From Rhetoric to Reality: Protecting Whistleblowers in Alberta

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In recent years, increasing attention has been paid to instances in which employees may be in a position to report on wrongdoing within their workplace. Employees who report on wrongdoing in the workplace have come to be known as whistleblowers. The decision on whether to report on wrongdoing places employees on the horns of a dilemma. They are often caught between their loyalty to co-workers or to their employer, on the one hand, versus their obligation to “do the right thing,” and serve the public interest by blowing the whistle against wrongdoing. Yet doing the right thing raises significant risks for potential whistleblowers. Their perceived lack of loyalty may lead to social ostracism, or various forms of harassment, up to and including being fired. In recognition of the potential risk to whistleblowers from disclosing wrongdoing, and in recognition that the public interest often can be better served by lowering the risks from making such disclosures, many jurisdictions have introduced specific legislation that is intended to provide protection to whistleblowers, particularly those who work in the public sector. There is widespread agreement - even in Alberta - that whistleblower protection is desirable. Yet there are several issues that must be resolved in the design of whistleblowing legislation.

A key issue is the very definition of whistleblowers and whistleblowing. Various law dictionaries and academics put forward a range of proposed definitions. One of the broadest holds that whistleblowers are “those who disclose information about something they believe to be harmful to the public’s interest, occurring in business or in government. It includes disclosure to authorities within the organization, to outside agencies or to the media.” Other definitions focus on whistleblowing in workplaces, or even more narrowly, public sector workplaces. Wrongdoings can be also defined more narrowly to include such specific categories as financial impropriety, criminal activity or harassment. The breadth of definition adopted for whistleblowing will have an important bearing on the type of whistleblower protection that is provided.

Another key issue that goes to the heart of whistleblower protection is the balance that needs to be struck between an employee’s duty of loyalty or “fidelity” to the employer on one hand, and freedom of expression and the public interest in disclosure of wrongdoing on the other. These three values have
deep and pervasive roots in our society, and reaching the right balance is a delicate task. It is clear, however, that failure to provide comprehensive protection to whistleblowers is not a balance at all.

A very practical issue is the identity of the designated authority for receiving disclosures of whistleblowing. Apart from assuring anonymity for whistleblowers, that authority will need to be independent and effective in order to encourage whistleblowers to come forward. Although governments are loathe to move on this point, it appears obvious that situating the receiving authority within the department in which the complaint arises will not lead to effective whistleblower protection.

A final key issue is the degree of comprehensiveness of whistleblower protection. Disclosure of wrongdoing can be advanced in some instances by a patchwork of specific rules and policies. However, in order to develop confidence on the part of potential whistleblowers, and a culture of disclosure of wrongdoing, comprehensive legislation is required.

These issues have been addressed to varying degrees in whistleblower regimes in different jurisdictions. The federal government has adopted whistleblower protection policy, and has introduced bills in the House of Commons twice. The Internal Disclosure Policy (IDP) has been in place for a few years, and has already faced serious criticisms, including internal criticisms, not least for its failure to provide strong, independent mechanisms for receiving disclosure and for oversight. In light of recent notorious scandals concerning wrongdoing in the public sector, it appears the IDP is not achieving its goals. Two recent bills have been introduced in the House of Commons. Bill C-25, although still problematic, contained an improved system in many respects. It did not pass during the 37th Parliament. Bill C-11, which is quite similar to Bill C-25, is currently under review in the 38th Parliament. Tellingly, the Public Service Alliance of Canada (PSAC), whose members stand to gain the most from federal whistleblower legislation, did not support this bill because of its design shortcomings.

Whistleblower protection has also been introduced over the past decade in Australia, the United Kingdom and the United States. Their approaches have varied, but are generally more comprehensive than Canada’s federal IDP and the federal
legislation introduced to date. Australia now has whistleblower protection legislation federally, in both territories and in all states. The Australian State of Queensland’s legislation has very broad coverage of activities that constitute wrongdoing, and enables disclosures by not only public sector employees, but also non-employees in certain cases. However, the disclosure generally must be within the department in which the perceived wrongdoing occurred.

In the UK, the Public Interest Disclosure Act applies to the private sector as well as the public sector. Apart from this, and an easier mechanism for obtaining redress against reprisals, it is similar to the Queensland legislation.

In the United States, the Whistleblower Protection Act (WPA) in 1989 provided relatively early protection for whistleblowers. The Act provides for disclosure to a variety of entities, including the Office of the Special Counsel (OSC), the Inspector General of an agency and any other individual or organization, including the media, provided the disclosure is not prohibited by law. However, there have been criticisms leveled at the lack of investigative powers and weak leadership of the OSC. New senate legislation, as yet not passed by Congress, would address this shortcoming. The 2002 passage of the Sarbanes-Oxley Act, in response to corporate corruption exposed in scandals such as Enron and WorldCom, created protections for corporate whistleblowers. The majority of states have whistleblower protection legislation.

Whistleblower protection in Canada at the provincial level is somewhat less advanced. Currently, there is some notional degree of whistleblower protection in every jurisdiction in Canada. A patchwork of rules in the common law, the Charter of Rights and Freedoms, collective agreements, and specific statutes such as employment and environmental protection legislation in some provinces provide some redress for some whistleblowers in some circumstances. However, this patchwork has incomplete coverage, and fails to provide the assurances needed to encourage potential whistleblowers - who also face many social consequences - to come forward.

Alberta would seem to be ready for whistleblower protection legislation. Albertans are known to have a significant interest in issues of governmental accountability, and the Alberta government is on record as supporting increased protection for whistleblowers.
The government defeated a private members whistleblower protection bill in 1998 because it did not like the bill’s design. Yet the government has not introduced its own bill since that time. The public interest in accountable government would be enhanced by adopting whistleblower protection legislation. And doing so also would provide an opportunity for the province to take a leadership position among Canadian provinces on this timely issue. The various models that exist internationally, federally and provincially constitute a wealth of design ideas and experience from which Alberta could draw in order to create its own legislation.
“At the outset, I would like to emphasize that I support the concept of whistle-blower protection...”


Introduction

Should a public employee report on the activities of a co-worker or supervisor if those activities are illegal, corrupt, or harmful to people or to the environment? Or should the employee keep their mouth shut, mind their own business, and just do their job according to a limited view of their job description? If someone “does the right thing” and exposes wrongdoing, is that person best thought of as a “rat” or a “hero”? Should such behaviour be punished (and the person shunned, or fired or worse), or should the behaviour be celebrated (and the person rewarded)?

Recent revelations of illegal and unethical behaviour at giant corporations such as Enron and WorldCom served to highlight the staggering breadth corrupt practices can have when unchecked and the devastating impact they can have when finally brought to light. In Canada, the unprecedented resignation of the country’s Privacy Commissioner in 2003, and the so-called sponsorship scandal, demonstrated that corruption can rear its head in the public sector as well. Corruption, including illegal practices and
misadministration, exists. Where it exists, people other than the perpetrators may be aware of it. Those who are aware of corrupt practices, and who report on those practices, have come to be called “whistleblowers.”

There is a great deal of literature promoting the adoption of whistleblower protection policies and legislation. For example, one website lists no fewer than 70 webpages, 20 of which are Canadian, containing materials that support the call for whistleblower protection. Laws and policies can have the effect of either encouraging people to come forward and “blow the whistle,” or they can discourage them from doing so. The primary aim of this paper is not to repeat the call for whistleblower protection legislation. That call has been made sufficiently by others. Rather this paper presents an analysis of the relevant issues in designing whistleblower legislation. It also presents a discussion of the ways in which existing and proposed whistleblower regimes address those issues. The primary aim of this paper is to take the topic beyond the “whether” and advance it to the “how”. By focusing on legislative design, it is hoped that this paper will contribute to the development and implementation of an effective whistleblower protection regime in Alberta.

