Measuring the Effectiveness of Canadian Whistleblowing Law

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Abstract

Due to the increasing complexity of modern organizations, one of the most powerful ways to address corruption is to allow insiders to report relevant information to a recipient who will ensure it is used in the public interest. Paradoxically, many organizations instead exercise reprisals against whistleblowers, for what they perceive as a lack of loyalty to the organization. This thesis seeks to analyze how the law can lead to cultural changes in public and private organizations that will create the right environment for reporting behavior that is against the public interest, by undertaking an analysis of comparative literature as well as semi-structured interviews with key Canadian stakeholders. To begin with, this thesis will propose a set of criteria that may be used to measure whistleblowing effectiveness quantitatively, and then discuss the best means for whistleblowing law to achieve effectiveness in promoting the public interest. It will argue that whistleblowing is effective in promoting the public interest when (1) investigations are launched when appropriate; (2) the wrongdoing comes to an end; and (3) the organization takes steps to change its policies or procedures when necessary. This thesis will then demonstrate in what ways Canadian whistleblowing law departs from the proposed model, and how investigative journalism has mitigated the deficiencies in Canadian whistleblowing law by holding relevant organizations accountable when there was no other way to do so. The thesis concludes by proposing measures to address deficiencies identified in Canadian whistleblowing law and further research areas on whistleblowing.

Key Words:

Whistleblowing, law, effectiveness, incentives, protection, reprisals, corruption, governance, media, investigative journalism, accountability, Canada, United States, United Kingdom.
List of Abbreviations

ABA: American Bar Association
ACFE: Association of Certified Fraud Examiners
CFTC: US Commodity Futures Trading Commission
CSO: Civil Society Organization
ERC: US Ethics Resource Center
FAIR: Canadian Federal Accountability Initiative for Reform
FCA: US False Claim Act
FSA: UK Financial Service Authority
GAP: US Government Accountability Project
NBES: US National Business Ethics Survey
PCAW: UK Public Concern at Work
PIDA: UK Public Interest Disclosure Act
PSDPA: Public Servants Disclosure Protection Act of Canada
PSIC: Public Sector Integrity Commissioner of Canada
RCMP: Royal Canadian Mounted Police of Canada
SEC: US Securities and Exchange Commission
SOX: US Sarbanes Oxley Act
TI: Transparency International
UNCAC: United Nations Convention Against Corruption
WPA: US Whistleblower Protection Act
# Table of Contents

Abstract........................................................................................................................................ II

List of Abbreviations .................................................................................................................. III

Table of Contents ........................................................................................................................ IV

1 Introduction ................................................................................................................................. 6

2 Methodology .............................................................................................................................. 9
   2.1 Research question ..................................................................................................................... 9
   2.2 Hypothesis ............................................................................................................................... 9
   2.3 Variables and indicators .......................................................................................................... 10
   2.4 Sampling ................................................................................................................................. 11
   2.5 Methods for collecting the data ............................................................................................ 13
      2.5.1 Documentary analysis ...................................................................................................... 13
      2.5.2 Semi-structured interviews ............................................................................................. 14

3 Criteria for measuring whistleblowing effectiveness ................................................................. 15
   3.1 An investigation is launched following credible reports of wrongdoing ....................... 17
   3.2 The wrongdoing was terminated ......................................................................................... 21
   3.3 The organization takes steps to change its policies and procedures ............................ 25
   3.4 The validity of the model to measure whistleblowing effectiveness ................................ 29

4 Ensuring whistleblowing law promotes the public interest .................................................... 31
   4.1 Encouraging the whistleblower to report wrongdoing in the public interest ............. 31
      4.1.1 The need for institutional incentives .............................................................................. 32
      4.1.2 Protection from reprisals ............................................................................................... 36
      4.1.3 Financial incentives ........................................................................................................ 45
      4.1.4 Statutory limitations to the freedom of speech ............................................................ 48
   4.2 The extent to which the employer should be given a reasonable opportunity to address
       the issue .................................................................................................................................... 50
   4.3 The nature of the information reported is useful for the public interest ....................... 57
   4.4 The accountability of recipients of reports of wrongdoing ............................................. 61

5 The State of Canadian Whistleblowing Law ........................................................................ 63
   5.1 Whistleblowing in the federal public service ................................................................. 63
      5.1.1 Building appropriate mechanisms to report wrongdoing in the federal public service . 63
5.1.2 Information that the Commissioner must or may refuse to investigate according to the PSDPA 66
5.1.3 Protection from reprisals ................................................................. 71
5.1.4 Accountability of the federal public service or the Commissioner’s Office ....... 75
5.2 Whistleblowing law applying outside the federal public sector in Canada .......... 75
  5.2.1 Internal mechanisms to report wrongdoing in the private sector ................. 75
  5.2.2 Key provincial whistleblowing laws ................................................. 76
  5.2.3 The criminalization of reprisals against whistleblowers ......................... 79
5.3 Financial incentives .............................................................................. 82
5.4 Reporting wrongdoing to the media ...................................................... 83

6 Investigative journalism and promoting accountability ................................ 87
  6.1 The importance of investigative journalism .......................................... 87
  6.2 Legal aspects of whistleblowing to the media ....................................... 89
  6.3 Investigative journalism in Canada ...................................................... 94
  6.4 Conclusions - Should whistleblowers report wrongdoing to the media? ....... 96

7 Discussion of the results and of the hypothesis ........................................ 100
  7.1 The Commissioner’s discretion to refuse to investigate ......................... 100
  7.2 Prohibition from obtaining information outside the public service ............ 101
  7.3 Incentives for the private sector to adopt the right reporting standards .......... 101
  7.4 Standard of proof of retaliation under the Criminal Code ....................... 102
  7.5 No protection for whistleblowers who report internally .......................... 102
  7.6 Availability of financial support for whistleblowers who suffer reprisals ....... 103
  7.7 Victims of reprisals must rely on public authorities to enforce the legal protections .... 104
  7.8 The opportunity for anonymous reports in the public and private sectors ...... 104
  7.9 Guidance about the acceptability to report wrongdoing to the media .......... 105
  7.10 Disclosures of sensitive information currently prohibited under the PSDPA ... 107

8 Conclusion .................................................................................................. 108

Bibliography .................................................................................................. 111

9 Appendix .................................................................................................... 120
  9.1 Consent form .......................................................................................... 120
  9.2 Interview plan ........................................................................................ 125
1 Introduction

The nature of corruption and fraud is such that much of their global costs cannot be known with certainty. Concealment is an intrinsic component of most corrupt or fraudulent transactions. Nevertheless, estimating the global costs of corruption and fraud is an important endeavor. The Association of Certified Fraud Examiners (ACFE) estimates that on average, a typical organization loses 5 per cent of its revenues to all types of fraud, which applied to the percentage of the 2013 estimated Gross World Product of $73.87 trillion, results in a projected potential total global fraud loss of nearly $3.7 trillion annually (ACFE 2014, p.8). The occupational fraud evaluated by the ACFE includes asset misappropriations, corruption (payment of bribes), and financial statement fraud.

On its part, the World Bank estimated the costs of corruption to $1.3 trillion in 2013 (Globalnation.inquirer.net 2013). However, this is considered to be a “conservative” assessment because it does not include global figures related to the embezzlement of public property as well as the full extent of tainted public procurement (only the bribes associated with such procurement). On its own, the World Bank estimates the full amount of tainted procurement projects to be around $1.5 trillion yearly (Web.worldbank.org 2004).

In 2014, Pricewaterhouse-Coopers reports that “economic crime continues to be a major concern for organizations of all sizes, across all regions and in virtually every sector”, and that 33 per cent of the organizations surveyed across the globe reported being hit by economic crime. The five types of fraud consistently reported are asset misappropriation, procurement fraud, bribery and corruption, cybercrime and accounting fraud (PwC 2014).

Modern organizations, either public or private, have become much more complex and it is unlikely that outsiders can be made aware of organizational actions without getting inside information from current or former employees of an organization. In fact, one of the most powerful ways corruption is exposed is when government or corporate employees themselves step forward to report corrupt practices (Johnson 2004, p.13). The ACFE reported that tips are consistently and by far the most common fraud detection method, with over 40 per cent of all cases detected by a tip.
This is more than twice the rate of any other detection method, and employees account for nearly half of all tips that led to the discovery of fraud (ACFE 2014, p.4). In addition, the ACFE reported that (ACFE 2014, p.4):

“organizations with hotlines were much more likely to catch fraud by a tip, which our data shows is the most effective way to detect fraud. These organizations also experienced frauds that were 41 per cent less costly, and they detected frauds 50 per cent more quickly”.

Although public and private organizations possess a valuable resource in the whistleblower to discover or uncover wrongdoing or risk of wrongdoing within the organization, they may often not realize this. They may instead penalize them by shooting the messenger for bringing bad news and being a troublemaker, who should be at best ignored or ostracized, and sometimes disciplined or dismissed just for speaking up (Bowers et al. 2012, p.1).

The need to engender change in pervasive organizational cultures and to strengthen whistleblower protection has been acknowledged in many reports associated with numerous strategies, and many countries have adopted statutes to encourage and protect those who step forward. However, protection by the law is necessary but not sufficient (Calland and Dehn 2004, p.3):

“unless organizations foster a culture that declares and demonstrates that it is safe to and accepted to raise a genuine concern about wrongdoing, employees will assume that they face victimization, losing their job or damaging their career”.

As a result, this research project seeks to analyze how the law can lead to cultural changes in public and private organizations that will create the right environment for reporting behavior that is against the public interest. It will also analyze how the law can ensure that the information reported by whistleblowers is used to the benefit of the organization as well as the public. This dissertation will first define a set of criteria that will be used to measure whistleblowing effectiveness, before discussing best means for whistleblowing law to achieve effectiveness in promoting the public interest. By seeking to determine if and why whistleblowing works, research on effectiveness can help set priorities and may have important implications for many areas of law and public policy (Apaza and Chang 2011, p.114).
This thesis argues that whistleblowing is effective in promoting the public interest when (1) investigations are launched when appropriate; (2) the wrongdoing comes to an end; and (3) the organization takes steps to change its policies or procedures when necessary. This study will demonstrate that these are the right criteria to assess whether a legal framework produces the right reactions from the organization and from relevant external actors, if applicable, in response to reports of wrongdoing by whistleblowers.

While Chapter 1 means to provide the reader with an overview of the overall objectives of this research project, Chapter 2 will go over methodological issues, including the research questions, the hypothesis, the relevant variables, the sampling as well as the methods used for collecting the data. Chapters 3 and 4 will provide a detailed analysis of what should be considered as “effective” in promoting the public interest in the context of whistleblowing as well as of the best mechanisms to achieve that objective, while Chapter 5 will discuss the current state of Canadian whistleblowing law. Chapter 6 will discuss how investigative journalism can effectively promote the public interest by holding public and private organizations accountable when there are no other ways to do so, and how investigative journalism was successfully used as such in Eastern Canada. Chapter 7 will provide recommendations about how to ensure that Canadian whistleblowing law can be made more effective at promoting the public interest. Finally, Chapter 8 will conclude by summarizing what has been achieved by this research project and suggest potential further research areas on whistleblowing effectiveness in Canada and abroad.
2 Methodology

Whistleblowing effectiveness has not been significantly analyzed in the Canadian context. This research project seeks to shape a model as to how whistleblowing effectiveness may be measured by building on existing models proposed by the literature. This research project will also discuss the best means for whistleblowing law to achieve effectiveness in promoting the public interest, and how Canadian whistleblowing law could be adapted to achieve that objective. Finally, this dissertation will discuss how whistleblowers turned out to be quite effective in the last five years in some circumstances, despite the fact that Canadian whistleblowing law is incomplete and currently contains a number of loopholes.

This chapter presents the methodological approach underlying this research project. In that order, it presents the research question, the hypothesis, the variables, the sampling method, and the methods for collecting and analyzing the data.

2.1 Research question

The main question underlying this research project may be worded as follows: In which specific ways does Canadian whistleblowing law promote, or fail to promote, the public interest, and why?

2.2 Hypothesis

Based on my current understanding of how Canadian whistleblowing law operates and my review of the literature, I would offer the following hypothesis: Canadian whistleblowing law does not fully promote the public interest but the strength of Canadian investigative journalism has mitigated the negative impacts of that failure to effectively promote the public interest.

For the purpose of this research project, the concept of “public interest” is primarily of a qualitative nature, and refers to the implementation of reporting mechanisms that communicate useful and reliable information to adequately trained recipients, who will be in a position to take corrective action, and who will be accountable to external actors if they fail to do so when circumstances warrant. The concept of “public interest” also involves that if the recipient of the report and the organization
undertook appropriate corrective actions to safeguard the interest of the organization and that of the public, the wrongdoing at the source of the report should not be publicized.

The concept of “effectiveness” may be primarily measured quantitatively and refers to the proportion of reports of wrongdoing that were dismissed as unsubstantiated, that triggered investigations by the organization or external actors, that stopped the wrongdoing, and that led to policy or procedural changes in the organization where the wrongdoing occurred, if such gaps or loopholes were identified.

2.3 Variables and indicators

This hypothesis implies that the dependent variable is whistleblowing effectiveness. The independent variable is the effectiveness of Canadian whistleblowing law in promoting the public interest, and the intervening variable is the assumed beneficial effect of independent media and investigative journalism on whistleblowing effectiveness.

The following subsections will proceed with the operationalization of variables to define the concepts of “whistleblowing effectiveness” and “promoting the public interest” in the context of whistleblowing, and to explain what are the “assumed beneficial effects” of independent media and investigative journalism on whistleblowing effectiveness.

**Dependent variable.** In this research project, the effectiveness of the Canadian framework on whistleblowing means that (1) the employer or the enforcement authorities launch an investigation following the reporting of wrongdoing, but only when appropriate; (2) the reporting ended the wrongdoing; and (3) the organization took steps to change its policies or procedures if gaps and loopholes are identified.

**Independent variables.** For the purpose of this research project, whistleblowing law promotes the public interest when (1) it includes measures or characteristics that will encourage whistleblowers to come forward; (2) the employer is given a reasonable opportunity to address the issue that triggered the reporting of wrongdoing before it is publicized; (3) the information reported is useful to detect wrongdoing; and (4) the relevant authorities are accountable as to how they investigate/prosecute those who
have committed the wrongdoing, have threatened whistleblowers, or have retaliated against them.

**Intervening variables.** The assumed beneficial effect of independent media and active investigative journalism means that (1) wrongdoing is disclosed to the media when there are no reactions from the employer and/or relevant enforcement authorities, or such reactions are inappropriate; (2) employees who fear to report wrongdoing to their employer or the enforcement authorities report it to the media; (3) the media assess the reliability of the information before they publish a story arising from a report of wrongdoing made to them; and (4) stories based on disclosures of wrongdoing by whistleblowers lead to investigations by appropriate authorities.

To understand the relationship between the relevant variables, the methodology of this dissertation is first to proceed with an analysis of literature on foreign whistleblower laws. Then, this data will be tested against the perceptions and opinions of key Canadian stakeholders to ensure the findings of the documentary analysis are applicable in the Canadian context. This study constitutes an exploratory qualitative research as it seeks to establish new interactions rather than establishing causality between existing variables.

### 2.4 Sampling

The sampling for this research project was done in an intentional and non-probabilistic manner, as commonly done in cases of qualitative research to select interviewees with rich and extensive experience to allow the researcher to understand in-depth the subject matter under study (Patton 2002). This project has privileged a stratified sampling approach to expose the different perspectives of stakeholders in relation to whistleblowing. The four chosen strata for this study are the following: (1) private sector organizations; (2) enforcement authorities; (3) think-tanks and civil society organizations; and (4) investigative journalists. The analytic framework is based on this sampling and it seeks to allow the researcher to capture the complexity of the subject matter of the study. Therefore, the sampling strategy should emphasize the systemic dimension of the relationship between the variables of this study and offer an interdisciplinary representation of a research topic that is also interdisciplinary.
The research project includes ten participants, who were chosen because they are often brought to reflect upon the usefulness and impact of whistleblowing and how to ensure that the reporting of wrongdoing be done in the public interest and in an optimal manner. Participants have signed a consent form prior to participation that describes the general conditions for participating in the research project, including that the identity of participants will remain confidential (see consent form, Appendix 1). If a deep theoretical understanding was not necessary to participate in the research project, participants must have been able to experience how whistleblowing mechanisms operate in practice and be able to express themselves in English or French. Nine out of ten participants have accepted that interviews be recorded and that the results be presented subsequently in an anonymous manner to other participants in order to validate iteratively the information gathered and the emerging analyses. Most of the participants have been selected by the researcher based on their field of expertise or their organization’s business or professional activities. Moreover, other participants were identified once the interviews were initiated, based on the suggestions provided by the interviewees. The table below presents the profile of each interviewee while preserving their anonymity.

<table>
<thead>
<tr>
<th>Type of organization</th>
<th>Number of interviewees</th>
<th>Level/profession of participants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforcement authorities</td>
<td>2</td>
<td>Head of the institution (1)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Head of operations (1)</td>
</tr>
<tr>
<td>Private organizations</td>
<td>3</td>
<td>Senior director, risk of fraud (1)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Senior Fraud and Corruption Investigator (1)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Case manager (1)</td>
</tr>
<tr>
<td>Investigative journalists</td>
<td>2</td>
<td>Investigative journalists (2)</td>
</tr>
<tr>
<td>Civil society organizations</td>
<td>2</td>
<td>Former Director (1)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Secretary (1)</td>
</tr>
<tr>
<td>Think tank</td>
<td>1</td>
<td>Director General (1)</td>
</tr>
</tbody>
</table>

One of the strengths of the sample is the balanced perspective it seeks to bring among the different categories of stakeholders. In addition, all participants shared valuable information with the researcher that was directly supportive of the achievement of this research project. The information was based on the participants’ longstanding experience in their respective field of expertise and their excellent
knowledge of the issues at stake. Combined with the detailed documentary analysis included at chapters 3, 4, 5 and 6 of this research project, the sample has proved to be sufficient to further our understanding of the issues under study.

However, because organizations’ whistleblowing mechanisms are a sensitive issue, it has been a challenge to find participants from each category of stakeholders who were willing to participate in this study, even with their anonymity ensured. Some of the enforcement authorities felt uncomfortable to participate in this study because they did not want to risk disclosing their investigation methods or because they were about to publish a report on related issues. Moreover, as this Master Degree is designed for practicing professionals as opposed to full time students, the time available to identify participants and carry out the project has also been an issue for the researcher. Nevertheless, the results obtained bring a useful contribution towards the establishment of a credible model to assess the effectiveness of whistleblowing law, the determination of whether the Canadian whistleblowing law appears to be effective based on that model, and providing recommendations for the improvement of whistleblowing law in Canada.

2.5 Methods for collecting the data

2.5.1 Documentary analysis

The analysis of existing literature constitutes one of the two main sources of data of this research project. The main purpose of the documentary analysis is to develop a model to assess the effectiveness of laws, rules and policies that seek to obtain useful information via whistleblowing mechanisms to detect and stop wrongdoing; as well as the role of the media with respect to these mechanisms. The documentary analysis also includes a comparative study component to draw from the other countries’ experiences in designing their own whistleblowing laws. For instance, Chapter 3 discusses what should be taken into account to assess whether whistleblowing is effective (dependent variable). Also based on other countries’ experiences, Chapter 4 discusses what factors can influence whether whistleblowing laws promote the public interest (the independent variable), also drawing from experiences from other jurisdictions as discussed by various authors. Chapter 5 provides a detailed analysis of whistleblowing law in Canada, and Chapter 6 provides
an analysis on the influence of the media on whistleblowing effectiveness (the intervening variable). However, Chapter 6 does not draw its conclusions from a comparative analysis. Instead, it primarily draws from another study to display how active investigative journalism can overcome flaws of the Canadian legislative framework for whistleblowing.

2.5.2 Semi-structured interviews

The ten semi-structured interviews were carried out in a flexible manner and resembled a conversation where the discussion topics were pre-established but where speaking sequences were unbalanced to ensure that participants have the opportunity to express their point of view (Savoie-Zajc 1997). The interview plan (Appendix 2) has been developed accordingly by presenting open-ended questions, in order to foster reflection among participants and cover the themes necessary to validate the hypothesis and the model developed based on the documentary analysis. The empirical evidence gathered through the interviews is included in chapters 3 to 6, along with the relevant documentary analysis.

The interview questions have evolved from one interview to another based on the argumentation of previous participants. This allowed the researcher to seek the most needed information to validate the model to assess effectiveness and test the project’s underlying hypothesis. Moreover, this has allowed testing the validity of some of the statements by confronting them with different points of view from other participants. The interviews were almost all recorded to ensure the quality of their analysis. The interviews lasted from 45 minutes to 100 minutes, but the majority of the interviews lasted around 70 minutes. Six interviews were held in French and four interviews were held in English.
3 Criteria for measuring whistleblowing effectiveness

Whistleblower effectiveness is the most difficult variable to measure, of all variables associated with whistleblowing. Although the issue of why whistleblowers act as they do and what consequences they often have to endure is often discussed by academic literature and the media, another important but less studied issue is the impact of whistleblowing on the governance of the organization where the wrongdoing occurred and on business practices in a given environment. Apaza and Chang’s review of literature assessed that “studies of whistleblowing have delved into why employers do not want whistleblowing to occur (Lovell 2003; Miceli and Near 1984; Miceli, Near and Schwenk 1991; Qusqas and Kleiner 2001), why employees blow the whistle (Appelbaum et al. 2006; Brewer and Skelden 1998; Menzel and Benton 1991), and how whistleblowing influences government policies” (Johnson and Kraft 1990), but very little on how whistleblower effectiveness should be measured. Macdonald Dryburgh observes that many “legal scholars tend to focus on the win/loss ratios of lawsuits in defining effectiveness. Unfortunately, as Miceli and Near note, many whistleblowing incidents involve lawsuits only when the whistleblower has suffered from retaliation” (Macdonald Dryburgh 2009, p.161).

There is no agreed definition of what is whistleblower effectiveness and no agreed model that guide researchers on how they should measure effectiveness. Moreover, the concept of effectiveness may be influenced by inherent methodological issues, and the validity of outsiders’ perceptions of effectiveness (see Miceli, Near and Morehead 2008, pp.16-18). As a result, this research project seeks to propose a model that could measure whistleblowing effectiveness quantitatively in future research projects.

Miceli and Near’s definition of effectiveness is “the extent to which the questionable or wrongful practice (or omission) is terminated at least partly because of whistleblowing and within a reasonable time” (Miceli and Near 1995, p.681). Other researchers have provided other benchmarks for measuring the effectiveness of whistleblowing. For instance, Dworkin and Baucus considered that whistleblowing is effective if the organization launched an investigation into the whistleblower’s allegations, whether it is on their own initiative or as required by a public body, or if the organization took steps to change policies, procedures, or eliminate wrongdoing.
Elliston et al. suggested that the assessment of successful whistleblowing should have two components: (1) whether the whistleblowers achieved what they had in mind; and (2) whether others in some way have paid heed to their warning (Elliston 1985, p. 17). Other important benchmarks to measure successful whistleblowing may include whether wrongdoers reported by whistleblowers are prosecuted by the appropriate authorities, but this would require access to statistics compiled by enforcement authorities.

