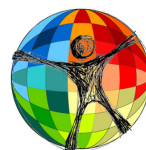


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Breaking the Silence: The Path Towards Stronger Whistleblower Protection Laws in Canada

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ABSTRACT

Canada is admired for its transparency, consistently ranking among the least corrupt nations in the world. Yet a 2021 report by the International Bar Association and the Government Accountability Project has ranked Canada tied for last out of 62 countries in terms of whistleblower protection. This showing has coincided with Canada's progressive decline in Transparency International's Corruption Perceptions Index. Corruption, namely money laundering and bribery of foreign officials, remains a concern. The effective protection of whistleblowers and handling of protected disclosures are essential to promoting the rule of law and preventing corruption. This article argues for proactive reform of Canada's whistleblower protection laws to provide a clear legal framework for whistleblowers.

Section I outlines the problem of corruption in Canada. Section II defines and justifies whistleblowing. Section III examines the current legislative landscape, including the federal *Public Servants Disclosure Protection Act* (the "PSDPA"), the Criminal Code, and provincial legislations. Section IV provides recommendations for strengthening Canada's legislation, notably by expanding the scope of the PSDPA, streamlining the reporting process to provide added clarity to prospective whistleblowers, and mandating and responding to regular reports and reviews of the legislation. There are limits to the amount of secrecy and opacity a healthy democracy can bear. Although secrecy is sometimes justified, a functioning democracy requires that citizens be informed enough to keep government and corporate powers to account. Strengthening Canada's whistleblower protection laws is a step towards ensuring that corruption is identified and addressed in the country's public and private sectors.

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[The government] is afraid of an informed, angry public demanding the constitutional government it was promised—and it should be.

- Edward Snowden¹

Canada has the international reputation of being the Titanic [disaster] of whistleblower protection.

- David Dutton²

Introduction

Canada is admired for its transparency, consistently ranking among the least corrupt nations in the world.³ Yet a report by the International Bar Association and the Government Accountability Project has ranked Canada tied for last out of 62 countries in terms of whistleblower protection.⁴ This showing has coincided with Canada's progressive decline in Transparency International's Corruption Perceptions Index.⁵ Since 2012, Canada's score has slipped, falling out of the top ten least corrupt countries.⁶ The

¹ Edward Joseph Snowden, "Statement from Edward Snowden in Moscow" (1 July 2013), online: Wikileaks <wikileaks.org/Statement-from-Edward-Snowden-in.html?snow>.

² Pierre Chauvin, "In defence of whistleblowers" (3 December 2019), online: OHS Canada <www.ohscanada.com/features/in-defence-of-whistleblowers/>. (citing David Dutton in an interview)

³ In 2020, Transparency International's Corruption Perception Index ranked Canada 11th out of 180 countries (see Transparency International, "Canada: Country Data" (last visited 12 July 2022), online: *Transparency International* <www.transparency.org/en/countries/canada>).

⁴ See Samantha Feinstein & Tom Devine, "Are whistleblowing laws working? A global study of whistleblower protection litigation" (2021), online: *International Bar Association* <www.ibanet.org/Article/NewDetail.aspx?ArticleUid=ee76121d-1282-4a2e-946c-e2e059dd63da> [Global Study].

⁵ See Transparency International, "Corruption Perceptions Index" (2020), online: *Transparency International* <www.transparency.org/en/cpi/2020/index/can>.

⁶ See *ibid.*

country is now trailing behind peers like Germany, the Netherlands and Norway.⁷ The effective protection of whistleblowers and handling of protected disclosures are essential to promoting the rule of law and preventing corruption.⁸ Although Canada has committed to stronger whistleblower protection laws as part of the G20 High Level Principles for Effective Protection of Whistleblowers,⁹ its current legal framework on the matter falls short of internationally recognized best practice.¹⁰ Whistleblowers play a crucial role in shedding light on information that would otherwise go undetected, seeding improvement in the “prevention, detection, investigation and prosecution of corruption.”¹¹ Many researchers and organizations rely on these disclosures to produce human rights or environmental research. For example, Forensic Architecture, a British counter-forensics firm, recently investigated NSO Group, an Israeli surveillance technology company, with support from the Citizen Lab and Amnesty International.¹² Forensics Architecture relied on a

⁷ See Transparency International Canada, “Canada Falls from its Anti-Corruption Perch” (25 February 2020), online: *Transparency International* <www.transparency.org/en/blog/canada-falls-from-its-anti-corruption-perch>.

⁸ See G20 Anti-Corruption Working Group, “G20 High-Level Principles for the Effective Protection of Whistleblowers” (2019) at 1, online (pdf): *UN Office on Drugs and Crime* <www.unodc.org/documents/corruption/G20-Anti-Corruption-Resources/Thematic-Areas/Public-Sector-Integrity-and-Transparency/G20_High-Level_Principles_for_the_Effective_Protection_of_Whistleblowers_2019.pdf> [G20 Principles]. See also David Lewis, AJ Brown & Richard Moberly, “Whistleblowing, its importance and the state of the research” in AJ Brown, David Lewis, Richard Moberly & Wim Vandekerckhove, eds, *International Handbook of Whistleblowing Research* (Northampton, MA: Edward Elgar Publishing Inc, 2014) at 1. The authors state that “whistleblowing is now established as one of the most important processes—if not the single most important process—by which governments and corporations are kept accountable to the societies they are meant to serve and service” (*ibid*).

⁹ See G20 Principles, *supra* note 8 at 1.

¹⁰ See The Centre for Free Expression at Ryerson, “What’s Wrong with Canada’s Federal Whistleblowing System: An analysis of the Public Servants Disclosure Protection Act (PSDPA) and its implementation” (14 June 2017), online (pdf): *Centre for Free Expression at Ryerson* <cfe.ryerson.ca/sites/default/files/whats_wrong_with_the_psdpa_0.pdf>.

¹¹ G20 Principles, *supra* note 8 at 1.

¹² See Forensic Architecture, “Digital Violence: How the NSO Group Enables State Terror” (last visited 5 July 2022), online: *Forensic Architecture* <forensic-architecture.org/investigation/digital-violence-how-the-nso-group-enables-state-terror>.

whistleblower to understand the ways in which NSO Group accesses new markets.¹³ This investigation expanded on the extensive research that Citizen Lab, where I conducted my human rights internship, has conducted on surveillance technology companies over the last decade.¹⁴

In this article, I argue that proactive reform of Canada's legislative scheme with respect to government and corporate whistleblowing is essential for the country to provide strong safeguards against corruption. In section I, I define the problem, providing an overview of what is known about corruption in Canada and a few examples of the fate of Canadian whistleblowers. In section II, I define whistleblowing and justify its importance as an avenue to keep state and non-state actors accountable. In this section, I consider the theoretical underpinnings that justify whistleblower legislation, as well as the countervailing harms that must be accounted for in designing an effective whistleblowing legislative scheme, including the need for confidentiality to safeguard privacy, market advantage, or national security. Finally, I point to the growing level of international consensus on the importance of protecting whistleblowers as evidence of an emerging international norm regarding its usefulness. In section III, I examine the *status quo*: the current protections for state and corporate whistleblowers in Canada at the federal and provincial level. The section primarily focuses on examining the federal *Public Servants Disclosure Protection Act* ("PSDPA") in detail, as well as surveying the other sources of whistleblower protections including the federal *Criminal Code* and provincial legislation. In section IV, I consider ways in which the current legislative scheme

¹³ As an example, a whistleblower testimony was presented at the Terror Contagion exhibit by Forensic Architecture with Laura Poitras at the Museum of Contemporary Art (MAC) in Montréal. The exhibit is running from December 1st, 2021, to April 18th, 2022.

¹⁴ The word *mercenary* refers to those who prioritize wages at the expense of ethics, which is many surveillance technology companies' business model. For an overview of Citizen Lab's research on the surveillance industry, see e.g. Bill Marczak et al, "Hooking Candiru: Another Mercenary Spyware Vendor Comes into Focus" (15 July 2021), online: Citizen Lab <citizenlab.ca/2021/07/hooking-candiru-another-mercenary-spyware-vendor-comes-into-focus/>; See also John Scott-Railton et al, "Dark Basin Uncovering a Massive Hack-For-Hire Operation" (9 June 2020), online: Citizen Lab <citizenlab.ca/2020/06/dark-basin-uncovering-a-massive-hack-for-hire-operation/>; See also Bill Marczak et al, "The Kingdom Came to Canada How Saudi-Linked Digital Espionage Reached Canadian Soil" (1 October 2018), online: Citizen Lab <citizenlab.ca/2018/10/the-kingdom-came-to-canada-how-saudi-linked-digital-espionage-reached-canadian-soil/>.

can be strengthened to bring Canada in line with international standards and to provide effective protections for whistleblowers. To do so, I trace the important characteristics of effective whistleblowing legislation and make recommendations about how Canada can build on its existing laws to provide more comprehensive protections. Although provincial governments play an essential role in whistleblower protection, my recommendations focus on legislation and policies that can be enacted and implemented by the federal government.

I. Corruption in Canada

Corruption costs billions worldwide,¹⁵ it erodes trust¹⁶ and can negatively impact democratic legitimacy.¹⁷ Canada is not immune: the country has been slipping in Transparency International's regarded Corruption Perceptions Index, now sitting in eleventh place.¹⁸ Canada is a haven for money laundering (colloquially called "snow washing").¹⁹ In British Columbia, two separate government-commissioned reports have raised alarms about money laundering in the province. The Expert Panel on Money Laundering in BC Real Estate has estimated that more than \$7 billion dollars were laundered in the province in 2018, between \$800 million and \$5.3 billion of which were funneled into the real estate market, leading to a 5% increase in housing prices.²⁰ Another report highlighted corruption not only in the real

¹⁵ See Stephen Johnson, "Corruption is costing the global economy \$3.6 trillion dollars every year" (13 December 2018), online: [World Economic Forum <www.weforum.org/agenda/2018/12/the-global-economy-loses-3-6-trillion-to-corruption-each-year-says-u-n>](http://www.weforum.org/agenda/2018/12/the-global-economy-loses-3-6-trillion-to-corruption-each-year-says-u-n).

¹⁶ See Transparency International, "How does corruption affect you?" (28 January 2021), online: [Transparency International <transparency.org.tt/2021/01/28/how-does-corruption-affect-you/>](http://transparency.org.tt/2021/01/28/how-does-corruption-affect-you/).

