Whistleblower protection —
For a Québec with integrity

Deliberations and recommendations of the
Syndicat de professionnelles et professionnels
du gouvernement du Québec (SPGQ)

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Drafting and research Marc Dean
Collaborators: Pierre Riopel and Richard Perron
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WHISTLEBLOWER PROTECTION

1. INTRODUCTION

In its document entitled *Corruption and Public Services*, Public Services International (PSI) creates a typology of sorts by distinguishing between two kinds of corruption: petty and grand. Petty corruption consists primarily of offering bribes, for example, to have the water meter reading lowered or to avoid paying custom duties. Generally, the solution to this problem is to give venal civil servants “decent” salaries.

Grand corruption occurs through networks of influence and generally involves large companies such as construction and pharmaceutical firms and payment of bribes or donations to political parties. As PSI explains, privatization and outsourcing fuel corruption and State capture by providing numerous motivational factors and favourable opportunities.

Now, to curb corruption, States use various approaches, including whistleblowing, or more precisely, protection of whistleblowers. But according to PSI, this alone is far from being sufficient to combat this blight. What is needed are quality public services and competent workers. Fragmenting, downsizing and underfunding the public sector spawn corruption in service delivery.

In the wake of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry (Charbonneau Commission) and multiple widely publicized accounts of corruption and collusion, the Government of Québec is beginning to put together an arsenal of legal instruments so that this kind of behaviour does not recur. One of the legal instruments that remains to be introduced is whistleblower protection.

It is worthwhile pointing out that in French, as in English, there are many synonyms for “whistleblower,” some of which have derogatory connotations, but the most neutral and commonly used term is “whistleblower.” The French equivalent is “divulgateur.”

2. WHISTLEBLOWER PROTECTION

What is a whistleblower? Transparency International France defines "whistleblower" as "an individual privy to information seriously suggesting that an act in breach of a law or regulation or of the rules of conduct specific to a given profession has been or is about to be committed, and who wishes to bring this to the attention of the competent authorities within the enterprise or organization on which the individual depends, or if disclosure is not possible in that context or is such as to expose the individual to serious risk of reprisal, to the attention of administrative or judicial authorities."

Whistleblowing is "the disclosure of information related to corrupt, illegal, fraudulent, or hazardous activities being committed by or in public- or private-sector organizations — which are of concern to or threaten the public interest — to individuals or entities believed to be able to effect action."

Many international organizations recommend that States have legal mechanisms for protecting whistleblowers as part of an effective anti-corruption system. The United Nations Organization (UN), the Organisation for Economic Co-operation and Development (OECD), the Organization of American

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1 HALL, David. *Corruption and Public Services*, Public Services International Research Unit, November 2012.

2 “State capture” means multinationals’ bribery of public officials in order to mold laws, policies and regulations to the companies’ advantage.
States (OAS), the Council of Europe, and the Group of 20 (G20), among others, have issued legal opinions or produced international conventions on the fight against corruption that stipulate that legislation to protect whistleblowers is crucial to effective action on that front, in the public and the private sector alike.

Non-governmental anti-corruption organizations have also weighed in on the subject. Transparency International, headquartered in Berlin, but with offices in over 100 countries, including Canada, is the most well known, but there are others, such as the United Kingdom’s Public Concern at Work, the United States’ Government Accountability Project (GAP), and Canada’s Federal Accountability Initiative for Reform (FAIR). These organizations do useful work in gathering information about the best government practices in the field and/or offering whistleblowers advice and support.

More than 60 countries, including Canada (federal government and a few provinces), have already followed their lead and, even at this early stage, a certain number of identifiable best practices are emerging from various legislative experiences. The United Kingdom, United States, and Norway are most cited as examples because they have extensive protection for whistleblowers, whether they are from the private or the public sector.3

Canada’s Public Servants Disclosure Protection Act, which was passed into law in 2005 and came into force in 2007, protects whistleblowers within the federal government. Under the act, the position of Public Sector Integrity Commissioner was created to investigate disclosures and protect whistleblowers. However, the Commissioner’s effectiveness was criticized in the Auditor General’s 2010 report.4

Several provinces — Ontario in 2006, Manitoba in 2007, New Brunswick in 2008, Saskatchewan in 2011, and Alberta in 2013 — have legislation to protect whistleblowers. Only Saskatchewan and New Brunswick have extended coverage to the private sector.

Soon it will be Québec’s turn to follow in the footsteps of the federal government and other provinces. However, we are not starting from scratch because certain Members of the Nation Assembly (MNAs) have considered this question fairly recently. In 2009, then MNA for Richelieu and Opposition member Sylvain Simard introduced Bill 196 to protect whistleblowers within Québec’s public sector.5 The bill never became law under the Charest government.

