin on 23 April 1999 (1st Session, 36th Parliament) on April 23, 1999. It received 1st reading only and did not proceed any further.

³⁰ Bill C-239 was introduced in the House by Mr. Pat Martin on 18 October 1999 (2nd Session, 36th Parliament) on October 18, 1999. (This Bill was the reincarnation of Bill C-499 discussed previously.) However it died on the Order Paper when Parliament was subsequently dissolved in the autumn of 2000 in preparation for the general election of Parliament.

³¹ Bill S-13 the Public Service Whistleblowing Act, was introduced in the Senate by the Hon. Noel Kinsella on December 2, 1999 (2nd Session, 36th Parliament). It advanced to and received 2nd reading but did not progress any further as it died when Parliament was subsequently dissolved in the autumn of 2000 in preparation for the general election of Parliament.

³² Bill C-508, Whistle Blower Human Rights Act, was introduced in the House by Mr. Gurmant Grewal on 17 October 2000 (2nd Session, 36th Parliament) but died when Parliament was later dissolved in November of that year in preparation for the general election of Parliament.

³³ Bill S-6, the Public Service Whistleblowing Act, was introduced in the Senate by the Hon. Noel Kinsella on 31 January 2001 (1st Session, 37th Parliament). It received 2nd and progressed to the Senate’s National Finance Committee. A report was issued March 28, 2001 and the Bill was subsequently referred back to Committee. It was abolished when the 1st Session of the 37th Parliament was prorogued on September 16, 2002.

C-201;³⁴ 10) 2001 – Bill C-206;³⁵ 11) 2001 – Bill C-351;³⁶ 12) 2002 – Bill C-201;³⁷ 13) 2002 – Bill S-6;³⁸ and 14) 2002 – Bill C-241.³⁹

1.5 Organization of Thesis

Chapter 2 deals with the nature of the phenomenon that is whistle blowing and starts with a definitional analysis of the term. It progresses to an analysis of wrongdoing that includes consideration of the public interest as essential to an understanding of why whistle blowing by a civil servant is morally and constitutionally justified in certain circumstances. Conceptually, it lays the theoretical foundation (through definition of terms and their relationship to one another) for an analysis in Chapter 3 of court decisions that have developed the common law test for whistle blowing, primarily as determined by the Supreme Court of Canada in *Fraser* and the Federal Court (Trial Division) in *Haydon*.

Chapter 3 will be the heart or analytical centre of the thesis. It will start off with the employment law duty of loyalty, narrow down to duty of confidentiality

³⁴ Bill C-201, Whistle Blower Human Rights Act, was introduced in the House by Mr. Gurmant Grewal on 1 February 2001 (1st Session, 37th Parliament). It is the reincarnation of Bill C-508 discussed previously and was abolished when the 1st Session of the 37th Parliament went into recess on September 16, 2002.

³⁵ Bill C-206 was introduced in the House by Mr. Pat Martin on 2 February 2001 (1st Session, 37th Parliament). It is the reincarnation of Bill C-499 discussed previously and its fate mirrored that of Bills S-6 and C-201 mentioned above.

³⁶ Bill C-351, the Public Service Whistleblowing Act, was introduced in the House by Mr. Thompson on 29 May 2001 (1st Session, 37th Parliament) and died when the 1st Session of the 37th Parliament ended on September 16, 2002.

³⁷ Bill C-201, Whistle Blower Human Rights Act, was introduced in the House by Mr. Gurmant Grewal on 2 October 2002 (2nd Session, 37th Parliament) and has received 1st reading only. It is still before the House (as of November 22, 2002).

³⁸ Bill S-6, the Public Service Whistleblowing Act, was introduced in the Senate by the Hon. Noel Kinsella on 3 October 2002. It has received 1st reading only and is still before the Senate (as of November 22, 2002).

³⁹ Bill C-241, the Public Service Whistleblowing Act, was introduced in the House by Mr. Thompson on 23 October 2002 (2nd Session, 37th Parliament) and has received 1st reading only. It is still before the House (as of November 22, 2002).

and the whistle blowing exception thereof. Whistle blowing is the exception to the duty because of a civil servant's right of freedom of expression on matters of public interest. But this exception is constrained by the internal reporting requirement (that has been frustrated) as the "condition precedent" that justifies whistle blowing. This will necessitate a detailed discussion of *Fraser, Haydon* and various other court and Public Service Staff Relations Board cases.

Chapter 4 considers the effect of a public servant's fundamental freedom of expression upon the duty of loyalty owed to the employee's employer – the government. The balancing of the freedom and the obligation and the relationship between the two is explored. Apparently different emerging conceptual frameworks for approaching freedom of expression in the organizational dissent context are analyzed and compared. The theoretical adequacy of the approaches is discussed.

Chapter 5 comments upon draft legislation and government policy on whistle blowing in Canada in light of the preceding discussion. I will examine whether existing protections are adequate for federal civil servants who disclose wrongdoing in their workplace. These formal instruments will also be evaluated from a law reform perspective relating to the reform of legal institutions (as opposed to the reform of a substantive area of the law) and what elements of such an initiative are required in order to increase the likelihood of successful implementation of the proposed measures.

In the concluding chapter I will summarize my argument and lay out the implications of my research upon the law and legal theory (or lack of it) in this area.

In this thesis, the terms "public interest" and "public concern" are used interchangeably, as are "public servant", "civil servant" and "employee" (and mean public servants of the federal Government of Canada); "employer" and "government" refer to the federal Government of Canada, unless otherwise specified or evident from the context in which it is used. In addition "criticism of government" by a civil servant and "expression of political opinion" by a civil servant are taken to mean the same thing, as quite often disciplinary proceedings against civil servants for having criticized the government usually involve the employee expressing dissatisfaction with a government policy from a political perspective or involving political considerations rather than involving some form of serious wrongdoing that harms the public interest.

CHAPTER 2

NATURE OF THE PHENOMENON

2.1 Introduction

This chapter consists of two major conceptual parts – first, the distinction between whistle blowing and criticism of government policy, and second, a consideration of the phenomenon of whistle blowing from an empirical as well as legal perspective. In the first part, the contention that organizational wrongdoing is the root cause of whistle blowing is examined more closely: wrongdoing is defined, problems associated with the definition are brought out and the role of the public interest in disclosing wrongdoing is canvassed. In the part focusing on whistle blowing, a brief look at the origins of the term opens the discourse. Then I look at various aspects of whistle blowing as revealed by empirical research in order to provide a basis for discussing empirical definitions of the term. A review of the evolution of how the law has shaped the notion of whistle blowing is next presented; this is compared with the empirical approach. The elements of a selected whistle blowing definition are analyzed and based upon this, a definition of whistle blowing is developed for use in the remainder of the thesis.

2.2 Distinction between whistle blowing and criticism of government policy

In this part of the chapter, I lay the foundation for my thesis, that whistle blowing is different from policy criticism and that these two acts should accordingly be treated differently by adjudicative bodies when determining whether a public servant should be exempted from the duty of loyalty. The

foundation for this assertion rests upon the conceptual distinction between these two forms of organizational dissent, based upon a critical analysis of the caselaw. This differentiation is based upon three fundamental differences between the two phenomenon: 1) whistle blowing necessarily involves the disclosure of confidential information whereas policy criticism does not; 2) wrongdoing is an essential element of whistle blowing and is not present in policy criticism; and 3) courts and tribunals require reporting of the wrongdoing to be made within the organization before the whistle may be blown externally, an element that does not exist as a prerequisite for policy criticism.

Although whistle blowing encompasses disclosing more forms of government wrongdoing than just iniquity,⁴⁰ I contend that wrongdoing of some sort is an essential element of whistle blowing. As mentioned above, that is one of the factors that distinguishes it from criticism of government policy, which does not require wrongdoing of any kind to be involved. These distinguishing factors comprise one of the dimensions of whistle blowing I explore in greater detail in this chapter. Another dimension analyzed pertains to the various definitions of whistle blowing by researchers and commentators from different disciplines, and from different perspectives; these definitions of whistle blowing vary greatly. The

⁴⁰ See the quote of Schiemann, L.J. in *Camelot plc v. Centaur Communications Limited*, [1999] Q.B. 124 at 137; [1998] 1 All E.R. 251 at 261; [1999] 2 W.L.R. 379 at 390, wherein he appears to indicate that revealing iniquity is all that whistle blowing concerns itself with, when he stated: "This is not a case of disclosing iniquity. It is not a whistleblowing case." For a much broader notion of what it encompasses, see Treasury Board of Canada Secretariat's *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*, (hereafter "The Policy") which lists four separate categories of wrongdoing, one of which is illegal activity. The others are: misuse of public funds/assets, gross mismanagement, and a substantial and specific danger to the life, health and safety of Canadians or the environment. (website last visited April 1, 2003): http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/idicww-diicraft1_e.asp#_Toc516303228

ambit of the activities these definitions cover range from a self-proclaimed 'restrictive'⁴¹ definition to those that are very broad, almost vague in description.⁴² Definitions also vary in their scope according to the discipline in which they arise; legal definitions tend to be more narrowly focused whereas the social science and business management ones tend to be broader.⁴³ The result of this diversity⁴⁴ is reflected in the difficulty achieving a consensus as to a universally accepted definition of whistle blowing. But for the purposes of this thesis, I will develop (later) a definition that best serves the position I will be advocating.

However, in the context of any particular discussion found in the jurisprudence of both the courts and administrative tribunals, whistle blowing and criticism of the government policy may sometimes be (mistakenly) treated as

⁴¹ Jubb, *supra*, note 15 at 78: Whistleblowing is a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or affirmation of an organization, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organization, to an external entity having potential to rectify the wrongdoing.

⁴² For a broad definition, see N. Dandekar, "Contrasting Consequences: Bringing Charges of Sexual Harassment Compared with Other Cases of Whistleblowing" (1990) 9 *Journal of Business Ethics* 151: "an effort to make others aware of some ongoing practices which seem to the whistleblower to be illegal; or harmful, or unjust."; with the whistle blower being "a member of an organization." An almost vague definition is provided by S. Bok, "Whistleblowing and professional responsibilities" in D. Callahan & S. Bok (eds.) *Ethics teaching in higher education* (New York: Plenum Press, 1980) at 277: "a disagreement with upper management regarding an accepted practice."

⁴³ For a legal definition, see R.L. Heenan & C. De Stefano, "Whistleblowing – Employee Loyalty and the Right to Criticize: A Management Perspective" in W. Kaplan, J. Sack & M. Gunderson (eds) *Labour Arbitration Yearbook 1991* (Toronto: Butterworths, 1991)(vol. 2) 199 at 200: The reporting of criminal activity carried on by the employer "in the absence of any curative steps being taken by the employer." For a social science definitions, see J.P. Near & M.P. Miceli, "Organizational dissidence: The case of whistleblowing" (1985) 4 *Journal of Business Ethics* 1 at 4: "the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action."

⁴⁴ See Appendix 1 for a list of 25 different definitions of whistle blowing from the legal, business, social science, sociological, etc. fields.

being synonymous. They are different matters although they are inter-related, since both are exceptions to the common law duty of loyalty owed by a civil servant to the government (in spite of the fact that confidentiality is a further refinement of loyalty, making them different in kind as well as degree). Making no distinction between the two may lead to confusion in their treatment, which may sometimes occur when care is not taken to distinguish the terms of reference in which they are discussed. In this thesis, for the purposes of discussion and the points that I wish to make and highlight, whistle blowing is *not* synonymous with either criticism of government policy or the expression of dissenting political opinion by a civil servant, since the latter two do not inherently involve exposure of wrongdoing, as is the case with whistle blowing.

Whistle blowing is a specific kind of organizational dissent, one that involves exposure of wrongdoing. It is different from criticism of government policy because whistle blowing is considered as an exception to the common law duty of confidence, which is a subcategory ("subspecies") of the duty of loyalty⁴⁵ and requires the civil servant to comply with additional procedural requirements before disclosing the wrongdoing outside the organization whereas criticism does not. That is, whistle blowing is more restricted than criticism of government policy in terms of (accepted) procedure relating to the ability of public servants to express themselves publicly.

The challenge in differentiating whistle blowing from policy criticism lies in recognizing that legitimate whistle blowing is an exception to the common law

⁴⁵ Ontario Law Reform Commission *Report on Political Activity, Public Comment and Disclosure by Crown Employees* (Toronto: Ontario Ministry of the Attorney General, 1986) at 35.

duty of loyalty, whereas policy criticism may be an exception depending upon the circumstances. They are different in nature and so should be approached from different conceptual bases. The first two exceptions in *Fraser* (illegal acts & harmful policies) are different from the third one (that criticism has no job performance impact, i.e., benign criticism) in that they may be categorized as directly involving the public interest or are matters of public concern. But more specifically, whistle blowing is really about exposing wrongdoing through the disclosure of confidential information, not about criticizing policy (whether good or harmful). Any discussion about policy, whether harmful or not, is still policy criticism and not whistle blowing in a narrow sense. Yet in a broader sense, it is doubtful that criticism of harmful policies can be considered to be whistle blowing if there is no disclosure of confidential information,⁴⁶ but only criticism of the effects of policies that are considered or estimated to be harmful.

A relatively recent administrative tribunal decision has introduced notion of the 'public interest' as a new qualification or categorical exception to the duty of loyalty.⁴⁷ As discussed in the judgment, the 'public interest' category seems to be a general, catch-all category since it encompasses all the more specific types or examples of whistle blowing. Referring generally to it as 'public interest' does

⁴⁶ Indeed, policy is usually accessible to the public: Principle 5(g)(3) of the Commissioner's Directive: Corporate Policy Framework, Policy Bulletin 32 with Correctional Service Canada states "Policy instruments shall be . . . public, with the exception of information essential to ensuring the protection of the security of a penitentiary, a community based facility of the safety of persons." Website: http://www.csc-Supreme Court of Canada.gc.ca/text/plcy/cdshtm/200-cde_e.shtml (website last visited April 27, 2003); and Annex "D" Checklist for Policy Writing of the Standard Operating Practices Policy Development with the same federal government ministry states "Keep in mind that the document will be publicly accessible by a wide variety of audiences." (website last visited April 27, 2003) Website: http://www.csc-Supreme Court of Canada.gc.ca/text/plcy/sop/200_e.shtml#d.

⁴⁷ *Chopra, supra*, note 5.

not really tell us much because there is nothing that the government does that is not an issue of public interest in some way. Moreover, when the government's conduct is in some way considered to be 'significant', 'important', etc., then the wrongdoing associated with it is unquestionably elevated from what otherwise might be a comparatively trivial matter into one of public interest.

Neil Fraser was dismissed from his position as a manager with the federal government because he not only went too far in expressing his political opinion (criticism) of federal government policies, but he also attacked the government itself. No element of what I contend to be the *sine qua non* of whistle blowing, namely wrongdoing, existed in that situation, as Fraser's dispute with the government over its metrification and *Charter* policies did not contain any allegation of wrongdoing. In this respect, my view of the case that it was not about government wrongdoing and exposing it (whistle blowing) but rather with the freedom of expression of civil servants re: political opinion (criticism of government policy) coincides with that of Professor Paul Weiler, who stated that the case "dealt with the right of public employees to participate fully in the normal *political process* " by "speaking out on issues in the *political arena*." ⁴⁸ (emphasis added). In other words, *Fraser* is about the participation of civil servants in the political process via criticism of government policy, and not about whistle blowing, which involves accountability of government for its activity.

It is important to observe that Fraser criticized government *policy* and not any specific conduct or acts of any individual(s) that could be characterized as

⁴⁸ P.C. Weiler, "The Charter at work: Reflections on the constitutionalizing of labour and employment law" (1990) 40 U. of Toronto L.J. 117 at 170.

wrong doing. Further, these policies, while perhaps controversial and divisive of the country politically, were not harmful in and of themselves in any way. By that I mean the policies did not endanger public health or safety or the environment, in the way in which a policy permitting the unrestricted importing of beef from countries with mad cow disease might be seen to put the health of Canada's beef eating population at risk of contracting variant Creutzfeldt-Jakob disease (invariably fatal), a human disease that has been linked to mad cow disease (bovine spongiform encephalopathy)(also invariably fatal).⁴⁹ Neither of these two policies that Fraser opposed involved any aspect of wrong doing whatsoever.

The Supreme Court of Canada in *Fraser* established that there are degrees of policy criticism, whether they are related to the specific job that the public servant performs or not. In discussing this aspect of the case under the heading "Extent of Permissible Criticism of Government by Public Servants", (which also included illegal acts (wrongdoing) engaged in by government) the Supreme Court of Canada determined that this is a grey area of the law and established a limit which the public servant is not permitted to exceed – the criticism is unacceptable if it is sustained (prolonged in duration over time), vitriolic (hostile and abusive in tone and/or content) and highly visible (receives prominent media attention and exposure, as opposed to carrying a placard at a rally). As well, the limit depends upon the public servant's position within the government: the lower the person is in the organization, the more latitude (freer)

⁴⁹ Centers for Disease Control and Prevention, National Center for Infectious Diseases – BSE and CJD Information and Resources. Website: <http://www.cdc.gov/ncidod/diseases/cjd/cjd.htm>. Site last visited January 22, 2003.

the public servant is provided to criticize policy, so that the highest bureaucrat (Deputy Minister) is not free at all to criticize government policy.⁵⁰

Another aspect concerns the premise that the case deals with policy criticism and not any government wrongdoing (and hence not whistle blowing). This explains why there is no mention of the internal reporting requirement⁵¹ that is an essential element as a precondition for the justification of blowing the whistle outside the organization (i.e., publicly). This reinforces the view that the internal reporting requirement should not be an element of policy criticism despite any Public Service Staff Relations Board (or other administrative tribunal or any lower court) pronouncement or indication to the contrary. The internal reporting requirement is simply not a relevant factor in determining if policy criticism was acceptable or not. (i.e., did it exceed the limits established by the Supreme court of Canada?). To hold otherwise would result in the absurdity of requiring the lowest level public servant to obtain permission to stand silently in a crowd that had gathered to protest against a government policy, an act that the Supreme Court of Canada indicated would be permissible.⁵²

The final aspect deals with the fact that the Supreme Court of Canada did not qualify the wrongdoing exemplified by saying that it had to be substantial or

⁵⁰ *Fraser, supra*, note 22 at 467, 468 (paras. 34 & 36).

⁵¹ This requirement essentially stipulates that before a public servant can go outside the organization with his/her complaint of wrongdoing he/she must use and exhaust all internal processes established by the organization for dealing with the matter. Only when this has been accomplished and the matter is still unresolved may the public servant 'go public' with his/her concerns. See *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union* (1981), 3 L.A.C. (3d) 140.

⁵² *Ibid.*

serious or gross, etc. That other definitions of wrongdoing have restricted it towards the grave end of the spectrum indicates that although there may indeed be degrees of wrongdoing (as well for policy criticism) there are no degrees of whistle blowing. The Criminal Code distinguishes between minor offences (summary conviction) and more serious offences (indictable) for procedural purposes as well as punishment, but also creates the 'hybrid' offence category wherein Crown Attorneys may proceed summarily or by indictment at their discretion. So while one particular criminal offence may be more serious than another, it cannot be said to be more illegal. Whistle blowing is the act of disclosing or disseminating confidential information (whether externally or internally to the organization, depending on the definition used or author supported) not the expression of an opinion (as is policy criticism). Once the disclosure has been made the act of whistle blowing is complete regardless of how widely the information is spread (i.e., how loudly the whistle is blown or how many people hear it) . Utilizing the mechanism of raising the bar on degrees of wrongdoing that are deemed to constitute wrongdoing for the purposes of whistle blowing is simply a means of ensuring that only conduct that is deserving of severe and widespread rebuke (since it affects the public interest) is included so that the process is not otherwise trivialized by minor transgressions.⁵³

⁵³ This is also the argument for providing constitutional protection to whistle blowers re: free speech rights: "The main reason we use threshold tests for the applicability of constitutional protection is to focus our attention on the situation where we believe the special safeguards associated with constitutional protection are needed." In P. Bryden, "*Blencoe v. British Columbia (Human Rights Commission)*: A Case Comment" (1999) 33 UBC L.R. 153 at 158.

I believe that being clear and (narrowly) defining whistle blowing to exclude policy criticism will allow both employers and adjudicative bodies to more clearly identify wrongdoing and distinguish it from policy criticism that is excessive or improper. This will permit disciplinary measures to be applied where appropriate.

Now that whistle blowing has been conceptually distinguished from policy criticism, I turn next to a closer examination (legal and empirical) of whistle blowing itself.

2.3 The Nature of Whistle Blowing

The origins of the term “whistle blower” are often found in an analogy to competitive sporting events. Specifically, a referee (the impartial authority figure) blows a whistle as a signal to stop play because an infraction of the rules has occurred; the violation is addressed and the contest continues in an orderly fashion, i.e., according to the rules of the game.⁵⁴ But this analogy is not an exact fit as something has been lost in the translation – it is usually an organizational member or “insider” (player) who exposes the wrongdoing to someone with authority to correct the wrongdoing, rather than the person in authority (referee) who notifies others about the impropriety. As Jubb indicated, the analogy is misleading because the whistle blower is powerless to stop the

⁵⁴ Jubb, *supra*, note 15 at 77. See also M.P. Miceli & J.P. Near, *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees* (New York: Lexington Books, 1992) at 15. Simoff used the sports analogy and also reported its origin with the English police constable who blew a whistle to alert other police as well as the public about the discovery of a criminal act: L. Simoff, “Confusion and Deterrence: The Problems That Arise from a Deficiency in Uniform Laws and Procedures for Environmental Whistleblowers” (1999) 8 Dickinson Journal of Environmental Law & Policy 325.

wrongdoing,⁵⁵ and Wexler stated that the whistle blowing employee does so in desperation to try and correct a morally problematic situation.⁵⁶

2.3.1 Wrongdoing Examined

2.3.1.(i) Legal aspect of the definition of wrongdoing

The wrongdoing that whistle-blowing legislation seeks to expose may be generally described as including the breach of any law, wasting public money, endangering public health or safety, damage to the environment, breach of public policy, mismanagement or abuse of authority.⁵⁷ However, each of the statutes or Bills referred to modifies these categories by requiring that they be “gross”, “grave”, “serious”, “significant” or “substantial”.⁵⁸

Part IV of the Ontario *Public Service Act* is entitled “Whistleblowers’ Protection”, and section 28.11 states that the purpose of that part of the statute is to:

“protect employees of the Ontario Government from retaliation for disclosing allegations of serious government wrongdoing and to provide a means for making those allegations public.”⁵⁹

Although enacted in 1993, Part IV has not yet been proclaimed into force.⁶⁰

⁵⁵ Jubb, *supra*, note 15 at 79.

⁵⁶ M. Wexler, *Confronting Moral Worlds: Understanding Business Ethics* (Scarborough: Prentice Hall Canada Inc., 2000) at 219.

⁵⁷ See Bill S-6, 2nd Sess., 37th Parl., 2002 (“*Public Service Whistle-Blowing Act*”, Senate Private Bill, 1st Reading October 3, 2002), s. 3; Ontario *Public Service Act*, R.S.O. 1990, c. P47, s. 28.13; Bill C-241, 2nd Sess., 37th Parl., 2002 (“*Public Service Whistleblowing Act*”, House of Commons Private Member’s Bill, 1st Reading October 23, 2002), s.3; *U.S. Civil Service Reform Act, 1978*, 5 U.S.C., s. 2301(b)(9) (1978); and the Treasury Board of Canada Secretariat *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*, *supra*, note 40.

⁵⁸ *Ibid.*

⁵⁹ Ontario *Public Service Act*, *supra*, note 57, at s. 28.11. This clearly indicates that the Ontario Government has chosen to employ the protection model of whistle blowing in its attempts to curtail government wrongdoing (as opposed to the financial reward model, as is used in the U.S.A. in various jurisdictions).

⁶⁰ *Public Service and Labour Relations Statute Law Amendment Act*, S.O. 1993, c. 38, s. 63(6), part. Part IV of the Ontario *Public Service Act* consists of sections 28.11 to 28.43, with s. 28.43

In *Fraser, Dickson, C.J.* identified one aspect of government wrongdoing as one of the exceptions to the duty of loyalty a public servant owed the Government of Canada. He stated that:

“As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in *illegal acts*, or if its policies jeopardized the life, health, or safety of the public servant or others, or if the public servant’s criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies”.⁶¹ (emphasis added)

It is important, I believe, to define as clearly as possible exactly what is meant by ‘wrongdoing’. Although ‘illegal acts’ referred to above in *Fraser* obviously qualify, the other examples relate more to government policy and opposition or criticism of government, rather than to such matters as gross mismanagement or abuse of authority, for example.

Wrongdoing involving illegal acts on the part of government or a government actor is not publicized because it occurs within an environment where confidentiality is important. Indeed, the wrongdoer usually tries to keep secret his conduct and does not advertise it. Perhaps it is even covered up. But

stating: “Sections 28.11 to 28.42 come into force on a day to be named by proclamation of the Lieutenant Governor.”

⁶¹ *Fraser, supra*, note 22 at 470.

government policy is something that is not kept secret from the public; indeed, it may be well known (depending on the subject matter concerned) and may also be instantly available to anyone who has access to a computer and the Internet.⁶²

2.3.1.(ii) Problems in definition of wrongdoing

Problems/differences in the definition of wrongdoing will affect what is and is not considered to be in the public interest for the purposes of protection (either under the common law or a statute). For example, what is a “significant breach” of established public policy? How does it differ from an ordinary breach of an established public policy? The requirement that the breach be significant suggests or implies that it is one of degree. But can it also be one of kind?

During the 1990's, the Ontario government had an established public policy of not providing a break on the health-care tax paid by professional sports teams based in that province. However, during the final days of Premier Mike Harris' conservative government in the spring of 2002, a “secret” cabinet order was made with the involvement of only a few of the total number of cabinet ministers. That order retroactively reduced the health-care tax paid by sports teams, thereby providing them with a \$10 million break on the payment of the tax.

This matter occurred on April 2, 2002, only 2 weeks before Ernie Eves became the new premier of Ontario. Yet he was not informed of this reversal of

⁶² See, for example, the policy regarding peer review of veterinary drug submissions, published online by the Veterinary Drugs Directorate of the Health Products and Food Branch of Health Canada: “Veterinary Drugs Directorate Peer Review of Veterinary Drug Submissions Policy Guidance Document (PPD-POL-001) at http://www.hc-sc.gc.ca/vetdrugs-medsvet/e_peerreviewpolicyfinaljuly_30_02.html (website last visited October 15, 2002).

policy and did not learn about it until 6 months later, in early October when it was raised in the provincial legislature by an opposition member.⁶³ The tax break was not publicized; an opposition party researcher uncovered it while searching for controversial government decisions, presumably under *Ontario's Freedom of Information and Protection of Privacy Act* (although not specifically stated in the newsarticle). As a reaction to this public disclosure of questionable cabinet decision making, access to orders-in-council passed during the few weeks before Mr. Eves became Premier of Ontario was restricted by the government. After the matter was raised in the Legislature, the government reversed the cabinet order by ending the tax break, before it had been implemented.⁶⁴

Had a civil servant disclosed to the public the April order-in-council before Premier Harris left office, he or she most likely would have been disciplined for breaching the duty of confidence owed to the government and would have been considered a whistle blower. Because it would have been very politically embarrassing to the government at that time, the discipline would in all likelihood have been severe: dismissal. Yet disclosure through a different mechanism, while no less embarrassing or politically damaging, has prevented the incident from being treated as whistle blowing because no organizational member ("insider") was involved. This incident illustrates the point that timeliness of disclosure is not a relevant factor since whistle blowing must involve in some manner the actions of an organizational member.

⁶³ R. Mackie and M. Campbell, "Ontario gave pro sports teams secret \$10 million tax break" *The Globe and Mail* (9 October 2002) A1.

⁶⁴ R. Mackie, "Eves orders review after axing sports deal" *The Globe and Mail* (10 October 2002) A8. However, the reimbursement to the sports teams had not yet occurred pursuant to the April 2, 2002 order-in-council, thereby avoiding the loss of tax revenue.

Clearly, this was a deviation from an established government policy. But was it a significant departure from it? The amount of \$10 million was involved in this situation, but is it still a significant breach when compared to the \$65 million the federal government may have wasted in paying for military pilot training that was never received?⁶⁵ The amounts of money in both examples are significant, but where is the threshold line to be drawn so that amounts below it do not trigger the "significant" requirement that brings it within the ambit of the "public interest" - \$100,000, \$1 million, \$10 million?

According to Wexler:

"In Stage 1 ["the trigger" – the discovery of wrongdoing], the line between what is and is not trivial rests solely in the hands of the whistle-blower. However, it is clear that the more trivial the event the harder it is to push it through all five stages of the whistle-blowing process."⁶⁶

Whatever the merits of the whistle blowing model that Wexler has developed⁶⁷, his observation that the power to disclose wrongdoing by whistle blowing does indeed rest in the first instant with the potential whistle blower. In my view, the result in this approach (of deeming only serious wrongdoing to be considered as wrongdoing for the purposes of a legislated whistle blowing regime) is the proper one, regardless of the model or regime established to control wrongdoing

⁶⁵ D. Leblanc, "DND loses millions on school for pilots" *The Globe and Mail* (9 October 2002) A8. The Canadian military entered into a rigidly structured and untendered contract with Bombardier Inc. for the training of helicopter and fighter pilots. The government contracted and paid for 355 training spots but used only 136 (38%) because far fewer pilots graduated from the training program than expected (61 of 160, or 38%). Under the terms of the agreement, the government was obligated to pay for all of the negotiated training spots, whether or not the military could fill them all over the time period involved.

⁶⁶ M.N. Wexler, *supra*, note 56 at 225.

⁶⁷ Wexler developed a model of a "typical, albeit stylized, whistle-blowing event" (at 223). The model can be summarized as: Stage 1 – discovery of wrongdoing; Stage 2 – the decision to whistle blow or not; Stage 3 – the act of whistle blowing or remaining silent re: wrongdoing; Stage 4 – reactions to the act of whistle blowing; Stage 5 – the whistle blower's response to the organization's reaction to the act of whistle blowing (at 222).

through the facilitation of whistle blowing. Wexler describes trivial wrongdoing as a "breach in moral behaviour" and provides the example of an employee "calling in sick on a sunny day."⁶⁸ This level of trivial wrongdoing is best handled at the level of the office within which it arose in a different manner from that of whistle blowing (i.e., it should be treated as a routine disciplinary matter since it is not a matter of general concern warranting public discussion or debate). Trivial wrongdoing should not be afforded the same expenditure of resources to encourage its reporting and correction as does serious wrongdoing. The reason is that I believe it is unlikely that the former rarely, if ever, will mature into a matter of general public interest. Although wrongdoing may be involved, it is not serious in nature nor widespread.⁶⁹

The pilot training example was disclosed to the public by the federal Auditor General in her annual report to Parliament while the Ontario tax break example was unearthed by an opposition researcher apparently using access to information legislation to review government documents. In contrast to these situations is the recent incident involving the bribery of a Canadian embassy official in Paris in exchange for improperly issuing travel documents to foreigners, who later claimed refugee status once they arrived in Canada. This corrupt practice came to light through an application pursuant to the federal *Access to Information Act*. Yet important details are missing because the released

⁶⁸ *Ibid.*, at 227.

⁶⁹ For example, a low level civil servant who passes along financial information obtained from the government's computer system to a male relative, in order to assist him in his divorce proceeding.

documents were heavily edited.⁷⁰ This highlights the inadequacy of utilizing or solely relying upon access to information laws to discover government wrongdoing, since whistle blowers generally do not edit the documents they release in the public interest to expose or facilitate correction of government wrongdoing by promoting public discussion of it. More fundamentally though, Cripps believed that such access to information laws do not provide the invaluable function of alerting the public's attention to specific government activities, because the ability to use such laws presupposes that the person already knows exactly what document he or she is looking for.⁷¹

Research by social science investigators into whistle blowing has also provided some insight into the nature of the wrongdoing involved. Jubb articulated the general sentiment of whistle blowing researchers when he stated that wrongdoing need not be actually proven to have occurred, as it is sufficient if it is suspected of having occurred. The standard used to assess the allegation requires only that the whistle blower have acted in good faith or have a reasonable belief that the wrongdoing occurred, since requiring actual wrongdoing places too high a burden on the whistle blower and would preclude whistle blowing of a preventive nature. Therefore he asserted that it is impracticable to try and establish criteria for pre-determining valid or legitimate whistle blowing from invalid or illegitimate whistle blowing.⁷²

⁷⁰ C. Freeze, "Paris embassy official bribed for visas" *The Globe and Mail* (5 September 2002) A1.

⁷¹ Y. Cripps. "Disclosure in the public interest: The predicament of the public sector employee" (1983) Public Law 600 at 633.

⁷² Jubb, *supra*, note 15 at 87.

Additionally, he contended that the wrongdoing complained about must be under the control of the organization for it to be responsible, as theoretically it is wrong to impose consequences or liability on an organization for wrongdoing beyond its control. He argued that to do otherwise is unfair to the organization and impairs the social value of whistle blowing. Therefore the organization must be in control of the wrongdoing in order for it to be accountable for it.⁷³

2.3.2 The "Public Interest"

Although Nader invoked the "public interest" in defence of whistle blowers,⁷⁴ Rongine pointed out that this definition did not adequately establish when the public interest was involved in whistle blowing.⁷⁵ Indeed, it appears that there may be no single, generally accepted definition of the public interest, perhaps because the definition of public interest is malleable,⁷⁶ or as Smith, J. stated: "The reality is, however, that there are many "public interests". . ."⁷⁷ And Vollman claimed that there was no precise definition of the term, but that it was more a "shifting mix" of economic, environmental, and social interests that change in response to the changing values and preferences of society over

⁷³ *Ibid.*

⁷⁴ Nader's definition states: "The act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, publicly "blows the whistle" if the organization is involved in corrupt, illegal, fraudulent, or harmful activity." Nader, Ralph, P. Petkas & K. Blackwell, *Whistle blowing: The Report of the Conference on Professional Responsibility* (Conference on Professional Responsibility, Washington, 1971)(New York: Grossman Publishers, 1972)(hereafter "Nader").

⁷⁵ N.M. Rongine, "Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing" (1985) 23 Am. Bus. L. J. 281 at 284.

⁷⁶ P. Moyer, "The Regulation of Corporate Law by Securities Regulators: A Comparison of Ontario and the United States" (1997) 55 U.T. Fac. L. Rev. 43 at 45.

⁷⁷ *Sierra Club of Western Canada v. British Columbia (Chief Forester)*, [1994] B.C.J. No. 1713 at para.47 (B.C.S.C.) online: QL (BCJ).

time.⁷⁸ Determining what is and is not a matter of public interest is difficult⁷⁹ as it has been contended by Massaro that doing so is a subjective exercise.⁸⁰

The “wider public interest” is “engaged”, according to Allan, whenever a public authority abuses power and also in maintaining the operation and processes of government in a legal manner.⁸¹ Recalling the list of wrongdoing categories provided earlier, it appears that each one can arguably be said to be a matter of public interest, especially when occurrences must rise to the level of being significant, substantial, serious, gross or grave.

Sarra’s view was that the public interest is “. . . a “short form” for the complex balancing of diverse interests that the court engages in”⁸² This same view was earlier expressed by Smith, J. in the *Sierra Club* case where he stated, in discussing the different notions of the public interest advocated by the parties in that case, “Achieving an acceptable balance between competing views is a pervasive concern”⁸³ This can be a contentious matter when

⁷⁸ K.W. Vollman, as cited in C.K. Yates & M.H. Buchinski, “Recent Regulatory and Legislative Developments of Interest to Oil and Gas Lawyers” (2001) 39 Alta. L. Rev. 260 at 286.

⁷⁹ D.P. Westman, *Whistleblowing: The Law of Retaliatory Discharge* (Washington, D.C.: The Bureau of National Affairs, Inc., 1991) at 34.