Apaza and Chang consider that the frameworks for measuring effectiveness mentioned above are too narrow for the analysis and evaluation of the whistleblowing process as a whole. They suggest looking at other consequences of whistleblowing, “such as political disruption and retaliation against whistleblowers, [which] might yield a different assessment of cases”. Therefore, their study defines effective whistleblowing “as an action which (1) makes the organization launch an investigation; (2) causes it to take steps to change policies or procedures; (3) terminates the wrongdoing within a reasonable timeframe; and (4) results in no retaliation to whistleblowers, due to the availability of legal protections” (Apaza and Chang 2011, p.115).

The model for measuring effectiveness of whistleblowing frameworks developed in this dissertation is based on elements mentioned above that are consistent with the view that effectiveness should be measured by the impact of the whistleblowing on the organization, in particular (1) whether the wrongdoing is terminated and (2) whether organizational changes arising from the whistleblower's report were implemented (Miceli and Near 1992, p.190). Moreover, effectiveness will be measured by (3) whether an investigation was launched, when it is appropriate to do so. This last criterion was added to the model, as an effective framework will distinguish substantiated allegations from misleading or unsubstantiated allegations when it is time to decide whether appropriate action is warranted by the whistleblower report. Taking this criterion into account for assessing effectiveness allows researchers to measure whether the applicable framework for reporting wrongdoing is able to lead to investigations when applicable rules warrant. This criterion also allows assessing whether unreasonable or incredible reports of wrongdoing can lead to any adversarial effects against the organization or against any employees who are the target of such unreasonable or incredible reports. For a
discussion of how reporting mechanisms that are not appropriately set up may harm an organization in that way, see Anechiarico and Jacobs, 1996. This criterion will also assess whether the legal framework influences report recipients and top decision makers from relevant organizations to make the right decision in consideration of the public interest.

This model for measuring effectiveness is therefore similar to the model proposed by Apaza and Chang (2011), but it takes into account the appropriateness of the decision about whether to launch an investigation and it does not assess whether the whistleblowing will result in no retaliation to the whistleblowers due to the availability of appropriate legal protections, because this measurement criteria is not based on the impact of the whistleblowing on the organization. However, the hypothesis underlying this research project assumes that the availability of appropriate legal protections will determine whether whistleblowing law effectively promotes the public interest, as seen in chapter 2.

This chapter will discuss why each element identified above is part of the model for measuring effectiveness, and whistleblowing law should be framed to be effective at launching investigations when appropriate, stopping wrongdoing and leading to appropriate organizational changes when required.

3.1 An investigation is launched following credible reports of wrongdoing

a) Analysis of the literature

There are three key factors that differentiate the power of employees within an organization based on resource dependence theory. These factors include (1) the hierarchical structure of the organization; (2) the specialization of labor; and (3) differences in the supply and demand for specific knowledge, skills, and abilities (Miceli, Near and Morehead 2008, p.137). The hierarchical structure provides power because greater resources are controlled at higher levels of management. The power of an employee may also be influenced on whether an organization depends on certain employees who have specialized knowledge and skills that are harder to replace. Finally, the employees who supply the most demanded resources are more able to benefit the organization and are thus more powerful than other employees.
who may be replaced easily by qualified substitutes. According to Miceli et al., if employees are more powerful considering any or all three factors, they will also be more powerful as whistleblowers or as complaint recipients (Miceli, Near and Morehead 2008, p.138). Moreover, empirical research shows that an employee is more effective at stopping wrongdoing and creating organizational changes if reporting wrongdoing is part of the employee’s role and responsibility (Miceli, Near and Morehead 2008, p.140).

Therefore, the power and resource dependence theories suggest that there are merits in implementing reporting procedures that are confidential or anonymous as it will give equal importance to reports of wrongdoing from all employees. These theories also suggest that whistleblowing effectiveness will be enhanced if more attention is paid on the nature of the information reported than on the personal characteristics of the whistleblower.

Such an approach would level the playing field as much as possible for employees of different hierarchical levels, specialization of labor, and of different knowledge, skills and abilities. If an individual’s role and responsibilities have an impact on whistleblowing effectiveness, an organization should use an adequately trained, skilled and independent recipient, whose role is clearly outlined, as soon as possible in the process to determine whether the allegations warrant further actions.

Miceli et al. suggest that another factor that will influence the power and effectiveness of the whistleblower is whether the wrongdoing reported is seen as credible or legitimate by other members of the organization. The appreciation of the individual that is the most important is that of the initial complaint recipient because he or she will have a significant influence on the future course of action. The factors that will influence the credibility and legitimacy of the whistleblower include whether the allegations are documented and corroborated, how the other employees view the whistleblower’s motives, and what process was used to report wrongdoing (Miceli, Near and Morehead 2008, p.140 to 145).

Moreover, Miceli et al. provide that whistleblowers tend to be more effective when they believe that reporting problems will get them corrected. Thus, whistleblowing effectiveness will increase when the whistleblower provides basic facts that can be verified later by appropriate authorities, but it will leave the burden to prove whether
the allegations are true to experienced investigators. Again, confidentiality/anonymity will play a key role in promoting whistleblowing effectiveness, as it will avoid hasty judgments by other employees on the whistleblower’s motives. Organizations should provide for different reliable internal routes to report wrongdoing to maximize the chances that the whistleblower use a process that is considered as “legitimate” by his or her peers (Miceli, Near and Morehead 2008, p.145).

Heard and Miller also make a number of suggestions to improve the effectiveness of the process for reporting wrongdoing within an organization that are consistent with the analysis made in the present subsection because they will have a positive impact on the employees’ trust that their report will be taken seriously (Heard and Miller 2006, p.7):

- “Ensure responsibility for investigations is clearly delineated and effective processes are in place for conducting investigations;
- Ensure investigations can take place relatively quickly;
- Focus on the complaint, not the complainant (as we also noted at the opening of this section of the chapter);
- Ensure communication gaps are closed (i.e., lack of communication between HR and Ethics Office can have serious implications, e.g., under SOX);
- Take reports of retaliation seriously and follow up on them;
- Discipline those that commit wrongdoing;
- Provide feedback to the individual that reported the wrongdoing”.

b) Evidence gathered from the interviews

The evidence gathered from the interviews confirms the data obtained from the analysis of the literature that whistleblowing effectiveness should be measured by whether an investigation is launched, when appropriate, and that the data should not be tainted by whether investigations were launched when corroborating evidence was insufficient and when the allegations were trivial. Nine of ten participants have said that almost all reports at least lead to a pre-assessment of the facts to determine whether an investigation will be launched. The main reasons invoked by participants about why the recipient of a report of wrongdoing would start an investigation is the
seriousness of the wrongdoing alleged, and the comprehensiveness of the information reported. Whistleblowers do not need to have all the information; they mostly need to identify the who, when and how, in relation to the occurrence of wrongdoing (two participants from the private sector). In that regard, half of the participants maintained that reports of wrongdoing generally lead to an investigation, two participants were of the view that only some reports lead to an investigation, and three participants felt that most of the reports of wrongdoing generally do not lead to an investigation. Not surprisingly, most participants perceived that the main reason for not launching an investigation is the lack of comprehensive evidence provided by the whistleblower or because the actions being reported did not constitute wrongdoing based on applicable rules.

However, perhaps more surprisingly, six participants have identified interference (or attempts to interfere) with the investigation process by internal staff as a potential main cause for not launching internal investigations on wrongdoing. This certainly highlights the legitimacy of ensuring the independence of the recipient and of the investigations from the rest of the organization. Such interference can take many forms, and some participants have mentioned that the complexity of an organization’s internal rules for the reporting of wrongdoing makes it too easy for ill-intentioned members of an organization to avoid launching an investigation into alleged wrongdoing. The political will of top management of the organization has also been identified as a key factor to ensure that there is no interference affecting the internal investigation process. One participant from a CSO rightfully mentioned that it is not enough that an investigation be launched, ensuring the integrity of the conduct of the investigation is even more important. In that respect, another participant from a private sector organization mentioned that when investigations may be carried out on senior officials of the corporation, they contract the investigation to an external third party to avoid any potential breaches of the investigation process as much as possible. Another reason to take investigations involving top management more seriously is that according to a private sector participant, senior officials of a corporation often do the most meaningful reports of wrongdoing in an organization.
c) Conclusions

Power and resource theories suggest that having a confidential or anonymous reporting procedure positively impacts whistleblowing effectiveness. This is consistent with the views of the participants, who mentioned that the seriousness of the allegations and the comprehensiveness of the information reported are the two main factors that will impact whether an investigation will be launched, as opposed to the personal characteristics of the whistleblowers or wrongdoers.

More generally, the literature provides that establishing a complaint recipient that is considered as “independent” from top management, and whose role is clearly outlined, will also increase the likelihood that investigations will be launched when appropriate, in part because it will increase the chances that employees will perceive that reporting problems will get them corrected. Moreover, an independent recipient will reduce the likelihood that interference with the investigation will occur, which was identified by a majority of participants as one of the main causes for not launching an investigation. Such independent recipients include an independent member of the board of directors or an external ethics hotline who will guarantee the anonymity of the whistleblower in relation to the employer, as well as provide appropriate advice on the chances of success of the whistleblower’s approach, particularly on the evidence available. It may be assumed that the most independent the complaint recipient is from top management of an organization, the less the power of the whistleblower, as described by Miceli et al., will have an impact on its effectiveness.

3.2 The wrongdoing was terminated

a) Analysis of the literature

The termination of the wrongdoing is at the heart of Miceli and Near’s model on whistleblowing effectiveness (Miceli and Near 1992, p.190).

As discussed earlier, one important factor predicting the decision to blow the whistle is the expected effectiveness at stopping the wrongdoing (Miceli, Near and Morehead 2008, p.134):

“Research has demonstrated consistently that observers of perceived wrongdoing are more strongly influenced to blow the whistle by their perception that they will be
successful in getting the wrongdoing stopped than by expecting retaliation. (e.g., Palguta 1981)

The dependence of the organization on the wrongdoer will also be key to determine if the whistleblower will be effective in stopping the wrongdoing. Wrongdoers who control substantial resources will be powerful and more difficult to stop, because they will likely have opportunities to use organizational resources in important and questionable ways, including by pressuring others to remain silent (Miceli, Near and Morehead 2008, p.146). The Enron case is a good example, as Sherron Watkin’s whistleblowing was ineffective until powerful outsiders became involved independent of her actions. And Watkins may have perceived correctly “that she could not mobilize these outsiders at the time in a way that would have changed the wrongdoing and avoided retaliation” (Miceli, Near and Morehead 2008, p.147).

The fact that the more the organization is dependent on the continuation of the wrongdoing, the less effective the whistleblower will be in terms of reporting wrongdoing internally has important implications for the whistleblower (Miceli, Near and Morehead 2008 p.148):

“Organizations that depend on continuation of the wrongdoing for their own survival are unlikely to terminate the wrongdoing when confronted with the evidence”.

When wrongdoing is considered critical for the survival of the organization, it may lose all perspective and become unable to perceive the even greater risks that arise from the organization’s involvement in the wrongdoing. In these circumstances, the whistleblower should consider reporting wrongdoing outside the organization to enhance whistleblower effectiveness, because internal reporting will likely not be effective. Whistleblowing effectiveness thus justifies reporting wrongdoing outside the organization when employees feel that top management is engaged in the wrongdoing, that they will not consider the long-term impact of such activities on the reputation and viability of the organization, and that their first reaction is going to be sweeping the problem under the carpet rather than substantially addressing the issue.

To avoid adopting a shortsighted view that continuing the wrongdoing is the privileged way to ensure the survival of the organization, the use of proper corruption risk assessment tools that would redefine how the survival of the organization may
be ensured and how whistleblowers can contribute to achieving this goal rather than endanger the organization would definitely increase whistleblowing effectiveness. The organization should ensure that the risk management strategy of the organization is comprehensive and takes into account how potential corruption scandals may affect the organization’s reputation, potential corporate liability issues, and access to some markets, which may all have major impacts on the finances of the organization (Kenyon 2013).

Some research also suggests that “encouraging reporting and immediate correction about which employees are informed may also have desirable effects almost as good as those resulting from preventing wrongdoing in the first place” (Miceli, Near and Morehead 2008, p.196). These benefits go beyond reducing tangible costs to the organization as they may engender positive feelings and favorable consequences among employees.

b) Evidence gathered from the interviews

The vast majority of participants agreed with the literature that whistleblowers have the potential to stop wrongdoing and that it impacts on whistleblowing effectiveness, but that it is difficult to determine in what proportion. Two private sector representatives added people are getting more efficient at detecting and stopping fraud and corruption, and that they have encountered many cases where fraud and corruption was stopped by whistleblowers. However, whistleblowing mechanisms must be set up properly in order to do so.

On the other hand, the two representatives from CSOs were more pessimistic about the success of whistleblowers by arguing that blowing the whistle does not typically stop wrongdoing. One participant from a CSO shared some of the statistics collected by his organization with respect to cases where potential whistleblowers seek support and advice from them. Of the 148 cases, they have in their database since 2012, 111 cases were deemed outside their mandate or the outcome is unknown because they lost touch with the whistleblower. Of the 37 cases that were found relevant and which they know the outcome, only 5 (or 14 per cent) resulted in the problem being addressed by the organization in question. However, we should bear in mind that individuals who feel the need to seek the advice of CSOs when they consider reporting wrongdoing may not trust the internal reporting channels of their
organization and as such, these numbers may be more reflective of the whistleblowing effectiveness to stop wrongdoing in organizations that do not have the appropriate corporate culture and where communication channels to report wrongdoing are not set up properly. Nevertheless, it suggests that whistleblowing effectiveness in Canada can certainly be improved, and that Canadian whistleblowing law should better incentivize or require organizations to implement the right culture and reporting mechanisms with respect to reporting wrongdoing.

Representatives from the private sector and from an enforcement authority also warned that sometimes, it is not enough to stop the wrongdoing. Ongoing oversight is absolutely necessary to ensure that the wrongdoing does not start again after the wrongdoing is stopped. This reinforces the merits of implementing a comprehensive risk management and evaluation strategy that will be tailored to the activities of the organization and that will evolve in parallel with the environment in which the organization will conduct its activities.

Some of the participants have mentioned that wrongdoing typically stops because wrongdoers have left the organization once they were caught, or because their supervisor were informed and took appropriate measures following the report of the whistleblower. A large majority of participants were also of the opinion that the fact that the wrongdoing is discussed publicly greatly contributes to stop the wrongdoing as well as the chances that it may occur again. This reinforces the point that organizations are better positioned to undertake corrective actions in response to wrongdoing, but that external actors should become involved if the organization fails to do so.

c) Conclusions

The literature provides that whether the wrongdoing will stop will largely depend on the extent to which an organization depends on the wrongdoer or on the continuation of the wrongdoing. When such dependence is too high, it would be far more effective to report the wrongdoing outside the organization because it will unlikely be addressed by internal reports in such circumstances. The empirical evidence suggests that there are many organizations in Canada that do not have a culture and reporting mechanisms that are supportive of whistleblowers. Legal incentives as well as corruption risk assessment and management strategies have the potential to
incentivize organizations to implement the right culture and reporting mechanisms that will promote whistleblowing effectiveness.

3.3 The organization takes steps to change its policies and procedures

a) Analysis of the literature

The inclusion of the potential policy changes arising from acts of whistleblowing in the model proposed by this research project seeks to fill a gap in the literature and tie whistleblowing to other mechanisms of bureaucratic accountability. In some cases, whistleblowing may be tremendously influential in terms of providing an incentive for improving policies and institutions in both the public and private sector. According to Miceli, Near and Morehead, the US model for whistleblowing was successfully exported around the world mainly through anti-corruption campaigns designed to stabilize free trade markets for globalization, assuming that effective whistleblowing could contribute to improving the functioning of capital markets (Miceli, Near and Morehead 2008, p.134).

The long-term effect of whistleblowers’ personal crusade may be the most important part of their story. Changing organizational policies and procedures goes one step further than stopping the wrongdoing because it seeks to ensure that such wrongdoing does not happen again. Miceli et al. argue that eliminating the bad apples within an organization is fine, but failing to identify a systemic cause of wrongdoing or rectify the actual problem that led to the commission of wrongdoing should be avoided (Miceli, Near and Morehead 2008 p.195). Therefore, an appropriate model for measuring whistleblowing effectiveness should definitely take account of appropriate organizational changes brought by whistleblowers.

Every day, whistleblowers expose wrongdoing hoping to effect a change of behavior in their organizations. Johnson argues that because whistleblowers often aim to change agency policy and procedures, they are being thought of as “policy entrepreneurs” (Johnson 2003, p.53). John W. Kingdon defines the main characteristic of policy entrepreneurs as “their willingness to invest their resources – time, energy, reputation, and sometimes money – in the hope of future returns”
Johnson then explains that the return the whistleblower is hoping for “comes in the form of changed agency practices” (Johnson 2003, p.53).

Johnson suggests that there are three questions that must be asked in order to assess whether a whistleblower had a policy impact (Johnson 2003, p.54):

- **The policy agenda.** Were new policy alternatives seriously considered by significant political or corporate actors? For example, did the whistleblowing mobilize organized interests? Did it affect public opinions? Did it lead to a demand for policy change?

- **Bureaucratic procedures.** What impact did whistleblowing have on conditions in the agency itself? Were there changes in organizational resources; in personnel or human resources; or in the way rules and regulations were implemented?

- **Substantive public policy.** How was substantive public policy affected by public disclosures, legislative efforts to formulate or adopt new policies or to clarify existing policies?

Although it is difficult to establish causality between whistleblowing and a change in policy or procedure, Johnson argues that an in-depth analysis of a few whistleblowing cases can reveal what whistleblowing may be successful. She has used such analysis to make the point that “a whistleblowing success in influencing policy is not only determined by his or her own characteristics and by characteristics of the whistleblower issue, but also by the environment”. She further maintains that the term “environment” includes the activity of interest groups or advocacy coalitions, public opinion and media attention, and the response of legislators to the accusations of wrongdoing (Johnson 2003, p.54). This means that a whistleblower would have better chances of triggering policy changes when media coverage is large and positive, when there are active civil society groups who actively advocate for investigations and/or corrective actions, and when legislators are receptive to take action to improve the legal framework (Johnson 2003, p.55). Her findings will have implications that should be taken into account by policy and law makers who wish to implement a balanced and effective legal framework that seek to provide meaningful milestones for the management of the information reported by whistleblowers.
Chapter 6 will discuss how the presence of those conditions has supported widespread organizational changes following a huge corruption scandal reported by whistleblowers.

In sum, Johnson maintains that there are three sets of variables that will condition policy impact: (1) the characteristics of the whistleblower (status, credibility and political skills); (2) the characteristics of the issue (saliency, specificity, and feasibility of corrective action); and (3) the political environment (public opinion, group activity, media coverage, and legislative receptivity to change) (Johnson 2003, p.70-71). These variables will also have an impact on whether an investigation will be launched when appropriate, and whether the wrongdoing will stop following the report.

Johnson’s analysis does not specifically consider the factors that make whistleblowing within the organization successful or effective when it has not been publicized externally. However, her three variables enumerated above may also apply to the effectiveness of a whistleblowing framework within an organization. While the personal characteristics of whistleblowers may be less relevant when their identity is protected and that it is the recipient, the investigators, and eventually top management who will mostly influence whether organizational changes will be made, the personal characteristics of whistleblowers may still have an important role to play in smaller organizations who do not have sophisticated mechanisms to manage reports of wrongdoing. The characteristics of the issue and of the political environment will also influence the policy impact of whistleblowers on their own organization.

As such, it may be useful to consider if the legislative framework can be developed in such a way so as to diminish the negative consequences of a particular environment in order to improve the effectiveness of whistleblowing frameworks in terms of producing policy changes. If the wrongdoing is publicized outside the organization, an effective whistleblowing framework in terms of bringing policy and procedural changes may be one that offers incentives for external parties to pay attention to the issues reported and to act on them, that exploits the adversarial nature of the Westminster parliamentary system to challenge the government’s policy agenda, and that can harness the social pressures arising from public opinion or from civil society advocacy groups to further these policy or procedural changes.
Whistleblowing laws will effectively promote the public interest when they encourage public and private organizations to focus less on the personal characteristics of the whistleblower but more on the characteristics of the issue reported (whether it constitutes wrongdoing, the seriousness of the issue, whether it arises from gaps in policy or procedure), and on implementing the right political environment within the organization. This can be done through encouraging the organization to adopt corruption risk assessment and management strategies, publicly encourage its employees to report the wrongdoing they have witnessed, and committing to not tolerate reprisals and to address any legitimate reports seriously and diligently.

b) Evidence gathered from the interviews

The majority of participants (seven participants) are of the opinion that organizations generally change their rules and/or policies following the reporting of wrongdoing, and that is an important aspect of measuring whistleblowing effectiveness if such reporting has identified gaps or loopholes in internal rules or procedures of the organization. However, the relevance of considering new rules or procedures for measuring whistleblowing effectiveness was more mitigated than for the other variables. Two private sector representatives argued that considering they already have comprehensive internal rules or policies to prevent fraud and corruption, they take the approach of sending reminders of existing rules and policies rather than changing the procedure. Instead, their organization usually sends reminders about the organization’s rules and policies, and conducts ongoing training on the company’s procedures to enhance awareness among all relevant employees. Only one participant took the view that most organizations do not change their internal rules and policies after someone has legitimately blown the whistle. Ironically, one other participant even mentioned that some organizations are getting better at shutting whistleblowers down when they have experienced whistleblowing.

Interestingly, one journalist also argued that some organizations go too far in reaction of some reports of wrongdoing, sometimes by creating unnecessary rules and procedures that are not meant to address the problem but that are only part of a public relations exercise. He advised that organizations should focus their efforts on the proper application of existing rules and procedures rather than having the reflex to come up with new ones. This statement was backed by three other participants.
Therefore, whistleblowing effectiveness should take organizational changes into account only when policy or procedural gaps were identified as a result of whistleblowing. It does not mean that because no changes were made to the policies or procedures of the organization after wrongdoing was reported means that the framework is not effective.

c) Conclusions

As already discussed in subsection 3.1 of this dissertation, the literature provides that organizational change following a report of wrongdoing will largely depend on (1) the personal characteristics of the whistleblower, as well as the (2) characteristics of the issue, and (3) the political environment where the issue was reported. Whistleblowing effectiveness will be enhanced when organizations pay more attention to the issue being reported than the personal characteristics of the whistleblower, and when the organization will have implemented the right culture and environment that support the exposure of wrongdoing.

3.4 The validity of the model to measure whistleblowing effectiveness

This research project argues that whistleblowing is effective in promoting the public interest when (1) whether an investigation was launched, when appropriate; (2) whether the wrongdoing was stopped; and (3) whether institutional changes were made to ensure that the wrongdoing does not happen again. The literature and empirical evidence gathered in this chapter confirm the validity of the model for measuring whistleblowing effectiveness. Both demonstrate that the chosen indicators are a direct consequence arising from the report of wrongdoing, and that the indicators are appropriate to show whether the report of wrongdoing has had an impact on the organization.

However, although research participants were generally of the view that the first two indicators should always be used to measure whistleblowing effectiveness, some of them proposed that whether organizational changes took place following a report of wrongdoing should only be taken into account when procedural or policy gaps were identified. Some of the participants suggested that too many organizations undertake such changes as part of a public relation exercise, which increases the complexity of
internal rules, creates uncertainty and decreases whistleblowing effectiveness. Other participants suggested that their organization already has comprehensive internal rules and policies, and that the approach is to send reminders of applicable rules following a report of wrongdoing rather than coming up with additional rules.
4 Ensuring whistleblowing law promotes the public interest

If the Canadian law is going to be effective at promoting the public interest in the context of whistleblowing, it must include provisions that address the issues discussed in the present chapter. Whether Canadian whistleblowing law has appropriately addressed those issues will be further discussed in Chapter 5 of this dissertation.