Conseil du trésor President Stéphane Bédard sees such a law in a positive light and could introduce a bill in the National Assembly very shortly. CAQ MNA Jacques Duchesneau is also in favour of greater protection for whistleblowers and therefore tabled a bill in February 2013 (Bill 199 — An Act to amend the Anti-Corruption Act as concerns the protection of whistleblowers). Even though the SPGQ was not consulted when the bill was being drafted, it had the opportunity to voice certain concerns.6

The SPGQ has repeatedly entered the public arena to offer the government its collaboration in making a law to protect those who speak out against wrongdoing. When the Government of Québec finally decides to go ahead with an act to that effect, the SPGQ will be quite ready to once again give its opinion and make recommendations aimed at the most complete and effective protection possible for whistleblowers, inspired by the best practices in the world.

3 Appendix I presents an overview of American whistleblower-protection practices.
4 See Appendix II for a few comments on Canadian practices.
5 See Appendix III for a few comments on Bill 196.
6 See Appendix IV for a few comments on Bill 199.
Strategically positioned to enable the government to properly fulfil its mission, the members of the SPGQ, who have expertise in the workings of the State, are perfectly suited for being genuine custodians of the integrity of public services. Since, in the performance of their duties, our members may witness wrongdoing, it stands to reason that we should have some input.

3. BEST PRACTICES IN WHISTLEBLOWER PROTECTION

According to the Québec and Canadian literature we consulted on the subject of whistleblower protection, the best practices have mainly to do with **effectiveness**:

- Clear legislative objectives and message, e.g emphasis on disclosure (typical in Commonwealth countries) or emphasis on the whistleblower (typical in the United States);
- Independent entity (Commonwealth pre-existing entities, such as ombudspersons, auditors general, and heads of the civil service);
- Appropriate categorization of wrongdoing: public interest vs personnel- or employment-related issues;
- Adequate protection (explicit protections and/or prohibitions) from reprisal: scope and efficacy;
- Thorough investigations: reactive and proactive abilities;
- Enforcement ability: scope of mechanisms (investigative tools, investigative ability, observations, etc.);
- Remedies and sanctions: appropriateness and clarity (precise guidelines, sanctions, or recourse, etc.).

Best practices in the field of whistleblower protection also involve **fairness**:

- Scope of jurisdiction: equal coverage and protection (public and private sector);
- Consistent standards: fairness and principles of natural justice;
- Accessibility: threshold of procedural and substantive requirements (internal and external disclosure);
- Encouraging of disclosure, trust, and protection: confidentiality, anonymity, and reward;
- Accountability: appeal and review.

Several case studies serve to prop up the in-depth reviews of legislation and its enforcement in various countries.

According to the OECD, "the risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected." Québec therefore has every reason to act swiftly to protect whistleblowers and, in so doing, see the last of collusion, corruption, and all forms of wrongdoing.

Originally, the term "whistleblower" meant an ordinary citizen or scientist in the public or private sector who, faced with evidence of a potential hazard to human health or the environment, decided to bring the matter to the attention of society and public authorities.

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7 Mainly:
- CANTIN, Isabelle et Jean-Maurice CANTIN. *La dénonciation d'actes répréhensibles en milieu de travail ou whistleblowing*, 2005.

Under the influence of English common law, the concept of whistleblowing took on a broader and more comprehensive dimension. "Whistleblower" now also refers to an employee or ex-employee of a business or government agency who signals to the competent authorities any behaviour likely to constitute a breach of the law or a threat to the public interest.

Whistleblowers can play a useful role in bringing practices such as corruption to light and in sounding the alarm on health and industrial risk or possible economic fallout. They can help expose illegal or unethical practices or acts that internal or external controls cannot.

As the Service central de prévention de la corruption (SCPC) of the Government of France sees it:

9 The first distinguishing feature of corruption is that it stems from quote-unquote intelligent crime. It increasingly relies on complex montages and to unmask it requires a certain technical knowledge, which means either having been part of the montage or an insider.

In addition, by definition, corruption is secret, invisible. Apart from the difficulty proving it, generally there are no immediate visible signs. Often the victim is anonymous and, like societies, has no physical existence. Lastly, corruption occurs through a network of crime; it is a relational arrangement and, at a certain level, requires the involvement of numerous players. [Translation]

This makes it difficult to expose and analyze the facts and bring cases to court. Even before gathering evidence, one must know of the very existence of corrupt practices. That is how whistleblowers, whether internal or external, can be full-fledged contributors in the fight against corruption.

