Recommendations for an effective British Columbia *Whistleblower Protection Act*

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Opinions expressed herein are solely those of the authors and should not be attributed to other parties. This white paper does not represent the official position of the Allard School of Law or the University of British Columbia.

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Introduction

This white paper outlines the necessary elements to create a robust whistleblower protection law for British Columbia ("BC").

Despite favourable rankings in anti-corruption indexes,[1] Canada and its provinces are not immune from corruption. Given numerous reports of corruption in BC in recent years,[2] it has become evident that the province would benefit from effective legislation that encourages those with critical information in the public interest to come forward.[3] Unlike the majority of Canadian provinces, however, British Columbia lacks a dedicated statute to protect whistleblowers.

Good whistleblower protection laws and systems are among the most effective means to prevent societal harm and improve the performance of organizations. Among other benefits, a strong whistleblowing regime can help detect harmful misconduct, safeguard the integrity of management systems, preserve public funds, deter corruption and maintain the public trust.[4] Research studies also consistently show that whistleblowing is "by far the most effective single mechanism available for uncovering wrongdoing", but only if individuals working in the system feel it is safe to blow the whistle on suspicious activities.[5] Finally, an effective whistleblowing system can also lead to reduced costs, better employee engagement, enhanced stakeholder confidence and improved performance.

After surveying whistleblowing laws and practices in Canada and numerous other countries, four key principles emerge as essential for a whistleblowing regime to be effective. These principles include:

1) adequate scope of coverage;
2) fair burdens of proof;
3) the use of free and fair institutions; and
4) adequate relief and incentives for whistleblowers.

Below, we elaborate on each of these principles, citing best practices from numerous jurisdictions, and suggest how BC's proposed *Whistleblower Protection Act* (Bill M-216 – 2017) could be amended to better incorporate these principles.

I. Scope of coverage

Whistleblower legislation should have a broad and seamless scope of coverage to ensure that protection is actually there when an individual needs it.[6] This requires adopting a "no loophole" approach when defining the form and content of a protected disclosure under the Act.

Gaps in coverage typically arise in three different places: (1) the **subject matter** of disclosure; (2) the definition of **who** can make a protected disclosure; and (3) the **form** of disclosure. We address each of these potential gaps below.

(1) Subject matter of a protected disclosure

The consensus in whistleblower literature is that legislation should protect disclosures of a wide variety of wrongdoing.[7] In addition to specific crimes or regulatory violations, whistleblower legislation should also protect disclosures that provide evidence of other significant misconduct.[8] This misconduct includes, but is not limited to, abuse of authority, miscarriage of justice, gross mismanagement or waste, actions that present substantial danger to public health or safety, environmental damage or any act that is meant to conceal an act of wrongdoing.[9] A helpful overarching guideline is to protect disclosures of "activity which undermines the institutional mission" of the organization.[10] With regards to the applicable legal standard, whistleblower legislation should protect individuals who have a "reasonable belief" that the information disclosed is evidence of wrongdoing, and not require that the information itself prove wrongdoing.[11] Four specific examples of legislation that incorporate this type of broad definition of wrongdoing include the UK's *Public Interest Disclosure Act* (*UK PIDA*) section 43B(1) [**Annex A**], New Zealand's *Protected Disclosures Act* (*NZ PDA*), section 3(1), "serious wrongdoing" [**Annex B**], Serbia's *Law on the Protection of Whistleblowers Act,* No. 128/2013, Article 2(1) "whistleblowing" [**Annex C**], and Ireland's *Protected Disclosures Act 2014,* section 5 "protected disclosures" [**Annex D**].[12]

Currently, the definition of "wrongdoing" in section 3 of BC's Bill M-216 includes illegality, acts that create a danger to health, safety and the environment, gross mismanagement and/or counselling to commit wrongdoing.[13] To align with best practices, this definition could be expanded to also include abuse of authority that may not rise to the level of illegality, gross waste, miscarriage of justice and concealment of wrongdoing. Section 12 of Bill M-216 adequately incorporates the "reasonable belief" standard for a disclosure to receive protection.[14]

Another element when considering scope of coverage is whether the legislation protects whistleblowers who disclose wrongdoing in both the private and public sectors. While there are examples of industry-specific legislation that protect private sector whistleblowers, particularly in the financial industry,[15] it is uncommon for stand-alone whistleblower legislation to protect whistleblowers who disclose wrongdoing by both public and private actors. Academics[16] and corruption-focused NGOs[17] maintain, however, that to truly protect all whistleblowers from potential employer retribution, legislation must protect disclosures of wrongdoing by both public and private employers.

The United Kingdom's *Public Interest Disclosure Act* (*PIDA*) is one example of stand-alone whistleblower legislation that extends protection to private sector employees. *PIDA* makes no distinction between wrongdoing by public and private actors in its definition of "qualifying disclosure", and therefore applies to whistleblowers who provide information of misconduct by both public and private actors.[18] Subsequent UK case law has highlighted some issues with the law's application as employees have attempted to use it as a shield in purely private contractual disputes.[19] To ensure that the legislation would not be vulnerable to abuse or a source of uncertainty for businesses, the UK's *Enterprise and Regulatory Reform Act* of 2013 amended the definition of "qualifying disclosure" such that it now requires a disclosure to be "made in the public interest".[20] This public interest test is meant to prevent *PIDA* from becoming a tool for private employment disputes and ensure that only claims with an element of genuine public interest are protected. This type of "public interest" qualification could be considered to ensure that valuable disclosures are protected regardless of who the whistleblower and the employer are, and to weed out cases of purely private interest.