4.1 Encouraging the whistleblower to report wrongdoing in the public interest

It is impossible for government regulators and enforcement authorities to monitor and detect every instance of business wrongdoing. The authorities depend to a large extent on insiders within the company, as well as competitors, to detect and report violations of the law. In that regard, whistleblowers may be a valuable and inexpensive resource in law enforcement (Bowal 2011, p.29).

This is why legislatures in several countries have adopted laws to encourage whistleblowing, heighten transparency, and deter wrongdoing. For example, the US was one of the earliest leaders in terms of using legal and institutional incentives to encourage whistleblowing and as such, many countries have been influenced by the US whistleblowing legislation. These countries include the United Kingdom, New Zealand, Australia (state and territorial legislation), Canada, Ireland, Israel, South Korea, and Japan (Miceli, Near and Morehead 2008 p.168).

The most commonly referred to incentive used by legislation is the protection of whistleblowers from retaliation. However, there are many other different ways to incentivize employees to report wrongdoing. Legislation around the world vary to a great extent as to whether external reporting must be done to particular recipients, whether protection of the whistleblower should depend on the motive behind the reporting of wrongdoing, whether financial incentives are offered, whether the whistleblower must first report the wrongdoing within the organization, and whether only reporting on public sector wrongdoing is protected (Miceli, Near and Morehead 2008 p.168).
This subsection will explore the mechanisms that seek to incentivize employees to report wrongdoing that have been discussed in the literature.

4.1.1 The need for institutional incentives

a) Analysis of the literature

It is important to note that the most significant factor that encourages potential whistleblowers to expose wrongdoing is not protection from reprisals, but whether the risk they take will lead to positive change.

To successfully encourage whistleblowers to come forward, relevant rules and policies should be supported by an appropriate culture within the organization and clearly establish that whistleblowing is not disloyal but supportive of the firm. Rules and policies should also provide clear, safe, and effective channels for whistleblowing by providing that the complaint recipient should be an independent member of the audit committee of the board of directors (Miceli, Near and Morehead 2008 p.198-99).

The implementation of the right corporate culture as well as safe reporting channels are very important because many employees do not fully trust the effectiveness of statutory protections against retaliation. In some cases, those who decide to speak out accept the fact that they may suffer consequences for their actions, which means that the ability to ‘make a difference’ matters very much to them (Miceli, Near and Morehead 2008, p.132). This lack of trust is justified by the somewhat poor results of whistleblower laws, including those in the US (Calland and Dehn 2004, p.84):

“…US statutory whistleblower laws have been Trojan horses, creating more retaliation victims than they helped achieve justice. This is true for two reasons. One is that passage of legal rights persuades more individuals to speak out, risking harassment. The second is that in practice the system has been rigged so that realistically it routinely endorses retaliation challenged by victims”.

To overcome the difficulties arising from poor whistleblower protection laws, there are various ways to communicate to employees that their legitimate concerns will be heard, that corrective actions will be implemented if justified, and that reprisals will not be tolerated.
First of all, something must be done to address the fact that there often is a fair amount of uncertainty surrounding the witnessing of wrongdoing because the individual often realizes that his or her suspicions may be mistaken and that there may be an innocent explanation for the conduct. Therefore, the pressure to prove the wrongdoing should not rest on the employee’s shoulders, because it is far more effective if the organization is responsible for investigating the matter (Calland and Dehn 2004, p.4).

This is why US whistleblower statutes that protect whistleblowers do not require accuracy, but a reasonable belief that the wrongdoing has occurred or is occurring (Miceli, Near and Morehead 2008 p.165). Most Australian statutes are similar (Miceli, Near and Morehead 2008, p.168).

Beyond letting employees understand that their reporting will be taken seriously and constructively, a second whistleblower incentive is the implementation of safe routes to report wrongdoing. It is now widely acknowledged that public and private organizations must take steps to reassure and enable staff to raise concerns or wrongdoing confidentially or anonymously. This approach is based on the fact that without safe communications channels for raising concerns or reporting wrongdoing, the only two options available for whistleblowers is to remain silent or to “feed the rumor mill” that may negatively affect and undermine public confidence (Calland and Dehn 2004, p.5).

Third, because we cannot assume that all employers or top managers will act ethically or responsibly towards the public interest, the outside disclosure of the wrongdoing may sometimes be the only effective way to protect the public interest before serious harm is done. Although external disclosures raise ethical and legal issues of confidentiality and secrecy, they constitute an extremely powerful mechanism as they can clearly influence the balance of relationships between business, the state, and the media. Therefore, whistleblowing laws that effectively promote the public interest should explain in law and in practice when outside disclosures, openly made, are permitted and protected. Moreover, asserting the role of an outside body as a recipient for concerns establishes the principle of accountability in the organization by reminding everyone who is accountable for what and to whom (Calland and Dehn 2004, p.7-8).
One key similarity between most whistleblower laws is that whistleblowing to the media is frowned on or not protected in most countries (Miceli, Near and Morehead 2008, p.168). No US state or the federal government identifies the media as a proper recipient, and the UK protects reporting to the media only when strict perquisites are met under limited circumstances. In Australia, only the state of New South Wales authorizes reporting to the media, and this only under limited circumstances (Protected Disclosure Act, 1994). This reluctance is likely the result of legislators’ mistrust of media whistleblowers’ motives (Miceli, Near and Morehead 2008 p.168).

External whistleblowing is more commonly allowed by legislation when it is done to regulators or enforcement authorities. In that regard, the UK’s Financial Services Authority (FSA) issued a policy statement that recommend to all publicly listed corporations to implement whistleblowing policies for their staff, and that such a policy should make clear that the FSA is an appropriate recipient for blowing the whistle (Calland and Dehn 2004, p.113). Government departments are required to have whistleblowing policies in place and the Civil Service Code encourages internal reporting of concerns while allowing for an appeal to the Civil Service Commissioners who are independent of government. In the US, the reporting of financial wrongdoing may be done to the SEC.

A fourth but more controversial incentive is the opportunity to report tips anonymously. For some employees and in certain working environments, anonymous disclosures constitute the only alternative to silence. However, it is important to distinguish anonymous, which implies no possibility for identifying the whistleblower and confidential, i.e., where the recipient knows the identity of the person but agrees not to disclose it, if and when the information is used (Calland and Dehn 2004, p.8). Some argue that anonymous leaks are more difficult to corroborate and investigate, and the possibility to clarify any ambiguous information is excluded. However, we will see later that some organizations have implemented ways to communicate with whistleblowers while preserving their anonymity.

The Sarbanes-Oxley Act (SOX) is one of the few statutes that allow anonymous reporting and that requires an anonymous report recipient for private organizations. To meet this requirement, an organization often contracts with an independent hotline company (Miceli, Near and Morehead 2008 p.158).
The incentives discussed above are intended for whistleblowers themselves. However, there are also means to incentivize entities to adopt reliable whistleblowing frameworks within the organization. For example, regulators in the private, public, and voluntary sectors are beginning to promote whistleblowing as part of a risk-based approach to regulation, and this was reinforced in the context of anti-corruption by the UK Bribery Act 2010, which allows corporations to avoid corporate liability for bribery if adequate procedures were already put in place before wrongdoing occurred. The Public Interest Disclosure Act (PIDA) is also structured in such a way as to make it in the employer’s interest to implement safe internal channels to report wrongdoing. Because tribunals will look at whether a whistleblower complied with or should have complied with any internal whistleblowing policy, UK employers start to realize that a whistleblowing policy can reduce the risk that wider disclosures will be protected (Calland and Dehn 2004, p.109).

The US Corporate Sentencing Guidelines also encourage organizations to set up a framework for whistleblowing by rewarding compliance with reduced fines and penalties. The guidelines encourage organizations to establish codes of ethics and a whistleblowing procedure that is well publicized, monitored, and under which complaints are acted on without retaliation to the whistleblower. Failure to follow these procedures can result in increased sanctions such as large fines, corporate probation, and mandated negative publicity if the organization is convicted of federal crimes (Miceli, Near and Morehead 2008 p.165). Ethics hotlines were specifically mentioned as an appropriate whistleblowing procedure, and many companies started using them as a result of this law (Miceli, Near and Morehead 2008, p.165-66).

b) Evidence from the interviews

As seen earlier in this subsection, previous research tends to show the most powerful motivation for whistleblowers to report wrongdoing is the expectation that things will change for the better. These results were corroborated by the participants to this research project. Eight of ten participants mentioned that “doing the right thing” or “expectations that something will happen” from the reporting of wrongdoing as one of the main incentives for employees to report wrongdoing to the designated recipient. There are many ways identified by participants that contribute to communicate to employees that their report will be taken seriously, but there is one that underlies
most of the others, and that is the internal culture of the organization. An organizational culture that is based on integrity and excellence will provide a wide variety of routes to report wrongdoing (e.g., the supervisor, the board of directors, an independent director, an independent ombudsman, or an external party), establish an independent recipient, conduct ongoing education and outreach about the benefits of reporting, and allow for the possibility to report anonymously within the organization without fear to be tracked down. These empirical results also confirm the findings from the analysis of the literature.

c) Conclusion

Both the literature and empirical evidence suggest that the law provides a huge influence on whether institutional incentives for reporting wrongdoing will be implemented by an organization. The main incentives discussed by the literature and the empirical evidence in this subsection seek to create expectations by employees that reports of wrongdoing will be taken seriously. These incentives include (1) the ultimate responsibility to prove wrongdoing has occurred should rest on the organization's investigators and not on the whistleblower; (2) providing for the opportunity to report wrongdoing anonymously or confidentially; (3) external reports are sometimes the only effective way to report wrongdoing, and clarifying when such reports would be acceptable would considerably improve the effectiveness of Canadian whistleblowing law; (4) providing for more than one route to report wrongdoing within an organization; (5) establishing an independent and adequately trained recipient who will receive reports from whistleblowers; and (6) conducting extensive education and outreach activities that prescribe that loyalty to the organization requires employees to report wrongdoing to the right recipient.

4.1.2 Protection from reprisals

a) Analysis of the literature

- Retaliation

There is ample evidence that suggest that retaliation against whistleblowers is rather common and severe, even in countries with elaborate whistleblower protections like the US. Rothschild and Miethe found that 69 per cent of whistleblowers lost their jobs
or were forced to retire, 68 per cent received negative job performance evaluations, and 64 per cent were blacklisted from getting another job in the same field (Rothschild and Miethe 1999). A 2005 survey conducted by the Merit System Protection Board also disclosed that about 20 per cent of respondents said they had been denied a job promotion because of whistleblowing (Apaza and Chang 2011, p. 116).

More recently, the 2013 National Business Ethics Survey (NBES) of the US Workforce reveals that observed misconduct in the workplace is down for the third annual report in a row, and is now at a historic low of 41 per cent, down from the historic high of 55 per cent in 2007. Unfortunately, however, both the number of employees who reported misconduct and the number employees who experienced retaliation after they reported showed no improvement in 2013. The rate of reported misconduct when observed went down from 65 per cent in 2011 to 63 per cent in 2013. The NBES reveals that when asked to explain why they remained silent after witnessing misconduct, more than one-third (34 per cent) of those who declined to report said they feared retaliation from senior leadership; 30 per cent worried about retaliation from a supervisor; and 24 per cent said their co-workers might react against them (Ethics Resource Center 2014, p.27). In fact, more than one in five US workers (i.e., 21 per cent) who reported misconduct said they experienced retaliation, which is almost identical to the 22 per cent retaliation rate in 2011. The retaliation rate has not always been as widespread as it was 12 per cent in 2007, the first year it was measured by the NBES. This is a significant statistic because 86 per cent of those who suffered retaliation expressed a willingness to report in the future, compared to a rate of 95 per cent for those who have not suffered reprisals for past reporting (Ethics Resource Center 2014, p.27).

- Protection

Despite the fact that employees may be more motivated by “doing the right thing” than by the prospect of benefiting from legal protections once they blow the whistle, legal protections from reprisals are very important to seek redress for the whistleblowers as necessary, and to reflect the fact that society will not tolerate reprisals against whistleblowers. To facilitate employees to come forward to assist regulators and enforcement authorities, whistleblowers must be protected from
reprisals for their reporting offences and other wrongdoing” (Bowal 2011, p.29). In the US, the Civil Service Reform Act and the Whistleblower Protection Act of 1989 (WPA) were passed specifically to protect the federal government whistleblowers (Miceli, Near and Morehead 2008 p.155). It is important to mention that whistleblowers benefit from the discretion to pursue their own case if the designated authority chooses not to do so, which may yield greater trust from whistleblowers in the system. The disclosure regime for US corporate whistleblowers gives them equal protection whether they raise the matter with their employer, the authorities or Congress. However, some authors argue that providing such an equal protection fails at providing guidance to report wrongdoing internally first (Calland and Dehn 2004, p.16).

One important breakthrough for US whistleblowers was the shifting of the burden of proof to win a ruling that their rights have been violated. After the WPA was passed in 1978, 9 years of hostile decisions followed primarily because of the whistleblowers’ inability to establish a prima facie case before the court. The Mt. Healy v. Doyle test was consistently applied for first amendment relief, which means “an employee must prove that protected speech played a ‘significant’, ‘dominant’, or ‘motivating’ factor in the contested personnel decision. After WPA amendments were passed in 1989, the employee seeking corrective action must demonstrate that a disclosure as understood under applicable law “was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant” in order to establish a prima facie case of retaliation (Calland and Dehn 2004, p.78). Of course, the employer then gets the opportunity to prove it would have acted against the employee anyway for independent reasons from the reporting of wrongdoing. But the organization can prove its innocent excuse only by “clear and convincing evidence, the toughest relevant civil law standard” (Calland and Dehn 2004, p.79).

In reaction to US business scandals that many say could have been prevented by strong whistleblower protections, SOX was implemented. SOX section 1107 protects whistleblowers, even those who are not employees, by charging a felony against one who, with intent to retaliate, takes any action harmful to any person for providing truthful information to a law enforcement officer about the possible commission of any federal offence” (Bowal 2011, p.30). Similarly, to the WPA, whistleblowers can
bring their own civil law suit under SOX after they seek redress through a legislated process or if there are no outcomes after 180 days. Those who are found to have unduly retaliated against a whistleblower may be subject to criminal sanctions of up to 10 years imprisonment (Miceli, Near and Morehead 2008, p.160). US whistleblowing law provides the greater flexibility for whistleblowers as it allows them to choose between reporting wrongdoing internally or to the appropriate enforcement authorities while benefiting from the same level of protection.

The protection of whistleblowers is also a very important part of the UK Public Interest Disclosure Act 1998 (PIDA). The Act offers protection to the whistleblower, in broad policy terms, provided that the disclosure is proportionate and in relation to one of the specified subjects of public concern. In fact, almost every worker in the UK, no matter the industry or position, is protected from unfair treatment at work for public interest whistleblowing. The Act seeks to protect whistleblowers whilst not giving protection to those making wild allegations or simply ‘gold digging’ (Bowers et al. 2012, p.5). Moreover, PIDA seeks to balance the interests of employers to maintain the control and direction of their business with the wider public interest to stop wrongdoing and protect society at large. Seeking to reasonably achieve these two conflicting policy objectives may explain the complex structure of the Act.

A disclosure is protected in the UK if “the disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of six categories of relevant failures” (ERA, section 43B). The first five categories of failure concern a past, ongoing, or likely future (1) criminal offence; (2) breach of a legal obligation; (3) miscarriage of justice; (4) danger to health or safety; or (5) damage to the environment (Bowers et al. 2012, p.16). The last category relates to deliberate cover-ups of information with respect to matters that fall within the first five categories. This implies that there is a double threshold to reach the standard of “qualifying disclosure”, which is the nature of the information being disclosed and the requirement that the whistleblower has reasonable belief that one of the relevant failures is occurring.

In contrast, the US WPA covers disclosures of ‘gross mismanagement’, ‘gross waste of funds’, and ‘abuse of authority’. These are more elastic concepts in the hands of the courts than under the UK legislation (Bowers et al. 2012, p.47).
The requirement for reasonable belief in the truth of the information and that it tends to show a relevant failure has been debated as to whether it sets the threshold for protection too high (Bowers et al. 2012, p.46). In some cases, it is difficult to determine with certainty whether the information is true and reliable. Discussing this requirement in the Fifth Shipman Inquiry report at paragraphs 11.110 and 11.111, Dame Janet Smith concluded that (Bowers et al. 2012, p.46-47):

“...it seems to me that this requirement may operate against the public interest, especially in cases where the worker has access to incomplete or secondhand information. I am concerned that, in order to make a disclosure even to his/her employer, a worker has to be in the position where s/he could say, for example, ‘I believe that this disclosure tends to show that a crime has been committed and my belief is reasonable’. If this threshold were applied to workers having the state of mind of [various people who could have raised early concerns about Shipman], I doubt that they would confidently have been able to cross that threshold”. The onus should not, in my view, be on an individual to establish ‘reasonable belief’ in the case of internal disclosures and disclosures to external regulators. The public interest would, in my view, be best served by substituting ‘suspicion’ for ‘belief’.

In short, Dame Janet Smith’s statement implies that it should be sufficient to show a ‘reasonable suspicion’, rather than requiring a ‘reasonable belief’ that the disclosure tends to show relevant failure. Her statement relies on the fact that an employee might be skeptical of the information received, but sufficiently concerned to believe that the matter needs to be properly investigated. In these circumstances, employees should be encouraged to bring the information to the attention of the department dealing with ethics or compliance within an organization.

PIDA provides three different levels of protection for whistleblowers, but each level includes its own evidence threshold that one must meet in order to be protected. In Street v. Derbyshire Unemployed Workers’ Centre [2005] ICR 97, the court has summarized these different levels into a three tiered disclosure regime.

The lowest threshold arises from subsections 43C to 43E of PIDA, which virtually provide automatic protection for internal whistleblowing or whistleblowing in the course of obtaining legal advice, where there is no requirement above those for a qualifying disclosure (i.e., falling under the six categories). By making protection more readily available to those who raise their concerns with their employer, PIDA
reinforces the importance of internal lines of accountability (Calland and Dehn 2004, p.108).

The second tier consists of the regulatory disclosures under subsection 43F of PIDA, which are readily but not quite as easily protected. Here the threshold requires that the whistleblower reasonably believes the information reported to the regulator and any allegation contained in it to be substantially true. According to Bowers et al., the threshold for protection is deliberately lower than for wider disclosures based on the assumption that a disclosure to a prescribed regulator is more likely to be in the public interest (Bowers et al. 2012, p.16-17, and 79). PIDA suggests that the legitimacy of reporting directly to a regulator is high as it does not require whistleblowers to have raised the concern internally first before disclosing the matter to a prescribed regulator (Calland and Dehn 2004, p.108).

The third tier relates to public disclosures, and this level of disclosure requires the highest threshold in order to be granted protection under subsections 43G or 43H of PIDA. It is here that the protection is less readily available, because in order to grant protection, a tribunal would have to determine the appropriate balance between the public interest and the interest of the employer. For instance, one of the requirements is satisfying a general test of whether, in all the circumstances, it was reasonable to make the disclosure (Bowers et al. 2012, p.17). The uncertainty about whether protection will be granted seeks to encourage the whistleblower to first make the disclosure to the person or entity directly accountable for the failure or to the regulator. Third tiered disclosures involve that the whistleblower successfully proves that he or she will be victimized if the disclosure is made to the employer or that evidence will be concealed, or that the disclosure has previously been made to the employer or to a prescribed regulator (Calland and Dehn 2004, p.109). The UK whistleblowing laws are less flexible in terms of providing options for the whistleblower than those in the US, but the three levels of evidence required to seek protection act as guidance and motivates whistleblowers to report internally first, unless there are serious reasons for not doing so.

The apparent theoretical strength of legislation does not mean that it will lead to good results in practice. In fact, Lewis claims that while the WPA is one of the strongest free speech laws that exist on paper, it had very few beneficial effects in terms of
protecting whistleblowers working for the federal government. Between the passage of the 1994 amendments to the WPA and September 2002, whistleblowers lost 74 of 75 decisions on the merits at the Federal Court of Appeals, which has a monopoly on judicial reviews of administrative decisions (Calland and Dehn 2004, p.85):

“The causes for sustained frustration are no mystery. The first is a gap between rhetoric and reality by political leaders. While no institutional chief opposes rights for whistleblowers in principle, few will tolerate them in practice”.

Moreover, instead of jury trials available under Sarbanes-Oxley, whistleblowing cases under the WPA are heard by administrative judges whom some claim are not fully independent because they can endure retaliation for challenging politically powerful government officials. Provisions seeking to protect whistleblowers should be interpreted more liberally to take into account the difficult situation whistleblowers find themselves into (Calland and Dehn 2004, p.87).

In the UK, the whistleblowers also bear a relatively heavy burden of proof to convince the court that they unduly suffered retaliation. Section 47B of PIDA provides that an employee has the right not to be subjected to any detriment as a result of any act, or any deliberate failure to act, by his employer done on the ground that the employee has made a protected disclosure. This section has been interpreted by the courts in Pinnington v. Swansea City Council [2004] EWCA Civ. 1180, [2005] ICR 685. This decision provides that once it is established a disclosure is protected under the Act, there are four further elements of the cause of action, i.e., (1) that the whistleblower was subject to detriment; (2) that the whistleblower was subject to detriment by any act, or any deliberate failure to act; (3) that detriment was done by the employer; and (4) that the detriment was done on the ground that the employee has made a protected disclosure. The concept of “detriment” was given a large meaning. In Ministry of Defense v. Jeremiah, [1980] ICR 13, 31, the court said “a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment”.

b) Evidence from the interviews

Canadian stakeholders’ views can easily be reconciled with the literature with respect to the fact that legal protections for whistleblowers are necessary but not sufficient to mitigate the negative impacts they must endure. There is almost unanimous
consensus that protections from reprisals are not sufficient to adequately protect whistleblowers from negative consequences arising from their reporting of wrongdoing. Eight participants have adopted that position, including all participants from the private sector and non-governmental organizations. However, all participants who discussed the protection granted by their own organization found that it was sufficient, when applicable.

One enforcement authority maintained that whistleblower protections are sufficient because its constitutive legal authority allows whistleblowers to remain anonymous, and because over 1500 tips received, there have been only three alleged cases of retaliation against whistleblowers. The last participant is a journalist who did not clearly express his opinion on whether protections provided by the law were sufficient.

Concerning whistleblowers who report wrongdoing to the media, it is interesting to note that both journalists who participated in the study were of the opinion that whistleblowers should not be 100 per cent protected because it would deter journalists to do their job properly by rigorously assessing the credibility of the information communicated by the whistleblower, and because it may lead to abuse by ill-intentioned whistleblowers. There is no ultimate protection for whistleblowers, and the best one available may be the goodwill of the recipient of the report, and whether the whistleblower is protected should be determined by the quality of the information provided (one investigative journalist).

Several participants have indicated that support from top management of the organization is key to implement effective protections for whistleblowers, and that such support is often expressed by the implementation of recipients for reports of wrongdoing with the right training and independence from the organization. Such means of protection are even more important because they seek to ensure that whistleblowers will be protected before they may experience retaliation, rather than seeking to fix the consequences arising from potential acts of reprisals.

