



CCAAG
CANADIAN COVID-19
ACCOUNTABILITY GROUP

Protecting whistleblowers and increasing transparency in Canada in the age of COVID-19

Response to the Constantine Cannon
challenge for the FT Global Legal
Hackathon

Overview

The COVID-19 emergency presents the greatest challenge to governments since the Second World War. While it is understood that the need for haste leaves governments little choice but to act swiftly and decisively, the inevitable **fraud** and **profiteering** should not be written off as an acceptable cost. Rather, there is an opportunity to **empower** citizens to participate in the enforcement of accountability in the acceptance and use of government financial supports, scientific evidence, and the administration of health services.

The Canadian COVID-19 Accountability Group proposes four streams of action:

01 COVID-19 Ombudsperson

02 Increased Transparency through Open Records

03 Whistleblower Protections and Compensation

04 Education and Awareness

THE CANADIAN CONTEXT

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Secrecy and Paternalism in Government Records

Public bodies are reluctant to provide information and have frustrated the spirit of Canada's freedom of information laws.

Absence of Private Sector Whistleblower Protections

Canada is 20 years behind global best practices for whistleblower protection legislation.

Poor Record of Canadian Whistleblower Regimes

Existing laws have been shown to be flawed and poorly implemented. Many whistleblowers have suffered retaliation.

2017 Review of PSDPA

The bipartisan report called for a major overhaul of the PSDPA.

Examples

- Susan Holmes, Cora Plourd Nicholson and Svetlana Tenetko reported abuse of the PEI immigration program
- Sylvie Therrien reported wrongdoing with the EI program

Problem: No Central Authority for COVID-19 Reporting

Implementing an effective fraud and abuse reporting system and protecting those who come forward will be difficult without proper oversight. Canadians who witness wrongdoing will have questions and require support, advice in reporting what they have witnessed and protection from retaliation. Government departments may benefit from a central authority to which they can turn for advice on handling wrongdoing and, perhaps, coordinating efforts to reduce or detect fraud and other forms of misconduct.

Solution: COVID-19 Ombudsperson

Create an independent entity, such as a COVID-19 Ombudsperson (or a similar ombudsperson-like office), at the federal level and in consultation with other jurisdictions. Provinces and territories may also wish to create such a body or integrate it into the functions of an existing authority.

Problem: A Culture of Secrecy

Canada's *Access to Information Act* continues to rate poorly when compared to open records laws in other countries, reflecting the longstanding reluctance on the part of our public bodies to provide information that is not of their own choosing. These deficiencies have been underscored during the recent pandemic, *e.g.*:

- Health Canada refused to provide historical data about confirmed COVID-19 cases.
- Federal officials refused to respond to questions about how many ventilators and critical care beds Canada might need during the pandemic.
- Defence Minister Harjit Sajjan refused to disclose how many Canadian Armed Forces members have contracted COVID-19.
- The Nova Scotia government refused to release its plan for lifting COVID-19 restrictions.
- New Brunswick's Horizon Health Network refused to reveal if any of its staff had tested positive for COVID-19.
- The British Columbia government refused to reveal the locations of confirmed COVID-19 cases.

Solution: Open Records by Default

1. Require federal and provincial public bodies to publicly release the following broad categories of records—without redaction—within 15 days of being complete:
 - Inspection reports, audits, statistics, and similar records related to the compliance and enforcement of government environmental, consumer, health, and safety regulations;
 - Scientific and public health research reports, studies, statistics, and similar records that have been prepared by or submitted to public bodies; and
 - Contracts, grants, and loans provided to companies and organizations, including records related to the conditions and values of those agreements, as well as whether they were fulfilled.
2. Require these public bodies publish a list of all classes of records encompassed by the above rules and maintain an online registry for the release of such documents.
3. Require that a portion of the performance pay for the heads of public bodies or their unelected designates be linked to compliance with these requirements, creating a financial penalty for non-compliance.

Problem: No Protections for Whistleblowers

Canadian whistleblower protection laws are patchy and ineffective - most workers have no protection at all if they report wrongdoing. The current laws are focused primarily on government employees and ignore almost all of the private sector. They do not cover many of the abuses we are likely to see during the COVID-19 pandemic.