⁸⁰ T.M. Massaro, “Significant Silences: Freedom of Speech in the Public Sector Workplace” (1988) 61 S. Cal. L. Rev. 1 at 27.

⁸¹ T.R.S. Allan, “Abuse of power and public interest immunity: Justice, rights and truth” (1985) 101 The Law Quarterly Review 200 at 206.

⁸² J.P. Sarra, *Restructuring of Insolvent Corporations: Creditor Rights and Judicial Recognition of the “Public Interest”, Principles for Reconciliation* (PhD. Dissertation, Faculty of Law, University of Toronto, 1999).

⁸³ *Sierra Club*, *supra.*, note 77 at para 48.

distinguishing the public interest from the private, self-interests of society's members.⁸⁴

There may also be competing public interests that must be balanced in whistle blowing situations. In circumstances that involve the disclosure into the public realm of confidential government information (which the public servant whistle blower claims is proof of wrongdoing), the public interest in the efficient operation of government agencies is weighed against the public interest of civil servants in exercising their freedom of expression rights without the fear of retaliation by their employer, the government.⁸⁵

2.3.3 An Empirical Consideration of Whistle Blowing

What can empirical research into whistle blowing reveal about a legal regime that addresses whistle blowing (and the government wrongdoing that whistle blowing seeks to expose)? The answer, I believe, is that empirical research from a social science perspective will assist in understanding why whistle blowers decide to disclose organizational wrongdoing, whether internally or externally to the organization. This understanding will help when evaluating the various proposed legislative whistle blower regimes discussed in greater detail later on, and whether they will be successful in addressing the question of curtailing government wrongdoing or the question of how best to go about handling/controlling the process of whistle blowing by public servants

⁸⁴ P.L. Bryden, "Public Interest Intervention in the Courts" (1987) 66 *The Canadian Bar Review* 490 at 491.

⁸⁵ See, for example, M.J. Lindauer, "Government Employee Disclosures of Agency Wrongdoing: Protecting the Right to Blow the Whistle" (1975) 42 *University of Chicago L.R.* 530 at 560, and A. Boyle, "Freedom of Expression as a Public Interest in English Law" (1983) *Public Law* 574.

(irrespective of the merits of the allegation of wrongdoing). As well, various legal commentators have considered empirical (mainly social science) research into whistle blowing when they discuss the matter from a mainly legal perspective.⁸⁶

Whistle blowing displays 3 characteristics that distinguish it from other forms of disputes within the organization: 1) it involves organizational members who unilaterally commence disputes with the organization on behalf of third parties who have no direct connection with the organization (i.e., outsiders); 2) the conflict is polarized between two organizational parties who possess unequal power within the organization; and 3) it occurs in situations where there is a lack of well-developed, neutral dispute resolution mechanisms.⁸⁷

Miceli & Near's review of the literature in 1985 led them to state that there was no existing whistle blowing theory per se, but that various theories of motivation facilitated an understanding of whistle blowing.⁸⁸ Rothschild & Miethe made a similar point when they said that different theories of deviance explain different aspects or individual determinants of whistle blowing.⁸⁹ Different theories attempting to explain various aspects of whistle blowing (deviance

⁸⁶ See, for example, Rongine, *supra*, note 75; M. Vincent, "Welcome disclosure: The decline of whistleblowing as an ethical act" (1995) 20 *Alt. L.J.* 74; and R.G. Fox, "Protecting the whistleblower" (1993) 15 *Adel. L.R.* 137.

⁸⁷ J.L. Perry, "Whistleblowing, Organizational Performance, and Organizational Control" in H.G. Frederickson (ed.), *Ethics and Public Administration* (Armonk, New York: M.E. Sharpe, 1993) at 69.

⁸⁸ M.P. Miceli and J.P. Near, "Characteristics of Organizational Climate and Perceived Wrongdoing Associated with Whistle-blowing Decisions" (1985) 38 *Personnel Psychology* 525 at 526. Ten years later, Keenan said the same thing: "... as a relatively new field of study, there are no widely accepted theories or models of whistleblowing, though there have been attempts to develop formalized theories by way of sets of interrelated propositions and attempts at model-building." J.P. Keenan, "Whistleblowing and the First-Level Manager" (1995) 3 *Journal of Social Behavior and Personality* 571 at 572.

⁸⁹ J. Rothschild and T.D. Miethe, "Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organizational Corruption" (1999) 26 *Work and Occupations* 107 at 118.

theory, differential association theory, etc) are held to predict different results.⁹⁰

When whistle blowing is considered from a legal perspective, much the same difficulty may be encountered.⁹¹

That different theories studied by various researchers have produced different findings or explanations of the phenomenon being investigated is not surprising. The reason is that:

“A model is a formal representation of the researcher’s image of the real world, which portrays those relationships that are of greatest interest to the investigator. Not all possible or known relationships are portrayed, as the level of complexity would be too great, thus hindering the understanding sought of the real world situation. The level of abstraction from the real world will determine the scope of the study. However, a careful examination of the selected . . . aspects will provide a more complete understanding of the . . . system’s functioning, thus approaching a ‘white-box’ situation.”⁹²

There are 3 types of whistle blowing claims, classified according to validity of the claim: 1) wrongdoing that is accurately perceived by the whistleblower; 2) invalid complaints based upon erroneous perceptions or incomplete information concerning the alleged wrongdoing; and 3) self-interested claims where the *whistleblower creates a problem* for self-protection or advantage (emphasis added). This last category may essentially be thought of as a false allegation,

⁹⁰ M.P. Miceli and J.P. Near, “What makes whistle-blowers effective?” (2002) 55 Human Relations 455 at 457.

⁹¹ F.S. Ravitch, “Exploring Baselines in Judicial Decisions: A Hermeneutic Approach to Understanding Unstated Judicial Presumptions” (Paper presented to the Law and Society Association, 30 May 2002) [unpublished] at 2: “Law is simply too big to be understood or described in all its intricacies from one foundation or theoretical viewpoint. Most of the competing theories can teach us something about law and legal interpretation . . .”

⁹² D. Harvey, *Explanation in Geography* (London: Edward Arnold, 1973), as cited in D. Mercan “An Investigation of the Intertidal Saturation Level as it Relates to Shore Platform Development” (M.A.Thesis, University of Windsor, 1982) at 30. Jubb expressed somewhat the same idea when he stated: “The proliferation referred to may be due in part to investigators from various disciplines studying and defining the whistle blowing phenomenon in a manner that assists their scope of enquiry and research methods.” Jubb, *supra*, note 15.

even though an actual situation has been manufactured or fabricated by the whistleblower for purely opportunistic or self-interested reasons. Here, the improper motive of the whistleblower (compared with the other 2 categories) is at the centre of the wrongdoing complaint.⁹³

In an early study⁹⁴ it was reported that of the subjects surveyed concerning retaliation for whistle blowing, 59% stated that they experienced no retaliation. And 15 years later Yang & France reported that the recipients of wrongdoing complaints believed that few such complaints were well founded; in one category of whistle blowing (False Claims Act lawsuits in the U.S.) only 11% were successful.⁹⁵

Miceli and Near speculated that the nature of whistle blowing activity and the amount of it would change based upon the decision making process of whistleblowers involving a cost-benefit analysis of their intended disclosure.⁹⁶

2.3.4 Aspects of Empirical Research into Whistle Blowing

Although investigation (mainly empirical) into various aspects of whistle blowing & organization dissent have been conducted for decades,⁹⁷ research of whistle blowing is more currently being recognized as a distinct area of study.⁹⁸

⁹³ Perry, *supra*, note 87 at 81.

⁹⁴ M.A. Parmerlee and J.P. Near and T.C. Jensen, "Correlates of Whistle-blowers' Perceptions of Organizational Retaliation" (1982) 27 *Administrative Science Quarterly* 17 at 26.

⁹⁵ C. Yang and M. France, "Whistle-blowers on trial" (1997) *Business Week*, 24 March 1997, p. 172.

⁹⁶ M.P. Miceli and J.P. Near, "Characteristics of Organizational Climate and Perceived Wrongdoing Associated with Whistle-blowing Decisions" (1985) 38 *Personnel Psychology* 525 at 541.

⁹⁷ For example, see R. O'Day, "Intimidation Rituals: Reactions to Reform" (1972) 10 *Journal of Applied Behavior Science* 373.

⁹⁸ R.L. Sims and J.P. Keenan, J.P. "Predictors of External Whistleblowing: Organizational and Intrapersonal Variables" (1998) 17 *Journal of Business Ethics* 411 at 412.

Empirical investigations into whistle blowing have revealed that organizational, situational and individual variables interrelate with each other to produce whistle blowing, which can be viewed as a complex phenomenon.⁹⁹

However, the results of earlier research must be considered to be preliminary only as they have not held to be conclusive,¹⁰⁰ perhaps because differences in the operational definition of whistle blowing have resulted in findings that do not correspond with those reported in the literature on the subject.¹⁰¹ Some early empirical studies into whistle blowing have been held later, upon closer examination, to be somewhat ambiguous. In their 1998 study Dworkin & Baucus¹⁰² commented on the ambiguity of earlier empirical research into whistle blowing by Miceli & Near, whose 1991 study results were later qualified by them in their 1992 study. Because Miceli & Near's 1991 study results appeared to be contrary to the literature on the topic (effectiveness of external versus internal whistle blowing channels), they cautioned that their findings may be peculiar to their sample. The inconclusiveness of research findings, especially where they differ from the generally accepted literature on the subject, should be viewed with caution and taken as a reminder that additional research may be required, since the study may be faulty in some way (research

⁹⁹ M.P. Miceli and J.B. Dozier and J.P. Near, "Personal and Situational Determinants of Whistle-blowing" Paper presented at the Meeting of the Academy of Management, as cited in R.L. Sims and J.P. Keenan, J.P. "Predictors of External Whistleblowing: Organizational and Intrapersonal Variables" (1998) 17 Journal of Business Ethics 411.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, at 418.

¹⁰² T.M. Dworkin and M.S. Baucus, "Internal vs. External Whistleblowers: A Comparison of Whistleblowing Processes" (1998) 17 Journal of Business Ethics 1281 at 1286.

design, inadequate sample size,¹⁰³ etc.) or the phenomenon being investigated may have changed over time.¹⁰⁴

Researchers have viewed many aspects of whistle blowing as essentially empirical issues rather than theoretical. Miceli & Near argue that, for example, expectations about how a potential whistleblower will react to perceived wrongdoing in terms of the organizational role played, the propensity of the organization to retaliate in response to whistle blowing, etc. are empirical issues that can only be answered through research into factual (concrete) situations and cannot be resolved abstractly (theoretically). By taking such an approach, they claim, the aggregate study findings on whistle blowing will assist in determining whether a "typical" whistleblower exists,¹⁰⁵ what the "relevant population" of whistleblowers may be and how representative a particular study's sample may be of whistleblowers generally (i.e., can the findings of a single study be generalized to whistleblowers as a whole?),¹⁰⁶ etc.

Two areas of whistle blowing that have been generally well investigated focus upon: 1) predictors of whistle-blowing, and 2) predictors of retaliation. However almost no empirical research has been conducted on the effectiveness

¹⁰³ J. Rothschild and T.D. Mieth, "Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organizational Corruption" (1999) 26 *Work and Occupations* 107 at 113.

¹⁰⁴ Dworkin and Baucus, *supra.*, note 102 at 1296.

¹⁰⁵ M.P. Miceli and J.P. Near, "Relationships Among Value Congruence, Perceived Victimization, and Retaliation Against Whistle-blowers" (1994) 20 *Journal of Management* 773 at 775.

¹⁰⁶ *Ibid.*, at 792.

of whistle blowing and very little theory addresses the conditions relating to the effectiveness of whistle blowing.¹⁰⁷

Daft defined organizational structure as being comprised of formal reporting relationships and inter-organization communication across departments; these formal relationships included the number of levels in the organization's hierarchy and the managers' and supervisors' span of control.¹⁰⁸ Dalton *et al.* believed that an organization's structure consisted of its configuration (span of control), number of hierarchies, subordinate ratio along with many other variables which could influence an individual organization member's behaviour.¹⁰⁹ King believed that Daft's definition of organizational structure was more encompassing than that of other researchers.¹¹⁰ King also stated that another implication of his research was that an organization's structural levels within its hierarchy may affect whistle blowing, since whistle blowing may actually be encouraged by the existence of numerous levels within a department.¹¹¹

However, Miceli & Near reported that smaller organizations are more likely to experience whistle blowing than larger organizations because in the larger organizations individuals might perceive that they have less influence or ability in changing wrongdoing. They similarly stated that organizations that are more

¹⁰⁷ Miceli and Near, "What makes whistle-blowers effective?" *supra.*, at 456.

¹⁰⁸ R.L. Daft *Organizational Theory and Design* 3d. ed. (St. Paul Minnesota: West Publishing Co., 1989), as cited in King, *supra.*, at 316.

¹⁰⁹ D.R. Dalton *et al.*, "Organizational Structure and Performance: A Critical Review" (1980) 5 *Academy of Management Review* 49, as cited in King, *supra.*, at 316.

¹¹⁰ King, Granville, "The Implications of an Organization's Structure on Whistle Blowing" (1999) 20 *J. Business Ethics* 315 at 316.

¹¹¹ *Ibid.*, at 324.

hierarchical, bureaucratic or authoritarian have fewer incidents of whistle blowing; when it does occur it is also less open.¹¹² The seeming contradiction between the implications of King's research with those of Miceli & Near for a large government bureaucracy show clearly that understanding the whistle blowing phenomenon based upon empirical findings is not straightforward.

From management's perspective, whistle blowing is considered to be a questioning of or a challenge to the organization's authority structure. If this occurs, then the entire structure of the organization may be undermined.¹¹³ But a difficulty Perry encountered in his research concerned identifying the relationships that might exist between a whistleblower's actions and the consequences to the organization of those actions.¹¹⁴

Miceli & Near identified the need for research in the role of an organization's climate in whistle blowing as well as for determining the generalizability of empirical studies involving the public sector to be applied to the private sector.¹¹⁵ However, with respect to the applicability of their specific

¹¹² M.P. Miceli and J.P. Near, *Blowing the Whistle: The Organizational & Legal Implications for Companies and Employees* (New York: Lexington Books, 1992).

¹¹³ D. Weinstein, *Bureaucratic Opposition* (New York: Pergamon Press, 1979).

¹¹⁴ Perry, *supra*, note 87 at 94.

¹¹⁵ M.P. Miceli and J.P. Near, "Individual and Situational Correlates of Whistle-Blowing" (1988) 41 *Personnel Psychology* 267 at 279. Further on point re: the need for studying the role of an organization's climate is Karen Peek's research on whether or not any relationship exists between ethical maturity and the education, gender and age of US Federal government employees (ethical maturity of adults is assessed using the widely recognized Cognitive Moral Development theory postulated by Lawrence Kohlberg in 1969). Peek found that a relationship exists between the cognitive moral development of a government employee and that person's educational level. However, no consistent relationships were found to exist between an employee and his/her gender and age. She believed that her research findings had significant implications involving ethics in government in that 1) it is important for management to maintain an ethical climate in the organization and 2) education plays a role in the ethical maturity of public servants. K. L. Peek *The good, the bad, and the 'misunderstood': A study of the cognitive moral development theory*

findings to whistle blowing as a social phenomenon, Miceli and Near stated that "generalizability is an empirical issue that can be addressed only in a progression of studies in different contexts." Their research subjects were federal public servants who "may have experienced contingencies entirely different from those facing private sector employees." They went on to suggest further research in order to determine "whether these findings are consistent across samples."¹¹⁶ Rothschild & Miethe agreed, stating that examining employees in similar work environments was important when trying to correlate variables involved in whistle blowing and differentiating between whistleblowers and non-whistleblowers (i.e. defining who a whistle blower is).¹¹⁷ Similarly, in their 1999 study of whether whistle blowing laws can protect federal public servants, Miceli and Near remarked that the findings of a single study could not be used to generalize to all whistleblowers. This contention was made in relation to the U.S. federal public service, despite the fact that their study used data collected over a 13 year time period.¹¹⁸

and ethics in the public sector (PhD. Dissertation, Faculty of Business Administration, Nova Southeastern University, 1999) [unpublished].

¹¹⁶ M.P. Miceli and J.P. Near, "Characteristics of Organizational Climate and Perceived Wrongdoing Associated with Whistle-blowing Decisions" (1985) 38 *Personnel Psychology* 525 at 541.

¹¹⁷ J. Rothschild and T.D. Miethe, "Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organizational Corruption" (1999) 26 *Work and Occupations* 107 at 110.

¹¹⁸ M.P. Miceli and M. Rehg and J.P. Near, "Can Laws Protect Whistle-Blowers?" (1999) 26 *Work and Occupations* 129 at 148.

2.4 Definition of Whistle-blowing¹¹⁹

Although elements of whistle blowing, as it originated with the notion of “iniquity”, can be traced back to the 1857 decision of Wood, V.C. in *Gartside v Outram*,¹²⁰ the first formal modern definition of whistle blowing appears to be the one developed by Ralph Nader in 1972 following a whistle blowing conference held in the U.S.A. the previous year. He defined whistle blowing as:

“an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, publicly blows the whistle if the organization is involved in corrupt, illegal, fraudulent, or harmful activity.”¹²¹

Rongine reported that subsequently to Nader publishing this definition of whistle blowing, much time by legal scholars, social scientists and philosophers has been devoted trying to improve upon it. He believed that there were 3 elements needed to render Nader’s definition more functional: 1) a more exact demarcation of when the “public interest” is genuinely involved, 2) a more exact specification of what is included in the “interest of the organization”, and 3) a particular characterization of the meaning of “corrupt, illegal, fraudulent or harmful activity.”¹²² He believed that any definition lacking such specifics would be indistinguishable from other “less meritorious” kinds of dissent with the result that it would be morally difficult to justify providing legal protection to the whistle-

¹¹⁹ See Appendix 1 for a more exhaustive list of definitions of whistle blowing that cover the spectrum of definitions of the term.

¹²⁰ (1856) 26 L.J. Ch. 113 at 114. See the following chapter for a more detailed treatment.

¹²¹ Nader, *supra*, note 74. See also A.F. Westin, (ed) *Whistle Blowing: Loyalty and Dissent in the Corporation* (New York: McGraw-Hill), 1981) at 13.

¹²² Rongine, *supra*, note 75 at 283.

blower.¹²³ He further stated that a definition that was overinclusive was no better than one that was incomplete. He proposed a definition in which "neither too much nor too little" was said: whistle-blowing is a

"communication to the public of the illegal or immoral conduct of one's employer that is likely to result in unnecessary harm to third parties."¹²⁴

Generally, legal definitions of whistle blowing (especially those contained in statutes) reflect policy objectives of the law: promoting disclosures in the public interest, protecting whistleblowers from retaliation, and perhaps some moral justification on the part of the whistleblower.¹²⁵ To this list the following can also be added: education of ethical practices in the workplace, and prevention of wrongdoing.¹²⁶

2.4.1 Empirical versus legal definitions of whistle blowing:

Vincent noted that there are various definitions of whistle blowing, since writers may have different concerns in mind when each defines the term.

However, he stated that all definitions of whistle blowing contain two required elements: that the whistleblower is or has been an employee of the organization and that a disclosure of organizational conduct (including an omission to act) be made (but he did not specify to whom).¹²⁷

¹²³ *Ibid.*

¹²⁴ *Ibid.*, at 284.

¹²⁵ Jubb, *supra*, Note 15 at 81.

¹²⁶ Preamble to Bill S-6, 2nd Sess., 37th Parl., 2002 ("*Public Service Whistle-Blowing Act*", Senate Private Bill, 1st Reading October 3, 2002). But Bill S-6 does not define whistle blowing, it only refers to it as a "written notice of allegation" in relation to wrongdoing committed by a public servant.

¹²⁷ M. Vincent, "Welcome disclosure" (1995) 20 *Alternative Law Review* 74.

Dworkin & Near (1997) however, stated that empirical and legal definitions of whistle blowing share a single important, common characteristic, namely that the whistle blower is only required to act in good faith in making the disclosure and not that the allegation of wrongdoing must be correct.¹²⁸ They reviewed legal definitions of the term and concluded that they tend to be restrictive compared to those provided by empirical (social science) researchers. The legal definitions of whistle blowing developed by most states in the U.S.A. were seen as protecting whistle blowing in relation to breaches of the law; immoral conduct as well as minor acts of wrongdoing were excluded from the definitions (as only serious instances of wrongdoing were considered to be worthy of attracting attention, and only three states protected against violations of codes of ethics (Connecticut, Pennsylvania and West Virginia).¹²⁹

In Canada, none of the following statutes or Bills dealing with the topic define whistle blowing: the Ontario Public Service Act¹³⁰, Bill S-6¹³¹ and Bill C-241.¹³² Instead they focus on enumerating grounds of wrongdoing that the statute seeks to curtail. The two Bills mentioned above currently before Parliament refer to whistle blowing as a "written notice of allegation" when dealing with the reporting of wrongdoing. Bill C-201 uses the term "protected

¹²⁸ T.M. Dworkin & J.P. Near, "A better statutory approach to whistle blowing" (1997) 7 *Business Ethics Quarterly* 1 at 3.

¹²⁹ *Ibid.*, at 2.

¹³⁰ Ontario *Public Service Act*, R.S.O. 1990, c. P47.

¹³¹ Bill S-6, 2nd Sess., 37th Parl., 2002 ("*Public Service Whistle-Blowing Act*", Senate Private Bill, 1st Reading October 3, 2002).

¹³² Bill C-241, 2nd Sess., 37th Parl., 2002 ("*Public Service Whistleblowing Act*", House of Commons Private Member's Bill, 1st Reading October 23, 2002).

behaviour” which it defines to mean the act of disclosing information evidencing wrongdoing to a superior or public body¹³³.

Canadian legal commentators Heenan and De Stefano limited what they referred to as ‘legitimate’ forms of whistle blowing to the reporting of criminal activity carried on by the employer “in the absence of any curative steps being taken by the employer.”¹³⁴ This comment implies that employee’s disclosure of the employer’s criminal activity is the only legitimate exception concerning whistle blowing justifying the former’s breach of the duty of loyalty and confidentiality owed to the employer.¹³⁵ It is a very narrow definition of whistle-blowing, perhaps the narrowest in contemporary times, as it harkens back to the “iniquity” that Wood, V.C. spoke of in 1857 in *Gartside v. Outram*. But whistle blowing, or the act of a public servant in speaking out and exposing government wrongdoing, encompasses more than merely exposing the criminal activity by the employer. As Dickson, C.J. stated in *Fraser*, it is permissible for a public servant to voice opposition to the government where 1) it commits illegal acts, or 2) where its policies jeopardize the life, health or safety of the civil servant or others, or 3) where the criticism has no impact on the public servant’s ability to effectively perform the duties of a public servant¹³⁶. He also stated that there may be other qualifications in addition to these, indicating that the list is not closed. But it is

¹³³ Bill C-201, 2nd Session, 37th Parl., 2002 (*Whistle Blower Human Rights Act*”, House of Commons Private Member’s Bill, 1st Reading October 2, 2002) s.2

¹³⁴ Heenan, *supra*, note 43 at 200. Their consideration of whistle blowing was not limited to the public sector.

¹³⁵ Indeed, this view corresponds with that part of the Supreme Court of Canada decision in *Fraser* that relates solely, in my view, to disclosing wrongdoing: illegal acts.

¹³⁶ *Fraser, supra*, note 22 at 470. The Court referred to these three situations as “qualifications” to the duty of loyalty, meaning that they are exceptions that permit public opposition to government policy or conduct.

important to remember that the Supreme Court of Canada was concerned with a public servant's expression of his political opinion about government *policy* (criticism) and not with exposing government *wrongdoing* (whistle blowing) since no confidential information was disclosed to the public by Mr. Fraser, nor did he allege any government wrongdoing.

Jubb contended that the vast number of varying definitions of whistle blowing partially results from the various discipline specific research methodologies and the scope of their individual investigations. This resulted in definitions of whistle blowing that are produced to serve their particular discipline.¹³⁷ He believed that these empirical studies consistently indicated that whistle blowers are victimized by the organization that they belong to and whose secrets they reveal. He then went on to suggest that the use of a victimization aspect in the definition of whistle blower was in effect the creation of a definition that served an ideological or political purpose¹³⁸ (this is most commonly found in legal (statutory) definitions).¹³⁹

From a social science perspective, Miceli & Near argued that empirical research is required on various types of whistle blowing so that differences and similarities among them can be ascertained because the appropriate definition of whistle blowing has not achieved general agreement.¹⁴⁰ Indeed, the results of

¹³⁷ Jubb, *supra*, note 15 at 77.

¹³⁸ *Ibid*, at 81.

¹³⁹ *Ibid*, at 77.

¹⁴⁰ M.P. Miceli and J.P. Near, "Relationships Among Value Congruence, Perceived Victimization, and Retaliation Against Whistle-blowers" *supra*, note 101, at 775. However, M. Wexler, *Confronting Moral Worlds: Understanding Business Ethics* (Scarborough: Prentice Hall Canada Inc., 2000) at 221 stated that "There is a general agreement on definitions of whistle blowing." when he discussed definitions from three noted social science sources, one of whom

earlier research must be considered to be preliminary only as they have not been held to be conclusive,¹⁴¹ perhaps because differences in the operational definition of whistle blowing have resulted in findings that do not correspond with those reported in the literature on the subject.¹⁴²

Social scientists Near and Miceli¹⁴³ defined whistle blowing as: "the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action." Their colleagues Dworkin and Near¹⁴⁴ reported that this definition of whistle blowing (or some variation of it) has been accepted by most social science researchers investigating the phenomenon (although Elliston believed that whistle blowing is not a single action, but a series of actions (a process) that constitute a form of communication¹⁴⁵). Perhaps as an even greater tribute to its acceptability, it has become the standard definition in a recent dictionary of social science items¹⁴⁶. However, differences in the operational definition of whistle blowing have

was Near & Miceli themselves. Yet he stopped short of claiming that there was a single, universally accepted definition of whistle blowing, likely because the three definitions he examined seemed to, for him, flesh out the basic parameters of whistle blowing. So there appears to be not even general agreement as to whether there is a generally accepted definition of whistle blowing.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, at 418.

¹⁴³ J.P. Near & M.P. Miceli, "Organizational dissidence: The case of whistle-blowing" (1985) 4 *Journal of Business Ethics* 1 at 4. Compare Near & Miceli's definition with that appearing in a dictionary: "a person who alerts the public to some scandalous practice or evidence of corruption on the part of someone else." From *The Macquarie Dictionary* (2nd ed. 1991) as cited in R.G. Fox, "Protecting the Whistleblower" (1993) 15 *Adel L.R.* 137.

¹⁴⁴ *Supra*, note 128 at 3.

¹⁴⁵ Elliston, Frederick A. (1982) "Anonymity and whistle blowing" in Poff, Deborah and Waluchow, Wilfrid (eds.) *Business Ethics in Canada* (1987), at pp. 144-154.

¹⁴⁶ *Ibid.*

resulted in findings that do not correspond with those reported in the literature on the subject.¹⁴⁷

Jubb contended that Miceli & Near's definition was "influenced by research considerations" since their reformulation into a more inclusive definition solved certain problems of an operational nature. He also seemed to imply that a definition designed for ulterior motives (i.e., it was designed to fit a particular ideology or political purpose) was in some ways a deficient attempt to adequately address the problem of definition. He was speaking here of where the definition seeks to portray the whistle blower as a victim of organizational retribution.¹⁴⁸

2.4.2 Empirical definitions generally

Empirical researchers generally agree that the whistle blower must be or have been an organizational member, someone who has or had access to the organization's confidential information.¹⁴⁹ Additionally, from his review of the literature on the subject, Jubb noted commonly agreed upon aspects of whistle blowing definitions: 1) whistle blowing is an act of reporting 2) the subject matter is broadly identified as apparently immoral or wrongdoing (including illegality) and 3) whistle blowing is not obligatory.¹⁵⁰ He also identified and commented upon the most contentious aspects of the whistle blowing definition: 1) whether to

¹⁴⁷ Sims, R.L. and J.P. Keenan, J.P. "Predictors of External Whistleblowing: Organizational and Intrapersonal Variables" (1998) 17 *Journal of Business Ethics* 411 at 416.

¹⁴⁸ Jubb, *supra*, note 15 at 80.

¹⁴⁹ Miceli, M.P. & J.P. Near, *Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees* (New York: Lexington Books, 1992) at 16, citing Elliston *et al*, *Whistleblowing Research: Methodological and Moral Issues* (New York: Praeger, 1985).

¹⁵⁰ Jubb, *supra*, note 15 at 83-84.

include motive 2) whether the disclosure must be made external to the organization and 3) whether disclosure must be unauthorized.¹⁵¹

2.4.2.(i) Motive:

Jubb stated that whistle blowers typically have mixed motives. In his view, whistle blowing is not dependent on the "purity" of the whistle blower's motive, as shameful or improper motives may be the cause of whistle blowing while morally based or well-intentioned whistle blowing does not necessarily produce beneficial results.¹⁵² His argument is that including motive as an element of whistle blowing would increase the problem of adequately defining whistle blowing, not reduce it because misrepresenting motive is what makes deception (i.e., ulterior motive) work. Therefore motive does not help separate the person who makes a false allegation of wrongdoing from the legitimate whistle blower.¹⁵³ This explains why, according to Jubb's view, legitimate versus illegitimate whistle blowing cannot be predicted.¹⁵⁴

2.4.2.(ii) Internal disclosure:

Many researchers concede that whistle blowing may be either internal to the organization or external to it, because from a dissent perspective any conceptual difference in the channel used is minimal and is not supported empirically, Jubb, however, maintained the opposite viewpoint. He believed that the internal/ external dichotomy must be maintained and that only external whistle blowing should be accepted as whistle blowing. He argued that for the

¹⁵¹ *Ibid.*, at 84.

¹⁵² *Ibid.*, at 88.

¹⁵³ *Ibid.*, at 89.

¹⁵⁴ *Ibid.*, at 82.

disclosure of confidential organizational information to count as whistle blowing, it must involve disobedience and a breach of trust (in that the organization's proprietary rights attaching to the confidential information have been violated through the release of that information to the public). He believed that using an internal disclosure channel fails to satisfy these requirements because the breach of loyalty is in relation to the whistle blower's organizational colleagues and not to the principles of the organization itself. Loyalty to colleagues is not to be confused with loyalty to the organization itself and its values or principles, he asserted.¹⁵⁵

2.4.2.(iii) Voluntary Disclosure:

There are 2 components to the voluntary disclosure aspect of whistle blowing: legal compulsion (under oath) and organizational role. Jubb believed that making a disclosure under oath is not whistle blowing, because it is a legal compulsion and not the act of a free will.¹⁵⁶ As for the organization role component, he believed that whistle blowing does not equal coerced acts or disclosure required by the whistle blower's organizational role or office. Therefore whistle blowing must be not obligatory. His strongest criticism for saying whistle blowing cannot be authorized is that it lacks the notion of dissent with the organization.¹⁵⁷

Miceli & Near, on the other hand, contended that an organizational role may prescribe whistle blowing; this aspect is incorporated into their definition. Their underlying concern for its inclusion in the definition is that by narrowly

¹⁵⁵ *Ibid.*, at. 90-92.

¹⁵⁶ *Ibid.*, at. 79-80.

¹⁵⁷ *Ibid.*, at. 89-90.

confining the definition of whistle blowing to illegal acts, it will be discouraged rather than encouraged as a means of curtailing organizational wrongdoing.¹⁵⁸

2.4.3. Jubb's definition of whistle blowing:

Although Jubb developed a social science definition of whistle blowing, it is a "restrictive, general purpose definition" that limits the context within which it applies.¹⁵⁹ Even though his definition is narrow, he nonetheless believed that genuine whistle blowing should be promoted because of the social benefits that it produces.¹⁶⁰ According to him, whistle blowing requires a context because it cannot exist in a vacuum. The context is provided by the nature of the organization. Jubb's definition limits the context by: 1) requiring loyalty to be owed by the whistleblower to the organization as the whistle blower has been given access to the organization's confidential information 2) making the organization the source of the wrongdoing and subject of the complaint; and 3) making the organization the target of the disclosure.¹⁶¹

The definition proposed by Jubb is as follows:

"Whistleblowing is a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organization, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organization, to an external entity having potential to rectify the wrongdoing."¹⁶²

In order for the term whistle blowing to have any meaning, Jubb asserted that it must be distinguished from informing, which may be as innocuous as

¹⁵⁸ *Supra*, note 149 at 21-25.

¹⁵⁹ Jubb, *supra*, note 15 at 86.

¹⁶⁰ *Ibid*, at 77.

¹⁶¹ *Ibid*, at 88.

¹⁶² *Ibid*. at 78.

simply conveying a message. Whistle blowing, however, seeks to stop the wrongdoing, because if the intention was otherwise then the disclosure is nothing but folly.¹⁶³ Therefore Jubb believed that the organization that is accused of wrongdoing must be reputable since whistle blowing that cannot harm an organization's good standing in the community is ineffective. The rationale is that an illegal or deeply corrupted organization, such as the Hell's Angels motorcycle club, does not morally deserve loyalty¹⁶⁴ and the disclosure serves only to confirm opinions or facts already known publicly about the organization (namely that it is disreputable).

2.5. Definition of whistle blowing used in this thesis

In this thesis, I will use the term "whistle blowing" narrowly to refer to disclosure of confidential government information by a public servant to any person or organization outside the federal public service of Canada concerning wrongdoing committed by another public servant (i.e., exposure of government wrongdoing to external recipients). It also connotes legitimate whistle blowing in

¹⁶³ *Ibid.* at 88.

¹⁶⁴ Note that this thread of the argument applies only in the context of organizations existing within democratic forms of government. If expanded to include other political regimes, I believe that this argument fails when applied to a dictator such as Col. Muammar Qadhafi of Libya, Kim Chong-il of North Korea, or the late Pol Pot of the Democratic Republic of Kampuchea (Cambodia), because like them or not, these people are/were the legitimate leaders of their countries. It is not like the case that existed in Somalia in the early 1990's where no legitimate central authority existed which exerted control over the entire country. Instead, various warlords ruled over whatever portion of the country they were able to carve out with armed force and dominate through the barrel of a gun. An informer or traitor bearing confidential information against such a regime is still considered a whistle blower (not only in the popular opinion of western democracies but also by the state he discloses information about) even though the leader of the regime is a despot who could not morally require loyalty of his subjects. By expanding the discussion outside the setting of the accountability of organizations in democratic societies, the context is changed so that the discussion becomes meaningless from an employment law perspective.

the sense of disclosure of wrongdoing made in the public interest and not for any other ulterior motive (e.g., revenge, to gain power in an employment relationship, etc). Also, legitimate whistle blowing does not mean that the allegation of wrongdoing is correct, but only that it is made in good faith and is founded upon a reasonable belief that wrongdoing has occurred. The term "reporting" is used to refer to disclosure of confidential government information concerning wrongdoing by a public servant internally within the government bureaucracy. The recipient of the disclosure is another public servant who occupies a higher hierarchial position within the government who ostensibly has the ability (to a greater or lesser degree) to rectify the situation.

In order to capture these elements of whistle blowing, the generic definition I have formulated and will resort to from this point forward may be expressed as follows:

whistle blowing is the voluntary public disclosure made by an organizational member concerning serious wrongdoing committed by the organization.¹⁶⁵

This is, in large part, a rephrasing of the definition proposed by Jubb, provided earlier. It is, I believe, a more streamlined version of his definition yet preserves most if not all the essential attributes or elements of his more expanded definition. Recall that Jubb's definition stated:

"Whistleblowing is a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organization, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which

¹⁶⁵ Note that this definition may be applied to private sector situations as well. It is easy enough to place this definition within the context of whistle blowing in the public sector by replacing 'organizational member' with 'public servant' and 'organization' with 'government'.

implicates and is under the control of that organization, to an external entity having potential to rectify the wrongdoing.”