¹⁷ See United Nations Office on Drugs and Crime, "United Nations Convention Against Corruption" (New York: 2004), online: www.unodc.org/unodc/en/corruption/tools_and_publications/UN-convention-against-corruption.html; See Mark E Warren, "What Does Corruption Mean in a Democracy" (April 2004) 48:2 American Journal of Political Science 328.

¹⁸ Transparency International, "Corruption Perceptions Index", *supra* note 5.

¹⁹ See Transparency International, "Canada Falls from its Anti-Corruption Perch", *supra* note 7.

²⁰ See Expert Panel on Money Laundering in BC Real Estate, "Combatting Money Laundering in B.C. Real Estate" (May 2019), online: *British Columbia*

estate sector, but also in casinos and in the sale of luxury vehicles.²¹ At the federal level, in 2008 and in 2014, the Financial Action Task Force, an influential international standards-setting body, called out Canada for “a significant set of deficiencies” regarding the country’s beneficial ownership transparency—the ability to determine the true owners of private corporations.²² Whereas in England any real estate interest is registered and public, tracing the beneficial ownership of real estate property in Canada is arduous.²³ In the 2021 budget, the Canadian Government announced the creation of a beneficial ownership registry for corporations, which may facilitate the early detection of money laundering.²⁴

Bribery by Canadian companies is also significant. SNC-Lavalin was famously charged with bribery under the *Corruption of Foreign Public Officials Act*.²⁵ The case caused a major political crisis. SNC-Lavalin eventually settled in a plea deal, but not before the resignation of the Attorney General and a cabinet minister, and the publication of an Ethics Commissioner report citing violations by the Prime Minister.²⁶ The scandal even reaped a

www2.gov.bc.ca/gov/content/housing-tenancy/real-estate-bc/consultations/money-laundering.

²¹ See Peter M German, “Dirty Money – Part 2: Turning the Tide – An Independent Review of Money Laundering in B.C. Real Estate, Luxury Vehicles Sales & Horse Racing” (31 March 2019), online: *International Centre for Criminal Law Reform* <icclr.org/publications/dirty-money-report-part-2/>.

²² See Peter Shawn Taylor, “Corruption and Financial Crime Have Tarnished Canada’s Reputation” (27 April 2020), online: CPA Canada <www.cpacanada.ca/en/news/pivot-magazine/2020-04-27-canada-trust-gap>.

²³ See Ali Shalchi & Frederico Mor, “Briefing Paper: Registers of Beneficial Ownership” (8 February 2021), Briefing Paper n° 8259, online: *House of Commons Library* <commonslibrary.parliament.uk/research-briefings/cbp-8259/>; Lawrence E Ritchie et al, “Canada’s budget introduces long-awaited beneficial ownership registry to combat money laundering” (27 April 2021), online: Osler <www.osler.com/en/blogs/risk/april-2021/canada-s-budget-introduces-long-awaited-beneficial-ownership-registry-to-combat-money-laundering>.

²⁴ See Lawrence E Ritchie et al, *supra* note 23.

²⁵ See John W Boscariol, Andrew Matheson & Robert A Glasgow, “SNC-Lavalin Pleads Guilty in Canada’s Most Significant Foreign Corruption Case to Date” (20 December 2019), online (blog): McCarthy Tetrault <www.mccarthy.ca/en/insights/blogs/terms-trade/snc-lavalin-pleads-guilty-canadas-most-significant-foreign-corruption-case-date>.

²⁶ See Transparency International, “Canada Falls from its Anti-Corruption Perch”, *supra* note 7.

passive warning from the Organization for Economic Co-Operation and Development (the “OECD”), which monitors enforcement of signatories to its anti-bribery convention.²⁷ Canada has also been criticized by Transparency International and by the OECD for its limited enforcement of laws against foreign bribery.²⁸

In my home province of Quebec, corruption has punctuated the media cycle. The Charbonneau Commission, established in 2011, uncovered established and widespread corruption including price-fixing schemes regarding contracts between construction companies and the municipal government, illegal donations by engineering firms to political parties, and links between the province's biggest unions and organized crime.²⁹ In 2017, former mayor of Montréal Michael Applebaum was found guilty of eight corruption-related charges in relation to cash kickbacks for real estate development projects and a municipal contract.³⁰ In 2015, employees of EBR Information Technology firm, IBM Canada and Revenu Québec were arrested for fraud, conspiracy, and breach of trust in relation to collusion regarding computer equipment and

²⁷ See OECD Working Group on Bribery, “OECD will follow Canadian proceedings addressing allegations of political interference in foreign bribery prosecution” (11 March 2019), online: OECD <www.oecd.org/canada/oecd-will-follow-canadian-proceedings-addressing-allegations-of-political-interference-in-foreign-bribery-prosecution.htm>.

²⁸ See Transparency International, “Exporting Corruption - Progress Report 2018: Assessing Enforcement Of The OECD Anti-Bribery Convention” (12 September 2018) at 35–36, online: *Transparency International* <www.transparency.org/en/publications/exporting-corruption-2018>; See also OECD Working Group on Bribery, “Canada’s enforcement of the foreign bribery offence still lagging; must urgently boost efforts to prosecute” (11 March 2019), online: OECD <www.oecd.org/corruption/canadasenforcementoftheforeignbriberyoffencesstilllaggingmusturgentlyboosteffortstoprosecute.htm>.

²⁹ See Martin Patriquin, “Quebec's corruption problem: While the values charter has dominated debates outside Quebec, corruption has riled those within”, *MacLean's* (7 January 2014), online: <www.macleans.ca/politics/quebecs-corruption-problem/>.

³⁰ See Jaela Bernstien & Benjamin Shingler, “Ex-Montreal mayor Michael Applebaum found guilty of corruption”, *CBC News* (26 January 2017), online: <www.cbc.ca/news/canada/montreal/applebaum-ruling-corruption-1.3952413>.

services contracts between the provincial government and private companies.³¹

Considering the prevalence of corruption in different sectors, the small number of whistleblowers is concerning and points to inadequate protection. Those who blow the whistle do so at great cost. Two decades ago, Joanna Gualtieri, a Global Affairs employee, exposed roughly \$2 billion in overspending on diplomatic facilities abroad.³² A lawyer and former property developer, she worked for the Canadian Government Department of Foreign Affairs in the bureau of physical resources.³³ She discovered lavish extravagance in the purchase of accommodations abroad for Foreign Affairs staff.³⁴ She said her bosses harassed her and moved her to a dead-end job after she came forward.³⁵ The Inspector General and Auditor General of Canada later supported her allegations.³⁶ She tried to sue the government, but was ultimately unsuccessful.³⁷ In the 1990s, Dr. Shiv Chopra shed light on the drug approvals process at Health Canada, saying he and his colleagues had been pressured to approve drugs despite concerns about human safety.³⁸ He was

³¹ See "IBM, Revenue Quebec employees arrested in UPAC raid", CBC News (11 March 2015), online: <www.cbc.ca/news/canada/montreal/ibm-revenue-quebec-employees-arrested-in-upac-raid-1.2990211>.

³² See Don Butler, "I was a broken person: The long, hard journey of whistleblower Joanna Gualtieri", *Ottawa Citizen* (18 November 2016), online: <ottawacitizen.com/news/local-news/i-was-a-broken-person-the-long-hard-journey-of-whistleblower-joanna-gualtieri>.

³³ See Althia Raj, "Trudeau's Words On Federal Whistleblower Law An 'Illusion,' Warns Former Whistleblower", *HuffPost* (16 February 2021), online: <www.huffpost.com/archive/ca/entry/canada-whistleblower-joanna-gualtieri_ca_602b33dcc5b6f88289fdecf5>.

³⁴ See *ibid.*

³⁵ See *ibid.*

³⁶ See Centre for Free Expression, "Prominent Canadian Whistleblowers: Joanna Gualtieri" (last visited 5 July 2022), online: Centre for Free Expression <cfe.ryerson.ca/key-resources/lists/prominent-canadian-whistleblowers>.

³⁷ See Althia Raj, *supra* note 33.

³⁸ See Joanne Laucius, "Whistleblower Shiv Chopra remembered for 'speaking truth to power'", *Ottawa Citizen* (10 January 2018), online: <ottawacitizen.com/news/local-news/whistleblower-shiv-chopra-remembered-for-speaking-truth-to-power>.

fired in 2004 for insubordination and lost a 13-year legal battle to be reinstated.³⁹

Virgil Grandfield is a former international aid worker who brought attention to the use of slave labour in Canadian Red Cross reconstruction projects in Indonesia.⁴⁰ The Canadian Red Cross had hired private contractors who deceived workers, stole their pay, and forced them to work against their will.⁴¹ When reporting his observations to Canadian Red Cross management in Ottawa, he was told to drop the issue.⁴² He informed the Canadian Red Cross board of governors and was offered a promotion in exchange for staying silent.⁴³ Grandfield resigned from the organization and leaked the story to the media.⁴⁴ An audit later confirmed Grandfield's findings.⁴⁵

These examples are not meant as an exhaustive study of corruption in the country, but simply as an indication that the problem is alive and worthy of attention by policymakers. Corruption is expensive and damages public trust in government institutions and in the corporate sector. Corruption is also insidious: it often straddles the public and private sectors. Canada remains a world leader in terms of having low levels of corruption, but given the downward trend noted by Transparency International's Index, Canadian policymakers should be eager to enact anti-corruption policies to restore public trust. Strengthening Canada's whistleblowing laws is a start.

³⁹ See *ibid.*

⁴⁰ See *ibid.*

⁴¹ See National Magazine Awards, "Off the page, with investigative journalist Virgil Grandfield" (2017), online: [National Magazine Awards <magazine-awards.com/en/2017/02/16/off-the-page-with-investigative-journalist-virgil-grandfield/>](http://NationalMagazineAwards.com/en/2017/02/16/off-the-page-with-investigative-journalist-virgil-grandfield/).