The Canadian laws designed to protect public sector whistleblowers have been called a “tissue paper shield” by international whistleblowing expert Tom Devine.

In the private sector, some health and safety, health care, and environmental laws prohibit retaliation against whistleblowers but do not provide the necessary protections that have been recognized by governments around the world as vital. Workers who disclose wrongdoing, even during an emergency, are at high risk of retaliation, and many examples of this have been reported.

Solutions: Whistleblower Protections & Compensation

1. New Whistleblower Protections

- Expand the definitions of wrongdoing, whistleblowers, whistleblower actions, and workers to cover any situation where public interest could be impacted.
- Expand whistleblower protections by allowing, among other things, anonymous reporting, reporting based on “reasonable belief,” multiple channels for reporting, and seeking redress in civil court at any stage.
- Implement measures to prohibit retaliation including by establishing civil immunity and defamation exceptions for whistleblowers, reversing the burden of proof for retaliation claims, and allowing reinstatement and compensation.

2. Compensation for Risk

- Implement whistleblower incentives for the private sector that include best-practice whistleblower protections, described above, and provide an award ranging from 10-30% of revenue recovered as a form of insurance for the risks that whistleblowers take.

Problem: A Lack of Awareness

Whistleblowing laws are particularly important during emergencies because they empower people to report wrongdoing by bad actors who may seek to capitalize on those emergencies for financial and political gain. But those laws are useless if employees are unaware of how to use them. Canadians also face the additional hurdles of persistent cultural barriers to whistleblowing including myths and misconceptions regarding their motives that stigmatizes potential reporting.

Solution: Awareness & Education

Federal and provincial governments should undertake whistleblowing awareness campaigns among public employees that educate employees about how to report wrongdoing concerning COVID-19-related expenditures of public funds, and non-disclosure or manipulation of critical information. These campaigns will send a clear message to both would-be whistleblowers and the broader citizenry that public safety and democratic accountability are paramount during the pandemic. Public education is also required to effect positive change and a speak up culture.

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Contributors



WBC Whistleblowing Canada Research Society

“Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has.”

Margaret Mead





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White paper by the
Canadian COVID-19 Accountability Group
in response to the **Constantine Cannon** challenge
for the FT Global Legal Hackathon

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Executive Summary

The COVID-19 pandemic is the most severe crisis faced by Canadian governments since the Second World War. The threat to public health has demanded dramatic action, both politically and financially, to slow the spread of the disease. However, public and private bodies have been less than transparent with the news media and the public about those actions. As a result of their scale, scope, and opacity, the potential for the abuse and misuse of resources and information has increased. Indeed, we are already seeing those risks emerge in the long-term health care system. As such, the Canadian COVID-19 Accountability Group (CCAG) proposes the following measures to address these risks and assist governments in fulfilling their obligations to Canadians:

1. Empowering Canadians by making certain government records open by default, including records related to the compliance and enforcement of government health and safety regulations, scientific and public health research records, and contracts, grants, and loans provided to companies and organizations.
2. The clear declaration that Canadian governments will protect anyone who reports public or private sector wrongdoing pertaining to health and safety, science, or the misuse of public funds, particularly during the COVID-19 crisis, as well as the drafting of legislation that enables that protection.
3. The introduction of compensation for whistleblowers facing the risk of retaliation for reporting significant wrongdoing by their employer or any other organization.
4. An awareness campaign to educate employees about how to report wrongdoing concerning the expenditure of public funds related to this crisis, as well as the non-disclosure or manipulation of information about COVID-19.
5. The creation of a COVID-19 Ombudsperson to advise and support Canadians wishing to disclose wrongdoing of which they have become aware.

The recommendations in this white paper are ambitious, and it is understood that implementation will require work and consistent, steady leadership. Some of them can be enacted quickly by a government determined to act in the public interest. Others will require more time, such as the development of comprehensive whistleblowing legislation. However, without these reforms, it will be difficult for citizens to hold bad actors accountable for their actions and inactions during the pandemic, as well as prevent future failures that could jeopardize both taxpayer dollars and Canadian lives.