4. TWO TYPES OF WHISTLEBLOWER-PROTECTION SYSTEMS

Study of the mechanisms established by countries where whistleblowers are afforded at least some protection shows that there are two basic types. Some countries have dedicated whistleblower-protection legislation, while others have opted to deal with whistleblower protection through sectoral legislation.

4.1 Dedicated laws

Among the countries in the first category, Great Britain, Norway, Japan, New Zealand, Ghana, and South Africa are the ones with the most complete protective legislation. Canada has a protection-specific federal statute, but it has major flaws (see Appendix II).

First of all, the aforesaid countries have laws specifically made to protect whistleblowers, which makes the legislation more visible and easier to promote. The scope of the legislation is broader and some of it applies to both the public and the private sector.

The definition of reportable behaviours is wider; it is not limited to corruption alone, but extends to include breaches of good practice and ethics and of the law in general.

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10 Ibid., p. 182.
Disclosure procedures include internal reporting. They are based on the assumption that changes in corporate culture aimed at developing internal communication in order to prevent problems are essential.

Protection against reprisal is also defined very broadly and comes with solutions. These laws establish external channels for redress, often, tribunals or independent bodies.

Lastly, a public entity is entrusted with overseeing protection and advising whistleblowers as well as receiving reports. Some countries have newly minted independent bodies, while others have opted for existing organizations (mediators, ombudspersons, internal auditors).

4.2 Sectoral laws

Many countries have adopted piecemeal mechanisms for protecting whistleblowers that apply to certain categories of individuals, disclosures, or areas of the law (South Africa, Canada, France, Australia, United States, Sweden, and Japan).

Anti-corruption laws contain provisions pertaining to protection of those who report corruption.

More and more, legislation concerning the civil service contains protection against sanctions for people who report irregularities. Institutions must have procedures for in-house handling of reports, namely, to superiors, advisers, or internal audit services (South Africa and Canada). However, whistleblowers must proceed through internal channels before they can turn to an independent body or the media. In addition is the protection afforded by internal codes of ethics within the civil service (Australia). Whistleblower protection may also be written into labour law (France). A few countries have even made retaliation against whistleblowers a criminal offence (including the United States with the Sarbanes-Oxley Act).

In Sweden, a broad constitutional interpretation of freedom of expression, along with its statute governing freedom of the press, gives public agents the fundamental right to anonymously criticize action by government departments and agencies. The famous WikiLeaks website is hosted by Swedish servers precisely because Sweden offers substantial legal protection for disclosures on the website. The Swedish constitution has provided extensive protection of freedom of speech and of the press for 250 years. It is legally prohibited for any administrative authority to investigate journalistic sources.

Other regimes, such as some environmental legislation (France), provide for protection of whistleblowers who report wrongdoing related to environmental risk. France's laws pertaining to compliance and bank secrecy make it mandatory to report internal misdeeds and also protect against retaliation. The same is true of competition laws. Some of this sectoral legislation covers public and private sector employees alike (Japan, South Africa, and the United States).

4.3 Dedicated laws or sectoral laws?

The sectoral approach has many drawbacks. First of all, sectoral laws are fragmented; that is to say, they apply only to certain categories of whistleblowers and cover a limited range of misdeeds. Furthermore, they are not very well known by employees or public agents outside the sector of activity concerned and their primary focus is aspects concerning reporting and sanctions and strengthening of mechanisms for internal disclosure.
A dedicated and comprehensive piece of legislation has the advantage of being more easily visible and easier for governments and employees to promote. This approach also makes it possible to have the same rules and procedures for both the public and the private sector and to ensure consistent and clear legislation.

5. OVERSIGHT AND ENFORCEMENT OF DISCLOSURE

Depending on the country, a specific body may be charged to receive disclosures and process them, and/or receive and investigate complaints of reprisals and discriminatory or disciplinary measures against whistleblowers. Currently, various options exist around the world:

5.1 Independent body

One solution is to create a single independent body that receives complaints and examines instances of reprisal. For example, as an independent investigative entity, the United States’ Office of Special Counsel can receive whistleblower disclosures for violations of laws, rules or regulations, gross mismanagement or waste of funds, abuse of authority, and substantial and specific danger to public health and safety, and forward them to the appropriate federal agency or the attorney general.

5.2 Ombudsperson

Another possibility is to entrust oversight to an ombudsperson, usually appointed by parliament. Some 120 countries have an ombudsperson or mediator. In New Zealand and Ireland, ombudspersons are tasked to receive complaints and, more commonly, advise whistleblowers. Saskatchewan also has delegated oversight to an ombudsman.