⁴² See *ibid.*

⁴³ See *ibid.*

⁴⁴ See *ibid.*

⁴⁵ See *ibid.*

II. Defining and Justifying Whistleblowing and Whistleblower Protections

A. Definition of Whistleblowing

Although the term ‘whistleblowing’ only began to mean ‘reporting wrongdoing’ towards the beginning of the 20th century,⁴⁶ the phenomenon has existed for much longer:

As long as there has been organised society, those with power have been unable to resist the temptation to abuse it. Inevitably, those adversely affected have challenged abuses through weapons as revolutionaries, or through words as dissenters—now known as whistleblowers.⁴⁷

Whistleblowers are individuals who challenge abuses of power that betray the public trust. The European Council defines a whistleblower as:

Any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship whether public or private.⁴⁸

Whistleblowing is essential for corruption prevention in both the public and private sectors. Those who have access to privileged information are uniquely placed to detect corruption in its nascent stages. Employees who have access to up-to-date information on practices in their workplaces are usually the first to recognize wrongdoing.⁴⁹ As a result, whistleblowers are the public’s “best early warning system against institutional liability or malfunction.”⁵⁰ Yet whistleblowers also face unique challenges. Given that they pose a threat to individuals who abuse their power,

⁴⁶ See Merriam-Webster, “‘Whistleblower’: A History”, online: Merriam-Webster <www.merriam-webster.com/words-at-play/whistle-blower-blow-the-whistle-word-origins>.

⁴⁷ Global Study, *supra* note 4 at 9.

⁴⁸ Council of Europe, “Protection of Whistleblowers: Recommendation CM/Rec(2014)7 and explanatory memorandum” (2014), CM/Rec(2014)7, online: Council of Europe <www.coe.int/en/web/cdcj/activities/protecting-whistleblowers>.

⁴⁹ See OECD, “Integrity Review of Italy: Reinforcing Public Sector Integrity, Restoring Trust for Sustainable Growth” (20 September 2013) at 84, online: OECD <www.oecd.org/fr/publications/oecd-integrity-review-of-italy-9789264193819-en.htm>.

⁵⁰ Global Study, *supra* note 4 at 9.

they are vulnerable to retribution. Whistleblowers may be subject to reprisals in the form of dismissal or intimidation, harassment, or physical violence from colleagues and supervisors.⁵¹ In some countries, whistleblowing is even associated with spying or treason.⁵²

B. Theoretical Justification for Whistleblower Protections

Whistleblowers perform a crucial function in a democracy such as Canada's: they expose abuses of power. Before proceeding further, it is worth revisiting some basic concepts of democratic theory. At its foundation, a liberal democracy posits that each human is of equal worth.⁵³ Human beings are the figure of moral importance, and each possesses inalienable sovereignty.⁵⁴ Humans authorize government action through a social contract.⁵⁵ There must be limits to all forms of power imposed on citizens. In *Roncarelli v. Duplessis*, a majority of six of the Supreme Court of Canada famously wrote that "there is no such thing as absolute and untrammelled 'discretion.'" ⁵⁶ Although the Court said so in the context of legislative interpretation, the principle is more broadly applicable to all forms of power in a democracy. Abuses of power are inevitable, but these abuses of power must be checked.

One way in which liberal democracies limit power is through the separation of powers.⁵⁷ Each branch of government has a distinct

⁵¹ See David Banisar, "Whistleblowing: International Standards and Developments" in Irma Sandoval, ed, *Corruption and Transparency: Debating the Frontiers between State, Market and Society*, World Bank-Institute for Social Research (Washington D.C.: UNAM, 2011), online: papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180.

⁵² See Transparency International, "Alternative to Silence: Whistleblower Protection in 10 European Countries" (2009) at 7, online: www.transparency.org/en/publications/alternative-to-silence-whistleblower-protection-in-10-european-countries.

⁵³ See Ian Shapiro, *The Real World of Democratic Theory* (Princeton, NJ: Princeton University Press, 2011) at 40.

⁵⁴ See Jean-Jacques Rousseau, *The Social Contract* at 12, online (pdf): Early Modern Texts <www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf>.

⁵⁵ See *ibid*.

⁵⁶ *Roncarelli v Duplessis*, [1959] SCR 121 at 140, 1959 CanLII 50 (SCC).

⁵⁷ The notion of separation of powers is attributed to Montesquieu in his seminal *Spirit of the Laws* book. See Charles de Secondat, Baron de Montesquieu, *The*

role but interacts with the others in a complex system of checks and balances.⁵⁸ Courts review the constitutionality of legislation and judicially review executive action; the legislature enacts new laws, constraining the power of the executive; the executive nominates members of the judiciary, who once nominated are guaranteed judicial independence. All sources of power are ultimately accountable to the citizenry.⁵⁹ Even counter-majoritarian protections, such as constitutionally enshrined rights, are created through a democratic process.⁶⁰

Whistleblowing is an additional check on government power. Whistleblowing through internal mechanisms is usually provided for by law. When these internal mechanisms are inaccessible or unresponsive, witnesses of wrongdoing sometimes turn to the public. Doing so enables a public debate on the conduct of government, promoting accountability and transparency. When the public disclosure is authorized by law, the public debate can focus on the issue at hand. When the disclosure is not authorized by law, there is an additional debate about the legitimacy of the disclosure, which itself advances the public discussion about what belongs in the public realm and what should be afforded confidentiality. To avoid gray zones, clear whistleblower legislation can lay out the cases in which whistleblowing is legitimate, for example when someone is breaking the law or when there is risk of great harm.

Whistleblowing is also a check on corporate power. Corporations are created by law and are subject to it.⁶¹ Their legitimacy stems

Spirit of Laws, translated by Thomas Nugent, revised ed (New York: Colonial Press, 1899), Book XI, chapter VI.

⁵⁸ See *ibid.*

⁵⁹ See *ibid.*

⁶⁰ For e.g., the *Canadian Charter* was created through a democratic process: See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁶¹ There are various theories that account for the legitimacy of corporations. The “concession” theory claims that the corporation is created by a concession of rights by the state. The contractarian perspective sees the corporation as a “nexus of contracts” and aims to hold agents (e.g., managers) accountable to principals (e.g., shareholders). Others see managers as trustees for the shareholders. All these models conceptualize the corporation differently from a legal point of view, but in all cases the corporation operates within a legal framework and is ultimately accountable for respecting the law, both domestic and international. For a discussion of the different legal theories of a corporation,

from the legal framework in which they operate.⁶² The law provides certain advantages to corporations, such as lower tax rates, because they are important economic actors that stimulate employment and revenue.⁶³ Corporations are also entitled to keep their operations confidential for various reasons, including safeguarding trade secrets and market advantage.⁶⁴ These privileges only apply so long as the corporation operates within its designated legal sphere. When corporations profit from wrongdoing, the legitimacy of confidentiality is at stake. Moreover, private and public corruption are often intertwined, so an effective scheme that protects public interest disclosures in both sectors is likely to reveal crossovers.⁶⁵

Given that corruption erodes public trust without necessarily having identifiable victims, traditional means of reporting wrongdoing are often insufficient.⁶⁶ Whistleblowers bring important information about abuses of power by governments or corporations to light in the public sphere. They offer an opportunity for the public to discuss the issue, so that citizens can pressure their elected officials in the media, the streets, or at the ballot box. As noted by the OECD: "Whistleblower protection is the ultimate line of defense for safeguarding the public interest."⁶⁷ Without whistleblowing, corruption can become commonplace.

see Eric W Orts, "The Complexity and Legitimacy of Corporate Law" (Fall 1993) 50:4 Washington and Lee L Rev 1565 at 1567-74.

⁶² For a discussion of how corporations are creatures that are created and legitimized by law, see HLA Hart, "Definition and Theory in Jurisprudence" in *Essays in Jurisprudence and Philosophy* (Oxford, UK: Oxford University Press, 2001) at 21-48.

⁶³ See OECD Tax Policy Studies, "Fundamental Reform of Corporate Income Tax" (2007), online: OECD <www.oecd-ilibrary.org/taxation/fundamental-reform-of-corporate-income-tax_9789264038127-en>.

⁶⁴ For a discussion of the importance of confidentiality and the moral dilemmas associated with what ought to be kept confidential or not, see Mortimer R Kadish, "The Political Problem of Confidentiality" (October 1987) 1:4 Public Affairs Quarterly 1.

⁶⁵ This crossover is evident in some of the cases reviewed in section II. For example, people in the construction industry paid Montréal elected officials, SNC-Lavalin bribed government officials in foreign jurisdictions, etc.

⁶⁶ See OECD, "Integrity Review of Italy: Reinforcing Public Sector Integrity, Restoring Trust for Sustainable Growth", *supra* note 49 at 12.

⁶⁷ OECD, "Committing to Effective Whistleblower Protection" (16 March 2016), online: OECD <www.oecd.org/corruption-integrity/reports/committing-to-effective-whistleblower-protection-9789264252639-en.html>.

C. Risks of Whistleblowing

Despite the important role of whistleblowing, effective legislation must carefully consider and weigh the harms it might cause. There is a fine line between morally righteous whistleblowing and morally condemnable leaking of confidential information. Professor Michael Davis points out that whistleblowing “always involves revealing information that would not ordinarily be revealed,” information with which one is “entrusted”.⁶⁸ Professor Lars Lindblom underlines that the duty of confidentiality is not in itself a source of moral obligation.⁶⁹ The moral tension at the centre of whistleblowing is about weighing the harms that can flow from the wrongdoing and the harms that can flow from the disclosure.⁷⁰ The harms that can flow from whistleblowing are multiple: criticisms of whistleblowing usually centre around the harms caused by infringements of privacy, loss of market advantage, or threats to national security.⁷¹

A degree of secrecy is required for corporations and governments to fulfill their duties. Governments control information to protect the privacy of constituents, to ensure stability of the state, and to shield information from other countries. As noted by Max Weber, secrecy allows both government and corporate bureaucracies to

⁶⁸ Michael Davis, “Some Paradoxes of Whistleblowing” (1996) 15:1 Business & Professional Ethics J 3 at 4-5.

⁶⁹ See Lars Lindblom, “Dissolving the Moral Dilemma of Whistleblowing” (February 2007) 76 Journal of Business Ethics 413.

⁷⁰ See *ibid.*

⁷¹ Access to information laws provide insight into the reasons for which information is withheld from the public. The Treasury Board Secretariat states that the Access to Information Act “balances access to government information with exemptions and exclusions that protect other important democratic values, such as the need for the public service to provide full, free and frank advice to ministers, the protection of the confidentiality of Cabinet deliberations, the protection of personal information, and national security considerations” (Treasury Board Secretariat, “The Access to Information Act”, online: Government of Canada <www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information-act.html>).

