WHISTLEBLOWING IN CANADA: A CALL FOR ENHANCED PRIVATE SECTOR PROTECTION

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INTRODUCTION

Corruption has existed for as long as sophisticated human institutions have been around. Rich and poor nations alike struggle against corruption, although it can present more of a challenge in some nations than others. Canada is admired for its transparency, continuously ranking highly on the list of least corrupt nations in the world.¹ This should undoubtedly be a point of pride for Canadians, but Canada must remain vigilant in its anti-corruption efforts and strive to make further progress. Criminals are always finding new, innovative ways to circumvent the law. Accordingly, law enforcement must be flexible and adaptive in their tactics for the anti-corruption system to be successful. Canada's impressive rankings imply that its current strategies have been deployed with considerable success. There is, however, one available instrument that the Canadian system has only marginally employed: whistleblowing.

While the practice of whistleblowing has existed for well over one hundred years, it has only been effectively adopted by most nations in the past few decades. In the vast majority of these jurisdictions, whistleblower protections are only extended to public sector employees. As a result, considerable segments of the workforce have little to no legislative protection from employer reprisal. In many countries, including Canada, only a limited portion of the private sector is afforded a secure channel or process whereby it can expose corruption. As such, a significant number of the

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¹ Transparency International [TI], "Corruption Perceptions Index 2017" (21 February 2018), online: *Transparency International* <www.transparency.org/news/feature/corruption_perceptions_index_2017> [perma.cc/2VBV-RNPT] [TI, "Corruption Perceptions Index 2017"]; "Canada Corruption Report" (2017), online: *Business Anti-Corruption Portal* <www.business-anti-corruption.com/country-profiles/canada/> [perma.cc/9SLQ-YS7P].

12 million Canadians working in the private sector are inadequately protected.² The shortcomings of the present regime will be analyzed in this paper, followed by an examination of leading whistleblower practices that Canada could incorporate in future legislation. Ultimately, a case will be made for the enactment of broad and uniform legislation aimed at protecting all whistleblowers in Canada. An expansive whistleblower regime of this kind would simplify the law and extend further protection to workers in the private sector, leading to reduced corruption. Although the beneficial consequences of this legislation would be multi-faceted, the scope of this paper will be limited to how Canada can better fulfill its international anti-corruption goals under the *Corruption of Foreign Public Officials Act (CFPOA)*³ by expanding the scope of its whistleblowing protections.

I. WHAT IS “WHISTLEBLOWING”?

Whistleblowing can be a controversial topic. While there is no universal definition for the term, the one that is most widely cited is “the disclosure by organization members (former and current) of the illegal, immoral and illegitimate practices under the control of their employers to persons or organizations that may be able to effect action.”⁴ This definition may be expanded or narrowed depending on the context of the corrupt or wrongful act under consideration. A duty of “good faith” and honesty on the part of the whistleblower are also required, although this appears to be assumed in the definition cited above. A model example of “positive” whistleblowing is Dr. Jian Yangyong of China. Against the wishes of his superiors and government officials, Dr. Yangyong chose to alert the world about the spread of the Severe Acute Respiratory Syndrome (SARS) virus in the early 2000s.⁵ If it were not for his courageous actions, thousands more lives might have been lost.

However, not all whistleblowers are heralded as heroes in the way Dr. Yangyong was. Some are dismissed as traitors or snitches, even if the information they disclose is in the broader public interest; the line between hero and traitor can sometimes be a fine one. The public perception of whistleblowing cases usually hinges on several determinative factors, including the specific context and the availability of alternative means to public disclosure. In most instances, however, whistleblowers who

² Innovation, Science and Economic Development Canada, *Key Small Business Statistics* (Ottawa: EDC, June 2016) at 4.

³ SC 1998, c 34 [CFPOA].

⁴ Janet P Miceli & Marcia P Near, “Organizational Dissidence: The Case of Whistle-Blowing” (1985) 4:1 *Bus Ethics J* 1 at 4.