Currently, section 3 of Bill M-216 limits whistleblower protection to disclosures of wrongdoing in the "public service", which is further defined in section 1 as "ministries, government bodies and offices".[21] Even if protection of private-private whistleblowing (a private sector employee blowing the whistle on a private sector employer) is deemed beyond the scope of BC's legislation, drafting should ensure that the legislation applies to potential wrongdoing committed by all levels of government, including municipalities[22] and administrative agencies, as well as to wrongdoing by private actors who contract or are in public-private partnerships with government.[23]

Section 38 of Bill M-216 does provide some protection for private sector employees who provide information concerning wrongdoing to the Ombudsperson.[24] The interaction of these provisions, however, suggests that a private sector employee will only receive protection if the wrongdoing they disclose is related to a ministry, government body or officer, rather than wrongdoing committed by a private actor.

We encourage BC to consider expanding whistleblower protection beyond "public service" wrongdoing, to those individuals who disclose significant misconduct of private actors that impacts the general public. Furthermore, while the definition of "public service" appears to capture municipalities and administrative agencies[25], it is unclear whether "ministries, government bodies and offices" include private-public partnerships or private actors who contract with the government. We further recommend that the Act specify that municipalities and administrative agencies are included in the "public service" definition.

(2) <u>Who can make a protected disclosure?</u>

The "no loophole" approach to coverage also applies to defining who can make a protected disclosure under the Act. To protect against employment retaliation, whistleblower protection coverage should extend to all types of employment relationships, including full-time, part-time, temporary and probationary employees, as well as contractors, consultants, volunteers, and employees seconded from another organization.[26] Protection should also extend to potential victims of "spillover retaliation", namely persons who are not whistleblowers but who may be perceived as whistleblowers, persons who have assisted whistleblowers, and persons who are preparing to make a protected disclosure.[27] Some examples of legislation that broadly define who can make a protected disclosure include the UK's *PIDA* section 43K(1)(a)-(d) [**Annex A**], Ireland's *Public Disclosures Act* 2014 section 3 "worker" [**Annex D**], and the US *False Claims Act* 31 USC 3730(h) [**Annex E**].

Currently BC's Bill M-216 extends protection from retaliation to employees,[28] private sector employees[29] and persons contracting with the government.[30] Section 1 of the Act defines "employee" as an employee of a ministry, government body or office. The Act also allows for disclosures of wrongdoing from non-employees.[31] While the current legislation appears to cover all of the recommended types of employment relationship, BC would benefit by clarifying that the interpretation of "employee" covers consultants, volunteers, and temporary, seconded and probationary employees. Section 31 of Bill M-216 also protects employees from retaliation if they seek advice on making a disclosure or are about to make a disclosure under the Act. To better cover "spillover retaliation", the Act should also extend protection to those who assist or may be perceived to be whistleblowers.

(3) <u>The form of disclosure</u>

Finally, whistleblower protection should prioritize the substance of a disclosure over its form, as gaps in coverage can arise if there are arbitrary form requirements for protected disclosures.[32] Protected disclosures should include "any disclosure that would be accepted as evidence of significant misconduct"[33], without regard to method (oral or written) or motive, as long as it is reasonable to believe that the information is pertinent and true. Experts suggest designating a specific person within an organization to whom a whistleblower can first disclose, in order to promote internal disclosures.[34] If a whistleblower finds that internal disclosure is impractical or inadequate, effective whistleblower legislation sets out a designated, independent external agency that can also hear and investigate reports of wrongdoing.[35] (The role of this agency is further discussed below in the "Free and Fair Institutions" section.) Finally, effective whistleblower legislation should also respect and protect disclosures to other external bodies, including the media and Parliament.[36] Whistleblower protection should not be barred because

otherwise pertinent information was first disclosed to a third party outside of the organization or external agency.

Currently, Bill M-216 limits both the form and audience of a protected disclosure. Section 14 of the Act limits the form of a disclosure by requiring employees to make disclosures in writing.[37] We recommend that BC revise this provision to close this gap in coverage and allow for both oral and written disclosures.

Likewise, Section 12 of Bill M-216 limits an employee's audience for disclosure to their supervisor, designated officer or the Ombudsperson.[38] While Section 16 allows for disclosure to the public, it limits these disclosures to urgent situations of imminent risk, where an employee has previously made a disclosure to law enforcement or a health officer or is acting at the direction of the agency or officer.[39] This section thus limits the protection available for whistleblowers in cases where internal disclosure or disclosure to an external agency is impractical or inadequate, as well as in cases where it is unclear if the wrongdoing would meet the high threshold of "imminent risk of a substantial and specific danger". Such limitations could restrict the flow of valuable disclosures and expose whistleblowers to reprisals without protection. We therefore recommend that BC extend protections beyond supervisors, designated officers or the Ombudsperson to include disclosures made to the media and members of Parliament.