For a discussion of corporate confidentiality, see the introduction of Richard Moberly, “Confidentiality and Whistleblowing” (2018) 96 North Carolina L Rev 751. For a discussion of national security and whistleblowing, see Richard Moberly, “Whistleblowers and the Obama Presidency: The National Security Dilemma” (June 2012) 16 Employee Rights and Employment Policy Journal 51 and Open Society Foundations, “The Global Principles on National Security and the Right to Information (Tshwane Principles)” (12 June 2013), online (pdf): <www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>.

maintain a competitive advantage over rival organizations, whether they are other companies or other states.⁷² Corporations control the flow of information to ensure profit maximization and stability.⁷³ These interests are often threatened by whistleblower disclosures. For example, Frances Haugen recently leaked Facebook documents to The Wall Street Journal. The newspaper published *The Facebook Files: A Wall Street Journal Investigation* “based on a review of internal Facebook documents, including research reports, online employee discussions and drafts of presentations to senior management.”⁷⁴ These leaked documents included discussions between Facebook employees on private platforms, as well as internal documents about corporate strategy. The disclosure of these documents directly threatened Facebook, leading to a \$6 billion drop of Facebook’s market capitalization within 24 hours of Haugen’s 60 Minutes interview on October 3rd, 2021.⁷⁵

The most contentious debates regarding whistleblowing centre around national security. The two most famous whistleblowers of the 21st century, Edward Snowden and Chelsea Manning, have both been heavily criticized for endangering national security.⁷⁶ Their respective disclosures to the public came on the heels of policy changes after 9/11, which marked a turning point in U.S. foreign policy, legitimizing a restriction of human rights in the name of national security.⁷⁷ 9/11 led to an increasing culture of

⁷² See HH Gerth & C Wright Mills, *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1946) at 233 cited in Mark V Nadel, “Corporate Secrecy and Political Accountability” (1975) 35:1 Public Administration Review 14 at 15.

⁷³ See Mark V Nadel, “Corporate Secrecy and Political Accountability” (1975) 35:1 Public Administration Review 14 at 15.

⁷⁴ “The Facebook Files: A Wall Street Journal Investigation” (last visited 5 July 2022), online: *The Wall Street Journal* <www.wsj.com/articles/the-facebook-files-11631713039>.

⁷⁵ The drop also coincided with a major Facebook platform outage (see Salvador Rodriguez, “Facebook shares drop nearly 5% after major site outage and whistleblower interview”, CNBC (4 October 2021), online: <www.cnn.com/2021/10/04/facebook-shares-drop-5percent-after-site-outage-and-whistleblower-interview.html>).

⁷⁶ See e.g. John Bolton, “Edward Snowden’s leaks are a grave threat to US national security” (18 January 2013), online: *The Guardian* <www.theguardian.com/commentisfree/2013/jan/18/edward-snowden-leaks-grave-threat>.

⁷⁷ See Kenneth Roth, “9/11 Unleashed a Global Storm of Human Rights Abuses: Victims of Attacks Still Await Justice” (9 September 2021), online: *Human Rights*

secrecy in government. In the U.S., classification of documents hit a high point in 2012 when 95 million documents were classified in that year alone.⁷⁸ Civil liberty groups defend whistleblowing for imposing standards of public accountability on the government, while opponents consider that such disclosures should be treated as acts of terrorism against national security.⁷⁹ In the aftermath of Snowden's early revelations, former Director of U.S. National Intelligence James Clapper declared before the U.S. Senate Intelligence Committee that the leaks represented the "most damaging theft of intelligence information in our history," adding that "terrorists and other adversaries of this country are going to school on U.S. intelligence sources, methods and tradecraft, and the insights that they are gaining are making our job much, much harder."⁸⁰

Some opponents question the legitimacy of whistleblowers altogether. Professor Rahul Segar argues that those leaking information have no authority as they have not been designated, elected or appointed.⁸¹ He argues that unauthorized disclosures undermine the "efficient functioning of the government, which, like any other collective enterprise, cannot achieve its aims in the absence of loyalty and faithfulness on the part of its members."⁸² A piece of hidden information might have innumerable consequences, he argues, many of which are unknown to the person who discloses the information.⁸³

Privacy, market advantage, and national security are all legitimate goals that merit serious consideration, but they do not delegitimize whistleblowing altogether. They simply raise

Watch [<www.hrw.org/news/2021/09/09/11-unleashed-global-storm-human-rights-abuses#>](https://www.hrw.org/news/2021/09/09/11-unleashed-global-storm-human-rights-abuses#).

⁷⁸ See Information Security Oversight Office, "2012 Annual Report to the President" (2012) at 1, online: [<sgp.fas.org/isoo/index.html>](https://sgp.fas.org/isoo/index.html), cited in Kaeten Mistry & Hannah Gurman, *Whistleblowing Nation: The History of National Security Disclosures and the Cult of State Secrecy* (New York: Columbia University Press, 2020) 7 at 18.

⁷⁹ See Manohar Kumar & Daniele Santoro, "A Justification of Whistleblowing" (2017) 43:7 *Philosophy and Social Criticism* 669 at 670.

⁸⁰ *Ibid* at 2–3.

⁸¹ See Rahul Sagar, *Secrets and Leaks: The Dilemma of State Secrecy* (Princeton, NJ: Princeton University Press, 2013) at 113–14.

⁸² *Ibid* at 110.

⁸³ See *ibid* at 112, 130.

important questions about what kinds of disclosures merit protection and the way in which whistleblowing ought to be done.⁸⁴ In the absence of clear legislation, the legitimacy of whistleblowing is subjective and debated in the public sphere.⁸⁵ Whistleblowing legislation must provide clear parameters for the kinds of disclosures that will be protected by the law. In addition to protecting certain disclosures to the public, whistleblower protections ought to provide for effective mechanisms of disclosure to bodies internal to the organization and to the authorities. When instances of wrongdoing can be effectively dealt with internally, the organization can avoid the harms that come from public disclosure. Nevertheless, protection of public disclosure remains a powerful alternative when internal mechanisms are inaccessible. If internal mechanisms are efficient and accessible, damning public disclosures will remain rare. Whistleblowing legislation provides guidance as to what is legitimate, publicly endorsed whistleblowing. The goal is to create institutions that are responsive to instances of corruption as well as to provide a clear framework for potential whistleblowers to weigh the pros and cons of disclosing wrongdoing so that they can anticipate the legal repercussions they might face.

D. Growing International Consensus

Around the world, there is a growing international consensus about the usefulness of whistleblower legislation. Whistleblowers have been hailed as heroes for shedding light on corrupt practices

⁸⁴ See J Vernon Jensen, "Ethical Tension Points in Whistleblowing" (1987) 6 *Journal of Business Ethics* 321 at 322-23.

⁸⁵ For example, public opinion about the Snowden disclosures has been deeply split. Public polls have reported varying levels of support, usually with a slightly higher margin finding Snowden to be a traitor. Interestingly, support for Snowden in Canada has been much higher as 67% of Canadians considered Snowden to be a hero. See Ariel Edwards-Levy & Sunny Freeman, "Americans Still Can't Decide Whether Edward Snowden Is A 'Traitor' Or A 'Hero,' Poll Finds", *HuffPost* (30 October 2013), online: <www.huffpost.com/entry/edward-snowden-poll_n_4175089>. Regarding the Snowden disclosures, former UN High Commissioner for Human Rights Navi Pillay stated in July 2013 that "Snowden's case has shown the need to protect persons disclosing information on matters that have implications for human rights, as well as the importance of ensuring respect for the right to privacy" (see UN News, "UN rights chief urges protection for individuals revealing human rights violations" (12 July 2013), online: <news.un.org/en/story/2013/07/444512-un-rights-chief-urges-protection-individuals-revealing-human-rights-violations>).

by governments and private actors,⁸⁶ marking a shift in the cultural perception of whistleblowers.⁸⁷ Many international agreements and treaties now call for whistleblower protection.⁸⁸ Global and regional treaties aimed at addressing corruption have recognized the importance of whistleblower protections to combat corruption.⁸⁹ The UNCAC, adopted in 2003 and signed by 140 nations, states that:

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this convention.⁹⁰

Other treaties that call for whistleblower protections include the Council of Europe Civil and Criminal Law Conventions on Corruption,⁹¹ the Inter-American Convention against Corruption,⁹²

⁸⁶ See e.g. John Cassidy, "Why Edward Snowden is a Hero", *The New Yorker* (10 June 2013), online: <www.newyorker.com/news/john-cassidy/why-edward-snowden-is-a-hero>; Glenn Greenwald, "Chelsea Manning Is a Free Woman: Her Heroism Has Expanded Beyond Her Initial Whistleblowing", *The Intercept* (17 May 2017), online: <theintercept.com/2017/05/17/chelsea-manning-is-a-free-woman-her-heroism-has-expanded-beyond-her-initial-whistle-blowing/>; Dan Milmo, "Frances Haugen takes on Facebook: the making of a modern US hero", *The Guardian* (10 October 2021), online: <www.theguardian.com/technology/2021/oct/10/frances-haugen-takes-on-facebook-the-making-of-a-modern-us-hero>.

⁸⁷ See International Bar Association – Legal Policy & Research Unit and Legal Practice Division, "Whistleblower Protections: A Guide" (3 April 2018) at 5, online: *International Bar Association* <www.ibanet.org/MediaHandler?id=a8bac0a9-ea7e-472d-a48e-ee76cb3cdef8>.

⁸⁸ See e.g. United Nations, "UN Convention Against Corruption" (2003), A/58/422, online: <www.unodc.org/unodc/en/treaties/CAC/>.

⁸⁹ See Transparency International, "A Best Practice Guide for Whistleblowing Legislation" (2018) at 1, online: <www.transparency.org/en/publications/best-practice-guide-for-whistleblowing-legislation>.

⁹⁰ United Nations, "UN Convention Against Corruption", *supra* note 88, s 33.

⁹¹ See Council of Europe, "Criminal Law Convention on Corruption" (1999), ETS No. 173, s 9 and 22, online: COE <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=173>.