The elements¹⁶⁶ of Jubb’s definition are: action, outcome, actor, subject, target and recipient. These correspond respectively to: the act of making the disclosure, getting the information onto the public record, by someone with access to the organization’s data or information, concerning illegality or wrongdoing, which implicates the organization, and to an external entity able to correct the situation¹⁶⁷

The contours of the definition are shaped by each of the elements employed. The first reveals that the disclosure (action) is intentional and voluntary, so as to retain the aspect of dissent with some facet of organizational practice or conduct. The loyalty of the whistle blower to the organization must be put into question, for if the whistle blower is compelled to make the disclosure legally or because of the organizational role occupied (e.g., the Auditor General of Canada), then there is no aspect of disagreement or opposition to the organization. Next, although Jubb separated outcome and recipient (getting the information onto the public record and to an external entity able to correct the situation, respectively), I believe that collapsing these two elements into one is more sensible, because for the information to get onto the public record it must necessarily be disclosed to an external recipient. Making the disclosure external to the organization necessarily means that the information is no longer private to

¹⁶⁶ Jubb reviewed in detail seven different empirical definitions of whistle blowing that he concluded were representative of the range of views found in the literature. He extracted from them six separate elements which existed in the definitions to varying degrees, which he then used to develop his own definition of whistle blowing: Jubb, *supra* note 15 at 83 & 85.

¹⁶⁷ Jubb, *supra*, note 15 at 83.

the organization but is out in the public realm and hence a matter of public record, to some degree or other. The person or entity to whom the confidential information is disclosed has to have the potential to correct the situation because, according to Jubb, to make the disclosure to an impotent recipient would be suicidal,¹⁶⁸ especially if the person/entity was unable or unwilling to act upon the disclosed information.

Jubb's description of the actor as a person with 'privileged access to information or data' in essence defines the person as an organizational member, past¹⁶⁹ or present. He included such people as volunteers, unpaid trainees, contractors, consultants, executives and directors as organizational members, so as to broadly include those who have also provided service to the organization outside the traditional employment contract. Although the whistle blower is required to have been an organizational member at some point, no time limit as to when the disclosure must be made is believed to be necessary or desirable.¹⁷⁰ In my view the essential aspect of this element turns on the duty of loyalty owed to the organization by the whistle blower, since when seen from outside the

¹⁶⁸ *Ibid.*, at 88: "Whistleblowing is about stopping, hindering or preventing perceived wrongs. A disclosure method that has negligible prospect of achieving this result is self-destructive folly, not whistleblowing." Jubb explains that disclosure to the media is made so that the publicity generated will exert pressure on the organization to rectify the situation whereas disclosure made to a regulator is done in the expectation that the offensive conduct will be prohibited or legal proceedings initiated against the organization.

¹⁶⁹ The empirical literature on research into whistle blowing has at times generally referred to a former organizational member who blows the whistle on his/her previous employer as an "alumnus whistleblower."

¹⁷⁰ Jubb, *supra*, note 15, at 86.

organization, they are considered to be an 'insider' whose disloyalty is revealed by their betrayal of organizational secrets.¹⁷¹

Although most commentators or researchers have included illegal acts and immoral practices with wrongdoing as separate aspects of the subject matter of whistle blowing, I believe that from a legal perspective this element can more clearly be described as simply 'wrongdoing'. This term is certainly broad enough to include both illegal and immoral acts, since there is no conceptual need to subdivide the element into specific components (instances or examples) in an attempt to exhaustively define the term. Broadly defining the element as 'wrongdoing' will avoid needless repetition of examples, allow for the extension of its ordinary meaning,¹⁷² and avoid a narrowing of the scope of its generality.¹⁷³

As discussed above, Jubb believed that his definition of whistle blowing was an "indictment"¹⁷⁴ of an organization that engages in wrongdoing, and so whistle blowing becomes an act of dissent with the organization as it challenges organizational authority. So that the act of whistle blowing would not be trivialized (as would be the case if it were received in the same way that mere informing is), he proposed that it be restricted to matters of serious wrongdoing.¹⁷⁵ With the definition modified by the requirement that the

¹⁷¹ Jubb however, discussed the duty of loyalty owed by the organizational member within the context of the 'target' element: Jubb, *supra*, note 15 at 86.

¹⁷² P.A. Cote, *The Interpretation of Legislation in Canada* (Cowansville, Quebec: Les Editions Yvon Blais Inc., 1984) at 41-42.

¹⁷³ R. Sullivan, *Driedger on the Construction of Statutes* 3rd ed. (Toronto: Butterworths, 1994) at 29.

¹⁷⁴ Jubb, *supra*, note 15 at 79.

¹⁷⁵ *Ibid.*, at 87.

wrongdoing be 'serious', trivial forms of illegal or immoral conduct are further eliminated from consideration.¹⁷⁶

Another aspect of this element relates to the validity of the allegation of wrongdoing, i.e., whether the wrongdoing must have actually occurred, or whether suspected or potential (anticipated) is to be included also. It is generally believed that encompassing the latter two aspects of wrongdoing allows for a preventive function of whistle blowing as well as providing a standard of proof that a greater number of whistle blowers could meet, by requiring that the allegation be made on the basis of a genuine and reasonable belief.¹⁷⁷

The whistle blowing must be directed at the organization to which the whistle blower belongs or belonged (target element). The organization is required to be the source of the wrongdoing or it must be under the organization's control (accountability) because it is conceptually wrong to impose consequences on an organization for wrongdoing beyond its control. To do otherwise is unfair and diminishes the social value of whistle blowing.¹⁷⁸

¹⁷⁶ This requirement will separate minor transgressions such as taking a pencil home from the office from more important misconduct such as racial discrimination in the workplace. The federal government has used systemic racial and ethnic discriminatory practices in the promotion of public servants into management positions contrary to societal attempts to achieve diversity in the workplace through human rights laws, such as occurred in *National Capital Alliance on Race Relations (NCARR) v. Canada (Health & Welfare)*, [1997] C.H.R.D. No. 3 (No. TD 3/97). Somewhere in between these two extremes lies the case where a municipal police officer misuses information maintained in a computer system for personal gain. In this case, a police officer with the criminal intelligence unit of a municipal police force used the national police information databank (CPIC) to collect information to be used to discredit the wife of his brother-in-law in the couples' divorce proceedings. The police officer's conduct was exposed because he was brazen enough to reveal this information in an affidavit filed with the court in the divorce action. See: C. Hornsey, "Charge looms against officer" *The Windsor Star* (6 May 2003) A1. Website: <http://www.canada.com/windsor/story.asp?id=565D23CE-21CD-4227-98A0-7579944389E8> site last visited May 6, 2003.

¹⁷⁷ Jubb, *supra*, note 15 at 87.

¹⁷⁸ *Ibid.* at 86.

The definition of whistle blowing I have developed contains some important features that distinguish it from various empirical definitions. My definition pertains to confidential information and not policy disagreement, in contradistinction to Bok's definition.¹⁷⁹ The definition is also confined to non-trivial wrongdoing, thereby drawing a boundary between serious & relatively unimportant or inconsequential wrongdoing. In this respect it is more restrictive than Nader's broad definition.¹⁸⁰ Yet it is consistent with the Treasury Board Secretariat's Policy on the Internal Disclosure of Wrongdoing in the Workplace, that relates to four categories of wrongdoing that could be described as 'serious'.¹⁸¹

The disclosure must also be a voluntary act that the employee is under no obligation to perform. So it therefore excludes people who have a legal or organizational obligation to report wrongdoing, such as an internal auditor. This aspect distinguishes my approach from that of Near and Miceli.¹⁸²

By requiring that the disclosure be made publicly by the employee i.e., external to the organization, it is done intentionally and not as a 'leak'. Further, internal reporting of wrongdoing is excluded from the reach of the definition, thereby aligning it with the Treasury Board Policy and the labour arbitration jurisprudence¹⁸³ that require internal reporting of the wrongdoing prior to going outside the organization. In fact, the Treasury Board Policy requires public

¹⁷⁹ See Appendix 1.

¹⁸⁰ Nader, *supra*, note 74.

¹⁸¹ *Supra*, note 40.

¹⁸² See Appendix 1.

¹⁸³ See *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union* (1981), 3 L.A.C. (3d) 140 (*Supra*, note 51).

servants to make their disclosures in conformity with the policy's procedures, upon pain of discipline that may include discharge if they do not do so.

In this chapter whistle blowing has been distinguished from policy criticism utilizing organizational wrongdoing, confidentiality of information, and internal reporting requirements. The nature of whistle blowing and wrongdoing were considered from empirical as well as legal perspectives, resulting in the development of a definition of whistle blowing to be relied upon subsequently.

In the next chapter, the employment relationship between the federal government in Canada and its public servants will be examined. The employee's duty of loyalty to the employer is the cornerstone of the discussion. But part of the analysis will consider the balancing of the public interest in the government's right to insist that it be able to maintain an impartial public service with the public servant's right to freedom of expression as provided by the *Charter*.

CHAPTER 3

WHISTLE BLOWING IN THE EMPLOYMENT LAW CONTEXT

*Mistakes live in the neighborhood of truth and therefore delude us*¹⁸⁴.

In law, *obiter dicta* lives in the neighbourhood of *ratio decidendi* and therefore eludes us. Or, as I attempt to explain in this chapter, the distinction between *obiter dicta* (“*dicta*”) and *ratio decidendi* (“*ratio*”) is not always so clear, since *dicta* has played an important role in the development of the law, sometimes more so than the *ratio* of the case both arose in. That this is so has been pointed out by Cross, who noted that the *dicta* of one case has often functioned as the origin of reasoning in a subsequent case that results in the *ratio* of that later case.¹⁸⁵

The above observation about *dicta* distills into its essence the fate of the decision of the Supreme Court of Canada in *Fraser*. Although *Fraser* was a case that dealt with the criticism of controversial government policies by a federal public servant and has been discussed by the Court in a subsequent case¹⁸⁶ (involving free speech rights of civil servants in relation to political opinion and freedom of association by civil servants in political matters) it is nonetheless a

¹⁸⁴ Rabindranath Tagore (1861 – 1941). Tagore was a Bengali poet and 1913 Nobel Laureate in literature. (see <http://www.creativequotations.com/one/762a.htm>) site last visited January 1, 2003).

¹⁸⁵ R. Cross, *Precedent in English Law*, 2nd ed. (London: Oxford University Press, 1968) at 86. As an illustration, Cross discussed the neighbour principle given by Lord Atkin in his speech in *Donoghue v. Stevenson*, [1932] A.C. 562 at 580. Cross asserted that the neighbour principle does not form part of the *ratio* of that case (Cross at p. 41), although 23 years later in the 4th edition of his work he stated that the principle had thereafter become “pivotal” in negligence law as it developed since then: R. Cross & J.W. Harris, *Precedent in English Law* 4th ed. (Oxford: Clarendon Press, 1991) at 45.

¹⁸⁶ *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69.

case concerning the right of participation in the political process by public servants rather than a whistle blowing case.¹⁸⁷ However, the *dicta* in *Fraser* has been used subsequently by courts and administrative tribunals as the basis of the reasoning to resolve the issues before them, not only of whistle blowing but also of criticism of government policy.¹⁸⁸ And legal commentators have likewise included *Fraser* in their discussions of whistle blowing by public sector employees.¹⁸⁹

The phenomenon of "whistle blowing" involves balancing important interests that have come into conflict. On the one side employees owe a duty of loyalty and confidentiality to their employer; on the other is the employees' (i.e., civil servants') right to freedom of expression guaranteed under s. 2(b) of the *Charter*. Also weighed against the duty of loyalty is the public interest in encouraging employees to come forward with information about their employer's illegal activity or other serious wrongdoing. The legal question is to decide when, if ever, employees can legitimately decide to put their employer's interests second to what they believe is a matter of public interest.

3.1. Duty of Loyalty and Confidentiality

Much has been written and many cases reported about the duty of loyalty / confidentiality owed by employees to their employers in the private sector; much less has been discussed about public sector employees and the nature of those

¹⁸⁷ P.C. Weiler, "The Charter at work: Reflections on the constitutionalizing of labour and employment law" (1990) 40 Univ. Toronto L.J. 117 at 170.

¹⁸⁸ See, for example, *Haydon, supra*, note 6, and *AUPE, supra*, note 24.

¹⁸⁹ Heenan & DeStefano, *supra*, note 43; M. Myers & V. Matthews Lemieux, "Whistleblowing – Employee Loyalty and the Right to Criticize: The Employee's Perspective" in W. Kaplan, J. Sack & M Gunderson (eds.) *Labour Arbitration Yearbook 1991* vol. 2 (Toronto: Butterworth's, 1991) at 216.

duties owed to the government by public servants. The leading Canadian case in this area is the Supreme Court of Canada decision of *Fraser*, which will be discussed in greater detail later.

The duty of loyalty (also known as fidelity) has been described as a comprehensive duty because it encompasses the subordinate duties of confidentiality and good faith. It includes such aspects as

“the obligation to perform lawful work assigned diligently and skillfully; to refrain from any sort of deception related to the employment contract; to avoid any relationships, remunerative or otherwise, giving rise to an interest inconsistent with that of the employer; and, finally, to conduct oneself, at all times, so as not to be a discredit to one’s employer.”¹⁹⁰

Simply stated, the duty of loyalty requires that the interests of the employer are to be put ahead of and advanced over those of the employee in order to avoid any conflict between these two interests.¹⁹¹ The employee must not disclose confidential information in a way that will harm the employer.¹⁹² The employee must exercise restraint in expressing any opposition to government policy¹⁹³ so that no distrust of government is fostered amongst those members of the public which the civil servant must serve.¹⁹⁴ Although some dissent with government policy is permitted, it must be somewhat low-keyed and limited; it may not amount to “sustained and highly visible attacks”¹⁹⁵ of a vitriolic or

¹⁹⁰ OLRC, *supra*, note 45 at 35-36.

¹⁹¹ K. Swan, “Employee Duties of Loyalty and Confidentiality” in A. Ponak & C.L. Rigg (eds.) *Proceedings of the 1986 Labour Arbitration Conference* (Calgary, Alberta: The University of Calgary, 1986) at 118.

¹⁹² OLRC, *supra*, note 45 at 56.

¹⁹³ *Fraser*, *supra*, note 22 at 466.

¹⁹⁴ *Ibid.*, at 469..

¹⁹⁵ *Ibid.*, at 470.

vituperative (hostile or abusive) nature¹⁹⁶ relating to major policies of the government.

The duty of confidentiality relates to information that is not common knowledge and has been received by the employee because of the employment relationship. This information cannot be disclosed or used by the employee without permission to do so from the employer.¹⁹⁷

The right of an employer to demand that his employees owe him a duty of loyalty and confidentiality has traditionally received strong protection from the common law. But for almost 150 years (since as far back as 1856) the courts have also recognized an exception to this obligation where an employee discloses information regarding an employer's wrongdoing that it is in the public interest to be disclosed. In *Gartside v. Outram*¹⁹⁸ the employer brought an action against an employee for breach of confidence. The court stated that:

"The equity upon which the bill is founded is a perfectly plain and simple one, recognised by a number of authorities and most salutary to be enforced, by which any person standing in the confidential relation of a clerk or servant is prohibited, subject to certain exceptions, from disclosing any part of the transactions of which he thus acquires knowledge. But there are exceptions to this confidence, or perhaps, rather only nominally, and not really exceptions. The true doctrine is, that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist."¹⁹⁹

¹⁹⁶ *Ibid.*, at 474.

¹⁹⁷ K.Swan, *supra*, note 191 at 129.

¹⁹⁸ *Supra*, note 120.

¹⁹⁹ *Ibid.*, at 114.

Subsequent court decisions have expanded the scope of the exception to the common law duty of confidentiality and loyalty beyond criminal conduct. For example, Lord Denning, M.R. in *Initial Services v. Putterill*²⁰⁰ stated that:

“It extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others. . . . The exception should extend to crimes, frauds, and misdeeds, both those actually committed as well as those in contemplation”

However the federal government in Canada views the duty somewhat differently, as in its *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*²⁰¹ it defines the duty of loyalty as the “commitment of employees to fulfil [sic] their duties faithfully and honestly and not to disclose confidential information unless authorized to do so.” It appears that the government has adopted such a broad reach to the duty because of what it relates to, namely information that is not common knowledge but that is considered ‘confidential government information’ that is the property of the government.

In the public sector, Swan²⁰² believed that it is clearly in the public interest to disclose wrongdoing where no vital national security or intelligence interests are harmed other than the general duty of confidentiality owed by the civil servant to the government. Yet he also believed that there could be situations where the disclosure of shocking corruption would incidentally damage vital security or defense interests that the information should be suppressed.

²⁰⁰ [1967] 3 All E.R. 145; [1968] 1 QB 396 at 405 (C.A.).

²⁰¹ *Supra*, note 40. Exceptions to the general duty, as mentioned above, are discussed later in Chapter 5.

²⁰² K.P. Swan, “Whistle-Blowing and National Security”, in P. Hanks & J.D. McCamus (eds) *National Security: Surveillance and Accountability in a Democratic Society* (Montreal: Yvon Blais, 1989) at 171.

He further recognized that even where disclosure is justified,

“ . . . the greatest difficulty however, is the degree of exposure of the whistle-blower who may pay very heavily for attempting to further the public interest. The penalty imposed by employers whose secrets are exposed is invariably discharge and whistleblowers cannot always expect to be vindicated in the courts or in arbitration hearings even if the public interest was indeed served by the disclosure. The chilling effect of such consequences is enough to stifle the conscience of many employees.”²⁰³

For public servants, the unauthorized release of confidential information may result in criminal prosecution.²⁰⁴

The issue of how to balance employee loyalty/confidentiality and the public interest has arisen in numerous arbitration decisions involving whistleblowing employees who have brought grievances claiming unjust dismissal or excessive discipline. Generally, arbitrators have recognized that there is a public interest exception to the duty of loyalty that may justify certain disclosures by employees. But they have emphasized that whistleblowers should first raise their concerns through internal channels before disclosing the information publicly.²⁰⁵

In considering reported cases of whistle blowing as discussed above, the main issue before the court or arbitrator is generally whether or not the employee has been unjustly discharged or excessively disciplined.²⁰⁶ Central to this

²⁰³ Swan, *supra*, note 202 at 173.

²⁰⁴ See *R. v. Ponting*, [1985] Crim. L.R. 318.

²⁰⁵ See, for example: *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union* (1981), 3 L.A.C. (3d) 140 at 166; *Re Government of Alberta and Alberta Union of Provincial Employees, Local 6* (1996), 37 L.A.C. (4th) 400 at p. 418; *Re Treasury Board (Employment & Immigration) and Quigley* (1987), 31 L.A.C. (3d) 156 at p. 177, 178; and by implication, *Re Amoco Fabrics Ltd. and Amalgamated Clothing and Textile Workers Union, Local 1606* (1984), 17 L.A.C. (3d) 425 at p. 432.

²⁰⁶ See, for example: *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union* (*supra*); *Re Government of Alberta and Alberta Union of*

inquiry is the consideration of whether or not the employee has exhausted all available (formal and informal) channels within the organization for bringing the alleged wrongdoing to the attention of management so that it can be addressed by the organization itself. Noticeably absent is any detailed account of the aspects of usually informal and sometimes not so subtle retaliation by the employer towards the employee, preceding or constituting discipline or termination.²⁰⁷ The poisoned work environment that may result from the friction between the whistle blower and other employees who steadfastly maintain their loyalty to the organization is another factor that comes into play.

Two years after *Fraser* was decided, the Supreme Court of Canada had the opportunity to elaborate upon the duty of loyalty owed by public servants to the government.²⁰⁸ This arose in circumstances that did not involve whistle blowing, but where a provincial statute prohibited public servants from expressing opinions in public on federal political issues. The civil servants involved were not disciplined but rather brought an application for a declaratory order that the impugned legislation was unconstitutional. Beetz, J. commented that a large public service is necessary to govern a large modern state and that these civil servants exercise, to a degree, political power under the supervision of ministers:

Provincial Employees, Local 6 (supra); *Re Treasury Board (Employment & Immigration) and Quigley* (supra); *Forgie v. Public Service Staff Relations Board* (1987), 32 C.R.R. 191 (F.C.A.); *Petit v. Insurance Corp. of British Columbia* (1995) 13 C.C.E.L. (2d) 62 (B.C.S.C.); *Re Simon Fraser University and Association of University and College Employees, Local 2* (1985), 18 L.A.C. (3d) 361.

²⁰⁷ One notable exception is *Marshall v. Varnicolor Chemical Ltd.* (1991), 8 C.E.L.R. (N.S.) 29 (O.L.R.B.) in the private sector and a recent situation involving federal public servants who sued for damages for harassment in reporting management wrongdoing is *Guenette v. Canada* (A.G.) (2002), 60 O.R. (3d) 601 (C.A.).

²⁰⁸ *Ontario Public Service Employees' Union v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, [1987] S.C.J. No. 48 (S.C.C.) online: QL (SCC) ("OPSEU").

“[TRANSLATION] However, while a public servant always remains a citizen he is also a servant of the State. As the holder of a small part of governmental authority and possessor of exceptional prerogatives at common law, the public servant shares in the exercise of power. This is indeed the reason that the State imposes a duty of loyalty and silence on him. Would not allowing public servants to exercise their political freedoms to the fullest risk compromising the action, even the very existence, of established governments, paralyze political control and waken [sic][read as “weaken”] the confidence of individuals in government, if the public servant were to fail to demonstrate the impartiality expected of the government?”²⁰⁹

However, *OPSEU* was decided on the basis of the division of powers without consideration of the Charter. The Court also refused to decide the case on the principles laid down in *Fraser* because none of the public servants involved had been disciplined.

3.2. Internal Reporting Requirement

In *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union*,²¹⁰ Kerr and Lehnert were senior corrections officers (jail guards) employed by the provincial government. Essentially, they made public statements on an open-line radio talk show criticizing the government over the administration of the provincial jails. They alleged that the murder of an inmate was covered up, that a parolee was found in a motel room with an under-aged girl, that the government put sex offenders back on the street before they had served their sentence, that corrections officials had lied to local elected officials concerning the placement of correctional

²⁰⁹ *Ibid.*, at para. 88, per Beetz, J.

²¹⁰ *Supra*, note 51, (hereafter the “B.C. jail guard case”).

facilities, and that the provincial corrections branch was mixing adult and juvenile offenders together contrary to the *Criminal Code* of Canada.

They were discharged from employment because their actions were viewed by the government as being incompatible with the performance of their duties as public servants. They had been warned about such activity in the past but had ignored the warnings by discussing these allegations against the government on a radio talk show.

The arbitrator who heard their grievance from discharge found that they owed a duty of fidelity to the provincial government which required them to exhaust all informal and formal internal means available to them to correct the situation (as perceived by them to exist) before going public with their concerns. This they failed to do at all, instead taking their allegations directly to the public. As Arbitrator J.M. Weiler stated:

“The duty of fidelity does not mean that the Daniel Ellsbergs and Karen Silkwoods of the world must remain silent when they discover wrong doing occurring at their place of employment. . . . However, the duty of fidelity does require the employee to exhaust internal “whistle-blowing” mechanisms before going public. . . . Only when these internal mechanisms prove fruitless may an employee engage in public criticism of his employer without violating his duty of fidelity.”²¹¹

This appears to be one of the earliest tribunal articulations of the internal reporting requirement that public servants are obligated to follow in their determination to expunge wrongdoing from within government. It was followed and applied in a subsequent arbitration case in Ontario the next year²¹² and has

²¹¹ *Ibid.*, at 92.

²¹² *Re Crown in Right of Ontario (Ministry of Natural Resources) and Ontario Public Service Employees' Union (MacAlpine)* unreported, 241/82, November 18, 1982 as cited by K. Swan,

been shortened to the duty “. . . to exhaust all reasonable opportunities to resolve the issue internally before making matters public.”²¹³ However, it did not form part of the *ratio* in *Fraser* nor was it even referred to in that case, even though it is an essential element of the whistle blowing exception to the duty of loyalty. The reason for its absence in *Fraser*, as mentioned previously, is that the case is about participation in the political process by public servants (criticism of government policy) and not about disclosing confidential information that indicates wrongdoing on the part of government (whistle blowing). This is consistent with my contention that whistle blowing and criticism of government policy by public servants are separate and distinct matters that relate to a public servant's duty of loyalty. The Ontario Law Reform Commission has also expressed a very similar perspective in describing its mandate in its Report.²¹⁴

DeGeorge argued (from a philosophically moral perspective) that an organizational member was required to exhaust internal procedures before going public (using external channels) if the whistle blowing is to be considered morally justified.²¹⁵ Although DeGeorge restricted his discussion of whistle blowing to

“Employee Duties of Loyalty and Confidentiality” in A. Ponak & C.L. Riggs (eds.) *Proceedings of the 1986 Labour Arbitration Conference* (Calgary: University of Calgary Press, 1987) at 131.

²¹³ *Simon Fraser University and The Association of University and College Employees Local 2*, (1985) 18 L.A.C. (3rd) 361 at 368.

²¹⁴ OLRC, *supra*, note 45 at 33. There, the OLRC stated that five specific issues had been set out in the Attorney General's Letter of Reference and that they were classified into 2 general (and therefore separate) topics: one dealing with political activity of civil servants, “including public comment concerning government policy” and the other with “the degree to which Crown employees should be required to preserve confidentiality concerning government information.”

²¹⁵ R.T. DeGeorge, “Whistle Blowing” in T.I. White (ed.), *Business Ethics: A Philosophical Reader* (Toronto: Maxwell MacMillan Canada, 1993) 516 at 525. This is DeGeorge's second condition of three which, if met, transforms whistle blowing from an act of disloyalty to an organization to one that is morally permitted. The moral permissibility of whistle blowing, for DeGeorge, rests upon the fulfillment of three conditions: “1. The firm, through its product or policy, will do serious and considerable harm to the public, whether in the person of the user of

nongovernmental organizations (i.e., the private sector), the theoretical criteria can be applied, with necessary modifications, to the public sector. Doing so will assist in clarifying the conceptual foundations upon which the courts and administrative tribunals have injected certain requirements or qualifications into the public servant's ability to make disclosures of wrongdoing external to the organization.²¹⁶

The arbitrator who heard Lehnert's and Kerr's grievance from dismissal also held that their allegations were misrepresentations of the truth. Just cause existed for the employer to discipline the employees; discharge was the government's solution. Kerr's and Lehnert's conduct was found to be a gross deviation from the standard of behaviour which the Corrections Branch was legitimately entitled to demand of its employees. The grievances were therefore denied.

its product, an innocent bystander, or the general public. 2. Once employees identify a serious threat to the user of a product or to the general public, they should report it to their immediate superior and make their moral concern known. Unless they do so, the act of whistle blowing is not clearly justifiable. 3. If one's immediate superior does nothing effective about the concern or complaint, the employee should exhaust the internal procedures and possibilities within the firm. This usually will involve taking the matter up the managerial ladder, and, if necessary – and possible – to the board of directors.” If a further two conditions proposed by DeGeorge are satisfied, then in his view the act of whistle blowing becomes morally obligatory: “4) The whistle-blower must have, or have accessible, documented evidence that would convince a reasonable, impartial observer that one's view of the situation is correct, and that the company's product or practice poses a serious and likely danger to the public or to the user of the product; 5) The employee must have good reason to believe that by going public the necessary changes will be brought about. The chance of being successful must be worth the risk one takes and the danger to which one is exposed.”

²¹⁶ For example, the Alberta Court of Appeal in *AUPE*, *supra* note 24 at para. 16 identified the internal reporting requirement as central to the Alberta government's position, but nevertheless stated that the central issue in the appeal was whether the duty of fidelity owed by the public servant to the government was a reasonable limit on the public servant's freedom of expression under s. 1 of the *Charter*. The Court implicitly found that the disciplinary measures instituted by government infringed the employee's right to freedom of expression even though the employee did not utilize internal reporting mechanisms before going outside the organization with his criticism of government policy.

As the arbitrator found the grievors' complaints to be misrepresentations of the truth, it follows that their allegations about misconduct on the part of government officials are more properly construed as false accusations of wrongdoing. The initial warning given to them not to continue with such behaviour and their subsequent discharge cannot be properly viewed as retaliation for public disclosure about organizational wrongdoing since their accusations were found to be distortions of the truth; no wrong doing had occurred so the response by management was not retaliatory. Their conduct violated the duty of loyalty and confidentiality owed to their employer and they were properly disciplined through discharge.

The internal reporting requirement is seen then as a reasonable element of the justification for external whistle blowing since it affords the organization itself the first opportunity to correct the situation early and to be able to minimize any adverse consequences that may have resulted from it.

3.3. Public Service Staff Relations Board

In the federal public service context in Canada, an aggrieved civil servant who has been retaliated against by management (under the guise of discipline) for whistle blowing usually files a grievance²¹⁷ with the person designated to address grievances within the grievance process established by the *Public*

²¹⁷ But where a federal civil servant has been harassed by management, he or she may bring a proceeding in the superior court of a province seeking general damages and loss of pension earnings, amongst other things, instead of commencing grievance proceedings under the *Public Service Staff Relations Act*. Where the civil servant's complaints do not fall within the class of grievances referable to adjudication pursuant to s. 92 of the *PSSRA*, the exclusive jurisdiction model of dispute resolution involving labour relations does not apply. See *Guénette v. Canada (Attorney General)* (2002), 60 O.R. (3d) 601 (Ont. C.A.) (leave to appeal to Supreme Court of Canada not filed as of August 8, 2003 (12 months after Ont. C.A. judgment)).

*Service Staff Relations Act*²¹⁸ and Regulations²¹⁹ made pursuant to that statute. Once started, the employee is required to pursue the grievance all the way up to the final level in the grievance process, since by not continuing to the final level after the grievance is initiated the employee is deemed to have abandoned the grievance.²²⁰ After the employee has exhausted the grievance process up to the final level and is still not satisfied with management's answer to the grievance, the employee *may* refer the grievance to adjudication before the Public Service Staff Relations Board ("the Board").²²¹ However, instead of going to the Board, the civil servant may instead bring an application for judicial review of the designated person's decision at the final level of the grievance process to the Federal Court Trial Division,²²² provided that no proceedings have been commenced before the Board.²²³

In the kind of grievance with which this thesis is concerned, civil servants seek to set aside disciplinary action taken against them (letter of instruction/reprimand, suspension with or without pay, discharge, etc.) for purportedly having breached the common law duty of loyalty owed to the government. The basis for the disciplinary action in such cases is that the employee has publicly criticized a government policy (policy criticism) and/or

²¹⁸ *Public Service Staff Relations Act*, R.S.C. 1985, c. P-36 ("PSSRA")

²¹⁹ *P.S.S.R.B. Regulations and Rules of Procedure, 1993*, SOR/93-348.

²²⁰ *Ibid.*, s. 75(2).

²²¹ *P.S.S.R.A.*, s. 92(1).

²²² *Federal Court Act*, R.S.C. 1985, c. F-7, s. 18.1. Although the designated person at the final level of the grievance is a member of senior management of government and provides the government's answer to the grievance, that person falls within the definition of "federal board, commission or other tribunal" in s. 1 of the *Federal Court Act*. See also *Haydon v. Canada*, *supra*, note 6.

²²³ Judicial review of a decision of the Board is within the jurisdiction of the Federal Court of Appeal: *Federal Court Act*, R.S.C. 1985, c. F-7, s. 28(1)(i).

disclosed some confidential government information relating to issues of public interest to someone outside the organization (whistle blowing). The employee many times raises the *Charter's* protection of freedom of expression as a defense. The Board's evaluation of "free speech" rights are performed within the context of the common law duty of loyalty and the exceptions to it as enunciated by the Supreme Court of Canada in *Fraser*.

Nevertheless, federal public servants continue to bring grievance proceedings before the Board and raise freedom of expression as a defence, where it is treated within the context of the common law duty of loyalty and the exceptions to it as enunciated by the Supreme Court of Canada in *Fraser*.²²⁴ However, as mentioned previously, if civil servants seeks to litigate free speech rights within a *Charter* framework, then the Board is bypassed and an application for judicial review to the Federal Court (Trial Division) is a quicker method of addressing the situation. Margaret Haydon used such a strategy to contest her 'letter of instruction' that she viewed as disciplinary in nature as a result of her contact with the media regarding problems within her department at Health Canada²²⁵ (discussed subsequently).

3.4. Labour Arbitration Jurisprudence

Many principles of the law shaping organizational dissent as it relates to civil servants have been developed through the cases decided by labour arbitration adjudicators. The internal reporting requirement discussed previously

²²⁴ See, for example, *Scott v. Canada Customs and Revenue Agency*, [2001] C.P.S.S.R.B. No. 60 (P.S.S.R.B.) online: (CSBB).

²²⁵ *Haydon*, *supra*, note 6.

is only one important element; others will now be examined: the accuracy of the allegation of wrongdoing, pre-emptive gag orders and retaliation by management against the whistle blower.

In *Canada Post Corporation and Canadian Union of Postal Workers (Varma)*²²⁶ the employee (Varma) made allegations of wrongdoing against the employer, the Canada Post Corporation. Arbitrator Swan was asked, as a preliminary matter, to decide whether the truth of the allegations was relevant to his ultimate determination of whether or not Varma's discharge from employment was the appropriate and acceptable disciplinary action. As an interim matter, he was unwilling to decide the issue, although he was clearly leaning towards the view that the accuracy of the allegation of wrongdoing would not be conclusive of whether the employee was properly discharged. He was unwilling to decide the issue in an abstract or theoretical manner at a preliminary stage without reference to the particular facts of the case - something that would come out at the full hearing.

He did however, refer to *Re Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees' Union*²²⁷ (the B.C. jail guard case) wherein the adjudicator listed the factors to be considered in cases where the employee had accused the employer of wrongdoing, including whether the statements made by the employee were true or not:

"In my view, each case must be decided on its own facts, taking into account among other factors, the content of the criticism, how confidential or sensitive was the information, the manner in which the criticism was

²²⁶ (1984), 19 L.A.C. (3d) 356.

²²⁷ *Supra*, note 51 at 161.

made public, whether the statements were true or false, the extent to which the employer's reputation was damaged or jeopardized, the impact of the criticism on the employer's ability to conduct its business, *the interest of the public* in having the information made public and so forth." (emphasis added).

This line of reasoning has been expressly adopted by other arbitrators subsequently.²²⁸

The issue of a pre-emptive 'gag order' in the form of a warning letter was at issue in *Clough v. Treasury Board*.²²⁹ Clough was a Customs Officer and President of his local union of customs workers. A union newsletter indicated that Clough would talk at a union meeting about a week or so later on the topic of the impact upon consumers of the proposed Free Trade Agreement (FTA) between Canada and the USA. Shortly before the meeting was to begin, Clough's District Manager gave him a letter which forbade him from talking about the aspect of the FTA which the union newsletter had announced. As a result of the letter, Clough did not talk about the FTA as planned. About a month later he was also formally disciplined for involvement with the announcement that had appeared in the union newsletter. He grieved the matter before the PSSRB. The adjudicator determined that union Clough's involvement with the announcement in the union newsletter and the intended talk regarding the FTA were matters that came within the third exception formulated in *Fraser*, namely benign criticism. Accordingly, the disciplinary action against him was reversed.

²²⁸ *Re Crown in right of Ontario (Ministry of Natural resources) and Ontario Public Service Employees Union* (MacAlpine), unreported, 241/82, November 18, 1982 (Grievance Settlement Board, Joliffe).

²²⁹ [1989] C.P.S.S.R.B. No. 49 (PSSRB) online: QL (CSBB) (PSSRB File No. 161-2-511).

Although the FTA had not been passed into law at the time, it was a topic of considerable public debate. However, the adjudicator at Clough's grievance hearing did not invoke any connection to the union newsletter or Clough's proposed talk concerning the FTA with matters of public interest, even though the subject matter of the proposed talk could be fairly characterized as such. The adjudicator stated that if Clough had spoken at the meeting about the FTA then he would have had to assess the disciplinary letter of reprimand in light of what Clough would have actually said. It appears that on matters of public interest or benign criticism that any pre-emptive disciplinary action by management to try and muzzle the civil servant will be reversed.

