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# National Energy Board

## Whistleblower Program Gap Analysis

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### PURPOSE

This report is an analysis of the National Energy Board (NEB) current whistleblower program. The report identifies goals and best practices of whistleblower programs, assesses the relative strengths and gaps of the current NEB program, and offers 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.

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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 analysis and recommendations in this report rely upon the knowledge and expertise of the consultant. Nothing in this report constitutes legal advice.

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.
5. Final project report.

This gap and analysis report provides the NEB with information about the goals and best practices of a whistleblower program, current NEB program activities (gaps) that create risk, current program activities that the NEB does well, and recommendations for the program moving forward.

### 1.1 Goals and Best Practices of Whistleblowing Programs.

This section of the gap analysis report draws upon research including a review of best practice guidance documents, actual whistleblower policy and programs from Canadian public and private organizations, and Canadian case law. The goals and best practices are explained in more detail in Part 2 of this report.

By way of summary, effective whistleblower programs share the following goals:

- Provide a reliable mechanism to solicit and receive disclosures of wrongdoing,
- Protect, as much as possible, the confidentiality and anonymity of the tipster and the disclosure,
- Provide effective management of the tipster's expectations,
- Provide effective, accountable, timely assessment of the disclosure,
- Provide effective, accountable, timely response and resolution of the disclosure,
- Protect the integrity of the disclosure and the agency's investigation,
- Conduct a professional and defensible investigation,
- Limit the liabilities of the agency receiving the disclosure,
- Detect, deter, and respond to reprisals against the tipster,

- Have effective program reporting and performance management audit capacities,
- Develop and deliver an effective supporting training program,
- Conduct periodic scheduled program review, and
- Assign designated responsibility for the program.

## **1.2 NEB Program Activities (Gaps) That Create Risk.**

Certain activities relating to a whistleblowing program carry liabilities for any organization. Such liabilities create reputational, legal, and organizational risk. A well-designed program identifies those risks, adjusts policy and procedure to mitigate and lessen such risks, and promotes regular policy review.

The following activities (gaps) of the current response model may create risk for the NEB:

- Current policy and procedure,
- Direct communication between the potential investigator and the tipster,
- Security of information,
- Tipster management,
- Evaluation of disclosure,
- Training,
- NEB note taking, reporting, and recordkeeping,
- Controls,
- Performance management audit, and
- Unclear direction to investigators.

These gaps are explained in more detail in Part 3 of this report.

## **1.3 Program Activities that NEB Does Well.**

As is true with any new product or service, getting started is often the most difficult part. The NEB whistleblower program is set upon a strong organizational foundation and the program has significant strengths.

- Senior level designated authority,
- Demonstrated commitment to NEB regulatory mandate,
- In-house program management,
- Program will accept anonymous disclosures,
- Program will not offer financial rewards, and
- NEB commitment to program excellence.

These strengths are addressed in Part 4 of this report.

## **1.4 Recommendations and Priorities.**

In order to address program activities (gaps) that create risk for the NEB a number of recommendations have been made. These recommendations are aligned with the deliverables of the consultant's contract.

- Conduct research and analysis on best practices for NEB whistleblower program,
- Research and propose a response plan model,
- Research and propose NEB written policy, and
- Training.

These recommendations are explained in more detail in Part 5 of this report.

## **1.5 Sources**

A list of significant sources consulted in the course of preparing this report is identified in Part 6 of this report. The sources are organized into the following categories:

- Meetings with key NEB staff,
- Acts and regulations,
- Guidance documents,
- Whistleblower policies and websites,
- Canadian case law, and
- Third party providers.

## Part 2 Goals and Best Practices of Whistleblowing Programs

Whether assessing the effectiveness of current whistleblowing policy and procedure or drafting an original regime, it is important to consider the intended goals of the prospective program. Working with established and agreed upon goals provides policy makers with a clear roadmap to chart the program's design. Goals must be established from the outset to keep the program on track and to ensure that the finished product mirrors the original blueprint.

Effective whistleblower policies and procedures share a number of common goals. Not all of these examples may apply to the NEB however, they are worthy of review.

### **2.1 Provide a reliable mechanism to solicit and receive disclosures of wrongdoing.**

The fundamental premise of every whistleblowing program is to offer the tipster a reliable mechanism to report alleged wrongdoing. There are several different mechanisms a receiving agency can use to solicit and receive a disclosure from a tipster. These include:

- Dedicated toll-free telephone numbers or 'hotlines',
- E-mail correspondence addressed to a particular point of contact within the receiving agency,
- Written letters addressed to a particular point of contact within the receiving agency,
- Internet-based reporting tools,
- In-person, walk-in reporting protocols,
- Live on-line chat tool, and
- Others.

Receiving agencies can choose to manage the entire whistleblower program in-house or contract all, or part of the program to a third-party service provider. Regardless of the mechanisms or business model that a receiving agency adopts, the reporting mechanisms must be reliable and well designed. Each mechanism should be managed with a written policy statement setting out the standards for operation, identifying an organizational area responsible for its maintenance, identifying which employees are permitted access, scheduled testing, operational readiness, performance management audit schedules, etc.