⁹² See Organization of American States, "Inter-American Convention Against Corruption (B-58)" (1996), s III(8), online: OAS <www.oas.org/en/sla/dil/inter_american_treaties_b-58_against_corruption.asp>.

the African Union Convention on Preventing and Combating Corruption⁹³ and the Arab Convention to Fight Corruption.⁹⁴

International organizations have also been seminal in pushing for greater international adoption of whistleblower laws and best practices. The OECD has been a notable leader, emphasizing the importance of whistleblowing in the OECD Recommendation on Public Integrity,⁹⁵ the Principles for Managing Ethics in the Public Service⁹⁶ and the OECD Recommendation Guidelines for Managing Conflict of Interest in the Public Service.⁹⁷ In 2010, the G20 Anti-Corruption Working Group recommended that G20 leaders support the Guiding Principles for Whistleblower Protection Legislation,⁹⁸ reaffirming the importance of whistleblower protection at the global level. The Asia-Pacific Economic Cooperation has also advocated for stronger whistleblower protections.⁹⁹ The United Nations Guiding Principles on Business and Human Rights, which are the guiding light on responsible business, do not yet provide express

⁹³ See African Union, "African Union Convention on Preventing and Combating Corruption" (2003), s 5(6), online: AU <au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>.

⁹⁴ See League of Arab States, "Arab Convention to Fight Corruption", discussed in Transparency International, "A Best Practice Guide for Whistleblowing Legislation", *supra* note 89 at 1.

⁹⁵ See OECD, "Recommendation on Public Integrity" (2017), s 9, online: OECD <www.oecd.org/gov/ethics/recommendation-public-integrity/>.

⁹⁶ See OECD, "Principles for Managing Ethics in the Public Service" (1998), online: OECD <www.oecd.org/gov/ethics/oecdprinciplesformanagingethicsinthepublicservice.htm>.

⁹⁷ See OECD, "Guidelines for Managing Conflict of Interest in the Public Service" (2003), online: OECD <www.oecd.org/gov/ethics/oecdguidelinesformanagingconflictinterestinthepublicservice.htm>.

⁹⁸ See G20 Anti-Corruption Working Group, *supra* note 9.

⁹⁹ See Asia-Pacific Economic Cooperation, "2014 APEC Ministerial Meeting" (2014), Annexe H, online: Asia-Pacific Economic Cooperation <www.apec.org/meeting-papers/annual-ministerial-meetings/2014/2014_amm/annexh>; National Whistleblower Center, "Whistleblower Laws Around the World: Protections and rewards for whistleblowers vary widely around the world", online: <www.whistleblowers.org/whistleblower-laws-around-the-world/>.

whistleblower protections, but researchers and activists have advocated for such provisions to be explicitly included.¹⁰⁰

This shift towards recognizing the importance of whistleblower protection has also influenced domestic legislation, with whistleblowing laws becoming a global legal phenomenon. In 1978, no country had whistleblower laws; today, at least 59 do.¹⁰¹ These laws protect whistleblowers from retribution, promoting a culture of accountability and integrity. However, many, like Canada's, do not offer sufficient remedies for whistleblowers.¹⁰²

III. Examining the Legislative Status Quo in Canada

Despite the growing international consensus as to the importance of affording whistleblowers robust protection, Canada's whistleblowing laws do not contain adequate measures for preventing or halting reprisals in the first place, before the whistleblower suffers serious harm. Experience shows that the existence of a law alone is not sufficient to instil trust in would-be whistleblowers.¹⁰³ The law must also provide a clear mechanism that elaborates on how whistleblowing claims will be managed and what protections will be offered, even in cases where the disclosure ends up being false or where the whistleblower was breaking confidentiality laws.¹⁰⁴ Whistleblower protection laws support a transparent organizational culture and can safeguard the public interest and promote a culture of accountability and

¹⁰⁰ See e.g. Arnaud Poitevin, "Submission to the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises: Whistleblowers and the mainstreaming of a protection within the United Nations Guiding Principles on Business and Human Rights" (7 February 2014), online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=2395470>.

¹⁰¹ For a map of countries with whistleblower protection laws, see National Whistleblower Center, *supra* note 99.

¹⁰² See *ibid.*

¹⁰³ See OECD, *supra* note 67.

¹⁰⁴ See United Nations Office on Drugs and Crime "UN Anti-Corruption Toolkit" (2004), online (pdf): United Nations Office on Drugs and Crime <www.unodc.org/documents/treaties/corruption/toolkit/toolkitv5_foreword.pdf>.

integrity.¹⁰⁵ Whistleblower protection legislation provides legitimacy, structure, and clarity to the mechanisms under which whistleblowers can disclose wrongdoings. This section provides an overview of the legislative landscape of whistleblower protections in Canada, including the federal *Public Servants Disclosure Protection Act*, the *Criminal Code*, and provincial laws.

A. The Federal Public Servants Disclosure Protection Act

1. The Legislative Scheme

Canada's primary whistleblower protection law is the *Public Servants Disclosure Protection Act* ("PSDPA"), which came into effect in 2007.¹⁰⁶ The PSDPA affords certain protections to federal public servants who disclose information regarding wrongdoing. It was enacted recognizing that "confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoing and for protecting public servants who disclose wrongdoings."¹⁰⁷ The PSDPA seeks to strike the appropriate balance between public servants' duty of loyalty to their employer, their right to freedom of expression as guaranteed in the *Canadian Charter of Rights and Freedoms*, and the public interest.¹⁰⁸ The PSDPA defines wrongdoing in or relating to the public sector as:¹⁰⁹

Wrongdoings

Actes répréhensibles

8 This Act applies in respect of the following wrongdoings in or relating to the public sector:

(a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other

8 La présente loi s'applique aux actes répréhensibles ci-après commis au sein du secteur public ou le concernant :

a) la contravention d'une loi fédérale ou provinciale ou d'un règlement pris sous

¹⁰⁵ See OECD, "Integrity Review of Italy: Reinforcing Public Sector Integrity, Restoring Trust for Sustainable Growth", *supra* note 49 at 12.

¹⁰⁶ *Public Servants Disclosure Protection Act*, SC 2005, c 46 [PSDPA].

¹⁰⁷ *Ibid*, preamble.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid*, s 8.

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| than a contravention of section 19 of this Act; | leur régime, à l'exception de la contravention de l'article 19 de la présente loi; |
| (b) a misuse of public funds or a public asset; | b) l'usage abusif des fonds ou des biens publics; |
| (c) a gross mismanagement in the public sector; | c) les cas graves de mauvaise gestion dans le secteur public; |
| (d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant; | d) le fait de causer — par action ou omission — un risque grave et précis pour la vie, la santé ou la sécurité humaines ou pour l'environnement, à l'exception du risque inhérent à l'exercice des attributions d'un fonctionnaire; |
| (e) a serious breach of a code of conduct established under section 5 or 6; and | e) la contravention grave d'un code de conduite établi en vertu des articles 5 ou 6; |
| (f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e). | f) le fait de sciemment ordonner ou conseiller à une personne de commettre l'un des actes répréhensibles visés aux alinéas a) à e). |
| (g) [Repealed, 2006, c. 9, s. 197] | g) [Abrogé, 2006, ch. 9, art. 197] |

The PSDPA primarily protects internal disclosures through government accountability mechanisms.¹¹⁰ A public servant may disclose information if they believe it could show that wrongdoing has been committed, is about to be committed, or that the public servant was asked to commit wrongdoing by a supervisor or

¹¹⁰ See *ibid*, ss 12–14.

senior officer.¹¹¹ The public servant may also disclose this information to the Commissioner, unless the information is a confidence of the Queen's Privy Council.¹¹²

There are certain limits to the information that can be provided. A public servant may provide no more information than is reasonably necessary to make the disclosure and must follow established procedures or practices for the secure handling, storage, transportation and transmission of information or documents.¹¹³ Importantly, the PSDPA provides narrow protections for disclosures to the public if there is not sufficient time to make the disclosure internally or to the authorities and the public servant believes on reasonable grounds that the subject matter of the disclosure relates to an act or omission that constitutes a serious offence under a federal or provincial law, or constitutes an imminent risk of substantial and specific danger to the life, health and safety of persons or to the environment.¹¹⁴ This protection of disclosures to the public does not apply to disclosures that are subject to any restriction by or under an act of parliament, including the *Personal Information Protection and Electronic Documents Act* ("PIPEDA").¹¹⁵

The cornerstone of any whistleblower legislation is how it protects whistleblowers from reprisal and the clarity it provides to whistleblowers about the legality of potential disclosures. The PSDPA provides for a process to address complaints relating to reprisals. No person shall take any reprisal against a public servant.¹¹⁶ A public servant who has reasonable grounds for believing that a reprisal has been taken against him may file a complaint in a form acceptable to the commissioner.¹¹⁷ The Commissioner has the discretion to extend this period if they wish.¹¹⁸ The PSDPA creates two agencies to manage these

¹¹¹ See *ibid*, s 12.

¹¹² See *ibid*, s 13(1). But see PSDPA, s 14, which states that information concerning wrongdoing by the Office of the Public Sector Integrity Commission may be disclosed to the Auditor General of Canada.

¹¹³ See *ibid*, s 15.1.

¹¹⁴ See *ibid*, s 16(1).

¹¹⁵ *Ibid*, s 16(1.1).

¹¹⁶ See *ibid*, s 19.

¹¹⁷ See *ibid*, s 19.1(1).

¹¹⁸ See *ibid*, s 19.1(3).

complaints: (1) the Office of the Public Sector Integrity Commissioner¹¹⁹ and (2) the Public Servants Disclosure Protection Tribunal.¹²⁰ Only the Tribunal can provide whistleblowers with a remedy, but access to the Tribunal is controlled by the Integrity Commissioner.¹²¹ The complaint must be filed within 60 days of when the complainant knew or should have known that the reprisal was taken.¹²²

The Commission may refuse to deal with the complaint if it is of the opinion that the subject matter of the complaint has been dealt with, if the complainant is a member of the Royal Canadian Mounted Police, if the complaint is beyond the jurisdiction of the commissioner, or if the complaint was not made in good faith.¹²³ The Commissioner must decide whether or not to deal with the complaint within 15 days of its filing.¹²⁴ The PSDPA also mandates a review of the legislation every five years.¹²⁵ The government has only reviewed the legislation once since 2007, and failed to meaningfully enact the recommendations.¹²⁶ If a person is found to have committed acts of reprisal against a whistleblower, they can be charged with an offence and be liable for a fine of up to \$10,000 or for an imprisonment term of up to two years.¹²⁷

2. Analysis of the Legislation

The legislation has several strengths as well as notable shortcomings. It defines wrongdoing broadly, providing a list of categories of wrongdoing, one of which is any act or omission that poses a risk to life, health, or safety of persons, or to the

¹¹⁹ See *ibid*, s 39.