Introduction

The COVID-19 pandemic is the most severe crisis faced by Canadian governments since the Second World War. The threat to public health has demanded dramatic action, both politically and financially, to slow the spread of the disease. However, public and private bodies have been less than transparent with the news media and the public about those actions. As a result of their scale, scope, and opacity, the potential for the abuse and misuse of resources and information has increased. Indeed, we are already seeing those risks emerge in the long-term health care system. The steps the Canadian COVID-19 Accountability Group (CCAG) proposes include both short-term and longer-term measures to increase government transparency and protect those who disclose wrongdoing.

Background

Canadian federal, provincial, and territorial governments moved with speed and determination once the threat of COVID-19 was recognized. Partisan divisions were largely put aside and sweeping powers granted to governments to dispense funds for the public good. At the federal level, this included *An Act to amend the Financial Administration Act (special warrant)*, *COVID-19 Emergency Response Act (CERA)*, *COVID-19 Emergency Response Act, No. 2 (CERA II)*, and *Canada Emergency Student Benefit Act*.¹

These new laws, orders, and regulations were drafted quickly. They were also drafted with the knowledge that there would be flaws that could be exploited by unscrupulous companies and individuals. Indeed, on March 30, 2020, Prime Minister Trudeau said, “This unprecedented situation calls for unprecedented action and it calls for good faith and trust between everyone involved” (Maclean’s, 2020). At the same time, he has warned that an accounting of those who have accepted public monies will be forthcoming. Provincial and territorial premiers have issued similar warnings.

Nor is this just a question of dollars and cents: terrible lapses and negligence in long-term health care facilities have led to the deaths of thousands of vulnerable Canadians (Flanagan, 2020). In one such facility, staff abandoned their posts (Derfel, 2020). The Ontario Patients’ Ombudsman has reported numerous whistleblowers coming forward and is encouraging more complaints.² Meanwhile, the Ontario government is launching an independent commission into long-term care (CBC News, 2020).

Despite such developments, however, those who disclose serious wrongdoing have few protections in Canada. Frequently called whistleblowers, these individuals risk their livelihoods to alert the public and organizations to misconduct that presents a danger to health, life, the environment, public finances, or other matters in the public interest. In addition, there remain cultural barriers to whistleblowing, which

¹ A full list of special COVID-19 federal legislation, regulations, and orders can be found at the Government of Canada page, “Government of Canada’s response to COVID-19” at <https://www.justice.gc.ca/eng/csj-sjc/covid.html>

² See the Ombudsman’s website at <https://www.patientombudsman.ca/COVID-19/Call-for-complaints>.

wrongdoers can exploit to take retributive action against whistleblowers without being called to account.

Almost all the provinces and territories have laws dedicated to protecting whistleblowers who work in government, such as the federal government's *Public Servants Disclosure Protection Act*. However, one of the top international experts on whistleblowing, Tom Devine, has called them a "tissue paper shield" (von Scheel, 2019). In the private sector, some health and safety, health care, and environmental laws prohibit retaliation against whistleblowers but do not provide the necessary protections that have been recognized by governments around the world as vital. The *Criminal Code* does prohibit retaliation against anyone reporting an offence to authorities.³ Yet, in practice, this patchwork approach has not been particularly effective and does not cover many of the abuses we are likely to see during the COVID-19 pandemic. Workers who disclose wrongdoing, even during an emergency, are at high risk of being fired in retaliation. This is unacceptable and not in keeping with Canadian values. In addition, internal tips have long been identified as the best way to detect internal fraud (ACFE, 2020).

Protection for whistleblowers is only one step, however. One of the best ways to reduce the need for whistleblowing is to increase government transparency. Although Canada was an early leader in enacting the *Access to Information Act* in 1983, that legislation has not been as effective as hoped. Canadian governments have a history of excessive secrecy (Shochat, 2010), and rate poorly in international comparisons of freedom of information laws (Centre for Law and Democracy, 2020). Making data on the health, science, and the distribution and use of COVID-19 funds open by default would both facilitate broader public oversight and deter potential abuses.

The protection of whistleblowers and the empowerment of Canadian citizens deserves the same determination and speed of action. Accordingly, we call on Canada's federal, provincial and territorial governments to immediately begin to make a broad range of records open by default, implement whistleblower protections based on global best practices, provide compensation for whistleblower reporting large frauds and abuses of public funds, and create a COVID-19 Ombudsperson's office to provide guidance and support for Canadians who wish to report serious misconduct. It is hoped these steps will deter misconduct, allow the correction of wrongdoing, and change cultural attitudes towards whistleblowing in organizations and society as a whole.

