

Speaking Up

Notes for Remarks by James R. Mitchell

to

The Fifth Canadian Conference on Ethical Leadership

Royal Military College

Kingston

November 6, 2003

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I want to begin by thanking Dr. Cowan for his invitation to speak this morning. I am, as I think he knows, a friend and sometime advisor to the Canadian Forces, and I have come on many occasions to RMC to speak to military audiences.

But I have never had a chance before to talk about whistle blowing. This despite the fact that I have thought about the issue quite a bit over the years, both during my time in the Privy Council Office, and more recently as ethical problems in the Public Service have made whistle blowing a topic of regular debate among public servants and among those like myself who are close to the Public Service.

My formal topic this morning is, at least officially, somewhat more grand. We are interested, at this conference, in the constraints that society imposes on its public sector personnel – whether military or civilian – when they are acting in the national interest.

One such traditional constraint is the duty of professional loyalty, which has usually been taken to include the duty of employees to deal with concerns about wrongdoing in their institution through internal channels, rather than through public disclosure.

And ‘disclosure of wrongdoing’ is what is meant by the term ‘whistle blowing’.

The specific question I was asked to address before you this morning is how, and to what extent, should government organizations create reprisal-free environments that all public servants to challenge higher authority on ethical grounds – i.e., on the grounds that higher authority has acted wrongly?

Or to put the question more simply, should governments create whistle blowing mechanisms in public sector institutions, and if so, of what sort? Whistle blowing is simply a challenge to higher authority on ethical grounds. And legalized whistle blowing is a formal mechanism that legitimizes the right to make that ethical challenge.

My short answer is, yes they should, but they have to be careful how they do it. I want to explain why I would say this today, even though I would not have said so ten years ago.

Whistle blowing

Whistle blowing is a matter of great interest today for two reasons, one fairly obvious and the other rather deeper.

The obvious reason for the current interest in the subject of whistle blowing is that there seems to be so much going on in departments and agencies that deserves to be brought to light and corrected or punished.

It’s really quite amazing, or perhaps I should say depressing. 20 years ago, we used to say that instances of actual theft or other criminal activity by senior public servants were so rare they weren’t worth talking about. And certainly they weren’t a problem that required a general solution in policy or legislation.

Would we say that today? I don’t think so. Today, MPs and newspaper editors and many thousands of ordinary Canadians are pressing for precisely a legislative solution to deal with wrongdoing in the public service workplace.

It is worth remembering that the Canadian Forces already has an Ombudsman – Andre Marin – whose responsibilities include, but go beyond, whistle blowing. Why was his Office created? In part, to respond to public concerns that internal mechanisms in the Canadian Forces to address issues of fairness, injustice and wrongdoing, were inadequate.

So the Canadian Forces has already gone a step beyond its sister institutions on the civilian side.

I'm sure there was a time when the very idea of an Ombudsman would have been seen as dangerous to military discipline. Indeed the whole idea that members of the Forces have rights as persons that could allow them to challenge military authority is probably still seen by some officers and senior NCOs as anathema. Those are the same people, no doubt, who wrote the rules prohibiting military spouses from petitioning the Base Commander on issues of housing or schooling that were completely outside the legitimate scope of the command hierarchy.

But let us not forget, deep in the ethos of command and discipline that defines the value and authority structure of the Canadian Forces is the concept of the lawful order. If an order is not lawful, you don't have to obey it. Indeed, it is your duty not to obey it.

I'm not a lawyer, but my friends in DND tell me this is one reason why so much care is taken in drawing up rules of engagement for Canadian troops deployed abroad and, where necessary, in drafting legal opinions on the lawfulness of a deployment (e.g., Kosovo) This is all done to ensure that the members of the Canadian Forces are able to act lawfully in carrying out their duty as members when they go abroad in the service of Canada.

The lives of civilian public servants are normally less complicated than this. Seldom is what they do in the course of their workday challenged on the grounds of legality. Or at least not until fairly recently.

Over the past thirty years, and especially in the aftermath of the Charter, we have created in and around the public sector workplace a structure of law and policy that imposes on managers a number of duties that their predecessors would not have recognized.