One important point to keep in mind is that when asked about the best mechanisms to protect whistleblowers, most participants discussed ex ante rather than ex post means of protecting whistleblowers. Several participants, including a majority with a private sector perspective, were of the opinion that the best protection for
whistleblowers was the possibility to make anonymous reports (two representatives from the private sector, one think tank representative, and one journalist). One way to provide anonymity is to allow the reporting of wrongdoing to an external party who will register the concerns expressed by the employee and assess whether there is sufficient information to trigger an investigation. If that is the case, the third party reports to the organization, most of the time to the board of directors or to the executive member who is in charge of compliance, while preserving the confidentiality of the whistleblower. Such a system allows the anonymity of the whistleblower in relation with the top management of the organization, but allows the investigators to communicate with the whistleblower via the third party in case more information is required while conducting the investigation. Some organizations also allow anonymous internal reporting to their compliance group, but this has the disadvantage of complicating the dialog with the whistleblower in case the report of wrongdoing is incomplete. One representative from the private sector maintained that one way to address this issue is to allow whistleblowers to report anonymously via a web platform, which will give the whistleblower a tracking number that may be used to log in the system later to check the status of the report and whether the organization needs more information in order to be able to investigate the wrongdoing. The two other participants of the private sector provided that an organization should have an independent authority to handle the whistleblower reports that would answer confidentiality concerns.

Having recipients with the right training and independence from top management is also a key indicator for providing adequate protections for whistleblowers by an organization. Several participants have held that support from top management is key to the protection of whistleblowers, and the establishment of an independent recipient with the appropriate expertise to process whistleblower reports is a clear indication of the will from organization to treat reports of wrongdoing seriously while treating the whistleblower with civility.

Finally, all participants from enforcement authorities and CSOs have mentioned that financial support for the whistleblowers who must defend themselves before courts or administrative tribunals should be provided financial support during the judicial process unless it was clear that they made up the allegations. As will be discussed further in subsection 4.2, the vast majority of participants were also of the opinion
that the application of legal protections for whistleblowers should not be conditional to whether the whistleblower first attempted to report the wrongdoing within the organization.

c) Conclusions

The literature and empirical evidence both suggest that reprisals are common and that whistleblowers are not well protected. Interestingly, research participants considered that effective protection could be better achieved through *ex ante* mechanisms discussed in subsection 4.1.1 of this dissertation, including the support from an organization’s top management and the establishment of the right culture, the possibility to file anonymous reports, and reporting to an independent recipient. This contrasts with the *ex post* means of protecting whistleblowers that are typically discussed by the literature. These include (1) imposing the burden of proof that sanctions were not related on the report of wrongdoing on the employer; (2) allowing whistleblowers to bring their own recourse before courts if the authorities fail to do so; (3) the definition of wrongdoing should be flexible enough to include most actions that are against the public interest, as such definition will determine whether the disclosure will be protected; (4) the law should provide enough guidance to courts on how the law should be interpreted to ensure that whistleblowers are well-protected; and (5) the availability of financial support for whistleblowers who must defend themselves before the courts. The ability of whistleblowing law to produce the right combination of *ex ante* and *ex post* means of protection for whistleblowers will determine how it contributes to effectively promote the public interest.

4.1.3 Financial incentives

a) Analysis of the literature

Some jurisdictions encourage whistleblowers to report wrongdoing by allowing them to receive a share of the amount recovered by the appropriate authorities. The country that uses financial incentives to reward whistleblowers for reporting wrongdoing the most is the US (e.g., the *False Claim Act*, the *Whistleblower Protection Act*, the *Dodd-Frank Act*). For instance, the FCA allows private citizens with knowledge of fraud against the US Government to file a lawsuit on its behalf and
if the claim is successful, receive between 15 and 25 per cent of the government’s recovery in a case in which the government is joined (Bowers 2012, p.368).

The FCA had a huge impact on civil recoveries of fraud by the US government. Such recoveries went up from $27 million in 1985 to an average of $300 million annually ten years after reviving the FCA. In the early 2000s, the figure has skyrocketed to more than $1 billion annually, which is about 40 times what the government could recover from taxpayers without deputizing the whistleblowers (Calland and Dehn 2004, p.81):

“There is little question that the False Claims Act is the most effective single law in history for individual whistleblowers to have an impact against corruption”.

Further, the scope for financial sanctions has been extended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. While the False Claims Act only applies to financial fraud against the government, the Dodd-Frank Act applies to a much broader range of financial fraud committed by corporations. Corporations are required to report to the US Securities and Exchange Commission (SEC) or the US Commodity Futures Trading Commission (CFTC). A person with independent knowledge of a financial fraud committed by such a business, who reports the information to the SEC or the CFTC, may be entitled to between 10 to 30 per cent of any amount over US$1 million recovered in a judicial or administrative action against the wrongdoer (Bowers et al. 2012, p.369). The US SEC has just granted a record reward of $30 million to a whistleblower living abroad who has disclosed information that led authorities to uncover a massive tax evasion scheme (Gadoury 2014).

Therefore, monetary rewards play an important role in the US in encouraging whistleblowers to come forward (Miceli, Near and Morehead 2008 p.153). Attempts to measure how successful is the granting of rewards for whistleblowers in the US tend to show that they are very successful at incentivizing employees to report wrongdoing (Ethics Resource Center 2014, p.35; Calland and Dehn 2004, p.81; and Miceli, Near and Morehead 2008, p.153). According to Miceli, Near and Morehead, this is much more effective than merely protecting the whistleblower from retaliation or even giving the whistleblower a private cause of action for retaliation, which is the traditional approach for most state whistleblower legislation (Miceli, Near and
The SEC received more than 3,200 tips last year, up 7 per cent from the year before (Shecter 2014).

US whistleblower laws that enable “people who do good to do well” have brought colossal savings to public finances. While there are moral hazards in such an approach, it is important to mention that financial incentives schemes are among the few schemes that are not triggered by the victimization of the whistleblower. Miceli, Near and Morehead believe that the use of rewards to promote whistleblowing is likely to grow because of exploding costs of health care and health care fraud, and of deficit reduction strategy (Miceli, Near and Morehead 2008 p.166). In Canada, the Canada Revenue Agency (CRA) has set up a hotline that allows citizens to report tax frauds but apparently no rewards were granted yet (CBC 2014). The certainty and size of the reward appear to affect the performance of the incentive scheme (Miceli, Near and Morehead 2008, p.197).

One obvious criticism of a whistleblower reward system is that a whistleblower might want to wait to report wrongdoing to increase the sum from which s/he will receive the award. A further concern raised by Bowers in relation to the Dodd-Frank Act is that encouraging reports directly to the regulator may undermine internal procedures (Bowers 2012, p.369).

Financial incentives have also been considered in the UK, but the Westminster Parliament decided not to go down that route. Westminster Parliamentarians considered there were sensitive ethical issues arising from the granting of rewards for the reporting of wrongdoing. PCAW speaks against generally offering incentives to whistleblowers, but recommends that there is a sound case for rewarding whistleblowers through a ‘good citizen’ fund. This is in line with how the statutory protection of the whistleblower is awarded at the moment in the United Kingdom, which specifically questions the motive of the whistleblower before granting protection. Bowers appears to be very skeptical of the legitimacy of the reward system as he concludes the final chapter of his book (Bowers 2012, p.370):

“A state fund to reward whistleblowers would require fundamental changes to the current legislation but would also be a move away from a society where witnesses give testimony because it is right to one for reward”.

47
b) Evidence from the interviews

The Canadian stakeholders who were interviewed for this research project appear to be more sympathetic to the UK than the US approach with respect to financial rewards for whistleblowers. It is interesting to note that only three participants mentioned that rewards would help enhance the reporting of wrongdoing by whistleblowers, and one participant from the private sector mentioned that most of the whistleblowers he knows would feel insulted at the idea of receiving money in exchange for doing something they consider as their duty. Some participants mentioned that whistleblowers should be well taken care of after they legitimately reported wrongdoing, particularly in relation with the costs associated with their defense if they suffer retaliation, but most of the participants thought they should not be offered cash for reporting in the first place.

c) Conclusions

Although there is increasing evidence provided by the literature that rewards contribute to increase whistleblowing effectiveness, the Canadian stakeholders who participated in this research project generally thought that the moral hazards associated with the use of rewards are too important.

4.1.4 Statutory limitations to the freedom of speech

Another protection that can benefit whistleblowers is the freedom of speech to challenge abuses of power, which is often part of the constitutional rights that take precedence over other statutes in a particular jurisdiction. For instance, freedom of speech is an important component of the American identity since the Declaration of Independence and it was institutionalized as the first amendment in the Bill of Rights to the Constitution.

The application of the first amendment use to be limited to situations where citizens criticized politicians, and government workers were gagged from freedom to use their professional expertise for dissent on behalf of the public. In 1968, the US Supreme Court extended first amendment protection to most government workers. It established a clear mandate to balance the government’s right to efficient
management against the public’s right to know, which must be assessed on a case-by-case basis (Calland and Dehn 2004, p.77).

Many US laws extend freedom of speech to workplace-based dissent, which covers local, state, and federal government employees as well as corporate employees, who also have a plethora of rights under more than 30 statutes (Calland and Dehn 2004, p.75). These protections include the Sarbanes-Oxley and Dodd-Frank legislations, which were discussed earlier.

However, protected speech in the public sector arises only when an employee or applicant lawfully discloses wrongdoing as defined under the applicable statute. When disclosures are prohibited by statute (e.g., on national security grounds), an employee is protected only if the disclosure is made internally (Calland and Dehn 2004, p.74).

Therefore, the whistleblower’s free speech rights are often limited by statutory prohibition, in the sense that the whistleblower will be required to report any matter internally within the government. When that happens, it belongs to the designated authority to decide whether the disclosure warrants any further action, and the public will never be made aware of the disclosure. If an employee decides to raise a matter publicly despite a statutory prohibition, he will not benefit from whistleblower protections based on free speech rights and may even be exposed to serious legal consequences, as can be well exemplified by the case of Edward Snowden or Bradley Manning. Therefore, free speech laws may be very fragile when the government responds to national security threats by imposing secrecy. According to Tom Devine, Legal Director of the GAP, the increasing use of secrecy following the 9/11 disaster “threatens to create a back door Official Secrets Act in the United States by criminalizing disclosures that previously were the point of whistleblower laws” (Calland and Dehn 2004, p.76).

In the UK, there are also certain provisions of PIDA who have the effect of discouraging whistleblowers to report wrongdoing by excluding from the scope of the Act disclosures that are made criminal offences by other statutes. This is the case, for instance, of disclosures that breach the UK Official Secret Act 1989. Such provisions can be very controversial because as Bowers et al. argue, “one area where the whistle might most usefully be blown in the public interest is in the civil
service or the security services where to do so would often amount to a breach of the Official Secrets Act, and therefore be a crime” (Bowers et al. 2012, p.53). Ironically, attempts to limit the exclusion from the scope of PIDA of disclosures done in breach of the Official Secrets Act were not successful, based on the argument that protection from reprisals is intended to apply to disclosures in the public interest. As Lord Borrie emphasized while the Public Interest Disclosure Bill was debated in the House of Lords on 5 June 1998, “it is very difficult to say that the commission of a criminal offence by a discloser can nonetheless be in the public interest” (Hansard HL 1998, col.616).

It is important to try to reconcile the competing policy objectives of protecting national security by ensuring that sensitive information is not leaked in the public domain, while ensuring that all public sector organizations are appropriately made accountable. If the publicity surrounding the normal process for disclosing wrongdoing in the public service is not suitable in the context of preserving national security, alternative recipients who could be allowed to review such disclosures could be considered.

### 4.2 The extent to which the employer should be given a reasonable opportunity to address the issue

a) Analysis of the literature

In both the US and the UK, an overwhelming majority of whistleblowers prefer to report concerns to internal authorities. This certainly reflects the employees’ inner sense of loyalty towards their employer, and perhaps the obligation of loyalty arising from the Common Law as well. For the purpose of this research project, it will be assumed that it is in the public interest that the organization gets the first opportunity to address the wrongdoing, unless there are demonstrable concerns that such an opportunity will be used to destroy or conceal evidence, or shut down the whistleblower. If an organization implements credible mechanisms to report wrongdoing, chances are that these would eventually be used by employees if they realize they can trust them to report wrongdoing. In the US, the Ethics Resource Center conducts a national survey on the reporting of wrongdoing in the workplace every two years. Their data suggest that employees tend to overwhelmingly report
wrongdoing inside the organization, and that there are very few whistleblowers who report wrongdoing outside the organization without reporting it internally first.

The 2013 NEBS revealed that more than nine out of ten (92 per cent) of reporters turn to somebody inside the company when they report a misconduct for the first time in the US. Of those whistleblowers who reported internally, 82 per cent reported to their direct supervisor at some point, and most (52 per cent) said they ultimately reported their concerns to higher management. The reporting to hotlines and ethics officers is much lower, at rates of 16 per cent and 15 per cent respectively. The reporting to a governmental or regulatory authority at some point is the lowest at 9 per cent, while the rate of reporting to someone outside the company who is not a governmental or regulatory authority is 13 per cent. “Overall, only 20 per cent of reporters ever chose to tell someone outside their company, the same percentage as in the NBES 2011 (Ethics Resource Center 2014, p.29).

Whistleblowers report misconduct outside their organization mostly because the problem was ongoing and they needed help to stop it. Other whistleblowers went outside their organization because they did not trust anyone inside and because they were retaliated against after their first internal report, at rates of 54 per cent and 40 per cent respectively. A similar number (39 per cent) said people would be hurt or the environment damaged unless outside authorities intervened. It is interesting to note that only 14 per cent of the whistleblowers were motivated by the potential to be given a substantial monetary reward (Ethics Resource Center 2014, p.30). However, 72 per cent said the law’s combination of whistleblower protections and bounties made them more likely to report, both internally or externally (Ethics Resource Center 2014, p.35).

Below is a table from the NBES 2013 that breaks down the motives for reporting wrongdoing outside the organization (Ethics Resource Center 2014, p.30).
<table>
<thead>
<tr>
<th>Why report externally?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>50% -</strong> The problem was ongoing and I thought someone from outside could stop it</td>
</tr>
<tr>
<td><strong>45% -</strong> I did not trust anyone in my company</td>
</tr>
<tr>
<td><strong>40% -</strong> I was retaliated against after I made my first report inside the company</td>
</tr>
<tr>
<td><strong>40% -</strong> I was afraid I would lose my job if I did not get outside assistance</td>
</tr>
<tr>
<td><strong>39% -</strong> I thought that keeping quiet would cause possible harm to people or the environment</td>
</tr>
</tbody>
</table>

20 per cent of whistleblowers report outside the company at some time.

Responses total more than 100 per cent because respondents were asked to select all that applied.

The NBES 2013 also point at possible strategies to improve reporting rates within an organization. To enhance its credibility, a well-designed whistleblowing system should allow the staff from one organization to bypass the direct management line because that may well be the area where their concerns arise. There is a significant disparity in reporting rates between corporations that are perceived as not tolerating retaliation in the workplace (72 per cent reporting) and corporations that are perceived as tolerating or ignoring retaliation (54 per cent reporting rate). Based on these numbers, “companies should work to eliminate retaliation, protect whistleblowers, and act strongly and consistently against those who ignore anti-retaliation standards” (Ethics Resource Center 2014, p.31). Moreover, researchers have found a positive correlation between increased internal whistleblowing and having specific, identified routes for whistleblowing, a particular person identified to receive and follow up the information, and a strong, non-retaliatory policy encouraging whistleblowing (Miceli, Near and Morehead 2008 p.194).

Legislation can help motivate organizations to implement robust internal reporting mechanisms to report wrongdoing. In the UK, the introduction of the PIDA (1998) as well as the *Bribery Act* (2010) provided a statutory incentive for employers to develop
appropriate procedures to encourage whistleblowers to raise their concerns within
the organization, and incentives for the employee to at least consider reporting
internally in order to maximize his or her chances to benefit from legal protections
against retaliation (as seen in subsection 4.1 of this dissertation). In the US, the
Sentencing Guidelines encourage employers to implement appropriate good
governance mechanisms but there are no incentives for employees to report
internally.

Since PIDA came into force in the UK in 1998, there has been a substantial increase
in the number of organizations that have developed and implemented tailor-made
whistleblowing or confidential reporting procedures. A survey of 114 organizations
made by Professor Lewis one year after the Act came into force revealed that the UK
public sector had a 95 per cent chance of having a whistleblowing procedure, as
against 63 per cent in the private sector. Professor Lewis also found that the
prominent reasons for implementing such policies in the public sector were for good
practice or compliance with the law (Lewis 2006). As such, PIDA has achieved one of
its main objectives, i.e., to encourage whistleblowers to report wrongdoing internally.
According to PCAW, 80 percent of claimants refer their concerns internally first
(PCAW 2010, p.6).

Professor Lewis conducted a confidential survey of the reporting procedures in the
UK top 250 FTSE firms and found that all those responding (64 firms of 250) to the
survey had a confidential reporting procedure. Of these 64 firms, more than 80
percent stated that the procedure had been used by employees (Lewis 2006). In
addition, PCAW’s 2010 review recorded that only 28 per cent of individuals
contacting its helpline stated that their employer did not have a whistleblowing
procedure, and that only one per cent of individuals who raised their concern with
their employer or regulator went to the media (Bowers 2012, p.353).

Beyond the fact that implementing safe and publicly-endorsed communication
channels to report wrongdoing within the organization is good practice because it will
likely support the organization in meeting its statutory obligations, it is also in the
employer’s self-interest to put in place procedures to address concerns of staff. As
mentioned by Bowers et al., encouraging staff to raise concerns first within the
organization produces benefits on several levels:
1. It fosters a more healthy and accountable workplace where problems are likely to be nipped out of the bud;

2. It encourages reporting that may act as an early warning system;

3. It is more likely that a report of wrongdoing will be raised internally using the procedure set out;

4. The procedure will ensure that the information will reach those who can act upon it;

5. It provides an element of deterrence for those who would be tempted to commit wrongdoing;

6. It will reflect the organization’s philosophy that concerns need to be addressed and handled appropriately, thereby also reducing the risk of litigation;

7. If an employee decides to make an external disclosure without first having made the disclosure internally or waiting for the matter to be addressed in accordance with the internal procedure, it is more likely that the procedure will not be a protected disclosure;

8. It will reflect the organization’s commitment that good practice be followed and that any concerns over malpractice are likely to be identified and addressed to those outside the organization; and

9. It will help an organization to establish a successful defense under the strict liability offence provided by section 7 of the Bribery Act.

In fact, introducing effective whistleblowing policies has been praised by the Committee on Standards in Public Life who stated that (Committee on Standards in Public Life, Cm 6407):

“Effective whistleblowing is a key component in any strategy to challenge inappropriate behavior at all levels of an organization. It is both an instrument in support of good governance and a manifestation of a more open organizational culture. …Where individual cases reach the point of invoking the Act then this represents a failure of the internal systems in some respect. Either the employee has failed to follow the procedure (for whatever reason) or the procedures themselves have failed. In our view,
therefore, any case where the Act is invoked should initiate a review of the whistleblowing procedures in that organization”.

Based on that assessment, implementing a whistleblower policy is only a start in fostering a culture where employees feel able to raise their concerns internally, and when raised, that those concerns are properly addressed (Bowers et al. 2012, p.348-349). The organizations that will make the best use of the information collected are those in which the organizations’ leaders realize the importance of providing an alternative to (but not a substitute for) reporting to line managers (Calland and Dehn 2004, p.6):

“Without [such alternative routes] they give their managers a monopolistic control over the information which goes to those in charge. As with any monopoly, one weak link – be it corrupt, lazy, sick or incompetent manager – will break the communication chain and stop those in charge getting information which could be critical to the success or failure of the organization”.

Moreover, providing safe alternative routes for whistleblowers reminds all employees that their duty of loyalty is owed to the organization and not to their manager, and that “providing a safe alternative to silence is one of the most effective ways to deter and discourage people from abusing their position and authority” (Calland and Dehn 2004, p.7).

b) Evidence from the interviews

Public exposure of wrongdoing can have very serious reputational and financial consequences for an organization. As such, it is widely acknowledged that in some instances, it is important that the organization has the first opportunity to address the wrongdoing reported by the whistleblower. This last statement was confirmed by nine of ten participants, but with an important caveat: the organization should earn the right to get the first opportunity to address internal wrongdoing. Most of the participants were of the view that the organization must earn the trust of its employees or business partners by setting up robust and safe reporting mechanisms for whistleblowers, by having top management emphasizing the importance of exposing practices that go against the law or the organization’s internal rules and values on an ongoing basis, and by “walking the talk” by taking action quickly after a legitimate report of wrongdoing was filed with the designated recipient.
However, nine of ten participants said that although it is important that the organization gets the first opportunity to address the wrongdoing, whistleblowers should always have the choice to report internally or externally first. Examples of instances where external reports are considered as legitimate by the participants is when top management is seen as corrupt or not supportive of internal exposures of wrongdoing, when it is expected that nothing will result from the report based on previous similar cases, or when there are indications that the organization or some of its officials will cover their tracks or exercise reprisals following the report done by the whistleblower. Allowing for the opportunity to report wrongdoing externally likely does not have the potential to undermine internal reporting processes when these can be trusted, because seven of ten participants have confirmed well-known research findings that whistleblowers overwhelmingly prefer to report wrongdoing internally. This preference may be explained by some of the participants’ perception that whistleblowers pay a huge price when they report externally, at least to the media.

Finally, seven of ten participants believe that if an organization’s whistleblower reporting mechanism is properly set up, reporting the wrongdoing internally should be in everyone’s interest as it may trigger an investigation into the allegations, stop the wrongdoing assuming the report was accurate, and identify potential gaps in the internal processes or controls of the organization with a view to ensure that the wrongdoing does not happen again in the future.

c) Conclusions

Both the literature and empirical evidence demonstrate that employees overwhelmingly prefer to report wrongdoing within their organization, and that the implementation of incentives discussed in subsection 4.1.1 of this dissertation will guide employees to do so. However, both the literature and empirical evidence suggest that the public interest is not effectively promoted when employees are unduly tied to report wrongdoing within dysfunctional organizations and reporting mechanisms. Most participants agree with the literature that whistleblowers should have the option to report externally when they have reasonable reasons not to trust that the internal reporting will not be used as it should be.
4.3 The nature of the information reported is useful for the public interest

a) Analysis of the literature

Prevailing legal arguments in the US and the UK suggest that whistleblowing is warranted if the whistleblower believes, in good faith, that the wrongdoing has implications for public policy; that is, some portion of society is endangered or disadvantaged by the organization’s actions (Miceli, Near and Morehead 2008 p.168).

This is a shift from earlier assumptions, according to which employees will only raise personal grievances because they do not recognize or identify with the well-being of the organization. Too many laws were based on this assumption, and this has inevitably led to employees’ negative behavior in the workplace (Calland and Dehn 2004, p.6):

“[this assumption] is not just misguided but self-defeating as information from the workforce is vital as it enables the organization to put a potential problem right before it causes any real damage to it, its reputation or its stakeholders”.

If whistleblowers generally report information that is in the public interest, then overanalyzing their motivations to act as such appears to be questionable because it shifts the attention from the information reported to the private life of whistleblowers. In fact, Micheli, Near and Morehead argue that “requiring a purely altruistic motivation for whistleblowers is an unrealistically high standard” (Miceli and Near 2008, p.37).

