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# **LAW, CULTURE AND REPRISALS: WHISTLEBLOWING & HEALTH CANADA'S DRUG APPROVAL PROCESS**

## **Why do Reprisals Occur ?**

  
POLICY BRIEF S 1.4



**Whistleblowing  
Canada Research  
Society**



## LAW CULTURE AND REPRISALS: Whistleblowing and Health Canada's drug approval process



### WHY DO REPRISALS OCCUR?

*In “The Necessary Illegitimacy of the Whistleblower” we learn “[...] the continuing legitimacy of the organization necessitates the illegitimacy of the whistleblower. This helps explain the continual blacklisting of the whistleblower and their vilification, resulting in the destruction of both their professional career and their reputation. Only specific protective legislation can provide insurance for their career.”*

#### Background

This is the fourth in a series of *Policy Briefs* originating from the in-depth case study *Law, Culture and Reprisals: A Qualitative Case Study of Whistleblowing & Health Canada's Drug Approval Process*. This study explores the whistleblowing phenomenon - how and why people who tell the truth about apparent wrong-doing are punished and wrong-doers often are not. Each finding is a topic of discussion in this Policy Brief series. The topics are:

1. The Case – An Overview - – [Read More](#)
2. Why Blow the Whistle? - [Read More](#)
3. How Reprisals Occur? - [Read More](#)
4. Why Reprisals Occur?
5. The Role of Law
6. The Role of Culture.

These findings were informed by the whistleblower's experience and supported by official documents obtained from Court files. While the findings are case-specific, there are many important lessons transferrable to other organizations and whistleblowers in difficult situations.

### KEY POINTS

Reprisals often occur when employees raise concerns, question authority and insist on doing their jobs ethically.

Reprisals can occur to maintain the ongoing legitimacy of the organization by rendering the whistleblower illegitimate through blacklisting and vilification.

Whistleblower protective legislation is a first step to correct the problem.

Reprisals will occur regardless of whistleblower protection legislation or if the allegations of wrongdoing are factually correct.

Dysfunctional structures and cultures are part of the problem.

Confusion around loyalty and secrecy imperatives contribute to the dysfunction.

Regulators are often under systemic pressure from the politicians who appoint them to ignore whistleblowing cases relevant to their sources of financial and/or ideological political support.

Whistleblowers are more likely to blow the whistle externally if they are ignored internally.



Whistleblowing Canada Research Society is a non-profit charity dedicated to advancing education on the whistleblowing phenomenon in Canada through research. This research is shared publicly to inform public dialogue and public policy.

EM: [info@whistleblowingcanada.com](mailto:info@whistleblowingcanada.com)  
PH: (236) 317-3949  
WS: [www.whistleblowingcanada.com](http://www.whistleblowingcanada.com)

## WHY DO REPRISALS OCCUR?

Dr. Brill-Edwards was demoted from her management position as Acting/Assistant Director-Medical to Reviewer of new drug submissions. She states she was blocked from accepting a position with the World Health Organization because of her refusal to sign a non-disclosure agreement requiring she give up legal actions against the Department.

As she described it, the reason she felt this was happening was that she was standing in the way of what was “probably the most important public policy of our lifetime – deregulation” (pers. comm. Apr. 8, 2014). She believed there was a deliberately dysfunctional structure in the Bureau of Human Prescription Drugs (BHPD) by “de-professionalizing”[1] the Department to facilitate deregulation. She asserted that there was also a dysfunctional culture that facilitated wrongdoing. Further, she had also breached the legal and policy imperative of loyalty and secrecy which she had been required to adhere to by signing an oath to that effect when she was hired.

So from her perspective, reprisals occurred due to three things:

- i. she challenged authority and deregulation
- ii. there was a dysfunctional structure and a dysfunctional culture, and
- iii. loyalty and secrecy oaths which contributed to the dysfunction.

### On deregulation she said:

"[. . .] it was always accepted that there was an absolute need, not questioned, but an absolute need for government intervention in the marketplace to specifically safeguard the interests of consumers. In the 70's that concept of the necessity of government intervention went out the window, because very powerful people took this position - "Government regulation is an encumbrance - it slows down industry, it slows down innovation, it slows down economic growth. It's nothing but bad, and we need to get rid of it as much as possible.



So you have the transition to an era where the old framework is gone and the new framework is “trust industry”. It will handle everything properly with as little intervention as we can manage. So in Canada we start in the 70's switching away from the 60's where the idea that the tragedy of thalidomide – which was a huge regulatory failure – led to the public view that we need regulators, we need people scrutinizing these things. There was also the experience of Frances Kelsey – a Canadian, working for the US FDA - keeping thalidomide off the American market.