Consider:

- under the *Canadian Human Rights Act*, employees are protected from discrimination on a number of grounds, including race and gender. The latter has now been read by the courts to include protection from often difficult-to-discern gender-based discrimination in compensation (pay equity)
- Under the *Employment Equity Act*, large public sector employers (such as the Treasury Board) are obliged to take concerted steps to analyze the composition of their workforce and, over time, to ensure equitable representation of so-called 'designated groups'

- *under the Charter of Rights and Freedoms*, the courts have found that all but a few Public Service employees have the right to be politically active and even to criticize their employer in public.
- *under the Public Service Staff Relations Act*, public servants have the right to collective bargaining and a host of other freedoms and entitlements that are enjoyed by their counterparts in private sector enterprises.
- *under various federal and provincial laws governing health and safety in the workplace*, employees have the right to a safe working environment. If the workplace is not safe, they have the right to complain and even to stop work.

The list goes on. What we have in Canada today is an architecture of law and policy that recognizes – quite properly – the rights of public sector workers, that gives them freedoms to behave in various ways, and that legitimizes their right to seek redress of grievances when the employer misbehaves or tries to prevent the employee from exercising his or her rights.

To put it simply – public sector employees have certain legal rights; public sector employers have certain legal obligations. But this is hardly surprising in a mature democracy like ours. What does all this have to do with whistle blowing? Indeed, if employees have all these protections, where is the need for any sort of whistle blowing regime at all?

The connection between rights and whistle blowing is interesting, because it helps us to understand the difference between whistle blowing and other redress mechanisms.

The redress mechanisms I have just described all derive from the legal obligation of the employer to do, or not do, certain, things, and from the consequential legal right of the employee to seek redress when their rights are violated.

Whistle blowing is not a concept originally defined in these legal terms. It refers originally to speaking up in the face of wrongful behaviour (misconduct). A whistle blower is someone who speaks up, regardless of the law and (perhaps) regardless of the consequences, to expose wrongdoing. That wrongdoing *may* be criminal but the term ‘whistle blowing’ carries no such connotation of the exposure of lawbreaking.

We should remember that, in our democracy, every citizen has the right and the duty to report lawbreaking to the police. What we are talking about in the case of whistle blowing is a right to report wrongdoing that may not be criminal to an authority other than the police.

That is, we are talking about moving from a situation where employees were considered to have no right whatsoever to disclose wrongdoing outside the chain of command, to one where their right to do so will soon be enshrined in legislation. And this despite the fact that the alleged wrongdoing may not be illegal.

Current Policy

Under the TBB policy whistle blowing (titled *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*) wrongdoing is defined as:

- a violation of any act or regulation
- a breach of the *Values and ethics Code for the Public Service*
- misuse of public funds or assets; or
- a substantial and specific danger to the life, health and safety of Canadians or the environment.

As you can see, what we now have in government policy, and what some want to see in legislation, is a right to challenge the actions of superiors on ethical grounds (as well as grounds of lawbreaking).

This is a big change.

- Unions like it because it empowers workers and puts the actions of management under independent scrutiny.
- the Opposition likes it, because it involves recourse to an officer-holder (relatively) independent of government who is empowered to investigate allegations of wrongdoing by government
- the press like it, because it the press generally likes the idea of an Ombudsman.
- And the public likes it. A recent Environics survey for PSAC showed that 89% of Canadians want legislation to protect public sector workers who expose government corruption from reprisals.

Why not a Stronger Whistle blowing Regime?

So, if everyone likes the idea, what are the drawbacks? Why not legislate the current policy? Why not strengthen it, as some (including the current Public Service Integrity Officer) have suggested, by making the Integrity Officer into a truly independent office-holder (perhaps reporting to Parliament) or by giving him the power to take corrective action? Or by extending his constituency to include not just federal public servants but all Canadians?

Why not do everything we can to ferret out wrongdoing, and to protect those who expose it? Why not empower a high-quality person (like the present Integrity Officer) to correct it?