⁵ David Banisar, “Whistleblowing: International Standards and Developments” in Irma Sandoval, ed, *Corruption and Transparency: Debating the Frontiers Between State, Market, and Society* (Washington, DC: World Bank Institute for Social Research, 2011) 1 at 6.

expose corruption and bribery are welcomed by the public and authorities alike. One obvious reason for this may be that the activities divulged by whistleblowers are not contentious: in almost countries around the world, particularly democratic ones, acts like bribery are considered unacceptable. Such conduct is viewed as inherently problematic and prohibited under the official letter of the law.⁶

Whistleblowers can also play a critical role in exposing complex schemes of corruption. Take, for example, the typical foreign public official bribery scheme that involves the funneling of proceeds of bribery through an intermediary, such as a subsidiary company located offshore or a personal “agent.”⁷ By revealing such an intricate web of corruption, a whistleblower can help law enforcement save valuable resources, time, and energy. In certain cases, the corrupt act may never have been uncovered without the whistleblower’s assistance. This illustrates why, since the early 1990s, Organization for Economic Co-operation and Development (OECD) countries have been introducing various legislation that offers protection to whistleblowers.⁸ The benefits associated with whistleblowing that combats bribery and corruption not only serve the interests of law enforcement, but that of the broader public, too.

II. A BROAD OVERVIEW OF CANADIAN WHISTLEBLOWER LAWS

Canadian whistleblower laws rank quite well compared to other countries.⁹ This does not, however, mean that Canadian laws safeguarding whistleblowers are always optimal or adequate.¹⁰ One of the most prominent pieces of Canadian whistleblower legislation is the *Public Servants Disclosure Protection Act (PSDPA)*.¹¹ This legislation protects federal public sector whistleblowers, subject to certain exceptions and limitations.¹² Under this Act, federal employees who wish to bring a claim forward

⁶ TI, “Corruption Perceptions Index 2017,” *supra* note 1.

⁷ Organisation for Economic and Co-operative Development [OECD], “OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials” (2 December 2014) at 8, online: *OECD* <www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm> [perma.cc/24ZP-FMMR] [OECD, “Foreign Bribery Report”].

⁸ Paul Latimer & AJ Brown, “Whistleblower Laws: International Best Practices” (2008) 31 U New S Wales LJ 766 at 766.

⁹ TI, “Corruption Perceptions Index 2017,” *supra* note 1.

¹⁰ Transparency International [TI], “UNCAC Implementation Review: Up and Running but Urgently Needing Improvement” (25 November 2013), online: *Transparency International* <www.transparency.org/news/feature/uncac_review_mechanism_up_and_running_but_urgently_needin_g_improvement> [TI, “UNCAC Review”].

¹¹ SC 2005, c 46 [*PSDPA*].

¹² For example, members of the Canadian Security Intelligence Service (CSIS) are not covered under the *PSDPA*.

may do so in a confidential and secure manner, without fear of reprisal.¹³ The *PSDPA* builds on the protections afforded to all individuals under section 425.1 of the *Criminal Code*,¹⁴ which was adopted by Parliament in 2004 and protects all whistleblowers from employer retaliation (e.g., demotion or termination of employment). The broader scope of the *PSDPA* allows most federal whistleblowers to benefit from reprisal protection if they report an incident or practice to their supervisors, or others “further up the ladder” within the organization, even if they do not make a corresponding disclosure to law enforcement officials.

Aside from the *PSDPA*, Parliament’s other attempts at providing national legislative protection to whistleblowers have not gone nearly far enough, with the consequence that employees in the provincial public and private sectors, on the whole, lack comprehensive legislative protections.¹⁵ Certain provinces have since attempted to close this gap by enacting legislation of their own, but only six have thus far extended these protections to the provincial public sector.¹⁶ The existing regime of protection for private sector workers is even weaker. At present, only two provinces have granted broad, sweeping legislative protections to private sector whistleblowers: Saskatchewan and New Brunswick.¹⁷ These provinces protect whistleblowing employees from being discharged or discriminated against in any manner when they have report, or propose to report, to a lawful authority any activity that is, or is likely to result in, an offence pursuant to a provincial or federal act.¹⁸ In most other provinces, the absence of blanket legislation protecting the broader private sector has led to the implementation of fragmented laws aimed only at particular industries or sectors.

Ontario is one province that appears to be in support of offering stronger incentives for whistleblowers to come forward. Most notably, the Ontario Securities Commission (OSC) has recently implemented a cutting-edge program modelled after its sister program in the United States.¹⁹ The OSC program provides mechanisms for

¹³ *PSDPA*, *supra* note 11, ss 12, 19.

¹⁴ RSC 1985, c C-46 [*Criminal Code*].

¹⁵ See e.g. *Canada Labour Code*, RSC 1985, c L-2; *Competition Act*, RSC 1985, c C-34.

¹⁶ Transparency International Canada [TI Canada], “Transparency International Canada: Report on Whistleblower Protections Canada” (April 2015) at 11–12, online (pdf): *Transparency International Canada* <www.transparencycanada.ca/wp-content/uploads/2015/06/TI-Canada_Whistleblower-Report_Final1.pdf> [TI Canada, “Whistleblower Report”].

