



Assessment of Quebec's Whistleblower Protection Legislation

Ian Bron

June 2, 2023



Centre for Free Expression
at The Creative School

About the Author

Dr. Ian Bron is a Senior Fellow at the Centre for Free Expression and an instructor in public administration at Carleton University. He is a graduate of the Royal Military College of Canada (BA (Hons)), the University of Ottawa (BEd, MEd), and Carleton University (PhD). His PhD dissertation compared whistleblowing regimes in the governments of Canada, the United Kingdom, and Australia. A former whistleblower himself, he disclosed misconduct in marine transportation security at Transport Canada in 2006. At that time, he was Chief of Regulatory Affairs. His career has spanned several roles: naval officer, educator, federal government regulator, and program evaluation team leader.

About the Centre for Free Expression

The Centre for Free Expression at Toronto Metropolitan University focuses on issues related to freedom of expression and the public's right to know. This includes campus free expression, academic freedom, hate speech, censorship, disinformation, access-to-information, whistleblower protection, anti-SLAPP legislation, corporate and government surveillance, and freedom of the press. The Centre sponsors public educational events, does research, provides advice, and engages in advocacy on these issues. Our work is undertaken in collaboration with academic and community-based organizations across Canada and internationally.

350 Victoria St.
Toronto, ON M5B 2K3
cfe@torontomu.ca
(437) 995-7396

About these Assessments

The assessments of Canadian whistleblowing statutes are based on CFEWI's [*Evaluation Criteria for Protection of Whistleblowers*](#), examining both what's on paper in the Act and how it is working in practice. These criteria were developed by CFEWI senior fellows David Hutton and Ian Bron in consultation with Government Accountability Project (GAP) and the Whistleblowing International Network (WIN). They are based on GAP's best practice criteria and informed by EU whistleblowing Directive 2019/1937, other standards, and CFEWI experience.

Criteria for the law on paper are intended to assess its potential to meet stated and implied objectives. Data for assessing the effectiveness of the law in practice should demonstrate whether it is actually meeting its objectives. This may come from government reports, cases in legal databases, and media reports.

© Ian Bron

Assessment of Whistleblowing Provisions Quebec

Act to Facilitate the Disclosure of Wrongdoings Relating to Public Bodies, C.Q.L.R., c. D-11.1
<https://www.legisquebec.gouv.qc.ca/en/document/cs/d-11.1>

1. Executive Summary

The *Act to Facilitate the Disclosure of Wrongdoings Relating to Public Bodies* (AFDWRPB) came into force on May 1, 2017. Subsequent changes introduced the role of the Commission municipale du Québec for municipal disclosures, while others were made to avoid overlap in mandate for other bodies. Fines for offences were increased in June 2022.

The Act fails all categories of the CFEWI criteria. This is mainly due to “critical weaknesses,” shortcomings which experience has shown fatally undermine whistleblowing regimes. See section 4 or visit CFEWI’s [Evaluation Criteria for Protection of Whistleblowers](#) for an explanation of the criteria.

In the category of **freedom to blow the whistle**, the AFDWRPB has five critical weaknesses: (1) the inclusion of motive via subjective “good faith” reporting requirements, (2) no protection for disclosures made in course of duties, (3) no protection or redress for a range of non-employees, (4) no protection for employees refusing to commit a wrongdoing, and (5) no mechanism to make disclosures public if they are not properly investigated or remedied by the relevant public body or the Public Protector. Positively, it allows for anonymous disclosures.

For **preventing reprisals**, the AFDWRPB has one key strength in giving authorities the same powers to investigate reprisal as they do to investigate wrongdoing. It has two critical weaknesses, however: (1) organizations have no duty to proactively protect whistleblowers and (2) there is no interim relief available to stop reprisals in progress. Further, while confidentiality is protected this could be strengthened with prohibitions and sanctions for breaches (or attempted breaches).

Under **redress for reprisals**, the Act has one key strength: it provides access to independent adjudication at the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST) or the Administrative Labour Tribunal (ALT) for reprisal complaints. The Public Protector may also conduct investigations but may only make recommendations. Critically, the Act fails this category as it does not reverse the burden of proof in establishing that a detrimental action was in response to a disclosure (actual or suspected). It also does not specify a full range of remedies to a “make whole” standard.

There are three critical weaknesses under **protecting the public interest**: (1) corrective processes lack credibility as wrongdoing cannot be ordered to stop, (2) there are no mandatory standards for investigations, and (3) the whistleblower has no right to contribute to the process

(e.g., to rebut false evidence from the organization). More positively, the Public Protector has the power to compel evidence and can “follow the money” outside the public sector.