¹²⁰ See *ibid*, s 20.7(1).

¹²¹ See *ibid*, s 20.4.

¹²² See *ibid*, s 19.1(2).

¹²³ See *ibid*, s 19.3(1).

¹²⁴ See *ibid*, s 19.4(1).

¹²⁵ See *ibid*, s 54.

¹²⁶ See House of Commons, Standing Committee on Government Operations and Estimates, "Strengthening the Protection of the Public Interest within the *Public Servants Disclosure Protection Act*: Report of the Standing Committee on Government Operations and Estimates" (June 2017) 42-1, online: House of Commons <www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/report-9/>.

¹²⁷ See PSDPA, *supra* note 106, s 42.3.

environment.¹²⁸ Transparency International discusses the respective advantages and disadvantages of having a broad definition of wrongdoing versus a comprehensive list. A broad category such as “any threat or harm to the public interest” is vague and does not provide clarity for potential whistleblowers as to how the provision would be interpreted. On the other hand, a list approach can create loopholes. The PSDPA’s definition reflects a mixed-approach, combining a list of categories with the general catch-all category of risk. This definition provides clarity to the public about what kinds of public interest disclosures will be protected.¹²⁹

The legislation’s threshold for protected disclosures is adequate. The legislation protects disclosures to the public when there is “reasonable belief of wrongdoing.”¹³⁰ The reasonable belief standard is recommended by Transparency International:

If a person reasonably believes that the information they disclosed shows wrongdoing, and that the belief was reasonable for someone in their position based on the information available to them, that person should be protected. Their motive to make the disclosure, or whether any subsequent investigation finds proof of wrongdoing, should be irrelevant to the protected status the whistleblower enjoys. However, individuals who knowingly make false disclosures should not benefit from whistleblower protection.¹³¹

This threshold strikes an appropriate balance between protecting the whistleblower even in cases where there is an honest mistake and misunderstanding without protecting knowingly false disclosures. In the case of false disclosures, the wrongly accused can discipline the employee or sue for compensation. However, the Commissioner can refuse to deal with a complaint if they are of the opinion that the disclosure was not made in good faith.¹³² This caveat introduces discretion to waive protections based on a

¹²⁸ See *ibid*, s 8.

¹²⁹ See Transparency International, “A Best Practice Guide for Whistleblowing Legislation”, *supra* note 89 at 7-8.

¹³⁰ PSDPA, *supra* note 106, s 16(1).

¹³¹ Transparency International, “A Best Practice Guide for Whistleblowing Legislation”, *supra* note 89 at 14-17 [emphasis added].

¹³² See PSDPA, *supra* note 106, s 19.3(1).

subjective judgment of a whistleblower's motivation, which provides an unnecessary hurdle to the disclosure of information that may be accurate and damning.

The definition also does not provide sufficient clarity as to the treatment of government action authorized by a potentially unconstitutional law—for example Edward Snowden's disclosures of the U.S. government's surveillance program. These disclosures are among the most contentious disclosures, especially when they concern national security programs. Such disclosures are protected under subsection 8(a) of the PSDPA if the programs are unconstitutional and violate *Charter* rights.¹³³ However, it is difficult to know whether a program is unconstitutional and constitutes wrongdoing in the absence of a court ruling. These disclosures may not be protected under the catch-all provision in subsection 8(d) as infringements of privacy do not pose a "substantial and specific danger to life, health, or safety of the persons."¹³⁴ The treatment of disclosures of potentially unconstitutional programs therefore remains nebulous. The legislation would be strengthened by providing more specific guidance about when such disclosures will be protected, either by broadening the catch-all provision to include protected rights or by providing an explicit process for these kinds of disclosures, for example by requiring that such disclosures be reviewed by a constitutional lawyer with expertise in national security before their publication.

The legislation's most notable shortcoming is that it only applies to the federal public service. It does not address private sector wrongdoing¹³⁵ or wrongdoing within the provincial public service. For the public sector wrongdoing that it does cover, the PSDPA does not allow private sector participants to be either investigated or sanctioned. The PSDPA also fails to define reprisals. Comprehensive whistleblowing legislation must protect against all types of reprisals, including dismissal, probation, punitive transfers, harassment, reduced duties or hours, withholding of promotions or training, loss of status and benefits, reprisals against friends or relatives, reprisals by third parties linked to the employer, reprisals that occur after the work relationship has ended, and

¹³³ See *ibid*, s 8(a).

¹³⁴ *Ibid*, s 8(d).

¹³⁵ See Transparency International Canada, "Enhancing Whistleblower Protection", online: Government of Canada <open.canada.ca/en/idea/enhancing-whistleblower-protection>.

threats of such actions.¹³⁶ The law would be strengthened by adding a mixed definition, like in the case of wrongdoing, that includes a list of prohibited types of reprisals along with an open category that can encompass other types of reprisals that are specific to a certain employment context and cannot be foreseen by the law.

The law also fails to protect whistleblowers against potential suits. Some pieces of legislation in other countries, such as the *Protected Disclosures Act 2014* in Ireland, include a “no contracting-out of protections” clause, which states that any provision in an employment contract that prohibits or restricts the making of protected disclosures is void.¹³⁷ The Council of Europe also recommends ensuring that disclosure in accordance with national law can be used as a defence from proceedings or release from liability under civil, criminal, and administrative law.¹³⁸ Ghana, for example, specifies that a whistleblower is not liable in civil or criminal proceedings in respect of the disclosure unless it is proved that the whistleblower knew that the information contained in the disclosure was false or that the disclosure was made with malicious intent.¹³⁹ The PSDPA also fails to enact a right to refuse participating in wrongdoing. The only legislated right to refuse is the commissioner’s discretionary right not to deal with the disclosure or commence an investigation in certain contexts.¹⁴⁰ Finally, the legislation does not enact confidentiality of the witnesses of wrongdoing. Inserting such protections has been recommended in the Standing Committee on Government Operations and Estimates’ report on how to strengthen the PSDPA.¹⁴¹

¹³⁶ See Transparency International, “A Best Practice Guide for Whistleblowing Legislation”, *supra* note 89 at 21-23.

¹³⁷ *Protected Disclosures Act 2014*, Ireland, s 23.

¹³⁸ See Council of Europe, 2014, Principle 23 at 39.

¹³⁹ See *Whistleblower Act, 2006*, Act 720, online (pdf): www.drasuszodis.lt/userfiles/Ghana%20Whistleblwer%20Act.pdf.

¹⁴⁰ See PSDPA, *supra* note 106, s 24(1).

¹⁴¹ See House of Commons, Standing Committee on Government Operations and Estimates, “Strengthening the Protection of the Public Interest within the *Public Servants Disclosure Protection Act*: Report of the Standing Committee on Government Operations and Estimates” (June 2017) 42-1 at 2, online: House of Commons www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/report-9/.

3. Effectiveness of the Legislation

The effectiveness of the mechanism is brought into question, as the Commissioner has only referred eight cases to the Tribunal, and no remedy has ever been issued.¹⁴² Since the enactment of the PSDPA in 2007, 464 people have submitted a complaint to the integrity commissioner, alleging they suffered a reprisal for blowing the whistle.¹⁴³ The onus is on the whistleblower to prove

¹⁴² See Public Servants Disclosure Protection Tribunal, "All Cases" (5 September 2018), online: Government of Canada <www.psdpt-tpfd.gc.ca/Cases/AllCases-en.html>.

¹⁴³ This number was compiled from the annual reports of the Office of the Public Sector Integrity Commissioner from 2007–2021 (see Office of the Public Sector Integrity Commissioner, "2007-08 Annual Report" (2008), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/2007-2008-annual-report>); See also Office of the Public Sector Integrity Commissioner, "2008–09 Annual Report" (2009), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/2008-2009-annual-report>; Office of the Public Sector Integrity Commissioner, "2009–10 Annual Report" (2010), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/2009-2010-annual-report>; Office of the Public Sector Integrity Commissioner, "2010–11 Annual Report" (2011), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/2010-2011-annual-report>; Office of the Public Sector Integrity Commissioner, "2011–12 Annual Report" (2012), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/2011-2012-annual-report>; Office of the Public Sector Integrity Commissioner, "2012–13 Annual Report" (2013), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/2012-2013-annual-report>; Office of the Public Sector Integrity Commissioner, "2013–14 Annual Report" (2014), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/2013-14-annual-report>; Office of the Public Sector Integrity Commissioner, "2014–15 Annual Report" (2015), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/2014-15-annual-report>; Office of the Public Sector Integrity Commissioner, "2015–16 Annual Report" (2016), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/2015-16-annual-report>; Office of the Public Sector Integrity Commissioner, "2016–17 Annual Report" (2017), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/2016-17-annual-report>; Office of the Public Sector Integrity Commissioner, "2017–18 Annual Report" (2018), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/2017-18-annual-report>; Office of the Public Sector Integrity Commissioner, "2018–19 Annual Report" (2019), online: Office of the Public Sector Integrity Commissioner of Canada <psic-ispc.gc.ca/en/resources/corporate-publications/psic-2018-19-annual-report>.

that adverse actions were intended by the employer as reprisals.¹⁴⁴ The Public Servants Disclosure Protection Tribunal's online database, last updated in 2018, lists eight cases.¹⁴⁵ It is notable that of the 464 complaints submitted to the tribunal, only eight whistleblowers representing six controversies were granted the permission to bring reprisal claims to the tribunal.¹⁴⁶ Three whistleblowers received relief through settlement agreements.¹⁴⁷ Only two out of the eight cases received a decision on the merits.¹⁴⁸ Due process proceedings in front of the Public Servants Disclosure Protection Tribunal must be approved by the Public Sector Integrity Commissioner, who consistently denies permissions to alleged whistleblowers.¹⁴⁹ An evaluation of the disclosure and reprisal management program noted that several interviewees wondered whether this low referral rate was a missed opportunity to get clarifications and jurisprudence on complex cases.¹⁵⁰

The global study by the International Bar Association and the Government Accountability Project notes that it is positive that five whistleblowers have received relief through a settlement agreement, and that information regarding the claims is publicly available on the Tribunal's website. On the other hand, it is concerning that the whole mechanism is rarely used and that the current process places significant barriers to reporting

[report](#)>; Office of the Public Sector Integrity Commissioner, "2019-20 Annual Report" (2020), online: *Office of the Public Sector Integrity Commissioner of Canada* <psic-ispc.gc.ca/en/resources/corporate-publications/2019-20-annual-report>; Office of the Public Sector Integrity Commissioner, "2020-21 Annual Report" (2021), online: *Office of the Public Sector Integrity Commissioner of Canada* <psic-ispc.gc.ca/en/resources/corporate-publications/2020-21-annual-report>.

