

# @Risk: Blowing the Whistle with Dr. John O'Connor and David Yazbeck

[Music]

**Jodi:** Hey, I'm Jodi Butts. Welcome to @Risk, brought to you by Interac.

Blowing the whistle is a risky thing to do. Nobody likes to hear bad news. But often what stands between us and a disaster is a whistleblower. Think of all the popular films we love about whistleblowers. Erin Brockovich, Silkwood, Serpico, Watergate, Chernobyl.

Also, consider the horrible repercussions whistleblowers faced from people in power when they came forward. Not every whistleblower is a knight in shining armor, but shouldn't we want to hear from anyone who believes better is possible? That's why some say we need stronger policies in the private and public sectors to shield people from retaliation when they do decide to blow the whistle and to require investigation of the concerns raised.

On this episode of @Risk, you'll hear from Dr. John O'Connor. Dr. O'Connor is a Fort McMurray physician who first spoke out about the potential negative health impacts of the tar sands on his patients living in Fort Chipewyan back in 2006. Soon after that he was accused of misconduct by Health Canada. Two years later Dr. O'Connor was cleared of any wrongdoing, but the people of Fort Chip continue to wait for a comprehensive health study.

You'll also hear from lawyer David Yazbeck who provided expert testimony to the House of Commons Standing Committee On Government Operations as part of the first statutory review of the Public Servants Disclosure Protection Act. That committee issued 15 recommendations in 2017, none of them have been implemented.

According to a study by the Government Accountability Project and the International Bar Association assessing global whistleblower laws for their legitimacy, Canada tied last with Lebanon. Canada, last place. What? Please listen to Dr. O'Connor and David Yazbeck on why we need whistleblowers and how Canadian and provincial governments can better protect them.

**Jodi:** Thank you for joining me Dr. O'Connor, and welcome to @Risk.

**John:** Thank you.

**Jodi:** So tell us, you've been described as a whistleblower. What did you blow the whistle on?

**John:** I am useless on the whistle, but I play guitar and banjo and mandolin. I have a mandolin. So basically in the course of my practice in the community of Port Chip in northern Alberta I, after listening to elders describe their concerns for the community in terms of health and environment, I discovered a burden of pathology including cancers and rare cancers in the community of 1200 people that really shocked me.

**Jodi:** Who did you share this information with?

**John:** Initially colleagues in Fort McMurray wondering if, and mainly specialists, actually wondering if they were aware of seeing patients from Fort Chip with malignancy and autoimmune diseases. And on reflection they agreed they had and they were, and they were concerned but it sort of hadn't occurred to them. Seeing patients on a referral you especially don't always look at the address. But when it was brought to their attention, they agreed. And then I went to Health Canada. Health Canada is responsible for on reserve health and Fort Chip, most of the community is on the reserve. And I was met with silence from Health Canada.

**Jodi:** And when you were consulting with specialists and reaching out to Health Canada, did you think you were doing anything controversial or did you just think you were fulfilling your duties as a physician?

**John:** I had absolutely no inkling that I was doing anything other than fulfilling my duties as a physician. One of the duties is advocacy, and that hadn't even entered my mind. I was just curious and concerned and went to the authorities that I thought should be already aware of it, or if not should be aware of it.

**Jodi:** And so what was Health Canada's reaction?

**John:** At the outset, nothing. It was like incredibly, looking back on it, at the time I thought maybe they're busy. But looking back it was very curious and for me concerning that I wasn't getting a response. When they did respond, their initial reaction was no. There is no issue in Fort Chip. The community had been forever complaining about the changes in the environment, the changes in the water and the wildlife, the fish that they lived on, fish taken from Lake Athabasca. Fort Chip's on the edge of Lake Athabasca. The community's concerns fell on deaf ears.

But when the media got hold of the story, which happened purely accidentally, the reaction of Health Canada was to send three physicians to the community. And when they landed they went to the nursing station in Port Chip, went into the kitchen, one of the physicians grabbed a mug, filled it with water from the sink in the tap, took a swig of it and turned to the nursing station staff and at that point it was a Globe and Mail reporter. The news broke very quickly in the media, a Globe and Mail reporter was witness to this, and he said, "You see? There's nothing wrong with the water here in Fort Chip." And that was the stance that they took and they've kept to their opinion in that stance ever since.

**Jodi:** So obviously that's not the reaction you were looking for. What were you hoping to see from Health Canada?

**John:** I thought especially as I was communicating with physicians, I thought the reaction would be one of equal concern and that there would have been some sort of research or a deeper look from Health Canada. And then because part of the community is not on reserve, from the province. And that did not happen. It was not until, like I said, media got hold of the story that there was a reaction and the reaction was the opposite of what I expected.