The first section of this paper examines various definitions of whistleblowing, comparing their breadth and their practicality. This section also differentiates between public and private sector employee whistleblowing, and whistleblowing in non-employment circumstances. Section two identifies three further issues that must be addressed when designing whistleblower legislation, namely: the relationship between the employee’s duty of fidelity to the employer on the one hand, and the employee’s right to free expression and the public interest in whistleblowing on the other; the degree of independence of the person to whom one discloses wrongdoing; and the advantages of comprehensive whistleblower legislation compared to other means of whistleblower protection.

Section three of the report examines the recent development of public sector whistleblower protection at the federal level in Canada. It discusses the establishment of policy measures protecting whistleblowers, the increasing calls for legislation, and the resulting bills that have been introduced in the House of Commons. The bills are discussed in detail as examples of domestic Canadian legislation dealing with the key issues discussed earlier in the report. Section four places these federal
developments in a comparative context, by examining whistleblower protection introduced over the past decade in Australia, the United Kingdom and the United States.

The federal activity and international comparative context form a backdrop for section five, which outlines the patchwork of whistleblower protection in the Canadian provinces. Section six then examines whistleblower protection in Alberta. The Alberta government is on record as supporting increased protection for whistleblowers, but it has yet to act. This section argues that Alberta’s broader political culture embodies many of the values underlying whistleblower protection, and that passing legislation would provide an opportunity for the province to take a leadership position among Canadian provinces on this timely issue.

1. Narrowing the definition of whistleblowing

The term “whistleblower” has been defined in a variety of ways, and the definitions that have been offered vary in terms of their breadth of coverage, comprehensiveness, and the manner of disclosure. Perhaps the most inclusive definition is found on the Canadian Law website, in which whistleblowers are defined as “those who disclose information about something they believe to be harmful to the public’s interest, occurring in business or in government. It includes disclosure to authorities within the organization, to outside agencies or to the media.” This definition is broad in that it extends to any activity “believed to be harmful to the public interest,” comprehensive in that it applies to both the public and private sectors, and inclusive in that the whistleblower may disclose to a wide variety of organizations, including outside agencies and the media.

Similarly, the Merriam-Webster Dictionary of Law provides a broad definition of a whistleblower as: “an employee who brings wrongdoing by an employer or other employees to the attention of a government or law enforcement agency and who is commonly vested by statute with rights and remedies for retaliation.” As in many other definitions, the Merriam-Webster version suggests that a whistleblower must be an employee of the organization against which one is blowing the whistle, implying that other interested parties would not qualify for protection afforded employees.

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3 Merriam-Webster Dictionary of Law, 1996 Merriam Webster Inc.
Another definition put forward by Marcia P. Miceli and Janet P. Near calls whistleblowing “organizational member’s disclosure of illegal, immoral or illegitimate practices under the control of their employers to persons or organizations that may be able to take action to stop the wrongdoing.” By this definition, the broad concept of the public interest is not invoked as a defining characteristic. Rather, whistleblowing involves the disclosure of activities that are specifically of an illegal, immoral or illegitimate character.

These various definitions reveal some of the inherent difficulties in arriving at a definition of whistleblowing that provides a degree of precision necessary to invoke the protections that may be afforded by a whistleblower regime. While there likely would be a high level of agreement on what constitutes illegal activity, such agreement would be far less likely on the more nebulous terms such as immoral or illegitimate activities. As Paul Thomas notes in his recent analysis of whistleblower protection in Canada, “an ‘academic’ definition of whistleblowing may need to be broad to capture all types of related activities, but an ‘operational’ definition for legal purposes must be more precise.”

In its examination of this issue at the time that the Australian federal government was considering adopting whistleblower protection legislation, the Australian Senate Select Committee on Public Interest Whistleblowing attempted to sidestep this definitional morass by noting, “What is important is not the definition of the term, but the definitions of the circumstances and conditions under which employees who disclose wrongdoing should be entitled to protection from retaliation.” This may be true, at least in part, if one separates the activities of whistleblowers reporting on the activities of their employer from those who, as non-employees, report on an activity “in the public interest.” The power of an employer to cause additional harm to an employee through the employment relationship suggests that additional protections may be needed for the specific case of employees, whether in the public or the private sectors. The non-employment related “public interest” disclosure is the kind typically found in environmental protection legislation, such as the Canadian Environmental Protection Act. To the extent that the full range of non-employee public interest disclosure may be identified and codified (a large assumption), it may be possible to identify a separate class of whistleblower protection as that relating specifically to employees.


7 R.S.C. 1985, c.33.
While narrowing the definition of whistleblower protection as that relating to employees does exclude some types of disclosure, it has the benefit of enabling a more focused discussion of the purpose and special needs of whistleblowers in their work environment. Limiting protection to employment related disclosures, however, does not completely eliminate the definitional problem. One can further distinguish between those employed in the public sector versus those employed in the private sector. A legislative whistleblower protection regime that applies to all employees in their employment environment necessarily is broader and more comprehensive than one directed specifically to the public sector. While much of the rest of this paper focuses on public sector employees, it will also briefly discuss the movement in some jurisdictions to increase substantially the protections for whistleblowers in the private sector, particularly in light of such spectacular instances of corporate wrongdoing as the Enron and WorldCom scandals in the United States.

In a number of jurisdictions, such as Australia at the state and federal level, the United Kingdom at the national level, and Canada at the federal level, there have been recent advances in whistleblower protection offered to those within the public service. Note the use of the term public service, as opposed to public sector used above, to suggest a further narrowing of the scope of whistleblower protection to those individuals directly in the employ of the government through the public service commission, rather than more broadly to those employed in public sector activities such as education or health care delivery, to employees of Crown corporations, or those who serve as contractors for governmental services.
2. Key issues in Whistleblower protection

In considering the design of whistleblower legislation, a number of further issues must be considered. Among the most important are the following: what is the right balance between an employee’s duty of loyalty (or “duty of fidelity”) to an employer versus the employee’s freedom of expression and the public interest in the disclosure of wrongdoing? If one sees a wrong being committed (or a right being omitted), to whom can one disclose this fact? What can specific whistleblower legislation add to the protections that currently exist for those who are considering disclosing some wrongdoing?

The duty of fidelity vs. freedom of expression and the public interest in disclosing wrongdoing

At the heart of the issue of whistleblower protection, particularly within the public sector, is the matter of one’s duty of fidelity to an employer. The duty of fidelity requires an employee serves his or her employer “in good faith,” and refrains from activity “which may harm an employer’s business.” The duty of fidelity suggests that there are limits on what an employee may disclose, or at least disclose publicly, about the activities of an employer. Justice Sanderman of the Alberta Court of Queen’s Bench in CRC-Evans Canada Ltd. v. Pettifer states as follows:

“It has long been accepted that there is a fundamental term implied in every contract of employment. The employee is expected to serve his employer honestly and faithfully during the term of his employment. This duty of fidelity permeates the entire relationship between employer and employee. It is a flexible concept that is paramount to the basic relationship. There is an implied obligation placed upon the employee to act in the best interests of his employer at all times. The employee shall not follow a course of action that harms or places at risk the interests of the employer.”

The duty of fidelity weighs against two other important interests: the employee’s freedom of expression and the public interest in disclosing wrongdoing. Freedom of expression is a key value in a democratic and free society and is articulated in Canada’s Charter of Rights and Freedoms (discussed further below). Its importance, both as a fundamental human right and as a protector of our democratic system, is unquestionable. It is also clear that there is a public interest served by the disclosure of wrongdoing. Whistleblowing can bring instances of wrongdoing to the attention of the relevant authorities in order ensure that they

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9 [1997] 26 CCEL (2d) 294 at page 303
are appropriately addressed, and it can help create a deterrent to future instances of wrongdoing. Furthermore, as noted in the preamble to federal Bill C-11 (discussed below), “confidence in public institutions can be enhanced by establishing effective procedures for the disclosure of wrongdoings and for protecting public servants who disclose wrongdoings.” There are few, if any, political leaders who would publicly disagree with Alberta’s former Minister of Justice and Attorney General, who stated in the legislature that he “support[s] the concept of whistle-blower protection.”

