



SHOOTING THE MESSENGER
DO NOT CROSS



The Need for Effective Whistleblower Protection in Alberta

Parkland Institute • May 2013



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Executive Summary

In late 2012, Alison Redford's Progressive Conservative government passed the *Public Interest Disclosure (Whistleblower Protection) Act*. Presented as making good on a longstanding promise, the government argued this legislation offered meaningful safeguards to Alberta whistleblowers.

Alberta's law does not protect those who blow the whistle on incompetence or corruption.

Unfortunately, this claim does not stand up to scrutiny. The Alberta law does not protect those who blow the whistle on incompetence or corruption, nor does it ensure that such allegations will be properly investigated. As various scandals, such those related to food recalls at the XL Foods meat-packing plant in Brooks, Alberta, and safety along TransCanada's pipeline infrastructure have demonstrated, Albertans are vulnerable to government and corporate wrongdoing that can affect their health, safety, and financial security in many ways. Alberta's new law does nothing to change this.

Protecting whistleblowers – honest employees who speak up about suspected misconduct – has been shown to be a powerful tool for combating malpractice and corruption. In the absence of effective whistleblower protection laws, Albertans run the risk that wrongdoing will go unnoticed, with potential consequences including the misuse of funds, serious physical harms or even loss of life related to tainted food or water, and potentially irreversible damage to our natural environment. Based on in-depth knowledge of whistleblowing within Canada and extensive international research on whistleblower protection, this report assesses the current situation in Alberta and makes evidence-based recommendations on how to achieve much-needed improvements.

There is now a strong, well-documented international consensus regarding best practices in relation to whistleblower protection. Yet Canada is a laggard in this field, with both federal and provincial governments making promises, stalling for years, and then introducing flawed and ineffective legislation. Other jurisdictions, notably the USA, UK, and Australia, are far ahead of us – by decades in some cases.

This report demonstrates the need for effective whistleblower protection by documenting the devastating consequences of blowing the whistle, including employer reprisals, media scrutiny, and psychological trauma. Even if a whistleblower succeeds in exposing wrongdoing, the damage to professional and personal life is often substantial. Proponents of effective whistleblower protection laws often find themselves facing essentially the same barriers that individual whistleblowers face: negative portrayals of whistleblowers; reflexive hostility towards the idea of whistleblower protection; and entrenched or systemic wrongdoing in high places.

The report also examines the Alberta situation, detailing the flaws in the current *Public Interest Disclosure (Whistleblower Protection) Act*. It highlights how the dangers inherent in such inadequate legislation are further aggravated by some of the conditions that prevail in Alberta, including:

- An energy industry that has enormous influence within the province and a questionable track record on public safety and environmental protection.
- A government that is committed to further privatization, even though such arrangements have often led in the past to substandard work at inflated prices.
- The widespread use of temporary foreign workers, who may become trapped in work environments that are dangerous both to them and to the public.
- A lack of transparency regarding public expenditures, aggravated by the increasing flow of public money to private industry.

A review of jurisdictions that have implemented effective laws suggests that this can only happen when several factors come together, the most important being major scandals or preventable disasters that generate sustained media attention. However, as Alberta's own history demonstrates, scandals and disasters may not necessarily lead to meaningful reforms. There is also a need for advance preparations to seize these opportunities when they arise. This groundwork is typically carried out by public interest organizations that pave the way by, for example, conducting research, educating the media and the public, and developing concrete proposals – thus providing tools that can help unite coalitions of interested parties around specific goals.

Our recommendations follow directly from our analysis of other countries' experience, and the current situation in Alberta. Since the formal legislative process has thus far failed to translate public demand into meaningful protection for whistleblowers, we recommend that concerned Albertans should:

1. Launch an alternative process with the aim of replacing the current law.
2. Engage the various stakeholders, perhaps in a coalition, with the aim of educating the participants, sharing perspectives, and building an informed consensus.
3. Initiate the process by holding a conference involving representatives of all stakeholders to find common ground, agree on objectives, and develop a collective commitment to proceed.

There are many possible stakeholders who should contribute to this process – including academics, unions and professional associations, business leaders, and politicians – once they understand how protecting whistleblowers serves their self interest. Albertans deserve no less from all those who claim to serve the citizens of this province.

Introduction

This paper examines the role of whistleblowing as a means of protecting the public interest. It reviews what has been learned about whistleblowing in other jurisdictions, considers the relevance of these lessons for Alberta, and concludes with policy recommendations.

The trigger for commissioning this paper was the 2012 provincial election, which prompted renewed discussion of whistleblowing and promises from politicians to protect whistleblowers. The paper summarizes what has happened since, including the recent passage of government legislation that is essentially worthless, leaving the public unprotected.

Whistleblowers are not acting to protect their own interests, but to protect the public.

The author has drawn upon the experience accumulated over the past 15 years by Federal Accountability Initiative for Reform (FAIR), a Canadian public interest charity dedicated to protecting whistleblowers, as well as the knowledge and experience of whistleblowing advocates, lawyers, and academics around the world, some of whom have been working in this specialized field for more than three decades.

What is whistleblowing and why is it important?

Whistleblowers are employees who report suspected wrongdoing or problems that they believe may cause harm to others or to the public interest. As truth-tellers, they are acting not to protect their own interests, but to protect us – the public. Usually there is no personal benefit for them in doing this (they could simply keep quiet and pretend that there is nothing amiss), but they feel compelled by their conscience or professional ethics to speak out. Yet all too often, in doing so, they put themselves at risk of reprisals.

Any of us could find ourselves in the position of having to make this hard choice. We may not know how we would react in such a situation, but fortunately there are many people who choose to ‘do the right thing’ despite daunting threats and personal risks. These courageous people are indispensable, helping to keep us safe in a world where incompetence, misconduct, and outright criminality can harm ordinary citizens in countless ways.

Sadly, whistleblowers frequently suffer reprisals designed to crush and silence them, and the problems that they are trying to expose are often covered up and continue unchecked. Protecting truth-tellers from such reprisals (and ensuring that their concerns are properly investigated) is a very important strategy for curbing malpractice and protecting the public interest.

Whistleblower protection can also be thought of as ‘witness protection for those reporting white collar misconduct’. No one doubts that witness protection programs are an important tool for law enforcement in the battle against organized

Lawmakers in any jurisdiction are now equipped to write effective whistleblowing laws.

crime, where witnesses can meet violent ends. But those responsible for ‘white collar’ misconduct within governments and corporations are just as skilled at silencing witnesses – usually by methods that are more subtle, but still devastating.

Origins of whistleblower protection

Whistleblower protection was pioneered in the USA,¹ mainly in the 1960s and 1970s. During the 1990s, other countries began to follow suit, notably Australia and the UK. Today these three jurisdictions – the USA, UK, and Australia – are the leaders in this field because they have passed the most advanced laws, accumulated the most experience, conducted the most in-depth research, and generally achieved the greatest success. All have seen the benefits when whistleblowers are successful in protecting the public interest, and in these countries there is strong public demand, and the political will to do better: all are now engaged in efforts to further improve their approach to whistleblowing.