**Jodi:** And you ended up coming under personal attack as well.

**John:** I did. I was shocked in March of 2007 when I got an envelope from the College Of Physicians And Surgeons here in Alberta. The envelope contained documents detailing the list of complaints that both held Canada and the province of Alberta had laid at the college regarding my activities and practice in Fort Chip.

And in fact it went deeper, there was allegations of financial wrongdoing and double dipping, which it rocked me to the core.

**Jodi:** Yeah, well it's so personal, right? Obviously an allegation of impropriety like that, right, that's not a casual observation. That goes to the heart of integrity.

**John:** Absolutely. It was, at the time I didn't realize it, but as time went on it was an effort to have my license taken away.

**Jodi:** And were there any protections for you as someone who was raising a health concern?

**John:** None whatsoever.

**Jodi:** Wow. And do any protections exist today?

**John:** There is some whistleblower protection in the province, or a type of whistleblower protection. I don't believe it's effective. As far as I'm aware, Alberta has the poorest whistleblower protection in the country.

**Jodi:** And just thinking back on the story you just told, obviously you would have wanted to have seen at least some level of protection from retaliation.

**John:** Yeah, at the time that was the furthest thing from my mind. I expected a sympathetic ear, collegial collaboration. But then as time went on, when I got these complaints and I had nothing but myself and my information, and very quickly afterwards the community of Fort Chip, and then from that point on the Canadian Medical Association supporting me. But it I did not realize that... I had no idea. I'd never met a whistleblower, and I had no idea that I was whistleblower. But yeah it was a steep curve of learning that I was on, and it lasted almost three years.

**Jodi:** Well one thing that kind of strikes me is that I mean, for sure you were asking questions and raising concerns. But what you are also doing is very consistent with how we think about science, right? We observe and then when we observe things that we don't have explanations for we seek explanations.

**John:** And that's something that is part and parcel of my daily practice.

**Jodi:** Right, of course. So you were saying earlier that the matter of cancer rates in Fort Chip, it remains unresolved. Has any research been done, or where do things stand today?

**John:** So in response to public and media pressure, the Alberta Health provincial health service did a study in 2008, a study of cancers. Prior to that Health Canada had indicated that from their records that cancer rates in Port Chip were no higher than expected and completely within the norm for a community of its size.

Nobody bought that. The Cancer Board in 2008 did a year-long cancer study of the community and they found a 30 higher rate of cancer, among them rare cancers. Fort Chip is a very traditional community, seventy percent of the population at that point lived off what they could hunt for fish or gather, which made it all the more concerning for cancers to develop with that background.

The Cancer Board, when they released a report in 2009, strongly recommended a study a health study for Fort Chip. And in fact from 2009 to 2010, I requested to be in and became part of a scientific team putting together terms of reference for such a study. It was all very positive and very good and very welcomed by the community and by the medical fraternity in Alberta.

Unfortunately the chair of the committee of this scientific team towards the end of our series of meetings put in a clause that would have had industry be part of a management oversight committee on any such study. That suggestion was met with objections by the majority of the scientific team. Our opinion was that industry had no part to play or should not have any part to play in a health study, especially given the fact that upstream from Fort Chip lies the tar sands mining industry. And that was the industry that was recommended to be part of the study. And number two, the findings of any health study with industry being part of it would be open to question. The credibility would be shot from the start.

So Fort Chip, when they were presented with this proposal, like a template of a health study and the terms of reference were very good, but with this clause for industry to be part of the study, Fort Chip rejected it immediately. And the response was this could be like the fox looking after the hen house. And with that rejection the government, both federal and provincial, walked away.

And the only study that's been done of any description, the only decent look at the community was organized by the two bands the Cree band the Mikisew Cree First

Nation and the Athabasca Chipewyan First Nation in collaboration with the University of Manitoba in 2014. And that study found, a preliminary study unfortunately wasn't followed up, but they found a direct connection between toxins in the environment and the health of the community.

**Jodi:** And there's nothing that compels the province or Health Canada to follow up on these research studies?

**John:** That is the crux of the matter. The promises were made. And even going back before my time in Fort Chip, back to the late 80s, there was a study called The Northern River Basin Study that was undertaken with both provincial and federal input that study suggested that at that point the tar sands were just in their sort of infancy. But that study suggested that a health study of the peoples living downstream of the industry should be undertaken, and that never happened.

And then there were a series of efforts made in the province to look at the health of people living downstream, and those studies, the findings were shelved. Nobody has access to those. And then with this promise of a health study that was the closest, the community of Fort Chip and indeed people downstream came to a comprehensive health study. Nothing has happened.