II. Fair Burdens of Proof

When a whistleblower brings a claim of employment retaliation following a protected disclosure, the burden of proof to establish illegal retaliation should be fair and realistic.[40] Growing international practice indicates that a whistleblower need not prove retaliation at the outset, but rather can establish a *prima facie* case of retaliation by demonstrating that his or her disclosure or attempted disclosure was a "contributing factor" in the challenged retaliation.[41] Once a *prima facie* case is met, the burden then shifts to the employer to establish that the same action would be taken regardless of the disclosure.[42] One example of legislation that employs this burden of proof is the United States' *Whistleblower Protection Act* 5 USC 1221(e) [**Annex F**].

Currently, section 32 of BC's Bill M-216 directs whistleblower reprisal complaints to BC's Labour Relations Board, rather than the courts. The Labour Relations Board is an established independent tribunal with appropriate expertise to hear these complaints.[43] The *Labour Relations Code* appears to place the burden of proof on the employer to demonstrate that it did not engage in unfair labour practices, which is in line with best practice.[44] Moving forward, BC may wish to ensure that, in practice, the Labour Relations Board employs a realistic burden

of proof and does not require whistleblowers to definitively prove they have been retaliated against because of their disclosures. Section 32(3) of Bill M-216 also sets out possible remedies the Board may order if they find an employer has retaliated against a whistleblower.[45] Whistleblowing experts note that this section could be strengthened to deter reprisals against whistleblowers by including remedial provisions to specifically sanction individuals who orchestrated, took part in or allowed for reprisals against whistleblowers.[46]

III. Free and Fair Institutions

Fair institutions that will enforce legally protected whistleblower rights are critical to effective whistleblower protection. Experts suggest that the ideal enforcement institution is an informal remedial body that is separate from government.[47] This body would protect the whistleblower's right to judicial due process, otherwise known as a "genuine day in court", and be structured to provide freedom from institutional conflicts of interest that are common in the preliminary stages of informal or internal review following a whistleblower complaint.[48] An effective whistleblower reporting body should also provide an option for alternative dispute resolution with an independent party of mutual consent, e.g. through a labour arbitrator or other alternative that would be less costly to the whistleblower.[49] As recommended by Quebec's 2015 Charbonneau Commission,[50] legislation should provide routes for both internal and external reporting and ensure whistleblower anonymity, both of which are essential elements to protect whistleblowers from reprisal and reputational harm.[51]

Because there is not currently a specific whistleblower protection Act in BC, a highly effective statute could be drafted by examining federal, provincial and international institutional models. Much of Canada's legislation in this area is based on principles established in case law. The 1981 case *Re Ministry of Attorney General, Corrections Branch and BCGEU* established that public servants' duty of loyalty to their employer did not create a "gag rule" with respect to employees making critical statements against their employer.[52] In particular, the case noted:

> Neither the public nor the employer's long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment to the attention of those who can correct such wrongdoing.[53]

This case as well as subsequent cases[54] formed the basis of the *Public Servants Disclosure Protection Act* ("PSDPA"), which claims to protect whistleblowers in a two-step integrated model.[55] In the first step, a Commissioner refers cases to an independent tribunal[56] established by the Act, the Public Disclosure Protection Tribunal, which rules on the issue in the second step.[57] The PSDPA uses a unique tiered approach to disclosure that allows internal or

external disclosure to the employer, regulatory agencies, external individuals or the media.[58] The PSDPA has been roundly criticized by parliamentarians and other experts, however, for its inability to protect whistleblowers from reprisal.[59] On its own website, the Tribunal lists only eight cases filed since its establishment in 2007.[60] Under the PSDPA, the Public Sector Integrity Commissioner's Office (PSIC) is the only place where whistleblowers can go with complaints of employment retaliation, and only the PSIC can refer a case to the Tribunal.[61] This gatekeeping approach has been described as "cumbersome and appallingly slow"[62], while the PSDPA's complex framework is considered by experts to be "a paper shield, the global lowest common denominator" in whistleblower protection.[63] Due to these weaknesses, we would not recommend using the PSDPA as a model for a new statute.[64] Specifically, BC should avoid employing a referral system in which an individual (in the PSDPA, the Integrity Commissioner) has sole discretion as the gatekeeper for employment retaliation complaints.[65]

In Canadian provinces, three main whistleblower legislation models have been used:

1) the integrated model exclusive to the integrity commissioner (Saskatchewan and Alberta);
2) the labour board and integrity commissioner model (Ontario); and
3) the labour board and ombudsman model (Manitoba, New Brunswick, and the proposed BC legislation).[66]

In the integrated model, an independent integrity commissioner is responsible for hearing, investigating and making recommendations on claims and may also refer the claim to another body.[67] While this model seems positive for institutional independence, it does not appear to offer sufficient assurance to motivate whistleblowers to come forward. In her 2016 report, Saskatchewan's Public Interest Disclosure Commissioner Mary McFayden noted that while she only completed one investigation in 2016, many people contacted her anonymously. Her conclusion was that public employees were afraid to come forward.[68] Likewise, in Alberta, only three cases were investigated in 2017 to 2018.[69] The low number of disclosures suggests this model is likely ineffective.