Finally, considering **evidence of effectiveness**, the Act fails the category because there is no meaningful performance measurement of the regime, and no reviews of the law are mandated after the first review three years after coming into force.

2. Key Features of the Act

The AFDWRPB states that its purpose is “to facilitate the disclosure, in the public interest, of wrongdoings committed or about to be committed in relation to public bodies and establish a general protection regime against reprisals.”

Who may make a disclosure (i.e., blow the whistle): Any person may make a disclosure to the Public Protector, and “a person who is a member of the personnel” may make disclosures to designated officers in most public bodies or any other person (s. 6) if they have information that could show a wrongdoing has occurred or is about to occur in relation to a public body.

Definition of wrongdoing: Actions or omissions that are

- A contravention of Quebec or Canadian law or regulations,
- A serious breach of the standards of ethics and professional conduct,
- A misuse of funds or property belonging to a public body,
- Gross mismanagement of public funds or a public asset,
- An act or omission that creates a substantial and specific danger to the life, health or safety of persons, or a substantial and specific danger to the environment, and
- A direction or counselling to do one of the above (s. 3).

To be protected, a disclosure must be: Made in writing to an officer designated to receive disclosures, to the Public Protector, or, in certain cases, to the Minister of Families or the Commission municipale du Québec (s. 6). Public disclosures are protected in emergencies but only if the appropriate authorities are first contacted (s. 7).

Who is protected: Reprisal is forbidden against any person who makes a qualifying disclosure, although reprisal is defined as formal disciplinary action in an employer-employee relationship, which would exclude contractors and many other potential whistleblowers. See ss. 20-32 and ss. 122 and 123 of the *Act Respecting Labour Standards* for details.

Definition of reprisal: Actions taken or counseled in response to a disclosure or cooperation with an investigation under the Act, including

- A demotion, suspension, dismissal, or transfer,
- Any other disciplinary measure,
- Any measure that adversely affects such a person’s employment or conditions of employment,

- In the case of childcare facilities, differential treatment or suspending or expelling the person's child, or
- A threat to take any of the above measures (see ss. 30-31)

Who investigates reprisal: The Public Protector and, for municipal cases, the Commission municipale du Québec (s. 32).

What body offers a remedy: The Public Protector may make recommendations; CNESST and ALT offer remedies (s. 32).

3. Suggested Improvements

As with many other Canadian jurisdictions, the AFDWRPB could be improved by a shift in its approach and with some targeted amendments to the Act.

Broadly, it would benefit by placing a greater emphasis on the protection of whistleblowers. Confidentiality is only protective if wrongdoers cannot otherwise surmise the identity of the whistleblower, and this must be accompanied by explicit sanctions for attempting to identify them. In addition, the premise of this legislation is that whistleblowers will be compensated for harms arising from retaliation. However, redress in similar regimes takes several years, during which reprisals may continue unchecked. More proactive protection could prevent reprisals from starting, and if they do, prevent them wearing down whistleblowers to the point they abandon their disclosures. It would also minimize professional, social, and psychological harms.

In addition, the AFDWRPB appears designed to channel disclosures through controlled avenues and gives more rights to organizations than to whistleblowers. While such avenues can be critical in ensuring proper procedures are followed, they may also prevent legitimate concerns from being raised or properly investigated. This may happen because certain classes of employees are not protected, authorities are forced to abandon investigations, whistleblowers are unable to rebut false evidence from implicated parties, or other reasons. The AFDWRPB regime would benefit by allowing more flexibility for persons making disclosures while at the same time increasing obligations for organizations receiving those disclosures.

Furthermore, disclosures made to the Public Protector are immune to freedom of information requests, and those made within departments have many exemptions which can be applied. This may prevent serious errors and misconduct from reaching the awareness of legislators or the public. This is contrary to democratic principles and the public interest.

Six areas for specific improvements are

1. Expanding protected disclosure to all workers, including employees, contractors, temporary staff, interns, volunteers, and job applicants,
2. Mandating the proactive protection of workers making disclosures, informed by a risk assessment,

3. Establishing a reliable and effective process for workers to obtain injunctive or interim relief from reprisals while investigations are ongoing,
4. Establishing a standard for proving reprisal that shifts the burden of proof to the organization once the worker has established a prima facie case of reprisal,
5. Setting high standards for investigations and investigators, including for competence and timeliness, and
6. Requiring meaningful performance indicators and data to be gathered to support routine monitoring and the evaluation or audit of the regime every five years.

