

Whistleblowers Not Protected: How the Law Abandons Those Who Speak Up in the Public Interest in Alberta

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Executive Summary

Albertans rely on whistleblowers, confidential journalist sources, and citizens who speak up in the public interest to help uncover wrongdoing in society. On just about every issue of concern to the public, organizations and individuals bombard us with public relations communiques, spin, silence, or outright lies. The real story, when it portrays organizations or individuals in bad light or reveals malfeasance, is rarely if ever known.

When it is known, chances are very good that the source of damning information is a whistleblower, defined broadly in this report as someone who publicly or anonymously speaks up in the public interest at the risk of personal and professional consequence. Whistleblowers tell us what is really going on and when we should be concerned about possible illegal and unethical dealings of those who hold the strings of political and/or economic power. Whistleblowers are critical, in other words, to serving the goals of accountability and transparency that check unbridled power lie at the foundation of a functioning democracy.

This report is about the laws that could mitigate the personal and professional consequences of whistleblowing specifically as it relates to Alberta. Three areas are examined in this report: (1) whistleblower legislation (2) court-imposed disclosure of confidential journalist sources, and (3) legislation that protects public participation and expression.

Alberta's whistleblower legislation is called the *Public Interest Disclosure (Whistleblower Protection) Act* (PIDA). It aims to protect public service employees who make disclosures of "wrongdoing" against retaliation or dismissal in the workplace.

The PIDA falls far short of international best practices for whistleblower protection. Worse, the legislation, and its interpretation by the Office of the Public Interest Commissioner (PIC) that investigates complaints, is laced with pitfalls through which few whistleblowers should ever dare to venture.

The trigger for whistleblower protection is that an employee has a reasonable belief that a "wrongdoing" has occurred. The definition of "wrongdoing" under the act is overly narrow and has been hobbled by PIC interpretations that are incorrect and ignore the "reasonable belief" threshold. In addition, closed and strict reporting procedures have been exacerbated by PIC interpretations that imposed further requirements not found in the legislation.

As a result, there have been only three successful findings of wrongdoing since the legislation was enacted in 2012. All other employees who reported wrongdoing to the PIC did not receive protection. Even where wrongdoing is found, the legislation

requires an employee to prove a connection between it and a workplace reprisal by the employer - something that is notoriously difficult to do.

The report recommends that: (1) the PIDA be amended with the primary goal of affording liberal and remedial protection for whistleblowers taking into account the deficiencies outlined in this report, as well as international best practices; (2) reforms are made to competently interpret and administer the Act according to its remedial terms, and provide adequate resources for the investigation of alleged wrongdoings and reprisals; (3) the experiences and concerns of public service employees be taken into account through an anonymous survey to gauge the kind and extent of wrongdoing they encounter in the workplace, and to help determine which legal reforms would encourage them to make disclosures; (4) private sector employees be included under a revamped regime.

Some whistleblowers choose to filter information confidentially through a journalist. That individual may provide a tip to a journalist or offer behind the scenes information and context to a story, leak a document, or be the primary source for the story. There is no protection of journalist source confidentiality in Alberta, outside the criminal context. This means that individuals and organizations can successfully demand that a journalist reveal the identity of a source by suing them in court.

A journalist shield law is needed in Alberta. Existing law, at the federal level, balances the need for confidentiality (to encourage sources to come forward) against the need for fair judicial administration (for police or plaintiffs to know all relevant evidence). This balancing has favored the latter in virtually all judicial decisions. It is recommended that an Alberta shield law reflect an approach adopted in most U.S. states. This approach preserves anonymity in all but the most exceptional cases. In applying this test, courts should also consider the rigor of journalist standards used to base a story on a confidential source.

For citizens who speak up on a matter of public interest, there is no protection in Alberta. Not only may they lose their job but they can be sued for telling the truth or expressing legitimate opinions. If the source of the wrongdoing is powerful or rich (or has much to lose), they may intimidate a whistleblower with an expensive and lengthy lawsuit. While Ontario and British Columbia have effective and balanced laws that prevent lawsuits that limit expression in the public interest, Alberta has no such law.

It is recommended that Alberta enact protection of public participation legislation modelled after the Ontario law. That legislation offers an expedited method for disposing of lawsuits against defendants who express themselves on matters that relate to the public interest. The process requires a plaintiff to prove their case has substantial merit and that the defendant has no valid defence. Even if a plaintiff is successful here, the lawsuit will only survive if the harm suffered is sufficiently serious to outweigh the public interest in the expression.

Successive Alberta governments have done virtually nothing to protect whistleblowers, confidential journalist sources, and citizens who speak up in the public interest. Among North American jurisdictions, Alberta is a laggard on all of these fronts. Strong legislation in these areas would help instill greater confidence in our institutions, inspire more democratic participation by citizens, and ultimately lead to better governance.

Introduction

Perhaps more than we realize, Albertans rely on whistleblowers, journalist sources and others who speak up in the public interest to uncover wrongdoing in society, be it government corruption, corporate malfeasance or otherwise. Despite the rhetoric of transparency that organizations and their representatives like to recite, access to the real story about what goes on behind the scenes is, at best, extremely difficult to uncover through ordinary means.¹ Citizens are bombarded with public relations communiqués, spin, “no comment,” or outright lies on just about every issue of concern to the public. The real story, when it portrays organizations or individuals in bad light or reveals malfeasance, is rarely if ever known.

When it is known, chances are very good that the source of damning information is a whistleblower, defined here broadly as someone who publicly or anonymously speaks up in the public interest at the risk of personal and professional consequence. Whistleblowers are indispensable to lifting the veil on information control and manipulation that organizations, both public and private, constantly feed the public. Whistleblowers tell us what is really going on and when we should be concerned about possible illegal and unethical dealings of those who hold the strings of political or economic power. Whistleblowers are critical, in other words, to serving the goals of accountability and transparency that check unbridled power and lie at the foundation of a functioning democracy.

One would hope that these civic-minded individuals - who receive no material benefit in return for their efforts - would be afforded strong protections through our laws. Instead, the social science literature bulges with narratives and empirical data portraying the serious, and sometimes tragic, personal and professional consequences whistleblowers suffer when their identity is known.

This report is about the laws that mitigate the personal and professional consequences of whistleblowing with a specific focus on Alberta. There is no jurisdiction that offers general whistleblowing protection to anyone who speaks up in the public interest. Instead jurisdictions typically offer a patchwork of protections, if any at all. These laws may be sectoral, limited to a particular type of disclosure or expression, and offer varying degrees of protection. In this report, I examine three laws found, at least partially, in Canadian jurisdictions: (1) whistleblower legislation, (2) protection against court-imposed disclosure of confidential journalist sources, and (3) protection of public participation legislation.

¹ Legally, access to information laws are the primary tool for government transparency. However, that system is flawed as much information is categorically off limits, delayed, destroyed, not recorded, or access is otherwise evaded. There is no general access to information law for private entities.

Whistleblower legislation in Alberta aims to protect public service employees who make disclosures of wrongdoing, according to strict and closed protocols, against retaliation or dismissal in the workplace. The legislation and its interpretation by the Office of the Public Interest Commissioner, is laced with pitfalls through which few whistleblowers should ever dare to venture.

For whistleblowers who speak up publicly, there is no protection in Alberta. Not only may they lose their job but they can be sued for telling the truth or expressing their legitimate opinion. If the source of the wrongdoing is powerful or rich (or has much to lose), he/she may intimidate a whistleblower with a lawsuit.² While Ontario and British Columbia both have strong and effective laws that prevent lawsuits that limit expression in the public interest from advancing in certain situations, Alberta has no such law.

Some whistleblowers choose to filter information through a journalist.³ That individual may provide a tip to a journalist or offer behind the scenes information and

² Usually, the cause of action for such a lawsuit is defamation, i.e., the lowering of one's reputation in society, which is not difficult to prove when the whistleblower has implicated the alleged wrongdoer plaintiff.

³ Alternatively whistleblowers may contact MLAs with their stories, which may attract absolute protection under Parliamentary privilege.

context to a story,⁴ leak a document,⁵ or be the primary source for the story.⁶ There is no protection of confidential journalist sources in Alberta, outside the criminal context. The fact that many professional journalists take the protection of confidential sources seriously and that it is rarely legally challenged suggests that this is the safest route for the whistleblower. In a legal sense, however, confidentiality is illusory.