A growing body of excellent research has been carried out to study existing systems and to clarify what works and what does not. As a result of such work, best practices are now quite well defined: the knowledge is now readily available for lawmakers in any jurisdiction to write effective whistleblowing laws.

Today the value of protecting truth-tellers is accepted in many other developed countries (though not all), and in addition to local initiatives in several countries there are also intergovernmental initiatives to encourage more countries to adopt anti-corruption laws that include whistleblower protection.^{2,3,4}

The threat of corruption and mismanagement

Whistleblowing is directed at combating not just corruption, but other threats to the public interest, e.g. unforeseen systemic problems, waste, mismanagement, abuse of power, or public health and safety hazards. But corruption remains a serious and ever-present menace to society – internationally, in Canada, and within Alberta.

There is much evidence that the well-being of ordinary citizens is threatened today by unethical acts or outright illegality by corporations, governments, and organized crime – and the scale and international reach of some of these activities is remarkable.

For example, extremely wealthy individuals have funnelled an estimated \$21 trillion into secret offshore accounts – an amount equivalent to the combined Gross Domestic Product of the USA and Japan. The primary purpose of these accounts is to evade taxes, and this financial ‘black hole’ is depriving governments each year of more than \$100 billion in revenues needed to provide essential services and infrastructure.^{5,6}

Organized crime has globalized, diversified, and embraced the latest technology, and is now a thriving international industry with a turnover estimated at \$870 billion/year.⁷ Its traditional staples remain drugs, prostitution, human trafficking, and arms smuggling – human misery traded for profit – but it is increasingly involved in white collar crime.

1. “A Timeline of Whistleblowers,” Government Accountability Project, accessed April 24, 2013, <http://www.whistleblower.org/about/a-timeline-of-whistleblowers>.
2. United Nations, United Nations Convention Against Corruption (New York, 2004), http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.
3. Organization of American States, Draft Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses (n.d.), http://www.oas.org/juridico/english/draft_model_reporting.pdf.
4. “Resolution 1729 (2010),” Council of Europe Parliamentary Assembly, accessed April 24, 2013, <http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta10/eres1729.htm>.
5. “Estimating the Price of Offshore,” Tax Justice Network, accessed April 24, 2013, http://www.taxjustice.net/cms/front_content.php?idcat=148.
6. “Trillions Stashed in Offshore Tax Havens,” Global Research, accessed April 24, 2013, <http://www.globalresearch.ca/trillions-stashed-in-offshore-tax-havens/32485>.
7. “Turnover of Global Organized Crime: \$870 Billion ... A Year,” Global Research, accessed April 24, 2013, <http://www.globalresearch.ca/turnover-of-global-organized-crime-870-billion-a-year/31995>.

In addition, many multinational industries are now dominated by corporations that seem to have embraced business practices that threaten the public interest and are certainly unethical, if not clearly illegal. Just two examples will suffice.

- The *financial industry* stands out as the architect of the financial melt-down in 2008, yet despite ample evidence of entrenched illegal behaviour by many, if not most, of the major institutions involved, not a single senior executive has been convicted of any crime. Where penalties have been levied, these are generally paid by the corporation (i.e. by the shareholders) rather than by the individuals who orchestrated the questionable schemes and profited by them. The failure of the authorities to hold individuals accountable stands in stark contrast to the previous (but much smaller) financial meltdown – the 1980s’ Savings and Loan scandal – following which some 1,072 officials and 2,558 bankers went to jail.^{8, 9}
- The *pharmaceutical industry* stands out as another immensely wealthy and powerful oligopoly. Many of its largest players are repeat felons, having collectively repaid \$20 billion between 1991 and 2010 to resolve various civil and criminal allegations. The pace of such settlements has spiked to more than \$10 billion in less than two years (between November 2010 and July 2012) for frauds committed against the US government. Regrettably, some corporations apparently treat such penalties and civil lawsuits as a cost of doing business – understandably, since even these massive fines are miniscule compared with the profits gained.

Within Canada, the Charboneau Inquiry in Quebec has exposed intimate, highly-organized, and long-standing collusion between crime bosses, politicians and their parties, company bosses bidding for public contracts, and bureaucrats – all designed to defraud the taxpayer by delivering substandard work at inflated prices. Experts say that similar arrangements exist in many other provinces.

Alberta has experienced its own share of controversies that suggest some combination of corruption, mismanagement, or incompetence. For example:

- **Electricity transmission:** A \$16 billion project to massively expand Alberta’s electricity transmission system without any needs assessment has been criticized as a scheme to enrich private companies at public expense.
- **XL Foods recall:** The largest food recall in Canadian history closed the Brooks plant for weeks and damaged the Alberta beef industry’s international reputation. In spite of long-standing concerns regarding unsafe practices in the plant, these problems went unaddressed until tainted beef was detected at US customs.
- **TransCanada Pipelines:** Following allegations by a whistleblower, an audit by the National Energy Board confirmed widespread violations by TransCanada of the engineering codes that are supposed to ensure pipeline integrity and safety.
- **Red Deer River spill:** A pipeline owned by Plains Midstream Canada leaked an estimated 3,000 barrels of oil into the river, threatening the water supply of more than 100,000 Albertans.

8. Gillian Tett, “More prison sentences may renew financial credibility,” *Financial Times*, accessed April 24, 2013, More prison sentences may renew financial credibility.

9. William K. Black, *The Best Way To Rob A Bank Is To Own One: How Corporate Executives and Politicians Looted the S&L Industry* (Austin: University of Texas, 2005).

The single best method of detecting institutional wrongdoing is to listen to employees.

- **Failures in regulatory oversight:** Alberta has been described by Maclean's as the 'wild west' for small investors,¹⁰ due to repeated scams and business failures that have cost investors nearly \$2 billion. This problem is attributed to the failure of Alberta's regulators.

The importance of whistleblowing

Though there is no 'silver bullet' that can reverse the tide of unethical and illegal practices, there is a common enabling factor: all depend upon secrecy to provide immunity and 'cover' for the continuation of the wrongdoing. Yet, in all of these situations there are witnesses, sometimes many of them, who are in a position to unveil the truth – if they dare.

U.S. Supreme Court Justice Louis Brandeis stated long ago that "*Sunlight is the best disinfectant*", since even practices that are perfectly legal may be viewed by the public as reprehensible – or even criminal in nature – and are thus quickly ended once exposed to public view.

How best to discover such misconduct? Research consistently and overwhelmingly confirms that the single best method of detecting institutional wrongdoing is to listen to employees.

For example, the *Association of Certified Fraud Examiners (ACFE)* is a professional association for fraud examiners that, since 1996, has been publishing reports based upon case information provided by its members. ACFE's latest *Report To The Nations*¹¹ once again confirms that 'tips' remain by far the most productive means of exposing frauds, accounting for 43.3% of cases. The majority of these tips come from employees and anonymous sources.

The next most effective detection methods were 'internal audit' (24.4%), 'management review' (14.6%), and 'by accident' (7.0%). This survey is based on data compiled from 1,388 cases of occupational fraud that occurred in 94 countries during 2010 and 2011. The *PriceWaterhouseCoopers Global Economic Crime Surveys*¹² in 2007 and 2009 have reported very similar findings.

