



BRIEF

SUBMISSION TO THE OPERATIONS AND ESTIMATES (OGGO) COMMITTEE

TOPIC – STUDY OF PRIVATE MEMBERS BILL C290

- AN ACT TO AMEND THE PUBLIC SERVANTS DISCLOSURE PROTECTION ACT

SUBMITTED BY

WHISTLEBLOWING CANADA RESEARCH SOCIETY

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DATE April 17, 2023

We appreciate this initiative – Bill C290 – an Act to amend the Public Servants Disclosure Protection Act (PSDPA) and the opportunity to share what we have learned about the plight of whistleblowers or truth-tellers in Canada that motivates us in our work.

Our Thanks to Mr. Garon, MP for Mirabel and the Bloc Quebecois for bringing this Private Members Bill forward and to those Members who have supported this initiative thus far. We have been working and waiting for many years for some little signal of humanity and compassion to shine in the very dark, perilous maze through which Canada’s whistleblowers or truth-tellers have had to stumble during that time. And this Bill is that signal. A sign that there is some sincere willingness to listen, to reflect and to act.

In this brief, I will highlight some historical facts, discuss why improvement in Canada’s whistleblowing regime is needed, and propose some suggestions on what can be done.

History

I know that many Members of Parliament were not present when the original Bill – the PSDPA - was first passed in 2005 and finally implemented in 2007.

So briefly, I will review some key moments and facts during that era. It is important to pay attention to history if we are to learn from it and avoid repeating mistakes of the past.

Here is the timeline of the birth of the PSDPA

- March 2004 - the Liberal government brought forward Bill C 25, the first iteration of the PSDPA, amid the Sponsorship Scandal and the subsequent inquiry by Justice Gomery.ⁱ It dies on the order paper when an election is called.
- Oct. 2004 - a Liberal minority government introduces Bill C 11, a new iteration of the PSDPA.
- Nov. 25, 2005, Bill C 11 receives Royal Assent just days before Parliament is dissolved on a non-confidence motion on Nov. 28, 2005.
- Jan. 23, 2006 – a general election takes place, and a Conservative government is elected.
- December 12, 2006 - the Federal Accountability Act (C-2) is granted Royal Assent. This statute, omnibus in nature, amends several statutes, including the Public Servants Disclosure Protection Act. It was implemented in 2007.

Notable is the fact that before the law was passed, both Justice Gomery and Joanna Gualtieri, lawyer, founder of FAIR and first civil society advocate to analyze the Bill, warned - *the Bill would not improve anything for whistleblowers*. Further, Gualtieri *warned it would make things worse*. And as history has shown, it did.

Both Canada’s major parties had a hand in developing this flawed Act. And in the further missteps that followed which perpetuated the suffering and enabled wrongdoers:

- First - The 2012 action of the then government to disobey a statute by ignoring the statutory obligation to conduct an *independent* review of the PSDPA after 5 years and present the results

to both houses of Parliament. Disobeying a statute is an indictable offence under Canadian law – section 126 of the Criminal Code.

- And next, the 2017 inaction of the new government. Parliamentarians on the OGGO committee tasked with conducting a review of the PSDPA came up with a unanimous report based on inputs from many experts recommending more than 20 amendments. This Report No. 9 was ignored by leaders with not even a recommendation - by - recommendation response (i.e. “comprehensive” response).

However, all is not lost. Bill C290 is a chance to begin to put things right.

Why Improvements Are Needed

It is generally acknowledged in democracies globally that whistleblowers provide the best early warning system for fraud, corruption, regulatory failure and wrongdoing. Yet, several recent Canadian and International studies and whistleblower cases have confirmed that truth and truth-tellers or reporting persons in Canada are imperiled by this uncompromising lack of willingness to provide true protection and stop reprisals. This peril includes major catastrophes both to individuals and society at large up to and including death. And when truth dies, one of the consequences we see is that harm and corruption grows.ⁱⁱ

The studies and whistleblower examples are briefly summarized below. More details can be found in Appendix 1.