**Jodi:** Where do you think the resistance is coming from?

**John:** To be honest, I don't know. But it was very interesting, the almost reflex reaction and backlash that happened when the health of the community was highlighted parallel with highlighting the fact that the community had been trying to advocate for itself in terms of environmental changes for years. The community was advised, for instance, by Health Canada in the early 2000s that they shouldn't drink the water from the Lake Athabasca because of high levels of arsenic. And when the community attempted on its own to sort of inquire as to where this arsenic was coming from, they had no response, it was no response at all.

And sort of background, very noble people in Port Chip, and very quiet, very measured, and just very traditional, minding their own business. So it was very, very defensive on the part of government and industry the reaction to the health issues and Fort Chip being highlighted in parallel with the environmental changes that the community had had been noticing.

Like I said, I don't know but I suspect. I suspect that an attempt was made and is still being made to protect the sacred cow that is the tar sands.

**John:** And so what do you think can get this over the finish line for the people of Fort Chip? Do you see this issue getting resolved or is this just something that is just kind of a persistent tragedy?

**John:** Nothing happened, Jodi, before the media got involved. And since media involvement there's been action. For instance the Cancer Board health study of the community. My glass is always half full, I'm a born optimist that eventually there will be an admission of not just a continuing need for a study, but an admission that the tar sands mining industry has caused severe damage to the environment. It's right on the on the Athabasca River, the issues in Port Chip stem from what's happening upstream.

A comprehensive health study would look at all determinants of health. And if that study concluded that industry has impacted the health of the community, that's very unfortunate. If it concludes and it is impartial and independent, if it concludes that there is no impact then that's fine. But just get to the bottom of the pathology that's occurring in the community. I think eventually it will happen.

**Jodi:** Well, we've seen physicians and other types of clinicians speaking up during the pandemic whether it was about the fact that there was this novel contagious disease or about conditions in long-term care and other types of workplace settings. It certainly would seem that people are in a bit of a moment to listen to clinicians when it comes to health matters.

**John:** Yeah, you're right. I mean it goes through sort of a cycle over the years. I mean thinking back to SARs. But in Alberta, it's sort of a... It's different. I'm not just the only physician who has raised concerns about for instance the tar sands and the impact on the environment and by extension the health of individuals downstream, immediately and distantly downstream. It's strange, and then again it's not strange that there hasn't been an appropriate reaction and action taken.

**Jodi:** Are you still experiencing aspects of reprisal or retaliation?

**John:** It has never gone away. But the level of support for my stance has mushroomed over the years. My wife Charlene, she's been by my side through all of this, an incredibly important element of this. And we have traveled the world giving presentations on this issue.

A few years ago we were at the AGM of Stat Oil in Stamanger in Norway addressing the shareholders and brought about for the very first time a vote about staying in or leaving the tar sands. The vote was overwhelmingly in favor of staying, but since then Stat Oil have pulled out.

Yeah, the support is palpable, but I'm still viewed by the authorities in the province as being bad for my past and for my continued sense. You learn to ignore it. It's there, never gone away. We learned to live with it and we carry on.

**Jodi:** Has this experience changed you?

**John:** I tell people that before it started I was six foot eight and had long blonde hair and now if I'm five foot six with no hair. That's obviously not true, but it has made me realize how important it is to be an advocate.

It's made me think twice about commenting but it hasn't stopped me commenting and raising concerns. I think I've been a better mentor for students and medical residents. I'm involved in teaching at the University of Alberta. I think it's enabled me to emphasize the spirit of being a community advocate and actually being able to point out in real terms what it means, the price you may have to pay.

I read a book years ago called *The Citadel* by AJ Cronin, I think was published in 1937. It was about a Scottish physician who entered his first practice in Wales, in a colliery town, a coal mining town in Wales. On his arrival or shortly after, he found there was a high rate of dysentery in the community. And on further inquiry he found that the water supply for the community ran right beside the sewer line and the town had been basically built and paid for by the coal mining company.

The sewer system and the water system were in need of replacement but the coal mining company would not countenance that. And realizing the connection between the two, one night Dr. Manson was his name, all fictitious but I'll come to the reason why I'm telling you this in a second. One night he broke into the coal mining company office and stole some dynamite and threw it down the sewer manhole and blew up the sewer line and the water line.

When investigations were completed it was concluded that it was gas in the sewer line that caused the explosion, but it meant that both lines had to be replaced and he saved the health of the community.