Empowering the Public through Openness by Default

Even the best whistleblowing regimes require individuals to assume substantive personal and financial risks to disclose information to the public that would otherwise remain undisclosed. As such, it is important that jurisdictions pair these regimes with strong open records laws, policies, and practices that reduce the need for such risk-taking. However, Canadian public bodies have a longstanding reluctance to provide

³ See <https://laws-lois.justice.gc.ca/eng/acts/c-46/page-88.html#docCont>.

information that is not of their own choosing. And this reluctance has been underscored during the recent pandemic. For example:

- Health Canada refused to provide historical data about confirmed COVID-19 cases in Canada because, according to spokesperson Eric Morrisette, “the provinces and territories are the owners of the information” (Treble, 2020);
- Federal officials refused to respond to questions from opposition parties and the news media as to how many ventilators and critical care beds Canada might need during the pandemic. In the House of Commons, Health Minister Patty Hajdu said it would be “misleading” to do so (Ballingall, 2020);
- Defence Minister Harjit Sajjan refused to say how many Canadian Armed Forces members have contracted COVID-19, citing “operational security reasons” (Campion-Smith, 2020);
- The Nova Scotia government refused to release its plan for lifting COVID-19 restrictions, even though the province’s chief medical officer of health, Dr. Robert Strang, had already briefed the Nova Scotia Business Labour Economic Coalition about that proposal (Laroche, 2020);
- New Brunswick’s Horizon Health Network refused to reveal if any of its staff had tested positive for COVID-19. “I would not be talking about anything related to personal health information of our staff,” said the network’s chief human resource officer Maura McKinnon. “And I would be looking for direction from (the province’s medical officer of health) before we would be disclosing any information like that” (MacKinnon, 2020);
- The British Columbia government refused to reveal the locations of confirmed COVID-19 cases. “It would be irresponsible to mention only a few communities and give people outside those areas a false sense that they are not susceptible or at lower risk,” said the provincial health officer Bonnie Henry (Henry, 2020); and
- According to *Winnipeg Free Press* columnist Dan Lett, the Manitoba government “refused to say how much has actually been spent (on personal protective equipment), what the province got, and how much it is still obligated to purchase.” The government has refused to “provide data on nursing vacancies and overtime, and doctors billings” (Lett, 2020).

Recommendation

As a result of these and many more examples of unwarranted secrecy, we recommend the federal and provincial public bodies be legally required to publicly release the following broad categories of records within 15 days of being completed:

1. Inspection reports, audits, statistics, and similar records related to the compliance and enforcement of government environmental, consumer, health, and safety regulations;
2. Scientific and public health research reports, studies, statistics, and similar records that have been prepared by or submitted to public bodies; and

3. Contracts, grants, and loans provided to companies and organizations, including records related to the conditions and values of those agreements, as well as whether they were fulfilled.

The disclosure of such records has always been important to ensure democratic accountability and public safety. But that disclosure is especially important during an emergency when large sums of money are expended by public bodies and the work of government inspectors, scientists and public health experts can mean the difference between sickness and health.

In addition, to ensure the success of our proposal, we further recommend a legal requirement that these records be released unredacted and not subjected to the exemptions and exclusions in Canada's freedom of information and privacy laws. That is because public bodies have repeatedly misused these exemptions and exclusions to prevent the release of embarrassing and inconvenient information, while our governments chronically underfund the offices responsible for mediating or adjudicating appeals regarding that abuse.

We also recommend each public body be legally required to publish a list of all classes of records encompassed by the above rules, as well as maintain an online registry for the release of such documents. Finally, we recommend a portion of the performance pay for the heads of public bodies or their unelected designates be linked to compliance with these requirements, creating a financial penalty for non-compliance.

While these measures may seem stringent, similar records are routinely released in other jurisdictions. For example, in the United States, the Centre for Disease Control provides the number of new COVID-19 cases by state, day, race, ethnicity, and age,⁴ and the United States Department of Defence provides the number of new COVID-19 cases among troops, dependents, civilians and contractors (Myers, 2020).

