

April 26, 2017

Standing Committee on Government Operations and Estimates
House of Commons
Canada
OGGO@parl.gc.ca

Re: Public Comment on the Public Servants Disclosure Protection Act

Dear Standing Committee on Government Operations and Estimates:

On behalf of the [National Whistleblower Center](http://www.whistleblowers.org) (NWC), a nonprofit, non-partisan, tax exempt organization founded in 1988,¹ I hereby submit this statement as the NWC's public comment on the Public Servants Disclosure Protection Act.

As a threshold matter, we would like to draw your attention to a conference held in January 2017 at the University of Toronto's Rotman School of Management. While this conference concerned Canada's new OSC-sponsored whistleblower program, much of the information presented is fully applicable to public sector whistleblower protection: The conference covered essential information necessary to understand how whistleblowing works in practice, and set forth the necessary justification for a strong and independent whistleblower program relevant to protecting government employees and government contractors. The full summary of the seminar and supporting materials is available online at bit.ly/UTorontoSeminar. We hereby submit the entire conference proceedings on the record before your Committee.

University of Toronto Professor Alexander Dyck chaired this conference. Professor Dyck serves as the Manulife Financial Chair in Financial Services,

¹ For nearly 30 years the National Whistleblower Center has provided testimony and expert advice to Congressional and Parliamentary bodies, and executive and regulatory officials on matters related to advancing whistleblower protections. Proposals submitted by the NWC have been adopted in various U.S. whistleblower laws (including the Whistleblower Protection Enhancement Act (WPEA) covering federal employees) and many European whistleblower laws. See www.whistleblowers.org. The NWC's *worldwide* wildlife whistleblower program was a Grand Prize Winner in the highly competitive Wildlife Crime Tech Challenge—an initiative of U.S. Agency for International Development (USAID), in partnership with the Smithsonian Institution, National Geographic Society, and TRAFFIC.

Professor of Finance and Business Economics, Rotman School of Management and Director, Capital Markets Institute. He is a world-renowned expert on fraud detection methodology, and was the principle author in the key study on the impact of whistleblowing on fraud detection. His research on fraud detection methods, specifically as they relate to a key U.S. whistleblower law (the False Claims Act), is the seminal work on this subject and should be carefully studied.²

Professor Dyck's findings fully support Canada adopting strong whistleblower protections for federal employees and all contractors who are paid by Canadian taxpayers to perform work on behalf of the government. We need not repeat his findings in this letter, but we strongly urge your Committee to carefully review both his presentation at the University of Toronto and his article linked to that presentation. See "[Who Blows the Whistle on Corporate Fraud?](#)" (Alexander Dyck, University of Toronto; Adair Morse, University of California, Berkeley and Luigi Zingales, University of Chicago). Professor Dyck's research is a credit to the high quality of independent work coming out of Canada objectively evaluating modern whistleblowing, and should be heavily relied upon by your Committee in reaching its conclusions and findings.

Among his critical findings were:

- "Employees clearly have the best access to information. Few, if any, fraud can be committed without the knowledge and often the support of several of them."
- "[I]n 82 percent of cases, the whistleblower was fired, quit under duress, or had significantly altered responsibilities. In addition, many employee whistleblowers report having to move to another industry and often to another town to escape personal harassment. . . . Given these costs, however, the surprising part is not that most employees do not talk; it is that some talk at all."
- "Monetary incentives seem to work well, without the negative side effects often attributed to them."

Professor Dyck's study focused on the question as to how to get those with the best information about a fraud to report the misconduct. This central thesis is equally applicable to private sector and government whistleblowing. The goal is to ensure that those who defraud the government or the taxpayers are held accountable. Employees unquestionably have the "best access" to this information, but those who report are subject to retaliation. Therefore, Professor Dyck's study provides support for increasing the positive incentives for becoming a whistleblower, i.e. the payment of rewards. In his conclusion,

² Linked in the conference proceedings, available at <http://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/CapitalMarketsInstitute/Events/PastEvents/Whistleblowers>.