Case study findings.

2017 Study showed reprisals occurred because of flawed legislation, dysfunctional organizational and political cultures and negative attitudes in the courts. A surprise was legislation alone will not protect whistleblowers. Culture is equally if not more important as the laws will not be upheld if introduced into an unwelcoming culture.

2018 Study showed the Federal law has provided the model for the provincial laws which means the whole country is affected by ineffective legislation. The only safe way to blow the whistle is anonymously.

2021 Study showed Canada’s PSDPA is worst in the world tied for last place with effectively no Best Practices out of twenty as the one it did have – an independent review in 5 years - was never done.

2022 Study showed the institutional environment for whistleblowers is hostile, traditional public service values on loyalty and impartial advice have “drifted” and the new distortions have become normalized deviance. Political interference occurs, incentives favor suppression of bad news and create the illusion of error-free administration.

Whistleblower cases.

An old case with current consequences.

A particularly serious example started 30 years ago in the 1990's when national security whistleblowers from then External Affairs, the RCMP and CSIS were suppressed, ostracized, careers and health destroyed for just doing their jobs. They reported on corruption in the Canadian Hong Kong High Commission allowing Chinese Triads/criminals to flow into Canada. The consequences have persisted until today and have grown to include interference in Canada's elections by the CCP.

The public servant, who first initiated the disclosure was Brian McAdam. He simply reported to superiors at the Hong Kong High Commission in 1993 where he was posted what he observed – his computer being hacked while he was looking at it. The files of bad actors and their criminal records were disappearing from the screen in front of him. This was witnessed by the RCMP officer attached to the High Commission who was in his office at the time. An investigation ensued as did the maltreatment of the whistleblower, Brian McAdam, and eventually those from the RCMP and CSIS who helped with the investigation and its report – the Sidewinder Report or Project Sidewinder. The investigation documented bribery, forgery of visas, and profiteering which allowed members of Chinese Triads (criminals) to enter Canada and bring with them drug and human trafficking, and related crimes.

When a former CSIS bureau chief testified at a House Committee recently that “every federal government over the past 30 years has been infiltrated by agents acting on behalf of China, and each one has chosen to ignore warnings about it” - there is little doubt that the initial warning was that of McAdam et al in the 1990's.

Brian had another chance to report in 2006, more than a decade later when he was asked to make a [submission to the Legislative Committee](#) studying the last iteration of the PSDPA before it was finally implemented. His invitation was cancelled at the last minute - after he had submitted on request a preview of his brief. His revelations and recommendations could very well have prevented today's disastrous debacle.

A current case.

This case concerns the Canadian Border Services Agency and an Officer who simply did his job by refusing to comply with illegal and up to criminal orders from his superiors – to destroy Passports that were in their keeping. For his honesty and loyalty, he was subjected to outrageous treatment which caused his health to suffer and forced him into early retirement – all well documented.

The harassment, in addition to threats of ensuring he never worked again, included destruction of his office (pictures viewed), putting Purell in his coffee that made him sick, and a generally toxic workplace that led to a breakdown in his mental health. This process is a recognized pattern known in the literature as weaponizing mental health.

The litany of failures is breath-taking as he tried all the normal routes one assumes would lead to the wrongdoing being dealt with. For example – the wrongdoing was top down, so no solution there. Then the PSIC was the next stop – but criminal acts were not his jurisdiction, and no referral elsewhere was given. Next the RCMP – this was not their jurisdiction either with no suggestion as to whose jurisdiction it was. A governing party MP showed concern but the message from the Minister was “this information

is not welcome”, the recommendation from the MP was “go to the opposition”. The opposition responded they could not raise the matter in the House unless it was first reported on by the media.