Such an approach may also be prohibitive for employees to report wrongdoing when they have previously been involved in disputes with the wrongdoer or the organization in general. In the UK, the good faith requirement is often criticized and recommendations were made that it be removed altogether in the Report of the Shipman Inquiry. For instance, Dame Janet Smith commented that (Fifth Report of the Shipman Inquiry 2004, paragraphs 11.105 and 11.108):

“If disclosure is in the public interest, it should not matter whether the person making the disclosure has mixed (or possibly, even malicious) motives. …in my view, [the words ‘in good faith’] could be properly omitted [from the Act]. The three-tiered regime of the PIDA, with its incrementally exacting requirements, should afford sufficient
discouragement to those minded maliciously to raise baseless concerns. I think that it would be appropriate also if the preamble to the PIDA made it plain that the purpose of the PIDA is to protect persons disclosing information, the disclosure of which is in the public interest. That would serve to focus attention on the message rather than the messenger. The public interest would be served, even in cases where the motives of the messenger might not have been entirely altruistic”.

In fact, whether the whistleblower’s motive should be taken into account is one of the most important areas of tension at the heart of the whistleblower legislation in the UK. This tension is caused by the conflicting policy objectives of confining the legislation’s protection to those responsibly acting in the public interest, and of preventing any chilling effect on whistleblowing if protection is uncertain (Bowers et al. 2012, p.ix).

“The most obvious example lies in the test for good faith, which focuses on motive. Whilst those who act other than in the public interest are therefore not protected, employers are encouraged to discredit the whistleblower rather than focusing on what they disclose”.

In that regard, Dame Janet Smith’s Shipman Inquiry report argued that (Bowers et al. 2012, p.10):

“if employers are able to explore and impugn the motives of the messenger when trying to justify having action taken against them, many messages will not come to light because organizations [providing advice to whistleblowers] will have to advise those who come to them that their motives can be impugned and that they may not be protected by PIDA. There should thus be a public discussion of whether the words in good faith ought to appear in PIDA”.

Policy and law makers may reconsider whether the requirement for the whistleblower to act entirely in good faith is an appropriate standard to assess whether a disclosure is justified, as most of the time the good faith requirement shifts the attention from the wrongdoing reported to the personal characteristics of the whistleblower. To be consistent with the public interest and for the sake of the framework’s effectiveness, a legislative framework should be designed based on this reality rather than on the assumption that whistleblowers will only raise personal grievances because they do not recognize or identify with the well-being of the organization (Calland and Dehn 2004, p.6).
In case total removal of the good faith requirement is considered as unworkable, another alternative is to replace it with a test that makes clear that the quality or nature of the whistleblower’s true motivations be sufficiently bad as to remove the protection from the whistleblower. This position is consistent with a resolution passed by the Assembly of the Council of Europe on April 29, 2010 and which state that

“Any whistleblower shall be considered as having acted in good faith provided s/he had reasonable grounds to believe that the information disclosure was true, even if it later turns out that this was not the case, and provided he or she did not pursue any unlawful or unethical grounds”.

Although a test would need to be established to determine what must be regarded as ‘unethical’, this approach highlights the fact that the finding of a failure to act in good faith should be exceptional and should not be considered only because there was not a positive intent to act in the public interest.

Consequently, what matters the most is whether the information reported constitute wrongdoing in light of the law and of the organization’s internal rules, and whether the information is reliable. Not so much the motives, except for some extreme cases that occur in exceptional circumstances. This is consistent with the US FCA, which values information over motive. According to the FCA, blowing the whistle to gain a large recovery is fine as long as the information is novel and leads to successful prosecution (Miceli, Near and Morehead 2008 p.164).

b) Evidence from the interviews

Most of the literature analyzed and the interviews held for this research project support the view that whistleblowers report wrongdoing in good faith, with a view to provide useful information. Almost half of the participants perceive that most of the information reported by whistleblowers is useful, but that it sometimes needs to be deciphered and organized (two participants from the private sector, one enforcement authority and one journalist). Three participants said that they get a lot of useful information from whistleblowers, but that some triage is necessary to eliminate reports that were based on inaccurate perceptions. In that regard, one enforcement authority maintained that inaccurate reports are mostly due to honest mistakes in perceptions, probably because willfully misleading enforcement authorities in launching an investigation may lead to charges under the Criminal Code. The last
three participants answered that although they get a lot of useful information via whistleblowers, they even get more information that is not useful for their organization. Despite this fact, these participants maintained that their whistleblower reporting mechanisms are still worthwhile overall (one journalist, one think tank, and one private sector representative). None of the participants agreed with the statement that the useless information reported outweighs the benefits brought by the useful information reported by whistleblowers.

Almost all participants have said that bad faith reporting of wrongdoing only occurs in very rare instances, and none of the participants have said that misleading reports of wrongdoing seriously affect the management of the whistleblowing mechanisms or the management of the organization in general. Representatives from enforcement authorities, journalists and the representative from the think tank have also mentioned that vengeance, self-interest, or the need for publicity or fame may also motivate individuals to report wrongdoing. However, participants from enforcement authorities provide that they do not refuse to launch an investigation if they learn that the whistleblower does not report entirely in good faith. It is striking that nobody from the private sector or CSOs ever mentioned this as a ground for reporting. This may have to do with the fact that the motives of the whistleblowers who report within the organization will be more scrutinized, which may deter those with motives that depart too much from the public interest to report. CSOs may also see whistleblowers’ motives in a more favorable light considering that their role and mandate is to provide support and advice to whistleblowers, particularly those who are subject to reprisals.

One journalist and two representatives from CSOs argued that the perceived motives of whistleblowers are too often used to attack their credibility, which contributes to affect the public’s perceptions about whistleblowers. One participant from a CSO argued that it is extremely challenging to establish whistleblowers’ motives with certainty, and that those should not matter in the decision about whether to launch an investigation. A majority of participants agreed with the statement that the desire to harm others may coexist with the public interest.

c) Conclusions

The literature and empirical evidence suggest that most of the information reported is useful, and that whistleblowers rarely report misleading information in bad faith. The
literature suggest that Policy and law makers may reconsider whether the requirement for the whistleblower to act entirely in good faith is an appropriate standard to assess whether a disclosure is justified, as most of the time the good faith requirement shifts the attention from the wrongdoing reported to the personal characteristics of the whistleblower. This is reinforced by some of the participants’ views that it is very difficult to establish a whistleblower’s motives with certainty.

4.4 The accountability of recipients of reports of wrongdoing

a) Evidence gathered from the interviews

How the recipient will handle reports of wrongdoing will have a strong influence on what will result from reports filed by whistleblowers, so it is extremely important that such recipients be made accountable with respect to how they assess those reports. A majority of participants have said that their organization seeks to ensure the accountability of recipients by implementing review mechanisms of their decisions. Depending on the structure of the organization, those who are responsible for reviewing the recipient’s decisions include the courts, top management, the Board of Directors, the Chief Compliance Officer, or the public.

Journalists said they do not have mechanisms within their organization to make them accountable for not publishing a story reported by a whistleblower, although one of them said that the prospect of the whistleblower going to another news agency may act as an incentive for journalists to do at least some due diligence assessment of the facts reported to them. However, journalists feel they can easily be made accountable for publishing a story that turns out to be inaccurate. The public can now easily and do regularly contact journalists by email and/or phone to express their opinions on stories published. Moreover, journalists held that the costs associated with defamation lawsuits are also a very important incentive to rigorously check the facts reported by whistleblowers before publishing a story. The enormous costs associated with defamation lawsuits contribute to making journalists accountable for the accuracy of the information they publish.

One of the enforcement authorities also mentioned that their office is made accountable by exposing the motives for deciding to investigate or not to the public. If an allegation of wrongdoing targets the conduct of someone within the enforcement
authority, another independent authority will be charged to investigate those allegations.
5 The State of Canadian Whistleblowing Law

This chapter will go over Canadian whistleblowing law and how it converges or departs from the literature and empirical evidence discussed in chapters 3 and 4. It will give an overview of the scope and nature of Canadian whistleblowing law in the public service and in the private sector. It will also provide a brief summary of key provincial laws and case law on whistleblowing.

5.1 Whistleblowing in the federal public service

5.1.1 Building appropriate mechanisms to report wrongdoing in the federal public service

In 2006, the government passed the Public Servants Disclosure Protection Act (PSDPA) in response to a very serious and mediatized corruption scandal referred to as the sponsorship scandal (for more details on the sponsorship scandal see CBC 2006). The purpose of the Act is to establish a procedure for the disclosure of wrongdoing in the public sector, and protect persons who disclose wrongdoings. The Act came into force in 2007.

The PSDPA applies to most of the federal public sector, i.e., approximately 400,000 public servants, which include government departments, agencies, parent Crown corporations, the Royal Canadian Mounted Police (RCMP), and other public sector bodies. The Act does not apply to the Canadian Forces, the Canadian Security Intelligence Service, and the Communications Security Establishment, but these organizations are required to establish their own mechanisms to deal with wrongdoing that must be similar to those set out in the Act. The Act does not apply to elected officials or their staff, and employees of the House of Commons and the Senate are also excluded (PSIC 2013).

The PSDPA requires the establishment of internal reporting structures within most of the federal public sector since the passage of the PSDPA in 2007. Section 10 requires chief executives (e.g., a Deputy Minister) of a federal department or agency to establish internal procedures to manage disclosures made pursuant to the PSDPA. In addition, each chief executive of a department or agency must designate a senior officer to be responsible for receiving and dealing with disclosures of
wrongdoing made by employees of their own department or agency (section 10 PSDPA). As such, public servants have the choice to disclose the wrongdoing to their immediate superior or to the senior officer designated for that purpose by the chief executive of the department or agency. The identity of the whistleblower, potential witnesses and of the alleged wrongdoer must be protected according to subsection 11(1) (a) of the PSDPA.

Section 12 of the PSDPA provides that a public servant may disclose to his or her supervisor, or the senior officer designated by the chief executive, “any information that the public servant believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the public servant has been asked to commit a wrongdoing”. If employees of a department or agency are reluctant to use the internal reporting mechanisms of their organization, section 13 of the PSDPA provides that a public servant may disclose information pursuant to section 12 of the PSDPA to the Public Sector Integrity Commissioner (the Commissioner), who is an independent Officer of Parliament whose raison d’être is to provide an alternative route to report wrongdoing outside a public sector entity.

What constitutes “wrongdoing” is defined by section 8 of the PSDPA. The definition provides for the following categories: (1) a contravention of any act of Parliament or of the legislature of a province (or any regulations arising thereof); (2) a misuse of public funds or a public asset; (3) a gross mismanagement in the public sector; (4) an act or omission that creates a substantial and specific danger to the life, health, or safety of persons or the environment; (5) a serious breach of a code of conduct established by a federal entity; and (6) knowingly directing or counselling a person to commit a wrongdoing set out in any of the previous categories. Depending on whether an act was reported internally or to the Commissioner, the designated official or the Commissioner have the sole discretion to determine whether the act reported falls under one of these six categories and whether it is appropriate to start an investigation.

When the Commissioner comes to a finding of wrongdoing following a disclosure made by a public servant or a member of the public on a balance of probabilities, he must table a report in Parliament that sets out (1) the finding of wrongdoing; (2) the recommendations, if any; (3) the time allowed to the employer to provide
observations on the Commissioner’s recommendations following the disclosure, if any; (4) the Commissioner’s opinion as to whether the employer’s response to his recommendations is satisfactory at that point in time; and (5) the employer’s written comments, if any (section 38(3.1) of the PSDPA).

The new regime for disclosures of wrongdoing was welcomed with enthusiasm soon after it came into force, but stakeholders were later disillusioned about the regime’s potential to effectively promote the public interest. Sulzner described the regime as the successful outcome of many years of advocacy that contributed to “a shift from a narrow, policy-based office with limited authority to a broad, legislatively created office with expansive authority” (Sulzner 2009, p.171). Sulzner provides that the creation of the Public Sector Integrity Commissioner’s Office “is a successful example of knowledge speaking to power”, but which “fortuitously coincided with the desire of the Liberal Party to use whistleblowing legislation to blunt the political damage caused by the sponsorship scandal and the subsequent interest of the Conservative Party in making the PSDPA the centerpiece of the *Federal Accountability Act* to clean up government and restore integrity” (Sulzner 2009, p.171).

In contrast, Saunders and Thibault argue that the PSDPA does little to convince whistleblowers that it is safe to come forward without fear of retaliation because (1) it does not encourage truth telling; (2) it does not provide protection against retaliation; (3) there is a lack of mandatory action that would produce change and produce a culture of right-doing; and (4) political leaders do not value disclosure (Saunders and Thibault 2010).

In addition, the Federal Accountability Initiative for Reform (FAIR) also provides a long list of deficiencies with the PSDPA, which includes (1) the law’s purpose, objectives, and assignment of responsibilities are unclear; (2) the scope of the law is very narrow; (3) the avenues for seeking investigation and redress have been restricted rather than expanded; (4) the coverage of wrongdoing excludes most real-life situations; (5) the provisions for investigations, sanctions, and corrective action are inadequate; (6) most complaints of reprisal are likely to be rejected; (7) the Public Sector Integrity Commissioner’s role vis-à-vis the Tribunal is inappropriate; (8) the tribunal is unlikely to protect anyone; (9) the entire process is shrouded in
impenetrable secrecy; and (10) the law is unwieldy, complex, and costly. This criticism is echoed to a large extent by Transparency International through their shadow report on the implementation of the United Nations Convention Against Corruption (UNCAC) by Canada (Transparency International Canada 2013).

In fact, despite all the mechanisms established by the PSDPA for the reporting of wrongdoing, there appears to be a serious lack of confidence in the ability of the law to effectively promote the public interest. The public servants’ and the public’s trust in the Office of the Public Sector Integrity Commissioner or at least, in the legal framework in which it must operate, is greatly affected by ongoing and widespread discontent over the number of cases that have been investigated and led to a report in Parliament in the seven years since the Commissioner’s Office was established, and how those cases were handled (Brennan 2014; Valiante 2014; Transparency International Canada 2013, p. 18; Millan 2014). Of the 525 disclosures to the Commissioner from April 1st 2007 to March 31st 2014, only 9 led to the case reports that were tabled before Parliament (PSIC 2014). Such results certainly have a negative effect on the public servants’ trust that the wrongdoing they report will be taken seriously.

The following subsection will discuss some of the characteristics of the PSDPA that contribute to create this lack of trust in the effectiveness of the PSDPA in promoting the public interest.

5.1.2 Information that the Commissioner must or may refuse to investigate according to the PSDPA

There are a number of exceptions to the principle that disclosures made in accordance to sections 12, 13, 14 and 16 of the PSDPA will be investigated under the Act. For instance, sections 13(2) and 30 of the PSDPA provide that the public servant cannot disclose to the Commissioner information that qualifies as a confidence of the Queen’s Privy Council for Canada in respect of which subsection 39(1) of the Canada Evidence Act applies, or any information that is subject to solicitor-client privilege. Subsection 39(1) of the Canada Evidence Act reads as follows:
39. (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen’s Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

(2) For the purpose of subsection (1), “a confidence of the Queen’s Privy Council for Canada” includes, without restricting the generality thereof, information contained in

(a) a memorandum the purpose of which is to present proposals or recommendations to Council;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) an agenda of Council or a record recording deliberations or decisions of Council;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

(3) For the purposes of subsection (2), “Council” means the Queen’s Privy Council for Canada, committees of the Queen’s Privy Council for Canada, Cabinet and committees of Cabinet.

(4) Subsection (1) does not apply in respect of

(a) a confidence of the Queen’s Privy Council for Canada that has been in existence for more than twenty years; or

(b) a discussion paper described in paragraph (2)(b)

(i) if the decisions to which the discussion paper relates have been made public, or
Moreover, section 17 of the PSDPA provides another exception to the Act: a disclosure of “special operational information” within the meaning of subsection 8(1) of the Security of Information Act (SIA) cannot be disclosed pursuant to the Act. The definition of “special operational information” under subsection 8(1) of the SIA covers sensitive matters such as intelligence, armed conflicts, intelligence capacities, or technologies and covert operations.

According to section 23 of the PSDPA, the Commissioner must refuse to investigate a disclosure made under the Act if a person or body acting under another Act of Parliament is dealing with the subject matter of the disclosure. However, the Commissioner may investigate a disclosure that is under investigation by a law enforcement authority, except if the target of the investigation is a member of the RCMP. Section 24 of the PSDPA also provides that the Commissioner may refuse to deal with a disclosure or pursue an investigation if he is of the opinion that:

...(a) the subject matter of the disclosure or the investigation has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under another Act of Parliament;

(b) the subject matter of the disclosure or the investigation is not sufficiently important;

(c) the disclosure was not made in good faith or the information that led to the investigation under section 33 was not provided in good faith;

(d) the length of time that has elapsed since the date when the subject of the disclosure or the investigation arose is such that dealing with it would serve no useful purpose;

(e) the subject matter of the disclosure or the investigation relates to a matter that results from a balanced and informed decision-making process on a public policy issue; or

(f) there is a valid reason for not dealing with the subject matter of the disclosure or the investigation.

In addition, the Commissioner may refuse to deal with a disclosure or pursue an investigation if the subject matter relates solely to a decision that was made in the exercise of an adjudicative function under an Act of Parliament (subsection 24(2) of
the PSDPA) or if the subject matter falls under the purview of the Conflict of Interest and Ethics Commissioner (subsection 24(2.1) of the PSDPA).

Finally, the Commissioner does not have sufficient powers to obtain information that is outside the public sector. Section 34 of the PSDPA provides that if the Commissioner’s investigation requires him to obtain information outside the public service, he must cease that part of his investigation and may refer the matter to any competent authority. This is an important limitation to the powers of the Commissioner, and the researcher has not come across similar limitations in other jurisdictions.

The grounds whereby the Commissioner must or may refuse to investigate a matter reported by the whistleblower are large and in some cases, very much imprecise. The purpose of this study is not to determine whether the Commissioner’s discretion was used in a way that would allow Canadian whistleblowing law to effectively promote the public interest, as the researcher does not have sufficient information on how the Commissioner’s discretion was exercised. However, such broad and imprecise grounds for refusing to investigate potential wrongdoing may definitely affect the trust that public servants and the public have in the effectiveness of the Commissioner’s Office to look into allegations of wrongdoing. These grounds apply to disclosures that would constitute wrongdoing and otherwise be acceptable under sections 8, 12 and 13. The ground for refusing to investigate for “any valid reason” as provided by section 24(1)(f) of the PSDPA is particularly problematic. One participant to the study claimed that the “any valid reason” ground accounts for about 30 per cent of the refusals to investigate by the Commissioner’s Office. The lack of clarity about how the Commissioner’s discretion to refuse to investigate is applied may negatively affect the perceptions that appropriate reporting of wrongdoing is part of the government of Canada’s institutional culture, that it will be supported by top management of the federal government and that something will happen following the exposure of wrongdoing internally or to the Commissioner.

In fact, at least three participants have said that too many disclosures are not investigated under the PSDPA, and that creating a regime to encourage federal service employees to speak out while refusing to launch investigations in most cases is extremely unfair for the whistleblower, and counterproductive for all stakeholders
involved, including the public (two participants from CSOs and one from the private sector). These weaknesses may certainly discourage some federal employees to report wrongdoing to the Commissioner’s Office, but this apparent lack of trust from public servants and the public may spill over how federal employees trust internal reporting in the Canadian government, which may negatively affect the opportunity of federal departments and agencies to first address the wrongdoing, before employees make anonymous leaks outside the organization.

As discussed earlier in this subsection, a public servant cannot disclose information to the Commissioner that qualifies as a confidence of the Queen’s Privy Council for Canada pursuant to subsection 39(1) of the Canada Evidence Act. Such confidence mostly relates to information arising from policy discussions, recommendations and decisions; as well as records of government decisions that may be included in memoranda to Cabinet, discussions papers, records of deliberations or decisions, communications between ministers of the Crown with respect to government decisions or the formulation of government policy, or draft legislation. Moreover, section 2(1) excludes from the definition of “public sector” the Canadian Forces, the Canadian Security Intelligence Service and the Communications Security Establishment. In addition, according to section 17 of the PSDPA and section 8 of the Security of Information Act, “special operational information” must not be communicated under the PSDPA.

The grounds for establishing such exceptions are obvious. There are several legitimate reasons to keep policy discussions involving ministers of the Crown and other senior public officials confidential, including national strategic interests and the promotion of frank and candid policy discussions among senior public decision-makers. In addition, restrictions on the disclosure of sensitive national security information undoubtedly promote the public interest as their purpose is to prevent that criminal groups, rogue states and the like access information that might affect national security.

However, when wrongdoing occurs in relation with the Queen’s Privy Council confidences, the Canadian Forces, the Canada Security Intelligence Service, the Communications Security Establishment or any special operational information as provided by section 8 of the Security of Information Act, there appears to be a lack of
accountability about how any such allegations of wrongdoing are addressed. Empowering a third party to review and act upon these allegations of wrongdoing may at least lessen any perceptions of conflicts of interest and improve the accountability of relevant public officials and organizations. This recipient could decide, based on the public interest and clearly established guidelines, which information may or may not be disclosed to the public.

This has already been done in the past in similar circumstances when Richard Colvin, a Canadian diplomat posted in Kabul, disclosed during parliamentary proceedings that Afghan detainees were being transferred from Canadian to Afghan forces while the former knew the detainees were going to be tortured by the latter. The opposition was able to officially request access to the relevant documents for the purpose of investigating the matter since they had more seats in the House of Commons than the government at the time. The government argued in response that they could not publicly disclose these documents as this would be against the public interest of preserving national security. The government and the opposition came to an 11th hour agreement whereby specific Members of Parliament (MPs) and a special panel of three judges would review the documents and assess which ones were relevant to the allegations. Then, the relevant documents were referred to a panel of arbiters to decide how they can be made available to all MPs, and to the public (Brennan 2010).

Although this process appears to be way too cumbersome to be re-edited for every disclosure of a sensitive nature from the federal public sector, it could inspire federal lawmakers to appoint an independent external recipient who would be responsible for reviewing disclosure that are currently excluded from the scope of the PSDPA because they are too sensitive.

5.1.3 Protection from reprisals

A federal public servant must have done a protected disclosure in order to be eligible for protection from reprisals under the PSDPA. The PSDPA defines a protected disclosure as “a disclosure that is made in good faith and that is made by a public servant (1) in accordance with the Act; (2) in the course of a parliamentary proceeding; (3) in the course of a procedure established under any other Act of Parliament; and (4) when lawfully required to do so” (section 2(1) of the PSDPA).
In order to qualify as a disclosure “in accordance with the Act”, a disclosure must be related to a “wrongdoing” as defined by section 8 of the PSDPA:

- A contravention of any Act of Parliament or of the legislature of a province (including regulations);
- A misuse of public funds or public assets;
- Gross mismanagement in the public sector;
- 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;
- A serious breach of a public service code of conduct; and
- Knowingly directing or counseling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

The scope of “wrongdoing” under the PSDPA appears to be drawn closer to the scope of UK’s PIDA rather than the more elastic concept of what constitutes wrongdoing in the US under the WPA (Bowers 2012, p.47). Moreover, the public servant must believe that the information he reports “could show that a wrongdoing has been committed or is about to be committed” in order to be protected under the PSDPA. In the UK, the whistleblower is protected if the information reported “tends to show” that a relevant failure as defined by PIDA has occurred, which appears to constitute a lower threshold to be eligible for legal protection from reprisals. In the US, whistleblowers must reasonably believe that the wrongdoing they report has occurred in order to be protected, which appears to be an even lower threshold because it is not tied to whether the whistleblower reported enough evidence that shows or tends to show that the wrongdoing has occurred. An indicator that whistleblower protections against retaliation may be problematic in the Canadian public service is that there have been only six cases of retaliation in more than seven years so far, three of which were settled out of court, and with the remaining three currently under negotiation between the parties. There has been no litigation so far because settlements have always been reached out of court.
The Commissioner’s power to investigate allegations of reprisals arise from section 19.1 of the PSDPA. Section 2 of the PSDPA defines reprisals as

“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 under section 33 [i.e., a disclosure by a member of the public]:

(a) a disciplinary measure;

(b) the demotion of the public servant;

(c) the termination of employment of the public servant [...];

(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 the paragraphs (a) to (d)”.