5.3 Specialized bodies

Many countries have created different kinds of organizations with limited jurisdiction that can receive reports on possible breaches of the law or other kinds of problems. Others are empowered to protect whistleblowers and penalize reprisal (United States).

5.4 Legal option

Another channel for disclosing wrongdoing is to take cases directly to court. This is a very expensive option, especially for wage-earners who have just been fired and no longer have income to launch a suit. Most States have specific laws allowing redress before the courts for whistleblowers who have suffered harm.

6. THE G20 INITIATIVE

On the occasion of the 2010 G20 Summit in Seoul, an ambitious action plan to counter corruption was approved. One of its thrusts (see point 7) concerns whistleblower protection. Based on an analysis of best practices, the OECD proposed six guiding principles:11

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1. Clear legislation and an effective institutional framework are in place to protect from discriminatory or disciplinary action employees who disclose in good faith and on reasonable grounds certain suspected acts of wrongdoing or corruption to competent authorities;

2. The legislation provides a clear definition of the scope of protected disclosures and of the persons afforded protection under the law;

3. The legislation is such that the protection afforded to whistleblowers is robust and comprehensive;

4. The legislation clearly defines the procedures and prescribed channels for facilitating the reporting of suspected acts of corruption and encourages the use of protective and easily accessible whistleblowing channels;

5. The legislation ensures that effective protection mechanisms are in place, including by entrusting a specific body that is accountable and empowered with the responsibility of receiving and investigating complaints of retaliation and/or improper investigation and by providing a full range of remedies;

6. Implementation of whistleblower protection legislation is supported by awareness-raising, communication, training, and periodic evaluation of the effectiveness of the framework of protection.

7. THE PRINCIPLES THAT UNDERPIN BEST PRACTICES

Further to publishing this action plan approved by the G20, the OECD was commissioned by the G20 to conduct a study on the world’s best practices in the area of whistleblower-protection legislation. Transparency International, a well-known international non-governmental organization, has also worked on this question. Here is a summary of guiding principles for effective legislation.

7.1 Dedicated, clear, comprehensive, simple, and effective legislation

Specific, clear, complete, simple, and effective legislation must be introduced to protect those who, in good faith and on reasonable grounds, speak out against suspected acts of wrongdoing. Legislation should provide for a trustworthy chain of disclosure open to receiving complaints and that is a safe alternative to silence. Emphasis on whistleblower protection is a key element in an effective mechanism for disclosing wrongdoing.

7.2 A comprehensive definition of “whistleblower”

In 2004, Transparency International France proposed a comprehensive definition of "whistleblower:"

An individual privy to information seriously suggesting that an act in breach of a law or regulation or of the rules of conduct specific to a given profession has been or is about to be committed, and who wishes to bring this to the attention

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of the competent authorities within the enterprise or organization on which the individual depends, or if disclosure is not possible in that context or is such as to expose the individual to serious risk of reprisal, to the attention of administrative or judicial authorities.

Transparency International believes that the purpose of whistleblowing is, first and foremost, to protect the public interest. It invites public institutions and private companies to establish programs to protect whistleblowers against reprisal that include appropriate channels for reporting, independent evaluation, and effective follow-up mechanisms.

7.3 A broader scope

Protection under the law should cover a wider array of types of disclosure, including violation of laws, regulations and administrative procedures, gross mismanagement and waste of funds, abuse of authority, criminal offences such as corruption or fraud, breaching of legal obligations, miscarriages of justice, threats to health and to the environment, and attempts to cover up facts in connection with any of the above.

Military personnel, police officers, and foreign service employees should be afforded protection under the law if they approach a designated internal audit body to denounce misdeeds, while safeguarding the national interest and national security.

7.4 Wide-scale protection

Permanent workers from both the public and the private sector, as well as employees with atypical employment status, such as consultants, temporary and occasional workers, trainers, interns, students, subcontracted workers, prospective and former employees, and volunteers, should also be shielded against reprisal when they report wrongdoing in good faith. Those who corroborate whistleblower statements or provide additional supporting evidence should also be protected.

The law should apply to all disclosures made in good faith (disclosure based on the honest belief that the information brought to light was true at the time of reporting). To prevent abuse and establish a credible whistleblower-protection system, deliberate disclosure in bad faith must be penalized under civil, criminal, or labour law, as the case may be.

7.5 Clear and simple internal and external disclosure procedures

The law provides for one or several channels for disclosure of wrongdoing in good faith. Generally, dedicated whistleblower-protection statutes require compliance with specific internal procedures before whistleblowers can appeal to an external body.