¹⁷ See *Saskatchewan Employment Act*, SS 2013, c S-15.1, ss 2–8; *Employment Standards Act*, SNB 1982, c E-7.2, s 28; TI Canada, “Whistleblower Report,” *supra* note 16 at 11–12.

¹⁸ Yosie Saint-Cyr, “The State of Whistleblowing in Canada” (6 June 2013), online: *Slaw* <www.slaw.ca/2013/06/06/the-state-of-whistleblowing-in-canada> [perma.cc/AQ4F-2JYG].

¹⁹ The Ontario Securities Commission also published the *Whistleblower Program*, OSC Policy 15-601 (14 July 2016) [OSC Policy 15-601]. The US Securities and Exchange Commission whistleblower program was implemented in the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, § 922, 124 Stat 1376 (2010) [*Dodd-Frank*] following the 2008 financial crisis. It is widely

confidential or anonymous disclosure that are very strong compared to many other whistleblower systems in Canada. Moreover, the OSC incentivizes potential whistleblowers with financial rewards (up to \$5 million dollars) if the information provided results in enforcement action.²⁰ The relative uniqueness of this program will be addressed in greater depth in Section V.

Aside from this OSC initiative, Ontario's provincial government has sought to further protect employees in segments of the private sector through the implementation of whistleblower provisions in its legislation.²¹ While certainly a step in the right direction, the scope of protections offered is generally limited to specific violations of the given legislation. Other significant deficiencies, such as weak provisions guaranteeing the confidentiality of whistleblower identities, are also prevalent in the legislation.²²

III. CHARACTERISTICS SHARED BY THE BEST WHISTLEBLOWING REGIMES

Even though there is no official set of criteria for a successful whistleblower regime, most scholars believe that the best systems tend to share the following features:

- (1) broad and clear legislation;
- (2) adequate mechanisms for disclosure;
- (3) protection of confidentiality;
- (4) protection against retaliation; and
- (5) sufficient remedies made available to the wronged whistleblower.²³

These listed concepts are rather straightforward. Many of these features are in fact present in Canada's existing whistleblower laws. Unfortunately, most of these laws do not extend to protect private sector whistleblowers. Even in the limited cases in which they are meant to offer protection, such as with respect to the *Criminal Code*'s provision against retaliation, the scope of protections is nevertheless insufficient. The deficiencies of the Canadian system are addressed in greater detail in the following section, which also develops a case for the establishment of comprehensive legislation.

believed that the scale of financial fraud would have been reduced if better whistleblower protections had been put in place prior to the crash.

²⁰ OSC Policy 15-601, *supra* note 19.

²¹ See e.g. *Occupational Health and Safety Act*, RSO 1990, c O.1; *Environmental Protection Act*, RSO 1990, c E.19.

²² TI Canada, "Whistleblower Report," *supra* note 16.

²³ Gerry Ferguson, *Global Corruption: Law, Theory and Practice*, 3rd ed (Victoria: University of Victoria, 2018) at 1021.

Although these five elements are crucial, they are not sufficient on their own; they are only the foundational features upon which an effective whistleblower system can be built. There are a variety of other ingredients, such as incentives to promote whistleblowing, that may further enhance a program. The significance of these other features will be discussed in Section VI.

IV. WHY THE CURRENT CANADIAN SYSTEM IS INADEQUATE

Canada, like many other OECD countries, has enacted various pieces of whistleblowing legislation over the past few decades. Similar to the majority of these countries, the scope of the current legislation is quite limited in that it is largely geared toward protecting employees in the public sector. Many leading scholars and organizations, however, recommend extending these legislative protections to *all* individuals, irrespective of their sector of employment.²⁴ Only a handful of nations like the United Kingdom, Japan, and South Korea have adopted this approach thus far.²⁵ Canada and other leading world democracies continue to lag behind in this regard.

The current whistleblower protections for Canadian private sector workers have been established through fragmented provisions in various legislative acts and programs. This means that secure channels for disclosure are unavailable to many potential whistleblowers, including those who wish to report the bribing of foreign public officials under the *CFPOA*, unless they are protected through a designated whistleblower program. Canada simply must secure more abundant and adequate options for whistleblowers.