These and other studies demonstrate that employees can help combat misconduct, and that many have done so, yet others undoubtedly remain silent because of fear of reprisals. The key to unlocking this bountiful source of information is to create mechanisms for safe reporting. However this is not easy, and requires a well thought-out approach.

Who are whistleblowers: myths and reality

Persistent attacks on whistleblowers have created a negative stereotype that is contradicted by research and experience. For example:

- Whistleblowers are often portrayed as unreliable and disloyal. But research shows that they are more likely to be high performers with a stellar

10. Tamsin McMahon with Anthony A. Davis, "How Alberta Became a Wild West for Small Investors," Maclean's, December 2, 2012, accessed April 24, 2013, <http://www2.macleans.ca/2012/12/02/nearly-2-billion-lost/>.

11. "2012 Report To The Nations," Association of Certified Fraud Examiners, accessed April 24, 2013, <http://www.acfe.com/rtnn.aspx>.

12. PriceWaterhouseCoopers, "The Global Economic Crime Survey: Economic Crime in a Downturn," (November 2009). PriceWaterhouseCoopers, "Economic Crime: People, Culture and Controls (2007). <http://www.pwc.com/gx/en/economic-crime-survey/global-economic-crime-survey-archive.jhtml>.



The Whistleblower's Ordeal

FAIR's description of what happens when whistleblowing goes wrong

1. Awareness
2. The decision of conscience
3. Raising concerns internally
4. Facing initial reprisals
5. The decision to commit fully
6. Going public and the consequences
7. The war of attrition
8. The endgame

track record, motivated by loyalty to the organization and its mission: they want to shield it from harm by the actions of corrupt or incompetent individuals.

- Whistleblowers are often portrayed as busybodies, looking for trouble and poking their noses into others' business. Yet the reality is that in most cases, simply doing their job properly made them whistleblowers. For example, they may be auditors who uncovered fraudulent transactions, or quality control inspectors who discovered substandard work, or scientists whose research findings were inconsistent with a predetermined political agenda.
- Whistleblowers are often portrayed as mavericks who ignore procedure. Again, research contradicts this and shows that they almost always follow procedure meticulously, reporting their concerns up through their line of command. They do so not only to give the organization every opportunity to fix the problems, but to protect themselves from retaliatory charges of misconduct: frequently they are blowing the whistle on breaches of procedure that undermine professional standards.
- Whistleblowers are often portrayed as publicity seekers who rush off to the media at the first opportunity. Yet research consistently shows that only a tiny proportion (1-2%) ever go to the media at any stage, even as a last resort when everything else has failed.

The conclusion is that whistleblowers simply don't fit the negative stereotype: those who do fit the stereotype are rarely whistleblowers – and don't stand to gain from whistleblower protection laws.

Shooting the Messenger

FAIR has been providing support to whistleblowers since 1998, and through this work we have spoken to hundreds of individuals – more than 300 in the past six years alone – from all walks of life and from all parts of Canada. Most contact us only after the process has started to go wrong: they have tried to raise concerns and found that their employer did not welcome these messages.

What emerges from these conversations is a remarkably consistent pattern of events, which we have set out in two publications on our website: *The Whistleblower's Ordeal*;¹³ and *How Wrongdoers Operate*.¹⁴ Whistleblowers often tell us that these documents described *exactly* what happened to them, and predicted future events with telling precision.

The Whistleblower's Ordeal describes an eight-step process, starting with awareness that something is wrong that cannot be ignored, and efforts to have the wrongdoing addressed. These steps typically lead to an escalating battle in which the whistleblower persists in attempts to get the problem addressed and suffers more extreme and damaging reprisals. In Canada, it seems, the end result is usually a successful cover-up, leaving the public still at risk, and the truth-teller's life devastated.

13. "The Whistleblower's Ordeal," Federal Accountability Initiative for Reform, accessed April 24, 2013, http://fairwhistleblower.ca/wbers/wb_ordeal.html.

14. "How Wrongdoers Operate," Federal Accountability Initiative for Reform, accessed April 24, 2013, <http://fairwhistleblower.ca/content/how-wrongdoers-operate>.

The fallout from blowing the whistle can be a devastating, life-changing experience.



The Cover-up

“...institutions, like most humans, have a reflexive reaction to the exposure of internal corruption and wrongdoing: no matter how transparent the effort, their first response is to lie, conceal and cover up. Also like human beings, once an institution has embraced a particular lie in support of a particular coverup, it will forever proclaim its innocence.”

Ron Ridenhour, the legendary investigative reporter who as a young soldier exposed the My Lai Massacre in Vietnam

Not every whistleblower suffers reprisals. Research suggests that those who report minor misconduct in relatively healthy organizations often do so without any negative consequences – even though they may find the process intensely stressful due to uncertainty about the end result.

However, research also indicates that the more significant the wrongdoing, the more troubled the organization, and the more persistent the whistleblower in raising the issue to higher levels in the organization (after being rebuffed), the more likely that reprisals will occur – and when they do they can be devastating. Senior management whistleblowers often face particularly severe retaliation, since the misconduct they report is more likely to involve top management. For example, when the CEO of Olympus, Michael Woodford, uncovered a massive fraud perpetrated by his predecessors, he was immediately fired by the board and had to leave Japan hastily after being advised that his life was in danger.

What many people do not fully understand is the magnitude of the harm that can be done to truth-tellers by reprisals. It is not just a matter of facing some unpleasantness at work and perhaps having to find another job: the fallout from blowing the whistle can be a devastating, life-changing experience. Bullying, harassment, isolation, and daily humiliations can result in Post Traumatic Stress Disorder (PTSD) and associated symptoms such as chronic insomnia, nightmares, flashbacks, panic attacks, and depression. In the end, they may be relegated to sick leave status and forbidden to return to such a toxic work environment. Some whistleblowers become physically sick when reminded of their former workplace, and may drive miles out of their way just to avoid it.

Other reprisals can include malicious rumours and false accusations, punitive investigations, being given impossible work assignments, and undergoing unfair performance evaluations. These techniques are all used to manufacture reasons to discipline and dismiss the truth-teller. Some whistleblowers have found that they have been ‘black listed’ in their sector and that future employers have been warned off employing them. Even when the case has received some publicity, and the whistleblower is portrayed positively, they often find that potential employers avoid them. And clearly, where the experiences in the workplace are highly negative, it can impact on a whistleblower’s family. The stress of adverse media attention, loss of income, and uncertainty about the future, can be enough to permanently damage relationships with spouses and children.

The flip side of this disturbing scenario is that when whistleblowers are crushed, the alleged wrongdoers are very often able to retain their power and position: either because there is a successful cover-up, or because they are well protected by others. Rather than facing any real sanctions, the wrongdoers may be rewarded with absurd ‘soft landings’, leaving them far better off than the whistleblower.

Life after blowing the whistle

There are some inspiring events to honour whistleblowers, such as the Ridenhour Prizes in Washington, DC – the Oscars of whistleblowing – where hundreds of dignitaries gather with media present to celebrate the actions of a few whistleblowers. But behind this façade, there's often a darker reality regarding the top scientist or engineer who once managed major projects and lived in suburban comfort, surrounded by family and a wide circle of friends. This individual now survives by selling batteries in Radio Shack, and lives on a meagre subsistence, isolated from former colleagues. Sadly, this is the trajectory of many whistleblowers, including those who seemed to prevail in both exposing the wrongdoing and gaining public acclaim.