Nonetheless, an employee in breach of the duty of fidelity risks a variety of punitive or disciplinary actions by the employer, including the risk of being fired. Such a risk is likely to place a significant chill on an employee’s willingness to disclose wrongdoing. And this lack of disclosure could result in specific instances of wrongdoing not being addressed, and moreover in a failure to deter future instances of wrongdoing.

The duty of fidelity is somewhat balanced both by common law and by statutory (i.e., Canada Labour Code and Canadian Human Rights Act) protections of employees from being fired without “just cause,” as well as by the guarantee of freedom of expression in section 2 of the Charter of Rights and Freedoms. Over time, the courts have provided some clarity to the character of the balance between an employee’s loyalty to their employer and their right to criticize their employer when doing so is perceived to be in the public interest. For example, in British Columbia in 1981, the court held that the duty of fidelity does not impose a gag rule on employees, where it stated,

“...those employees who learn of wrong-doing and seek to correct it, who see practices or products that may endanger society and seek to correct them, or who are directed to do illegal or immoral acts and object to doing them. For these employees, if no other avenue of redress is available, public expression of certain information, even though it may be critical of the employer, should be encouraged not deterred by fear of losing their job. With respect to public criticisms of the employer, the duty of fidelity does not impose an absolute “gag rule” against an employee making any public statements that might be critical of his employer.”

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In a decision of the Alberta Court of Appeal in 2002, the court highlighted the character of the duty of fidelity of public service employees as well as the right of government employees to speak publicly about perceived wrongdoing.\footnote{AUPE v. Alberta, 2002 ABCA 202, available at http://www.canlii.org/ab/cas/abca/2002/2002abca202.html} The court began (at paras. 24-5) by highlighting earlier decisions clarifying the duty of fidelity, “The scope of the duty of fidelity in the context of public service employees was considered by the Supreme Court of Canada in Fraser v. Canada (Public Service Staff Relations Board), [1985] 2 S.C.R. 455. The initial decision of the Public Staff Relations Board in Fraser applied the principle that ‘a public servant who acts in a manner that undermines the credibility of his own department, its programs and officers engages in a direct conflict of interest deserving of a disciplinary response of the employer’s part’.

“The ruling was upheld on judicial review and on appeal to the Supreme Court of Canada. At p. 470 Dickson, C.J. stated: “...As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. ...it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government.”\footnote{Ibid. at paras. 24-5.}

From this context, the court proceeded to rule on the matter of the actions of Jason Gibson, a Child Protection social worker employed with the Alberta Department of Family and Social Services. At issue was whether Mr. Gibson’s duty of fidelity to the government as his employer constrained him from publicly criticizing the government, and thereby from exercising his freedom of expression as guaranteed by section 2 of the Charter. The Court held that Mr. Gibson’s criticism of the government did not breach his duty of fidelity.\footnote{Ibid., at paras. 33-35.} In short, the Court held it is necessary to maintain a balance between the freedom of expression guaranteed to all Canadians, including members of the public service, and the duty of fidelity expected of employees. In the circumstances of Gibson’s case, the freedom of expression overrode the duty of fidelity.
Public servants cannot be ... "silent members of society". I say this for three reasons.  
First, our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion.  
Secondly, account must be taken of the growth in recent decades of the public sector—federal, provincial, municipal—as an employer. A blanket prohibition against all public discussion of all public issues by all public servants would, quite simply, deny fundamental democratic rights to far too many people.  
Thirdly, common sense comes into play here. An absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit. ... [A]n absolute prohibition against public servants criticizing government policies would not be sensible.  
- Chief Justice of the Supreme Court of Canada,¹ cited by the Alberta Court of Appeal in AUPE v. Alberta²

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Further cases interpreting the meaning of the duty of fidelity for public sector employees currently are before Canadian courts. It is expected that future judgments will continue to clarify the nature of this duty. However, as it currently stands, there are significant deterrents to whistleblowing, and not always a safe or effective channel through which to do it. The calls for legislative reform in this area make it clear that the current balance between the duty of fidelity on one hand, and freedom of expression and the public interest in whistleblowing on the other, is not really a balance at all.

The recipient of the disclosure

One of the more contentious, and certainly one of the most important, provisions of any whistleblower protection policy is the identification of the person or persons to whom one can disclose perceived wrongdoing. From the perspective of the potential whistleblower, there are several key issues related to the disclosure mechanism. One is that they remain free from reprisal as a result of blowing the whistle. They should not be demoted, subjected to intimidation or threats, socially ostracized, fired, or suddenly find
themselves without an opportunity for career advancement. One mechanism to reduce these risks is to provide anonymity and confidentiality in the disclosure process. The competing value against which the desire for anonymity must be assessed is the natural justice principle that those accused of wrongdoing have the right to know the accusations that have been made against them, and the ability to respond to the accusations. There may be instances in which the work environment is such that these values collide, making it difficult to guarantee anonymity while providing opportunities for the accused to defend themselves.

A second key issue is the independence of the person or persons receiving the disclosure. Employers, including government employers, often have a desire to limit the damage that may arise from a disclosure of wrongdoing, and to allow an organization to self-correct. This leads to a desire to ensure that wrongdoing is reported in the first instance within the organization. Failure to comply with internal reporting procedures may itself become grounds for disciplinary action against the whistleblower. For the potential whistleblower, on the other hand, the preference generally is to ensure independence by having a person or persons outside the individual’s department receive disclosures and conduct investigations. Furthermore, when the whistleblower protection is focused on government employees, there often is a preference among potential whistleblowers to have the agency or body that receives disclosures report directly to Parliament rather than to a government Minister. As an officer of Parliament, the reporting body is free from the kind of political interference that is difficult to ensure against when the reporting relationship is to a Minister.

Closely tied to the matter of independence is the issue of whether the body receiving disclosures has the resources required to complete investigations in a timely and effective manner. Where the body has independent authority, it is capable of conducting investigations even when it may be costly to do so, as long as its budget allocation is free from political interference. In those cases where the body receiving disclosures receives its funding from a government Minister, the risk is that its funding may be insufficient to perform its duties in a way that inspires confidence.
There is a variety of mechanisms to provide protection for whistleblowers. As noted above, some protections exist through common law, which may provide a shifting balance over time between the duty of fidelity and the duty to serve the public interest. In addition, the Charter of Rights and Freedoms may provide some protections for freedom of expression of public servants making certain kinds of statements about their employer.\(^\text{15}\) As well, the collective bargaining environment provides opportunities for employees and their representatives to insert provisions into collective agreements to provide guarantees against harassment and against discipline except for just and reasonable cause.\(^\text{16}\) Further to these protections, whistleblower protection may be available through government or company policies, or may be embedded in particular laws related to such things as environmental protection, occupational health and safety, or employment standards. Indeed, to one extent or another, all jurisdictions in Canada contain some types of whistleblower protections, either through protections offered by federal laws or policies, or in the case of some provinces, by specific protections provided at the provincial level, for some types of employees in some types of situations.

However, there are many problems with this patchwork approach. Obviously, it provides very uneven protections for employees across the country. To the extent that whistleblower protections are included in collective agreements, non-unionized employees (including, for example, those who contract their services to governments) are exempt from those protections. Where protections are included in common law, potential whistleblowers would be advised to consider the possible legal costs that may be involved in protecting themselves after disclosing a wrongdoing. Where whistleblower protections are included in statutes directed in the first instance to other purposes (such as employment standards codes, or environmental protection legislation), coverage will not apply outside of those areas, the reporting provisions may be ambiguous or unclear, understanding one’s rights and obligations may be complicated, and the resulting procedures may not be sufficiently transparent to provide convincing guarantees of the independence of the process. In addition, the patchwork approach doesn’t give potential whistleblowers assurance that their specific instance is covered, and falls well short of nurturing a culture that values disclosures in the public interest. It places whistleblowers at considerable risk.