The Commissioner's decision as to whether reprisals occurred is based on the balance of the probabilities. Section 19.3 of the PSDPA provides that the Commissioner may refuse to deal with a complaint of reprisals if he is of the opinion that

“(a) the subject matter of the complaint has been adequately dealt with, or could more appropriately be dealt with, according a procedure provided for under an Act of Parliament, other than this Act, or a collective agreement;

(b) if the complainant is a member or former member of the Royal Canadian Mounted Police, the subject matter of the complaint has been adequately dealt with by the procedures referred to in subsection 19.1(5);

(c) the complaint is beyond the jurisdiction of the Commissioner; or

(d) the complaint was not made in good faith”.

One participant to the study opined that the Commissioner's Office undertakes an investigation for about 50 per cent of the allegations of reprisals. When the Commissioner considers that reprisals may have occurred or if there was a lack of collaboration from the relevant civil servants, or if it is in the public interest that the case is heard, the Commissioner may refer the case to the Public Servants
Disclosure Protection Tribunal established under subsection 20.7(1) of the PSDPA. The tribunal will determine whether reprisals have taken place against the complainant. If it does determine that reprisals have taken place, it may order a remedy in favor of the complainant, order disciplinary action against any person identified by the Commissioner in the application as the person or persons who took the reprisals, or both (subsection 20.4(1) of the PSDPA).

Complaints of reprisals may also be settled out of court pursuant to section 20 to 20.2 of the PSPDA. At any time during an investigation, the Commissioner may appoint a person as a conciliator for the purpose of attempting to bring about a settlement of the complaint. The settlement must be agreed to by the complainant and the person with the authority to implement the remedy. The Commissioner must also review the terms of the settlement and has full discretion as to approve or reject the terms.

A participant to the study maintained that the process to benefit from protections against retaliation may take two to three years, which significantly affects the whistleblowers’ ability to earn their living in the meantime. The judicial process is heavy and requires the whistleblower to be represented by an attorney, and there is no financial support available to cover the costs incurred. There are at least four participants to this study who have questioned the effectiveness of the process to protect whistleblowers from retaliation in the federal public sector.

Another impediment to the effective protection of whistleblowers in the public and in the private sectors is that they must rely on public authorities (the Public Sector Integrity Commissioner or police forces) to seek redress for illegal reprisals under any applicable Canadian law that seek to protect whistleblowers in Canada. This contrasts with the US and UK law, where whistleblowers may take their own cases to the courts if the relevant authorities decide not to take action.

Another limitation to the effective protection of whistleblowers in the Canadian federal public service is that anonymous reports are currently not allowed, either if one chooses to report internally or to the Commissioner. This contrasts with anonymous reporting procedures for publicly traded Canadian corporations pursuant to Multilateral Instrument no. 52-110 on Audit Committees (paragraph 2.3(7)).
5.1.4 Accountability of the federal public service or the Commissioner's Office

The Office of the Public Sector Integrity Commissioner may be held accountable for its decisions in three different ways. First, all the Commissioner’s Office decisions are clearly supported by motives that rely on applicable legislation and made available to the whistleblower and the alleged wrongdoer. Second, the Commissioner’s decisions are reviewable by federal courts according to section 51.2 of the PSDPA and section 18.1 of the Federal Courts Act. Third, if public servants believe that the Commissioner’s Office has committed wrongdoing as defined by the PSDPA while it handled their disclosure, they may make their own disclosure to the Office of the Auditor General who has, in relation to that disclosure, the powers, duties, and protections of the Commissioner under the PSDPA (Section 14 of the PSDPA). So far, there have been 12 disclosures made to the Auditor General since 2007. One of them was unsubstantiated, two led to a report that was tabled in Parliament and which found that wrongdoing had occurred in the Commissioner’s Office, and the rest of the disclosures are still under investigation (OAG-BVG.gc.ca 2014). Therefore, there are ways to hold the Commissioner’s Office accountable if its decisions constitute wrongdoing as defined by the PSDPA. However, all these accountability mechanisms are tied to the scope of the PSDPA and other relevant laws and cannot address whether the legal framework itself has loopholes or deficiencies.

5.2 Whistleblowing law applying outside the federal public sector in Canada

5.2.1 Internal mechanisms to report wrongdoing in the private sector

In the private sector, whistleblower policies seem to vary to a great extent from one organization to another, and therefore it is difficult to generalize about how effective they are.

*Canadian Multilateral Instrument 52-110* requires publicly-traded companies to have a policy and procedure in place to address and manage (1) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (2) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters. However, this provision only applies to wrongdoing
that is related to financial matters and does not apply to the reporting of other breaches of the law or of the organization’s internal rules. Moreover, many corporations that are not publicly traded are not subject to this instrument and many do not have whistleblowing mechanisms. This contrasts with the US *Sentencing Guidelines* and the UK *Bribery Act*, which provide powerful incentives for all organizations to adopt appropriate mechanisms to detect fraud, bribery and corruption.

Canadian laws should create the right incentives for corporations that are not publicly-traded to adopt the right standards for the reporting of wrongdoing within their organization. Their biggest incentive to adopt such mechanisms is to avoid that employees make disclosures externally, and perhaps to be more efficient at detecting fraud that may harm the organization; but not every organization realizes these potential benefits of whistleblower mechanisms. In fact, several participants took the view that the vast majority of businesses in Canada did not have mechanisms in place to report wrongdoing, or that those were badly set up (two CSO representatives, two private sector representatives, and one think tank representative). Appropriate private sector accountability mechanisms include making the recipient of reports accountable to the Board of Directors or one of its committees chaired by an independent director. Recipients may also be accountable to a senior ethics officer, who is then accountable to the Board.

### 5.2.2 Key provincial whistleblowing laws

a) Provincial public sector whistleblowing laws

In May 2014, seven of ten Canadian provinces had whistleblowing laws for the reporting of wrongdoing within the public service, i.e., Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia and Newfoundland and Labrador (Transparency International Canada 2013; CBC 2014). All these laws appear to be largely drawn from the PSDPA (which has been discussed in subsection 5.1 of this dissertation and applies to the federal public sector), except Saskatchewan and New Brunswick, who have whistleblower protection legislation that apply to the private sector (CBC 2014; Government of Manitoba 2014; Canada.com 2012). Moreover, the SPGQ, Quebec's public service union, reported on 10 July 2014 that the
government is preparing a draft legislation to protect Québec public servants who disclose wrongdoing (SPGQ 2014).

b) Québec’s Anti-Corruption Act

In 2011, the government of Québec passed the Anti-Corruption Act “to strengthen actions to prevent and fight corruption in contractual matters within the public sector and to enhance public confidence in the public procurement process”. The Act establishes the Office of the Anti-Corruption Commissioner “as well as the mission and powers of the Commissioner”, and a “procedure to facilitate the disclosure of wrongdoings to the Commissioner” (Anti-Corruption Act, section 1). The Anti-Corruption Act defines “wrongdoing” as (Anti-Corruption Act, section 2):

“(1) a contravention of a federal or a Québec law or of a regulation made under such a law, if the contravention pertains to corruption, malfeasance, collusion, fraud or influence peddling in, for example, awarding, obtaining or performing contracts granted, in the exercise of their functions, by a body or a person belonging to the public sector or a contravention of any of sections 21.12 to 21.14 and 27.5 to 27.11 of the Act respecting contracting by public bodies (chapter C-65.1);

(2) a misuse of public funds or public property or a gross mismanagement of contracts within the public sector; or

(3) directing or counselling a person to commit a wrongdoing described in paragraph 1 or 2”.

In sum, the Act applies mostly to corrupt acts that relate to the awarding of public contracts by the Québec government.

Sections 26 to 30 of the Anti-Corruption Act deal with the procedure for disclosing wrongdoing to the Anti-Corruption Commissioner. Pursuant to section 26:

“Any person who wishes to disclose a wrongdoing may do so by disclosing information to the Commissioner that the person believes could show that a wrongdoing has been committed or is about to be committed, or that could show that the person has been asked to commit a wrongdoing”.

It is interesting to note that the Anti-Corruption Act uses language that is similar to section 12 of the PSDPA when it suggests that a disclosure under the Act should constitute “information that the person believes could show that a wrongdoing has
been committed or is about to be committed”. The wording of the Act did not constitute a limitation to the discretion of the enforcement authorities to investigate as one participant to this study mentioned that the enforcement authorities properly investigate almost all disclosures of wrongdoing. The only motive provided by the Act to refuse to launch an investigation is if “the matter is frivolous or does not fall within the Commissioner's mission” (Anti-Corruption Act, section 29). In that case, the Commissioner must inform the person who made the disclosure of his decision. This heavily contrasts with the numerous motives available to the Commissioner under the PSDPA to refuse to launch an investigation.

Another significant difference with the PSDPA is that the Quebec Anti-Corruption Act provides that a whistleblower may disclose information “despite the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1), the Act respecting the protection of personal information in the private sector (chapter P-39.1), any other communication restrictions under other laws of Québec and any duty of loyalty or confidentiality that may be binding on the person, in particular, with respect to an employer or a client” (Anti-Corruption Act, section 27). This is a clear sign that fighting corruption in the awarding of public contracts must have precedence on other legal obligations of confidentiality. The only restriction applicable to disclosures made under the Act is the duty to respect “professional secrecy between an advocate or a notary and a client” (Anti-Corruption Act, section 27(2)). On March 2014, there had been 2,448 reports to the Anti-Corruption Commissioner since the Act came into force, on 13 June 2011.

The Act recognizes that anonymity is an effective way to protect whistleblowers from reprisals by requiring that the Anti-Corruption Commissioner must take all necessary measures to protect the identity of persons making a disclosure. However, the Commissioner may communicate the identity of such persons to the Director of Criminal and Penal Prosecutions. Moreover, the Anti-Corruption Act prohibits taking reprisals “against a person who has disclosed a wrongdoing or has cooperated in an audit or an investigation regarding a wrongdoing, or again to threaten to take a reprisal against a person so that he or she will abstain from making such a disclosure or cooperating in such an audit or investigation” (Anti-Corruption Act, section 32). The term “reprisals” is given a large interpretation as it includes the demotion, suspension, termination of employment or transfer of the whistleblower, or any
disciplinary or other measure that adversely affects the employment or working conditions of the whistleblower (Anti-Corruption Act, section 33). The Anti-Corruption Act thus provides for both ex ante and ex post means of protection for whistleblowers against reprisals. On 31 March 2014, there were only three cases of reprisals that had been reported to the Anti-Corruption Commissioner, and the investigations were ongoing.

5.2.3 The criminalization of reprisals against whistleblowers

In response to well-publicized corporate frauds on the financial markets in the US in the early 2000s and several embarrassing public sector abuses in Canada, including the sponsorship scandal, the Canadian government enacted section 425.1 of the Criminal Code (Bowel 2011, p.28). Section 425.1 of the Criminal Code essentially acts as an injunction not to retaliate against employees for blowing the whistle, and applies to all employers in Canada, including the private sector. It creates a criminal penalty of up to five years imprisonment for any employer who retaliates against a whistleblower. The provision reads as follows:

425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,

(a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

(b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.

(2) Anyone who contravenes subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.
There are some positive aspects underlying section 425.1 of the Criminal Code. For instance, the law places the burden of non-retaliation on a wide range of individuals and is not limited to the employer itself. Of course, it applies to the employer, but also to a person acting on behalf of the employer and to any person in a position of authority in respect of the employee. According to Bowal, this means “the issue of whether a supervisor was authorized to retaliate in any instance is avoided because all of them have a direct compliance responsibility” (Bowal 2011, p.31). Moreover, the law prohibits any discipline that would “adversely affect the [whistleblower’s] employment”, which means that technically even shunning the whistleblower may fall under the scope of section 425.1 of the Criminal Code.

However, because of the criminal nature of the offence, the conviction of an employer under section 425.1 must be supported by evidence “beyond reasonable doubt” that the measures taken against the employee were applied with the intent to discourage him or her to blow the whistle or to retaliate for already having blown the whistle. In practice, meeting this evidence threshold may be difficult because there are many possible motives for imposing sanctions on employees, and such motives may be mixed or ambiguous. Likewise, the employee who reports wrongdoing must “believe” that an offence has been, or is being committed in order to be protected. It is not enough that an employee suspects the occurrence of wrongdoing, s/he must determine whether that wrongdoing constitutes an offence under federal or provincial law. Bowal opines that “courts may imply a reasonableness requirement to the belief, looking at objective evidence to establish reasonable and probable grounds”. However, “the belief is not merely in the wrongdoing, but in an offence: the employee must relate the wrongdoing to an offence” (Bowal 2011, p.32). Moreover, employees reporting wrongdoing must be careful of their perceived motives for reporting wrongdoing to enforcement authorities (Bowal 2011, p.33):

“A countervailing criminal offence of public mischief is reserved for those who, with intent to mislead, cause a peace officer to investigate. Not all regulators will be “peace officers”, like police, but there may be other legal sanctions in legislation and at common law (e.g., malicious prosecution) for filing frivolous and vexatious reports, such as section 140 of the Criminal Code”.

A further limitation of section 425.1 of the Criminal Code is that it also fails to act preventively by not protecting disclosures of prospective offences.
Section 425.1 of the *Criminal Code* is distinct from many whistleblower legislations around the world because it provides protection to employees only when they report wrongdoing “to a person whose duties include the enforcement of federal or provincial law”. Such a person includes a police officer or the representative of a regulator because they are empowered by the law to take enforcement action, but excludes any representative of the employer, which was considered legitimate by the Supreme Court of Canada in the Merk case discussed in subsection 5.2.2c) of this dissertation.

The fact that employees will not be protected by the law if they raise their concerns internally will unlikely be in the best interest of the organization and may lead to absurd situations. It certainly does not sit well with widespread evidence that an overwhelming majority of whistleblowers feel more comfortable to first address their concerns within their organization (Ethics Resource Center 2014, p.29; PCAW 2010, p.6).

Transparency International and the Organization for Economic Cooperation and Development (OECD) also raise some issues with the enforcement of 425.1 of the *Criminal Code*. Since it came into force in 2005, there are no recorded cases under that provision (OECD 2011, p.55). Moreover, in order to be protected by section 425.1 of the *Criminal Code*, an employee must blow the whistle only in relation to an illegal act, not merely an unethical act. Therefore, according to Bowal, the employer may retaliate against an employee who reports unethical behavior, such as “breaches of the employer's own policies, manifestation of unfairness or abuse of power, gross mismanagement of financial resources, or if the employee dissents in how the business is operated in some respect” (Bowel 2011, p.32). In addition, Section 425.1 only protects employees and does not cover independent contractors.

According to Bowal, the criminal deterrent effects of section 425.1 are limited for the following reasons (Bowel 2011, p.34):

- “employees are unlikely to know federal and provincial regulatory legislation well enough to know when their employers are offending, and how to report to law enforcement authorities. Most employees would rather ‘walk than talk’;
- The new law provides no incentive for whistleblowers to come forward;
• The proof of retaliation, motivated only by employer criminal bad faith, all beyond a reasonable doubt will always be a challenge;

• Employers are not prohibited from disciplining employees in all instances; and

• The effectiveness of section 425.1 will depend on the willingness of the Crown to enforce this law and to see retaliation against legitimate whistleblowers as a serious crime. Will the police and the Crown view this sort of employer response as a criminal behavior?”

Besides section 425.1 of the Criminal Code, the main protection for whistleblowers so far in Canada lies in a number of more specific federal and provincial laws that outlaw retaliation against insiders who make a complaint or collaborate with an investigation of a regulator. These protections are associated with a range of activities such as human rights, labor, and occupational health and safety (Bowal 2011, p.29). Section 425.1 of the Criminal Code is thus innovative in the sense that it applies to all employers across Canada, while the other anti-retaliation legislation to date were limited to precise activities or applied only to specific provinces.

Another impediment to the effective protection of whistleblowers under section 425.1 of the Criminal Code is that they must rely on public authorities to pursue their cases before the appropriate courts, in contrast with the US and the UK, where whistleblowers may take their own cases to the courts.

5.3 Financial incentives

As discussed earlier, the US made the policy decision to reward whistleblowers with financial incentives to promote whistleblowing effectiveness, while the UK chose to dismiss that option when they elaborated PIDA. On its part, Canada has just set up its first “reward for tips” program, the Offshore Tax Information Program. The program has generated a flurry of more than 1,000 calls leading to nearly 100 active cases and was described as “quite promising” according to Toronto tax experts (Schecter 2014).

However, the interviews revealed that Canadian stakeholders who participated in this study appeared to be skeptical at the idea of giving financial rewards to whistleblowers for reporting wrongdoing. Only three participants have mentioned rewards as an appropriate way to incentivize employees to report wrongdoing, and
one participant mentioned that most whistleblowers he knows would feel insulted at the idea of receiving money for reporting wrongdoing. In response to the observation that rewards might help to compensate for the reprisals suffered by some whistleblowers, he took the view that it may be far better to take care of whistleblowers while they are involved in judicial or administrative processes resulting from their report rather than rewarding them with a bounty. Other participants also observed that rewards may lead to more bad faith or misleading reports, which is echoed by US whistleblowing experts from the academia who said that “incentives can prompt frivolous claims and induce people to fabricate or exaggerate concerns just to receive a financial reward” (Schecter 2014). However, I never found any empirical evidence backing that statement. Moreover, several participants to the study have said that it is fairly easy for experienced investigators or compliance officers to denote that the information provided is frivolous or not reliable.

Therefore, although it may be too early to come to the conclusion that granting rewards to whistleblowers will effectively promote the public interest in the context of whistleblowing, the Offshore Tax Information Program could be used as a pilot in order to determine whether rewards prompt frivolous claims and induce people to fabricate or exaggerate concerns just to receive a financial reward.

5.4 Reporting wrongdoing to the media

In the federal public sector, there is a very narrow possibility to report wrongdoing to the media while still being protected by the PSDPA. Section 16(1) of the PSDPA provides that a disclosure pursuant to the Act may be made to the public if there is not sufficient time to make the disclosure according to the mechanisms in place and that the employee believes on reasonable grounds that the subject matter of the disclosure is an act or omission that (1) constitutes a serious offence under an Act of Parliament or of the legislature of a province; and (2) constitutes an imminent risk of a substantial and specific danger to the life, health, and safety of persons, or to the environment. However, section 16(1) of the PSDPA does not apply to the disclosure of information that is subject to any restriction created by or under any Act of Parliament (section 16(1.1) of the PSDPA). There are no protections for whistleblowers in the private sector because the internal rules of an organization
never encourage the reporting of wrongdoing outside the organization and section 425.1 of the Criminal Code grants protection only to the whistleblowers who report wrongdoing to enforcement authorities.

With respect to the private sector, most organizations prohibit external disclosures. However, all private sector participants to the study agreed that many private organizations should not be trusted with how they handle internal reports of wrongdoing. The challenge is to make private organizations with weak integrity standards accountable, while not implementing transparency mechanisms that could be abused to unduly tarnish the reputation of well-managed organizations. One participant from the private sector suggested there could be a designated recipient that would be responsible for receiving reports of wrongdoing from businesses, such as a regulator, who could ensure that the wrongdoing is addressed while preserving the reputation of the business.

Beyond urgent situations as described in section 16(1) of the PSDPA, Canadian whistleblowing law does not attempt to determine in which circumstances the reporting of wrongdoing to the media is legitimate and appropriate, as done in the UK under PIDA’s three-tiered disclosure regime.

However, there is an ongoing tension that exists between Section 2b) of the Canadian Charter of Rights and Freedom, which guarantees everyone’s freedom of speech, and the duty of loyalty employees owe to their employer. Canadian tribunals advocate that employees strike a balance between the duty of loyalty and recourse to public disclosure of wrongdoing. Generally, labor dispute adjudicators tend to follow the Supreme Court of Canada’s guidance established in 1985 in Fraser v. PSSRB, which held that “in some circumstances, a public servant may actively and publicly express opposition to the policies of a government, particularly if the government were engaged in illegal acts or if its policies endangered the life, health, or safety of the public servant or others” (Millan 2014). This landmark decision has been further clarified by subsequent decisions, which have subjected the employees’ right to publicly disclose a situation involving their employer to five general conditions (Stikeman Elliott 2008; Millan 2014):

“(1) the employee must exhaust all internal recourses;
(2) the employee must act entirely in good faith and for serious objective reasons;

(3) the extent of the public disclosure must not be out of proportion to the desired objective;

(4) the employee must only disclose facts which are relevant and necessary, and even then, only after having verified the accuracy of those facts; and

(5) the employee can only be held liable for his own statements and reasonably foreseeable comments which others might make based on such statements, but not for instances of media sensationalism or for erroneous or exaggerated interpretations”.

If a whistleblower meets those criteria, an employer normally would not be able to sanction him or her if the wrongdoing is publicly disclosed despite the duty of loyalty. In light of the of the literature and empirical evidence discussed in subsections 4.2 and 4.3 of this dissertation, these criteria appear to be very strict, even if these are supposed to act as guidance as to when a public disclosure of wrongdoing would be acceptable under Canadian law. While bearing in mind that whistleblowers should not have to report wrongdoing inside an organization that has done nothing to earn the trust of its employees, and that it may be counterproductive to ask whistleblowers to be entirely in good faith when they report wrongdoing, these criteria could inspire the legislator if the federal or provincial governments ever decide that more guidance is needed to determine when whistleblowers may publicly report wrongdoing, while still benefiting from statutory protections against reprisals.

Moreover, it is important to mention that the general rule granting the first opportunity to the employer to address a wrongdoing reported by a whistleblower appears to be subject to a broad consensus in Canada, which was confirmed by the Supreme Court in Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771 [2005] 3 SCR 425 (Millan 2014). In this decision, the court has given a broad interpretation of Saskatchewan’s section 74 of the Labor Standards Act, which reads as follows:

74(1) No employer shall discharge or threaten to discharge or in any manner discriminate against an employee because the employee:

(a) has reported or proposed to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada;
In that case, Linda Merk was the office manager of the union Local who was fired after writing a letter to the union’s International President advising that the president of the Local and its business manager were misappropriating funds. The trial judge had found that the misappropriation had indeed taken place, but since she interpreted the term “lawful authority” to mean “a person or institution authorized by law to investigate offences”, she did not convict the employer. The Saskatchewan Court of Appeal upheld the ruling of the trial judge. However, the Supreme Court reversed those decisions by ruling in favor of a broad interpretation of the whistleblower protection provision contained in the Saskatchewan’s Labor Standards Act, holding that employees internally reporting wrongdoing to persons up-the-ladder within the organization enjoyed the same protection as employees reporting wrongdoing to public authorities pursuant to section 74 of that Act.

This decision implicitly recognizes that reporting wrongdoing internally should be encouraged, but that the organization should be made accountable if it fails to use the information reported by the whistleblower in a way that effectively promotes the public interest.
6 Investigative journalism and promoting accountability

So far, we have discussed what is whistleblower effectiveness, how can whistleblowing law can effectively promote the public interest, and how Canadian whistleblowing law converges or departs from that model. This chapter will discuss the importance of investigative journalism in exposing wrongdoing and making organizations that are not subject to appropriate accountability mechanisms accountable, and how investigative journalism was successful to address shortcomings of Canadian whistleblowing laws in Eastern Canada.