## **2.2 Protect, as much as possible, the confidentiality and anonymity of the tipster and the disclosure.**

An inherent, and at times explicit function of a whistleblower program is to provide a conditional guarantee or commitment that the receiving agency will protect the identity of the tipster who has made the disclosure and the contents of that disclosure to the extent that the law will allow. In this regard there is a significant distinction between ‘anonymous’ and ‘confidential’.

Anonymous information is provided by a tipster whose identity is not and cannot become known by the receiving agency or another party. To remain truly anonymous, the identity of the tipster will not be known by the receiving agency. Confidentiality is best understood as the strategic approach used by a receiving agency to manage and guard the specific disclosure of information and the identity of the source (whether known or anonymous) that provided the disclosure. A disclosure can be simultaneously anonymous and managed confidentially.

The receiving agency must have robust policies and procedure in place to guard the confidentiality of the source’s identity and the information disclosed by the source. It is just as important to guard the confidentiality of information received from an anonymous tipster for if that information were to be released, a third party might be able to deduce the identity of the otherwise anonymous tipster.

If the tipster includes his or her name in the disclosure, sends an e-mail from an easily traceable e-mail address, calls from his/her own phone number, or signs the written letter of disclosure with their name, then the disclosure the caller has provided and the caller’s identity, although managed confidentially, is not anonymous. The source of the information can be traced to a particular individual.

It must be understood that there are a number of ways that a receiving agency can be compelled to disclose records that might reveal information about the identity of the tipster. It is unwise to promise tipsters unconditional confidentiality.

Among the most effective ways to mitigate the risk of disclosing information that might reveal a tipster’s identity is to:

- Maintain tight organizational controls over the whistleblowing disclosure program,
- Limit access to tips and disclosures,
- Summarize the original disclosure and keep it physically separate from the investigation,
- Limit direct contact between the tipster and the investigator,
- Ensure proper internal e-mail discipline among investigators,
- Have effective written policies in place,
- Have an effective written training program for your agency,

- Warn the tipster about self-disclosing, and
- Ensure strong supervision and accountability.

### **2.3 Provide effective management of the tipster's expectations.**

Tipsters have a variety of motivations and expectations. It is a best practice for a receiving agency to explain the agency's policies and procedures prior to soliciting and accepting a tip. It is also advisable to explain to the tipster the limits of the agency's capacities to investigate a tip, the tools available to the agency's investigators, and the potential outcomes of the process. Tipsters must be advised before a tip is accepted about the limits on the agency's ability to maintain confidentiality over the disclosure.

Providing a feedback mechanism and updates to the tipster is important. Tipsters may resort to making public disclosures if they are under the impression that the agency has ignored or summarily dismissed their disclosure. Feedback can be done through e-mails and there is no requirement that investigators speak directly face-to-face with the tipster. In fact, it is not advisable.

### **2.4 Provide effective, accountable, and timely assessment of the disclosure.**

Once a disclosure has been received by an agency the disclosure should be summarized in order to insulate the tipster. The important points of information should be summarized on a separate document in such a manner that the identity of the tipster is not disclosed. The disclosure summary can then be assessed and a determination made about what, if any, action should be undertaken by the receiving agency.

The agency's policy should describe an approved procedure to summarize and assess each tip. The policy should also describe a number of possible assessment outcomes and tip dispositions such as:

- Alleged wrongdoing is not within the mandate of the agency, forward summary to another agency for information and follow-up. Advise tipster, closed pending further information.
- Insufficient information in disclosure. Assign summary to investigator for follow-up, determine the following points (Objective A, B, C etc.), and submit report to inform re-assessment of disclosure.
- Alleged activity does not meet the definition of 'wrongdoing' pursuant to policy. Advise tipster, closed pending further information.
- Sufficient information has been provided in disclosure. Assign to investigator for follow-up.



Decisions made during the initial and follow-up assessments must be documented and attributable. Accountability at this stage is important.

## **2.5 Provide effective, accountable, timely response and resolution of the disclosure.**

If, after being summarized and analyzed, a disclosure is assigned to an investigator for action the tip should be managed following the agency's standard case management procedures. Because of potential liabilities of a disclosure received from a tipster, it is important that investigation of the tip not be permitted to languish. Timelines and diary dates for action by the investigators should be established by supervisors and closely monitored.

## **2.6 Protect the integrity of the disclosure and the agency's investigation.**

The agency may be liable for the security and the confidentiality of the disclosure. Employees must exercise discipline when communicating over corporate e-mail, text messaging, and during conversations inside and outside the workplace. Employees should never refer to the identity of a tipster, the source of a disclosure, or describe the tipster as a 'whistleblower'.

Documents and investigative files pertaining to a disclosure from a tipster should always remain under lock and key. Electronic access to disclosures, identity, contact information, investigative reports, and other documents relating to the tipster's disclosure should be tightly restricted and auditable. It is preferable to keep all the electronic documents and functions of the whistleblower program on a separate computer isolated and insulated from the agency's intranet and other electronic case management and reporting systems.

