National Energy Board

Whistleblower Program Research and Analysis

2016 January 21

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ABSTRACT

This research report identifies and reviews Canadian federal, provincial, and case law of relevance to whistleblower programs in general terms. This general information would require the review of legal counsel in order to decide how this information may apply or be relevant to the National Energy Board whistleblower program. The research also examines trends in Canadian whistleblower programs, how Canadian police agencies manage confidential informants, and provides recommendations for the program moving forward. The research, analysis, and report were completed by Mr. Ken Brander, president and principal consultant of Clarium Fraud and Compliance Solutions Ltd. This research report is not intended to serve as legal advice

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Part 1 Executive Summary

The National Energy Board (NEB) has engaged Clarium Fraud and Compliance Solutions Ltd. to conduct a review of the NEB whistleblower program. Clarium's consultant is a retired police detective from the Edmonton Police Service experienced with handling confidential informants and tips from the Crime Stoppers program. The consultant is not a lawyer and nothing in this document should be considered to be legal advice. The legislation and case law identified in this report is examined in general terms only to the extent that, in the opinion of the consultant, it may pertain to whistleblowing programs. This general information would require the review of legal counsel in order to decide how this information may apply or be relevant to the NEB whistleblower program.

This NEB contract includes the following deliverables:

1. Research and analysis report,
2. Gap analysis report,
3. Proposed policy and procedure,
4. Training manual and training sessions with NEB staff, and
5. Final project report.

This research and analysis report (Deliverable 1) provides the NEB with general information about the landscape of whistleblowing legislation, litigation, and trends in Canada. The results of this research will influence the gap analysis report (Deliverable 2), proposed policy and procedure (Deliverable 3), and the training program/manual (Deliverable 4). With respect to Deliverable 3 and Deliverable 4, it will be necessary for the NEB to utilize internal technical expertise and consider the input of its legal counsel in order to finalize a policy and procedure. Throughout the preparation of the above deliverables, key NEB staff have been consulted.

Canadian whistleblower legislation and programming is by in large instituted at the sectoral level. There is no single piece of federal legislation that requires all government agencies, private enterprise, and other employers to have a prescribed whistleblower policy in the workplace. Likewise, there is no single piece of legislation that protects every Canadian employee from reprisals for making a disclosure of wrongdoing in the workplace. Rather, the Canadian whistleblower landscape is a mosaic of sector-specific legislation and programming of varied effectiveness.

Whistleblower programs vary across international boundaries as well. In the United States a number of laws such as Sarbanes Oxley Act, Dodd-Frank Act, False Claims Act, and others offer protection for whistleblowers and in some cases substantial rewards or 'bounties' for disclosures that lead to successful regulatory action. Qui Tam civil suits in the United States allow private parties, even if personally unaffected by the alleged wrongdoing, to file legal action on behalf of the federal government to remedy misconduct. In some countries such as France anonymous whistleblowing disclosures are not accepted and cannot be acted upon.

At the heart of any whistleblowing program lays the friction between the duty of loyalty an employee owes the employer against the benefits of having a mechanism for employees to report wrongdoing within their organization in an environment free from reprisals. For a number of reasons, employers are often not enthusiastic about receiving disclosures of wrongdoing from employees. Correcting alleged wrongdoing often incurs investigation, expense, disciplinary action, liability, regulatory action, and may cause the company public embarrassment or reputational risk. When disclosing alleged wrongdoing whistleblowers face real risks of reprisal. Those that receive a whistleblower's tip also face legal, organizational, and reputational risks involving issues surrounding confidentiality and protecting the tipster from reprisals.

However, many companies and government agencies consider the benefits of an internal reporting mechanism well worth managing such risks. Research has demonstrated the value of having a whistleblower program in place to solicit tips from employees and other organizational insiders. Tips from employees are the most effective tool to detect fraud and other wrongdoings within an organization. Over 40% of all occupational fraud schemes are detected by a tip and that tip usually comes from an employee. In fact, having a tip hotline is the most effective method to detect occupational fraud. Companies that have an effective tip hotline reduced the loss of the fraud scheme by 41%, and they detected the frauds 50% more quickly than by using any other method.[1]

Clearly, tip lines are effective as a mechanism for employees to report wrongdoing. The recognized benefits of a tip line apply equally to the NEB as Canada's national energy regulator. Employees and other people working inside and alongside NEB-regulated companies have the potential to provide the NEB with information that affects the construction, operation, and abandonment of pipelines and powerlines. A well-designed and secure program supported by strong policy, procedures, and supervision is an effective tool to solicit and receive tips of alleged wrongdoing that the NEB might not otherwise have detected.

This research report examines whistleblower programs in the Canadian context. The acts, regulations, and case law are identified in general terms and only as they may relate to whistleblower programs. Nothing about the commentary is intended to be held out as legal advice. This general information would require the review of legal counsel in order to decide how this information may apply or be relevant to the NEB whistleblower program.

[1] Association of Certified Fraud Examiners (ACFE), *Report to the Nations on Occupational Fraud and Abuse: 2014 Global Fraud Study,* p. 18 - p. 23. Accessed on 2016 January 07 at http://www.acfe.com/rttn/docs/2014-report-to-nations.pdf

1.1 Federal Legislation.

- *Criminal Code,*
- *Canada Evidence Act,*
- *National Energy Board Act and Regulations,*
- *The Public Servants Disclosure Protection Act*,
- *Canada Labour Code,*
- *Canadian Environmental Protection Act,* and
- *Access to Information and Privacy Acts.*

1.2 Provincial Legislation.

- Provincial public interest disclosure acts, and
- Provincial health, safety, and employment protection acts.

1.3 Canadian Case Law.

- Canadian civil case law.

    i) Talisman Energy Inc. v. Flo-Dynamics Systems Inc. et al, (2015) Alberta Court of Queen's Bench (regarding privilege),
    ii) Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, (2015) Supreme Court of Canada (regarding duty of loyalty),
    iii) Haydon v. Canada, (2000) Federal Court (regarding duty of loyalty), and
    iv) Anderson v. IMTT Quebec Inc. (2013) Federal Court of Appeal.

- Canadian criminal case law.

    i) R. v. Leipert (1997) Supreme Court of Canada (regarding protection of Crime Stoppers tip), and
    ii) R. v. X.Y. (2011) Ontario Court of Appeal (regarding informer privilege).

1.4 Trends in Canadian Whistleblower Programs.

- Third party service providers,
- Oaths of confidentiality and codes of conduct,
- Canadian bounty disclosure programs, and
- Extra-territoriality of reprisal claims.

1.5 Police Use of Informants.

- Reporters,
- Crime Stopper tipsters,
- Confidential informants, and
- Agents.

1.6 Risks and Recommendations.

1.7 Sources.

A list of significant sources consulted in the course of preparing this report is identified in Part 8. The sources are organized into the following categories:

- Acts and regulations,
- Guidance documents,
- Whistleblower policies and websites,
- Canadian case law, and
- Third party providers.

This research project demonstrates that the Canadian whistleblower landscape is generally recognized as a mosaic of ad hoc and sector specific legislation. Protections against reprisal largely depend on the nature of the disclosure and the sector in which the reporter happens to work.

As a third party, the NEB has relatively little capacity to investigate allegations of reprisals against tipsters who provide the NEB information about alleged wrongdoings.

Part 2 Federal Legislation

There are a number of federal laws that address the protections and limitations of the confidentiality of tips and reprisals taken against whistleblowers. Many of these federal laws may not necessarily directly apply to the NEB although to reach such a conclusion the NEB would need to consult with its legal counsel. However, each law raises issues and risks that the NEB should consider when designing and administering its own programming. This research demonstrates the sector-specific approach that Canadian federal lawmakers have applied to the related issues of whistleblowing and protecting tipsters from reprisals.

2.1 *Criminal Code*.