Whistleblowing legislation timeline

1978 USA: Civil Service Reform Act

1986 USA: False Claims Act (1863) amended

1989 USA: Whistleblower Protection Act

**1990 Queensland, Australia:
Whistleblowers (Interim Protection)
and Miscellaneous Amendments Act**

**1998 United Kingdom: Public Interest
Disclosure Act**

2002 USA: Sarbanes-Oxley Act

2011 USA: Dodd-Frank Act

Remarkably, many of these people go on to rebuild their lives and remain productive, even though they are often forced to start over in a new profession. It's also noticeable how they resist being designated as heroes, usually insisting that they simply did their job. And although they may regret the impact on their lives, few seem to regret their decision to speak up: most say that they had no other morally acceptable choice.

Whistleblowing by jurisdiction

The USA

In 1972, Ralph Nader published *Whistle blowing: the report of the Conference on Professional Responsibility*,¹⁵ which cited more than 24 cases and argued for legal protections for such individuals.

In 1977, the first NGO to specialize in this field – the Washington, D.C. based *Government Accountability Project (GAP)* – was formed and established itself by exposing defective construction work in nuclear power plants.

GAP ultimately assisted about 600 whistleblowers at 17 different plants across the country, and exposed dangerous misconduct by the nuclear construction industry: for example, one power plant that was 97% complete had to be abandoned because shortcuts in construction made it impossible either to repair or to operate safely. During the 1980s and 1990s, GAP also helped over 500

15. "Whistle Blowing," accessed April 24, 2013, http://www.chris-winter.com/Erudition/Reviews/R_Nader/Whistle_Blowing.html

food safety whistleblowers, who four times successfully challenged USDA plans to substitute corporate honour systems for government inspection of government-approved meat and poultry.

In 1989, the landmark *Whistleblower Protection Act* was passed, the first purpose-written whistleblower law, covering all US federal employees.

The federal legislation was strengthened in 1994, and then again in 2013, by the *Whistleblower Protection Enhancement Act*. In 2013, Congress also enacted best practice rights for government contractor employees. These new rounds of legislation were required largely because of weak due process rights, including limited judicial review, that were used to gut the existing laws. For example, precedent-setting decisions, made by apparently hostile judges, created new loopholes and sometimes completely reversed the original intent. One case, imposing a requirement of 'irrefragable proof' just to be eligible for protection, created a standard far tougher than required for a criminal conviction.

Today the USA has an array of whistleblower protection laws at the federal and state levels, covering workers in both the public sector and in many industries. However, there remain major challenges.

The nature of the USA legislative system has made it impossible to enact a single comprehensive law (as in the UK). Instead, what has evolved is a patchwork of laws with overlaps in coverage, and also serious gaps. And, unlike many other countries, USA employment law is based upon the 'at will' principle, meaning that employers can terminate employees without having to give any reason. Whistleblower protection laws in the USA are therefore handicapped by attempting to create rights where few exist, rather than building upon a framework of existing protections for employees. Nevertheless, 44 out of 50 states have enacted a 'public policy exception' to the 'at will' doctrine, permitting suits for damages.

The USA is also the leading proponent of 'qui tam' legislation – a distinct and quite different approach to whistleblowing that has been highly effective in combating fraud by government contractors. This is described in the Appendix.

Australia

The Australian state of Queensland introduced temporary legislation in 1990 – the first in Australia – which was groundbreaking for its time. Since 1993, all Australian states have followed with permanent whistleblower protection laws covering public sector wrongdoing, and in two cases limited private sector wrongdoing.

There is as yet no whistleblower protection law at the 'Commonwealth' level (the government of Australia), although private members' Bills on the topic have been introduced, and a government Bill was finally introduced (but not yet passed) in March 2013, to fill this gap. As yet, there is only very limited federal whistleblowing legislation dealing with any private sector wrongdoing.

The Australian Capital Territory (home of the federal government, like Washington, D.C.) passed a public sector-related law in 2012 that is considered to represent best practice in many respects.

Australia is notable for the extensive research that has been conducted there, and the use of this research to identify best practices and to pinpoint what improvements are required in the various laws.

The United Kingdom

In 1998, the UK introduced a deceptively simple law that gave whistleblowers the right to seek a remedy before an employment tribunal, should they suffer reprisals after blowing the whistle.

This law is notable for its coverage of workers in both the public and private sectors, and its demonstrated effectiveness. Approximately 20% of whistleblowers prevail before the tribunal – a higher percentage than is achieved in most other jurisdictions – and hence UK whistleblowers have a fighting chance of obtaining compensation for reprisals.

The UK law also encourages employers to set up effective internal disclosure mechanisms, since if these are absent (or don't work), a wider public disclosure, to the media for example, is more readily protected, and the whistleblower will have a stronger claim to compensation for any reprisals.

In spite of broad support for the law, the UK has also seen examples of apparent efforts to undermine it. For example, in 2003 the Department of Trade and Industry (DTI) unilaterally changed the way that whistleblower cases are summarized for the public record, thus depriving NGOs of their primary means to monitor the effectiveness of the law. Public Concern at Work (PCAW), the leading UK whistleblowing organization, complained about this practice to the Ombudsman, and DTI was ultimately fined an unprecedented £130,000 (about \$200,000) for misleading PCAW and wasting its time. DTI did not, however, reverse its secretive practice.

Ireland

Ireland is worthy of a mention because of its approach to creating whistleblower legislation. The government has adopted a very public process that is designed to facilitate informed discussion and lead to a consensus. Ireland is also starting with some broad principles and working from these towards the specific measures to be included in the law. If this innovative approach works, the outcome should be a law that is not only technically sound, but widely understood and supported – and hence more likely to work in practice.

Canada

Canada's track record on whistleblower protection is shameful.

At the federal level, a deeply-flawed law,¹⁶ introduced with much hype and hyperbole ('The Mount Everest of whistleblower protection'), has now been in force for six years, at a cost of \$37 million,¹⁷ but has produced few results. The

16. "What's Wrong With Canada's Federal Whistleblower Legislation," Federal Accountability Initiative for Reform, http://fairwhistleblower.ca/psdpa/psdpa_critique.html.

17. "The Costs of Canada's Failed Whistleblower Regimes," Federal Accountability Initiative for Reform, accessed April 24, 2013, <http://fairwhistleblower.ca/psdpa/costs>.

18. "Provincial Legislation: An Analysis," Federal Accountability Initiative for Reform, accessed April 24, 2013, <http://fairwhistleblower.ca/content/provinces>.

Canada's track record on whistleblower protection is shameful.

first Integrity Commissioner, Christiane Ouimet, resigned in disgrace (having produced no findings of any kind), and her successor, Mario Dion, has done only slightly better. Despite the fact that his office has jurisdiction over almost 400,000 public servants, he has found only five cases of wrongdoing, and referred only three cases of reprisal to the tribunal. In addition, the legally-required 5-year review of the law – an opportunity to implement much-needed reforms – is being stalled by the government and is now a year overdue.

