

2016

Ontario Securities Commission Whistleblower Protection Program

Brooke Neal

Follow this and additional works at: <https://scholar.smu.edu/lbra>

Recommended Citation

Brooke Neal, *Ontario Securities Commission Whistleblower Protection Program*, 22 *LAW & BUS. REV. AM.* 271 (2016)
<https://scholar.smu.edu/lbra/vol22/iss3/13>

This Update is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *Law and Business Review of the Americas* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

ONTARIO SECURITIES COMMISSION WHISTLEBLOWER PROTECTION PROGRAM

Brooke Neal

I. INTRODUCTION

As a whole “the predominant aim of [whistleblower] legislation is to protect employees who report the illegal, immoral or otherwise illegitimate conduct of their employers from reprisal.”¹ To incentivize employees to report and to punish employers who retaliate against those employees, Canadian legislation provides protections such as guarantees of confidentiality and internal processes “to deal with reprisals and threats of reprisal.”² When compared to other nations, however, Canada’s whistleblower protection is minimal at best.³ Because Canadian whistleblower legislation only provides the “barest protection from reprisals it will come as no surprise that employees are often reluctant to openly report employer transgressions.”⁴

In order to incentivize employees to report misconduct and to provide greater protection when they do report, the Ontario Securities Commission (OSC) has recently implemented a new whistleblower protection program.⁵ On July 14, 2016, the OSC announced the creation of the Office of the Whistleblower and the implementation of “the first paid whistleblower program by a securities regulator in Canada.”⁶ The policy, which was first introduced in October 2015,⁷ makes “Ontario the first Canadian jurisdiction to offer cash rewards of up to \$5 million to whistleblowers.”⁸ As explained in the corresponding OSC Policy state-

-
1. Adrian Ishak, *State of Whistleblowing Legislation in Canada*, CANADIAN LABOUR & EMPLOYMENT LAW (Nov. 17, 2014), <http://www.labourandemploymentlaw.com/2014/11/state-of-whistleblowing-legislation-in-canada/>.
 2. *Id.*
 3. See Obaidul Hoque, *The Neglected State of Whistleblower Laws in Canada*, ROCHON GENOVA (Nov. 13, 2015), <http://www.rochongenova.com/blog/2015/11/trends-in-whistleblowing-laws-across-canada.shtml>.
 4. Ishak, *supra* note 1.
 5. See Whistleblower Program, OSC Policy 15-601 at 1 (July 14, 2016).
 6. Ontario Securities Commission Office of the Whistleblower, *OSC Launches Office of Whistleblower*, OSC (July 14, 2016), <http://www.osc.gov.on.ca/en/home.htm>.
 7. Drew Hasselback & Barbara Shecter, *OSC Raises Whistleblower Payout Cap to \$5 Million as Reward for Helping Ferret Out Wrongdoing*, FP STREET (Oct. 28, 2015), <http://business.financialpost.com/news/fp-street/osc-raises-whistleblower-payout-cap-to-5-million-as-reward-for-helping-ferret-out-wrongdoing>.
 8. Drew Hasselback, *Ontario Securities Commission Will now pay up to \$5 Million for Tips as First in Canada to Offer Whistleblower Rewards*, FP STREET (July 14,

ment, the “powerful addition to [Ontario’s] enforcement arsenal and game-changer for securities enforcement in Canada,”⁹ allows individuals to “report information on serious securities- or derivatives-related misconduct to the Commission” in exchange for whistleblower award eligibility.¹⁰

Although this reward amount brings Canada more in line with countries such as the United States and the Securities and Exchange Commission program, several lawyers have pointed to obvious issues with the program, including its negative effect on internal reporting, believing that the program will only incentivize and increase the number of “blindsided allegations.”¹¹ Additionally, the Law Society of Upper Canada, has expressed concerns that the program will place internal counsel at odds with the Law Society Rules of Conduct, leaving very little room for the award to have the effects that the OSC desires.¹²

In exploring the possible ramifications of the OSC’s new program, this paper will begin with a brief overview of the history of whistleblower legislation in Canada, including a brief analysis of how Canadian courts have dealt with whistleblower legislation. Next, the creation of the OSC’s Office of the Whistleblower and the corresponding policy statement will be considered, focusing specifically on what have been called “structural shortcomings”¹³ as well as predictions for the program’s success.