Section 425.1 of the *Criminal Code* provides a good foundation for the development of future Canadian whistleblowing laws. As noted earlier, all whistleblowers in Canada are protected from employer reprisal under this provision as long as there is a public interest dimension and their disclosure is made to a law enforcement official. If these requirements were satisfied, employers would face potential criminal sanctions for firing, demoting, harassing, or even threatening to take other retaliatory actions against employees.²⁶ For most whistleblowers in the private sector, this provision provides the *only* line of defence against employer retaliation.

²⁴ See e.g. Transparency International [TI], “Whistleblower Protection and the UN Convention Against Corruption” (15 May 2013), online (pdf): *Transparency International* <www.transparency.org/whatwedo/publication/whistleblower_protection_and_the_un_convention_against_corruption> [perma.cc/GEC8-MYRP] [TI, “Whistleblower Protection UN Convention”].

²⁵ *Public Interest Disclosure Act 1998* (UK), c 23; *Whistleblower Protection Act*, 18 June 2004, Act No 122 (Japan); *Act on the Protection of Public Interest Whistleblowers*, 29 March 2011, Act No 10472 (South Korea); OECD, “Whistleblower Protection,” online (pdf): *OECD* <www.oecd.org/gov/ethics/whistleblower-protection.htm> [perma.cc/332W-ZWSF].

²⁶ *Criminal Code*, *supra* note 14, s 425.1(2); TI, “UNCAC Review”, *supra* note 10.

While this may seem like a strong safety net for employees, the reality is that the law is not so straightforward.

Whistleblowers should avoid immediately disclosing their findings to law enforcement officers or to the general public when they observe a problem—this should be a mechanism of last resort. If employees reported every illegal act they witnessed by going directly to law enforcement or denouncing it publicly, it would overburden the legal system and cause unnecessary disorder. Numerous courts, including the Supreme Court of Canada, have weighed in on this precise issue throughout the years. It has been established that before employees blow the whistle, they must first attempt to “go up the ladder” within the organization²⁷ and exhaust the appropriate internal disclosure mechanisms before going public.²⁸ Adhering to this internal disclosure process prevents employees from breaching their duties of loyalty and confidentiality.²⁹

Despite having established a preference for this internal disclosure method, Canadian courts have acknowledged that this may not always be a feasible option, depending on the facts of the case.³⁰ There may be rare instances where an employee would be justified in bypassing an internal remedy, such as when there is an imminent threat to public safety.³¹ The “up the ladder” principle stands for less urgent matters, which potentially leaves private sector whistleblowers in a difficult position. On the one hand, they cannot benefit from the protection offered under the *Criminal Code* if they do not report to a law enforcement official; on the other hand, they have no statutory protection against potential retaliation if they attempt to use internal compliance mechanisms by going up the chain of command. Rather than encouraging employees to “do the right thing” when they encounter a corrupt practice, the present system instead forces them to think twice about the possible consequences they would be subject to should they report.

For many whistleblowers in the private sector, the prospect of losing their job represents a major deterrent. Some simply cannot afford to put their financial livelihood at risk. Even if finances are not an issue, there exist ample non-financial risks to consider. The reality is that being a whistleblower is rarely an enjoyable experience. Many whistleblowers incur significant personal costs, the most common of

²⁷ *Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70 at paras 23–28 [*Merk*].

²⁸ *Anderson v IMTT-Quebec Inc*, 2013 FCA 90 at para 40.

²⁹ *Merk*, *supra* note 27; *Atlas Janitorial Services Co v Germanis* (1994), 53 CPR (3d) 1 at para 43 (Ont Gen Div).

³⁰ *Merk*, *supra* note 27 at para 37.

³¹ *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455.

which are stress-induced health problems and strains on their family relationships.³² All too often the prevailing sentiments among whistleblowers are frustration and regret. It is imperative that this outlook be changed if Canada wishes to facilitate whistleblowing in the future.³³ Employees in the private sector should not fall through cracks in the law and be forced to choose between doing the right thing and facing bad faith sanctions from their employer. This issue is at the heart of why Canada needs to adopt legislation aimed at protecting private sector whistleblowers. The benefits that the lucky few enjoy, such as employees in the securities markets, ought to be extended to the rest of the private workforce.

V. THE CASE FOR LEGISLATIVE PROTECTION

Following a series of corporate fraud scandals in the 2000s, various pieces of legislation aimed at preventing corruption and corporate malfeasance were introduced at both the federal and state levels in the United States. The most widely recognized of these are the *Sarbanes-Oxley Act of 2002 (SOX)*³⁴ and *Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)*.³⁵ One salient feature of both of these federal acts is the promotion of whistleblowing as a means of curtailing corruption. Lawmakers recognized that the scale of damage done through corporate corruption scandals could have been mitigated if safeguards had been in place and if employees had been less reluctant to come forward to report issues. While some complainants found that their concerns fell on deaf ears, many others were unwilling to come forward because they were afraid of retaliation and harassment.³⁶ Legislative protections were thus passed to prevent a repeat of these corporate scandals.