\(^{15}\) Chris Rolfe and Rodney Wilts, op cit, at p.7.

\(^{16}\) Ibid. See also http://www.leas.ca/projects/whistleblowers/whistleblowers5.htm.
The immediate objective of whistleblower legislation is to reduce the risks for potential whistleblowers. Ideally, any whistleblower protection legislation should develop a framework for disclosure that balances duty of fidelity with freedom of expression and the public interest, uses clear and to the extent possible independent disclosure mechanisms, and provides clarity and consistency for potential whistleblowers. These are the standards against which comprehensive whistleblower protection regimes should be assessed.

3. Recent changes in the Canadian federal whistleblower protection regime

The Canadian federal government has been a relative late-comer in providing whistleblower protection through legislation. Developments over the past decade, however, appear to be leading inevitably to the adoption of whistleblower protection legislation. In 1996, the Task Force on Public Service Values and Ethics issued a report, A Strong Foundation, also known as the Tait Report, that recommended the adoption of a statement of principles for public service, or a public service code. Such a code, according to the report, should include a disclosure mechanism to enable public service employees to report on activities “that are potentially illegal, unethical or inconsistent with public service values, and to have these concerns acted upon in a fair and impartial manner.”

Although the Chretien government did not act immediately on the recommendations of the Tait Report, they were made more pressing by several court cases that highlighted the need for federal employees to disclose instances of perceived wrongdoing.

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Endnote: Available at http://www.parl.gc.ca/infocomdoc/37/3/OGGO/Meetings/Evidence/OGGOEV11-E.HTM#int-909877
The Internal Disclosure Policy

Five years after the Tait Report was issued, in November 2001 the Treasury Board (the department responsible for federal employees) adopted the Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace (commonly called the Internal Disclosure Policy, or IDP). This policy, which is currently (i.e., May 2005) in effect, defines a disclosure as “information raised within the organization in good faith, based on reasonable belief, by one or more employees concerning a wrongdoing that someone has committed or intends to commit.”

The IDP defines wrongdoing as an act or omission concerning a violation of any law or regulation; a breach of the Values and Ethics Code for the Public Service; misuse of public funds or assets; gross mismanagement; or a substantial and specific danger to the life, health and safety of Canadians or the environment. Thus, the definition of wrongdoing currently in use in the federal public service avoids the use of vague or ill-defined terms such as “illegitimate” or “immoral” activity, and instead refers to more specific criteria. Of course the IDP applies only to those employed in the federal public service.

One of the more contentious aspects of the policy relates to the individual receiving the disclosure of wrongdoing. The IDP starts with the premise that disclosures normally will be made to and through the department. Each department must designate a senior officer with responsibility for overseeing the disclosure of wrongdoing within the department. Furthermore, overall responsibility for matters of potential wrongdoing, as for all other departmental matters, continues to rest with the senior public servant within the department, the Deputy Minister or equivalent.

As a limited exception to the expectation of departmental oversight, the IDP established a new position, housed in the Treasury Board Secretariat, of Public Service Integrity Officer (PSIO). The PSIO can receive disclosures of alleged wrongdoing in two circumstances - if the whistleblower has cause to believe that the matter will not be addressed within the department or otherwise feels unwilling to bring it forward for departmental review, or if the disclosure was made initially within the department but the whistleblower believes that it was not appropriately addressed. It was expected that through the establishment of the PSIO, a new outlet would be available to encourage whistleblowers who might otherwise not come forward.
to express concerns about actual or potential departmental wrongdoing. The PSIO is appointed by the government, and has a mandate to report annually on the activities of the office. The report is made to the Minister, who in turn reports to Parliament.

In the first report issued by the Public Service Integrity Officer (Dr. William Keyserlingk), significant shortcomings were identified with the office and with the federal government’s whistleblower protection regime. The Report provided the following account of activities:

“Of the 105 cases received by the PSIO in 2002-03, 87 fell within its mandate and were reviewed and investigated. In 20 cases, the files were closed after a preliminary review. Of the remaining 67 cases, 47 were eventually referred ... to a more appropriate authority after varying degrees of investigation by the PSIO. In the cases remaining, no wrongdoing was found in 8 cases, and 7 cases were determined to be outside the jurisdiction of the PSIO. Investigations into the 5 remaining cases were continuing as of March 31, 2003.”

One reading of the data provided by the PSIO is that the relatively low disclosure level, and the extremely low level of findings of wrongdoing, would suggest that there was little evidence of wrongdoing within the federal public service, at least for the year for which he was reporting. However, it would appear that other information that was evident or emerging at the time suggests that there may have been more wrongdoing than was being brought forward. Two particularly high profile instances of wrongdoing - the alleged financial mismanagement of the Privacy Commissioner as identified in the report of the Auditor General in September 2003, and the irregularities in awarding of government contracts that became known as the sponsorship scandal identified in the report of the Auditor General in November 2003, seemed to suggest that at least part of the problem lay with the nature of the disclosure process.

Dr. Keyserlingk used the PSIO Annual Report of 2002-03 to recommend that the office, or its successor agency, be “reconstituted on the basis of legislation rather than policy, that it be placed outside the ambit of government and that it report to and be overseen by Parliament.” According to the report, the PSIO “does not have sufficient support and confidence of the public sector employees for whom it was established .... (and) despite considerable efforts to show (it) is functionally

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25 Auditor General of Canada. November 2003 Report - Matters of Special Importance - 2003. According to the Auditor General, “We observed that from 1997 to 31 August 2001, there was a widespread failure to comply with the government’s contracting policies and regulations, a pervasive lack of documentation in the files, and little evidence in many cases that the government had received value for its sponsorship-in some cases, no evidence.” http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20031100ce.html.

26 Ibid.
independent ... skepticism persists." Thus, according to the Report’s recommendations, the office (or its successor) should be removed from the Treasury Board Secretariat, and report directly to Parliament.

"It is most important that the Integrity Commissioner not be created or perceived to operate as an officer within the executive branch of government, since he or she will be tasked to investigate, in a neutral and impartial manner, activities within the federal public sector. Otherwise, the Commissioner would be placed or perceived to be in a potential conflict of interest. As an officer within the executive branch, it would be difficult to counter the perception that the Integrity Commissioner is not closely aligned with the interests of the government and that the office is not subject to potential influence or interference from other government authorities. As an Agent of Parliament, the Integrity Commissioner’s independent status is unassailable. This would provide the necessary autonomy and freedom required for the Commissioner to discharge the mandate in an impartial manner as an independent officer and to report directly to Parliament and the public."

Public Service Integrity Office, 2003-2004 Annual Report


In addition, the Report stressed that public servants should have direct access to the PSIO in the first instance, rather than being required first to report within their departments. The PSIO Annual Report of 2003-2004 repeated the call for legislation, noting that “[t]here may never be a more receptive climate and auspicious time than the present for disclosure of wrongdoing legislation.”

The Kernaghan Report

Shortly after the PSIO 2002-2003 Annual Report was issued, the federal government, through the then-president of the Treasury Board, established a five-member Working Group on the Disclosure of Wrongdoing, chaired by Kenneth Kernaghan, which issued its report in January 2004. The Kernaghan Report makes a number of key recommendations for changes to the whistleblower protection regime in Canada. The most fundamental changes are the following:

• broaden coverage to include all those working in the federal public sector, including for example, employees of Crown Corporations and federal public agencies in addition to those currently covered;
• adding “reprisals resulting from good faith disclosures of wrongdoing” to the list of items included in the definition of wrongdoing;

27 Ibid.
• improve the enforcement and investigation roles of the office;
• provide for direct accountability to Parliament; and
• base the whistleblower regime on a legislative framework rather than a departmental policy document.