II. HISTORY OF WHISTLEBLOWER LEGISLATION IN CANADA

Compared to the whistleblower protection legislation that is available in other countries, many lawyers argue that “Canada lags significantly behind.”¹⁴ The following section will give a brief overview of the “patchwork”¹⁵ of protection provided under Canadian whistleblower legislation, beginning with a look at what protections are available for public service and private sector employees. Finally, it will conclude with a brief analysis of how courts have treated issues regarding whistleblower legislation.

2016), <http://business.financialpost.com/news/fp-street/ontario-securities-commission-will-now-pay-up-to-5-million-for-tips-as-first-in-canada-to-offer-whistleblower-rewards>.

9. OSC Office of the Whistleblower, *supra* note 6.

10. Whistleblower Program, *supra* note 5.

11. David Dias, *Lawyer Concerned with Blindsided Allegations Under OSC Whistleblower Program*, CANADIAN LAWYER (Oct. 29, 2015), <http://www.canadianlawyer.com/legalfeeds/2956/lawyer-concerned-about-blindsided-allegations-under-osc-whistleblower-program.html>.

12. See Alex Robinson, *New Awards Policy for Whistleblowers Under Fire*, LAW TIMES NEWS (July 11, 2016), <http://www.lawtimesnews.com/201607115518/headline-news/new-awards-policy-for-whistleblowers-under-fire>.

13. Obaidul Hoque, *The Neglected State of Whistleblower Laws in Canada*, ROCHON GENOVA (Nov. 13, 2015), <http://www.rochongenova.com/blog/2015/11/trends-in-whistleblowing-laws-across-canada.shtml>.

14. *Id.*

15. Adrian Ishak, *State of Whistleblowing Legislation in Canada*, CANADIAN LABOUR & EMPLOYMENT LAW (Nov. 17, 2014), <http://www.labourandemploymentlaw.com/2014/11/state-of-whistleblowing-legislation-in-canada/>.

A. PUBLIC SERVICE EMPLOYEES

The major piece of federal Canadian legislation that shields those in public service from the negative implications of whistleblowing, the Public Servants Disclosure Protection Act (PSDPA) was passed in 2007.¹⁶ The stated purpose of the PSDPA is “to establish a procedure for the disclosure of wrongdoings in the public sector.”¹⁷ In doing so, the Act strives to “achieve an appropriate balance between” the “duty of loyalty” and the “freedom of expression” that public servants are both bound by and enjoy under the Canadian Charter of Rights and Freedoms.¹⁸

Under the framework of the PSDPA, it is the responsibility of the chief executive to “establish internal procedures to manage disclosures made under [the] Act by public servants employed in the portion of the public sector for which the chief executive is responsible.”¹⁹ These internal procedures must “protect the identity of persons involved in the disclosure process” and must adequately “ensure the confidentiality of information collected in relation to disclosures of wrongdoings.”²⁰ A public servant who wishes to make a disclosure may do so to “his or her supervisor or to the senior officer designated for the purpose by the chief executive.”²¹ If the disclosure has been made pursuant to the PSDPA, then the Act prohibits any “reprisals” taken against the public servant.²²

As the only “freestanding federal whistleblower legislation” in Canada, the PSDPA is strong evidence that Canada does in fact “lag significantly behind” other countries in terms of the breadth and availability of whistleblower protection.²³ For example, the United States implemented The Civil Service Reform Act, its first whistleblower law, in 1978, and since then the availability of protection for whistleblowers has only grown wider and more readily available through various pieces of federal legislation.²⁴ Additionally, most American states grant similar protections to their employees and “since 2010 [the SEC has] paid out in excess of US \$50 million.”²⁵ By contrast, provincially, “only six [Canadian] provinces have legislation which provides protection to civil servant whistleblowers.”²⁶

16. Hoque, *supra* note 13.

17. Public Servants Disclosure Protection Act, S.C. 2005, c. 46.

18. *Id.*

19. *Id.* at s. 10(1).