These three regimes aim to protect individuals who make *disclosures* in the *public interest*. Ideally these concepts should be understood in a broad sense. A *disclosure* may be factual, e.g. a document or a witnessing of events that are the typical subject matter of whistleblower inquiries or leaks to the press. In the public participation

⁴ For example, after a tip led The Narwhal (Sharon Riley) to a buried government report, confidential sources provided further context, concerning the large scale failure of oil and gas reclamation regulation in Alberta: see <https://thenarwhal.ca/many-of-albertas-reclaimed-wells-arent-actually-reclaimed-government-presentation/> and <https://thenarwhal.ca/report-buried-by-alberta-government-reveals-mounting-evidence-that-oil-and-gas-wells-arent-reclaimed-in-the-long-run/>

⁵ For example, a privileged memo leaked to the CBC (Rusnell/Russell) broke open one of the biggest political scandals in recent years, the so-called Tobaccogate affair. The memo showed that recommendations for a lucrative government contract were favorably changed vis-à-vis the firm of the justice minister's ex-husband and future campaign manager. That firm ended up winning the contract: <https://www.cbc.ca/news/canada/edmonton/redford-tobacco-litigation-probe-not-provided-all-relevant-documents-report-says-1.3520271>. A leaked document to CBC (Rusnell/Russell) also broke the so-called fake passengers scandal involving Premier Redford: <https://www.cbc.ca/amp/1.2720906>. More recently, a leaked confidential memo (Russell/Rusnell) revealed Alberta's looming health-care upheaval: <https://newsinteractives.cbc.ca/longform/confidential-alberta-health-services-document-reveals-massive-proposed-health-care-system-restructuring>. A leaked audio recording (Rusnell/Russell) tipped off a proposed \$200M private orthopedic surgical facility would be largest in Alberta's history: <https://www.cbc.ca/news/canada/edmonton/private-orthopedic-surgical-alberta-health-1.5678883>. A leaked document revealed vulnerabilities at Alberta Health in protecting health records in computer systems: <https://www.cbc.ca/news/canada/edmonton/alberta-health-cybersecurity-patient-health-1.4769212>. A leaked document revealed drug use (8 overdoses, 1 death) over a single weekend at Edmonton remand centre: <https://www.cbc.ca/news/canada/edmonton/edmonton-remand-centre-drug-overdoses-1.4752312>. The full report of the Calgary Olympic bid committee pertaining to the costs of hosting the 2026 Olympics was leaked to the CBC: <https://www.cbc.ca/news/canada/calgary/calgary-olympic-whistleblower-1.4838501>. An internal campaign email was leaked to CBC (Rusnell) showing Alberta PC party illegally soliciting donations: <https://www.cbc.ca/news/canada/edmonton/alberta-tory-riding-association-illegally-solicited-donations-1.976545>

⁶ For example, an unnamed source led to an in-depth investigation by CBC (Rusnell/Russell) uncovering that Alberta Health was funding a multi-million dollar unproven alternative health program run by Pure North <https://www.cbc.ca/news2/interactives/unproven/>. Oil workers, anonymous and identified, revealed health and

safety violations at multiple work sites, and employer pressure to falsify records after incidents occur: <https://www.nationalobserver.com/2019/08/20/coverups-and-lies-systemic-cancer-world-oilpatch-health-and-safety-breaches-say>. Unnamed sources (employees) revealed sexual harassment at an Edmonton correctional facility: <https://www.cbc.ca/news/canada/edmonton/whistleblowers-call-sexually-explicit-recordings-at-edmonton-prison-dangerous-1.3861599>

context, a disclosure might also include opinions. A protected disclosure should never, of course, include intentional lies.

Each regime, in one sense or another, is also directed at protecting the public interest. In the whistleblowing context, this takes the form of a closed list of “wrongdoing” that may be reported. In the other contexts, the term is understood more broadly, sometimes with reference to the following Supreme Court articulation of the concept:

To be of public interest, the subject matter “must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached”... Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

Public interest is not confined to publications on government and political matters... Nor is it necessary that the plaintiff be a “public figure” ... Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.⁷

Persons making public interest disclosures face many social - and, it turns out, legal - impediments. They may be ostracized by coworkers, attacked in the press, lose their jobs, or face other kinds of reprisals. They also may have incomplete information about the wrongdoing they perceive. If as a matter of policy, we agree that individuals should be encouraged to speak up about serious wrongdoing they encounter, then new and more effective legislation is needed to help secure their protection. This report, I hope, offers a step in that direction.

A. Public Interest Disclosure (Whistleblower Protection) Act

Whistleblower legislation protects *employees* who make public interest disclosures in the context of the *workplace* environment. The basic purpose is to encourage

⁷ *Grant v. Torstar Corp.* 2009 SCC 61 at paras. 102, 105, 106.

employees to speak up about a perceived wrongdoing in the workplace by preventing employers from firing or disciplining them for doing so.⁸

The saga of whistleblowers is well-documented in social science literature.⁹ They are typically under-protected legally, and suffer numerous social and personal consequences for speaking up about their employer. Along with workplace retaliation, many whistleblowers suffer social ostracism at work, loss of family, and financial ruin through loss of employment. The stakes are therefore extremely high for whistleblowers.

To be worthwhile, laws protecting whistleblowers need to be generous in their protections and ever mindful of the precarious plight of the whistleblower. Sadly, whistleblower protection in Alberta is hardly worthy of the name.

Alberta's whistleblowing legislation is called the Public Interest Disclosure (Whistleblower Protection) Act (PIDA) and was first introduced in 2012.¹⁰ The act is administered by the public interest commissioner (PIC).¹¹ The public interest commissioner's office performs a number of functions under PIDA.¹² For our purposes, the primary function is the investigation of, and reporting on, disclosures of wrongdoing, and of reprisals.¹³

1. Who is Protected?

Line-drawing about who is protected is an undesirable feature of whistleblower protection that is not comprehensive in scope. The act draws two lines. First, it

⁸ At common law, an employer has a legal right to fire or discipline an employee for cause; for example, breaching a duty of loyalty to the employer. Whistleblower protection also prevents an employer from firing or disciplining an employee without cause.

⁹ See, for example, C. Fred Alford's *Whistleblowers: Broken Lives and Organizational Power* (Cornell University Press, 2001) and Kate Kenny's *Whistleblowing: Toward a New Theory* (Harvard University Press, 2019).

¹⁰ Public Interest Disclosure (Whistleblower Protection) Act, SA 2012, available at <https://www.canlii.org/en/ab/laws/stat/sa-2012-c-p-39.5/latest/sa-2012-c-p-39.5.html>

¹¹ The current Public Interest Commissioner Marianne Ryan was sworn in on July 4, 2017.

¹² To review the written procedures of subject organizations to ensure consistency with the legislation (s. 5); To manage disclosures from employees (s. 15); To advise designated offices about the management and investigation of a disclosure (s. 14); To prepare a detailed annual report to the Legislative Assembly (s. 33).

¹³ To investigate legitimate disclosures of wrongdoing (s. 18) and reprisals (s. 26) and to report on them.

applies only to the public sector i.e., government departments and offices, agencies, boards, and commissions.¹⁴ One-and-a-half-million private sector employees in Alberta are therefore excluded from whistleblower protection.¹⁵ At least one jurisdiction - the United Kingdom - extends whistleblower protection to both the public and private sectors.¹⁶

Second, the act is limited to “employees”, a legally ambiguous term that may or may not, depending on circumstances, apply to contract workers. Given the goals of whistleblower protection, there seems no reasonable basis for limiting either the sector of protection or the type of employee covered. Any workplace individual could potentially be exposed to wrongdoing that negatively impacts the public interest.

2. Which Disclosures are Protected?

A fundamental goal of whistleblower protection should be to encourage employees to report wrongdoing that undermines the public interest without burdening the system (or unnecessarily diminishing the reputation of the organization) with less serious workplace complaints. Thresholds for protected disclosures in Canada are often set high enough to exclude employee disagreement with decisions that follow proper management procedures.

At the same time, the categories of protected disclosures (so-called “wrongdoing”) are sometimes too-narrowly drafted or are subject to wrong interpretations by the PIC. For these reasons, most reported improprieties do not meet the threshold of “wrongdoing” with the result that disclosing employees are not eligible for protection against employer reprisal.

A protected disclosure must relate to a “wrongdoing,” meaning:

- a statutory violation (breaking a specific written law)
- “substantial and specific” danger to life, health or the environment, or

¹⁴ With one exception - the Ontario Securities Commission see [here](#) - whistleblower protection in Canada covers only public sector workplaces.

¹⁵ The private sector employs nearly 12 million people in Canada, and almost 1.5 million in Alberta: see https://www.ic.gc.ca/eic/site/061.nsf/eng/h_03090.html#point2-1

¹⁶ Public Interest Disclosure Act 1998 (UK) see: <https://www.legislation.gov.uk/ukpga/1998/23/contents>

- “gross mismanagement”

The category of statutory violations does not include breaches of the rule of law. For example, the kind of wrongdoing exposed in the SNC-Lavalin scandal, i.e. inappropriate political pressure on prosecutorial discretion, would not be protected in Alberta.¹⁷ In addition, the category has also been wrongly interpreted by PIC to *not* include “technical” violations that are subsequently rectified.¹⁸

The category of “substantial and specific” danger to life, health or the environment creates a high threshold that may deter disclosures by employees who fear that a wrongdoing may not be either “specific” or “substantial” enough. The problem is exacerbated by uncertain science about cause and effect regarding health and environmental risk. For example, it is unclear that a disclosure alleging cabinet ignored recommendations of the chief medical officer during a public health emergency, such as the COVID-19 pandemic, would qualify under this definition.