This experience would do-in the strongest among us. In this regard, the world of neuroscience has important information for leaders at all levels to take note of – political and administrative. It is well-documented that the harassment and bullying that honest public servants who disclose wrong-doing can be subjected to can cause physical damage to the brain – seen on brain scan. This is in addition to and likely causing, the mental health detriments up to and including PTSD and suicide. ⁱⁱⁱThis development can change the landscape in terms of legal liability for employers who neglect to act in the face of such behaviour. Further, concerns are so high in the medical and academic communities that some are calling for legislation to declare bullying behaviours a public health problem so that people can get treatment for the harm they suffer. ^{iv}

What is needed

The literature has confirmed that legislation alone will not protect whistleblowers, especially if it is introduced into an unwelcoming or resistant environment as it will not be upheld. Culture is equally or even more important. Culture is greatly impacted by leadership and the values and norms in the overlapping and administrative cultures of government. ^v We cannot keep on repeating the mistakes of the past that led to the poor performance of this current disclosure regime without causing further serious harm.

The improvements contained in Bill C290 represent an important paradigm shift. The following are the Best Practice improvements: Broad disclosure rights – who you can disclose too has been broadened - Departments should not be able to issue regulations banning public disclosures of its own misconduct. Subject matter disclosure rights have been widened – what you can disclose. Protection against spillover retaliation is included, as is reliable identity protection. There is now a realistic time frame to act on rights. Personal accountability for reprisals has been strengthened as has the transparency and review requirement which now stipulates a review must be conducted every 5 years. Finally, the most basic of rights - the right to a genuine day in court has been included. The fact that public servants did not have this right under the original PSDPA (unless the PSIC deigned to give it to them) was indeed a rule most fitting for a totalitarian legal regime such as Russia perhaps? But Canada?

But why stop there? Please see a list of the internationally recognized 20 Best Practices for legislation attached at Appendix 2. We urge you to work to include as many as possible. Surely Canadians deserve no less?

Of particular importance is the Burden of Proof or the reverse onus requirement where a manager must prove the action taken was not a reprisal rather than the employee prove that it was. Also consider, the question of the financial losses to someone who is penalized for simply upholding the law and doing his/her job. Is this just?

The problems plaguing the current regime are with legislation, implementation, leadership, political and administrative cultures and lack of constructive scrutiny by parliament^{vi}. Both problems and solutions are listed in the Table 1 below.

Table 1

Problems with the current whistleblowing regime and Proposed solutions.

| Problem | Proposed Solution |
|--|---|
| Flawed legislation | Leaders- political and bureaucratic - know what effective legislation looks like. It remains for them to just do what needs to be done and fix it. There is no rational reason why Canadians should not have a law that contains all 20 best practices and protects every citizen who discloses wrongdoing. See GAP IBA document. Are Whistleblowing laws working? |
| Implementation failure | Provide adequate internal and external disclosure mechanisms which provide the necessary functions for success – i.e. Advisory – awareness raising, training, legal support, psychosocial support; Investigative – investigation of wrongdoing and reprisals; and Adjudicative – corrective action, protection of discloser (compensation), prevention of harm. |
| Uncommitted and ineffective leadership | Leaders must lead the change by being a visible part of the behaviour change communication plan, essential to culture change. There must be no gap between what they say and what they do as this signals insincerity and trust will be lost leading to failure (again). |
| Political and administrative cultures that stress control over information | Develop open, listening and reflective cultures, to replace defensive, controlling ones if public trust is to be maintained. Shift from command-and-control public administration to listening and learning approaches. Admit errors, accept responsibility, correct and learn. |
| Lack of constructive scrutiny by Parliament | An on-going Parliamentary Committee with oversight functions and which would interact with NGO's and whistleblowers to ensure system feed-back and ongoing maintenance. |

Recent Studies & Findings

* 2017 – *Law, Culture and Reprisals: A Qualitative Case Study of Whistleblowing and Health Canada’s Drug Approval Process*. Forward, Pamela.