Only 6 out of Canada's 10 provinces (and none of the three territories) have whistleblower laws, and none of these has been effective. FAIR's analysis,¹⁸ which is to be published soon, reveals that all of these laws share similar flaws, that they are in most cases scarcely exercised, and that none can demonstrate satisfactory outcomes. As we will show later, the most recent provincial legislation – introduced in Alberta – has fallen far short of the government's claims by ignoring modern best practice, copying outdated legislation from other provinces, and adding regressive measures that render the law essentially worthless.

In fact, whistleblowers in Canada today are significantly worse off than 10-15 years ago: their common law rights have been narrowed and the whistleblowing laws that are claimed to protect them do the opposite, forcing them into secretive administrative procedures that deny them due process, facilitate rather than prevent reprisals, and seem designed to keep damaging disclosures hidden from public view.

Alberta's whistleblower legislation falls far short of best practice, copies outdated legislation from other provinces, and adds regressive measures that render the law essentially worthless.

This is a tragedy: honest Canadians continue to face reprisals when they report wrongdoing; many are too fearful to speak out; and the Canadian public is not being protected from government and corporate misconduct.

International research and discovering best practices

Australia stands out as a jurisdiction that has studied its own experience comprehensively and systematically – and applied the findings to improve its laws. Australian research is also particularly pertinent to Canada (and Alberta) because of historical, cultural, and legislative similarities.

A large-scale collaborative research project led by Griffith University has produced a wealth of research findings, many of which have relevance for other jurisdictions. The initial study, launched in 2005, involved six universities, a number of international collaborators, and 14 partner organizations. This study included an in-depth employee survey that reached 7,663 public officials from 118 public agencies. Fifteen agencies were studied in greater depth using a case study approach. A 333-page report issued in 2008 examines, among other things: the incidence of whistleblowing; who blows the whistle and how and why; the reporting channels used; outcomes for the organization and the whistleblower; and the risk factors for reprisals. Follow-on reports have examined other issues, such as best practices for organizations' own internal disclosure systems.

19. "Whistleblowing Best Practices and Conventions," Federal Accountability Initiative for Reform, accessed April 24, 2013, <http://fairwhistleblower.ca/content/whistleblowing-best-practices>.

There is also a high degree of international collaboration among researchers and civil society organizations working in this field, primarily through the *International Whistleblowing Research Network* (for academics) and the *Whistleblowers International Network* (for whistleblowing advocacy and support groups).

As a result of such research and collaboration, there is a strong consensus today regarding what constitutes best practice – what works and what does not. This consensus is readily accessible and is documented in several forms, such as: Transparency International’s *Guidelines for Whistleblower Legislation*; the Organization of American States Model Law; and in checklists published informally by organizations such as GAP. FAIR maintains a summary of these best practice sources.¹⁹

There is no excuse today for legislators in any jurisdiction to enact badly-written laws.

Barriers to effective whistleblowing laws

There are almost always two central issues at play in a whistleblowing situation:

1. how to investigate the whistleblower’s allegations, and if necessary halt the misconduct and sanction wrongdoers;
2. how to protect the whistleblower from reprisals and, if this fails, how to provide a fair and just remedy.

These issues tend to become intertwined. For example:

- If the investigations are inadequate (or become a cover-up), then the public remains unprotected and the whistleblower’s primary reason for coming forward is betrayed. In this situation, the whistleblower also becomes more vulnerable, since those responsible for the wrongdoing maintain their position and power, which they can use to orchestrate further reprisals.
- If the wrongdoers are exposed and the misconduct stopped, but the whistleblower still suffers reprisals, this is not only profoundly unjust – it has a chilling effect on other potential truth-tellers, again putting the public interest at risk.

20. “Study Shows Bureaucrats Still Fear Blowing Whistle Despite ‘Ironclad’ Protection,” The Canadian Press, Huffpost Politics, February 2, 2012, accessed April 24, 2013, http://www.huffingtonpost.ca/2012/02/02/study-shows-bureaucrats-s_n_1250798.html.

As one participant in a focus group²⁰ observed, potential whistleblowers would like to see “*that these stories have happy endings. Show me the [whistleblower] who got a promotion and the wrongdoer who lost his job*”. But achieving such ‘happy endings’ is a challenge, for a number of reasons.

Reflexive institutional hostility towards whistleblowers

Organizations tend to vigorously oppose – almost as a reflex action to eliminate threats – disclosures that they find threatening, embarrassing, or disruptive, and one of the easiest ways to do this is to attack the messenger rather than address the issue. Even when it is clearly in the organization's own best interests to address the problem expeditiously, wrongdoers are often able to evade personal responsibility by keeping senior leaders in the dark, or in denial.

Not long before the collapse of Enron, a senior executive, Sherron Watkins, tried to warn CEO Ken Lay that there were huge concealed liabilities on the company's books. Watkins still believes that Lay (now deceased) did not understand what his subordinates were doing, and simply could not comprehend or accept the massive problem that she tried to explain to him. Whatever the reason, Enron's failure to address the massive fraud resulted in the company's collapse: the largest bankruptcy in US history at that time.

Entrenched and systemic wrongdoing

Sometimes the wrongdoing is orchestrated (or implicitly blessed) by the senior leaders themselves when it serves their own personal interests. The pursuit of personal gain by unscrupulous insiders may not only trump the public good, but often threatens the survival of the organization itself.

As William K. Black has observed of banking collapses, "*failure of the institution does not indicate failure of the fraud*". Many senior people walked away from the wreckage of the last banking crisis with their bonuses and personal fortunes intact.

Negative portrayals of whistleblowers in the media

In virtually every case that becomes public, those accused of wrongdoing launch an assault on the whistleblower's actions, character, and motives. These well orchestrated campaigns have helped to create a false perception of whistleblowers as disloyal, 'disgruntled', irresponsible, attention-seeking, and perhaps even mentally unstable.

The media may portray the whistleblower as a hero, but such sensationalized reporting may also contribute to the 'smokescreen' by shifting attention onto the whistleblower and away from the alleged wrongdoing and the wrongdoers. False and unjustified negative portrayals of whistleblowers colour the views of organizational leaders as well as the public.

Deep-rooted opposition to whistleblowing reforms

The reflexive hostility towards whistleblowers by many in power also manifests itself in efforts to neuter whistleblowing laws: before, during, and after implementation.

If opponents are unable to block or weaken legislation, they can undermine its implementation. Hostile decisions by judges can undermine or even completely reverse the intent of the law: this has happened on a grand scale in the USA.

Agencies charged with enforcing the law can also be undermined in various ways: for example, by starving them of resources, or appointing unsuitable leaders, or leaving them leaderless.

The Office of Special Counsel (OSC) in the USA, created in 1979 and charged with protecting federal government whistleblowers, has a long history of neglect by successive administrations of all political stripes. The last head of OSC, Scott Bloch, was investigated by the FBI, prosecuted, and narrowly escaped jail for his misconduct while in office.