The public has a right to know whether the regulations meant to protect them are being enforced, as well as when and where they are violated and by whom. The public has a right to know the scientific and medical research that are informing government decisions. And they have a right to know how their money is being spent. In the midst of the pandemic, these rights have never been more important. And making these records open by default is vital to securing these rights.

Protecting Those who Protect the Public Interest

The most effective means of identifying problems within complex public and private sector systems - such as the lethal failures of our long-term care programs for the elderly - is to empower and safeguard the individuals who work within them to report wrongdoing. Indeed, whistleblowing is the cheapest and most effective way of identifying wrongdoing in all sectors. We implore governments at all levels of work to

⁴ See the Centers for Disease Control and Prevention website at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

institute legal protections for public interest whistleblowing in federal, provincial, and municipal laws to include the best practice clauses set out below.

Whistleblowing in the COVID-19 Context

Public interest whistleblowing in Canada continues to be an extremely risky proposition. The harsh realities of whistleblower retaliation continue to punish and deter those who wish to speak out against wrongdoing at all levels and in all segments of our society. The whistleblower experience has been depicted in numerous movies, such as the 1999 film *The Insider*, which dramatized Jeffery Wigand's exposure of tobacco company efforts to make cigarettes more addictive and the cost he paid to do so. While no movies have been made about their experiences, many Canadian whistleblowers have suffered similar retaliation.⁵ Several stories about Canadian COVID-19 whistleblowers have already emerged, and more can be expected:

- A whistleblower reported that workers in Ontario nursing homes weren't being provided protective gear in the early days of the pandemic (Haines, 2020).
- Justin Ling, an independent filmmaker, reported that whistleblowers inside Canada's federal prison system are being punished for speaking out about the spread of COVID-19 in prisons and the lack of mitigation measures such as social distancing and extra soap for handwashing (Ling, 2020).
- A Quebec nurses' union has reported hundreds of complaints from its members and is calling a new government whistleblowing system "window dressing" (Greig & Cabrera, 2020).

Reprisals can take many forms, ranging from harassment in the workplace to dismissal and blacklisting. Even death threats, carried out in some countries, are not uncommon. This inflicts a psychological and financial toll on whistleblowers. Along with the belief that nothing will be done, fear of retaliation is the major reason employees decide not to speak up when observing wrongdoing (Mesmer-Magnus & Viswesvaran, 2005).

Canadian whistleblower protection laws, such as they are, do not provide effective legal protection against such retaliation. The laws are patchy and cover only small, specific sections of the workforce. Although they appear to outlaw retaliation, they are decades behind global best practices. With very limited exceptions, they do not include clauses that can provide the deterrence, protection, and compensation that are required if we wish to have whistleblowers come forward in the public interest to provide information relating to wrongdoing.

⁵ For a list of prominent Canadian whistleblowers, visit the Centre for Free Expression website at <https://cfe.ryerson.ca/key-resources/lists/prominent-canadian-whistleblowers>.

Protection for COVID-19 whistleblowers

In the current Covid-19 pandemic, the importance of these issues is magnified. It is clear that wrongdoing in the following areas can have a critical impact on our ability to combat the virus and its health and economic impacts

1. The provision of healthcare to Covid-19 victims;
2. Scientific and medical research relating to Covid-19; and
3. The acceptance and use of government financial aid provided to support citizens and organizations through the economic downturn.

As such, we believe Canadians have a right to expect whistleblowers will be protected when disclosing such wrongdoing.

Recommendation

Canadians have a right to expect governments to follow up on their commitments to accountability. As noted above, the first step is a commitment to increased transparency via open by default records. The second should be a clear declaration by the prime minister and premiers of their commitment to protect any Canadian who blows the whistle on wrongdoing during the COVID-19 emergency and during the recovery. The declaration should include a commitment to longer-term protections for those who disclose wrongdoing in all sectors via dedicated whistleblower protection legislation. This legislation should follow best practices, some of which are listed below.⁶ Unlike numerous previous efforts, the development of these laws should involve stakeholders from relevant civil society groups and experts in such legislation, with all-party participation in the process.