Incorporating provincial labour boards into the dispute-resolution process may be a better model. The integrity commissioner and labour relations board model (Ontario) directs the integrity commissioner, who is responsible for maintaining high standards of ethical conduct in public service, to either investigate or choose a person who is in the best position to investigate the disclosure.[70] If the Commissioner determines a reprisal was taken against the whistleblower, a complaint can be filed with the labour relations board.[71] It is not clear whether using the integrity commissioner or ombudsperson prior to referral to the labour board would be preferable. Some commentators suggest that Bill M-216[72], which utilizes the ombudsperson

model, could preserve the core tenets of effective whistleblowing legislation if both the Labour Relations Board and ombudsperson are sufficiently independent.[73] Furthermore, the involvement of multiple actors has been cited as critical to effective whistleblower laws.[74] Experts specifically suggest that the body that looks into whistleblower reprisal claims must be separate from the body that investigates disclosures of wrongdoing, as discussed further below.[75] Thus, the labour board/integrity commissioner model appears preferable to the integrated model, which streamlines the complaint process through one actor.

Principles found in foreign sources and NGO reports can also help develop effective BC legislation, particularly with regard to anonymity protection. International best practices to protect whistleblowers through institutions have been recognized to include dedicated legislation, the publication of data from the designated complaints authority, and effective training.[76] In a 2015 report by non-profit organization Blueprint for Free Speech, Canada whistleblower anonymity protection was assessed compared to other G20 countries as "absent/not at all comprehensive".[77] To improve this ranking, lessons can be drawn from other countries. The U.S. Whistleblower Protection Act prohibits the Office of Special Counsel from revealing the identity of an individual without consent, unless necessary "due to an imminent danger to public health, safety, or violating criminal law."[78] Other countries have imposed penalties on those who reveal the identity of a whistleblower[79] or have established hotlines for disclosure.[80] Most recently, the European Commission announced a proposed law that protects whistleblowers in judicial proceedings, and exempts the whistleblower from liability for disclosing the information.[81] In sum, incorporating additional anonymity protections would add legitimacy to public institutions and encourage whistleblowers to report.

IV. Adequate Relief and Incentives for Whistleblowers

Whistleblower relief must be available in a broad range of reprisal situations so that a whistleblower is not worse off for speaking out. The Government Accountability Project (GAP) lists several necessary features of whistleblower relief, including compensation with "no loopholes" that would cover all direct, indirect and future consequences of reprisal, including such expenses as medical bills for consequences of harassment.[82] Interim relief while an investigation or arbitration is in process is particularly important and could be included in potential BC legislation. GAP notes that, without adequate interim relief, ultimate victory for a whistleblower "may be merely an academic vindication for unemployed, blacklisted employees who go bankrupt while they are waiting to win".[83] In the context of proposed Bill M-216,[84] a relief fund could potentially provide interim funds to a whistleblower during the ombudsperson's investigation and during any Labour Relations Board hearing to cover expenses such as lost salary or medical bills. GAP also notes that adequate relief should include coverage of attorney

fees for whistleblowers who prevail in their claims and a job transfer option to prevent repetitive reprisals by the employer in question.[85]

Programs that incentivize whistleblowers to come forward through compensation in successful cases have resulted in significant recovered funds in both the United States and Canada. In the public sector, the US False Claims Act ("FCA") has shown strong results in incentivizing whistleblowers to come forward. The FCA prioritizes information rather than the whistleblower's motives, with one academic noting that "the desire by the government to recover money and correct wrongdoing now trumps concerns regarding whistleblower motive".[86] The FCA, which allows citizens to make claims on behalf of the government (called "*qui tam*" suits) in the case of contract fraud, has recovered $56 billion USD in public funds since 1986 and $3.7 billion USD in 2017 alone[87]; it is cited by US experts as their most effective whistleblower policy tool.

In the private sector, the US Dodd Frank legislation, which was enacted in response to a series of scandals involving large companies such as Enron, allows whistleblowers to be compensated a percentage of the funds recovered as a result of their original information if the amount recovered is over $1 million [see **Annex G**], as part of the U.S. Securities and Exchange Commission ("SEC") whistleblower program.[88] Under the SEC program, whistleblowers receive 10% to 30% of the total amount collected through monetary sanctions.[89] In 2015, the program received tips from 96 countries and handed out 22 awards averaging $2.5 million each.[90]

Monetary incentives for whistleblowers have also been implemented in Canada. The Ontario Securities Commission Program ("OSC") has a similar program to the US's SEC whistleblower program.[91] The OSC's Whistleblower Protection Program allows whistleblowers who report information on Ontario securities law to receive 5% to 15% of total monetary sanctions,[92] up to a maximum of $5 million CAD, if the information results in an enforcement action.[93] This program does not require a whistleblower to report internally first, recognizing that there may be circumstances where a whistleblower "may appropriately wish not to report to an internal compliance and reporting mechanism".[94] In their 2017 annual report, the OSC reported returning $143 million to investors that year in three no-contest settlements, and $342 million returned to investors through eight no-contest settlements to date.[95] A limited compensation model such as this could also be effective in BC.

In reviewing whistleblower laws that target both the public and private sphere, incentivizing whistleblowers via adequate relief and monetary compensation appear key to encouraging people to come forward and help recover public funds.