Bloch's counterpart in Canada, Christiane Ouimet, the first Public Sector Integrity Commissioner, was also shown to be negligent in the discharge of her duties, but was never held accountable: instead, she was allowed to retire with her pension intact (plus a settlement package of \$500,000) and shielded from any sanctions.

At the time of writing, the Canadian federal government is continuing to block any reform of its deeply-flawed law by stalling the legislated 5-year review. This review – which is supposed to examine the effectiveness of the law and to identify necessary changes – is now a full year overdue. Critics fear that when the review is finally launched, the process may be superficial and managed in such a way as to limit expert input and prevent proper consideration of essential reforms.

Such actions create a perception that the Canadian government is undermining its own legislation.

Much of the reflexive opposition to whistleblowing seems to arise from misconceptions and ignorance of the facts, with stakeholders such as the public, unions, corporations, and politicians not understanding how whistleblowing serves their own best interests. We will examine these interests later.

The other source of opposition is from those who know that they have something to hide: politicians, bureaucrats, or businessmen whose improper or illegal practices are entrenched.

What does it take to get whistleblower laws passed?

Jurisdictions that have established effective whistleblower arrangements have many similarities in the way that their laws came into being: a certain combination of circumstances that created the means to overcome inertia or outright hostility.

These circumstances are: *scandals or preventable disasters; sustained media attention; the existence of specific and soundly-based proposals; buy-in from a range of key stakeholders; and rapid implementation.*

Scandals and preventable disasters

To our knowledge, every important advance in whistleblowing has come in the aftermath of scandals or preventable disasters that caught the public imagination and created an irresistible demand for change.

In the US, one of the triggers for the 1989 legislation (though not the only one) was the Challenger Shuttle disaster, where an entire Shuttle crew, including a civilian school teacher, died in an explosion watched by millions on television. The technical root cause of the disaster was the failure of O-rings in the booster rockets, but the management root cause was the failure to listen to three engineers who predicted this failure and warned against the launch. To add insult to injury, rather than being thanked for their efforts, they suffered harsh treatment from their employer following the disaster. The senior engineer, Roger Boisjoly, who testified to Congress regarding the O-ring problem and his team's unsuccessful efforts to prevent the launch, was never able to work in the aerospace industry again.

In the following two decades, two rounds of high-profile corporate scandals in the US led to protection for private sector employees. The 2001/2002 Enron and WorldCom scandals, and then the 2007/2008 financial crisis, both led to new laws designed to curb white-collar corruption: the Sarbanes-Oxley and Dodd-Frank Acts respectively. Both acts include whistleblower protections.

In the UK, one of the triggers for the *Public Interest Disclosure Act* was the analysis by Public Concern at Work of a number of tragedies in the late 1980s and 1990s, including the 1987 sinking of a drive-on car ferry with the loss of 193 lives. The ship sank in calm weather within minutes of leaving harbour because the bow loading door was inadvertently left open – the captain could not see this from the bridge. During the subsequent inquiry and criminal trial, it was revealed that crew members had been pointing out this danger for years and pleading for a solution – such as a warning light on the bridge – but they had been ignored.

Other UK scandals and disasters in the 1980s included: the Clapham Junction rail disaster and the Piper Alpha oil rig explosion – which between them cost 203 lives – and several serious financial scandals.

The current government's commitment to strengthen the UK's whistleblowing legislation has also come in response to scandal: horrific revelations regarding mistreatment of patients in the Health Service, as well as the revelation of the BBC's decades-long cover-up of sexual abuses perpetrated by one of its now-deceased star personalities, Jimmy Saville.

In Australia, Queensland became the first state to introduce whistleblower protection following the Fitzgerald Inquiry into police corruption. This two-year long inquiry exposed misconduct at the highest levels and led to the jailing of three former ministers and the police commissioner.

Precedents in other jurisdictions show that properly-written laws do work.

Incidents like these, properly investigated and reported, demonstrate to the public the serious consequences of unchecked corruption and incompetence, and highlight the need for honest employees to be able to speak up safely in order to protect the public.

Sustained media attention

All of the scandals and disasters mentioned above were clearly newsworthy, but circumstances kept them in the news and in the public eye. In some cases lengthy public inquiries or investigative journalism provided a steady flow of further revelations – exposing even more misconduct, and often revealing the efforts of insiders to avert disaster or to halt wrongdoing.

Disasters and scandals happen all the time, but may not be seen as connected in their causes or even preventable. However, when these events result in sustained media coverage, the resulting public outrage can create a powerful demand for change. Informative reporting can also educate citizens and help the public to judge whether the changes proposed by politicians are sufficient to prevent recurrences.

Specific, soundly-based solutions

When the politicians (and bureaucrats) go looking for answers that will satisfy the public, it's important that sound solutions are readily available to them: without delay, and backed up by convincing evidence and arguments. This is where the work of civil society organizations and academics becomes important: to develop sound legislative proposals – preferably before they are called for – backed up by solid research.

This is how the *Sarbanes-Oxley* and *Dodd-Frank* whistleblowing measures were enacted in the US – they were already prepared and ready to go when the opportunity arose. In the UK, three private members bills were put forward between 1995 and 1998, and the one finally accepted in 1998 proved to be particularly well-designed and effective – the result of its authors, Public Concern at Work and the Campaign for Freedom of Information, having done their homework.

Precedents in other jurisdictions are also important to show that properly-written laws do work, and to counter critics who typically make hysterical and unfounded predictions about supposed abuses and unintended effects.

Buy-in from a range of key stakeholders

Stakeholders may include business organizations, unions, civil society organizations, and advocacy groups. It is notable that in the UK – the only major jurisdiction with protection for all employees – there was strong support from the Confederation of British Industry, the Institute of Directors, and Trades Union Congress. In the USA, the 13-year campaign to pass the Whistleblower Protection Enhancement Act was ultimately successful in November 2012 through the vocal support of a coalition of 400 organizations covering the entire political spectrum, with 80 million members.

Rapid implementation

'Rapid' is a relative term: creating new legislation tends to be a slow process. However, it seems to be important to get the job done before the public forgets why these reforms are needed.

Whistleblower protection in Alberta

Historical context

The history of whistleblower protection in Alberta is not a distinguished one. In 1998, a private member's bill was rejected by the government, which claimed to support the principle but not the design of the law.

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."* These remarks might suggest that the government would shortly introduce its own, better designed legislation, but this did not happen.

Fourteen years later, during a closely-fought provincial election, both leading parties pledged to introduce whistleblower protection. After swearing in her new cabinet, newly-elected Premier Redford promised a sweeping review of laws – *"taking the best examples from the world, including whistleblower legislation"* – that would help Albertans access information about their government.

Unfortunately, this did not happen either. Instead, the government introduced a bill that, far from representing best examples from around the world, sets a new low, even within Canada. Largely copied from other provinces, the few modifications made by the government further emasculate an already weak and outdated bill. The most indefensible of these is the provision that allows the Commissioner to completely exempt from the Act *"any person, class of persons, public entity, information, record or thing."* This section alone renders the law merely symbolic.

The law contains no remedies whatsoever for whistleblowers who suffer reprisals, there is no mechanism to challenge the Commissioner's decisions, and virtually everything that the Commissioner does can remain secret forever. The government claims that it looked at jurisdictions outside of Canada in its search for best practices, but there is no evidence of this in the bill.