I tell my students and residents that from time to time, you need to blow up a sewer line in order to benefit your patients. And when they look at me in a kind of a quizzical way I referenced the book. I've bought copies of the book, second-hand copies of the book, you can't buy it at any of the Chapters or Indigo anymore. I bought copies of the years and handed them out to select residents and students who I think get it. And that's the way I practice, I've practice since this whole Fort Chip thing, practice in that way.

**Jodi:** If you had to do it all over again, would you?

**John:** In a heartbeat.

**Jodi:** Good for you. Dr. O'Connor, thank you so much for taking this time to speak with me and thank you for your advocacy.

**John:** I really appreciate this Jodi, thank you.

**Jodi:** Thank you for joining me David, and welcome to @Risk.

**David:** It's my pleasure, thank you.

**Jodi:** So help our audience understand why is whistleblowing such a risky choice for a person to make?

**David:** Well, there's a very complex answer to that question. But I think the bottom line is that in my experience when a whistleblower raises a concern it is often perceived, and sometimes openly and sometimes subtly even imperceptibly, as a threat to an organization. And so it's inevitable that whistleblower actions will cause a reaction.

And I'm assuming that if one could establish an organization which was extremely enlightened into an area of whistleblowing policy, there wouldn't be that reaction. But the fact of the matter is that most organizations are not like that. So there's almost invariably a reaction to whistleblowing, and it's almost always negative.

And it's akin, to use a very popular topic, it's akin to a virus. A virus enters into your body and your body does what it can to fight it off. And unfortunately, even though whistleblowers generally are trying are doing better for an organization, they're often perceived as a virus. They're perceived as a threat or an attack. And so it's inherently risky for somebody to essentially be a virus, except that this is a good virus.

**Jodi:** Yeah, well so much wrongdoing has been revealed through whistleblowing.

**David:** Well that's right. And I was part of a group a few years ago, you may be familiar with the Canadian Standards Association, the CSA. Now they're called the CSA Group. If you buy a toaster oven for example, there'll be a little CSA logo on it saying it electrically it works properly and it's safe. And they do guidelines for various policies including a whistleblower policy.

So I was involved in this group that helped create that policy. and one of the things that we really stressed to organizations was that you should try to create a culture which supports and encourages speaking up. Because at the end of the day, speaking up about problems within an enterprise is a good thing. Right? You want to know about problems. You want to know whether or not one out of every 20 widgets are broken.

And in some cases it can be much more serious. It could be in terms of a drug approval process. It could be health and safety in a workplace. It could be, to use another current example, the extent of care in long-term care facilities. All of these things are really positive because they point out problems that affect human beings.

And so yeah whistleblowers are usually doing a very helpful thing at great risk, I would add, of course.

**Jodi:** Yeah I used to work at Mount Sinai Hospital in Toronto, and I'm sure we didn't live up to this every day like just to be candid, but there used to be this great poster on our patient relations officers in her office. And it said every complaint is a gift.



**David:** Oh, I love that. That's great. I want one of those.

**Jodi:** It's an opportunity to improve, right?

**David:** That's right, exactly right. And sometimes it's just an intuition, sometimes it's a suspicion or maybe an observation that's not quite complete. So it's not always the case that someone who identifies a wrongdoing is right. But even those should be welcome because people should feel free to express a concern like that, right or wrong. And as long as it's being done in good faith, and the fact of the matter is that 99.9 percent and in other words the vast majority of disclosures like that are done in good faith in order to root out a problem. So we should be welcoming that, yeah it is a gift. Right.

**Jodi:** Do you think that some of the resistance to whistleblowing, whether it be in the public sector or in the private sector, is this concern about complaints being made about bad faith? Or do you think the resistance comes from elsewhere?

**David:** I think it comes from elsewhere. I think that labeling a complaint as a bad faith complaint is simply a tactic. It's a very easy way, an ad hominem attack, sometimes it's an easy way to divert interest in the problem and it happens all the time. But the reality is that, as I said, the vast majority of concerns there are legitimate and expressed in good faith.

And so I think we have to be skeptical about allegations that a disclosure of wrongdoing has been made in bad faith. And frankly you have to have the strongest possible information in order to support that. And I think we have to assume that an allegation that a whistleblower has acted out of bad faith is probably a more defensive mechanism than anything.

And it's unfortunate that we get to that point because it is a wonderful tool, right, because it immediately shifts the debate and shifts the problem onto the whistleblower and the subject matter of the whistleblowing is removed from the discussion. Are you doing this in good faith, do you have some sort of axe to grind, is your brother-in-law involved somehow in this? All sorts of questions can arise and it really distracts from the problem and of course it diverts the very, very limited resources that a whistleblower has into defending themselves. And that has the ultimate impact of making their disclosure less effective.