With the enactment of *SOX*, publicly traded companies were compelled to establish a code of ethics and whistleblowing procedures, such as anonymous internal hotlines.³⁷ When *Dodd-Frank* was enacted several years later, it built on *SOX* by

³² See e.g. Aaron Kesselheim, David Studdert & Michelle Mello, “Whistleblowers' Experiences in Fraud Litigation against Pharmaceutical Companies” (2010) 362:19 N Engl J Med 1832; Robert G Vaughn, *The Successes and Failures of Whistleblower Laws* (Cheltenham: Edward Elgar, 2012) at 136–49.

³³ Kesselheim, Studdert & Mello, *supra* note 32; Ben Hallman, “Whistleblowers, Beware: Most Claims End In Disappointment, Despair” (6 April 2012), online: *Huffington Post Canada* <www.huffingtonpost.ca/entry/whistleblower-law-false-claims-act-awards-james-holzrichter_n_1563783> [perma.cc/U5R9-7AA6].

³⁴ Pub L No 107-204, 116 Stat 745 [*SOX*].

³⁵ Pub L No 111-203, 124 Stat 1376 (2010) [*Dodd-Frank*].

³⁶ Ferguson, *supra* note 23 at 1037.

³⁷ Terry Dworkin, “US Whistleblowing: A Decade of Progress?” in David B Lewis, ed, *A Global Approach to Public Interest Disclosure* (Cheltenham: Edward Elgar, 2010); Adan Nieto Martin, “Internal Investigations, Whistleblowing, and Cooperation: The Struggle for Information in the Criminal

providing whistleblowers with financial incentives to come forward.³⁸ Both *SOX* and *Dodd-Frank* have had relatively positive effects since their respective enactments. They have not only provided a means to fight corporate fraud and corruption, but they have further extended whistleblower protections to a considerable segment of the private sector in the United States. For whistleblowers who are not covered under these acts, there are other federal and state legislative protections available to them.³⁹ It is further relevant to note that the recent reforms to *Dodd-Frank* by the Trump administration have not notably affected the whistleblower program—if at all.

Both American statutes, particularly the whistleblowing elements incorporated within them, were replicated in Ontario almost immediately after they were enacted.⁴⁰ Similar to the United States, the province and the OSC used these measures to target publicly traded companies. Even though these additions have yielded some success throughout the years in uncovering corporate fraud, developments relating to the bribery of foreign public officials and the *CFPOA* have unfortunately not been particularly profound. Perhaps this indicates that some of Canada’s anti-corruption laws do not go far enough to achieve their intended goals.

Many leading scholars and organizations argue that the current fragmented methods of providing legislative protection to whistleblowers in Canada and the United States actually make it more difficult for employees to come forward than in countries such as the United Kingdom and Japan in which blanket regimes exist.⁴¹ In North American countries, complainants may encounter basic difficulties, such as knowing whether they are afforded legal protection.⁴² For these reasons, many experts would prefer a dedicated, uniform system that is similar to legislation in the United Kingdom and Japan. If Canada were to change its approach and aim to protect both the public and private sector under the same legislation going forward, the number of whistleblowers may increase.

Process” in Stefano Manacorda, Francesco Centonze & Gabrio Forti, *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Cham: Springer, 2014) 69 at 74.

³⁸ *Dodd-Frank*, *supra* note 35, § 922.

³⁹ See e.g. *American Recovery and Reinvestment Act of 2009*, Pub L No 111-5, 123 Stat 115; Vaughn, *supra* note 32 at 152–53.

⁴⁰ OSC Policy 15-601, *supra* note 19; *Keeping the Promise for a Strong Economy Act (Budget Measures)*, 2002, SO 2002, c 22. The Ontario act is commonly referred to as “C-SOX” given its similarity to its American counterpart.

⁴¹ See e.g. Anja Osterhaus & Craig Fagan, “Alternative to Silence: Whistleblower Protection in 10 European Countries” (13 November 2009), online: *Transparency International* <www.issuu.com/transparencyinternational/docs/2009_alternativetosilence_en> [perma.cc/EMP4-8JD7].