Professor Dyck and his co-authors pointed out the positive role that rewards can play in promoting accountability and exposing frauds:

A natural implication of our findings is that the use of monetary rewards providing positive incentives for whistle blowing is the possibility of expanding the role for monetary incentives. As the evidence in the healthcare industry shows, such a system appears to be able to be fashioned in a way that does not lead to an excessive amount of frivolous suits. The idea of extending the qui tam statute³ . . . is very much in the Hayekian spirit of sharpening the incentives of those who are endowed with information.

Another presenter at the University of Toronto at the January 2017 conference was Andrew Call, an Associate Professor at the W.P. Carey School of Business at Arizona State University.⁴ He presented findings from his study concerning the impact whistleblowers have on the quality of government investigations. See, Call, et al., “Whistleblowers and Outcomes of Financial Misrepresentation Enforcement Acts,” posted at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506418. His findings scientifically demonstrate that if a whistleblower comes forward with evidence of fraud, the probability of a successful investigation and prosecution is enhanced, and the likelihood of a guilty finding is increased. His findings provide additional scientific proof backing up Professor Dyck’s work, which objectively demonstrates that whistleblowing serves the public interest and must be enhanced and incentivized.

Heidi Franken, Chief of the Office of the Whistleblower at the Ontario Securities Commission (OSC) also spoke at the conference.⁵ She explained how a new law approved by the OSC works. This law was modeled on a reward-incentive model, and provided protections for employees. Although these protections directly apply only to private sector whistleblowers, the fact that the OSC was willing to experiment with implementing a whistleblower system more in line with the findings of Professor Dyck is a positive sign that Canada should strengthen its whistleblower laws.

Peter Dent, Partner, Deloitte, LLP, and Chair of Transparency International Canada also presented at the University of Toronto conference. Mr. Dent provided expert analysis of the current state of whistleblowing in Canada, and specifically addressed problems with Canada’s Public Servants Disclosure Protection Act. Most significantly, Mr. Dent discussed another objective, scholarly report on how whistleblowers are perceived at work. This

³ The term “qui tam” refers to the provision within the False Claims Act that permits employees to obtain a financial reward if their original information results in a successful enforcement action. The reward paid directly from the monies obtained from the wrongdoer, at no expense to the taxpayers.

⁴ See, footnote 2.

⁵ *Id.*

study, published by the Columbia University Journal of Economic Behavior and Organization, explained how whistleblowers are shunned and subjected to retaliation and blacklisting—which ultimately disincentivizes others from reporting fraud in their organizations.⁶

The report's findings are most troubling, as it concluded that even organizations that are composed of honest persons will shun a whistleblower who reports dishonest behavior:

“However, we also find that when groups can select their members, individuals who report lies are generally shunned, even by groups where lying is absent. This facilitates the formation of dishonest groups where lying is prevalent and reporting is nonexistent.”

See [“Nobody likes a rat: On the willingness to report lies and the consequences thereof.”](#) (Ernesto Reuben, Matt Stephenson, Columbia Business School).⁷

Taken together, the three studies presented at the conference objectively demonstrate, with empirical evidence, that (a) whistleblowing is the key to fraud detection; (b) whistleblowers help trigger better government investigations with stronger enforcement outcomes; and that (c) whistleblowers will suffer retaliation and blacklisting, and thus badly need strong protections and incentives.

As the Executive Director of the National Whistleblower Center, an Adjunct Professor at Northeastern University School of Law (teaching a course on whistleblower law), a practicing attorney with 33-years of experience representing whistleblowers,⁸ and the author of *The Whistleblower's Handbook*⁹, I was also invited to give a presentation at the University of Toronto conference. My presentation, which stemmed from my expertise in this field and independent research fully supported the findings of the academics, and the great potential of OSC's new whistleblower program. The underscoring that U.S. law enforcement officials strongly endorse powerful U.S. whistleblower laws that incentivize whistleblowers, and that these endorsements can be objectively supported by the highly successful enforcement actions triggered by whistleblower disclosures.¹⁰

The well-documented expert opinions and regulatory analysis presented at the University of Toronto conference should guide the Standing Committee's

⁶ *Id.*

⁷ <http://www.sciencedirect.com/science/article/pii/S0167268113000735>

⁸ <http://www.kkc.com>.

⁹ <https://www.whistleblowershandbook.com>.