The law, therefore, should provide for and foster the establishment of simple, safe, and independent mechanisms for disclosure of wrongdoing within the organization in question. This internal independent body should be empowered to conduct investigations promptly and carry out the appropriate follow up in the knowledge that the whistleblower is guaranteed confidentiality. Procedures should be designed so that well-managed public or private organizations can correct problems and come up with solutions before the problem worsens.
However, our professionals within Québec’s government departments and agencies know from experience that as it now stands, when psychological harassment complaints are filed, for example, the organization concerned snaps shut like an oyster and tries everything possible to drown the fish. It goes into denial and it is not uncommon to see victims treated as if they are the ones who are the wrongdoers.

Yet, a fair number of Québec government departments and agencies have policies against psychological harassment built on lofty principles that are difficult to apply and that hamper complainants brave enough to pursue disclosure of wrongdoing all the way. The same is true of those who speak out against misdeeds such as collusion and corruption in the awarding of contracts by public and parapublic organizations in sectors such as construction and computers. A code of silence based on fear and bullying has taken root in municipalities and Québec government departments and agencies.

Any internal disclosure procedure must therefore come with the assurance that it operates at arm’s length from administrative or political authority and that it produces results quickly. However, as things are now, we believe that we should be looking at an external disclosure procedure to prevent the possibility of reprisal.

Whistleblowers should be able to have input and be kept informed of follow-up to the complaint within a reasonable amount of time, in addition to being provided advice and support. The private sector should also be encouraged or legally obliged to establish mechanisms for disclosing wrongdoing.

Whistleblowers should therefore have the possibility of disclosing information to an independent authority external to the organization in question, e.g. ombudsperson or auditor general, the legislator, the minister responsible, the justice system, the police, the media, and/or civilian organizations specialized in advising and supporting whistleblowers. It is important that whistleblowers have a number of protected disclosure channels so that they do not rely entirely on a single, albeit independent, authority. Even the heads of organizations may be suffer undue external pressure that interferes with their objectivity.

Dedicated hotlines and websites could also be used for making disclosures. However, the City of Montréal ethics hotline has shown that such a system has limitations because employees have no confidence that they will be protected from reprisal.

Since the media is increasingly called upon to bring wrongdoing to light, protection of journalistic sources should be enshrined in the law.

Positive reinforcement could be encouraged. Whistleblowers should be rewarded for having prevented a public organization or private from suffering harm. A system of monetary rewards could be established to prompt and acknowledge disclosure in good faith, as is the case in the United States, for example. A *qui tam* system, which enables whistleblowers to file suit on the government’s behalf, could also be instituted.

The disclosure process should be expeditious and include rigorous follow-up mechanisms to incite people to break the code of silence. The key to an effective process is the trust that prospective whistleblowers have in the system.
7.6 Types of reprisal prohibited by law

The law must protect against all forms of reprisal or discrimination, whether firing, disciplinary action, suspension, demotion, transfer or reassignment, negative performance reviews, harassment, threats, stigmatization by peers, loss of status or benefits, denial of bonuses or access to training or promotions, or any significant change in responsibilities, tasks, and working conditions. Furthermore, the SPGQ considers that the list of reprisals prohibited by law must be open and non-restrictive so that imaginative managers do not find ways of getting around the system.

A transparent and reliable process for both parties (whistleblowers and respondents) must be put in place. The law must protect the identity of whistleblowers, allow anonymous disclosure, and include sanctions when identity is revealed without the person’s explicit consent.

As in cases where an employer retaliates against a union representative or a woman on maternity leave, the burden of proof must not be on whistleblowers who act in good faith. The onus should be on the employer to prove that the measure was not taken in order to punish the whistleblower for having come forward in good faith.

Any disclosure in good faith according to the law must enjoy immunity from civil, criminal, or administrative liability, including liability for libel and defamation, so that whistleblowers do not collapse under the weight of frivolous lawsuits. The law must protect whistleblowers who make honest mistakes while acting in good faith and their refusal to take part in acts they suspect are wrong, and must override any conventions, agreements, or rules that interfere with enforcement of the law.

7.7 Enforcement of the law and redress

Legislation must be enforced effectively and be as robust and consistent as possible. A pre-existing independent body, such as the office of the ombudsperson or the auditor general, or an entity created for the purpose of protecting whistleblowers, must oversee enforcement of the statute and receive complaints concerning reprisal or wrongful internal investigation. This body must also be empowered to make binding recommendations and refer cases to the appropriate judicial entity.

Whistleblowers who believe they have been chastised for their actions must be able to turn to the justice system for redress in the form of damages, reinstatement, transfer to an equivalent position, or compensation for lost wages. An indemnity fund could be written into the law so that whistleblowers are compensated when respondents are insolvent.