The final category of wrongdoing is “gross mismanagement.” This term was undefined prior to a welcome amendment in 2018 that elaborated it to include “act or omission that is deliberate and shows a reckless or willful disregard to the proper management of” public money, delivery of public services and certain systemic abuses of employees. These conditions should be satisfied - and wrongdoing found - where superiors don’t care that something is done (or not done) contrary to proper management practices.

A whistleblower often has limited, or at least incomplete, information on which to make a judgment about potential wrongdoing. In recognition of that, a disclosure is protected under the act if the employee “reasonably believes” that a wrongdoing has been, or will be, committed.¹⁹ This should mean that someone who encounters some direct evidence of possible wrongdoing in the course of their duties would be protected. However, the PIC determines wrongdoing against a more rigorous standard of what an investigation reveals, as opposed to what the whistleblower knew and reasonably believed.

¹⁷ Federal whistleblower protection also does not cover rule of law wrongdoing. See also the case of Sylvie Therrien who disclosed a quota system used to reduce the number of EI recipients that did not violate the legislation but did violate legal norms of procedural fairness as well as rule of law: discussed in Robert Shepherd’s “Whistleblowing and Ethical Practice” in Ian Green’s and David P. Shurgarman’s (eds.) *Honest Politics Now: What Ethical Conduct Means in Canadian Public Life* (Toronto: James Lorimer & Co., 2017) at 233.

¹⁸ Public Interest Commissioner Annual Report 2017-18 at 24.

¹⁹ Section 9 PIDA

These incorrect interpretations are inconsistent with the remedial purposes of the act, and discourage whistleblowers from coming forward. The PIC appears less concerned with sheltering whistleblowers from reprisal than with protecting individuals and organizations from accusations of wrongdoing. Rather than jealously guarding the precarious situation of the whistleblower, the office of the PIC finds ways to exclude them from protections under the act.

Protections are denied in other ways. When a disclosure leads to an *unrelated* finding of wrongdoing, the employee is not protected. In the Health Services case, in which a disclosure directed at poor procurement practices did not rise to the level of wrongdoing, the commissioner nonetheless discovered a conflict of interest.²⁰

There was no wrongdoing - and thus no protected disclosure - since the conflict of interest was not what the employee complained about. Yet, the possibility of retaliation likely increases the greater the misconduct discovered regardless of whether the whistleblower specified it in their complaint.

The Act also prevents disclosures that pertain to deliberations of cabinet or its committees, solicitor-client privilege²¹ or parliamentary privilege.²² These are large categories behind which to hide wrongdoing.

For example, the Tobaccogate controversy started as a leak of a document to the press that showed the procurement ranking of a firm that had strong connections to the then-Justice Minister was inexplicably and upwardly changed. That firm was subsequently awarded a multi-million-dollar contract. We know from the three investigations into Tobaccogate, that Alberta Justice claimed solicitor-client privilege over this document. If the source had disclosed it to the PIC, it would have refused to investigate on the basis of the claimed privilege.²³

Another unfortunate feature of the Act is the requirement that a disclosure, or even the seeking of advice about making a disclosure, be made “in good faith.”²⁴ This opens up an avenue of attack where the employee has a strained relationship with management, perhaps as a result of challenging them over the wrongdoing in

²⁰ *Allegations of Wrongdoing Related to Health Services* (July 16, 2014) P14-106915

²¹ See s. 28.1(1) PIDA

²² See. S. 4.1 PIDA

²³ Under similar federal legislation, the Public Interest Commissioner has explicitly refused to investigate a disclosure on the basis of solicitor-client privilege: Shepherd *supra* note 17 at 214.

²⁴ Protection against reprisal rests on a disclosure made in “good faith” (s. 24).

question.²⁵ Given the goal of exposing wrongdoing in the public service, a disclosure should be judged on the merits without an inquiry into an employee's motivation. At the very least, the onus should be on the employer to prove that an employee is not acting in good faith.²⁶

3. Procedural Hurdles

The Act offers protection only to a disclosure made *in writing* and *containing the following information if known*: a description of the wrongdoing, names of the individual(s) involved, the date of the wrongdoing, and whether proper procedures were followed.²⁷

In a 2017 reprisal investigation, the Commissioner added the requirement that a written complaint to an authorized person (here the deputy minister) must also either reference the PIDA or explicitly identify that it is a disclosure under the Act:

“...the email sent to the deputy minister did not constitute a disclosure of wrongdoing. The email did not make any reference to PIDA or suggest that the email ought to be considered a disclosure under the act. Therefore, the deputy minister could not have formed an intent to reprise against the employee for making a disclosure.”²⁸

It is, of course, obvious that a superior could form an intent to retaliate against an employee whether or not the Act is referenced in the disclosure.

Equally alarming is the case of *Allegations concerning a department within Health Services* (April 4, 2017). Here an employee refused to follow improper workplace instructions unless a superior provided written authorization. But since the employee did not refuse to participate in the wrongdoing or contact the designated officer or

²⁵ See Transparency International “A Best Practice Guide for Whistleblowing Protection” (2018) at 15: “motivation should be irrelevant (no ‘good faith’ requirement).” The act also leaves unclear the status of disclosures where there is a mixed motive, i.e. a disclosure in the public interest and as retribution against an unresponsive employer.

²⁶ The act is silent as to onus. The onus should not be on the employee: see OECD “Committing to Effective Whistleblower Protection” (2016) at 50.

²⁷ Section 13 PIDA.

²⁸ Annual Report 2017-18 at 20: Allegation of reprisal for having submitted a disclosure of wrongdoing (13 June 2017).

the PIC - but rather managed the wrongdoing by challenging his superiors - he was denied protection from reprisal under the act.²⁹

Seeking advice about whether to pursue a formal disclosure is limited to certain workplace superiors or the commissioner's office.³⁰ Actual disclosures must be communicated to the chief officer (usually deputy minister) or the commissioner.³¹ Complaints to superiors or actions taken outside of this process, even if made in writing, are unprotected. By contrast, a Government of Canada review of its whistleblower legislation recommended that a worker should be able to make a disclosure to any manager within an organization without losing whistleblower protection.³²

Disclosing wrongdoing directly to the public, the press, or appropriate regulatory authorities, even in urgent cases³³ also leaves the whistleblower unprotected.

There is provision in the Alberta legislation for disclosing wrongdoing anonymously to the commissioner.³⁴ This confidentiality may lead to spillover retaliation, where the employer wrongly infers the identity of the employee or supporting witnesses and retaliates against them. Employees victimized by spillover retaliation are not covered under PIDA.

Given the grave risks of whistleblowing and the many gaps in protection under PIDA, employees should have access to legal advice before deciding to make a disclosure. There is no mechanism in PIDA, however, to provide or compensate for independent legal advice prior to making a disclosure.³⁵

4. Protection Against Reprisal

²⁹ Case: #PIC-16-03861.

³⁰ Section 8: the supervisor, the designated officer, the chief officer or the Commissioner.

³¹ Section 9 PIDA.

³² See Government of Canada Report, note 38, Recommendation 1B at 36 which suggests that the term "supervisor" include disclosures made to "any manager within (the) organization." This would ensure that advice sought or disclosures made to non-designated supervisors would not exempt someone from whistleblower protection.

³³ The commissioner may however refer urgent matters to appropriate external authorities (s. 30).

³⁴ Section 21 PIDA.

³⁵ The only provision relating to compensation for legal costs is limited to advice sought out as a direct result of a reprisal.

The Commissioner is also responsible for investigating allegations of workplace reprisal by an employer. Where the Commissioner finds that a reprisal has occurred, the matter is referred to the Labour Relations Board, which then holds formal hearings concerning the appropriate remedy, e.g. reinstatement and compensation.

Protection against reprisal under the act is firmly tethered to one of four eligibility categories: (1) a finding of wrongdoing based on a disclosure, (2) seeking advice about a disclosure according to proper procedures, (3) co-operating with an investigation, or (4) refusal to participate in a wrongdoing.³⁶ There is no protection for an employee who is unsuccessful in establishing at least one of these preconditions.

Assuming wrongdoing is found after an investigation, a whistleblower must prove a connection between disclosure and retaliation.³⁷ Proving a connection between a disclosure and a reprisal can be difficult.³⁸ For example, in a 2017 case, the Commissioner found that an employee failed to prove a connection between a change in duties (the alleged reprisal) and a complaint (found not to be disclosure) that occurred four years earlier.³⁹ The PIDA does nothing, such as creating a presumption in favor of the employee or reversing the onus to the employer, to help employees overcome the burden of proving a causal connection.

The protection given to public sector employees under the Act is against workplace reprisals defined as “a dismissal, layoff, suspension, demotion or transfer, discontinuation or elimination of a job, change of job location, reduction in wages, change in hours of work or reprimand,” and any other measure that “adversely affects the employee’s employment or working conditions.”⁴⁰ As comprehensive as this language may seem, it may not go far enough. Reprisal should also include actions or omissions taken to prejudice a whistleblower’s future employment, e.g. failure to provide a reference letter or “blackballing” an employee.⁴¹

³⁶ Section 24 PIDA, also includes “done anything in accordance with this Act.”