4. Detailed Assessment and Scores

The Act is relatively new, with gaps in reporting and inconsistent data. Accordingly, assessments of implementation must be considered tentative and non-conclusive. The 2020 Secrétariat du Conseil du Trésor report acknowledges these issues and challenges.

The following are brief explanations of the five categories of CFEWI's [Evaluation Criteria for Protection of Whistleblowers](#) and the concept of "critical weaknesses."

Freedom to blow the whistle: This assesses how free workers are to raise a concern about anything that may threaten the public interest, without barriers, hazards, or uncertainties

Preventing reprisals: This assesses whether the law prevents reprisals, ensures investigations into reprisal will be timely and competent, and has consequences for those responsible.

Redress for reprisals: This assesses whether whistleblowers can obtain complete remedies in a timely manner after a reprisal.

Protecting the public interest: This assesses whether disclosures of wrongdoing are subject to competent and timely investigation, that appropriate and timely corrective action is taken, and that appropriate information on findings and action is available to all parties and the public.

Evidence of effectiveness: This assesses whether evidence on the effectiveness of the whistleblowing regime is collected and made readily available, and whether it undergoes improvement based on that information.

Critical weaknesses: Critical weaknesses are those which decades of international experience has shown will render a whistleblowing law ineffective even when oversight officials are exercising their full powers. For example, U.S. experience has shown that success rates in obtaining a remedy are in the order of ten times higher when the burden of proof for reprisals is reversed (i.e., the employer must prove that detrimental action is not related to whistleblowing). Even then, the odds of success are below 33% (Devine, 2016).

Assessment Table: Act to Facilitate the Disclosure of Wrongdoings Relating to Public Bodies (AFDWRPB)

Category	Evaluation of design (what's on paper)	Evaluation of Implementation (how well it is working in practice)	Score
1. Freedom to blow the whistle	<p>Strengths:</p> <ul style="list-style-type: none"> ✓ Protects all persons making disclosures (although remedies vary) ✓ Definition of wrongdoing includes ethical and professional breaches ✓ Allows for confidential and anonymous disclosures ✓ Allows disclosures to the public in emergencies <p>Weaknesses:</p> <ul style="list-style-type: none"> ✗ Contains subjective terms (e.g., serious breach, gross mismanagement) which may be interpreted by officials implicated in wrongdoing or failing to address the wrongdoing ✗ Definition of reprisal limited to formal discipline in employment context ✗ Informal disclosures to other bodies are not covered ✗ Stringent conditions for emergency disclosures may defeat purpose ✗ Has no ban on gag orders or non-disclosure agreements ✗ Contains no equivalent whistleblower protections for policing matters (though some protections are contained in <i>Anti-corruption Act</i>) <p>Critical weaknesses:</p> <ul style="list-style-type: none"> ! Includes a “good faith” requirement, which introduces motive as a qualifier (should be “reasonable belief”) ! Does not have remedies that cover contractors, temp staff, job applicants, and others not considered full employees of public bodies ! Disclosures made in course of duties are not covered (e.g., role-related or simply mentioning to colleagues that something may be illegal) ! Public servants have no right to refuse to commit a wrongdoing ! Has no mechanism to make the disclosure public if departmental officials and the Public Protector refuse to investigate, conduct an improper investigation, or fail to keep the whistleblower informed in a reasonable time 	<p>Strengths:</p> <ul style="list-style-type: none"> ✓ Appears to have a high ratio of substantiated wrongdoing to disclosures – over 20% of investigations by Public Protector result in a finding of wrongdoing. Reasons for this better-than-average efficacy are unclear and may reflect competence, careful selection of cases, or high rejection rates <p>Weaknesses:</p> <ul style="list-style-type: none"> ✗ The recent review of the Act suggests there remains resistance to the regime by regulated entities. ✗ A review of cases found an instance in which a disclosure was not accepted due to the manner in which it was submitted and the motive of the whistleblower ✗ Annual reports indicate that nearly all disclosures are dismissed before full investigation, or no wrongdoing is found 	0