Section 425.1 of the Criminal Code offers some protection to employees who make a disclosure or tip to the police. This section prohibits and creates a criminal offence for employers who retaliate or threaten retaliation against employees who provide police with information about alleged criminal activities of the employer. This prohibition only applies to employers alleged of misconduct that is criminal in nature such as corruption, fraud, money laundering, theft, perjury, etc. In order to receive protection under this section, employees must report the alleged misconduct specifically to police. Reporting alleged criminal misconduct to a regulator or other lawful authority instead of the police will not activate the protections of this section.

The Criminal Code primarily deals with punishing offenders and few remedies are offered for victims of crime. The section creates a criminal offence for the employer who retaliates against an employee but does little to remedy reprisals that have been suffered by the employee.

2.2 *Canada Evidence Act.*

Based on the consultant's experience, it can be understood that generally, common law holds that the name of people who provide confidential information to police about crime should not be disclosed. This principle is well-established in common law and has been for several centuries. Under this principle police officers cannot be asked to reveal the identity of their confidential sources and witnesses providing testimony cannot be asked if they are informants for the police. Section 37 of the *Canada Evidence Act*[2] also speaks to this principle and protects the identity of police informers from being disclosed in criminal proceedings.

[2] *Canada Evidence Act* accessed 2016 January 14 http://laws-lois.justice.gc.ca/PDF/C-5.pdf

2.3 *National Energy Board Act and Regulations.*

The *National Energy Board Act* and *Regulations* promote transparency and accountability in the construction, operation, and abandonment of pipelines and power lines in Canada. Subject to certain specific exceptions, all NEB hearings with respect to the issuance, revocation, or suspension of certificates or for permissions to abandon the operation of a pipeline shall be public.[3] Part IX of the Act grants the NEB authority to make regulations, create violations, and assess administrative monetary penalties. The purpose of penalties is to promote compliance with the Act and not to punish.[4] Any person who is served with a notice of violation may request a review, is entitled to full disclosure of the case, and could cross-examine involved NEB staff during such proceedings.

The NEB operates in an environment that places considerable requirements and expectations for transparency, accountability, and considerations of the public interest. Under such circumstances protecting the confidentiality of tipsters' identities, disclosures, and records is not guaranteed nor is it automatic. Effective policies, procedures, and strong supervision must in place to ensure that the NEB exercises security over the confidentiality tipsters' identities, disclosures, and records to the extent that such protection is available.

Although the NEB has authorities to exercise confidentiality over information likely to be disclosed during NEB proceedings, these authorities are defined and limited. Section 16.1 and 16.2 of the Act afford the NEB limited and conditional authority to exercise confidentiality over information under the following circumstances:

> *16.1 In any proceedings under this Act, the Board may take any measures and make any order that it considers necessary to ensure the confidentiality of any information likely to be disclosed in the proceedings if the Board is satisfied that*
>
> *(a) disclosure of the information could reasonably be expected to result in a material loss or gain to a person directly affected by the proceedings, or could reasonably be expected to prejudice the person's competitive position; or*
>
> *(b) the information is financial, commercial, scientific or technical information that is confidential information supplied to the Board*
>
> *and*

[3] National Energy Board Act, Sec 24(1), accessed 2016 January 13, http://laws-lois.justice.gc.ca/eng/acts/N-7/page-5.html#docCont

[4] Ibid. Section 136(2), accessed 2015 January 13, http://laws-lois.justice.gc.ca/eng/acts/N-7/page-25.html#h-97

(i) the information has been consistently treated as confidential information by a person directly affected by the proceedings, and

(ii) the Board considers that the person's interest in confidentiality outweighs the public interest in disclosure of the proceedings.

16.2 In respect of any order, or in any proceedings, of the Board under this Act, the Board may take any measures and make any order that the Board considers necessary to ensure the confidentiality of information that is contained in the order or is likely to be disclosed in the proceedings if the Board is satisfied that

(a) there is a real and substantial risk that disclosure of the information will impair the security of pipelines, international power lines, buildings, structures or systems, including computer or communication systems, or methods employed to protect them; and

(b) the need to prevent disclosure of the information outweighs the public interest in disclosure of orders and proceedings of the Board.[5]

Confidentiality should never be promised to a tipster.

The *Onshore Pipeline Regulations* obliges regulated companies to ensure some degree of protection to its employees against reprisals for making reports about certain alleged wrongdoings by the company. The section obliges regulated companies to establish documented policies and goals for meeting its obligations under section 6 of the Regulations (design, construction, operation and abandonment of a pipeline in a manner that ensures safety and security of public, employees, pipeline, and environment) including:

> *A policy for the internal reporting of hazards, potential hazards, incidents, and near-misses that includes the conditions under which a person who makes a report will be granted from immunity from disciplinary action.*

The section requires the company's policy to address internal reporting of only four specific occurrences:

- Hazards,
- Potential hazards,
- Incidents, and
- Near misses.

The company is required to explain in written policy under what conditions an employee making the report will be granted immunity from disciplinary action. The objective of this

[5] Ibid. Section 16.1 and 16.2, accessed 2016 January 13, http://laws-lois.justice.gc.ca/eng/acts/N-7/page-4.html#docCont

immunity clause is to encourage employees to report these four types of occurrences without fear of disciplinary action. The NEB has authority to review a regulated company's policy in this regard.

Section 6.3(1)(a) of the *Onshore Pipeline Regulations* is a relatively recent amendment and one which was undoubtedly carefully considered during the drafting process. It appears clear that the regulation was intended to oblige and ensure that regulated companies have an internal reporting mechanism that encourages employees to report hazards, potential hazards, incidents, and near misses. Other federal acts and regulations provide more developed prohibitions against reprisals and protections of confidentiality.

The proposed policy will provide general information to prospective tipsters about the confidentiality, anonymity, and reprisals.

2.4 *Public Servants Disclosure Protection Act.*

The *Public Servant Disclosure Protection Act*[6] came into force on April 15, 2007.[7] The Act applies to all employees in departments, agencies, boards, tribunals, Crown corporations, court administrations, and the Royal Canadian Mounted Police. Among other things the Act:

- Establishes the Office of Public Service Integrity Commissioner to apply and enforce the Act,
- Requires every chief executive in the federal service to establish an internal disclosure mechanism,
- Encourages federal public service employees to report incidents of serious wrongdoing internally,
- Allows federal public service employees to report directly to the Public Service Integrity Commissioner,
- Establishes the Public Servants Disclosure Protection Tribunal, comprised of two to six Federal Court judges (or equivalents) to determine findings in cases of alleged reprisals, and
- Protects employees from reprisals by creating offences for offenders and remedies for victims.

The *Public Servant Disclosure Protection Act* does not apply to employees of companies regulated by the NEB. However, there are provisions of this legislation that the NEB may wish to consider in developing and refining the NEB whistleblower. For instance, the Act*:*

[6]Public Servant Disclosure Protection Act, Accessed 2016 January 14 http://laws-lois.justice.gc.ca/PDF/P-31.9.pdf

[7] The Professional Institute of the Public Service of Canada, *Pocket Guide on Whistleblowing,* (September 2012), page 2, accessed 2016 January 14, http://www.pipsc.ca/portal/page/portal/TOPLEVELSITE/bsearchresults

- Defines 'reprisal'. The definition is found in Section 2 of the Act and means:

  any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:

  (a) a disciplinary measure;
  (b) the demotion of the public servant;
  (c) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;
  (d) any measure that adversely affects the employment or working conditions of the public servant; and
  (e) a threat to take any of the measures referred to in any of paragraphs (a) to (d).

- Defines 'wrongdoing'. Section 8 of the Act defines wrongdoing as:

  (a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;
  (b) a misuse of public funds or a public asset;
  (c) a gross mismanagement in the public sector;
  (d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;
  (e) a serious breach of a code of conduct established under section 5 or 6; and
  (f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

- Prohibition against reprisals. The act prohibits reprisals against public servants who make disclosures of alleged wrongdoing, establishes procedures reporting and investigating reprisals, and authorizes disciplinary action for those involved in taking or directing reprisals. The protection against reprisals is extended to contractors and those applying for contracts with the federal public service,
- Establishes procedures for a public servant to access legal counsel at any point in the disclosure process (Section 25),
- Creates a number of prohibitions including: making false statements in a disclosure, obstructing an investigation into a disclosure or reprisal, and destroying documents and other things in relation to a proceeding under the Act,
- Obliges a public servant to cooperate with proceedings under this Act even if the public servant might self-incriminate, and
- Requires procedures for security and confidentiality over information.