Creating a safe situation for whistleblowers

In order for whistleblowers to even consider coming forward, they must know that the law will protect them - regardless of what sector, industry, or jurisdiction they are in. This protection can be achieved by ensuring such legislation includes broad and inclusive definitions of:

1. Wrongdoing, encompassing any situation where the public interest could be impacted. Current laws are very restrictive as to what can even be reported by a whistleblower;
2. Whistleblowers, so that they can include contractors, part-time staff, interns, co-op students, volunteers, and trainees (for example) rather than just full-time staff;
3. The types of circumstance that can result in whistleblowers needing to come forward; and

⁶ There are a number of best practice guidelines for whistleblowing laws. One of the strongest has been developed by the Government Accountability Project, a U.S. NGO (available at <https://whistleblower.org/international-best-practices-for-whistleblower-policies/>). See also Ireland's *Protected Disclosure Act, 2014*, frequently cited as an exemplar, at <http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/print#sec1>.

4. Whistleblower actions to protect not just the reporting itself, but seeking advice and support before and during the process.

Creating safe processes and systems to encourage and support whistleblowers

Many of the systems intended to support and protect whistleblowers are poorly designed. They channel whistleblowers into processes where they are identified to their employers and isolated. Moreover, if that process fails, there is very little legal recourse available to them. The following are some of the protections that must be built into our laws and their reporting systems:

1. Allows reporting based on a “reasonable belief” that wrongdoing is or has taken place;
2. Allows anonymous reporting to protect the whistleblower’s identity;
3. Includes specific clauses to protect the identity of the whistleblower(s);
4. Provides protection for all reports of wrongdoing, with a presumption such reports are valid and the person reporting is to be protected unless or until proven otherwise by a neutral and competent authority;
5. Includes multiple disclosure channels for whistleblowers; and
6. Enables whistleblowers to seek support and protection from the civil courts at any stage of the process.

Prohibiting retaliation and providing robust measures to investigate and provide redress

Measures for the prohibition of reprisals against whistleblowers should include:

1. A broad definition of retaliation;
2. Civil immunity from damages and a “responsible communicator” and “qualified privilege” to shield whistleblowers from defamation lawsuits;
3. A reversal of the burden of proof onto the retaliating person or organization;
4. Access to interim injunctive relief from the civil courts to stop retaliation and provide ongoing protection, including interim relief for unfair dismissal to allow for reinstatement;
5. Reinstatement at the same level of seniority and repayment of up to five times any lost remuneration;
6. Compensation for the loss of future opportunities and remuneration;
7. Powers of investigation of retaliation must equal those for the investigation of wrongdoing; and
8. Protection against both direct and indirect retaliation.

It is also important that protection and support should apply to those who support whistleblowers or provide evidence or testimony to their report.

Whistleblower Compensation

Canada did not consider incentives when first introducing its whistleblower legislation. For example, when the federal government Working Group on the Disclosure of Wrongdoing published its report in 2004, rewards for whistleblowing were not mentioned. One union official argued against even small rewards for whistleblowing, citing a 1967 British decision which described them as a “great evil” (Carson, 2006).

It is important that incentives not be thought of as a bounty. Rather, they are best considered as insurance for the risks that whistleblowers take. Even where incentives exist, cases take years to clear the investigation and litigation stages. Awards typically barely cover the costs to whistleblowers of legal fees, lost income, lost promotion opportunities, and blacklisting, not to mention the emotional and psychological toll reprisal can take on whistleblowers and their families.

The United States was the first to lead in the use of incentives. American whistleblower incentives follow one of two models: a reward for reporting wrongdoing or enabling citizens to sue wrongdoers on behalf of the government. The latter are called “qui tam” laws, with the best example being the False Claims Act (FCA). Between 1986 and 2020, \$63 billion was repaid to the U.S. Treasury under the FCA. In 2019 alone, \$3 billion was recovered. Whistleblowers collect a percentage of these recoveries. This has led one expert (Kohn, 2011) to call the FCA “the most effective anti-fraud law in the United States (and perhaps the entire world).” The U.S. Securities and Exchange Commission and Internal Revenue Service also provide incentives for tips that lead to recoveries.

Many countries are now considering implementing or expanding such incentives because they provide a form of insurance for whistleblowers against the damage to their careers and livelihoods. Canada has three such programs now in place.