Any retributory action against a whistleblower by an employeur should be subject to disciplinary measures or a civil or criminal suit, depending on the gravity of the act of reprisal.

7.8 Promotion and periodic review of the law

The pre-existing independent organization or the body to be created specifically to protect whistleblowers should be responsible for getting out as much information as possible about the law and promoting it widely. This information would, among other things, serve to create a mindset whereby the public at large, employers, and employees see the disclosure of wrongdoing as an act of loyalty toward the organization in question and society as a whole.
After the law is enacted, if the system is to prove effective, we believe it is crucial that there be a broad-based campaign explaining that the legislation is a radical shift in the field of the protection of whistleblowers who come forward in good faith. All stakeholders must be aware of the change in culture required.

Managers must be offered training to deal effectively with disclosure and recognize and prevent reprisal against whistleblowers.

The law should stipulate that public- and private-sector administrators inform their employees about their rights and obligations (posters, training, etc.) and the kinds of disclosure protected under the law.

In Québec, we cannot afford to wait any longer to act to protect whistleblowers. However, the new system might stand to be improved or have unforeseen consequences, which is why the law should be reviewed periodically by management, unions, and civil society (for example, by the National Assembly every five years). This would make it possible to verify whether the act is being enforced properly and if improvement is needed. The law should provide for statistics on its enforcement and publication of the data on a regular basis.

The simple fact of having a law that protects whistleblowers is not enough to guarantee that good practices prevail. Very often, procedures are adopted more to satisfy legal requirements or to project an image of wanting to eradicate corruption than to effect true improvement or to change "corporate" culture. For example, ethics commissioners in government departments and agencies, who are no exception when it comes to seeking promotion, are there to remind employees of their duty to act with reserve and loyalty rather than to formally apply a code of ethics.

Similarly, even though employees seem to have greater awareness of their right to protection, many of them are convinced that they will be punished if they disclose breaches of the law or any other misconduct. Unfortunately, when one considers the reaction of some administrations or governments when their employees reveal wrongdoing to an external body or the media, it appears that whistleblowers’ fears are well-founded. This seems to be the case with Canadian federal law, a recent example being the case involving the Employment Insurance program.

8. CONCLUSION AND RECOMMENDATIONS

Québec is currently in the throes of a major ethical crisis triggered by troubling revelations at the Charbonneau Commission about collusion and corruption in the construction industry. The tentacles extend to provincial politics and political parties, municipal politics, engineering firms, and management and unions. The crisis has undermined citizens’ trust in their democratic institutions, and Québec’s image abroad has been badly tarnished.

The Government of Québec has introduced a certain number of measures to rectify the situation. However, the SPGQ feels that one thing that remains to be done is to institute a robust and

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13 This is what the U.S. Merit Systems Protection Board recommended to the American President and Congress in Blowing The Whistle: Barriers to Federal Employees Making Disclosures, Washington, November 2011.

14 Recently the United Kingdom reviewed its whistleblower-protection system in each of its ministries and agencies.
comprehensive legislative instrument for whistleblower protection. As the OECD has pointed out, the risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected.

We have summarized the best practices in the field of whistleblower protection according to the OECD, the G20, and Transparency International, three international organizations recognized for the thoroughness of their research.

Based on the information thus collected and on our professional members’ real-life experience, the SPGQ is able to recommend that the government establish a dedicated law to protect whistleblowers, shaped by the best principles and practices known, that will serve as a model worldwide and enable Québec to stand as a champion of integrity. To that end, the SPGQ has made 14 recommendations:

1- A more comprehensive definition of “whistleblower;”

2- There must be a broad range of types of admissible disclosure and disclosure in bad faith must be penalized;

3- Protection should apply to all forms of reprisal or discrimination;

4- Burden of proof should be shifted so that the onus is on employers to demonstrate that no punitive action was taken against the whistleblower as a result of disclosure;

5- An independent organization such as the office of the ombudsperson or the attorney general must oversee enforcement of the law. It must receive complaints about reprisal and be able to make binding recommendations and refer complaints to Québec’s standing anti-corruption unit (UPAC) and the appropriate judicial bodies. It should also be tasked to promote the protection afforded by the law in order to foster disclosure of wrongdoing;

6- The government must provide the resources required for establishing a disclosure process and an investigative system that is rigorous and effective. This will incite people to break the code of silence and discourage disclosure in bad faith;

7- Any retributory action against a whistleblower by an employer should be subject to disciplinary measures or a civil or criminal suit, depending on the gravity of the act of reprisal;