Likewise, management retaliation against a civil servant for testifying under oath at the grievance hearing of a colleague will be set aside and the transgressor disciplined.²³⁰ In that case McKee summonsed Marken to testify under oath at his grievance hearing regarding disciplinary action against him. Marken's evidence assisted McKee in his grievance, which was eventually allowed in part.²³¹ Within two months of testifying in support of McKee, Marken's acting position was terminated and his position was about to be declared surplus (i.e., he was to be laid off). The adjudicator at Marken's grievance hearing found that Carson, on behalf of the employer, had breached s. 8(2)(a) of the *Public Service Staff Relations Act* by terminating Marken's acting position and

²³⁰ *Marken and Carson*, [1992] C.P.S.S.R.B. No. 172 (PSSRB) online: QL (CSBB)(PSSRB file No. 161-2-605).

²³¹ *McKee and Treasury Board (Fisheries and Oceans)*, [1991] C.P.S.S.R.B. No. 60 (PSSRB) online: QL (CSBB)(PSSRB file no. 166-2-21002).

subsequently laying him off for the sole reason that he testified pursuant to a summons at McKee's grievance hearing.

Marken's testimony basically portrayed management in a negative way as it was Marken's view that management acted irresponsibly in placing McKee in a situation which resulted in disciplinary action being taken against him. No wrongdoing per se by management was involved in the McKee grievance, but the wrongdoing involved in Marken's situation was the retaliation by management against him for testifying under summons at a grievance hearing to the effect that called into question the judgment, if not the competence of management. Embarrassment and the consequent anger at Marken seemed to have been the motivating factors that triggered retaliation against him.

Where an employee makes allegations of wrongdoing that are not substantiated and does not exhaust all internal redress mechanisms regarding his complaint before taking his criticism external to the organization, the employee's discharge will be upheld.²³² If the employee believes that management has not dealt with his complaints of harassment and mistreatment in a satisfactory manner, he must still exhaust all internal redress processes before going public. And when he does go public, his disclosure of the information must not be in such a highly visible manner so that what starts as benign criticism becomes vitriolic. If the allegations of wrongdoing cannot be substantiated, they will be treated as misleading. Given all of these circumstances, discharge is appropriate.

²³² *Scott v. Canada Customs and Revenue Agency*, [2001] C.P.S.S.R.B. No. 60 (PSSRB) online: QL (CSBB) (PSSRB file no. 166-2-29740).

3.5. Ratio decidendi and obiter dicta in Fraser v. PSSRB

Before I analyze the decision in *Fraser*, I believe that it is useful to briefly review the interplay between a decision's elements of *ratio decidendi* (*ratio*) and *obiter dicta* (*dicta*). Ordinarily under the rules of *stare decisis*, trial judges are bound to follow only the *ratio* of a higher level court within the same jurisdiction when considering the judgments relevant to the case at hand. But with respect to Supreme Court of Canada decisions, *dicta* may play an equally important role. The reason is that it has been stated, in certain circumstances, that *dicta* of Supreme Court of Canada decisions "constitutes the applicable law"²³³ on a point and which lower level courts should follow, even if the courts are not strictly bound to follow the decision.²³⁴

The 'certain circumstances' referred to above have evolved from a number of Supreme Court of Canada decisions²³⁵ that will determine when an *obiter dicta* statement of legal principle is to be "regarded as declaratory of the law".²³⁶ These conditions include the fact that the *dicta* must originate from at least a majority of the Court (a unanimous decision would be preferable) and it must be

²³³ *R. v. R.J.S.*, [1995] 1 S.C.R. 451 at 471, [1995] S.C.J. No. 10 (S.C.C.) online: Q.L. (SCC) at para. 5 per Lamer, C.J.: "Even if, strictly speaking, the remarks of the majority [of the Supreme Court of Canada] in that case are *obiter dicta*, the statement in O'Hara represents the well-considered opinion of the Court and constitutes the applicable law on this point."

²³⁴ *Ottawa v. Nepean Township et al.*, [1943] 3 D.L.R. 802 at 804, per Robertson, C.J.O.: "What was said there may be *obiter*, but it was the considered opinion of the Supreme Court of Canada, and we should respect it and follow it, even if we are not strictly bound by it."

²³⁵ *R. v. Sellars*, [1980] 1 S.C.R. 527 at 529-30; *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396; *Schwartz v. The Queen*, [1977] 1 S.C.R. 673; and *R. v. R.J.S.*, *supra*.

²³⁶ *R. v. Hynes (D.W.)* (1999), 177 Nfld. & P.E.I.R. 232 at para. 34, per Green, J.A. Although this passage was written in dissent, it is accepted as an "accurate synopsis of the criteria for attributing binding effect to *obiter* pronounced in the Supreme Court of Canada": *Newfoundland Association of Provincial Court Judges v. Newfoundland*, [2000] N.J. No. 258 (Nfld. C.A.) online: Q.L. (NJ) at para 334, per Marshall, J.A. ("*Nfld. Association*").

evident that: 1) the Court considered it desirable to express its opinion on the matter; 2) the matter was fully argued before the Court; and 3) the comments constitute the fully considered opinion of the Court.²³⁷

Therefore, all the criteria must be satisfied in order for the *dicta* of a Supreme Court of Canada decision to have a binding effect on lower level courts. In addition, the application of the *dicta* must not perpetrate an injustice in the case to which it is being extended.²³⁸ The problem arises, however, when one of the three criteria is either missing or has not been completely satisfied. In *Nfld. Association*²³⁹ Marshall, J.A. believed that in such a situation all criteria required for the binding effect of *dicta* on lower level courts would not have been met so that the court should not extend *dicta* to the case before the court, because applying *dicta* where in theory it should not be so applied would be to perpetuate an injustice.

Marshall, J.A.'s dissenting opinion is lucidly powerful in its accordance with theory. But this did not prevent the majority, in its judgment delivered by Green, J.A., to simply sweep aside theoretical considerations when faced with a 'floodgates of disregarding *obiter dicta*' argument. The majority believed that if theory justified not following the *dicta* of a Supreme Court of Canada decision, then the door would be open for lower level courts to ignore a pronouncement by the Court whenever they believed the Court was not sufficiently rigorous in its

²³⁷ *R. v. Hynes, supra*, note 236.

²³⁸ *Nfld. Association, supra*, note 236, per Marshall, J.A at para. 337 & 384.

²³⁹ *Ibid.*, at para. 337 & 384.

analysis on the issue involving *dicta*.²⁴⁰ The majority of the Nfld. C.A. was not prepared to allow this to happen. Where *dicta* was “clearly bound up with and treated as an integral part of the analysis employed by the majority” of the Supreme Court of Canada, its intention satisfied the third criterion (that the comments constitute the fully considered opinion of the Court) so that the *dicta* pronouncement should be considered a declaration of law binding on lower courts.²⁴¹ However, this reasoning is not persuasive because if a lower level court disregarded Supreme Court of Canada *dicta* as not binding when it actually was binding, then this legally incorrect decision could be appealed to an appellate court on that very question of law, up to the Supreme Court of Canada itself, if necessary.²⁴²

²⁴⁰ *Ibid.*, at para 87, especially note 7.

²⁴¹ *Ibid.* “With the greatest of respect, I do not believe it is open to a court to disregard the rulings (or obiter) of the Supreme Court of Canada on the ground that they were made per incuriam in cases where the lower court is merely of the opinion that some fundamental aspect of the Supreme Court's ruling did not receive “due weight” or was not “fully considered.” Generally, the per incuriam doctrine is applied as a justification for a court not following one of its own previous decisions. It does not justify a refusal by a lower court to follow the decision of the highest appellate court. [citations omitted] Even if it can in theory be applied to justify not following the previous decision of a higher appellate court, to allow such an exception to be applied because “due weight” was not given to a particular factor would open the door to courts ignoring Supreme Court pronouncements simply because they think the reasoning underlying the pronouncement is inadequate or poorly considered. So long as it is apparent that the decision was intended to amount to a fully considered opinion - even if in the opinion of another court the reasoning underlying the opinion is inadequate - that is sufficient to make the obiter statement binding on lower courts. The inquiry, therefore, is not whether the court may have left something out of its analysis or gave less than due weight to some matter, but rather, whether the court was deciding, with the benefit of argument, to express its opinion, however flawed, on the issue in question. . . . In such a situation it is not, with respect, open to a lower court to reject the analysis employed by the higher court even if the lower court is dissatisfied with the higher court's analysis or believes it to be wrong or ill-conceived. That would be an all-too-easy way to avoid the operation of the Sellars principle. The exception would effectively subsume the rule. Accordingly, regardless of whether one agrees with or can criticize the rationales for the ruling, (including obiter) in No. 1, [the case under discussion] it is nevertheless binding.”

²⁴² For an example of an appeal to the Supreme Court of Canada on this very area of law, see *R. v. Entreprises W.F.H. Ltee.* [2001] S.C.C.A. No. 625 (S.C.C.) online: QL (SCCA). The catch lines

With the analytical framework now established for analyzing a judicial decision so that the *ratio* can be separated and distinguished from the *dicta* (where it exists), I turn to the *Fraser* decision of the Supreme Court of Canada to analyze its constituent components. Because the *Fraser* decision has had such a pervasive influence on the analysis of policy criticism and whistle blowing in cases brought before various courts, tribunals and arbitration boards, it is therefore necessary to carefully examine this decision of the Supreme Court of Canada.

3.6. The *Fraser* decision

The Supreme Court of Canada's decision in *Fraser*²⁴³ has been described as "a watershed on the duty of loyalty"²⁴⁴ by a prominent labour arbitrator and so deserves close scrutiny, especially of the important facts. Neil Fraser was Group Head of the Business Audit Division at Revenue Canada in Kingston, Ontario and supervised four to six auditors and determined which businesses would be audited (i.e., he exercised a managerial function). He personally opposed two major controversial policies of the federal government: conversion from the Imperial system of measurement to the metric system (metrification) and enshrining the *Charter of Rights and Freedoms* in Canada's constitution. Neither

of the S.C.C.A. decision phrased the issue in this area of law thus: "Whether the Court of Appeal erred in holding that it was bound by an obiter dictum of this Court and by stare decisis to conclude that an impugned provision was justifiable under s. 1 of the Charter?" This was an application for leave to appeal from a decision of the Quebec Court of Appeal. The leave application was dismissed without reasons on December 12, 2002.

²⁴³ *Supra.*, note 22. The judgment of the Court was delivered by Dickson, C.J.

²⁴⁴ K. Swan, *supra*, note 191 at 125.

of these two policies related to the work performed by the Business Audit Division at Revenue Canada.

In the latter part of January 1982, Fraser initially expressed his views publicly on metric conversion when a letter he wrote to the editor of the local newspaper was published, criticizing the government's metrification policy. A week later he attended a city council meeting, the tenor of which opposed the government's metrification policy. During the council meeting, he held a placard expressing his views opposing the metrification policy and was interviewed by a newspaper reported. The next day a local newspaper article on the topic briefly quoted his views on that policy. (This set of facts is referred to as Fraser's first policy criticism incident).

Starting about one week later (February 1, 1982) Fraser again attended a city council meeting where he criticized not only the government's metrification policy, but also its policy to entrench the *Charter of Rights and Freedoms* in Canada's constitution. He subsequently appeared on an open line radio talk program in Kingston and criticized both government policies. In addition, he made offensive comments about then Prime Minister, Pierre Trudeau. Thereafter, Fraser's criticism of the two government policies became more frequent and intensive, escalating to appearances on television programs (local and national). He increased his comments to the level of attacks upon the Prime Minister, making them personal and vicious; he compared the Canadian government to the Nazi regime in Germany during World War II and the ruling

Polish government (in 1982). He was involved in trying to organize a national pamphlet and telegram campaign to protest the government's metrification and *Charter* policies. (This set of facts is referred to as Fraser's second policy criticism incident).

Mr. Fraser was disciplined for his first policy criticism incident (a three day suspension without pay) as well for the second policy criticism incident (a ten day suspension from work without pay) and shortly after the second suspension period expired he was discharged from employment with the federal public service in late February, 1982. He disputed the disciplinary action relating to both suspensions and the termination of his employment. The adjudicator with the Board who heard the matter decided that the first suspension was not justified and reversed it; the second suspension and the discharge were found to be appropriate in the circumstances. On an application for judicial review of the Board's decision, the Federal Court of Appeal upheld the Board's decision.

The *ratio* in *Fraser* concerning criticism of government begins²⁴⁵ with the Supreme Court of Canada describing the role of the executive branch of government as being responsible for the administration and implementation of the policy that is determined and articulated by the legislative branch of government. The Court then focuses upon a specific part of the executive - the federal public service in Canada, and the essential characteristics of the people employed within it to ensure that it operates in an impartial and effective manner. The Supreme Court of Canada describes these traits as knowledge, fairness,

²⁴⁵ *Fraser, supra.*, note 22 at 470.

integrity and loyalty. It is this last facet of a civil servant's professional personality that the essence of the *ratio* concerning criticism of government deals with in that case.

With respect to a public servant's loyalty owed to the government, Dickson, C.J. delivered the judgment of the Court and had this to say (which I contend forms an important part of the *ratio* of the decision):

*"As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government."²⁴⁶ (emphasis added identifying the *ratio* which pertains to policy criticism on the facts of the case and the underlined part identifying the *dicta* which pertains to both wrongdoing and policy criticism of a kind not before the court).*

Clearly, the above paragraph containing the *ratio* also contains the *dicta* which, I believe, has been the origin of much conceptual confusion resulting in a bad analytical framework used subsequently to resolve issues of whistle blowing and government policy criticism by public servants. The reason for this confusion is likely the explanation given by Green, J.A. in *Nfld. Association* discussed

²⁴⁶ *Fraser, supra*, note 22 at 470.

above: that the *dicta* was “clearly bound up with and treated as an integral part of the analysis employed by the majority” of the Supreme Court of Canada, (thereby satisfying the third criterion of binding *dicta*). In relation to the facts of the case, I believe that the *ratio* (which relates to policy criticism) can be extracted to read:

“As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, . . . the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, . . . it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government.”

The *dicta* (which I contend relates to whistle blowing as well as a new category of policy criticism) then can be expressed as being composed largely of the excised portions from the same paragraph:

“A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others . . .” (emphasis added identifying the whistle blowing part of the *dicta* and the underlined segment identifying a specific category of policy criticism part of the *dicta*).

The ‘for example’ in this passage indicates an illustration, which clearly identifies what follows as *dicta* according to Black’s Law Dictionary, as noted previously.

I believe that the illustrative example in the above passage relating to 'illegal acts' is the only part of the judgment of the Court that pertains to whistle blowing as it is concerned with wrongdoing; it does not involve government policy in any way whatsoever. I do not believe that it is possible to speak of a government policy that promotes illegal acts. Indeed, it would be a self negation for a democratic government to adopt a policy to intentionally breach the very laws it creates and expects society and all of its individual members to obey. Therefore, illegal acts cannot be treated precisely the same as harmful policies in terms of the conceptual framework used to address the issue.

On the other hand, the part of the *dicta* relating to harmful policies (i.e., those that have the effect of jeopardizing life, health or safety) does not, in my view, relate to whistle blowing because there is no intentional wrongdoing per se involved in policies that have harmful effects or consequences that were unforeseen. Instead, it relates to criticism of a category of policy, namely those whose consequences jeopardize or endanger people in some way. This view supports the Supreme Court of Canada's approach in resolving Fraser's appeal, as he was not concerned with government wrongdoing, but with his freedom to publicly criticize government policy with which he disagreed. The Court simply identified, in *dicta*, another category of policy criticism which would constitute an exception to the duty of loyalty owed to the government (in addition to the benign policy criticism category).

The words of Schiemann, L.J. in his judgment delivered 13 years after the Supreme Court of Canada decided *Fraser* in 1985 has captured the essential

problem of that case in the years since it was decided: "This is not a case of disclosing iniquity. It is not a whistleblowing case."²⁴⁷ I say 'problem' not in the sense that the case was wrongly decided by the Supreme Court of Canada on the substantive merits, but 'problem' in the sense that part of what was offered as the *ratio* is actually *dicta* to the actual issue before the Court. Neil Fraser was dismissed from his position with the federal government because he not only went too far in expressing his political opinion (criticism) of federal government policies, but he also attacked the government itself. No element of what I contend to be the *sine qua non* of whistle blowing, namely wrongdoing, existed in that situation, as Fraser's dispute with the government over its metrification and *Charter* policies did not contain any allegation of wrongdoing. In this respect, my view of the case that it was not about government wrongdoing and exposing it (whistle blowing) but rather with the freedom of expression of civil servants re: political opinion (criticism of government policy) coincides with that of Professor Paul Weiler, who stated that the case "dealt with the right of public employees to participate fully in the normal *political process* " by "speaking out on issues in the *political arena*." ²⁴⁸ (emphasis added). In other words, *Fraser* is about the participation of civil servants in the political process via criticism of government policy, and not about whistle blowing.

It is important to observe that Fraser criticized government *policy* and not any specific conduct or acts of any individual(s) that could be characterized as

²⁴⁷ Schiemann, L.J. in *Camelot plc v. Centaur Communications Limited*, *supra*, note 40.

²⁴⁸ P.C. Weiler, "The Charter at work: Reflections on the constitutionalizing of labour and employment law" (1990) 40 U. of Toronto L.J. 117 at 170.

wrongdoing. Fraser opposed the government's policies of metrification and entrenching the *Charter* in Canada's Constitution. He disagreed with the political judgment of his masters on these policies and on that basis he vehemently opposed the policies (and on one occasion the prime minister). Further, these policies, while perhaps controversial and divisive of the country politically, were not inherently harmful since they did not endanger public health or safety or the environment. The policies at issue in *Fraser* are different from and can be contrasted with a (hypothetical) policy permitting the unrestricted importing of beef from countries with mad cow disease. The latter might be seen to put the health of Canada's beef eating population at risk of contracting variant Creutzfeldt-Jakob disease (invariably fatal), a human disease that has been linked to mad cow disease (bovine spongiform encephalopathy)(also invariably fatal).²⁴⁹ Neither of the two policies that Fraser opposed involved any aspect of wrong doing whatsoever, nor would the beef importation policy (if implemented), although the latter could have potentially harmful (health) consequences to the public that the former would not. What all of them have in common is the exercise of political judgment that could be called into question. However that is not a task for a civil servant. I believe the *Fraser* decision of the Supreme Court of Canada stands for the proposition that it is not acceptable for

²⁴⁹ Centers for Disease Control and Prevention, National Center for Infectious Diseases – BSE and CJD Information and Resources. Website: <http://www.cdc.gov/ncidod/diseases/cjd/cjd.htm>. Site last visited January 22, 2003.

public servants to criticize the political judgment of their masters. Those that do will be disciplined for it.²⁵⁰

I further contend that applying the *dicta* of *Fraser* to circumstances involving government wrongdoing (rather than restricting it to policy criticism) is not a sound approach to dealing with whistle blowing situations. Whistle blowing situations are better handled using a different line of reasoning that has been developed through labour jurisprudence. That Dickson, C.J. did not distinguish policy criticism from whistle blowing does not make his comments incorrect per se, as he identified a pre-existing exception and created two new exceptions to the common law duty of loyalty.²⁵¹ It was not necessary for the Supreme Court of Canada to exhaustively map out the boundaries between the activities of

²⁵⁰ See, for example, *Haydon v. Treasury Board (Health Canada)*, [2002]C.P.S.S.R.B. No. 5 (PSSRB file no. 166-2-30636)(Decision of J.W. Potter, Vice Chairman dated January 25, 2002). Haydon was a veterinary drug evaluator with Health Canada who was suspended for speaking to the media in February 2001 about a dispute between Canada and Brazil. The dispute concerned Canada suspending the importation of Brazilian beef allegedly in retaliation for the awarding of a contract to manufacture aircraft to a Brazilian firm instead of to a Canadian firm. According to newspaper quotes, Haydon stated “In my opinion, I don’t think there’s any difference [in risk] between Brazilian beef and Canadian beef. With the aircraft dispute, it’s more a political move than a health one for the Canadian government.” (at paragraph 2 of decision). Haydon was initially suspended for 10 days for her comments to the press. On appeal, the suspension was reduced to five days. Adjudicator J.W. Potter stated (at paragraph 89): “This would, I believe, send an appropriate message that public criticism of Government policy, in these circumstances, was not appropriate and hopefully would be sufficient to be corrective.”

²⁵¹ They are: exposing illegal government activity (iniquity), criticizing harmful policies and benign policy criticism, respectively. The first exception has its origins in the English case of *Gartside v. Outram supra*, note 120, so the Supreme Court of Canada’s inclusion of it here does not really inform the discussion of a civil servant’s duty of loyalty in any fundamentally new manner. The second exception re: criticizing harmful policies is really a new category of policy criticism (much like a government’s financial restructuring policy would be a separate category of policy criticism). And the third exception of benign criticism is really a bright line test which limits the degree or extent of acceptable criticism of government policy by a civil servant since it determines how much is too much criticism of policy and does not relate to any kind of policy category or specific substantive policy per se (harmful, financial restraint, taxation of offshore property, etc).

whistle blowing and policy criticism when it formulated the additional categorical exception since that particular aspect of the duty of loyalty was not before the Court. I believe that the problem arises when lower courts and administrative tribunals confuse whistle blowing and policy criticism, not only by requiring the internal reporting requirement to be an element of policy criticism (where it was not required by the Supreme Court of Canada in *Fraser*), but also by classifying situations of wrongdoing as 'harmful policies' where government practices, not policy implementation, is involved and then treating it as if it was criticism (as I believe occurred in *Haydon* by the Federal Court (discussed later)).

3.7. Balancing of Interests versus Bright Line Test

I now turn to discuss some of the aspects and implications of the *Fraser* decision (both generic and issue specific) and attempt to distinguish whistle blowing and policy criticism. The generic aspect relates to which *kind* of test (balancing of interests or bright line²⁵²) to use in the circumstances (i.e., under what conditions each test is appropriate) and its advantages and disadvantages. The specific aspect relates to discrete facets of the Supreme Court of Canada's decision based upon the particular facts of the case.

Although the Supreme Court of Canada used a balancing of interests approach in *Fraser*, comments made by Dickson, C.J. in that case seem to

²⁵² A bright line test is a generic term which does not connote any specific test per se. Rather, it functions to mark the boundaries of a discrete realm of issues or activities by setting a limit upon what is permissible or accepted. It is the equivalent in U.S. and Canadian law of the 'floodgates of litigation' terminology used in British legal discourse: *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1989] F.C.J No. 320 (F.C.T.D.) online: QL (FCCB) (hereafter "CNR - FCTD") per Addy, J.

suggest that an alternative approach utilizing a bright line test is ostensibly applicable in that particular situation as well.²⁵³ However more recent judicial developments appear to call into question those comments as the caselaw suggests that these tests are mutually exclusive, that is, the conditions under which one test is appropriate are considered to be inappropriate for use of the other test. It therefore appears that the environmental conditions within which the issue arises before the court will regulate the use of one test over the other, despite the advantages a particular test has to offer.

The conditions which favour a bright line test appear to be somewhat limited. As Steel, J.A stated: "there are no bright lines" in situations with "conflicting values" that necessitate "a complex balancing exercise."²⁵⁴ He referred to Gonthier, J. in *R. v. Schmantz* to the effect that it is not always easy to determine the occurrence of an event against the backdrop of "a wide spectrum encompassing the varying degrees of legal jeopardizes."²⁵⁵ In other words, in very broad grey areas of the law involving conflicting values a bright line test is unsuitable and will yield to a balancing of interests test whose performance is complex. And Iacobucci, J. expressed a similar opinion where

²⁵³ *Fraser, supra*, note 22 at 460: "He [referring to the PSSRB adjudicator who made the initial decision] recognized that a line had to be drawn, or a balance reached, between Mr. Fraser's freedom of expression and the desire of the Government to maintain a public service characterized by professionalism and impartiality." and at 468: "That brings me to the crucial question: did the Adjudicator err in where he drew the line in this case? Mr. Fraser would have a clear line drawn between job-related and non-job-related criticisms."

²⁵⁴ *R. v. H. (C.R.)*, [2003] M.J. No. 90 (Man. C.A.) online: QL (MJ) at paras. 67-68.

²⁵⁵ [1990] 1 S.C.R. 398 at 415.

he stated that "it is neither possible nor desirable to draw bright lines" in complex situations, as they tends to oversimplify the proceedings before the court.²⁵⁶

Furthermore, where the precise boundary between issues or activities under review varies or is flexible, a bright line test is not to be used to separate them.²⁵⁷ Additionally, where the decision depends largely upon the facts of the individual case, it is unlikely that the determination can be reduced to a bright line test.²⁵⁸ It also appears that in matters involving free-speech rights (such as those under the first Amendment to the U.S. Constitution), a bright line test is not conducive to resolving the dispute.²⁵⁹

It does not appear that the jurisprudence requires the environmental conditions to exist cumulatively for a balancing test to be used in favour of a bright line test. Any of the conditions that exist separately by themselves seem to be sufficient to displace a bright line test.

A bright line test results from pragmatic considerations, so a major advantage is that it is easy to apply (administer) and greatly facilitates the decision making task since it provides a clear and inflexible exclusionary rule

²⁵⁶ *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, [2000] S.C.J. No. 36 (S.C.C.) online: QL (SCC) at para. 10.

²⁵⁷ *Vancouver Society of Immigrant & Visible Minority Women v. Canada*, [1999] 1 S.C.R. 10, [1999] S.C.J. No. 5 (S.C.C.) online: QL (SCC) at para. 122 (hereafter "Vancouver Society").

²⁵⁸ A. Diduck "Conceiving the Bad Mother: The Focus Should be on the Child to be Born" (1998) 32 U.B.C. Law Rev. 199 at para. 54.

²⁵⁹ *Gentala v City of Tucson*, 213 F. 3d 1055 at 1072, (United States Court of Appeal, 9th Circuit) per Carter, J.A.: "As much as we would like to provide local, state and national government entities with bright lines and simple tests to simplify the task of making decisions in this complex and politically charged area, drawing exact lines and articulating formulaic tests is belied by the purposes of the first Amendment [free speech] guarantees themselves."

regarding what is permitted.²⁶⁰ It establishes clear boundaries and is generally accepted.²⁶¹ The use of a bright line test functions to set uniform standards; this acts to avoid inconsistent results.²⁶² No new exceptions to the rule are created, except by government.²⁶³ A consequent major attraction of bright line tests is that they make it easier to determine whether policy objectives are met.²⁶⁴

Also, the government personnel who administer the test are not required to exercise their judgment in making a determination, that is, they do not make a fact specific decision. This decreases the subjectivity involved in the decision making process. Applied to the realm of policy criticism, it reduces the risk that the duty of loyalty owed to the government will be breached since civil servants are clearly aware of what is and is not permissible conduct, and so helps to ensure that the public service will remain impartial. That is, it preserves impartiality and neutrality of the public service²⁶⁵ as it relates to criticism of government policy by civil servants.

On the other hand, the disadvantages of using a bright line test may at times be severe. If the issue to be resolved is contextual, the courts are reluctant to use a bright line test, preferring instead to fashion a resolution on a case by

²⁶⁰ *CNR - FCTD* *supra*, note 252; M.K. Joachim, "Seniority Rights and the Duty to Accommodate" (1998) 24 Queen's L.J. 131 at para. 20; R.A. Clifford, "Clifford's Notes Rule 213: Disclose, disclose, disclose" (2002) 25(7) Chicago Lawyer.

²⁶¹ *Ibid.*

²⁶² *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, [1992] S.C.J. No. 40 online: QL (SCC) at para. 3, per LaForest, J. (hereafter "*CNR* – Supreme Court of Canada").

²⁶³ Clifford, *supra*, note 260.

²⁶⁴ *Chan v. Canada (Minister of Employment & Immigration)*, [1995] 3 S.C.R. 593, [1995] S.C.J. No. 78 (S.C.C.) online: QL (SCC) at para. 65.

²⁶⁵ *Mississippi Poultry Association v. Madigan*, 31 F. 3d. 293 at 309, per Wiener, J.A. (United States Court of Appeal, 5th Circuit).

case basis.²⁶⁶ Further, where Parliament could have, but has chosen not to legislate in an area, this has led the courts to conclude that Parliament prefers to favor judicial development of the law in this area on a case by case basis. This in turn makes the courts reluctant to use a bright line test.²⁶⁷ As Parliament has steadfastly abstained from passing any one of the many private members' Bills addressing whistle blowing by federal civil servants over the past ten years, it is likely that the courts would continue to use the balancing approach adopted in *Fraser* when they encounter a whistle blowing case, such as the Federal Court did in *Haydon*.

Bright line tests tend to be inflexible and to offend an innate sense of justice in certain cases.²⁶⁸ Since they are considered to be rigid, they do not permit the balancing of all relevant circumstances, including the public interest.²⁶⁹ This can result in harsh, inequitable results²⁷⁰ that may be harmful because the results have been arrived at arbitrarily.²⁷¹

Since the test is a rule based on pragmatic considerations, it can never be absolute and inflexible and applicable to every factual situation, because these practical considerations that gave rise to the test may or may not be present in the situation under review, and to varying degrees and numbers. It is also inappropriate to leave the issue entirely to the whim or individual judgment of a management bureaucrat. In addition certain parameters might extend beyond

²⁶⁶ *Vancouver Society, supra.*, note 257 at para. 61.

²⁶⁷ *Ibid.*, at para. 122.

²⁶⁸ *CNR – FCTD, supra.*, note 252.

²⁶⁹ *Skye Properties Ltd. et al v. Wu* (2002), 58 O.R. (3d) 154, [2002] O.J. No. 734 (Ont. Div. Ct.) online: QL (ORP) at paras. 22, 25

²⁷⁰ Clifford, *supra.*, note 260.

²⁷¹ *R. v. Regan*, [2002] S.C.J. No. 14 at para. 91 per LeBel, J.

the limits of the test making it difficult to severely restrict exceptions,²⁷² and a bright line test may be subject to exceptions for policy reasons. This will cause the decision making process to become more complex.²⁷³

In contrast to the utilization of a bright line test the courts have traditionally resorted to a balancing of interests test when competing rights or values clash for supremacy. As frequently employed as it is (such as in *Fraser, Haydon, AUPE v. Alberta, etc.*), this test is not without its weakness. Indeed, Rohr has observed that the weighing of competing interests “illuminates the true nature of balancing tests and reveals their problematic character” and “brings out the key problem in balancing tests.”²⁷⁴ The problem with balancing tests is not to determine which side predominates according to the weight given to it but to decide what is to be weighed against what, i.e., what gets placed on each side of the balancing scales in the first place. Once this has been determined, it is often obvious which side has the “weightier” claim and will therefore prevail.²⁷⁵ The impact this will have on the final outcome means that how the interests under consideration are initially characterized will in all likelihood determine what gets weighed, and which values or principles are perceived to be, and consequently treated as, more important. The result will reflect that, by their very nature, these more important values might even trump the side that has a more weightier claim, i.e., more evidence that has been presented in its favour. Therefore, based upon the

²⁷² *CNR – FCTD, supra*. note 252.

²⁷³ *CNR - Supreme Court of Canada, supra*, note 262..

²⁷⁴ J.A. Rohr, *Civil Servants and Their Constitutions* (Lawrence, Kansas: Kansas University Press, 2002) at 123 - 124.

²⁷⁵ *Ibid.*, at 124.

above viewpoint, the final result might likely be decided at an early stage of the analysis when the selection is made as to what is to be balanced against what.

Considering the environmental conditions of the *Fraser* and *Haydon* decisions, was the balancing of interests test actually used by the Supreme Court of Canada more appropriate than a bright line test in resolving the conflict between Neil Fraser's and Margaret Haydon's freedom of expression and their duty of loyalty to the government as civil servants? One situation dealt with policy criticism whereas the other dealt with whistle blowing, so should the legal framework be different or the same? Although the Court in *Fraser* seemed to indicate that drawing a line to separate freedom of expression from the civil servant's duty of loyalty to the government was necessary, in the final analysis it used a balancing test to determine which of these two important values was paramount in the conflict between them.

In the policy criticism realm, the Supreme Court of Canada in *Fraser* decided that the duty of loyalty was a more important value than a civil servant's unfettered freedom of expression in the formulation of the analytical framework to be used. The Court provided an exception to the duty of loyalty: criticism of the government by a civil servant must not be sustained, highly visible, or aggressively attack major government policies (that is, the level or tone of criticism must not be vitriolic).²⁷⁶ That is, policy criticism by a civil servant must be benign for it to be permissible. Otherwise, crossing this line will constitute just grounds for discipline, the severity of which might depend on how far over the

²⁷⁶ *Fraser, supra*, note 22 at para. 41.

line the civil servant has gone. This bright line test which the Supreme Court of Canada developed was then applied to the specific facts of the case in order to resolve the issue before it, but only after the Court had balanced the clashing fundamental values encountered in that particular situation.

So although within the policy criticism realm *Fraser* has apparently used a bright line test to establish a boundary for acceptable policy criticism by a civil servant which may not be crossed and can perhaps also be used to separate good policy from harmful policy, s` I do not believe that separating the global sphere of organizational dissent and its concomitant duty of loyalty into the separate and distinct realms of policy criticism and whistle blowing is accomplished by use of a bright line test either.

The criterion of wrongdoing is the 'watershed' that separates or divides the global sphere of a civil servant's duty of loyalty into two separate and distinct realms of policy criticism and whistle blowing. A bright line test cannot perform this function. It is used to set limits or boundaries to, for example, an activity beyond which one is not allowed to cross. That is, it determines the degree or extent of acceptable activity within a realm by telling us how much is too much of a certain activity (i.e., policy criticism).

A watershed criterion separates two activities within a single sphere from each other because they are different in kind whereas a bright line test pertains to a single activity and determines the degree to which behaviour is acceptable by setting a clearly defined limit to it. Within the context of organizational dissent, I contend that one cannot cross the divide separating policy criticism

from whistle blowing in relation to the same activity or conduct because the criterion of wrongdoing does not exist in both realms. Wrongdoing does not determine what excessive behaviour (degree) is not permissible, it determines what kind of behaviour is not permissible at all (e.g., illegal activity). This is different from how a bright line test functions within the policy criticism realm when it draws a line between acceptable and unacceptable criticism based upon “sustained, highly visible attacks on major government policies” as laid down in *Fraser*.

In the whistle blowing realm the assessment of whether civil servants have breached their duty of loyalty by exposing wrongdoing is not amenable to a bright line test. Rather, a balancing of interests and rights with the duty of loyalty appears to be preferable, as outlined below.

A civil servant’s duty of loyalty to the government (as a mechanism of maintaining an impartial civil service) and the civil servant’s freedom of expression are important, conflicting values²⁷⁷ that are involved in a balancing exercise that is complex in its performance under s. 1 of the *Charter*²⁷⁸. At that particular stage of the s. 1 analysis proportionality is assessed: the objective of the impugned law is weighed against the deleterious effects of the measure designed to implement the law, followed by a secondary balancing test where the deleterious effects of the measure are weighed against the salutary effects of the measure. Hence the balancing test at the proportionality stage of the impugned

²⁷⁷ *Fraser, supra.*, note 22 at paras. 1, 21 and 35

²⁷⁸ *Oakes, Dagenais, infra*, Chapter 4, notes 321 and 315 respectively.

law's justification exercise is performed in a complex manner.²⁷⁹ As discussed above, this environmental condition is anathema to a bright line test.

As mentioned previously, certain parameters might extend beyond the limits of the bright line test, making it difficult to severely restrict exemptions. In *Fraser Dickson*, C.J. created three exceptions to the duty of loyalty and then remarked "having stated these qualifications (and there may be others)" indicating that the list of exceptions to the duty of loyalty is not exhaustively closed with the three he mentioned, but open for the courts and tribunals to add others as the circumstances warrant. Therefore, drawing a bright line around the duty of loyalty will not provide the guarantee that the line will remain immutable because it will vacillate with the addition of new exceptions. This has occurred in a decision of the PSSRB where it found a civil servant's conduct not to violate the duty of loyalty since it came within an exception based on the public interest.²⁸⁰ So an area of the law such as this that continues to expand incrementally through the addition of exceptions does not appear to be suited for the application of a bright line test.