## **2.7 Conduct a professional and defensible investigation.**

A tip should be recognized as a starting point for any investigation. Investigators should corroborate the information provided in a tipster's disclosure independently. Receiving agencies must be particularly sensitive to the inherent risks of receiving disclosures from tipsters, especially anonymous tips. If mismanaged, an investigation could reveal the identity of the tipster, throw suspicion on innocent staff, alert others that an investigation has been undertaken, jeopardize evidence, expose the receiving agency to workplace complaints, threaten the legitimacy of the program, and threaten staff morale.

It is unwise to rely solely on a tipster's disclosure to justify accusations of wrongdoing. Rather, a tip should be recognized as a lead or clue that must be corroborated. A professional and defensible investigation will recognize and treat a

disclosure or tip as a potential starting point for an investigation that requires further review, analysis, and corroboration before any person or department is accused of wrongdoing.

## **2.8 Limit the liabilities of the agency receiving the disclosure.**

A robust policy, properly administered by competent employees and supervisors who follow established procedures, will help protect the agency from regrettable, inappropriate, and ill-conceived investigative activities by the agency and its employees. In this regard, training and supervision is key.

Strong policy and reliable procedures limit the risks that an investigator or the agency will manage a disclosure or a tipster recklessly. In the absence of consistent written guidance and procedures even well intentioned employees and agencies can make bad decisions. Bad decisions are often very expensive for the receiving agency and can result in claims of liability from the tipster, employees who stood accused or under suspicion, and other employees who were negatively impacted.

## **2.9 Detect, deter, and respond to reprisals against the tipster.**

Reprisals are generally recognized as any unwarranted negative employment action taken against the tipster by the employer or other employees in retaliation for the tipster's disclosure. Reprisals can be direct or indirect and include such actions as:

- Termination and/or blacklisting,
- Demotion,
- Decrease in pay and/or benefits,
- Transfer, re-assignment, change in employment duties,
- Intimidation or harassment, unfair treatment, and
- Any other negative employment action.<sup>1</sup>

Employers may have a legal obligation to protect their employees from unwarranted negative employment action including reprisals. A number of provincial and federal laws and regulations protect Canadian public and private sector tipsters from reprisals by their employers and fellow employees.

Whistleblower policies must prohibit reprisals in all forms. The policy should also provide a mechanism to safely follow-up with the tipster to proactively detect instances of reprisals, train staff, and establish protocols for the investigation and organizational response of any claims of reprisals.

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<sup>1</sup> ACFE course. "Working With Whistleblowers: Developing Your Program and Managing Claims"

The NEB, as a third party regulator has limited legal capacities and authorities to detect, deter, and respond to any reprisals that a tipster may face by a company. Managing tipster expectations is important in this regard and potential tipsters should be made fully aware of this limitation.

## **2.10 Have effective program reporting and performance management audit capacities.**

Auditing the performance of a whistleblower program must be done regularly to assess its effectiveness, revise policies and procedures as required, and address new and emerging risks. The program performance management audit policy should consider metrics such as:

- Disclosures received per reporting period (quarterly, semi-annually, annually, etc.),
- Average number of disclosures per employee or per capita,
- Disclosures received by organizational branch, division, geographic area, etc.
- Percentage of anonymous disclosures,
- Measurement of time from receipt of disclosure until its conclusion and all significant milestones in between,
- Average agency cost of response per disclosure,
- Types of wrongdoing alleged,
- Types of dispositions used to conclude disclosures,
- Program training costs,
- Lack of program use (attributable to outliers such as lack of training, awareness, language, organizational culture etc.).<sup>2</sup>

For the NEB, other metrics to consider are:

- NEB regulated companies the subject of a disclosure,
- NEB organizational areas involved in response to a disclosure,
- NEB investigational tools employed in the course of investigating the disclosure,
- Final dispositions of NEB investigations initiated due to a disclosure from a tipster.

## **2.11 Develop and deliver an effective supporting training program.**

In order to be effective, the agency's whistleblowing policy needs to be shared with the agency's employees. Those employees who are directly involved in soliciting, receiving, managing, and investigating tips are required to receive specialized

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<sup>2</sup> ACFE course. "Working With Whistleblowers: Developing Your Program and Managing Claims"

training. Simply handing out copies of policy is insufficient. All employees however, should receive some basic training involving the agency's whistleblower program. The agency's head should set the tone of the training program.

The training program should be written and reviewed annually. Delivery of training should be well documented and a variety of training methods should be used. At a minimum, employees should receive training on:

- Whistleblower policy,
- Reporting mechanisms,
- Conduct and wrongdoing that is reportable, and
- Reprisals.<sup>3</sup>

### **2.12 Conduct periodic scheduled program review.**

As with any organizational program or policy, a whistleblower program's policy and procedures need to be reviewed and updated in order to remain effective, address any emerging risks, and assess the organization's response to previously assessed program gaps. At a minimum, the program should be scheduled for review on an annual basis. The review should:

- Be assigned to a senior executive to administer,
- Clearly define and establish review objectives at the outset,
- Be documented; strengths and gaps should be identified and acknowledged,
- Provide recommendations to bridge gaps which should be assigned a diary date and strategy for completion, and
- Be shared with senior management.

