Freedom of Expression, Whistleblowing and the Canadian Charters

A whistleblower is a person who speaks out in order to expose public or private sector improprieties or negligence. The sanctioning of whistleblowing by governmental agencies raises some interesting questions for individuals charged with upholding civil rights in Canada. This article is based on a presentation to the Conference of Canadian Ombudsmen in Quebec City.

by Inger Hansen

A few explanations about my work may be in order. The Information Commissioner's mandate is established under the federal *Access to Information Act*. The Commissioner is appointed by Parliament and has the same powers of investigation as provincial ombudsmen. Complaints may be presented by anyone who has used the Act or their representative. Complaints may also be initiated by the Commissioner. The complaints must be against the federal government and concern failure to comply with the *Access to Information Act*.

A number of provinces also have freedom of information or access to information and privacy laws and in the provinces of New Brunswick, Newfoundland, and Manitoba, the provincial ombudsmen's mandate include access to information complaints. The provinces of Quebec and Ontario have established decision-making and advisory commissions to deal with such complaints and their ombudsmen are not directly involved in freedom of information issues.

The federal office has not yet has occasion to use any of the provisions of the *Canadian Charter of Rights and Freedoms* in support of a complainant under the *Canadian Access to Information Act*. However, that fact has not prevented me from giving considerable thought to the issues involved and I am convinced that charter rights are relevant to the work of all Canadian ombudsmen.

While the principles that I hope to establish may have general application, my presentation will focus on freedom of expression, which is defined in paragraph 2(b) of the federal *Charter of Rights and Freedoms* as:

> "freedom of thought, belief, opinion, and expression including freedom of the press and other media"

At the same time, though, in a democratic society, rights and freedoms are not absolute; they are often qualified or limited in order to protect the rights of others or in light of other constitutional values. An example is the qualification on free speech in laws on libel or slander or the prohibition of hate propaganda. Section 1 of the Charter thus guarantees the rights set out in the Charter, subject to such limitations as are shown to be justified in a free and democratic society. Any limitation of a guaranteed right must be established by a rule of law. The limitation cannot restrict the right more than is required to achieve a desirable social purpose and those who rely on the limitation must prove it is justifiable in a free and democratic society.

Fundamental rights and freedoms may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

My concern is with an old problem which has in recent time been given a new name in the English language. I am talking about whistleblowing. A whistleblower is a person who speaks out in order to expose public or private sector improprieties or negligence. The term whistleblower has already found its way into the *Civil Service Reform Act* of the United States and here in Canada, the federal Auditor General has recently suggested the establishment of a fraud hotline so that public servants may anonymously report misuse of government funds. Proposals have also been made in the House of Commons, for example after the Hinton railway disaster, for legislation to protect

Inger Hansen is the Information Commissioner of Canada.

persons who in good faith expose threats to public health and safety.

There exist at least two problems in this area: on the one hand, the motives of the whistleblower may be suspect and on the other, even if the information is genuine, the informer may still suffer adverse consequences if he or she goes public. In some instances going public may be against the law.

Some ombudsmen's offices have encountered persons who feared reprisals as a consequence of making a complaint. Such a situation may be handled by the ombudsman initiating the complaint on his or her own initiative or by causing an investigation based on the systemic approach. Occasionally, there may be sufficient evidence to warrant an allegation of obstruction of the ombudsman.

We all know that it takes a very strong person to risk his or her career as a public servant by going on the public record as an accuser of his superiors or her political masters. The decision to whistleblow is not taken lightly by thoughtful people.

Public servants are supposed to be loyal to their employer. They are not supposed to "be political" and they face more restrictions on their freedom of speech than other members of society.

Until recently, it was generally believed that public servants were not permitted to engage in work for political candidates. The authority was found in the *Public Service Employment Act* which provides that:

> "32.(1) No deputy head and, except as authorized under this section, no employee, shall
>
> (a) engage in work for, on behalf of or against a candidate for election as a member of the House of Commons, a member of the legislature of a province or a member of the Council of the Yukon Territory or the Northwest Territories, or engage in work for, on behalf of or against a political party ..."

This provision was challenged under the federal Charter by some public servants, none of whom were deputy ministers. In that case, the Federal Court of Appeal found that the words were vague, ambiguous, uncertain or subject to discretionary determination and thus unreasonable. Paragraph 32(1)(a), the Court concluded, is of no force and effect.

An amendment to the *Public Service Employment Act* may, of course, be proposed before the next election and I should emphasize that the court made it clear in other parts of the decision that the ruling on paragraph 32(1)(a) did not alter the principle that the public service must be politically neutral. The important principle for our purposes is that the Court stated that limits on Charter rights must be expressed in definitive terms.

Other limitations on freedom of speech which affect public servants are to be found in the *Official Secrets Act* which we inherited from England. Let me quickly summarize just one provision.