The *Public Servant Disclosure Protection Act* provides a number of protections and creates a number of offences that appear to be beyond the scope of the NEB mandate. However, the

Act also offers the NEB a number of considerations for its program and regulatory enforcement. This information is provided for the NEB's general information.

The proposed NEB policy will define important terms and will provide procedures for security and confidentiality over information.

2.5 *Canada Labour Code.*

The *Canada Labour Code* offers protections to employees of federal employers against reprisals for disclosures involving matters of occupational health and safety. Part II of the Code creates a legal obligation for employees to report "any thing or circumstance in a work place that is likely to be hazardous to the health or safety of the employee, or that of the other employees or other persons granted access to the work place by the employer."[8] Employers are legally obligated to ensure that the health and safety at work of every person employed by the employer is protected[9] and respond as soon a possible to reports made by employees.[10]

Additionally, the Code prohibits an employer from taking specific reprisals because the employee has:

- Testified or is about to testify in a proceeding or inquiry under the Code,
- Has provided information to a person engaged in the performance of their duties under this Code regarding the conditions of work affecting health or safety, or
- Has sought the enforcement of any of the provisions in Part II of the Code which includes reporting a disclosure to the employer.[11]

The reprisals prohibited under this part of the Code are very specific and limited:

- Dismissal,
- Lay off,
- Demotion,
- Imposition of a financial or other penalty,
- Refusal to pay an employee remuneration otherwise entitled to,
- Disciplinary action, and
- Threats of any of the above.

The *Canada Labour Code* is an example of the sector-specific patchwork of whistleblower protections in Canada. The Code reinforces the duty of loyalty an employee owes to the employer and prohibits the employer from retaliating against the employee. In order to

[8] Canada Labour Code, Section 126(1)(g) accessed 2016 January 14 http://laws-lois.justice.gc.ca/PDF/L-2.pdf
[9] Ibid, Sec 124 http://laws-lois.justice.gc.ca/PDF/L-2.pdf
[10] Ibid, Sec 125(1)(z.02) http://laws-lois.justice.gc.ca/PDF/L-2.pdf
[11] Ibid, Sec 147 accessed 2016 January 14 http://laws-lois.justice.gc.ca/PDF/L-2.pdf

receive the protections afforded by this Code, the employee must report the issue to the employer. That is not to say the employee cannot report health and safety issues to other competent authorities in addition to the employer but the employer must be notified and likely notified first.

The Code provides limited protection from very specific reprisals taken against employees who report or otherwise participate in proceedings involving *only* health and safety in the workplace. Other wrongdoings such as money laundering, fraud, theft, assaults, even human trafficking are beyond the scope of this legislation.

2.6 Canadian Environmental Protection Act.

The *Canadian Environmental Protection Act* is another example of sector specific whistleblower protection. This act is older than the *Public Servant Disclosure Protection Act, Canada Labour Code*, and many similar provincial acts yet it has several elements that make it more suitable to protect whistleblowers.

- Voluntary Reports. The Act allows a person who is not otherwise legally obliged to report the matter an opportunity to report an alleged wrongdoing. The Act places no restrictions or other limits on who this person might be. Therefore, any person whether employed by a regulated company or simply a concerned member of the public may report a suspected wrongdoing.
- Confidentiality. The Act provides people making a report the ability to request confidentiality over their identity and any information that could reasonably be expected to reveal their identity. When a reporter makes such a request, the Act requires that

  > *no person shall disclose or cause to be disclosed the identity of a person who makes a request under subsection (2)* (request for confidentiality) *or any information that could reasonably be expected to reveal their identity unless the person authorizes the disclosure in writing.*

  This protection is very broad. It creates an obligation for the Minister to have policies and procedures in place to provide security and confidentiality over information that could reasonably be expected to reveal the reporter's identity. It also prohibits any person from disclosing that information or causing it to be disclosed.
- Reprisals. The protections afforded employees against reprisals are broad. Unlike the definition in the *Canada Labour Code* this Act include the catch-all phrase 'otherwise disadvantage' in its definition of reprisals.

  > *Despite any other Act of Parliament, no employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that*

(a) the employee has made a report under subsection (1);
(b) the employee, acting in good faith and on the basis of reasonable belief, has refused or stated an intention of refusing to do anything that is an offence under this Act; or
(c) the employee, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done by or under this Act.[12]

- Penalties. The Act allows the Crown to prosecute violators, including those that disclose confidentiality and take reprisals, by either summary or indictment. The Act provides minimum fines for convictions which increase upon second and subsequent convictions.[13]

2.7 Access to Information and Privacy Act.

These two federal laws allow citizens to the access records of government institutions and to access information the federal government has collected about themselves. These two pieces of federal legislation have an impact upon the type of information that government institutions could be required to release involving the identity and disclosure of tipsters.[14] [15]

- The NEB is a government institution as defined in both Section 3 and the Schedule of Government Institutions of the *Access to Information Act* and *Privacy Act*.
- The *Access to Information Act* describes a 'record' as meaning "any documentary material, regardless of medium or form."[16]
- Section 3 of the *Privacy Act* defines personal information to include:

information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing:

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence, and

[12] Canadian Environmental Protection Act Section 16 subsections (1) through (4) accessed 2016 January 14 http://laws-lois.justice.gc.ca/PDF/C-15.31.pdf
[13] Ibid, Section 272 accessed 2016 January 14 http://laws-lois.justice.gc.ca/PDF/C-15.31.pdf
[14] Privacy Act, accessed 2016 January 14 http://laws-lois.justice.gc.ca/PDF/P-21.pdf
[15] Access to Information Act, accessed 2016 January 14 http://laws-lois.justice.gc.ca/PDF/A-1.pdf
[16] Ibid, Section 3, accessed 2016 January 14 http://laws-lois.justice.gc.ca/PDF/A-1.pdf

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

Exemptions of records. Both the *Access to Information Act* and the *Privacy Act* each create lawful exemptions from the obligation to disclose information. Some of these lawful exemptions might have an impact for the NEB whistleblower program and would need to be discussed with the NEB legal counsel.

Access to Information Act:

- Section 16.5 requires that head of a government institution shall refuse to disclose any record requested under this Act that contains information created for the purpose of making a disclosure under the *Public Servants Disclosure Protection Act* or in the course of an investigation into a disclosure under that Act. Among other things, this exemption protects against the release of information about tipsters, the tipster's disclosure, and the investigative process.

- Sec 17 exempts disclosure of the record if disclosure could reasonably be expected to threaten the safety of individuals.

- Sec 19(1) exempts disclosure of records that contain personal information as defined in section 3 of the Privacy Act (defined above).

- Sec 20(1)(a) exempts the disclosure of a record that contains trade secrets of a third party. Section 20(1)(b) exempts financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party.

- Sec 21(1) states the head of a government institution may refuse to disclose any record requested under this Act that contains:

  (a) advice or recommendations developed by or for a government institution or a minister of the Crown,
  (b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate.

- Sec 23 states the head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

Privacy Act:

- Sec 7 states that personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except:

  > (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or
  > (b) for a purpose for which the information may be disclosed to the institution under subsection 8(2)(lists several justifications not applicable to WB)

- Sec 8(1) restricts personal information under the control of a government institution from being disclosed without the consent of the individual to whom it relates.

- Sec 26 states that the head of a government institution may refuse to disclose any personal information about an individual other than the individual who made the request, and shall refuse to disclose such information where the disclosure is prohibited under section 8.

- Sec 27 states that the head of a government institution may refuse to disclose any personal information requested that is subject to solicitor-client privilege.

Requests for information made under these acts which involve personal information and solicitor-client privilege may be entitled to exemption from disclosure. Recent Canadian case law explained in Part 4 also suggest some circumstances in which solicitor-client privilege can exempt internal tips and whistleblower investigations from disclosure. Legal opinion is required in this regard and is well beyond the scope of this research.