### **2.13 Assign designated responsibility for the program.**

Although many people and organizational departments might be directly or indirectly involved with the whistleblower program, a single, senior position within the responding agency should be assigned the designated responsibility for the program. By assigning this responsibility to a senior executive, the responding agency is demonstrating the importance of the program and the seriousness with which the whistleblower program is managed.

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<sup>3</sup> Ibid.

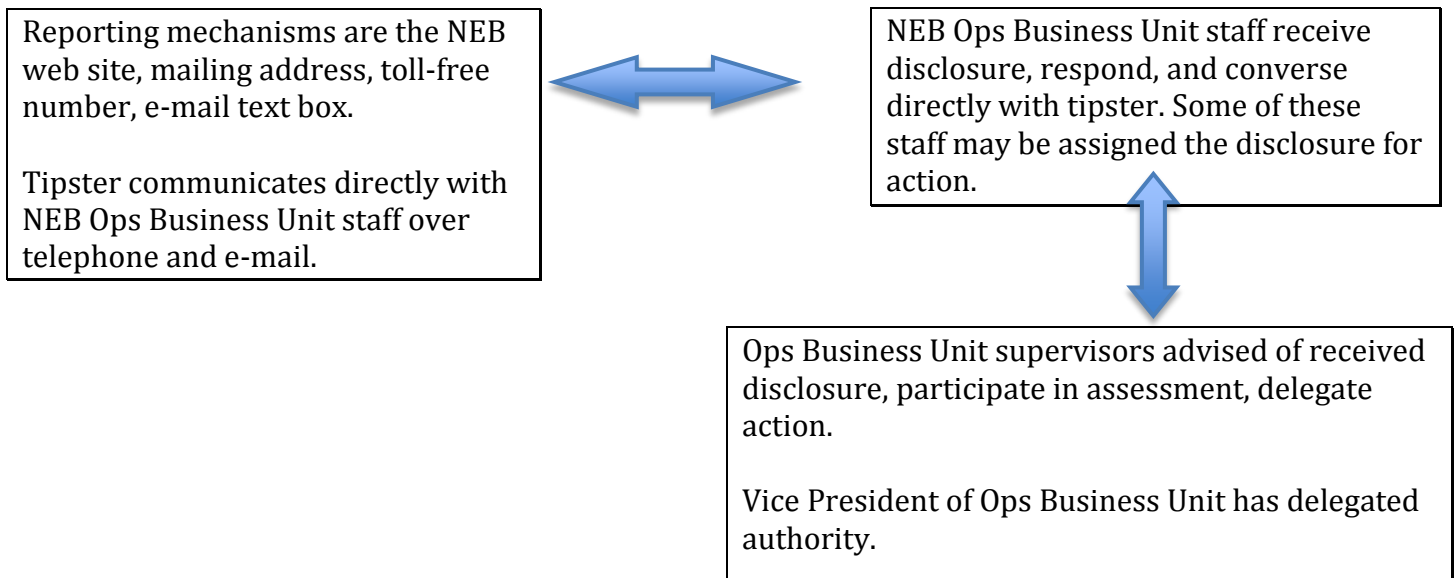
### Part 3 NEB Program Activities (Gaps) That Create Risk

The present whistleblower program has a number of risks for the NEB. Presently, the response plan model receives disclosures from the public by using two primary reporting mechanisms: an NEB toll-free telephone number for tipsters and an NEB web-based e-mail function. The NEB toll-free telephone line is available during regular business hours and answered by NEB staff assigned to various regulatory branches of Operations Business Unit on a 2-week rotating basis. Likewise, these staff are also tasked with responding to e-mail disclosures received from tipsters solicited on the NEB web site.

Once a disclosure is received, an assessment is made as to which branch of Operations Business Unit is best suited to receive the tip and the tip is assigned to that branch to conclude. The Vice President in charge of Operations Business Unit exercises responsibility over the whistleblower program.

Below is a visual representation of the present response model:

**Figure 3.1 Present NEB Whistleblower Response Model**



#### 3.1 Current written policy and procedure.

The current policy does not adequately anchor the program with sufficient guidelines, rules, and procedures to meet the program goals examined in Part 2. Providing policy proposals is part of this project and work is presently underway in that regard.

Presently, the contractor is reviewing best practices and a proposed policy will be provided in February 2016. See Part 5 Recommendations #2 and #3 for additional information on response plan models and policy proposals.