It is an offence to communicate, use, retain or fail to take care of anything that relates to or is used in a prohibited place (this could be a defence establishment) or that has been entrusted in confidence to that person by anyone who holds office under Her Majesty, or that the person obtained while in some capacity that enabled him or her to gain access to it while subject to the Code of Service Discipline within the meaning of the *National Defence Act*.

The essence of the offence is to communicate something without authority to the prejudice of the safety or interests of the State, meaning Canada.

At the same time, there have been moves on the part of government to provide more open government, the *Access to Information Act* being one of the most important in recent times. The new Communications Policy, issued by Treasury Board in 1988, also directs public servants that "good communications is fundamental to the achievement of government objectives" and that the government must:

1. provide information to the public about its policies, programs and services that is accurate, complete, objective, timely, relevant and understandable;

2. take into account the concerns and views of the public in establishing priorities, developing policies and implementing programs; and

3. ensure that the government is visible and answerable to the public that it serves.

Under the *Access to Information Act* itself, the administration encourages public servants to release information informally with reference to subsection 2(2) of the Act which reads:

> "(2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public."

When acting in good faith, public servants are protected from civil and criminal liability if they release information under the *Access to Information Act* and if they act with "due authority" they would not be in violation of the oath of office and secrecy.

The problem is that many public servants do not appear to know when they are authorized and when they are not. Many consider the provisions and policies I have referred to ambiguous, vague and contradictory.

It does not take much imagination to think of what can go wrong. Subtle sanctions may be applied to discourage future whistleblowing, the extent of the public servant's authority to disclose some information may be misinterpreted. Careers of both provincial and federal public servants can easily be put at risk in this new age of more open government.

But you may ask, who lends support to the public servant who discovers unsafe situations for which the government is responsible? Who stands by the person who discovers improprieties of other civil servants? Who counsels the public

servant who becomes aware of evidence of criminal acts or abuse of power on the part of his or her bosses? Who comes to the defence of the individual whose integrity and conscience will not tolerate the luxury of silence? Sometimes no one.

Is the right to freedom of expression in the charters important here? Do ombudsmen have a role to play?

If the state seeks to impose criminal sanctions as a legitimate restraint on the ability of individual freedom of expression, lawyers, not ombudsmen, will become involved. If an individual who has been eased out for speaking up, pursues redress through a grievance process or civil action for wrongful dismissal, the ombudsman may simply watch the proceedings with interest. Other avenues than the ombudsman may also be available to redress official languages complaints and human rights violations based on discrimination.

But what about the residue of administrative actions that may be taken to silence potential whistleblowers? What about the whistleblowers who have not necessarily had their day in court or before a tribunal? They too may be harassed or overlooked for promotions. Can the right to freedom of expression be invoked to argue their cause? Is the ombudsman able to do that? Is or should the ombudsman be able to intervene if the state unfairly silences whistleblowers?

Should a new expanded role be created for ombudsmen to assist the so-called whistleblower? Should laws that create ombudsmen contain provisions permitting a potential whistleblower to confide in the ombudsman without fear of sanctions? Should it be possible for an ombudsman to determine the public interest in disclosure of the information received from the whistleblower?

Let's examine some action taken or advocated to try to solve the whistleblower's dilemma. In Sweden, public servants may draw government wrongdoing to the attention of the media. The media, to the best of my knowledge, are prohibited from publishing the identity of the informer.

The *Whistleblower Protection Act* of 1989 provides protection at the federal level in the United States for those who disclose government "illegality, waste and corruption" and the Office of Special Counsel is charged with protecting whistleblowers against prohibited personnel practices. Some states have similar legislation. The Canadian Auditor General has spoken of the idea of a fraud hotline which he says already exists in the United States and saves their government $20 to $50 for every dollar spent running toll-free telephone lines and checking the anonymous tips.

An interesting example of a statutory role as informer has been given to the Information Commissioner in the Canadian *Access to Information Act*. The Commissioner is expressly authorized to disclose to the Attorney General of Canada information relating to the commission of an offence against any law of Canada or a province on the part of any officer or employee of a government institution if in the Commissioner's opinion there is evidence of such activities.

There is, as we all know, no federal ombudsman, but I think that is irrelevant to the recommendation that is inherent in my presentation. If there were one, my suggestions would cover the mandate of such an office as well.

I think that Canadian ombudsmen are ideally suited to sort out the whistleblowers' dilemma. They are independent of government, they have the experience and resources to separate the megalomaniacs from those who in good faith bring forward plausible evidence of government wrongdoing. Ombudsmen are used to act as intermediaries in the interest of a greater social good. Ombudsmen have the knowledge and experience that would enable them to dissuade informers who are imagining things or are mistaken about the facts or the law.

By interpreting their mandates liberally and acting informally, ombudsmen probably do some of what I have spoken about. But I suggest that they should have an express statutory mandate enabling them to hear the whistleblower, to protect his or her identity when appropriate and to make public or otherwise communicate the information received from the whistleblower to any level in government, including the legislature that appointed the ombudsman. The ombudsmen should also be authorized to investigate complaints of sanctions or harassment against the whistleblower where there are no other reasonable avenues available for redress.