⁴² OECD, *Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*, Paper delivered at the G20 Anti-Corruption Working Group in Cannes (2011) [OECD, *Best Practices*]; Ferguson, *supra* note 23 at 1021–22.

Another benefit of enacting more comprehensive legislation is that it may compel companies to strengthen their internal compliance programs. These voluntary initiative programs have increased rapidly in recent years throughout North America, particularly among larger companies, to allow employees to report “warnings signs” before it is too late.⁴³ These internal protocols and procedures are especially important because whistleblowers are encouraged to make their disclosures to someone “up the ladder” where possible. Internal channels for confidential reporting can not only persuade whistleblowers to come forward, but they further demonstrate to law enforcement and shareholders that the company has taken proactive steps to prevent corruption.⁴⁴ Following the decision in *R v Niko Resources Ltd*,⁴⁵ Canadian courts have expressed support for the implementation of rigorous internal compliance programs to help prevent violations under the *CFPOA*. Here, the establishment of a confidential anti-corruption channel was set out by the court under its list of desirable internal compliance measures.

More recently, the *Extractive Sector Transparency Measures Act (ESTMA)* seems to have enhanced the incentives for larger companies to establish a whistleblowing hotline as part of their internal compliance program.⁴⁶ At its core, *ESTMA* is intended to at least partially supplement the *CFPOA* by compelling large oil, gas, and mining companies to file reports of payments totaling \$100,000 or more.⁴⁷ Unlike the *CFPOA*, however, *ESTMA* casts a wider net to include both Canadian and foreign government officials and state-owned entities.⁴⁸ This difference exists because *ESTMA* is intended to reinforce our international commitments in fighting corruption, whether foreign or domestic, as indicated in the stated “purpose” of the Act.⁴⁹

ESTMA’s connection to the introduction of whistleblowing hotlines by larger extractive companies is a development that deserves praise. Many of the implemented internal compliance programs are rather extensive and progressive: they offer anonymous disclosure, protections against retaliation, and even the option to hire external advisors to assist in the handling of the reported violation under certain

⁴³ Banisar, *supra* note 5 at 7.

⁴⁴ OECD, *Best Practices*,” *supra* note 42 at 26.

⁴⁵ (2011), AJ No 1586 (QL)(QB) [*Niko Resources*]; Marta Munoz de Morales, “Corporate Responsibility and Compliance Programs in Canada” in Stefano Manacorda, Francesco Centonze & Gabrio Forti, *Preventing Corporate Corruption: The Anti-Bribery Compliance Model* (Cham: Springer, 2014) 441 at 449; Kevin O’Callaghan & Claudia Feldkamp, “Anti-Bribery and Corruption Planning: An Ounce of Prevention Beats a Pound of Cure” (2012) 1:4 CLAR 72.

⁴⁶ *Extractive Sector Transparency Measures Act*, SC 2014, c 39, s 376 [*ESTMA*].

⁴⁷ *Ibid*, s 9(2).

⁴⁸ *Ibid*, s 2.

⁴⁹ *Ibid*, s 6.

circumstances.⁵⁰ In some respects, these initiatives provide stronger protections for whistleblowers than existing statutes. While this is all a step in the right direction, particularly in the extractive industry, there are numerous problems associated with this internal, up-the-ladder approach.

For starters, there is no guarantee that such programs will always go far enough to have the desired effect. For example, employees may only wish to come forward if anonymous disclosure is an option, but the hotline could be limited to confidential reporting; others might eschew internal disclosure mechanisms because their identity may be easily ascertainable given the nature of the leak; and some companies might not even establish a channel for whistleblowing. These considerations are only a handful of the reasons why having the corporate world lead the way, through what is essentially a “self-regulation” approach, does not provide the most ideal path forward. Rather than encouraging companies to implement the desired regulations, Parliament itself should raise the standard by enhancing the robustness of whistleblower protections. This way protection will also be afforded to employees in smaller to mid-sized companies, irrespective of the industry. Companies may then be encouraged to follow suit and strengthen their internal compliance programs to reflect this government-led change.

Implementing legislative protections can also increase the number of voluntary disclosures on the part of companies. This practice is already a prevalent means by which corruption of foreign public officials is exposed, so a broader whistleblowing regime may feed into this trend. The reason this practice has increased in popularity among companies is that it is widely believed to result in lower financial penalties than they would otherwise face.⁵¹ This appears to create a win-win scenario where companies get rewarded for “good” behaviour and law enforcement saves precious resources. Presently, self-disclosure by companies with respect to foreign bribery is actually the *leading* method by which corruption is uncovered in OECD countries.⁵² An estimated 31 percent of all cases fall into this category, with detection from law

⁵⁰ “Whistleblower Policy” (8 December 2017), online: *Nevsun Resources Ltd*

<www.nevsun.com/corporate/governance/policies/whistleblowing> [perma.cc/ZZS5-7LCL].