Part 3 Provincial Legislation

As demonstrated in Part 2 of this report, a defining characteristic of federal whistleblower legislation in Canada is its sector-specific nature. The same holds true in the provincial arenas.

3.1 Public Interest Disclosure Acts.

The following provinces have whistleblower acts that apply to provincial departments, offices of the Legislature, and public entities:

- Alberta,
- Saskatchewan,
- Manitoba,
- Ontario, and
- New Brunswick.

Generally, the purposes of these acts are to:

- Facilitate the disclosure and investigation of serious wrongdoings,
- Protect employees who make such disclosures from unlawful reprisals,
- Promote public confidence, and
- Other purposes as prescribed by the respective acts.

The Province of Alberta provides a very useful best practices policy guide[17] to all its reporting entities to assist in the development of policies and procedures that meet the requirements of its act. This guide will be used as a significant reference in the design of the NEB policy.

[17] Province of Alberta, Service Alberta, *Public Interest Disclosure (Whistleblower) Protection Act: Best Practices for Key Elements of a Whistleblower Policy and Procedure (2013),* accessed 2016 January 20, http://c.ymcdn.com/sites/www.asboa.ab.ca/resource/collection/525B4692-1D66-4F98-9DCC-BF73B74E6782/Best_Practices_for_Key_Elements_of_a_Whistleblower_Policy_%28May_2013%29.pdf

3.2 Other Acts and Regulations.

The provinces also have similar versions of occupational health and safety acts, environmental protection acts, and employment standards as their federal counterparts. Many of these acts provide sector-specific limited protection to employees who report alleged wrongdoings and safety issues as defined by the respective act. For example, Sec 74 of Saskatchewan's *Labour Standards Act* and Sec 28 of New Brunswick's *Employment Standards Act* prohibit employers from retaliating against employees who have reported or proposed to report to a lawful authority any activity that is likely to result in an offence against labour or employment or an Act of Parliament, or testifies in an investigation. Much like Section 425.1 of the *Criminal Code*, these provisions prohibit and create an offence for unwarranted reprisals against employees but do not offer remedies for employees when reprisals occur.

Part 4 Canadian Case Law

4.1 Canadian Civil Case Law.

Generally speaking, Canadian civil law governs many of the risks and liabilities for individuals and corporations involved in whistleblower tips lines. For this reason, it is important that any proposed policy and procedure be well informed regarding decisions that Canada's civil courts have reached regarding whistleblower programs. The following civil cases provide general information for whistleblowing program. The NEB may wish to consult with its legal counsel for specific applications of the case law to the NEB's fact situation.

4.1(a) Talisman Energy Inc. v. Flo-Dynamics Systems Inc. et al, 2015, Alberta Court of Queen's Bench (regarding privilege).

Talisman claimed that between 2011 and 2013, the Defendants and in particular G. Toska, took millions of dollars from Talisman some of which were moved offshore. Talisman alleged that while a Talisman employee or contractor, G. Toska and Mr. Elliot sought to divert water services contracts to Flo-Dynamics Systems Inc. (FDS) and other Corporate Defendants in which they had an undisclosed ownership or financial interest. Talisman further alleged that FDS distributed millions of dollars from these contracts through holding companies to each of the Individual Respondents. The Defendants counterclaimed, alleging that Talisman intentionally and unlawfully interfered with FDS' relationships with its clients, vendors, suppliers, employees and contractors, disparaged the reputations of Mr. Elliot, G. Toska and E. Toska, and improperly claimed ownership over certain patents belonging to the Defendants.[18]

In her analysis of this case, Jordan Deering of the law firm Norton Rose Fulbright notes that this issue came to Talisman's attention through an anonymous whistleblower. Talisman immediately commenced an investigation led by one of its in-house lawyers. Talisman's internal whistleblower investigation generated 550 documents prior to the retainer of external legal counsel. The defendants sought production of this whistleblower file while

[18]Talisman Energy Inc. v Flo-Dynamics Systems Inc, 2015 ABQB 100 (CanLII), accesses 2015 December 15, http://canlii.ca/t/gg9v5

Talisman asserted it was privileged information and was protected from being disclosed to the defendants.[19]

Deering notes that the court considered three grounds of privilege: litigation privilege, case-by-case privilege, and legal advice privilege.

The court was not satisfied that the dominant purpose for creating the whistleblower file was litigation. The court noted that a whistleblower investigation could have numerous other purposes, including assessing termination of an employment or business relationship or compliance with whistleblower policies and procedures. Therefore, the whistleblower disclosure and the internal investigation that ensued could not receive litigation privilege. The court also found that it could not fully ascertain the circumstances surrounding Talisman's whistleblower program in order to assess whether case-by-case privilege applied.

According to Deering the Court found that only privilege that applied to protect the whistleblower file from disclosure was the privilege of legal advice. In making this determination, the court concluded that, "One of the purposes of the investigation… was to ascertain the facts in order to get legal advice from their in-house legal counsel" and accordingly, the whistleblower file was privileged. Legal advice privilege only required the provision of legal advice to be "one of the purposes" and not the "dominant purpose," as is the case for litigation privilege. The court found that only legal advice privilege applied in these circumstances and accordingly, the whistleblower file was protected from disclosure by privilege.[20]

Deering argues that this case creates a number of conditions for corporate whistleblower programs:

- The corporate investigation policy should require the immediate involvement of internal or external legal counsel. The policy should specify that legal counsel leads and manages the internal investigation, for the express purpose of ascertaining the facts to provide legal advice to the company.
- All members of the investigation team should understand legal advice privilege and ensure it is maintained. Key items should include marking all communications "Solicitor-Client Privileged". Disclosure of the tipster's identity and disclosure should be limited to legal counsel and the central investigation team only.
- Whistleblower policies should be drafted to better rely upon all categories of privilege. In particular, the whistleblower policies should note the litigation purpose of an investigation and the importance of confidentiality of the whistleblower complaint and investigation.

[19] Jordan Deering, *Privilege Over Whistleblower Investigation Files*, October 2015, accessed on 2015 December 15 http://www.nortonrosefulbright.com/knowledge/publications/133592/privilege-over-whistleblower-investigation-files.
[20] Ibid.

Deering argues that this recent decision confirms that the privilege of legal advice between counsel and client extends over whistleblowing disclosures and ensuing internal investigations. However this privilege is not absolute.[21]

4.1(b) Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, (2015) Supreme Court of Canada (regarding duty of loyalty).

This case is often cited in whistleblower case studies because it enforces the legal principle that employees owe a duty of loyalty to their employers and are required, with certain exceptions, to disclose incidents to their employer first in order to provide the employer with an opportunity to solve the problem. This 'up-the ladder' approach is also supported in *Haydon, Anderson,* and other Canadian cases.

Merk alleged that she was fired as bookkeeper and office manager of the respondent trade union because she blew the whistle by informing International Union of Iron Workers representatives of alleged financial misconduct committed by her immediate supervisors at Local 771. Under section 74(1)(a) of the Saskatchewan Labour Standards Act, no employer can discharge an employee because the employee "has reported … to a lawful authority any activity that is or is likely to result in an offence". While the Saskatchewan trial judge was satisfied that the financial misconduct amounted to "an offence" and that Merk was terminated because she reported it, she nevertheless concluded that Merk had not complained to a "lawful authority". In her view the expression "lawful authority" should be limited to a person or institution authorized by law to deal with the activity as an offence and did not include employers. Both the summary conviction appeal judge and the majority of the Saskatchewan Court of Appeal agreed with the interpretation of "lawful authority" adopted by the trial judge.[22]

The Supreme Court of Canada disagreed, overturned the decisions of the lower courts, and found in favour of Merk:

> *The expression "lawful authority" in section 74 of the Labour Standards Act of includes not only the police or other agents of the state having authority to deal with the activity complained of "as an offence", but also individuals within the employer organization who exercise lawful authority over the employee(s) complained about, or over the activity that is or is likely to result in the offence. This interpretation of section 74 flows from the plain meaning of the expression "lawful authority" and is consistent with its purpose and context.*

[21] Ibid.