Main Findings: Reprisals are caused by weak whistleblower protection laws, dysfunctional organizational cultures, dysfunctional political cultures, attitudes/ideologies in the courts. The surprise finding was that legislation alone will not protect whistleblowers; culture is equally if not more important as if legislation is introduced into an unwelcoming, resistant culture, it will not be upheld. ^{vii}

*2018 – *Whistleblowing in Canada. A Knowledge Synthesis Report*. Martin-Bariteau, Florian and Veronique Newman.

Main Findings: The Federal law has provided the model for the provincial laws which means the whole country is affected by ineffective legislation. In the words of the authors, “With the uncertainty surrounding the legal framework, whistleblowers’ best protection relies on their anonymity.” ^{viii} And as for private sector workers, some 19 million of them – there is no legislated protection whatsoever.

*2021 – *Are whistleblowing laws working? A global study of whistleblower protection litigation*. Feinstein, Samantha and Tom Devine

Main Findings: Regarding Canada’s PSDPA, it is tied for last place with one best practice only out of twenty that are generally accepted as necessary for effective legislation – an independent review after 5 years. This review was never done. ^{ix}

*2022 – *Square Peg in a Round Hole? Three Case Studies into Institutional Factors Affecting Whistleblowing Regimes in the United Kingdom, Canada, and Australia*. Bron, Ian.

Main Findings: Overall, norms remain generally hostile; whistleblowers continue to be viewed as a problem. Traditional values on loyalty and advice distorted, and increasingly confidentiality is distorted into secrecy. This deviance has been normalized. Other significant factors – political interference appears to put pressure on public servants to take actions that likely would have been challenged in the past; incentives favor suppression of bad news and creating the illusion of error-free administration; neither employment law nor free speech rights have had a significant effect on outcomes. ^x

Appendix 2

List of twenty “Global Best Practices” missing from the PSDPA

- from *Are whistleblowing laws working? A global study of whistleblower protection litigation* by the Government Accountability Project and the International Bar Association.

1. Broad whistleblowing disclosure rights with ‘no loopholes’
2. Wide subject matter scope, with ‘no loopholes’
3. Right to refuse violating the law
4. Protection against spillover retaliation at the workplace
5. Protection for those beyond the workplace
6. Reliable identity protection
7. Protection against full scope of harassment
8. Shielding whistleblower rights from gag orders
9. Providing essential support services for paper rights
10. Right to a genuine day in court
11. Option for alternative dispute resolution with an independent party of mutual consent
12. Realistic standards to prove the violation of rights
13. Realistic time frame to act on rights
14. Compensation with ‘no loopholes’
15. Interim relief
16. Coverage for legal fees and costs
17. Transfer option
18. Personal accountability for reprisals
19. Credible internal corrective action process
20. Transparency and review. (This was in the original law to be done in 5 years, but it never happened).

Best Practices contained in C290

As assessed by Tom Devine, Government Accountability Project

The following are the improvements included in C290:

- No. 1 Broad disclosure rights – who you can disclose to. Departments should not be able to issue regulations banning public disclosures of its own misconduct.
- No. 2 Wide subject matter disclosure rights – what you can disclose
- No. 4 Protection against spillover retaliation
- No. 6 Reliable identity protection
- No. 10 Right to a genuine day in court
- No. 13 Realistic time frame to act on rights
- No. 18 Personal accountability for reprisals
- No. 20 Transparency and Review – C290 strengthens the requirement for a 5-year review by now adding a review must be conducted every 5 years.

Additional Priority Best Practices.

Best Practices that should be added to Bill C290 to ensure a whistleblower has a reliable chance to prevail are- burden of proof or the reverse onus requirement where a manager must prove the action taken was not a reprisal rather than the employee prove that it was; also consider, the question of the financial losses to someone who is penalized for simply upholding the law and doing his/her job; and a department should not be able to issue regulations banning public disclosures of its own misconduct. In other words, the amended PSDPA should ban NDA's and supersede such regulations.

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