Unlike the earlier recommendation of the Public Service Integrity Officer, however, the Kernaghan Report did not support greater authority of the office relative to the management structure within the departments. Indeed, departmental authority was seen to supercede the independence afforded by providing for direct disclosures to the PSIO. Furthermore, at the core of the Kernaghan Report is the desire to foster a “culture of rightdoing,” rather than focusing on the disclosure of wrongdoing. This cultural shift, according to the authors, must be based in and flow throughout the departments, rather than simply serve as a value imposed by an external watchdog.

Shortly after the receipt of the Kernaghan Report, and in a political climate charged with concerns about lack of governmental accountability as a result of the scandals surrounding the resignation of the Privacy Commissioner and the sponsorship scandal, and further charged with speculation about an impending federal election, the Martin government introduced Bill C-25, the Public Servants Disclosure Protection Act, in March 2004. The Bill, which did not pass prior to the dissolution of the 37th Parliament in May 2004, contained provisions that included the extent of coverage, the establishment of a code of conduct, the definition of wrongdoing, the manner of disclosure, and the establishment of a Public Service Integrity Commissioner. Each feature will be discussed briefly.

**Extent of coverage**

The group of employees that would be covered by the provisions of Bill C-25 is broader than currently applies through the IDP. The Bill uses the terms “public servants” and “public sector” rather than the more limited “public service” as is used in the IDP. The broader terms include employees in the public service (as named in the Public Service Staff Relations Act), and also includes those identified in Schedules I.1, II and III of the Financial Administration Act as well as employees of Crown corporations. Although a number of public sector employees continue to be excluded from the protections afforded by the Bill (such as those
in the defence and intelligence industries, including members of the Canadian Forces, the Canadian Security and Intelligence Service, and the Mounties, among others), it was more inclusive in coverage than the existing IDP regime.

**Code of conduct**
Following the recommendations of the Kernaghan Report, the Bill also intended to place the protections for the disclosure of wrongdoing in a broader context of encouraging ethics and “rightdoing” among the public service. Consequently, it mandated the Treasury Board to establish a code of conduct applicable to the public sector, and required heads of departments to establish codes of conduct for their areas of jurisdiction. Furthermore, the government committed to establishing a “Charter of Values of Public Service” to serve as a guide to those in public service. The establishment of codes of conduct and a charter of values recognizes the inherent conflict between the “duty of loyalty” owed by employees to their employer and their freedom of expression coupled with the public interest in disclosure of wrongdoing.

**Definition of wrongdoing**
The definition of wrongdoing included in the Bill is largely similar to that in practice through the IDP. A minor exception is a modification of the current provision relating to reporting on illegal activity. The provision in the Bill limits protection to those instances in which the wrongdoing relates to “official activities” of public servants, thereby limiting the protection to areas directly involving the employment activities of the public servant.

**Manner of disclosure**
The disclosure mechanism set out in the Bill is in many respects similar to that in the IDP. As with most whistleblower protection statutes, potential whistleblowers are prohibited from making disclosures that are “frivolous, vexatious or in bad faith.” This provision was somewhat strengthened in the Bill through the provision that a disclosure made in bad faith may result in an employee facing disciplinary action, up to and including possible termination of employment. This provision clarifies and arguably expands the risk to which a potential whistleblower may be subject as a result of the disclosure. In addition, and again consistent with the IDP, the Bill requires disclosure in the first instance to officials in the employee’s department, and requires departments to establish procedures, including the designation of a senior officer, to be responsible for administering the department’s policy.
A disclosure can be made outside the department, to the Public Sector Integrity Commissioner, if the matter already has been disclosed to the department and he or she believes the matter has not been appropriately addressed, or if the public servant believes “on reasonable grounds” that departmental disclosure would not be appropriate. An additional provision provides for disclosure directly to the Commissioner if there is insufficient time for “regular” disclosure and either a serious offense is about to be committed or serious harm is about to be done.

Establishment of a Public Sector Integrity Commissioner
The Bill would have replaced the Public Service Integrity Officer with the Public Sector Integrity Commissioner as the senior federal official responsible for advising public servants on possible disclosures; receiving, reviewing and possibly investigating disclosures; and generally acting as a watchdog overseeing departmental administration of the whistleblower regime. The Commissioner was intended to be appointed by the government, and thus would be answerable to Parliament through the government and through a government minister. While the Commissioner would have been provided with opportunities to conduct investigations, there were a number of limitations on the scope of such investigations. One limitation was organizational - while the Bill would have created a Commissioner, it did not create a Commission. Instead, the Minister responsible was charged with providing staff to the Commissioner, and in principle such staffing could be subject to variation over time. In short, the staffing function was not under the control of the Commissioner. Furthermore, the Commissioner was precluded from conducting investigations that strayed outside the public sector, and in the event of parallel investigations undertaken, for example by a peace officer or through the office of the Attorney General, limitations were placed on the information that the Commissioner could provide to such parallel investigators.

Criticism of Bill C-25
In the course of its consideration of Bill C-25, the Parliamentary Committee on Government Operations invited a number of witnesses to comment on the proposed legislation. Of particular relevance were the comments provided by Nycole Turmel, president of the Public Service Alliance of Canada (PSAC), a union whose 155,000 members would be subject to the Bill. PSAC opposed the passage of the legislation, on the basis of three perceived shortcomings. First, the disclosure provisions of Bill C-25
represent a continuation of the provisions of the Internal Disclosure Policy, whereby in most instances disclosure must first be made to an official in the employee’s department. Second, effective whistleblower protection, according to PSAC, must be premised on a perception that the individual or agency to whom one is disclosing wrongdoing is an independent and impartial authority. To the extent that the authority is within the employee’s department, the presumption of independence and impartiality is not likely to be met. Furthermore, the designation of the Public Sector Integrity Commissioner as an appointee of the government, and accountable to and through a Minister, also undermines the independence of the office. Third, the Bill provides protection for whistleblowers only when the disclosure is not “frivolous, vexatious or in bad faith,” and only when the disclosure was made in accordance with the principles of the Bill (i.e., mainly in the first instance through the employee’s department). Subjecting potential whistleblowers to disciplinary action, including possibly termination of employment, based on these provisions would result in a further chill to whistleblowing, according to the PSAC submission.

Bill C-13, which came into force on September 15, 2005, contained amendments to the Criminal Code which provide a measure of legal protection to whistleblowers. Although the amendments were intended as a response to Enron and corporate fraud, the whistleblower protection section was drafted broadly and is not limited to particular kinds of misconduct.

Section 425.1 of the Criminal Code, which applies to all employers in Canada, makes it an offence to engage in retaliatory action against an employee in order to prevent the employee from contacting authorities about a potential contravention of a law or to retaliate against the employee for doing so. Of course in a prosecution under the Criminal Code the burden is proof beyond a reasonable doubt, making successful prosecutions difficult. And the decision whether to take proceedings is that of the Crown, and is outside the control of the victim of the retaliation.

The federal government’s latest attempt to provide whistleblower protection through legislation is through Bill C-11, the Public Servants Disclosure Protection Act, introduced in Parliament on October 8, 2004. In most respects, Bill C-11 carries forward the
provisions from Bill C-25 on such matters as mandating the establishment of a code of conduct (i.e., fostering a culture of ‘rightdoing’), the definition of wrongdoing, and the establishment of internal disclosure procedures within each department. The main change introduced through Bill C-11 is in the oversight agency. Whereas Bill C-25 would have created a Public Sector Integrity Commissioner who would report to the Minister responsible to the Treasury Board, Bill C-11 vests oversight and reporting in the President of the Public Service Commission. In doing so, and in providing that the President of the Public Service Commission reports to Parliament through a Minister, Bill C-11 continues to limit the independence of the agency overseeing disclosures of wrongdoing. In regard to urgent or important matters, section 39.4 of the Bill authorizes the President of the Public Service Commission to make a special report directly to Parliament.