**Jodi:** So I guess that's also kind of part of the risk of blowing the whistle is that there might be a personal attack coming your way.

**David:** Yes, and I would add there might be and I would go so far as to say there likely will be a personal attack. Yeah, that is it's definitely one of the risks and in my practice it's very unfortunate... I mean it's fortunate when somebody comes to me before a disclosure of wrongdoing. They've got the wherewithal and the insight to get advice, but it's unfortunate that I have to say to them be prepared. Be prepared for all of these

risks, and there's a whole slew of them and they're not pretty, they're not pretty at all yeah.

**Jodi:** And so just going back for a moment on like where the resistance to adoption of whistleblower policies might be coming from, is it tied up in power? Is it just not wanting to be subject to other people's judgment or feedback, or where do you think it comes from?

**David:** Well I think I think it's more the latter, Jodi, to be honest. I mean in some ways the latter is a part of- there's a power dynamic involved in that as well, people not wanting to be judged. I can give you an interesting insight. The federal government had established the Public Sector Integrity Officer some years ago. It was a subset of the treasury board so it was not statutorily established but it had some role to play in terms of whistleblowing. And then in due course they passed legislation which established a separate office and that legislation required a legislative review which was supposed to take place after five years, and I think it was more like eight or ten years.

But at any rate, there was a review and I was involved in testifying before the committee, as were a lot of other whistleblower advocates. And the committee came up with, that is the operations committee of the of the House Of Commons, came up with a pretty strong set of recommendations about amending the act to make it better. and the government of the day said no, we're not going to do anything.

In fact, I had this conversation with somebody last night about whistleblower legislation. It seems to me from a public perspective, even from a political perspective, it's kind of a no-brainer where we're improving the opportunity for people to disclose wrongdoing within government which is going to make government safer, more efficient, and make the policies and procedures that are implemented by government to be better. Who wouldn't oppose that, right?

And yet here was a golden opportunity for the federal government to amend the legislation which is universally criticized and they refuse. So what's that about? I'm not sure. I think, I mean I know when people criticize me, I don't like it. And I'm sure, Jodi, you don't like it.

**Jodi:** I certainly don't love it, let's put it that way.

**David:** Of course, you're perfect. But anyway so in a way it gets at a fairly, I don't want to have something too esoteric here, but it gets at a fairly deep-seated psychological issue which we all have, which is nobody likes to be criticized. Which is why rigorous programs will have a process where blame is not the issue and where people can do it anonymously sometimes and so there's not a face to the allegation, things like that. There are ways to make the system friendlier as it were.

**Jodi:** Yeah for sure. I just turned my mind back to the hospital and in addition to having a patient relations officer, we did have a whistleblowing policy and it was something

that was actually mandated by our audit committee. And we had set up a third party line. And I was somewhere in the middle between being a seasoned general counsel and still being on the young side of a lawyer, and I remember thinking like I kind of thought it was a little bit extreme. It's like okay, like people trust me. They can, like people talk to me all the time.

But in reading some of the stories about what's happened to whistleblowers, and sometimes the protections and policies don't work. And so that need to be anonymous or at least the option if possible is hugely important.

**David:** It is important, yes. And as an option it can be crucial. However when oftentimes, particularly if you're dealing with reprisals, so if you're if you're dealing with... Well even when you're dealing with wrongdoing but there are implications for people who are employees as well, if they've actually engaged in the wrongdoing and so sometimes procedural fairness obligations come into play and anonymity maybe sacrificed because of that.

But those are the extreme cases. We're talking about regular folks observing a problem in the workplace and having a desire to repair it. Why would we discourage that? That's a silly question to ask, but it just happens.

**Jodi:** Yeah, and so what are... So we've spoken about anonymity as one possibility when it's suitable. What other types of protections do you often see in whistleblowing policies?

**David:** The main protection has to be against retaliation or reprisal. Because most policies will say that a person should not be subject to retaliation or reprisal, should not suffer any adverse consequences if they decide to raise an issue of wrongdoing even if they're wrong. And that takes away bad faith considerations, and as I said in the vast majority of cases those aren't relevant.

So most policies have that as a stated objective, but are there any teeth? If a whistleblower is the victim of reprisal, what can they do about it? And that's where the risk analysis for an individual really comes into play because they're going to think, "Okay. somebody might get mad at me for a few days." That's one thing. But, "Oh, I might lose my job." That's another thing. Maybe you're the sole breadwinner, maybe you're a single parent. There could be any number of factors that mean that losing a job is drastically detrimental to your life.