### **3.2 Direct communication between the potential investigator and the tipster.**

In the current model NEB Operations Business Unit staff have direct verbal contact with the tipster. There is no communications filter or barrier between the tipster and the potential investigator. This creates a number of avoidable risks:

- The NEB staff who received the disclosure from the tipster might become directly involved in any follow-up action such as a review, inspection, follow-up, or investigation in response to the tipster's disclosure. The staff may know the tipster's identity, may inadvertently include identifying remarks or references from the initial disclosure in reports, and may be required to give evidence under oath. It may be difficult to keep the tipster's identity and the disclosure confidential under such a response plan model.
- The tipster may not necessarily be filled with good intentions and may attempt to manipulate or influence the NEB staff. Tipsters may attempt to guide the investigation toward a desired result, may intimidate the NEB staff with accusations and threats of occupational reprisals should the NEB not share the tipster's conclusions, and may interfere with the staff's ability to execute their duties by making persistent telephone calls and e-mails directly to the staff. By involving the staff directly with the tipster, the staff is placed in a complicated situation that may affect the judgment and capacity to conduct a professional investigation.

### **3.3 Security.**

The present model is vulnerable to inadvertent divulgence of the disclosure and the tipster's identity. The reporting mechanisms are not adequately physically and electronically isolated from rest of the NEB reporting tools.

Under the current program:

- E-mail records, disclosures, notes, and reports involving tipsters are not kept physically or electronically separate from other NEB reports. Security cannot be assured and these documents are vulnerable to inadvertent or intended interception, viewing, and release.
- NEB staff are communicating directly with tipsters on NEB telephones. This creates an audit trail on NEB staff cellular phones, NEB phone records, and the tipster's cellular telephone records. When a third party obtains NEB phone records as part of an access to information request or other disclosure package the tipster's phone number may be recognized and the tipster's identity may be revealed. Likewise, a third party may obtain the tipster's phone records and identify telephone numbers of NEB staff. This holds equally true for cellular text messages and e-mail messages. Each leaves a trace and a trail that could easily demonstrate a connection between the tipster and the NEB effectively divulging the tipster as the source of the disclosure.
- Internal e-mails amongst NEB staff may disclose excessive amounts of information regarding the tipsters. Internal e-mails can be subject to access to information requests, civil actions, and could be compellable evidence at regulatory hearings (subject to exemptions). As part of the routine vetting of an access to information request personal information is routinely redacted. However, this issue is an information security concern that can be addressed through enhanced training and supervision.

### **3.4 Tipster management.**

The present response model does not provide sufficient direction to NEB staff on principles and techniques to manage the tipster and the tipster's expectations. The program response should include:

- A preliminary assessment of the tipster's motives in disclosing the alleged wrongdoing to the NEB,
- A preliminary assessment of the reliability of the information,
- Instructions and guidance to the tipster on the disclosure process, liabilities, limitations, and possible outcomes of investigations generally,
- Instruction and guidance on how tipsters themselves can safeguard their confidentiality and anonymity,
- Reprisals and limitations upon the NEB to investigate and remedy reprisals against tipsters,
- Regular and periodic feedback mechanisms to the tipster, and
- Instruction to NEB staff on acceptable techniques and prohibited means to communicate with the tipster, making promises to tipsters, recordkeeping, managing tipster's expectations, and other issues.

### **3.5 Evaluation of disclosure.**

The present model includes an assessment tool to review disclosures and decide what responses might be considered and undertaken by the NEB. However, the current evaluation process is not adequately anchored in written policy, not adequately documented, and may be difficult to audit. It is important that the NEB response plan model be able to demonstrate accountability in the decision-making process regarding disclosures from tipsters. Written policy will allow for consistency.

Disclosures are not vetted prior to evaluation. As a result, information that might identify the tipster may become known by NEB employees who have no operational need to know. This decreases security and confidentiality of the tipster and the tipster's disclosure, increases the likelihood of an inadvertent breach, and creates added unnecessary liability for the NEB.

### **3.6 Training.**

Under the present response plan model, comprehensive training for NEB staff has not yet become available. Part of this contract is to design and deliver a suitable training program to mitigate this risk. See Part 5 Recommendation #4 for more information.

### **3.7 NEB note taking, reporting, and record keeping.**

Managing disclosures from tipsters requires NEB staff to pay close attention to their note taking and report writing practices. In some instances note taking and report writing practices of some NEB staff may not be sufficiently reflective of the sensitivities involved in managing confidential information such as disclosures from tipsters and the tipster's identity. Information such as the name of the tipsters, the tipster's telephone number, the tipster's e-mail address, and other identifiers do not have a place in investigative notes or reports. Investigative notes and reports may become public in which case the tipster's identify and information may be determined.

This gap will be addressed in the training program presently under design as part of this contract (see Part 5 Recommendation #4 for more information).

### **3.8 Controls.**

The current response plan model involves rotational assignments of NEB employees to manage the reporting mechanisms (NEB toll-free number and the electronic mailbox). Rotational responsibility diffuses control, accountability, and expertise over the confidentiality of the disclosures and the tipsters' identities. Ideally, the organizational function tasked with responding to the reporting mechanisms should



be small and tightly supervised promoting consistency, reliability, and personal responsibility of those involved.

### **3.9 Performance management audit.**

Under the current model there are opportunities to improve measurements of program performance. The program management goals explained in Part 2.10 are not fully recognized in the current model.