³⁷ The Commissioner’s office has confirmed this nexus between wrongdoing and reprisal. In *Alleged reprisal stemming from a change in position* (June 16, 2017) in Annual Report 2017-18: “In this case, a review of the allegations found the employee did not make a disclosure under the Act - a necessary element required to receive protections under the Act.”

³⁸ G-20 Anti-Corruption Action Plan “Protection of Whistleblowers: Study on Whistleblower Protection, Frameworks, Compendium of Best Practices and Guiding Principles for Legislation” at para. 27. See also Report of the Standing Committee on Government Operations and Estimates “Strengthening the Protection of the Public Interest within the Public Servants Disclosure Protection Act” (June 2017) AT 57 (Government of Canada Report).

³⁹ Annual Report 2017-18 at 21.

⁴⁰ Section 24(2) PIDA.

⁴¹ The Whistleblowing Commission, “Report on the Effectiveness of Existing Arrangements for Workplace Whistleblowing in the UK” (November 2013) at para. 87.

Where a reprisal is found to be connected to one of the four protected categories, remedies include reinstatement, corrective compensation, and solicitor-client costs (for prosecuting an allegation of reprisal through the board).⁴² However, reinstatement to former employment may not be an acceptable or realistic remedy for an employee. A “transfer option” to another position should be an available remedy.⁴³

5. Public Interest Commissioner Investigations

Investigations by the Commissioner’s office are hobbled by a number of constraints. Legally, they have no authority to demand documents or information that is subject to solicitor-client, parliamentary, or cabinet privilege. As discussed above, this offers a large shield of protection behind which to hide wrongdoing. For other information, the commissioner’s office does not have subpoena power though this deficiency is partially offset by the penalty provisions for anyone who withholds or provides misleading information during an investigation.

There are questions about the rigor of investigations beyond these legal hindrances. An informal and collaborative approach to investigations has been adopted by the commissioner’s office.⁴⁴ In fact, the office acknowledges that internal reviews are “far better positioned” to investigate wrongdoing while the PIC office provides “investigative expertise, resources, and independent oversight.”⁴⁵ However, internal investigations may be compromised by those who do not want to portray the organization in a bad light or, worse, where those investigating are themselves implicated in the wrongdoing.

Investigations can be time-consuming involving the review of thousands of documents and dozens of witnesses.⁴⁶ They may involve complex matters requiring various types

⁴² s. 27.1(3) PIDA.

⁴³ One could argue that 27.1(3)(f)(vi) “rectify a situation resulting from a reprisal” is broad enough to include a transfer option.

⁴⁴ The Office is allowed to “resolve the matter” within a subject organization prior to an investigation (s. 17); as well, investigations that do go forward are to be “conducted as informally as possible” (s. 18(2)).

⁴⁵ Annual Report 2017-18 at 5.

⁴⁶ In Case: #PIC-14-02130 *Allegations related to the Department of Justice and Solicitor General* (June 2, 2016) at 7, the investigation involved “review and analysis of 5,571 records, a review of department policies, applicable legislation, best standard practices for procurement and internal legal reviews on matters of law. Thirty-seven (37) employees of the Government of Alberta were interviewed as part of the investigation.”

of expertise. The office may be under-resourced to conduct more investigations as there are only four full-time investigators.⁴⁷

6. Recommendations

The preceding analysis of the PIDA and its interpretation by the PIC over the years reveal a regime rife with pitfalls for whistleblowers. Not surprisingly then, the PIC has found only three instances of wrongdoing and zero cases of reprisal involving 27,000 public service employees since the act was introduced in 2012.⁴⁸

Unless an employee has a “smoking gun” of evidence that she is confident meets a high threshold of wrongdoing and follows proper reporting procedures to the letter, she runs the risk of not being eligible for protection. Even then, she must prove a connection between the disclosure and a retaliation that may occur many years later and may be disguised as workplace performance issue.

These deficiencies are traps for public servants who may be lured into a false sense of security in making disclosures. In this sense, it would be better if the act is repealed rather than allow the current state of affairs to continue. However, the far better solution is to fix the legislation and the way it is administered.

It is therefore recommended that PIDA be amended:

- With the primary goal of affording liberal and remedial protection for whistleblowers taking into account the deficiencies outlined in this report, as well as international best practices;⁴⁹

⁴⁷ My thanks to Chris Ewaniuk, manager, of the Public Interest Commissioner office for providing this information in a November 27, 2019 email. The four investigators at that time had backgrounds in law, human rights investigations, national security intelligence, major crime investigations, administrative investigations, and corporate fraud investigations. The office may contract out for needed expertise to assist with certain investigations in particular data recovery and computer forensics.

⁴⁸ Number of cases of wrongdoing and reprisal based on manual count of cases reported on website. Public service employee number found at <https://www.alberta.ca/how-government-works.aspx>

⁴⁹ For a summary of best practices recommended by international organizations, see: <https://whistleblower.org/international-best-practices-for-whistleblower-policies/>. See also Center for Free Expression https://cfe.ryerson.ca/sites/default/files/Evaluation%20Criteria%20for%20Whistleblower%20Protection_0.pdf. See also the recently passed European Directive on Whistleblowing <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&rid=4>

- Ensuring reforms are made to competently interpret and administer the act according to its remedial terms, and provide adequate resources for the investigation of alleged wrongdoings and reprisals.
- Taking into account the experiences and concerns of public service employees through an anonymous survey to gauge the kind and extent of wrongdoing they encounter in the workplace, and to help determine which legal reforms would encourage them to make disclosures;
- To include private sector employees under a revamped regime.

B. Confidential Journalist Sources⁵⁰

Investigative journalists typically rely on sources for behind the scenes tips and information for their stories.⁵¹ The kind of information shared by sources may range from simple background and context for a story, to explosive public interest disclosures either through a leaked document or as a direct informant for a story.⁵²

Journalists prefer for sources to “go on the record” to substantiate claims.⁵³ Sources, however, may insist on anonymity since they fear retaliation if they become identified

⁵⁰ There is an important distinction to be made between a confidential source - who the reporter knows and is able to interrogate for veracity - and an anonymous source who the reporter does not know. The focus of this report is on confidential journalist sources. Furthermore, journalist shield laws usually offer protection against court-order disclosure of “newsgathering” including, for example, journalist notes and contacts as well confidential sources. An Alberta journalist shield law should offer comprehensive protection for “newsgathering” of journalists.

⁵¹ There is no recent empirical work on this phenomenon. However, in two separate studies (1971, and 1985) in the US found that confidential sources were used in approximately one-quarter of news stories. Another US study shows that 80 per cent of news magazine stories and two-thirds of Pulitzer Prize awards relied on confidential sources: Jason M. Shepard’s *Privileging the Press: Confidential Sources, Journalism Ethics and the First Amendment* (LFB Scholarly Publishing: El Paso, 2011) at 4.

⁵² Shepard *ibid* at 4 “[s]ometimes, a promise of confidentiality is the price journalists are willing to pay for access to information they otherwise could not obtain. Some promises of confidentiality result in explosive scoops, but more often they allow sources to talk frankly so journalists can better understand issues and context.”

⁵³ Reputable journalists are not able to do much with “off the record” tips so this information is generally unhelpful. Beyond that, a confidential source may give information “on background” (to ascertain ways to verify the tip) “not for attribution” (to be quoted but without using the source’s name) or “on the record” (to be quoted with attribution). A good journalist will try to “ratchet up” a source if it is safe for them to do so.

as the source of the information. These may be the very same individuals who are afraid of the inadequate protection afforded through whistleblower legislation.

The critical role of confidential sources in disclosing matters in the public interest is captured in the following New York Times editorial cited in *R. v. National Post*:

“In [such] whistleblowing cases, press secretaries and public relations people are paid not to give out the whole story. Instead, inside sources trust reporters to protect their identities so they can reveal more than the official line. Without that agreement, and that trust between reporter and source, the real news simply dries up, and the whole truth steadily recedes behind a wall of image-mongering, denial and even outright lies.”⁵⁴

Behind the scenes disclosures are more prevalent than one might think. In one US study of former federal policymakers, 42 per cent admitted to leaking information to the press while in office. Of those 80 per cent did so “to counter false or misleading information” while 75 per cent sought to direct public attention to a policy issue.⁵⁵

Of course, not all anonymous sources are reliable.⁵⁶ Most menacingly, some anonymous leaks are knowingly false or misleading and are targeted to unfairly harm an individual or organization. The inaccurate press coverage of Mahar Arar by a number of media outlets, based on false information from unidentified government sources, is a cautionary tale of the dangers of anonymity.⁵⁷

This concern, while real, is manageable through the adoption journalistic standards by media outlets and the high ethical practices of individual journalists. For example, the CBC Journalistic Standards and Practices requires that efforts be made to ascertain the credibility of a confidential source, corroborate their information and advise the managing editor prior to publication.⁵⁸ As well, reputable journalists will

⁵⁴ Editorial, “Shielding a Basic Freedom” *The New York Times*, September 25, 2005 quoted at para. 29 *R. v National Post* 2010 SCC 16.