20. *Id.* at s. 11(1)(a)-(b); see also Yosie Saint-Cyr, *The State of Whistleblowing in Canada*, SLAW (June 6, 2013), <http://www.slw.ca/2013/06/06/the-state-of-whistleblowing-in-canada/>.

21. Public Servants Disclosure Protection Act, S.C. 2005, c. 46, s. 12.

22. *Id.* at s. 19.

23. Obaidul Hoque, *The Neglected State of Whistleblower Laws in Canada*, ROCHON GENOVA (Nov. 13, 2015), <http://www.rochongenova.com/blog/2015/11/trends-in-whistleblowing-laws-across-canada.shtml>.

24. *Id.*

25. *Id.*

26. *Id.*

B. PRIVATE SECTOR EMPLOYEES

Even though the protection for public sector whistleblowers under Canadian legislation is minimal compared to what is available in other countries, “the protections that have developed for [these] public sector employees are vastly more robust than those afforded to employees in the private sector.”²⁷ For example, compared to the six provinces that have enacted legislation to protect employees in the public sector, only Saskatchewan and New Brunswick have their own provincial legislation to protect private sector employees.²⁸ Outside of this provincial legislation employees in the private sector are often forced to “turn to patchwork legislation, which tends to focus on specific misconduct and then only to limited channels of communication.”²⁹ Two places where employees in the private sector can turn for protection are the Criminal Code and the Canada Labour Code, both of which are fairly limited in scope.³⁰

Similar to the Sarbanes Oxley Act in the United States, section 425.1 of the Criminal Code broadly “prohibits employers from retaliating or threatening to take action against employees who provide information to law enforcement officials”³¹ making any such employer “guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.”³² However, the text of section 425.1 greatly limits its scope and application, and as will be seen in the later section, courts are reluctant to construe this provision broadly.³³ For example, it only applies when the employee provides or intends to “provide information to a person whose duties include the enforcement of federal or provincial law,” and it only applies to an “offence that the employee believes has been or is being committed contrary to this or any other federal provincial Act or regulation.”³⁴ Therefore, if employees report to a source other than law enforcement, such as “a media source or an outside agency or advocacy group,” they are not given any protection and the employers are free to retaliate without threat of imprisonment or fine.³⁵

Additionally, the Canada Labour Code provides “protections for employees who give information to an inspector, testify against their employers, or have sought enforcement of the Code.”³⁶ However, much like the Criminal Code, the application of the Labour Code in relation to

27. Adrian Ishak, *State of Whistleblowing Legislation in Canada*, CANADIAN LABOUR & EMPLOYMENT LAW (Nov. 17, 2014), <http://www.labourandemploymentlaw.com/2014/11/state-of-whistleblowing-legislation-in-canada/>.

28. Yosie Saint-Cyr, *The State of Whistleblowing in Canada*, SLAW (June 6, 2013), <http://www.slaw.ca/2013/06/06/the-state-of-whistleblowing-in-canada/>.

29. Ishak, *supra* note 27.

30. *See id.*

31. *Id.*

32. Criminal Code, R.S.C., 1985, c. C-46, s. 425.1(2)(a).

33. *See Anderson v. IMIT-Quebec Inc.*, [2013] FCA 90.

34. Criminal Code, R.S.C., 1985, c. C-46, s. 425.1(1)(a); *see also* Ishak, *supra* note 27.

35. Yosie Saint-Cyr, *The State of Whistleblowing in Canada*, SLAW (June 6, 2013), <http://www.slaw.ca/2013/06/06/the-state-of-whistleblowing-in-canada/>.