### **3.10 Limitation on NEB authority to investigate and respond to reprisals.**

A central feature of almost all whistleblowing programs and legislation is a prohibition of reprisals against the whistleblower. Reprisals can be recognized as any type of direct or indirect unwarranted negative employment action including:

- Termination from employment,
- Blacklisting,
- Demotion,
- Decrease in pay or benefits,
- Transfer, re-assignment, or change of duties,
- Intimidation or harassment, and
- Unfair treatment.

The NEB has a very specific mandate in this regard. Section 6.3(1)(a) of the *Onshore Pipelines Regulations* requires regulated companies to have a policy for the internal reporting of hazards, potential hazards, and near misses that includes the conditions under which a person who makes a report will be granted immunity from disciplinary action.

The NEB has authority to review the policy of a regulated company but has no mandate to investigate allegations of reprisals against tipsters who provide disclosures to the NEB. The appropriateness of employment action is a complex legal assessment that courts and tribunals other than the NEB are empowered to make.

As explained above, protection against reprisals is a central feature of most whistleblowing policies and legislation. As it pertains to protecting whistleblowers against reprisals, the NEB's role is defined and in some sense unique. The NEB's defined role as established by section 6.3(1)(a) of the *Onshore Pipelines Regulations* does not present a risk in and of itself. Rather a risk may emerge if potential tipsters are not aware of the NEB's role in this regard. This risk can be mitigated by suitable communication strategies on the NEB website making prospective whistleblowers aware of the NEB's defined role.

## **Part 4 Program Activities that NEB Does Well**

The NEB whistleblower program is in its early stages of organizational development and application. It is fair to say that the program requires refinement but significant successful milestones in the program's development have been attained.

#### **4.1 Senior level designated authority.**

The NEB has designated operational authority for the current program to the Vice President in charge of Operations Business Unit. By designating a senior executive with responsibility over the program, the NEB is sending a clear signal that the program is important and is considered seriously. This demonstrates accountability at a high organizational level and sets a strong tone from the top.

#### **4.2 Demonstrated commitment to the NEB regulatory mandate.**

Among other things, the NEB is responsible for monitoring how companies comply with regulations and commitments concerning the safety of employees, the public, and the environment.<sup>4</sup> Managing a whistleblower reporting program is a very public statement that the NEB is committed to executing its mandate by soliciting tips and disclosures from industry insiders who might not otherwise come into contact with the NEB or NEB employees.

#### **4.3 In-house program management.**

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

- By a third-party service provider to manage all or part of a whistleblower program including disclosures and investigations,
- By in-house program management including 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 firms to manage their own whistleblower programs. By managing the entire program internally the NEB retains complete security and control over the program, disclosures from tipsters, records, and investigations. The NEB also avoids any potential conflicts of interest and breaches

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<sup>4</sup> National Energy Board website 'Regulation of Pipelines and Power Lines', accessed 2016 Jan 05, <http://www.neb-one.gc.ca>

of trust created when a third party service provider manages the programs for both the 'regulator' and the 'regulated'.

#### **4.4 Program will accept anonymous disclosures.**

Not all whistleblower programs and not all jurisdictions are able or willing to receive anonymous disclosures. Accepting anonymous disclosures not only promotes the protection of the tipster's identity but also serves to encourage tipsters who otherwise might not be willing to provide the NEB with a disclosure.

#### **4.5 Program will not offer financial rewards.**

Offering financial rewards does have a place in some whistleblower and tip line programs. In Canada, the Canada Revenue Agency (CRA) has a formula and offers financial rewards to tipsters under certain conditions. The Ontario Securities Commission (OSC) is proposing such a policy for its program. Financial reward formulas are typically based on penalties and funds recovered due to the tipster's disclosure. The Crime Stoppers program offers financial rewards for tipsters whose disclosure results in an arrest or recovery of drugs, stolen property etc.

Managing a program that offers financial rewards to tipsters adds significant organizational risks, requires heightened levels of internal controls and audit, demands increased training and accountability, and necessitates extremely close supervision.

Considering the role and mandate for the NEB and its whistleblowing program it is a prudent design decision to refrain from offering financial rewards to tipsters. In many instances, occupational tipsters do not provide disclosures in exchange for financial reward. Rather, they alert competent authorities out of a sense of duty, loyalty, or justice. Simply stated, they want the problem or wrongdoing addressed.

#### **4.6 NEB commitment to program excellence.**

The NEB program has been in operation for several months and a number of disclosures have been concluded. The NEB has identified areas of potential improvement and has hired a consultant to offer recommendations. The NEB is making obvious and defensible efforts to demonstrate meaningful and critical program self-assessment and a commitment to program excellence.

## **Part 5 Recommendations and Priorities**

This gap analysis exercise has provided opportunities to offer recommendations that align very closely with the deliverables described in the Executive Summary. Work has begun on each of these recommendations already and each will be the subject of additional reporting to the NEB.

### **5.1 Recommendation #1: Conduct research and analysis on best practices for NEB whistleblower program.**

Three of the central themes that will be focus of the research and analysis will be:

- The legal responsibilities and liabilities of a party receiving a tip from a whistleblower,
- Legal mechanisms to protect the confidential information and the identity of whistleblowers, and
- Legal mechanisms to protect whistleblowers from reprisals.