Canadian Incentives Programs

The first incentive program in Canada was the Canada Revenue Agency (CRA) Offshore Tax Informant Program (OTIP). This was launched in 2014 to respond to public concern over the use of offshore tax shelters, the extent of which was being exposed by whistleblowers such as Rudolf Elmer, Bradley Birkenfeld, and others. The program rewards informants with 5-15% of the tax revenue recovered, when the amount recovered is greater than \$100,000. The requirements for the information to be provided are detailed, including the fact that it must not already be possessed by the CRA. Upon receiving a report, CRA officials assess the information, and, if it is deemed worth pursuing, enter into a contract with the “informant” (Canada Revenue Agency, 2019). In 2018, the Quebec tax authority, Revenu Québec, implemented a similar program.

In 2016, the Ontario Securities Commission became the first provincial body to introduce rewards via its Whistleblower Program. This program incentivises the provision of original information on securities- or derivatives-related misconduct if they result in recoveries of over \$1 million. The awards range from 5-15%, to a maximum of \$5 million. The *Ontario Securities Act* supplements this with protections

for whistleblowers, including a “reverse onus” clause requiring employers to prove that any reported reprisal was unrelated to the whistleblowing. The program promises “reasonable efforts” to keep the identity of whistleblowers confidential (Ontario Securities Commission, 2015). No other province had implemented such a program. While the Quebec Autorité des marchés financiers and Alberta Securities Commission developed whistleblower protections, they declined to offer incentives (Martin-Bariteau & Newman, 2018).

Recommendation

The CCAG recommends that Canada immediately implement whistleblower incentives for the private sector. The law should include best-practice whistleblower protections, such as confidentiality guarantees and a reverse onus of proof, which requires employers to prove that disciplinary action or any other form of retaliation is not a response for whistleblowing. Other principles are described in the section above on protections. To better compensate for risk, we recommend that awards be consistent with U.S. programs, which range from 10-30% of the revenue recovered. In addition, similar compensation could be offered to whistleblowers who expose non-financial wrongdoing, with the award coming from fines that would be levied by the relevant authority as a result of the disclosure of that information.

Several agencies with experience in reviewing government contracts and operations already exist and could be adapted or serve as a model for an oversight agency. At the federal level, this includes the Procurement Ombudsman at the Ministry of Public Works and Procurement Services and the Office of the Auditor General.

In addition, the *Criminal Code* already provides a mechanism for the recovery of funds from criminal organizations that could be adapted to the mispending of emergency spending in the COVID-19 pandemic – and beyond. Part XII.s, Proceeds of Crime (Money Laundering) and Terrorist Financing Act, requires a “balance of probabilities” level of proof, rather than a “beyond reasonable doubt” level, and has been used successfully by Canadian authorities in the past. Specific changes could include:

- Broadening the definition of “designated offence” under section 462.3 (1) to include improperly obtaining or using funds granted, loaned, or contributed by any level of government as a result of COVID-19 pandemic emergency measures, and
- Adding a new section under section 462.37 (1) for the court to order, on the request of the relevant authority, a discretionary payment to informants whose information has resulted in a forfeiture.

Provinces have enacted similar legislation intended to prevent convicted offenders from profiting from their crimes. Other amendments could be made as necessary and the program could serve as a prototype for a future recovery regime for similar offences involving the misappropriation or misuse of public funds.

Education and Awareness

Whistleblowing laws, such as the *Public Servants Disclosure Protection Act* and its provincial counterparts, are particularly important during emergencies. That is because they empower public servants to report wrongdoing by bad actors who may seek to capitalize on those emergencies for financial and political gain. But those laws are useless if employees are unaware of how to use them. That is why the G-20 Anti-Corruption Action Plan recommended such legislation “should be supported by effective awareness-raising, communication, training, and evaluation efforts.” And that is also why, in its first statutory review of the *Public Servants Disclosure Protection Act*, the Standing Committee on Government Operations and Estimates recommended “increasing the number of (whistleblowing) training and information sessions” offered to employees, so that all of them are “familiar with their rights and the recourse available to them if they suffer reprisals.”

Consistent with such recommendations, we believe it is important for the federal and provincial governments to immediately undertake whistleblowing awareness campaigns among public employees as part of their response to the pandemic. These campaigns would educate employees about how to report wrongdoing concerning the expenditure of public funds related to this crisis, as well as the non-disclosure or manipulation of information about COVID-19. In doing so, the federal and provincial government would send a clear message to both their employees and the broader citizenry that public safety and democratic accountability are paramount during the pandemic.