36. Michael Torrance, *Global CSR Monitor - Whistleblower Protections and CSR*, NORTON ROSE FULBRIGHT (May 27, 2010), <http://www.nortonrosefulbright.com/>

whistleblowers is limited in that it only applies to employees “who seek enforcement of, or are participating in proceedings or inquiries under, the *Canada Labour Code*.”³⁷ In cases where the employer is found guilty of “discharg[ing], threat[ening] to discharge or otherwise discriminat[ing]” against a whistleblower employee, he can be “liable on summary conviction” for fines ranging from \$10,000 to \$250,000.³⁸

Because of the “patchwork” nature of the available protections for those in the private sector, the new OSC policy could potentially have the greatest effects on the public sector. However, as will be explored later, the new policy is nevertheless still plagued with shortcomings and logistical problems that many argue will prevent it from being as successful as it could be.

C. COURT TREATMENT OF WHISTLEBLOWER LEGISLATION IN CANADA

Canadian courts have also dealt with whistleblower legislation, “do[ing] little to protect whistleblowers” or those who are critical of their employers.³⁹ For example in, *Fraser v. P.S.S.R.B.*, the Supreme Court of Canada, made it clear that in “striking an appropriate balance between the right of the individual to speak freely and the duty of the . . . public servant to fulfill his functions properly,”⁴⁰ “the interest in the actual and apparent impartiality of the public service justified an increased duty of loyalty on the part of public servants.”⁴¹ The case involved the discharge of Mr. Neil Fraser who worked for the Revenue Canada, Taxation for ten years.⁴² In 1982, Mr. Fraser began to publicly comment on “the Government’s policy on metric conversion,” criticizing the Government’s position in the *Kingston Whig-Standard* and appearing on a Kingston radio station to do the same.⁴³ After he was given several warnings and suspensions, on February 22, 1982, Mr. Fraser was terminated from his position at Revenue Canada.⁴⁴ In challenging his termination Mr. Fraser argued that the “Adjudicator erred in holding that his criticism of government policies, unrelated to the work of his department could form the basis for disciplinary action.”⁴⁵ The Court concluded that “free speech or expression by the public servant is not an absolute, unqualified value and may be modified by a competing interest,” and in this case the loyalty

knowledge/publications/44863/global-csr-monitor-whistleblower-protections-and-csr.

37. Ishak, *supra* note 27.

38. *Canada Labour Code*, R.S.C., 1985, c. L-2, s. 256 (1), 1.1.

39. Obaidul Hoque, *The Neglected State of Whistleblower Laws in Canada*, ROCHON GENOVA (Nov. 13, 2015), <http://www.rochongenova.com/blog/2015/11/trends-in-whistleblowing-laws-across-canada.shtml>.

40. *Fraser v. P.S.S.R.B.* [1985] 2 S.C.R. 455.

41. Hoque, *supra* note 39.

42. *Fraser*, 2 S.C.R. 455, at para. 2.

43. *Id.* at para. 3, 6.

44. *Id.* at para. 9.

45. *Id.* at para. 17.

that Mr. Fraser owed to the government as a public servant was greater than his right to speak and criticize the government freely.⁴⁶ Ultimately, the Court's decision meant that when openly and publicly criticizing the government, public servants "voluntarily assume the risk" that their conduct might open them up to termination or disciplinary action.⁴⁷

Courts have also stressed the importance of "exhaust[ing] internal whistleblowing mechanisms before going public."⁴⁸ For example, in *Anderson v. IMTT-Quebec Inc.*, the Federal Court of Appeal of Quebec narrowly interpreted section 425.1 of the Criminal Code as to not apply to the underlying facts of the case, focusing instead on the importance of internal resolution and loyalty.⁴⁹ The case involved an employee at IMTT- Québec who was dismissed for what he claimed were "actions he had taken to ensure the safety of IMTT workers."⁵⁰ The Court sided with the employer, who claimed that the employee was terminated because of "permanent breakdown of the relationship of trust resulting from the applicant's clear lack of loyalty and disrepute he had caused the company."⁵¹ In reaching its decision, the Court made clear that "[t]he purpose of section 425.1 of the Criminal Code is not to allow an employee to make with impunity, reckless complaints to the public authorities and without regard for the employer's internal mechanisms."⁵² The Court drew their focus on internal reporting from the earlier decision in *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 77*.⁵³ In *Merk*, Justice Binne stressed the benefits of "encourag[ing employees] to resolve the problems internally," arguing that such an "up the ladder approach has also been favored by courts and other labour arbitrators."⁵⁴