6.1 The importance of investigative journalism

The importance of free press for a healthy and sustainable democracy has been widely acknowledged for some time. Edmund Burke allegedly observed that “there were Three Estates in Parliament; but, in the Reporter’s Gallery yonder, there sat a Fourth Estate more important far than they all” (Baker 2007, p.5). Johann Graf Lambsdorf, father of the Corruption Perceptions Index, also found a strong negative correlation between the amount of corruption and the extent of freedom of press in different countries. He suggests that “a successful media is a strong impediment to corrupt politics by making it difficult for elites to get away with corrupt behavior” (Lambsdorff 2007, p.46). In 2006, the Senate Standing Committee on Transport and Communication also emphasized how important free press is to democracy:

“News and information and the discussion of opinion are fundamental to the successful workings of democracy within modern complex societies... It is impossible to have democracy without citizens and impossible to exercise meaningful citizenship without access to news, information analysis and opinion” (Senate of Canada 2006, p.65).

Although concerns exist in some countries about the independence, priorities or interests of the media, they are most of the time an essential means by which conduct is capable of being scrutinized and those in positions of power are called to account for their actions. The mere existence of free media, whether domestically or abroad, has a powerful deterrent effect on misconduct, as can be exemplified by the popular test people often use when they face difficult ethical dilemmas: “would I feel comfortable if my actions were reported in the media?” This test will lead to two lines
of behavior: (1) the person will act in a way in which she is prepared to account; or (2) the person will not have to act in such a way as she will use her influence to ensure she will not have to account for her actions. The importance of the relationship between whistleblowers and the media is extremely important because whistleblowing may often be the only check on that second course of conduct, and this is particularly true for wrongdoing in government (Calland and Dehn 2004, p.11). As stated by Chuck Lewis, a well-known investigative journalist based in Washington (Calland and Dehn 2004, p.22):

“[The media] is the one place outside the powerful – almost terrifyingly so – instruments of government. It is the one place you can shine a light on government or you can talk about government so that the public will learn about what you have heard or found out or know. There really is only one place, and that is the media. That sets up a whole set of issues that are complicated because a lot of the media is seriously flawed”.

The flaws Chuck Lewis is referring to are the powerful corporate or political interests that sometimes succeed at influencing news content, as well as what is being reported and what is not. As former US Supreme Court Justice Douglas said, “investigative journalists are a fragile bark on a stormy sea”, because they are rarely really sure how deeply committed the news organization they work for is to quality journalism (Calland and Dehn 2004, p.23). Therefore, because the plight of investigative journalist may have similarities with the plight of the whistleblower, they may sometimes develop a very close relationship by sharing the burden of the whistleblower’s story. In a classic case of whistleblowing, a whistleblower will help a journalist tell a story, and the journalist will protect the whistleblower source from ever being revealed or identified. Mr. Lewis also adds that whistleblowers are also often capable of going public to talk about what they saw and what they did. If that happens and there is a backlash caused by the story of the whistleblower, the criticism will be addressed to both the whistleblower and the news organization, which binds them inextricably together once the story is published (Calland and Dehn 2004, p.25).
6.2 Legal aspects of whistleblowing to the media

a) Analysis of the literature

Some legislation allows the media to play an active role in the implementation of the whistleblowing framework. For instance, while PIDA’s three-tiered approach favors internal disclosures as a first port of call, it also acknowledges that “public disclosures and the role of the media is recognized as an essential basis of PIDA as it is the ultimate and fail safe system of accountability in a democracy” (Calland and Dehn 2004, p. 117). Recognizing the important role of the media in exposing wrongdoing as part of a legislative framework for whistleblowers may help address the criticism that the media often mistakes its own interest with the public interest.

Unfortunately, the whistleblowing cases we hear often about in the media are those where everything went wrong, i.e., the reputation of the organization is badly hit and the whistleblower has lost everything. This phenomenon does little to reassure the public that whistleblowing is a safe and acceptable part of one’s duties towards his or her employer organization. This is in part due to the traditional view that whistleblowing necessarily involves public disclosures (Calland and Dehn 2004, p. 117).

Such perceptions appear to be more grounded in anecdotal rather than empirical evidence. Miceli, et al., provide that when whistleblowers publicize wrongdoing outside the organization, it is often because the wrongdoing was not corrected after the internal report, because they experienced retaliation, or because the nature of wrongdoing required it (e.g., when fraud and violence in the workplace requires involving the authorities) (Miceli, Near and Morehead, p.8-9; Ethics Resource Center 2014, p.29). Similarly, Callahan and Dworkin’s research suggest that the media does play an important accountability role for organizations with lower accountability standards. They found that employees are more likely to use external whistleblowing channels when their internal reporting produces no results, when top management is involved, or when they fear retaliation from hierarchical levels above the level of their supervisors (Callahan and Dworkin 1994).

Moreover, some of the literature argues that, external whistleblowing is more effective than internal whistleblowing. “Rothschild and Miethe’s interview results
show that 44 per cent of the external whistleblowers thought that their organization had changed its practices as a result of their disclosure, but only 27 per cent of the internal whistleblowers thought that their organization had changed its practices as a result of their disclosure” (Rothschild and Miethe 1999, p.126). In addition, Dworkin and Baucus also come to the conclusion that external whistleblowing is more effective than internal whistleblowing because it more often leads to investigations or other remedial actions by the organization (Dworkin and Baucus 1998). The downside is that external whistleblowers suffer more retaliation than internal whistleblowers (Apaza and Chang 2011, p.115).

One very important point to remember is that appropriately balanced whistleblowing laws should distinguish the organizations that can rightly be given the chance to address wrongdoing occurring from within, from those that cannot. In instances where the organization would have addressed the wrongdoing properly, the value of an external disclosure is questionable because the external recipient (i.e., the regulator or other enforcement authorities) will likely put these facts straight back to those in charge of the organization. However, it is clear that an organization where external disclosures are considered and used as the primary recipient is strong evidence of at least poor management and weak leadership (Calland and Dehn 2004, p.7).

Until recently, few legal systems were providing adequate protections for whistleblowers who raised a matter externally despite the fact that the disclosure was appropriate and done in good faith. This brings such whistleblowers to report wrongdoing anonymously, which often makes it more difficult to exchange information in case the enforcement authorities need more evidence. Therefore, there would be merit in a legislative framework explaining in details when outside disclosures, openly made, should be permitted and protected (Calland and Dehn 2004, p.7).

Moreover, although there is no doubt that legal incentives to report wrongdoing internally play a valuable role in establishing the right balance between the interests of all stakeholders, some commentators advise that whistleblowing laws should not unduly tie whistleblowers into an exhausting internal scheme (Calland and Dehn 2004, p.15):
“Not only do such arrangements risk obscuring rather than asserting accountability, they can confuse the message with the messenger”.

Allowing whistleblowers to go to the media if they choose to does not mean that the story will be published automatically. The news organization will need to evaluate the credibility and amount of evidence before deciding to publish the story of a whistleblower, and this decision is likely not only taken by the journalist involved. Anonymous allegations are even more sensitive. As the UNCAC’s Best practices for promoting responsible and professional reporting on corruption for journalists recommend, journalists should “always consider whether there is a strong public interest in publishing [anonymous allegations]” (2010, p.7). These practices also recommend that journalists carefully assess “whether the information has been corroborated by other sources and whether independent investigations have been carried out” (Best practices for promoting responsible and professional reporting on corruption for journalists 2010, p.7). Whistleblowers with solid credible evidence and the appropriate temperament to stand the heat arising from the publication of such stories are not common. As Chuck Lewis puts it (Calland and Dehn 2004, p.26):

“We tend to think that whistleblowers are everywhere, and it is common for there to be whistleblowers. But actually they are extremely rare, particularly ones that who are credible and know what they are talking about and who don’t have skeletons in their closet and have the psychological make-up to withstand the heat and all the pressure and don’t mind taking a hit financially”.

In addition, it is important to note that one’s right to freedom of expression may conflict with other people’s human rights, such as a person’s right not to “be subjected to arbitrary interference with his or her privacy, family, home, or correspondence, not to attacks upon his or her honor and reputation” (Universal Declaration of Human Rights 1948, resolution 217A). Courts will usually uphold the journalists’ right to freedom of information whenever there is a clear public interest in revealing the information, even if the disclosure of the information represents a breach of privacy or an offence towards one or more individuals (Best practices for promoting responsible and professional reporting on corruption for journalists 2010, p.6). Because the notion of public interest is vague, it is subject to interpretations by the courts. “However, there seems to be a large agreement that exposing a crime, including offences of corruption, is an issue of public interest” (Best practices for
promoting responsible and professional reporting on corruption for journalists 2010, p.6).

Another important issue relevant to the interactions between investigative journalists and whistleblowers is the increasing criminalization of leaking information to journalists, although this phenomenon is more predominant in the US than in Canada. US journalists have come under more scrutiny during the last decade and they are being increasingly pressured to disclose their sources, which sometimes includes the identity of whistleblowers. James Risen, a well-known journalist from the New York Times, was threatened with jail time for refusing to disclose information that would have been used during the trial of one of his sources. A federal appeals court ruled in 2012 that he would receive no First Amendment protection safeguarding the confidentiality of his sources – in this case former CIA employee Jeffrey Sterling. This precedent-setting court decision could create significant hurdles for investigative journalism and could be a further blow to First Amendment protections for reporters in the US (Pitzke 2013).

Although whistleblowers who leak information to Canadian journalists are better protected, their protection is not absolute. In R. V. National Post [2010] SCC 16, the Supreme Court of Canada stated that the use of the Wigmore criteria was a practical method to judicially approve a promise of journalist-source confidentiality on a case-by-case basis. Based on common law principles, everyone owes a general duty to give evidence relevant to the matter before the court so that the truth may be ascertained. Wigmore suggested that exceptions to this duty are recognized as privileges at common law according to which confidentiality of sources will be upheld if the following four criteria are met: (1) the communication originates in a confidence that it will not be disclosed; (2) the confidence must be essential to the relationship in which the communication arises; (3) the relationship must be one which should be “sedulously fostered” in the public good; and (4) the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth. The party seeking to prevent the disclosure has the onus to demonstrate on a balance of probabilities that each criterion has been met. This test was upheld by another Supreme Court decision the same year in Globe and Mail v. Canada (Attorney-General), 2010 SCC 41, which concluded that the Wigmore test was preferable to a
blanket class privilege or a constitutional protection for the journalist-source relationship (Globe and Mail v. Canada 2010, p.69):

“only where there would be a real risk that Mr. Leblanc’s answer would disclose MaChouette’s identity [i.e., the name of the source], should the judge ask himself whether, after an assessment of the relevant considerations, the balance of interests favors privilege over disclosure. For example, at the far end of the spectrum, if Mr. Leblanc's answers were almost certain to identify MaChouette then, bearing in mind the high societal interests in investigative journalism, it might be that he could only be compelled to speak if his response was vital to the integrity of the administration of justice. Ultimately, these matters will be for the judge to determine, but he must consider them”.

b) Evidence from the interviews

Nine of ten participants consider that reporting wrongdoing to the media can be in the public interest, including all representatives generally adopting a private sector perspective. Participants have adopted this view because whistleblowers must have a way to report wrongdoing when they do not trust the internal processes or the designated enforcement authority to act as recipient of the report. There is also a general consensus among participants that the possibility that the wrongdoing is reported in the media constitutes a serious deterrent to act against the law or an organization’s internal rules and values. One CSO participant argued that “the only thing that governments and large corporations really fear [in terms of exposing wrongdoing] is the exposure of wrongdoing by the media”, which is why reporting to the media is so dangerous for whistleblowers. That statement was backed by eight participants who perceived it was very dangerous for whistleblowers to report wrongdoing to the media, including an enforcement authority.

Participants also perceived that one of the main reasons why whistleblowers want to talk to the media is that they want the public to know about the wrongdoing. The examples of whistleblowers Edward Snowden and Richard Colvin were used by some of the participants to illustrate how strong motivations to expose situations publicly may bring whistleblowers to take significant risks that have the potential to have huge consequences on their career and personal lives. However, the desire to publicize wrongdoing is not exclusively associated with the will to promote the public interest. Some of the participants have mentioned encounters with whistleblowers
who were more motivated by vengeance or having their name mentioned in the news than serving the interest of the organization or the public interest.

A further downside of reporting wrongdoing to the media is that it makes investigations by enforcement authorities much more difficult because wrongdoers may start to cover their tracks and to act much more carefully (one enforcement authority). Moreover, several participants have said that the media always have their spin and the information they report is often not entirely accurate. This contradicts to some extent the statement made by other participants whereby the media generally carry out rigorous assessments of the facts before exposing wrongdoing because of the serious financial consequences that may arise from potential defamation law suits by alleged wrongdoers.

Finally, a majority of participants acknowledged that media stories also contribute in making internal investigations more effective. Seven of ten participants have said that they are aware of internal investigations that were triggered by reports of wrongdoing done through the media.

6.3 Investigative journalism in Canada

The understanding of journalism that prevails in Canada is rooted in the Enlightenment model, which is characterized by a culture centered on press freedom but dominated by commercial properties, and where journalists are considered professionals and where “information-oriented” journalism prevails. Such a model is less characterized by advocacy and taking a personal stance on some issues, and tends to keep opinion and advocacy separate (Valiante 2013, p.9). Such a model may be favorable to the disclosure of corrupt acts and other wrongdoing as it focuses on the truth and leaves aside all partisan political considerations that could potentially interfere with the objective reporting of wrongdoing.

Guiseppe Valiante, a young investigative journalist who has done his Master thesis within the Concordia University Department of Journalism, argues that investigative journalists play a key role in “holding politicians accountable and shedding light on moral transgressions”. In the results chapter of his thesis, he makes the point that investigative journalists “believe they have exposed state corruption and helped to influence the decisions by citizens to change the ruling power at the municipal and
provincial level” (Valiante 2013, p.17). Valiante’s thesis highlights three main reasons why investigate journalism has performed so well in Montreal to uncover corruption: (1) the rise of television program *Enquête*, (2) the increase in whistleblowers, and (3) the competitive Francophone market as well as organizational culture behind Montreal media institutions (Valiante 2013, p.21).

According to Valiante, whistleblowers from all backgrounds started to leak information on widespread corruption schemes to investigative journalists after a popular TV show began to discuss stories reported by whistleblowers. One of the key participants to his study maintained that so many whistleblowers came forward to journalists because nothing else was working, which means that “whistleblowers were hoping that news organizations would be able to fix what was ailing society” (Valiante 2013, p.68). Those who leaked information include public officials from the Quebec Department of Transport, large labor unions, construction companies, and even sources in the police (Valiante 2013, p.25):

“For example, former Montreal police chief Jacques Duchesneau, who was responsible for a scathing 2012 report on corruption in the construction industry when he was head of the province’s anti-collusion squad, told the Charbonneau Commission that he leaked his own report to the media because he feared provincial politicians would hide the report’s findings”.

Duchesneau feared his report would be buried by politicians, because in addition to prove that corruption was rife in Quebec’s construction industry, it also disclosed that that organized crime had infiltrated that industry, and labor unions, as well as political parties (these were being financed by dirty money) (Banerjee and Levesque 2012). This report had a huge impact in terms of how corruption was going to be addressed by Quebec authorities. The information communicated by whistleblowers and published by investigative journalists pushed the appropriate authorities to launch many corruption-related investigations, some of which are still ongoing at the moment (The Globe and Mail 2012; CBC News 2012; Toronto Star 2013). Transport Québec has saved over $1 billion in about three years in road building contracts, which demonstrates that widespread collusion to rig public contracts has stopped (The Gazette 2012). Moreover, the information reported by whistleblowers led to the establishment of new anti-corruption institutions, such as the Permanent Anti-Corruption Unit (New York City Global Partners 2012) and the commission of inquiry
on the granting and management of public contracts (the Charbonneau Commission) (Ceic.gouv.qc.ca 2011).

The developments that led to the establishment of the Charbonneau Commission are a great illustration of how serious cases of corruption reported by whistleblowers that are widely exposed in the media contribute in making a wide range of corrupt actors accountable, when nothing else was working. By intensifying the pressure on governments, increased public interest in stopping wrongdoing may even lead to the strengthening of the legal framework available to the authorities to fight corruption and even to the creation of new innovative institutions. This is what happened in Québec with the adoption of the Anti-Corruption Act, the Integrity in Public Contracts Act and the creation of the Permanent Anti-Corruption Unit (UPAC). These new anti-corruption tools stimulated better enforcement, increased the likelihood of serious punishment, and increased oversight responsibilities for monitoring and policing with the appropriate authorities. Nevertheless, successful use of the media to address extreme cases of corruption should not divert the attention from the fact that “the exposure and publicizing of wrongdoing by insiders is only one way corrupt practices become part of the public’s agenda to be confronted and corrected. The general pattern, as we have seen in the political as well as in the business arena, has been to use laws and rules and different kinds of enforcement agencies whose job it is to monitor, police, and punish those who break the law” (Johnson 2004, p.43).

6.4 Conclusions - Should whistleblowers report wrongdoing to the media?

We have seen in this chapter that investigative journalism plays an essential role in healthy and sustainable democracies, and that it has played a huge role in exposing and eventually containing corruption in the awarding of public contracts in the province of Québec. There are also a few examples of foreign whistleblowing laws that allow whistleblowers to report wrongdoing to the media while still being eligible for legal protection from reprisals in some circumstances. Does this mean that Canadian whistleblowing laws should protect whistleblowers who report wrongdoing to the media? Despite the fact that empirical research on whistleblowing effectiveness found that external reporting of wrongdoing is by far the most effective, some would argue that if whistleblowing law recognizes that it is legitimate to report
wrongdoing to the media, this may increase the likelihood that individuals with malicious intentions will abuse the system. However, this demonstrates that it would be easy to implement several built-in protections that would effectively protect the employer's legitimate interests as much as the public interest.

First, top management of an organization can effectively communicate to employees on an ongoing basis that the reporting of wrongdoing is encouraged within the organization, and that reprisals against whistleblowers will not be tolerated. If appropriate communications are combined with safe channels to report wrongdoing (i.e., ensuring anonymity or at least confidentiality) and by an organizational culture that promotes excellence and high integrity standards, chances are that most if not all whistleblowers will give the opportunity to the organization to address the wrongdoing in the first place (see subsection 4.1 of this dissertation for full discussion).

Second, organizations can designate recipients for reports of wrongdoing who are adequately trained as investigators and considered as sufficiently independent from top management, such as an independent ethics officer who does not hold an executive position or a Board of Directors committee chaired by an independent director. Organizations may designate an external ethics hotline to act as recipient, which will ensure anonymity for the whistleblower and independence from top management. Smaller organizations may designate their external auditor or a law firm to act as recipient, or any other organization that proposes such services (three participants from the private sector and one participant from a think tank). The training of the recipient is key as experienced investigators will be able to tell very quickly most of the time whether the behavior reported constitute wrongdoing and whether there is sufficient information to trigger an investigation and if not, which information may be necessary to pursue the case reported (one participant from the private sector) (see subsection 4.1.1 of this dissertation for full discussion).

Third, employers are in a position to motivate very clearly why they decided to start or refused to start an investigation, and it is in their advantage to do so to ensure that the whistleblower understands the grounds on which the decision was made. These motivations may help the whistleblower to understand why an investigation is not warranted. Moreover, if the whistleblower decides to report that wrongdoing publicly,
a clear explanation of the motives underlying the employer’s decision will contribute to determine whether the whistleblower acted maliciously.

Fourth, assuming that the whistleblower does not trust his or her employer’s reporting mechanisms or is not satisfied at how the organization handled the report of wrongdoing, the whistleblower can easily go to a regulator, if there is one having jurisdiction over the employer’s professional activities, or to law enforcement authorities. Most of enforcement authorities examined, including the two who participated in this study, widely publish how they may be reached by anyone who wishes to report wrongdoing (two participants from enforcement authorities). Pending investigations will remain confidential, until any prosecutions are launched, as the case may be.

Fifth, if a whistleblower decides to report wrongdoing to the media for whatever motive, the investigative journalist will need to do his or her own due diligence with respect to the reliability of the whistleblower’s allegations even before considering publishing the information. One investigative journalist who participated in this study mentioned that top management of his organization reviewed stories before publication to ensure they are reliable and that they respect any agreement made with a whistleblower. The same journalist also mentioned that the huge financial impact of potential defamation lawsuits on the news organization was also an important incentive to adequately check the facts before publishing a story. Moreover, even if the whistleblower and the journalist succeed in preserving the anonymity of the whistleblower, the protection of this anonymity is not unlimited if the matter is brought before a court. Courts will protect the anonymity of the communications only if the relationship between the journalist and the whistleblower must be one “that is sedulously fostered in the public good”, or which “the interests served by protecting the communications from disclosure outweigh the interest in getting the truth” (R. v. National Post [2010] SCC 16) (see subsection 4.4 of this dissertation for full discussion).

These built-in protections can go a long way to ensure that whistleblower stories are published in the media only as a last resort measure because all other reporting mechanisms have failed to expose and correct wrongdoing that has been legitimately reported, and that is based on reliable evidence.
However, it is always possible that an employee still decides to report wrongdoing to the media without giving the employer the opportunity to address the wrongdoing when it was justified to do so, and that the journalist publishes the story without appropriately checking and challenging the facts. An employee may also decide to report wrongdoing to the media or if he or she disagrees with the findings of an employer’s internal investigation carried in good faith and according to the state of the art, or that of an appropriate enforcement authority. It is also possible that the journalist who received such report omits to do his or her own due diligence about the reliability of the facts reported and about whether reporting this story would be in the public interest. If that is the case and the publication unduly tarnishes the reputation of the organization, the employer should have appropriate remedies in court that should seek to compensate him and deter malicious whistleblowers to abuse the opportunity to report wrongdoing to the media as a last resort.

Expressly allowing in a legal framework the opportunity for whistleblowers to report wrongdoing to the media in some predefined cases certainly involves risks for public and private organizations. However, there may be an even greater risk for the public to let some public and private organizations without appropriate and effective accountability mechanisms, particularly in an era of budget constraints and geopolitical turmoil.
7 Discussion of the results and of the hypothesis

Chapter 7 will draw from previous research of this dissertation and provide recommendations that suggest how Canadian whistleblowing law could more effectively promote the public interest.

7.1 The Commissioner’s discretion to refuse to investigate

The Commissioner’s discretion to refuse to investigate a matter reported by a whistleblower is large and imprecise, as discussed in subsection 5.1.2 of this dissertation. Such large and imprecise discretionary powers to refuse to investigate valid disclosures under sections 8, 12 and 13 has the potential to negatively affect the public servants’ and the public’s perceptions that exposing and correcting wrongdoing is part of the culture of the federal civil service and that their report will be taken seriously. This research project has not encountered any evidence that shows that the PSDPA is designed in such a way as to favor the reporting of false or misleading information. The fact that only 20 per cent of the information reported internally or to the Commissioner in the federal public service is subject to an investigation may have more to do with the rigidity of the legal framework rather than on the nature of the information reported. All participants to the study from the private sector took the view that the majority of the information reported is useful, although the nature and relevance of the information reported may be influenced by how the internal mechanisms for reporting have been set up. One participant has said that the more the reporting mechanisms are considered as credible by employees, the more the information reported through them will be considered as relevant and useful.