Let me state my position:

- I now believe that some form of protection for whistle blowers is not only a reasonable protection for workers but, as recent events have shown, a necessary one.
- There is clearly a benefit to society, and to the government itself, through the existence of an Officer to whom workers can go to disclose concerns about lawbreaking, mismanagement and unethical behaviour.

But there is also, in my view, good reason not to go much farther than this. (By “much farther”, I mean farther than, say, legislating the present regime.)

Our Westminster System

First, we need to recall the basic features of our system of Westminster government:

- the government governs (with the support of a professionally loyal, permanent Public Service)
- Parliament (that is, the House of Commons) holds the government to account
- and our society operates within the rule of law, which means among other things that the courts and the police are independent of government

This simple division of roles has become clouded in recent years through the establishment of an increasing number of parliamentary officers with specific duties in the area of protection of rights and investigation of wrongdoing.

I am thinking of:

- the Auditor General
- the Information Commissioner
- the Privacy Commissioner
- the Canadian Human Rights Commission
- the Commissioner of Official Languages

To this list we can add the Canadian Forces Ombudsman and the Public Service Integrity Officer.

All of these office-holders are a kind of Ombudsman. All have a responsibility to investigate “wrongdoing” of one sort or another. Each of the five Parliamentary officers has a statute setting out their powers, and none is really accountable to anyone, certainly not to Parliament.

This trend toward independent office-holders as protectors of rights and investigators of wrongdoing has eaten away at the traditional – and fundamental – role of Parliament.

Instead of looking to Parliament, Canadians now look to these independent office-holders as protectors of their rights in the face of wrongdoing in or by government. Why is this?

- In part, because Canadians have lost faith in all politicians, not just those in the Government
- In part, because Parliament has been discredited through the televised behaviour of the Opposition and the Government in Question Period.

But we should not forget, as Denis St-Martin of the University of Montreal reminds us, that every time we give power to an unaccountable officer of Parliament, we erode the power (and legitimacy) of Parliament itself.

And if we empower an Ombudsman – whether it is the Public Service Integrity Officer or the Information Commissioner or the Auditor General – to take corrective action, we undermine the legitimacy of authority inside government.

- We create a situation where the premise is that senior authorities cannot be trusted to take corrective action in the face of information about wrongdoing below them.
- We legitimize second-guessing of management decisions by people who fall under the authority of management.
- We interject the into the workplace the judgment of an independent party who is unlikely to know anything about the business of the institution.

It is interesting that successive Auditors General have fully appreciated these considerations. They know that their role is to look at what is going on, and to tell Parliament about it, so that Parliament (or, properly, the Government prodded by Parliament) can take whatever corrective action is required.

Elements of a Proper Regime

What this suggests is that there is a balance to be struck in legislating a regime that would empower public sector employees to challenge higher authority on ethical grounds.

Let me try to identify what I think are the principles that should be followed in a proper regime.

The first principle is respect for the Minister's authority under the law, and his or her accountability to Parliament for the exercise of that authority – not just personal accountability but accountability for everything done in or by the Minister's department

The second principle is explicit recognition of the role and responsibilities of public servants within the “democratic chain of command”:

- professionally loyal to the government of the day (a loyalty that includes the duty to keep the confidences of the government in support of which they are working);
- working within a public service line of authority that leads up to the Deputy Minister and the Minister.

The third principle is respect for the authority of the head of the public sector institution:

- if there is illegal activity, it is their responsibility to call in the police;
- if there is mismanagement, it is their responsibility to correct it.

The final principle is respect for Parliament as the foundation and embodiment of our democratic system:

- if the law has been broken, then citizens have access to the police and the courts;
- but if there is wrongdoing in government, it is Parliament's duty to see that wrongdoing is exposed and corrective action taken. That fundamental responsibility can be *supported* by Officers of Parliament, but it cannot be assigned – handed over – to another party such as an Ombudsman by whatever name.

People have rights, and those rights deserve protection. Citizens in general have an interest in the proper administration of government, and that interest must be respected. But it is in no one's interest to create a situation where the premise is that public authority cannot be trusted, or where the rights of public servants would trump the duty of management to do what a Minister wants (legally) to have done.

Thank you.