Category	Evaluation of design (what's on paper)	Evaluation of Implementation (how well it is working in practice)	Score
2. Preventing reprisals	<p>Strengths:</p> <ul style="list-style-type: none"> ✓ Reprisal is an offence with penalties (though it is unclear who enforces) ✓ The Public Protector has the same power to investigate reprisal as for wrongdoing ✓ Protects employees who provide supporting evidence for the disclosure <p>Weaknesses:</p> <ul style="list-style-type: none"> ✗ No competence or timeliness standards for investigating reprisal ✗ Does not protect employees seeking advice before making a disclosure ✗ Does not offer anyone protection against informal reprisal, such as unconventional harassment (e.g., ostracizing and blacklisting) ✗ Does not protect recipients of disclosures ✗ Does not protect colleagues or family from spillover retaliation ✗ Attempts to breach confidentiality are not an offence <p>Critical weaknesses:</p> <ul style="list-style-type: none"> ! Organizations have no duty to protect and assist public servants before, during, or after whistleblowing (e.g., no standards, no training, no social or legal support, no prohibition of efforts to identify whistleblower, no separation of whistleblower from those making reprisal) ! No interim or injunctive relief is available for those suffering reprisal 	<p>Strengths:</p> <ul style="list-style-type: none"> ✓ Fines for offences such as reprisal were increased in 2022 <p>Weaknesses:</p> <ul style="list-style-type: none"> ✗ Little data is provided in annual reports, and it is unclear how many complainants obtain redress ✗ Data from Public Protector annual reports is inconsistent but suggests low levels of complaints of reprisal ✗ There is no evidence that any person making a reprisal has suffered any consequences 	0

Category	Evaluation of design (what's on paper)	Evaluation of Implementation (how well it is working in practice)	Score
3. Redress for reprisals	<p>Strengths:</p> <ul style="list-style-type: none"> ✓ Allows for independent review and adjudication through CNESST and ALT <p>Weaknesses:</p> <ul style="list-style-type: none"> ✗ Although arbitration and mediation are possible via CNESST and ALT, these are limited and late in the process; the Act should offer dispute resolution earlier in the process (with shared costs and a mediator agreed on by both parties) ✗ Arrangements for legal advice may be made with the consent of the Public Protector, but independent legal advice arranged by whistleblower is not covered ✗ Does not offer full “make whole” remedies to restore whistleblowers to a position in which they would have been but for the reprisal ✗ Does not offer whistleblowers the option to transfer to an alternative and equivalent position <p>Critical weaknesses:</p> <ul style="list-style-type: none"> ! There is no reverse onus provision: the whistleblower has the burden of proof to establish that detrimental action/reprisal is due mainly to disclosure 	<p>Strengths:</p> <ul style="list-style-type: none"> ✓ In a 2020 case peripherally related to the Act, the ALT demonstrated a willingness to impose punitive sanctions <p>Weaknesses:</p> <ul style="list-style-type: none"> ✗ Little data is provided in Public Protector annual reports, and it is unclear how many complainants obtain redress (if any) ✗ CanLII returns six cases which directly pertain to use of the Act. Results are inconclusive but one case suggests that motive and the limited avenues for disclosure may frustrate claims by whistleblowers seeking redress for reprisal 	0

Category	Evaluation of design (what's on paper)	Evaluation of Implementation (how well it is working in practice)	Score
4. Protecting the public interest	<p>Strengths:</p> <ul style="list-style-type: none"> ✓ The Public Protector has the power, via the <i>Public Protector Act</i>, to initiate own investigations ✓ The Public Protector can compel evidence from both the private and public sector ✓ The Office of the Public Protector is independent of the government <p>Weaknesses:</p> <ul style="list-style-type: none"> ✗ The process lacks transparency as ministries and Public Protector are not required to publicly report on investigations (although short summaries are nonetheless provided in annual reports); only general data in annual reports is required ✗ Courts (or other authorities) do not have the power to order a halt to wrongdoing or require specific action ✗ Internal departmental investigators do not have the same powers as the Public Protector to follow or compel evidence ✗ The law does not cover private or non-profit sectors (though the <i>Anti-Corruption Act</i> may offer coverage in some cases) ✗ The appointment process for the Public Protector is not truly independent as the premier nominates the candidate; should include a non-partisan selection committee <p>Critical weaknesses:</p> <ul style="list-style-type: none"> ! It does not have an effective and robust corrective process: no standards have been set for timely or competent investigations and the Public Protector has no power to order wrongdoing to cease (though recommendations can be escalated to National Assembly) ! The whistleblower has no right in law to contribute to the process (e.g., offer expert advice, rebut opposing evidence, comment on final report before publication) 	<p>Strengths:</p> <ul style="list-style-type: none"> ✓ Available data suggests that Public Protector had received over 940 disclosures by April 2022 and investigated about 100 of these <p>Weaknesses:</p> <ul style="list-style-type: none"> ✗ Departmental processes are largely opaque, with many organizations refusing to fully comply with the letter and spirit of the law ✗ Data reported by regulated bodies is too sparse to draw conclusions ✗ Annual reports from Public Protector suggest that only about 2.5% of disclosures result in a finding of wrongdoing, suggesting high rejection rates 	0