Recommendation no.1: Remove the Commissioner’s discretion to refuse or cease to investigate under section 24 of the PSDPA. The Commissioner already has some discretion to decide whether investigating a matter is in the public interest in his interpretation of the meaning of “wrongdoing” under section 8 of the PSDPA.
7.2 Prohibition from obtaining information outside the public service

Section 34 of the PSDPA provides that if the Commissioner’s investigation requires him to obtain information outside the public service, he must cease that part of his investigation and may refer the matter to any competent authority. This is an important limitation to the powers of the Commissioner, and the researcher has not come across similar limitations in other jurisdictions.

Recommendation no.2: Repeal section 34 of the PSDPA, which requires the Commissioner to cease the part of his investigation that involves obtaining information that is outside the public service.

7.3 Incentives for the private sector to adopt the right reporting standards

As discussed in subsection 5.2.1 of this dissertation, only publicly traded companies are subject to a legal requirement to adopt the right standards for the reporting of wrongdoing within their organization. There are too many organizations that do not have adequate institutional incentives for reporting wrongdoing as described in subsection 4.1.1. This may encourage employees to report wrongdoing outside the organization, which has serious implications for them, and the organization as well as the public.

Recommendation no.3: Private organizations should generally benefit from legal incentives to implement comprehensive risk evaluation and management strategies to adopt mechanisms for the reporting of wrongdoing within their organization, and to establish an independent recipient as much as possible. Such incentives could be drawn from Multilateral Instrument no. 52-110 on Audit Committees. It could also be drawn from section 7 of the UK Bribery Act or the US Sentencing Guidelines, which allow private organizations to avoid corporate liability if they can demonstrate that they had implemented the right mechanisms to detect corrupt activities.
7.4 Standard of proof of retaliation under the *Criminal Code*

There are few sanctions applicable to individuals who exercise reprisals against whistleblowers in the private sector besides the criminal sanctions under section 425.1 of the *Criminal Code*. Because section 425.1 is a criminal offence, allegations of retaliation must meet the high standard of proof that the infraction has occurred “beyond reasonable doubt”. This may be why there appears to be no prosecutions under section 425.1 of the *Criminal Code* as of October 2013, although this provision came into force in 2005 (Transparency International 2013, p.18). If society wishes that those who are able to expose wrongdoing do so, the public interest warrant that individuals who take risks for the benefit of the majority be compensated in an efficient manner for any illegal actions taken against them. “For example, employment standards legislation could be amended to provide for greater entitlement to damages if a wrongful dismissal were the result of a reprisal for whistleblowing” (Transparency International Canada 2013, p.19).

**Recommendation no.4:** Implement a civil remedy that would enable whistleblowers who experience reprisals to recover damages for unfair treatment would enhance the protection of whistleblowers. For example, employment standards legislation could be amended to provide for greater entitlement to damages if a wrongful dismissal were the result of a reprisal for whistleblowing.

7.5 No protection for whistleblowers who report internally

As discussed in subsection 5.2.3 of this dissertation, section 425.1 of the *Criminal Code* makes it an offence to commit reprisals against whistleblowers in the private sector who provide information to federal or provincial law enforcement authorities about criminal offences. As such, there is no statutory protection for whistleblowers who experience retaliation for attempting to use internal reviews or other compliance mechanisms within private sector organizations in order to report corruption or related misconduct. This has the potential to make internal reporting mechanisms
discussed in subsection 4.1.1 of this dissertation irrelevant, and does not sit well with the well-known statistics that whistleblowers generally prefer to report wrongdoing internally before reporting it outside the organization (see subsection 4.2 of this dissertation for full discussion). Such limited protection does not effectively promote the public interest as lack of adequate protection may discourage whistleblowers to expose behavior that may be harmful for the public interest.

Recommendation no.5: Modify section 425.1 of the *Criminal Code* in order to protect from reprisals whistleblowers who report wrongdoing within their organization as much as those who report wrongdoing to federal or provincial enforcement authorities.

### 7.6 Availability of financial support for whistleblowers who suffer reprisals

At least four participants to this research project (including representatives from CSOs, the private sector, journalists and enforcement authorities) generally took the view that the judicial process through which whistleblowers must seek protection from reprisals under the PSDPA is too rigid, heavy, and costly. One participant maintained that the process, which requires representation by attorney, might take two to three years to complete. Sometimes, whistleblowers have lost their job during that process, which seriously impedes their ability to have their ends meet since there is no financial support available. That same participant also mentioned that unions have not adapted well to the new framework for whistleblowing, and provide little meaningful support to whistleblowers during the litigation. In those circumstances, it may not be surprising that all cases referred to the Public Servants Disclosure Protection Tribunal to determine whether or not a reprisal action has been taken against a whistleblower were settled out of court (see subsection 5.1.3 for full discussion). The rigidity and heaviness of the judicial process to seek redress against illegal reprisals as well as the absence of financial support for whistleblowers during that process impedes on effective whistleblower protection and as such, does not effectively promote the public interest.
Recommendation no. 6: Consider ways of streamlining the judicial process whereby whistleblowers may seek redress against illegal reprisals under the PSDPA or any other applicable law. Provide for financial support for whistleblowers who are in a difficult financial position during the judicial process, including independent and government-funded legal counsel for public sector whistleblowers.

7.7 Victims of reprisals must rely on public authorities to enforce the legal protections

As discussed in subsection 4.1.2 of this dissertation, whistleblowers may take their own case to the courts if they consider they have suffered retaliation that is illegal under the law in the US and the UK. In Canada, whistleblowers from the federal public sector must rely on the discretion of the PSIC to enforce their rights, while whistleblowers outside the public sector must rely on police forces to investigate alleged cases of reprisals and law enforcement authorities to prosecute the case. The dearth of cases of illegal reprisals against whistleblowers that have been prosecuted either under the PSDPA or the *Criminal Code* suggests that there could be more efficient ways to enforce whistleblowers' legal protections against reprisals, including a civil remedy that would enable whistleblowers who experience reprisals to seek redress themselves from courts rather than relying on prosecutorial action.

Recommendation no.7: Allow whistleblowers who experienced reprisals to introduce themselves civil remedy actions to recover damages (including punitive damages) from those who have applied illegal reprisals. Individuals and organizations could be made liable under such legal actions.

7.8 The opportunity for anonymous reports in the public and private sectors

Anonymous reports are currently not allowed within the Canadian federal public service, either if one chooses to report internally or to the Commissioner. Only
publicly traded corporations are required to have anonymous reporting mechanisms in place by Canadian Multilateral Instrument 52-110. As mentioned earlier, US corporations have met the SOX requirement to implement anonymous reporting mechanisms by contracting with an external third party (e.g., an external ethics line) who will duly record the report and transfer the information to the board of directors without revealing the identity of the whistleblower.

Several participants considered that the best protection for whistleblowers is anonymity (two representatives from the private sector, one journalist and one representative from a think tank). They provided there are ways available to communicate with anonymous whistleblowers (see subsection 4.1.1 of this dissertation), and that even if anonymity may allow ill-intentioned whistleblowers to escape accountability, their allegations will not be pursued if they are not substantiated. In that respect, one journalist indicated that his organization exercises much more scrutiny over the allegations of anonymous whistleblowers. Assuming that appropriate scrutiny is exercised by relevant organizations over anonymous reports and despite the inconveniences discussed above, anonymous whistleblowing effectively promotes the public interest as it allows whistleblowers to avoid reprisals rather than compensating them for damages they may have suffered in reaction to their exposure of wrongdoing. According to one participant, anonymous reports may also be in the employer’s interest as it allows some individuals to report sensitive information that they would not report otherwise if there was no anonymity.

**Recommendation no.8:** Allow for anonymous reporting of wrongdoing in the public sector and establish legal incentives for non-publicly-traded corporations to implement anonymous reporting mechanisms as provided by SOX, the *US Sentencing Guidelines* and the *UK Bribery Act*.

### 7.9 Guidance about the acceptability to report wrongdoing to the media

As discussed in subsection 4.1.2, the UK PIDA grants protection to whistleblowers who expose wrongdoing to the media if they meet five general conditions, i.e., (1) if they act in good faith; (2) if they have a reasonable belief in the substantial truth of
the information and allegations; (3) if they do not act for the purpose of personal gain; (4) if they have reasonable belief that they will suffer reprisals, that relevant evidence will be destroyed or concealed, or if they previously made the disclosure internally or to a regulator, with no result; and (5) it is reasonable to make the disclosure in all the circumstances of the case (which interpretation is subject to a legislative criteria listed at subsection 43G(3) of PIDA). In contrast, the PSDPA provides that disclosures to the media will only be protected if they constitute a serious offence under federal or provincial law, and if the disclosure is related to an imminent risk of a substantial and specific danger to the life, health, and safety of persons, or to the environment. Considering that organizations have a number of built-in protections against false or misleading whistleblower reports to the media, the public interest may benefit from broadening the scope of public disclosures that are eligible for protection under the PSDPA and other laws that would provide for legal protections of whistleblowers in the private sector. The reporting of wrongdoing to the media should be allowed only in last recourse, when other reporting mechanisms have been ineffective or inappropriate because of reasonable expectations that reprisals will take place or that wrongdoers will destroy or conceal evidence. Providing further guidance about when public disclosure of wrongdoing is justified may provide added value to Canadian whistleblowing law considering the benefits brought by independent media to the Canadian democratic system and free market economy, as discussed in chapter 6. A contrario, more guidance on public exposure would also emphasize when internal reports or reports to the appropriate authorities should be privileged before disclosures to the media may begin to be envisaged.

Recommendation no.9: Broaden the scope of whistleblower protection for public and private sector whistleblowers who make public disclosures when there are reasonable reasons to believe reprisals will take place in response to the disclosure, or that the organization will destroy or conceal evidence. However, ensure that public and private organizations have efficient legal recourses against whistleblowers who make false or misleading public reports of wrongdoing, or who have not considered reporting the matter internally or to the appropriate authority in the first place.
7.10 Disclosures of sensitive information currently prohibited under the PSDPA

As discussed in subsection 5.1.2 of this dissertation, there are disclosures that must be made internally pursuant to the *Canada Evidence Act* and the *Security of Information Act*. Likewise, any disclosures by public servants employed by the Canadian Forces, the Canada Security Intelligence Service or the Communications Security Establishment must also be made internally. Obviously, it is in the public interest that the most sensitive information that has the potential to affect national security or frank policy discussions within Cabinet not be publicly disclosed. However, there may also be a risk for the public to let sensitive public organizations without appropriate and effective accountability mechanisms, particularly in an era of budget constraints and geopolitical turmoil. Empowering an external, independent, and not politicized third party to review such sensitive disclosures of wrongdoing while not making them public may lessen any perceptions of conflict of interest, as well as improve transparency and accountability of relevant public officials, while preserving the public interest that this information remains confidential.

**Recommendation no.10:** Empower an external, independent, and not politicized third party (or the Public Sector Integrity Commissioner if the confidentiality of the information can be ensured) to review disclosures of wrongdoing that fall under the scope of the *Canada Evidence Act* and the *Security of Information Act*; or that are made by employees of the Canadian Forces, the Canadian Security Intelligence Service or the Communication Security Establishment. However, these disclosures should not be made available to the public.
8 Conclusion

This thesis first sought to shape a model to measure whistleblowing effectiveness quantitatively by building on existing models proposed by the literature. It argued that whistleblowing is effective in promoting the public interest when (1) investigations are launched when appropriate; (2) the wrongdoing comes to an end; and (3) the organization takes steps to change its policies and procedures when necessary. The literature and empirical evidence gathered in this research project confirm the validity of the model for measuring effectiveness. Both demonstrate that the chosen indicators are a direct consequence arising from the report of wrongdoing, and that the indicators are appropriate to show whether reports of wrongdoing have had an impact on the organization.

However, although the participants to this research project were generally of the view that the first two indicators should always be used to measure whistleblowing effectiveness, some of them proposed that whether organizational changes took place following a report of wrongdoing should only be taken into account when procedural or policy gaps were identified. This distinction seeks to avoid confusing cosmetic policy or procedural changes that may be part of an organization’s public relations exercise following the exposure of wrongdoing with legitimate changes based on identified gaps in the organization’s internal rules.

In addition, this thesis sought to identify the best means for whistleblowing law to achieve effectiveness in promoting the public interest, and how Canadian whistleblowing law could be adapted to achieve that objective. These measures are discussed in Chapter 4 of this dissertation. For the purpose of this research project, whistleblowing law will effectively promote the public interest when (1) it includes measures that encourage whistleblowers to come forward; (2) the employer is given a reasonable opportunity to address the wrongdoing before it is publicized; (3) the information is useful to detect wrongdoing; and (4) the relevant authorities are accountable as to how they investigate or prosecute those who have committed the wrongdoing, have threatened whistleblowers or have retaliated against them.

In that regard, Canadian whistleblowing law includes some positive aspects as it requires the establishment of different routes to report wrongdoing within the federal
public service, including a recipient who is independent from the government; it provides for serious sanctions for individuals who exercise reprisals against whistleblowers on behalf of any employer across Canada; and it requires all publicly-traded companies to establish anonymous reporting mechanisms with respect to financial or accounting matters. However, Canadian whistleblowing law departs in significant ways from the measures that effectively promote the public interest discussed in Chapter 4. Flaws in Canadian whistleblowing law applying to the federal public sector include grounds to refuse to investigate wrongdoing that are so broad and imprecise that they significantly affect public servants’ and the public’s trust that the law was established to promote the public interest. The Public Service Integrity Commissioner may not obtain information that is outside the public sector when he investigates wrongdoing, and the federal regime leaves some federal entities unaccountable as to how they handle reports of wrongdoing. With respect to the private sector, Canadian law fails to provide for incentives to establish internal reporting mechanisms that would apply to all businesses, and the case law imposes a very high threshold to meet for whistleblowers who wish to publicly disclose wrongdoing outside their organization because there are no other ways to make that organization accountable.

However, active investigative journalists, who successfully managed to hold public and private organizations accountable when no other accountability mechanism was working, have mitigated the flaws in Canadian whistleblowing law in effectively promoting the public interest. This dissertation thus provides suggestions as to how Canadian whistleblowing law could be made more effective at promoting the public interest, drawing from the documentary analysis and empirical evidence analyzed in chapters 3 and 4, as well as the important role that investigative journalists have played in Eastern Canada to reduce corruption and produce policy and institutional changes that seek to ensure that such patterns do not happen again.

The purpose of this research project was not to measure the effectiveness of the Canadian framework based on the model proposed in this dissertation, as this would require undertaking quantitative analyses and access to statistics compiled by a broad range of organizations, which was not possible for this research project. Therefore, further quantitative research will need to be done to establish a proper causal relationship between the focus of a legislative framework for whistleblowing
on the public interest, as defined in this project, and its effectiveness. Moreover, it would be interesting if the model for measuring whistleblowing effectiveness could be used in other jurisdictions to develop a platform to compare which legal framework appear to be more effective, and why.
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**Legislation**

Québec Anti-Corruption Act

US Bill of Rights to the Constitution

UK Bribery Act, 2010

Canada Constitution Act, 1982

US Declaration of Independence

US Dodd-Franck Wall Street Protection Act of 2010

Canada Evidence Act (R.S.C., 1985, c. C-5)

Canada Federal Accountability Act (S.C. 2006, c. 9)

Saskatchewan Labor Standards Act (repealed)

Canada Multilateral Instrument no. 52-110 on Audit Committees

UK Official Secrets Act, 1989

New South Wales Protected Disclosure Act, 1994

UK Public Interest Disclosure Act, 1998

Canada Public Servants Disclosure Protection Act (S.C. 2005, c. 46)

Canada Security of Information Act (R.S.C., 1985, c. O-5)

US Sentencing Guidelines

Universal Declaration of Human Rights, 1948

US Whistleblower Protection Act

**Jurisprudence**


Globe and Mail v. Canada (Attorney General), 2010 SCC 41


Pinnington v Swansea City & County & Anor, Court of Appeal - Civil Division, August 19, 2004, [2004] EWCA Civ 1180

Street v Derbyshire Unemployed Workers' Centre [2004] EWCA Civ 964 (21 July 2004)
9 Appendix

9.1 Consent form

Consent Form

We invite you to carefully review this form and to ask questions before signing the document.

1. Title of the project

Assessment of the Canadian legal framework for whistleblowing in order to detect fraud and corruption.

2. Name of the person responsible for the study

Frédéric St-Martin, LL.L, LL.B, LL.M
Candidate for the Master in Anti-Corruption Studies
International Anti-Corruption Academy
Phone number in Canada: 613-421-4954
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3. Name of the director of the study

Andrew Brady Spalding, B.A, J.D, Ph.D
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4. Description of the project

Goal of the project
The research project seeks to determine if the legal framework that regulates the reporting of wrongdoing in Canada is effective to detect fraud and corruption. If certain gaps or shortcomings are identified, solutions to address those issues will be developed.
**Description of the project**
This is an exploratory qualitative research project. The research data will be collected through the interview of various stakeholders, as well as a documentary analysis of applicable legislative frameworks and internal rules of relevant organizations. This data will then be analyzed in order to establish a model based on the observations of the participants and the documents analyzed.

**Number of participants in the study**
A sample of 10 to 15 interviews is expected for the study.

**Justification of the research**
While the ultimate goal of the research project is to assess the applicable rules on the reporting of wrongdoing in Canada, it first seeks to propose a common framework of analysis that could be used to do the same assessment in more than one jurisdiction. Moreover, the analysis of the Canadian context seeks to address the lack of comparative data in this area of legal and policy research. The ultimate goal of this project is to contribute to the promotion of good governance in public and private organizations in Canada.

5. Procedures

**Details of the participation to the study**
A first exchange with the researcher will allow you to get to know the objectives of the research project and of the procedure, as well as the reasons why you have been selected as a participant. The present consent form should be discussed and signed just before the interview. An interview plan that will include the main themes of the discussion will be sent to you prior to the interview to help you prepare the discussion. You will also be invited to select three to five real life cases that you have experienced during your duties to illustrate the themes that will be discussed.

Your participation in the semi-structured interview with the researcher, which will last for about an hour, represents your main contribution in this project. The location of the interview will be determined by common agreement between the participant and the person responsible for the research. Please note that the interview will be recorded to facilitate the analysis of the data.

In some cases, the interview could also be conducted by email or telephone.
The researcher may contact you after the interview by phone to seek your comments on the analysis formulated.

The total length of your participation in the present project (including the pre-interview contact, the interview and the post-interview contact) will be approximately of one hour and half.

**Conditions of participation**
- Be a key stakeholder in relation with the research topic in at least one of the following categories:
  - Representative of an enterprise;
  - Representative of enforcement authorities or a public authority;
  - Representative of a non-governmental organization; or
  - Investigative journalist.
- Be able to clearly speak in French or English in order to be able to fully participate in the semi-structured interview;
- Accept that the interview be recorded and that some elements of your argumentation be presented in an anonymous manner to the other participants in subsequent interviews to validate the information obtained;
- Sign freely the current consent form.

6. **Advantages and benefits**

No personal or specific advantage for the participant is anticipated.

However, we expect positive social benefits to arise from this research. For instance, the project could contribute to the exploration of possible means to improve corporate or public organizations’ governance in order to reduce fraud and corruption in both the private and public sectors.

On request, we will forward you the integral results of the study once it is completed.

7. **Risks and disadvantages**

*Risks*

No physical, psychological, economic or social risk arises from the participation to this research project.
Disadvantages
The only disadvantage anticipated is the time required for the participation to the study.

The researcher commits to communicate to the participant any information that may modify his or her consent to participate in the study.

8. Confidentiality

The confidentiality of the recording of the interview and of the notes arising from the discussion is guaranteed.

To ensure the confidentiality of the data, each participant will be identified by a code, as well as all the documents submitted and the notes arising from the interviews.

All the data for this study will be stored in a safe location where only the researcher will be able to access the data. The data will be kept for a period of five years following the beginning of the study. Secondary analyses of the data may be carried out by the researcher during that period. The data will be coded by using the same key code that was used for the main analyses and secured for five years. On January 1st 2019, all the data and the key code will be destroyed.

9. Eventuality of a suspension of the study

The participation to this study can be interrupted by the researcher if he believes it is in the interest of the participant or for any other reason.

10. Freedom to participate in and freedom to withdraw from the study

Your participation to this study is entirely voluntary. You are free to accept or refuse to participate and you can withdraw from the study at any time, without prejudice.

11. Compensation and/or expenses

There are no expenses expected from the participation to this study, and therefore no compensation will be paid for participation to the participants.

No compensation for the time used to participate in this study can be paid to the participants.
12. Contact persons

For any questions or comments concerning the present study or if you want to withdraw from this study, please contact the researcher:

Frédéric St-Martin, LL.L, LL.B, LL.M
Candidate for the Master in Anti-Corruption Studies
International Anti-Corruption Academy
Phone number in Canada: 613-421-4954
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13. Adherence to the project and signature

I have read and I understand the content of the current document. I certify that the project was explained to me and that I had the opportunity to ask all the questions I deemed necessary concerning this project, and the that answers were satisfactory. I certify I had the opportunity to reflect about my participation and that I will be able to withdraw at any time.

I hereby accept to participate in this research project.

________________________  ____________________  _____________
Name of participant     Signature                Date
9.2 Interview plan

PROCEDURE AND THEMES TO BE DISCUSSED DURING THE INTERVIEW

Part I – Selection of real life cases and collection of data

1. To begin with, we would appreciate if you could select three to five real life cases where you have been involved in a reporting of wrongdoing situation during the accomplishment of your duties.

2. Then, please prepare to discuss the issues enumerated in parts II, III, and IV by making reference to the real life cases that you have selected.

3. Finally, any other document relevant from your organization that you could share with respect to the management of whistleblowing mechanisms (such as annual reports, statistics, guidelines, judicial or administrative decisions, etc.) will greatly contribute to reinforce the findings of this study.

4. We wish to remind you that all the data communicated will be used on an anonymous basis to develop the research report. The researcher will ensure the confidentiality of the data.

Part II – Discussion on the normative framework regulating the reporting of wrongdoing and the public interest

1. The means in place to encourage employees to report wrongdoing within their public or private organization.

2. The reasonable opportunity for the organization involved (the employer) to address the situation that is the source of the reporting of wrongdoing.

3. Does the information reported through the whistleblowing mechanisms contribute to promote the public interest?
   - The usefulness of the information reported;
   - The strengths and limits associated with whistleblowing mechanisms to detect fraud and corruption;
   - Reporting of wrongdoing directly to the media;
• The means in place to ensure that the reporting of wrongdoing is done in the public interest.

4. The accountability of the authorities in charge of administering regimes for the reporting of wrongdoing and their resources available for investigations.

Part III - Discussion on the effectiveness of the Canadian regime for the reporting of wrongdoing

1. The frequency where the employer or the relevant authorities launch an investigation following the reporting of wrongdoing.

2. The proportion of cases where organizations modify their internal policies or procedures so that the malpractices that triggered the reporting of wrongdoing do not happen again.

3. The proportion of cases in which reports of wrongdoing had the effect of ending the wrongdoing.

4. The extent to which legal or other protections granted to employees who report wrongdoing are efficient in reducing retaliation.

5. The proportion in which whistleblowing mechanisms are used in bad faith and affect the good governance of the organization.

Part IV – Blowing the whistle to the media

1. The reasons why whistleblowers sometimes report wrongdoing to the media in the first place.

2. The possibility that a whistleblower reports wrongdoing to the media after he or she reported it within the organization or to the relevant authorities.

3. The possibility that the relevant authorities launch an investigation based on the information put in the public domain by the media.