III. CURRENT WHISTLEBLOWER LEGISLATION IN CANADA: IMPLEMENTATION OF THE OSC POLICY

As mentioned above, on July 14, 2016, the OSC announced the creation of the Office of the Whistleblower and published OSC Policy 15-601.⁵⁵ The creation of the Office marks the "first paid whistleblower program by a securities regulator in Canada."⁵⁶ The motivation behind the new OSC program as described by new Chief of the OSC's Office of the

46. *Id.*

47. *Id.* at para. 52.

48. George Avraam & Cherrine Chow, *Whistleblower Protection: The Importance of Internal Policies*, CANADIAN FRAUD LAW (May 12, 2014), <http://www.canadian-fraudlaw.com/2014/05/whistleblower-protection-the-importance-of-internal-policies/>.

49. See *Anderson v. IMIT-Quebec Inc.*, [2013] F.C.A. 90, at paras. 38-40.

50. *Id.* at para. 2, 7.

51. *Id.* at para. 19.

52. *Id.* at para. 44.

53. See *id.* at para. 39.

54. *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 77*, [2005] S.C.C. 70, at para. 23-24.

55. Whistleblower Program, OSC Policy 15-601 at 1 (July 14, 2016).

56. *Id.*

Whistleblower was to “change the stigma of whistleblowing.”⁵⁷ To achieve this goal, the OSC created a program to reward whistleblowers “for the personal and professional risks that they take in coming forward.”⁵⁸ To be protected under the new rewards program, employees must “report information on serious securities- or derivatives-related misconduct . . . to the Commission.”⁵⁹ After “certain eligibility criteria”⁶⁰ are met, it is then up to the OSC “to determine how much a whistleblower can collect within a range of five to 15 percent of any sanctions imposed or collected by the regulator, capped at \$5 million.”⁶¹ The following sections will look further into the details of the new program, focusing on what critics are calling “structural shortcomings”⁶² as well as predictions for problems the program will create.

A. SHORTCOMINGS OF THE OSC PROGRAM

Although many agree that the OSC program is a step in the right direction toward enhancing the protection options for Canadian whistleblowers, critics have pointed to several “structural shortcomings” of the new OSC program.⁶³ For example, the OSC program offers no provision to provide “leniency for the culpable whistleblower’s role in the misconduct.”⁶⁴ Unlike the SEC’s program which “offers leniency to whistleblowers who are involved in the improper activities they uncovered,” those who report under the OSC program run the risk of opening themselves up to liability, decreasing the likelihood that they will report misconduct.⁶⁵ Additionally, the OSC program only offers rewards on tips that uncover actual wrongdoing.⁶⁶ This means that “[a] tipster who provided information that is found to be misleading or untrue cannot receive a reward,” and will likely be terminated from his job.⁶⁷

Perhaps an even greater shortcoming is the program’s alleged guarantee of confidentiality. The language of the corresponding OSC policy statement reveals that all that is promised to whistleblowers is that the

57. Drew Hasselback, *Ontario Securities Commission Will now pay up to \$5 Million for Tips as First in Canada to Offer Whistleblower Rewards*, FP STREET (July 14, 2016), <http://business.financialpost.com/news/fp-street/ontario-securities-commission-will-now-pay-up-to-5-million-for-tips-as-first-in-canada-to-offer-whistleblower-rewards>.