Summary recommendations for a robust whistleblowing law in British Columbia

In sum, to create comprehensive legal protections for whistleblowers, we recommend that the BC whistleblower law:

Scope

1) Expand the definition of "wrongdoing" to include abuse of authority, gross waste, miscarriage of justice and concealment of wrongdoing.
2) Expand whistleblower protection beyond the public service, and protect individuals who disclose wrongdoing by **private actors** that impacts the general public.
3) Ensure that "public service" captures municipalities, private-public partnerships and private actors who contract with the government so that wrongdoing by these actors can be disclosed and investigated.
4) Clarify the definition of "**employee**" and ensure that it covers consultants, temporary and probationary employees, volunteers, and seconded employees.
5) Extend protection to those who assist a whistleblower or those who may be perceived as a whistleblower.
6) Remove the form requirement in Section 14 of the Act, which requires written disclosures.
7) Extend protection from retaliation to include disclosures made to the media and Parliament, rather than requiring disclosures to be made only to supervisors, designated officers or the Ombudsperson.

Fair Burdens of Proof

8) Ensure that employment retaliation claims heard before the Labour Relations Board use **realistic burdens of proof that place the onus on the employer** to show that challenged actions would have been taken regardless of a protected disclosure.

Free and Fair Institutions

9) **Preserve confidentiality** of the whistleblower regardless of the form of disclosure, in line with the Charbonneau Commission Recommendations.
10) Include **strong and specific provisions against reprisal**, which obligate government managers and supervisors to protect and support employees who make a disclosure.
11) Ensure judicial due process, a cost-effective form of dispute resolution, and a "genuine day in court" for the whistleblower.
12) Ensure that the Ombudsperson's annual report is comprehensive and includes information beyond general statistics. Reports of individual investigations should be made public to increase transparency.

Adequate Relief

13) Include relief for whistle-blowers that covers all direct, indirect and future consequences of whistleblowing, interim relief while the investigation is in process, attorney fees for successful whistleblowers and an employment transfer option.
14) Establish a whistleblower compensation program that includes a limited percentage-based reward for original information that leads to successful monetary recovery.

Recommended Reading for further detail and information:

- Tom Devine, "International Best Practices for Whistleblower Policies" (22 July 2016), *Government Accountability Project,* online: <https://www.whistleblower.org/international-best-practices-whistleblower-policies>.
- House of Commons, Standing Committee on Government Operations and Estimates, *Strengthening the Protection of the Public Interest Within the Public Servants Disclosure Protection Act* (June 2017), Chair: Tom Lukiwski), online: <ourcommons.ca/DocumentViewer/en/42-1/OGGO/report-9/>.
- Gerry Ferguson, *Global Corruption: Law, Theory and Practice,* 2nd ed. (International Centre for Criminal Law Reform, 2017), Chapter 12, online: <https://icclr.law.ubc.ca/resources/global-corruption-law-theory-and-practice/>
- Transparency International, "Recommended draft principles for whistleblowing legislation" (2009), online: <https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf>.

Annex A: UK's *Public Interest Disclosure Act,* 1998 c. 23

Section 43B(1)

43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—
  (a) that a criminal offence has been committed, is being committed or is likely to be committed,
  (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
  (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
  (d) that the health or safety of any individual has been, is being or is likely to be endangered,
  (e) that the environment has been, is being or is likely to be damaged, or
  (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)

Section 43K(1)(a)-(d)

43K Extension of meaning of "worker" etc. for Part IVA.

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—
  (a) works or worked for a person in circumstances in which—
    (i) he is or was introduced or supplied to do that work by a third person, and
    (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)",

(c) works or worked as a person providing general medical services, general dental services, general ophthalmic services or pharmaceutical services in accordance with arrangements made—

(i) by a Health Authority under section 29, 35, 38 or 41 of the National Health Service Act 1977, or

(ii) by a Health Board under section 19, 25, 26 or 27 of the National Health Service (Scotland) Act 1978, or

(d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than—

(i) under a contract of employment, or

(ii) by an educational establishment on a course run by that establishment;

and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

Annex B: New Zealand's *Protected Disclosures Act*, 2000 No 7

Section 3(1) "serious wrongdoing"

"serious wrongdoing" includes any serious wrongdoing of any of the following types:

(a) an unlawful, corrupt, or irregular use of funds or resources of a public sector organisation; or

(b) an act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment; or

(c) an act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial; or

(d) an act, omission, or course of conduct that constitutes an offence; or

(e) an act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement,— whether the wrongdoing occurs before or after the commencement of this Act

Annex C: Serbia's *Law on the Protection of Whistleblowers Act,* No. 128/2013

Translation available at: https://whistlenetwork.files.wordpress.com/2017/01/law-on-protection-of-whistleblowersfinal.pdf

Article 2(1), "whistleblowing"
"whistleblowing" shall mean the disclosure of information regarding an infringement of legislation; violation of human rights; exercise of public authority in contravention of the purpose it was granted; or danger to life, public health, safety, and the environment; or with the aim to prevent large-scale damage.

Annex D: Ireland *Protected Disclosures Act 2014*

Section 5. "Protected disclosures"

(1) For the purposes of this Act "protected disclosure" means, subject to subsection (6) and sections 17 and 18 , a disclosure of relevant information (whether before or after the date of the passing of this Act) made by a worker in the manner specified in section 6 , 7 , 8 , 9 or 10.

(2) For the purposes of this Act information is "relevant information" if—
   (a) in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and
   (b) it came to the attention of the worker in connection with the worker's employment.

(3) The following matters are relevant wrongdoings for the purposes of this Act—
   (a) that an offence has been, is being or is likely to be committed,
   (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,
   (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
   (d) that the health or safety of any individual has been, is being or is likely to be endangered,
   (e) that the environment has been, is being or is likely to be damaged,
   (f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,
   (g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or
   (h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.