⁵⁵ Shepard, *supra* note 54 at 6

⁵⁶ Shepard identifies seven categories of leaker motives summarized at *ibid* at 6: “The ‘ego leak’ is done to increase the self-importance of the leaker. A ‘goodwill leaker’ is done to build rapport or earn good will with the reporter. A ‘policy leak’ aims to get more attention to particular proposals. An ‘animus leak’ is done to criticize or attack an opponent. A ‘trial balloon leak’ floats a particular idea or strategy to test its favorability. A ‘whistleblower leak’ is attempting to fix what the leaker perceives as wrong.”

⁵⁷ <https://thewalrus.ca/hear-no-evil-write-no-lies/>

⁵⁸ <https://cbc.radio-canada.ca/en/vision/governance/journalistic-standards-and-practices>. Similar protections are in place for leaked documents. See also the Globe and Mail editorial standards: <https://www.theglobeandmail.com/about/editorial-code/>

never go to press with a story without at least corroborating with another reliable source or (much more typically) obtaining documentary confirmation.⁵⁹

Reputable journalists and news organizations take the grant of confidentiality seriously and verify the accuracy of allegations prior to publication. In these circumstances, it is highly unlikely that deliberately false and misleading stories make it to press.

1. Current Law

Thus far, the focus has been on the public interest benefits of protecting confidential sources.⁶⁰ The law must balance this interest against what is sometimes called the “evidence” interest.⁶¹ In criminal law, this manifests as access to evidence of the source, be it her identity, a document being leaked or even a journalist’s notes, that is being withheld from a criminal investigation.

In non-criminal law, a person accused of wrongdoing may have a right to sue in defamation, i.e. lowering her reputation in society. Since one can not sue an unknown person, the plaintiff would need to seek a court order requiring the journalist to reveal her source. This is the kind of civil action that would be the subject of a provincial journalist shield law.

In Alberta there is currently no journalist shield law in connection with civil actions. At common (or judge-made) law in the Alberta, courts are divided about whether a journalist privilege exists.⁶² In one trial level decision on a defamation suit, privilege was successfully applied to protect a journalist’s source.⁶³ However, in a 1987 Court of Appeal judgement, the existence of any such privilege at law was firmly rejected on

⁵⁹ A reputable journalist will ask the source for documentary evidence or at least enough particulars to identify relevant documentation through an access to information request.

⁶⁰ As the Supreme Court in *National Post* put it at para. 28: “It is in the context of the *public* right to knowledge about matters of public interest that the legal position of confidential sources or whistleblower must be located.”

⁶¹ So described in *National Post* at paras. 1 and 26.

⁶² The existence and/or strength of the privilege in other provinces is similarly unclear. In *Crown Trust v. Rosenberg* [1983] O.J. No. 511, and *McInnis v. University Students Council* 48 O.R. (2d) 542 two Ontario trial courts denied the existence of any such privilege and compelled disclosure of journalist notes to further the public interest in disclosure to opposing litigants. In *Bouaziz v. Ouston* 2002 BCSC 1297, the possibility of a privilege in some circumstances was acknowledged but the interest in full disclosure to the opposing litigant again won the day.

⁶³ *Waslyshen v. CBC* 2005 ABQB 902.

both common law and constitutional grounds.⁶⁴ In other words, journalist sources are not given any special protection in Alberta.

The upshot is that if a plaintiff wants to know the identity of a source to assist in making their case, they need only show a court that the disclosure is relevant to the proceeding. In a strategic defamation case (for example to punish the source or to discourage future sources) outing the leaker to discredit or harm him or her may be the whole point of the law suit.

If journalist sources are to be encouraged to make public interest disclosures, their anonymity must be jealously guarded. A journalist shield law needs to be enacted to ensure that the targets of public interest disclosures are not able to pierce confidentiality in their pursuit of a legal action without some safeguards in place. In this endeavor, Alberta could learn from experiences in other jurisdictions both in Canada and the United States.

2. Journalist Shield Models

According to current federal law, two conditions are to be met prior to considering whether the anonymity of a source should be maintained. First, protection only extends to information that is given in confidence *and* on a promise of confidentiality by the journalist to the source.⁶⁵ Another condition is that the information is given to a journalist, defined loosely as someone whose main paid occupation concerns the production of news.⁶⁶ These are also reasonable requirements for a provincial journalist shield law.

Three models for an Alberta journalist shield law will be canvassed next: (1) absolute protection, (2) interest balancing, and (3) exceptional circumstances.

(a) Absolute Protection

⁶⁴ *Moysa v. Alberta (Labour Relations Board)* [1987] A.J. No. 418. Neither of these findings was overturned in *Moysa v. Alberta (Labour Relations Board)* [1989] 1 S.C.R. 1572.

⁶⁵ This is both in the common law test in *National Post* and the definition of “journalistic source” in the *Journalistic Sources Protection Act*, SC 2017, c. 22 (JSPA).

⁶⁶ See definition of journalist in JSPA. The issue of defining a journalist is often presented as problematic but in reality, this definition captures most if not all journalists who rely on anonymous sources. The status of bloggers and pro bono writers may be legally interesting but it is practically irrelevant as sources do not go to them.

Absolute protection means that under no circumstances would a journalist be forced to disclose the identity of their source.

The strongest rationale for an absolute rule is that anything less could defeat the purpose for creating the privilege. If we imagine that the only basis for a source to reveal sensitive information is on the assurance of confidentiality, then only blanket protection will suffice.

As Freedman states: “A reporter’s promise, ‘I will not reveal your name unless it meets a three part legal test that has been subject to varying judicial interpretations’ is hardly calculated to inspire a source’s confidence.”⁶⁷ According to Freedman, any deficiencies in an absolute privilege rule is the price we must pay to advance the public interest in having leaks of wrongdoing to come to light.⁶⁸ Both the states of New York and of California have absolute shield laws for confidential newsgathering, including the protection of journalist sources.⁶⁹

The Supreme Court of Canada, in the criminal context, rejected absolute protection. The court cited, as a main concern, a lack of accreditation and uniform ethical standards through which a journalist could be identified and properly self-regulated. The worry is that a journalist unbound by ethical rules and editorial oversight should not be allowed to protect (possibly unscrupulous) anonymous sources without the possibility of judicial review.

In other words, blanket protection to sources could mean that lies may be fed through ambitious or uncaring journalists with no available legal recourse to persons unfairly targeted. Courts therefore require some ability to pierce confidentiality in these kinds of cases.

(b)Interest Balancing

The law in Canada, developed largely in the criminal context, follows a model of balancing competing interests: the interests of justice and law enforcement, on one hand, against the interests of newsgathering and reporting through the protection of a journalist’s source, on the other.

⁶⁷ Eric M. Freedman “Reconstructing Journalists’ Privilege” 29 *Cardozo Law Review* 1381 at 1388.

⁶⁸ *Ibid* at 1390-1.

⁶⁹ N.Y. Civ. Rights Law § 79-h available at <https://law.justia.com/codes/new-york/2013/cvr/article-7/79-h> Cal. Evidence Code § 1070 available at <https://www.rcfp.org/privilege-compendium/california/>

If identity is too easily revealed through a court process, there could be a chilling effect where confidential sources “dry up.”⁷⁰ At the same time, the source may have participated in a crime or have evidence critical to uncovering a crime. In this criminal context, courts are to weigh in the balance the seriousness of the crime at stake, the likely probative value of the evidence, whether there are alternative means to secure the information, the chilling effect on confidential sources, and the impact of disclosure on the specific source and journalist in question.⁷¹

The *National Post* case serves as good illustration of the main factors in play. In that case, a forged bank document was leaked to the media that showed then-Prime Minister Chretien (more specifically his private company) was owed a significant amount of money by a hotel located in his riding. This was controversial since Chretien personally lobbied for a federal loan to the financially troubled hotel in question.

The source who forwarded the forged document to the *National Post* reporter did so on a confidential basis and claimed, through the reporter, to have received the document from another unidentified person. In the process of the journalist verifying the authenticity of the document, the matter was forwarded to the police by the bank involved. The police sought a court subpoena to obtain the physical evidence of the document and envelope to conduct forensic analysis. This analysis, while only possibly revealing of the forger’s identity, could also possibly identify the source.

The *National Post* court decided that the physical evidence could possibly reveal the identity of the forger, a serious crime, and therefore this should outweigh any chilling effect that might result to newsgathering through potentially exposing the confidential source.

The biggest problem with the balancing exercise is that it often takes place in a speculative vacuum. No one knows what the impact of legal rules is on the willingness of sources to confidentially leak sensitive information.⁷² Equally, courts do not know the nature of the evidence they are being asked to reveal. They therefore cannot know how probative that evidence will be to the alleged crime.