⁵¹ For example, in *R v Griffiths Energy International*, (2013) AJ No 412 (QL)(QB) the self-disclosure by the company appears to have been a mitigating factor in the penalties imposed by the court. Even though the company was fined close to \$10 million for its corrupt activities, the penalty was quite similar to the one imposed in *Niko Resources* (*supra* note 45). Given the fact that the former company’s bribes were valued over ten times that of the latter company’s, the message from the Canadian courts with respect to self-disclosure seems pretty clear. This appears to be the trend in the United States as well. After the Securities and Exchange Commission charged Goodyear Tire & Rubber Company for FCPA violations in 2014, regulators strongly hinted that they imposed a lower fine of \$16 million due to “prompt remedial actions” and self-disclosure by the company.

⁵² OECD, “Foreign Bribery Report,” *supra* note 7 at 15–16.

enforcement ranking a distant second at 13 percent.⁵³ Whistleblowing, which accounts for 17 percent of all self-disclosure cases, was one of the leading ways by which companies initially learned about the corruption.⁵⁴

Well over half of all companies providing such bribes to foreign public officials were large corporations, which underlines the significant impact that the establishment of a strong internal compliance program could have on self-disclosure.⁵⁵ The enactment of federal legislative protections could bolster the effectiveness of these internal programs. In fact, in providing these statistics, the OECD noted that whistleblowing has not been used to its full potential as a tool to uncover foreign bribery because of the lack of protection provided by countries.⁵⁶ Strengthening the protection provided to private sector whistleblowers in Canada may encourage more companies to come forward, resulting in a decreased level of corruption. If combined with other strategies, like deferred prosecution agreements, the results may be even more effective.

VI. ELEMENTS TO BE INCORPORATED INTO THE LONG-AWAITED WHISTLEBLOWER LEGISLATION

Passing laws is one thing, but passing *effective* laws is another. Some of the foundational qualities of world-class whistleblower regimes were listed in Sections III and IV. Much of Canada's current whistleblower legislation—irrespective of which sector of the workforce it is geared toward—exemplifies these qualities to a large extent. Yet, Canadian laws have room for improvement. The following subsections highlight several elements that ought to feature prominently in any forthcoming Canadian whistleblower legislation.

Nationwide Public-Private Protection

A uniform system intended to protect all employees in both sectors of the economy is preferable to the current fragmented arrangement. The British and Japanese systems provide a model for the clearer and simpler codification of whistleblower legislation, which could encourage more individuals to come forward by increasing their understanding of the legal protections available to them. Such a change would further ensure the harmonization of procedures and criteria across different provinces and sectors of the economy that must be satisfied by whistleblowers prior to disclosure. If this sort of public-private legislative reform is not feasible, the next best approach would be to embrace broad, national private sector legislation. Nevertheless, the focus

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid* at 21.

⁵⁶ *Ibid* at 16.

of the provisions in the legislation should ultimately be on the *substance* of the disclosure as opposed to the procedures taken by the whistleblower.⁵⁷

Reverse Burden of Proof Provision

The *Ontario Securities Act* was recently amended to allow whistleblowers to benefit from a reverse burden of proof provision in limited circumstances, such as if they suspect that they were retaliated against for cooperating with the OSC.⁵⁸ It seems fitting that in such cases the employer should bear the onus of establishing that retaliatory sanctions were not the reason behind the whistleblowing employee's recent firing, demotion, harassment, etc. To a limited extent, this practice has been partially implemented in whistleblowing programs in other countries, including the United States, United Kingdom, France, South Africa, and Norway.⁵⁹ This lower standard of proof furnishes employees with further protection against reprisals, which is likely why it has received the support of anti-corruption organizations like Transparency International.⁶⁰ Given the all-too-frequent harassment and retaliation endured by whistleblowers, a reverse burden of proof provision seems like a step in the right direction to protect whistleblowers post-disclosure.