(4) For the purposes of subsection (3) it is immaterial whether a relevant wrongdoing occurred, occurs or would occur in the State or elsewhere and whether the law applying to it is that of the State or that of any other country or territory.

(5) A matter is not a relevant wrongdoing if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer.

(6) A disclosure of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is not a protected disclosure if it is made by a person to whom the information was disclosed in the course of obtaining legal advice.

(7) The motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure.
(8) In proceedings involving an issue as to whether a disclosure is a protected disclosure it shall be presumed, until the contrary is proved, that it is.

Section 3. "worker"

"worker" means an individual who—

(a) is an employee,
(b) entered into or works or worked under any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertook to do or perform (whether personally or otherwise) any work or services for another party to the contract for the purposes of that party's business,
(c) works or worked for a person in circumstances in which—
    (i) the individual is introduced or supplied to do the work by a third person, and
    (ii) the terms on which the individual is engaged to do the work are or were in practice substantially determined not by the individual but by the person for whom the individual works or worked, by the third person or by both of them,
(d) is or was provided with work experience pursuant to a training course or programme or with training for employment (or with both) otherwise than—
    (i) under a contract of employment, or
    (ii) by an educational establishment on a course provided by the establishment, and

includes an individual who is deemed to be a worker by virtue of subsection (2) (b) and any reference to a worker being employed or to employment shall be construed accordingly.

Annex E: US *False Claims Act* 31 US Code § 3730 – Civil actions for false claims

31 USC 3730(h) Relief from Retaliatory Actions

(h) Relief From Retaliatory Actions.—

(1) In general.—

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

Annex F: US *Whistleblower Protection Act* 5 US Code § 1221(e)

Individual right of action in certain reprisal cases

(e)

(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or protected activity; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

Annex G: US Dodd-Frank Act 9 USC § 922 (2010)

Whistleblower Protection

(a) IN GENERAL.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 21E the following:

"SEC. 21F. SECURITIES WHISTLEBLOWER INCENTIVES AND PROTECTION.

"(b) AWARDS.—

"(1) IN GENERAL.—In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

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[1] *See e.g.*, Transparency International, "Corruption Perception Index" (2017), available at: < https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table>.

[2] Kathy Tomlinson and Xiao Xu, "B.C. vows crackdown after Globe investigation reveals money-laundering scheme, *The Globe and Mail* (16 February 2018, updated 5 March 2018) online https://www.theglobeandmail.com/news/investigations/real-estate-money-laundering-and-drugs/article38004840/; Dan Levin, "British Columbia: The 'Wild West' of Canadian Political Cash", *The New York Times* (13 January 2017) online: <https://www.nytimes.com/2017/01/13/world/canada/british-columbia-christy-clark.html>; Elizabeth McSheffrey, "Alberta Oil and Gas Millions Fuel BC Liberal Machine", *Vancouver Observer* (8 July 2015) online: < https://www.vancouverobserver.com/news/alberta-oil-and-gas-millions-fuel-bc-liberal-machine>; Linda Solomon Wood & Chris Hatch, "Time for a Corruption Inquiry in BC", *National Observer* (9 March 2017) online: < https://www.nationalobserver.com/2017/03/09/opinion/time-corruption-inquiry-bc>; Ian Mulgrew, "Surrey Municipal Corruption Case was Minimized", *The Vancouver Sun* (2 February 2018) online: < vancouversun.com/news/crime/surrey-municipal-corruption-minimized>.
While Canada's Country Statement at the Anti-Corruption Summit in London 2016 commits to addressing tax evasion and corruption overseas, it is less forthright in acknowledging and addressing domestic corruption. See "Anti-Corruption Summit - London 2016 Canada Country Statement", online: < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522856/Canada.pdf>.

[3] Although whistleblowers are frequently portrayed as "rogue actors" who seek to undermine the work of their organizations, in reality, they are typically honest individuals who come forward because they do not want to be complicit in dishonest transactions or systems they have witnessed that undermine societal welfare. Interview with