It is too early to tell whether these special reporting provisions will be sufficient to persuade potential whistleblowers of the independence of the oversight agency should Bill C-11 become law in its present form. There is reason to suspect, however, that the general reporting provisions contained in Bill C-11 will continue to raise concerns about the independence of the reporting agency, which of course is the chief concern with the current provisions of the IDP raised by Dr. Keyserlingk. For example, Australia uses the Public Service Commissioner model as the oversight agency for wrongdoing in its public service. A 2002 report in that country called for transferring this authority to an Ombudsman, and Officer of Parliament, to avoid reporting to a government Minister.33 As well, in 2000 the Public Service Alliance of Canada told the Senate Finance Committee that the Public Service Commission would not be an appropriate body to oversee whistleblower protection, expressing concern that the Commission is too closely attuned to government.34

Notwithstanding these reservations, the climate appears right at the federal level to introduce whistleblower protection through legislation. Should Bill C-11 become law, whistleblower protection for federal public sector employees will have the kind of legislative foundation increasingly common among advanced democracies.

33 Thomas, “Debating a Whistleblower Protection Act,” p. 31.
34 Ibid., p. 35.
4. Canadian whistleblower protection in comparative perspective

A number of previous studies have provided a comparison of whistleblower protection in Australia, the UK, and the United States, and this section draws on these studies in placing the Canadian federal whistleblower regime in comparative perspective. The UK and Australian cases are of interest because they share with Canada the Westminster-style parliamentary system, and Australia further shares a federal system of government. The United States provides an interesting comparison for two reasons - whistleblower protection is based on a model quite different from that in Australia and the UK, and also because of recent changes to whistleblower protections that have had a significant impact in taking such protections beyond the realm of the public sector, and requiring protections in the private sector as well.

The Australian Context

Australians were among the first to provide for whistleblower protection through legislation, and this change was instigated at the state rather than national level, in the State of Queensland. Groeneweg suggests that the Queensland government enacted this legislation in response to widespread instances of corruption in the public service in the 1980s and 1990s. The so-called “demonstration effect” has led the Australian federal government, both territories and all of the state governments to adopt whistleblower protection for employees in the public sector.

The Whistleblowers Protection Act 1994 for the State of Queensland illustrates the breadth of coverage that can be provided in such legislation. Protection is extended to those who disclose three classes of activities - unlawful, negligent or improper conduct affecting the public sector; danger to public health or safety; and danger to the environment. The class of subjects dealing with unlawful, negligent or improper conduct affecting the public sector; danger to public health or safety; and danger to the environment. The class of subjects dealing with unlawful, negligent or improper conduct is further elaborated in the Act, and includes such actions as “official misconduct,” maladministration, and negligent or improper management involving a substantial waste of public funds, among others. Further, the Act is broadly inclusive by enabling disclosures by anyone employed in a public sector entity, and also provides for disclosure by non-employees in the case of dangers to persons with disabilities, substantial and specific dangers to the environment, and significantly, reprisals taken against anyone for making a public interest disclosure.

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The disclosure provisions of the Queensland legislation provide that a disclosure must be made to “an appropriate entity.” The person deemed an appropriate entity appears to vary according to the circumstances of perceived wrongdoing. It is expected that disclosure will be made to an entity that has the authority to investigate and/or redress the perceived wrongdoing. In most instances, this would appear to be the head of the department in which the perceived wrongdoing occurred, one’s direct supervisor, or a departmental officer charged with accepting disclosures. Thus, as is the case with the current policy at the federal level in Canada, disclosure primarily takes place within the department of the whistleblower’s employ, and thereby confronts the challenge posed by the clash of values between departmental loyalty and free expression and the public interest.

The UK government created a legislative foundation for whistleblower protection through the passage in 1999 of the Public Interest Disclosure Act (P.I.D.A.). The Act works in conjunction with the Civil Service Code, which provides mechanisms for the disclosure of wrongdoing, to define the whistleblower protection approach in the UK public service. The provisions of P.I.D.A. however, extend beyond the public sector and provide for whistleblower protection in both the public and the private sectors.

Like the Canadian situation, disclosure of wrongdoing in the UK public service must in the first instance occur within the department where the wrongdoing is alleged to have occurred or is about to occur. The legislation also provides for an Office of Civil Service Commissioners, but this office is best regarded as a supplementary mechanism once departmental procedures have been exhausted. The conditions that must be met to justify a disclosure outside the department are similar to those used in Canada - that the matter previously was raised within the department and no satisfactory action was taken, or there is a reasonable belief that the whistleblower would be penalized or evidence concealed or destroyed as a result of a departmental disclosure. Thus, the UK insistence on departmental sovereignty in reporting on and responding to wrongdoing is similar to what we have seen in the Canadian and Queensland cases.

The UK model responds somewhat differently to instances of reprisal. In Queensland, a reprisal is regarded as a tort (that is, a breach of duty for which damages can be obtained in a civil
The recourse for a reprisal therefore is to bring a suit for damages. However, launching a law suit can be both time consuming and expensive. In the event that a whistleblower has suffered from a reprisal resulting from his or her whistleblowing in the UK, the recourse is to submit a complaint to an industrial tribunal, which has the authority to award compensation or make a re-employment order. Such a procedure likely would be perceived by most whistleblowers as lowering the threshold in seeking redress from reprisals.

In the United States, adoption of the Whistleblower Protection Act (WPA) in 1989 provided relatively early protection for whistleblowers. As Groeneweg notes, the WPA provides protection against retaliation for employees who disclose wrongdoing related to a violation of any law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to public health and safety. The American whistleblower regime provides for disclosure to a variety of entities, including the Office of the Special Counsel (OSC), the Inspector General of an agency, another employee in the department designated to receive such disclosures or any other individual or organization such as a congressional committee or the media, provided the disclosure is not prohibited by law. In the event that a whistleblower believes that he or she has suffered retaliation resulting from the activity, a complaint may be lodged with either of two agencies of the executive - the Office of the Special Counsel, or the Merit Systems Protection Board.

Despite these protections, many observers have found fault with the system in place to protect whistleblowers in the United States. One perceived shortcoming is the lack of investigative powers of the Office of the Special Counsel. A second is that during a number of periods, the OSC was perceived as lacking the leadership to effectively promote or guarantee the protection of whistleblowers. In the summer of 2004, the Federal Employee Protection of Disclosures Act was introduced in the U.S. Senate. This Act would have the effect of broadening the class of disclosures that would benefit from protection, and also provide greater authority to the OSC. At this time, the Bill has not passed Congress and hence has not become part of the US Code.

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43 Ibid.
44 Groeneweg, p. 9. See also United States Code, Title 5, Part III, Subpart A, Chapter 23, Section 2302, on Prohibited Personnel Practices.
45 Groeneweg, p. 9.
A significant development with respect to whistleblower protection occurred with the passage in 2002 of the Sarbanes-Oxley Act.\(^\text{46}\) In response to concerns about corrupt and illegal practices in corporations, particularly in light of the scandals involving Enron and WorldCom corporations, the Sarbanes-Oxley Act mandated a number of procedures and provided protections for employees who blow the whistle on wrongdoing within their companies. The Act requires that all publicly traded corporations establish audit committees, a part of whose function is to establish procedures for accepting employee complaints, including anonymous complaints. Retaliation against a whistleblower who provides truthful information to a law enforcement officer about illegal activity is defined as a criminal activity, and employees who successfully prevail in a claim of retaliation may receive a remedy that includes reinstatement, back pay, attorney fees and costs and “special damages.”

The result of the passage of the Sarbanes-Oxley Act is that corporations are now providing procedures for the reporting of wrongdoing within their organizations. Since a large number of companies operating in Canada are part of larger US-based multinational organizations, a number of Canadian companies also are introducing some form of whistleblower protection. In

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**US State Whistleblower Protection Laws**

There are dozens of federal laws protecting whistleblowers or otherwise designed to protect workers from retaliation or other illegal treatment. There are also many similar state and local laws. …

Some states have explicit statutory protections for whistleblowers. These include: California, Connecticut, Delaware, Florida, Hawaii, Louisiana, Maine, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, and Washington.