8- Anyone who has suffered reprisal must be able to seek redress;

9- The law must protect the identity of whistleblowers and allow anonymous disclosure;

10- Positive reinforcement could be encouraged, e.g. awarding whistleblowers a percentage of the amounts recovered;

11- Permanent workers and workers in atypical categories within the public and private sector should be covered;

12- A campaign should be mounted to promote the law with a view to changing “corporate” culture (more transparency and end of the code of silence, bullying, and the tendency to stifle complaints internally);
13- The law should be reviewed periodically to verify whether it is being enforced properly and if improvement is called for;

14- The law should provide for a number of protected disclosure channels so that whistleblowers do not rely entirely on a single authority which, despite its independent status, could suffer undue external pressure that interferes with its objectivity.

In conclusion, success hinges on the ability of the established system to earn the trust of every player, especially prospective whistleblowers.
Appendix I – Overview of American whistleblower protection

The Whistleblower Protection Act was passed in 1989. It enables federal employees to confidentially report waste, fraud, abuse of power, conflict of interest, and other wrongdoing they have witnessed to authorized federal agencies. Several American States also have legislation for protecting whistleblowers.

The Office of Special Counsel is an open organization which actively promotes disclosure. It is responsible mainly for disclosure intake and analysis. However, anonymous disclosures are inadmissible, and its investigative power is relatively limited. Instead, whistleblowers are afforded protection by two adjudicative organizations — the Merit Systems Protection Board and the Office of Personnel Management. The latter also provides support for whistleblowers.

The False Claims Act is an American law amended in 1986 and subsequently which supports whistleblowing by citizens. Under the qui tam provision of the act, a whistleblower can, on behalf of the government, bring suit against an individual or a company engaged in fraud and be awarded a percentage of the sums recovered. All told, the suits bring in several hundred million dollars a year for complainants.

It bears pointing out that there are no provisions in the Whistleblower Protection Act for discouraging false allegations.
Appendix II - Comments on Canadian whistleblower-protection practices

The Public Servants Disclosure Protection Act was passed in 2005 and came into force in 2006-2007. It establishes an independent Public Sector Integrity Commissioner, who, thus far, has denounced only a few instances of wrongdoing out of hundreds of disclosures since its creation. The cases were investigated and a report was written for each one.

Apart from the above act, there are policies and other pieces of legislation (sectoral or general) covering whistleblowing, such as the Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace, which established creation of the position of Senior Officer and the Public Service Integrity Officer in 2001.

The following are the main criticisms of the Public Servants Disclosure Protection Act:

- Confidentiality, and not the public interest, is the centrepiece of the legislation;
- There are too many grounds or technicalities that enable complaints to be dismissed;
- Insufficient provision is made for enforcement of the act (sanctions and corrective action);
- Power- and responsibility-sharing between the federal government and agencies is not optimized; for example, agencies have too much responsibility and little accountability;
- Its scope is not broad enough; a number of government bodies, agencies, and corporations are excluded;
- Government misdeeds involving the private sector cannot be investigated. This is especially harmful in the case of allegations against the pharmaceutical and the food industry, for example;
- There is very little protection against whistleblower harassment;
- The Commissioner’s powers are too limited; the position precludes proactivity or adjudication;
- Deadlines for submitting complaints are too short.

According to the Federal Accountability Initiative for Reform (FAIR), the new quasi-judicial system specifically for whistleblowers instituted by this regime is bound to fail, given its size and complexity. It operates within a bubble of impenetrable secrecy, impermeable to Canada’s own legal system, with layer upon layer of provisions lying in wait to entrap whistleblowers, dismiss their disclosures, and block access to legal protection. This regime is costly and useless.

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15 See the various analyses by the Federal Accountability Initiative for Reform (FAIR) at www.fairwhistleblower.ca, in particular, What's Wrong with Canada’s Federal Whistleblower Legislation: An Analysis of the Public Servants Disclosure Protection Act: www.fairwhistleblower.ca/psdpa/psdpa_critique.html
It bears pointing out that the Gomery Commission report stated that the act could stand improvement by way of amendment. The Commission proposed the following in particular:

- the definition of persons authorized to make disclosures should be broadened to include anyone working on behalf of the government;
- the list of “wrongdoings” that can be disclosed and of actions that are forbidden “reprisals” should be an open list;
- if a whistleblower makes a complaint alleging a reprisal, the burden should be on the employer to show that the actions were not a reprisal;
- there should be an explicit deadline for all chief executives to establish internal procedures for managing disclosures.

Lastly, it recommended that the government enact a law establishing a public service charter.