David Hutton, former Executive Director of Canada's Federal Accountability Initiative for Reform (FAIR), 17 April 2018.
[4] Canadian Standards Association, "EXP01-16 Whistleblowing systems – A guide" (2016) at 9-10.
[5] Centre for Free Expression, "What's Wrong with Canada's Federal Whistleblowing System" (2014), available at: <https://cfe.ryerson.ca/sites/default/files/whats_wrong_with_the_psdpa_0.pdf> at 4-5. [Centre for Free Expression]
[6] Tom Devine, "International Best Practices for Whistleblower Policies" (22 July 2016), *Government Accountability Project,* online: <https://www.whistleblower.org/international-best-practices-whistleblower-policies>. [GAP Best Practices]
[7] Gerry Ferguson, *Global Corruption: Law, Theory and Practice,* 2nd ed (International Centre for Criminal Law Reform, 2017) at 12-12. [Ferguson]
[8] GAP Best Practices, *supra* note 6 at page 2.
[9] *Ibid*.
[10] *Ibid*, at page 3.
[11] Transparency International, "Recommended draft principles for whistleblowing legislation" (2009), online: <https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf>. [Transparency International]
[12] Serbia's whistleblowing law is considered by experts to be one of the best for several reasons. First, the unique grassroots, democratic process that created the law both improved its substance and resulted in wide scale buy-in. Second, the law's protections, including its anti-retaliation rights are broadly applicable to all citizens with no loopholes or exceptions. Third, and most importantly, the law's top priority is to provide fast temporary relief to whistleblowers (within eight days) that freezes reprisals until the legal case is resolved. Without strong temporary relief provisions, employers attempt to stretch out retaliation cases as long as possible because as long as the cases are not resolved, the employer has effectively won. Interviews with Tom Devine, March 12, 2018 and David Hutton, 17 April 2018.
[13] British Columbia Bill M 216 – 2017, *Whistleblowers Protection Act*, 40th Parl, British Columbia, 2017, (first reading 16 February 2017), ss. 3, 12. [Bill M 216]
[14] *Ibid*, s. 12.
[15] *See e.g.*, *Whistleblower Program*, Ontario Securities Commission SC MP 15-601 [OSC Whistleblower Program]; *Sarbanes-Oxley Act,* 18 USC (2002). (United States).
[16] *See e.g.*, Paul Latimer & AJ Brown, "Whistleblower Laws: International Best Practice" (2008) 31:3 UNSW LJ 766 at 775. [Latimer]
[17] *See e.g.*, Transparency International, *supra* note 11 at 2.
[18] *Public Interest Disclosure Act 1998* (UK), c 23, s 43B. [UK *PIDA*]
[19] UK, House of Commons Library, *Whistleblowing and Gagging Clauses* (Briefing Paper No CBP 7442) by Doug Pyper, at 13.
[20] *Ibid*, at 14.
[21] Bill M-216, *supra* note 13 at ss. 1, 3.
[22] Interview with Nathalie Baker, Barrister and Solicitor, StevensVirgin, 6 February 2018.
[23] Interview with Professor Joseph Weiler, 6 February 2018.
[24] Bill M-216, *supra* note 13 at s. 38.
[25] *Ibid*, at s. 1, definition of "government body" (e) and "public service".
[26] GAP Best Practices, *supra* note 6 at 3, and Interview with David Hutton, April 17, 2018.
[27] Ferguson, *supra* note 7 at 12-12.
[28] Bill M-216, *supra* note 13 at s. 31.
[29] *Ibid*, at s. 38.
[30] *Ibid*, at s. 39.
[31] *Ibid*, at s. 34.
[32] Latimer, *supra* note 16 at 785.
[33] GAP Best Practices, *supra* note 6 at 2.
[34] Latimer, *supra* note 16 at 776 & Ferguson *supra* note 7 at 12-15.
[35] *Ibid*.
[36] *Ibid* at 780.
[37] Bill M-216, *supra* note 13 at s 14.
[38] *Ibid*, at s 12.
[39] *Ibid*, at s 16.

[40] Interview with Tom Devine on February 5, 2018.
[41] GAP Best Practices, *supra* note 6 at 9.
[42] *Ibid.*
[43] Weiler, *supra* note 23.
[44] *Labour Relations Code,* RSBC 1996 s 244 s 14(7).
[45] Bill M-216, *supra* note 13 at s. 32(3).
[46] Hutton, *supra* note 26.
[47] GAP Best Practices, *supra* note 6 at 9.
[48] *Ibid*.
[49] *Ibid*.
[50] Canada, Charbonneau Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, *Schemes, Causes, Consequences and Recommendations* (Quebec: Government of Quebec, 2015) vol 3 at 81.
[51] Ferguson, *supra* note 7 at 12-15.
[52] Re Ministry of Attorney General, Corrections Branch and British Columbia Government Employees Union (1981), 3 LAC (3d) 140 at 162-163.
[53] *Ibid.*
[54] Public Servants Disclosure Protection Tribunal, "The Basics of Whistleblowing and Reprisal", (Ottawa, Public Servants Disclosure Protection Tribunal, February 2012) at 3, online: <psdpt-tpfd.gc.ca/ResourceCentre/ArticlesAnalyses/Documents/BasicsWhistleblowing-eng.pdf> [PSDPT 2012] at 8, discussing the impact of *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455 and *Haydon v Canada* (Treasury Board) [2004] 2 FC 82, which also pre-dated and influenced the PSDPA.
[55] Public Servants Disclosure Protection Tribunal "A Comparison of Disclosure Regimes in Canada", (Ottawa: Public Servants Disclosure Protection Tribunal, October 2003) at 2, online: <psdpt-tpfd.gc.ca/ResourceCentre/ArticlesAnalyses/Documents/DisclosureRegimesComparison-eng.pdf>. [PSDPT Comparison]
[56] Public Servants Disclosure Protection Tribunal Canada, online: <psdpt-tpfd.gc.ca/Cases/AllCases-eng.html>.
[57] PSDPT 2012, *supra* note 54 at 9.
[58] Ferguson, *supra* note 7 at 12-15, 12-16.
[59] House of Commons, Standing Committee on Government Operations and Estimates, *Strengthening the Protection of the Public Interest Within the Public Servants Disclosure Protection Act* (June 2017) at 1 (Chair: Tom Lukiwski), online: <ourcommons.ca/DocumentViewer/en/42-1/OGGO/report-9/>. [House of Commons-Strengthening PSDPA]
[60] PSDPT 2012, *supra* note 54.
[61] Centre for Free Expression, *supra* note 5 at 4. [Centre for Free Expression]
[62] *Ibid*.
[63] House of Commons-Strengthening PSDPA, *supra* note 59 at 1. Tom Devine, Legal Director of the Government Accountability Project ("GAP") reports that Canada's federal whistleblower law is widely viewed by experts as "not a legitimate whistleblower law," with only one case proceeding under the law in 11 years. Interview with Tom Devine, March 12, 2018.
[64] Note that Canadian Criminal Code Section 425.1 also protects employees from reprisal, but as of 2015 this provision has reportedly never been used. See Wolfe et al, *Breaking the Silence, Strengths & Weaknesses in G20 Whistleblower Protection Laws*, at 31, online: <blueprintforfreespeech.net/wp-content/uploads/2015/10/Breaking-the-Silence-Strengths-and-Weaknesses-in-G20-Whistleblower-Protection-Laws1.pdf>. [G20 Whistleblower Protection]
[65] Centre for Free Expression, *supra* note 5 at 7.
[66] PSDPT Comparison, *supra* note 55.
[67] *Ibid*, at 6, see "Power of the Commissioner".
[68] Saskatchewan, Public Interest Disclosure Commissioner, Annual Report 2016, (Regina: Public Interest Disclosure Commissioner, 2017) at 5, online: <http://www.saskpidc.ca/uploads/document/files/pidc-ar-2016-en.pdf>
[69] Public Interest Commissioner, "Case Summaries 2017-2018" *Public Interest Commissioner Alberta*, online: < https://yourvoiceprotected.ca/for-employees/case-summaries-2017-2018/>.
[70] Public Service of Ontario Act, S O 2006, c 35, Schedule A, s 118(2). Online: < https://www.ontario.ca/laws/statute/06p35#BK153>. See also Integrity Commissioner of Ontario, "Summary of Process: Disclosure of Wrongdoing" (Ontario: OICO) online: https://www.oico.on.ca/docs/default-source/dow/disclosure-of-wrongdoing-process.pdf?sfvrsn=2>.