So having an effective system in terms of reprisal is significant. And it means, what you might think it means as a lawyer, you might think okay, it means that if there's a wrong done to you can undo that wrong. If you get fired you can be reinstated, if you lose money you can be repaid that money, etcetera. But on top of that there's the whole process and most of these systems have processes which stink to be frank.

You know, how much is it going to cost? And then there's the question of proof. And that's where I think virtually every whistleblower advocate is in agreement that if you have a system where reprisal is prohibited and you have recourse in the event you believe you've been the victim of reprisal, who proves that it happened? And so what we always advocate for is a reverse onus which is that if you allege that there has been a reprisal against you, it's going to be assumed to be true unless the employer, invariably we're talking about employers but let's just say organization, unless the organization can demonstrate that there was a legitimate reason for it.

And a lot of people think that's kind of shocking, and especially if you're trained in the common law. He who asserts or she who asserts must prove, that whole notion. But we've had this kind of principle in place in circumstances forever, for example in labor legislation. If you're involved in a union organizing drive and you get fired because you're trying to organize a union, you could file a complaint and it's assumed that you were fired because you were trying to organize a union and the employer has to disprove that.

And so this is not a shocking tool to be used, but it's crucial in the case of whistleblowers because it's so difficult. It's rare that you find the so-called smoking gun showing that there was reprisal.

**Jodi:** Yeah, and it's a lot of work to prove things, right, like even things that seem obvious like to prove it to a standard that can result, for example, in you getting your job back. Like yeah that's a lot of work after you just did something that's probably pretty emotional draining at the least.

**David:** Emotional for sure, and if you've lost an income stream then you're stuck struggling to prove something with in many cases very few resources. Thankfully a lot of whistleblowers have the support of their unions, and I'll just, to be frank I'm a labor lawyer so I support unions. But and certainly in the public sector a lot of whistleblowers have been supported by the unions and that's- we're so lucky for that, that they've been able to do that.

**Jodi:** Yeah, some people may be asking themselves like in some workplaces there are unions, there's audit programs both external and internal. There's always the media, going to the media as an option, third-party reviews, etcetera, etcetera. Why aren't those enough?

**David:** Let's face it. In the majority of cases a whistleblower is not somebody who works for the local gas station and is alleging that the fuel counter is slightly inaccurate. In most cases we're talking about significant organizations, large organizations in both private and public sector, and public sector by definition they're large. So these organizations have enormous resources and all of the other tools that are available that you mentioned, sure they're available, but organizations are able to mitigate the effects

of those tools pretty effectively. And a whistleblower really needs somebody to be in their corner other than themselves to take on the organizations.

And if they're expected to defend themselves in addition to having disclosed wrongdoing, it's an enormous undertaking. And without either legal support, and I don't mean legal counsel but legal support in the form of a reverse onus or a process that makes it easier to pursue their case, it's very difficult.

But on top of that, having all the resources that you need to have, physical, financial, emotional resources, they're just not there. But the organizer, I mean if you blow the whistle against a major bank they've got an in-house legal department. They're going to be set into motion immediately and you're stuck on the phone or whatever trying to find a lawyer or talking to your friend neighbor or whatever.

It's the balance of power, and we talked about this earlier, Jodi, about power. And the balance of power is stacked against the whistleblower. So all of those things you mentioned are helpful and they have their place, but you still need some teeth at the end of the day.

**Jodi:** Yeah I think that's 100 correct. I think the other thing too, even setting aside sort of the power imbalances that exist and kind of assuming that the vast majority of people show up every day to work wanting to do better and that's from the highest levels down to the lowest, sometimes there's just blind spots. And whether it's willfully blind or unconsciously blind, sometimes it's the shock of a whistleblower just sort of saying no, I'm pulling the lever that's gonna stop the production line from just keeping it going. Sometimes that's what it takes.

**David:** Well yes, sometimes it does. And it almost feels like if you have an undertaking, it seems to be operating successfully, it runs by itself so to speak. But somebody points out that there's something wrong about it, it's for some people you have to suspend your belief. Because you see it, right, you see it operating. You see things working. And then you think how that can be a problem. How can it be that serious? So sometimes progress blinds us, frankly. So at the end of the day, whistleblowing is as much about human psychology and social relations as it is about anything.

**Jodi:** That's very interesting it actually reminds me something the first conversation we had on the @Risk podcast was with Chris Hadfield. And I was talking to him about the temptation to move ahead, like to basically sail out to sea even though you see the storm clouds. And he said Jodi, people love their plans. And so his advice was don't fall in love with your plan.