58. *Id.*

59. Whistleblower Program, *supra* note 55.

60. *Id.*

61. Hasselback, *supra* note 57.

62. Obaidul Hoque, *The Neglected State of Whistleblower Laws in Canada*, ROCHON GENOVA (Nov. 13, 2015), <http://www.rochongenova.com/blog/2015/11/trends-in-whistleblowing-laws-across-canada.shtml>.

63. *Id.*

64. *Id.*

65. *Id.*

66. Drew Hasselback & Barbara Shecter, *OSC Raises Whistleblower Payout Cap to \$5 Million as Reward for Helping Ferret Out Wrongdoing*, FP STREET (Oct. 28, 2015), <http://business.financialpost.com/news/fp-street/osc-raises-whistleblower-payout-cap-to-5-million-as-reward-for-helping-ferret-out-wrongdoing>.

67. *Id.*

“Commission Staff will make all reasonable efforts to keep the identity of the whistleblower, and information that could be reasonably expected to reveal the whistleblower’s identity confidential.”⁶⁸ This weak guarantee is also subject to two “rather broad”⁶⁹ exceptions, allowing disclosure of the “whistleblower’s identity, in connection with an administrative proceeding . . . in order to permit a respondent to make full answer or defence,” as well as “when Commission Staff determines that it is necessary for the purposes of the Act . . . to disclose the information to any of the entities listed in section 153 of the Act.”⁷⁰ While those reporting misconduct are allowed to hire a lawyer to complete the submission form for them,⁷¹ “anonymity can only be guaranteed at the reporting stage.”⁷² Securities Litigator Linda Fuerst points out that the “OSC can’t give any ironclad guarantees of anonymity,” because “in the event that allegations lead to charges and subsequent proceedings, the defendant will have a right to disclosure.”⁷³ Further, it is important to note that if the case falls apart, which is likely to happen if the whistleblower remains anonymous, the possibility of a reward may also “fall apart.”⁷⁴

B. PREDICTIONS FOR THE SUCCESS OF THE OSC PROGRAM

In addition to the “structural shortcomings”⁷⁵ of the program, critics have pointed to several possible issues with the implementation of the program, giving it a rather weak prediction of success. The two major issues that critics foresee include conflicts with lawyer-client confidentiality and an increase of blindside allegations.⁷⁶ Issues regarding confidentiality are specifically concerned with how the new OSC policy will relate to internal counsel, who as lawyers are held to different ethical standards.⁷⁷ Under the Law Society of Upper Canada’s Rules of Professional Conduct, lawyers are expected to “hold in strict confidence all information concerning the business and affairs of the client acquired in the course of professional relationship.”⁷⁸ While lawyers are not allowed to “knowingly assist in or encourage any dishonesty, fraud, crime or illegal

68. Whistleblower Program, OSC Policy 15-601 at 6 (July 14, 2016).

69. Hoque, *supra* note 62.

70. Whistleblower Program, *supra* note 68.

71. *Id.* at 4.

72. David Dias, *Lawyer Concerned with Blindside Allegations Under OSC Whistleblower Program*, CANADIAN LAWYER (Oct. 29, 2015), <http://www.canadianlawyermag.com/legalfeeds/2956/lawyer-concerned-about-blindside-allegations-under-osc-whistleblower-program.html>.

73. *Id.*

74. *Id.*

75. Obaidul Hoque, *The Neglected State of Whistleblower Laws in Canada*, ROCHON GENOVA (Nov. 13, 2015), <http://www.rochongenova.com/blog/2015/11/trends-in-whistleblowing-laws-across-canada.shtml>.

76. See Dias, *supra* note 72; Alex Robinson, *New Awards Policy for Whistleblowers Under Fire*, LAW TIMES NEWS (July 11, 2016), <http://www.lawtimesnews.com/201607115518/headline-news/new-awards-policy-for-whistleblowers-under-fire>.