[71] *Ibid* at s. 140(2).
[72] Hansard evidence indicated that the purpose of the bill is (1) to facilitate investigation and inquiry into matters potentially damaging to the public and (2) protect individuals who make such disclosures. British Columbia, *Debates of the Legislative Assembly*, 40th Parl, 6th Sess, No 41, at 13600 (Hon Linda Reid), online: < https://www.leg.bc.ca/content/hansard/40th6th/20170216pm-Hansard-v41n8.pdf>.
[73] Weiler, *supra* note 23.
[74] Transparency International, *supra* note 11 at 10.
[75] Email correspondence with David Hutton.
[76] *Ibid.*
[77] G20 Whistleblower Protection, *supra* note 64.
[78] 5 U.S.C. § 1213(h) cited in OECD, *G20 Anti-Corruption Action Plan, Protection of Whistleblowers,* at s 54, page 21, online: <http://www.oecd.org/corruption/48972967.pdf > The U.S. Dodd Frank Act also has strong anonymity protections. After the SEC has issued an award, the SEC is prohibited from disclosing information which could reveal the identity of the whistleblower except in narrow circumstances. See Richard Moberly, Jordan A. Thomas & Jason Zuckerman, "De facto gag clauses: the legality of employment that undermine Dodd-Frank's whistleblower provisions" (2014) 30:1 *ABA Journal of Labour and Employment Law* (Summon)
[79] *Ibid* at s 26, page 11.
[80] *Ibid* at s 30, page 12.
[81] "Whistleblower Protection: Commission sets new, EU-wide rules" *European Commission* (23 April 2018) online: <http://europa.eu/rapid/press-release_IP-18-3441_en.htm>.
[82] GAP Best Practices, *supra* note 6 at "Compensation with No Loopholes".
[83] *Ibid*, at "Interim relief".
[84] Bill M 216, *supra* note 13.
[85] GAP Best Practices, *supra* note 6 at "Transfer Options".
[86] Ferguson, *supra* note 7 at 12-24.
[87] "Justice Department Recovers over $3.7 Billion from False Claims Act Cases in Fiscal Year 2017" (21 December 2017), online: US Department of Justice <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017>.
[88] *Dodd Frank Wall Street Reform and Consumer Protection Act,* 9 USC § 922 (2010). See also Eileen Taylor & Jordon A Thomas "Enhanced Protections for Whistleblowers under Dodd Frank act: The Responsibilities, Rights and Risks of Reporting Fraud" (2013) 83: 1 The CPA Journal at 67 (ProQuest), online: < https://www.labaton.com/blog/upload/CPA-Journal-Enhanced-Protections-for-Whistleblowers-Under-the-Dodd-Frank-Act.pdf>.
[89] *Ibid* at 68.
[90] "The age of the whistleblower; Corporate Crime" *The Economist* (3 December 2015), online: <https://www.economist.com/business/2015/12/03/the-age-of-the-whistleblower>.
[91] Ferguson, *supra* note 7 at 12-42.
[92] OSC Whistleblower Program, *supra* note 15 at s 18.
[93] Ferguson, *supra* note 7 at 12-42.
[94] OSC Whistleblower Program, *supra* note 15 at s 16(1).
[95] "Challenging the Status Quo: Annual Report 2017" at 3, online: Ontario Securities Commission < http://osc.gov.on.ca/documents/en/Publications/Publications_rpt_2017_osc-annual-rpt_en.pdf>.