In these circumstances, courts typically favor law enforcement while minimizing the effects of disclosure on journalists’ newsgathering function and the whistleblowers

⁷⁰ As stated by the Supreme Court in *R. v. Vice Media* 2018 SCC 53 at para. 26, the law must be concerned not to create a “chilling effect” where confidential sources “dry up”, journalists avoid taking notes or self-censor for fear of being forced to share information with police, or the public comes to view the media not as independent but as an arm of the state.

⁷¹ *R. v. National Post*. This has been modified somewhat in the *Journalistic Sources Protection Act* (JSPA).

⁷² Courts have been reluctant to presume a chilling effect in all cases where a source reveals information on a promise of confidentiality. *Vice Media* at para. 28-29

themselves.⁷³ For example, the likely probative value of the physical evidence in *National Post* and later in *Vice Media* (another Supreme Court case) was in large measure presumed while the chilling effect on journalist sources was not.

At common law, the media is also put in the position of proving that confidentiality outweighs disclosure, also known as the burden of proof. Recent legislation at the federal level has reversed the onus onto the police (or plaintiff) to prove that disclosure is justified according to similar considerations noted in the *National Post* case.⁷⁴

However, it remains unclear whether reversing the onus will have the desired effect of providing greater protection to confidential sources.⁷⁵ The same speculative exercises might be engaged in to the detriment of confidential journalist sources, regardless of who formally must “prove” it.

(c) Exceptional Circumstances

A straightforward balancing of competing interests (particularly in light of its application in the case law) will be cold comfort for would-be confidential sources. At the same time, it is unlikely that a legislature would want to completely tie the hands of a court through a rule of absolute protection.

An effective middle way would be some articulation of the exceptional circumstances test offered by Justice Stewart’s dissent in the US Supreme Court’s foundational case of *Branzburg v. Hayes*. This test requires a journalist to reveal their source only if there is:

- “...probable cause to believe that the newsman [sic] has information that is clearly relevant to a specific probable violation of the law;
- ...the information cannot be obtained by alternative means; and

⁷³ Judicial attitudes, for whatever reason, tend to favor disclosure over confidentiality in this context. See Factum of the Appellants, *Vice Media Canada Inc. and Ben Makuch, for Vice Media Canada Inc., et al. v Her Majesty the Queen in the Right of Canada* at the Supreme Court of Canada, Court File No. 37574 (Submitted 26 February 2018) at para 3: “With one exception, all decisions since *Lessard* [in 1991] that balance those competing interests when reviewing orders targeting material in the hands of the media have been decided firmly in favour of law enforcement.”

⁷⁴ Journalistic Source Protection Act.

⁷⁵ Abella J., in dissent in *Denis v. Cote* at para. 71, recognizes that the intent behind reversing the onus is “that absent exceptional circumstances, a presumption of protection for journalistic sources will prevail.”

- [there is] a compelling overriding interest in the information.”⁷⁶

The first notable feature of this test is that it removes much of the speculation associated with a straight balancing test. The information sought must be “clearly relevant” to a “specific probable” violation of the law. Mere speculation that the information sought might assist law enforcement, or a civil plaintiff, in some vague way is not enough. Even then, privilege is to be maintained unless there is a “compelling overriding interest in the information.” This is not a mere balancing exercise but clearly favors confidentiality in all but the most exceptional circumstances.

According to Mathewson, this three part test has been codified into legislation in 32 US states and the District of Columbia.⁷⁷ Some have argued that the exceptional circumstances should be specified to include, for example, disclosures that are unlawful in and of themselves (e.g. breach of solicitor-client privilege).⁷⁸ Class exemptions like this seem unwarranted as the importance of a public interest in maintaining solicitor-client privilege can be accommodated under an exceptional circumstances test without it becoming a place to hide wrongdoing.⁷⁹

Abramowicz convincingly argues that the three-part test, as currently formulated, looks only at the public interest in obtaining evidence. The newsgathering interest, on the other hand, is viewed as fixed. Abramowicz advocates that this interest should be evaluated on the basis of whether proper journalistic procedures and practices are followed in using a confidential source. This includes only using confidential sources for “important” information, attempting to verify it elsewhere, ensuring the information is within the source’s direct knowledge, engaging in deliberation with an editor who knows the identity of the informant and has the newspaper’s credibility in

⁷⁶ It is worth observing that administration of justice is served through the disclosure of wrongdoing, regardless of whether the source is identified. This usually gets lost in the application of rules to specific cases where the choice is not between whether the information exists or not but whether the identity of the source should be revealed: see Stewart J.’s dicta in *Branzburg v. Hayes* at 725

⁷⁷ Joe Mathewson’s *The Supreme Court and the Press: The Indispensable Conflict* (Northwestern University Press: Evanston 2011) at 109. See e.g. Washington state Wash. Rev. Code § 5.68.010 available at <https://apps.leg.wa.gov/RCW/default.aspx?cite=5.68.010> Fla. Stat. § 90.5015 available at http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0000-0099/0090/Sections/0090.5015.html

⁷⁸ See, for example, Jason D. Burke’s “Shielding the Public Interest: What Canada Can Learn from the United States in the Wake of National Post and Globe & Mail” (2012) *Boston College International and Comparative Law Review* 189 at 221.

⁷⁹ See, for example, Cameron Hutchison “Got a Secret? Copy Your Lawyer: Supreme Court Decision Most Recent Threat to Access to Information” *Edmonton Journal* (December 6, 2016) <https://edmontonjournal.com/news/politics/opinion-got-a-secret-copy-your-lawyer-supreme-court-decision-most-recent-threat-to-access-to-information/>

mind, and transparency in explaining why confidentiality was granted to the informant.⁸⁰

In Canada, similar guidelines are followed by reputable institutional newsgatherers and journalists.⁸¹ More to the point, it should be part of the exceptional circumstances test that the court consider journalistic procedures and standards used to check and verify information provided by a confidential source.⁸²

3. Recommendations

It is recommended that the Alberta legislature adopt a journalist shield law that:

- Protects journalists as that term is defined in the *Journalistic Sources Protection Act*;
- Applies to the newsgathering of journalists including any and all information procured through a promise of confidentiality as to the identity of a source; and
- Reflects the substance of the three-part “exceptional circumstances” test in *Branzburg v. Hayes* with the added proviso that even greater protection is afforded to sources subject to more stringent verification and oversight standards of news organization and individual journalists.

C. Protection of Public Participation

Counterintuitively, the legal system itself may play an important role in inhibiting those who would speak up in the public interest. The right to sue according to a fair

⁸⁰ David Abramowicz “Calculating the Public Interest in Protecting Journalists’ Confidential Sources” (2008) 108 Columbia Law Review 1949 at 1971-3.

⁸¹ See discussion at notes 58 and 59, and accompanying text.

⁸² It is worth noting that Abella J. in *National Post* in dissent suggests that courts should give deference to the professional judgement of established journalists. See para. 130: “Where, as here, the journalist has taken credible and reasonable steps to determine the authenticity and reliability of his source, one should respect his professional judgement and pause, it seems to me, before trespassing on the confidentiality which is the source of the relationship.”

process is a fundamental feature of a democratic society and the rule of law. But like anything, it can be abused. Powerful interests can use this system against lesser-resourced individuals who challenge or criticize them. This is known colloquially as a gag lawsuit or (more formally) a strategic lawsuit against public participation (or “SLAPP”). As the Ontario Anti-SLAPP Advisory Panel describes it,

“Strategic litigation against public participation (SLAPP) has been defined as a lawsuit initiated against one or more individuals or groups that speak out or take a position on an issue of public interest...SLAPPs can intimidate opponents, deplete their resources, reduce their ability to participate in public affairs, and deter others from participating in discussion on matters of public interest.”⁸³

Put another way, no one wants to be sued. As any lawyer will advise their client, the litigation process is slow, extremely expensive and uncertain in its results. This is not much of a deterrent for well-resourced litigants. Indeed, a tried and true public relations tool is to not only deny unsavory allegations made against you but to substantiate that denial with threat or filing of a lawsuit. Existing procedural court rules do not adequately address these kinds of cases.⁸⁴ For the average would-be defendant, it is much easier stay silent, or retract what you have said, than to face the prospect of a long fight in which the other side has nothing to lose.

Various think-tanks and non-governmental organizations have advocated for anti-SLAPP laws in Canada over the past two decades. The impetus stemmed from cases where citizen groups and individuals have spoken out against powerful interests connected to environmental degradation, municipal development, the closure or performance of public services, and consumer awareness and protection.⁸⁵

⁸³ Anti-SLAPP Advisory Panel Report to the Attorney General (October 28, 2010) at para. 1. See also *1704604 Ontario Ltd. v. Pointes Protection Association* 2018 ONCA 685 at para. 2 per Doherty JA: “From time to time, those who are the target of criticism resort to litigation, not to vindicate any genuine wrong done to them, but to silence, intimidate, and punish those who have spoken out. Litigation can be a potent weapon in the hands of the rich and powerful. The financial and personal costs associated with defending a lawsuit, particularly one brought by a deep-pocketed plaintiff determined to maximize the costs incurred in defending the litigation, can deter even the most committed and outspoken critic.”