77. See Robinson, *supra* note 76.

78. LAW SOCIETY OF UPPER CANADA RULES OF PROFESSIONAL CONDUCT ch. 3.3-1(2000).

conduct,”⁷⁹ “confidentiality and the solicitor-client relationship are [still] paramount.”⁸⁰ Under the OSC program, “those who obtained information in connection with providing legal services” can be eligible for whistleblower awards, if “the whistleblower has a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the subject of the disclosure from engaging in conduct that is likely to cause or continue substantial injury to the financial interest or property of the entity or investors.”⁸¹ This eligibility naturally conflicts with the lawyer’s duty to keep client confidences, and as securities lawyer Jim Boyle says “including lawyers in the whistleblowing policy is simply inconsistent with the integrity and ethical standards to which lawyers hold themselves.”⁸² In fact, many of these concerns were raised by lawyers during the OSC’s “consultation process,” but when the program was implemented in July 2016, internal counsel were indeed included as eligible for awards.⁸³ Because of the program’s conflict with the duty of confidentiality, lawyers believe that it is “unlikely that any internal lawyers could be whistleblowers, even if they are eligible according to OSC policy.”⁸⁴ Nevertheless, the program is still likely to “create uncertainty for lawyers” who work as internal counsel.⁸⁵

Another issue that is likely to be problematic when the program is implemented, is the lack of an internal reporting requirement. Without an internal reporting requirement, “the new whistleblower policy gives companies little opportunity to look into allegations internally before being confronted with a high-profile investigation.”⁸⁶ According to the OSC policy statement, “employees can report misconduct directly to the OSC without going to their supervisor or internal compliance officer.”⁸⁷ Therefore, without a proper internal reporting mechanism, companies are more susceptible to blindside allegations.⁸⁸ Securities litigator Lisa Fuerst advocates for a program that would “require that a whistleblower report internally or be able to provide a reasonable explanation for why the whistleblower didn’t,” such as in situations when the employee fears retaliation.⁸⁹ Fuerst argues, similar to Justice Binne in *Merk*, that such a program that “encourage[s] individuals to report first internally,” would benefit the company because it would provide “an opportunity to look at the allegations, and if necessary conduct an appropriate internal investi-

79. *Id.* at ch. 3.2-6

80. Robinson, *supra* note 76.

81. Whistleblower Program, OSC Policy 15-601 at 9-10 (July 14, 2016).

82. Robinson, *supra* note 76.

83. *Id.*

84. *Id.*

85. *Id.*

86. David Dias, *Lawyer Concerned with Blindside Allegations Under OSC Whistleblower Program*, CANADIAN LAWYER (Oct. 29, 2015), <http://www.canadianlawyermag.com/legalfeeds/2956/lawyer-concerned-about-blindside-allegations-under-osc-whistleblower-program.html>.

87. *Id.*

88. *See id.*

89. *Id.*

gation and decide whether there's any merit to them before the regulators get involved."⁹⁰

IV. CONCLUSION

While most would agree that "truly robust whistleblower legislation in Canada is essential to preserving the integrity of [the] capital markets," not all agree on whether the new OSC program will be successful enough to bring Canada in line with other nations.⁹¹ As explained above, securities litigators are skeptical of the program, and many cite the program's vague "guarantees" and broad exceptions as being detrimental to its goal of "chang[ing] the stigma of whistleblowing."⁹² The OSC awards program is definitely "a step in the right direction," but many of these problems will have to be addressed before the program can fill the gaps in Canadian whistleblower protection legislation.⁹³

90. *Id.*; see *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 77*, 2005 S.C.C. 70, at para. 23-24.

91. Obaidul Hoque, *The Neglected State of Whistleblower Laws in Canada*, ROCHON GENOVA (Nov. 13, 2015), <http://www.rochongenova.com/blog/2015/11/trends-in-whistleblowing-laws-across-canada.shtml>.

92. Drew Hasselback, *Ontario Securities Commission Will now pay up to \$5 Million for Tips as First in Canada to Offer Whistleblower Rewards*, FP STREET (July 14, 2016), <http://business.financialpost.com/news/fp-street/ontario-securities-commission-will-now-pay-up-to-5-million-for-tips-as-first-in-canada-to-offer-whistleblower-rewards>.

93. Dias, *supra* note 86.