**David:** Well that's a really good way to look at it. It's hard to be flexible.

**Jodi:** Yeah, no, for sure. So one other kind of development, not to get too into the details of law, but one thing I wanted to ask you about in your practice or amongst your colleagues we've seen in law such a proliferation of the confidentiality agreement

or obligations to not disparage. Like it used to be those were kind of reserved for serious situations or situations of high conflict. But now they're just kind of like- it's you would be guilty of malpractice if you didn't put it into every separation between two parties. Is that hampering progress via whistleblowers?

**David:** Yeah that's a really interesting question and it comes up often. I've encountered it a lot lately as being a systemic problem, right, because you blow the whistle, there's some sort of process engaged, and then it's settled. And part of the settlement is that you can't speak any further about it.

I mean presumably part of the settlement also includes correcting whatever the wrongdoing was or the reprisal was in the beginning. And that's something that, I mean, we have to remember that confidentiality cuts both ways. And so sometimes you're prohibited from disclosing what led to a whistleblower laying the claim or disclosing the wrongdoing, but also there will be actions taken hopefully that imply that the organization was faulty and provide some corrective measures. They just don't want to admit it publicly.

So usually there's a quid pro quo there. But at the same time if you look at this as a public policy issue, then you end up in a circumstance where yeah, you are resolving something and the crucial element of the resolution is not known to the public at large. That's probably for like for social scientists is probably less of a concern in the private sector, although these days the private sector is pretty influential and has lots of impact on us. But less of a concern of the private sector than the public sector, but it's so hard to get around that.

Because like frankly, Jodi, even if somebody is just terminated and they're terminated and they're entitled to notice of severance, a notice period, and they don't get enough and then negotiate a settlement and instead of getting six months they get eight months, well even that becomes confidential, right? It's so typical these days that it's hard to ignore.

And for whistleblowers you get put in a position where you've gone through hell, literally, and here's a faint hope of getting some compensation and maybe even some recognition and maybe even some correction of the problem you've identified. But you're told yeah, but you have to shut up afterwards. From a risk analysis, who's gonna want to speak more when you at least you get all of these rewards, you get all of these certain things in exchange for your silence?

It's unfortunate but it's kind of like the way it's just the way it operates. And as you point out it seems to be due regard, it's typical.

**Jodi:** Yeah no, it's a real challenge, right. And it's just kind of another way that reticence, that resistance to openness kind of plays it itself out.

So let's talk about the public sector. Because yes, private sector companies can adopt these policies, they often at least start off adopting them to try and route out fraud within their organizations. But I think more and more those organizations that's sort of the start of the journey and then they open it up to cover other types of wrongdoing. But you can have whistleblowing in the public sector too in governments.

And it's really, I must say when I was kind of reviewing all of the different policy briefs on this, Canada is really far behind on this.

**David:** Yes, yeah.

**Jodi:** How far behind are we? Is it just me kind of over reading into it, or are we really substantially behind?

**David:** We're pretty far behind. I'd have to do- I'd have to put my hand on it, Jodi, to find the document. But I know that there's at least one fairly rigorous rating of, I guess it's probably mostly Western democracies, but weight rating... Well maybe not. But the rating of countries in terms of their public sector whistleblower protection laws and Canada is pretty close to the bottom. Yeah, it's unfortunate.

**Jodi:** And here is the shocking thing for me. So sometimes Canada will be a little, we'll be out of step with other countries. And when you look at the policy landscape you'll be like, oh well Europe's really far ahead and the United States isn't doing this and I guess maybe we're being a little bit influenced by our neighbors. Or vice versa, like you know, Europe and Canada do this. You get this triangular relationship.

But the EU has a standard on whistleblowing, the United States embraces whistleblowing. Australia is a leader in whistleblowing. We really are quite an aberration.

**David:** yes and it's very easy for us to be smug here in the north when we compare ourselves to that nation to the south of us. But you're right. Like I mean two words, Thomas Paine, come to mind. I mean the United States has a very strong tradition of challenging public policy makers which I think we lack in terms of intensity, I think, and we often look to them for progress and for even for analysis on whistleblower policies and how they work.

And I don't know, I mean I wish I knew. The federal government recognized that they needed something like this and they established the public sector integrity officer and that was back I guess in the early 2000s, 2002-ish, it was I think.

But it's kind of like labor law. I mean my theory about labor law is it it's intended to contain the right to strike. It's limited to a certain period of time because governments recognize how powerful it is. And I think I think Canada has in a way taken a page from that book and said with whistleblowers, we're gonna establish a central system for dealing with wrongdoing and reprisals. Here it is, and it has the effect of diverting all

the energy into that system and as I believe the system is pretty ineffective. And so you end up channeling them all into a process which is unhelpful at the end of the day for the most part. So in that sense that's probably not surprising, but I don't know why.