For its part, the Canadian Association of Professional Employees considered that the process is not clearly defined or transparent enough and that whistleblowers are not sufficiently protected. Furthermore, whistleblowers are not rewarded for their efforts.
Appendix III – A few comments on Bill 196 respecting the protection of whistleblowers within Québec’s public service, introduced by Sylvain Simard, former Member for Richelieu, National Assembly of Québec, 2009

Bill 196 (Québec Public Sector Employees Disclosure Protection Act) is a compendium of best practices in the area of whistleblower protection. The bill’s purpose is stated in the Explanatory Notes: “To establish a procedure for the disclosure of wrongdoings committed by Québec public sector employees and to protect those who disclose wrongdoings.”

However, one can legitimately ask why the act covers disclosure of wrongdoing by Québec public sector employees only, which automatically excludes ministers and staffers, for example. In fact, many complaints to the SPGQ concern political wrongdoing, such as hobbling the decisions made by civil servants regarding a given program in order to favour the friends of the party in power.

The mechanics of the bill are based in large part on federal legislation. It provides that “the chief executive officer of a public body must establish internal procedures allowing employees to make disclosure.” Chief executive officers of public or parapublic bodies are also responsible for administrative management of the act, including the creation of internal procedures for disclosure.

The Québec Public Sector Integrity Commissioner is tasked to oversee the proper operation of these procedures and to receive disclosures from anyone who is not in the employ of the government. The Commissioner’s functions include receiving and examining disclosures, conducting investigations, and deciding whether a disclosure is admissible.
Appendix IV – A few comments on Bill 199, An Act to amend the Anti-Corruption Act as concerns the protection of whistleblowers, introduced by Jacques Duchesneau, former Member for Saint-Jérôme, National Assembly of Québec, 2013

In the Explanatory Notes for Bill 199, An Act to amend the Anti-Corruption Act as concerns the protection of whistleblowers, we are told that:

- the purpose of the bill is to amend the Anti-Corruption Act in order to broaden the scope of its provisions relating to the protection of whistleblowers and to entrust responsibility for their protection to the Anti-Corruption Commissioner;

- the bill specifies that any decision, activity or practice that endangers the longevity, integrity, or financial soundness of a body or a person belonging to the public sector, that is in violation of an act or regulation or that is contrary to the principles of economy, efficiency, or effectiveness constitutes a wrongdoing;

- the bill stipulates that persons subject to the Public Service Act must disclose any information relating to any wrongdoing by a department or public body, and persons who disclose wrongdoings may demand protection of their identity;

- the bill broadens the powers of the Commissioner to include the authority to protect persons who have disclosed wrongdoings under the act;

- the bill provides that any person who takes a reprisal against a person having disclosed a wrongdoing or cooperated in an audit or an investigation regarding a wrongdoing is guilty of an offence. The notion of what constitutes a reprisal measure is also clarified; and

- the bill provides for disciplinary action for any public servant who takes a reprisal against a person having disclosed a wrongdoing.

The fact of obliging government employees to report wrongdoing on pain of sanction runs counter to the spirit of any legislation aimed at protecting whistleblowers. The approach should not be to punish those who do not report misdeeds, but rather to ensure that anyone who is aware that wrongdoing has occurred will not hesitate to report it because they know they will be protected.

Before the bill becomes a law that is truly effective, various amendments would have to be made, for example, concerning the powers of the Integrity Commissioner, who must have adjudicative power enabling him or her to conduct thorough investigations that extend beyond the public sector into the private sector, and enough time to get the job done properly.
Appendix V – Example of a whistleblowing process in the United Kingdom\(^\text{16}\)

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\textbf{Figure 4}
Example of a whistleblowing process

- Employee has a concern about wrongdoing or breach of the civil service code

  Disclosure routes covered by PIDA legislation

  - Alternative route if appropriate
    - There is a good reason for not raising a concern with the line manager
    - A particularly serious and urgent concern which needs addressing immediately
    - There is a good reason for not raising a concern within the department

  Employee raises concern with line manager
  Employee raises concern with another line manager or a senior manager in the management chain
  Employee raises concern raised with nominated officer
  Employee raises with permanent secretary/chief executive
  Employee raises concern with the Civil Service Commission or prescribed person

- Adequate response received?
  - Yes
    - End of process: Employee is protected from discrimination by PIDA
  - No
    - Employee publicises serious concern through the media or other means
      - Concerns raised this way must not breach other legislation, such as the Official Secrets Act, and could leave the employee unprotected by PIDA if not considered appropriate

- Adequate response received?
  - Yes
    - End of process: Employee is protected from discrimination by PIDA
  - No

Source: National Audit Office analysis

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