The research and analysis will be conducted in the following areas:

1. Federal legislation including:

- *The Criminal Code,*
- *The National Energy Board Act and Regulations,*
- *The Access To Information and Privacy Act,*
- *The Public Servants Disclosure Protection Act, and*
- *Canada Labour Code.*

2. Provincial legislation including:

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

3. Civil litigation involving whistleblowers and reprisals including:

- Case studies,
- Liabilities for the organization receiving the whistleblower tip,
- Liabilities involving disclosure of whistleblowers' identity, and
- Liabilities involving reprisals against whistleblowers.

4. Trends in Canadian whistleblower programs, legislation, and litigation.

5. Analysis of how police agencies manage confidential informants and Crime Stoppers tips.

## 6. Other areas recommended by the NEB whistleblower project working group.

This research and analysis will provide the NEB with a thorough understanding of the risks, liabilities, and best practices pertaining to the design, development, and management of an effective, robust, and defensible whistleblower program.<sup>5</sup>

The NEB will be provided with a written report summarizing the research. Additionally, this information will also be condensed in a meaningful manner and included in the training deliverable.

### 5.2 Recommendation #2: Research and propose a response plan model.

The model being considered will:

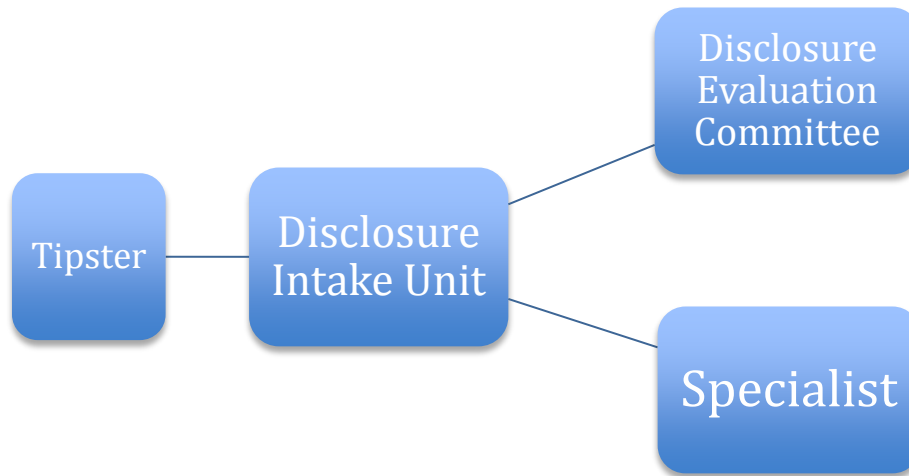
- Provide a secure reporting mechanism for tipsters,
- Provide tipsters with individual control numbers and passwords to permit secure web-based communications between the tipster and the NEB,
- Recommend a reporting centre to receive the disclosure, edit the information, submit the report to a Disclosure Evaluation Committee for evaluation, and conduct any and all web-based communication with the tipster,
- Recommend a Disclosure Evaluation Committee to receive and assess the disclosure. The committee will include staff of NEB Legal Services Unit and will decide on a course of action. The team will receive progress reports, approve final dispositions, ensure policy is adhered to, and report.
- Recommend that the Disclosure Evaluation Committee assign disclosures identified for further action to suitable specialists within the NEB Operations Business Unit. Any requests for information or clarification from the tipster will be coordinated between the specialist and the reporting centre. The specialist will submit questions and requests to the reporting centre that will in turn send a request to the tipster. In this way the tipster and the team staff investigating the disclosure are insulated from direct communication,
- Recommend particular performance management audits as described in Part 2, and
- Create a physical and electronic separation of systems, reports, and databases between the reporting centre and the rest of the NEB to further enhance security controls.

Figure 5.2 represents a rough draft of the proposed response plan model.

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<sup>5</sup> This research and analysis will rely upon the knowledge and expertise of the consultant with respect to potential legal issues but will not constitute legal advice.

**Figure 5.2 Rough Draft Proposed Response Plan Model**



### **5.3 Recommendation #3: Research and propose NEB written policy.**

Leveraging the results of this gap analysis report, the research and analysis described in 5.1, and working in conjunction with the project working group, a formal set of policy and procedure guidelines will be drafted for NEB approval. The proposed policies and procedures will provide NEB staff with the guidance and procedures necessary to ensure that disclosure tips are properly received, documented, investigated, and closed.

The following draft table of contents reflects desired content of the proposed policy and procedure document.

1. Foreword by NEB Chair and CEO Mr. Peter Watson (or designate).
2. Glossary of terms.
3. Organization, design, and delivery of the NEB whistleblower program.
4. Roles and responsibilities.
5. Training.
6. NEB disclosure reporting mechanisms including NEB online report form.
7. Security protocols involving confidential information as well as identity of tipsters and disclosures.
8. Coding and indexing tipsters.
9. Guidance on the processes for receiving, investigating, and closing disclosures.
10. Reprisals.
11. Internal distribution lists.