And the federal legislation, the Public Service Disclosure Protection Act, Jodi, in law preambles in the legislation aren't effective in the sense that they're not binding, but they give a sense of what the act is about. And in the case of the Public Servant Disclosure Protection Act the preamble is pretty significant, and it essentially situates the act in the context of Canadian constitutional democracy. The idea that a whistleblower is an essential component of the operation of our democratic system because it's just another one of these checks that we really need.

And yet, and then you read the rest and then you read how it's applied and it's just not effective. So it there's a recognition of its importance but we haven't followed through. And like I said, the government operations committee gave the government a golden opportunity, right, it was an all-party committee and here they were. There was some really positive recommendations and most experts agreed on these, including myself, and the government just turned it down. I don't know why. I wish I knew.

**Jodi:** And the provinces haven't taken it up either. Like there's not a shining star of a province that that's adopted a good whistle-blowing policy either. Because sometimes that's also how change happens, right, because we do have multiple jurisdictions. But it hasn't happened at the provincial level either.

**David:** No you're right. I mean there are some provinces do have a similar system but it's equally, in many cases it's equally ineffective. And you have ad hoc things too. There are many municipalities who have tried to establish whistleblower policies but they're also limited in their scope.

Yeah, at the end of the day to me, like just from a risk analysis, not only from the whistleblower's perspective but from the government's perspective, why wouldn't you establish a system which allows people to freely and fairly disclose potential flaws in the operation of government and compensates them for their wrongdoing?

I mean just again to borrow something from pop culture, you watch a television detective series and they're often relying on tips from the public. And they're kind of revered these public tips, right, because they... Or if somebody is kidnapped, there's an APB that goes out and we have of course the Amber Alerts which are reserved to really serious cases and thank goodness we have them.

But the whole point is that people out there can help. And why don't we throw the same effort into regular problems that are in the in the operation of government? I don't know why. It doesn't make any sense except that people don't like to be challenged.

**Jodi:** Yeah, I when I reflect on my very limited experience, but the experience of bringing in the whistleblowing policy back when I was general counsel. And the audit



committee was very clear to them. It was about a culture not just of transparency but of accountability and a commitment to continuous improvement. Because sometimes that is the best way to improve is to hear from your detractors or for from people who maybe aren't even detractors, or just see something that you don't that is an opportunity to get better.

Before I let you go I wanted to ask you, I this is not scientific by any stretch, but I did a quick Twitter search and I just put in whistleblower and I looked at the top 10 tweets. And I was really taken aback because for sure you saw some examples of whistleblowing you would expect to see, so what's happened at Smith College in terms of allegations over racism, a person resigned from the school. And there were Google's recent terminations of two leaders in their AI group.

But there were also tweets about anti-black racism training at a Buffalo school board and at Coca-Cola. And there was also a tweet from alt-right political activist Jack Pozabayak self-identifying as a whistleblower. And it made me wonder are there concerns about the concept of whistleblowing being overtaken by less than good faith parties?

**David:** Well that's a it's a good question, but I think... I mean I don't have that concern. In any system where you establish a process for people just to obtain a redress for perceived wrongs, you're going to have people who are doing it for with inappropriate motives. It doesn't matter whether it's whistle blowing or whether it's an insurance claim. You can think of numerous examples where you may know people where people are just, to use the vernacular, to try to milk the system so to speak.

I think it's, frankly, because of the risks involved for whistleblowers I think it's very rare, but it may happen. And to me if it does happen, if people too easily self-label as a whistleblower, that's just the price we pay. There are going to be those cases and they're going to be very, very rare but we have to deal with them because it's just like whether it's a human rights complaint or any sort of allegation there will be cases where people are making complaints that may not be justifiable but we still allow them to do that, and we allow the course to run.

So why is there this inherent skepticism almost immediately of whistleblowers? I don't know. I think we should just welcome it. And frankly our legal systems are robust enough to weed out the bad faith actors. And the problem is that, like I've said whether it's whistleblowing or human rights complaints or sexual assault allegations, the vast majority of the concerns expressed are legitimate. And if there's, if you want to use a very simple assessment of whether they're not, just look at the risks involved in being public about that. Because it's horrible what people go through.

**Jodi:** Absolutely. Well David, thank you so much for sharing your insights with me and for helping us better understand whistle blowing and the toll it can take and particularly in a risk context. Thank you.

**David:** Thank you, Jodi. It's my pleasure.