There are also state laws that offer special protections just for their own state or local government employees: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

- From WhistleblowerLaws.com\(^1\)

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practice, many of the provisions of corporate whistleblower protection suffer from many of the same difficulties as protections in the public sector, particularly with respect to lack of independence between the department in which the activity is alleged to have occurred and the agency charged with investigating that activity. Whether such protections will have the effect of altering the corporate culture of company and departmental loyalty (particularly among employees seeking career advancement into the senior ranks) in favour of a culture of free expression and pursuit of the public (and shareholder) good is uncertain.

5. Whistleblower protection in the Canadian Provinces

Despite the recent trend in many jurisdictions to entrench general whistleblower protection in legislation, for the most part this trend has not been followed at the provincial level in Canada. As noted above, this does not mean that employees in the various provinces have no whistleblower protection; rather it means that the protections that do exist are based on a variety of mechanisms such as the common law, provisions within some collective agreements, a number of federal laws such as the Canadian Environmental Protection Act, the Canada Labour Code, and the Canadian Human Rights Act, the freedom of expression provisions of the Charter of Rights and Freedoms, and particular provincial statutes or codes. The result is a patchwork of protections that varies from one province to another and which makes it difficult for potential whistleblowers to be aware of the protections that may exist, to understand the reporting mechanisms, and to have assurance that they will not place their job at risk by making a disclosure in the public interest.

The most general whistleblower protection legislation among the Canadian provinces is provided in New Brunswick in the Employment Standards Act. Section 28 of the Act prohibits penalizing any employees, in either the public or private sector, as a result of the employee making a complaint or giving evidence against the employer with respect to matters covered by the Act, or disclosing information about the employer breaking a provincial or federal law. Thus, while the provisions for whistleblower protection in New Brunswick are inclusive in the classes of employees covered, they are severely limited in the range of activities about which one may disclose information and receive protection. Rather than including a broad range of activities as in

47 Stephen Kohn, “The Sarbanes-Oxley Act (“SOX”): Legal Protections for Corporate Whistleblowers,”
much whistleblower protection legislation, such as misuse of public funds, gross mismanagement, or a serious breach of a code of conduct, the New Brunswick protections are limited to instances in which employers are breaking the law. It is for this reason that some analysts dismiss the New Brunswick model as offering little additional protection for whistleblowers.\textsuperscript{48}

Whistleblower legislation in Ontario differs from the New Brunswick model in several respects. The NDP government of Bob Rae passed legislation in 1993 that included whistleblower protection as part 4 of the Ontario Public Service Act. Following the American model, part 4 of the Act established an independent Counsel, reporting directly to the legislature, to oversee the reporting and investigative functions of the whistleblower protections. However, while this Act was passed by the legislature, the Rae government did not have it proclaimed during its mandate, and it has not been proclaimed subsequently. Therefore, this general whistleblower protection remains not in force in Ontario.

Ontario legislation does provide some selective protection for those reporting wrongdoing on environmental matters. The Environmental Protection Act,\textsuperscript{49} and the Environmental Bill of Rights\textsuperscript{50} provide protections for employees and also for non-employees to lodge complaints against employers who have taken reprisals against employees for a variety of activities, including disclosing wrongdoing to an appropriate authority. Similar protections exist in the Yukon\textsuperscript{51} and Northwest Territories.\textsuperscript{52} Whistleblower protections included in particular statutes, such as those relating to the environmental, are both important and limited. They are important in that the preservation of environmental health is viewed as a public good that supercedes an employee’s duty of fidelity to an employer whose acts damage the health of the environment. However, such provisions offer only limited protections for whistleblowers because there is a much narrower range of activities that fall under their purview. Items such as gross mismanagement, or improper use of public funds, are outside the scope of such protections.

\textsuperscript{48} New Brunswick, Employment Standards Act, 1982, sec. 28.
\textsuperscript{50} R.S.O 1990, c. E.19.
\textsuperscript{51} S.O. 1993, c. 28.
\textsuperscript{52} Yukon Environment Act, R.S.Y. 2002, c. 79.
6. Whistleblower protection in the Alberta public sector

As noted above, some provinces have added to the federal protections of whistleblowers. For example, New Brunswick has created limited protections for all employees, and Ontario, BC and two of the Territories have created additional protections in relation to environmental matters. The Alberta government, in contrast, has been slow to follow the emerging international and national trend of providing protection for those who disclose wrongdoing.

This lack of whistleblower protection at the provincial level in Alberta is surprising considering that the focus of Alberta’s contribution to political debate in Canada over the past generation has been on the issues of increased accountability and the reform of existing mechanisms of political representation. To be sure, much of this debate has centred on perceived shortcomings of the federal level of government, and on perceptions of the lack of effective political representation of Alberta specifically, and of the West in general, in federal institutions of government. Criticism has centred, for example, on the unrepresentativeness of the federal party system and the electoral system, on the lack of effective representation through the Canadian Senate, and on the inability of a federal government dominated by elected members from other regions to “understand” the West. Similarly, criticism has been leveled at the size and expenditures of the federal government, at perceived waste and mismanagement, and at a lack of accountability. Such sentiments are consistent with much of the philosophy underlying whistleblower protection.

The focus on governmental openness and accountability that seems to characterize so much of Alberta-based assessments of the government in Ottawa, strangely is largely absent from discussions about the provincial level of government. As one illustration, while the governments of half of the provinces in Canada, representing more than three-quarters of the country’s population, are currently engaged in discussions about reforming the electoral system (an issue of representation and accountability), no such discussion has been initiated by Alberta’s provincial government. Rather than sponsoring or encouraging discussions of government accountability, the Klein government has been focused almost exclusively on the fiscal issue of debt elimination and on changes to the publicly funded health care system. Surprisingly, while many Albertans evidently support the claims of a succession of federal parties with disproportionate strength in the West, such as Reform,
the Canadian Alliance, and most recently the Conservative Party of Canada, that greater representational effectiveness and accountability are needed in Ottawa, those same issues have not been brought to provincial politics with the same veracity. The result is remarkably little action on matters of accountability in Alberta provincial politics, and almost nothing by way of the protection of whistleblowers in the provincial public sector.

This is not to argue that the issue of whistleblower protection has never been raised at the provincial level. Rather, it is to suggest that the Alberta government has not taken advantage of the opportunity to improve governmental accountability through whistleblower protection. For example, the opposition Liberals introduced whistleblower protection legislation on a number of occasions, most recently in 1998 when Edmonton Gold-Bar MLA Hugh Macdonald introduced the Whistleblower Protection Act as Bill 207. According to the sponsor, the bill would,

“enshrine legal protection for any government employee or any employee of a company contracting with the government who alerts the provincial Ombudsman to dangerous or illegal activities occurring in government. The bill sets out a definite process for the Ombudsman to investigate an employee’s complaint and, if necessary, make the inquiry report public. The types of wrongdoings targeted by the bill include acts or omissions by government departments, agencies or contractors that constitute a contravention of Alberta’s laws and regulations...The identity of any employee is protected from disclosure during the Ombudsman’s investigation as well as in the final report. The Bill would further protect employees by prohibiting adverse employment action against any employee who made a complaint in good faith.”