[22] Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, [2005] 3 SCR 425, 2005 SCC 70 (CanLII) accessed on 2015 December 15, http://canlii.ca/t/1m1zp

The plain meaning of section 74 is reinforced by the labour relations context. Whistleblower laws, such as section 74, seek to reconcile an employee's duty of loyalty to his or her employer with the public interest in the suppression of unlawful activity. The employees' duty of loyalty and the public's interest in whistleblowing is best reconciled with the "up the ladder" approach, i.e. protecting employees who first blow the whistle to the boss or other persons inside the employer organization who have the "lawful authority" to deal with the problem. Failure by whistleblowing employees to "try to resolve the matter internally" is condemned by courts and labour arbitrators as prima facie disloyal and inappropriate conduct[23].

(14) Whistleblower laws create an exception to the usual duty of loyalty owed by employees to their employer. When applied in government, of course, the purpose is to avoid the waste of public funds or other abuse of state-conferred privileges or authority. In relation to the private sector (as here), the purpose still has a public interest focus because it aims to prevent wrongdoing "that is or is likely to result in an offence". (It is the "offence" requirement that gives the whistleblower law a public aspect and filters out more general workplace complaints.) The underlying idea is to recruit employees to assist the state in the suppression of unlawful conduct. This is done by providing employees with a measure of immunity against employer retaliation.[24]

and

(16) The general principles of labour relations provide, I believe, the appropriate context. In employment law, there is a broad consensus that the employee's duty of loyalty and the public's interest in whistleblowing is best reconciled with the "up the ladder" approach. The Saskatchewan legislature was not oblivious to the realities of the workplace.

4.1(c) Haydon v. Canada, 2000, Federal Court (regarding duty of loyalty).

In this case, heard in Federal Court, a number of public servants (drug evaluators) sought remedy against letters of reprimand issued by their employer for publically disclosing their concerns over a drug approval process. After repeated efforts to have their concerns addressed internally, including a request for an external investigation and the intervention of the Prime Minister and the Health Minister, the public servants finally decided to complain publicly including by participating on television interviews. The public servants were issued official reprimands for their public disclosure.
The court decided that:

The Supreme Court of Canada decision in Fraser v. Public Service Staff Relations Board is the leading case concerning the duty of loyalty owed by public servants, as it

[23]Ibid.
[24]Ibid.

established the bounds of permissible public criticism of government policies by public servants. The duty of loyalty is a well-known and long-accepted legal principle which provides an intelligible standard by which to measure an employee's conduct. It is a reasonable limit to the freedom of expression provided not by a law but by a common law rule. A balance has to be struck between the duty of loyalty and freedom of expression. The common law duty of loyalty is sufficiently precise to constitute a limit "prescribed by law" for the purposes of a section 1(freedom of expression) analysis. The limitation placed on the applicants' freedom of expression was not based on vague and undetermined criteria. A restriction or limitation to a Charter right or freedom must have its source in law. The objective of the duty of loyalty owed by public servants is to promote an impartial and effective public service which is essential to the functioning of a democratic society; it is therefore a pressing and substantial objective. There is also a rational connection between the common law duty of loyalty and its objective. As to minimal impairment, the duty of loyalty does not demand absolute silence from public servants; it encompasses exceptions or qualifications where, for example, the Government is engaged in illegal acts or where its policies jeopardize the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his ability to perform effectively his duties. These exceptions embrace matters of public concern and ensure that the duty of loyalty impairs the freedom of expression as little as reasonably possible in order to achieve the objective of an impartial and effective public service. The common law duty of loyalty has been tailored to accomplish its specific objective while allowing for exceptions.[25]

This case involved federal public servants but reinforces the principle that employees owe a duty of loyalty towards the employer under most circumstances. This and other cases demonstrate that, under most circumstances employees are expected to make their employers aware of alleged wrongdoings, health and safety risks, and other serious concerns first in order that the employer has an opportunity to remedy the situation.

4.1(d) Anderson v. IMTT Quebec Inc (2013), Federal Court of Appeal.

This action involved a judicial review of a decision from the Canada Industrial Relations Board (the Board), dismissing the applicant's complaint alleging a violation of sections 133 and 147 of the Canada Labour Code (the Code) that offers whistleblowers certain protections from reprisals.

Anderson asked the Board to rescind his dismissal by the respondent IMTT-Québec Inc. (IMTT). He submitted that his dismissal resulted from actions he had taken to ensure the safety of IMTT workers, and that he, therefore, qualified for the protection of section 147 of the Code which prohibits an employer from dismissing an employee for providing information regarding the conditions of work affecting health or safety, or for acting in accordance with or seeking the enforcement of any provisions of the Code relating to

[25] Haydon v. Canada, [2001] 2 FCR 82, 2000 CanLII 16081 (FC), accessed on 2015 December 15, http://canlii.ca/t/433m.

occupational health and safety. The Board found instead that the applicant's dismissal resulted from the breakdown of the relationship of trust with his employer, his obvious lack of loyalty toward his employer and his attempts to discredit it.[26]

The Board noted that the powers granted by the pertinent sections were limited and Anderson's dismissal had little, if anything to do with his whistleblowing disclosure:

> *[19] On the basis of the evidence before it, the Board determined that the applicant had been suspended and dismissed not because he had reported the potential danger posed by the light standard, but rather because of his behaviour prior to this event and his actions following it. In particular, the Board held that, as of February 2009, it had been recommended that the applicant no longer be kept in his position. According to the Board, the dismissal was motivated by the permanent breakdown of the relationship of trust resulting from the applicant's clear lack of loyalty and the disrepute he had caused the company: Decision at paras. 85-92. The following comments by the Board are relevant:*
>
> > *[87] The reason for the dismissal was not that the complainant had sought compliance with or enforcement of the health and safety provisions of the Code, but merely that there had been a breakdown of the relationship of trust as a result of the complainant's clear lack of loyalty and the disrepute he had caused the company.*
> >
> > *[88] The complainant acted disloyally toward the respondent when, on November 20, 2008, he forwarded an email regarding errors made by a colleague to Mr. Frédéric Perron, a health and safety technician and when, on March 16 and 30, 2009, he forwarded to the union president an email he had sent Mr. Fisette in which he questioned the competence of the terminal manager, as well as a copy of the complaint he had filed against Mr. Dion with the Ordre des ingénieurs du Québec.*
> >
> > *[89] In his fierce determination to discredit the terminal manager and his colleagues, the complainant wound up discrediting the respondent. Further, he failed to provide the harbourmaster at the Port of Québec with complete information by leaving out the safety measures that had been introduced and the action that had been taken to correct the situation. The complaints he filed with the Ordre des ingénieurs du Québec against his colleague and against Latulippe and its representative, Mr. Louis Latulippe, demonstrate a blind determination that brought discredit to the respondent both internally and in its business relations.[27]*

The Federal Court of Appeal (the Court) agreed with the Board and upheld Anderson's dismissal (with costs). This case supports the decisions in *Merk, Haydon,* and others that

[26] Anderson v. IMTT-Québec Inc., 2013 FCA 90 (CanLII), Accessed on 2015 December 15, http://canlii.ca/t/g1rcq.
[27] Ibid.

recognizes an employee's duty of loyalty to the employer and a requirement that employees, with few exceptions, disclose problems internally before disclosing the problems to an outside authority or publically. This case also promotes the concept of 'good-faith' disclosures discredits the practice of misusing whistleblower protection laws to support workplace grievances.

4.2 Canadian Criminal Case Law.

Canadian criminal law has also dealt with the issue of protections and limits of informant confidentiality. Law enforcement agencies use information provided by confidential human sources regularly in all types of serious criminal investigations. Many crimes are solved only because of information provided by a confidential human source. Canadian courts have recognized the indispensable role confidential informants play in the administration of justice and have protected the explicit guarantee of confidentiality inherent in the contract between the justice system and the informant.