Based upon the above generic aspects of *Fraser*, there are five specific aspects that deserve further consideration: 1) creation of exceptions to the duty of loyalty; 2) stipulation of degrees of policy criticism; 3) distinction between

²⁷⁹ See *Haydon, supra.*, note 6 at paras. 88, 111 and 112, and also a more detailed examination of this aspect of the case, *infra.*

²⁸⁰ *Chopra v. Treasury Board (Health Canada), supra.*, note 5 at para 91. The adjudicator stated that the civil servant, Shiv Chopra, was speaking on an "important public issue" and that the concerns he raised were "issues of public interest" and so constituted an exception to the duty of loyalty.

active and passive policy criticism; 4) applicability of the internal reporting requirement; and 5) no qualification of wrongdoing.

Regarding the first specific aspect, it is useful at this point to clearly review what the Supreme Court of Canada did in *Fraser*. It fundamentally created three separate exceptions²⁸¹ to the duty of loyalty a civil servant owes to the government: 1) disclosing illegal acts on the part of government, 2) policy criticism of harmful policies; and 3) criticism (of whatever kind - policy, administration, government, etc) that does not impact the employee's ability to perform the job of a civil servant). These three exceptions each constitute a separate and distinct category: 1) whistleblowing based upon wrongdoing committed by government; 2) specified policy criticism; and 3) benign criticism.

As discussed previously concerning the first exception, there is more than merely the illegal acts category mentioned in *Fraser*. The federal government itself has included misuse of public funds/assets and gross mismanagement as additional categories of wrongdoing in its policy on the reporting of wrongdoing as articulated by the Treasury Board.²⁸² So the Supreme Court of Canada's first exception to the duty of loyalty relates to the disclosure of wrongdoing (whistle blowing on illegal acts) regardless of how the conduct of the civil servant is characterized by the court or the PSSRB.²⁸³

²⁸¹ But note that this short list of exceptions is not exhaustive, since the Supreme Court of Canada referred to these as "qualifications", stating "and there may be others": *supra*, note 22 at 470.

²⁸² *Supra*, note 40.

²⁸³ See, for example, *Grahn v. Canada (Treasury Board)*, [1987] F.C.J. No. 36 (F.C.A.) online: QL (FCCB) where Hugessen, J.A. stated that the public servant "publicly criticized his employer"

The second exception to the duty of loyalty relates, as mentioned above, strictly to policy criticism. Public servants are free to criticize the government provided that the criticism does not affect ("has no impact" on) their ability to effectively carry out the duties of a civil servant or on the public's perception of the civil servant's ability to do a civil servant's job. So this exception to the duty of loyalty involves 'benign criticism' since it has no adverse impact upon the civil servant's ability function as a civil servant. It is noteworthy that the Supreme Court of Canada did not state that the exception relates to the civil servant's ability to perform his or her own specific job tasks; it refers to the ability to function in the capacity as a representative of the government in its dealings with the public. The impact would be expected to be least on the lowest level employee in the organization and greatest upon the highest level bureaucrat.

The third exception is what the *Fraser* case focused upon, namely establishing limits to what is permissible criticism of government policy. It determined that public servants will cross the line of permissible criticism if they attack the political judgment of a superior.

Although the above three exceptions to the duty of loyalty have been explicitly created by the Supreme Court of Canada in *Fraser*, I believe that the decision also contains the seeds of a fourth, implicit exception based upon a somewhat vague and imprecisely articulated notion of the 'public interest'. This

and "publicly accusing his superiors of illegalities" in relation to an unsubstantiated allegation that his superiors violated federal privacy laws and tolerated a fraud upon the unemployment insurance fund.. The Court also stated: "We accept that the nature of the applicant's allegations brings him within the first of the exceptions mentioned by Dickson, C.J.C. in *Fraser v. Public Service Staff Relations Board*."

appears at three points in the judgment of Dickson, C.J.C. where he stated that “Central to that issue is the . . . right of an individual . . . to speak freely and without inhibition on *important public issues*”²⁸⁴ and that “. . . some speech by public servants concerning *public issues* is permitted.”²⁸⁵ and again “A blanket prohibition against all public discussion of all *public issues* by all public servants would, quite simply, deny fundamental democratic rights to far too many people.”²⁸⁶ (emphasis added). This aspect of the decision has been further expanded upon in subsequent whistle blowing cases by courts and administrative tribunals (discussed later).

In the second specific aspect, the Supreme Court of Canada established that there are degrees of policy criticism, whether they are related to the specific job that the public servant performs or not. In discussing this aspect of the case under the heading “Extent of Permissible Criticism of Government by Public Servants”, the Supreme Court of Canada determined that this is a grey area of the law and established a limit which the public servant is not permitted to exceed – the criticism is unacceptable if it is sustained (prolonged in duration over time), vitriolic (hostile and abusive in tone and/or content) and highly visible (receives prominent media attention and exposure, as opposed to carrying a placard at a rally). As well, the limit depends upon the public servant’s position within the government: the lower the person is in the organization, the more latitude (freer) the civil servant is provided to criticize policy, so that the highest

²⁸⁴ *Fraser, supra.*, note 22 at para. 1.

²⁸⁵ *Ibid.*, at para. 31.

²⁸⁶ *Ibid.* at para. 33.

bureaucrat (Deputy Minister) is not free at all to criticize government policy.²⁸⁷

This also relates to the third specific aspect, that the Supreme Court of Canada has distinguished between active and passive policy criticism. The former is well illustrated by Neil Fraser as well as the Supreme Court of Canada's hypothetical example of a Deputy Minister speaking out against the policies of their own departments, and the latter by a front line clerk silently standing in a rally that protests against a government policy to, say for example, reduce funding for a particular program.²⁸⁸ The lowest level public servant would be allowed more leeway for active policy criticism than a higher level employee, and perhaps unrestrained passive policy criticism in terms of it being sustained for a long time period.

The fourth specific aspect concerns the internal reporting requirement and the premise that the case deals with policy criticism and not any government wrongdoing (and hence not whistle blowing). This explains why there is no mention of the internal reporting requirement that is an essential element as a precondition for the justification of blowing the whistle outside the organization (i.e., publicly). This reinforces the view that the internal reporting requirement is not an element of policy criticism despite any Public Service Staff Relations Board (and any lower court) pronouncement or indication to the contrary. The internal reporting requirement is simply not a relevant factor in determining if policy criticism was acceptable or not (i.e., did it exceed the limits established by the Supreme Court of Canada). To hold otherwise would result in the absurdity

²⁸⁷ *Fraser, supra*, note 22 at 467, 468 (paras. 34 & 36).

²⁸⁸ *Ibid.*

of requiring the lowest level public servant to obtain permission to stand silently in a crowd that had gathered to protest against a government policy, an act that the Supreme Court of Canada indicated would be permissible.²⁸⁹

The fifth and final aspect deals with the fact that the Supreme Court of Canada did not qualify the wrongdoing exemplified by saying that it had to be substantial or serious or gross, etc. That other definitions of wrongdoing have restricted it towards the grave end of the spectrum indicates that although there may indeed be degrees of wrongdoing (as well for policy criticism) there are no degrees of whistle blowing. The Criminal Code distinguishes between minor offences (summary conviction) and more serious offences (indictable) for procedural purposes as well as punishment, but also creates the 'hybrid' offence category wherein the Crown Attorneys may proceed summarily or by indictment at their discretion. So while one particular criminal offence may be more serious than another, it cannot be said to be more illegal. Whistle blowing is the act of disclosing or disseminating confidential information (whether externally or internally to the organization) not the expression of an opinion (as is policy criticism). Once the disclosure has been made the act of whistle blowing is complete regardless of how widely the information is spread. Utilizing the mechanism of raising the bar on degrees of wrongdoing that are deemed to constitute wrongdoing for the purposes of whistle blowing is simply a means of ensuring that only conduct that is deserving of severe and widespread rebuke

²⁸⁹ *Ibid.*

(since it affects the public interest) is included so that the process is not otherwise trivialized by minor transgressions.²⁹⁰

The implications of this may cause further confusion because the Supreme Court of Canada allowed an exception for disclosure of information relating to not just any government policy, only those that jeopardize life, health or safety. So these latter policies can fairly be described as being 'harmful' in some way to people they affect. And it also allowed for other exceptions to be developed in the future; whether the courts would create unqualified categories such as illegality or qualified ones such as 'harmful' policies is uncertain. But if the Treasury Board's policy as well as draft legislation (both discussed previously) is any indication, it would likely tend to be categories of wrongdoing that are serious, substantial, grave, gross, etc. so as to not trivialize the process.

If Green, J.A. in *Nfld. Association* is correct and *Fraser* is binding on lower level courts re: whistle blowing, where does the internal reporting requirement fit in? Under *Fraser*, it is not applicable, but under labour jurisprudence it is an essential element justifying the disclosure. Lower level courts do not explicitly say they are bound by *Fraser* when they apply it, they simply apply the *Fraser* line of reasoning to a new situation where perhaps a better approach would involve the use of the principles developed through arbitral jurisprudence.

Although the first and third criteria required for Supreme Court of Canada *dicta* to

²⁹⁰ This is also the argument for providing constitutional protection to whistle blowers re: free speech rights: "The main reason we use threshold tests for the applicability of constitutional protection is to focus our attention on the situation where we believe the special safeguards associated with constitutional protection are needed." In P. Bryden, "*Blencoe v. British Columbia (Human Rights Commission)*: A Case Comment" (1999) 33 UBC L.R. 153 at 158.

be considered binding on lower level courts may be satisfied by the *Fraser* decision, it is questionable whether the second exists – that the matter was fully argued before the Court. But the 'matter' refers to the first exception in *Fraser*, namely illegal acts and harmful policies. Neither of these were argued before the Court since there was no illegal act alleged by Fraser to have been committed by the government nor were its policies alleged to be harmful. Consequently, there is no factual basis to support any contention that the matter (which relates to whistle blowing) was fully argued before the Court. So strictly speaking, the *Fraser* principles are not binding on lower level courts in relation to whistle blowing situations involving civil servants.

So what this reveals about the theory regarding *dicta* is that it is an inadequate analytical framework to use singularly to resolve whistle blowing cases; it must be supplemented. It also tells us that the *Fraser* principles are an incomplete analysis on the subject, and if applied, must be used in conjunction with principles established from labour arbitration jurisprudence to properly resolve the situation.

3.8. Application of the principles in *Fraser*

How the *Fraser* principles have been applied in noteworthy decisions by the Federal Court (Trial Division)²⁹¹ and the Alberta Court of Appeal²⁹² are now discussed.

²⁹¹ *Haydon, supra*, note 6.

²⁹² *A.U.P.E., supra*, note 24.

3.8.1. Court Cases

The *Haydon*²⁹³ case is important because it is perhaps the first court case involving whistle blowing by a federal civil servant, it provides a legal analysis of the right to freedom of expression under the *Charter* and whether it has been violated by the common law duty of loyalty, and also because the court places the *Charter* analysis within the context of the *Fraser* framework. The AUPE case is similarly important because although it involves a provincial civil servant, it does not require the internal reporting requirement for policy criticism, and it arrives at the opposite conclusion than did the court in *Haydon* regarding the violation of the *Charter* right to freedom of expression by the common law duty of loyalty.

In *Haydon*, the applicant (Margaret Haydon) was a drug evaluator with Health Canada and was responsible for evaluating new veterinary drugs to ensure they complied with the human safety requirements of the federal *Food and Drug Act*. Haydon would then recommend in writing to accept or reject the tested drug. Over the course of time she became concerned about the efficacy of the drug approval process generally and with the drug rBST (recombinant bovine growth hormone) in particular. Her concern and complaint was that an administrative decision was made to approve certain drugs irrespective of the drug evaluator's recommendation, and that drug evaluators were being pressured by management to recommend approval of drugs of questionable safety.

²⁹³ *Haydon v. Canada, supra*, note 6.

She tried to have her concerns addressed internally within Health Canada and the federal government as her initial recourse: requesting an investigation, sending a letter to the Health Minister, filing grievances within her department, and commencing proceedings before the Public Service Staff Relations Board. When these mechanisms failed to satisfy her concerns, she publicly disclosed matters in a single television news interview that had national coverage. As a result, she was subsequently disciplined through a 'letter of instruction' from her department's Director that required her to abide by departmental policy regarding contact with the news media and to obtain permission from management prior to speaking to the media. She grieved this disciplinary action up to the Associate Deputy Minister (ADM), who confirmed the letter of instruction, thus denying the grievance. Haydon then brought an application for judicial review before the Federal Court (trial Division) pursuant to s. 18.1 of the *Federal Court Act*.

On the judicial review application, the approach adopted by the Court was to determine if the common law duty of loyalty violated the *Charter* and if not, to then determine if the ADM correctly applied the *Fraser* principles to the facts of the situation. Even though Haydon argued that the decision of the ADM (final level designated person in the grievance process) upholding the 'letter of instruction' infringed her free speech right under the *Charter*, the Federal Court concluded that the common law duty of loyalty was a reasonable limit under s. 1 of the *Charter* on the employee's right to freedom of expression. The Court then infused this finding into the *Fraser* framework to determine if Haydon's actions came within an exception to the duty of loyalty.

The Court found that Haydon's conduct fell within what it termed "the first qualification of the *Fraser* test" namely disclosure of harmful policies.²⁹⁴ But the Court went on to state that the internal reporting requirement also applied in this situation: "As a general rule, I believe that public criticism will be justified where a reasonable attempt to resolve the matter internally would have been unsuccessful."²⁹⁵ The Court noted that the letter of reprimand was a 'complete prohibition' on contact with the media that "does not take into account the exceptions identified in *Fraser*"; in other words the ADM ignored the law to the point of being 'unreasonable'.²⁹⁶ As a result Haydon was justified in making her disclosure outside the organization to the public media.

Another aspect of the application of the *Fraser* principles by the Federal Court in *Haydon* relates to the judicial expansion of the exceptions to the duty of loyalty, or rather a unification of them into a broader basis for exempting a civil servant from the duty of loyalty. Previously I had referred to the Supreme Court of Canada's treatment of the 'public interest' as an implicit basis for further expansion of the exceptions to the duty of loyalty. The Court in *Haydon* has picked up on that aspect of the case and explicitly used it as the unifying basis for the *Fraser* exceptions, and then specifically applied it to the Court's analysis of the facts before it.

In discussing the *Fraser* exceptions in its *Charter* analysis before applying the resulting legal conclusion to the facts of the case, Tremblay-Lamer, J. stated

²⁹⁴ *Ibid.*, at 112 (para. 100).

²⁹⁵ *Ibid.*, at 117 (para. 112)

²⁹⁶ *Ibid.*, at 119 (para. 118).

“In my opinion, these exceptions embrace matters of *public concern*.” and that “Where a matter is of legitimate *public concern* requiring a public debate, the duty of loyalty cannot be absolute to the extent of preventing public disclosure by a government official. The common law duty of loyalty does not impose unquestioning silence.”²⁹⁷ The Court concluded that “In cases that fall within the *Fraser* qualifications, the *public interest* outweighs the objective of an impartial and effective public service.”²⁹⁸ Later in the judgment when she reviewed the particular facts involved, the judge again referred to the notion of the public interest when reviewing the Associate Deputy Minister’s decision to discipline Haydon: “I believe that he failed to proceed with a fair and complete assessment of the Applicants’ right . . . to speak on an important *public issue*.”²⁹⁹ and therefore “This demonstrates that the ADM did not consider the possibility that the Applicants’ statements amount to a *public concern* issue.”³⁰⁰ (emphasis added throughout).

The Court determined that Haydon’s comments fell within the “first” exception to the duty of loyalty as articulated by the Supreme Court of Canada in *Fraser*, “namely disclosure of [harmful policies]”³⁰¹ and accordingly did not justify the disciplinary action of the ADM towards her. This should have been sufficient for the Court to dispose of the matter, but instead it seems to have gone further and treated the ‘public interest’ as an overarching matrix of which the specific

²⁹⁷ *Ibid.*, at para. 83.

²⁹⁸ *Ibid.*, at para 120.

²⁹⁹ *Ibid.*, at para 111.

³⁰⁰ *Ibid.*, at para. 112.

³⁰¹ *Ibid.*, at para. 100.

exceptions provided in *Fraser* are its constituents. This development in *Haydon* has been later recognized and applied in a labour arbitration case involving federal civil servant.³⁰²

Haydon is therefore significant because it determines that the restriction placed on a public servant's freedom of expression by the common law duty of loyalty is a reasonable limit under s. 1 of the Charter. It also reaffirms that the internal reporting requirement is an essential element of any justification for a public servant to publicly blow the whistle on government wrongdoing. And it appears to have given rise to the role of the 'public interest' as perhaps a separate exception to the duty of loyalty.

The opposite result regarding freedom of expression obtained in the *Alberta Union of Provincial Employees v. Alberta* case.³⁰³ An Alberta provincial civil servant named Gibson was a social worker involved with protecting children from harm/abuse. The Alberta government planned and was undertaking a redesign of Gibson's department. Gibson read a report on the matter from an opposition MLA and wrote the MLA a letter stating, in effect, that funding cuts to various stakeholder groups will have a harmful effect upon them and that the redesign has not been and will not be effective in achieving its goals. (This conduct of Gibson can be characterized as a one-time expression of his opinion in opposition to a government restructuring policy.) As a result of sending this letter to the opposition MLA, Gibson received a letter of reprimand from his supervisor and verbal instructions that forbid him from expressing any opinion on

³⁰² *Chopra v. Treasury Board (Health Canada)*, supra, note 5.

³⁰³ *Supra.*, note 24.

any government policy to anybody.³⁰⁴ He grieved these disciplinary actions, which were upheld by the grievance officer. He then brought an application for judicial review, which was subsequently appealed to the Alberta Court of Appeal.

Although the Alberta Court of Appeal explicitly stated that “the central issue in this appeal is whether the duty of fidelity is a reasonable limit on free expression under s. 1 of the *Charter*,³⁰⁵ no *Charter* analytical framework was employed to arrive at the decision that the duty of loyalty was not a reasonable limit on the freedom of expression in s. 2(b) of the *Charter*. Rather, after finding that Gibson’s letter did not breach his duty of loyalty to the government (based upon application of the *Fraser* principles to the facts³⁰⁶) the Court simply stated: “Rather, the limitations imposed upon him by his employer breached s. 2(b) of the *Charter* and, as the limitations did not fall within the ambit of the duty of fidelity, they cannot be saved by s. 1.”³⁰⁷

So in the *AUPE* case we have the resolution of the situation using the *Fraser* principles which are then infused into a *Charter* conclusion without any reasoning as to how the Court arrived at its decision. Aside from the substantive result, this is the reverse process used by the Federal Court (Trial Division) in *Haydon*, where the *Charter* issue was resolved first and then that result was

³⁰⁴ *Alberta Union of Provincial Employees v. Alberta*, [2000] A.J. No. 1046 (Alta. Q.B.) online: QL (AJ) at para 9, 10. This is the trial level decision (hereafter “*AUPE – trial*”).

³⁰⁵ *AUPE*, *supra*, note 24 at para 15.

³⁰⁶ The Court found that Gibson, through his letter, did not engage in a highly visible attack on a major government policy, that the subject matter was not opposite in interest to that of the government since both parties were interested in the common concern re: the “ability of social workers to effectively protect children from harm” and that the criticism did not adversely affect his ability to perform the duties of a civil servant or on the public perception of that duty.

³⁰⁷ *AUPE*, *supra*, note 24 at para 34.

infused into an analysis using the *Fraser* principles. Regardless of whether the substantive issue is policy criticism or whistle blowing by civil servants, the conceptual framework used to analyze and resolve the issues should be consistent where freedom of expression and the duty of loyalty compete against each other. That it is not may be a reflection of the confusion generated by which framework to use when and in relation to which aspects of the case.

3.8.2. Tribunal Decisions

In *Chopra v. Treasury Board (Health Canada)* the adjudicator held that the employee's comments made at a conference regarding the existence of racial discrimination within Health Canada did not affect the employee's ability to do his job of drug evaluation.³⁰⁸ This situation is unlike that in *Fraser*, which consisted of sustained and highly visible attacks on a major government policy, which amounted to a lack of loyalty to the government. So therefore Chopra was found to have come within the benign criticism exception of *Fraser*.

Most notably, however, the adjudicator stated that the employee "was speaking on an *important public issue*" (Haydon (supra)). In my view, racism and employment equity are issues which transcend an individual's station in life and constitute *'issues of public interest'.*"³⁰⁹ So the adjudicator seems to have determined whether or not the issue was of public importance using criteria such as "legitimate, compelling and pressing"³¹⁰ in assessing whether public

³⁰⁸ *Supra*, note 5 at para. 91 (hereafter "Chopra's conference case").

³⁰⁹ *Ibid.*

³¹⁰ *Alberta v. Edmonton Sun*, [2003] A.J. No. 5 (Alta. C.A.) online: QL (AJ) per Berger, J.A. at para 119: "The decision to publish was taken in good faith in order to inform the public of a legitimate, compelling and pressing issue of public importance and if, objectively assessed, the issue is properly so characterized."

comments concerning proven racial discrimination³¹¹ within Health Canada are exempt from disciplinary action. It was not necessary for the adjudicator to rely upon *Haydon* to invoke the notion of the public interest since the B.C. jail guard case 20 years earlier had enumerated “the interest of the public in having the information made public” as a factor to be considered in assessing employee allegations of wrongdoing on the part of the employer. But, the Court in *Haydon* and the adjudicator in the instant case seem to be making an intrinsic connection between the public interest and any exceptions to the duty of loyalty. How this judicial development will shape the exceptions to the duty of loyalty articulated in *Fraser* will depend on the treatment given to it by the Courts and tribunals subsequently.

³¹¹ Chopra’s conference case, *supra.*, note 5 at paragraphs. 6, 7.

CHAPTER 4

FREEDOM OF EXPRESSION AND THE COMMON LAW DUTY OF LOYALTY

In the last chapter I concluded by briefly discussing the relationship between freedom of expression and the duty of loyalty as reviewed by two different courts. Those courts adopted different approaches to using a conceptual framework involving *Charter* analysis of free speech rights of civil servants and the common law duty of loyalty.³¹² The same two analytical factors just mentioned were used in reverse sequence by the two courts – and produced opposite results regarding whether the duty of loyalty was a reasonable limit upon a public sector employee's freedom of expression.³¹³ In *Haydon*, the *Charter* analysis was performed first with the conclusion then infused into the *Fraser* framework and then used to resolve the issue before the court whereas in the *AUPE* case the reverse approach was undertaken. In this chapter I will examine the *Charter* analyses of those two courts more closely, since I believe that it is necessary to try to reconcile them as they point us in different directions in attempts to determine whether the duty of loyalty is a reasonable limit on a public servant's freedom of expression (i.e., how the employee's duty of loyalty shapes or is shaped by freedom of expression).

As mentioned in the previous chapter, an important case involving free speech rights of public servants was the *Fraser* case heard by the Supreme

³¹² The duty of loyalty factor included the internal reporting requirement taken from labour arbitration jurisprudence

³¹³ In *Haydon* the Federal Court (T.D.) held that the common law duty of loyalty was a reasonable limit upon a civil servant's freedom of expression whereas in *AUPE* the Alta. C.A. held that it was not.

Court of Canada in 1985. Although this case was heard and decided by the Supreme Court of Canada after the Charter became law, it did not involve *Charter* interpretation of freedom of expression because the facts that gave rise to the initial legal proceedings, and those proceedings themselves, arose before the *Charter* became the law. Although not a whistle blowing case per se (because it did not involve public disclosure of any governmental wrongdoing), it is nonetheless important because it provided exceptions to common law duty of loyalty owed by an employee to the employer and it set limits upon a public servant's acceptable criticism of government policy. More importantly, for the purposes of this thesis, the Supreme Court of Canada in *Fraser* did provide a signal that the disclosure of wrongdoing (illegal acts of government) constitutes an exception or qualification to the employee's duty of loyalty owed to the government. Further, it was not until 15 years later in 2000 when a federal civil servant's attempt to have the courts vindicate her act of publicly exposing confidential government information on a matter of topical and significant public interest (conduct that relates to endangering public health) that the Federal Court had the opportunity to hear the arguments that canvassed the law on this issue (i.e., whistle blowing by public servants - *Haydon*).

This chapter will examine the role of the constitutional protection for freedom of expression in determining when, if ever, a civil servant is justified in publicly disclosing government wrongdoing.

4.1. The Canadian Charter of Rights and Freedoms

4.1.1. The Charter and the Common Law

In the situation where a public servant has publicly disclosed instances of actual or perceived governmental wrongdoing, disciplinary action has followed. However, the discipline has usually resulted not from the violation of a specific statute, but because the public servant has breached the common law duty of loyalty owed to the government.³¹⁴ In addition to any specific consequences (suspension, letter of reprimand etc.) for having made the disclosure, the public servant is subsequently prohibited from speaking out publicly or contacting the media and denouncing government practices etc. This part of the disciplinary action is an additional aspect that the public servant alleges is a violation of his or her freedom of expression as provided by the Charter

When Charter scrutiny is brought to bear upon the common law, the objective is to give the common law the meaning it can reasonably bear which is most consistent with the Charter's values.³¹⁵ In the context of an employment situation involving the government (i.e., in a situation involving a civil servant as an employee and the government as the employer), the Charter will apply directly to restrict government action.³¹⁶ In this context, the goal of an impartial and

³¹⁴ In Canada, the common law exists at the federal level and in all the provinces except Quebec, where the civil law system governs. It has been described as the "residual" source of the law because it does not depend upon any explicit Act of the legislature for its authority. See R.J. Sharpe & K.E. Swinton, *The Charter Of Rights and Freedoms* (Toronto: Irwin Law, 1998) at 59.

³¹⁵ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 878, [1994] S.C.J. No. 104 (S.C.C.) online: QL (SCC) per Lamer, C.J.C..

³¹⁶ *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570 at 584-85, per LaForest, J: "Briefly stated, it [Douglas College] is simply part of the apparatus of government both in form and in fact. In carrying out its functions, therefore, the college is performing acts of

effective civil service will, in all likelihood, always remain the same and never change over time, so that the common law duty of loyalty will not become out of step with the prevailing societal values, as long as a democratic form of government exists in Canada. Therefore, the Supreme Court of Canada will not likely see the need to change the common duty of loyalty / confidentiality (as it relates to civil servants) in order to conform to Charter values, if it is required to decide upon the issue. In other words, the only way the common law duty of loyalty will become inconsistent with the values of society which are prevalent at that time is if the nature of democracy changes from what it is now. We are talking about public institutions, namely the executive branch of government and not societal values such as public morality or attitudes towards sexual openness/orientation, etc. which have changed significantly over the past 40 years.

Although the Charter treats the common law differently than it does legislation, an even more fundamental differential treatment exists between Charter litigation involving public (government) as opposed to private parties. Charter considerations are different when dealing with government than when dealing with entirely private parties in terms of the s. 1 analysis, onus of proof and the remedial approach taken by the courts as they relate to the common law. The reason for this differential treatment is that in private litigation no Charter *right* is violated since there is an absence of state action. The most these

government, and I see no reason why this should not include its actions in dealing with persons it employs in performing these functions. . . . Accordingly, the actions of the college in [employment matters with its faculty] are those of the government for the purposes of s. 32 of the *Charter*. The *Charter*, therefore, applies to these activities.”

litigants can do is argue that the common law is inconsistent with Charter *values*. In other words, a Charter challenge to the common law between private litigants involves a conflict between *principles* within the common law rather than the government's breach of a Charter *right* via legislation.³¹⁷

In terms of the approach to be used, Cory, J. speaking for the Court in *Hill* stated it is "important not to import into private litigation the analysis that applies in cases involving government action." Therefore, the limitations clause in s. 1 of the Charter and the test developed by the Court under that section do not apply to the common law in private litigation. Instead, a more flexible approach of weighing generally framed Charter values against principles that underlie the common law is adopted.³¹⁸

Further, the division of the onus in a government action Charter challenge is not applicable. In litigation involving the government, one party alleges a *prima facie* violation of a Charter right and the other party (the government) must justify the violation as being reasonable. But in private litigation the party claiming that the common law is inconsistent with Charter values has the burden of proving that is indeed the situation. Moreover, that same party has the burden of proving that when the values are balanced, the common law should be modified to align it with Charter values. So, in the usual Charter litigation involving the government, it is the government must justify the law's breach of the

³¹⁷ *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64 (S.C.C.) online: QL (SCC) at para. 97 (hereafter "*Hill*").

³¹⁸ *Ibid.*, at paras. 93 – 97.

Charter right whereas in private litigation the burden is on the party seeking to modify or change the common law.³¹⁹

Finally, if the party in private litigation has been successful to this stage, the court must be convinced that a modification of the common law is necessary. In this situation the Charter values that are at odds with the common law will provide the guidelines for alteration of the common law. But the court will act cautiously and make revisions to the common law as little as possible to align it with the Charter values. That is to say the common law will be revised only incrementally in private litigation when it is brought into conformity with Charter values. Far-reaching changes to the common law (such as repeal, for example) are left to be accomplished by the legislature, not the courts.³²⁰

4.1.2. Section 1 Analysis

The Supreme Court of Canada in *R. v. Oakes*³²¹ laid down the fundamental analysis of s. 1 to be used when determining whether the impugned restriction on a *Charter* right is a “reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.” First, the court must determine whether the limitation has been prescribed by law. In relation to this issue the Supreme Court of Canada has held that where the government is involved in using the common law to limit a right or freedom that is protected under the *Charter*, the *Charter* will apply.³²² After determining that the limitation has been prescribed by law, the *Oakes* test consists of two basic components

³¹⁹ *Ibid.*, at para. 98.

³²⁰ *Ibid.*, at paras. 93 - 97.

³²¹ [1986] 1 S.C.R. 103.

³²² *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573 at 598-599. This decision was rendered subsequent to *Oakes*.

(first, a pressing and substantial purpose had to be shown and second, the measure adopted had to be proportional to the objective), with the second component subdivided into three parts (a rational connection between the means used and the goal to be achieved; minimal impairment of the Charter right; and a proportionate effect between the means used and the end to be achieved). When all the conditions have been met, then the limitation of the right is justified under the law.

If the impugned limitation has passed the section 1 analysis up to the proportionality stage, it is further subjected to a balancing exercise that is complex in its performance. Under *Oakes* the *purpose* of infringing the right is balanced against the *effect* of the infringement on the right. But subsequently the Supreme Court of Canada in *Dagenais v. CBC*³²³ reformulated the third step of the *Oakes* test regarding proportionality by adding the requirement that the beneficial (salutary) effects of the impugned law must be balanced against its harmful (deleterious) effects. This means that only a very important objective can justify severely deleterious effects; that is, if a measure's harmful effects are too severe vis-à-vis the objective, then proportionality does not exist and the restriction upon the protected right is not justified.

The Supreme Court of Canada held that the infringement would not be authorized at common law unless it complied with the Charter. Lamer, C.J. stated it this way:

³²³ *Supra.*, note 315 at para. 93.

“In my view, characterizing the third part of the second branch of the Oakes test as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality. I believe that even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied, and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will not be reasonable and demonstrably justified in a free and democratic society. I would, therefore, rephrase the third part of the Oakes test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.”³²⁴

This aspect of the analysis therefore requires a detailed examination of the effectiveness of the measure.³²⁵

4.1.3. Freedom of Expression

4.1.3.(i) Rationales for protecting expression

From amongst the many arguments for protecting freedom of expression, the Supreme Court of Canada has identified three rationales for providing the basis for this protection: 1) the marketplace of ideas and seeking truth; 2) participation in political decision making; and 3) the attainment of individual self fulfillment and autonomy.³²⁶ Indeed, these values were enunciated by the Court

³²⁴ *Ibid.*, at para 95.

³²⁵ *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para 69. There, LaForest, J. writing for a unanimous Court stated that a trial judge must “weigh the importance of the ... particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.” Clearly, the trial judge must actually engage in the balancing process and not be content that the mere ‘possibility’ of two interests capable of being weighed (i.e., identification of what is to be weighed) is sufficient to find that proportionality exists. It is not.

³²⁶ *Ford v. Quebec*, [1988] 2 S.C.R. 712 at 764-65; *Irwin Toy .v Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 976-77.

to be the core values underlying freedom of expression.³²⁷ These three rationales for constitutionally protecting expression will be referred to as the political (participation in democracy), truth seeking or psychological (individual autonomy attainment) rationales.

Hogg described the political rationale as at the core of reasons for constitutionally protecting freedom of expression, with truth seeking as a broader rationale and the psychological rationale as being even broader still.³²⁸ As well, Dickson, C.J. writing for the majority in *R. v. Keegstra* stated that the court, through the majority opinion in *Irwin Toy*, went “. . . further towards stressing as primary the “democratic commitment” said to delineate the protected sphere of liberty.”³²⁹ Since the political rationale relates directly to the functioning and accountability of government and public institutions, this rationale alone will be explored in greater detail.

4.1.3.(ii) Political rationale

Hogg believed that the most powerful rationale was the political one. That is, freedom of expression functioned as a tool of democratic government. He pointed to Rand, J.'s opinion in *Switzman v. Elbling* as being the best articulation of freedom of expression's essential role in the democratic form of government: parliamentary government essentially depends upon an open society which fosters and encourages free public opinion, and it requires almost

³²⁷ *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at 876-77, per LaForest, J.

³²⁸ P.W. Hogg, *Constitutional Law of Canada* (4th ed.) (Scarborough: Carswell, 1997) at 40-7.

³²⁹ *R v. Keegstra*, [1990] 3 S.C.R. 697 at 727.

unrestrained access to and spreading of ideas. It is not surprising that Hogg therefore asserted that political speech is at the core of freedom of expression.³³⁰

Cory, J.A. expressed a very similar viewpoint. He stated that a democracy could not exist without the liberty of, in part, advancing “opinions about the functioning of public institutions” and that “[t]hese opinions may be of existing practices in public institutions and of the institutions themselves.” He also said that freedom of expression “. . . is, for example, often the hallmark of . . . campaigns for the establishment of new public institutions or the reform of existing practices and institutions.” He believed that suppressing the exchange of ideas and opinions threatened the existence of democratic governments because freedom of expression was essential to democracy: “A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions.”³³² He believed that governments that attempt to prevent the spreading of contrary views and opinions cease to be democratic and instead are moving towards totalitarianism.

Whatever specific value the expression is predicated upon, it must be remembered that it is but one of a set of “core values” that justify providing constitutional protection to expression. In a related situation where Ontario restricted the political activity of its civil servants and Crown employees in federal elections (as well as their ability to express their views on political issues),

³³⁰ *Hogg, supra.*, note 328 at 40-7; *Switzman v. Elbling*, [1957] S.C.R. 285.

³³¹ *R. v. Kopyto* (1987), 62 O.R. (2d) 449 at 462, [1987] O.J. No. 1052 (Ont. C.A.) online: QL (ORP). Harry Kopyto was a lawyer who had been charged with the criminal offence of contempt of court for making statements that scandalized the court. He raised freedom of expression as a defense to the charge concerning his utterances to the press.

³³² *Ibid.*

Dickson C.J.C. stated that "It must not be forgotten, however, that no single value, no matter how exalted, can bear the full burden of upholding a democratic system of government."³³³

4.2. Whistle Blowing

4.2.1. Court Cases

Very few court decisions have dealt with freedom of expression and a public servant's open criticism of government policies/practices or whistle blowing. The *Fraser* and *Haydon* cases are the most notable, if not the only ones that deal directly and extensively with these issues. *Fraser* is important as it established exceptions to the common law duty of loyalty and determined the limits of a public servant's acceptable criticism of government policy. *Haydon* is important because it appears to be the first post *Charter* court decision concerning whistleblowing by a federal public servant where the freedom of expression defence and the constraining common law duty of loyalty were subjected to *Charter* scrutiny. It upheld the *Fraser* principles as being reasonable limits under s. 1 of the *Charter*.