⁸⁴ See *ibid* at para. 11. See also ABlawg post in Alberta context: <https://ablawg.ca/2020/04/15/is-now-the-time-to-consider-anti-slapp-legislation-in-alberta-a-reflection-on-pointes-protection/>

⁸⁵ See, for example, the examples detailed in Susan Lott’s “Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation” Public Interest Advocacy Centre (September 2004)

Anti-SLAPP legislation also protects financially challenged news organizations and start-ups who otherwise are intimidated not to publish stories in the public interest by the threat or anticipation of an expensive lawsuit.⁸⁶

Recent legislative developments in Canada have expanded the ambit of protection from anti-SLAPP to simply the protection of public participation (PPP). Both the Ontario law, and the B.C. legislation based on it, do not have a requirement that a lawsuit be demonstrably strategic or initiated by a better-resourced plaintiff. Rather, both are aimed at protecting public interest expression and participation regardless of who the parties are or their motives may be. Heretofore, then, this report will refer to such lawsuits - and legislation - as protection of public participation (PPP).

There is no way of knowing the incidence of lawsuits which threaten public participation in Alberta. Like other jurisdictions, the need for PPP legislation is presumed anecdotally through high profile cases. Red flags of lawsuits that threaten public participation should rise any time we see the subject of public criticism threatening legal action against a corroborated allegation,⁸⁷ or when a reputable news organization with stringent journalistic standards is sued over a published story.⁸⁸

However, as the Ontario experience shows, legal threats to public participation need not take the form of published stories in the media. Simple acts accessible to all us, such as Facebook posts advocating for environmental protection, or posting an online business reviews have been the target of lawsuits to which ordinary people have sought refuge in PPP legislation.⁸⁹

This report now turns to the basic mechanics of the Ontario's PPP law, which has generally been praised as a balanced law⁹⁰

⁸⁶ See e.g. *WIC Radio v. Simpson* 2008 SCC 40 at para. 15: "There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. Investigative reports get "spiked", the Media Coalition contends, because, while true, they are based on facts that are difficult to establish according to the rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation."

⁸⁷ See e.g. <https://www.cbc.ca/news/politics/michael-cooper-goat-herder-cultures-1.5179039>.

⁸⁸ See for e.g. *Subway v. CBC* 2019 ONSC 6758

⁸⁹ See e.g. *New Dermamed Inc. v. Sulaiman* 2019 ONCA 141, and *United Soils Management Ltd. V. Mohammed* 2019 ONCA 128.

⁹⁰ See for e.g. Taylor Hudson "The Ontario Protection of Public Participation Act 2015: So Far, So Good" (2018) 48 *Advocates Quarterly* 419, summarized at 445: "While the PPPA is young, its application to date has largely resulted in an expeditious, inexpensive and balanced procedure that promotes broad protection of expression."

1. The Ontario Model

The stated purpose of the Ontario law is to encourage individual expression and participation on matters of public interest and discourage the use or fear of litigation as a means of unduly hampering that expression and participation.⁹¹ The focus of the legislation is to weigh the relative merits of protecting the defendant's expression in the public interest, on the one hand, against a plaintiff's right to their day in court, on the other.

This assessment is to be done expeditiously (to avoid unnecessary cost) and consequently on the basis of limited evidence. In particular, motions are to be heard within 60 days⁹² using affidavit (sworn written statement) evidence. Cross-examination on affidavit evidence (prior to the motion) is normally limited to 7 hours total for each side.⁹³

The types of legal actions covered in this law are open-ended but defamation suits, i.e. plaintiffs who accuse a critic of lowering their reputation in the community, are the most likely kind.

There are three thresholds to meet for a case to be dismissed under Ontario's law, discussed next.

(a) Public Interest Expression

First, the defendant must show that their "expression...relates to a matter of public interest."⁹⁴ This is an easy hurdle to pass in most cases.

⁹¹ *Protection of Public Participation Act 2015* (PPPA 2015) amending the *Courts of Justice Act* with the additions of ss. 137.1(1) to 137.5. The purposes are set out in s. 137.1.

⁹² S. 137.2(2) PPPA 2015

⁹³ S. 137.2(3) and (4) PPPA 2015. At the hearing of the motion, therefore, the evidentiary record before the court will consist of affidavit and attached documentary evidence as well as transcripts of any cross-examination on those documents.

⁹⁴ 137.1(3) PPPA 2015

The term “expression” is defined expansively in the act.⁹⁵ Similarly, the Supreme Court’s broad articulation of “public interest” (discussed in the introduction)⁹⁶ was affirmed in the leading PPPA case of *Pointes Protection*.⁹⁷

The use of the word “matter” to modify “public interest” also means that there is no qualitative assessment of the expression at this stage, thus lowering the threshold even further for the defendant.⁹⁸

As noted above, Ontario courts have entertained PPP applications ranging from published newspaper pieces to Facebook and twitter posts. Defendants making use of the law range from corporations to ordinary citizens. The kinds of issues considered in the public interest include the raising of environmental concerns, criticisms of investment companies, customer reviews of businesses, and criticisms of politicians.

(b) Lawsuit has Substantial Merit and there is No Valid Defence

If the expression is in the public interest, the plaintiff must then show that the lawsuit has “substantial merit”, and that the defendant “has no valid defence.”

In *Pointes Protection*, the Supreme Court emphasized that these determinations are based on very limited evidence. Bearing this in mind, a plaintiff must show “there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success.”⁹⁹ The same analysis applies to assessing whether the defendant has a valid defense (again) with a “real prospect of success.”

Using defamation as an example, it is relatively easy for a plaintiff to prove that their reputation has been injured by a criticism, though showing that a defendant has no defence may be more difficult. Valid defences include truth and, insofar as opinion is concerned, fair comment. The latter offers wide latitude for defendants to express

⁹⁵ 137.1(2) PPPA 2015 “expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

⁹⁶ *Grant v. Torstar supra* note 7.

⁹⁷ 1704604 *Ontario Ltd. V. Pointes Protection Association* 2020 SCC 22 at para. 27

⁹⁸ *Ibid.* at para. 28

⁹⁹ *Ibid.* at para. 54

opinionated even prejudiced commentary in the public interest so long as it has some basis in fact.¹⁰⁰

But while attacks and criticisms in the public interest allow defendants to express a wide range of opinion, fair comment has its limits. Lies or exaggerations without any factual basis will not, in most cases, be legally defensible.¹⁰¹

(c) The Public Interest Hurdle

Assuming a plaintiff satisfies the second step, he or she must still show that the harm suffered is “sufficiently serious” that it outweighs protecting the expression in the public interest.¹⁰² This “public interest hurdle,” as the Supreme Court rightly notes, lies at the “crux” or “core” of the legislation.¹⁰³

Ontario’s Anti-SLAPP Advisory Panel explained the need for this step:

“...[T]he fact that a plaintiff’s claim may have only technical validity should not be sufficient to allow the action to proceed. If an action against expression on a matter of public interest is based on a technically valid cause of action but seeks a remedy for only insignificant harm to reputation, business or personal interests, the action’s negative impact on freedom of expression may be clearly disproportionate to any valid purpose the litigation might serve. The value of public participation would make any remedy granted to the plaintiff an unwarranted incursion into the domain of protected expression. In such circumstances, the action may also be properly regarded as seeking an inappropriate expenditure of the public resources of the court system. Where these considerations clearly apply, the court should have the power to dismiss the action on this basis.”¹⁰⁴

¹⁰⁰ Specifically, the test is whether any honest person, no matter how opinionated or prejudiced, could express the opinion (on a matter of public interest) based on proven facts: *WIC Radio Ltd. v. Simpson* 2008 SCC 40.

¹⁰¹ Defences of qualified privilege or responsible journalism may be available for lies or exaggerations, but such defences are limited to certain defined circumstances.

¹⁰² ...” the harm likely to be or have been suffered by the responding party [plaintiff] as a result of the moving party’s [defendant’s] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.” Section 137.1(4) PPPA 2015.

¹⁰³ *Pointes Protection supra* note 97 at paras. 18, 62

¹⁰⁴ Anti-SLAPP Advisory Panel *supra* note 83 at para. 37

One concern here is to safeguard against libel chill. In other words, citizens may cross a legal line in expressing their opinions without knowing they have done so, or by unintentionally communicating erroneous information. When that happens and the harm to the plaintiff is relatively insubstantial, the case may still be thrown out.

This is not a free pass to say whatever you want however. Whereas the quality or motive for the expression is not relevant to the first hurdle, it is here.¹⁰⁵

For example, the public interest value in “a statement that contains deliberate falsehoods, gratuitous personal attacks, or vulgar and offensive language” will be less than if the “same message had been delivered without lies, vitriol, and obscenities.”¹⁰⁶ The Ontario Court of Appeal, on this basis, has refused to throw out defamation actions in three cases of apparently baseless accusations.¹⁰⁷

In addition, the Supreme Court in *Pointes Protection* added further indicia for courts to consider in assessing the public interest in protecting expression under this hurdle. These indicia include:

“the importance of the expression, the history of the litigation between the parties, broader or collateral effects on *other* expressions on matters of public interest, the potential chilling effects on *future* expression either by the party or by others, the defendant’s history of activity or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and harm caused or the expected damages awarded, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group...”¹⁰⁸

Up to this point, the legislation, and its interpretation by the Ontario Court of Appeal and Supreme Court, seems properly calibrated to weigh the competing interests under the public interest hurdle. However, the recent Supreme Court decision in *Bent v. Platnick* illustrates the need for PPP legislation to specify other relevant indicia.