The Alberta Hansard shows that during the second reading of this bill, the governing Conservative party went on record as being in favour of whistleblower protection in principle, but opposed to Bill 207. On March 4, 1998, during the bill’s debate in the legislature, the Hon. Jon Havelock, the then-Minister of Justice and Attorney General of Alberta, commented:

“At the outset, I would like to emphasize that I support the concept of whistle-blower protection, though not in the format of this proposed legislation. That seemingly contradictory statement is because the bill raises a number of concerns, the most fundamental being that it creates a shift in the roles played by the Legislative Assembly, the administration and unelected

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53 Northwest Territories Environmental Rights Act, R.S.N.W.T. 1988, c.83 (Supp.).
officials such as the Ombudsman and the Labour relations board. Essentially, such a shift will take authority from elected representatives and the administration and vest it in appointed officials. 54

The government went on to defeat the legislation by a vote of 48 to 13. The Minister’s comments that the government was in support of whistleblower protection in principle would lead one to expect that the government would either create a policy enshrining whistleblower protections, or introduce a bill to advance the principle of whistleblower protection while addressing the perceived shortcomings of the defeated bill. That the government has failed to do so, either in the policy or legislative environments, in the six years that have lapsed since the defeat of Bill 207 seems inconsistent with the government’s stated support for whistleblower protection.

The absence of specific legislative or policy protection for whistleblowers in Alberta suggests that a potential whistleblower would undertake considerable risk in reporting on wrongdoing. For example, in the Official Oath administered to Alberta public servants, the employee undertakes not “without due authorization, (to) disclose or make known any matter or thing which comes to my knowledge by reasons of my employment in the public service.” 55 A number of jurisdictions have adopted the practice championed by the Kernaghan Report of providing a code of conduct, or a statement of values, for employment in the public sector, and have inserted whistleblower protections within the code or statement of values. The government of Alberta has not taken this approach, and instead the Code of Conduct and Ethics for the Public Service of Alberta 56 reinforces constraints on the disclosure of information, rather than encouraging employees to disclose wrongdoing. For example, section 16 (1) of the Code provides that, “Employees who speak or write publicly shall ensure that they do not release information in contravention of the Oath of Office [quoted above].” Section 21 (1) of the Code specifies that sanctions for disclosing information include “disciplinary action, up to and including dismissal.”

Furthermore, other Acts regulating employment in the public sector have not been used to provide specific protection for whistleblowers in the public sector in Alberta, as they have in some other jurisdictions. For example, although the Public Service Employee Relations Act provides some protections for employees
to lodge complaints with the Labour Relations Board, the Act does not provide specific provisions for disclosure of such wrongdoing as gross mismanagement or the misuse of public funds. Nor does the Public Service Act provide such protections. Nor are heads of departments or agencies required to appoint an officer to accept such disclosures. Nor has the Alberta government established a separate and independent office or officer to advise potential whistleblowers, to investigate wrongdoing, or to report to the legislature on the disposition of allegations of wrongdoing. In short, in the potential tension between the duty of fidelity to the employer versus freedom of expression and the public interest in disclosing wrongdoing, the pendulum in Alberta is pointed entirely at the need to remain loyal to the government and the department. In this context, one is left to wonder what meaning the Minister of Justice intended by the statement that the government supports the principle of whistleblower protection.

As noted above, the absence of explicit whistleblower protection legislation does not imply that provincial public sector employees have no protections from reprisals in the event they make disclosures of alleged wrongdoing. Some protections may be included within provisions of collective agreements between the public sector union bargaining units and government employers. For example, article 29.01 of the collective agreement between the Alberta Union of Provincial Employees and the Alberta government provides that, “a complaint alleging sexual harassment, unjust treatment, discrimination, or alleging unfair working conditions, may be presented as a grievance.” Although this clause does not explicitly address itself to whistleblowing per se, it does cover a narrow range of wrongdoings and provides a limited process for blowing the whistle on them. And if whistleblowing on other topics resulted in a reprisal that takes the form of sexual harassment, unjust treatment, discrimination or unfair working conditions, then the whistleblower may be afforded protection from such reprisal.

The past decade has seen a clear trend towards the protection of whistleblowers through legislation. Notwithstanding this development, there is considerable criticism over the effectiveness of existing legislation to provide the kind of protection needed to encourage employees to disclose instances of wrongdoing, or potential wrongdoing, in the workplace. A vast array of whistleblower advocacy organizations has arisen, and they are...
almost universally critical of the extent to which existing laws effectively protect whistleblowers. That said, most analyses view such legislation as an important first step in providing protections for those considering disclosing wrongdoing. Proponents of such laws often identify the symbolic value that the passage of a whistleblower law provides to those in the public sector. Such laws provide an opportunity for government to affirm its commitment to eradicate wrongdoing, or as proposed by the Kernaghan Report, to celebrate its commitment to the values of “rightdoing.” Critics argue, however, that there is a risk that such legislation in practice may be little more than window-dressing, providing an opportunity for government to claim a commitment to efficient, effective and accountable government, while actually containing provisions that work to discourage employees from disclosing unacceptable practices.

Whistleblowing legislation is not a panacea, and as with most legislation, the devil is in the details. Who is covered by such legislation, and what types of activities are defined as unacceptable practices? To whom does one disclose the practice, and are protections provided in the event that the disclosure is made to the “wrong” official? What type of redress does an employee receive in the event of being subject to a reprisal? These are all matters on which existing legislation varies. Furthermore, what is the measure of success of a whistleblower law - one in which many disclosures of wrongdoing are made, or one in which few are made? These are not matters easily resolved, nor are they issues about which there exists universal agreement.

Fortunately, however, there are many examples of whistleblower protection regimes, with a variety of designs. There are critiques of those regimes that compare the different design features. Alberta has an abundance of resources to draw upon in designing a whistleblower protection statute. These issues, while complex and worthy of discussion, are not incapable of resolution. And introducing a bill in the legislature will facilitate a public discussion not only of the detailed design questions, but also of the values underlying whistleblower protection. This process itself will provide an educational opportunity for a discussion of values and ethics in the public sector, and in society generally.

The absence of whistleblower legislation in Alberta does not mean that these issues will go away. What it means is that employees are less likely to disclose wrongdoing. To disclose
wrongdoing in the absence of a clear policy or legislative regime for whistleblower protection simply subjects the potential whistleblower to unacceptable risks. It is useful to be reminded that whistleblowing itself is viewed by some as an inherently objectionable activity. Reporting on one’s friends, co-workers, supervisors, or business associates places one inevitably at risk of suffering some form of social approbation. While the cultural norms about the value of whistleblowing may be changing, they certainly have not gone to the point of universally celebrating such activity as noble or even good. Although it may be desirable to contemplate the development of a culture of “rightdoing,” we continue to live in a world in which reporting on wrongdoing is often frowned upon. In the absence of an effective whistleblower regime, however, one adds to the “social cost” of whistleblowing the potential that there may also be severe employment and economic costs. Thus, most analysts would view some type of whistleblower protection regime, whether implemented through departmental policy or through legislation, as a necessary first step to facilitating disclosures in the public interest.

Although the government is on record as endorsing the principle of whistleblower protection, it has failed to bring forth any such legislation. The protections that are afforded to potential whistleblowers in the provincial public sector through other mechanisms in Alberta are weak to non-existent. In such circumstances, disclosing wrongdoing in the public sector in Alberta places the employee at significant risk of having their career stalled, being demoted, or losing their job altogether. This does not inspire confidence in the integrity of the public sector, ensure openness and accountability of the government, or inspire public mindedness among the public service. While this may minimize possible embarrassments and maximize governmental control of the public sector, it is out of step with changes in the principles of public sector management in other contemporary democracies.

The time is right for the Alberta government to take the lead among Canadian provinces in providing whistleblower protection legislation for all provincial government employees. Such legislation would be highly consistent with the province’s culture of political and bureaucratic accountability. It would reflect a view that values honesty and integrity in government, freedom of expression, and public service in the public interest. Taking the lead among Canadian provinces in adopting comprehensive
whistleblower legislation for all provincial public servants would enable Albertans to benefit from the knowledge gained by comparing the experiences of the many jurisdictions outside Canada that already have adopted some form of whistleblower protection legislation. Let us begin Alberta’s second century in Confederation by recognizing the importance of our provincial public sector employees, valuing their contribution to the development of this province, and providing them with the protections they deserve in reporting wrongdoing by passing whistleblower protection legislation.