Category	Evaluation of design (what's on paper)	Evaluation of Implementation (how well it is working in practice)	Score
5. Evidence of effectiveness	<p>Strengths:</p> <ul style="list-style-type: none"> ✓ None <p>Weaknesses:</p> <ul style="list-style-type: none"> ✗ No evidence of effective awareness raising or training ✗ No periodic reviews of the law ✗ No periodic evaluations <p>Critical weaknesses:</p> <ul style="list-style-type: none"> ! There are no outcomes or performance measures for the regime, such as baseline levels of observed wrongdoing, awareness, trust, user satisfaction, process times and backlogs, short and long-term outcomes for whistleblowers, or completed corrective action 	<p>Strengths:</p> <ul style="list-style-type: none"> ✓ Fines for offences were introduced in 2018 following the mandated review ✓ The three-year review was conducted as scheduled, including challenges, lessons learned, and recommendations <p>Weaknesses:</p> <ul style="list-style-type: none"> ✗ The review report took two years before reaching committee ✗ There is no evidence of any efforts to assess effectiveness of the regime against its objective and expected ultimate outcomes (e.g., deterrence of wrongdoing) ✗ Data is inconsistent and incomplete for agency investigations 	0

5. Selected Law and Cases

Act to Establish the Administrative Labour Tribunal, C.Q.L.R. c. T-15.1. <https://canlii.ca/t/55ptc>

Act Respecting Labour Standards, C.Q.L.R. c. N-1.1. <https://canlii.ca/t/55xq2>

Act Respecting Public Inquiry Commissions, C.Q.L.R. c. C-37. <https://canlii.ca/t/h9h4>

Anti-Corruption Act, C.Q.L.R. c. L-6.1. <https://canlii.ca/t/8pmt>

Public Protector Act, C.Q.L.R. c. P-32. <https://canlii.ca/t/55pwc>

Syndicat de la fonction publique et parapublique du Québec (SFPQ) c Gouvernement du Québec (Ministère du développement durable, de l'environnement et de la lutte contre les changements climatiques), 2017 CanLII 57692 (QC SAT), <https://canlii.ca/t/h5sbm>

Hénault et Collège d'enseignement général et professionnel de Lévis-Lauzon, 2020 QCTAT 2125 (CanLII), <https://canlii.ca/t/j7tmv>

Thermitus c. Protecteur du citoyen, 2020 QCCS 83 (CanLII), <https://canlii.ca/t/j4rtc>

Syndicat des employés du CISSSMO – SCFP 3247 c Centre intégré de santé et de services sociaux de la Montérégie-Ouest, 2022 CanLII 703 (QC SAT), <https://canlii.ca/t/jlpv8>

6. Sources

Bron, I., & Hutton, D. (2022). *Evaluation criteria for protection of whistleblowers: A guide for legislation and policy*. <https://cfe.torontomu.ca/publications/evaluation-criteria-protection-whistleblowers-guide-legislation-and-policy>

Devine, T. (2016). Government Accountability Project international best practices for whistleblowing policies. <https://whistleblower.org/international-best-practices-for-whistleblower-policies/>

European Union. (2019). Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>

Quebec. Public Protector. (2016). *List of bodies subject to the Act to facilitate the disclosure of wrongdoings relating to public bodies (CQLR, c. D-11.1)*. Public Protector. <https://protecteurducitoyen.qc.ca/sites/default/files/2022-02/List-of-the-public-bodies-subject-to-the-act.pdf>

Quebec. Public Protector. (2017). *Document de référence à l'intention des organismes publics concernant la procédure visant à faciliter la divulgation d'actes répréhensibles*.
<https://protecteurducitoyen.qc.ca/sites/default/files/pdf/divulgateion/Document-reference-responsable-suivi-divulgations.pdf>

Quebec. Secrétariat du Conseil du Trésor. (2020). Loi facilitant la divulgation d'actes répréhensibles à l'égard des organismes publics: *Rapport sur la mise en oeuvre de la loi*.
https://www.assnat.qc.ca/Media/Process.aspx?MediaId=ANQ.Vigie.Bll.DocumentGenerique_159099&process=Default&token=ZyMoxNwUn8ikQ+TRKYwPCjWrKwg+vlv9rjjj7p3xLGTZDmLVSmJLoge/vG7/YWzz

See also Quebec Ombudsman annual reports at
<https://protecteurducitoyen.qc.ca/fr/enquetes/rapports-annuels/2021-2022>