(i) ***Bent v. Platnick***¹⁰⁹

¹⁰⁵ *Pointes Protection supra* note 97 at para. 74

¹⁰⁶ *Pointes Protection* 2018 ONCA 685 at 95.

¹⁰⁷ *Montour v. Beacon Publishing Inc.* 2019 ONCA 246; *Lascharis v. B’nai Brith Canada* 2019 ONCA 163; *Levant v. Day* 2019 ONCA 244.

¹⁰⁸ *Pointes Protection supra* note 97 at para. 80.

¹⁰⁹ *Bent v. Platnick* 2020 SCC 23

Ms. Bent, a personal injury lawyer, was sued in defamation by Dr. Platnick, a family doctor, related to a post she made on a trial lawyer listserv. Dr. Platnick was regularly retained to interpret expert medical reports for insurers - but without ever examining the patient himself.

In the post, Ms. Bent accused the plaintiff of misrepresenting the reports of medical experts relating to two insured persons (the defendant's clients) seeking compensation for meeting the catastrophic impairment threshold under Ontario's no-fault accident regime. Bent also warned lawyers to always check assessments against the expert reports on which they are based.

In one case, Platnick misrepresented the opinions of medical experts stating that it was the "consensus conclusion" of those involved in the assessment that the insured did not meet the threshold of catastrophic impairment - when in fact, that was not the case.

In another prior case, an expert made an "internally contradictory" finding by referencing class 4 (the catastrophic impairment category) but calling it "moderate impairment." Dr. Platnick sought clarification from the expert and found that it was the class 4 ranking that was incorrect. However, Ms. Bent received the first report of the expert, as well as Dr. Platnick's report (which did not explain why the change was made), and presumed the discrepancy was due to Platnick misrepresenting the expert's assessment.

In a 5:4 split, the Supreme Court dismissed the motion and allowed the action to proceed. Under the public interest hurdle weighing exercise, the majority opinion validated the importance of the expression to the administration of justice (i.e. Ms. Bent warning other lawyers to always check assessment reports against the expert reports they are based on) and, to that extent, the expression was worthy of high protection.

But the opinion also noted that Dr. Platnick allegedly experienced serious harm as a result of the expression. The determining factor was that Ms. Bent made serious accusations of professional misconduct against Dr. Platnick without reaching out "to confront him or to investigate her allegations against him."¹¹⁰ In other words, Ms. Bent was under a duty to investigate before accusing the doctor of misrepresenting reports.

However, the majority decision failed to consider the context in which the expression occurred. Insurance litigation is highly adversarial and biases in medical reports of

¹¹⁰ *Ibid.* at para. 164; see also para 167

go-to physicians for insurers are a real problem.¹¹¹ It is not realistic to expect a doctor regularly retained by an insurer to be forthcoming in explaining (perhaps not even allowed by the insurer to explain) the process of preparing reports. Yet the majority opinion assumes he would. And if he did not explain the discrepancy, then was Ms. Bent supposed to bite her lip? And, if so, would that not be the self-censorship and libel chill that this legislation - and the public interest hurdle in particular - is aimed at reducing?

The perspective of the majority seemed skewed in another way. Why is the onus on the opposing lawyer to investigate rather than on the insurer to explain, at the very least, discrepancies that arise regarding *critical* and *determinative* findings in the medical reports? Had Dr. Platnick and the insurer been proactive in explaining the discrepancies in the medical reports, none of this would likely have occurred.

The duty to explain (as opposed to a duty to investigate) is reinforced by the highly questionable practices through which the medical assessments were made. As highlighted by the dissenting opinion, Platnick - in the face of conflicting medical reports - acted unilaterally in labelling the opinion a “consensus conclusion”, while after the fact the insurer attempted to have dissenting doctors change their assessment (which two of the experts refused to do).

Where these kinds of games are happening in an adversarial setting leading to conflicting medical evidence upon which everything hinges, is commentary that criticizes it and causes harm not a self-inflicted wound? Should the onus really be on the defendant to find out what is really going on before warning others about what she is experiencing?

The dissent, more realistically, judged the value of the expression in light of what Ms. Bent “reasonably believed” rather than what in a perfect world she *might* have found out through further investigation. The standard of “reasonable belief” is used in whistleblowers protection laws (including Alberta’s PIDA) in recognition of the fact that complete information is rarely accessible or available to substantiate suspicious and apparent wrongdoing. In other words, whistleblowers are protected when making public interest disclosures about wrongdoing in the workplace according to a “reasonable belief” standard even if it turns out they were wrong.

Whistleblower protection is, like PPP, legislation that encourages those who know something to speak up in the public interest in the face of systemic barriers to accessing full information.

In light of this decision, PPP legislation should explicate that the context in which the expression arises must be given serious consideration by courts. Part of that context should include what the defendant reasonably believed in making the expression;

¹¹¹ *Ibid* at paras. 182, 224-5.

what the defendant reasonably could have expected to find out through further inquiry that would have materially affected the legitimacy of the expression; and the whether the plaintiff was culpable in eliciting the actionable expression.

A duty to investigate before commenting in circumstances where there are real barriers to accessing information could have the effect of eviscerating the purpose of protecting public participation and expression under this law.

2. Recommendations

The Ontario law is balanced and well drafted and appears to be a template for PPP legislation in Canada now that BC has adopted essentially the same law. The Supreme Court has provided some needed guidance on how the broad language of the public interest hurdle should be interpreted.

However, the majority opinion in *Bent v. Platnick* is a misstep that should be addressed through legislation. Going forward, legislatures would be wise to consider codifying non-exhaustive factors for courts to consider in a public interest hurdle analysis.

It is therefore recommended that the Alberta Legislature

- Enact PPP legislation similar to that which has been enacted in Ontario and British Columbia with the addition of indicia noted below;
- The public interest hurdle analysis specify a non-exhaustive list of indicia courts are to consider when assessing the value of protecting public interest expression, including that which was set out in *Bent v. Platnick* as well as:
 - o What the defendant reasonably believed in making the expression
 - o What the defendant could reasonably have found out upon further inquiry that would have materially affected the legitimacy of the expression
 - o The culpability of the plaintiff giving rise to the actionable expression

Conclusion

Albertans have the good fortune of living in a country, and province, that is democratic and where there is respect for (and protection of) the rule of law. Many citizens work to make our communities better and have a strong sense of what is in the public interest. In its pursuit of gain, power may be corrosive to the public interest. Big money can silence fair and necessary criticism. Secrecy can hide corruption and malfeasance. As the constant drip of news stories exposes this, citizens lose confidence in society's institutions. They may become cynical, distrustful and disengaged. Some may even view the public interest as a quaint or naïve notion. Overall, our democracy suffers.

Confidence in our institutions can, in part, be revamped through legal measures that protect individuals, whether in their job or otherwise, who expose wrongs they perceive as being against the public interest. The public is then more likely assured that a lack of reported malfeasance is not connected to laws that discourage whistleblowers from coming forward. As well, when illegal or corrupt acts are exposed, better policy choices, proper financial management, and the penalizing or removal of bad actors ensues. From a public policy perspective, it is strange that Alberta has such poor protections on this front.

On the other hand, those who would write these laws would themselves be held to account because of them. Successive Alberta governments have done nothing (or very little) to protect whistleblowers, confidential journalist sources and those who speak out in the public interest. Among North American jurisdictions, Alberta is a laggard on all of these fronts.

Alberta's whistleblower protection for public servants is, in a word, abysmal. Rather than jealously guarding whistleblowers and the critical role they play, the legislation and its interpretation by the PIC sets a trap for them. The only measure by which the legislation may be considered a success is in the way it provides an outlet - other than the media - through which wrongdoing can be internally managed to preserve the reputation of target individuals and government bodies. The legislation and its administration by the PIC are sorely in need of review and revamping.

For other kinds of whistleblowers, there is no protection. Confidential sources for journalists are not protected in Alberta against civil actions. A meaningful law is needed that maintains the anonymity of these sources when their information is vetted through rigorous journalist standards in all but the most exceptional circumstances.

Finally, following Ontario and British Columbia, it is time for Alberta to enact PPP legislation. Those in society who advocate in the public interest, or who report or comment on malfeasance, should be protected against baseless or merely technically valid lawsuits by deep-pocketed or powerful individuals and interests. PPP has the widest scope of the three measures as it is available to all citizens in whatever form

of communication they may engage in, including social media. It is also the most affirming of the values we place on free expression and democratic participation.

If the government of Alberta enacts strong legislation in these three areas, greater confidence in our institutions, better governance, and more democratic participation will likely ensue.