4.2.1.(i) The *Fraser* decision

The Supreme Court of Canada in *Fraser* started out by noting that although the case before the Court was in part about free speech rights, neither the freedom of expression provisions of the *Charter* nor the *Canadian Bill of*

³³³ *Ontario Public Service Employees Union (OPSEU) v. Ontario (A.G.)*, *supra.*, note 204 at 25. Although this case involved freedom of expression /association issues it was decided on a division of powers basis and not under the Charter since legal proceedings were initiated in 1979.

Rights was in issue. So although the Court addressed the freedom of expression issue, it did not do so from a *Charter* perspective, but instead approached it from an employment law perspective.³³⁴ Nevertheless, some of the Court's comments are not only appropriate, but instructive in understanding freedom of expression from a *Charter* viewpoint.

The Supreme Court of Canada indicated that a balance had to be struck between the employee's freedom of expression rights and the governmental objective of maintaining an impartial and effective public service. The Court started its balancing of values with the proposition that some speech by public servants concerning public issues is permitted because: 1) democracy is rooted in and thrives on public discussion of public issues 2) a blanket ban on all public discussion of all public issues by all public servants would deny fundamental democratic rights to far too many people, and 3) prohibition of all participation and discussion by all public servants would prohibit activities which no reasonable person would want to prohibit in a democracy.³³⁵ Specifically, Dickson, C.J.C. accepted Fraser's position that public servants cannot be "silent members of society"³³⁶ when he discussed the balance that had to be struck between a civil servant's free speech rights and the government's goal of maintaining an impartial and effective civil service. He stated that the balancing

³³⁴ See previous chapter on Employment Law.

³³⁵ *Fraser, supra.*, note 22 at 466.

³³⁶ *Ibid.*, at 466. And Major, J. writing for the Court in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 at 212 spoke along the same lines when he stated that "Employment in the civil service is not feudal servitude."

must “start with the proposition that some speech by public servants concerning public issues is permitted.”³³⁷

The Court provided three exceptions to the duty of loyalty that engaged a public servant’s free speech rights³³⁸. Distinct from the exceptions to the duty of loyalty relating to policy criticism, the Court’s judgment introduced an exception based upon wrongdoing by government – engaging in illegal acts. Although not applicable in *Fraser* based upon the particular facts of that case, 15 years later government wrongdoing came into its own as an exception to the duty of loyalty. This category became important as basis upon which the Federal Court resolved the issue involving Margaret Haydon when she spoke to the media about inappropriate practices within Health Canada.

4.2.1.(ii) The *Haydon* decision

Margaret Haydon was reprimanded for breaching the duty of loyalty she owed to the government following certain unauthorized public comments she made during an appearance on a national television program regarding the drug review process within Health Canada.³³⁹ She was also restricted from making further public comments on the matter. Instead of grieving the reprimand before the Board, she brought an application for judicial review in the Federal Court.

³³⁷ *Fraser, supra.*, note 22 at 466.

³³⁸ These have been fully canvassed in the previous chapter on Employment law.

³³⁹ Margaret Haydon was a drug evaluator with Health Canada. Her public comments disclosed information relating to the efficacy of the drug approval process generally within Health Canada, administration decisions to approve certain drugs irrespective of the drug evaluator’s recommendation concerning the drug, and that drug evaluators were being pressured by management to recommend the approval of drugs of questionable safety. These comments of hers concerned the conduct and practices of management and did not involve comment on any policy of Health Canada.

At the hearing, the government conceded that imposing disciplinary sanctions upon Haydon and prohibiting her from making future statements were violations of her freedom of expression under the *Charter*. The court accepted this admission and moved onto the s. 1 analysis.³⁴⁰

In the first step of the s. 1 analysis, the court held that the common law duty of loyalty was sufficiently precise so as to qualify as prescribed by law. Next, the objective of the common law duty of loyalty, as discussed in *Fraser*, was accepted as promoting an impartial and effective public service, which is essential to the functioning of a democratic society. Therefore the duty of loyalty passed the pressing and substantial objective test.

The court then determined that all steps of the proportionality test were met by the government. First, the court held that there is a rational connection between the duty of loyalty and the objective of promoting an impartial and effective public service. Secondly, the duty of loyalty does not demand absolute silence from public servants. Therefore, the court accepted that the two exceptions³⁴¹ to the common law duty of loyalty as enunciated in *Fraser* impair the public servant's freedom of expression as little as possible in achieving the objective of an impartial and effective public service (minimal impairment of the right). And finally the court found proportionality existed between the effect of the

³⁴⁰ *Haydon, supra*, note 6 at 104.

³⁴¹ According to the Court in *Haydon* it said that these were 1) illegal acts *and* 'harmful policies', and 2) where speaking out had no impact on the job performance of a civil servant (emphasis added). However, I believe that the 'first' exception is really two distinct exceptions, contrary to how the Court described the exception. So in my view, there are actually three exceptions: whistle blowing (disclosure of wrong doing), a specific category of policy criticism (harmful policies) and benign criticism of whatever kind (no job performance impact) respectively.

measure and the objective of the duty of loyalty, thereby concluding that the duty of loyalty under the common law, as expounded in *Fraser*, is a reasonable limit under s. 1 of the Charter on a public servant's freedom of expression.

Having concluded its *Charter* analysis of the duty of loyalty upon a public servant's freedom of expression and having found it to be a reasonable limit upon that freedom, the court then infused this finding into the *Fraser* framework to determine whether Haydon was justified in making her disclosure to the public media. This required the Court to determine if the Associate Deputy Minister (ADM) correctly applied the *Fraser* principles to the facts before him in arriving at his decision to uphold the discipline to Haydon for her conduct. It found that he had not done so. His decision was set aside and remitted back for reconsideration in accordance with the court's reasons.

The Court decided that Haydon had exhausted the internal reporting requirement mechanisms within her ministry to the point where the issue was not resolved to her satisfaction. Her public statements were an attempt to correct problems which were related to the drug review process within Health Canada. Accordingly, the ADM erred in determining that her conduct was "inappropriate public criticism of management."³⁴² Further, the Court said that prohibiting her from all future contact with the media was unreasonable as it ignored the illegal acts and harmful policies exception to the duty of loyalty laid down in *Fraser*. Because she had, in the Court's view, brought herself within this 'first' exception to the duty of loyalty, she was justified in speaking to the media.

³⁴² *Haydon, supra.* note 6 at 115.

The decision appears to state the law as it currently exists on the matter of a public servant's constitutionally protected freedom to disclose confidential government information on matters of public interest in certain circumstances. Each side got what it wanted and could claim victory. Haydon succeeded on the facts as her conduct was vindicated by the court and the disciplinary letter of reprimand was set aside. The government won on the law as the court upheld the *Fraser* principles as being reasonable limits under s. 1 of the *Charter* – they survived *Charter* scrutiny. It appears that both sides were able to claim victory.

However, in the 3rd step of the proportionality test, the court's reasoning is rather perfunctory and weak. No detailed assessment is undertaken as required by the Supreme Court of Canada in *Dagenais*; a simple proclamation suffices for analysis. The entire analysis consists of a single paragraph under the heading "Proportionality Between the Effect of the Measure and the Objective." The court resolved the test by stating:

" Given the exceptions [to the duty of loyalty] identified above, I believe that the common law duty of loyalty has only modest and tailored effects on a public servant's freedom of expression. I am of the opinion that the *possibility* of engaging in a balancing of competing interests, namely the government's interest in maintaining an impartial and effective public service and that of an employee to inform the public of any wrongdoing as well as the public's right to have any wrongdoing exposed ensures that proportionately is secured. It is clear that in cases that fall within the *Fraser* qualifications, the public interest outweighs the objective of an impartial and effective public service."³⁴³ (emphasis added).

However, proportionality was not actually assessed to determine if it existed between the impugned law's objective and the measures used to attain

³⁴³ *Haydon, supra*, note 6 at 110.

that objective. The court seems to indicate that the mere fact that it is possible to balance the objective of the law against some interest or right (rather than the effects of the measure) will undoubtedly result in achieving proportionality. At its best, this seems to be nothing more than an attempted restatement of the 3rd step of the test and not an application of the test to the facts of the case. It is possible that the final result might have been different if the Court correctly identified the measure, its beneficial and harmful effects and then conducted the balancing tests in the appropriate way. I say this because I believe that the Court's reasons for arriving at the final result are partially based upon the use of an incorrect test at the proportionality stage of the analysis.

That the court misstated the third part of the second branch of the *Oakes* test is apparent from the passage quoted above. What the court did was to balance "competing interests" at the proportionate effect part of the analysis instead of determining proportionality between the deleterious effects of the measure and the objective of the impugned law *and* determining proportionality between the deleterious and salutary effects of the measure as required by *Dagenais*. The court correctly stated (i.e., apprehended) the first half of the test in the heading to the analysis, but misapplied it. No actual balancing of the harmful effects of the measures and the objective of the law was conducted; the court simply stated that it was possible to balance the objective of the law (maintaining an effective and impartial civil service) with disclosure of wrongdoing. The disclosure of wrongdoing is neither the deleterious nor salutary *effects* of the measure. Rather, it is as the court stated, only one of two

“competing interests.’ The court also failed to perform the second half of the analysis at all (balancing the deleterious and salutary effects of the measure).

The correct test at this stage of the analysis would first involve balancing the objective of the law (maintaining an effective and impartial civil service) against the deleterious effects of the measure.³⁴⁴ I contend that the deleterious effects would be, in the whistle blowing context,³⁴⁵ the prevention of disclosing any government wrongdoing to the public with the consequent increased secrecy and decreased accountability on the part of government. Also, the wrongdoing either continues if it is still an ongoing activity or it is not corrected or punished if it consisted of a perfected act (assuming that the internal reporting requirement has been exhausted without any satisfactory resolution, as far as the whistle blower is concerned). The second aspect of this part of the analysis is to balance the deleterious effects of the measure with the salutary effects of the measure, the latter being ensuring confidential government information remains confidential until management authorizes its disclosure (either outside the immediate department but still within the organization or outside the entire organization itself, i.e., to the public). This helps to maintain the public’s continued confidence in the government and the civil service (in that the public’s perception of the impartiality, neutrality, fairness and integrity of the civil service is not diminished).

³⁴⁴ The measure being the gag order, or prohibition against making any comment regarding government conduct or disclosing confidential information without prior authorization from management.

³⁴⁵ It is important to note that, consistent with my basic contention that whistle blowing and policy criticism are different, the deleterious effects of the measure limiting whistle blowing are different from the deleterious effects of the measure limiting policy criticism.

If my identification of the measure of the objective as well as the harmful and beneficial effects of the measure is correct, then selecting as the objective an impartial and effective civil service appears to have been determinative in resolving the balancing test. When this is balanced against increased government secrecy, decreased accountability and the possible continuation of wrongdoing or lack of discipline or correction of the wrongdoing (the effects of the measure), having an impartial and effective civil service could arguably be more likely to prevail. The existence of an impartial and effective civil service is an important structural component of government that serves society as a whole as opposed to what might be a rare and isolated occurrence of whistle blowing by an individual, ostensibly anchored upon that person's free speech rights.

Therefore, if the court had managed to get the characterization right in the beginning, I believe that the government would still have prevailed because it is apparently more important to maintain an impartial and effective civil service than to allow civil servants unfettered freedom to be disruptive of government functioning and instigate a loss of confidence in the government from the public, whom the civil service in part serves.³⁴⁶ This viewpoint is consistent with the Supreme Court of Canada decision in *Fraser* where it stated that free speech is not an "absolute, unqualified value"³⁴⁷ but rather one that is qualified by the need for an impartial and effective civil service.³⁴⁸ The Supreme Court of Canada's view is that the institution of government will suffer a loss of confidence from the

³⁴⁶ *Fraser, supra.*, note 22 at 471.

³⁴⁷ *Ibid.*, at 468.

³⁴⁸ *Ibid.*, at 463.

public if the public perceives the civil service to be biased, unfair, etc.

Accordingly, the Supreme Court of Canada has decided that maintaining the public's confidence in the government and the civil service is more important than an individual public servant's unrestricted right to speak unfettered, whenever, on whatever subject.

As I have attempted to demonstrate, by resetting the elements to be balanced so as to conform with *Oakes* and *Dagenais*, the conclusion of the Court in *Haydon* may well be replicated.

4.2.1.(iii) *AUPE v. Alberta*

Briefly, Gibson was a social worker who read a report dealing with the government restructuring of his department, prepared by an opposition MLA. He wrote her a letter praising her report and expressing his opinion that the restructuring program would in effect fail and have harmful consequences upon those people it was intended to serve. He was disciplined via a letter of reprimand and verbally informed by his supervisor that he was prohibited from expressing his opinion on any government policy to anybody – in other words, a complete and total gag order re: government policy criticism.

In contrast to the *Charter* analysis of the Federal Court in *Haydon*, the Alberta Court of Appeal in *AUPE* reversed the analytical sequence by resolving the duty of loyalty aspect first (by finding that Gibson's letter did not contravene the duty of loyalty) and then infusing the result into the *Charter* framework which it then used to resolve the issue before it. However, if the Federal Court's decision in *Haydon* is considered to be the high water mark of *Charter* analysis

on the restriction of a public servant's freedom of expression by the common law duty of loyalty, then surely the Alberta Court of Appeal's decision in *AUPE* must be treated as the corresponding low water mark in jurisprudence on the topic. I come to this viewpoint, unfortunately, because we lack the benefit of the complete reasoning of the Court on this aspect of its judgment. This viewpoint is supported, I contend, by reproducing the entire *Charter* analysis of the Alta. C.A.:

"Therefore, Gibson's letter did not breach his duty of fidelity. Rather, the limitations imposed upon him by his employer breached s. 2(b) of the Charter and, as the limitations imposed did not fall within the ambit of the duty of fidelity, they cannot be saved by s. 1."³⁴⁹

From this passage it is clear that the court performed no explicit Charter analysis of the issue that it had said earlier in its judgment was central to the appeal. This is unfortunate, since we lack the benefit of the complete reasoning of the court on this aspect of its judgment. The court, in the passage preceding the above, found that Gibson's single letter was not a "sustained and highly visible attack on major Government policies" and that his criticism did not adversely impact his ability to perform effectively the duties of a civil servant or upon the public perception of that ability. As the above quoted paragraph indicates, the court in essence found that Gibson had brought himself within the second exception in *Fraser* regarding the duty of loyalty of a civil servant (i.e., no impact on job performance).

This should have been enough to allow the court to determine that the discipline he received was unwarranted, on an employment law basis under *Fraser*. But the court proceeded to use the employment law determination as

³⁴⁹ *AUPE*, *supra* note 24 at para 34.

the basis for its conclusion that Gibson's freedom of expression had been violated because the 'gag order' imposed upon him by his supervisor was outside the reach of the duty of loyalty, and so not a reasonable limit upon his free speech right. Perhaps it is because the court thought it was obliged to address the issue since it stated that the *Charter* issue relating to freedom of expression was central to the appeal.³⁵⁰ At first glance the reasoning appears convoluted in that an employment law determination is made, then infused into the *Charter* conclusion which further resorts back to employment law principles as they relate to the *Charter*. Left as is, this analytical framework for policy criticism does not provide adequate clarity or guidance as to how to deal with such issues, from either the employee's or employer's perspective. Bald statements of conclusion are one thing, how to arrive at them is another. The Alta. C.A. has therefore left the issue in the same state as it found it.

Yet this initial indictment of the decision may be ameliorated by viewing the decision from a different perspective – that the court provided the *Charter* conclusion only of its bifurcated reasoning of the issues. By that I mean the following: the court separated the issues into two factual branches, namely employment law (opinion letter to MLA) and *Charter* (verbal gag order) The confusion arises when the court links the two together unnecessarily after having resolved the employment law matter.

That the court dealt with the issue of the breach of Gibson's duty of loyalty to the government in his letter to the opposition MLA is clear. It reviewed the relevant *Fraser* principles and applied them to the facts to determine that he

³⁵⁰ *Ibid.*, at para 15.

had not exceeded the limits imposed by that duty. This represents the first branch of the court's approach. The second branch is devoted to the verbal gag order re: future criticism of government policy. Here, the court's analysis is completely lacking and is replaced instead with its conclusion that the gag order is an unreasonable limit upon Gibson's freedom of expression that has not been demonstrated to be justified by democratic principles.

I believe that had the court resolved both factual matters from an employment law approach its decision would stand on solid ground and it could have avoided the *Charter* morass it fell into. That the verbal gag order imposed by Gibson's supervisor violates the *Fraser* employment law principles is quite clear from Dickson, C.J.C.'s statements in that case. There, he said that the balancing of a civil servant's free speech rights against those of the government in ensuring an effective and impartial civil service starts with the proposition that some speech by civil servants on matters of public interest is permitted. He then specifically indicated that no reasonable person would want to totally prohibit a civil servant from participating in or opining on matters that underpin democracy.³⁵¹ So it would have been much simpler and legally supportable for the court to have resolved all issues by resort to the *Fraser* principles and stated that it was unnecessary to address the freedom of speech issue under the *Charter*.

Unfortunately, what the court has done is added to the confusion surrounding the continued amalgamation of policy criticism and whistle blowing aspects of breaches of the duty of loyalty instead of neatly separating them out.

³⁵¹ *Fraser, supra.*, note 22 at 466 – 467.

Additional support for this view rests in the observation that the government argued that in policy criticism situations such as this one (i.e., Gibson's letter to the opposition MLA), an internal reporting requirement must first be used by the employee. However, the court does not address this issue in its judgment – either in its reasons or in its conclusions. But, since the government raised and argued the issue and the court determined that Gibson's singular act of sending a letter containing his opinion critical of government policy did not breach his duty of loyalty, it is arguable that the court *implicitly* recognized that the internal reporting requirement is not applicable to policy criticism situations. This is the correct result flowing from a proper reading of the *Fraser* decision since the Supreme Court of Canada did not include an internal reporting requirement in policy criticism situations. To insert such a requirement in a policy criticism situation is both a misapprehension and misapplication of the *Fraser* principles: a misapprehension because *Fraser* lacks the requirement and a misapplication because the court would be adding an extra element and accordingly increasing the burden upon the civil servant where it is not appropriate to do so.³⁵² So this aspect of the judgment represents a beneficial clarification of the law regarding policy criticism situations.

Finally, I believe that the approach of the court in *Haydon* is preferable to the reverse sequence or bifurcated approach used by the court in *AUPE*.

Freedom of expression is a fundamental freedom, and any analysis and issue resolution involving this freedom should precede the subsequent use of it in a

³⁵² Unlike the situation with whistle blowing, discussed in the preceding chapter, where use of the internal reporting requirement is appropriate since it is a necessary element of the analysis (it is a pre-condition to making the disclosure public).

dependent analysis (i.e., the subsequent analysis depends on the resolution of the freedom of expression issue). It completely deals with the *Charter* issues separately and then infuses that result into an employment law context, where it is considered as only one factor amongst others, since it does not appear to be the sole or determining factor in the conceptual framework.

4.3. Conclusion

Long before the Charter existed federal public servants have been constrained by the common law duty of loyalty in their ability to publicly criticize the government. The Supreme Court of Canada in *Fraser* enunciated three exceptions to this restraint upon a public servant's freedom of expression (which is not an absolute right). Fifteen years later the Trial Division of the Federal Court clarified the law with respect to whistle blowing situations and provided a sound conceptual basis upon which future developments may occur.

Although numerous freedom of expression cases under the Charter have been decided by the Supreme Court of Canada, none has squarely involved whistle blowing by a public servant on matters of public interest. The issue still remains open whether and to what extent the *Charter* may be used to expand the *Fraser* exceptions to the duty of loyalty; it appears that neither *Haydon* nor *AUPE* represent the final word on the subject.

CHAPTER 5

EXISTING AND PROPOSED WHISTLE BLOWER PROTECTION MECHANISMS

In previous chapters I have considered the dynamics of organizational management and culture, the common law duty of loyalty and freedom of expression and how court and tribunal decisions have treated their relationship in an employment law context. Now the lessons learned will be used in the discussion of how attempts to 'reform' the public service culture have been impacted by existing Treasury Board policy, from a perspective that seeks to increase government accountability through whistle blowing mechanisms. How proposed Bill S-6 might affect the culture of the federal public service is discussed. The role of the courts in incrementally reforming the law through judicial decisions from an employment law and freedom of expression approach are included where appropriate.

5.1. Accountability Mechanisms – Generally

According to Manning and Galligan,³⁵³ the law or government policy are not always obeyed by public officials. A common response has been to establish an ombudsman office to address the problem of making government and administration accountable. But an ombudsman office is only one of various institutions and mechanisms that are available for that purpose, as others include: the courts, inspectorates and auditors, special appeal tribunals and

³⁵³ N. Manning & D.J. Galligan, "Using an ombudsman to oversee public officials" (1999) PREM notes, no. 19 at 1. Available online at : <http://www1/worldbank.org/PREMNotes/premnote19.pdf> (website last visited May 28, 2003).

internal complaint procedures are initiatives that are utilized in modern constitutional systems.³⁵⁴

The only general initiative concerning whistle blowing currently used by the Canadian Government uniformly throughout the federal civil service is an internal complaint procedure in the form of a policy pertaining to disclosing wrongdoing.³⁵⁵ No ombudsman office at the federal government level exists that deals exclusively with wrongdoing complaints, although many have been proposed in Parliament.³⁵⁶ The principal positions contained in this policy are the 'Senior Officer' at the individual department level and the 'Public Service Integrity Officer' at the federal civil service level.³⁵⁷ Both of these positions may be classified as 'executive regulators' (since they regulate on behalf of government) as part of the 'internal complaint procedure' mentioned above.³⁵⁸ These positions can be compared with the ombudsman and with the courts as these are three different institutions and mechanisms that may be implemented to try to and achieve greater government and administration accountability.

³⁵⁴ D. Galligan, "Making Government and Administration Accountable" (Address of the World Bank Global Conference on Comprehensive Legal and Judicial Development, 5-7 June 2000)[unpublished] at 31. Available online (website last visited May 28, 2003) at: http://www4.worldbank.org/legal/legop_judicial/ljr_conf_papers/Galligan.pdf

³⁵⁵ Although illegal acts are one category of wrongdoing, a separate federal government policy deals specifically with it: *Policy on Losses of Money and Offences and Other Illegal Acts Against the Crown*. Available online: Treasury Board of Canada Secretariat (website last visited May 28, 2003): http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/TBM_142/4-7_e.asp

³⁵⁶ See Chapter 1 re: "Brief History of Federal Whistle Blowing Legislation".

³⁵⁷ The Public Service Integrity Officer exists within the Office of Values and Ethics as part of the Treasury Board Secretariat.

³⁵⁸ Manning and Galligan, *supra*, note 353 at 3.

5.1.1. Internal Complaint Process – Policy Based

A general or specific government policy may establish a procedure for internal (intra-governmental) disclosure of wrongdoing (whistle blowing).

Internal complaint mechanisms, such as those established by the policy concerned, usually tend to be informal processes that are easy to establish and are fairly inexpensive to operate. The issue or complaint that they were created to address need not be limited to legal matters, but can be given a broad scope, and the complaint is usually dealt with by an official who is experienced in administrative matters. However, such systems find it difficult to maintain the separation between the primary decision maker (executive regulator) and the investigator. They tend to suffer from secrecy; their internal procedures oftentimes lack transparency, and their quality is low because of an absence of training or proper organization.³⁵⁹

5.1.2. Ombudsman

Different from the executive regulator he is the Ombudsman, who is described as “an independent government official who receives complaints against government agencies and officials from aggrieved persons, who investigates, and who, if the complaints are justified, makes recommendations to remedy the complaints.”³⁶⁰ The main function of an ombudsman is to investigate a complaint against government and its administration; it is accordingly essential

³⁵⁹ Galligan, *supra*, note 354 at 36.

³⁶⁰ D.M. Gottehrer and M. Hostina, “Essential Characteristics of a Classical Ombudsman” at 9. United States Ombudsman Association. Available online (website last visited May 28, 2003) at: <http://www.usombudsman.org/References/Essential.PDF>

that the ombudsman be independent of both.³⁶¹ Nor is the ombudsman an advocate for any individual or group, even though the recommendations made by an ombudsman might benefit the aggrieved person.³⁶² Indeed, the essential elements that characterize an ombudsman are: independence, impartiality and fairness, a credible review process, and confidentiality.³⁶³

The investigation the ombudsman undertakes seeks to determine if the action of the administration is faulty in terms of its procedure or substance. To that end the investigative powers provided are usually extensive – the power to question officials and obtain documents. If the complaint is substantiated then a solution is proposed for the government or administration to adopt. The government or agency is prompted (although not legally obligated) to comply with the suggestions by the ability of the ombudsman to publicize its investigation report and the response to it, and/or to make an (unfavorable) report to Parliament. This negative publicity of government's failure to accept and implement the proposed remedy is a powerful motivation for compliance.³⁶⁴

The ombudsman model investigates various and different defects in government and administration. But ombudsman offices may be rather different in their purpose and function, according to the nature of the defect they investigate. Galligan identified three main categories of investigation and the corresponding ombudsman models developed to handle them: (1) the illegality model in which the ombudsman investigates complaints of illegal acts committed

³⁶¹ Galligan, *supra*, note 354 at 38.

³⁶² Gottehrer and Hostina, *supra*, note 360 at 5.

³⁶³ *Ibid.*, at 1.

³⁶⁴ Galligan, *supra*, note 354 at 38-39.

by the administration; (2) the constitutional and human rights model focusing on abuses of, or illegalities relating to, those kinds of rights; and (3) the maladministration model founded on the concept that good administration requires more than merely complying with the law, since many defects other than illegal acts may broadly be considered to constitute maladministration. Galligan included such matters as carelessness, undue delay, lack of cooperation, unfairness and procedural irregularity in his notion of maladministration.³⁶⁵ He believed that this last model was "something of a luxury" since it could only exist and function meaningfully after an effective judicial system had been established and abuses of human rights had been controlled.³⁶⁶ It appears that this is the ombudsman model adopted for use by Bill S-6 (discussed later). One drawback of this model is that it might impose heavy burdens on the Ombudsman's office because of the greater number of types of complaints required to be investigated.³⁶⁷ But when this model is adopted in the context of internal whistle blowing within the federal civil service (as proposed by Bill S-6) it becomes a more specialized ombudsman office than one handling all complaints about government generally (since it is restricted to matters involving wrongdoing in the federal civil service workplace and does not include matters pertaining to clerical errors, carelessness, inefficiency, rudeness, etc.).

³⁶⁵ Galligan, *supra*, note 354 at 39; Manning and Galligan, *supra*, note 353 at 2.

³⁶⁶ Galligan, *supra*, note 354 at 40.

³⁶⁷ Manning & Galligan, *supra*, note 353 at 2.

5.1.3. Judicial Supervision

In contrast to internal complaint and ombudsman mechanisms of achieving government accountability, resort to the judicial system is seen as being a more limited approach. The reasons for the court's restricted effectiveness are that: 1) it is confined to the legality of specific acts and decisions of the administration; 2) the persons affected by the administrative action must commence a court challenge to it, resulting in a sporadic means of attaining accountability; 3) it is an expensive and slow endeavor (compared to the other two methods discussed); and 4) the court's capacity to review administrative action is functionally limited since it deals with other kinds of disputes also (e.g., criminal, divorce, etc.). On the other hand the unique aspect of this institution is that it protects rights in specific situations and can provide remedies the other two mechanisms cannot (e.g., declarations of nullity or liability). Although this is a feature not possessed by either an executive regulator or the ombudsman, it is still narrow since it pertains only to the person(s) who challenged the administration action; broader implications for the administration as a whole may be negligible, because it may be likely to have marginal impact on administrative practices generally.³⁶⁸

5.1.4. Comparison of Mechanisms

The key differences between judicial supervision of government and the use of ombudsman or executive regulators to attain greater accountability lies mainly in their functions. Courts are judicial bodies that adjudicate upon

³⁶⁸ Galligan, *supra*, note 354 at 35.

questions of law whereas the others are non judicial bodies that are essentially investigative. Generally speaking, the fundamental institutional difference is that resort is made to the courts to challenge the legality of administrative action; any involvement in legal matters by the Ombudsman is as an adjunct to the legal system. Courts can impose legally enforceable remedies (but only between the parties involved in the dispute) while the other two cannot make any binding orders.³⁶⁹ They make recommendations, which might exceed the immediate issue of the specific complaint investigated and may be systemic in nature. Finally, the court system is generally expensive, time-consuming and almost always necessitates the involvement of lawyers; access to the ombudsman or executive regulator is easier, faster and far less costly (if any expense at all is incurred).³⁷⁰

5.2. Specific Accountability Mechanisms

The above discussion has been general in its focus and treatment of the mechanisms involved. Now I will discuss in more detail the specific mechanisms provided by Bill S-6 and the Treasury Board Secretariat policy.

5.2.1. Bill S-6 (Ombudsman)

Bill S-6³⁷¹ is a private member's Bill introduced in the Senate of Canada on October 3, 2002 and appears to be virtually identical to its counterpart introduced in the House of Commons (Bill C-241) but is more comprehensive than the third Bill (C-201) of the 3 private members' Bills currently before both

³⁶⁹ Gottehrer and Hostina, *supra*, note 360 at 7.

³⁷⁰ Manning and Galligan, *supra*, note 353 at.3.

³⁷¹ *Supra.*, note 38, Chapter 1. As discussed in Chapter 1, other proposed Bills currently before Parliament are Bill C-201 and Bill C-241.

Houses of Parliament. Each of these Bills attempts to establish a regime containing a mechanism within which concerns of federal public servant 'whistle blowers' may be resolved internally within their organization (i.e., the federal public service). The Government of Canada has not introduced any government Bills in either the House or Senate as of May 31, 2003. So the only draft legislation to address government wrong doing appears, at the present time, to be the private members' Bills referred to above.

5.2.1.(i) Purpose:

The stated purposes of Bill S-6 are threefold: 1) *education* of the public service (including management) of ethical practices in the workplace and to promote those practices; 2) *facilitation of whistle blowing* internally within the federal public service by creating a new administrative regime for the reporting of government wrongdoing, accomplished through the creation of an independent Commissioner³⁷² who only receives, investigates and reports to Parliament, but who does not have the authority to rectify the alleged wrongdoing;³⁷³ and 3) *protection* of the whistle blower from organizational retaliation³⁷⁴ (emphasis added).

5.2.1.(ii) Definitions:

"Whistle blowing" is not defined in Bill S-6 but "wrongful act or omission" is, and it serves to provide a list of what is considered to be 'wrongdoing.' Like

³⁷² Bill S-6, s. 4(1). Formally, the office created is known as the "Public Interest Commissioner".

³⁷³ The Commissioner has no legal authority to correct the wrongdoing, and so really functions only as an investigator/screener of alleged government wrongdoing.

³⁷⁴ Whistle blowing is encouraged through the protection model, rather than the reward model (i.e., the financial incentive model whereby the whistle blower shares in the actual legal recovery of money found to be owing to the government by the wrongdoer. The financial incentive model finds widespread use throughout the United States, at both the federal and state levels).

other Bills or legislation in other jurisdictions, the important point made is that for the most part, only 'significant' wrongdoing is made the subject of inquiry by the Commissioner. Although s. 3 identifies five 'categories' of wrongdoing (illegal acts; wasting public money; endangering public health, safety or the environment; breaching public policies or directives, and gross mismanagement or abuse of authority), only two are required to be 'significant' in order for the Commissioner to be empowered to investigate the matter: wasting public money and *breaches of written, established* public policies or directives. That the policies or directives must be *written* and *established* suggests that *formal*, as opposed to *informal* policies are the focus of the legislators' intention (emphasis added).

In addition, there is an important distinction to be made between the 'second' exception provided in *Fraser* and the third 'category' in Bill S-6. In *Fraser*, the focus was upon "*policies* [that] jeopardized the life, health or safety" of people while Bill S-6 does not deal with *policies* but rather *acts* that are "likely to endanger public health or safety or the environment" (emphasis added). *Fraser* contains the element of "life" while Bill S-6 does not, but Bill S-6 contains an element relating to the environment while *Fraser* omits it. Yet it seems quite likely that any act which endangered the environment or public health / safety would also constitute a threat to human life (in proportion to the degree or extent of the threat), so that this provision of Bill S-6 parallels the second exception in *Fraser* re: threats to life. Since the Supreme Court of Canada in *Fraser* stated that there may be other exceptions to the duty of loyalty in addition to those it

articulated, threats to the environment could easily be included by the Court under the *Fraser* analysis.

5.2.1.(iii) Public Interest Commissioner:

The Commissioner performs an investigative, not adjudicative function upon the receipt of a written notice alleging wrongdoing. Broad powers are available to the Commissioner: investigating and reporting on the state and management of the department involved in the alleged wrongdoing including the conduct of any person within that department insofar as it relates to the official duties of the person; and the authority to examine the documents, etc. of the public office or institution involved. The Commissioner has not been given any specific legal authority to institute or conduct a hearing or other type of formal legal proceeding into the matter.

Disclosure of an allegedly illegal act may be made by the Commissioner to the Attorney General of Canada or any province where the Commissioner believes, based upon the evidence presented or that has been uncovered during an investigation, that an illegal act has been committed.³⁷⁵ Likewise, the Commissioner may publicize any information relating to wrongdoing when doing so is believed to be in the public interest.³⁷⁶ As an ombudsman, the Commissioner is powerless to correct any wrongdoing that is substantiated,³⁷⁷ although the Commissioner nevertheless is able to indirectly bring pressure to bear upon the government through the public's reaction to the release of

³⁷⁵ Bill S-6, s. 5(4).

³⁷⁶ *Ibid.*, s. 5(1).

³⁷⁷ Gottehrer and Hostina, *supra.*, note 360 at 1: "A classical Ombudsman functions in government to receive and investigate complaints." and at 9: "... and who, if the complaints are justified, makes recommendations to remedy the complaints."

information obtained while investigating the wrongdoing complaint. This aspect of public exposure and consequent denunciation of government wrongdoing has tremendous "psychological value" because the Commissioner serves to vindicate the public's confidence "that there exists a watchdog for the people who will hold government accountable."³⁷⁸

As mentioned above, after the public servant makes a complaint concerning wrongdoing, the Commissioner is restricted to investigating the allegation and making a report. No lawful authority has been given to the Commissioner actually to do anything about the alleged wrongdoing itself (i.e., stop, correct, punish, initiate legal proceedings in respect of the complaint, etc.). So from the whistle blowing employee's perspective, no substantive redress concerning the wrongdoing allegation can be achieved by resort to the mechanism provided in Bill S-6. The ombudsman model (as adopted by Bill S-6) used in seeking greater accountability of government does not extend to providing a remedy for complaints.

5.2.1.(iv) Internal Reporting Requirement:

At the present time the current Treasury Board policy³⁷⁹ governing the issue of internal reporting of government wrongdoing requires a civil servant to conform to the procedural requirements of the policy when making such a disclosure outside the employee's department. This policy would be superceded by the passage of Bill S-6 and its mechanism for the disclosure of wrongdoing within government. If passed into law, it appears that the regime

³⁷⁸ *Ibid.*, at 10.

³⁷⁹ *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*, *supra*. note 40.

established by Bill S-6 for the reporting of government wrongdoing by civil servants would be the sole mechanism to be used for that purpose, even though mandatory language regarding its utilization is not contained within the Bill.