¹⁴⁴ See Transparency International Canada, "Enhancing Whistleblower Protection", *supra* note 135.

¹⁴⁵ See Public Servants Disclosure Protection Tribunal, *supra* note 142.

¹⁴⁶ See Global Study, *supra* note 4 at 37.

¹⁴⁷ See Public Servants Disclosure Protection Tribunal, *supra* note 142.

¹⁴⁸ See *ibid.*

¹⁴⁹ PSDPA, *supra* note 106, s 20.4-20.6.

¹⁵⁰ See Office of the Public Sector Integrity Commissioner of Canada, "Evaluation of the Disclosure and Reprisal Management Program" (2 March 2020), online: *Office of the Public Sector Integrity Commissioner of Canada* <psic-ispc.gc.ca/en/resources/corporate-publications/evaluation-disclosure-and-reprisal-management-program>.

whistleblower reprisals.¹⁵¹ In both cases where there was a decision on the merits, the whistleblower was unsuccessful, and the process took a long time.¹⁵² The global study sums up the deterrence effect of the Canadian legislation: “[i]t takes tenacity and financial resources for any whistleblower to sustain a reprisal dispute for over six years, only to lose.”¹⁵³

B. The Federal Criminal Code

The Canadian *Criminal Code* also provides some protection of whistleblowers. Section 425.1 provides for up to five years of imprisonment for employers who take disciplinary measures or retaliate against employees who provide information to law enforcement:¹⁵⁴

Threats and retaliation against employees Menaces et représailles

425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,	425.1 (1) Commet une infraction quiconque, étant l’employeur ou une personne agissant au nom de l’employeur, ou une personne en situation d’autorité à l’égard d’un employé, prend des sanctions disciplinaires, rétrograde ou congédie un employé ou prend d’autres mesures portant atteinte à son emploi – ou menace de le faire :
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(a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of	a) soit avec l’intention de forcer l’employé à s’abstenir de fournir, à une personne dont les attributions comportent le
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¹⁵¹ See Global Study, *supra* note 4 at 37.

¹⁵² See Public Servants Disclosure Protection Tribunal, “All Cases”, *supra* note 142.

¹⁵³ Global Study, *supra* note 4 at 37.

¹⁵⁴ *Criminal Code*, RSC, 1985, c C-46, s 425.1.

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| <p>federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or</p> <p>(b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.</p> | <p>contrôle d'application d'une loi fédérale ou provinciale, des renseignements portant sur une infraction à la présente loi, à toute autre loi fédérale ou à une loi provinciale — ou à leurs règlements — qu'il croit avoir été ou être en train d'être commise par l'employeur ou l'un de ses dirigeants ou employés ou, dans le cas d'une personne morale, l'un de ses administrateurs;</p> <p>b) soit à titre de représailles parce que l'employé a fourni de tels renseignements à une telle personne.</p> |
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Punishment

- (2) Any one who contravenes subsection (1) is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction.

Peine

- (2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :
- a) soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans;
- b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Importantly, the provision only protects disclosures to law enforcement, not to the public. In many cases, whistleblowers denouncing abuses of power by powerful individuals may not trust law enforcement to take swift action. David Hutton, Senior Fellow at the Centre for Free Expression's Whistleblowing Initiative, emphasizes this tension: "The whistleblower has no way to initiate

action against those taking reprisals: the police have to do it, [b]ut whistleblowers are trying to expose something that the powers that be do not want exposed, so to think the police will support them is a stretch.”¹⁵⁵ For those who resort to public disclosures, the provision offers no protection. Most importantly, there do not seem to have been any prosecutions under this section of the *Criminal Code*, casting doubt that it is a meaningful tool in the whistleblower’s arsenal.¹⁵⁶

C. Provincial Whistleblower Protections

Nine provinces and one territory have dedicated whistleblowing legislation for public sector whistleblowers: Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec, and the Yukon.¹⁵⁷ Nunavut, Ontario, and Saskatchewan include whistleblower protections in other more general pieces of legislation.¹⁵⁸ The Northwest Territories is the only jurisdiction that does not offer any protections for public sector employees. Three of these legislations prohibit reprisals, but do not provide for a remedy for the whistleblower.¹⁵⁹

¹⁵⁵ Micah Toub, “Canada needs to get serious about whistleblower protections. Here’s why” (27 April 2020), online: CPA Canada <www.cpacanada.ca/en/news/pivot-magazine/2020-04-27-canada-protecting-whistleblowers>.

¹⁵⁶ The author searched for prosecutions through Canlii, Westlaw, the annotated *Criminal Code*, and newspaper articles.

¹⁵⁷ See *Public Interest Disclosure (Whistleblower Protection) Act*, SA 2012, c P-39.5 (Alberta); *Public Interest Disclosure Act*, SBC 2018, c 22 (British Columbia); *The Public Interest Disclosure (Whistleblower Protection) Act*, SM 2006, c 35 (Manitoba); *Public Interest Disclosure Act*, RSNB 2012, c 112 (New Brunswick); *Public Interest Disclosure and Whistleblower Protection Act*, SNL 2014, c P-37.2 (Newfoundland and Labrador); *Public Interest Disclosure of Wrongdoing Act*, SNS 2010, c 42 (Nova Scotia); *Public Interest Disclosure and Whistleblower Protection Act*, RSPEI 1988, c P-31.01 (Prince Edward Island); *Act to facilitate the disclosure of wrongdoings relating to public bodies*, CQLR, c D-11.1 (Quebec); *Public Interest Disclosure Of Wrongdoing Act*, SY 2014, c 19 (Yukon).

¹⁵⁸ *Consolidation of Public Service Act*, SNU 2013, c 26, s 38-54 (Nunavut); *Public Service of Ontario Act*, 2006, SO 2006, c 35, Sch A, s 139(1) (Ontario); *The Saskatchewan Employment Act*, SS 2013, c S-15.1, s 6-6 (Saskatchewan).

¹⁵⁹ *Public Interest Disclosure Act*, *supra* note 157 (British Columbia); *Consolidation of Public Service Act*, *supra* note 158, s 38-54 (Nunavut); *The Saskatchewan Employment Act*, *supra* note 158, s 6-6 (Saskatchewan).

New Brunswick and Saskatchewan are the only two jurisdictions to provide protections for corporate whistleblowers.¹⁶⁰ The *Saskatchewan Employment Act* prohibits discriminatory action against an employee who reports or proposes to report to a lawful authority any activity that is or is likely to result in an offence.¹⁶¹ The *Employment Standards Act* in New Brunswick prohibits suspending, laying off, penalizing, dismissing or otherwise terminating the employment of an employee, imposing disciplinary measures, or discriminating against an employee if the reason for doing so is related to the employee giving information or evidence against the employer with respect to an alleged violation of provincial or federal law.¹⁶² Some other provincial acts provide narrow protections as well. The Ontario *Securities Act* provides a civil cause of action for whistleblowers who experience a reprisal for providing information to the Securities Exchange Commission.¹⁶³ The *Worker Compensation Act* in British Columbia makes it illegal “for an employer or union to penalize a worker for raising a health or safety issue at work.”¹⁶⁴

IV. The Path Towards Greater Whistleblower Protections in Canada

Whistleblower protections are uneven, fragmented, difficult to navigate, and outdated. This section outlines recommendations to strengthen the Canadian legislative scheme.

A. Expand the Scope of the PSDPA to Cover Private Sector Whistleblowing

A first recommendation is to expand the protections afforded by the PSDPA to corporate whistleblowers and provincial

¹⁶⁰ See *The Saskatchewan Employment Act*, *supra* note 158, ss 2–8; *Employment Standards Act*, SNB 1982, c E-7.2, s 28; Daniel Kim, “Transparency International Canada: Report on Whistleblower Protections in Canada” (April 2015) at 11–12, online: [Transparency International Canada <static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/5df7c8833a774003e678b023/5df7c87b3a774003e678a939/1576519803459/TI-Canada-Whistleblower-Report-Final1.pdf?format=original>](https://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/5df7c8833a774003e678b023/5df7c87b3a774003e678a939/1576519803459/TI-Canada-Whistleblower-Report-Final1.pdf?format=original).

¹⁶¹ *Supra* note 158, s 2-42.

¹⁶² *Employment Standards Act*, *supra* note 160, s 28.

¹⁶³ *Securities Act*, RSO 1990, c. S.5, s 121.5(1).

¹⁶⁴ *Workers Compensation Act*, RSBC 2019, c 1, s 48.

government whistleblowers to provide clear and accessible protections to all prospective whistleblowers. A robust stand-alone legislation lends clarity and coherence to the legal framework protecting whistleblowers. As the primary legislation in the country, the PSDPA is already the focal point of whistleblower protections. Transparency International underlines that effective whistleblower protections rely on dedicated legislation that is “designed, monitored and regularly reviewed with the involvement of all relevant stakeholders.”¹⁶⁵ For example, the United Kingdom’s legislation, a highly developed and comprehensive whistleblower legislation,¹⁶⁶ adopts a single disclosure regime for both private and public sector whistleblowing protection.¹⁶⁷

The legislation could also mandate whistleblowing policies in the corporate sector to spur a culture shift. Mandating robust whistleblower protections would be consistent with the broader movement towards greater corporate responsibility.¹⁶⁸ The Dutch legislation, for instance, requires that employers who have over 50 employees draw up a procedure for dealing with a report of wrongdoing within the organization.¹⁶⁹ The legislation can also impose penalties and sanctions against employers who fail to implement an internal whistleblower mechanism. The French law foresees financial sanctions of up to 1 million euros for a company

¹⁶⁵ Transparency International, “A Best Practice Guide for Whistleblowing Legislation”, *supra* note 89 at 64.

¹⁶⁶ See Banisar, *supra* note 51.

¹⁶⁷ See Marie Chene, “Good Practice in Whistleblowing Protection Legislation” (2009), online (pdf): U4 Anti-Corruption Resource Centre Expert Answer <www.u4.no/publications/good-practice-in-whistleblowing-protection-legislation-wpl.pdf>.