It is not impossible to consider a scenario in which a disclosure made to the NEB from a tipster could lead to an investigation of an offence or offences under the *Criminal Code.* In such a case, criminal case law might have some application to the confidential information disclosed to the NEB and the identity of the tipster.

Two important cases are worth review. The case of R. v. Leipert involves the protection of a Crime Stoppers tip from disclosure. The Crime Stoppers program bears a number of similarities to a corporate whistleblowing program. The case of R. vs. X.Y. demonstrates the liabilities and consequences of inadequate program policy, procedures, and supervision.

4.2(a) R. v. Leipert (1997) Supreme Court of Canada (relating to protection of Crime Stoppers tip).

This case originated in British Columbia in 1996 and centred on the Crown's refusal to disclose a Crime Stoppers tip that alerted police to the accused who was allegedly cultivating marijuana in a residential dwelling. The trial judge ordered that an edited copy of the Crime Stoppers tip be disclosed to the accused however the Crown refused citing police informer privilege. The case was decided by the Supreme Court the following year.

> *The police received a tip from a Crime Stoppers Association that the accused was growing marijuana in his basement. A police officer went to the accused's house accompanied by a sniffer dog on four different occasions. The officer and the dog walked the street in front of the residence and each time the dog indicated the presence of drugs in the house. On one occasion, the officer smelled the aroma of marijuana coming from the house. He also observed that the basement windows were covered and that one window was barred shut. On the basis of these observations, the officer obtained a search warrant. The information filed in support of the application*

for the warrant also disclosed that the officer had received a Crime Stoppers tip (the tip itself was not disclosed)*. Following a search of the house, the accused was charged with cultivation of marijuana and possession of marijuana for the purpose of trafficking. At trial, the accused asserted that, pursuant to his right under the Canadian Charter of Rights and Freedoms to make full answer and defence, he was entitled to the Crime Stoppers document reporting the tip. The Crown refused disclosure on the ground of informer privilege. The trial judge viewed the document and attempted to edit out all references to the identity of the informer. He then ordered disclosure. The Crown asked to rely on the warrant without reference to the tip. The trial judge refused this request because the accused did not consent. As a result, the Crown ceased to tender evidence, the defence elected to call no evidence, and the trial judge entered an acquittal. The Court of Appeal reversed the trial judge's decision and ordered a new trial. The Supreme Court agreed with the Court of Appeal and held that the appeal should be dismissed and ordered a new trial.*[28]

In its written decision the Supreme Court commented that:

The rule of informer privilege is of such fundamental importance to the workings of a criminal justice system that it cannot be balanced against other interests relating to the administration of justice. Once the privilege has been established, neither the police nor the court possesses discretion to abridge it. The privilege belongs to the Crown, which cannot waive it without the informer's consent. In that sense, the privilege also belongs to the informer. The privilege prevents not only disclosure of the informer's name, but also of any information which might implicitly reveal his identity. In the case of an anonymous informer, it is almost impossible for a court to know what details may reveal his identity.

The informer privilege is subject only to the "innocence at stake" exception. In order to raise this exception, there must be a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused.[29]

and

Where an accused seeks to establish that a search warrant was not supported by reasonable grounds, he may be entitled to information which may reveal the identity of an informer notwithstanding informer privilege in circumstances where the information is absolutely essential. "Essential" circumstances exist where the accused establishes the "innocence at stake" exception to informer privilege. Thus, absent a basis for concluding that disclosure of the information that may reveal the identity of the informer is necessary to establish the innocence of the accused, the information remains privileged and cannot be produced, whether at the hearing into the reasonableness of the search or at the trial proper.

[28] R. v. Leipert, [1997] 1 SCR 281, 1997 CanLII 367 (SCC), Accessed on 2015 December 15, http://canlii.ca/t/1fr41.
[29] Ibid.

Anonymous tip sheets should not be edited with a view to disclosing them to the defence unless the accused can bring himself within the innocence at stake exception. To do so runs the risk that the court will deprive the informer of the privilege which belongs to him absolutely, subject only to the "innocence at stake" exception. It also undermines the efficacy of programs such as Crime Stoppers, which depend on guarantees of anonymity to those who volunteer information on crimes. In the case of an anonymous informer, where it is impossible to determine which details of the information provided by the informer will or will not result in that person's identity being revealed, none of those details should be disclosed, unless there is a basis to conclude that the innocence at stake exception applies.

Here, the trial judge erred in editing the tip sheet and in ordering the edited sheet disclosed to the accused. The identity of the anonymous informer was protected by privilege and, given the anonymous nature of the tip, it was impossible to conclude whether the disclosure of details remaining after editing might be sufficient to reveal the identity of the informer to the accused. The informer's privilege required nothing short of total confidentiality in this case. As it was not established that the informer's identity was necessary to establish the innocence of the accused, the privilege continued in place.[30]

Corporate whistleblowing programs that focus on receiving disclosures and tips from people who request or infer confidentiality and anonymity operate similarly to the Crime Stoppers program. The Crime Stoppers program does not record the name of the tipster. The tips provide police investigators with a starting point for an investigation or a particular strategy but everything alleged in the tip must be independently corroborated by the police. The tips do not form part of the disclosure package to the accused and physical security over the tips is tightly guarded by the police agency and the Crime Stoppers Association. Police investigators never communicate directly with the tipster.

Policy and procedure for a corporate whistleblowing program ought to be designed to incorporate the fundamental practices of the Crime Stoppers program. Having a tightly structured corporate whistleblower program that so closely mirrors the Crime Stoppers program not only offers best practices and potential protections.

4.2(b) R. v. X.Y. (2011) Ontario Court of Appeal (relating to informer privilege).

This case is an example of the risks and liabilities for individuals and agencies that manage a confidential human informant. It must be understood that a confidential police informer is a significantly different commodity that a confidential tipster. The agency's interaction with a tipster is indirect, highly controlled, and brief. The agency's investigator does not meet the tipster, does not know the tipster's identity, and does not correspond or communicate directly with the tipster. Handling a police informant on the other hand involves much closer contact

[30] Ibid.

with the informant. Whereas a tipster provides an anonymous telephone call or an e-mail over the telephone or internet, a police informer is personally known to his/her police handler. The police officer and the police agency know the true identity of the informant and must protect that identity. Typically, the police handler and informant communicate directly, often even in person. A police officer may handle the same informant for weeks, months, and even years.

The organizational risks and liabilities involved with handling a human informant are substantially greater than those involved in operating a whistleblower hotline. However, this case has been included to demonstrate the distinction between tipster and informant and illustrate the inherent risks of handling informants.

The failure of the police and the Crown to protect the identity of the accused X.Y. as a confidential informer was caused as much by poor training, written policies, and supervision, as it was neglect and indifference.

> *While being interviewed by a police officer, the accused asked that the recording equipment be turned off before disclosing the accused's prior activities as an informer. Unknown to the accused, although one recording device was turned off, a secondary system recorded the entire interview. The officer did nothing to confirm or refute the accused's claim to be a police informer and there is no evidence that the officer sought advice from a supervisor before including the full transcript in the materials provided to the Crown for disclosure to defence counsel. The prosecutor did not question the police about the accused's informer status before disclosing the transcript to the defence. When defence counsel pointed out the breach of informer privilege, the prosecutor moved quickly to recover all documents that contained the text of the interview and stated that the accused's interview would not be tendered at trial. The accused was attacked in detention, explicitly because the attacker had learned from disclosure in another case that the accused was a "rat", and the attacker made threats of future harm. The accused unsuccessfully sought admission into the witness protection program. The trial judge dismissed the accused's application for a stay of proceedings, characterizing the conduct of the police and the prosecutor as inadvertent and unintentional and holding that to continue the prosecution would not result in an unfair trial or have any material effect on the accused because of the significant and diligent efforts the prosecutor had made to remedy the breach and reconstitute the privilege. The accused appealed the subsequent conviction.*[31]

The Supreme Court decided that the appeal should be held and X.Y. was released from custody. The Court concluded that:

> *The trial judge erred in concluding that to permit the prosecution to continue would not further prejudice the accused; in failing to properly consider the effect of the breach on the overall repute of the administration of justice; in concluding that the abuse would not be perpetuated and aggravated in the future; and in concluding that*

[31] R. v. X.Y., 2011 ONCA 259 (CanLII), Accessed on 2015 December 15, http://canlii.ca/t/fkv5w.

the conduct of the police and prosecutor could be excused by their subsequent efforts to reconstitute the privilege. The conduct of the police and prosecutor amounted to gross negligence. Informer privilege is an absolute class privilege, to which a single exception applies that is irrelevant to this appeal. The ban on revealing an informer's identity protects not only an individual informer from possible retribution, but also signals to potential informers that their identity, too, will be protected. It is the obligation of the police and Crown to ensure that the privilege is protected. The trial judge had evidence of actual and [page434] promised retribution, yet failed to consider the overall impact of the disclosure on current and prospective informers. It is far from clear that once informer privilege has been lost, it can somehow be restored to its original vitality. The proceedings should be stayed for abuse of process.[32]

Although this case involved a police informer, which is significantly different than a tipster, this case offers a number of important lessons for agencies that operate a whistleblower program:

- Well written policies and procedures are an absolute necessity for any agency operating a whistleblower hotline. Policies should be reviewed regularly on a pre-approved schedule.
- A documented and written training program must be established. Training must be provided to all employees involved in the whistleblower program. Training must be documented and reinforced by strong supervision. Procedures must be consistent with policy.
- The distinction between tipster and informant must be made. A decision to manage a tipster as an informant is fraught with organizational risks and liabilities that generally speaking will exceed the risk appetite for most corporate entities. Any decisions in this regard must be made at the highest levels of the organization with the full involvement of corporate counsel and experienced specialists.
- Inadvertent disclosure of the tipster's identity and a failure to protect the tipster's identity is a real risk. Comprehensive written policy, effective training, and strong supervision are keys. It is also critically important to limit the number of employees who have access to records of the tipster's disclosure and mechanism(s) used to communicate with tipsters. The records and mechanisms should be physically separated from corporate data and communications systems.
- Key parts of a corporate whistleblower program must be audited on a regular and ad hoc schedule to ensure compliance issues are identified and mitigated.
- Because of the legal risks and liabilities corporate counsel plays a key role in any corporate whistleblower program.

[32] Ibid.

Part 5 Trends in Canadian Whistleblower Programs

It is fair to say that whistleblower programs are becoming an increasingly popular tool to help agencies, companies and regulators detect, deter, and investigate cases of fraud, compliance failures, money laundering, and other high risk organizational wrongdoings. Whistleblower program management and litigation has become a specialized field especially in the United States. It is not unreasonable to suggest that in the near future, a corporate whistleblower program will be a mandatory feature for Canadian publically traded companies.

5.1 Third Party Service Providers.

There are a number of whistleblower program models in use by public and private corporations in Canada and internationally. Generally, whistleblower programs are managed in three ways:

- By a third party service provider engaged to manage all or part of a whistleblower program including receiving and managing disclosures and subsequent investigations,
- By an in-house program including receiving and managing disclosures and investigations, or
- By a combination of these two.

There are a handful of third party service providers operating in Canada. A number of the NEB regulated companies use these third party firms to manage their own whistleblower programs. By managing its own program, the NEB also avoids any potential conflicts of interest and breaches of trust created when a third party service provider manages the whistleblower programs for both the 'regulator' and the 'regulated'.

5.2 Oaths of Confidentiality and Codes of Conduct.

Some employers are requiring all employees to take an oath of confidentiality and abide by codes of conduct that specifically prohibit public disclosures of alleged wrongdoing. Several public bodies such as the House of Commons, the Royal Canadian Mounted Police, and the Library and Archives of Canada are reported to have such restrictions on public disclosure.[33]

5.3 Canadian Bounty Disclosure Programs.

Two significant Canadian agencies solicit tips from the public and offer rewards based on a formula of recovered funds, penalties, and other factors. The Canada Revenue Agency has two whistleblowing programs: Informant Leads Program[34] and Offshore Tax Informant Program[35] that solicit disclosures from the public. The latter program offers rewards to tipsters.

The Ontario Securities Commission recently released a proposed whistleblowing policy that would award tipsters up to $5 million dollars upon final resolution of an administrative matter.[36]

5.4 Extra Territoriality of Reprisal Claims.

Corporations must abide by the laws and regulations of the jurisdiction in which they operate or trade including their home jurisdiction. Companies may face legal risks in multiple jurisdictions simultaneously. Canadian companies with branches or affiliates operating in the United States may have to be concerned about the Sarbanes Oxley Act, Dodd-Frank Act and others laws with significant whistleblower protections. Likewise, American companies that operate branches or affiliates in Canada may have to comply with all domestic (American) laws in addition to Canadian laws.

In 2013, the Canadian National Railway was sued by a whistleblower plaintiff arguing the company breached its obligations to protect the employee from reprisals after reporting an

[33] The Star, David Hutton, *Canada's Crackdown on Government Whistleblowers,* (2013 December 20), accessed 2015 December 15 http://www.thestar.com/opinion/commentary/2013/12/20/canadas_crackdown_on_government_whistleblowers.html

[34] Canada Revenue Agency, *Informant leads Program, a*ccessed 2016 January 07, http://www.cra-arc.gc.ca/gncy/nvstgtns/lds/menu-eng.html

[35] Canada Revenue Agency, *Offshore Tax Informant Program, a*ccessed 2016 January 07, http://www.cra-arc.gc.ca/gncy/cmplnc/otip-pdife/menu-eng.html

[36] Ontario Securities Commission, *OSC Releases Policy for Proposed Whistleblower Program for Public Comment,* accessed 2016 January 07, https://www.osc.gov.on.ca/en/NewsEvents_nr_20151028_whistleblower-program-public-comment.htm

alleged wrongdoing by the company. The plaintiff, Mr. Timothy Wallender filed his action in the Western District of Tennessee.[37] This matter has yet to be concluded in court.

Part 6 Police Use of Informants

When it comes to managing confidential information and informants police agencies have much experience to offer corporations and agencies that operate whistleblower programs. Police rely on reporters, tipsters, confidential human informants, and agents on a daily basis. The categories are determined largely by the type of involvement the informant has in the police investigation.

Consider the following chart:

	Reporter	Crime Stoppers Tipster	Confidential Informant	Agent
Description of role	Provides police information about an event or crime (aka witness or complainant). Can be interviewed by police, summoned to court, required to testify and is a compellable witness.	A person who reports limited information ('tip') to a local Crime Stoppers program that in turn provides a summary of the tip to police partners. Tipster is assigned a control number and may be	A person who provides specific and/or ongoing information to police. The CI is usually closely associated to the target. The CI is known to police, full background investigation conducted, managed with	A person who acts on behalf of police, generally by virtue of the person's unique relationship with the target. Police direct the agent to undertake certain investigational activities the police could not perform themselves.

[37] Jim Middlemiss, *Blowing the Whistle on Fraud* (2014 January 27), accessed 2016 January 07 http://www.canadianlawyermag.com/4972/Blowing-the-whistle-on-fraud.html

		entitled to a reward if the tip results in an arrest or recovery of drugs, proceeds of crime etc.	primary and secondary police handlers, program audit function, CI is paid under tightly controlled protocols.	Use of an agent requires extremely high levels of supervision, control, policy and procedure, and risk. Agent is paid and is a compellable witness.
	Reporter	Crime Stoppers Tipster	Confidential Informant	Agent
Confidentiality	Potentially expected. Limited offer. Limited entitlement.	Expected. Offered. Legally recognized and entitled.	Expected. Offered. Legally recognized and entitled.	Expected (during the police operation only). Offered (during the police operation only). Legally entitled (during the police operation only).
Anonymity	Not expected. Not offered. Not entitled.	Expected. Offered. Legally recognized and entitled.	Not expected. Not offered. Not entitled.	Not expected. Not offered. Not entitled.
Organizational liability	Low	Medium	High	Highest
Organizational Risk	Low	Medium	High	Highest

For the NEB, it is recommended that the whistleblower program only solicit and manage disclosures from tipsters who would be considered and managed as the police equivalent of a Reporter or a Crime Stopper Tipster. To encourage a tipster to act as the police equivalent of a Confidential Informant or an Agent requires substantially more training, financing, supervision, and risk appetite. If the NEB were ever to undertake such activities those activities should occur on an ad hoc basis separate from the whistleblower program. Applying these general considerations to a specific fact situation would require legal advice form counsel.