Additionally, the grievance process established by s. 91 of the *PSSRA* does not appear to be applicable to wrongdoing reporting, since it is restricted to matters "affecting the terms and conditions of employment of the employee [civil servant]."³⁸⁰ The 'terms and conditions of employment' relate to such matters as: holidays, compensation, discipline, seniority, lay-off, health & safety, etc.³⁸¹ The voluntary disclosure of government wrongdoing and its correction does not appear to be a matter that relates intrinsically to the 'terms and conditions of employment' as determined by the courts, and so whistle blowing per se would seem to be excluded from the ambit of that term. The employee would not be entitled to use the grievance procedure set out in s. 91(1) of the *PSSRA*; it is the wrong vehicle for the wrongdoing complaint. But if the employee did make such a complaint in accordance with the established procedures and experienced some kind of retaliation as a result, then recourse could be had to the grievance process, as happened in the *Guenette* case.³⁸² So although there may be a connection between whistle blowing and the grievance process, it seems to be dependent upon the reaction to whistle blowing and not the act of whistle blowing itself.

³⁸⁰ *PSSRA*, *supra*, note 218. Section 91(1) reads: "Where any employee feels aggrieved . . . (b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, . . . in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled . . . to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act."

³⁸¹ *Vaughan v. Canada*, [2003] F.C.J. No. 24, (F.C.A.) online: QL (FCCB) at para 90, 100.

³⁸² *Supra*, note 217.

Yet under Bill S-6, retaliation in general (including harassment) is considered to constitute disciplinary action, which is prohibited by s. 19(1) in relation to whistle blowing activities or the refusal by a public servant to engage in wrongdoing. Further, s. 21 makes a contravention of s. 19(1) an offence punishable by summary conviction. However, no remedy mechanism for having suffered disciplinary action is provided for in Bill S-6. It merely permits the affected employee to "use every recourse available to the employee under the law". The Bill neither assists the employee in obtaining redress for the disciplinary action suffered nor does it impede that endeavour.³⁸³ The remedy must be sought from the Public Service Staff Relations Board through the grievance process under the *PSSRA* or in an action for damages in the courts.³⁸⁴ Both these bodies have expertise in dealing with disciplinary and dismissal matters, so there is no need to create yet another process that would duplicate other existing processes already in place and functioning to deal with the matter. In addition, as stated earlier, the Commissioner is functionally an ombudsman who essentially investigates and reports findings, not an adjudicator or judge required to receive and assess evidence, make findings of fact that result in a decision which affects the rights of individuals or government.

A public servant who has a reasonable basis for believing that wrongdoing has occurred or is about to occur within the government is permitted to make a

³⁸³ Bill S-6, s. 22.

³⁸⁴ Legal proceedings in the provincial courts are available to the public servant as determined by the Ontario Court of Appeal in *Guenette v. Canada*, *supra*, note 217. However, the Federal Court of Appeal came to the opposite result: *Vaughan v. Canada*, [2003] F.C.J. No. 241 at paras. 32, 63 and 85; the federal public servant was restricted to using the grievance process set out in the *PSSRA* or instituting legal proceedings in the Federal Court of Canada.

complaint of such activity to the Commissioner (written notice of allegation – s. 9(1)(a)). The notice is required to be in writing³⁸⁵ and must contain certain specified information: the whistle blowing employee's name and signature, the identity of the wrongdoer, why the whistle blowing employee believes that the wrongdoing has occurred or will occur and why the activity complained about is wrongful, providing details known to the whistle blowing employee.³⁸⁶ If the notice is given in good faith and is based upon reasonable belief, it is deemed to not be a breach of any oath of office or secrecy or to have breached the employee's duty of loyalty owed to the government (s. 9(3)).

When the Commissioner receives a written notice from a public servant alleging wrongdoing, he must make a preliminary determination as to its suitability to form the basis of an investigation. If the notice is not trivial, frivolous or vexatious, provides all the necessary particulars regarding the wrongdoing, does not violate the solicitor-client privilege, and is given in good faith and on the basis of reasonable belief then the Commissioner must accept the notice (s. 12(1)). Where the notice contains a statement which is known to be false or misleading at the time by the employee giving the notice, then the Commissioner is entitled to determine that the notice lacks a good faith basis (s. 12(2)). Yet simply because the notice might contain mistaken facts does not mean that it will be considered to have been given in bad faith; the Commissioner has the discretion to determine that if the existence of mistaken facts is the only 'defect'

³⁸⁵ Bill S-6, s. 9(1)(a): "An employee who has reasonable grounds to believe that another person working for the Public Service or in the Public Service workplace has committed or intends to commit a wrongful act or omission (a) may file with the Commissioner a written notice of allegation;"

³⁸⁶ Bill S-6, s. 9(2).

with the notice, that it is otherwise still a valid notice of wrongdoing.³⁸⁷ These preconditions to the acceptability of the notice, along with a definition of wrongdoing restricted to serious matters, serve to screen out minor or trivial and false allegations of wrongdoing. The consequences of such abuses of the system could be severe, as under existing labour arbitration jurisprudence, false or unsubstantiated allegations of wrongdoing may result in discharge of the employee.³⁸⁸ If the notice is rejected at the preliminary determination stage the Commissioner is required to so inform the employee who provided the notice.

In situations where the notice violates solicitor-client privilege, or has not been made in good faith or on the basis of reasonable belief, the Commissioner has the discretion so to inform the employee as well as the employee's minister. With notices which may be considered to have been false allegations of wrongdoing, it seems both reasonable that disciplinary action would likely follow, and that it would be appropriate in the circumstances. The threat of disciplinary action where appropriate will have a chilling effect on subsequent attempts to make false allegations of wrongdoing, will greatly assist in the prevention of abusing the system for personal reasons or gain, and stop the reporting of trivial matters.

On the other hand, where the whistle blowing employee has complied with all the substantive requirements for a valid written notice, then the Commissioner

³⁸⁷ Bill S-6, s. 12(3).

³⁸⁸ See *Trevena and Treasury Board (Revenue Canada – Taxation)*, [1998] C.P.S.S.R.B. No. 102 (PSSRB) online: QL (CSBB)(PSSRB File No. 166-2-28562) and *Grahm v. Canada (Treasury Board)*, (1987), 91 N. R. 394, [1987] F.C.J. No. 36, (F.C.A.) online: QL (FCCB).

is obligated to accept the notice and inform the employee of its validity and acceptance (s. 13).

5.2.1.(v) Investigation and Report

If the notice is accepted as being valid³⁸⁹ under s. 13, then the Commissioner is required to investigate the allegations of wrongdoing and make a report to the Minister of the employee accused of wrongdoing. But if other circumstances surround the valid notice, then the Commissioner may be exempted from making a report, although still obligated to investigate the wrongdoing allegations, and required to inform the complainant that no report will be prepared.³⁹⁰ Although there initially may be little point in the Commissioner conducting the investigation at all in those circumstances since if no report will ever be produced then nothing will be accomplished to assist in the correction of alleged wrongdoing, it would nevertheless serve to confirm whether wrongdoing has in fact occurred. An employee might be mistaken in the facts relied upon in making the complaint of wrongdoing yet still believe those facts to be true. An investigation would presumably reveal that there is no factual basis for the complaint because the actual situation is not as it is claimed to be, and that no wrongdoing had occurred. In this circumstance it would serve no useful purpose

³⁸⁹ The notice must not be trivial, frivolous or vexatious, and has not been given in bad faith or lacks a reasonable basis or breaches any solicitor-client privilege, but must allege and provide adequate particulars of a wrongful act.

³⁹⁰ According to s. 14(2), the Commissioner would not have to make the report where the whistle blowing employee could have used other review procedures available (e.g., the grievance process under the *PSSRA*, as the allegation might turn out to be a management – human resources problem) or if the matter could initially be dealt with more appropriately under another procedure, such as a Human Rights Tribunal proceeding where, for example, pervasive departmental racial discrimination is involved (such as in *Chopra v. Treasury Board (Health Canada)*, *supra*, note 5, or where a delay in filing the notice with the Commissioner would result in the Commissioner's report serving no useful purpose.

to report to the Minister that the alleged wrongdoing employee had done nothing wrong. The absence of a report after an investigation by an impartial ombudsman should convince a reasonable person that the initial complaint had no merit since no impropriety was found to have occurred.

At this point it is important to ask what is the required standard of proof relating to the evidence of wrongdoing that must be presented to the Commissioner to cause an investigation pursuant to s. 14(1) of Bill S-6? First, the notice must be accepted by the Commissioner. To accept the written notice of the public service employee, the Commissioner must be satisfied that the notice contains "adequate" particulars of the wrongdoing, that it was given in "good faith" and that it was made on the basis of "reasonable" belief.

The different standards of proof used by courts and tribunals range from 'beyond a reasonable doubt' in criminal trials to 'preponderance of evidence' (or the 'balance of probabilities') to 'credible or trustworthy'³⁹¹ evidence in civil proceedings. In certain U.S. jurisdictions an enhanced civil standard is employed; it is greater than the 'preponderance of evidence' yet less than 'beyond a reasonable doubt'.

All of these standards are used in adjudicative proceedings whereas the legal proceedings instituted by the Commissioner are only investigatory in nature. Should those same standards apply to very different proceedings? All the public servant can accomplish with the allegation of wrongdoing is to trigger an investigation that, if the complaint is substantiated, will result in recommendations given to the wrongdoer's Minister and an executive summary presented to

³⁹¹ *Immigration and Refugee Protection Act*, S.C. 2001, c.27, s. 170(h).

Parliament. The intent of Bill S-6 does not appear to be to weed out a valid allegation of wrongdoing because of a lack of verifiable evidence before the investigation is initiated. If the allegation is unfounded, that will come out during the investigation when the evidence adduced does not support it. Rather, a minimal standard is used to assess the evidence provided and based upon that, to decide if further inquiry into the matter is warranted.

Such a minimal standard can be found in the *Coroners Act* of various provinces,³⁹² namely that of reasonable and probable grounds. It is used to determine whether to investigate further or aid in the investigation leading up to the actual coroner's inquest itself, wherein the jury makes findings of fact and recommendations.³⁹³ Similarly in the criminal context, when police must decide whether to investigate a matter further in order to determine if a crime has occurred, a 'reasonable and probable grounds' test is also used. Cory, J. examined the meaning of this phrase in *R. v. Storrey*³⁹⁴ and quoted Scott, L.J. to the effect that it means a reasonable person would inquire further into the matter:

"the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably."³⁹⁵

³⁹² See, for example, the *Coroners Act*, R.S.O. 1990, c. C.37, s. 16(1) which states: "A coroner may . . . (b) enter and inspect any place where a dead body is and any place from which the coroner has reasonable grounds for believing the body was removed." And s. 16(2) which states: "A coroner who believes on reasonable and probable grounds that to do so is necessary for the purpose of the investigation may, . . . (c) seize anything that the coroner has reasonable grounds to believe is material to the purposes of the investigation." The *Coroners Act*, R.S.B.C. 1996 c.72, s. 15(2) contains a similar provision.

³⁹³ *Ibid.*, s.31(1), (3) for Ontario and s. 27(1), (3) for British Columbia, respectively.

³⁹⁴ [1990], 1 S.C.R. 241 at 251; [1990] S.C.J. No. 12 online: QL (SCC) at para. 15.

³⁹⁵ *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.) at 329.

The reason for adopting this particular standard is that the goal of the whistle blower in making the disclosure is to draw attention to the situation, so that it can be investigated and corrected if it is determined that wrongdoing has occurred. This standard functions then to determine whether further examination of the matter in a more detailed fashion is warranted, as worthy from unworthy complaints must be sorted out.

The important aspect of s. 14(2)(c) is that the delay is not to be calculated from the date when the employee became aware of the wrongdoing, but from the date of its actual occurrence.³⁹⁶ This will undoubtedly translate into the potential whistle blowing employee having to decide very promptly, after becoming aware of the alleged wrongdoing, whether to make a complaint to the Commissioner or not. The potential whistle blower may take a long time to decide whether to complain about the alleged wrongdoing because of factors such as: overcoming reluctance to be disloyal to a colleague, overcoming fear of retaliation, moral uncertainty about 'doing the right thing', struggling with divided loyalties between the public interest and government, etc. This may result in a greater risk that the delay will contribute to a finding by the Commissioner that no useful purpose

³⁹⁶ The assumption is made that the wrongdoing occurred relatively recently and was a single, completed event and not an ongoing activity. This provision of Bill S-6 appears then to reward wrongdoing that was a single occurrence and has been covered up for a period of time before discovered. But the interesting question is whether a series of seemingly completed and isolated events of the somewhat distant past can be considered to be symptomatic of a pattern of behaviour that could constitute wrongdoing that is ongoing.. See, for example, *Guenette v. Canada (A.G.)*, *supra*, note 217, where the whistle blowing employees accused the management of the federal government of "flagrant disregard of fiscal accountability" and "continuing incompetence concerning the manner in which the Bureau of Physical Resources approached its mandate" in relation to the purchases of lavish foreign properties for the official residence of diplomats posted abroad.

would be served by preparing and delivering a post-investigative report. Where a report following an investigation must be made, the Commissioner must send a copy of the report to the accused employee's minister within one year after having received the notice of wrongdoing (s. 14(4)).

It is ironic that the whistle blowing employee is informed only about the validity or invalidity³⁹⁷ of the notice of wrongdoing (and the specific reasons therefor) and not about the findings and recommendations of the Commissioner regarding the substantive allegation of wrongdoing. If the notice is determined to be invalid and hence is rejected by the Commissioner, no investigation will occur, but the employee is not entitled to be informed of this fact. If the notice is accepted and acted upon, then the employee could ascertain the results of the investigation by obtaining a copy of the statement of activity discussed previously, as the Commissioner is not legally required to provide a report of the investigation to the employee. But this would mean that the employee would have to wait until the statement was presented to Parliament perhaps more than one year after the notice was initially filed with the Commissioner, before being able to access an executive summary of the Commissioner's findings and recommendations in relation to the complaint the employee filed.

If the employee's minister receives a report from the Commissioner pursuant to s. 14, then the minister must respond to the Commissioner in some fashion. The response may be that the Minister has done something, plans to do something or plans to do nothing concerning the wrongdoing allegation. No

³⁹⁷ Sections 13(1) and 12(4) respectively of Bill S-6, *supra*, note 38.

time limit within which a response is required is stipulated in Bill S-6.³⁹⁸ If the Minister advises the Commissioner of a proposed course of action, the Commissioner appears to have the authority to require additional responses of the Minister in the nature of a 'status report' until the matter has been completely dealt with by the Minister.³⁹⁹

As mentioned previously, the findings and recommendations in relation to all investigations of wrongdoing conducted by the Commissioner are submitted to Parliament indirectly. This is achieved through the inclusion of an executive summary, amongst other information,⁴⁰⁰ in the annual report to Parliament from the Public Service Commission.

5.2.1.(vi) Protections and Offences

Section 18 of Bill S-6 prohibits any person from providing false information to the Commissioner while the Commissioner is exercising duties or powers under the Bill. This is broad enough to cover not only information contained in the notice of wrongdoing, but also any information provided during the course of an investigation, and any response to a Commissioner's report provided by a Minister. The remainder of the offences relate to protecting a whistle blowing employee by prohibiting management from retaliating against an employee for blowing the whistle or planning to do so, for refusing to engage in wrongdoing, or

³⁹⁸ Bill S-6, s. 15.

³⁹⁹ *Ibid.*, s. 15(3).

⁴⁰⁰ The precise mechanism is referred to as a "statement of activity": s. 17(1) of Bill S-6. Most of the information contained in the statement is of a statistical nature: the number of notices received, accepted, rejected, investigated, reports made, etc. Only an 'executive summary' ("abstract of the substance of all reports to ministers") along with the discretionary inclusion of the substance of any individual report to a minister and the response or lack thereof are the non-statistical components of the statement of activity provided to Parliament.

for doing anything so as to comply with the provisions of the Bill.⁴⁰¹ The 'protection model' used in the Bill to enhance government accountability through the reporting of wrongdoing by public servants accomplishes this by very broadly defining "disciplinary action." This term includes almost all the usual methods used by management to harass, intimidate or punish an employee for dissenting, through words or actions, with some aspect of organizational culture or for displaying loyalty to the organization's "avowed mission and principles."⁴⁰² The protection afforded by s. 19 extends for two years from the date the employee files a notice of wrongdoing with the Commissioner. Any disciplinary action taken against the whistle blowing employee by management within this time period is deemed to be retaliatory. However, this presumption can be rebutted by a "preponderance of evidence to the contrary."⁴⁰³ In other words, a whistle blowing employee cannot file a valid notice and thereafter for two years claim absolute job security in the face of disciplinable conduct that is unrelated to the whistle blowing (e.g. job incompetence, legitimate workplace reorganization, etc.). Also prohibited is the identification of the whistle blowing employee.⁴⁰⁴

An interesting PSSRB decision that would likely invoke the s. 19(3) presumption of retaliation is *Rothenberger and Treasury Board (Royal Canadian*

⁴⁰¹ Bill S-6, s. 19(1). These offences all fall under the rubric of prohibited disciplinary action.

⁴⁰² D. Goleman, *Working with Emotional Intelligence* (New York: Bantam Books, 1998) at 284. Goleman believes that retaliation by management serves to send a powerful signal to other members of the organization in a position similar to that of the whistle blowing employee: "... most are victimized by the organization – fired, persecuted, sued – rather than thanked. They commit the ultimate sin: to speak the unspeakable. And their expulsion from the organization sends a tacit signal to everyone else: "Go along with the collusion here lest you, too, lose your membership." To the extent that such collusion keeps questions vital to organizational effectiveness from being asked, it threatens the organization's survival."

⁴⁰³ Bill S-6, s. 19(3).

⁴⁰⁴ *Ibid.*, s. 20(1).

Mounted Police).⁴⁰⁵ Three weeks after she complained to her female supervisor that material of a sexual nature (and which she considered to be offensive and harassing) had been faxed to the workplace, Rothenberger was told by the staff sergeant that her shift was being changed from the day shift to the evening shift. She was convinced that it was in retaliation for verbally reporting the use of government property for improper purposes (i.e. the sending to the staff sergeant of the sexual material). The adjudicator ruled otherwise, finding that legitimate operational reasons existed for changing her hours of work. Although the result might be the same (because of the factual basis for the shift change) if Bill S-6 had been enacted into law at that time, s. 19(3) of Bill S-6 nonetheless would have first placed the onus on management to disprove retaliation rather than requiring Rothenberger to prove that it was the basis for the shift change. The larger and more important point is that it is no small moment during the course of an adversarial proceeding when the burden of proof shifts from one party to the other. S. 19(3) of Bill S-6 is such a moment that seeks to reform the grievance process directly and the organizational culture indirectly through its operation. The chilling effect of s. 19(3) on management's propensity or inclination to retaliate is analogous to that of requiring the employee to put the allegation of wrongdoing in writing and sign it, thereby identifying the accuser. One provision acts to prevent reprisal and protect the whistle blower while the other discourages false or trivial allegations of wrongdoing.

Section 21 of the Bill makes it a summary conviction offence to file a notice of wrongdoing that violates solicitor-client privilege, retaliate against a

⁴⁰⁵ [1995] C.P.S.S.R.B. No. 2 (PSSRB) online: QL (CSBB)(PSSRB File No. 166-2-25653).

whistle blowing employee, reveal the employee's identity or to give the Commissioner false information.⁴⁰⁶ In addition to the prohibition against management retaliation, the employee that is disciplined contrary to the Bill is permitted to pursue any and all legal remedies, causes of action, etc. available whether or not any legal proceedings are initiated against the person who has committed an offence contrary to the Bill.⁴⁰⁷ Most importantly, the presumption of retaliation outlined in s. 19(3) applies to the legal proceedings commenced by the employee where illegal disciplinary action has been taken against the employee. This means that, for example, where the employee has been dismissed purportedly for cause, the burden is placed upon management to prove that the dismissal was not retaliatory in nature. This does not appear to alter the employer's legal burden in wrongful dismissal lawsuits generally, where the employer must prove that the employee was terminated for just cause.⁴⁰⁸

5.3. Treasury Board Policy (Executive Regulator)

On November 30, 2001 a new policy of the Treasury Board of Canada Secretariat regarding internal whistle blowing by public servants was implemented. Entitled "Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace",⁴⁰⁹ it created procedures for the intra-departmental and intra-governmental disclosure of wrongdoing and purportedly offered protection to public servants who complied with the policy when reporting

⁴⁰⁶ The offence is punishable only by fine, to a maximum of \$10,000.

⁴⁰⁷ Bill S-6, s. 22.

⁴⁰⁸ "The legal burden of proving that the employee has committed sufficiently serious acts of misbehaviour or incompetence to warrant summary dismissal is on the employer." G. England, *Individual Employment Law* (Toronto: Irwin Law, 2000) at 258.

⁴⁰⁹ *Supra*, note 40.

wrongdoing within their department. The policy appears to follow on the heels of the Federal Court (Trial Division) decision in *Haydon*⁴¹⁰ and the appeal to the Ontario Court of Appeal from the Ontario Superior Court of Justice decision in *Guenette v Canada*.⁴¹¹ It is quite likely that the policy was crafted in response to, or at least in consideration of, these court decisions, because the policy objective seeks to protect employees from retaliation if they report workplace wrongdoing.⁴¹² The policy addresses these decisions because the applicants in *Haydon* resorted to various internal mechanisms within their department at Health Canada to have their concerns addressed within the government. Ultimately they were not satisfied with the response so they disclosed their concerns to the national media. Similarly, the applicants in *Guenette* followed internal procedures for reporting concerns about possible wrongdoing within their department at Foreign Affairs but experienced retaliation (harassment and intimidation) in response to their disclosures. They initiated legal proceedings in the Ontario Superior Court of Justice, claiming general and punitive damages for their treatment by from management. The policy attempts to address the shortcomings which occurred in these two situations.

The preamble to the policy indicates that the public service serves the government and the public interest by giving advice that is “consistent with Public Service values.” This identifies the organizational culture perspective of how the

⁴¹⁰ *Supra*, note 6. *Haydon* was decided on September 5, 2000.

⁴¹¹ *Supra*, note 217. *Guenette* was commenced on June 10, 1998 and decided by the court on September 22, 2000. It was subsequently appealed by Genette and Gualtieri to the Ontario Court of Appeal, which rendered its judgment in favour of the appellants on August 8, 2002.

⁴¹² The policy objective is stated as follows: “To allow employees to bring forward information concerning wrongdoing, and to ensure that they are treated fairly and are protected from reprisal when they do so in a manner consistent with this policy.”

government expects the public service to act – in furtherance of the public service’s organizational culture in preference to the public interest. This approach aligns the wrongdoing policy with the common law duty of loyalty that the civil servant owes to the government. Indeed, the policy’s definition of “duty of loyalty” states that an employee may not “disclose confidential information unless authorized to do so.”

At first glance the policy definition of wrongdoing appears to be so broadly worded that it would eviscerate the first exception to the duty of loyalty under *Fraser*, i.e., illegal acts. As an example of how constraining this policy is on a public servant’s ability to disclose confidential information, the preamble indicates that an external disclosure may only be made in relation to an “immediate risk to the life, health or safety of the public.” But according to labour jurisprudence no matter what type of wrongdoing is involved, the civil servant is obligated to report it internally before disclosing it outside the organization. In this respect, the Treasury Board’s policy on illegal acts⁴¹³ complements and works in tandem with the wrongdoing in the workplace policy and the internal reporting requirement imposed upon potential whistle blowers. These are three separate yet inter-related facets of an appropriate measure imposed on civil servants that allow the organization the first attempt to address the wrongdoing involved.

The policy defines wrongdoing to include only four categories of the six that were discussed previously herein to be wrongdoing: illegal acts, misuse of

⁴¹³ Treasury Board of Canada Secretariat “*Policy on Losses of Money and Offences and Other Illegal Acts Against the Crown*” Available online: (Treasury Board of Canada Secretariat website) http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/TBM_142/4-7_e.asp (site last visited May 25, 2003).

public funds, gross mismanagement and finally a substantial and specific danger to the life, health and safety of Canadians or the environment. The two categories not included are a significant breach of established public policy and an abuse of authority. The policy is not as rigorous in the definition of wrongdoing as it could have been – more of the categories could have been qualified to be serious, significant, etc. Defining wrongdoing to include ‘misuse of public funds or assets’ rather than requiring the wrongdoing to be a ‘significant waste of public funds or assets’ runs the risk of trivializing the process regarding activities that many front line public servants are likely to encounter.

With respect to abuse of authority in the workplace, there exists both an overlap between it and harassment of employees by management and there is also the concern with false allegations of abuse of authority as it relates to disciplinary matters. In the first aspect, the civil servant would be able to resort to the complaint process established for resolving allegations of harassment in the workplace pursuant to the Treasury Board’s policy on workplace harassment.⁴¹⁴ In the second aspect, the employee might resort to making false allegations of abuse of authority as a means of countering disciplinary or other unpleasant treatment by management. By that I mean legitimate discipline could be challenged by the employee under the guise of an abuse of authority complaint. This would unnecessarily complicate employee discipline matters generally, as it has the potential to be used to interfere with management

⁴¹⁴ *Policy on Prevention and Resolution of Harassment in the Workplace*, Treasury Board of Canada Secretariat, June 1, 2001. Available online (website last visited May 25, 2003) at http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/hw-hmt/hara1_e.asp

practices that the employee does not like or agree with.⁴¹⁵ In neither of these situations is it beneficial to include abuse of authority that occurs within the federal public service workplace since they can be dealt with more appropriately elsewhere.

The second excluded category merits different considerations. It is more likely to be the result of a judgment call performed at the higher levels of government after discussion and consideration – lower level civil servants would not likely be involved in this exercise. There may be valid reasons for altering or modifying a policy on a subject, and these would be most likely made by the elected politicians after considering the matter. So to include a matter that pertains more to politicians rather than the rank and file of the civil service at whom the wrongdoing policy is basically aimed would tend to obfuscate the intent and purpose of the policy itself.

While it may be true that the Treasury Board Policy does require a minimal intra-departmental mechanism through the establishment of a designated Senior Officer to receive, review, initiate investigations (when required) of wrongdoing complaints and report thereon to the department Deputy Head, it goes further and provides substantive criteria for assessing the merits of those complaints. It mirrors Bill S-6 in that it allows the Senior Officer to screen out and reject complaints if determined to be “. . . trivial and vexatious; fails to allege or give

⁴¹⁵ For an example of an unfounded complaint of abuse of authority in the employee – employer relationship, see *Guenette, supra*, note 217 at 606. There, Guenette “blew the whistle” internally on perceived government wrongdoing: significant waste of taxpayer’s money. He claimed that management retaliated against him for disclosing wrongdoing, and filed a complaint of harassment and abuse of authority against two of his supervisors. All complaints against one supervisor were not substantiated (and therefore were really false allegations) while those against the other were substantiated in part.

adequate particulars of a wrongful act, or if it is determined that it was not given in good faith or on the basis of reasonable belief.”⁴¹⁶

The Senior Officer initiates the investigation and appears to be the person conducting the actual investigation, although the parameters and limitations of the investigation are not provided. Once the investigation has been completed, the senior Officer reviews it and reports the results to the Deputy Head of the department, along with any recommendations. So the Senior Officer only makes suggestions to the Deputy Head, who is responsible for correcting the situation.⁴¹⁷

A problem arises in that it is the Deputy Head of each government department who is responsible for establishing the internal disclosure mechanisms for the particular department. Some departments may establish the minimal requirement of having a Senior Officer while others may apparently adapt their existing protocols to “respond to their specific mandate or organizational requirements.”⁴¹⁸ This could result in a lack of a uniform standard for the evaluation of wrongdoing and inconsistency in its application because the powers of the Senior Officer concerning investigations are not articulated (aside from screening the disclosure to determine if there are sufficient grounds for further action, i.e., an investigation). Government is not one huge homogenous institution that always acts in a unified, coherent manner. It consists of various branches amongst and within which power is divided; they and the officials of

⁴¹⁶ *Supra.*, note 40: Appendix A of the Board Policy: Departmental/organizational internal disclosure and resolution process.

⁴¹⁷ *Ibid.*, comment no. 6.

⁴¹⁸ *Ibid.*, “Responsibilities of Deputy Heads” section, comment no. 4.

each one differ in their cultures and motivations.⁴¹⁹ The possibility therefore exists that a 'patchwork' of different mechanisms could arise, each determined by the particular subculture of the particular department.

Managers are limited in their role in the procedure, as they act as a liaison with their employees in educating them as to the existence of the policy and the duties and obligations of all the parties involved. But perhaps most importantly, they fulfill a critical function – that of maintaining the integrity of the civil service by protecting the whistle blowing employee from retaliation. Implicit is the assumption that the wrongdoer would be a co-worker of the employee, for if the wrongdoer were the employee's manager or superior above the manager, then the likelihood of retaliation occurring increases and the manager's ability or willingness to protect the employee would be compromised.⁴²⁰

If employees believe that the issue cannot be disclosed within their own department, or having done so are not satisfied with the manner in which it was addressed, then resort may be had to an officer outside the department - the Public Service Integrity Officer (PSIO) of the Office of Values and Ethics of the Treasury Board Secretariat. The function of the Office itself is to assist and support management – the Deputy Head and Senior Officer – in their handling of the whistle blowing complaint, and to monitor the efficiency of the whistle blowing

⁴¹⁹ R. Abel, "Speaking Law to Power: Occasions for Cause Lawyering" in A. Sarat & S. Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford, U.K.: Oxford University Press, 1998) at 102.

⁴²⁰ This, in fact, is what happened in *Guenette*. In that case, Guenette alleged government wrongdoing and claimed he was harassed and intimidated by two of his supervisors when he reported the matter. The subsequent investigation concerning the retaliation found that the complaint against one supervisor was unsubstantiated while that against the other was proven in part. That supervisor was reprimanded and his job performance monitored: *Guenette, supra.*, note 217 at 606 (Ontario Reports citation).

mechanisms within the departments. The PSIO, on the other hand, works with the employees by providing advice to them about making a disclosure of wrongdoing prior to doing so and generally performs the same functions (and has the same limitations) as the designated Senior Officer.

Disciplinary action may be taken only against employees and managers who retaliate against whistle blowing employees or who disclose information in a manner contrary to the policy. People who hold other positions (more senior management positions) appear to be not covered by this policy.

5.4. Comparison of Bill S-6 with Treasury Board Policy

In terms of the facilitation of whistle blowing within the federal civil service, the ombudsman created under Bill S-6 (the "Commissioner") is an investigator independent of government and the administration, but accountable to Parliament, which exercises oversight functions towards the Government and the administration. Under the Policy, both the Senior Officer and Public Service Integrity Officer (SO and PSIO respectively) are civil servants who report to the Deputy Head of the Department involved with the wrongdoing complaint. They are part of the administration, not independent of it. They act as guardians of government information and are responsible for ensuring its confidentiality. This is the fundamental difference between the two initiatives. Closely related to this aspect is the greater credibility of the review process associated with the Commissioner as a neutral decision maker re: the merits of the complaint.

The Commissioner is the primary decision maker with respect to the wrongdoing allegation, and based upon the investigation results, decides what

solution should be proposed to the administration to address the wrongdoing, where found to exist. The SO and the PSIO, on the other hand, are not the primary decision makers under the Policy; that function is reserved for the Deputy Head of the Department involved. The only decision making function the SO and PSIO enjoy is as screening agents to determine if the complaint meets the minimum requirements with respect to content of wrongdoing and is not trivial.

Bill S-6 would require the complaint to be in writing, while the Policy states that it is "preferable" that it be written. Both also require that it include a minimum amount of specified information in order to trigger an investigation into the allegation made. Under Bill S-6 whistle blowers must identify themselves but the Policy makes no such requirement. So it is possible, under the Policy while not under the regime that would be created by Bill S-6, for the whistle blower to remain anonymous. This may be seen as a drawback or a benefit of Bill S-6: requiring the whistle blower's identity to be disclosed will have a chilling effect on the number of complaints made, but those that would be made will be less likely to be frivolous or vexatious and more likely to be substantiated.

The complaints in each initiative are screened by their respective 'gatekeepers' who must decide if the complaint should proceed to a more complete investigation (Commissioner and SO/PSIO respectively). These people are given the discretion to reject the complaint if it is trivial, frivolous, vexatious, provides insufficient information regarding the alleged wrongdoing, is not given in good faith, or has no reasonable basis for belief that wrongdoing

was done. Bill S-6 has the additional requirement that the complaint may not breach any solicitor-client privilege with respect to government information. Both also allow the gatekeeper to decline to advance the complaint to the next stage if it can be handled more appropriately via another mechanism or process. For example, the systemic racial discrimination against visible minorities in their promotion into management within Health Canada was not treated as an illegal act (breach of a statute) but was dealt with through a complaint to the Canada Human Rights Commission.⁴²¹ Likewise, a complaint of sexual harassment by a manager towards a subordinate could be handled within the policy prohibiting sexual harassment in the workplace, etc. Although both mechanisms contain this feature, the major difference is that the SO/PSIO can refuse to review the complaint or investigate it on the basis that it is better handled elsewhere, whereas the Commissioner can only refuse to make a report, but must still investigate the matter.

In terms of the actual investigation conducted into the merits of the complaint, the Commissioner would have broader and more sweeping powers available than either the SO or PSIO under the Policy. Pursuant to Bill S-6, the Commissioner enjoys the ability to subpoena people and documents, and enter any federal office for the purpose of questioning any person in the conduct of the investigation⁴²² but neither the SO nor the PSIO are empowered to do so. In fact, their powers are not articulated in the Policy, either generally or specifically.

⁴²¹ *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, [1997] CHR D No. 3 (No. TD 3/97) (Canadian Human Rights Tribunal) online: QL (CHRD) March 19, 1997.

⁴²² Section 4(3) of Bill S-6 gives the Commissioner the same powers given to Commissioners under the *Public Service Employment Act*, R.S.C. 1985, c. P-33, which in turn (s. 7.2) provides the powers given to Commissioners pursuant to Part II of the *Inquiries Act*, R.S.C. 1985, c. I-11.

So although they appear to have authority to investigate wrongdoing, the scope of that authority is unknown.

Subsequent to the completion of the investigation, the Commissioner makes a decision on the wrongdoing allegation and consequently recommends how a substantiated allegation may be resolved. A report is provided to the Minister of the civil servant accused of wrongdoing and the Minister is required to respond to it, although the report is not binding. In contrast, the SO or PSIO prepares a report following the investigation and submits it to the Deputy Head of the Department so that the Deputy Head may make a decision on the merits of the complaint. So in the regime established by the Policy, the primary decision maker is removed from the investigation whereas in the regime that would be established by Bill S-6, the Commissioner investigates and makes the decision on the merits of the complaint (in accordance with the ombudsman model). The former bifurcated approach appears to have the advantage that the primary decision maker is removed from the investigation and therefore would be less caught up in the momentum of the inquiry as it relates to the merits of the complaint. However the Deputy Head is still a senior civil servant who it is reasonable to expect would support the administration's position in the matter. Hence the lack of neutrality or impartiality of the decision maker in the internal complaint process is seen as a major weakness of that initiative. The Commissioner under Bill S-6 on the other hand is independent of government and the administration, so the Commissioner having responsibility for the

investigation and the decision on the merits is less of a concern since impartiality in both phases is more reasonable to expect.

Both mechanisms contain provisions that relate to protection of the whistle blowing civil servant. However, the Policy simply states that it is the responsibility of the PSIO (not the SO) to protect the whistle blower from [management] reprisal.⁴²³ The PSIO is not only required to protect whistle blowing employees from retaliation, but at the same time protect the privacy and confidentiality of government information – an apparent inconsistency. Absent from the Policy is any mention of how the employee is to be protected, what powers the PSIO enjoys in this regard, or what protective mechanisms exist to in fact protect the whistle blower. This seems anomalous because if the civil servant uses the departmental procedures and falls under the auspices of the SO, the latter does not have the responsibility to protect the employee from reprisal. Quite the contrary, in fact, the SO is charged with the duty of protecting the privacy and confidentiality of government information.⁴²⁴ The regime under Bill S-6, on the other hand, would prohibit retaliation against a whistle blower or an employee about to blow the whistle on wrongdoing or an employee who

⁴²³ Recall that the previous discussion revealed that the SO operated at the Departmental level and the civil servant would be expected to make the disclosure within his/her own department first. Only in unusual or exceptional circumstances would the civil servant make the disclosure outside the Department but still within the government to the PSIO, who functions at a government/public service wide level to receive wrongdoing complaints.