COVID-19 Ombudsperson

The recommendations in this white paper are ambitious, and it is understood that implementation will require hard work and consistent, steady leadership. Some can, as noted in the introduction, be enacted quickly by a government determined to act in the public interest. Others will require more time, such as the development of comprehensive whistleblowing legislation.

In addition, many Canadians who witness wrongdoing will have questions and require support and advice in reporting what they have witnessed. Most will have no experience with reporting different kinds of wrongdoing and which authority to turn to, be it federal, provincial, territorial or municipal. Even those in organizations with disclosure mechanisms, such as whistleblower hotlines, may not know of (or trust) them. They would benefit from support in choosing where to go, articulating their concerns, and understanding what evidence they need to make a credible disclosure of wrongdoing.

Government departments, for their part, may benefit from a central authority to which they can turn for advice on handling wrongdoing and, perhaps coordinating efforts to reduce or detect fraud and other forms of misconduct.

Recommendation

To address this need, we recommend the creation of an independent entity, such as a COVID-19 Ombudsperson (or a similar ombudsperson-like office) at the federal

level and in consultation with other jurisdictions. Provinces and territories may also wish to create such a body or integrate it into the functions of an existing authority.

Ombudspersons have a long history in helping organizations resolve problems in a non-confrontational manner. The International Ombudsman Association defines their primary role as “(1) to work with individuals and groups in an organization to explore and assist them in determining options to help resolve conflicts, problematic issues or concerns, and (2) to bring systemic concerns to the attention of the organization for resolution” (IOA, n.d.) and provide standards of practice. Strict confidentiality for all people approaching the office is also assured.

The COVID-19 Ombudsperson could serve several functions, including:

- Helping Canadians determine whether they have observed wrongdoing;
- Advising Canadians where to go and what evidence they might need when they have witnessed wrongdoing;
- Tracking reports of wrongdoing to determine whether there are patterns;
- With the consent of the person reporting the wrongdoing, alerting government agencies, and possibly private organizations, of the wrongdoing;
- Advising relevant government agencies when patterns of misconduct emerge;
- Advising government officials on creating a safe mechanism for whistleblower protection;
- Advising private sector organizations when they have concerns related to COVID-19;
- Liaising between different levels of government, different departments, civil society groups, unions, and other groups or individuals;
- Assist in the informal resolution of issues arising between parties, such as different levels of government, enforcement authorities, businesses, and those who have reported wrongdoing; and
- Educating the public about transparency and whistleblowing issues, or coordinating the education efforts recommended above.

As per IOA guidelines, the COVID-19 Ombudsperson would not conduct full investigations, and would maintain neutrality.

Summary

We believe that the COVID-19 emergency demands bold action not just in dispensing government financial support and buttressing hard-pressed public health care, but to implement improvements to public and private sector accountability.

Our first recommendation is to improve government transparency by making certain broad classes of records open by default. Such a change is consistent with the democratic right of Canadians to know what their governments are doing, and how their funds are being used.

Our second recommendation is to implement broad, urgently needed public and private sector whistleblower protections, helping those who serve the public interest by reporting wrongdoing.

Our third recommendation is to implement compensation for those who report significant wrongdoing, which would help level the playing field between employees and employers and serve to encourage Canadians to come forward.

Our fourth recommendation, education and awareness, would inform Canadians of their rights with respect to access to government records and the disclosure of wrongdoing.

Our final, and perhaps most immediate recommendation, is to create a COVID-19 Ombudsperson to tie these activities together and provide neutral support and guidance to Canadians, governments, and private sector organizations.

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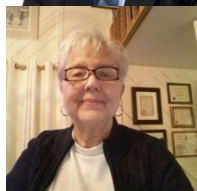
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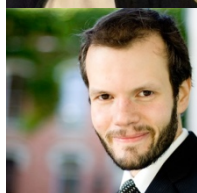
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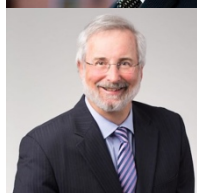
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