FAIR immediately conducted an analysis of the government's bill and documented our key findings, including 14 serious shortcomings.²¹ During the debate in the legislature, opposition parties moved 29 substantive amendments designed to fix these and other problems, but all were rejected. Alberta still has no whistleblower protection worthy of the name.

21. "An Analysis of Alberta's Whistleblower Protection Law," Federal Accountability Initiative for Reform, November 5, 2012. http://fairwhistleblower.ca/files/fair/docs/alberta/Analysis_of_Alberta_PIDA.pdf.



FAIR's top 7 concerns regarding Alberta's whistleblowing law

1. The Commissioner has unlimited powers to exempt any person or organization, placing them above the law – an extraordinary provision to put in any legislation.
2. The Commissioner need not ever conduct a single investigation of alleged wrongdoing: he has unlimited discretion to do nothing.
3. There is no requirement to report the specifics of any wrongdoings found – these can remain secret forever.
4. There is no mechanism to challenge the Commissioner's decisions, e.g. if he decides not to investigate, or decides that there was no wrongdoing or reprisals.
5. Whistleblowers go to MLAs or the media at their own risk: the law provides no right to make such disclosures and be protected.
6. There is no mechanism for whistleblowers to obtain a remedy such as compensation if they suffer reprisals (as most do, often ending their careers).
7. The law does not cover private sector wrongdoing at all, even when government money is involved, or public health and safety are at risk.

What's at stake for Albertans

When witnesses cannot speak up – because they fear the reprisals that may result – the public may be harmed in countless ways.

When witnesses cannot speak up, the public may be harmed in countless ways.

The most obvious harm is often the waste, misuse, or theft of tax dollars. These may seem like relatively 'victimless crimes' – since the burden is spread among all taxpayers, and no one individual is seriously affected. However, such misconduct can cost billions, and may result in essential services, such as education, health care, and infrastructure, being starved of funds.

The consequences of incompetence and wrongdoing by others can also hit closer to home:

- We may be exposed to tainted food or water.
- We may suffer serious, even fatal side-effects from prescription medications.
- Our hospitals and care homes may become dangerous places instead of sanctuaries.
- Travelling for work or leisure may become hazardous due to unsafe roads, bridges, trains and airliners.

- Our pensions and investments may be wiped out by scammers or corporate crooks.
- We may face unseen but life-threatening hazards in our workplace.
- The environment that we will pass on to our grandchildren may be poisoned by chemicals and industrial waste.

In all of these areas, Albertans are vulnerable and dependent upon governments and corporations to operate competently and honestly. Yet in all of these areas, too often the public trust is betrayed.

These risks are further aggravated by some of the conditions that prevail in Alberta, such as:

- An energy industry that has enormous influence within the province, both economically and politically, and a questionable track record on public safety and protection of the environment.



Some Alberta whistleblowers

- **Evan Vokes:** Senior engineer who exposed that TransCanada was failing to follow safety practices in the construction of its pipelines.
- **Dr. John O'Connor:** Physician who raised concerns regarding the apparent high frequency of cancers in Fort Chipeweyan, downstream of the Athabasca Oil Sands.
- **Larry Elford:** Former investment advisor who lost his job after writing about the practices of the financial services industry which, for example, misleads investors by describing its salespeople on commission as 'financial advisors'.
- **Steve Villebrun:** Health Canada employee who exposed misuse of public funds by a non-profit which was granting major sole-source contracts to a company owned by one of its directors.
- **Dr. Raj Sherman:** Former Tory MLA, now leader of the Alberta Liberal Party, who leaked information to the media about poor ER patient outcomes after his government did not take action.

- A government that is committed to further privatization – by traditional means or through so-called Public Private Partnerships (P3s) – although such arrangements have often led in the past to substandard work at inflated prices.
- The widespread use of temporary foreign workers, who may become trapped in work environments that are dangerous both to them and to the public. The food industry recently provided a dramatic example of this in the XL Foods recall at Brooks.

- A lack of transparency regarding public expenditures, aggravated by the increasing flow of public money to private industry.
- A large publicly funded health care system that is tainted by mismanagement and showing signs of stress.
- Weak regulatory oversight. Experts agree that Canada has a well-earned international reputation as a haven for white-collar crime, largely due to the failure of federal enforcement efforts, and Alberta stands out for its lax securities regulation.

How to secure whistleblower protection in Alberta

Through its actions over the past six months, the government has all but openly declared that it has no intention of providing effective whistleblower protection, and is content with providing the appearance of such protection, unconvincing though it is.

In doing so, the government has opened itself to criticism when future scandals erupt: when waste of public funds is exposed, or when Albertans are harmed, injured, or even die because of incompetence or corruption.

When this happens it will be legitimate to ask *“How many people knew about this problem beforehand?”* and *“Why was no-one able to raise the alarm?”*

If the answer is that employees did know but dared not speak out – or they tried to speak out, but were silenced – then this government must shoulder the blame for failing to protect these witnesses, and thus failing to protect the Albertan public.

It is the mark of great leaders, including politicians, that they recognize and learn from their mistakes, and can change direction. It’s not too late for a change of heart by Premier Redford in her approach to this issue.

Whether the present government provides political leadership or not, there are many groups within Alberta whose interests are served by effective whistleblower protection, and who can help ensure that this does eventually come about.

The interests of stakeholders

As we have seen in other jurisdictions, a confluence of favourable conditions seems to be required to get effective legislation passed, but these opportunities can be lost if the stakeholders do not play their part.

Business

Senior leaders who want their companies to stay in business need to know when things are going wrong so that they can nip problems in the bud before they become unfixable. As research and experience demonstrates, making it safe for employees to raise concerns is one of the best ways of accomplishing this.

Failing to protect from retaliation those who come forward is the most certain way of ensuring that senior management will be kept in the dark (or in denial) until they read about their company's crimes in front page news.

It's also in the best interests of businesspeople to ensure that others are not corrupt.

Rival businesses, bureaucrats or politicians may tilt the playing field so that those with the best connections or the biggest bribes are favoured. As the Charbonneau Inquiry in Quebec has demonstrated, once a cartel of bad actors is established, honest businesses cannot compete and are forced to 'play the game' or get out altogether.

One corrupt or incompetent operator can cause serious damage to an entire industry – as happened with the XL Foods recall – causing shutdowns, loss of consumer confidence, and potentially loss of market share. In the wake of such incidents, there is often an over-reaction and the entire industry may be hit by burdensome new regulations: everyone may suffer because of one rogue operator.

And there's no organization, no matter how well run, that cannot fall victim to a few unscrupulous or incompetent executives. As many financial institutions discovered after the sub-prime meltdown, and as Wal-Mart discovered in Mexico, the apparently highest-performing divisions are often the ones with the most to hide and the farthest to fall.

It is notable that in the UK, business organizations like the Confederation of British Industry and the Chartered Institute of Personnel and Development were among the strongest supporters of the new whistleblower law.

Unions and professional associations

There are many reasons why it is in the interest of unions to support strong whistleblower protection laws.