Then in the 80's in our agency and in many agencies around the world you have the de-professionalization of the agencies so the people who were well schooled and experienced as regulators all got their marching orders." (pers. comm. Apr. 28, 2014)

### On loyalty and secrecy oaths she said:

"You know initially when you swear an oath you take it for granted you are not going to be asked to do things that are morally wrong let alone illegal. So you don't even anticipate that this could be problematic so you never ask what the limitations are. It's not going to happen. As time went on I started to realize that there is wrongdoing here. At a more junior level I often could see the wrong doing was more incompetence than purposeful, and intentional. But at the more senior level, I kept cleaning up these messes [i.e. the Aid drugs] – thinking “Oh good. That's done.” And then turn around and Boom! It's happening all over again. And that's when you start to realize somebody is making this happen, allowing this to happen. When I realized this, I went and got legal advice from a group that were often working with Unions, a legal group. And the case in law that spelled out the answer to your question about the limits of loyalty was the case of the fellow [Neil Fraser] who publicly questioned the switch to the metric system. That case was interesting because he lost the case on the basis that he was disagreeing with government policy, he was not being asked to do anything unsafe. But happily, the Judges spelled out the circumstances that they could conceive of where a public employee would not only be allowed to speak out, but had a duty to speak out". (pers. comm. Apr. 8, 2014)

[1] De-professionalizing refers to the removal of professionals with expertise in relevant fields (Brill-Edwards, pers. comm. April 8, 2014).

Regarding secrecy and loyalty, even though the precedent of the Supreme Court decision in *Fraser v. Public Service Staff Relations Board* (PSSRB), [1985] 2 S.C.R. 455, created what was termed an exception to the loyalty/secrecy imperative in the case of illegality or a threat to the health and safety of the individual or others, it was not well known or understood at the time. Further, its application currently is “inconsistent” and “maturing” and not very helpful to whistleblowers. Others contend that loyalty and whistleblowing are compatible and the application of the *Fraser v. PSSRB* in the public service is confused and suggests a need to reconsider it.

### Insights from whistleblowing literature

When considering the problem of reprisals, the following highlights from the literature are important to keep in mind and indicate that protective legislation while important is but a first step to try to correct the problem. Dysfunctional cultures need to be addressed.

- Reprisals will occur regardless of whistleblower protection legislation or if the allegations of wrongdoing are right or wrong.
- In the US, whistleblowing has increased but so have reprisals, despite a forty year history of whistleblower protection legislation and enhancements to the legislation.
- In addition to deregulation, regulators are often under systemic pressure from the politicians who appoint them to ignore whistleblowing cases relevant to their sources of financial and/or ideological political support.
- Whistleblowers are more likely to blow the whistle externally if they are ignored internally.

The findings raise such questions as what were/are the cultural understandings and imperatives regarding reprisals and the role of public servants? To whom do they owe their first loyalty – the Canadian state and the law or the Minister/party in power? What comes first policy or the law? Who regulates the regulator?

**What can we do to repair the damage these persistent problems are causing in many organizations to improve organizational environments?**

Speaking up and telling the truth about how our organizations are functioning should be normal. How can telling the truth be signalled as a reason for gratitude and approval rather than an occupational hazard?

### Recommendations

To address the findings of why reprisals occurred, i.e. for challenging authority and deregulation, dysfunctional structure and culture, and loyalty and secrecy oaths, there is overlap with Policy Brief S 1.2, “Why blow the whistle.”

We made recommendations such as training on ethics, reprisal prevention through self-awareness, the role of public-servants, accountability to the law, democratic governance, and conflict resolution,

These recommendations also apply here. Those that apply most directly are

- i. institute training for staff on the role of public servants as elaborated by Sossin. His propositions seek to “improve the effectiveness of the civil service in executing the policy preferences of the government of the day [. . .]” while at the same time “[. . .] revitalizing the role of civil servants as guardians of the rule of law and the public trust” (59). This training would include clarification of loyalty and to whom public servants owe their first loyalty
- ii. institute training for staff on the intersection of politics and law, accountability to law and democratic governance
- iii evaluate the impact of deregulation on all sectors of the economy and specifically, on the ability of Health Canada to fulfil its statutory responsibilities.

The mere fact of such programs taking place would signal the importance leaders place on the topics. Leaders’ actions have a large influence on culture and culture change.



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**Whistleblowing  
Canada Research  
Society**

2656 Gulfstream Road  
Roberts Creek, BC V0N 2W4  
Email: [info@whistleblowingcanada.com](mailto:info@whistleblowingcanada.com)  
Phone: (236) 317-3949  
Website: [www.whistleblowingcanada.com](http://www.whistleblowingcanada.com)

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