November 30, 2020

VIA EMAIL: RSCommittee.Admin@assembly.ab.ca

Standing Committee on Resource Stewardship
% Committee Clerk
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Edmonton, Alberta
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## Re: Public Interest Disclosure (Whistleblower Protection) Act

We are writing to the Committee in response to an invitation received by Mr. Curtis Stange of ATB Financial to provide submissions in the Committee's review of the *Public Interest Disclosure (Whistleblower Protection) Act* (the "**Act**"). We appreciate the opportunity to participate.

Our comments on the Act are framed by the spirit of the Act, as stated in section 2(2). Section 2(2)(a) states that the Act is intended to apply to, among other things, matters relating to a public entity that an employee believes may be unlawful, dangerous to the public or injurious to the public interest. We also note that section 3(1)(c) of the Act defines 'wrongdoing', in part, as including gross mismanagement of public funds, a public asset, or in the delivery of a public service. However, the definition of 'public entity', in referring (via the *Public Interest Disclosure (Whistleblower Protection) Regulation*) to sections 1(1)(r)(i) and (ii) of the *Financial Administration Act*, includes entities, such as ATB Financial, that are recognized as corporate enterprises operating in a commercial manner, and not serving a public function in the same way as other agencies.

Typically, those other agencies are stewards for funds or other assets that belong to the public generally, are given statutory decision or rule making authority over the public, have their operations funded by public money, and/or provide or direct government services to the public such as education or health. None of those are the case for ATB Financial. Funds held in ATB Financial accounts belong to ATB Financial customers, not the general public. Unlike a regulator or administrative tribunal, ATB Financial does not have any statutory role to play in the lives of Albertans. Finally, while ATB Financial is a source of revenue for the province, our operations are self-funded and we do not rely on public funds to operate. Therefore, we do not believe that the current definition of 'public entity' in the Act furthers the purpose of the Act.

For this reason, we would suggest the Committee consider amending the Act to exclude ATB Financial from its operation. This could be accomplished by amending the definition of 'public entity' in section 2(1) of the Regulation. While we note that the Commissioner also has the power to exclude agencies from the application of the Act, we believe that providing that exemption via the Act, or the associated Regulation, would be preferable for the purposes of clarity. Alternatively, if the Committee prefers a narrower approach to addressing this issue, we believe that the definition of wrongdoing found in 3(1)(c) could be amended such that it not apply to entities such as ATB Financial that do not deal with public funds or public assets or provide a public service. This would result in ATB Financial still being considered a public entity under the Act, but with the definition of wrongdoing being limited to violations of law or substantial and specific dangers to an individual or the environment. We believe this would better reflect our status as a commercial entity.

Our other comment on the Act relates to confidentiality. We note that, upon the conclusion of an investigation of wrongdoing, section 22(3) of the Act requires the Commissioner to provide a report to the relevant department, public entity, or office and section 22(4) requires the Commissioner to notify the complainant of the fact that a report was produced and of any other information the Commissioner considers appropriate. We believe the Act would benefit from having both the report and the information provided to the complainant subject to explicit confidentiality requirements in section 22.

In the case of the report, it is reasonable to think that it may contain information from which the identity of individuals involved in the matter can be discerned, and that it would not serve the public interest for such information to be disclosed. We note that the Commissioner has posted reports on its website and that those reports commonly contain a notation restricting the recipient from further distributing the report and a note that the report uses generic language to protect the identity of the parties involved. However, section 22 does not contain an explicit obligation on the organization receiving the report to maintain it as confidential. Though the Act provides for regulations "respecting the confidentiality of information collected concerning disclosures and complaints of reprisal", the Regulation does not currently address those topics. We believe that the process would benefit from including such a restriction in section 22, consistent with the notation that the Commissioner already includes on reports.

Likewise, there is no explicit obligation on the part of the complainant to maintain the confidentiality of the information provided to them from the Commissioner. While it may be possible to mitigate that concern by controlling what information is provided by the Commissioner, having an explicit duty of confidentiality may allow the Commissioner to more

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fully explain the results of an investigation to a complainant (which may be particularly helpful in the case of a complainant who does not agree with the outcome) and would more fully protect the confidentiality of the process. We believe that complainants would be more likely to avail themselves of the protection of the Act, and that other individuals such as witnesses would be more likely to fully participate, if they had additional comfort as to the confidentiality of the process. We suggest that this obligation could also be included in section 22.

Along similar lines, we note that section 52(1) of the Act provides that no proceeding or decision of the Commissioner related to wrongdoing can be called into question in any court (except on the grounds of jurisdiction). We believe this is appropriate, and would suggest expanding and clarifying it to say that no report related to wrongdoing is producible in any court proceeding. The existing restriction in 52(1) means that no one can challenge the Commissioner's decision in court, however, it does not seem to explicitly prohibit a party from attempting to introduce a report and rely on its conclusions in litigation that the Commissioner is not a party to. Not only would this run contrary to the confidentiality principles that we believe are appropriate, we believe it would also be contrary to the intent of both section 52(1) and the purpose of the Act. We believe it is clear that the Act is not intended to provide evidence for use in civil litigation.

We thank you again for the opportunity to provide feedback in the review of the Act. We are available to discuss these matters further at your convenience.

**Stuart McKellar, Q.C IDC.D**

**General Counsel, SVP Corporate Operations and Corporate Secretary**

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