¹⁶⁸ Over the last decade, there has been a shift towards imposing greater responsibility on companies, illustrated by the endorsement of the United Nations Guiding Principles on Business and Human Rights in 2011 (see United Nations Human Rights Office of the High Commissioner, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework” (2011), HR/PUB/11/04, online (pdf): <www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>).

¹⁶⁹ See Transparency International, “A Best Practice Guide for Whistleblowing Legislation”, *supra* note 89 at 32; Dutch House for Whistleblowers Act, 2016, online (in Dutch): <wetten.overheid.nl/BWBR0037852/2016-07-01>.

and up to 200,000 euros against the Chief Executive Officer personally if they fail to implement whistleblowing procedures.¹⁷⁰

Canada can also implement incentives for corporations to implement whistleblowing procedures. For example, a company's pre-existing and demonstrably effective compliance program can be considered a mitigating factor in cases of corporate misconduct.¹⁷¹ Under the *UK Bribery Act*, an organization that can prove that, despite a particular bribery incident, it had adequate procedures in place to prevent bribery, can be absolved of liability.¹⁷² Expanding the scope of the law to the private sector would likely be feasible from a constitutional standpoint given the federal government's jurisdiction under the criminal law power.

A single, comprehensive legislation that applies to both public sector and private sector employees makes it easier for governments and employers to promote.¹⁷³ A stand-alone legislation would also increase legal certainty and clarity, as it imposes the same rules and procedures to all public and private sector employees, rather than piecemeal or sector-based approaches which often apply only to certain employees and to the disclosure of certain types of wrongdoing.

B. Streamline Protections and Processes to Improve Clarity and Accessibility

Beyond expanding the scope of the PSDPA, the federal legislature should also aim to streamline protections and processes to improve clarity and accessibility for potential whistleblowers. A first step would be to create a centralized whistleblower protection office to assist any potential corporate or government whistleblower.¹⁷⁴ To improve clarity and accessibility, the scheme

¹⁷⁰ See Law no. 2016-1691 (*Sapin II Law*), France, s 17.

¹⁷¹ See OECD, "Corporate Governance and Business Integrity: A Stocktaking of Corporate Practices" (25 November 2015) at 80, online: OECD <www.oecd.org/corruption/corporate-governance-business-integrity-stocktaking-corporate-practices.htm>.

¹⁷² See Serious Fraud Office, "The Bribery Act of 2010 Guidance" (2011) at 21, 29, online (pdf): Ministry of Justice <www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>.

¹⁷³ See Banisar, *supra* note 51 at 19-21.

¹⁷⁴ See Democracy Watch, "Submission to the Review by the Standing Committee on Government Operations and Estimates of the *Public Sector Disclosure Protection Act*" (21 March 2017) at 1, online (pdf): Democracy

should also provide clear reporting guidelines for internal disclosures, disclosures to authorities, and disclosures to the public. As stated, if the internal mechanisms and authorities are effective and responsive, whistleblowers are less likely to disclose to the public, mitigating the concerns of whistleblower critics. Canada's legislation already provides for these three types of disclosures, but these protections are not well known and are only available to public sector whistleblowers.¹⁷⁵ A centralized office could help potential whistleblowers navigate the legislation and decide how best to disclose information about wrongdoing.

Transparency International has identified the essential components of an effective whistleblowing reporting mechanism. Internal policies should be endorsed by management and regularly promoted to staff via organizational communication tools.¹⁷⁶ The OECD similarly specifies that a whistleblowing regulatory scheme should be accompanied by effective awareness-raising, communications and training.¹⁷⁷ In Serbia, for instance, all employers with more than 10 employees are required to adopt an internal policy governing the internal whistleblowing reporting procedure.¹⁷⁸ Such legislation could also include minimum standards of training for organizations in all sectors. Quebec has similar legislation mandating anti-harassment policies in Quebec workplaces.¹⁷⁹ A reporting mechanism should also include confidential and anonymous reporting channels. Care should be taken that disclosure recipients are independent from any potential wrongdoer.¹⁸⁰ These training and communication responsibilities could be taken on by the Office of the Public Sector Integrity Commissioner, as recommended by the Standing Committee on Government Operations and Estimates in its report

Watch democracywatch.ca/wp-content/uploads/SubmissionToOGGOonWhistleblowersMar2017.pdf.

¹⁷⁵ See *ibid.*

¹⁷⁶ See Transparency International, "Guide for Whistleblowing Legislation", *supra* note 89 at 34.

¹⁷⁷ See OECD, "Integrity Review of Italy: Reinforcing Public Sector Integrity, Restoring Trust for Sustainable Growth", *supra* note 49.

¹⁷⁸ See *Whistleblowers Protection Act*, Official Gazette of the Republic of Serbia no. 128/2014, s 16 [Zakon o zaštiti uzbunjivača].

¹⁷⁹ See *An Act Respecting Labour Standards*, CQLR c N-1.1, s 81.19.

¹⁸⁰ See Transparency International, "A Best Practice Guide for Whistleblowing Legislation", *supra* note 89 at 35.

on strengthening the PSDPA.¹⁸¹ Most importantly, the mechanism should ensure timely, thorough, and independent investigations of whistleblowers' disclosures.¹⁸² As noted above, one of the primary shortcomings of the Canadian mechanism is that it is difficult to access and is ineffective in providing remedies for whistleblowers.

Whistleblowers should also have access to individual confidential advice, free of charge.¹⁸³ The Netherlands, for example, put in place an advice department and an investigations department.¹⁸⁴ The advice department is tasked with informing, advising and supporting an employee about the steps to be taken regarding the suspicion of wrongdoing, referring whistleblowers to administrative bodies or services charged with investigating criminal offenses where appropriate, and providing general information about dealing with a suspicion of wrongdoing.¹⁸⁵ The Canadian government does provide up to \$3,000 for independent legal advice, but access to this limited amount is discretionary.¹⁸⁶

C. Mandate Regular Reporting and Review of the Legislative Scheme

Finally, effective whistleblower legislation needs to be updated and adjusted over time. To do so, there must be regular reporting to the House of Commons, which is currently in place, along with a regular review of the legislation.¹⁸⁷ The current law requires a review every five years, but only one review has been conducted

¹⁸¹ See House of Commons, *supra* note 141 at 2.

¹⁸² See *ibid.*

¹⁸³ See Transparency International, "A Best Practice Guide for Whistleblowing Legislation", *supra* note 89 at 60.

¹⁸⁴ See *The Whistleblower Authority Act*, Netherlands 2016, AVT15/BZK116131, s. 3(a), online: www.huisvoorklokkenluiders.nl/binaries/huisvoorklokkenluiders/documenten/publicaties/2016/07/01/dutch-whistleblowers-act/English+version+Dutch+Whistleblowers+Act.pdf.

¹⁸⁵ See *ibid.*

¹⁸⁶ See Office of the Public Sector Integrity Commissioner, "Support for Legal Advice", online: Office of the Public Sector Integrity Commissioner <www.psic.ispc.gc.ca/en/support-legal-advice>.

¹⁸⁷ See Office of the Public Sector Integrity Commissioner annual report, *supra* note 143.

since the legislation's enactment in 2007.¹⁸⁸ In June 2017, this first statutory review was conducted by the House of Commons Government Operations Committee.¹⁸⁹ The committee called for key changes to the law and enforcement system to protect those who report wrongdoing by people in the federal government.¹⁹⁰ Recommendations included expanding the definitions of "wrongdoing", "reprisal" and "protected disclosure", amending the legislation to better protect whistleblowers, reversing the burden of proof onto the employer to prove that they did not engage in reprisals, providing legal and procedural advice to public servants seeking to make a protected disclosure, and embedding confidentiality of the whistleblowers in the legislation.¹⁹¹

In its response letter written in October 2017, the Government of Canada failed to commit to making any of these changes, instead vaguely stating that it would "move forward to implement improvements to the administration and operation of the internal disclosure process and the protection from acts of reprisal against public servants."¹⁹² The legislation has not been updated to enact these recommendations.¹⁹³ Developing a robust whistleblower protection legislative scheme will require ongoing evaluation to ensure that the legislation meets its goals. Conducting the mandated five-year review is a start, but it is also important to engage with the committee's recommendations and put in place the required changes to ensure that the legislation is impactful.

¹⁸⁸ See House of Commons, Standing Committee on Government Operations and Estimates, *supra* note 126.

¹⁸⁹ See *ibid.*

¹⁹⁰ See *ibid.*

¹⁹¹ See House of Commons, Standing Committee on Government Operations and Estimates, *supra* note 126.

¹⁹² House of Commons, Standing Committee on Government Operations and Estimates, "Government Response to the Ninth Report of the Standing Committee on Government Operations and Estimates" 42-1, online: *House of Commons* <www.ourcommons.ca/DocumentViewer/en/42-1/OGGO/report-9/response-8512-421-253>.

¹⁹³ The author compared the 2017 and 2021 versions of the PSDPA in CanLii.

Conclusion

To conclude, there are limits to the amount of secrecy and opacity a healthy democracy can bear.¹⁹⁴ Although secrecy is sometimes justified, a functioning democracy requires that citizens be informed enough to keep corporate and government powers to account.¹⁹⁵ Professor Allison Stranger puts it beautifully:

While they may exasperate and provoke, whistleblowers are the bellows that keep the fires of justice and the Constitution burning brightly. They take realities that the powerful view as natural or inescapable and show us that they are intolerable. In so doing, whistleblowers encourage us all to think for ourselves.¹⁹⁶

Whistleblower protections are an essential guardrail against abuses of power. Effective legislation can promote a culture of corporate and government accountability, allowing those who are most likely to witness abuses of power to share information with the public without fear of reprisal. This article has provided an overview of the legislative landscape in Canada, its strengths and weaknesses, and the ways in which it can be reinforced. Effective whistleblower legislation can be designed in such a way that it protects the central importance of whistleblowing while recognizing the corresponding importance of confidentiality. Canada's federal legislation is a start, but it does not protect corporate or provincial government whistleblowers, and it is opaque and difficult to navigate. By expanding the legislation's scope, streamlining its processes and protections, and reviewing it regularly, Canada can break the silence and demonstrate that it is a country in which corruption has no place.

¹⁹⁴ See Allison Stranger, *Whistleblowers: Honesty in America from Washington to Trump* (New Haven: Yale University Press, 2019) at 204.

¹⁹⁵ See *ibid.*

¹⁹⁶ *Ibid* at 209.

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