12. Oversight and approval.
13. Records retention.
14. Internal and external corporate communication.
15. Disclosure and vetting.
16. Internal audits.
17. Periodic review.
18. Progressive coaching and discipline for failing to observe policies.
19. Checklists, aide memoires, and assessment questions for NEB on-call staff receiving disclosures.
20. Approved reporting forms.
21. Sample of completed reporting forms.

#### **5.4 Recommendation #4: Training**

Policies and procedures are most effective when complemented with effective and ongoing training. Those NEB staff most involved with the receipt, investigation, and supervision of disclosures should receive comprehensive initial and periodic ongoing training. NEB staff not directly involved but accountable, responsible, or otherwise affected by the whistleblower program should receive condensed training.

Training must be pertinent and directly relate to the business activities that the NEB conducts. All aspects of the training including course content, delivery dates, staff trained, location of training, course instructor, and course content should be documented and retained for audit and compliance purposes.

This proposal offers two training deliverables:

*A Written Training Manual* This manual is intended for current and future NEB staff involved in the whistleblower program. This manual will contain elements of the work performed including pertinent research and analysis, policy and procedure, and training topics covered during the classroom session described below. The NEB will be supplied with an electronic copy to retain. A bound printed copy will be provided to staff that attend the in-house NEB training session described below.

*In-House NEB Training Sessions.* This training will be designed for NEB staff involved in the receipt, documentation, follow-up, and closure of whistleblower disclosures. The course content will be designed to reflect the business activities of the NEB and the actual types of tips that might be received.

In preparing the NEB-related scenarios, the consultant will rely upon the expertise of an appointed NEB subject matter expert (SME) to collaborate in the design of suitable practical scenarios. The NEB in-house training session is designed to be delivered in an 8-hour business day. The proposed course content is as follows:



*Module 1 Title: Whistleblower Programs: The Canadian Context.*

Topics: Important terms and definitions.  
Pertinent legislation.  
Characteristics of a robust whistleblower program.  
Potential rewards and limitations of whistleblower tips.  
Case studies.

Delivery Method: Lecture and PowerPoint presentation.

Learning Objectives: At the conclusion of this module the students will:

- a) Demonstrate understanding of the Canadian landscape for whistleblower programs and pertinent legislation.
- b) Demonstrate understanding of the characteristics of a robust whistleblower program.
- c) Demonstrate understanding of the potential rewards and liabilities of whistleblower tips.

*Module 2: Title: Motivations of a Whistleblower.*

Topics: Motivations and expectations of a whistleblower.

Delivery Method: Instructor led group work, group presentation, and group discussions.

Learning Objectives: At the conclusion of this module the students will:

- a) Identify commonly held motivations and expectations of whistleblowers.
- b) Learn proactive techniques to identify bad-faith motivations and manage unrealistic whistleblower expectations.

*Module 3: Title: The NEB Whistleblower Program.*

Topics: Policies and procedures of the NEB whistleblower program. This is a significant module and will provide the students with instruction on the NEB procedures to be followed in the receipt, documentation, follow-up, and closure of whistleblower reports.

Delivery Method: Lecture and PowerPoint presentation, instructor-led group discussions.

Learning Objectives: At the conclusion of this module the students will:

- a) Demonstrate understanding of NEB policies and procedures.

*Module 4: Title: Reprisals.*

Topics: Reprisals against whistleblowers.

Delivery Method: Instructor led group work, group presentation, and group discussions.

Learning Objectives: At the conclusion of this module the students will:

- a) Be able to identify common reprisals against whistleblowers.
- b) Understand the proper procedures to be followed in the event a whistleblower alleges reprisal.
- c) Understand the risks and consequences face by whistleblowers in making a disclosure.

*Module 5 Title: Practical Scenarios.*

Topics: Whistleblower tips in the NEB context.

Delivery Method: Instructor-led scenario training, group work, critique and analysis.

Learning Objectives: At the conclusion of this module the students will:

- a) Demonstrate proficiency at following NEB whistleblower policies and procedures by participating in scenario training involving typical tips that NEB is likely to receive.
- b) Demonstrate proficiency at successfully completing NEB forms and reports.
- c) Participate in constructive critique of participants and identifying elements of the scenario that went well and that require improvement.

## Part 6 Sources

In conducting work for this contract a number of sources have been consulted for this gap analysis 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 Meetings with key NEB staff.

- Operations Business Unit Vice President,
- Director Safety Management,
- Environmental Protection Team,
- Safety Management Team,
- Project Working Group
- Legal Counsel, and
- Information Technology.

### 6.2 Acts and regulations.

- *Criminal Code*,
- *National Energy Board Act*,
- *National Energy Board Onshore Pipeline Regulations*, and
- Province of Alberta *Public Interest Disclosure (Whistleblower Protection) Act*.

### 6.3 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 gouvernement 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).

#### 6.4 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,

## **6.5 Case law.<sup>6</sup>**

- 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.

## **6.6 Third party providers.**

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

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<sup>6</sup> This research and analysis will rely upon the knowledge and expertise of the consultant with respect to potential legal issues but will not constitute legal advice.



**CERTIFIED FRAUD EXAMINER**