¹⁰ These materials are linked in the conference proceedings, available at <http://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/CapitalMarketsInstitute/Events/PastEvents/Whistleblowers>. They are also set out, in detail, in *The New Whistleblower's Handbook* (Lyons Press, 2017) (July release date).

understanding of whistleblower incentives and protections, and why they are critically important to an effective whistleblower program. Although the University of Toronto's conference directly addressed Canada's new OSC-sponsored whistleblower program, much of the information presented is fully applicable to public sector whistleblower protection. This includes expert findings including:

- The retaliation experienced by honest employees who report wrongdoing. See "Nobody likes a Rat," cited above. Employees experience this type of retaliation regardless of whether they work in the private sector, as government contractors, or as government employees.
- Professor Call's findings that whistleblower information results in a stronger chance of a conviction or regulatory action, and an increase in penalties based on the information provided by the whistleblowers. His research demonstrates the importance of not just protecting, but also incentivizing, whistleblowers. Again, the ability of whistleblowers to deliver high-quality information to government investigators is relevant to any findings regarding whistleblower protection in the public sector. In fact, because public money at issue, these findings are even more relevant to taxpayers than is general corporate fraud.
- The landmark paper authored by University of Toronto Professor Alexander Dyck demonstrates the absolute importance of whistleblowers as a source of information regarding fraud, and how strong whistleblower protections afforded in the U.S. False Claims Act have worked, without any negative consequences. This well-researched paper underscores that an effective anti-corruption program (whether it is designed to detect and prevent fraud against the government or fraud in the private sector) must have a whistleblower program that protects and incentivizes whistleblowers. It also demonstrates that the type of protections offered under the U.S. False Claims Act can serve as a model for Canada, along with other countries.
- How U.S. government regulators have praised the strong whistleblower protections afforded employees under the False Claims Act and other whistleblower laws, as I discussed in my presentation, as well as how recoveries under the U.S. False Claims Act exponentially increased once it was amended in 1986 to include rewards for relators (whistleblowers).

Canada should adopt a law modeled on the U.S. False Claims Act, which is consistent with the above expert findings, to protect its government employees and all government contractors and incentivize their reporting fraud to law enforcement officials.

The key features of the False Claims Act (FCA), [31 U.S.C. §§ 3729–3733](#), are outlined here:

1. Retaliation is strictly prohibited. If an employee suffers retaliation (s)he can file a lawsuit for reinstatement and monetary damages (including double back pay and damages for emotional distress/loss of reputation). There is no cap on the amount of damages. The lawsuit can be filed directly in federal court. There is no need to exhaust administrative procedures. A jury trial is permitted and the law has a realistic three-year statute of limitations.

2. The FCA also contains a provision improving an employee's ability to obtain competent counsel. If the employee prevails in a case, he or she is entitled to be compensated for all attorney fees and costs. Attorneys are paid at reasonable market rates, so even if an employee cannot afford to pay full fees at the outset of a case, experts on whistleblower law will often work on a contingency-fee basis since they will be paid when their clients prevail. Defendants cannot obtain fees from the whistleblower, unless the whistleblower loses his or her case, and a court determines that the original lawsuit was filed in bad faith and was frivolous. Thus, the fee shifting provisions often found in civil law is not available to discourage reporting or filing of a retaliation case.

3. A reward is paid if the employee's disclosure results in a successful enforcement action. Specifically, if the whistleblower's original information is the proximate cause of the government's ability to collect a fine, fee or penalty from a guilty party, the whistleblower is rewarded through a payment of between 15-30% of the monies collected by the government. The reward structure creates the best procedures that serve the public interest. It incentivizes reporting of actual violations that can be proven. It permits employees to file their claims confidentially, and focus the government's efforts on accountability and high-quality investigations. Furthermore, rewards incentivize employees to report and provide the ultimate best protection against the most likely form of retaliation these employees suffer (*i.e.* losing their job). Based on the success of this whistleblower law in the U.S., the Ontario Securities Commission adopted a similar rewards-based program. This type of program can, and should, be adapted to serve government and government-contractor whistleblowers in the public sector.

Based on the United States' successful experience with the False Claims Act, which has been well-documented and thoroughly studied, we strongly recommend that Canada adopt a similar law that contains special provisions explicitly covering government workers and private sector contractors who provide services to the government.

If you would like additional information, please do not hesitate to contact me.

Respectfully submitted

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Executive Director