Incentives and Financial Protections for Whistleblowers

The SEC and OSC programs have been partly successful in combatting financial corruption because of the financial incentives they offer. Although these programs are quite unique and have yet to make a major impact on the corruption of foreign officials, they have increased the likelihood of such a breakthrough. Unlike most whistleblowing programs, an incentive-based initiative can motivate employees to come forward for reasons other than ethical, moral, or legal ones.⁶¹ In situations where the bribery of foreign public officials is carried out by "agents" and other third parties to conceal the source of the payment, an incentive-based program can be a highly effective tool for law enforcement. It may even be used to target "non-traditional" whistleblowers such as high-earning executives and other corporate elites who may otherwise be hesitant to report corrupt practices due to personal financial considerations (e.g., lost earnings potential or stock options).

Strong financial incentives can be a particularly valuable tool when used to combat the corruption of foreign public officials. This is because corporate

⁵⁷ Ferguson, *supra* note 23 at 12–13.

⁵⁸ *Securities Act*, RSO 1990, c S.5, s 121.5.

⁵⁹ TI, "Whistleblower Protection UN Convention," *supra* note 24 at 8.

⁶⁰ TI Canada, "Whistleblower Report," *supra* note 16 at 11.

⁶¹ Vaughn, *supra* note 32 at 125.

management officials, including chief executive officers, are often heavily involved in sanctioning bribes: a recent study noted that *over half* of all bribes paid were approved by these individuals.⁶² Alleviating the potential economic losses of these individuals through a rewards-based system may facilitate more prosecutions under the *CFPOA*. This program could be further enhanced when combined with other measures, such as an anonymous disclosure mechanism similar to the OSC's provision. To avoid insignificant or petty reports, a portion of the penalties should only be awarded to the whistleblower if a particular minimum penalty is successfully levied (e.g., \$250,000). This would make the system more practical and in line with other whistleblowing initiatives offered in Canada; namely, those offered by the Canada Revenue Agency and the OSC.

Aside from financial incentives, other means of financial protection or compensation may be made available for high-profile cases with potentially large fines attached to them. Special economic initiatives may be introduced for recoveries exceeding \$1million dollars, which can apply beyond just the *CFPOA* to cover other forms of corrupt domestic practices as well. These initiatives can take various forms, including the waiver of certain legal fees or the possibility of an "acknowledged" reward system to ease the financial burden on whistleblowers. The latter protection, for instance, will mitigate some of the short-term financial stresses that whistleblowers may face because they would receive a portion of their reward in advance. This can be especially helpful if they are involved in lawsuits of their own with their (former) employer that stem from the disclosure, or have resigned to seek new employment elsewhere following the incident and require short-term financial assistance. Furthermore, similar to the OSC's program, financial rewards and compensation should be made available to both anonymous and confidential whistleblowers whenever possible. This will help preserve the names and reputations of whistleblowers who are concerned about workplace harassment, difficulty finding new employment opportunities, or other consequences that result from the disclosure.

CONCLUSION

Current attitudes toward whistleblowing are well reflected in Article 33 of the *United Nations Convention Against Corruption (UNCAC)*, which calls on member states to only *consider* adopting legislative measures to protect whistleblowers.⁶³ In other words, abiding by this Article is not required but is, rather, optional. *UNCAC* likely recognized that whistleblowing is still a controversial practice in many countries around the world due to differing legal traditions and practices. Nevertheless, it is clear

⁶² OECD, "Foreign Bribery Report," *supra* note 7 at 8.

⁶³ 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005).

that the outlook toward whistleblowing has been changing in recent decades. This is evident in the increasing number of legislative protections for whistleblowers, particularly in OECD countries.⁶⁴ Whistleblowers are increasingly viewed as instruments by which crime, corruption, and wrongdoing can be diminished. If protections were extended in Canada to employees in the private sector, both domestic and foreign corruption would be curtailed. In this paper, specific emphasis was placed on the corruption of foreign public officials under the *CFPOA*.

Ideally, the private and public sectors will be protected under the same legislation—similar to what is done in the United Kingdom and Japan. This will simplify the law and allow individuals to better understand their rights prior to disclosure. Of course, the expansion of the scope of whistleblower protection will not independently limit corruption. Numerous interrelated factors are critical to the establishment of an effective whistleblowing system. In particular, these recommended features should inform any future enactment of legislative protection. This would help to better target some of the chief perpetrators of *CFPOA* corruption (i.e., larger companies) and bring about more cases of self-disclosure. Future studies by academics can perhaps focus more thoroughly on the relationship between these two issues. What is certain at this moment is that Canadians stand to benefit from enhanced whistleblower protection. Although this will not be a cure-all solution to the age-old problem of corruption, it will be a step in the right direction.

⁶⁴ Latimer & Brown, *supra* note 8 at 1.