This strategy is (rightly) very popular with the membership. After the passage of the UK's whistleblower law, pamphlets explaining the law and employees' rights became the unions' most commonly-requested publications.

It is in the unions' interest to ensure that employers don't fail – which they may well do if misconduct goes unchecked. Non-profits may have their funding pulled, and businesses may discover crippling hidden losses, or lose the confidence of their customers. Sometimes whistleblowers are blamed when colleagues lose their jobs in this way – but the real culprits are those responsible for the misconduct, and those who turned a blind eye until it was too late to rescue the organization.

In many jurisdictions, the framework of employment law and collective agreements that unions work within is inadequate to protect members who become

whistleblowers. For example, those accused of misconduct may be in charge of the grievance process or able to manipulate it; or they may themselves be union members – placing the union in a conflicted position. It can also be extraordinarily costly – in terms of time, money, and relationships with the employer – to support an employee that the organization has targeted as an enemy.

Professional associations – such as those representing doctors, nurses, accountants, and engineers – often impose strict codes of conduct and can punish violators with heavy penalties, including ejection from the profession. But these associations may not have the policies, the means, or the will to protect members who become whistleblowers by refusing to violate these codes.



\$\$\$\$\$\$\$\$\$ The costs of corporate misconduct \$\$\$\$\$\$\$\$\$\$

In December 2008, Siemens agreed to pay a record \$1.34 billion in fines after being investigated for serious bribery. The investigation found questionable payments of roughly €1.3 billion, triggering inquiries in Germany, the United States, and many other countries. In response to this and other damaging scandals, Siemens undertook extensive internal reforms, and today the company is frequently invited to share its expertise at business ethics conferences.

SNC-Lavalin is now facing several accusations of serious illegality, and is learning the hard way about the damage inflicted by corruption. The company is pouring resources and expertise into cleaning up its act, recruiting some of the best talent available to help it.

But the company has already been banned from World Bank contracts for a decade; there will likely be further revelations, lawsuits, and settlements; and the brand has been damaged. This need never have happened.

Raising awareness and working through some of these issues is important to ensure that unions and professional associations have the tools and the will to support and protect the whistleblowers among their ranks.

Civil society groups

Canada has civil society organizations that work to protect society on many fronts, including good government, transparency, access to information, justice, human rights, ethics, and the environment. Many of these groups have at

times been greatly assisted by employees who exposed threats to their cause. It is in the interest of all such groups to make it safer for whistleblowers who have information vital to the public interest issues that they espouse to come forward.

Politicians

Politicians seek public approval and legitimacy, and they ultimately lose both by being associated with corruption and scandal.

Ministers, like business leaders, need to know about problems within their departments so that these can be fixed before these become front-page news. By discouraging internal challenge or dissent, they unwittingly create the very conditions that breed incompetence and corruption – and they leave concerned employees with no other recourse but to go to the media.

Politicians want their province to be known as a safe place to do business, but scandals harm the economy by frightening off potential investors.

Finally, politicians want to take pride in the democracy that they are a part of: it's hard to do this when the public and outsiders see behaviour that they consider unseemly, unethical, or downright corrupt.

Recommendations

The following recommendations flow from an understanding of the challenges of creating effective whistleblower protection, an analysis of the current situation in Alberta, and from the interests of the various stakeholders.

1. Recognizing that the formal legislative process has not yet delivered effective legislation, launch an alternative process with the aim of replacing the current law.
2. Engage the various stakeholders, perhaps in the form of a coalition, with the aim of educating the participants, sharing perspectives, and building an informed consensus.
3. Initiate the process by holding a conference involving representatives of all stakeholders to find common ground, agree on objectives, and develop a collective commitment to proceed.

Other suggestions and ideas

Academics could contribute by:

- incorporating whistleblowing in the curriculum, especially for journalism, law, ethics, and management studies.
- developing case studies that include Alberta based organizations and whistleblowers.
- conducting research, for example: to estimate the costs to Alberta of corruption and incompetence within government and corporations; or to examine the effectiveness of current whistleblower laws across Canada,

including comparisons with best practice and with other jurisdictions.

Unions and professional associations could contribute by:

- making whistleblower protection a key plank in any future collective bargaining negotiations.
- informing their members and engaging in consultations with them regarding their needs for whistleblower protection.
- developing policies to be incorporated into future collective agreements and codes of conduct.

Businesspeople could contribute by:

- surveying employees to determine their confidence in management ethics and their willingness to report violations.
- re-examining the effectiveness of their corporate compliance programs – from the perspective of identifying and preventing problems, rather than as defensive measures designed to limit liability.
- raising the subject of whistleblowing in business and professional associations, and sponsoring awards for whistleblowing, educational presentations, and events.
- examining the experience of companies such as Siemens (and perhaps SNC-Lavalin) in attempting to recover from damaging revelations and prevent recurrences.

Politicians could demonstrate leadership on this issue by committing to support the process and to enact laws that truly represent international best practices.

Appendix

‘Qui tam’ or False Claims Act legislation

The USA is the leading proponent of ‘qui tam’ legislation – an approach that has been highly effective in combating fraud by government contractors.

‘Qui tam’ is a Latin phrase for ‘private attorney general’ rights created by the Magna Carta, which in common law refers to someone acting on behalf of the king – the basis of the USA False Claims Act.

The *False Claims Act* was first introduced in 1863, during the Civil War, as a means of curbing profiteering. Unscrupulous contractors were selling the government lame mules, defective weapons, and rancid provisions – at outrageous prices. The law empowers any citizen to sue a contractor on behalf of the government, in return for a portion of the penalties to be repaid to the government if the suit is successful. The Act compensated for the government’s lack of investigative resources and the Justice Department’s reluctance to pursue powerful businessmen – problems that may still arise to this day.

The Act was revitalized by amendments made in 1986 and 2006, and is America’s most effective anti-corruption statute, leading to the return of \$35 billion to the US treasury since the mid 1980’s – and \$4.9 billion in 2012 alone.

‘Qui tam’ legislation represents a distinct and separate branch of whistleblowing law, which has enabled very effective policing of US government expenditures that involve the private sector. It should not be confused with other so-called ‘bounty’ systems, which offer rewards for information, but leave the whistleblower still a passive observer in the process.

The *False Claims Act* is effective primarily because it radically shifts the balance of power, giving the whistleblower the power and resources to take the initiative and to prosecute powerful wrongdoers, rather than waiting for some government agency to do so. It also levels the playing field to some degree by providing an incentive for skilled lawyers to take on these cases, which can be highly lucrative if successful.

Although highly effective, one of the drawbacks of the *False Claims Act* is that it focuses attention on cases that involve loss of money (rather than other types of harm), and only government money at that. For example, although the US Government has recovered billions of dollars from Pharmaceutical companies for defrauding the government with defective medications, and corrective actions such as label changes may be imposed, there is no remedy under this Act for the resulting deaths of citizens. The drug Vioxx alone is estimated to have caused at least 60,000 deaths, but the victims or their families have to seek compensation under other legislation.

In addition, the penalties, although seemingly huge, are miniscule in comparison with the profits gained, and are normally borne by the corporation rather than the individuals responsible – thus making it attractive for companies to treat these fines as a cost of doing business rather than reforming their practices.



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