Part 7 Risks and Recommendations

It is clear that a whistleblower programs has the potential to offer many opportunities to solicit and receive tips that might not otherwise come to the attention of the NEB. As such, it is a valuable mechanism to detect, deter, and remedy compliance issues consistent with its mandate. However, as the research shows there are a number of risks and potential liabilities associated to such a program. Strong policy, adequate training, legal advice, and effective supervision will mitigate these risks to a level that suits the NEB.

Some of the risks and liabilities identified in the research are summarized below:

7.1 Risks.

For organization:

- Disclosure could be not in good faith and is actually a grievance versus a legitimate report of alleged wrongdoing,
- Policies might be inadequate to protect confidentiality of tipster and of disclosure: poor physical controls, security, unvetted summaries distributed, those without need to know are briefed on unnecessary details of disclosure,
- Training might be insufficient: failure to identify a treacherous tipster, investigator breaches boundaries of tipster/investigator relationship (makes promises made about the course of investigation, divulges confidential information to tipster, offers rewards

such as employment or money to the tipster, participates in unethical behaviour, romantic involvement, etc.), and
- Supervision may be inadequate.

NEB liabilities involving disclosure of tipster's identity (subject to legal advice from counsel regarding specific application to the NEB):

- Potential liability for NEB if the NEB or an NEB employee through error, omission, or malice intentionally or unintentionally discloses the tipster's identity, and
- Loss of credibility and increased reputational risk for NEB.

NEB liabilities involving reprisals against tipster (subject to legal advice from counsel regarding specific application to the NEB):

- Potential liability for NEB if tipster is not sufficiently briefed prior to accepting the disclosure about possible occupational and legal risks and repercussions including warranted and/or unwarranted reprisals from employer,
- Potential liability for NEB if tipster not made fully aware of NEB's limited capacity to detect, deter, and investigate reprisals against a tipster, and
- Loss of credibility and increased reputational risk.

7.2 Recommendations.

The gap analysis report submitted on 2016 January 11 provided a broad list of recommendations for the NEB program. A proposed response model was also recommended. At a more refined level, the NEB should consider the following recommendations for the design and development of its whistleblower policy and procedures:

i. Choice of program name. The program should avoid the use of the word 'whistleblower' in its title as this word has a generally negative connotation. An alternate title using the words 'ethics', 'integrity', and/or 'compliance' should be considered. One possible title could be the 'Ethics and Integrity Reporting Program'.

ii. Establish definitions for important terms. The research demonstrates that federal and provincial acts and regulations provide definitions for key words and terms. Such clarity assists tipsters and provides the NEB program focus. At a minimum, the policy should define the following terms:

    - 'disclosure',
    - 'investigation',

- ‘reprisal’,
- ‘tipster’, and
- ‘wrongdoing’.

iii. Develop a reliable and secure reporting mechanism to solicit and receive disclosures from tipsters.

iv. Secure information and reports about tipsters and disclosures physically and electronically separate from all other NEB report and data systems.

v. Assign confidential control numbers and passwords to tipsters to facilitate secure confidential and anonymous communications.

vi. Eliminate the ability for tipsters to be able to communicate directly with the investigators.

vii. Provide potential tipsters with adequate information at the solicitation stage of the program to increase their awareness about the legal duty of employees to the employer, the limitations of the NEB to deter and investigate reprisals taken against tipsters, the possible investigative outcomes of the disclosure, and tips on self-enhancing confidentiality. Each of these measures manages the tipster’s expectations about the program and the tipster’s relationship with the NEB.

viii. Summarize original disclosures to edit out any information that could pose a reasonable risk of identifying the tipster. Use that summary as the staring point for any NEB compliance action.

ix. Limit access to original disclosures and documents which could reveal the identity of the tipster.

x. Involve legal counsel in the program. Legal counsel is important when receiving and evaluating disclosures and considering NEB response plans.

xi. Designate responsibility for the program to a senior executive. This promotes accountability and demonstrates NEB commitment to the program.

xii. Develop effective policy to firmly establish procedures based on best practice.

xiii. Develop a written training program and document all training. The training program should be reviewed at least annually.

xiv. Build in performance management and audit capacities to the program.

xv. Unsure strong supervision at all points of the program.

Part 8 Sources

In conducting work for this contract a number of publically available sources have been consulted for this research report and the other deliverables described in Part 1. Further research will be conducted and additional sources will be consulted. This list will grow as the project progresses.

6.1 Acts and Regulations.

- *Criminal Code,*
- *National Energy Board Act and Regulations,*
- *Canada Evidence Act*
- *Canada Labour Code,*
- *Canadian Environmental Protection Act,*
- *Public Servants Disclosure Protection Act,*
- *Access to Information Act,*
- *Privacy Act,*
- Province of Alberta *Public Interest Disclosure (Whistleblower Protection) Act.*

6.2 Guidance Documents.

- Province of Alberta *Public Interest Disclosure (Whistleblower Protection) Act Best Practices for Key Elements of a Whistleblower Policy and Procedure,* (2013),

- Province of Quebec *Whistleblower protection – For a Quebec With Dignity Deliberations and Recommendations of the Syndicat de professionnelles et professionnels du government du Quebec (SPGQ),* (2014),
- Association of Certified Fraud Examiners (ACFE) course *Working With Whistleblowers,* (2015),
- Professional Institute of Public Service Canada *Pocket Guide on Whistleblowing,* (2012),
- Government of United Kingdom, Department For Business Innovation and Skills *Whistleblowing Prescribed Persons Guidance,* (2015).

6.3 Whistleblower Policies and Websites.

- National Energy Board,
- Tyndale Christian School (pursuant to Alberta's PIDA),
- Central Okanagan School District,
- City of Mississauga,
- Royal Roads University,
- Stuart Olson,
- Canadian Council of Christian Charities,
- Scotiabank,
- TD Bank Group,
- Canadian Bank Note Company,
- Costco,
- Waterpolo Canada,
- CBC,
- Canadian Diabetes Association,
- Canadian Hearing Society,
- Salvation Army,
- Computer Modelling Group,
- Oracle Mining,
- Arc Resources Ltd.,
- Canadian Energy Services,
- Alliance Pipeline Ltd.,
- Enbridge Pipelines,
- TransCanada and affiliates,
- Kinder Morgan,
- Spectre Energy and affiliates,
- Trans Northern Pipelines,
- Enerplus Corp,
- Touchstone Exploration Inc.,
- Paramount Resources Inc.,
- Pembina Pipeline Corp.,
- Perpetual Energy Inc.,

- Enerflex Ltd.,
- Encana,
- Marathon Oil,
- Inter Pipeline,
- Talisman,
- Domtar,
- Canadian Natural Resources,
- Exxon,
- Nevsun Resources Ltd.,
- Levon Resources Ltd.,
- Bona Vista Energy Corp.,
- Crescent point Energy Corp., and
- PennWest,

6.4 Canadian Case Law.

- Anderson v IMTT Quebec Inc.,
- Merk v International Association of Bridge, Structural, Ornamental, and Refining Ironworkers 771,
- Haydon v Canada,
- Read v Canada,
- R v Liepert,
- R v XY,
- R v Scott,
- The Oliveri Case (Ontario), and
- Talisman Energy Inc. v Flo-Dynamics Systems Inc., and
- Fraser v. Public Service Staff Relations Board.

6.5 Third Party Providers.

- Xpera Confidence Line,
- Whistleblower Security,
- Ethicspoint,
- Global Compliance Inc., and
- MNP.