⁴²⁴ At the end of the week in which the federal Privacy Commissioner resigned his office in late June 2003, the Commons committee investigating him (see *infra*) released its final report into the matter. In a newspaper article discussing the report, the National Post described the Treasury Board Policy on disclosure of wrongdoing as “the government’s feeble whistleblowing policy”, but it is unclear whether that is the Committee’s assessment of the policy or that of the newsarticle’s author: K. May, “Report: Radwanski Bought Silence” *National Post* (27 June 2003) A1.

refuses to engage in wrongdoing. Since these prohibitions are made offences punishable on summary conviction, serious consequences could result from retaliation against a whistle blowing civil servant. It is more than the lip service, which may prove to be the legacy of the protection to whistle blowers afforded by the Policy.⁴²⁵ In addition, Bill S-6 would permit the whistle blowing civil servant who has been subjected to retaliation to “use every recourse available . . . under the law,” so the victimized employee would be able to commence civil proceedings for monetary damages, as was done in *Guenette*.⁴²⁶

A third, but apparently lesser, aspect of both mechanisms is education of the civil service generally on ethical practices in the workplace. The Policy accomplishes this in a very narrow sense by requiring the SO to spread information about the Policy and to provide interpretation of it along with related advice within the Department. However, Bill S-6 would empower the Commissioner to go well beyond the mandate of the executive regulators as

⁴²⁵ Indeed, the events surrounding the federal Privacy Commissioner, George Radwanski (who is an officer of Parliament), and his investigation by the Commons Government Operations and Estimates Committee in June 2003 bears this out. Mr. Radwanski was being investigated for the appropriateness of his reportedly extravagant travel and dining expenses – more than \$500,000 over a two year period. The Committee issued an interim report in mid-June, “saying that he misled them about his expenses and other matters and altered copies of a letter and expense reports before submitting copies for the review.” S. McCarthy, “Radwanski must go, all-party committee will urge” *The Globe and Mail* (23 June 2003), A1. Some of the Privacy Commissioner’s staff had testified before the Committee about the matter. The *National Post* reported that “The committee heard testimony that Mr. Radwanski threatened that if he ever found out who blew the whistle to the committee, their career in the public service would be over.” The article also quoted Lynn Ray, president of the Union of Solicitor General Employees as saying “ We’ve known there were problems here for some time but with no whistle-blower protection we could not provide the protection they [the Privacy Commissioner’s staff] needed and it wasn’t until the Commons committee started digging that they were prepared to come forward.” The article also pointed out that “Until now, the government has stood firm on its refusal to pass whistle-blowing legislation and instead introduced a “disclosure policy” that is administered by Edward Keyserlingk, the Integrity Officer.” K. May, “Privacy Commissioner Faces Employee Revolt” *National Post* (20 June 2003) A10.

⁴²⁶ *Supra*.

stipulated in the Policy since the Commissioner is given broad authority to use "such other means as seem fit" to be able to inform the Public Service about the purposes and processes of the Bill as well as its provisions. This would ostensibly permit the Commissioner to promote the goals of the proposed legislation through the use of a broad range of activities: workshops, conferences, seminars, training programs, newsletters, announcements, etc. Rather, the Commissioner may also make public any information considered to be in the public interest. This ability may also serve as an educational tool for the benefit of society in terms of promoting accountability of government and the administration.

5.5. Comparison of Bill S-6 and the Policy with the Common Law

The Policy incorporates recent common law developments (*Haydon*, *Guenette*) and has the effect of making whistle blowing more restrictive. Bill S-6 is an ombudsman model. The Commissioner performs no adjudicative function, lacks binding authority and can only investigate and make recommendations. The common feature among all three initiatives is the restriction of each to wrongdoing blowing that is serious in nature.

The common law internal reporting requirement dovetails nicely with the Policy and also with the Treasury Board Secretariat's policy on Illegal Acts. Both these policies mandate that the internal reporting requirement be used first, and the whistle blowing employee having received no satisfaction then s permitted to go outside the organization with the complaint.

The Policy sets out the exceptions which justify going outside the organization with the wrongdoing complaint.

Any employee who discloses wrongdoing by complying with the Policy's procedure and is still dissatisfied, may go public with the complaint.⁴²⁷ But if the intradepartmental process is utilized first before whistle blowers can avail themselves of the PSIO at the organization wide level, an unknown amount of time will have passed, perhaps rendering the risk to life, health or safety of the public less than immediate and therefore it would be not amenable to going outside the department/government.

Also, the exceptions to the common law duty of loyalty are incrementally expanded by the PSSRB, for example. In *Chopra 2001* the PSSRB unequivocally created another exception to the duty of loyalty using the "public interest", and is based upon and is a more refined articulation of the Federal Court's reasoning in *Haydon*.⁴²⁸ But this tells us very little and seems to be a convenient way of creating a residual exception where nothing else seems to apply yet the decision maker wants to exempt the particular factual case from the duty of loyalty. It is a vague and less than helpful category.

5.6. Law Reform Aspects of Bill S-6 and the Treasury Board Policy

Although Hurlburt stated that there is no official criteria for evaluating the success of a law reform commission's proposals, he did put forward a set of

⁴²⁷ *Fraser, supra, note 22* and the Treasury Board Policy, *supra, note 40* at para. 8 of the Preamble. Also included in wrongdoing is disclosure in the 'public interest': *Chopra v Treasury Board (Health Canada), supra., note 5* (hereafter "*Chopra, 2001*").

⁴²⁸ Although the genesis of this broad exception can be traced back to *Fraser*.

values⁴²⁹ to be used as the basis for such an evaluation.⁴³⁰ It is a list of values that the law should embody: 1) it should be fair or just; 2) the law ought to treat everyone equally; 3) it should satisfy current human interests; 4) the law should maximize individual freedom; 5) the law should conform to current morality; 6) it should be understandable; and 7) the law ought to be enforceable.

Hurlburt acknowledged that some of these values may overlap or be in conflict with each other in particular situations (a law conforming to current morality may lack an element of fairness or justice) but that they still provided a basis for evaluating a law reform commission's work. If a proposal for a change in the law contains any or some of these values to a greater degree than the current law, then he considered the proposal to qualify as a law reform.⁴³¹

The unfairness and inequality of the Treasury Board Policy lay in such "feeble"⁴³² protection it provides federal civil servants (discussed previously) that the President of the Union of Solicitor General Employees stated that it provides no whistle blower protection at all.⁴³³ The primary obligation of the Senior Officer under the Treasury Board Policy is to protect the confidentiality of government information, not protect the civil servant whistle blower. Therefore the Treasury Board Policy is deficient in these areas in comparison with Bill S-6's proposals.

⁴²⁹ Hurlburt, W.H. (1997) "The Origins and Nature of Law Reform Commissions in the Canadian Provinces: A Reply to "Recommissioning Law Reform" by Professor R.A. MacDonald" 35 *Alberta Law Review* pp. 880 – 902, at p. 898. (referred to as "Hurlburt – Reply").

⁴³⁰ The end product of a great many law reform reports is a draft statute or amendment to a statute. Hence the comments regarding the assessment of a law reform commission's proposal is also applicable to a Bill before Parliament that seeks to change or 'reform' the current law in some way.

⁴³¹ Hurlburt – Reply, *supra*, note 429.

⁴³² K. May, "Report: Radwanski Bought Silence" *National Post* (27 June 2003) A1

⁴³³ K. May, "Privacy Commissioner Faces Employee Revolt" *National Post* (20 June 2003) A10.

Bill S-6 would provide the protection the Treasury Board Policy cannot, and it would treat *all* federal civil servants within its ambit the same way. It has a single, uniform mechanism for reporting and providing protection to public servant whistle blowers, unlike the bifurcated approach taken by the Treasury Board Policy.

Further, the Treasury Board Policy does not satisfy the enforceability criterion (no. 7) of Hurlburt. It does not provide protection for civil servants who encounter wrongdoing in their workplace. I refer to the narrative in Chapter One on how the former Privacy Commissioner Radwanski treated his staff – bullying them, threatening retaliation for disclosing wrongdoing and creating a climate of intimidation within the federal Office of the Privacy Commissioner.

That the Treasury Board Policy does not embody the important values articulated by Hurlburt demonstrates that it has failed, not as a law reform initiative (since that is what it is not), but as a fair, sound and workable initiative to address a serious problem (wrongdoing and its disclosure) within the federal civil service. Bill S-6 is superior in its proposed approach than the Treasury Board Policy as a mechanism to address the problem of accountability within government.

Marsh *et al* indicated that the success of a law depends upon the interaction of various factors related to the law, the system involved and the participation of the social reform groups that advocate change. The law has its greatest influence on simple, straightforward procedures that are easy to monitor. Social reform groups that maintain pressure for the monitoring of the system's

performance tend to enhance accountability⁴³⁴, since monitoring law reform measures ensures that they are more likely to be effective⁴³⁵. Handler echoed virtually the same position when he contended that changed procedures that are technically simple and easily monitored are characteristics that increase the likelihood of successful implementation of any law reform. This also has the likely effect of achieving greater compliance with the reformed law.⁴³⁶

Both Bill S-6 and the Treasury Board Policy are simple in their procedure and what they require substantively in relation to evidence of wrongdoing. But the link between monitoring procedures and increased accountability that would exist with Bill S-6 is absent from the Treasury Board Policy. In the Policy, both the Senior Officer and the Public Service Integrity Officer make their report about wrongdoing to the Deputy Head of the department in which the wrongdoer works for a final decision on the matter. So, there is no external oversight body involved in the entire process. But with Bill S-6, the independent Commissioner would make his decision on the matter and report to the wrongdoer's Minister for further discussion. Whatever the results of that discussion, the Commissioner provides a summary of the entire matter subsequently to Parliament in his annual report to it. So a stronger likelihood of successful implementation and greater compliance with the reforms proposed by Bill S-6 seems probable.

In this chapter I have reviewed the current state of the law and initiatives regarding whistle blowing by federal public servants. I will proceed to evaluate

⁴³⁴ J. Marsh, *et al*, *Rape and the Limits of Law Reform* (Boston: Auburn House Publishing Company, 1982) at 118 ("Marsh *et al*").

⁴³⁵ *Ibid.*, at 6.

⁴³⁶ Handler, Joel *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (New York: Academic Press, 1978).

their effectiveness and likely success in the next and concluding chapter. An integration of previous discussions in a summary fashion will also be included.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS FOR THE PROTECTION OF PUBLIC SERVANTS WHO EXPOSE WRONGDOING

6.1. The Incident Concerning the Office of the Privacy Commissioner

This thesis began with an introduction to the subject by briefly mentioning the matter concerning the federal Privacy Commissioner, George Radwanski. That matter can now be revisited with greater understanding of what went wrong and why, from a perspective involving civil servants and whistle blowing.

Mr. Radwanski was being investigated by a House of Commons Committee for the appropriateness of his reportedly extravagant travel and dining expenses – more than \$500,000 over a two year period. But what initially started out as a routine parliamentary review of the financial responsibility of one of its officers was soon transformed into an investigation of wrongdoing within government and its disclosure by civil servants. The Committee issued an interim report in mid-June, 2003 “saying that he [Radwanski] misled them about his expenses and other matters and altered copies of a letter and expense reports before submitting copies for the review.”⁴³⁷ Some of the Privacy Commissioner’s staff had testified before the Committee about the matter. The National Post newspaper reported that “The committee heard testimony that Mr. Radwanski threatened that if he ever found out who blew the whistle to the committee, their career in the public service would be over.” The article also quoted Lynn Ray, president of the Union of Solicitor General Employees as

⁴³⁷ S. McCarthy, “Radwanski must go, all-party committee will urge” *The Globe and Mail* (23 June 2003), A1.

saying "We've known there were problems here for some time but with no whistle-blower protection we could not provide the protection they [the Privacy Commissioner's staff] needed and it wasn't until the Commons committee started digging that they were prepared to come forward." The article also pointed out that "Until now, the government has stood firm on its refusal to pass whistle-blowing legislation and instead introduced a "disclosure policy" that is administered by Edward Keyserlingk, the Integrity Officer."⁴³⁸

While the civil servants in the Office of the Privacy Commissioner seem to have started with the appropriate course of conduct by making their concerns about the subject matter of the Commons Committee investigation known to the Privacy Commissioner through their letter to him, their subsequent activity departed from the prescribed process. It does not appear that they contacted either the Senior Officer or the Public Service Integrity Officer with their complaint, as required by the Treasury Board Policy.⁴³⁹ They did not exhaust the process for the internal reporting of their concerns about the alleged wrongdoing of the Privacy Commissioner before publicly disclosing their complaint through releasing the letter to the media and the lunch hour demonstration in front of their office building. These departures from the established process would ostensibly be grounds for discipline.

⁴³⁸ K. May, "Privacy Commissioner Faces Employee Revolt" *National Post* (20 June 2003) A10.

⁴³⁹ Note that it is the Privacy Commissioner's staff (civil servants) who are subject to the Treasury Board Policy, and not the Commissioner, who is an Officer of Parliament. Although there is a reference in the news articles to prior unsuccessful attempt(s) at internal reporting by Radwanski's staff, it seems to be an unrelated matter to the one investigated by the Commons Committee.

While the civil servants improperly bypassed the mandated procedures in existence for the disclosure of wrongdoing in an apparent attempt to hasten what they believed to be the proper outcome, it pales in comparison to the Privacy Commissioner's reported conduct giving rise to and during the investigation. His behaviour arguably seems to have had the effect of mitigating any transgressions committed by the civil servants who worked for him and participated in the whistle blowing with respect to his extravagant spending and the subsequent investigation thereof.⁴⁴⁰ As an Officer of Parliament, he ought not to have misled the Commons Committee investigating him (by altering a letter to the Committee), either by his own actions or by coercively enlisting his staff to assist him in doing so. Further, by threatening retaliation against those staff members who testified against him during the hearing before the Commons Committee, he crossed the line of acceptable behaviour, regardless of how damaging or embarrassing that testimony might have been.⁴⁴¹ Both of these activities would be offences under Bill S-6 and had it been passed into law before the Commons Committee embarked upon a review of the Privacy Commissioner's extravagant travel and dining expenses, it is unlikely they would have occurred. In addition, his staff would have had recourse to the ombudsman mechanism created under that Bill to investigate the alleged wrongdoing, so releasing the staff letter to the

⁴⁴⁰ I say this because although in other circumstances involving a markedly lower profile investigation, the actions of the civil servants in doing the same things would almost certainly have attracted disciplinary action. But with such a high profile matter involving an Officer of Parliament who (according to the various newspaper articles) has without precedent caused the Commons Committee to formally declare that it has lost confidence in his ability to discharge the duties of his office, pursuing and disciplining his civil service staff would only inflame and further prolong in the public view an affair that the Government and likely Parliament would rather prefer to be quickly and quietly concluded.

⁴⁴¹ *Marken and Carson, supra*, note 230, Chapter 3.

media as well as the lunch hour demonstration would likely not have occurred as they would have been matters for discipline under Bill S-6. So the timeline of events would have been different not only in content, but likely in duration since it would have been elongated, although ultimately the result might have been the same.

As a consequence of the intense media coverage and widespread publicity generated during what has been described as a "slow news cycle", federal Privacy Commissioner George Radwanski resigned his office on June 24, 2003.⁴⁴² Yet the high profile affair may in one sense be described as the proverbial cloud with a silver lining for federal public servants generally, although the atmospheric conditions for the civil servants within the Privacy Commissioner's Office could more aptly be described as being stormy weather during Mr. Radwanski's tenure. According to reported sentiments attributed to Reg Alcock, M.P. and the Chairman of the Commons Committee that investigated the now former Privacy Commissioner, a sea level change regarding exposure of wrongdoing in the workplace might be about to wash over the federal civil service, if carried through to fruition: "Mr. Alcock said the . . . many worrisome administrative and financial issues . . . will force MPs to call a review into everything from the effectiveness of the government's whistleblower policy to the protection of merit in hiring and how the country's five parliamentary watchdogs are appointed."⁴⁴³

⁴⁴² D. Martin, "And he still doesn't get it: Commissioner was undone by a sense of his own grandeur" *National Post* (24 June 2003) A1.

⁴⁴³ K. May, "Radwanski Goes Out Kicking: Castigates critics for 'vicious and untrue' attacks, says his sin was to do his job too well" *National Post* (24 June 2003) A1.

It is with this recommendation in mind that I now turn to consider the likely success and effectiveness of law reform initiatives respecting whistle blowing civil servants. Before specific proposals are examined, I believe it is beneficial briefly to introduce institutional law reform parameters in order to properly place the subsequent discussion in context.

6.2. The Success and Effectiveness of Law Reform

Marsh *et al*⁴⁴⁴ stated that when certain behaviour or conduct is constrained by the law, then law reform goals have been achieved. The law and specific rule changes attempted and the system to which the changes are applied to a large measure determine the success of such efforts. According to Handler⁴⁴⁵, when certain procedural steps are specified that must be followed in processing cases, when a legal change is easily monitored and is technically simple and decreases organizational discretion then the optimum situation exists for achieving instrumental goals. However, he was of the opinion that the primary benefit of law reform is in its ability to provide legitimacy and visibility to certain attitudes and values (e.g., accountability).

Unfamiliarity with organizational change principles severely hinders the success of law reform proposals. Nimmer has stated that:

" since reforms differ in substance, in planning and development, the explanations for specific reform failures are diverse. In general, however, the repetition of failure can be attributed in large part to recurring misperceptions about the nature of the judicial process and about how behavior within the process can be modified."⁴⁴⁶

⁴⁴⁴ *Supra.*, note 434 at 5.

⁴⁴⁵ *Supra.*, note 436.

⁴⁴⁶ Nimmer, Raymond *The Nature of System Change: Reform Impact in the Criminal Courts* (Chicago: American Bar Foundation, 1978) as cited in Marsh *et al*, *supra* note 434 at 111.

6.3. Implementation of Law Reform Measures

North⁴⁴⁷ indicated that the normal method of implementing law reform proposals was through legislation. Marsh *et al* also expressed the same view, saying that "legislative reform has remained the social change strategy of choice."⁴⁴⁸

Marsh *et al* believed that it is necessary to be aware of the relationships between substantive law and procedural law or between interpersonal interactions and organizational dynamics as they influence the outcome of a law reform.⁴⁴⁹ Recall that Perry⁴⁵⁰ determined that whistle blowing occurs in organizations that lack a well-developed, neutral dispute resolution mechanism. Although the federal government has instituted a policy towards whistle blowing by its own employees, it is not seen as neutral for two reasons: 1) the main function of the person responsible for investigating the wrongdoing complaint (Senior Officer) is to protect the confidentiality of government information, not the whistle blower employee, and 2) the primary decision maker in respect of the wrongdoing complaint is a senior bureaucrat who is not independent of the administration. So it is not surprising that the Policy is structurally impaired in its effectiveness in addressing wrongdoing in the federal government. This may help to explain why half the Privacy Commissioner's staff either signed the letter to him requesting he resign (and which they also made public) or participated in the lunch hour protest about his resolve to remain in office despite the interim report of the Commons Committee investigating him. The staff appears to have

⁴⁴⁷ P. North, "Law Reform: Problems and Pitfalls" (1999) 33 U.B.C. L. Rev. 37 at 46.

⁴⁴⁸ Marsh *et al*, *supra*, note 434 at 2.

⁴⁴⁹ *Ibid.*, at 7.

⁴⁵⁰ *Supra.*, note 87.

chosen a public stage to voice their concerns rather than rely upon a weak mechanism for assistance in their opposition to the Privacy Commissioner's wrongdoing. The ombudsman model and investigation mechanism proposed by Bill S-6 would appear to qualify as a neutral dispute resolution mechanism that would minimize the risk that another investigation like that of the Privacy Commissioner of being played out in such a sensational manner.

Understanding organizations as channels or agents of change that determine effectiveness has become increasingly important in evaluating programs and policy implementation.⁴⁵¹ Miceli and Near concluded that the role of an organization's climate in whistle blowing was a factor that required further empirical research (into whether the organization was responsive or apathetic to the whistle blower's concerns).⁴⁵²

Reform is more likely to be implemented whenever it mandates, permits or suggests a means for the officials within an organization to expand their sphere of influence, i.e., their power and prestige.⁴⁵³ So the government and administration would favour the retention of the Treasury Board Policy over the creation of a whistle blowing ombudsman regime as proposed by Bill S-6 since the Policy retains the status quo regarding bureaucracy's control over a whistle blowing matter instead of eliminating it as Bill S-6 would do through the creation of an independent and neutral ombudsman. When stakeholder involvement is

⁴⁵¹ E. Hargrove, *The Missing Link* (Washington, D.C.: The Urban Institute, 1975); S. McLanahan, "Organizational Issues in U.S. Health Policy Implementation: Participation, Discretion, and Accountability" (1980) 16(3) *The Journal of Applied Behavioral Science* at 354-369.

⁴⁵² *Supra.*, note 105.

⁴⁵³ Marsh *et al*, *supra*, note 434 at 113-114.

maintained, it serves as a catalyst for sustaining the action brought about by the law reform.⁴⁵⁴ The annual report of the Commissioner to Parliament as proposed by Bill S-6 is seen as sustaining the effort by Parliament to make the government and administration more accountable to it.

Handler contended that changed procedures that are technically simple and easily monitored are characteristics that increase the likelihood of successful implementation of any law reform. This also has the likely effect of achieving greater compliance with the reformed law⁴⁵⁵. The regime proposed by Bill S-6 is not radically different from the one currently provided by the Policy in terms of the substantive requirements of a valid wrongdoing complaint made by a civil servant. However, it is superior in that it is independent of the government and administration and neutral in its approach to seeking greater accountability of government and the administration.

6.4. Recommendations

Bill S-6 attempts to provide effective protection to federal civil servants who venture to expose wrongdoing that occurs within the public service. It prohibits certain conduct on the part of administration management and makes that conduct offences punishable on summary conviction. Under this proposed legislation, serious consequences could result from retaliation against a whistle blowing civil servant; it is more than the lip service which may prove to be the legacy of the protection to whistle blowers afforded by the Treasury Board's current policy on wrongdoing. Indeed, the Privacy Commissioner's conduct in

⁴⁵⁴ Marsh *et al*, *supra*, note 434, at 115.

⁴⁵⁵ Handler, *supra*, note 436.

the way in which he managed the Office of the Privacy Commissioner demonstrates that the Treasury Board Policy was ineffective in protecting civil servants who seek to disclose wrongdoing they encounter within their workplace. Hence a major goal of the policy has not been achieved, and the initiative may be considered as a failure in that respect. However the Policy presents conflicting and at times inconsistent goals – protecting the confidentiality of government information *and* protecting whistle blowing civil servants. But in a democratic system of government, the existence of serious wrongdoing by senior levels of management (except perhaps where national security is at stake) cannot be considered to be government information that should be kept confidential. So where such wrongdoing occurs, the conflict in the goals of the Policy will be most apparent.

Although an ombudsman model like the one proposed by Bill S-6 is capable of performing many functions, even some traditionally fulfilled by other institutions, Galligan cautioned against the idea that employment of an ombudsman mechanism could eliminate the need for other institutions of accountability. He was especially concerned that it would be viewed as an appropriate replacement for the courts. Rather, he believed that the two institutions should complement each other, as an ombudsman office is a non-judicial body whose primary function is to investigate complaints and where appropriate recommend a solution, which might possibly be broader than the specific complaint. It is generally more accessible than the courts, whose

procedures are quite different. The task of the courts is to decide questions of law that arise from the specific case that is presented to them.⁴⁵⁶

Galligan advanced the general idea that different mechanisms (i.e., courts and ombudsman office) have different functions to accomplish but they should be developed in conjunction with each other, taking care not to overlap or duplicate work unnecessarily. They will be more effective in making government and administration accountable where their implementation is comprehensive. Because no one single mechanism can do everything, the need will continue to exist to blend the different mechanisms together according to the objectives and their suitability to the task.⁴⁵⁷

Accordingly, adoption of Bill S-6 and the ombudsman regime it proposes is preferable to the continued reliance upon the Treasury Board's current Policy and the confusing jurisprudence on the disclosure of wrongdoing by civil servants. This underdeveloped area of Canadian law should be filled with the statutory regime that Bill S-6 would utilize to fill any gaps in securing greater government accountability. As Wolfson⁴⁵⁸ has noted, the historical roots of much of Canadian law can be found, in part, in both English tradition⁴⁵⁹ and American legislative initiatives. Americans have had statutory whistle blowing legislation for federal civil servants since the late 1970s and the British have

⁴⁵⁶ Galligan, *supra*, note 354, at 40.

⁴⁵⁷ *Ibid.*, at 41.

⁴⁵⁸ L.H. Wolfson, *Juvenile Delinquents, Young Offenders and Young Persons in Conflict With the Law: A Study of Juvenile Delinquency Law Reform in Canada* (LL.M. Thesis, University of British Columbia, 1976) at 2.

⁴⁵⁹ The Canadian common law duty of loyalty can be traced back to English caselaw : see Chapter Three, "Duty of Loyalty and Confidentiality", *supra*.

similarly enacted legislation relatively recently.⁴⁶⁰ It is time that Canada followed suit, for to ignore the need any longer (as clearly demonstrated by the recent matter concerning the former federal Privacy Commissioner, George Radwanski) will surely cause many federal civil servants, the government and indeed the public to echo Santayana's admonition: "Those who cannot remember the past are condemned to repeat it."⁴⁶¹

6.5. Limitations of the Study

This thesis should be considered in the context of the larger discussion of the duty of loyalty owed by civil servants to the government that employs them. Recognizing some of the limitations of this work will place it within that context.

First and foremost, it is an initial incursion and not an exhaustive or authoritative work on how the organizational dissent of a public servant is constrained by the duty of loyalty owed to the government. Second, further and more detailed research can undoubtedly be conducted into the various aspects of this area of the law. For example, the relationship (if any) between the public and private sector involving whistle blowing could be explored, as that area has been omitted from this work. Third, the major focus of this study has been upon the duty of loyalty and whistle blowing by civil servants and not upon the broader issue of their free speech rights that would also encompass policy criticism in all

⁴⁶⁰ *Public Interest Disclosure Act 1998* (U.K.) 1998 .c 23.

⁴⁶¹ Santayana, G. *The Life of Reason, Or The Phases of Human Progress* (New York: Charles Scribner's Sons, 1955) at 82. Santayana was speaking of the inability to retain experience: "Progress, far from consisting in change, depends on retentiveness. When change is absolute there remains no being to improve and no direction is set for possible improvement: and when experience is not retained, as among savages, infancy is perpetual. Those who cannot remember the past are condemned to repeat it."

its forms. Although whistle blowing and policy criticism may be interrelated to a certain degree, I have tried to separate them in order to bring some clarity to a confusing situation involving the duty of loyalty.

The perceived lack of a unified social science theory on whistle blowing⁴⁶² may help to explain England's observation that there has been almost no legal research conducted into this area of Canadian law.⁴⁶³ Rather, the sparse caselaw currently points us in different directions with respect to the conceptual framework to be used when legal analysis of a whistle blowing situation is performed. Various different legislative and common law approaches (a 'patchwork' of approaches such as are found at both the federal and provincial levels of government in Canada) exist in an attempt to provide protection to whistle blowers. Confusion in the law substantively and procedurally as well as deterrence in reporting the wrongdoing are the likely results.⁴⁶⁴ It is not surprising then that confusion, rather than clarity, is the prevalent state in Canada concerning the rights and duties of civil servants who encounter wrongdoing in the workplace and seek to address it, along with the manner in which the legal system approaches the phenomenon.

⁴⁶² *Supra.*, note 88, Chapter 2.

⁴⁶³ *Supra.*, note 23, Chapter 1.

⁴⁶⁴ A similar situation exists in the United States of America amongst the 50 states in terms of protection for whistle blowers in the regulation of the environment. See L. Simoff, "Confusion and Deterrence: The Problems That Arise from a Deficiency in Uniform Laws and Procedures for Environmental Whistleblowers" (1999) 8 *Dickinson Journal of Environmental Law & Policy* 325.

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APPENDIX 1

Whistle blowing definitions

B. Beattie, "Whistle blowing" (2000) 47 *New Zealand Management* 60.
whistle blowing is the disclosure of information about serious wrongdoing to someone who can act responsibly on that information. It is not "leaking", which is usually classified as the release of information for political or personal gain.

S. Bhojani, "The Professions and Whistleblower Protections" in R.G. Smith (ed.), *Crime in the Professions* (Aldershot, England: Ashgate Publishing Limited, 2002) at 139.

"Those who report crime in the public interest come within a group in society colloquially known as "whistleblowers". The Macquarie dictionary defines 'whistleblowing' as '... the activity of blowing the whistle on or exposing the corrupt practices of others' and 'whistleblower' as '... someone who alerts the public to some scandalous practice or evidence of corruption on the part of someone else'. For the purposes of the present chapter 'whistleblowing' will be regarded as a reference to disclosure of conduct which amounts or could amount to a breach of the civil law as well as to conduct which could amount to a criminal offence in the strict sense."

S. Bok, "Whistleblowing and professional responsibilities" in D. Callahan & S. Bok (eds.) *Ethics teaching in higher education* (New York: Plenum Press, 1980) at 277-295.

a disagreement with upper management regarding an accepted practice.

N.E. Bowie & R.F. Duska, *Business Ethics* 2d. ed. (Engelwood Cliffs: Prentice Hall, 1990) at 73.

Whistleblowing is the act, by an employee or officer of any institution, profit or nonprofit, private or public, of informing the public about a belief that either (s)he has been ordered to perform, or (s)he has obtained knowledge that the institution is engaged in activities which (a) run cause unnecessary harm to third-parties, (b) are in violation of human rights, or (c) run counter to the defined purpose of the institution.

A. Chambers, "Whistleblowing and the Internal Auditor" (1995) 4 *Business Ethics: A European Review* 192 at 192-93

Whistleblowing by internal auditors is "The unauthorized disclosure in the public interest by internal auditors of audit results, findings, opinions or information acquired in the course of performing their duties relating to questionable practices."

M. Chiasson, H.G. Johnson & J.R. Byington, "Blowing the Whistle: Accountants in Industry" (1995) *CPA Journal*, February, 24.

Whistleblowing, defined as disclosing questionable practice involving the organization or its members, may be either internal or external. Internal whistleblowing involves informing relevant organization members about wrongdoing. External whistleblowing involves going to outside the organization . . . to voice concerns over an organizational wrongdoing.

G. Courtemanche, "The Ethics of Whistle Blowing" (988) February Internal Auditor, February, 36.

"Whistle blowing . . . I define as the unauthorized and voluntary reporting of illegal or improper acts perpetrated within an organization to authorities outside the organization or to the general public."

N. Dandekar, "Contrasting Consequences: Bringing Charges of Sexual Harassment Compared with Other Cases of Whistleblowing" (1990) 9 Journal of Business Ethics 151.

"an effort to make others aware of some ongoing practices which seem to the whistleblower to be illegal; or harmful, or unjust."; with the whistle blower being "a member of an organization."

W. De Maria, "Unshielding the Shadow Culture" (1994) (Department of Social Work and Social Policy, University of Queensland) 1 at 3.

"the whistle blower is a concerned citizen, totally, or predominantly motivated by notions of public interest, who initiates of her or his own free will, an open disclosure about significant wrongdoing directly perceived in a particular occupational role, to a person or agency capable of investigating the complaint and facilitating the correction of wrongdoing."

R.L. Heenan & C. De Stefano, "Whistleblowing – Employee Loyalty and the Right to Criticize: A Management Perspective" in W. Kaplan, J. Sack & M. Gunderson (eds) *Labour Arbitration Yearbook 1991* (Toronto: Butterworths, 1991)(vol. 2) 199 at 200.

The reporting of criminal activity carried on by the employer "in the absence of any curative steps being taken by the employer."

Johnson, in Elliston et al *Whistleblowing Research: Methodological and Moral Issues* (New York: Praeger, 1985) at 15.

whistleblowing occurs " . . . when

- 1 an individual performs an action or series of actions intended to make information public
- 2 the information is made a matter of public record
- 3 the information is about possible or actual non trivial wrongdoing in an organization
- 4 the individual[s] who performs the action is a member or former member of the organization."

P.B. Jubb, "Whistleblowing: A Restrictive Definition and Interpretation" (1999) 21 *Journal of Business Ethics* 77 at 78.

Whistleblowing is a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has or had privileged access to data or information of an organization, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organization, to an external entity having potential to rectify the wrongdoing.

Keenan, J.P. "Blowing the Whistle on Less Serious Forms of Fraud: A Study of Executives and Managers" (2000) 12 *Employee Responsibilities and Rights Journal* 199 at 200.

Whistleblowing involves present or former organization members reporting illegal, unethical, or illegitimate activities under the control of organization leaders to those who are willing and able to take action to correct the wrongdoing.

Mathews, as cited in M.E. Guy, *Ethical decision making in everyday work situations* (New York: Quorum Books, 1990) at 141.

the act of a man or woman who believes that the public interest overrides the interest of the organization he or she serves.

M. Myers & V.J. Matthews Lemieux, "Whistleblowing – Employee Loyalty and the Right to Criticize: The Employee's Perspective" in W. Kaplan, J. Sack & M. Gunderson (eds) *Labour Arbitration Yearbook 1991* (Toronto: Butterworths, 1991)(vol. 2) 211 at 211.

"the disclosure of an employer's improper activities by an employee."

R. Nader, P.J. Petkas & K. Blackwell, *Whistleblowing: The report of the conference on professional responsibility* (New York: Grossman Publishers, 1972)

The act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, publicly "blows the whistle" if the organization is involved in corrupt, illegal, fraudulent, or harmful activity.

J.P. Near & M.P. Miceli, "Organizational dissidence: The case of whistleblowing" (1985) 4 *Journal of Business Ethics* 1 at 4.

the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.

Ontario Law Reform Commission Report, *Report on Political Activity, Public Comment and Disclosure by Crown Employees* (Toronto: Ontario Ministry of the Attorney General, 1986) at 306.

'unauthorized or unlawful disclosure of information relating to some kind of serious government wrongdoing, where the disclosure is alleged to be in the "public interest"'

N. Perry, "Indecent Exposures: Theorizing Whistleblowing" (1998) 19 *Organizational Studies* 235.

the process by which insiders go public with their claims of malpractices by, or within, powerful organizations.

Public Interest Disclosure Act 1998 (U.K.), 1998, c.23, ss.43A, 43B.

Whistle blowing is described as a "protected disclosure" which is defined as a "qualifying disclosure", which means a disclosure of information which tends to show wrongdoing (and which is enumerated in six categories: criminal offence, non-compliance with a legal duty, miscarriage of justice, endangering individual health or safety, environmental damage, concealment of any of the preceding matters).

N.M. Rongine, "Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing" (1985) 23 *Am. Bus. L. J.* 281 at 284.

"communication to the public of the illegal or immoral conduct of one's employer that is likely to result in unnecessary harm to third parties"

K.P. Swan, "Whistleblowing – Employee Loyalty and the Right to Criticize: An Arbitrator's Viewpoint" in W. Kaplan, J. Sack & M. Gunderson (eds) *Labour Arbitration Yearbook 1991* (Toronto: Butterworths, 1991)(vol. 2) 191 at 192.

"the breach of an employee's duties of loyalty and/or confidentiality to advance some higher interest" which he described as being "for the purpose of exposing to public view the illegality, impropriety or danger which those practices or policies create."

L. Vickers, *Freedom of Speech and Employment* (Oxford: Oxford University Press, 2002) at 42.

"Whistleblowing" refers to raising the alarm in public about a wrong being committed in private."

D. Weinstein, "Bureaucratic Opposition" (New York: Pergamon Press, 1979) at 2.

Whistle blowing is a form of "bureaucratic opposition" that "attempts to change a bureaucracy by those who work within the organization but do not have any authority."